



The PRS Scope Review

An analytical framework for assessing the risk of consumer harm, and steps to improve PRS regulation

Statement

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One-Page Overview

In light of increasing convergence, the wide diversity of services provided and the growth of Premium Rate Services (PRS) as a micro payment mechanism, we have reviewed the way in which PRS is regulated. We carried out the PRS Scope Review to ensure the current regulatory regime meets the needs of consumers, affords an appropriate level of consumer protection, and at the same time supports an innovative and changing PRS industry.

We conclude that the characteristics of PRS are sufficiently unique that a specific PRS regulatory regime is justified in order to protect consumers from harm, above and beyond the protection afforded by general consumer protection regulation.

This Statement establishes an analytical framework that will help inform future Ofcom considerations on whether the scope of regulation should be widened or narrowed. This framework will help determine whether a particular service or service category carries sufficient risks of consumer harm to require inclusion in the regulatory regime.

This Statement also recommends a number of initiatives, including:

- Introducing a mandatory registration scheme for the PRS industry, with all Service and Information Providers being required to register with PhonepayPlus prior to operating in the market. This registration scheme will be used to populate a searchable database to assist parties in carrying out due-diligence on their commercial partners, and will also support PhonepayPlus' enforcement activities;
- PhonepayPlus should consult on strengthening PRS advertising requirements to align with Ofcom's approach to the use of PRS in TV programmes: 'calls from mobiles will cost considerably more'; and
- As part of the upcoming revision to its Code of Practice, PhonepayPlus should consider creating minimum standards for complaints handling across the PRS industry.

The detail of these initiatives, and others, are outlined in the remainder of this Statement.

Section 1

Executive Summary

Why we have reviewed how PRS is regulated

- 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 Ofcom last reviewed the regulation of PRS in 2004. Since then the telecommunications market has continued to evolve, with significant implications for the PRS industry. Key recent developments for the PRS market include:
- i) A significant increase in mobile phone ownership and usage;
 - ii) An increase in the number of communication providers; and
 - iii) An increase in the number ranges used for PRS.
- 1.3 In light of increasing convergence, the wide diversity of services provided and the growth of PRS as a micro payment mechanism, we have reviewed the way in which PRS is regulated to ensure the current PRS regulatory regime meets the needs of consumers, affords an appropriate level of consumer protection and, at the same time, supports an innovative and changing PRS industry. In particular, we want to ensure that regulation is only targeted at areas where it is needed.

How PRS is currently regulated

- 1.4 The current PRS regulatory framework consists of a hierarchy with three components:
- i) The Communications Act 2003 ('the Act'): section 120 of the Act defines PRS and provides Ofcom with the power to set conditions for the purpose of regulating the provision, content, promotion and marketing of PRS;
 - ii) The PRS Condition: This 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; and
 - iii) The PhonepayPlus Code of Practice ('the Code'): The Code is approved by Ofcom under section 121 of the Act and outlines wide-ranging rules to protect consumers as well as the processes that PhonepayPlus applies when regulating the PRS industry.

- 1.5 The PRS Condition applies to a subset of PRS, Controlled PRS,¹ which is defined as including:
- a PRS which costs more than 10p per minute;
 - a PRS using a 'Special Services Number', e.g. 0871, which costs more than 5p per minute;
 - a Chatline Service (as defined);
 - a Sexual Entertainment Service (as defined); or
 - an internet dialler (as defined).
- 1.6 Those Controlled PRS are subsequently regulated by PhonepayPlus' Code and the relevant communications providers involved in their provision are subject to Ofcom's backstop enforcement powers. Controlled PRS require this level of regulation because of their potential to cause consumer harm that may not be adequately addressed by more generic consumer protection regulation.

Our consultation in May 2009

- 1.7 In May 2009 we published a consultation, 'The PRS Scope Review'² ('the Consultation') in which we discussed the risk of consumer harm in the absence of effective PRS regulation. We identified a number of key characteristics of PRS, considered their potential to give rise to consumer harm, and invited views on our analysis.
- 1.8 We also suggested in the Consultation that, based on our analysis of the PRS sector, there were gaps in the regulatory framework that needed to be addressed, particularly with respect to price transparency, complaints procedures, and empowering PRS suppliers to act responsibly.

Our conclusions

An analytical framework for PRS

- 1.9 In performing its principal duties under the Act, Ofcom is required to have regard to the principles under which regulatory activities are applied transparently, proportionately, and consistently, and are only targeted at cases where action is needed. It is important to ensure that PRS regulation (as applied through the definition of Controlled PRS) continues to capture those categories of PRS that are likely to give rise to risks of consumer harm that would not be adequately covered by alternative means of protection.
- 1.10 When considering whether there is a need to amend the PRS Condition we intend to exercise our duties under the Act by applying an analytical framework, which takes account of market changes and reflects the risks of consumer harm resulting from the demand and supply side characteristics of PRS.

¹ As defined in section (e) of PRS Condition.

² The Consultation is available at http://www.ofcom.org.uk/consult/condocs/prs_scope/

We intend to examine the extent to which a particular service or service category carries risks of causing consumer harm. Specifically, we will consider whether:

- The consumer's Originating Communications Provider is the actual supplier of the PRS.
- There is a complex, fragmented value chain, with large numbers of suppliers operating at different levels in the chain.
- Barriers to entry and exit are relatively low at the Information Provider level.
- Consumers are only able to ascertain the quality of the PRS at the point at which it is consumed.
- The price of the PRS is relatively low, potentially discouraging consumers from seeking redress.
- The purchase process involves little or no authentication, thus encouraging consumers to purchase on impulse.
- The PRS is likely to involve inappropriate or offensive content.
- The PRS is likely to be marketed to children or likely to have a particular appeal to children.

Our assessment is not intended to be a 'tick box' exercise, but will focus on the overall risks of harm from a particular service. As the Statement makes clear, the nature of the harm that may occur is a relevant consideration for whether a service should be regulated.

Specific measures to improve current PRS regulation

1.11 We have concluded that the current regulatory regime is functioning well and PhonepayPlus has acted swiftly to address specific problems that have emerged over the past few years. However, there is the potential to further refine the existing regulatory framework in order to better protect consumers.

1.12 We have carefully considered stakeholders' comments to the proposals raised in the Consultation and summarise in the table below our current position on each of the possible measures.

Target Area	Responses to Consultation proposals	Ofcom position
1. <i>Facilitating consumers to make informed decisions</i>	Respondents typically supported Ofcom's proposal to carry out further work into introducing pre-call announcements (PCAs) for PRS.	Ofcom is to commission a technical evaluation on the introduction of PCAs. This study will feed into a wider Ofcom review of options for improving pricing transparency of telephone numbering ranges.
	There was very strong opposition to the Ofcom suggestion that PRS advertising should contain the maximum price that may be charged by a communications provider and the name of that provider.	We are satisfied that the suggestion in the Consultation would be unworkable and should not be pursued. Instead, PhonepayPlus should consult on strengthening its existing guidance on advertising (in any media) in line with Ofcom's approach to PRS in TV programmes: 'calls from mobiles will cost considerably more'.
2. <i>Facilitating effective</i>	Respondents supported Ofcom's proposal that PhonepayPlus	We recommend that PhonepayPlus should expand its number checker to better assist

<i>consumer redress</i>	should expand the 'number checker' on their website.	consumers needing to identify the provider responsible for a particular service.
	Most respondents supported requiring PRS service and information providers to adopt formal complaints procedures.	PhonepayPlus should consider introducing complaints handling obligations as part of the drafting of its new Code of Practice.
3. <i>Empowering PRS suppliers to act responsibly</i>	There was a high level of support amongst respondents for introducing a registration scheme that assists the industry to undertake due diligence on their commercial partners.	PhonepayPlus should introduce a mandatory registration scheme for both Service Providers and Information Providers (akin to option F2 in the Consultation).
	There was strong support for Ofcom to carry out an analysis of the market for call barring facilities, although the mobile operators unanimously opposed any move to mandate call barring.	Ofcom will consider further whether to undertake a study on introducing selective call barring for 09 numbers, as well as barring for voice/SMS to mobile shortcodes, and reverse billed SMS.

Co-ordination with PhonePayPlus' 12th Code of Practice

- 1.13 PhonepayPlus intends to consult on a revised Code of Practice ('the 12th Code'), in early 2010, which will establish new rules for the PRS industry. It is likely that Ofcom will consult at the same time on whether, subject to stakeholder comments, to approve the 12th Code.
- 1.14 In this Statement, and as summarised in the above table, we have identified a number of actions that we recommend PhonepayPlus should take forward through its 12th Code. The detail surrounding each of these proposals will require intensive engagement with the PRS industry and will be subject to full consultation through the 12th Code process.

Section 2

Background to the Scope Review

Introduction

- 2.1 Since PRS were introduced in the UK around 25 years ago, they have been subject to regulatory safeguards in order to ensure adequate consumer protection. 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.
- 2.2 The rationale for PRS regulation is to target those services whose characteristics means they are likely to give rise to particular risks of harm that may not be effectively covered by existing means of consumer protection.
- 2.3 In light of increasing convergence in the communications sector, the wide diversity of services provided and the growth of PRS as a micro-payment mechanism, Ofcom considered that a 'first principles' examination of the role, structure and application of regulation in this area was needed. The aim of this Scope Review has been to consider whether PRS regulation is meeting the needs of consumers whilst supporting an innovative and changing PRS industry.

The regulatory framework

- 2.4 The current PRS regulatory framework consists of a hierarchy with three components:
- i) The Communications Act 2003 ('the Act'): section 120 of the Act defines PRS and provides Ofcom with the power to set conditions for the purpose of regulating the provision, content, promotion and marketing of PRS;
 - ii) The PRS Condition: This 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; and
 - iii) The PhonepayPlus Code of Practice ('the Code'): The Code is approved by Ofcom under section 121 of the Act and outlines wide-ranging rules to protect consumers as well as the processes that PhonepayPlus applies when regulating the PRS industry.
- 2.5 PRS is defined in subsections (7) and (8) of section 120 of the Act, set out below:
- (7) A service is a premium rate service for the purposes of this Chapter 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.

(8) A service falls within this subsection if its provision consists in—

- (a) the provision of the contents of communications transmitted by means of an electronic communications network; or
- (b) 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.

2.6 As indicated above, the PRS Condition captures a subset of PRS, 'Controlled PRS' which is defined as including:

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

2.7 Those Controlled PRS are subsequently regulated by PhonepayPlus' Code and the relevant communications providers involved in their provision are subject to Ofcom's backstop enforcement powers. Controlled PRS require this level of regulation because of their potential to cause consumer harm that may not be adequately addressed by more generic consumer protection regulation.

The PRS supply chain

2.8 There are typically a number of different parties involved in the supply of any particular PRS. Depending on the nature of the PRS, the supply chain could potentially include:

- Originating Communications Provider: The Originating Communications Provider (OCP) is the consumer's communications provider who offers the consumer access to the PRS. For many PRS a consumer accesses the service in the same way that he or she dials any other telephone number.³ The OCP will have a connection between its network and the network of the Terminating Communications Provider (TCP), which is chosen by the PRS Service Provider (SP). However, the OCP will not necessarily have a direct commercial relationship with the TCP. Rather it could connect to the TCP through a transit communications provider such as BT. It is difficult to make precise estimates of

³ PRS can also be accessed via the internet and interactive TV.

the number of suppliers operating at each level of the value chain,⁴ but there are likely to be a few hundred OCPs.⁵

- **Terminating Communications Provider:** The TCP provides the necessary network facilities to terminate the call on behalf of the Service Provider (SP). It is the TCP that has the commercial relationship with the SP and with whom the revenue from the cost of the call is shared. Currently, there are a large number of TCPs that specialise solely in providing PRS termination services. However, a company operating as a TCP might also operate as a SP, for example providing the service platform. According to information from PhonepayPlus there are estimated to be around 60-70 TCPs actively involved in providing PRS services.⁶
- **Service Provider:** The SP's role can cover a range of different functions, including the provision of the PRS content itself, the packaging and promotion of the service, and the provision of the service platform. Often however, the role of the SP is limited to providing the service platform and packaging the content. Again, it is common for suppliers to operate only at the SP level. Barriers to entry are relatively low, requiring only modest investment in a technical interface with TCPs.⁷ There are estimated to be in excess of 3,000 SPs and Information Providers (IPs).⁸
- **Information provider:** The IP sits upstream of the SP in the value chain, although it may be the case that the same company acts as both the SP and IP. The role of the IP will typically be to act as a service promoter and/or as a content provider. Barriers to entry are low and are largely limited to creative content production costs and the costs involved in marketing a service. As noted above, there are estimated to be more than 3,000 IPs and SPs. There can also be other companies upstream of the IP with whom the IP contracts to support the promotion and delivery of PRS, such as marketing agencies, IT suppliers, fulfilment agencies and contact centres for outsourced customer services.

2.9 The OCP is responsible for charging the consumer for the PRS. The OCP retains a proportion of the money collected from their customer and then passes on the balance to the TCP (or very often to the transit operator who would also retain a proportion and then pass the remainder on to the TCP). A proportion is retained by the TCP with the remainder being passed on to the SP. The SP shares the balance with any other parties involved in the provision of the service, which often includes one or more IPs.⁹

2.10 Below we illustrate the typical supply chains of two different types of PRS, an 09 service and a mobile shortcode service, to give an indication of what is often a very complex supply chain. As shown below, where PRS is accessed through a mobile shortcode the mobile operator will originate and terminate the call/SMS:

⁴ The UK does not have a licensing regime, so there is no central registration of suppliers operating in the telecommunications market.

⁵ *The Regulation of Premium Rate Services- an Ofcom Report for DTI*, 9 December 2004, paragraph 3.8.

⁶ PhonepayPlus had 67 funding network operators (i.e. TCPs) in 2006/7 and 62 in 2007/8.

⁷ *The Regulation of Premium Rate Services- an Ofcom Report for DTI*, 9 December 2004, paragraph 5.3.

⁸ *Ibid*, paragraph 3.8.

⁹ More information regarding the amounts retained and passed on by the players in the fixed and mobile PRS supply chains can be found in Figures 3.7 and 3.8 of the Analysys-Mason report, at <http://www.phonepayplus.org.uk/upload/ResearchDec08AM.pdf>

Figure 1: The parties that can be involved in the provision of an 09 PRS

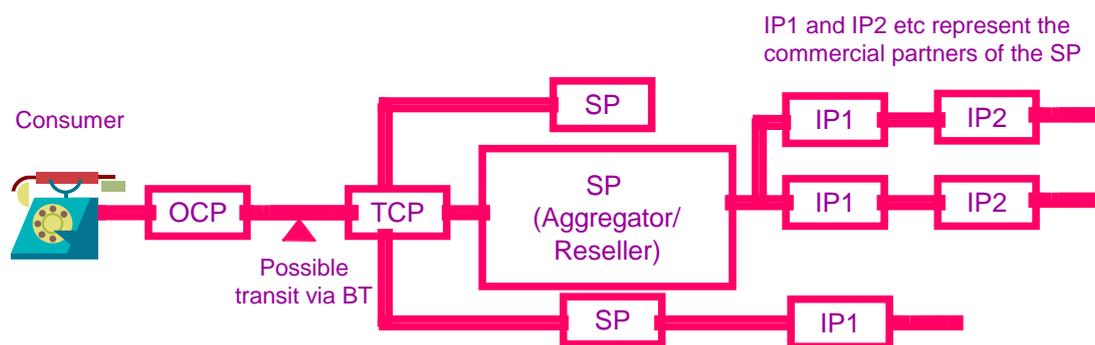
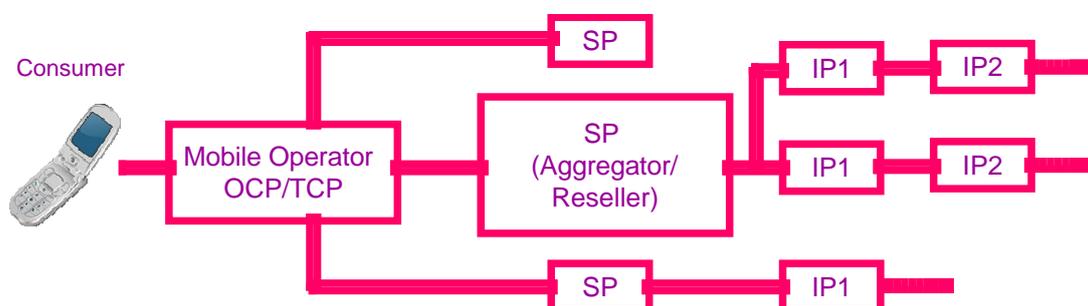


Figure 2: The parties that can be involved in the provision of a mobile PRS



2.11 Throughout this statement we will use the terms originating provider, terminating provider, service provider, and information provider (and their acronyms) to refer to the parties in the PRS value chain. We are aware these terms may not be entirely accurate for all scenarios (e.g. where PRS is accessed through pay-TV). We are also aware that these definitions are not universally accepted within the industry and that AIME has proposed alternative terms and definitions (included as part of its submission on the Scope Review). While we accept AIME’s position that the current terms may not be ideal, for the ease of continuity and to ensure readability with the consultation document we will continue using these terms in this document. We understand however that PhonepayPlus will be re-examining the adequacy of these terms and definitions as part of its upcoming consultation on the 12th Code.

Market developments

2.12 Ofcom last reviewed the regulation of PRS in 2004. Since then the telecommunications market has continued to evolve, with significant implications for the PRS industry. Before we set out our assessment of the current regulatory framework, we recap below the most significant recent developments for the PRS market, which include:

- i) A significant increase in mobile phone ownership and usage;
- ii) An increase in the number of communication providers; and
- iii) An increase in the number ranges used for PRS, including new Directory Enquiry (DQ) Services.

The impact of the growth of mobile phone ownership

- 2.13 The increase in mobile ownership and usage has a number of implications for PRS regulation:
- a) The original rationale for PRS regulation, to protect consumers from the risk of possible disconnection if they could not pay their phone bill, has now become less relevant. By the end of 2008, 61% of mobile users (approximately 47m)¹⁰ were on pay-as-you-go services (compared to 2.8m contract or 'pay monthly' users by the end of 1998.¹¹
 - b) The fact that 61% of mobile users are pay-as-you-go customers gives rise to a different set of potential concerns. Pay-as-you-go customers are likely to be less aware as to how much they spend on any given PRS. They do not receive a bill (although MNOs typically offer their pay-as-you-go customers an online statement or balance) and they are therefore generally less able to analyse their experience and learn from it.
 - c) In respect of advertising PRS tariffs, the tariff for PRS calls from a BT landline is typically stated in an advertisement for PRS. Mobile tariff information for 09 PRS calls is only included in advertising in qualitative terms ('calls from mobiles may vary', or 'calls from mobile will cost considerably more'). An increase in mobile usage, and a decline in BT's market share, is therefore likely to have led to a decrease in overall price transparency in the PRS market.
 - d) With the increase of mobile PRS services, the nature of PRS complaints have changed over time. The type of PRS that caused the most problems in 1999 were 'live' services, especially chat lines. Currently, some 90% of complaints into PhonepayPlus are generated by mobile PRS and most of those complaints relate to mobile subscription services and the use of the 'STOP' command, which is meant to instantly stop incoming PRS messages from the number the STOP-message is sent to but does not in all instances work.
 - e) Mobile operators offer a degree of call barring facilities to their customers to prevent them from accessing PRS, should consumers wish for this type of protection. All mobile operators offer call barring facilities to 09 numbers, with some of them offering 09 barring facilities for different price bands. Mobile shortcodes were introduced in 2003 and enable billing for both outbound voice/SMS and inbound SMS. At present most mobile operators do not offer customers the option of barring mobile shortcode services, which leads us to conclude that the level of protection available to consumers has decreased over time.
 - f) With the majority of children owning a mobile phone, specific issues can emerge regarding access to inappropriate and potentially offensive content, or children being specifically targeted by services. In addition, children may be more easily misled as to the content, tariff, and terms and conditions of a service. The fact that children are unlikely to have access to other payment mechanisms (such as credit cards) also makes them a particularly vulnerable group in the PRS market.

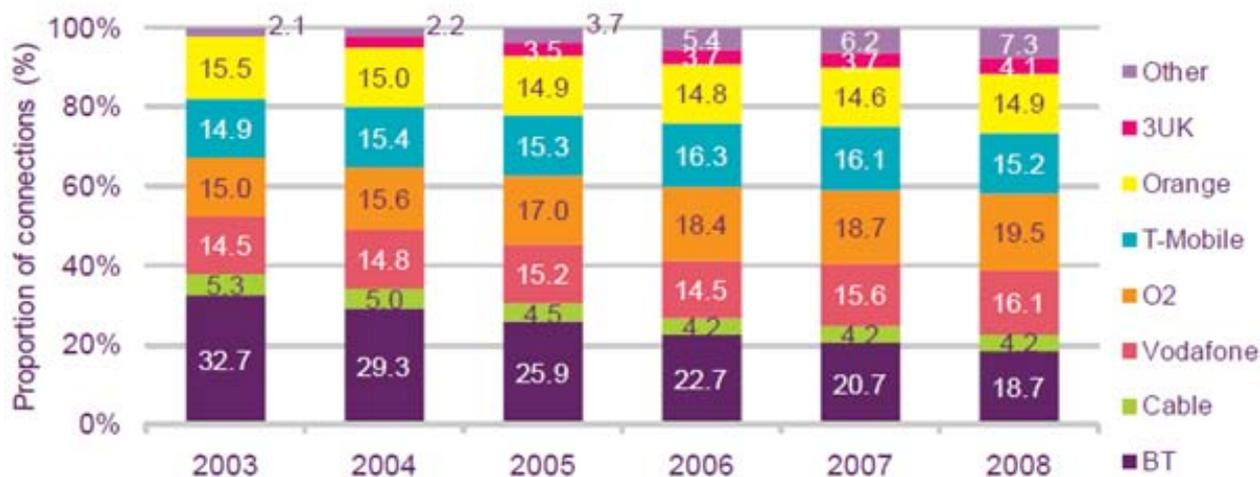
¹⁰ As stated in the Communications Market Report 2009, which can be found at http://www.ofcom.org.uk/research/cm/cmr09/CMRMain_4.pdf

¹¹ This information can be found at http://www.telecomsporal.com/Assets_papers/Wireless/Intercar_prepaid.pdf.

The impact of the growth of communications providers

2.14 As illustrated in figure 3 below, the number of originating communication providers has increased over time.¹² Regarding fixed line connections, BT's market share has continued to decrease over the past 5 years; the growth in other fixed providers is mainly in the wholesale line rental,¹³ carrier pre-select¹⁴ and unbundled local loop¹⁵ segments. This further diminishes the value to consumers of price messages for PRS which are linked to a BT price point.

Figure 3: Share of total UK fixed and mobile connections



Includes estimates where Ofcom does not receive data from operators. 'Other' includes CPS, WLR, mobile ISP and MVNO subscribers in addition to alternative network operators.

- 2.15 The mobile market has seen an increase in number of operators as well. In 2003, 3UK entered the market as the fifth mobile network operator. In addition, a number of MVNOs, such as Virgin, Fresh, Tesco and BT Mobile have entered the market. The combined growth in new fixed and mobile operators is reflected in the increase of share of the category 'other', from 1.6% in 2002 to 7.3% in 2008.
- 2.16 As the OCP determines the price for a PRS call from its network, the increase in the number of operators has led to an increase in the number of tariffs for calls to the same PRS service. In addition, with the exception of mobile shortcodes, only BT's exact tariff for a call to a PRS is typically stated in advertising material. As BT's share of the market has declined, fewer consumers will know the exact price of a PRS from the advertisement, and at the same time, because of the increase in the number of OCPs, there is a greater variability in tariffs of calls to the same PRS from different OCPs. We therefore consider price transparency has decreased over time.

¹² This information can be found in the Communications Market 2009, figure 4.29, http://www.ofcom.org.uk/research/cm/cmr09/CMRMain_4.pdf

¹³ Wholesale line rental is a regulated wholesale service provided by BT which allows other communications providers to offer telephone line access.

¹⁴ Carrier pre-select allows a retail customer to permanently select an alternative call provider rather than the default call provider, for either calls or specific call types.

¹⁵ Unbundled local loop is the process by which the incumbent provider's local loops are physically disconnected from its network and connected to another communications provider's network.

The impact of the growth of PRS numbers

2.17 Another key market development is the increase in the number ranges used for PRS. In an Ofcom consultation in 1999 it was stated that by April 2001, all PRS numbers would start with 090.¹⁶ Currently, PRS can be found on many different number ranges:

- i) the 09 number range;
- ii) the 118 number range, which is used for directory information services;
- iii) mobile shortcodes, which are normally four or five digit numbers often starting with 5, 6 or 8, followed by a word. They can be used for mobile voice and SMS;
- iv) 070 prefixes, which are used for personal numbers also known as a 'find-me-anywhere' services. PhonepayPlus only regulates these numbers when they are not properly used as a personal number but as premium rate-style services and the cost of the call exceeds 10p per minute;¹⁷ and
- v) 0871 numbers, which Ofcom recently decided to include in the definition of Controlled PRS in the PRS Condition.

2.18 The increase in number ranges could lead to confusion among customers as to which number ranges are PRS and which tariffs belong to which number range. As set out in more detail in section 5 below, internal Ofcom research shows that transparency is an issue across communications services. Furthermore, according to a study commissioned by PhonepayPlus, on average, more than half of consumers say they have no trust at all or low trust in any given phone-paid service, and for most phone-paid services, between 15% and 25% of those not using the service state that lack of trust is one of the reasons for this.¹⁸ Accuracy of pricing information is the key factor that consumers most frequently say will help to improve trust.

¹⁶ This publication can be found at <http://www.ofcom.org.uk/static/archive/oftel/publications/1999/consumer/prem0899.htm>

¹⁷ Guidance on the acceptable use of personal numbers can be found at http://www.ofcom.org.uk/telecoms/loi/numbers/num_070_guide#acc070.

¹⁸ See http://www.phonepayplus.org.uk/pdfs_research/uk_phone_paid_services_market_200812.pdf.

Section 3

Identifying The Characteristics of PRS

Introduction

- 3.1 We conducted the PRS Scope Review ('the Consultation') in recognition of significant changes in the PRS sector in the last ten years, in particular: an increase in mobile PRS usage (and related complaints), a more complex and fragmented PRS market, and a lack of clarity in the market as to which services are captured by PRS regulation. The aim of the Consultation was to consider whether current PRS regulation meets the needs of consumers whilst supporting an innovative and changing PRS industry. This was the primary purpose of the Consultation, as defined in the Terms of Reference published in December 2006.
- 3.2 To answer this question, we first needed to understand what it is about PRS that raises the need for specific regulation. Therefore, in the Consultation we identified certain characteristics that are common to PRS, and the risks to consumers from those services that meet a number of these characteristics. In light of this analysis, and informed by responses to the Consultation, we identify below typical characteristics of PRS and how these characteristics can lead to consumer harm. In Section 4 we consider how these characteristics will be used to assess whether the regulatory regime remains appropriate for addressing this harm.
- 3.3 The Consultation sought views from stakeholders on a number of questions. We received 29 submissions in total. The list of respondents can be found in Annex 4.

The characteristics of PRS

- 3.4 Not every PRS will have the full set of the characteristics identified below. However, by describing PRS by reference to a set of characteristics, we are able to develop the basis for a forward looking analytical framework for PRS and assessing the risk of consumer harm associated with it.

Supply side characteristics of PRS

- 3.5 In the Consultation, we characterised the PRS supply chain in the following way:
- The consumer's OCP is typically not the actual supplier of the PRS;
 - There is often a complex, fragmented value chain;
 - There are often large numbers of suppliers operating at different levels in the chain; and
 - Barriers to entry and exit are relatively low at the IP level, meaning there is the potential for significant turnover of suppliers in the market. By contrast barriers for SPs offering mobile PRS are higher than in the fixed line model because such SPs need to technically connect to each of the mobile OCPs in order to provide a full service to their IP client.
- 3.6 In these circumstances, two particular concerns can arise. Firstly, the combination of the complex value chain, the high number and easy entry and exit of IPs, and rapid technological change, may mean that some suppliers tend to be less concerned with

maintaining a favourable reputation. This can incentivise opportunistic behaviour towards consumers and other suppliers in the supply chain.

- 3.7 Secondly, the fact that a consumer's OCP sets the retail price of a PRS rather than the supplier of the service gives rise to the possibility that the same PRS will be sold at different prices by different OCPs (except for mobile shortcodes, where all mobile OCPs offer the same price for the same shortcode). This poses a challenge for SPs and IPs in communicating to consumers the price that they will be charged for the service. In addition, given consumer uncertainty about the price that they will be charged, OCPs may have an incentive to increase prices for PRS.
- 3.8 Similarly, the consumer may not be able to easily identify the supplier of the service in the event that problems arise. This raises concerns about their ability to seek effective redress.

Demand side characteristics of PRS

- 3.9 The Consultation also considered demand side characteristics of PRS, which are re-stated below. These, in combination with the supply side characteristics, are critical in correctly assessing the risks of consumer harm from particular services.
- 3.10 **Experience goods:** PRS could be described as experience goods: consumers are only able to ascertain the quality of a PRS at the point at which it is consumed. Consumers may, therefore, not be able to make choices based on full information.¹⁹ Furthermore, if reputation is not very important PRS suppliers may have incentives to provide low quality or high price services as the consequences of doing so may not impact upon them - for example if consumers rarely repeatedly purchase a particular PRS and consumers are not aware which supplier is offering the PRS. Services such as digital content are typically 'consumed upon purchase', which means that they are exempt from some provisions of the Consumer Protection (Distance Selling) Regulations 2000 in respect of the right to cancel.²⁰
- 3.11 **Bill-supply separation:** Consumers access and pay for PRS via their fixed or mobile OCP but the service is likely to be supplied by a third party, an SP, along with an IP. Consumers may not always be aware of the identity of the SP and/or IP, and the identity of the SP and/or IP might not be visible to the OCP either, as the number of parties involved in the provision of a PRS can be extensive, and there are not always direct commercial relationships between all parties involved in the supply of a PRS. If consumers are dissatisfied with any aspect of the service (e.g. promotion, quality of service, charge), they might therefore find it difficult to identify and contact the party who is responsible for the part of the service with which they are dissatisfied.²¹ Furthermore, suppliers can exploit the complexity of the supply chain to shift the responsibility to other SPs and/or IPs further down the supply chain and avoid responsibility for resolving consumer complaints. This would affect a consumer's ability to obtain information or advice, to identify the right party to complain to, and ultimately to seek redress. In many cases, consumers may not be able to seek redress from their OCP, as it is not usually the direct provider of the PRS in issue.

¹⁹ Although consumers could be familiar with the quality and the price of the services through repetitive use or based on information from third parties (e.g. friends, relatives, websites).

²⁰ Regulation 13 - Exception to the right to cancel; paragraph (1)(c).

²¹ PhonepayPlus operates a PRS number checker, which can be used by consumers trying to identify the supplier of a PRS. In 2007-8 the number checker received over one million hits.

- 3.12 **Communications provider bills consumer:** PRS are paid for via the consumer's OCP's bill (or via pay-as-you-go credit). This means that the total charges for the service will only become apparent after the event, and if the consumer receives an itemised bill that clearly identifies individual PRS. This is not the case for all consumers. Those consumers accessing a PRS through a pay-as-you-go mobile phone may find it even more difficult to identify charges for PRS. Similarly, the identification of charges for the service can be difficult for contract customers who do not receive a fully itemised bill which could require payment of extra charges or where there are barriers to overcome in order in accessing the bill, e.g. when the bill is only available electronically. Therefore, some consumers may never be fully aware of the charges incurred for a particular service. Since PRS prices vary by SP and also by OCP, often consumers do not know the price prior and even post purchase.
- 3.13 **Relatively low expenditure per transaction:** The services provided are often of relatively low value for a single transaction. Although these prices are higher than the price of most ordinary telephone calls, they are still relatively low compared to many other purchases that a consumer may make. Therefore, consumers may only invest a limited amount of time and effort to assess the purchase of a particular PRS and may not consider it worthwhile to shop around. Equally, consumers may not consider it worth the effort to make a complaint about an individual PRS if they were not satisfied with the service. Should the consumer make a complaint, they may not be very likely to pursue it to its conclusion and may refrain from using PRS in the future, to the detriment of the PRS industry as a whole.
- 3.14 **Impulse purchase with an easy sales process:** In the absence of an authentication process consumers can easily purchase a service without necessarily considering the implications. For example, if a consumer had to use a credit card to vote on a TV programme, providing their credit card details, security code and billing details, they may not take the effort to do so. The simplicity of the sales process could result again in consumers not making the effort to check and understand the charges that they will face for a PRS when making such an impulse purchase. Many PRS are marketed to promote impulse purchases by consumers, for example, mobile phone ring tones can be marketed as fun, "must have" services and similarly, television viewers are encouraged to take part by voting for a favourite act.
- 3.15 **Inappropriate or offensive content:** Some services provide content that may be considered offensive to a wider audience, including minors. Consumers could inadvertently access content that they would find offensive. Similarly, children could gain access to content not deemed appropriate for their age, such as sexually explicit adult services.
- 3.16 **Appeal to children:** A significant segment, though certainly not all of the PRS presently offered, are marketed to or may appeal to children.²² Ring tones and games, for example, are particularly popular with younger consumers. Many children have their own mobile phone and children now make up a significant part of consumers of the market for certain PRS.²³ Furthermore, children are unlikely to use a credit card to make certain purchases, which is why the payment mechanism for PRS may be attractive to them. Children may be more likely to enter into impulse

²² PhonepayPlus commissioned market research for its recent review of mobile phone-paid services. In discussing that research it noted that: "children are more likely to use phone-paid services than adults in each socio-economic group" - Mobile phone-paid services and their Marketing, PhonepayPlus, July 2008, paragraph 3.2.

²³ As set out in more detail on page 11 of the Analysys-Mason report commissioned by PhonepayPlus.

purchases without being sufficiently well informed or capable of making informed decisions about the purchase of a PRS, and may be more susceptible to scams and misleading advertising. Appeal to children would exacerbate the potential for the other demand side characteristics outlined above to cause harm.

Responding to comments on the PRS characteristics

- 3.17 We asked stakeholders to comment on whether we had correctly identified the supply and demand side characteristics of PRS.

Question 4.1: Do you agree with our analysis of the characteristics of the PRS supply side and the possible concerns related to these characteristics?

Question 4.2: Do you agree with our analysis of the demand characteristics of PRS? Do you think there are additional characteristics which are not included in our analysis?

Stakeholder comments

Supply Side Characteristics

- 3.18 Many respondents felt that it is important to first define PRS (rather than describe the supply chain) and then to consider whether there are characteristics present likely to cause consumer harm. For example, MBG said that the scope of PRS should be defined by the PRS mechanism and that Ofcom should then determine the level of regulation that applies.
- 3.19 Respondents expressed a range of views on the supply side characteristics. Several, including BT, Consumer Focus, the MDA and 2Ergo, agreed with Ofcom's analysis. Others disagreed with specific aspects. For example, AIME argued that the supply chain is not necessarily complex. C&W noted that it acts as both the TCP and a SP in respect of directory enquiries. GMTV, the BBC and RadioCentre said that the Consultation's description did not reflect the broadcasting supply chain where the barriers to entry and exit are not low, broadcasters care about their reputation, and consumers will contact broadcasters directly for redress.

Demand Side Characteristics

- 3.20 Many respondents agreed with the identified demand side characteristics, including BT, C&W, GMTV and Invomo. Consumer Focus noted that lack of visibility around price and the supplier's identity is a key aspect that gives rise to harm.
- 3.21 Others, such as the MBG and the PRA, argued that the characteristics are not sufficiently unique to PRS and could apply to a range of retail transactions. They argued that Ofcom needed to identify the unique features of PRS when considering the scope of regulation. As with the supply side characteristics, there was some uncertainty as to how Ofcom would use the characteristics.
- 3.22 3 and the MBG felt that there were inconsistencies in Ofcom's approach to fixed and mobile regulation, particularly with regard to audiovisual content that is provided, branded and billed by the network provider. AIME considered that a lack of price transparency only arose in the range of tariffs charged by fixed and mobile operators for long-dial PRS numbers. The RadioCentre said that PRS is a market for 'frivolous', non-essential goods and that any harm needs to be placed in context, with many consumers likely to understand the risks of the services. The PRA argued that bill-

supply separation is not a problem if the identity of the supplier is known. 3 said it was important to note that direct-to-bill services do not create concerns about pricing as the consumer knows the cost before making a purchase, in contrast with calls that are of an undetermined length.

Ofcom response

- 3.23 We agree that, in considering the scope of PRS, our starting point should be to first define PRS. This is achieved by means of the definition of PRS in section 120 of the Act, which sets the basic parameters for the regulatory regime. The PRS Condition then defines 'Controlled PRS'; services which are subject to specific regulation under the Code. The justification for such regulation is that Controlled PRS have particular features, including some or all of the characteristics that we identified, that raise a risk of consumer harm.
- 3.24 We acknowledge that there is no single transactional model for PRS and that scenarios other than those that we have described will exist. The list of supply and demand side characteristics is not intended to be exhaustive and will not be present for every PRS. For example, we recognise the point made by broadcasters that they may be particularly incentivised to protect their brand and reputation. We would note, however, that in recent years there have been serious failures by broadcasters in their use of PRS which have served to underline the importance of regulation in this area.
- 3.25 As the Consultation noted, a combination of one or more of the PRS characteristics listed above could lead to consumer harm, particularly in the absence of effective regulation. Different types of PRS and indeed Controlled PRS have different characteristics and therefore give rise to differing levels of potential consumer harm.
- 3.26 We agree with the comment made by MBG that regulation should reflect these differences appropriately. However, a judgment on whether a service is regulated through the PRS Condition will always be a binary decision and any tailoring of the rules to reflect that some services are of lower risk is a matter for PhonepayPlus to subsequently consider when establishing rules through its Code. We note PhonepayPlus currently takes into account the particular risks posed by services and, for example, has specific rules for PRS that have an appeal to children or that involve potentially offensive sexual entertainment.
- 3.27 Having considered all the consultation responses, we remain of the view that the characteristics we identified in the Consultation continue to be appropriate. We accept however, that the characteristic that the 'communications provider bills the consumer' is a feature that is inherent in the definition of PRS under the Act and that the associated risks of harm will therefore be present for all PRS falling within the scope of Section 120 of the Act. As such it will not be a relevant feature when considering whether any specific PRS is likely to give rise to risks of consumer harm, as discussed in the following section.

Section 4

An Analytical Framework for Regulating PRS

Introduction

- 4.1 The Consultation was intended to spark a policy debate about the characteristics of PRS that give rise to the need for PRS regulation. We proposed using these characteristics to develop an analytical framework that could take into account relevant market changes and could be used as a reference point for examining whether particular services required regulation.
- 4.2 The Consultation noted that some preliminary options for utilising the analytical framework could result in:
- Revisions to the PRS Condition and specifically Controlled PRS, which may extend or, alternatively, withdraw regulation of particular services, based on, amongst others, considerations of proportionality;
 - Recommendations to PhonepayPlus to amend their Code which may include proposals for sector specific guidance; and
 - Considering potential recommendations from Ofcom to BIS²⁴ (formerly known as BERR) for changes to the legislative framework for PRS regulation if in our view the current regulatory framework is not sufficiently robust or effective.
- 4.3 We have concluded that the analytical framework should be based on an assessment of the potential for consumer harm, with reference to the characteristics of PRS that we have identified above. We will use this framework to assess whether the definition of Controlled PRS in the PRS Condition remains appropriate. We would also be likely to have regard to the framework in any future discussions with BIS regarding section 120 of the Act. In this section of the Statement, we set out our conclusions regarding the analytical framework and the next steps we intend to take.

An analytical framework for assessing the risk of consumer harm

- 4.4 Under the Act Ofcom's principal duties in carrying out their functions are:
- to further the interests of citizens in relation to communications matters; and
 - to further the interests of consumers in relevant markets, where appropriate by promoting competition.
- 4.5 In performing these duties under the Act, amongst others, Ofcom is required to have regard to ensure that regulatory activities are applied transparently, proportionately, consistently and targeted only at cases in which action is needed. It is important to ensure that in light of the dynamic nature of the PRS market, PRS regulation (applied through the definition of Controlled PRS) continues to capture those categories of PRS that are likely to give rise to the risk of consumer harm and that should be subject to PhonepayPlus' Code of Practice.

²⁴ Department for Business, Innovation and Skills.

- 4.6 An analytical framework, which takes account of market changes and reflects the risks of consumer harm resulting from the characteristics of PRS on both the supply side and demand side, provides us with a useful tool in assessing whether there is a need to amend the PRS Condition. This in turn helps to ensure that PRS regulation is applied transparently, proportionately, consistently and targeted only at cases in which action is needed. We have previously widened the scope of the PRS Condition to include a number of services, such as internet diallers and 0871 numbers. We will use the framework set out below to inform our consideration of whether to make any future amendments.

We intend to examine the extent to which a particular service or service category carries risks of causing consumer harm. Specifically, we will consider whether:

- The consumer's Originating Communications Provider is the actual supplier of the PRS.
- There is a complex, fragmented value chain, with large numbers of suppliers operating at different levels in the chain.
- Barriers to entry and exit are relatively low at the Information Provider level.
- Consumers are only able to ascertain the quality of the PRS at the point at which it is consumed.
- The price of the PRS is relatively low potentially discouraging consumers from seeking redress.
- The purchase process involves little or no authentication, thus encouraging consumers to purchase on impulse.
- The PRS is likely to involve inappropriate or offensive content.
- The PRS is likely to be marketed to children or to have a particular appeal to children.

- 4.7 We will consider whether a combination of these features (and the available evidence) suggests that the PRS could cause consumer harm. It is these considerations that Ofcom will need to be mindful of should it consider rolling back or extending PRS regulation in certain areas.
- 4.8 We provide some examples below of how different combinations of the characteristics may potentially cause consumer harm. We have sought to include the most likely cases but they are not intended to comprise a definitive or exhaustive list as the characteristics may give rise to other harmful consequences.
- 4.9 Consumer harm can arise when consumers pay higher prices, services are of lower quality and/or there is less innovation in the market because of the impact of some demand and supply features. This harm may arise because of both a market failure,²⁵ but also if there is regulatory failure²⁶ – for example, it is particularly

²⁵ Market failure arises when the market left to its own devices will not lead to the best outcome for consumers and suppliers. This could be the case, for example, when some suppliers may have

important that PRS users have access to an effective way of redress if things go wrong.

- 4.10 As PRS are experience goods, consumers may need to seek redress more often than for other types of communications services, particularly as they may not have information about the quality of the service at the time of purchase. However, if something goes wrong the complexity of the value chain can make it difficult for consumers to identify who in the supply chain is responsible for the cause of complaint. Furthermore, even if there was a clear process to make a complaint, the low expenditure per transaction could discourage consumers to seek redress. This does not mean that the total amount of harm will be limited. Although the level of harm may be small for each transaction on average, it may be substantial overall given the large number of PRS transactions.
- 4.11 The fact that many PRS are experience goods, coupled with difficulties consumers face in seeking redress, can provide incentives for certain PRS suppliers to provide low quality and/or high price services to consumers or at the extreme, engage in scams and fraudulent practices. This may have important implications that could increase the potential for consumer harm in the long run. In the absence of specific PRS regulation, the inability of SPs to effectively communicate precise price information to consumers could also provide incentives to some OCPs to increase their prices. If redress is costly and ineffective, consumers may subsequently be discouraged from using PRS. This could lead to consumer harm.
- 4.12 Even when consumers have access to an effective redress mechanism, they may not know whether they have grounds for complaining. For example, they may not know who is responsible for failure to deliver the service or the poor quality of the service. They may also not know whether they have been overcharged for the service. The fact that PRS are experience goods, that there is separation in the billing and supply of the service, and that often it is difficult to understand how much consumers have been charged for the service could all potentially lead to consumer harm.
- 4.13 Harm can also arise if consumers inadvertently access inappropriate and offensive content and these concerns are heightened where children may be able to access such services. The fact that PRS are impulse purchases with an easy sales process makes this a particular concern.
- 4.14 If PRS specific regulation was not fully effective, a ‘vicious circle’ may arise. The risk is that in such a situation there could be incentives for SPs and IPs to engage in frauds or scams. Less extremely, OCPs may have incentives to increase prices in the absence of price information easily available to consumers. Lastly, because of the experience good nature of PRS, SPs and IPs may have incentives to provide lower quality services. As a result, low quality (in the extreme case, fraudulent) and high price suppliers may crowd out good quality SPs and IPs. As a consequence, consumers could become more and more reluctant to use PRS. This could lead to a situation that would prevent both SPs and consumers from benefiting from a viable PRS sector.
- 4.15 Our application of the analytical framework is not intended to be a ‘tick box’ exercise. Rather, we will take the above considerations in the round to assess the likely risk of

market power, when there is imperfect information or in the presence of externalities. Other types of market failure – e.g. public good or merit good – are unlikely to be relevant for PRS.

²⁶ Regulatory failure arises when public intervention is unwarranted, or even when appropriate, it is subject to errors that significantly reduce its benefits.

consumer harm and inform our overall position on a type of PRS. One way to measure this risk for existing services will be to consider the extent to which the PRS in question has previously caused consumer detriment (this is likely to be through an examination of consumer complaints to PhonepayPlus), and for new services we are likely to consider how PRS with broadly similar characteristics have given rise to harm in the past.

Our discussion in the Consultation of potential and actual consumer harm

- 4.16 In the Consultation, we discussed the consumer harm that could arise from PRS where PRS-specific regulation is insufficient or ineffective. As noted above in paragraphs 4.8-4.14, the risks of harm include consumers paying higher prices than expected, services being of a lower quality, reduced innovation in the market, difficulties encountered by consumers seeking redress, consumer access to inappropriate and offensive content, and providers behaving in an opportunistic manner (including the potential for scams).

Question 4.3 Do you agree with our assessment of the potential consumer harm in a situation where PRS regulation is insufficient or ineffective?

Question 4.4 Do you agree with our assessment of the potential and actual consumer harm in respect of PRS?

Stakeholder comments

- 4.17 Most respondents (including AIME, 2ergo, BBC, FleXtel, the Mobile Data Association and one confidential submission) agreed with our assessment of the harm that could occur if PRS regulation was ineffective. Only two respondents disagreed with Ofcom's analysis. Channel 4 noted that, by virtue of the Broadcasting Code and their licences, broadcasters have procedures in place that would minimise the risks of harm from their use of PRS, regardless of whether there is also a specific PRS regulatory regime. RadioCentre submitted that Ofcom needs a greater sense of proportion in its analysis and needs to recognise that the market for PRS is a market for low-value, non-essential services, where consumers are able to evaluate the potential risks of harm. RadioCentre considered that the regulator should therefore focus its resources on those parties who are deliberately causing consumer harm.
- 4.18 Although there was broad agreement about the potential for consumer harm to occur from PRS, there was no consensus on the nature/scale of the harm that was actually occurring under the PRS regime. 2ergo, Consumer Focus, C&W and the Mobile Data Association all agreed with Ofcom's assessment of the potential and actual harm in respect of PRS. BT agreed with Ofcom, but considered further steps could also be taken to minimise harm, including PhonepayPlus awarding more automatic refunds, and providing PhonepayPlus with greater flexibility to order TCPs to withhold revenue from their clients once an investigation has been launched.
- 4.19 A range of opinions were expressed by respondents who disagreed with Ofcom's assessment of potential and actual PRS harm. AIME acknowledged there are areas for improvement, but was concerned by what it considered to be a failure by Ofcom to contextualise the scale and significance of PRS problems. A similar view was expressed in three confidential submissions, with the respondents all suggesting that the current regime was clearly effective, as evidenced by the significant drop in complaints to PhonepayPlus.

Ofcom response

- 4.20 We are satisfied that we have appropriately assessed the risks of consumer harm from PRS. These risks primarily stem from the characteristics of PRS that were discussed above, and are sufficient to justify the need for a specific PRS regulatory regime. We will however continue to examine, through the application of the above analytical framework, whether the regulatory regime remains appropriate for specific services.
- 4.21 Our discussion in the Consultation of the range of possible and actual harm from PRS was not intended to imply that the regime was deficient and that urgent initiatives were needed. Indeed the Consultation explicitly noted that we thought the regulatory regime to be robust and that it is having a direct impact on reducing consumer harm. We do consider however, and were supported on this by the majority of respondents, that in the absence of specific PRS regulation it is highly likely that generic consumer protection regulation would inadequately protect consumers from the harm from PRS.
- 4.22 It is certainly true that some services give rise to greater risks of potential consumer harm than others. We acknowledge the point made by Channel 4 that broadcasters are to some extent unique, as they have specific obligations that are imposed on them that exist independently of PhonepayPlus' Code. However, the peculiarities of specific services are matters that should be taken into account when considering whether a service should be subject to the regulatory regime (as discussed above), not whether the PRS regime as a whole can be justified.
- 4.23 In the Consultation we also sought views on the appropriateness of self-regulatory schemes as an alternative for PRS regulation. Stakeholder responses and our position can be found in Annex 2 of this Statement. The Consultation also discussed a number of services by way of example, in light of the characteristics of PRS. In Annex 3 we summarise stakeholders' comments and Ofcom's comments in response.

Applying the analytical framework

- 4.24 We intend to apply the analytical framework to PRS where we think the status quo may not be sufficiently protecting consumers, or where we think regulation may no longer be necessary. While exemption from regulation may be attractive to some stakeholders, we require high standards of evidence prior to making regulatory changes and will adopt a prudent approach that places the welfare of consumers at the forefront of our analysis and in accordance with our statutory duties.
- 4.25 If we then conclude that the PRS Condition requires amendment (to either narrow or widen the Condition), we will consult publicly, with reference to the above analytical framework.
- 4.26 It is important to note that we are not adding an additional layer of regulation or process by applying this analytical approach. Rather, we are simply clarifying the relevant considerations and ensuring consistency in our assessment of whether the definition of a 'Controlled PRS' in the PRS Condition remains appropriate. We have taken on board stakeholders' queries regarding how we intended to use the PRS characteristics that we identified and trust that this section of the Statement clarifies matters.

Section 5

Improving Current PRS Regulation

Introduction

- 5.1 As we said in the Consultation, the current regulatory regime is functioning well and PhonepayPlus has acted swiftly to address specific problems that have emerged over the past few years. However, there is the potential to further refine the existing regulatory framework to better protect consumers. We discuss these measures – and stakeholders’ comments – in this section, and also set out what we intend to do and our recommendations to PhonepayPlus.
- 5.2 As part of the process of considering what refinements or additions could be made to the regulatory regime, we articulated in the Consultation four outcomes that we would like to see in PRS markets:
- i) Consumers should be able to purchase PRS with confidence, with this confidence supporting a vibrant and healthy PRS market;
 - ii) Consumers should be confident that when they purchase a service they know (and can find out with relative ease) what price they are paying for that service, including whether it is a one-off purchase or whether they are purchasing a subscription service;
 - iii) To the greatest extent possible, consumers should be able to understand the quality and facets of that service. The service should function in the way that it is represented to the consumer and as part of that, it should be possible for the consumer to terminate a service without unnecessary delay and complexity; and
 - iv) When a consumer pays for a PRS they should receive the service they purchased.
- 5.3 In order to achieve these outcomes, we identified several broad areas where further regulatory impetus was likely to be needed. The specific concerns we had are discussed fully in paragraphs 4.46 - 4.73 of the Consultation and focused on:
- facilitating consumers to make informed purchase decisions;
 - facilitating effective consumer redress; and
 - enabling suppliers in the PRS market to act responsibly.
- 5.4 We have carefully considered the comments of stakeholders and have proposed a number of actions – some of which would need to be implemented by PhonepayPlus (subject to consultation) when it revises its Code of Practice and others that will be addressed by Ofcom as part of a longer term programme of work.

Facilitating consumers to make informed decisions

- 5.5 Consumers want to be able to purchase a service that meets their needs, knowing the price that they will pay for the service and what it is that they will receive. To be able to do this, consumers need some basic, readily accessible and user-friendly information about the nature of a particular service to be able to decide whether to

purchase one service in preference to another or indeed whether to make a purchase at all.

- 5.6 The price of the service is typically a key factor for a consumer in making a purchase decision. To ensure that consumers receive accurate pricing information for PRS the current regulatory regime imposes obligations on different parties:
- Service Providers must ensure that all users of premium rate services are ‘fully informed, clearly and straightforwardly, of the price of a service prior to incurring any charge’;²⁷ and
 - Originating Communications Providers must publish the tariffs that apply on their network for calls to any PRS number range.²⁸
- 5.7 Despite these obligations, we have concerns that consumers are still unable to easily determine the price they will pay for certain PRS. Indeed, in the Consultation we noted that ‘a lack of price transparency remains the major problem today in the PRS market’.
- 5.8 Our primary concerns are with the transparency of prices for 09 calls. Although calls to a specific 09 number will be terminated by one TCP, the retail price for that number is ultimately a matter for each originating operator to determine – meaning that consumers on different networks will be charged at different rates for the same service. Our evidence is that the prices for these calls can vary substantially.
- 5.9 While having a range of prices for a particular good/service is not problematic in itself, uncertainty and a lack of transparency can lead to consumer harm. This may particularly be the case if the advertised rate for a PRS bears little correlation with the actual price that a consumer will be charged.
- 5.10 The Consultation outlined market research indicating that uncertainty about the price of 09 calls is likely to be causing consumer detriment.²⁹ This research demonstrated that approximately a third of consumers thought that current information given in promotions for PRS was of little use to them in calculating the price of a call. Around a third of consumers also reported receiving higher than expected bills for PRS, with this experience being more common amongst those that spend more (52% of consumers spending more than £20 a year commented that their bill was higher than expected, compared with 28% of consumers spending less than £20 a year).
- 5.11 It is also pertinent to note that of those market research respondents that reported not using PRS in the past 12 months, 73% reported that it was because they were worried that they might be overcharged.³⁰ It is likely that a lack of price transparency or at least a lack of trust and confidence in the pricing of PRS is a factor. The reluctance of consumers to use PRS because of concerns about pricing further supports our view that there is a problem with pricing transparency in the PRS industry.
- 5.12 We acknowledge that the regulatory obligations described above at paragraph 5.6, may not in themselves ensure that consumers receive appropriate and easy to

²⁷ PhonepayPlus 11th Code of Practice, Rule 5.7.1.

²⁸ General Condition 14.

²⁹ See Annex 7 of the Consultation, www.ofcom.org.uk/consult/condocs/prs_scope/annex7.pdf.

³⁰ It should be noted that only 28% of this group said that they were likely to use PRS even if they could be sure how much they would cost.

understand pricing information, and that this is a problem that cannot be solved by greater enforcement of the current regulations alone. Given the wide range of retail tariffs for each PRS, SPs are unable to convey the true cost of an 09 PRS to an individual consumer, while many OCPs publish tariff information in a manner that is of little practical use to the average consumer (e.g. tariff tables that are up to 200 pages long).

5.13 The Consultation suggested three main areas for improving pricing transparency:

- i) Requiring all originating providers to offer the same retail tariff to a PRS number;
- ii) Examining introducing pre-call announcements for PRS; and
- iii) Strengthening advertising obligations for PRS.

Setting retail price points

5.14 The Consultation noted that amendments to the European Framework on Electronics Communications Networks and Services² are currently being discussed which, if enacted, could provide support for any future moves for each PRS to have a standardised price. In particular, the proposals state that national regulatory authorities such as Ofcom would be able to specify the maximum prices that can apply for specific number ranges for consumer protection purposes. The timing for approval of the revised European Framework remains uncertain and the current proposals, if adopted, are unlikely to come into force in national law until the end of 2010 at the earliest.

5.15 Given concerns about pricing transparency we wanted to test initial industry views on the merits and practicalities of any future move to change the way that tariffs are set for PRS (particularly for 09 numbers).

Question 6.1: Do you consider there is a consumer benefit requiring all OCPs to offer the same retail price to a PRS number?

Question 6.2: If you do believe there is a consumer benefit, do you have suggestions as to how this option could be implemented?

Question 6.3: Do you consider this option could have any negative side-effects? If so, which ones?

Stakeholder comments

5.16 Stakeholder views were fairly evenly split on whether there was merit in requiring communications providers to offer the same retail price for an 09 PRS.

5.17 Consumer groups, the content industry, and fixed line operators were generally supportive of a move to standardise retail prices (including Consumer Focus, the Premium Rate Association, Cable & Wireless, the Mobile Data Association, BT, Channel 5, and GMTV). These respondents considered that allowing PRS providers to set the retail rate for their service would remove any confusion that existed today about pricing and would result in a dramatic reduction in complaints about 09 services. Several content providers expressed their frustration at not being able to communicate the price of their service to their customers.

5.18 Opposition to any move to cap retail prices for 09 calls stemmed largely from the mobile operators and included the Mobile Broadband Group, Orange, Vodafone, 3,

FlexTel, the RadioCentre, as well as two confidential submissions. These respondents typically challenged Ofcom's assertion that pricing uncertainty is causing consumer harm, with many respondents noting that this claim was sourced from consumer research rather than an examination of complaints to PhonepayPlus. Respondents also noted that Ofcom's research demonstrated that consumers were aware they could locate the actual price for an 09 call if they wanted to.

- 5.19 A key theme of submissions opposing the idea of capping 09 rates at a level determined by the PRS provider was that any intervention into retail pricing would be a backward step for competition. Several respondents queried whether Ofcom should instead look to enforce existing pricing obligations on OCPs and SP/IPs to provide consumers with accurate pricing information.
- 5.20 Where respondents considered how such an option could be implemented, they generally favoured the introduction of a number of narrow price bands for 09 sub-ranges, where an IP would choose the price range for their service and all OCPs would be bound by the price ceiling for that number. Orange submitted that if Ofcom was to impose price caps it would be only natural for tariffs to cluster around the price ceiling.
- 5.21 Several respondents noted that introducing price caps for certain number ranges could have the unintended effect of increasing prices – although the IP could choose the price band for their service, each OCP would still be able to choose the proportion of the cost that they want to retain, potentially forcing the IP to increase prices from where they would otherwise fall.

Ofcom response

- 5.22 As we indicated in the Consultation, the purpose of including questions on retail price bands was simply to canvass initial views should the matter be examined in detail at some stage in the future. We do not yet have a view on whether the problem of pricing transparency is of such a magnitude as to justify such an intervention, and have not yet considered the possible consequences should retail price caps be introduced. We are grateful for stakeholder submissions on this option; these were informative and will help guide future Ofcom policy.
- 5.23 We intend to examine the merits of introducing retail price measures for the 09 number range in a wider Ofcom examination of the Number Translation Services (NTS) framework. This review will consider whether the NTS market is working efficiently for suppliers as well as consumers and whether the current NTS framework is providing sufficient consumer protection (through for example, pricing transparency).

Pre-call announcements

- 5.24 The Consultation outlined Ofcom's support for undertaking a study into whether pre-call announcements (PCAs) should be mandated for PRS. The Consultation noted that PCAs are favoured by consumers for receiving further pricing information, but that PCAs are technically very complex and costly to introduce. In addition, there is a risk that if PCAs were introduced, certain automated calling services (such as burglar or lifeline alarms) could be caused to fail.³¹

³¹ Ofcom has previously recognised this risk, deciding not to go ahead with introducing PCAs on the 070 and 0870 number ranges.

- 5.25 Stakeholders were asked to provide their views on whether PCAs would improve pricing transparency and whether Ofcom should undertake further work in this area. Stakeholders were also specifically asked whether they were aware of any automated services operating on 09 numbers.

Question 6.4: Do you consider PCAs would improve price transparency in the PRS market?

Question 6.5: Do you consider Ofcom should carry out such a study? If so, which aspects should such a study cover?

Stakeholder comments

- 5.26 Of those respondents who commented on the merits of PCAs, nearly all acknowledged that the facility would improve pricing transparency, albeit many expressed very strong reservations about whether PCAs should actually be introduced. The key reservations were expressed by network operators who considered that any requirement for PCAs to state the actual price for each individual PRS (i.e. the retail rate charged by the OCP for that specific service), would mean that the costs would be disproportionate to any consumer benefits.
- 5.27 Thirteen respondents supported Ofcom undertaking a study into the practicalities and merits of introducing PCAs. The key considerations that respondents wished to be explicitly examined, if any study into PCAs was to be conducted, were:
- The details of an announcement, i.e. whether PCAs should be required to state the actual tariff of the originating network, or whether some other statement would be satisfactory (e.g. 'calls from mobiles may cost considerably more');
 - With whom responsibility for the PCA should rest – the originating or terminating network;
 - The technical capabilities of networks to implement PCAs;
 - The likely costs of implementing PCAs;
 - The likely benefits and negative effects that PCAs would have on consumers;
 - Whether the introduction of PCAs would have an impact on retail tariffs;
 - The impact PCAs may have on automated services;
 - The impact that PCAs would have on time-critical services;
 - Whether PCAs should be mandatory for all PRS or whether some flexibility should be introduced, e.g. whether consumers should have the option to 'opt out' or to 'opt in', whether they should only be applied to higher-risk or more expensive services, or whether PCAs should only be mandatory where the OCP charges a rate that differs from the charge advertised by the SP/IP;
 - Whether it is practical to implement 'pre-call labelling' whereby consumers can dial an alternative number (or dial * before the number) to receive a free announcement about the price of the PRS in question; and

- How PCAs can be implemented where a CP is originating calls on behalf of resellers and is unaware of their retail tariffs.
- 5.28 Three respondents considered that PCAs were so unpractical that it was not worthwhile to examine the matter any further. These respondents noted that implementation would be too complex and costly given that there are thousands of PRS, each of which may have hundreds of CPs providing access – with each CP having different tariffs for different customers, which may vary depending on unique circumstances such as the time of the day that the call was made. It was also suggested that Ofcom could never be completely satisfied that there are no automated lifeline services operating on the 09 number range.
- 5.29 Other relevant points raised by respondents included the need to consider the costs of bi-lingual PCAs, particularly for Welsh broadcasters, and the need to consider the potentially damaging impact that PCAs could have on some services, particularly if any requirement for PCAs was extended beyond 09 services to the DQ market.

Ofcom response

- 5.30 As with the issue of retail price caps, it is our view that the introduction of PCAs cannot be considered in isolation and is best examined as part of a wider review of the NTS framework. To the extent that pricing transparency on 09 numbers is confirmed to be causing consumer detriment, this workstream will consider a number of possible solutions, including the relative merits of introducing PCAs.
- 5.31 There is still considerable uncertainty about the practicalities and costs of introducing PCAs and we intend to commission a feasibility study of the possible introduction of PCAs on the 09 number range. The terms of reference for this study will take into account the issues raised by respondents (summarised above in paragraph 5.27). The results of this study into the implementation of PCAs will subsequently feed into the wider NTS review as part of a cost-benefit analysis of different options.
- 5.32 Although no respondent could identify an automated service that was operating on the 09 number range, there appears to be a risk that Ofcom will not be able to satisfy itself that the introduction of PCAs will not interfere with the operation of automated services. We would therefore need to understand fully the extent of this risk as we explore the viability of PCAs further.

PRS advertisements

- 5.33 The Consultation proposed that PhonepayPlus should amend its Code of Practice to strengthen the requirements on what pricing information should be contained within PRS advertisements. Specifically, we proposed the possibility of introducing a requirement to "require every advertisement to contain the BT price and the maximum price that may be charged by an OCP, including naming that OCP".
- 5.34 Currently there are two broad obligations on SP/IPs regarding the pricing information that must be conveyed to consumers in PRS advertising:
- The PhonepayPlus Code of Practice requires Service Providers to 'fully inform' consumers about the charge for a service.³² PhonepayPlus' Help Notes state that "while consumers may have a general awareness that calls from mobile phones

³² PhonepayPlus 11th Code of Practice, Rule 5.7.1.

and some landline networks may cost more than others, it is necessary to include information in the promotional material stating this fact.”³³; and

- Under the Broadcasting Code broadcasters need to inform viewers that calls from mobiles may be significantly more expensive than the benchmark BT price.³⁴
- 5.35 The Consultation noted that although PhonepayPlus requires Service Providers to ‘fully inform’ consumers about the cost of a PRS, it is not realistic to expect them to inform users of the price charged by every single communications provider. We noted that requiring PRS advertising to state the maximum tariff for the service would better inform consumers about the maximum charge they would face, while including the name of the OCP may place some downward pressure on prices by effectively ‘naming and shaming’ the highest charging provider.
- 5.36 We did however note that this option would only provide a limited degree of pricing transparency, that there may be costly compliance costs, and that OCPs may now have an incentive to raise their prices to the highest advertised price.

Question 6.6: Do you consider including BT’s tariff and a maximum tariff for the PRS in PRS advertisements would improve price transparency in the PRS market?

Question 6.7: Do you consider the name of the OCP with the highest tariff should be included?

Question 6.8: Do you consider there are any additional implications linked to this option, apart from the ones we have set out above?

Question 6.9: Could you provide us with an estimate of cost information regarding the collection and updating of tariff information (for SPs and OCPs)? Do you believe there are any other costs involved under this option?

Stakeholder comments

- 5.37 There was near unanimous opposition to this proposal to require PRS advertising to state the maximum price for the service and to identify the OCP who is charging that rate.
- 5.38 The key points made by those opposing this proposal included:
- the proposal would involve substantial compliance costs as IPs would need to continuously monitor the various tariffs being offered for their service;
 - as retail prices change very frequently, this proposal could dramatically reduce the shelf-life of advertising campaigns;
 - there would be implications for pre-recorded programmes, with broadcasters being unable to guarantee that the pricing information would be accurate when the programme aired;
 - the proposal was likely to encourage OCPs to increase their prices to the maximum tariff (or thereabouts);
 - the proposal would not necessarily improve pricing transparency, as the OCP with the highest price may only have a very small customer base;

³³ Help Note on Pricing Information, Version 1: November 2006.

³⁴ Guidance Notes, Section 2: Harm and Offence, p10 (as at September 2009).

- consumers may refrain from using PRS as they may assume that they would be charged the highest price;
 - no definitive list of CPs exists, so it would be impossible for an IP to be certain that they have complied with the requirement to identify the highest pricing OCP, or for Ofcom to enforce compliance;
 - this proposal would result in too much information being included in advertisements and may lead to consumer confusion; and
 - several respondents noted that this proposal would place the burden for informing consumers on SP/IPs when the problem with a lack of pricing transparency is caused by OCPs.
- 5.39 Several respondents also commented that the BT price is becoming less relevant to consumers and Ofcom's insistence that it should be referred to in advertising was unfair. It was claimed that the continuous reference to the BT price was akin to a 'stamp of approval' and was inappropriate for the regulator to require in a competitive market.
- 5.40 Both Channel 4 and GMTV argued that the current approach in broadcasting is effective and that there was no need to introduce even more stringent obligations. Cable & Wireless and the RadioCentre submitted that Ofcom should instead consider extending to the rest of the PRS industry the requirement that broadcasters have to inform consumers that "calls from mobiles will cost considerably more".
- 5.41 Support for this proposal was limited. Consumer Focus considered that it may provide incentives for OCPs to increase their prices and submitted that Ofcom should go further and require PRS advertising to state the prices charged by BT, the five main mobile networks, and mobile virtual network operators. The Premium Rate Association supported the proposed obligation only in the event that Ofcom decided not to cap retail rates for 09 PRS.

Ofcom response

- 5.42 We included this proposal for a new advertising obligation in the Consultation as it has previously been suggested as a possible means of increasing price transparency and at first glance it does appear attractive. We considered the Scope Review provided a good opportunity to explore it further. However, we recognise that there are significant drawbacks with this approach and we do not intend to pursue it further in the near future.
- 5.43 While including the maximum price in PRS advertising would caution consumers as to the highest cost they may face, this information may not be particularly useful to many consumers. Consumers using an OCP other than BT or the most expensive operator would be left with a wide range of possible tariffs. Furthermore, there is a risk that the information provided may mislead consumers, particularly if the highest priced OCP has a very small customer base.
- 5.44 In any event, it is evident that the compliance costs from implementing such a proposal would be disproportionate to any possible consumer benefit. As stakeholders have pointed out, an IP would have to continuously monitor the prices that hundreds of OCPs were charging for their service and amend advertising campaigns should the advertised prices no longer be accurate. We are also persuaded to discount this proposal on the basis that OCPs would now have an

incentive to raise their prices close to the highest price that has been singled out in advertisements.

- 5.45 However, it is clear that greater transparency about prices in PRS advertising would be beneficial to consumers. Broadcasters currently face more stringent obligations than other PRS suppliers to inform viewers that calls from mobile phones will cost more than those from landlines. This state of events came about in 2007 following a review commissioned by Ofcom of the systemic compliance failures by broadcasters in their use of PRS in programmes. Ofcom imposed greater transparency obligations on broadcasters through their broadcasting licences. While the tagline ‘calls from mobiles will cost considerably more’ is not comprehensive, it does alert the consumer to the possibility of an expensive call from their mobile phone.
- 5.46 In the current Code, PhonepayPlus requires that SPs “must ensure that all users of premium rate services are fully informed, clearly and straightforwardly, of the cost of using a service prior to incurring any charge”. This is supported by the PhonepayPlus Help Notes which indicate that ‘fully informing’ consumers about pricing requires PRS suppliers to state that prices for PRS may vary depending on the originating provider. We do not think this is sufficiently explicit. It is unlikely to draw consumer attention to the potentially significant charges that may be incurred calling a PRS number from a mobile phone. Following the review into PRS in TV programmes, Ofcom concluded that simply requiring broadcasters to state that ‘network costs may vary’ was not emphatic enough in drawing consumer attention to the potentially expensive exercise of calling PRS numbers from a mobile phone.³⁵
- 5.47 It is now appropriate to consider bringing the rest of the PRS industry into line with the obligations that exist on broadcasters when PRS is used during programmes. Specifically, we think there may be merit in requiring all PRS advertising to include, in addition to a ‘standard’ network rate, a statement along the lines that ‘calls from mobiles will cost considerably more’. We recommend that PhonepayPlus consult on introducing such a requirement as part of its upcoming revision of its Code of Practice.³⁶ Although this is certainly not an ideal outcome (as consumers will not be fully informed about the prices they will face), we consider it is useful and pragmatic solution for PRS advertising. As noted above, longer-term options for improving tariff transparency will be considered through the review of the NTS framework.
- 5.48 We acknowledge the submission from several network operators that the use of the BT charge as a reference point for the cost of calling an 09 number is not ideal and that it amounts to free publicity. We support leaving it up to each advertiser as to the basic rate that they wish to communicate to consumers and note that PhonepayPlus does not currently require advertisers to state the BT price. However, in the absence of any move to allow IPs to set price points for their services, it is likely that many providers will still choose to advertise the BT rate – as it is a useful and easily understood proxy for communicating a price point to a wide audience.

³⁵ Guidance Notes to the Broadcasting Code, Section 2: Harm and Offence, p10 (as at September 2009).

³⁶ Any such consultation will need to consider what services this obligation should apply to (i.e. there is no apparent problem with pricing transparency on calls to mobile shortcodes) and whether there is scope within services for when the obligation should apply (i.e. if the likely cost is over a certain threshold).

Facilitating effective consumer redress

- 5.49 As with any market, it is inevitable that problems will occur in the PRS industry and that consumers will need to seek redress. However, given the often fragmented nature of the PRS industry, consumers may experience considerable difficulties trying to get in touch with the most appropriate party for dealing with their complaint. This process could involve being passed between the relevant OCP, the TCP, the SP, and the IP.
- 5.50 The Consultation outlined market research commissioned by Ofcom, which indicates that only a minority of respondents would know what to do if they had a problem with a PRS.³⁷ Only a quarter of respondents were confident they would know who to speak to if they had a problem with their service, while only 17% were confident that a PRS problem would be resolved.
- 5.51 The Consultation identified two areas where further measures may be appropriate in improving consumer redress in the PRS industry:
- i) Making it easier for consumers to identify the provider of the PRS;
 - ii) Making the complaints procedure of SP/IPs more straightforward.

PhonepayPlus' number checker

- 5.52 Often the most significant barrier for a consumer seeking redress is trying to contact the party that is best placed to deal with their complaint. Most consumers will first contact their OCP, who while often not responsible for the PRS in question, can nevertheless play a very important role in putting the consumer in contact with someone who can examine their complaint.
- 5.53 A crucial tool for identifying the relevant PRS supplier (for both consumers and the front-line staff of OCPs) is the PhonepayPlus number checker, which is available on its website. The number checker currently provides:
- The name of the SP, a contact phone number, and the 'standard' price of the service for the top 500 09 numbers (as determined by the number of requests to PhonepayPlus);
 - The name of the TCP, a contact phone number, and the 'standard' price of the service for all other 09 numbers (sourced from the Ofcom numbering database); and
 - The name of the SP or IP with contact details for any shortcode entered. This information is supplied to PhonepayPlus by the mobile operators and their aggregators.
- 5.54 We noted in the Consultation that the number checker would identify the SP for 85% of all in-remit searches. In order to make it easier for consumers to pursue complaints, we proposed that PhonepayPlus should extend the number checker to cover most PRS numbers, at a potential cost of £0.6 million, as estimated by independent consultants, Indepen.³⁸

³⁷ http://www.ofcom.org.uk/consult/condocs/prs_scope/annex7.pdf

³⁸ See section 6.2, http://www.ofcom.org.uk/consult/condocs/prs_scope/annex5.pdf.

Question 6.10: Do you agree with our proposal to expand the PhonepayPlus number checker?

Question 6.11: Which criteria should be used regarding numbers to be included in the number checker (e.g. revenues, complaints over the last X weeks etc)?

Question 6.12: What information should be included per number in the number checker?

Stakeholder comments

- 5.55 There was broad support from stakeholders for an expansion of PhonepayPlus' number checker, subject to establishing procedures to improve the accuracy rate for the database. Cable & Wireless provided qualified support for the expansion of the number checker, but considered that there may be more cost-efficient options for identifying the relevant details for the remaining 15% of the database.
- 5.56 However, there was no consensus amongst respondents as to what numbers should be included in an expanded number checker. A range of options were supported, including:
- All 'active' PRS numbers that are in use and being promoted (AIME, 3, Orange, PRA);
 - All PRS numbers (BT, 2ergo);
 - All numbers, not just PRS (FlexTel); or
 - All numbers that pass a particular test, e.g. 5 checks per week, a revenue threshold, or price per call (variations raised by GMTV, Invomo, and the Mobile Broadband Group)
- 5.57 There were also a wide range of views as to the information that should be captured for each number and displayed to the consumer through the number checker. While there was significant disparity between responses as to what information should be collected, there was some consensus that the purpose of the number checker should be to enable a consumer to pursue a complaint. As such, there was broad agreement that at a minimum the number checker should provide consumers with the relevant IP's name and contact details, and in situations where this was not practical (such as the use of shared shortcodes), the relevant details for the SP should be provided.
- 5.58 Beyond this basic information respondents suggested a range of information that consumers should also be provided with, including a description of the service associated with the number, the relevant price for the service, a PhonepayPlus registration number for the IP, and the contact details for the TCP.

Ofcom response

- 5.59 PhonepayPlus should take steps to extend the scope of its number checker to include a greater range of numbers and to provide contact details on the provider of the PRS rather than the TCP.
- 5.60 Extending the number checker is likely to significantly reduce the time spent (and the resulting frustration) by consumers trying to register their complaint with the appropriate company. It is also likely to significantly reduce the time that OCPs and TCPs spend in trying to determine who consumers should be recommended to

contact. The cost-benefit analysis undertaken by Indepen was not challenged by respondents.³⁹

- 5.61 We consider that PhonepayPlus should ensure that its number checker aims to capture all PRS; or as many as is reasonably practicable in light of the associated cost and benefits. It is our view that the number checker should aim to provide relevant information for all PRS numbers that may fall within PhonepayPlus' jurisdiction, with a particular focus on ensuring it contains all PRS that are being actively used by providers.
- 5.62 The principal purpose of the number checker should be to provide consumers with sufficient details to be able to contact the responsible party to lodge a complaint. We consider that the number checker should display, as a minimum, the name and relevant customer contact details of the responsible SP. We are cautious of further extending the information that the number checker should provide, given the risks that it may easily become out of date – particularly given that prices regularly change, services move numbers, and IPs can easily exit the market.
- 5.63 The scope of the number checker is inextricably linked to two other initiatives: the development of a registration scheme, and a PhonepayPlus workstream considering the extent to which providers in the value chain should assume responsibility for addressing consumer complaints (both of which are examined below). It would be premature to finalise the detail of any expanded number checker until these projects are more advanced – particularly if IPs are given greater responsibility for responding to consumer complaints. In such a scenario, there could well be merit if the number checker was to provide details on the IP associated with a particular PRS number – particularly if such information was linked with an industry-wide registration scheme.
- 5.64 We recommend that the final scope of the number checker is best left to PhonepayPlus to develop through discussions with the industry, taking into account the likely costs of extension, the development of a registration scheme and wider work on addressing consumer complaints.

Formal complaints procedures in the PRS industry

- 5.65 The Consultation briefly noted that PhonepayPlus was likely to examine introducing formal complaints procedures for SPs and IPs through its 12th Code of Practice. We agreed that this warranted consultation and sought initial views of stakeholders.

Question 6.13: Do you agree PhonepayPlus should carry out an analysis into the benefits of requiring SP/IPs to adopt a formal complaints procedure?

Stakeholder comments

- 5.66 There was broad support for establishing minimum standards for complaints handling for SPs and IPs. However, this support was often qualified, with several respondents noting that any obligations on complaints handling would have to take into account the different sizes and resources of various operators throughout the value chain.
- 5.67 The few respondents who opposed this initiative considered that there were already existing safeguards that PhonepayPlus could use to address shortfalls in customer

³⁹ Indepen, 'The Feasibility of a Central Registration Scheme for Premium Rate Services' (July 2007), http://www.ofcom.org.uk/consult/condocs/prs_scope/annex5.pdf

service, that it would be disproportionate to impose such obligations on operators that have no customer-facing functions (particularly SPs), and that broadcasters should be exempt from any new obligations, as they already have obligations by virtue of their broadcasting licences.

Ofcom response

- 5.68 We recommend that PhonepayPlus should continue to work with industry on consumer redress before introducing formal complaints procedures for SPs and IPs as part of its 12th Code of Practice. We are persuaded that any such obligations need to be sufficiently flexible to take account of the relative size and resources of the SP or IP in question. This flexibility is particularly important where parties (such as broadcasters) already have specific complaints handling obligations imposed through another mechanism.
- 5.69 As the Scope Review did not attract many submissions from IPs we need to be careful about endorsing proposals that may have ramifications for their business models. Prior to approving any new PhonepayPlus Code of Practice that imposes new complaints handling obligations we will need to be satisfied that appropriate steps have been taken to seek out the views of IPs.

Empowering PRS suppliers to act responsibly

A centralised registration scheme

- 5.70 As has been noted above, PRS are often provided through a complex supply chain, with large numbers of SPs and IPs being involved in the delivery of services. By virtue of their more permanent presence in the industry, relative size, and ability to exercise control over the platform through which PRS is delivered, SPs have traditionally been the key focus for regulation in this industry, even though the IP is likely to be the party exercising de facto control over the design, promotion and operation of PRS. We sought stakeholder views on whether IPs should also be targeted as a point of regulation, in addition to SPs, or on their own.
- 5.71 The current approach of holding SPs accountable for the actions of those that they contract with is an effective means of incentivising SPs to monitor the behaviour of IPs and to exercise due care when deciding with whom to partner. Any shift in regulatory focus to hold IPs accountable for their actions is only likely to be effective if accompanied by very robust due-diligence obligations on SPs. In the absence of an incentive for SPs to monitor the actions of IPs, there is a very real risk that IPs could repeatedly enter and exit the market with the intention of avoiding PhonepayPlus scrutiny.
- 5.72 The Consultation noted that there is likely to be merit in PhonepayPlus establishing a searchable database to assist the PRS industry to carry out due-diligence (with the database potentially populated with data sourced from a complementary registration scheme). Such a regime would assist TCPs carrying out due-diligence on SPs (as required under the current Code of Practice), or help SPs to carry out due-diligence on IPs (should IPs be held responsible for the design, promotion, and operation of PRS through PhonepayPlus' new Code of Practice).
- 5.73 A number of possible options were outlined in the Consultation and the accompanying annexes:
- Option B: a central registration scheme for SPs only;

- Option C: as Option B, but with the facility to search on the reputations of individual directors;
- Option D: a central registration scheme for SP and IPs, but with the focus of regulation remaining on the former;
- Option E: a central registration scheme for IPs only, with IPs the primary focus of the regulatory regime;
- Option F1: amend the PhonepayPlus adjudications database to allow parties to search whether an SP or IP has been found in breach of the Code of Practice;
- Option F2: a 'reputational database' where both SPs and IPs are required to register, with the names of directors also being captured; and
- Option F3: a 'reputational database' where SPs are required to register, with PhonepayPlus to add the names of directors of an IP when that IP breaches their Code.

5.74 Ofcom noted in the Consultation that it favoured option F1, which could be implemented at minimal cost (at an estimated £20,000). We did however note that both F2 and F3 would generate substantial benefits and could merit implementation, particularly if there was a requirement for increased due diligence through PhonepayPlus' 12th Code of Practice.

Question 6.14: Do you consider that in light of developments in the PRS market, IPs should be targeted as a point of regulation, in addition to SPs or on their own? If so, what kind of rules should be applied to IPs and/or SPs?

Question 6.15: Do you consider there are other options for a registration scheme / reputational database which have not been included in these studies?

Question 6.16: Which is your preferred option, and what are the reasons for this?

Question 6.17: Do you agree with our analysis that PhonepayPlus should run a registration scheme / reputational database?

Stakeholder comments

- 5.75 The overwhelming majority of respondents were supportive of shifting the focus of PRS regulation to make companies responsible for the actions under their control, and in particular, making IPs responsible for ensuring that a specific PRS complies with the PhonepayPlus' Code. Orange, AIME, the Premium Rate Association and 2ergo were all supportive of this concept, but noted that such a change would only be workable if SPs were subject to appropriate due diligence requirements to monitor the IPs with whom they contracted.
- 5.76 Only GMTV and Channel 5 expressed concern with increasing the regulatory scrutiny on IPs, with both respondents noting that Ofcom already regulates their activity by virtue of the Broadcasting Code and the terms of their licences. Both broadcasters noted the potential for regulatory overlap and confusion as to which rules they would be expected to follow.
- 5.77 With respect to the registration scheme, many respondents commented on what they considered to be Ofcom's unhelpful use of the term 'reputational database'. There was clearly some concern that a searchable database may contain opinions and anecdotal comments about the reputation of companies and individuals operating in

the PRS industry. There was a very strong theme from responses that any searchable database should only contain factual and publicly available information, such as PhonepayPlus adjudications.

- 5.78 Where stakeholders indicated their support for a registration scheme, option F2 was clearly favoured – with support from AIME, 3, 2ergo, Consumer Focus, the Mobile Broadband Group and the Mobile Data Association. PhonepayPlus commented that while option F1 may be the most cost-effective means of improving due-diligence under the current 11th Code of Practice, it is likely that option F2 will be needed should the burden of regulation increasingly fall on IPs through the revised 12th Code.
- 5.79 Only Invomo and one confidential submission supported Ofcom’s proposal for modifying PhonepayPlus’ adjudications database to better support carrying out due-diligence (option F1). Consistent with its view that SPs should continue to be the actors that are primarily held responsible for PRS compliance, Channel 5 supported either option F3 or D (which was also supported by the Premium Rate Association).
- 5.80 There was broad support amongst respondents that, regardless of whether IPs should be the principal focus of PRS regulation, there was a need for further information to be made available on individuals operating in the PRS industry. Many respondents noted the low barriers to market entry in the PRS industry and that directors of companies could easily establish new companies after having been fined by the regulator. Respondents generally supported the idea that parties in the value chain should be easily able to link a breach of the PhonepayPlus Code of Practice with the individual directors of the company involved.
- 5.81 All respondents agreed that PhonepayPlus was the most appropriate body to administer the database. AIME noted that it was in the process of developing a voluntary ‘Merchant Promoter Registration Scheme’ which, if successful, could be taken over by PhonepayPlus to avoid any unnecessary duplication.

Ofcom response

- 5.82 Ofcom supports refocusing PRS regulation to better target those parties who are causing harm. Whereas SPs are currently held responsible for ensuring that services using their platform are compliant with PhonepayPlus’ Code of Practice, we consider there is merit in shifting this responsibility further down the value chain to those IPs that are exercising an appropriate degree of control over PRS. It will be challenging to come up with an accurate definition of those that should be held responsible, while avoiding extending liability too far down the value chain to parties that are only involved in a tangential manner, such as affiliate marketers. Any such definition should be consistent with the definitions of PRS providers set out in Section 120 of the Act. Nevertheless, we are confident that this is achievable and will be closely involved with PhonepayPlus as part of our co-ordinated consultation on PhonepayPlus’ 12 Code of Practice.⁴⁰
- 5.83 We are however conscious of the limited representations made by IPs on the Scope Review. Prior to approving any new PhonepayPlus Code of Practice that increases the scope of liability for IPs we will need to be satisfied that appropriate steps have been taken to engage with IPs on this matter.
- 5.84 While we support holding IPs accountable for their actions, we consider this will only be practical if stringent obligations are also imposed on SPs to vet those IPs with

⁴⁰ See Section 6 for details of PhonepayPlus’ and Ofcom’s co-ordinated consultation process.

whom they contract. In the absence of some degree of oversight by SPs it is easy to envisage a scenario whereby IPs could enter the market, scam consumers, and wind up the company before being held to account by PhonepayPlus. If PhonepayPlus' 'pre-empt and protect' agenda is to remain relevant then any move to hold IPs liable for their actions will need to be complemented by new obligations for SPs to undertake ongoing due-diligence and risk assessment of their clients and the services they are offering. While SPs may no longer be liable if a specific PRS fails to comply with PhonepayPlus' Code of Practice, their unique position as a 'gate-keeper' means they should face liability for any due-diligence failings that could have prevented the breach from occurring.

- 5.85 We are satisfied that simply modifying PhonepayPlus' adjudications database (option F1 in our Consultation) would not be a sufficiently useful tool in the regulatory environment likely to emerge from PhonepayPlus' review of its Code of Practice. Such a proposal would not facilitate the due-diligence we would expect SPs to carry out, would not link individual directors with the breaches of the Code of Practice, and would not assist PhonepayPlus to take enforcement action against the vast number of IPs that would now fall directly within its enforcements powers.
- 5.86 We are of the view that if, as is likely to be proposed in its consultation, PhonepayPlus' 12th Code of Practice is to hold IPs responsible for the compliant operation and promotion of PRS, then a mandatory registration scheme is necessary. We consider that a scheme akin to option F2 from the Consultation can be justified – whereby both SPs and IPs are required to register and registered parties are able to access an associated database containing factual and publicly available information about other registered parties and individuals (where those individuals are directors of a company that has been found in breach of the PhonepayPlus Code of Practice).
- 5.87 Submissions on the Consultation clearly expressed the view that those in the PRS industry needed to be able to easily determine not only whether the company they may be about to do business with has a prior breach history, but whether the directors of the company have been associated with companies that have previously been sanctioned by PhonepayPlus. We agree that such a function will be essential if due-diligence obligations are to be strengthened under the 12th Code. The cost/benefit analysis undertaken by Plum Consulting for the Consultation clearly demonstrates that option F2 provides parties with the most relevant and useful information for undertaking due-diligence.⁴¹ In particular, of all the options examined, F2 was the only proposal which would be able to comprehensively link individuals with their previous breach histories.
- 5.88 The purpose of this registration scheme would be twofold: to assist those in the industry to meet their due-diligence obligations under PhonepayPlus' Code of Practice, and to facilitate PhonepayPlus enforcement action. As such, we consider that PhonepayPlus should have responsibility for the operation and administration of the registration scheme. PhonepayPlus will work with the industry to ensure that their scheme takes account of any existing industry initiatives or databases where that would deliver efficiencies without compromising the integrity of the scheme.
- 5.89 It is very important that any requirement for SPs and IPs to register with PhonepayPlus does not become a barrier to entry for new operators. We consider registration should be automatic and not subject to prior PhonepayPlus vetting – its purpose is to facilitate industry due diligence, so registration in itself should not signify any endorsement on behalf of PhonepayPlus to operate in the industry. In

⁴¹ http://www.ofcom.org.uk/consult/condocs/prs_scope/annex6.pdf. See in particular figure 2.

order to offset establishment and operational costs of the scheme we would support PhonepayPlus charging a reasonable registration fee for the establishment and ongoing administration of the registration scheme.

- 5.90 Finally, we would like to clarify that the use of the term ‘reputational database’ in the Consultation was simply meant to demonstrate that the primary purpose of the database would be to facilitate industry due-diligence and that registration would not be subject to PhonepayPlus approval. It is important that the information contained in the database about companies and individuals is factually accurate and the development of the registration scheme will need to take this into account.

Call barring

- 5.91 Given the unique risks of harm from PRS, it is important that consumers are able to monitor and control their expenditure. One means of supporting this is by allowing consumers to decide that their telephone should not be able to make certain types of calls. The availability of call barring for PRS is particularly important given the risks that a phone could be used without the permission of the bill-payer and that children could potentially access inappropriate content.
- 5.92 The Consultation noted that CPs are not required to offer call barring as Ofcom had previously considered that sufficient numbers of operators offered the service for 09 numbers to meet the needs of consumers. However, we signalled that in light of market developments (such as the growth of mobile PRS) we may need to revisit whether current call-barring services are meeting the needs of consumers. In particular, we noted that most mobile networks did not currently offer a facility to block outgoing voice and SMS to mobile shortcodes, or reverse-billed SMS.
- 5.93 The Consultation sought the views of mobile operators as to whether they were willing to voluntarily extend their call barring facilities; and also asked stakeholders whether they supported Ofcom undertaking an in-depth analysis of the market for call barring.

Question 6.18: Do you agree with the options identified regarding call barring facilities?

Stakeholder comments

- 5.94 With the exception of the mobile operators, there was strong support for a closer examination of whether current call barring facilities were meeting the needs of consumers. Where views were offered, there was support for examining whether there was merit in introducing selective call-barring to 09 numbers (i.e. sub-barring), as well as examining outgoing voice/SMS to shortcodes, and reverse-billed SMS.
- 5.95 BT noted that while it is natural to support a high degree of granularity for call barring, there are likely to be some very serious technical issues to address in mandating sub-barring on the 09 number range. It was noted that call barring is a Wholesale Line Rental (WLR) facility and that at present Openreach call barring is effectively set-up on an on/off basis. Altering this facility could potentially be very costly.
- 5.96 The mobile operators opposed any regulation to mandate call barring. With particular reference to shortcodes the mobile operators claimed that introducing the facility would be very expensive, that uptake is likely to be low (as it is for 09 call barring), and that, as at least one operator already offers call barring to shortcodes,

consumers who feel strongly about the matter have the option of subscribing to that operator. 3 made the point that not all shortcodes offer PRS (for example, enabling congestion charges), so any call barring facility would potentially need to be highly complex to enable consumers to only bar certain services.

- 5.97 There were no offers from the mobile operators for call barring facilities to be voluntarily extended. The operators strongly opposed any extension of regulation and stated that Ofcom would need to undertake a rigorous cost/benefit analysis before proceeding any further with this proposal.

Ofcom response

- 5.98 The responses have helped further our understanding of call barring and we will take them into account in deciding whether there is merit in further work in this area. On one hand, it is possible to argue that if there was demand for this service, and the provision was technically feasible and not too expensive, then the market would deliver such a facility. Indeed at least one operator already offers call barring for shortcodes. However, it is clear that the market does not always proactively provide solutions to consumer detriment. Also, in any further work on the issue of sub-barring, we will need to consider how many consumers actually wish to bar their phones from accessing certain 09 services, but require access to others.⁴²

⁴² One such category of consumers wanting selective call barring may be those wanting to bar access to sexual entertainment services, while still retaining the choice of accessing services such as voting lines.

Section 6

Relationship with PhonepayPlus' 12th Code of Practice

Implementing recommendations through a new Code of Practice

- 6.1 In July 2009, PhonepayPlus published a discussion paper on the development of its 12th Code of Practice.⁴³ This paper was designed to elicit early views from stakeholders on the direction of the 12th Code prior to a formal consultation.
- 6.2 On the same day Ofcom published an "Information Note and Invitation to Provide Comments", explaining our intention to consult on whether to approve PhonepayPlus' proposed 12th Code at the same time as PhonepayPlus formally consults on the detail of the Code. It was noted that this co-ordinated consultation process would more appropriately reflect the close working relationship between Ofcom and PhonepayPlus and is also likely to be a more efficient approach than has previously been the case.
- 6.3 In Section 5 of this Statement, we have identified a number of actions that we recommend PhonepayPlus should take forward through its 12th Code (including strengthening PRS advertising obligations, expanding the number checker, introducing complaints handling procedures, and establishing a registration scheme). We will support PhonepayPlus' efforts to pursue these recommendations, but the detail surrounding each of these proposals will require intensive engagement with the PRS industry and will be subject to full consultation through the 12th Code process.

Relationship with any revised PRS Condition

- 6.4 Although supportive of co-ordinated consultation by PhonepayPlus and Ofcom on the 12th Code, both the Mobile Broadband Group and 3 submitted that there was a lack of clarity as to when Ofcom would revise the PRS Condition. 3 sought confirmation that PhonepayPlus would not look to revise its Code of Practice until Ofcom had first clarified which services would be removed or included from the PRS regime.
- 6.5 We do not consider that any amendment is required to the PRS Condition before the consultation on PhonepayPlus' 12th Code of Practice.
- 6.6 We are not yet in a position where we have identified the need to amend the definition of Controlled PRS in the PRS Condition. Any such amendment would only be considered after extensive discussion and an examination of evidence and would need to be subject to full consultation. We consider that this is a separate exercise to PhonepayPlus' review of the Code of Practice and do not wish to cause its consultation unnecessary delay. We would therefore advise the industry to engage fully in the consultation on the 12th Code of Practice.

⁴³ See <http://www.phonepayplus.org.uk/upload/Code12-GreenPaper-FINALv2-June2009.pdf>

Annex 1

Impact Assessment

Analytical framework for reviewing the definition of Controlled PRS

- A1.1 The analytical approach set out in the Statement does not comprise an additional layer of regulation or process. Rather, we are simply clarifying the relevant considerations and ensuring consistency in our assessment of whether the definition of a 'Controlled PRS' in the PRS Condition remains appropriate and proportionate. An impact assessment is therefore not required at this time.
- A1.2 Our approach is intended to ensure that PRS regulation is applied transparently, proportionately and consistently, and is targeted only at cases in which action is needed. If we conclude that the PRS Condition requires amendment (to either narrow or widen the Condition), we will consult publicly, with reference to the analytical framework. Such an assessment will need to incorporate an impact assessment.

Measures to improve existing regulation of PRS

- A1.3 The Consultation included a detailed impact assessment of the different options regarding a registration database.⁴⁴ There was little comment from respondents on the impact assessment in the Consultation. However, we note that AIME queried the estimated £1m cost of option F2, believing it could be set up for £50,000, with operational costs of £100,000p.a. We have seen no evidence to suggest that our estimate was incorrect, but would note that the projected £1m cost was over five years and included the likely compliance costs for SPs and IPs to register (as opposed to the direct costs quoted by AIME). However, we expect PhonepayPlus to consider further the question of costs in light of AIME's comments.
- A1.4 In considering Ofcom's recommendations to PhonepayPlus regarding registration, expansion of its number checker, advertising guidance, and complaints handling procedures, PhonepayPlus will need to consider the potential impacts and seek views from the industry.

Equality impact assessment

- A1.5 We have conducted an Equality Impact Assessment, and conclude that both the analytical framework and the measures to improve current PRS regulations as set out in this Statement would have no differential impact in terms of disability, racial background, gender or sexual orientation. Nevertheless, if we consult on any amendments to the PRS Condition, we shall of course consider whether there is a potential impact in terms of equality.

⁴⁴ See http://www.ofcom.org.uk/consult/condocs/prs_scope/annex5.pdf and http://www.ofcom.org.uk/consult/condocs/prs_scope/annex6.pdf.

Annex 2

Our approach to examining self- and co-regulation

Our principles for analysing self- and co-regulation

A2.1 In December 2008 we published a statement 'Identifying appropriate regulatory solutions: principles for analysing self- and co-regulation' ('the December 2008 statement') setting out the approach we intend to adopt in the future to determine whether self- or co-regulation is likely to succeed in delivering our statutory duties in respect of consumers and citizens.⁴⁵ We used the following definitions:

- Self regulation: Industry collectively administers a solution to address citizen or consumer issues, or other regulatory objectives, without formal oversight from government or regulator. There are no explicit ex ante legal backstops in relation to rules agreed by the scheme (although general obligations may still apply to providers in this area).
- Co-regulation: Schemes that involve elements of self- and statutory regulation, with public authorities and industry collectively administering a solution to an identified issue. The split of responsibilities may vary, but typically government or regulators have legal backstop powers to secure desired objectives.

A2.2 The December 2008 statement refers to section 3(4)(c) of the Act which provides that, in performing our statutory duties, we must have regard to "the desirability of promoting and facilitating the development and use of effective forms of self-regulation." Further, according to section 6(1) of the Act, Ofcom must:

keep the carrying out of their functions under review, with a view to securing that regulation does not involve:

- (a) the imposition of burdens which are unnecessary; or
- (b) the maintenance of burdens which have become unnecessary.

A2.3 Section 6(2) of the Act provides that, in reviewing its functions under section 6, Ofcom has the duty:

- (a) to have regard to the extent to which the matters which they are required under section 3 to further or to secure are already furthered or secured, or are likely to be furthered or secured, by effective self-regulation; and
- (b) in the light of that, to consider to what extent it would be appropriate to remove or reduce the regulatory burdens imposed by Ofcom.

A2.4 In the December 2008 statement we noted that we need to consider on a case-by-case basis whether self- and co regulation could be an effective option. We described a set of analytical steps we will follow when assessing the

⁴⁵ <http://www.ofcom.org.uk/consult/condocs/coregulation/statement/>.

appropriateness of self- and co regulation, based on understanding the collective incentives of industry to resolve an issue in a way that addresses the best interest of citizens and consumers. These are:

- i) Do the industry participants have a collective interest in solving the problem?
- ii) Would the likely industry solution correspond to the best interests of citizens and consumers?
- iii) Would individual companies have an incentive not to participate in any agreed scheme?
- iv) Are individual companies likely to “free-ride” on an industry solution?
- v) Can clear and straightforward objectives be established by industry?

Assessment of PRS against principles for analysing self and co-regulation

A2.5 In the context of PRS, we consider the following types of outcomes to be in the best interest of consumers:

- Consumers should be able to purchase PRS with confidence and, of course, the more this is the case the more vibrant and healthy will be the PRS market;
- Consumers should be confident when they purchase a service that they know (and can find out with relative ease) what price they are paying for that service and whether it is a one-off purchase or whether a subscription to the service is being purchased;
- To the greatest extent possible when purchasing a remote service, consumers should be able to understand the quality and facets of that service. The service should function in the way that it is represented to the consumer and as part of that, it should be possible for the consumer to terminate a service without unnecessary delay and complexity; and
- It is obvious, but worth stating that when a consumer purchases a PRS they should receive that service.

A2.6 Below we give our assessment on the appropriateness of self regulatory initiatives for PRS against these steps.

A2.7 As previously discussed, there is generally a complex, fragmented supply chain involved in providing PRS, with a large number of suppliers operating at different levels in the chain. SPs and IPs, who are generally not visible to the consumer, typically supply the service to the consumer, and this, combined with relatively low barriers of entry and exit, could make them less concerned with their reputation. We therefore believe that reputable SPs and IPs have a collective interest in solving PRS problems, but that less reputable SPs and IPs may have different incentives and could instead pursue a strategy of short term gain.

A2.8 OCPs set the retail price of a PRS. Although it is in their interest for consumers to use PRS with confidence on an aggregate level, they may individually have an incentive to increase prices for PRS.

- A2.9 Based on this we believe that SPs, IPs and OCPs may not all have a collective interest in solving the problem. The reputable parties may be willing to take part in a self-regulatory scheme, but we believe the less reputable parties will have little or no incentive to do so.
- A2.10 Parties also may have incentives to cheat and “free-ride” on a self-regulatory solution. Since in self-regulatory schemes there are no formal penalties for non-compliance, individual companies could ‘on paper’ say they comply with all provisions, whilst in practice not do so. One of the good practice criteria when developing a co- or self-regulatory scheme is around enforcement measures, where the statement sets out that schemes may need to have sanctions that provide an incentive to comply. In addition, a solution where an independent party would investigate alleged breaches would avoid situations where industry members could be reluctant to take action against other industry members, because of certain commercial interests.
- A2.11 One other criterion is the presence of a system of redress where there is an independent appeals mechanism ensuring that complaints are resolved quickly and effectively, and where there is the possibility of escalation to an independent party. As set out above, the OCPs, SPs and IPs have different processes to deal with complaints, and under a self-regulatory scheme, there may not be an option to refer a complaint to such an independent party.
- A2.12 Based on the above analysis, we believe that there are three main factors that may impact the success of self-regulatory initiatives in the context of PRS:
- i) We consider that the collective interests of the industry and the public interest may not always be aligned with the private interest of all parties in the PRS supply chain and that less reputable parties will have limited or no incentives to join a self-regulatory scheme;
 - ii) For a self-regulatory initiative to be successful, it should be able to set penalties for non-compliance by an independent party that will not have a commercial interest in certain practices carried out by certain parties; and
 - iii) We believe a self-regulatory scheme should have a proper system of complaints resolution and redress.
- A2.13 In the Consultation, we sought views on the above analysis and on the possibility of self-regulation in the context of PRS.

Question 5.4: Do you agree with our analysis of the appropriateness of self-regulatory initiatives in the context of PRS?

Question 5.5: Do you consider self-regulatory initiatives could be implemented for (certain) PRS? If so, please set out for which services, and what such an initiative would look like.

Stakeholder comments

- A2.14 There was universal support for Ofcom’s view that it would be not practical to have self-regulation across the entire PRS industry. However, many respondents considered that Ofcom and PhonepayPlus should support self-regulatory alternatives for ‘low risk’ PRS. Respondents generally supported a move towards a tailored regulatory regime whereby regulation could be removed/reduced from

'safer' services, particularly if all parties providing the service had strong incentives for compliance with any self-regulatory regime. Orange claimed Payfort was an example where providers had sufficient commercial incentives to ensure participation in a self-regulatory regime.

Ofcom response

- A2.15 We do not consider that self-regulation is a viable proposition across the entire PRS industry, but will continue to consider whether self-regulation is appropriate on a case-by-case basis.
- A2.16 As part of our consideration whether a service carries a sufficient risk of causing consumer harm that it should be within the scope of the PRS Condition, we will explicitly consider what would be likely to occur in the absence of regulation. The existence of strong self-regulatory schemes are likely to reduce the prospect of consumer harm occurring. It is likely that the key factors we will consider when examining a self-regulatory alternative will include:
- i) whether the collective interests of the public and industry will be aligned with the private interest of all parties in the PRS supply chain and whether less reputable parties will have limited or no incentives to join a self-regulatory scheme;
 - ii) whether the scheme can set and enforce penalties for non-compliance in an appropriately independent manner; and
 - iii) whether the scheme promotes a proper system of complaints resolution and redress.

Annex 3

Examples of services and the potential for harm

Examining the characteristics of specific services

- A3.1 In the Consultation we examined a number of examples of services to test whether we had correctly identified the key characteristics of PRS and the possible risks of harm from those services. We considered a call from a mobile to an 09 number, a ring-tone subscription, downloading a game to mobile handset using Payfortit, accessing content on a mobile provider's portal, and using 0800MumDad – a service that enables reverse-billed calls to be made to a mobile phone.
- A3.2 In the Consultation we said that, although the above services were very different, the supply chains and the parties involved in providing the service were similar. We also suggested that they had certain demand side characteristics in common, i.e. experience goods and relatively low expenditure per transaction. However, we also recognised differences: 0800MumDad did not seem to involve an impulse purchase, and ring tones and purchasing games using Payfortit could have an appeal to children.
- A3.3 Given the characteristics of services and the supply side structure of the market, we suggested in the Consultation that each of these services had a potential to lead to negative outcomes for consumers. Complaints data and results from market research show that there is evidence of actual consumer harm for all services, albeit to different degrees. For example, we noted that certain on-portal services appear to generate few complaints (or when there were complaints, they appear to be dealt with by the mobile OCPs in a satisfactory manner).
- A3.4 We also considered the extent to which consumers were sufficiently covered by other means of consumer protection (i.e. non-PRS). The Consultation noted the relevance of Alternative Dispute Resolution (ADR), which consumers are able to utilise if they have a complaint about their OCP. So where an OCP provides their own branded content through on-portal services, a consumer will have the added protection of being able to take unresolved complaints to ADR.
- A3.5 Stakeholders were asked for their views on each of the relevant services.

Question 5.1: Do you agree with the application of the characteristics to these services?

Question 5.2: Do you agree with our assessment of potential harm for each of the services?

Question 5.3: Do you agree with our assessment of alternative means of protection for the new services in our analysis?

Stakeholder comments

- A3.6 These questions generally attracted little stakeholder comment, other than from those with a direct interest in the services considered by way of illustration.
- A3.7 2Ergo, BT, Invomo, the MDA, and two confidential submissions agreed with our application of the characteristics. However, several respondents, including Orange and FleXtel, thought that it was too subjective and gave rise to uncertainty. AIME and Invomo thought the examples were not representative and were of limited use.
- A3.8 On the question of potential harm, 2Ergo thought that the risk of lack of redress was less important than pricing transparency and inadvertent subscriptions. Orange said that the Payfort 'purchase screen' displayed on the mobile phone clearly shows the price of the service before the consumer confirms the purchase, and that there are other remedies available to consumers.
- A3.9 In general, respondents seemed to agree that where additional consumer protection exists it should be taken into account in considering whether PRS regulation is required (and if so to what extent). BT pointed out that there could be compliance difficulties if different approaches were taken to similar services simply on the basis of alternative means of protection. Invomo and one confidential submission considered that Ofcom should also note that other regulators, such as the Advertising Standards Authority and the Financial Services Authority, and indeed the industry itself can provide remedies. A number of respondents, including the PRA, and two confidential submissions, agreed with our general discussion of the extent to which ADR may be available to customers of the services in question.

Ofcom response

- A3.10 We note that not all respondents agreed with our descriptions of these examples, in particular the less-established services. For the avoidance of doubt, the discussion of these services in the Consultation was not intended to be a formal examination of the services or an application of our analytical framework, but was intended to help ensure we had correctly identified the relevant characteristics of PRS that can lead to consumer harm.
- A3.11 We consider that the availability of alternative means of redress is an important consideration in assessing whether a type of PRS is likely to lead to consumer harm. However, as with the other considerations, it is not in itself decisive and should not be considered in isolation, but taken in the round in assessing whether there is potential for consumer harm.
- A3.12 We note that in certain cases there may be some degree of overlap with other regulators for certain Controlled PRS. However, PhonepayPlus may often be able to anticipate and address widespread consumer problems more swiftly and/or effectively than other regulators, for example by requiring certain categories of PRS to fulfil conditions in advance of the service being launched.⁴⁶ It may also have ready access to vital information, such as call volumes and recordings of phone calls, which other regulators do not.

⁴⁶ By means of its 'prior permission' requirements.

Annex 4

List of Respondents

The following stakeholders submitted non-confidential responses to our consultation. The responses can be found at http://www.ofcom.org.uk/consult/condocs/prs_scope/responses/

- 2ergo
- Advertising Standards Authority
- AIME
- BBC
- BT
- Cable & Wireless
- Channel 4
- Channel 5
- Consumer Focus
- The Federation of Communication Services
- FleXtel
- GMTV
- Hutchison 3G UK
- Invomo
- The Mobile Broadband Group
- The Mobile Data Association
- Orange
- The Premium Rate Association
- RadioCentre
- S4C
- Scottish and Southern Energy
- Vodafone
- Williams, M

In addition, we received six confidential responses.