



## Approval of the PhonepayPlus Code of Practice (fourteenth edition)

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

Statement

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## About this document

There are a whole range of interactive services that consumers can access via their landline and mobile phones, computers and digital TV. Where these services are charged for via the customer's telephone bill or pre-pay account, they are known as premium rate services. They can range from receiving a daily horoscope, following football scores, voting in television programmes, making charity text donations or downloading the latest ringtone. While these services are valued by those that use them, they can sometimes give rise to consumer harm.

Ofcom has overall responsibility to make sure that consumers are protected by ensuring appropriate rules are in place and enforced. To achieve this, we have designated PhonepayPlus to carry out the day-to-day regulation of premium rate services.

PhonepayPlus does this through a Code of Practice that establishes certain standards for the operation of premium rate services in the UK. From time to time, PhonepayPlus revises the Code to ensure it continues to operate in consumers' best interests and provides a fair and proportionate regulatory regime for industry. We have powers to approve the Code provided it meets certain legal tests.

Following consultation and consideration of responses received, this document sets out Ofcom's decision to approve PhonepayPlus' 14<sup>th</sup> Code of Practice. The Code will come into effect on 12 July 2016.

# Contents

Section		Page
1	Summary	1
2	Background and legal framework	4
3	Key changes to 14 <sup>th</sup> Code and consultation responses	10
4	Approving the 14 <sup>th</sup> Code under section 121 of the Act	17
<b>Annex</b>		<b>Page</b>
1	Notification of Approval of a Code for Premium Rate Services under section 121 of the Communications Act 2003	27
2	PhonepayPlus Code of Practice (14 <sup>th</sup> Edition)	29
3	Glossary of terms	30

## Section 1

# Summary

## Introduction

- 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 Under the Communications Act 2003 (the 'Act') Ofcom approves PhonepayPlus' ('PPP') Code of Practice (the 'Code'). One overall effect is that PPP is the day-to-day regulator of PRS. PPP's Code regulates the provision and contents of PRS in the UK and facilities made available in the provision of such PRS. From time to time, PPP revises the Code to ensure it continues to provide a trusted environment for consumers and a fair and proportionate regulatory regime for the industry.
- 1.3 Following implementation of the 13th Code of Practice on 1 July 2015, PhonepayPlus carried out a separate review of Part 4 of that Code regarding investigations, procedures and sanctions. On 23 November 2015 and in light of that review, PPP published a consultation on various changes to Part 4 which it proposed should be introduced as part of a new Code of Practice (fourteenth edition) ('the 14<sup>th</sup> Code')<sup>1</sup>. Having taken account of responses to that consultation, PPP published a decision document on 10 March 2016 on the draft 14<sup>th</sup> Code (the 'draft Code') which it submitted to Ofcom for approval<sup>2</sup>.
- 1.4 On 14 March 2016, Ofcom published a consultation document on approval of the 14<sup>th</sup> Code which explained that Ofcom provisionally considered the draft Code met the legal tests for approval under the Act<sup>3</sup>. This domestic consultation, in response to which Ofcom received two responses, closed on 25 April 2016.
- 1.5 At the same time as Ofcom published its domestic consultation on the draft Code, the draft Code and a copy of Ofcom's consultation were submitted by the Department for Business, Innovation and Skills (on Ofcom's behalf) to the European Commission, as required by Directive 2015/1535/EU, thereby initiating a three-month standstill period. That standstill period has elapsed, with no comments received.
- 1.6 Having considered the two responses to its domestic consultation, Ofcom is satisfied that the criteria set out in the Act have been met and that it would be appropriate to approve, under section 121 of the Act, the 14<sup>th</sup> Code.
- 1.7 This statement sets out Ofcom's approval of the 14<sup>th</sup> Code for the regulation of PRS under section 121 of the Act.

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<sup>1</sup> <http://www.phonepayplus.org.uk/~media/Files/PhonepayPlus/Consultation-PDFs/000Nov2015/Part-4-Review--Code-Consultation-document.pdf>,

<sup>2</sup> <http://www.phonepayplus.org.uk/news-and-events/news/2016/march/statement-following-consultation-on-the-14th-code-of-practice>

<sup>3</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/approval-phonepayplus-14th-code-of-practice/summary/condoc.pdf>

## What are the key changes in the 14<sup>th</sup> Code?

- 1.8 Our consultation explained that, apart from Part 4 of the Code, many of the provisions in the 14<sup>th</sup> Code are unchanged from the 13<sup>th</sup> Code approved by Ofcom on 1 July 2015 (or are subject to minor consequential changes as a result of the Part 4 changes). Our consultation therefore focussed on the key changes to Part 4 as identified below:
- i) Inclusion within the 14<sup>th</sup> Code of high-level criteria used by PPP to determine whether a case should be allocated to either a Track 1 or Track 2 investigation.
  - ii) Removal of the case allocation track currently known as the “Emergency Procedure”, by bringing forward a consideration of interim measures – i.e. revenue withholds and/or service suspension orders – to an earlier stage in all Track 2 investigations.
  - iii) The recommendations of the Investigations Team at various key stages of an investigation to be subject to oversight by senior members of PPP.
  - iv) Replacement of the current Code Compliance Panel (CCP) with a new body, the Code Adjudication Panel (CAP), which will not include members of the PPP Board. This provides a separation between those who make the Code and those who enforce it. A Tribunal with members drawn from the CAP will decide whether interim measures should be imposed and ratify any decision to agree a settlement with a PRS provider (‘provider’). Further, any final breach finding and sanction decision (where the parties are unable to settle) will be made by a Tribunal.
  - v) The issuance of a formal “Warning Notice” to providers, before the case is presented to a Tribunal for decision, which sets out any alleged breaches, supporting evidence and recommended sanctions. This is expected to enhance the potential for providers to settle cases prior to a hearing.
  - vi) A more flexible hearing, which allows for different levels of oral and legal representation.
  - vii) Replacement of the current post-adjudication review stages and the Independent Appeals Body (IAB) with a single, limited review procedure.
- 1.9 We also noted PPP’s proposal that, from the date the 14<sup>th</sup> Code takes effect, any Track 2 investigations started under the 13<sup>th</sup> Code would have to be taken forward under the revised Part 4 procedures.
- 1.10 Aside from (i) above, the key changes will affect Track 2 investigations only. Such investigations follow a formal process and may result in a Tribunal decision. They differ from Track 1 cases where potential breaches may be resolved between PPP and a provider in the absence of a full investigation, with the provider agreeing to comply with an action plan.

## Ofcom’s views of the changes in the 14<sup>th</sup> Code

- 1.11 The 13<sup>th</sup> Code, which the 14<sup>th</sup> Code will replace, remained focussed on consumer outcomes. Ofcom considered the 13<sup>th</sup> Code met the legal tests for approval in section 121 of the Act in July 2015. We consider that this approach has provided an

appropriate regulatory framework, balancing the need to ensure consumers are protected while at the same time enabling industry to operate and innovate.

- 1.12 The 14<sup>th</sup> Code does not deviate from the approach of the 13<sup>th</sup>. Instead, the 14<sup>th</sup> Code makes changes to the enforcement process followed where PPP becomes concerned about a providers' compliance with the rules in the Code. The changes to Part 4 are intended to deliver a more streamlined enforcement process whilst maintaining a fair, open and transparent process for all parties through which investigations will be conducted and concluded.
- 1.13 On the basis that provisions of what was the 13<sup>th</sup> Code approved in July 2015 are unchanged and have contributed to an appropriate regulatory framework, and that the 14<sup>th</sup> Code adds to them in the manner described, it is our judgment that the 14<sup>th</sup> Code meets the legal tests for approval under section 121 of the Act, including, *inter alia*, being objectively justifiable, transparent, non-discriminatory and proportionate, and that it would be appropriate to approve the 14<sup>th</sup> Code.

### **When will the 14<sup>th</sup> Code take effect?**

- 1.14 The 14<sup>th</sup> Code will come into force, with Ofcom's approval, on 12 July 2016.

## Section 2

# Background and legal framework

2.1 This section provides a background to PRS, explains the purpose of PRS regulation, sets out the statutory definition of PRS and describes how PRS are currently regulated in the UK.

## What are PRS?

2.2 The concept of PRS is broad. In general terms, PRS offer some form of content, product, facility or service that is charged to a consumer's bill for electronic communications services.<sup>4</sup> They are services delivered via an Electronic Communications Network ('ECN') and paid for to the provider of an Electronic Communications Service ('ECS').

2.3 These may be accessed by way of a conventional voice call, but may also be accessed in other ways, such as SMS, PC, mobile phone downloads or interactive digital TV. Common forms of PRS include TV voting lines, competitions, adult entertainment, chat lines, business information services, technical helplines, mobile phone ringtones and game downloads, horoscopes and directory enquiry services. They usually operate on numbers beginning 0870/1/2/3, 09, 118 or five to seven digit mobile text or voice shortcodes usually beginning with 6, 7 or 8.

2.4 PRS vary in cost. Ofcom's NGCS review<sup>5</sup> resulted in the introduction of the unbundled tariff on 1 July 2015 for revenue-sharing numbers including the number ranges used for PRS. The unbundled tariff was introduced to enable consumers to better understand how much of their money is paid to their phone company and how much is passed to others, such as the organisation or service being called (such as the PRS provider). It requires that, instead of paying a single charge to their phone company, customers pay two separate charges:

- the Access Charge: which will be paid to the phone company which originates the call; and
- the Service Charge: which is paid to the phone company which terminates the call and may be shared with the provider, i.e. the company providing a service using the number (a chatline for example), to cover or contribute towards their costs. Organisations and service providers must include their Service Charge whenever the number is presented (i.e. in advertising and marketing).

2.5 Ofcom's NGCS review also resulted in the capping of Service Charges for specific number ranges (with the exception of 118 numbers). For example, the maximum per minute Service Charge for calls to 09 numbers is £3.60 per minute (inc. VAT) for calls from a UK landline and there is also a maximum one-off Service Charge cap for calls to 09 numbers at £6 per call (inc. VAT).

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<sup>4</sup> PRS are defined in section 120(7) of the Act

<sup>5</sup> <http://stakeholders.ofcom.org.uk/consultations/simplifying-non-geo-no/final-statement>

## The statutory definition of PRS

2.6 The PRS that may be subject to the specific regulatory framework are defined in section 120(7) of the Act, which provides that a service is a PRS 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.”*

2.7 Section 120(8) says a service falls within that section 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.”*

## How are PRS regulated in the UK

2.8 The current PRS regulatory framework comprises the following:

- i) sections 120 to 124 of the Act;
- ii) the PRS Condition, made by Ofcom under section 120 of the Act; and
- iii) the PPP Code of Practice, as approved by Ofcom under section 121 of the Act.

2.9 This framework works in the following way:

- Section 120 of the Act defines PRS and provides Ofcom with the power to set conditions (‘the PRS Condition’) for the purpose of regulating the provision, content, promotion and marketing of PRS. The PRS Condition which Ofcom has made applies only to certain PRS, known as Controlled PRS (‘CPRS’). In other words, only a specific subset of PRS are subject to the PRS Condition.
- Section 121 says Ofcom may approve a code for regulating the provision and contents of PRS (and relevant facilities) where we think it appropriate to do so and certain requirements are met. It also provides for Ofcom to approve modifications to an approved code.
- PPP makes the Code, which Ofcom approves in accordance with section 121. The Code outlines wide-ranging rules to protect consumers as well as the processes PPP applies when regulating the PRS industry. PPP enforces and administers the Code.

- The PRS Condition requires providers falling within its scope to comply with directions given by PPP in accordance with its Code and for the purposes of enforcing the provisions of that Code. Ofcom can ultimately take enforcement action for breaches of the PRS Condition

2.10 The overall effect of this hierarchy of powers is that CPRS are regulated by the Code, administered and enforced by PPP, and communications providers ('CPs') and CPRS providers involved in their provision are subject to Ofcom's statutory backstop enforcement powers.

## Legal tests under section 121 of the Act

2.11 PPP has responsibility for drafting the Code and consulted on the substance of the Code. Its consultation examined the proposed changes from the 13th Code in detail and invited stakeholders to respond directly to PPP on the merits and detail of the draft Code.

2.12 Ofcom has responsibility for whether or not to approve the Code. Under section 121(1) of the Act, Ofcom may approve the draft Code if it appears:

- “(a) that a code has been made by any person for regulating the provision and contents of premium rate services, and the facilities made available in the provision of such services;*
- (b) that the code contains provision for regulating, to such extent (if any) as they think fit, the arrangements made by the providers of premium rate services for promoting and marketing those services; and*
- (c) that it would be appropriate for them to approve that code for the purposes of section 120 ....”*

2.13 Under section 121(2) of the Act Ofcom may not, however, approve the draft Code unless satisfied:

- “(a) that there is a person who, under the code, has the function of administering and enforcing it; and*
- (b) that that person is sufficiently independent of the providers of premium rate services;*
- (c) that adequate arrangements are in force for funding the activities of that person in relation to the code;*
- (d) that the provisions of the code are objectively justifiable in relation to the services to which it relates;*
- (e) that those provisions are not such as to discriminate unduly against particular persons or against a particular description of persons;*
- (f) that those provisions are proportionate to what they are intended to achieve; and*
- (g) that, in relation to what those provisions are intended to achieve, they are transparent.”*

- 2.14 Section 121(3) of the Act relates to the circumstances in which Ofcom can approve so much of the 14th Code as relates to a person who is a provider of a service by virtue of section 120(12). This appears to Ofcom not to be relevant in relation to the changes in the 14<sup>th</sup> Code. In so far as it is relevant to provisions of the 14<sup>th</sup> Code that are unchanged from the 13th Code, Ofcom has previously considered the provision and is not aware of changes in circumstances which might cause us to take a different view.

## Impact Assessment

- 2.15 Impact Assessments ('IAs') provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice in policy-making. This is reflected in section 7 of the Act, which states that we generally have to carry out IAs where our proposals would be likely to have a significant effect on businesses or the general public or when there is a major change in Ofcom's activities. As a matter of policy, Ofcom is committed to carrying out and publishing IAs in relation to the great majority of our policy decisions. For further information about our approach to IAs, see the guidelines Better Policy-Making: Ofcom's Approach to Impact Assessment at <http://www.ofcom.org.uk/about/policies-and-guidelines/better-policy-making-ofcoms-approach-to-impact-assessment/>.
- 2.16 The analysis presented in this document constitutes an IA for our decision to approve the 14<sup>th</sup> Code.
- 2.17 As part of our IAs, we conduct an Equality IA to identify whether our proposals would have particular effects on specific groups within society. We have therefore considered whether we were required to undertake a full Equality Impact Assessment for this review. On the basis of our Initial Equality IA Screening, we determined that this was not required, because the changes in the 14<sup>th</sup> Code do not raise specific equality issues. They will affect consumers and citizens equally, regardless of race, gender or disability.

## PhonepayPlus Code Review

- 2.18 PPP embarked upon a review of the 12<sup>th</sup> Code in mid-2013 and consulted on a revised 13<sup>th</sup> Code in 2014. The consultation included proposals to make amendments aimed at improving, and providing clarity to stakeholders about, the process for reviews, oral hearings and appeals as set out in Part 4 of the Code ('Part 4') – covering investigations, procedures and sanctions where there is an alleged breach of the Code.
- 2.19 In light of views expressed during the consultation on the proposed 13<sup>th</sup> Code, PPP decided not to carry through its proposals on Part 4 into the 13<sup>th</sup> Code (which came into effect on 1 July 2015). Instead, and with the exception of making some limited amendments to the Emergency Procedure (EP) provisions within Part 4, PPP commenced a separate and comprehensive review of Part 4 together with its "Investigations and Sanctions Procedures". Ofcom welcomed this further review as respondents had raised substantive points about PPP's proposed changes which required further consideration and discussion.
- 2.20 On 23 November 2015, following its review of Part 4, PPP published a consultation on various changes to Part 4 which it proposed should be introduced as part of a new Code of Practice; the 14<sup>th</sup> Code. Having taken account of responses to that consultation, PPP published a decision document on 10 March 2016 on the draft Code for the regulation of PRS which was submitted to Ofcom for approval.

2.21 As explained above, Ofcom has since consulted on approval of the draft Code and the draft Code was submitted to the European Commission, as required by Directive 2015/1535/EU, thereby initiating a three-month standstill period. That standstill period has elapsed, with no comments received. Ofcom received two responses to its domestic consultation, which are discussed in section 3.

## PhonepayPlus Supporting Procedures

2.22 In addition to looking at and proposing changes to Part 4 of the Code, PPP's review also considered the Investigations and Sanctions Procedures document<sup>6</sup> which, whilst not part of the Code, serves as a guidance document to support PPP's end-to-end enforcement process.

2.23 The procedures document has been revised in draft to reflect the proposed changes to Part 4 and was published on 13 January 2016 (entitled the "Code of Practice Supporting Procedures"), allowing stakeholders to read it in conjunction with PPP's consultation on the proposed changes to Part 4<sup>7</sup>. An amended draft was published alongside PPP's statement and draft 14<sup>th</sup> Code on 10 March 2016<sup>8</sup>. A current version of the Supporting Procedures, which PPP will review as the need arises on an ongoing basis, will be published shortly after this statement is issued.

## PhonepayPlus Guidance

2.24 Separate from the Part 4 review and the Supporting Procedures, PPP has also consulted on a number of pieces of guidance which are intended to accompany the Code and explain how it will be interpreted.

2.25 In February 2016, PPP published a consultation on five pieces of guidance that have been amended or developed afresh on:

- Advice services;
- Digital marketing and promotions;
- Enabling consumer spend control;
- Method of exit from a service; and
- Subscription services<sup>9</sup>.

2.26 In March 2016, PPP also published a consultation on vulnerability guidance in order to, amongst other things, assist providers to interpret the Code and remain compliant

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<sup>6</sup> <http://www.phonepayplus.org.uk/~media/Files/PhonepayPlus/News-Items/2015July/Investigations-and-Sanctions-Procedure-July-2015.pdf>

<sup>7</sup> [http://www.phonepayplus.org.uk/news-and-events/news/2016/january/phonepayplus-publishes-draft-code-14-supporting-procedures?utm\\_source=Newsweaver&utm\\_medium=email&utm\\_campaign=traffic+via+Newsweaver](http://www.phonepayplus.org.uk/news-and-events/news/2016/january/phonepayplus-publishes-draft-code-14-supporting-procedures?utm_source=Newsweaver&utm_medium=email&utm_campaign=traffic+via+Newsweaver)

<sup>8</sup> <http://www.phonepayplus.org.uk/~media/Files/PhonepayPlus/News-Items/2016/Amended-Supporting-Procedures-to-the-Code-latest-draft.pdf>

<sup>9</sup> <http://www.phonepayplus.org.uk/news-and-events/news/2016/february/phonepayplus-publishes-guidance-consultation>

with the provisions aimed at protecting vulnerable consumers<sup>10</sup>. Both consultations have now closed.

- 2.27 The changes proposed by PPP to its guidance are unrelated to the changes to Part 4 in the 14<sup>th</sup> Code, and are not directly relevant to Ofcom's consideration of the 14<sup>th</sup> Code under the Act. However, we do consider these to be important as guidance should provide extra clarity as to how some of the provisions in the 14<sup>th</sup> Code will be interpreted.
- 2.28 PPP published the finalised guidance on vulnerability on 13 June 2016, and aims to publish the other pieces of guidance before the end of July<sup>11</sup>.

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<sup>10</sup> <http://www.phonepayplus.org.uk/~media/Files/13th-Code-of-Practice/Guidance-and-Compliance/2016-Vulnerability-Guidance-Consultation.pdf>

<sup>11</sup> [http://www.phonepayplus.org.uk/~media/Files/PhonepayPlus/News-Items/2016/vulnerability-statement-june-2016.pdf?utm\\_source=Newsweaver&utm\\_medium=email&utm\\_campaign=traffic+via+Newsweaver](http://www.phonepayplus.org.uk/~media/Files/PhonepayPlus/News-Items/2016/vulnerability-statement-june-2016.pdf?utm_source=Newsweaver&utm_medium=email&utm_campaign=traffic+via+Newsweaver)

## Section 3

# Key changes to 14<sup>th</sup> Code and consultation responses

3.1 This section summarises the key changes to the 14<sup>th</sup> Code which were the focus of our consultation, the responses received and Ofcom's consideration of those responses.

## Key changes

### i) Include allocations criteria in the Code

3.2 In our consultation, we noted that PPP uses a consistent set of criteria to determine whether to allocate a case to either a Track 1 or Track 2 investigation. However, these criteria were not published. In order to provide more certainty and transparency to providers as to the factors which PPP will apply when deciding which Track to allocate a case, PPP proposed to include high level criteria in the 14<sup>th</sup> Code.

3.3 In particular, the 14<sup>th</sup> Code will set out that:

- In determining the allocation of a case, PPP will take into account all relevant considerations as shall be set out in the Supporting Procedures as published from time to time; and
- Such considerations shall include, but are not limited to: the seriousness of any apparent breach and severity of any apparent consumer harm as shall be initially assessed by PPP and the breach history of the party or parties concerned.

### ii) Consideration of interim measures and removal of the Emergency Procedure (EP)

3.4 PPP's 13<sup>th</sup> Code of Practice provides for three case allocation tracks – Track 1, Track 2 and the EP. Whilst PPP is entitled to consider imposing interim 'revenue withhold' directions when cases are allocated to either Track 2 or the EP, it is only able to consider imposing an interim 'service suspension' order when a case is allocated to the EP.

3.5 Our consultation noted PPP's proposal to bring forward the consideration of interim measures (i.e. both revenue withholds and/or service suspensions) to an earlier stage in all Track 2 investigations. PPP expects the new process will enable it to act quickly to protect the interests of consumers and, in the case of revenue withholds, ensure that any potential fines which may be levied in the future can be paid. PPP commits that withholds and suspensions will only be used where the tests are met, and expects that suspensions will continue to be rarely used. In particular, the 14<sup>th</sup> Code will set out that:

- 3.5.1 PPP may only seek an interim service suspension measure where it considers that an apparent breach of the Code is causing serious harm or presents a serious risk of harm to consumers or the general public and requires urgent corrective action; and

- 3.5.2 PPP may only seek an interim withhold measure where it considers that a relevant party cannot or will not comply with any sanction that may be imposed by a Tribunal or administrative charge imposed by PPP.
- 3.6 PPP's proposal means that there would be automatic consideration of whether a withhold and/or suspension order is necessary on commencement of all Track 2 investigations. This removes the need for the separate EP in the 13<sup>th</sup> Code of Practice, which PPP proposed to abolish. It considers that this will result in a simpler and fairer procedure.
- 3.7 The decision to implement interim measures will be taken by a Tribunal (see (iv) below), with a right of review to another Tribunal made up of different CAP members if relevant new evidence comes to light which suggests that the application of interim measures is no longer appropriate or if the provider was not notified of the application for interim measures prior to their imposition.

### **iii) Internal review of Investigations Team recommendations**

- 3.8 Our consultation noted PPP's proposal that the recommendations of the Investigations Team at various key stages of a Track 2 investigation shall be subject to oversight by an internal panel which will comprise senior members of PPP, before those recommendations are put to the relevant party and considered by a Tribunal.
- 3.9 The key stages of any Track 2 investigation will include:
- assessment of whether to seek any proposed interim measures and, if so, their scope;
  - assessment of potential breach findings and sanctions in draft Warning Notices; and
  - assessment of any settlement proposals relating to interim measures or breaches, sanctions and/or administrative charges.
- 3.10 The role of the internal panel is to provide oversight and quality assurance on investigations. This would ensure that the decisions at key stages of an investigation are subject to scrutiny and review. The exact nature of the senior oversight proposed will be set out in the Supporting Procedures.

### **iv) Creation of the Code Adjudication Panel (CAP)**

- 3.11 Our consultation explained that PPP proposed to replace the current Code Compliance Panel (CCP) with a new body, the Code Adjudication Panel (CAP) which will no longer include members of the PPP Board. The CAP will provide three members for a Tribunal to ratify any interim measures, make adjudication decisions and conduct any review proceedings.
- 3.12 The proposal to remove the involvement of PPP Board members from adjudication decisions provides a separation between those who make the Code and those who enforce it.
- 3.13 We noted that PPP will ensure that the CAP retains the right mix of commercial, technical, consumer-based, legal and adjudicatory expertise and also that members are sufficiently independent of PRS providers. In particular, the draft Code set out

that members of the CAP will not have any commercial interest in PRS and provides that the CAP will include:

- a chair, who is a qualified barrister or solicitor with not less than 15 years' relevant experience;
- up to three but no less than two legally qualified members who are qualified barristers or solicitors with not less than 10 years' relevant experience; and
- up to thirteen but no less than six lay members with adjudicatory and relevant marketing, technical, operational, consumer-based or other experience.

## **v) Warning Notice to be sent to the relevant party at the conclusion of an investigation, including details of alleged breaches and recommended sanctions**

3.14 Under the 13<sup>th</sup> Code of Practice, PPP is required to provide the relevant party with all necessary information about any alleged breach(es) of the Code before a report is prepared and sent to a Tribunal. The relevant party will then be given a reasonable period of time to make representations on that information. This information does not include details of likely sanctions that could be imposed on that party, and settlement options are limited to those instances where the relevant party has requested an oral hearing (rather than a hearing on the papers).

3.15 Our consultation noted PPP's proposal that, going forward, on conclusion of an investigation by the Investigation Team and where that team is satisfied that it has sufficient evidence of a potential breach of the Code by the provider under investigation, a 'Warning Notice' will be prepared, reviewed internally by a panel of senior members of PPP and sent to the provider before a case is taken to a Tribunal for decision. The content of the Warning Notice will include a description of the service, potential breaches identified and supporting evidence. The Warning Notice will also set out the sanctions that the Investigations Team considers are appropriate for a Tribunal to impose for the alleged breach(es) of the Code.

3.16 The Warning Notice will be sent to the provider concerned, giving them a chance to respond prior to any consideration of the case by a Tribunal. The provider can accept the breaches and sanctions at that stage, which would then be ratified by a Tribunal without a hearing unless the Tribunal considers that there are exceptional reasons not to do so. If a provider wished to accept the breaches and sanctions in part, this would be considered by the same panel of senior PPP members that signed off the Warning Notice. Any settlement reached would then, similarly to the above, require ratification by the Tribunal. If no settlement is reached, the case would then be considered by the Tribunal in a full hearing.

## **vi) Flexible adjudication hearings**

3.17 Under the 13<sup>th</sup> Code of Practice, adjudication decisions are ordinarily taken by a Tribunal on the papers. Limited oral submissions from the relevant party may be made on the papers, although this does not happen in all cases. A relevant party can require that, instead of a hearing on the papers, a full oral hearing takes place, providing an opportunity for full or more detailed oral submissions.

3.18 Our consultation noted PPP's proposal that under the 14<sup>th</sup> Code, where providers choose to make oral submissions on the papers they will be given greater opportunity

to provide counter-arguments/explanation than is currently the case with the intention that providers do not feel they have to request a full oral hearing to present their views properly.

- 3.19 Where a case is taken to a Tribunal for a final decision to be made, the 14<sup>th</sup> Code makes clear that the case may continue to be decided either on the papers or, if the relevant party so requests, by way of an oral hearing. During an oral hearing, oral submissions (including legal) and oral evidence can be heard.
- 3.20 However, the 14<sup>th</sup> Code also envisages that relevant parties will, if they so request, be entitled to make more limited oral representations to the Tribunal even where the case is being considered by the Tribunal on the papers. This will give the provider an opportunity to provide any clarification and/or context to the Tribunal if they have not already done so. New evidence or arguments will not be normally permitted at this stage unless there is a compelling reason why this new evidence could not have been presented at an earlier stage of the investigation.

### **vii) Replacement of the current post-adjudication review stage and Independent Appeals Body (IAB) with a single, limited review procedure**

- 3.21 Under the 13<sup>th</sup> Code of Practice, a number of options are open to relevant parties that wish to appeal an adjudication. In particular, they are entitled to:
- apply for a post-adjudication review on the grounds that there is a new issue of fact or law or that the Tribunal came to a decision that was so unreasonable that no reasonable Tribunal could have reached it (ordinarily within 10 working days from publication of the adjudication decision);
  - request a post-adjudication oral hearing at which the matter would be considered afresh (ordinarily within 10 working days of a Tribunal decision being published);<sup>12</sup> and/or
  - after an oral hearing, appeal the matter to the IAB - a separate body which, whilst governed by the Code, does not include any PPP Board members - on the grounds that there has been an error of fact, law or the Tribunal exercised its discretion incorrectly.
- 3.22 Our consultation noted that, having considered stakeholder feedback and the use made by relevant providers of each of the above appeal mechanisms, PPP proposed to remove each of the above review mechanisms and replace it with a single, limited review procedure.
- 3.23 In summary, the proposed new review stage is expected to work as follows:
- The relevant party will have the opportunity to apply for a review of decisions on limited grounds, related to material errors of fact or process, errors of law or *Wednesbury* unreasonableness (irrationality).<sup>13</sup>

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<sup>12</sup> We noted that this is distinct from pre-adjudication oral hearings which, as discussed at (vi) above, PPP has proposed to maintain.

<sup>13</sup> See ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223***. This case set the test for the judicial review ground of unreasonableness as being that “the reasoning or decision is so unreasonable that no reasonable authority could ever have come to it”.

- The decision to grant a review will be made by the Chair of the CAP (or another legally qualified member of the CAP if the Chair was involved in the original decision or is unavailable) on the application of either the provider or PPP.
- The review (where granted) will be heard by three different members of the CAP to those who were involved in the original Tribunal decision. It will ordinarily be heard on the papers (with a right of limited oral representation if PPP or the relevant party so require) although the party or PPP may request that it take place as a full oral hearing. The reviewing Tribunal will have the power to confirm, vary or rescind any adjudications (in whole or part) made by the original Tribunal.

3.24 Should the appeal be rejected upon review, the provider can, should they wish to, proceed to a Judicial Review.

## Implementation

3.25 Our consultation noted PPP's proposal that the 14<sup>th</sup> Code apply automatically to all existing and new complaints and investigations from its commencement date. This proposal reflected PPP's view that the processes in the 14<sup>th</sup> Code will provide greater benefit to providers than the current 13<sup>th</sup> Code in terms of fairness and simplicity, for the following reasons:

- i) The proposed investigations and adjudications process is simpler, more streamlined, and more robust.
- ii) It will provide earlier and more informed opportunities for settlement.
- iii) It provides for a greater separation between those making and enforcing the Code.
- iv) The sanctions available to a Tribunal under the draft Code are identical to those available under the 13<sup>th</sup> Code of Practice.

3.26 For all investigations opened under the 13<sup>th</sup> Code but not concluded before the commencement of the 14<sup>th</sup> Code, PPP proposed to notify the parties under investigation that their case will be dealt with under the procedures in the 14<sup>th</sup> Code.

## Consultation responses

3.27 We received two responses to our consultation – from Ombudsman Services and the Fair Telecoms Campaign. Both responses are non-confidential and are published on our website here: <http://stakeholders.ofcom.org.uk/consultations/approval-phonepayplus-14th-code-of-practice/?showResponses=true>.

### Ombudsman Services

3.28 Ombudsman Services concurred with Ofcom's provisional view that the proposed 14<sup>th</sup> Code appears to satisfy the seven criteria for approval in s121(2) of the Act. In particular, it noted the following:

- The proposed changes will not have any impact on the criteria in s121(a), (c) and (e).

- The rules regarding the makeup of the newly created CAP appear to be robust and the checks and balances in place look to be appropriate to ensure PPP's continued independence (from PRS providers).
- The Code in its entirety looks to be “objectively justifiable” and “proportionate”. In particular, that:
  - the creation of new criteria within the Code for allocating a case to a Track 1 or Track 2 procedure looks to be manifestly better for procedural fairness (and enhances transparency);
  - the removal of the EP, which will be subsumed into the Track 2 process, looks to constitute a proportionate simplification.
- Most of provisions in the Code are unchanged and can see no evidence to indicate the amendments would have adverse consequences for the Code's transparency or clarity.

3.29 On implementation, Ombudsman Services agreed that only a short period was necessary before the Code becomes enforceable. It considered that the modifications were relatively modest and do not constitute a radical departure from existing arrangements. It noted PPP's engagement and consultation with stakeholders and therefore considered that industry should already be sufficiently aware of the changes.

3.30 Ombudsman Services considered the proposed transitional arrangements (i.e. that investigations commenced under the 13<sup>th</sup> Code will be handled under the new Part 4 procedures when the 14<sup>th</sup> Code take effect) to be reasonable. In particular, it noted that:

- the updated process looks to be more streamlined and therefore of benefit to those involved in existing matters;
- PPP will take adequate steps to update parties to the procedural changes and therefore parties should not suffer detriment;
- substantive breaches will be assessed under the Code that was in place at the time they are said to occur and therefore will ensure that no party will be expected to meet a new burden that they could not have been aware of at the relevant time.

### **Fair Telecoms Campaign**

3.31 The Fair Telecoms Campaign asked for Information, Connection and/or Signposting services (“ICSS”) to be included in the PRS Condition. It stated that there is no justification for the unregulated provision of ICSS services on 084 numbers (or any number with a Service Charge of up to 5.833 pence, exclusive of VAT). It suggested that a significant proportion of ICSS providers have switched to 084 numbers and are therefore unregulated.

### **Ofcom's assessment**

3.32 Ofcom's notes the Ombudsman Services response which supported our approval of the 14<sup>th</sup> Code and agreed to PPP's proposed transitional arrangements and short implementation timescale.

- 3.33 We also note the response from the Fair Telecoms Campaign (“FTC”) which asked Ofcom to revise the current PRS Condition to include ICSS.
- 3.34 The issue raised in the FTCs response fell outside the scope of Ofcom’s consultation on approval of the PPP Code of Practice under s121 of the Act, and we are satisfied that it does not undermine Ofcom’s view that it would be appropriate to approve the 14<sup>th</sup> Code.
- 3.35 However, Ofcom does consider it important to ensure that PRS regulation continues to capture 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. Ofcom has developed an analytical framework<sup>14 15</sup> which sets out the basis on which it will assess whether to extend the scope of the PRS Condition and, when carrying out such an assessment, Ofcom is required to have regard to the principles under which regulatory activities are (amongst other things) applied proportionately and are only targeted at cases where action is needed.
- 3.36 Currently, those ICSS which are provided using ‘premium rate numbers (09, 118, 087) fall within the scope of the PRS Condition and therefore are subject to PPP’s Code of Practice. Ofcom is not currently aware of any evidence which suggests that ICSS provided using other number ranges result in a level of actual or potential consumer harm which would warrant them being subject to the PRS Condition. The FTC’s response did not include any such evidence. As a result, Ofcom currently considers that it would not be appropriate or proportionate to extend the PRS Condition as the FTC has suggested.
- 3.37 However, PPP is reviewing the extent to which there is a risk of consumer harm from service types which are not caught by the PRS condition. This includes ICSS using other number ranges. Although we are not currently minded to amend the PRS Condition, we may revisit this issue in future, for example, following PPP’s review.
- 3.38 In conclusion, in light of the two responses received to our consultation – one in support of Ofcom’s approval of the Code and one which raises matters outside the scope of this particular consultation (and which Ofcom is satisfied does not undermine its view that it would be appropriate to approve the 14<sup>th</sup> Code) – we are satisfied that the 14<sup>th</sup> Code meets the requisite legal tests for approving a Code under the Act. The following section sets out Ofcom’s assessment and decision in more detail.

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<sup>14</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/prs\\_scope/statement/prs.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/prs_scope/statement/prs.pdf)

<sup>15</sup> Ofcom used the framework in 2011 to assess whether own-portal services and PRS bought using Payforit as a payment mechanism required specific PRS regulation, <http://stakeholders.ofcom.org.uk/binaries/consultations/review-prs/statement/statement.pdf>

## Section 4

# Approving the 14<sup>th</sup> Code under section 121 of the Act

- 4.1 This section sets out the reasons why Ofcom considers that it would be consistent with the legal tests set out in section 121 of the Act (and summarised in Section 2 of this document) to approve the 14<sup>th</sup> Code.
- 4.2 In relation to section 121(1)(a) of the Act, Ofcom considers that the 14<sup>th</sup> Code, developed by PPP, the co-regulatory body for PRS, *“has been made by a person for regulating the provision and contents of PRS, and the facilities made available in the provision of such services”*. In Ofcom’s view, that is clear from the provisions of the 14<sup>th</sup> Code and there is no change in this respect compared with the current 13<sup>th</sup> Code.
- 4.3 In relation to section 121(1)(b) of the Act, Ofcom considers that the 14<sup>th</sup> Code, *“contains provision for regulating, to such extent (if any) as they think fit, the arrangements made by the providers of premium rate services for promoting and marketing those services”*. Ofcom considers that this requirement is met. We have previously assessed and were satisfied that the 13<sup>th</sup> Code met this requirement. The position in relation to provisions in that edition of the Code which are unchanged in the 14<sup>th</sup> edition has not changed, and Ofcom considers those provisions have contributed to an appropriate regulatory regime. We further consider, for the reasons set out in this Statement, that the changes in the 14<sup>th</sup> Code are, amongst other things, objectively justified and proportionate measures that address relevant regulatory needs. On that basis, we consider that the 14<sup>th</sup> Code as a whole contains provisions for regulating the arrangements made by PRS providers for promoting and marketing relevant services to the extent Ofcom thinks fit.
- 4.4 In relation to section 121(1)(c) of the Act, Ofcom considers, *“it would be appropriate for them to approve that code [the 14<sup>th</sup> Code] for the purposes of section 120”*. In considering this, we are particularly mindful of the requirements of section 121(2) of the Act since Ofcom may not approve the 14<sup>th</sup> Code unless all seven such requirements are met.
- 4.5 We consider that, in satisfying these requirements, the 14<sup>th</sup> Code, in addition to the satisfactory provisions that remain in it from the 13<sup>th</sup> Code, provides for enforcement procedures which, considered end to end, are consistent with key principles:
- **fairness** – they give providers fair rights of defence and representation;
  - **effectiveness** – providing a high-level of consumer protection in cases where harm arises;
  - **efficiency** – they streamline procedural requirements in appropriate places, and so are liable to result in more timely decision-making and enforcement, for the benefit of consumers and providers; and
  - **balance** – they represent a fair balance between the requirements of fairness, effectiveness and efficiency.

4.6 On those grounds, we consider that it would be appropriate for us to approve the 14<sup>th</sup> Code.

4.7 The seven requirements of section 121(2) of the Act, and our specific reasons for considering that they, and the overall requirement that it is appropriate to approve the 14<sup>th</sup> Code, are met, are set out below. While we have set out our assessment under each, some of our considerations are relevant to more than one requirement. We have taken all these considerations into account in assessing whether we think all the requirements are met.

**(a) “that there is a person who, under the code, has the function of administering and enforcing it”**

4.8 Ofcom is satisfied that PPP would continue to have responsibility for administering and enforcing the 14<sup>th</sup> Code should it be approved under section 121 of the Act, as it does under the current 13<sup>th</sup> Code.

**(b) “that that person is sufficiently independent of the providers of PRS”**

4.9 The 14<sup>th</sup> Code does not make changes that Ofcom considers would have a bearing on PPP’s independence from PRS providers. Below, we reprise briefly why we continue to consider PPP to be sufficiently independent of the industry.

4.10 PPP last updated its Governance Statement in July 2013<sup>16</sup>. This Governance Statement contains details relating to PPP’s constitution, regulation, strategy, funding, budget and levy setting procedures. This Governance Statement sits outside the 14<sup>th</sup> Code.<sup>17</sup> We are satisfied with this approach, on the basis that adequate provisions remain within the 14<sup>th</sup> Code to satisfy Ofcom that PPP is sufficiently independent of PRS providers.

4.11 In particular, the 14<sup>th</sup> Code states that all Board members of PPP will be appointed in their individual capacities. Apart from a minority of Board members who are appointed on the basis of their contemporary industry knowledge, no member of the Board may have any commercial interest in the premium rate sector.<sup>18</sup>

4.12 We consider that the 14<sup>th</sup> Code also contains appropriate provisions to guarantee that the bodies responsible for making adjudications are sufficiently independent of PRS. In particular, the 14<sup>th</sup> Code confirms that members of the CAP will not have any commercial interest in the premium rate sector throughout the entire duration of their membership.

4.13 For the above reasons we are therefore satisfied that the requirement in section 121(2)(b) is met.

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<sup>16</sup>[http://www.phonepayplus.org.uk/~/\\_media/Files/PhonepayPlus/Corporate\\_and\\_Governance/Governance/PhonepayPlus\\_Governance\\_Statement\\_September\\_2013.pdf](http://www.phonepayplus.org.uk/~/_media/Files/PhonepayPlus/Corporate_and_Governance/Governance/PhonepayPlus_Governance_Statement_September_2013.pdf)

<sup>17</sup>[http://www.phonepayplus.org.uk/~/\\_media/Files/PhonepayPlus/New%20Folder%20Structure/About%20PhonepayPlus/Governance/PhonepayPlus\\_Governance\\_Statement\\_September\\_2013.pdf](http://www.phonepayplus.org.uk/~/_media/Files/PhonepayPlus/New%20Folder%20Structure/About%20PhonepayPlus/Governance/PhonepayPlus_Governance_Statement_September_2013.pdf)

<sup>18</sup> See paragraph 1.4.1 the 14<sup>th</sup> Code

**(c) “that adequate arrangements are in force for funding the activities of that person in relation to the 14<sup>th</sup> Code”**

- 4.14 The 14<sup>th</sup> Code does not make changes that Ofcom considers would have a bearing on the adequacy of PPP’s funding arrangements. We set out below why we continue to consider PPP has adequate arrangements in place.
- 4.15 PPP is a non-profit making organisation and is currently funded by a levy on out-payments from network operators to providers.
- 4.16 In addition, PPP receives some of its income from fines and administrative charges imposed on regulated persons who are found to have breached the Code. The rationale for the use of such fines and charges to fund PPP’s activities is that those who place an additional cost burden on PPP, in terms of a need to carry out investigative and enforcement activities, should pay an increased share of PPP’s expenditure rather than imposing higher costs on the majority of participants in the PRS industry who act responsibly and are complying with the Code.
- 4.17 We also note that PPP continues to operate the registration scheme by requiring registrants to pay a reasonable registration fee.<sup>19</sup>
- 4.18 PPP consults on its budget plans each year, following which the plans (and the level of the levy necessary to meet that budget) are submitted to Ofcom for consideration and approval. The funding arrangements for PPP are set out in more detail in Annex 1 of the draft Code and, in light of the foregoing, Ofcom is satisfied they meet the legal test for ensuring there are adequate funding arrangements in place. We are therefore satisfied that the requirement in section 121(2)(c) is met.

**(d) “that the provisions of the 14<sup>th</sup> Code are objectively justifiable in relation to the services to which it relates”**

- 4.19 Having considered the responses to our consultation, Ofcom is satisfied that the provisions of the 14<sup>th</sup> Code are objectively justifiable in relation to the services to which it relates. We consider that when taken in its entirety, the 14<sup>th</sup> Code will continue to provide an effective regulatory regime for PRS, without unnecessarily increasing the regulatory burden on the PRS industry, and indeed the changes are likely to result in improvements due to a more streamlined and simplified enforcement process.
- 4.20 We take account that we have previously considered objectively justifiable the provisions of the 13<sup>th</sup> Code (which were approved by Ofcom on 1 July 2015) that are unchanged. We are not aware of any reasons why that position should change.
- 4.21 With reference to what we consider to be the key changes in the 14<sup>th</sup> Code, our conclusion is that each is, on its own and when taken together with the other changes, objectively justified for the following reasons:
- a) The inclusion of high level criteria used by PPP to determine whether a case is allocated to a Track 1 or Track 2 investigation will provide more transparency to providers as to the factors PPP applies when making such a decision.
  - b) The removal of the EP from the 14<sup>th</sup> Code, and the ability for PPP to consider imposing interim measures in all Track 2 cases (where certain criteria are met) is

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<sup>19</sup> Paragraph 3.4.9 of the 14<sup>th</sup> Code.

objectively justifiable. This achieves PPP's objective of simplifying its enforcement procedures and, where interim measures can be imposed in Track 2 cases, it is clear that this removes the need for the separate EP. The consideration of interim measures in all Track 2 cases is likely to ensure greater consistency in PPP's approach to interim measures, and allow PPP to impose such measures in a more timely fashion (in particular, without having to separately justify use of the EP before requesting that interim measures be imposed). This should enable consumer harm to be reduced and/or prevented earlier than under the current process and ensure that any consumer redress is ultimately available when an adjudication is made.

- c) As to the establishment of an internal panel of senior PPP members to review the recommendations of the Investigations Team at various key stages of an investigation, this provides for members who are not involved in the day-to-day running of an investigation to consider matters afresh and provide a greater degree of internal scrutiny to ensure that the correct recommendations are being made and/or taken to a Tribunal for decision where appropriate. This should ensure that adjudications and the steps taken by PPP prior to adjudications are fair, consistent, proportionate and generally more robust and may reduce the likelihood of appeals from providers during the implementation of an interim measure and/or a final adjudication.
- d) On the Warning Notice to providers which will set out the case against the provider and any proposed sanction before any Tribunal decision, this will enable PPP to achieve its aim of providing further transparency and certainty to parties during the investigations process. Under the current process, settlement options are more limited as providers are not informed of likely sanctions until much later on when the Tribunal makes a decision and settlement can only be discussed when an oral hearing with the Tribunal is requested. Therefore, the additional content in the Warning Notice, and the ability of PPP to agree to settlements before a case goes to Tribunal (subject to ratification by the Tribunal) will enable providers to make a more informed decision as to whether to settle the case early without a full hearing at the Tribunal and, irrespective of its impact on settlement, provide more certainty to providers about the alleged case against them.
- e) As to replacing the CCP with a new body, the CAP, which will no longer include members of the PPP Board, this is intended to provide a separation between those who make the Code – the Board – and those who enforce it. This is likely to provide stakeholders with more confidence in the enforcement process by ensuring a degree of independence between the investigations and policy-making functions. We note, in particular, that a number of stakeholders had previously raised concerns about this point. We note the establishment of an internal panel - which will include senior PPP members - to provide oversight of the recommendations of the Investigations Team. However, the Tribunal is not bound by the panel's recommendations and may choose not to uphold alleged breaches and/or impose different sanctions. The senior oversight and the separate Tribunal function together should ensure that the decisions made during an investigation, and in any adjudication, are appropriate and robust.
- f) The greater opportunity for relevant parties to make fuller oral submissions, where an adjudication decision is being considered on the papers as an alternative to requesting a full oral hearing, will provide more flexibility to parties when a case reaches the Tribunal for decision. In particular, it will allow relevant parties to present their case and retain transparency over the process, but in what they consider may be a more proportionate manner. By that stage, the

provider will be fully informed of the alleged breaches and proposed sanctions which will all be set out in the Warning Notice.

- g) Replacing the current post-adjudication stage and IAB with a single, limited review procedure is intended to ensure that the appeals process is simplified and more streamlined. This responds to stakeholder criticism that the appeals process under the current Code of Practice is overly complex. If a provider remains unhappy after a review, the next step for them will be to seek an independent judicial review of that decision. The single review stage proposed will allow providers to challenge a decision outside of PPP earlier than would be the case now (where they are generally required to exhaust the current appeals process in the 13<sup>th</sup> Code before they can seek a judicial review). We also note that the IAB and post-adjudication oral hearings have been very rarely used by providers.

- 4.22 In addition, PPP will apply the revised Part 4 procedures to all existing as well as new investigations from the date the 14<sup>th</sup> Code takes effect. This means that all cases opened under the 13<sup>th</sup> Code will benefit from having to follow and being taken forward under the procedures in the 14<sup>th</sup> Code from the date the 14<sup>th</sup> Code takes effect.
- 4.23 We consider that the changes in the 14<sup>th</sup> Code as summarised above will result in an improved and more streamlined enforcement process which is suitably accessible, fair, and proportionate. As such, we consider these changes to be objectively justifiable and, also, consider it appropriate for these changes to apply to all existing as well as new investigations from the date the 14<sup>th</sup> Code takes effect.
- 4.24 We also consider that the provisions of the 14<sup>th</sup> Code which remain unchanged as against the 13<sup>th</sup> Code of Practice continue to be objectively justifiable in relation to the services to which they relate.
- 4.25 Accordingly, taking all these points together, we consider that the 14<sup>th</sup> Code as a whole meets the relevant objective justification requirement. We are therefore satisfied that the requirement in section 121(d) is met by the 14<sup>th</sup> Code.

**(e) “that those provisions are not such as to discriminate unduly against particular persons or against a particular descriptions of persons”**

- 4.26 Ofcom considers that the provisions of the 14<sup>th</sup> Code do not discriminate unduly against particular persons or against a particular description of persons. The 14<sup>th</sup> Code will be applied uniformly to all relevant parties engaged in the provision of CPRS, as defined in the PRS Condition. . The 14<sup>th</sup> Code does not make any changes which will lead to some parties, who are not currently subject to any obligations under the 13<sup>th</sup> Code, now being subject to obligations set out in the 14<sup>th</sup> Code. We are therefore satisfied that the requirement in section 121(2)(e) is met by the 14<sup>th</sup> Code.

**(f) “that those provisions are proportionate to what they are intended to achieve”**

- 4.27 The central objective of PRS regulation is to protect consumers from the risks of harm that may accompany the use of such services. In pursuing that objective, any regulatory obligations should be proportionate to the nature of the consumer harm being addressed. Following consideration of the responses to our consultation, Ofcom maintains its view that the provisions of the draft Code are proportionate, in light of this objective, to what they are intended to achieve.

- 4.28 Ofcom has previously assessed that the provisions of the 13<sup>th</sup> Code meet this proportionality requirement. We are not aware of any reasons why this might have changed in respect of the provisions from the 13<sup>th</sup> Code that are unchanged in the 14<sup>th</sup> Code. Ofcom considers that the key changes which are likely to have an impact on the proportionality of the 14<sup>th</sup> Code are those changes previously identified in this document. We consider it unlikely that other, less significant changes in the 14<sup>th</sup> Code will adversely affect its overall proportionality. We further consider that the changes to Part 4 of the 14<sup>th</sup> Code are proportionate within the meaning of section 121 of the Act.
- 4.29 We note that the changes in the 14<sup>th</sup> Code are not intended to impose further obligations on parties than are already provided under the 13<sup>th</sup> Code. Rather, they are intended to simplify the procedures followed by the parties (and PPP) when investigating potential breaches of the Code. A number of the changes, such as the amendment to the right for parties to make oral representations when a matter is considered on the papers and the simplification of the internal review process, are intended to provide for a more proportionate enforcement process. Further, the introduction of a senior panel to oversee the recommendations of the Investigations Team should also help to ensure that any recommendations put forward by that Team in an interim or final Warning Notice are appropriate and proportionate.
- 4.30 We note that the change which will enable PPP to be able to consider imposing interim measures as part of all Track 2 investigations will mean that PPP is likely to consider the imposition of such measures on a more frequent basis than it currently does under the 13<sup>th</sup> Code. However, these are subject to safeguards including strict criteria set out in the 14<sup>th</sup> Code which limit the circumstances in which PPP can recommend that interim measures be imposed, and rights to notice and to make representations in appropriate cases. Where one or more of these criteria are met (and in light of the other safeguards), Ofcom is satisfied that it would be proportionate for PPP to recommend (and impose) interim measures.
- 4.31 We are also mindful of the fact that, except for the inclusion of allocation criteria in the 14<sup>th</sup> Code, only providers subject to a Track 2 investigation will be affected by the changes. In general, a greater number of cases are dealt with via the Track 1 procedure<sup>20</sup> which is not subject to change. Costs associated with the process are likely to decrease for both providers and PPP as settlements are more likely to be agreed earlier than at present and in any case, a provider will be able to apply for judicial review of an adjudication earlier than is likely to be the case at present due to the replacement of the post-adjudication and IAB stages with a single, limited review procedure. We note that the IAB and post-adjudication oral hearings have been very rarely used by providers.
- 4.32 In reaching our decision, we also take account of PPP's assessment of the changes in the 14<sup>th</sup> Code. In particular, PPP noted some of the qualitative benefits of the revised Part 4 process to be:
- Greater transparency on the criteria applied by PPP when deciding whether to allocate a case to a Track 1 or Track 2 investigation.
  - Enhanced opportunity for providers to settle a Track 2 investigation by agreement due to the Warning Notice and more flexible hearings.

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<sup>20</sup> Up to Q2 of 2015/16, 63% of cases were dealt with using the Track 1 procedure.

- Fewer cases overall going to a Tribunal hearing if more cases are settled earlier following the issuing of the Warning Notice.
- An overall reduction in the time taken to go through the PPP enforcement process due to a reduction in the number of steps in the process.

4.33 On the basis of the foregoing, and having considered the responses to our consultation, Ofcom considers that the 14<sup>th</sup> Code as a whole, comprising the provisions unchanged from the 13<sup>th</sup> Code and the proposed changed provisions, each of which we consider to be proportionate, satisfies the proportionality requirement in section 121(2)(f) of the Act.

**(g) “that, in relation to what those provisions are intended to achieve, they are transparent”**

4.34 Ofcom considers that, in relation to what the 14<sup>th</sup> Code is intended to achieve, the provisions are transparent. Ofcom notes that, apart from Part 4, the provisions of the 14<sup>th</sup> Code have not changed from the 13<sup>th</sup> edition (or are subject to minor consequential changes as a result of Part 4 changes).

4.35 We note the 14<sup>th</sup> Code has been developed by PPP as a result of ongoing engagement with the PRS industry since the Part 4 Review was announced in March 2015 and in light of PPP’s experiences of enforcing the Code and stakeholder feedback. As noted above, PPP held stakeholder workshops in 2015 to get industry views on the proposed Part 4 changes and formally consulted on the proposed changes (over a 10-week period) which resulted in its decision document and final draft Code published on 10 March 2016.

4.36 Ofcom is therefore satisfied it is appropriate to approve the 14<sup>th</sup> Code in this regard. We consider that PPP’s consultation document, decision document and draft Code, clearly set out to industry the requirements that will apply to them, including the changes from the 13<sup>th</sup> Code, and do so in a transparent manner.

4.37 We also note that PPP published a draft ‘Code 14 Supporting Procedures’ document in January 2016<sup>21</sup>, a revised version in March 2016<sup>22</sup>, and will publish a finished version of this to sit as a current version alongside the approved 14<sup>th</sup> Code. Whilst the Supporting Procedures document is not part of the 14<sup>th</sup> Code, it serves to support the enforcement process and acts as a guidance document to PPP and industry for both informal and formal investigations.

4.38 The effect, in our view, is that the 14<sup>th</sup> Code has been developed following a transparent process through stakeholder engagement and consultation. Its provisions are themselves transparent in relation to what they are intended to achieve and the Supporting Procedures document provides further clarity and details about the criteria applied by PPP when deciding whether to allocate a case to a Track 1 or Track 2 investigation and the actions that may be taken in the course of any informal or formal action against providers who may be in breach of the Code provisions. In addition, the 14<sup>th</sup> Code makes clear that any action commenced under the 13<sup>th</sup> Code,

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<sup>21</sup> [http://www.phonepayplus.org.uk/news-and-events/news/2016/january/phonepayplus-publishes-draft-code-14-supporting-procedures?utm\\_source=Newsweaver&utm\\_medium=email&utm\\_campaign=traffic+via+Newsweaver](http://www.phonepayplus.org.uk/news-and-events/news/2016/january/phonepayplus-publishes-draft-code-14-supporting-procedures?utm_source=Newsweaver&utm_medium=email&utm_campaign=traffic+via+Newsweaver)

<sup>22</sup> <http://www.phonepayplus.org.uk/~media/Files/PhonepayPlus/News-Items/2016/Amended-Supporting-Procedures-to-the-Code-latest-draft.pdf>

and which is still ongoing when the 14<sup>th</sup> Code takes effect, will have to follow the revised Part 4 procedures from their commencement date.

## **Having regard inter alia to the provisions of the 14<sup>th</sup> Code, Ofcom has decided that it is appropriate for Ofcom to approve it**

4.39 Ofcom may not approve the 14<sup>th</sup> Code unless we are satisfied of the above matters, as set out in section 121(2) of the Act. We must also be satisfied that it is appropriate for us to approve it. In deciding whether we are satisfied of such matters, Ofcom must act consistently with its general duties under section 3 of the Act, and in accordance with the six Community requirements set out in section 4 of the Act. We set out our provisional assessment as to those matters, and on approval of the 14<sup>th</sup> Code overall, below.

### **Section 3: Ofcom's general duties**

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

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

4.41 Section 3(2) and 3(4) of the Act are also relevant. They set out matters Ofcom must secure and/or have regard to pursuant to our duties. Section 3(4) provides that, in performing its duties, Ofcom must have regard to "such of the following as appear to them to be relevant in the circumstances", including:

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

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

- a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
  - b) any other principles appearing to Ofcom to represent the best regulatory practice.
- 4.43 Section 3(5) of the Act provides that Ofcom, in performing its duty of furthering the interests of consumers, must have regard, in particular, to the interests of those consumers in respect of choice, price, quality of service and value for money.

#### **Section 4: The six Community requirements**

- 4.44 Section 4 of the Act sets out the six Community requirements which Ofcom, in carrying out its functions under inter alia Chapter 1 of Part 2 of the Act, must act in accordance with.
- 4.45 In broad terms, the six requirements are as follows:
- i) to promote competition, including in relation (a) to the provision of electronic communications networks and services, and (b) to the provision and making available of services and facilities that are provided or made available in association with the provision of electronic communications networks or services to secure that Ofcom's activities contribute to the development of the European internal market;
  - ii) to secure that Ofcom's activities contribute to the development of the European internal market;
  - iii) to promote the interests of all persons who are citizens of the European Union (within the meaning of Article 20 of the EC Treaty<sup>23</sup>);
  - iv) to take account of the desirability of Ofcom's carrying out its functions in a manner which, so far as practicable, does not favour (a) one form of electronic communications network, service or associated facility, or (b) one means of providing or making available such a network, service or facility, over another;
  - v) to encourage (to such extent as Ofcom consider appropriate for certain purposes which are specified in section 4(8) of the Act) the provision of network access and service interoperability; and
  - vi) to encourage such compliance with the standards specified in section 4(10) of the Act as is necessary for facilitating service interoperability and securing freedom of choice for customers of communications providers.

#### **Conclusion**

- 4.46 Ofcom has carefully considered the PPP 14<sup>th</sup> Code and the responses to our consultation and considers that it would be appropriate to approve it.
- 4.47 In reaching this conclusion, Ofcom has had regard to its duties under section 3 of the Act. Ofcom believes that approval of the 14<sup>th</sup> Code would be compatible with those duties, not only because the 14<sup>th</sup> Code would be in line with Ofcom's primary duty to further the interests of citizens and consumers, but also because, amongst other

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<sup>23</sup> Ex Article 17, prior to the amendments introduced by the Treaty of Lisbon.

things, it would promote greater consumer confidence in the PRS market and, as a result, encourage investment and innovation, and promote competition, in the sector.

- 4.48 In particular, Ofcom considers that effective competition can only exist where consumers are not misled about the cost or nature of services and where traders who cause consumer harm are held accountable. We are satisfied that the 14th Code would further these aims.
- 4.49 Also, Ofcom considers that the changes in the 14<sup>th</sup> Code represent a transparent, accessible and proportionate set of enforcement proceedings, including adequate rights of defence and appeal for providers. Overall, it appears to Ofcom that the ability of parties under investigation to engage constructively with PPP during enforcement proceedings (including during adjudication decisions), to put their case in response to allegations and to have the opportunity to find an earlier resolution to their case, has been enhanced by a number of the proposed changes to the Code. This in turn is likely to be beneficial for consumers as earlier resolution of cases could mean that consumer harm is addressed earlier and/or redress is made available sooner than would be the case under the current procedures.
- 4.50 Similarly, the change which will enable PPP to consider the imposition of service suspensions or revenue withholds in all Track 2 investigations where doing so is appropriate, should allow PPP to impose such measures in a more timely manner and, in particular, without relying on the invocation of an EP. This in turn should facilitate PPP's efforts to prevent serious harm to consumers and ensure that revenues are able, where possible, to provide refunds to consumers.
- 4.51 At the same time, whilst maintaining fair rights of defence for parties under investigation, a significant amount of unnecessary complexity has been removed from the enforcement process (including through replacing the current appeals mechanisms with a single, limited review procedure). We note, in particular, that parties genuinely seeking to contest the lawfulness of a decision reached by PPP will remain entitled to do so under the new review procedure and would remain entitled to apply for judicial review of that decision in any event.
- 4.52 In these ways, and others described in this document, the provisions of the 14<sup>th</sup> Code, in our view, satisfy the sorts of principles of fairness, effectiveness and efficiency with which the Code must be consistent. This contributes to our satisfaction that approving it would be in line with our duties.
- 4.53 Insofar as the majority of the provisions within the 14<sup>th</sup> Code remain the same as those set out in the 13<sup>th</sup> Code (or have been subject to minor consequential amendments as a result of the changes to Part 4 discussed above), we remain satisfied that these are appropriate. We note, in particular, that Ofcom approved those provisions as recently as 1 July 2015, and that Ofcom is not aware of any material change in circumstances since that date which would make it inappropriate for Ofcom to approve the 14<sup>th</sup> Code with them included.

## Annex 1

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

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

### WHEREAS:

- (A) section 121 of the Communications Act 2003 (c. 21) (“the Act”) empowers the Office of Communications (“Ofcom”), subject to being satisfied of certain matters specified in that section, to approve a code which has been made by any person for regulating the provision and contents of premium rate services, and the facilities made available in the provision of such services;
- (B) on 23 November 2015 PhonepayPlus (PPP) published a draft Code of Practice (“the draft Code”) and a consultation document seeking stakeholder views on its content;
- (C) on 10 March 2016 PPP formally submitted to Ofcom the 14<sup>th</sup> Code with a request that Ofcom approve it pursuant to section 121 of the Act;
- (D) on 14 March 2016 Ofcom published a consultation document on the 14<sup>th</sup> Code, stating that Ofcom was minded to approve that draft Code under section 121 and inviting comments on that proposal by 25 April 2016; and
- (E) on 14 March 2016 the Department for Business, Innovation and Skills submitted the 14<sup>th</sup> Code to the European Commission, in line with Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (the “Directive”).

Ofcom has now considered the responses which it received to the consultation document, and notes that the European Commission and other Member States did not make any comments on the 14<sup>th</sup> Code submitted to the Commission. For the reasons set out in the Statement which accompanies this Notification, Ofcom considers that the requirements for approving a code set out in section 121 of the Act have been satisfied and that it would be

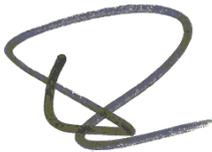
appropriate and in accordance with Ofcom's statutory duties now to approve the PPP Code of Practice (14<sup>th</sup> edition).

**NOW, therefore:**

1. Ofcom hereby gives its approval of the code for premium rate services set out in the Schedule hereto (and reproduced in Annex 2 to the Statement which accompanies this Notification) for the purposes of sections 120 and 121 of the Act, to take effect from, and including, 12 July 2016.

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

**Signed by**

A handwritten signature in dark ink, appearing to be 'Lynn Parker', written in a cursive style.

**Lynn Parker**

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

**21 June 2016**

**Annex 2**

# PhonepayPlus Code of Practice (14<sup>th</sup> Edition)

[http://stakeholders.ofcom.org.uk/binaries/consultations/approval-phonepayplus-14th-code-of-practice/statement/PhonepayPlus\\_CoP\\_14th\\_Edition.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/approval-phonepayplus-14th-code-of-practice/statement/PhonepayPlus_CoP_14th_Edition.pdf)

## Annex 3

# Glossary of terms

**Access Charge** Is the charge paid to the phone company originating the call.

**The Act** The Communications Act 2003, which came into force in July 2003.

**CAP** Code Adjudication Panel. A panel of experts who will undertake adjudicatory activity and decision-making in relation to Code enforcement on behalf of PPP under the new Code.

**CCP** The Code Compliance Panel is currently responsible for PPP's adjudicatory function.

**CPRS** Controlled premium rate service has the meaning set out in the Condition issued by Ofcom under section 120 of the Act.

**Interim measures** The suspension of services or withholding of revenues from a party in the PRS value chain prior to a final adjudication on breaches of the Code by a Tribunal.

**Investigations Team** Part of the PPP Executive that holds expertise in evidence gathering, handling and analysis. The Investigations Team is tasked with case management and day-to-day enforcement activities under the Code.

**PPP** PhonepayPlus is recognised by Ofcom as the day-to-day regulator of PRS.

**PRS** Premium rate service has the meaning set out in section 120 of the Act.

**Service Charge** is the charge paid to the phone company which terminates the call and may be shared with the PRS provider.

**SMS** Short Message System is a text messaging service component of phone, Web or mobile communications systems.

**Track 1 procedure** An investigation of potential breaches of the Code, which may be resolved between PPP and the relevant PRS provider via an agreed Action Plan. The Track 1 procedure does not require an adjudication by a Tribunal.

**Track 2 procedure** An investigation into potential breaches of the Code, which may require more extensive efforts to gather information and evidence. Any final decision as to whether a breach has occurred (and, if so, any sanction to be imposed) is made by a Tribunal.

**Warning Notice** A formal submission produced by the PPP Executive and sent to a relevant PRS provider which includes a description of the service, alleged breaches of the Code identified, relevant supporting evidence and proposed sanctions. It will also explain how a PRS provider can respond to the Warning Notice.