



Approval of the PhonepayPlus Code of Practice (12th Edition)

A statement and notification approving the
PhonepayPlus Code of Practice for regulating Premium
Rate Services under section 121 of the Communications
Act 2003

Statement

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Section 1

Summary

- 1.1 Premium rate services ('PRS') typically offer some form of content, product or service that is charged to users' phone bills. They can offer information and entertainment services via fixed or mobile phone, fax, PC or interactive digital TV. Regulation of PRS is designed to ensure that consumers can use these services with confidence and have access to effective redress when they encounter problems.
- 1.2 This statement sets out Ofcom's approval of a new PhonepayPlus Code of Practice (12th Edition) ('the final Code') for the regulation of PRS under section 121 of the Communications Act 2003 ('the Act').
- 1.3 On 29 April 2010, PhonepayPlus published a consultation on its draft Code of Practice ('the draft Code').¹ On the same day Ofcom published a consultation document,² noting that Ofcom considered the draft Code met the legal tests for approval under the Act. Having carefully considered responses from stakeholders, Ofcom is satisfied that the criteria set out in the Act have been met and that it would be appropriate to approve, under section 121 of the Act, the final Code.

What are the key changes being proposed to PRS regulation?

- 1.4 The approval of the final Code has been preceded by over two years of intensive stakeholder engagement by both PhonepayPlus and Ofcom. Several of the most significant proposals are a direct result of Ofcom recommendations from its 2009 PRS Scope Review.³ In addition, many key aspects of the final Code were subject to an earlier discussion document issued by PhonepayPlus in June 2009.⁴
- 1.5 From Ofcom's perspective, the most significant changes from the previous Code of Practice (11th Edition) ('the previous Code') are:
 - i) those parties that control the operation/content/promotion of a PRS will now be held directly responsible by PhonepayPlus for complying with the Code of Practice, while providers offering intermediary services will face new obligations to undertake due diligence on their clients and to monitor the risks they may pose to consumers;
 - ii) before operating in the market PRS providers⁵ will need to register with PhonepayPlus (PhonepayPlus is proposing to exempt 0871 providers from this obligation);
 - iii) PhonepayPlus will have the ability to use more informal investigation procedures for cases with minimal consumer harm and its Tribunal will have the power to impose new sanctions on those parties who breach its Code of

¹ See <http://www.phonepayplus.org.uk/upload/New-Code-consultation-Final.pdf>

² See <http://stakeholders.ofcom.org.uk/consultations/ppp/>

³ See http://www.ofcom.org.uk/consult/condocs/prs_scope/

⁴ See <http://www.phonepayplus.org.uk/upload/Code12-GreenPaper-FINALv2-June2009.pdf>

⁵ The term 'PRS provider' is used in this document to encompass both a 'Communications Provider' and a 'Controlled Premium Rate Service Provider' as both terms are defined in the PRS Condition http://stakeholders.ofcom.org.uk/binaries/telecoms/policy/narrowband/PRS_Condition_20_Dec_10.pdf

Practice (such as ordering automatic refunds to be made to all consumers of a service and requiring a liable party to submit to an independent compliance audit);

- iv) PRS providers will be required to have effective complaints procedures in place; and
- v) PRS providers will need to take steps to identify excessive usage of a service to minimise cases of 'bill shock'.

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

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

When will the final Code take effect?

- 1.9 The final Code will come into force on 1 September 2011.

Section 2

Background

What are premium rate services?

- 2.1 In general terms, PRS offer some form of content, product, facility or service that is charged to a consumer's bill for electronic communications services.⁶ 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, mobile phone ringtones, game downloads, horoscopes, and directory enquiry services.
- 2.2 PRS vary in cost, typically between 5 pence and £1.53 per minute/call for calls from UK landlines and up to £10 on mobile shortcodes. In most cases the bulk of the revenue from such services goes to the company who markets and controls the content of the PRS. The remainder of the revenue is usually shared throughout the value chain, including with the consumer's telephone company (which receives a fee for 'origination' of the phone call), the telephone company that terminates the call to the party which is providing the service, and any intermediary companies that may offer a technical platform to help deliver the service.

How premium rate services are regulated in the UK

- 2.3 The current PRS regulatory framework comprises the following:
- i) sections 120 to 124 of the Act;
 - ii) PhonepayPlus' Code of Practice, as approved by Ofcom under section 121 of the Act; and
 - iii) the PRS Condition, made by Ofcom under section 120 of the Act, which amongst other aspects defines a narrower category of PRS as 'Controlled PRS' and requires certain communications providers to comply with directions given by PhonepayPlus for the purpose of enforcing its Code of Practice.
- 2.4 Section 120 of the Act defines PRS (as well as providers of PRS) and provides Ofcom with the power to set conditions for the purpose of regulating the provision, content, and promotion of PRS. Ofcom has the power to approve a code for PRS that meets the legal requirements set out in section 121 of the Act.⁷ In the past, Ofcom has approved the PhonepayPlus (formerly ICSTIS) Code of Practice for these purposes. The most recent version is the PhonepayPlus Code (11th Edition), dated April 2008.⁸

⁶ PRS are defined in section 120(7) of the Act.

⁷ Or approve modifications or withdraw approval, under section 121(6) of the Act.

⁸ See <http://www.phonepayplus.org.uk/output/Code-of-Practice-1.aspx>.

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

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

- 2.5 In relation to those PRS which fall within the definition of 'Controlled PRS', compliance with the Code is *mandatory* and Ofcom retains backstop powers under the PRS Condition. Insofar as a particular PRS is not caught within the definition of Controlled PRS, the PhonepayPlus Code of Practice applies to it, but compliance is *voluntary*.⁹ In this respect, PhonepayPlus relies on its Code being enforced by contractual chains running from the Network Operators through the PRS value chain.
- 2.6 The PRS Condition requires communications providers falling within the scope of the PRS Condition to comply with directions given by PhonepayPlus in accordance with its Code of Practice and for the purposes of enforcing the provisions of that Code. The application of the PRS Condition is limited to 'Controlled PRS', so that only a specific subset of PRS are subject to Ofcom's enforcement powers for breach of the PRS Condition. The definition of Controlled PRS currently includes:¹⁰
- a PRS which costs more than 10p per minute;
 - a PRS using a 'Special Services Number' (e.g. 0871), which costs more than 5p per minute (excluding 0843/4 numbers);
 - a Chatline Service (as defined);
 - a Sexual Entertainment Service (as defined); and
 - an internet dialler (as defined).
- 2.7 These Controlled PRS are regulated by PhonepayPlus' Code of Practice and the relevant communications providers involved in their provision are subject to Ofcom's backstop enforcement powers.¹¹

The Role of PhonepayPlus

- 2.8 Ofcom has responsibility and accountability for the regulation of PRS under the terms of the Communications Act 2003. Ofcom has designated PhonepayPlus to deliver the day-to-day regulation of the market, by approving the PhonepayPlus Code of Practice. Regulatory strategy, scope and policy are developed in dialogue with PhonepayPlus, but final decisions will rest with Ofcom. This relationship is formalised in a Formal Framework Agreement.¹²
- 2.9 Through its Code of Practice PhonepayPlus regulates the content, promotion and overall operation of all Controlled PRS. The Code of Practice outlines the rules that PhonepayPlus enforces against as well as the procedures to be followed by PhonepayPlus and the sanctions available to its independent Tribunal.
- 2.10 PhonepayPlus investigates all complaints received about the PRS it regulates. If PhonepayPlus thinks a provider may have breached the Code of Practice, it will investigate. This investigation can result in a case being adjudicated by the PhonepayPlus Tribunal. The Tribunal is made up of members of the independent

⁹ As specified under paragraph 1.2.3 of the Eleventh Code of Practice.

¹⁰ As defined in section (e) of the PRS Condition.

¹¹ Ofcom will shortly consult on extending the remit of the PRS Condition so that Ofcom's backstop enforcement powers mirror the new regulatory remit of PhonepayPlus.

¹² See

<http://stakeholders.ofcom.org.uk/binaries/consultations/phonepayplus/summary/formalframework.pdf>

Code Compliance Panel and has the power to impose sanctions on companies running the services.

- 2.11 Where there is evidence of very serious consumer harm, including fraudulent activity, PhonepayPlus has the power to invoke an Emergency Procedure and to tell a network to stop a number from operating altogether while it investigates.

The Consultation Process

- 2.12 The process that has led to this approval of the final Code has taken over two years and has provided stakeholders with the ability to shape policy formation through several consultations. The final Code represents a fundamental shift in the way PRS is regulated in the UK.

Ofcom's PRS Scope Review

- 2.13 In 2009 Ofcom published a statement as part of its PRS Scope Review.¹³ We concluded that the characteristics of PRS was sufficiently unique that a specific PRS regulatory regime continued to be necessary to protect consumers, beyond the protection afforded by general consumer protection regulation. The Scope Review also concluded that although the current regulatory regime was functioning well, there was the potential to further improve the existing framework in order to better protect consumers.
- 2.14 The Scope Review made a number of recommendations for PhonepayPlus that have been given effect through this final Code, including:
- PhonepayPlus should expand its Number Checker to better assist consumers needing to identify the provider responsible for a particular service;
 - PhonepayPlus should consider introducing complaints handling obligations as part of the drafting of its next Code of Practice; and
 - We supported a move to hold all PRS providers accountable for actions within their control and concluded that if PhonepayPlus was to directly regulate those parties that control the content/operation/promotion of a PRS then it should introduce a mandatory registration scheme for the PRS industry.

PhonepayPlus' 2009 Discussion Document

- 2.15 Over the last two years, PhonepayPlus has had a project underway to develop a new Code of Practice (a 12th edition). PhonepayPlus has been conscious of taking a 'no surprises' approach by engaging with the industry on the direction it was taking and in June 2009 published a discussion document outlining its initial proposals and inviting comment from industry and consumers.¹⁴ This call-for-input prompted 19 submissions from interested parties.
- 2.16 The 2009 discussion document noted that the proposed revision of the previous Code would be among the most significant in the organisation's history. The discussion document raised the prospect of PhonepayPlus making four key changes to PRS regulation:

¹³ Ofcom PRS Scope Review, http://www.ofcom.org.uk/consult/condocs/prs_scope/

¹⁴ See <http://www.phonepayplus.org.uk/upload/Code12-GreenPaper-FINALv2-June2009.pdf>

- that any new Code would be based on identifying desirable outcomes, supported with rules where appropriate, rather than prescribing a step-by-step guide to compliance;
- that every business in the phone-paid services value chain would assume an appropriate degree of responsibility for the provision of compliant services and the delivery of consumer protection measures;
- the creation of a database on which all PRS providers would be registered for due diligence and risk management purposes; and
- that providers must have in place adequate customer care facilities to ensure consumers are able to register a complaint and seek redress as quickly as possible.

Consultations on the draft Code

- 2.17 In June 2009 Ofcom published an ‘information note’ outlining its intended approach to consulting on the approval of PhonepayPlus’ draft Code.¹⁵ Ofcom stated that it intended to undertake its consultation on whether a draft Code should be formally approved in parallel with PhonepayPlus’ consultation on the substance of the draft Code. It was considered that such an approach could speed up the process of approving the final Code, without prejudicing the fairness of the consultation process.
- 2.18 To facilitate this approach Ofcom and PhonepayPlus worked closely together on the development of the draft Code. Ofcom representatives were part of PhonepayPlus’ ‘12th Code Programme Board’ and Ofcom has had input on the direction and substance of the draft Code.
- 2.19 In April 2010 the draft Code was published by PhonepayPlus and both organisations published their consultations on the draft Code.¹⁶ The two organisations have distinct functions and were consulting on different issues from different perspectives.
- 2.20 PhonepayPlus had responsibility for drafting the draft Code and consulted stakeholders on the substance of the proposed new rules. Its consultation examined the proposed changes from the current Code in detail and invited stakeholders to respond directly to PhonepayPlus on the merits and detail of the draft Code. Ofcom has responsibility for approving any Code of Practice and consulted stakeholders on whether the draft Code met the legal tests set out in section 121 of the Act and whether it should be approved if it were to be formally submitted by PhonepayPlus to Ofcom with no material changes to its current form.
- 2.21 PhonepayPlus received 55 responses to its consultation,¹⁷ while Ofcom received 14 consultation responses.¹⁸ The responses to PhonepayPlus are not relevant to Ofcom’s consideration of the final Code under the Act. However, we have set out the substantive responses to PhonepayPlus and discussed these points where appropriate. The issues raised by respondents are dealt with in the following

¹⁵ See http://stakeholders.ofcom.org.uk/binaries/consultations/prs_scope/informationnote.pdf

¹⁶ See <http://stakeholders.ofcom.org.uk/consultations/ppp/> and <http://www.phonepayplus.org.uk/upload/New-Code-consultation-Final.pdf>

¹⁷ See <http://www.phonepayplus.org.uk/output/ConsultationResponses-12thCode.aspx>

¹⁸ See <http://stakeholders.ofcom.org.uk/consultations/ppp/?showResponses=true>. A list of respondents to the Ofcom consultation can be found at Annex 1.

chapters and although they resulted in some changes to the draft Code the changes made were not considered sufficiently material to warrant a further consultation.

- 2.22 Following the consultation process and the changes to the draft Code the Department for Business, Innovation and Skill submitted a version of the Code (on Ofcom's behalf) to the European Commission on 1 October 2010, as required by Directive 98/34/EC (as amended by Directive 98/48/EC).¹⁹ The requisite three month standstill period lapsed without any comments being received.

PhonepayPlus Consultation on Guidance to the draft Code

- 2.23 The draft Code was consciously framed by PhonepayPlus as an outcomes-based code, with the intention being that the high-level rules would be supplemented by accompanying guidance on how the rules would be interpreted.
- 2.24 To assist stakeholders to respond to the draft Code consultation PhonepayPlus published several pieces of 'illustrative guidance', similar to that which it expected would eventually accompany the Code of Practice, should it come into force. On 27 October 2010 PhonepayPlus formally consulted on 22 pieces of general and service specific guidance on how the draft Code would be interpreted if the version submitted to the European Commission was approved by Ofcom (the 'draft Guidance').²⁰ This consultation provided an opportunity to address any issues of concern raised by respondents to the consultation on the draft Code and to remove any uncertainty created by a move to an outcomes-based Code.
- 2.25 The responses to PhonepayPlus' consultation on the draft Guidance are not relevant to Ofcom's consideration of the final Code under the Act. However, we have set out the substantive responses and discussed these points where appropriate.
- 2.26 The final version of the guidance ('the Guidance') is being published alongside the final Code today by PhonepayPlus.

Upcoming Consultations

- 2.27 To assist the successful implementation of the final Code Ofcom will shortly consult on amending the PRS Condition so that Ofcom's backstop enforcement powers mirror the new regulatory remit of PhonepayPlus. This will likely be followed by a further consultation on whether the scope of the PRS Condition with respect to the services that are regulated by PP+ remains appropriate (as part of a follow-up to the PRS Scope Review).

¹⁹ See <http://www.bis.gov.uk/policies/innovation/standardisation/tech-standards-directive>

²⁰ See <http://www.phonepayplus.org.uk/output/Consultation-on-Guidance-for-Code12.aspx>

Section 3

The Key Aspects of the final Code: Consultation Responses and Ofcom's position

- 3.1 The draft Code that PhonepayPlus consulted upon contained a number of significant changes from the previous Code. From Ofcom's perspective, the most significant changes that were proposed were:
- i) extending responsibility throughout the value chain for compliance with the Code;
 - ii) introducing a mandatory registration requirement for PRS providers;
 - iii) extending the requirement for PRS providers to withhold payments to their clients;
 - iv) introducing new sanctions and more flexibility into PhonepayPlus investigations;
 - v) introducing new complaints handling obligations; and
 - vi) introducing obligations to minimise instances of unexpectedly high bills.
- 3.2 We indicated in our consultation that we supported all of these changes and that the draft Code met the legal tests for approving a code under the Act.
- 3.3 The remainder of this chapter examines each of these main proposals and summarises the main responses of stakeholders. It then outlines Ofcom assessment of the responses and conclusions, and any subsequent amendments made before the final Code was formally submitted by PhonepayPlus for Ofcom's approval.

i) Extending responsibility throughout the value chain

- 3.4 Previous PhonepayPlus' Codes of Practice have defined parties as either Network Operators, Service Providers, or Information Providers. Service Providers were defined as the first party in a value chain who was not a Network Operator.²¹ Any PRS Provider who was not a Network Operator or a Service Provider was deemed to be an Information Provider.²²
- 3.5 Through the draft Code, PhonepayPlus proposed replacing the labels 'Service Provider' and 'Information Provider' with the terms 'Level 1 Provider' and 'Level 2 Provider'. The draft Code proposed that a Level 2 Provider would be 'the last contracted person in the premium rate value chain who controls or is responsible for the operation and content of the relevant premium rate service and/or the use of a facility within the premium rate service.' A Level 1 Provider would effectively be an entity offering any intermediary services between the Network Provider and the Level 2 Provider. As we noted in our consultation, while in practice many Service Providers

²¹ See for example paragraph 11.3.6 of the 11th Code of Practice.

²² See for example paragraph 11.3.7 of the 11th Code of Practice.

will now be Level 1 Providers and some Information Providers will be deemed to be Level 2 Providers, the new terminology may not always be directly substitutable for the previous terms.

- 3.6 The key aspect of the draft Code was that it proposed to extend regulatory responsibility throughout the PRS value chain. To date PhonepayPlus has primarily held responsible the first provider in a value chain that contracts with a terminating network operator (previously known as the Service Provider) if there is a breach of their Code of Practice regardless of whether a party further down the value chain actually caused the breach (e.g. a billing provider could be held liable for any misleading advertising by a PRS provider who uses their platform).
- 3.7 Through the draft Code PhonepayPlus proposed holding organisations accountable for those actions that are within their control. As such, all Level 2 Providers would be held directly responsible for ensuring the operation and content of their PRS complies with the PhonepayPlus Code. Under the previous Code, Network Operators were required to undertake a certain level of due diligence, but under the draft Code Level 1 Providers and Network Operators will assume new responsibilities to perform effective due diligence and risk assessment on any party with which they directly contract. This approach to regulating the PRS industry was previously supported by Ofcom through the PRS Scope Review.
- 3.8 The obligations in the draft Code required Network Operators and Level 1 Providers to:
- perform thorough due diligence on any party with which they contract in connection with the provision of PRS;²³
 - assess the potential risks of any party with which they contract in respect of PRS and to take reasonable ongoing steps to control those risks;²⁴ and
 - carry out reasonable monitoring of PRS provided by a Level 1 or 2 Provider with which they contract.²⁵
- 3.9 It is important to note that if a Level 1 Provider delivered part of a PRS that ‘directly impacts on consumers’ then under the draft Code that provider will still have regulatory responsibility for ensuring the functions it performs comply with the Code.²⁶ So for example, this rule could be invoked by PhonepayPlus if a Level 1 Provider misused its billing platform or undertook advertising on behalf of its client.

Consultation Responses

- 3.10 There was broad agreement from the industry, both in responses to Ofcom and PhonepayPlus, that it was appropriate that parties should only be held accountable for those activities within their control – and that Level 2 Providers should therefore be responsible for ensuring that the PRS they control complies with the PhonepayPlus Code of Practice. Consumer Focus in particular supported the concept of requiring all parties in the PRS value chain to take responsibility for the part they play in delivering a service to a customer.

²³ Paragraph 3.3.1 of the draft Code.

²⁴ Paragraph 3.1.3 of the draft Code.

²⁵ Paragraph 3.1.7 of the draft Code.

²⁶ Paragraph 3.8 of the draft Code.

- 3.11 Submissions to Ofcom indicated mixed levels of support for the specific due diligence and risk monitoring obligations in the draft Code. AIME and BT both supported the obligation in the draft Code on Network Operators and Level 1 Providers to monitor those they did business with, but were of the view that the draft Guidance needed to be very specific as to the steps such providers needed to take to ensure their compliance.
- 3.12 The Mobile Broadband Group (MBG), O2, and UKCTA were of the view that PhonepayPlus' expectations of Network Operators regarding due diligence and risk assessment were disproportionate. These parties considered that the illustrative due diligence guidance published alongside the draft Code demonstrated that PhonepayPlus expected operators to incur substantial costs to invest in new monitoring systems, to 'dip-test' the network traffic to their clients, and to take intrusive measures to satisfy themselves that their clients had adequate processes to comply with the Code. UKCTA noted that as PRS would only represent a fraction of the traffic carried by a Network Operator, rather than incur substantial costs to monitor traffic to individual services and run the risk of liability if these measures fell short of expectations, many Network Operators may instead consider exiting the premium rate market.

Ofcom's Position on New Regulatory Responsibilities

- 3.13 We are satisfied with the changes being put in place through the final Code to spread regulatory responsibility throughout the value chain. In this respect the final Code is largely unchanged from that which was consulted upon, although some of the concerns noted by stakeholders have been addressed by amending the draft Guidance.

New Obligations on Level 2 Providers

- 3.14 We consider it to be a fairer and more targeted means of regulating the PRS industry if PhonepayPlus is given the ability to target those PRS providers that are actually controlling the PRS in question, rather than intermediary providers, as has been the case under previous Codes.
- 3.15 As PhonepayPlus will be primarily regulating the activities of Level 2 Providers, it is critical that the definition of such a party is appropriate. The definition of a Level 2 Provider is one aspect that has been changed between the versions of the draft and final Codes:²⁷
- i) Rather than being the party that controls the 'operation and content' of a PRS, the definition of a Level 2 Provider in the final Code is the party controlling the 'operation, content and promotion' of a relevant PRS. It was felt that such a change was needed to more accurately target the party that controls the entirety of the PRS – and that although they may not carry out all these functions themselves, they will exercise control over the party that does. The addition of 'promotion' reflects the importance that the Code places on accurate marketing of PRS to consumers.
 - ii) A Level 2 Provider no longer needs to be the 'last contracted party in the value chain' who fulfils these functions. This change was made to remove any incentive for providers to structure their contractual arrangements to avoid liability under the final Code. Under this new definition PhonepayPlus will no longer need to

²⁷ The new definition of a Level 2 Provider can be found at paragraphs 5.3.7 - 5.3.8 of the final Code

make enquiries as to contractual relationships (i.e. to identify the last contracted party), but can instead focus its investigations on identifying the party controlling the PRS, which is in line with the intent of the changes proposed in the consultation.

- 3.16 Our consultation document noted that one risk of focusing PRS regulation on Level 2 Providers is that many Level 2 Providers are relatively small entities and may not be aware of this change or have the opportunity to provide input into the policy process. PhonepayPlus has advised that it received 55 consultation responses, including 15 from Level 2 Providers. They were also able to take into account of comments from 40 Level 2 Providers through workshops they held with industry. Steps taken by PhonepayPlus to raise awareness amongst this category of providers included external newsletters, website promotion, interviews with industry leaders, involvement in electronic forums, and newspaper advertising.
- 3.17 We are satisfied PhonepayPlus has taken all reasonable steps to consult fully and that the views of Level 2 Providers have been adequately taken into account.

New Obligations on Network Operators and Level 1 Providers

- 3.18 With respect to the obligations on Network Operators²⁸ and Level 1 Providers,²⁹ we are satisfied that the new due diligence and risk monitoring obligations contained within the final Code are appropriate.
- 3.19 The Guidance makes clear that due diligence and risk monitoring obligations will be applied by PhonepayPlus in a proportionate manner. The Guidance reinforces Ofcom's view that every party in the PRS value chain should take responsibility for those activities that are within their control – and that where there is a reasonably identifiable risk of harm to consumers it is appropriate to expect a Network Provider and Level 1 Provider to take reasonable steps to minimise the prospect of that harm occurring.
- 3.20 The Guidance published today by PhonepayPlus represents a set of obligations on Network Operators and Level 1 Providers. Key changes that have been made to the draft Guidance that was consulted upon include:
- i) The Guidance states that there is not an assumption that a breach of the Code by a client will result in the Network Operator or Level 1 Provider being assumed to have failed in its due diligence or risk monitoring;
 - ii) The Guidance now states that when considering whether there has been a breach of due diligence or risk monitoring obligations PhonepayPlus will first consider whether, on the facts of the specific case, there was a reasonably identifiable *and* controllable risk that the consumer harm would eventuate. PhonepayPlus will then consider the appropriateness of the steps taken by the relevant provider; and
 - iii) The Guidance affirms that there are no uniform expectations as to what steps a Network or Level 1 Provider will need to take with respect to their clients. Rather, the steps that need to be taken will depend on the facts of the case, the parties' previous breach history and where the parties sit in

²⁸ The definition of a Network Operator remains unchanged from the draft Code and can be found at paragraph 5.3.4 of the final Code.

²⁹ The definition of a Level 1 Provider remains unchanged from the draft Code and can be found at paragraphs 5.3.7 - 5.3.8 of the final Code.

the value chain. The Code notes that those parties contracting directly with Level 2 Providers will be expected to have a greater degree of foresight of the risks associated with the relevant services than those who contract with Level 1 Providers.

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

- 3.21 One of Ofcom's recommendations from the PRS Scope Review was that if Level 2 Providers were to be held accountable for actions within their control, then as well as imposing due diligence obligations on those further up the value chain, a mandatory registration scheme would be needed for all PRS providers.³⁰ The rationale for introducing a registration scheme is two-fold: to assist those in the industry to meet their new due-diligence obligations by providing information about their clients, and to facilitate PhonepayPlus enforcement action against a wider group of PRS providers than they have previously regulated.
- 3.22 The draft Code proposed that before providing any PRS all Network Operators, Level 1 and Level 2 Providers must register with PhonepayPlus and that it would be a breach of the Code to contract for the provision of a PRS with a PRS provider who was not also registered. This requirement to register would be subject to PhonepayPlus' ability to exempt particular categories of PRS. The draft Code also proposed a number of obligations on registrants, including
- to supply such information as PhonepayPlus may require for the purpose of efficient and effective regulation;³¹
 - to update any registration information provided to PhonepayPlus as soon as practicable;³²
 - to renew registration on an annual basis, or at another interval determined by PhonepayPlus;³³ and
 - to pay a reasonable registration fee, which will be determined by PhonepayPlus.³⁴
- 3.23 PhonepayPlus proposed that all breaches and sanctions imposed under the Code would be linked with the liable provider's registration details, together with relevant information arising from adjudications concerning associated individuals.³⁵ Level 2 Providers would have a separate obligation to provide PhonepayPlus with relevant details to identify their services to consumers and to identify the Level 1 Provider associated with the provision of the PRS.³⁶

³⁰ See http://www.ofcom.org.uk/consult/condocs/prs_scope/prs_statement/prs.pdf, paragraphs 5.82-5.90.

³¹ Paragraph 3.4.4 of the draft Code.

³² Paragraph 3.4.5 of the draft Code.

³³ Paragraph 3.4.6 of the draft Code.

³⁴ Paragraph 3.4.7 of the draft Code.

³⁵ Paragraph 3.4.8 of the draft Code.

³⁶ Paragraph 3.4.12 of the draft Code.

Consultation Responses

- 3.24 Ofcom did not receive any industry comments on the merits of introducing a registration scheme. This initiative has already been subject to several previous consultations, including:
- Ofcom's PRS Scope Review (May 2009), in which Ofcom approved the introduction of a registration scheme if PhonepayPlus was to move to register Level 2 Providers;
 - PhonepayPlus' Discussion Document on the development of its 12th Code of Practice (June 2009); and
 - PhonepayPlus' consultation on whether to proceed with a tender for the creation of a registration scheme ahead of finalisation of the 12th Code (April 2010).
- 3.25 Although we did not receive comments on the registration scheme through this consultation, that is not surprising given the broad industry support expressed through other consultation exercises, including Ofcom's own PRS Scope Review. On the strength of this industry support PhonepayPlus has proceeded with funding the development of the registration scheme ahead of any Ofcom approval of the final Code.

Ofcom's Position on Registration Scheme

- 3.26 We have previously expressed our support for the introduction of a registration scheme. Requiring PRS providers to provide a degree of information about themselves and their services is an important part of the wider effort to spread regulatory responsibility throughout the value chain. It will provide parties with relevant information about their clients' past history and will also assist PhonepayPlus to identify relevant organisations as it looks to regulate further down the value chain than it has done before.
- 3.27 For the point of clarification, the requirement for PRS providers to register with PhonepayPlus is akin to an information disclosure regime and does not represent a move to license PRS providers. The purpose of registration is to enable PRS providers to access information about the operations and history of their clients in order to facilitate effective due diligence, as well providing the regulator with up to date information to support enforcement activity. PhonepayPlus will not vet registrants and it is clear that the final Code does not grant PhonepayPlus the power to refuse to accept the registration of a provider. Similarly, although PhonepayPlus has a number of sanctions it can impose on providers (including barring them from operating), it does not have the power to de-register providers.
- 3.28 We remain of the view that an industry registration scheme should be introduced and that the terms used in the final Code to give effect to the registration requirements are appropriate.

iii) Extending a requirement to withhold PRS payments

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

would enable the regulator to take effective action against those that breached its Code of Practice.

- 3.30 PhonepayPlus considered that although the current mechanism had proven effective in slowing down the flow of funds to parties that breach their Code, as Level 1 Providers were not prevented from paying their clients in advance of receiving payment from Network Operators there was still a possibility that the responsible party could receive the funds from their activity before any inappropriate activity had been detected. The draft Code therefore proposed that this existing obligation be widened so that Network Operators *and* Level 1 Providers would be required to withhold payments to any provider for at least 30 days after the use of the relevant PRS.³⁷

Consultation Responses

- 3.31 Ofcom did not receive any industry comments on the proposed changes to the withholding of outpayments.
- 3.32 We are aware that PhonepayPlus received numerous submissions arguing that such an obligation was too intrusive and was not necessary to prevent consumer harm (including from OpenMarket, Mblox, Square 1, WIN, ITV, Virgin, Open Vantage, Telecom 2, MBG, and AIME). It was put to PhonepayPlus that any party that paid out money to their client in advance of receiving money from the Network Operator would be doing so at their own commercial risk – if their client absconded then any relevant fines owed would be deducted from the money held by the Network, leaving the relevant Level 1 Provider facing the shortfall. Furthermore, if the liable client absconded after being paid out in advance then the Level 1 Provider may have to answer questions as to whether they had undertaken appropriate due diligence and risk assessment.

Ofcom Position on Withholding Revenue

- 3.33 Based on stakeholder submissions PhonepayPlus has now reverted to the position that exists under the current Code of Practice – that although Network Operators must withhold outpayments for 30 days, there will be no such requirement placed on Level 1 Providers.
- 3.34 In our consultation we noted that under the draft Code the possibility of Level 2 Providers receiving payments too quickly increases the risk of opportunistic behaviour and the likelihood of scams occurring. However, we have carefully considered submissions on this point and concur that PhonepayPlus has sufficient regulatory tools to address such a scenario and that even in the absence of such a provision the final Code places a strong incentive on the rest of the industry to monitor the risks that their clients may be looking to scam consumers and quickly exit the market before being held to account.
- 3.35 In light of the arguments made and discussions with PhonepayPlus, we have no objections to this provision being removed.

³⁷ Paragraph 3.5.1 of the draft Code.

iv) Introducing new sanctions and more flexibility into PhonepayPlus investigations

- 3.36 The draft Code proposed introducing greater flexibility into how PhonepayPlus can investigate and respond to potential breaches of its Code. The draft Code proposed to replace the 'Informal Procedure' for investigations with a 'Track 1 Procedure'. The establishment of a Track 1 Procedure would provide PhonepayPlus with discretion in cases where there is little or no consumer harm to provide relevant parties with an 'action plan' for remedying the area of concern. If the party did not comply with the action plan then PhonepayPlus would still have the opportunity to invoke its more formal investigation powers through a 'Track 2 Procedure'.
- 3.37 The draft Code also proposed two new sanctions that a Tribunal may choose to impose on a party found in breach of the Code:
- a) where there has been a serious breach of the Code and/or serious consumer harm a Tribunal can order refunds to be provided to all consumers for the full retail amount spent by those consumers,³⁸ and
 - b) a Tribunal can order a party in breach of the Code to submit to a compliance audit of their processes by an independent third party and to implement the resulting recommendations.³⁹

Consultation Responses

- 3.38 Ofcom did not receive any industry comments on the proposed changes to PhonepayPlus' investigation process or the new sanctions.
- 3.39 We are aware that stakeholders did raise concerns with PhonepayPlus about the new power to require an organisation to provide a refund to all consumers for the full retail amount spent by those consumers. UKTV, ITV, BBC and AIME submitted that this was a very punitive sanction (refunding all expenditure rather than just revenue retained by the liable party, and refunding all consumers rather than those who have made a complaint) and also queried whether the responsibility for paying such a refund would pass up the value chain if the liable party exited the market and refused to pay.

Ofcom's Position on New Sanctions and Changes to PhonepayPlus Investigations

- 3.40 We are satisfied that the final Code should contain the proposed new sanctions and increased flexibility that were contained within the draft Code.
- 3.41 With respect to the new sanction whereby PhonepayPlus can order a party to pay a full refund to all customers, we consider it appropriate and necessary for PhonepayPlus to be able to utilise such a remedy in a serious case of consumer harm. The final Code provides that the sanction can only be used where there has been a serious breach of the Code or serious consumer harm and both Ofcom and PhonepayPlus have noted an expectation that this sanction will only be used in the case of scams, where a PRS can reasonably be expected to provide no benefit to consumers.

³⁸ Paragraph 4.8.2(j) of the draft Code.

³⁹ Paragraph 4.8.2(k) of the draft Code.

3.42 The final Code also makes clear that this sanction cannot pass up the value chain if the responsible party defaults – indeed that is true of all the sanctions in the final Code, whereby parties are only liable for the actions within their control.

v) New complaints handling obligations

3.43 The previous Code requires Service Providers (who for the most part will now be Level 1 Providers) to have in place customer service arrangements that include effective mechanisms for considering consumer claims for refunds and making subsequent payments.⁴⁰ Network Operators are currently required to satisfy themselves that their clients have adequate customer service obligations to discharge their obligations under the Code.⁴¹

3.44 As the draft Code proposed holding Level 2 Providers accountable for ensuring their PRS complies with the PhonepayPlus Code of Practice, PhonepayPlus also proposed that such providers should face obligations with respect to their customer service arrangements. The proposed obligations went further than those imposed on Service Providers under the previous Code and required Level 2 Providers to ensure that:

- consumers are able to have complaints resolved quickly, easily and fairly and that any redress is provided quickly and easily;⁴²
- there must be a proportionate complaints process in place, which is easily accessible and effectively publicised;⁴³
- complaints must be handled promptly at all stages within a process that is clear to the consumer;⁴⁴
- if refunds are provided, this must be done promptly and in an easily accessible manner;⁴⁵ and
- consumers who remain dissatisfied with the handling of their complaint must be provided with the contact details of PhonepayPlus.⁴⁶

3.45 Under the draft Code, it was also proposed that Network Operators and Level 1 Providers would face an obligation to ensure that PhonepayPlus regulation is satisfactorily maintained by taking all reasonable steps to ensure that consumer complaints are resolved quickly and fairly and that any redress is provided quickly and easily.⁴⁷

Consultation Responses

3.46 Ofcom received very few industry comments on the proposed changes to PhonepayPlus' complaints handling obligations. The MBG submitted to Ofcom that PhonepayPlus and Industry Liaison Panel (ILP) members are working together to

⁴⁰ Paragraph 3.3.5 of the previous Code.

⁴¹ Paragraph 2.3.1(f) of the previous Code.

⁴² Paragraph 2.6.1 of the draft Code.

⁴³ Paragraph 2.6.2 of the draft Code.

⁴⁴ Paragraph 2.6.3 of the draft Code.

⁴⁵ Paragraph 2.6.4 of the draft Code.

⁴⁶ Paragraph 2.6.5 of the draft Code.

⁴⁷ Paragraph 3.1.1(d) of the draft Code.

agree a complaints handling process to help improve the customer experience. It was submitted that originating communications providers already have their complaints handling processes regulated by Ofcom and that although mobile networks are working through the ILP to improve the customer experience of customers, this is a voluntary initiative and any obligations on originating providers should not be formalised in the Code.

Ofcom's Position on Complaints Handling Obligations

- 3.47 The introduction of complaints handling obligations was a recommendation from Ofcom's PRS Scope Review consultation.⁴⁸ We supported the introduction of obligations requiring providers to effectively resolve consumer complaints, while recognising that any obligations needed to be sufficiently flexible to take into account the size and resources of the providers in question. We continue to support the introduction of complaint handling rules by PhonepayPlus and consider the rules introduced by the final Code are appropriate.
- 3.48 With respect to the views expressed by the MBG that PhonepayPlus could end up regulating the activities of originating communications providers, we are satisfied that this is not the case. At present originating communications providers are not subject to the PhonepayPlus Code of Practice and PhonepayPlus is unable to regulate the activities associated with origination, such as the provision of bills to end users or the provision of customer service (even if a mobile network may be involved in both origination and termination – as in the case of mobile shortcodes). Indeed PhonepayPlus has amended their complaints handling guidance to note that mobile network operators fall outside of PhonepayPlus' regulation with regard to complaint handling and customer service.
- 3.49 We are satisfied that following the consultation, the provisions in the final Code regarding complaints handling remain appropriate.

vi) Preventing unexpectedly high bills

- 3.50 The draft Code included a new obligation on Level 2 Providers to take reasonable steps to identify excessive use of a service(s) and to inform the consumer of that usage.⁴⁹ The rationale for this new provision was to try to reduce the risk of consumers unknowingly incurring significant phone bills through 'excessive' use of a service.

Consultation Responses

- 3.51 Ofcom did not receive any industry comments on the merits of this new regulatory requirement. We are aware however that PhonepayPlus received submissions on this issue from twelve parties,⁵⁰ with the common theme being that as PhonepayPlus already imposes a range of spending caps on services there is no need for a further obligation on providers to identify excessive usage.

Ofcom's Position on Preventing Unexpectedly High Bills

- 3.52 Although the ability of PhonepayPlus to set spending caps is an important means of curtailing unexpectedly high expenditure on PRS (particularly regarding the use of

⁴⁸ See http://stakeholders.ofcom.org.uk/consultations/prs_scope/

⁴⁹ Paragraph 2.3.6 of the draft Code.

⁵⁰ MBG, WIN, Mblox, Telecom Express, D&S, MIG, Magrathea, PRA, FTXT, 4D TalkTalk, and ITV.

PRS that may be more addictive) we consider there is still the risk that consumers can run up unexpectedly high bills. We noted in our consultation that although the current spending caps may mean a consumer is disconnected from a phone-call or sequence of texts, there is nothing to prevent them from immediately opting back into the service. This is a particular risk where the consumer is not the bill payer.

- 3.53 As we noted in our consultation document, as a result of this obligation we would expect Level 2 Providers to be able to identify those consumers who are repeatedly hitting any prescribed spending caps in a short period of time (i.e. those callers who are repeatedly having to be forcibly released from calls over a short period of time, or are receiving repeat reminders about their subscription charges over a short period of time). We acknowledge there may be times when a Level 2 Provider is unable to identify that a consumer is making repeat calls (i.e. when a fixed line CLI is not visible to the Level 2 Provider) – but the text of the obligation is sufficiently flexible ('to take reasonable steps to identify') that compliance with this requirement should not prove onerous.
- 3.54 We accept that this provision is not going to prevent all instances of 'bill shock' where consumers unknowingly run up substantial phone bills through 'excessive' use of a service, and we expect there will be many consumers willing to incur what others may deem to be high bills. However, we do not consider it unreasonable for a provider of a PRS where a consumer is running up significant bills to have an obligation to inform such a customer of the implications of their usage – unlike the spending caps, this is not an obligation to terminate usage, but simply to take steps to ensure the consumer is fully informed about their usage.

Comments on Changes to the draft Code

- 3.55 We are satisfied that the major policy initiatives examined above will strengthen the regulatory regime by allowing PhonepayPlus to more clearly target those parties that are causing consumer harm while creating a more proportionate regulatory framework for legitimate providers. These developments should enable greater protection of consumers and will build trust within the PRS industry.
- 3.56 We consider the changes made to the draft Code following the consultation to be appropriate and are satisfied they take into account concerns raised by stakeholders. In particular, the definition of a Level 2 Provider has been adapted to enable PhonepayPlus to easily target the specific entity controlling any given PRS, some industry concerns about the possibility of onerous due diligence obligations will have been addressed by changes to the draft Guidance, while Ofcom and PhonepayPlus have responded to stakeholder views that it is not necessary to introduce new obligations to further slow the flow of funds through the value chain.
- 3.57 The key policy areas examined in this section are not the only changes that were proposed in the draft Code, but they were the areas likely to have the biggest impact on PRS providers and consumers.
- 3.58 We also note that the consultation process resulted in a number of changes being made between the draft Code that was consulted upon and the final Code being approved today. We have identified the substantive differences above. Other specific changes to the provisions of the draft Code are fully discussed in PhonepayPlus' statement.

- 3.59 The following section now assesses whether the entirety of the final Code formally submitted by PhonepayPlus to Ofcom for approval meets the requisite legal tests for approving a code under the Act.

Section 4

Approving the final Code under section 121 of the Act

- 4.1 Having given consideration to the responses received to our consultation on the draft Code and the subsequent amendments to the draft Code, Ofcom has decided to approve the final Code submitted by PhonepayPlus, under section 121 of the Act.
- 4.2 This section sets out the legal tests and principles that are relevant to Ofcom's decision as to whether or not to approve the final Code and the reasons why Ofcom is of the view that it would be consistent with those tests and principles to approve it in light of the consultation responses.

The relevant legal tests and principles

- 4.3 In order to approve the final Code, Ofcom must be satisfied that:
- a) a code has been made by any person for regulating the provision and contents of PRS, and the facilities made available in the provision of such services;⁵¹
 - b) the final Code contains provisions for regulating, to such an extent as Ofcom think fit, the arrangements made by the providers of PRS for promoting and marketing those services;⁵²
 - c) all of the requirements in section 121(2) of the Act are met; and
 - d) having regard inter alia to the provisions of the final Code, it is appropriate for Ofcom to approve it⁵³ (reflecting the fact, that even if the preceding tests are met, Ofcom has discretion whether to approve the final Code and must exercise this discretion in line with its duties under the Act).
- 4.4 Each of these four matters is discussed further below.

a) Ofcom considers that the final Code is a code that has been made by a person for regulating the provision and contents of premium rate services, and the facilities made available in the provision of such services

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

⁵¹ The test in section 121(1)(a) of the Act.

⁵² The test in section 121(1)(b) of the Act.

⁵³ The test in section 121(1)(c), with Ofcom exercising its discretion in accordance with its duties under sections 3 and 4 of that Act.

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

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

(c) Ofcom considers that the final Code meets all of the requirements in section 121(2):

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

- 4.8 Ofcom is satisfied that PhonepayPlus would continue to have responsibility for administering and enforcing the final Code under section 121 of the Act.

that that person is sufficiently independent of the providers of PRS

- 4.9 We note that PhonepayPlus has published a 'Governance Statement' which contains details relating to PhonepayPlus' constitution, strategy, budget and levy setting procedures.⁵⁴ For the first time much of the rules pertaining to PhonepayPlus' governance arrangements will now sit outside the Code of Practice. We are satisfied with this approach, on the basis that adequate provisions remain within the final Code to satisfy Ofcom that PhonepayPlus is sufficiently independent of PRS providers.
- 4.10 In particular, the final Code states that all Board members of PhonepayPlus will be appointed in their individual capacities. A minority of Board members may have commercial interests in the sector (and be appointed on the basis of their contemporary industry knowledge), but any such members will be prohibited from taking part in the adjudication process.⁵⁵
- 4.11 We consider that final Code also contains appropriate provisions to guarantee the independence of the bodies responsible for making adjudications. The final Code precludes more than one Board member from sitting on a Tribunal that adjudicates on provisions of the Code (and that this Board member must be a minority on the Tribunal).⁵⁶
- 4.12 As with the current Code of Practice, the final Code makes provision for parties to apply for a review and/or oral hearing of adjudications. Following an oral hearing relevant parties have the right to appeal decisions to the Independent Appeals Body (IAB). The powers and procedures of the IAB are outlined in Annex 2 of the final Code and require all members of the IAB to be fully independent of PhonepayPlus.

⁵⁴ See <http://www.phonepayplus.org.uk/upload/New-Code-consultation-Annex-E-Governance-Statement.pdf>

⁵⁵ See paragraph 1.4.1 and 1.4.2 of the final Code.

⁵⁶ See paragraph 1.4.3 of the final Code.

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

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

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

- 4.17 Ofcom considers that the provisions of the final Code are objectively justifiable in relation to the services to which it relates. We consider that when taken in its entirety, the final Code will result in a more effective regulatory regime for PRS, without unnecessarily increasing the regulatory burden on the PRS industry. The extent to which the major changes proposed in the final Code are objectively justifiable is discussed in section (d) below where Ofcom examines the appropriateness of the final Code.
- 4.18 PhonepayPlus has identified a number of issues with its previous Code that it has tried to address through drafting this final Code, including:
- a) PhonepayPlus has recognised that many of the rules in previous Codes had been rendered obsolete by changes in technology, marketing and general provider practice. PhonepayPlus is now moving, where appropriate, towards a more flexible outcomes-focused approach to regulation, with more detailed guidance available to assist the industry. This approach is intended to ensure PhonepayPlus is better placed to respond to emerging issues of consumer harm, while also giving the industry greater flexibility in how the final Code can be complied with.
 - b) The development in the final Code to hold Level 2 Providers accountable for their actions is prompted in part by a desire to move towards a fairer means of regulating the PRS industry. The final Code will now facilitate targeting those companies in a value chain that have been more directly involved in causing consumer harm. It is anticipated that holding Level 2 Providers responsible for the compliant operation and promotion of their PRS will also assist in efforts to target repeat offenders, as such parties will no longer be able to use the

existence of a Level 1 Provider above them in the value chain to shield them from liability;

- c) PhonepayPlus (and Ofcom through its PRS Scope Review) have recognised that this new regulatory environment is likely to require a complementary registration scheme. Without a registration scheme it would be very difficult for PhonepayPlus to take effective enforcement action against the smaller Level 2 Providers, as well as adding to the compliance costs of Network Operators and Level 1 Providers who will be under new due diligence obligations with respect to their clients;
- d) PhonepayPlus has identified several aspects of its investigations/sanctions which it would like to address through this final Code. As many consumers do not pursue legitimate refunds for PRS due to the time/effort involved in pursuing an often small amount of money owed,⁵⁷ PhonepayPlus considers a mechanism is needed where a Tribunal can order automatic refunds to be made. The final Code also codifies the ability of PhonepayPlus to require providers to submit to a compliance audit of their internal procedures, a power that has been used indirectly in the past where Tribunals have suspended sanctions if the provider took certain steps to improve their internal procedures. Finally, PhonepayPlus also considers the approach to investigations required under the current Code to be too formal and would like the flexibility in cases where consumer harm to be minor to deal with the matter in a more informal manner, without having to publish a record of the breach.
- e) PhonepayPlus considers that there is a problem with inadequate complaints handling procedures in the industry and is introducing new obligations on Level 2 Providers to have effective procedures in place for the resolution of consumer complaints. This development stems from Ofcom's PRS Scope Review, where we recommended PhonepayPlus examine whether formal regulation was needed in this area (noting that any such expectations would need to be proportionate to the size and resources of the party in question); and
- f) PhonepayPlus and Ofcom are of the view that more could be done by providers to reduce instances of 'bill shock', where consumers receive unexpectedly high bills. Ofcom recognises that originating communications providers play a key role in bill shock, although this is beyond the scope of the PhonepayPlus Code of Practice. To address the responsibilities of PRS providers, the final Code requires Level 2 Providers to take reasonable steps to notify consumers in cases there could be high usage.

4.19 Ofcom and PhonepayPlus continue to believe that an effective regulatory regime is vital in order to protect consumers and the reputations of legitimate PRS operators, as well as to keep pace with changes in technology and the PRS industry. We are satisfied that the issues that have been identified above with the current regulatory regime need addressing and that the provisions of the final Code are based on reasonable grounds and are justifiable in respect of the services to which the final Code relates. The likely effects of the provisions of the final Code are discussed further below.

⁵⁷ See for example, the June 2009 PhonepayPlus Discussion paper on the 12th Code of Practice, <http://www.phonepayplus.org.uk/upload/Code12-GreenPaper-FINALv2-June2009.pdf>, paragraph 4.21.

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

4.20 Ofcom is satisfied that the provisions of the final Code do not discriminate unduly against particular persons or against a particular descriptions of persons, and that the final Code will be applied uniformly to all relevant parties engaged in the premium rate sector, as defined under section 120 of the Act. Although the final Code imposes different obligations on different categories of providers, such an approach is not discriminatory but is rather a proportionate means of regulating parties based on the functions that they exercise. Below we consider the extent to which two key changes could potentially be considered to be discriminatory. The extent to which the other major changes could be considered to be discriminatory is examined in the following section on the appropriateness of the proposals (part d).

Considering whether the New Regulatory Responsibilities are Discriminatory

- 4.21 With respect to regulatory responsibilities, the three identified parties in the value chain will face varying obligations:
- a) Network Operators: the role of Network Operators continues to be central to regulation of the PRS industry, with Network Operators having responsibilities to carry out due diligence on their clients, bar access to services where necessary and withholding revenue payments;
 - b) Level 1 Providers: in the past Level 1 (Service) Providers have been targeted by PRS regulation for reasons largely of pragmatism, with PhonepayPlus and Ofcom viewing them as a ‘gatekeeper’ whose control of the PRS platform meant they were in a unique position in the value chain to prevent harm from occurring. Under the final Code, Level 1 Providers will no longer be held responsible if, for example, the promotion or content of a PRS breaches the Code of Practice, but they will now face new due diligence and risk assessment obligations with respect to their clients (as well as barring access and withholding revenue payments); and
 - c) Level 2 Providers: in the past Level 2 (Information) Providers were only held accountable for their actions in a narrow range of circumstances – where the provider consented to being held responsible for any breaches of the Code of Practice and PhonepayPlus was satisfied it was appropriate to deal with this provider rather than the Service Provider.⁵⁸ Under the final Code Level 2 Providers will now be held accountable for complying with specific rules regarding the operation, promotion and content of the PRS they control, regardless of whether they consent to the jurisdiction of PhonepayPlus. This approach recognises that it will often be the actions of Level 2 Providers that cause consumer harm.
- 4.22 It is not discriminatory to assign regulatory responsibilities that vary depending on what activities any given party carries out in the value chain and the provisions of the final Code will apply equally to parties within each category.
- 4.23 The final Code does provide some scope for certain Level 1 Providers to be treated differently – those Level 1 Providers that provide part of a PRS that directly impacts on consumers are required to comply with Part Two of the final Code (the part of the

⁵⁸ The so called ‘IP pass-through’, paragraph 8.3.4 of the 11th Code of Practice.

Code that is binding on Level 2 Providers).⁵⁹ Such a provision is not discriminatory as it is only applicable to those Level 1 Providers that are providing an aspect of a service that they control and which directly affects consumers (such as advertising or billing) and is consistent with the intention of PhonepayPlus and the final Code to hold all providers accountable for their actions.

Considering whether the Registration Requirement is Discriminatory

- 4.24 With respect to the registration scheme, the final Code only imposes high-level obligations: all PRS providers need to register annually with PhonepayPlus (subject to their discretion to exempt particular services), provide such information as PhonepayPlus may require, and pay a reasonable registration fee. Ofcom is satisfied that these broad powers are not in themselves discriminatory, since the registration requirements will apply to all PRS providers, except for a limited category of PRS service in relation to which the imposition of such requirements would not be proportionate.
- 4.25 The PRS exempted from registration will be identified by PhonepayPlus. PhonepayPlus intends to exempt 0871 providers from having to register given that their use of PRS is likely to be peripheral to their main business operations. We do not consider this to be unduly discriminatory and support PhonepayPlus taking steps to ensure that the requirement to register is only targeted at providers of those services that have a higher risk of causing consumer harm and where there is an expectation of more rigorous due diligence on the part of associated providers.
- 4.26 The ability to charge a registration fee could conceivably represent a barrier to market entry if the fee was set at a level that effectively discriminated against new entrants (who may not have access to significant resources). However, the final Code restricts PhonepayPlus' ability to charge any more than a 'reasonable' fee and they have made clear that the fee will be set on a cost-recovery basis. We strongly support this approach and wish to stress that the registration scheme will not be a revenue-raising mechanism. PhonepayPlus has indicated that the registration fee for the first year will be £100, a figure that should not represent a barrier to market entry. We also note that to ensure the registration fee is not discriminatory PhonepayPlus is proposing to exempt two categories of providers from having to pay the fee (although they will still need to register): registered charities and businesses with small PRS revenue.
- 4.27 The implementation of the registration scheme is discussed further below in the sections on the proportionality and appropriateness of the proposed requirements.

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

- 4.28 The central objective of PRS regulation is to protect consumers from the risks of harm that may accompany the use of such services. Such an objective cannot be pursued in a vacuum and both PhonepayPlus and Ofcom must ensure that any regulatory obligations are proportionate to the nature of the consumer harm. Ofcom considers that the provisions of the final Code are proportionate in light of this objective. Below we consider the proportionality of the two key aspects in the final Code. The extent to which the other major changes could be considered to be proportionate is explained in the following section as part of an assessment of the appropriateness of each of the proposals (part d).

⁵⁹ Paragraph 3.8.1 of the final Code.

Considering whether the New Regulatory Responsibilities are Proportionate

- 4.29 Ofcom's PRS Scope Review outlined the range of potential harm from PRS, including where consumers pay higher than expected prices, receive low quality services, are discouraged from seeking redress, access inappropriate content, have their privacy infringed, or are the victims of scams.⁶⁰ PhonepayPlus has subsequently framed its final Code around upholding six consumer protection outcomes: legality, transparency and pricing, fairness, privacy, avoidance of harm and complaints handling.
- 4.30 The final Code seeks to uphold these consumer protection outcomes by distributing appropriate responsibilities throughout the value chain. Experience shows that consumer harm is most often caused by Level 2 Providers. Such Level 2 Providers control the operation and content of a PRS, have direct contact with consumers, are best positioned to ensure a PRS does not breach the Code and are best positioned to remedy any consumer harm. It is a logical step that such providers should therefore bear the primary responsibility for ensuring that any given PRS complies with PhonepayPlus' Code of Practice.
- 4.31 The effect of this approach is that many Level 2 Providers will now for the first time be directly regulated by PhonepayPlus. We do not consider this to be 'regulatory creep' but are satisfied it is a measured step to improving the protection of consumers. Level 2 Providers will no longer be able to escape regulatory scrutiny for their actions. In light of their role in controlling a PRS we consider it is proportionate to hold them responsible for any harm they cause.
- 4.32 While it is reasonable that Level 2 Providers should now bear responsibility for their own actions, those further up the value chain continue to have an important role in minimising the risk of consumer harm by virtue of their role as 'gatekeeper' in the value chain. Such parties are in a position to decide whether to do business with a Level 2 Provider, or in the case of a Network Operator whether to allow a particular provider to have access to their network. We therefore support the move by PhonepayPlus to introduce new obligations on Network Operators and Level 1 Providers to take appropriate steps to minimise the prospect that a PRS utilising their platform/network will cause consumer harm. As noted in the PRS Scope Review, in the absence of very strong due diligence obligations on these parties, there is a risk that Level 2 Providers will see opportunities to conduct scams.⁶¹
- 4.33 Every business involved in the provision of a service will now assume some degree of responsibility for ensuring consumers are not harmed, but this responsibility will only extend to those activities that are within a party's control. We consider this to be a fairer and more proportionate means of regulating the PRS industry. It is also likely to support efforts to target repeat offenders, with Level 2 Providers being held directly accountable for their actions.⁶²

Considering whether the Registration Requirement is Proportionate

- 4.34 Mandating the registration of PRS providers will impose a compliance cost on PRS providers, but we consider this is a proportionate and necessary means of minimising

⁶⁰ See, http://www.ofcom.org.uk/consult/condocs/prs_scope/prs_statement/prs.pdf, paragraphs 4.7 – 4.23.

⁶¹ See, http://www.ofcom.org.uk/consult/condocs/prs_scope/prs_statement/prs.pdf, paragraphs 5.82 – 5.90.

⁶² Although we note some have already been held accountable if they consented through IP pass-through arrangements.

the prospect of consumer harm occurring under the final Code. A well functioning registration scheme will support PhonepayPlus' enforcement activities and the new obligations on certain providers to undertake due diligence on their client's activities.

- 4.35 The final Code grants PhonepayPlus a broad discretion in how the registration scheme should be implemented, but we are satisfied that there is an appropriate system of 'checks and balances' in place so that the burden on the PRS industry is no more than necessary to support the objectives of the Code.
- 4.36 PhonepayPlus has consulted publicly on key registration issues and sought views from stakeholders on issues such as who should register, what information should be provided, and what an appropriate means of setting the registration fee would be. PhonepayPlus' governance arrangements, effective working relationship with the PRS industry, and the Framework Agreement⁶³ with Ofcom are further checks on ensuring the registration scheme will be implemented in a proportionate manner.

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

- 4.37 Ofcom is satisfied that, in relation to what the final Code is intended to achieve, the provisions are transparent. Ofcom notes that the provisions of the final Code have been drafted with a view to ensuring a sensible balance between making them as clear and unequivocal as possible with the need to reflect the fast-moving and dynamic PRS industry which delivers PRS across various different platforms.
- 4.38 The final Code has been developed by PhonepayPlus as a result of ongoing dialogue with the PRS industry and in the light of PhonepayPlus' experiences of regulating that industry. A number of the provisions of the final Code which would represent changes to the existing PhonepayPlus regime stem from Ofcom's PRS Scope Review, which was published in October 2009. As noted above, PhonepayPlus also issued a discussion document in June 2009 on the development of its draft Code, which sought initial industry views on the direction that it was taking.
- 4.39 We noted in our consultation that although we were minded to approve the draft Code, we were conscious that the proposals were likely to have the greatest impact on Level 2 Providers – some of whom may not have been regulated directly by PhonepayPlus or Ofcom in the past and are less likely to be familiar with the contents of the two previous consultations on these issues.
- 4.40 We consider that PhonepayPlus has had considerable success in engaging with this community of PRS providers and that the communications it undertook raised awareness of its draft Code. As noted above, in order to raise awareness of the new regulatory changes PhonepayPlus held stakeholder meetings held around the country, undertook mail-outs, took part in online forums, took out paid advertisements, had engagement with trade associations and held media briefings. We are satisfied PhonepayPlus has taken all reasonable steps to be transparent in the development of the final Code and in effectively communicate the likely impact of its proposals to Level 2 Providers.

⁶³ The Framework Agreement has formalised the relationship between Ofcom and PhonepayPlus and outlines the responsibilities of each organisation with respect to PRS. See <http://www.ofcom.org.uk/consult/condocs/phonepayplus/formalframework.pdf>

(d) Having regard inter alia to the provisions of the final Code, Ofcom considers that it is appropriate for the final Code to be approved

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

Section 3: Ofcom's general duties

4.42 Section 3(1) of the Act sets out the principal duties of Ofcom in carrying out its functions:

- a) to further the interests of citizens in relation to communications matters; and
- b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

4.43 Section 3(2)(b) of the Act is also relevant: the requirement that Ofcom secure the availability throughout the UK of a wide range of electronic communications services.

4.44 Section 3(3) of the Act provides that, in performing their duties under subsection (1), Ofcom must have regard, in all cases, to-

- a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
- b) any other principles appearing to Ofcom to represent the best regulatory practice.

4.45 In addition, section 3(4) of the Act provides that, in performing its duties, Ofcom must have regard to "such of the following as appear to them to be relevant in the circumstances", including:

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

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

Section 4: The six Community requirements

- 4.47 Section 4 of the Act sets out the six Community requirements (which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive⁶⁴) which Ofcom, in carrying out its functions under inter alia Chapter 1 of Part 2 of the Act, must act in accordance with.
- 4.48 In broad terms, the six requirements are as follows:
- i) to promote competition, including in relation (a) to the provision of electronic communications networks and services, and (b) to the provision and making available of services and facilities that are provided or made available in association with the provision of electronic communications networks or services to secure that Ofcom's activities contribute to the development of the European internal market;
 - ii) to secure that Ofcom's activities contribute to the development of the European internal market;
 - iii) to promote the interests of all persons who are citizens of the European Union (within the meaning of Article 20 of the EC Treaty⁶⁵);
 - iv) to take account of the desirability of Ofcom's carrying out its functions in a manner which, so far as practicable, does not favour (a) one form of electronic communications network, service or associated facility, or (b) one means of providing or making available such a network, service or facility, over another;
 - v) to encourage (to such extent as Ofcom consider appropriate for certain purposes which are specified in section 4(8) of the Act) the provision of network access and service interoperability; and
 - vi) to encourage such compliance with the standards specified in section 4(10) of the Act as is necessary for facilitating service interoperability and securing freedom of choice for customers of communications providers.

Ofcom's overall assessment of the appropriateness of approving the final Code

- 4.49 Ofcom has carefully considered the entirety of the final Code and considers that it is appropriate to approve it. The final Code will strengthen the regulatory regime by more clearly targeting regulation at those parties in the value that are responsible for causing consumer harm. We consider the final Code will promote greater consumer confidence in the PRS market and, as a result, will encourage investment and innovation in the sector.

⁶⁴ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, which has been recently amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009.

⁶⁵ Ex Article 17, prior to the amendments introduced by the Treaty of Lisbon.

- 4.50 The following section examines the most significant changes from the existing PhonepayPlus Code of Practice and summarises Ofcom's views on why we consider it appropriate to approve the final Code.

Extending Regulatory Responsibility throughout the Value Chain

- 4.51 By virtue of their more permanent presence in the industry and ability to exercise control over the platform through which PRS is delivered, Level 1 Providers have traditionally been the key focus for regulation in this industry even though Level 2 Providers are exercising control over the promotion and operation of PRS and are potentially the parties responsible for causing consumer harm.
- 4.52 We have previously supported the approach of holding Level 1 Providers accountable for ensuring the PhonepayPlus Code was complied with largely for reasons of pragmatism:
- it placed very strong incentives on Level 1 Providers to monitor those with whom they did business; and
 - it made investigations and enforcement action straightforward by avoiding the need for PhonepayPlus to navigate an often complex value chain in its investigations to try to identify the party that may have actually been directly responsible for consumer harm.
- 4.53 The final Code now distributes regulatory responsibility along the value chain. Level 2 Providers will have responsibility for ensuring that the day-to-day promotion and operation of PRS complies with the Code of Practice, while Level 1 Providers will face new obligations to take appropriate steps to minimise the prospect that PRS utilising their platform will cause consumer harm.
- 4.54 As outlined in the Scope Review, there are challenges with altering the responsibilities of providers in this way. However, we are satisfied that the approach adopted through the final Code will be effective. Most importantly:
- Level 1 Providers will continue to have strong incentives to monitor those with whom they do business; but rather than being liable for the actions of their clients, they will now face liability for due diligence failings;
 - Level 2 providers who were previously not directly subject to regulation by PhonepayPlus will now be directly responsible for complying with the final Code; and
 - the introduction of an industry registration scheme will greatly assist PhonepayPlus' efforts to identify relevant parties and take effective enforcement action.
- 4.55 We accept there are a number of small risks with this shift in regulatory focus, including:
- the risk that under the final Code some Level 2 Providers might be able to conduct a scam and exit the market before remedying consumer harm (i.e. although the company will be liable for its actions, it might be wound up and its assets disbursed before being held to account). We consider the risk that more scams may be committed under the final Code has been adequately managed by the introduction of robust due diligence requirements on Level 1 Providers to

monitor their clients, and the ability of PhonepayPlus to link the breach history companies to specific directors through its registration scheme. Ofcom will also undertake a consultation to support PhonepayPlus' regulation of Level 2 Providers by widening the scope of the PRS Condition to apply to all Controlled PRS Providers.

- As Level 2 Providers are less likely to have a permanent presence in the PRS industry (when compared to Level 1 Providers), there is an increased likelihood that some Level 2 Providers will choose to exit the market rather than pay fines to PhonepayPlus. We consider that the primary focus of PRS regulation is the prevention of consumer harm and that the final Code is likely to achieve this objective, even though the collection of financial penalties might prove more challenging.

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

A Mandatory Requirement to Register with PhonepayPlus

4.57 As signalled through Ofcom's PRS Scope Review, any move to hold Level 2 Providers directly accountable for their actions should be complemented by the introduction of a mandatory registration scheme for PRS Providers. We are satisfied that the requirement for PRS providers to register with PhonepayPlus is appropriate: such a registration scheme would support the new due diligence obligations and would assist the enforcement activities of PhonepayPlus.

4.58 Although the direct impact of a requirement to register with PhonepayPlus is likely to be minimal for any given business (e.g. filling out an online form describing their business and services and paying a nominal registration fee), failure to register would be a breach of the Code that could trigger a range of sanctions.⁶⁶ We are satisfied that the implementation of the registration scheme is being done in a targeted manner. We therefore support PhonepayPlus' exemption of 0871 providers from a requirement to register, given the relatively low risks posed by these services.

Introducing New Sanctions and Flexibility into Investigations

4.59 We are satisfied that it is appropriate to introduce a more flexible 'Track One' procedure for investigations into cases where the alleged breach is of a minor nature (which would result in a compliance plan for the relevant party to follow). We do not consider this move will have any adverse effect on PRS providers as if they disagree with the resulting compliance plan or fail to follow it, they will still have the opportunity to fully defend an alleged Code breach should PhonepayPlus initiate a more formal investigation. The opportunity to deal with such cases in a more informal manner is consistent with the efforts of PhonepayPlus to introduce a more flexible approach to regulation that enables it to focus its resources on instances of serious consumer harm.

4.60 We will now deal with the appropriateness of the two new sanctions in turn: (i) the ability for a Tribunal to order automatic refunds to all consumers⁶⁷ and (ii) the ability

⁶⁶ Paragraph 3.4.1 of the final Code.

⁶⁷ Paragraph 4.8.2(j) of the final Code.

to require a provider to submit to a 'compliance audit' of their processes and to adhere to the recommendations.⁶⁸

- 4.61 We are conscious that some stakeholders had concerns about how PhonepayPlus intended to apply the sanction that required a PRS provider to provide full refunds to all consumers who have been charged for the relevant PRS. Such a sanction would apply to all consumers, regardless of whether they lodged a complaint in relation to the service in question, and would require the PRS provider to refund the full retail price of the PRS regardless of how much of the retail revenue the liable party had received. We are satisfied that there are a number of safeguards in place to ensure this sanction would not be disproportionate:
- this sanction can only be imposed in cases where there has been a 'serious breach of the Code and/or serious consumer harm'. Given that refunds would be supplied to all consumers, it is likely that a Tribunal would only impose such a sanction where the service in question could not have provided any material value to consumers (e.g. a scam);
 - as Tribunals must have regard to the proportionality of the sanctions they impose (including considering *all the sanctions* imposed on a PRS provider), the ability to require automatic refunds should not lead to a disproportionate burden relative to the seriousness of the breach of the Code (e.g. given the financial impact this sanction could have on the relevant provider, the Tribunal could decide to reduce the level of sanctions that would otherwise be imposed to ensure the totality of the punishment remained proportionate);
 - recognising that it may not always be technically or legally possible to credit a consumer's account or to notify consumers of the availability refund, the final Code provides PhonepayPlus with the discretion to instead require a donation to charity; and
 - as with other sanctions, the affected party will be able to make an application to review or appeal the decision.
- 4.62 Ofcom considers the PhonepayPlus Tribunal procedures to be highly effective and expects that this new sanction will further assist Tribunals in ensuring that infringers remedy the consequences of their breaches.
- 4.63 With respect to the new sanction requiring a provider to submit to a compliance audit by a 3rd party (including paying the costs of the audit and implementing the recommendations within a defined period), we are also satisfied that this is also an appropriate remedy for a Tribunal to consider imposing.
- 4.64 The establishment of new due diligence obligations through the final Code is likely to result in more cases going to Tribunals about the adequacy of providers' internal procedures (i.e. failure to monitor clients) than previously. If, for example, a Tribunal concluded there had been significant shortfalls in a provider's due diligence, or there had been repeated due diligence failings, it may be appropriate in such a scenario to try to remedy the situation by imposing a compliance audit rather than a fine.
- 4.65 We recognise that complying with such a sanction could result in a provider making costly and complex changes to their internal processes, the precise nature of which may not be known at the time the sanction was imposed. To address this concern the

⁶⁸ Paragraph 4.8.2(k) of the final Code.

final Code allows providers subject to a compliance audit to formally appeal the resulting audit recommendations.

New Complaints Handling Obligations

- 4.66 The new complaints handling obligations are a result of a Scope Review recommendation that PhonepayPlus should examine strengthening the requirements in this area. We consider the obligations to be reasonable and do not consider they will be particularly onerous for providers to comply with.
- 4.67 As noted in paragraph above, the key obligations will fall on Level 2 Providers, who will now be required to have proportionate complaints procedures in place, to resolve complaints quickly and fairly, and provide dissatisfied consumers with the contact details of PhonepayPlus. The key aspect of these requirements is the test of proportionality – with the nature of complaints processes being proportionate to the nature of the PRS business. For example, a broadcaster offering PRS would be expected to have a markedly different complaints procedure in place for dissatisfied consumers than a GP's surgery that was offering an 0871 number to patients.
- 4.68 Under the final Code, Network Operators and Level 1 Providers will now be obliged to ensure that PhonepayPlus regulation is satisfactorily maintained by taking all reasonable steps to ensure that consumer complaints are resolved quickly and fairly and that any redress is provided quickly and easily. As such, there is no direct obligation on such parties to resolve complaints themselves, but rather to support the obligations on Level 2 Providers by taking reasonable steps. An ILP working group has been working on what Network Operators and Level 1 Providers should do when consumers make complaints about PRS and this best practice guidance will sit alongside the Code requirements.
- 4.69 The complaints handling obligations in the final Code are at a very high level and allow providers a great deal of flexibility in how they may choose to comply. On balance, we are satisfied that the provisions in the final Code are appropriate. While there may be some initial uncertainty as to how complaints should be resolved 'fairly', 'easily', and 'quickly', we expect that PhonepayPlus Tribunals will apply these qualifying factors in a reasonable manner in order to determine whether a provider has breached their complaints handling obligations. We also anticipate that guidance published by PhonepayPlus in this area will clarify the steps providers may consider taking to meet their obligations.

Preventing Unexpectedly High Bills

- 4.70 For some time Ofcom has had concerns about cases that are commonly referred to as 'bill shock', where consumers run up unexpectedly high bills on their telephone accounts. Such cases are by no means limited to the PRS industry, with one common cause being consumers roaming overseas. Nevertheless, we have become aware of instances where consumers have run up significant bills for PRS such as gambling services or virtual chat services over a relatively short time period. In such instances, although a provider may adhere to daily caps on spending for their service (e.g. terminating sexual entertainment services once a spending cap for the call has been reached), we have concerns that this may not be sufficient to reduce the potential for consumer harm.
- 4.71 The final Code includes a new obligation on Level 2 Providers to take reasonable steps to identify excessive use of a service(s) and to inform the consumer of that

usage.⁶⁹ The rationale for this new provision is to try to minimise those instances where consumers may unknowingly run up significant phone bills through ‘excessive’ use of a service.

- 4.72 We are conscious that in many cases, a consumer is willing to spend a sum of money on PRS that may be considered by others to be excessive. This obligation would not require PRS providers to stop offering such services, but rather to have procedures in place to identify users who may be running up unusually high bills and to inform them appropriately. For example, as a result of this obligation we would expect Level 2 Providers to be able to identify those consumers who are repeatedly hitting any prescribed spending caps in a short period of time (i.e. those callers who are repeatedly having to be forcibly released from calls over a short period of time, or are receiving repeat reminders about their subscription charges over a short period of time).
- 4.73 We acknowledge that by itself this provision will not solve the problem of unexpectedly high bills and we will continue to consider the wider consumer issues in this area. Although much of the responsibility for informing consumers about high bills is likely to lie with originating providers, we consider it appropriate that Level 2 Providers have some responsibility where consumers are incurring very high charges through their use of a PRS.

Conclusion

- 4.74 The final Code represents a fundamental shift in the way the PRS industry is regulated. From Ofcom’s perspective, the most significant changes from the previous Code of Practice are:
- extending responsibility throughout the value chain for ensuring that PRS complies with the Code;
 - introducing a mandatory registration requirement for PRS providers;
 - introducing new sanctions and more flexibility into PhonepayPlus investigations;
 - introducing new complaints handling obligations; and
 - introducing obligations to minimise instances of ‘bill shock’.
- 4.75 The requirement for PRS providers to register their details with PhonepayPlus is a significant step in a liberalised communications market where many providers would only deal with the regulator if it was alleged they had breached a specific regulation. This proposal has not been taken lightly and both PhonepayPlus and Ofcom consider it is a necessary measure to rid the PRS market of individuals and companies that repeatedly cause consumer harm, while also supporting the ability of reputable providers to identify those parties they may wish to do business with.
- 4.76 We recognise the extension of regulatory responsibility throughout the value chain is likely to have the greatest impact on those parties responsible for controlling/promoting PRS content, but are satisfied this is an appropriate step to take. It is Ofcom’s view that the substantive rules contained in the final Code are reasonable and we support the concept of holding parties directly accountable for those actions within their control.

⁶⁹ Paragraph 2.3.6 of the final Code.

- 4.77 In concluding that it is appropriate to approve the final Code, Ofcom has had regard to its duties under section 3 of the Act. Ofcom believes that its approval of the final Code is compatible with those duties, not only because the final Code would be in line with Ofcom's primary duty to citizens and consumers, but also because it would promote legitimate competition in the provision of PRS and the networks and services by which PRS are provided. Effective competition can only exist where consumers are not misled about the cost or nature of services and where traders who cause consumer harm are held accountable. We are satisfied that the final Code would further these aims.

Section 5

Clarifying the Treatment of Broadcasters

- 5.1 The regulatory treatment of in-programme PRS is unique as, by virtue of their broadcast licences, broadcasters are accountable to Ofcom rather than PhonepayPlus. However, a concern that emerged amongst broadcasters through the consultation process is that many broadcasters who control the operation, promotion and content of a PRS will now meet the definition of a Level 2 Provider and might therefore have to comply with PRS rules established by PhonepayPlus in addition to their licence obligations to Ofcom.⁷⁰
- 5.2 It was never the intention of Ofcom or PhonepayPlus to change the existing regulatory arrangements for in-programme broadcast PRS. We wish to clarify for stakeholders that under the new Code Ofcom will continue to have responsibility for the regulation and enforcement associated with the use of in-programme PRS by licensed broadcasters. Ofcom will continue to investigate complaints about the use of in-programme PRS, while PhonepayPlus will continue to have regulatory remit to investigate the compliance of other parties in the value chain associated with in-programme PRS, including Network Operators and Level 1 Providers.
- 5.3 It is important to note that although PhonepayPlus will not investigate whether licensed broadcasters have complied with the new Code with respect to in-programme PRS, they will be able to investigate the other activities associated with PRS that are not subject to Ofcom's licence conditions. For example, licensed broadcasters will need to ensure compliance with the final Code with respect to any PRS promotions featured only on websites, as such activities are not subject to Ofcom's licence conditions. We consider there is a clear delineation as to which activities Ofcom and PhonepayPlus will regulate with respect to licensed broadcasters and are satisfied that this approach remains appropriate.
- 5.4 In post-consultation discussions with broadcasters it was put to Ofcom that, given broadcasters are already licensed by Ofcom, it would be disproportionate to also require them to register with PhonepayPlus. We are of the view that it would not be disproportionate if PhonepayPlus was to require broadcasters to register with them. Although broadcasters are primarily held accountable to Ofcom there will be some PRS activity they undertake where PhonepayPlus regulation will apply. The registration scheme is intended to facilitate improved due diligence practices and ensure the effective population of a number checker and we are satisfied there may be some benefit to be gained from the registration of broadcasters. In any event, we are not satisfied that the act of registering is particularly onerous, nor the nominal fee of £100 disproportionate to justify requiring an exemption of broadcasters. We consider it appropriate for PhonepayPlus to make the final decision on whether to exempt broadcasters from registration and understand that they do not intend to exempt broadcasters.

⁷⁰ These concerns were submitted by a confidential respondent and were alluded to in AIME's submission to PhonepayPlus.

Section 6

Implementation

6.1 In our consultation document we proposed that there should be period of three months following any Ofcom approval before a new PhonepayPlus Code of Practice should come into force. We noted that whether this would be practical would depend on the responses provided by stakeholders to both consultations, the nature of any subsequent modifications that would need to be made to the draft Code, and whether in light of responses Ofcom was satisfied it could formally approve the final Code without a further consultation.

Consultation Responses

6.2 BT and a confidential respondent both agreed that three months would be an appropriate period to prepare for the new Code to come into force, while Channel 4 Television considered that three to six months would be satisfactory. Both AIME and FCS were of the view that a six month implementation period was appropriate. UKCTA considered that a minimum of six months would be required to make changes to contractual arrangements required by due diligence obligations, but that a 12 month window would be more realistic to complete this work.

6.3 The MBG and 3 were of the view that the new Code could not come into force while Ofcom is reviewing whether certain services should be regulated by PhonepayPlus. It was submitted that to remove regulatory uncertainty Ofcom first needed to apply its Scope Review analytical framework to set the boundaries for PhonepayPlus regulation and then subsequently determine the nature of the regulation that should apply to those services.

Ofcom Conclusion

6.4 Ofcom and PhonepayPlus have recognised that many stakeholders have requested more time to prepare for the introduction of the new Code. We have agreed that a five month implementation period represents sufficient time for the PRS providers to prepare for their new responsibilities and to make any necessary changes to ensure compliance.

6.5 We recognise that the due diligence and risk monitoring obligations will require Network Operators and Level 1 Providers to reassess the risks posed by their clients and to take any necessary precautionary steps, however a five month window would appear to be more than adequate for such providers to ensure compliance with these new obligations. The final Code does require providers to make changes to their contracts (such as rule 3.3.3 requiring contracts between registered parties to include terms consenting to PhonepayPlus jurisdiction), however all such changes are relatively minor and given they are a regulatory requirement we do not envisage a potential for disputes to arise in their negotiation that would justify a longer implementation period.

6.6 We are also conscious that there is already a high level of understanding within the PRS industry as to the likely changes from this new Code. Although the exact content of the final Code has not been known for certain until today, PhonepayPlus has already communicated to the industry the version of the Code that was lodged by BIS with the European Commission in October 2010. It was made clear in the Ofcom consultation that it was unlikely the final Code would differ materially from the version

submitted to the Commission and PhonepayPlus has been able to rely on this to begin informing industry members of the upcoming changes. Indeed industry groups such as AIME consider there is enough certainty about the content of the final Code that they have already held training forums on how to their members can comply with the final Code.

- 6.7 We disagree with the position of the MBG and 3 that it is not appropriate to approve the final Code while Ofcom is separately considering whether to widen or narrow PhonepayPlus' remit with respect to certain PRS (through its follow-up to the PRS Scope Review). There is no guarantee as to the outcome of that review and we consider it would be inappropriate to delay the introduction of such wide-ranging reforms while Ofcom considers the regulatory status of a very small proportion of the PRS market. We are satisfied that there is sufficient regulatory certainty at present that the introduction of a new Code of Practice will not disproportionately affect those who may at some stage in the future benefit from an Ofcom decision to exempt them from regulation. Indeed we note that PhonepayPlus and mobile operators reached agreement on how the previous Code would be applied to Payfortit services while Ofcom reviewed the status of that service, which is something that could potentially be again considered under the final Code – and would be much more appropriate that not applying the final Code to any PRS.
- 6.8 The final Code will come into force on 1 September 2011.

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/ppp/>

- AIME
- BT
- Channel 4 Television
- Consumer Focus
- FCS
- Mobile Broadband Group
- O2
- Three UK
- UKCTA

In addition we received five confidential responses.

Annex 2

Notification of Approval of a Code for Premium Rate Services under section 121 of the Communications Act 2003

The approval of a Code for premium rate services for the purpose of sections 120 and 121 of the Communications Act 2003

WHEREAS:

- (A) section 121 of the Communications Act 2003 (c. 21) (“the Act”) empowers the Office of Communications (“Ofcom”), subject to being satisfied of certain matters specified in that section, to approve a code which has been made by any person for regulating the provision and contents of premium rate services, and the facilities made available in the provision of such services;
- (B) on 24 June 2009 Ofcom published an Information Note in which Ofcom announced its intention to engage with PhonepayPlus on the drafting of a new Code of Practice and to subsequently consult in parallel with any PhonepayPlus consultation on whether it was minded to approve a new Code of Practice under the Act;
- (C) on 29 April 2010 PhonepayPlus published a draft Code of Practice (“the draft PhonepayPlus 12th Code”) and a consultation document seeking stakeholder views on its content;
- (D) on 29 April 2010 Ofcom also published a consultation document on the draft PhonepayPlus 12th Code, stating that Ofcom was minded to approve that draft Code under section 121 and inviting comments on that proposal by 8 July 2010;
- (E) on 30 September 2010 PhonepayPlus formally submitted to Ofcom the draft PhonepayPlus 12th Code with a request that Ofcom approve it pursuant to section 121 of the Act; and
- (F) on 1 October 2010 the Department for Business, Innovation and Skills submitted the draft PhonepayPlus 12th Code to the European Commission, in line with Technical Standards and Regulations Directive 98/34/EC (as amended by Directive 98/48/EC).

Ofcom has now considered the responses which it received to the consultation document and, for the reasons set out in the Statement which accompanies this Notification, Ofcom considers that the requirements for the purposes of approving a code set out in section 121 of the Act have been satisfied and that it would be appropriate and in accordance with Ofcom’s statutory duties now to approve the PhonepayPlus Code of Practice (12th Edition);

NOW, therefore:

1. Ofcom hereby gives its approval of the code for premium rate services set out in the Schedule hereto for the purposes of sections 120 and 121 of the Act, to take effect from, and including, 1 September 2011.

2. Except as otherwise defined in this Notification, words or expressions used shall have the same meaning as they have been ascribed in the Act.

Signed by

Claudio Pollack

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

30 March 2011

Schedule: The PhonepayPlus Code (12th Edition)

This follows on the next page.

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PhonepayPlus
Code of Practice

PhonepayPlus
Code of Practice 2011
Twelfth Edition

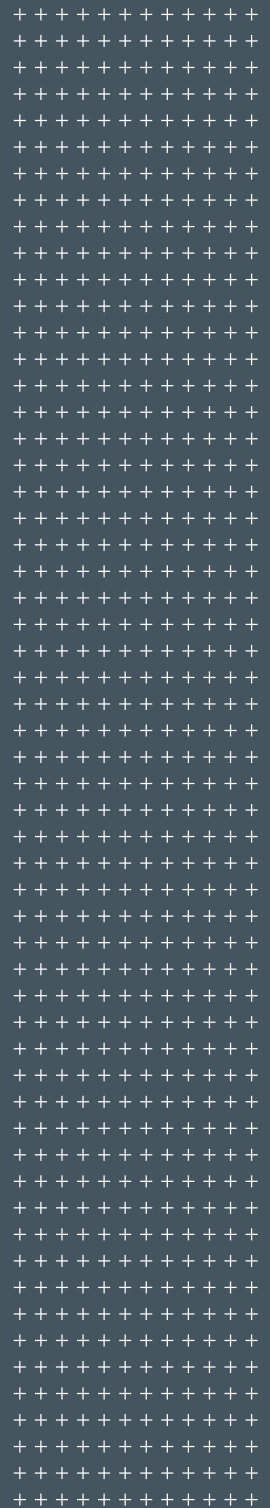
As approved by the Office of
Communications for the purposes
of Sections 120 and 121 of the
Communications Act 2003 on
30 March 2011

The Twelfth Edition of the Code
of Practice came into force on
1 September 2011

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Part One

About PhonepayPlus

1.1 Introduction to PhonepayPlus

PhonepayPlus is a regulatory body with responsibility for enforcing this Code of Practice, which regulates the use of premium rate services (PRS). Our aim is to provide a safe environment for consumers using PRS and a fair, proportionate and robust regulatory regime for industry. This Code of Practice, our twelfth, is based on over twenty years' experience of regulating this market and we have refined the Code to focus on the underlying principles of consumer protection to achieve a regulatory regime that gives greater clarity and more flexibility to providers of premium rate services.

1.2 Scope of the Code

- 1.2.1 The Communications Act 2003 ('the Act') provides Ofcom with the power to approve a Code for the purposes of regulating premium rate services and Ofcom has approved this Code under Section 121 of the Act. Certain providers of premium rate services are obliged, pursuant to the Condition set by Ofcom under the Act and Section 120(3)(a) of the Act, to comply with directions given by PhonepayPlus in accordance with its Code of Practice for the purpose of enforcing its provisions.
- 1.2.2 The Condition set by Ofcom applies to controlled premium rate services ('CPRS'), the definition of which is contained within Part Five of this Code. The definition of CPRS is a subset of the definition of premium rate services contained in the Act. Insofar as the particular premium rate service is not within the definition of CPRS, this Code applies to it but compliance is voluntary.

1.3 Providers of premium rate services

PhonepayPlus regulates through the imposition of responsibilities on providers of premium rate services. Three categories of providers are defined in Part Five: essentially these are Network operators, Level 1 providers (who form part of a premium rate value-chain) and Level 2 providers (the end provider of the service). A provider of premium rate services may fall within more than one of these categories.

1.4 Independence

- 1.4.1 PhonepayPlus operates in an entirely independent manner. All members of the Board of PhonepayPlus are appointed in their individual capacities. Apart from a minority of members who are appointed on the basis of their contemporary industry knowledge, no member of the Board may have any commercial interest in the premium rate sector.

- 1.4.2 Any Board member with such commercial interests will take no part in the adjudication process.
- 1.4.3 Board members constitute a minority on Tribunals that adjudicate on the provisions of the Code, and no more than one Board member may sit on such a Tribunal.

1.5 Guidance and advice

- 1.5.1 Part Two of the Code sets the outcomes expected by PhonepayPlus and the rules with which providers must comply. To assist Premium rate service providers, PhonepayPlus will also publish non-binding Guidance to accompany the Code. This Guidance will inform providers about how the required rules will be expected to apply to the provision of premium rate services, both generally and in relation to specific service types.
- 1.5.2 Guidance is intended to assist those involved in the provision of premium rate services to comply with the Code; it does not form part of the Code. Compliance with Guidance will be taken into account in the consideration of any alleged breach of the Code and/or the setting of sanctions, as set out further in Part Four below. The extent to which a party attempted to comply with the Code by any alternative methods will also be taken into account.
- 1.5.3 Guidance may be amended from time to time on reasonable notice and following appropriate consultation.
- 1.5.4 PhonepayPlus may from time to time issue and/or amend non-binding compliance advice concerning any provisions of the Code.

1.6 Confidentiality

Confidential information (such confidentiality being judged on an objective basis) received by PhonepayPlus will be kept in confidence by PhonepayPlus and will not be divulged to any third party other than PhonepayPlus employees, officers, professional advisors and Ofcom or other proper authority without consent (such consent not being unreasonably withheld or delayed). PhonepayPlus may divulge confidential information if it is necessary for it to do so in order to discharge its responsibilities under the Code. Confidential information may also be disclosed in response to a request from a regulator or other lawful authority, or shared with law enforcement agencies for the purpose of investigating fraud or other offences, or if it enters the public domain or becomes lawfully available from a third party free from any confidentiality restriction.

1.7 Reach of the Code

- 1.7.1 Save as is provided below, this Code applies to all premium rate services which are accessed by a user in the United Kingdom or provided by a Level 1 or Level 2 provider which is situated in the United Kingdom.

1.7.2 Some premium rate services may also be 'information society services' in which case there are some limitations to the extent to which the Code applies to them. This is further set out in Part Five below. These are typically premium rate services which are available on the internet.

1.8 Code approval and notification

1.8.1 This Code is approved by the Office of Communications (Ofcom) for the purposes of sections 120 and 121 of the Communications Act 2003.

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

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*Calls provided by BT will be charged at up to 5p per minute. Mobile and other providers' charges may vary and are likely to cost more. Prices correct at time of going to print.

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Part Two

Outcomes and Rules

2 Required outcomes and rules relating to all premium rate services

The outcomes which premium rate services are expected to achieve are set out below. They are followed by sets of rules which have to be complied with.

References to a premium rate service or services in this Code include all aspects of a service including content, promotion and marketing and any technical matters including those relating to delivery and quality of sound or picture.

Level 2 providers have responsibility for achieving these outcomes by complying with the rules in respect of the provision of the relevant premium rate service. All Network operators and Level 1 providers involved in providing premium rate services must take all reasonable steps in the context of their roles to ensure the rules are complied with.¹

2.1 Legality

Outcome “That premium rate services comply with the law.”

Rules

2.1.1 Premium rate services must comply with the law.

2.1.2 Premium rate services must not contain anything which is in breach of the law, nor omit anything which the law requires.

2.1.3 Premium rate services must not facilitate or encourage anything which is in any way unlawful.

2.2 Transparency and Pricing

Outcome “That consumers of premium rate services are fully and clearly informed of all information likely to influence the decision to purchase, including the cost, before any purchase is made.”

¹ See Part Three below and in particular paragraphs 3.7 and 3.8

- 2.2.1 Consumers of premium rate services must be fully and clearly informed of all information likely to influence the decision to purchase, including the cost, before any purchase is made.
- (a) Promotional material must contain the name (or brand if part of the name) and the non-premium rate UK contact telephone number of the Level 2 provider of the relevant premium rate service except where otherwise obvious.
- (b) PhonepayPlus may specify categories of promotions in respect of which promotional material must contain reference to the Level 2 provider's registration with PhonepayPlus and its registration number. PhonepayPlus shall publish a list of any such specified categories on its website.
- 2.2.2 All written information which is material to the consumer's decision to purchase a service must be easily accessible, clearly legible and presented in a way which does not make understanding difficult. Spoken information must be easily audible and discernable.
- 2.2.3 Where a premium rate service promotes or is promoted by a non-premium rate electronic communications service both services will be considered as one where, in the opinion of PhonepayPlus, it is reasonable to do so.
- 2.2.4 Unless a service is available 24 hours a day, its hours of operation must be stated in UK time on the promotional material.
- Rules relating to pricing
- 2.2.5 In the course of any promotion of a premium rate service, written or spoken or in any medium, the cost must be included before any purchase is made and must be prominent, clearly legible, visible and proximate to the premium rate telephone number, shortcode or other means of access to the service.
- 2.2.6 Any messages that are necessary for a consumer to access, use or engage with a service but are provided separately from the service itself must be free of charge.
- 2.2.7 Where promotional material is transmitted on television or in any other audio/visual format, pricing information must be clearly visually presented and spoken if the advertised cost of the service generally exceeds £3.83 plus VAT.
- 2.2.8 Where a service involves a consumer being charged for an international call this must be made clear in any promotional material.

2.3 Fairness

- Outcome **“That consumers of premium rate services are treated fairly and equitably.”**
- Rules
- 2.3.1 Consumers of premium rate services must be treated fairly and equitably.
- 2.3.2 Premium rate services must not mislead or be likely to mislead in any way.
- 2.3.3 Consumers must not be charged for premium rate services without their consent. Level 2 providers must be able to provide evidence which establishes that consent.
- 2.3.4 Premium rate services must be provided without undue delay after the consumer has done what is necessary to connect with the service and must not be unreasonably prolonged.
- 2.3.5 Premium rate services must not be of a nature which encourages unauthorised use by non-bill payers.
- 2.3.6 Level 2 providers must take reasonable and prompt steps to identify excessive use of its service or services by any consumer and to inform the relevant consumer of that usage.
- 2.3.7 Level 2 providers of sexual entertainment services must take all reasonable steps to discourage use by non-bill payers and to prevent use by those under 18 years of age.
- 2.3.8 Level 2 providers of virtual chat services must take all reasonable steps to discourage use by non-bill payers and to prevent use by those under 18 years of age. However, non-sexual entertainment text and picture-based virtual chat services may be used by those aged 16-17 provided that no advertising for the service has occurred in media where the target audience is below 16 years of age.
- 2.3.9 Premium rate services must not directly appeal to children to purchase products or take advantage of children's potential credulity, lack of experience or sense of loyalty.
- 2.3.10 Premium rate services must not seek to take advantage of any vulnerable group or any vulnerability caused to consumers by their personal circumstances.
- 2.3.11 Where the means of termination is not controlled by the consumer there must be a simple method of permanent exit from the service, which the consumer must be clearly informed about prior to incurring any charge. The method of exit must take effect immediately upon the consumer using it and there must be no further charge to the consumer after exit except where those charges have been legitimately incurred prior to exit.

- 2.3.12 (a) All sexual entertainment services must terminate immediately when a maximum of £25.54 plus VAT per call has been spent.
- (b) Services aimed at, or which should have been expected to be particularly attractive to children, must terminate immediately when a maximum of £2.56 plus VAT per call, or in the case of a subscription service a maximum of £2.56 plus VAT per month, has been spent.
- (c) All virtual chat services must, as soon as is reasonably possible after the user has spent £8.52 plus VAT, and after £8.52 plus VAT of spend thereafter:
 - (i) inform the user separately from the service or any promotion that £8.52 plus VAT has been spent; and
 - (ii) terminate the service promptly if the user does not interact further with it following the provision of the message sent in accordance with (i).
- (d) For all subscription services, once a month, or every time a user has spent £17.04 plus VAT if that occurs in less than a month, the following information must be sent free to subscribers:
 - (i) the name of the service;
 - (ii) confirmation that the service is subscription-based;
 - (iii) what the billing period is (e.g. per day, per week or per month) or, if there is no applicable billing period, the frequency of messages being sent;
 - (iv) the charges for the service and how they will or can arise;
 - (v) how to leave the service; and
 - (vi) Level 2 provider contact details.

- 2.4.2 Consumers must not be contacted without their consent and whenever a consumer is contacted the consumer must be provided with an opportunity to withdraw consent. If consent is withdrawn the consumer must not be contacted thereafter. Where contact with consumers is made as a result of information collected from a premium rate service, the Level 2 provider of that service must be able to provide evidence which establishes that consent.
- 2.4.3 Level 2 providers must ensure that consumers’ personal information is not collected without their consent or passed to any other person other than for the sole purpose of facilitating a refund to a consumer.
- 2.4.4 Where services involve the collection of any personal information such as names, postal and email addresses and telephone numbers, the purpose for which the information may be used must be made clear to consumers before the information is collected.

2.5 Avoidance of harm

Outcome “That premium rate services do not cause harm or unreasonable offence to consumers or to the general public.”

Rules

- 2.5.1 Premium rate services must not cause or be likely to cause harm or unreasonable offence to consumers or to the general public.
- 2.5.2 Premium rate services must not promote or incite or be likely to promote or incite hatred in respect of any group or individual identified by age, disability, gender, race, religion or belief, sexual orientation or transgender status.
- 2.5.3 Premium rate services must not encourage or be likely to encourage consumers to put themselves or others at risk.
- 2.5.4 Premium rate services must not promote or facilitate prostitution.
- 2.5.5 Premium rate services must not induce and must not be likely to induce an unreasonable sense of fear, anxiety, distress or offence.
- 2.5.6 Level 2 providers must ensure that their services are not promoted in an inappropriate way.
- 2.5.7 Level 2 providers must use all reasonable endeavours to ensure that promotional material is not targeted at or provided directly to those for whom it, or the service which it promotes, is likely to be regarded as being offensive or harmful.
- 2.5.8 Premium rate services aimed at or likely to be particularly attractive to children must not contain anything which a reasonable parent would not wish their child to see or hear in this way.

2.4 Privacy

Outcome “That premium rate services do not cause the unreasonable invasion of consumers’ privacy.”

Rules

- 2.4.1 Level 2 providers must ensure that premium rate services do not cause the unreasonable invasion of consumers’ privacy.

2.5.9 Where premium rate services involve the possibility that two or more consumers might be able to exchange contact details or make arrangements to meet, then clear advice should be given regarding appropriate safeguards, in line with any generally available police advice.

2.6 Complaint handling

Outcome **“That consumers are able to have complaints resolved quickly and easily by the Level 2 provider responsible for the service and that any redress is provided quickly and easily.”**

Rules

- 2.6.1 Level 2 providers must ensure that consumers of their services are able to have complaints resolved quickly, easily and fairly and that any redress is provided quickly and easily.
- 2.6.2 Level 2 providers must provide a proportionate complaints process which is easily accessible through a non-premium rate UK telephone number and must be effectively publicised.
- 2.6.3 Consumer complaints must be handled promptly at all stages within a process which is clear to the consumer.
- 2.6.4 Where refunds are provided to consumers they must be provided promptly and in an easily accessible manner.
- 2.6.5 Consumers who remain dissatisfied with the handling of their complaint must be informed that they may complain to PhonepayPlus and be provided with its contact details.
- 2.6.6 Level 2 providers must provide upon request to PhonepayPlus such information that allows examination of how they have handled any consumer complaint.

Part Three

Registration and Responsibility

3.1 General responsibilities

All Network operators, Level 1 and Level 2 providers must:

- 3.1.1 ensure that PhonepayPlus regulation is satisfactorily maintained by;
- (a) taking all reasonable steps in the context of their roles, including the adoption and maintenance of internal arrangements to ensure that the rules set out in Part Two are complied with and the outcomes achieved in respect of all premium rate services with which they are concerned, and
 - (b) carrying out their own obligations under the Code promptly and effectively, and
 - (c) taking all reasonable steps to prevent the evasion of, and not to undermine, the regulation of premium rate services, and
 - (d) taking all reasonable steps to ensure that consumer complaints are resolved quickly and fairly and that any redress is provided quickly and easily;
- 3.1.2 have regard to the funding provisions which are set out in Annex 1 to the Code and comply with such provisions where so required;
- 3.1.3 assess the potential risks posed by any party with which they contract in respect of:
- (a) the provision of premium rate services, and
 - (b) the promotion, marketing and content of the premium rate services which they provide or facilitate,
- and take and maintain reasonable continuing steps to control those risks;
- 3.1.4 act on any direction, instruction, notice or request for information given by PhonepayPlus in pursuance of its duties as a regulator. Where PhonepayPlus specifies a timeframe for action or response that timeframe must be adhered to or an extension promptly requested in writing setting out clear reasons. Any such extension will be granted only in exceptional circumstances;
- 3.1.5 not engage or permit the involvement in the provision of premium rate services of a Network operator, Level 1 or Level 2 provider and/or associated individual in respect of whom a sanction, which has been published, has been imposed under paragraphs 4.8.2(f), (g) or (h) or any previous version of those provisions so as to enable such person to operate in breach of that sanction;

- 3.1.6 carry out reasonable monitoring of premium rate services provided by any Level 1 or Level 2 provider with which they have contracted;
- 3.1.7 use all reasonable endeavours in the context of their roles to ensure that all of the premium rate services with which they are involved are of adequate technical quality, including the mechanisms used to deliver services to and to enable exit from services by consumers.

3.2 Directions

- 3.2.1 Any direction, instruction, notice or request for information issued by PhonepayPlus will be effective immediately upon being sent by fax or email to a fax number or email address provided by the relevant premium rate services provider for registration with PhonepayPlus. If a direction, instruction, notice or request for information is sent by PhonepayPlus by first class pre-paid post to an address provided by the relevant Premium rate service provider for registration with PhonepayPlus, then it will be effective on the second working day after posting.
- 3.2.2 When directed to do so by PhonepayPlus all Network operators and Level 1 and Level 2 providers shall immediately:
- (a) terminate access to such premium rate services and/or numbers as PhonepayPlus may specify;
 - (b) terminate access to all numbers that are allocated to any specified Level 1 or Level 2 provider;
 - (c) terminate access to some or all numbers over which a specified premium rate service or type of service may be operated.
- 3.2.3 When directed to do so by PhonepayPlus all Network operators and Level 1 providers shall immediately:
- (a)
 - (i) retain such amount of money as PhonepayPlus may require out of monies payable by any Network operator or Level 1 provider to a Level 1 or Level 2 provider until permitted by PhonepayPlus to do otherwise, or
 - (ii) retain some or all money payable to a specified Level 1 or Level 2 provider in respect of certain numbers or premium rate services (as may be specified) until permitted by PhonepayPlus to do otherwise, or
 - (iii) retain all money payable to a specified Level 1 or Level 2 provider until informed by PhonepayPlus that it may do otherwise;

- (b) pay over to PhonepayPlus such an amount of money retained pursuant to 3.2.3(a) or withheld pursuant to paragraph 3.5 below, as PhonepayPlus may require in order to satisfy outstanding fines and/or administrative charges, such payments to be made within 30 days of such direction;
- (c) pay refunds on behalf of Level 1 or Level 2 providers when so required by PhonepayPlus in accordance with paragraph 4.9.1 or 4.9.2 below.

3.3 Contracts

- 3.3.1 All Network operators and Level 1 providers must perform thorough due diligence on any party with which they contract in connection with the provision of premium rate services and must retain all relevant documentation obtained during that process for a period that is reasonable in the circumstances.
- 3.3.2 In connection with the provision of premium rate services which are not exempt services (see paragraph 3.4.2 below), Network operators, Level 1 and Level 2 providers must only contract with other Network operators, Level 1 or Level 2 providers which are registered with PhonepayPlus.
- 3.3.3 Such contracts must include provisions that:
- (a) each party is bound to comply with the Code and any directions made by PhonepayPlus in accordance with it; and
 - (b) pursuant to section 1 of the Contracts (Rights of Third Parties) Act 1999, PhonepayPlus may directly enforce the relevant term(s) of that contract.
- 3.3.4 Any breach of these provisions concerning the obligations of Network operators and Level 1 and Level 2 providers in respect of contracts will be regarded as very serious Code breaches.

3.4 Registration

- 3.4.1 Before providing any premium rate service all Network operators, Level 1 and Level 2 providers must register with PhonepayPlus subject only to paragraph 3.4.3 below.
- 3.4.2 PhonepayPlus may identify particular categories of premium rate services in respect of which registration will not be required ('exempt services'). PhonepayPlus will provide public notice of any such exempt service and will publish a full list of exempt services from time to time.
- 3.4.3 Network operators, Level 1 and Level 2 providers who provide only exempt services are not required to register with PhonepayPlus.

- 3.4.4 Registration will require the provision of such information as PhonepayPlus may from time to time require for the purpose of efficient and effective regulation of premium rate services.
- 3.4.5 Information provided to PhonepayPlus for the purposes of registration must be updated as soon as practicable.
- 3.4.6 Registration must be renewed annually or at intervals determined by PhonepayPlus.
- 3.4.7 PhonepayPlus will make a reasonable charge for such registration and for annual renewal of registration. PhonepayPlus will set the amount of the charge, giving reasonable notice to interested parties. All Network operators, Level 1 and Level 2 providers who wish to register must pay the charge.
- 3.4.8 All breaches and sanctions imposed under the Code (this edition and any previous editions) on any Network operator, Level 1 or Level 2 provider will be linked to that Network or provider's registered details together with any relevant information arising from adjudications concerning associated individuals or any other relevant information which is publicly held.
- 3.4.9 Certain categories of information held on the PhonepayPlus Register under this provision will be accessible at any time by relevant parties or regulators and any law enforcement agency with a legitimate interest.
- 3.4.10 A registered party which is not providing any premium rate service or is providing only exempt services may de-register at any time but their details will continue to be held by PhonepayPlus for a reasonable period.
- 3.4.11 PhonepayPlus may make clear on the Register any sanction imposed under the Code (this edition and any previous editions) or on failure to renew registration within such period as PhonepayPlus may reasonably require and may identify any director, partners or other associated individuals involved.
- 3.4.12 Numbers
 - (a) Level 2 providers must provide to PhonepayPlus relevant details (including any relevant access or other codes) to identify services to consumers and must provide the identity of any Level 1 providers concerned with the provision of the service.
 - (b) PhonepayPlus will include all such details on the PhonepayPlus Register and those details will be available to be checked directly by consumers.
 - (c) Whenever the information provided under sub-paragraph 3.4.12(a) above changes, the updated information must be provided to PhonepayPlus within two working days of the change.

3.5 Withhold

- 3.5.1 Network operators shall not make, and shall withhold, payments due to any provider for a period of at least 30 days after the use of the premium rate service to which the payments relate.
- 3.5.2 Where PhonepayPlus so directs, in accordance with the provisions of this Code, payments must be retained for a period in excess of 30 days.
- 3.5.3 Any Network operator who pays money to any provider, contrary to the obligation to withhold payments pursuant to paragraph 3.5.1 or after receipt of a direction by PhonepayPlus to retain money from that provider, may be directed by PhonepayPlus to pay to it an amount no more than the amount of the fines, administrative charges or refunds that have not been paid by, or on behalf of, the provider when due without prejudice to any other action which might be taken by PhonepayPlus against that Network operator.
- 3.5.4 The amount payable by the Network operator to PhonepayPlus under paragraph 3.5.3 shall be no more than the amount that should have been withheld or retained by the Network operator in accordance with the Code.

3.6 Data Protection

- 3.6.1 All Network operators, Level 1 and Level 2 providers:
 - (a) must make a notification to the Office of the Information Commissioner under the Data Protection Act 1998 and must, in their notification;
 - (i) disclose PhonepayPlus as the potential recipient of personal data, and
 - (ii) state that data collected from consumers may be used by PhonepayPlus for regulatory purposes;
 - (b) must not give any undertaking to consumers, suppliers, other Networks Operators, Level 1 or Level 2 providers or others which could preclude any information being given to PhonepayPlus in confidence. Level 1 and Level 2 providers must warn consumers that any data collected may be passed to PhonepayPlus.
- 3.6.2 Services which involve the collection of personal information, such as names, addresses and phone numbers (which includes the collection of Calling Line Identification (CLI) or caller display information), must make clear to consumers the purpose for which the information is required and may be used in the future. The service must also identify the data controller (if different from the Network operator, Level 1 or Level 2 provider) in any different use to which the personal information might be put and give the consumer a clear opportunity to prevent such usage.

3.7 Responsibilities of Network operators

- 3.7.1 Prior to commencement of any premium rate service, Network operators must supply PhoneypayPlus with such information as it may require and which will establish that the Network operator meets the criteria necessary to be recognised as a Network operator for the purposes of the Code.
- 3.7.2 If a Network operator provides any part of a premium rate service which directly impacts on consumers, whether in respect of its promotion or otherwise, the Network operator shall be responsible for compliance with the rules and obligations set out in this Code in relation to the functions it performs in respect of that premium rate service.
- 3.7.3 If pursuant to an investigation carried out under Part Four of the Code PhoneypayPlus considers that a Network operator is involved in a breach of the Code in relation to its own functions in respect of a premium rate service then PhoneypayPlus may raise a breach of the Code against that Network operator and proceed against it. It shall be treated in all respects concerning that breach of the Code as though it was a Level 2 provider.
- 3.7.4 Number Exportation
- (a) Network operators must maintain a record of premium rate numbers which, having been allocated or exported to them, are exported by them to another Network operator or over which they cease to have control for any reasons.
 - (b) Network operators must supply to PhoneypayPlus on request without any delay in relation to any number to which paragraph 3.7.4(a) applies, the name of the Network operator to whom the number has been exported or who has control over it and, if known, the name of the Level 2 provider.

3.8 Responsibilities of Level 1 providers

- 3.8.1 If a Level 1 provider provides any part of a premium rate service which directly impacts on consumers, whether in respect of its promotion or otherwise, the Level 1 provider shall be responsible for compliance with the rules and obligations set out in this Code in relation to the functions it performs in respect of that premium rate service.
- 3.8.2 If pursuant to an investigation carried out under Part Four of the Code PhoneypayPlus considers that a Level 1 provider is involved in a breach of the Code in relation to its own functions in respect of a premium rate service, then PhoneypayPlus may raise a breach of the Code against that Level 1 provider and proceed against it. It shall be treated in all respects concerning that breach of the Code as though it was a Level 2 provider.

3.9 Responsibilities of Level 2 providers

- 3.9.1 Before promoting or providing services, Level 2 providers must have readily available all documentary and other evidence necessary to substantiate any factual claims made. This material, together with a statement outlining its relevance to the factual claim in question must be provided without delay if requested by PhoneypayPlus.
- 3.9.2 Where certain premium rate number ranges, shortcodes or other means of access to services have been designated by either Ofcom or a Network operator for use only for particular purposes or for the provision of particular categories of service, or where Ofcom or a Network operator has restricted certain premium rate number ranges, shortcodes or other means of access to services from being used for particular purposes or for the provision of particular categories of service, those number ranges, shortcodes or means of access must not be used in contravention of these restrictions. Ofcom's designations will have precedence over any issued by a Network operator.

3.10 Prior permission

- 3.10.1 PhoneypayPlus may require that particular categories of service must not be provided without its prior written permission. PhoneypayPlus will give reasonable notice of such requirement and the category of service to which it applies, and will publish a full list of such service categories on its website from time to time.
- 3.10.2 Prior permission may be refused or granted by PhoneypayPlus subject to the imposition of additional conditions following consideration of all relevant factors including the compliance record of those concerned with the provision of the service. Prior permission may be withdrawn or varied upon reasonable grounds and with notice in writing.
- 3.10.3 If a party who has applied for prior permission is not satisfied with any aspect of the determination made by PhoneypayPlus it may apply to the Chairman of the Code Compliance Panel ('CCP') for a review of the determination.
- 3.10.4 (a) Where a Level 1 or Level 2 provider can demonstrate to the satisfaction of PhoneypayPlus in relation to a particular service that any objective of the Code can be adequately satisfied by means other than strict adherence to the Code provisions, PhoneypayPlus may give prior written permission (which may be given subject to conditions) for the service to be provided by such alternative means. Such permission may be withdrawn or varied by PhoneypayPlus subject to the giving of reasonable notice.

- (b) Where PhonepayPlus considers following reasonable consultation that any objective of the Code can be adequately satisfied by means other than strict adherence to the Code provisions it may issue a Statement of Application which will set out such alternative means and any conditions applicable. A Statement of Application may be withdrawn or varied by PhonepayPlus on the provision of reasonable notice.

- 3.10.5 Whenever PhonepayPlus grants permission under sub-paragraph 3.10.4(a) it will publish on its website prior to the permission taking effect the details of the permission, the relevant parts of the Code to which it applies and any conditions attached to it, but shall not be required to publish commercial confidential information.
- 3.10.6 A breach of any condition imposed in connection with prior permission granted by PhonepayPlus in accordance with the Code shall be a breach of the Code.
- 3.10.7 PhonepayPlus may require the payment of reasonable charges in respect of dealing with applications for prior permission.

Part Four

Investigations, Procedures and Sanctions

4.1 Tribunals

Details concerning the Code Compliance Panel ('CCP') and Tribunals are set out in 'Code Annex 2: The Code Compliance Panel and Tribunals' which is published on the PhonepayPlus website.

4.2 Investigations

- 4.2.1 PhonepayPlus will consider, and where appropriate investigate, all complaints which it receives, provided the complaint is made within a reasonable time from when it arose.
- 4.2.2 PhonepayPlus monitors premium rate services, and may initiate an investigation itself where there appears to be a breach of the Code.
- 4.2.3 During an investigation PhonepayPlus may direct any Network operator, Level 1 or Level 2 provider (referred to in this section as a 'party') to disclose, subject to the confidentiality provision set out in paragraph 1.6, and within a time period which PhonepayPlus may specify, any relevant information or copies of documents. This may include, but is not limited to:
- (a) call volumes, patterns and revenues;
 - (b) details of numbers allocated to any relevant party;
 - (c) details of any services operating on any specified premium rate number, shortcode or other means of access;
 - (d) evidence of consumer consents;
 - (e) evidence of consumer complaint handling;
 - (f) evidence of due diligence;
 - (g) evidence of risk assessment and control;
 - (h) arrangements between Network operator and Premium rate service providers;
 - (i) arrangements between any Premium rate service providers and any other relevant party.
- 4.2.4 A party must not knowingly or recklessly conceal or falsify information, or provide false or misleading information to PhonepayPlus (either by inclusion or omission).

- 4.2.5 A party must not fail to disclose to PhonepayPlus when requested any information that is reasonably likely to have a regulatory benefit in an investigation.
- 4.2.6 Taking into account the severity of the consumer harm alleged, and the breach history of the party or parties concerned, PhonepayPlus will decide whether to use the Track 1, Track 2 or the Emergency procedure when conducting an investigation.
- 4.2.7 Where breaches are raised against more than one party as part of the same investigation, PhonepayPlus is not obliged to use the same investigation procedure for each party involved. It will decide the most appropriate procedure to use on a case by case basis, based on each party's involvement and history.
- 4.2.8 During or following an investigation, PhonepayPlus may raise breaches of the Code against any party it considers to be involved in breaching the Code.
- 4.2.9 If further relevant information comes to light during the course of an investigation, and the case has not yet been placed before a Tribunal, PhonepayPlus may change the investigation procedure used, or withdraw an allegation of any or all breaches, at its discretion. If the investigation procedure is so changed PhonepayPlus shall allow adequate time to the party concerned to deal with the matter.

4.3 Track 1 procedure

In appropriate cases where an apparent breach of the Code has caused little or no consumer harm, PhonepayPlus may use the Track 1 procedure. Factors including the seriousness of the apparent breach and the case history (including any previous use of the Track 1 procedure) of the party under investigation ('the relevant party') will be taken into account when deciding whether the Track 1 procedure should be used. In the event of the Track 1 procedure being used, the following will occur:

- 4.3.1 The relevant party will be contacted and informed of the apparent breach. PhonepayPlus will provide the relevant party with a set of actions which it believes is necessary to remedy the breach and prevent any repetition together with a deadline for the actions ('the action plan'). PhonepayPlus may invoice the relevant party for its reasonable administrative costs;
- 4.3.2 If the action plan is accepted, the relevant party must demonstrate to PhonepayPlus that it has been followed and the breach remedied on or before the deadline. If this is not done PhonepayPlus will assume that the breach has not been remedied and the Track 2 procedure may be invoked;
- 4.3.3 Where the relevant party does not agree to any part of the action plan (including the deadline), it must clearly set out its disagreement in writing within five working days of receipt by it of the action plan. PhonepayPlus will consider such representations and may decide to alter the action plan as a result. If no agreement can be reached, the Track 2 procedure may be invoked;

- 4.3.4 If the relevant party disputes that a breach has occurred, the Track 2 procedure may be invoked;
- 4.3.5 PhonepayPlus will keep a record of the use of the Track 1 procedure. A Tribunal may take into account the previous use of the Track 1 procedure if considering any breaches by the same or any connected party in the future.

4.4 Track 2 procedure

When PhonepayPlus receives or initiates a complaint, the Track 2 procedure will usually be used:

- 4.4.1 PhonepayPlus will provide the relevant party with all necessary information about the alleged breach or breaches of the Code. This will include details of any service and/or promotional material and will refer to the relevant provisions of the Code;
- 4.4.2 The relevant party will be given a reasonable period of time in which to respond and provide any information requested. A response will normally be required within ten working days. In exceptional circumstances PhonepayPlus may set a shorter or longer time limit but it will never be less than one working day, nor longer than 15 working days;
- 4.4.3 If the relevant party fails to respond within the required period, PhonepayPlus will proceed with the case on the assumption that it does not wish to respond;
- 4.4.4 PhonepayPlus will prepare a report of its allegations and investigation including any responses from the relevant party, together with relevant supporting evidence, which will be placed before a Tribunal to adjudicate on the matter;
- 4.4.5 The relevant party will be notified by PhonepayPlus of the date of the Tribunal consideration, and entitled to make informal representations to it on that date in person in order to clarify any matter;
- 4.4.6 At any point during the course of the Track 2 procedure, PhonepayPlus may direct a Network operator or Level 1 provider to retain any outstanding payment relating to the service in question from the relevant party.

4.5 Emergency procedure

- 4.5.1 In appropriate cases where an apparent breach of the Code has taken place which is serious and requires urgent remedy, PhonepayPlus will use the Emergency procedure;
- (a) PhonepayPlus will conduct an immediate preliminary investigation;

- (b) On completion of its preliminary investigation, PhonepayPlus will notify its findings to three members of the CCP. The three people notified will decide whether the situation is sufficiently serious and urgent to warrant the use of the Emergency procedure;
- (c) If all three people agree on the use of the Emergency procedure, PhonepayPlus will:
 - (i) Use its best endeavours to inform the relevant party that its service appears to be in breach of the Code, that the Emergency procedure is being used and direct it to suspend the service immediately,
 - (ii) Direct any relevant Network operator or Level 1 provider to retain any payments outstanding in respect of the service under investigation,
 - (iii) Direct any relevant Network operator or Level 1 provider to bar access to the relevant service or numbers immediately if the party under investigation cannot be contacted or does not immediately suspend the service,
 - (iv) Publish its use of the Emergency procedure in such manner as it sees fit.
- (d) Once the service has been suspended, PhonepayPlus will provide the relevant party with all necessary information about the alleged breaches of the Code. This will include details of the service and/or promotional material and will refer to the relevant sections of the Code;
- (e) The relevant party will then have five working days in which to respond and provide any information requested. In exceptional circumstances, PhonepayPlus may set a shorter time limit;
- (f) All relevant information, including any response from the party under investigation, will be placed before a Tribunal as soon as is reasonably practicable after the relevant party has responded, or the deadline for response has passed;
- (g) The relevant party will be informed by PhonepayPlus of the date of the Tribunal consideration and entitled to make informal representations to it on that date in person in order to clarify any matter.

4.5.2

If, within ten working days of the Emergency procedure being agreed under sub-paragraph 4.5.1(c) above, another case with substantially similar characteristics comes to light, PhonepayPlus may invoke another Emergency procedure with the consent of one CCP member. PhonepayPlus will immediately inform the Chairman of the CCP of such an action.

4.5.3

Review of Emergency procedure

- (a) Within two working days following the making of a direction under paragraph 4.5.1(c), or at any time prior to adjudication in the event that new information comes to light suggesting that the use of the Emergency procedure is not appropriate, the relevant party may apply to PhonepayPlus for an urgent review of the use of the Emergency procedure in the particular case.
- (b) The application for review must be made in writing, must include any supporting evidence and must set out:
 - (i) the grounds on which the relevant party considers that the Emergency procedure should not have been used; and/or
 - (ii) the grounds on which the relevant party considers that access to the service or numbers should no longer be prevented.
- (c) Subject to any requirement for further information, a Tribunal will consider the matter within two working days of receipt of an application for review and will decide, through whatever process it decides, whether the prevention of access to the services or numbers should continue pending completion of the normal Emergency procedure process, or whether access should be permitted to some or all of the services or numbers concerned, and if so upon what, if any, conditions. The Tribunal may also decide whether the Emergency procedure should be changed to a Track 2 procedure and/or whether PhonepayPlus should direct any relevant Network operator, Level 1 provider or Level 2 provider to cease retaining any payments outstanding in respect of the service under investigation.

4.6 Adjudication

The Tribunal will make a decision as to whether the Code has been breached on the basis of the evidence presented to it. When considering whether there has been a breach of the Code, a factor the Tribunal may take into account where relevant is the extent to which the relevant party followed any relevant Guidance published by PhonepayPlus. Relevant parties will be informed in writing of the outcome of the case. A full reasoned decision (the 'Tribunal decision') will be prepared and provided to the relevant party. The relevant party will be informed of its right under the Code to apply for a review and/or an oral hearing. The Tribunal decision will be published on the PhonepayPlus website, and in any other way that PhonepayPlus shall determine.

4.7 Reviews

- 4.7.1 Tribunals may, at their discretion, review any determinations made in respect of applications for prior permission, adjudications, sanctions and/or administrative charges.
- 4.7.2 The relevant party or PhonepayPlus may request a review by setting out in writing the grounds for a review. Except where new information, not reasonably available at the time of the original determination, has come to light, a request for a review must be made within ten working days of the publication of the relevant determination, or the sending to the relevant party of the prior permission decision or the administrative charge invoice. In any case, except in highly exceptional circumstances, a request for a review must be made within 30 days of the publication of the relevant determination, or receipt of the prior permission decision or the administrative charge invoice.
- 4.7.3 Where the application for a review is in respect of a determination made by a Tribunal, it must raise a new issue of fact or law that was not reasonably available at the time of the original Tribunal or demonstrate that the Tribunal came to a decision which was so unreasonable that no reasonable Tribunal could have reached it.
- 4.7.4 Having received a request for a review, the Chairman of the CCP (or other legally qualified member of the CCP) will consider the grounds of the application and decide whether a review is merited. If it is decided that the review is merited, a Tribunal will carry out a review of the relevant decision(s) as soon as is practicable.
- 4.7.5 The enforcement of sanctions imposed pursuant to an adjudication is not automatically suspended by written notice requiring a review. The relevant party may apply in writing to the Chairman of the CCP setting out the grounds on which the sanction should be suspended. Unless the Chairman (or other legally qualified member of the CCP) considers that there are exceptional reasons in the particular case to grant the application, he will only do so if he is satisfied that not to do so would give rise to undue hardship, and that to do so would not give rise to a significant risk of public harm. If a relevant party has not been granted a suspension of sanction and has failed to comply with any sanction, the Chairman (or other legally qualified member of the CCP) may stay the review.

4.8 Sanctions

- 4.8.1 Once a Tribunal has determined that the Code has been breached, PhonepayPlus will put before it any breach history of the party in breach, any previous sanctions imposed, the revenue earned from the service or services and any other relevant information. This will include, but is not limited to, the extent to which the party in breach has followed any relevant Guidance published by PhonepayPlus and/or the extent to which the party in breach attempted to comply with the Code by any alternative methods. A Tribunal will generally consider failure to comply with Guidance combined with failure to consider alternative methods to comply with the Code to be a serious aggravating factor. Following Guidance will be considered a mitigating factor.
- 4.8.2 The Tribunal can apply a range of sanctions depending upon the seriousness with which it regards the breach(es) upheld. Having taken all relevant circumstances into account, the Tribunal may impose any of the following sanctions singularly or in any combination in relation to each breach:
- (a) require the relevant party to remedy the breach (including requiring a party to register in the PhonepayPlus Register if it has not previously done so);
 - (b) issue a formal reprimand and/or warning as to future conduct;
 - (c) require the relevant party to submit some or all categories of service and/or promotional material to PhonepayPlus for compliance advice or prior permission for a defined period. Any compliance advice given must be implemented within a specified period to the satisfaction of PhonepayPlus and a reasonable administrative charge for such advice may be charged to be paid to PhonepayPlus;
 - (d) impose a fine on the relevant party to be paid to PhonepayPlus;
 - (e) require that access is barred to some or all of the relevant party's services or numbers for a defined period, or until compliance advice has been implemented to the satisfaction of PhonepayPlus, and direct any Network operator, Level 1 or Level 2 provider accordingly;
 - (f) prohibit a relevant party and/or an associated individual found to have been knowingly involved in a serious breach or a series of breaches of the Code from providing, or having any involvement in, specified types of service or promotion for a defined period;
 - (g) prohibit a relevant party and/or an associated individual found to have been knowingly involved in a serious breach or series of breaches of the Code from providing, or having any involvement in, any premium rate service or promotion for a defined period;

(h)	prohibit a relevant party from contracting with any specified party registered (or which should be registered) in the PhonepayPlus Register save on specified terms or at all for a defined period;	(b)	a further breach of the Code by the relevant party, which may result in additional sanctions being imposed; and/or
(i)	require that refunds are paid within a specified time period to all consumers who claim a refund, for the full amount spent by them for the relevant service or for a specified lesser amount, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made;	4.8.5	If a Network operator fails to comply with a sanction direction issued following the process set out in this Part (including any appeal to the Independent Appeals Body) PhonepayPlus may (without prejudice to any other action available to it) refer the matter to Ofcom in accordance with Section 120 of the Act for it to take such action as it shall see fit.
(j)	require in circumstances where there has been a serious breach of the Code and/or serious consumer harm, that refunds for the full amount spent or a specified lesser amount are paid within a specified time period to all consumers who have used the service, regardless of whether they have claimed a refund. Such refunds should be credited directly to the consumer’s account with his or her originating communications provider. Where there is no such originating communications provider account, consumers must be notified of their right to a refund and be given an easy method of obtaining the refund. Where it is not technically or legally possible to notify consumers, PhonepayPlus may direct the relevant party to donate an amount of money equivalent to the refunds to an appropriate registered charity selected by PhonepayPlus. Evidence must be provided to PhonepayPlus that refunds have been made or payment to the selected charity has been made;	4.8.6	If a Tribunal considers that it may wish to make a prohibition under sub-paragraph 4.8.2(f), 4.8.2(g) or 4.8.2(h) in respect of any named individual, PhonepayPlus shall first make all reasonable attempts to so inform the individual concerned and the relevant party in writing. It shall inform each of them that any of them may request an opportunity to make informal representations to the Tribunal and of the right of any of them (or PhonepayPlus itself) to require an oral hearing.
4.9 Refunds		4.9.1	Where a Tribunal has directed a relevant party to pay refunds to consumers, either under paragraph 4.8.2(i) or 4.8.2(j), and the relevant party can satisfy PhonepayPlus that it cannot do so without recourse to money which has been retained by a Network operator or Level 1 provider in response to a PhonepayPlus direction (‘a retention’), then it may pass a list of consumers to whom refunds are due to the party which holds a retention, which will then make the payments due from the retention. In such cases, the relevant party will be responsible for any reasonable administration costs which the party who has a retention may incur. Those costs may be deducted from the remainder of a retention after all refunds are made.
4.8.3	All breaches upheld and sanctions imposed against a Network operator, Level 1 or Level 2 provider under Track 2 or the Emergency procedure will be noted on the PhonepayPlus Register and will be available to public scrutiny.	4.9.2	If a relevant party fails promptly to pay refunds in response to a PhonepayPlus sanction, PhonepayPlus may (without prejudice to other action) direct a Network operator or Level 1 provider which holds a retention to make refunds from the retention. In such cases, the relevant party will be responsible for any reasonable administration costs which the party with a retention incurs as a result of making payments on its behalf. Those costs may be deducted from the retention after all refunds are made.
4.8.4	The failure of any relevant party to comply with any sanction within a reasonable time will result in:	4.9.3	The obligation on any party holding a retention to make refunds on behalf of a party in breach of the Code shall end if PhonepayPlus has not issued a direction as set out in paragraph 4.9.2 three months after the completion of the adjudication process, provided that any reasonable time for any appeals has also passed.
(a)	PhonepayPlus issuing a direction to a Network operator, Level 1 or Level 2 provider to suspend access to some or all premium rate numbers, shortcodes and/or any other means of access to services or other codes allocated to the relevant party until full compliance with the sanction(s) has been achieved. Such suspension would also include any premium rate numbers, shortcodes or other means of access to services, or other codes allocated during the period of suspension; and/or	4.9.4	If funds from a retention remain following the payment of all refunds, or after the three month period mentioned above, it must be used to pay in whole or in part any outstanding PhonepayPlus fines or administrative charge owed by the party in breach.

4.10 Administrative charge

- 4.10.1 A relevant party found to be in breach of the Code may be invoiced for the administrative and legal costs of work undertaken by PhonepayPlus ('the administrative charge').
- 4.10.2 Non-payment of the administrative charge within the period specified by PhonepayPlus will be considered a breach of the Code and may result in further sanctions and/or legal action.
- 4.10.3 PhonepayPlus may instruct a relevant Network operator or Level 1 provider to retain revenue, and/or not to provide further numbers, until the administrative charge is paid.
- 4.10.4 PhonepayPlus may direct the relevant Network operator or Level 1 provider to pass any previously retained funds to it up to the value of the administrative charge owed.
- 4.10.5 If a relevant party considers that an administrative charge invoiced to it is excessive it may challenge the level of the administrative charge by requesting a review in accordance with the process set out at paragraph 4.7 above.

4.11 Oral hearings

- 4.11.1 A relevant party or PhonepayPlus can require that an oral hearing by a Tribunal takes place whenever PhonepayPlus has made an allegation that the relevant party has breached the Code or within ten working days of the sending of a Tribunal decision to the relevant party. The matter will then be considered afresh.
- 4.11.2 An oral hearing may also be required by a relevant party following a review (applied for or carried out) in respect of prior permission or the attachment of conditions to it, or in the circumstances set out in paragraph 4.8.6 above.
- 4.11.3 Details of the procedures governing oral hearings are set out in 'Code Annex 2: The Code Compliance Panel and Tribunals' which is published on the PhonepayPlus website, and in Guidance which is also published on the PhonepayPlus website.

4.12 Appeals

- 4.12.1 Level 1 and Level 2 providers, applicants for prior permission, associated individuals and Network operators ('appellants') may, after an oral hearing at which the appellant or his representative has appeared, appeal to the Independent Appeals Body ('IAB') against Tribunal decisions and adjudications (other than any adjudication by consent).
- 4.12.2 PhonepayPlus may also appeal to the IAB against Tribunal decisions and adjudications (other than any adjudication by consent).

4.12.3 Appeals may be made on the following grounds:

- (a) The disputed decision was based on error of fact;
- (b) The disputed decision was wrong in law; or
- (c) The Tribunal exercised its discretion incorrectly in reaching its decision.

4.12.4 The powers and procedures of the IAB are set out in 'Code Annex 3: Independent Appeals Body', which is published on the PhonepayPlus website.

4.13 Publication of decisions

All adjudications, whether reached by written or oral process, will be published by PhonepayPlus and may identify any party. Adjudications will be published on the PhonepayPlus website and in any other way that PhonepayPlus shall determine.

Part Five

Framework

5.1 Delegation of powers

The Board may delegate its powers to employees of PhonepayPlus and/or the Code Compliance Panel ('CCP') as it sees fit. Delegated powers may not be sub-delegated.

5.2 Reach of the Code

5.2.1 Some premium rate services may also be 'information society services' (see definition at paragraph 5.3.21 below). Information society services are required to be regulated in accordance with Directive 2000/31/EC on Electronic Commerce ('the E-Commerce Directive'). The Code will apply to such services when the Level 1 or Level 2 provider responsible for the provision of those services under the Code is:

- (a) established in the United Kingdom; or
- (b) established in another EEA member state, but only where:
 - (i) the services are being accessed or may be accessed from within the United Kingdom, and
 - (ii) the conditions set out in Article 3.4 (read, as appropriate, in accordance with Article 3.5) of the E-Commerce Directive are satisfied.

5.2.2 Nothing in the Code shall be construed as requiring any person, or as enabling PhonepayPlus to require any person, to provide any information in circumstances where:

- (a) the requiring of that person to provide information would be, or
- (b) the making of provision in the Code for PhonepayPlus to be able to require that person to provide that information would have been,

contrary to Directive 2000/31/EC including Article 15 thereof.

5.3 Definitions

Framework

5.3.1 'Premium rate service' has the meaning set out in Section 120 of the Communications Act 2003 ('the Act').

Subsection (7) provides:

"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."

Subsection (8) provides:

"A service falls within this subsection if its provision consists in:

- (e) the provision of the contents of communications transmitted by means of an electronic communications network;
- (f) allowing the user of an electronic communications service to make use, by the making of a transmission by means of that service, of a facility made available to the users of the electronic communications service."

Subsection (14) provides:

"References in this section to a facility include, in particular, references to:

- (g) a facility for making a payment for goods or services;
- (h) a facility for entering a competition or claiming a prize; and
- (i) a facility for registering a vote or recording a preference."

5.3.2

'Controlled premium rate service' has the meaning set out in the Condition issued by Ofcom under Section 120 of the Act effective from time to time. At the date of publication of this Code the meaning is:

"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 on an 0870 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.”
- 5.3.3 ‘General conditions of entitlement’ means the general conditions set by Ofcom pursuant to Section 45 of the Act which are applicable at the material time.
- ‘Total metering and billing system’ has, for the purposes of this Code, the same meaning as in Condition 11 of the general conditions of entitlement.
- ‘A lead network’ means an electronic communications network provider who is obliged to obtain approval for its total metering and billing system in accordance with Condition 11 of the general conditions of entitlement.
- 5.3.4 Subject to paragraphs 5.3.5 and 5.3.6 below, ‘Network operator’ means, for the purposes of this Code in respect of any premium rate service, a person who falls within Section 120(10) or Section 120(11) of the Act and:
- (a) who is a lead network; or
- (b) has a direct network connection and has direct billing arrangements in respect of that connection with the lead network; or
- (c) through arrangements made with a lead network, provides electronic communication services to the public and bills the public directly, and can perform or can require the performance of all the obligations that are set out in Section 3 of the Code; or
- (d) if no-one falls within (a), (b) or (c) above, the Network operator shall be the person who falls within Section 120(10) or (11) and, in respect of the premium rate service or services in question, provides or has, in the reasonable opinion of PhonepayPlus, the closest or most substantial connection with the provision of the communications network used for the provision of the premium rate service.
- A direct network connection exists when a person provides switching equipment (to currently accepted industry standards), which by interconnection arrangements made between that person and the lead network, enables the conveyance of signals between the lead network and that person.
- 5.3.5 If a premium rate service is provided which is accessible only through the use of VoIP technology or in any other form so that, in respect of that service, there is no Network operator identifiable under paragraph 5.3.4 above, then the Network operator, for the purposes of this Code, is the person who provided the facility through which the user gained access to the service.

- 5.3.6 If the primary function of a person is to aggregate or collate content of services for third parties and/or acquire network access through wholesale arrangements which it then provides to third parties on a retail basis, that person is a Level 1 provider for the purposes of this Code and is not a Network operator, unless there is no other Network operator identifiable who is involved in the provision of the relevant premium rate service.

Level 1 and Level 2 providers

- 5.3.7 Any person who falls within Section 120(9)(a)-(d) or Section 120(10) or (11) of the Act who is engaged in the provision of a Premium rate service (‘the relevant premium rate service’) and who is not a Network operator in respect of that service may be a Level 1 and/or Level 2 provider.
- 5.3.8
- (a) A Level 1 provider is a person who provides a platform which, through arrangements made with a Network operator or another Level 1 provider, enables the relevant premium rate service to be accessed by a consumer or provides any other technical service which facilitates the provision of the relevant premium rate service.
- (b) A Level 2 provider is the person who controls or is responsible for the operation, content and promotion of the relevant premium rate service and/or the use of a facility within the premium rate service.
- (c) In respect of any relevant premium rate service where it is not clear whether a person involved in any way in the provision of the service and/or who receives directly or indirectly any part of the charges made to the consumer for provision of the relevant premium rate service is a Premium rate service provider falling within (a) or (b) above, PhonepayPlus shall determine whether that person is a Premium rate service provider and whether the person is a Level 1 or Level 2 provider with reference to Guidance which it shall issue from time to time.

General

- 5.3.9 ‘Associated individual’ is any sole trader, partner or director or manager of a Premium rate service provider, anyone having day to day responsibility for the conduct of its relevant business and any individual in accordance with whose directions or instructions such persons are accustomed to act, or any member of a class of individuals designated by PhonepayPlus.
- 5.3.10 ‘Board’ means the board of directors of PhonepayPlus.
- 5.3.11 ‘Call’ means any communication which passes through an electronic communications network whether initiated by a user or initiated by or facilitated by a Premium rate service provider and ‘caller’ shall be construed accordingly.

- 5.3.12 ‘Chairman of the Independent Appeals Body’ is the person, being a qualified solicitor or barrister of not less than ten years’ standing, appointed to be Chairman of the Independent Appeals Body.
- 5.3.13 ‘Chatline service’ has the meaning set out in the Condition issued by Ofcom under Section 120 of the Act effective from time to time.
- 5.3.14 ‘Child’ or ‘Children’ means a person/people under 16 years of age.
- 5.3.15 ‘Compliance audit’ is the process of thorough examination of the internal procedures a Premium rate service provider has in place to ensure that its obligations under the Code are complied with.
- 5.3.16 ‘Connected company or person’ means any company or person connected within the meaning of Section 839 Income and Corporation Taxes Act 1988.
- 5.3.17 ‘Data controller’ means a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed (as set out in the Data Protection Act 1998).
- 5.3.18 ‘Electronic communications network’ has the meaning given to it in Section 32(1) of the Act.
- 5.3.19 ‘Electronic communications service’ has the meaning given to it in Section 32(2) of the Act.
- 5.3.20 ‘Independent Appeals Body’ is a body of persons, independent of PhonepayPlus, appointed to hear appeals after an oral hearing has taken place in respect of Tribunal decisions and adjudications (other than any adjudication by consent).
- 5.3.21 ‘Information society services’ are any services normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services (as defined in Article 1.2 of Directive 98/34/EC as amended by Directive 98/48/EC), subject to the exceptions set out in the Directive.
- 5.3.22 ‘Ofcom’ is the Office of Communications. References to Ofcom and to any statutory authority or other regulatory body include any replacement successor bodies.
- 5.3.23 ‘Person’ means any natural or legal person.
- 5.3.24 ‘Personal data’ means data which relate to a living individual who can be identified (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual (as set out in the Data Protection Act 1998).
- 5.3.25 ‘Personal information’ is any information about a person, including but not limited to names, addresses, telephone numbers, other contact details, occupations and other personal details.
- 5.3.26 ‘PhonepayPlus’ means the employees of PhonepayPlus save where the context otherwise requires.
- 5.3.27 ‘PhonepayPlus Register’ is the online database maintained by PhonepayPlus which contains such information about Premium rate service providers as PhonepayPlus may require for the purpose of efficient and effective regulation of Premium rate services.
- 5.3.28 ‘Premium rate service provider’ means any Network operator, Level 1 or Level 2 provider.
- 5.3.29 ‘Promotion’ means anything where the intent or effect is, either directly or indirectly, to encourage the use of premium rate services, and the term ‘promotional material’ shall be construed accordingly.
- 5.3.30 ‘Retention’ is an outstanding payment due to a Network operator, Level 1 or Level 2 provider which has been retained by a Network operator, Level 1 or Level 2 provider in response to a PhonepayPlus direction. ‘Retain’, ‘retaining’ and ‘retained’ shall be construed accordingly.
- 5.3.31 ‘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. Pay-for-product services where the product is of a clearly sexual nature are sexual entertainment services.
- 5.3.32 ‘Special Services Number’ means a UK telephone number beginning 08.
- 5.3.33 ‘Subscription services’ are services which incur a recurring premium rate charge.
- 5.3.34 ‘VAT’ means value added tax at the rate applicable from time to time.
- 5.3.35 ‘Virtual chat services’ are not live conversation services but enable two or more users to exchange separate messages, whether by recorded voice, text or pictures, while engaged in the service.
- 5.3.36 ‘Withhold’ refers to payments held by a Network operator or Level 1 provider in accordance with the 30-day rule, as set out in paragraph 3.5.1.

Annex 1

Funding Arrangements

1 General provisions

- 1.1 Information obtained by PhonepayPlus under these provisions shall be confidential, save that PhonepayPlus may share it with Ofcom to the extent that is reasonable for the proper regulation of premium rate services.
- 1.2 For the purposes of these funding provisions, the following definitions shall apply:
- (a) ‘Outpayments’ are sums payable by Network operators to Level 1 or Level 2 providers in respect of revenue generated by premium rate services;
 - (b) ‘Revenue’ is the sum received by a Network operator in respect of or attributable to the provision of a premium rate service, gross of any sum that may be due to third parties arising out of the provision of the said service;
 - (c) ‘Financial year’ means the financial year of PhonepayPlus as set from time to time, which at the date of publication of this edition of the Code is 1 April to 31 March;
 - (d) ‘Own service’ is any premium rate service provided by a Network operator operating as a Level 2 provider itself or through any associated company or any connected company or person.
- 1.3 The provisions of the Code apply to this Annex. In particular the general responsibility in paragraph 3.1.4 of the Code is applicable to the funding provisions of this Annex.

2 Timetable

- 2.1 PhonepayPlus will publish a timetable for its annual budgetary and forecasting procedures as set out below. It will specify the dates by which various activities should be carried out by Network operators and/or PhonepayPlus.
- 2.2 PhonepayPlus may, upon giving reasonable notice to interested parties, vary some or all of the dates set out in the timetable.

3 Budget and activity plan

- 3.1 As far as is practicable, by 31 December each year, PhonepayPlus will publish a proposed budget and activity plan for the forthcoming financial year for wide consultation and scrutiny.

- 3.2 Having considered the comments received under paragraph 3.1, PhonepayPlus will review and then present its proposed budget and activity plan to Ofcom for comment and approval.
- 3.3 PhonepayPlus will then announce its proposed budget, specifying the amount it intends to collect (‘the Budgeted Figure’) for the forthcoming financial year through the levy, as defined below, having regard to its available and required reserves.

4 Forecasting

- 4.1 Network operators may provide PhonepayPlus by the date specified in the timetable with a forecast of the value of outpayments (gross of the levy – see paragraph 5 below) to be made by the relevant Network operator and of any own service revenue anticipated during the forthcoming financial year and such forecast shall be used for calculating levy payments under paragraph 6.2 below.
- 4.2 In the absence of a forecast in accordance with paragraph 4.1 above, or by agreement, PhonepayPlus will issue a direction to the Network operator requiring the provision of a forecast and/or may make its own forecast of the outpayments likely to be made by the relevant Network operator and of own service revenue during the forthcoming financial year. This will be based on such information as PhonepayPlus may have concerning the Network operator’s outpayments and own service revenue in previous years, information received from other Network operators and PhonepayPlus’ own knowledge of the market and the industry.
- 4.3 Own service revenue forecasted will be multiplied by the industry standard outpayment margins as determined by PhonepayPlus in order to identify the Network operators’ receipts as a Level 1 or Level 2 provider for the purposes of this Annex (‘own receipts’).
- 4.4 Where a Network operator has provided premium rate services over its own electronic communications network or service for a period longer than three months in the first financial year of service provision, PhonepayPlus will forecast for the following financial year the outpayments likely to be made and the likely level of own service revenue, by reference to the revenue likely to be generated by such services multiplied by the industry standard outpayment margins as determined by PhonepayPlus.
- 4.5 Where a Network operator intends to provide premium rate services over its electronic communications network or service and has not previously done so or has not done so for more than three months in the current financial year, no forecast will be made and payment of the levy will be made in accordance with paragraph 6.4 below.

- 5 Levy
- 5.1 PhonepayPlus will determine the proportion of every outpayment and own receipts that need to be retained and paid to PhonepayPlus ('the levy'). PhonepayPlus may from time to time vary the rate or rates at which the levy is set to ensure that it continues to receive adequate funding to carry out its activities as the regulatory agency for premium rate services.
- 5.2 PhonepayPlus will advise Network operators (in writing) and other interested parties (by publication on its website) of the levy to be applied to outpayments from time to time and issue directions accordingly. The levy will be expressed as the proportion of each outpayment and own receipt that must be retained (e.g. 0.XX pence per £1).
- 5.3 Following receipt of notification under paragraph 5.2 above, Network operators must inform everyone to whom they make outpayments of the level at which the levy has been set and that they (the Network operator) will deduct the levy at source from every outpayment that is made and pay the deducted amount to PhonepayPlus.
- 5.4 Network operators are responsible for deducting the levy notified under paragraph 5.2 from every outpayment that they make. Where a Network operator fails to deduct the levy, the Network operator will remain liable to PhonepayPlus as though it had in fact deducted the levy.
- 6 Payments
- 6.1 In accordance with the timetable, PhonepayPlus will advise each Network operator whose outpayments and/or own service revenue for the forthcoming year have been forecast under paragraph 4 of this Annex, of the total amount that the Network operator is expected to collect in the forthcoming financial year by the application of the levy notified for the time being under paragraph 5.2 ('its contribution').
- 6.2 Each Network operator's contribution will be calculated by multiplying its forecasted outpayments and own service receipts for the forthcoming year by the applicable levy for the time being (e.g. £1,000,000 x 0.XX).
- 6.3 Upon being advised of its contribution by PhonepayPlus pursuant to paragraph 6.1 above, a Network operator must pay its contribution to PhonepayPlus by 12 equal monthly instalments payable by the last day of each month commencing on the following 31 March. Wherever possible, Network operators should arrange to make payments by electronic transfer.
- 6.4 Where a Network operator falls within paragraph 4.5 above the Network operator will, during the balance of the first financial year of service provision, make monthly payments to PhonepayPlus calculated by multiplying its actual outpayments each month by the applicable levy.
- 6.5 All invoices provided by PhonepayPlus to Network operators will add a charge for VAT where appropriate at the applicable rate.
- 6.6 All Network operators must provide PhonepayPlus with quarterly reports upon the actual levels of outpayments that they are making as soon as is reasonably practicable following 30 June, 30 September, 31 December and 31 March in each year.
- 6.7 Network operators may, in exceptional circumstances, seek PhonepayPlus' agreement to a recalculation of their forecasts and the consequential payments required of them under paragraph 6.3 above.
- 7 Late payment
- If a Network operator fails to pay to PhonepayPlus monies due in accordance with the timescales set out in this Code and/or in accordance with directions issued by PhonepayPlus, the Network operator will be liable to pay interest in respect of such monies at the rate of 3% above the prevailing base rate for the time being of HSBC plc from the date on which the relevant payment became due.
- 8 Adjustments
- 8.1 At the end of each year and in any event by no later than 30 April, Network operators must provide PhonepayPlus with a statement of the actual aggregate outpayments that they have made, and the revenue that they have received in their capacity as a Network operator and their own service revenue during the preceding year. The statement must identify all cases in which the Network operator has provided premium rate services in respect of which there is no identifiable outpayment (see paragraph 10 of this Annex). Where it has supplied no such services, the Network operator must state this in the statement.
- 8.2 Following receipt of the statement referred to in paragraph 8.1 above or an auditors' report pursuant to paragraph 9.1 below, PhonepayPlus will determine in respect of each Network operator the aggregate amount that ought to have been collected pursuant to paragraph 5.4 above and the aggregate amount that has been paid pursuant to paragraph 6 of this Annex by that Network operator.
- 8.3 Where a Network operator's payment to PhonepayPlus based on forecast outpayments exceeds actual outpayment levels, the Network operator will be entitled to have the excess amount repaid. PhonepayPlus will recalculate this sum based on information provided under paragraph 8.2 above.
- 8.4 Where PhonepayPlus concludes, pursuant to paragraph 8.2, that a Network operator ought to have collected an amount in excess of that actually paid to PhonepayPlus, the Network operator will be liable to PhonepayPlus for the difference which will be payable forthwith on demand.
- 8.5 PhonepayPlus will not make a calculation pursuant to paragraph 8.2 in respect of a Network operator which has not provided a declaration of its actual outpayments for the entire financial year pursuant to paragraph 8.1 above.

9 Auditors

- 9.1 The PhonewayPlus auditor for the time being ('the Auditors') have the power to request from a Network operator direct confirmation by audited statement of the actual level of outpayments it made and the actual revenue it retained in respect of premium rate services supplied by it as a Network operator during any relevant period. Such audited statement may be provided (by arrangement) by the Auditors, or by a Network operator's auditors who must provide such a statement within such reasonable time as the Auditors may request and/or PhonewayPlus may direct.
- 9.2 Network operators will not be subject to a request under paragraph 9.1 above more than once in every four years, save where previous audited statements have revealed significant inconsistencies or where information provided to or obtained by PhonewayPlus or the Auditors may give the Auditors cause for concern.
- 9.3 A Network operator or a Network operator's auditors shall, at the request of the Auditors, supply such further information and/or explanation of such matters as the Auditors may consider necessary to satisfy themselves as to the accuracy of the Network operator's figures in such a format as may be prescribed (including by further statement).
- 9.4 If an auditors' report obtained under paragraph 9.1 above indicates that the actual outpayments made by a Network operator during the relevant year were different from those declared under paragraph 8.1 above, the Auditors will make such adjustments as are necessary pursuant to paragraph 8.
- 9.5 If the Auditors advise it to be necessary for the proper administration of this part of the Code, PhonewayPlus may direct that a Network operator subjects itself to assessment by an agreed independent auditor for the purpose of establishing whether the Network operator has fully complied with its obligations under this part of the Code. The costs of any such assessment shall be borne by PhonewayPlus unless the independent auditor concludes that the Network operator was not in all material respects complying with its obligations under this part of the Code or where the independent auditor was unable to reach any conclusion because of non-co-operation by the Network operator, in which case the costs will be borne by the Network operator.
- 9.6 Where an audit conducted under paragraphs 9.1 or 9.5 above has revealed material inconsistencies in the information previously supplied to PhonewayPlus by a Network operator, PhonewayPlus may take enforcement action under the Code.

10 No identifiable outpayment

- 10.1 Where PhonewayPlus has received notification under paragraph 8.1 above that a Network operator has supplied service(s) for which there is no identifiable outpayment, it may direct the relevant Network operator to explain the reasons for the lack of any identifiable outpayment(s) and/or to supply details of the level of revenue it has generated in respect of those services.
- 10.2 If PhonewayPlus considers it appropriate to do so, it will direct the Network operator to treat the revenue it has generated in respect of such service(s) or such a portion of that revenue as PhonewayPlus may determine as though it were in fact an outpayment.

Annex 2

The Code Compliance Panel and Tribunals

1 Code Compliance Panel

- 1.1 PhonepayPlus has established a Code Compliance Panel ('CCP') which comprises:
- (a) The Chairman of the CCP who is a qualified barrister or solicitor with not less than 15 years' relevant experience; and
 - (b) Two legally qualified members who are qualified barristers or solicitors with not less than ten years' relevant experience; and
 - (c) Up to ten lay members with adjudicatory experience; and
 - (d) Up to three members of the PhonepayPlus Board entitled to undertake adjudicatory functions.
- 1.2 The Chairman of the CCP is appointed by the PhonepayPlus Board, and reports to the Board on the work of Tribunals. The legally qualified members and lay members are appointed by the Board in consultation with the Chairman of the CCP.
- 1.3 The PhonepayPlus Board has delegated to the CCP the function of undertaking adjudications or reviews of adjudications (including a review of any sanction or administrative charge imposed) in respect of alleged breaches of the PhonepayPlus Code of Practice currently in force ('the Code') and reviews of determinations made by PhonepayPlus in relation to prior permission, including the imposition of conditions upon which prior permission is granted.

2 Tribunals

- 2.1 A Tribunal consists of three members comprising:
- (a) The Chairman of the CCP or such of the two legally qualified CCP members as he shall nominate (who shall sit as Chairman of that Tribunal); and
 - (b) One person drawn from the lay members of the CCP and one person drawn from the PhonepayPlus Board members of the CCP.
 - (c) The Tribunal may consist of two lay members of the CCP sitting with the Chairman of that Tribunal and no PhonepayPlus Board member if the Chairman of the PhonepayPlus Board so consents in any particular case.

3 Oral hearings

- 3.1 Any relevant party may, by notice in writing, require that an oral hearing be held:
- (a) after a review (applied for or carried out) in respect of prior permission or the attachment of conditions to it;
 - (b) where the party has received communication from PhonepayPlus alleging a breach or breaches of the Code;
 - (c) in respect of any adjudication made by a Tribunal without an oral hearing; or
 - (d) where it is the Tribunal's intention to prohibit a relevant party or associated individual from involvement in or promotion of any or all service types for a defined period, or from contracting with another party, see paragraphs 4.8.2(f), 4.8.2(g), 4.8.2(h) and 4.8.6.
- 3.2 Within any written notice requiring an oral hearing, the relevant party must provide details of the allegation or decision in respect of which the oral hearing is required and set out clearly the applicant's case in respect of it.
- 3.3 Such written notice may be provided to PhonepayPlus at any time up to ten working days after receipt of a decision, or at any time prior to an adjudication where the oral hearing is required following an allegation of a breach of the Code.
- 3.4 Oral hearings shall take place before a Tribunal appointed for the purpose.
- 3.5 The relevant party is entitled to appear at the oral hearing in person or to be represented. PhonepayPlus will attend the oral hearing to present its case and may instruct a representative to act on its behalf.
- 3.6 The enforcement of sanctions imposed pursuant to an adjudication is not automatically suspended by written notice requiring an oral hearing. The relevant party may apply in writing to the Chairman of the oral hearing Tribunal ('the Chairman') setting out the grounds on which the sanction should be suspended. Unless the Chairman considers that there are exceptional reasons in the particular case to grant the application, he will only do so if he is satisfied that not to do so would give rise to undue hardship, and that to do so would not give rise to any risk of public harm. If a relevant party has not been granted a suspension of sanction but has failed to comply with the sanction, the Chairman may stay the oral hearing.
- 3.7 The Chairman shall give such directions as he considers necessary for a fair and speedy hearing.

- 3.8 If the relevant party is neither present nor represented at the hearing, and the Tribunal has no cause to believe there is good reason for the relevant party's absence, the matter shall be determined by the Tribunal as it sees fit in the absence of the relevant party.
- 3.9 Where a relevant party (or PhonepayPlus) requires an oral hearing pursuant to the right set out in paragraph 4.11 of the Code but the relevant party fails, without good cause, to appear (itself or through a representative) at an oral hearing which is properly established, then the oral hearing Tribunal may make such finding as it considers fit.
- 3.10 The Chairman shall generally conduct the pre-hearing process and the hearing itself as set out in the guidelines published on the PhonepayPlus website. However he shall have the power to conduct the pre-hearing process and the hearing as he sees fit according to the interests of justice, including deciding to adjourn the hearing.
- 3.11 The Chairman may require the provision of security by the relevant party for the administrative charges of PhonepayPlus.
- 3.12 The Chairman shall have the power to strike out a case in the event of serious or persistent failure to comply with case management directions which have been ordered.
- 3.13 The Tribunal shall be entitled to consider and act upon confidential information without directly or indirectly disclosing to the applicant (or PhonepayPlus as the case may be) the source of that information, provided that the other party is given a reasonable opportunity to rebut its substance.
- 3.14 A sound recording shall be made of the oral hearing. Recordings will be made available to PhonepayPlus and the applicant.
- 3.15 An oral hearing shall be conducted in private, unless the applicant or PhonepayPlus otherwise requires. If an oral hearing is in public, either party may request that any part of the hearing be conducted in private and any such application shall itself be heard in private.
- 3.16 The oral hearing Tribunal shall decide the matter entirely afresh. For the avoidance of doubt, the Tribunal:
- (a) may impose a greater or lesser sanction than that originally imposed;
 - (b) may reverse a decision to issue or refuse a prior permission;
 - (c) may set such conditions on a prior permission as it sees fit;
 - (d) must agree to impose such sanctions, prior permission and/or conditions, and administrative charges or otherwise dispose of the matter as may be jointly agreed by PhonepayPlus and the applicant and which has been agreed by the Chairman of the CCP or, if he is unavailable, by one of the legally qualified CCP members ('adjudication by consent').
- 3.17 The Tribunal shall, as soon as is practicable after the hearing, provide a reasoned written decision. All decisions will be published by PhonepayPlus and may identify any Network operator, Level 1 or Level 2 provider concerned.

Annex 3

Independent Appeals Body

1 Appeals

- 1.1 A relevant party (in this Annex referred to as an ‘appellant’) may, after an oral hearing at which the appellant or its representative has appeared, appeal to the Independent Appeals Body (‘IAB’) against Tribunal decisions and adjudications (other than any adjudication by consent).
- 1.2 PhonepayPlus may appeal to the IAB against Tribunal decisions and adjudications (other than any adjudication by consent).
- 1.3 Appeals may be made on the following grounds:
- (a) the disputed decision was based on error of fact;
 - (b) the disputed decision was wrong in law; or
 - (c) the Tribunal exercised its discretion incorrectly in reaching its decision.
- 1.4 In order to institute an appeal, the appellant must provide a written notice of appeal setting out the grounds upon which the appeal is made and the facts and matters upon which it is based, to be received by the clerk to the IAB (‘the Clerk’) within 20 working days of the issue of the Tribunal adjudication or determination which is the subject of the appeal.
- 1.5 The notice of appeal must be accompanied by:
- (a) the written adjudication;
 - (b) the case bundle used at the Tribunal oral hearing;
 - (c) a security deposit of £5,000 or an application (to be determined by the Chairman of the IAB) to waive or reduce such a security deposit setting out the grounds for such waiver or reduction;
 - (d) a description of any new evidence upon which the appellant intends to rely and which, for good reason, was previously unavailable;
 - (e) if the notice of appeal and/or any necessary accompanying documents are being provided to the Clerk more than 20 working days after the issue of the Tribunal adjudication, the appellant must also provide an application (to be determined by the Chairman of the IAB) for the appeal to proceed, setting out the reasons for the delay and the grounds for such application.

1.6 If an appellant or his representative failed to appear in person at an oral hearing for good reason, but the oral hearing proceeded in his absence and PhonepayPlus has refused to permit a further oral hearing, the appellant may apply to the Chairman of the IAB to request him to require that PhonepayPlus holds a further oral hearing.

1.7 The procedures which follow are those laid down by the IAB and are under its control.

2 The procedures of the Independent Appeals Body

2.1 The IAB is able to hear any appeal lodged with the Clerk to the IAB (‘the Clerk’) in accordance with the provisions of paragraph 4.12 of the Code.

2.2 The Clerk shall forthwith, upon receipt of the notice of appeal, provide a copy of it and of the accompanying documents to the Chairman of the IAB (‘the Chairman’) and to PhonepayPlus.

2.3 In the event that an appellant was, for good reason, unable to attend a Tribunal oral hearing but the oral hearing proceeded in his absence, then the appellant may apply to the Chairman. The Chairman shall obtain the views of the chairman of the hearing panel in writing, or in a hearing at which the appellant may also attend. The Chairman may require that PhonepayPlus provides a further oral hearing. The Chairman shall have the discretion to award the costs of the application.

3 The Appeal Tribunal

3.1 Upon receipt of a notice of appeal, the Chairman shall appoint an Appeal Tribunal, consisting of three members, to deal with the appeal. The Chairman or Deputy Chairman (if any) shall be the Chairman of the Tribunal (‘the Tribunal Chairman’).

3.2 If the appellant has applied for a waiver or reduction in respect of the provision of the required security deposit and for the appeal to proceed despite the notice of appeal having been lodged out of time, then as soon as reasonably practicable, the Tribunal Chairman shall convene a hearing at which any such application shall be considered and at which PhonepayPlus may be heard.

3.3 In respect of an application for a waiver of the requirement to provide the security deposit, the Tribunal Chairman shall waive the deposit (or reduce the required level of security) if he determines that there appears to be plain merit in the grounds of appeal and that exceptional hardship will result from the requirement that the security be provided.

3.4 PhonepayPlus shall be entitled to apply to the Tribunal Chairman for a determination that the appeal should not be permitted to proceed unless the security deposit is increased to a higher level and/or that a sum is lodged as security for costs. The Tribunal Chairman may make such a determination entirely at his discretion.

3.5 In respect of an application for an appeal to proceed despite having been made late, the Tribunal Chairman shall grant such application if he is satisfied that, in all the circumstances, it is fair to do so and he may impose such conditions as he sees fit as to the further conduct of the appeal or as to lodgment of security for costs.

4 Suspension of sanctions

4.1 The enforcement of sanctions imposed by PhonepayPlus is not automatically suspended by the provision of a notice of appeal. An appellant may apply to the Tribunal Chairman, by written application to the Clerk, setting out the grounds upon which the sanction should be suspended. The Clerk will forthwith provide a copy to the Tribunal Chairman. Unless the Tribunal Chairman considers that there are exceptional reasons in the particular case to grant the application, he will do so only if he is satisfied that not to do so would give rise to undue hardship, and that to do so would not give rise to a significant risk of public harm. He shall seek the views of PhonepayPlus on those matters prior to making a decision and may convene a hearing to deal with such applications.

4.2 If an appellant has not been granted a suspension of sanction, and has not complied with the sanction imposed, the Tribunal Chairman may stay the appeal on the application of PhonepayPlus or on his own volition. Appeals stayed for more than six months shall be automatically struck out and may not be recommenced.

5 Representation

5.1 The appellant shall be entitled to appear before the Appeal Tribunal in person and be represented.

5.2 PhonepayPlus shall attend as respondent to any appeal before the Appeal Tribunal and may instruct a representative to act on its behalf.

6 Pre-hearing process

6.1 The Tribunal Chairman may, at his own discretion, or upon the application of either party to the appeal, convene a conference of the parties at which he may give such directions as he considers necessary for the fair and speedy hearing of the appeal.

Such directions may include, for example, directions for:

- (a) the admission of facts before the hearing;
- (b) the disclosure of documents;
- (c) the provision of expert reports;
- (d) the exchange of written statements;
- (e) the preparation of agreed bundles of documents;

(f) the submission and exchange of outline arguments.

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

6.3 For the avoidance of doubt, the Chairman shall have the power to make directions for disclosure of documents and any other directions relating to evidence as though the appeal was a first hearing of the matter which is the subject of the appeal.

6.4 Not less than ten working days before the date of the hearing of the appeal, the Clerk shall send written notice of the day, time and place of the hearing of the appeal to the last known address of the appellant and to PhonepayPlus.

6.5 Within five working days of receipt of the notice specifying the date of the hearing, both the appellant and PhonepayPlus shall each inform the Clerk in writing of whether they intend to appear at the hearing and the name of any person who will be representing them at the hearing.

7 The hearing

7.1 The appellant shall outline the grounds of his appeal and call such witnesses and refer to such documents as he is entitled to do.

7.2 PhonepayPlus shall then be entitled to respond to the case put by the appellant and to call such witnesses or present any written statements or other documents.

7.3 The appellant shall then be entitled to address the Appeal Tribunal.

7.4 A witness in person may be cross-examined by the other party in the appeal.

7.5 A witness who has been cross-examined may be re-examined.

7.6 The Tribunal Chairman may question any witness at any time.

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

7.8 If the appellant is neither present nor represented at the hearing and the Appeal Tribunal has no cause to believe there is a good reason for the appellant's absence, the appeal may be dismissed.

8 Confidential information

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

