



Review of Premium Rate Services

Decision on an application of the analytical framework

Statement

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Section 1

Summary

Proposals

- 1.1 In October 2009, following consultation, Ofcom published the PRS Scope Review statement, “*The PRS Scope Review: an analytical framework for assessing the risk of consumer harm, and steps to improve PRS regulation*”¹. It included an analytical framework that can be used to analyse any particular form of Premium Rate Service (‘PRS’), to help assess whether it should be subject to PRS regulation because of the risk of consumer harm. This framework looks at the demand and supply side characteristics of the service and assesses the extent to which this may lead to a risk of consumer harm.
- 1.2 Following that publication, mobile communications providers (‘MCPs’) asked Ofcom to assess whether certain types of PRS require specific PRS regulation and, specifically:
- fixed and mobile portal content services charged to the customer’s phone bill (‘own portal services’); and
 - PRS bought using Payforit as a payment mechanism (‘PFI services’).
- 1.3 In July 2011, Ofcom published a consultation document, “*Review of Premium Rate Services: an application of the analytical framework*” (‘the July 2011 Consultation’)², in which, in light of our application of the framework, and our analysis of the case for regulation of the services under review, we proposed the following:
- own portal services should be removed from the scope of PRS regulation; and
 - PFI services should remain within PRS regulation but that we would ask PhonepayPlus (‘PP+’) to consider how it would regulate those services in a manner that takes into account the reduced potential for consumer harm in comparison with other forms of PRS.
- 1.4 In respect of PFI services, we also said we would re-consider the position if MCPs were able to give us sufficient confidence that, if formal regulation did not apply, current levels of self-regulatory control would at least be maintained, and an effective means of redress for consumers direct with the MCP introduced. To this end, we met with MCPs post-consultation to clarify what would be required for us to re-consider our position in relation to PFI services.
- 1.5 We also consulted on an amendment to the PRS Condition which would give effect to our proposals.
- 1.6 The consultation closed on 7 October 2011. Ofcom received 30 responses, all of which were from industry stakeholders. The responses substantially agreed with our

¹ http://stakeholders.ofcom.org.uk/binaries/consultations/prs_scope/statement/prs.pdf

² <http://stakeholders.ofcom.org.uk/binaries/consultations/review-prs/summary/condoc.pdf>

analysis and proposals on own portal services but not on PFI services, where the majority of respondents disagreed that these services should remain subject to regulation.

Decision

- 1.7 Based on our application of the framework, analysis of consultation responses (including the assurances provided to us by MCPs as to self-regulation) and overall assessment of the risk of consumer harm, Ofcom has decided to confirm the proposals set out in the July 2011 Consultation. This is for the following reasons, explained more fully in this statement:
- *Own portal services*: our assessment is that there are important differences between own portal services and more conventional PRS whose characteristics have in the past given rise to consumer harm and that, therefore, there is more limited risk of consumer harm arising. Our view is that the case for regulation is not made.
 - *PFI services*: our assessment is that, while the risks of consumer harm from PFI services are somewhat less than with other (more conventional) PRS, the similarities and associated risks are such that removal of all regulation would not be warranted. Our view is that there remains a case for some regulation, but that regulation should be limited so as to be proportionate to, and targeted at, the risks identified.
- 1.8 In order to give effect to this decision, this statement includes a notification modifying the PRS Condition.
- 1.9 Ofcom is satisfied that the statutory requirements for modifying the PRS Condition are met. In that regard, Ofcom believes that making modifications the effect of which is that own portal services will be outside the scope of PRS regulation, and that PFI services will be within it, are objectively justified and consistent with the principles of transparency, proportionality and non-discrimination.
- 1.10 This modification to the PRS Condition (which is outlined in Annex 3) will be effective from 1 September 2012.

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 content, or a product, facility or service, the charges for which are made to a consumer's phone bill or pre-pay account. They are services delivered via an Electronic Communications Network ('ECN') and paid for to the provider of an Electronic Communications Service ('ECS').
- 2.3 PRS may be accessed by a conventional ('09') voice call, but also other ways, such as SMS, computers, mobile phone downloads or interactive digital TV. Common forms of PRS include specialist helplines, recorded information lines, mobile entertainment such as music downloads, ringtones, videos, images and games downloads, voting or competitions and adult entertainment content.
- 2.4 PRS vary in cost, typically between 6 pence per minute and £1.53 per minute/call for calls from BT landlines (incl. VAT) and up to £10 per call/SMS on mobile shortcodes. In most cases, the bulk of the revenue goes to the company who markets and controls the content. The remainder is usually shared throughout the value chain, including with the consumer's Originating Communications Provider ('the OCP'), the Communications Provider who is terminating the call to the PRS provider, and any intermediary offering a technical platform to help deliver the service.

The purpose of PRS regulation

- 2.5 As described in paragraph 2.2 of the PRS Scope Review statement, the rationale for PRS regulation is that certain services possess characteristics which mean they are likely to give rise to particular risks of harm, which risks may not effectively be mitigated by existing means of consumer protection. Those characteristics include simplicity, attractiveness, low (absolute) value, limited requirements for validation of the transaction and a fragmented supply chain. The regulatory framework recognises that these characteristics mean PRS require specific (additional) regulatory provisions to target and prevent consumer harm, and that reliance on market forces and horizontal consumer legislation is insufficient.
- 2.6 In light of some of the responses to the July 2011 Consultation, set out in more detail in section 5 below, we consider it is helpful to set out more fully the background to PRS regulation, and the intended purpose behind it. We do so as follows.
- 2.7 The rationale for specific PRS regulation described above can be traced through the development of, and commentary on, the current regulatory framework. In the House of Lords' debate on the then Communications Bill in 2003, Lord McIntosh said:

"PRS regulation was originally invented to deal with pricing transparency of telephony offered over BT's network by service providers. As the money was collected via the BT bill, the service provider had no relationship with the customer and, therefore, had no incentive to behave scrupulously

towards consumers. Hence the need for regulation. The UK mobile phone operators and ICSTIS³ have been working closely with the Government to ensure that the Communications Bill continues to provide consumer protection in the area of PRS.” (Hansard, House of Lords, 20 May 2003, Col 727)

2.8 Baroness Gould, meanwhile, said:

“A key focus of ICSTIS's work in 2003 will be increasing media literacy among consumers and those working with them. That means informing and empowering consumers so that they are better able to understand how premium rate services work on a variety of platforms and a range of devices—the Internet, digital interactive TV and mobile messaging services. ICSTIS wants consumers to know what to look for when deciding whether to use a premium rate service. It also wants them to know how to protect themselves and their families from unwarranted contact or harmful content by using call-barring or filtering devices.

An informed, confident consumer is the key to preventing consumer harm and increasing confidence in PRS as a billing mechanism. When the pace of technological development outstrips consumer knowledge there is potential for consumer harm.

There must be concern over unauthorised use, serious, willful consumer deception and the inappropriateness of some services, particularly sexual entertainment.” (Hansard, House of Lords, 25 March 2003, Col 701-702)

2.9 In a 2004 report for DTI entitled “*The Regulation of Premium Rate Services*”⁴, Ofcom said:

“The main purpose of regulatory intervention in the premium rate sector is to secure that adequate standards are applied to PRS and promotions, and to ensure adequate protection of consumers from running up high bills. Regulation is justified because of the ease with which these services can be accessed, and the expensive nature of the charges involved. It is important to ensure adequate price transparency so that the consumer is in a position to give informed consent before incurring such charges.”

2.10 Those points are reflected in section 120(1) of the Communications Act 2003 (“the Act”), which provides that (Ofcom’s **emphasis**):

*“OFCOM shall have the power, for the purpose of **regulating the provision, content, promotion and marketing of premium rate***

³ Formerly PP+.

⁴ http://stakeholders.ofcom.org.uk/binaries/telecoms/policy/narrowband/prs_review.pdf

services, to set conditions under this section that bind the persons to whom they are applied.”

- 2.11 The emphasised words, in particular, indicate the range of areas relating to PRS in which harm may occur and for which specific regulation may be required. In recognition of this, Ofcom is given a wide mandate, concerned with the content of such services, as well as their promotion, marketing and provision. PRS regulation is not concerned simply with charges and transparency of billing.

The statutory definition of PRS

- 2.12 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 telecommunications service.”*

- 2.13 Section 120(8) says a service falls within that section if it 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 PRS are currently regulated in the UK

- 2.14 The current PRS regulatory framework consists of a hierarchy with three components:

- (i) the Communications Act 2003 ('the Act');
- (ii) the PRS Condition; and
- (iii) the PP+ Code of Practice ('the Code').

- 2.15 This hierarchy 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 Condition (and ultimately to Ofcom's statutory backstop enforcement powers).

- The PRS Condition requires providers falling within its scope to comply with directions given by PP+ in accordance with its Code and for the purposes of enforcing the provisions of that Code. Ofcom can ultimately take enforcement action for breach of the PRS Condition.
- The Code itself is approved by Ofcom under section 121 of the Act. It outlines wide-ranging rules to protect consumers as well as the processes PP+ applies when regulating the PRS industry.

2.16 The overall effect of this hierarchy of powers is that CPRS are regulated by the Code and communications providers and CPRS providers involved in their provision are subject to Ofcom's statutory backstop enforcement powers.

Flexibility in applying the regulatory framework

2.17 There is flexibility as to how the regulatory framework is applied. There are two main aspects to this flexibility. They enable the regulatory regime to be adapted so that it addresses the likelihood of harm attaching to particular PRS in the ways, and to the extent, required, given the characteristics of, and associated risks of consumer harm arising from, the relevant services. This provides a framework which enables regulation to remain appropriate and proportionate to the harm (or the likelihood of its occurrence).

2.18 First, by narrowing or widening the scope of the PRS Condition, Ofcom can include in, or exclude from, regulation specific types of PRS depending on an assessment of the risk of harm. In this way, particular types of PRS have been included in the scope of regulation while others have been removed.

2.19 For example, in 2006 Ofcom extended PRS regulation to internet diallers. Prior to that time, regulation did not cover diallers using '08' premium rate numbers. In light of growing evidence of a migration of diallers to such numbers, and of consumer harm arising from their use, Ofcom extended the definition of CPRS to include all diallers, irrespective of the call cost or number.

2.20 Second, whilst inclusion in, or exclusion from, the PRS Condition is a binary decision, PP+ can vary the application of its Code. It can do so to recognise that certain types of CPRS falling within the PRS Condition may pose more or less risk of consumer harm than others.

2.21 For example, PP+ subjects certain CPRS to a requirement that their provider must first obtain PP+'s written permission before operating the service. This covers services assessed as involving a higher risk of harm to consumers on account of the particular characteristics they exhibit, actual evidence of harm and their potential to cause it. They include Broadcast PRS, Call Quiz TV, live services, like live chat, and certain services costing more than £1.28 plus VAT per minute.

2.22 Conversely, PP+ are also able to exempt CPRS from specific requirements of the Code where its full application would be inappropriate for, or disproportionate to, the consumer harm protected against. For example, in 2007, PP+ modified the application of the Code to 087 numbers, on the grounds such numbers were mostly used for customer sales and support services, involved lower retail prices and the potential for consumer harm in their use was generally lower.

- 2.23 These examples demonstrate that the regulatory regime for PRS is more than one-dimensional. It can be adapted to target and mitigate the specific risk to consumers that arises, or is likely to arise, from particular services.

Why PRS are regulated differently

- 2.24 By way of context, which Ofcom has taken into account in making first our consultation proposals and now our decision in this statement, there have been a number of abuses and scams (or other negative outcomes) involving PRS which have caused significant consumer harm and undermined consumer confidence in PRS and the long term growth, and future, of the sector. These have demonstrated some of the characteristics of services which are liable to give rise to consumer harm and the need for the application of the regulatory framework described. They can be categorised under these headings:

- misleading promotions;
- unsolicited promotions;
- inappropriate promotions;
- inappropriate content;
- failure to respond to STOP commands;
- charging (for subsequent services) without consent; and
- inadvertent over-consumption.

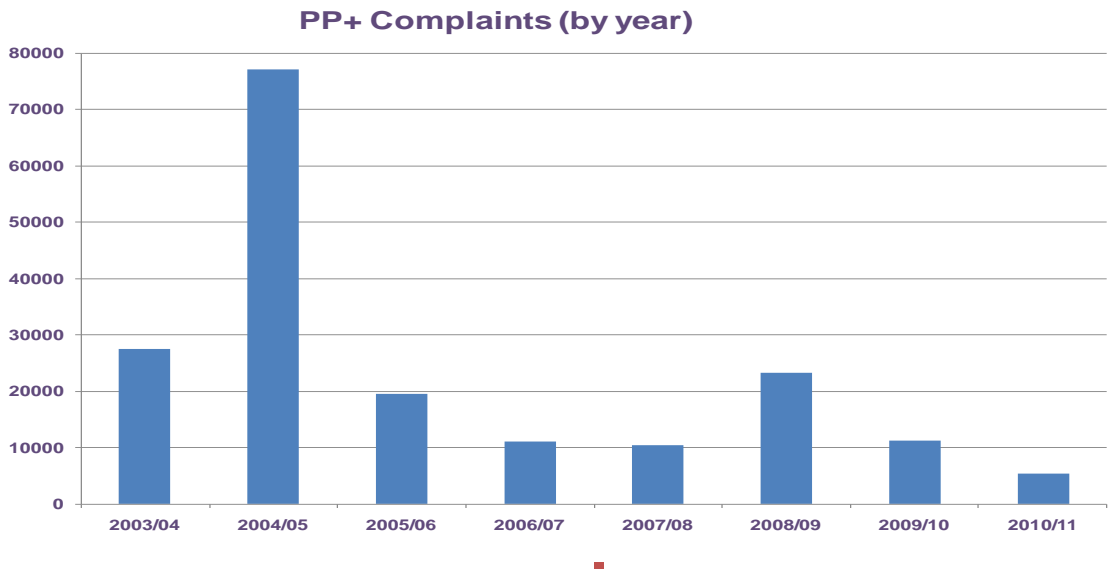
- 2.25 More specific examples of some of the wrongdoing in PRS, and/or the consumer harm arising out of specific types of services, are set out below.

- ***The consumer is misled into purchasing a PRS:*** There have been a number of scams involving consumers using a PRS without realising they are doing so. For example, cards posted through letterboxes instructing the consumer to call a particular number (i.e. a PRS number), designed specifically to mislead the consumer into believing there is a parcel awaiting collection. Another example concerns Internet diallers (see below).
- ***The purchased service is not delivered to the consumer.*** PRS are remotely purchased and delivered after purchase. This gives providers the possibility to behave opportunistically, deliberately not delivering the service. One example is Call TV Quiz services, where lines were kept open after competitions had closed.
- ***The consumer may inadvertently take a subscription rather than a one-off service:*** There are examples of consumers being misled and/or being unaware of the subscription nature of services and believing they are making one-off purchases. One relates to the Crazy Frog ringtone, where providers omitted, or did not provide clearly, significant information about their services. Another is where providers prevent consumers ceasing subscription services by operating ineffective “STOP” commands.

- **The service quality is not as anticipated:** PRS are what economists call experience goods⁵ and the consumer will typically be unable to assess the quality of the service in advance of payment. Some providers, unconcerned about generating repeat purchases and consumer loyalty, have sought to exploit this by offering poor quality services.
- **Consumers inadvertently “over-consume” a service:** PRS provide a simple authentication method for low cost (in absolute terms) services marketed to promote impulse purchases, the total cost of which a consumer may only discover on later receipt of their communications bill or expiry of their pre-pay credit. The combination of these characteristics means consumers can easily over-consume and over-spend on more “addictive” services (like chat and voting lines, and TV Quiz competitions). In extreme cases this could lead to consumers being unable to pay their bills.
- **Children are exploited as consumers:** Some PRS have a strong appeal to children, who are less likely capable of making informed purchasing decisions. Children have been particularly vulnerable to exploitation by certain PRS providers.

2.26 Figure 1 below shows the volume of complaints received by PP+ over recent years. It highlights, in particular, the effectiveness of the regulatory framework, with complaints falling to a record low (5,376 complaints for the year 2010/11) compared to 23,278 received during 2008/09 and 77,000 in 2004/05.

Figure 1: PP+ complaints (by year)



2.27 While this is a positive picture, it nevertheless also demonstrates some of the risks of the PRS sector, and that PRS have the potential to cause significant consumer harm very quickly. The spikes in complaint volumes experienced during 2004/05 and

⁵... Goods where consumers are only able to ascertain the quality at the point of consumption - see paragraphs 3.12 to 3.13 of this statement.

2008/09, for example, were caused by 'rogue' internet diallers and problems with mobile phone-paid services, respectively. These are briefly described below.

'Rogue' internet diallers

2.28 During 2004, a serious problem arose with 'rogue' diallers⁶ using premium rate ('09'), international and satellite numbers. The two most significant issues which emerged were:

- diallers failing to uninstall themselves after legitimate use, resulting in continued use at a higher premium rate; and
- dialler programmes installing themselves surreptitiously, typically using pop-ups that triggered the installation despite the consumer taking no action other than attempting to close the pop up box.

2.29 Both these issues resulted in consumers receiving high, and subsequently disputed, bills, causing a significant degree of consumer harm and large numbers of complaints to ICSTIS. ICSTIS estimated that the amounts involved in dialler scams were typically £50 - £100 per customer, but considerably higher in some individual cases.

Mobile phone-paid services

2.30 PP+ saw a significant increase in complaints about mobile phone-paid services during 2008/09, with some 21,401 complaints being received (92% of its total complaints for that year). In addition, the number of individual complaints to PP+ relating to a single service increased from an average of 5-10 per service in 2007 to as many as 270 complaints per service in 2008. This led to PP+ conducting a review of the mobile phone-paid services market. Following a consultation in July 2008, PP+ issued its final decision in the form of a statement on 22 July 2009.⁷ This resulted in a number of new regulations being introduced.

2.31 PP+ identified the following main causes behind the increase in complaints:

- **Misuse of promotional SMS messages and misuse of marketing lists:** this involved the practice of sending unsolicited SMS messages to mobile handset owners. Whilst the owners of the handsets had not accepted any message or consented to any charge, they were sometimes charged to receive these messages, which often contain a promotion of some kind. A variant of this issue included the misuse of SMS messages which "push" a mobile handset's internet browser to a specific mobile website which

⁶ Diallers are software which switches the modem setting of a computer from one internet connection to another, typically from a local rate ('0845') telephone internet connection to a premium rate one ('090' or equivalent). They can be a legitimate and convenient way of paying for content on the internet, such as sports results and music downloads, at premium rates

⁷ http://www.phonepayplus.org.uk/News-And-Events/News/2009/7/~/_/media/Files/PhonepayPlus/Consultation%20PDFs/2009StatementonMobileWhitePaper.pdf

immediately charges the handset's owner, or registers them for a subscription service, without their consent.

- **Failure to provide sufficient information about the costs and conditions of the service:** this involved a failure to provide transparent information to consumers, including information about price, whether the service is opt-in or opt-out and the nature of the service. In the main, complaints in this area arose from mobile phone-paid services which were purchased through a website (either accessed through a PC or mobile handset). Another failure identified was in relation to consumer harm from text-based chat services. In particular, promotion of text-based chat services using an SMS sent from a mobile long number rather than shortcodes (which was viewed as misleading), as well as promotions that mislead consumers into believing they can meet the people with whom they are exchanging texts and/or pictures.
- **Various issues linked to subscription services:** PP+'s review highlighted that the main driver of complaints about mobile phone-paid services was services using subscription billing. The main root causes of the complaints were: failure to provide pricing or other required information that informs the consumer they are purchasing a subscription; false or misleading implication that a product or service is free, when in fact it is dependent on the consumer signing up to a subscription; and the charging of a joining fee to the consumer without clearly informing them.

Scope of this review

2.32 As described in more detail in section 3 of this statement, in October 2009 Ofcom published the PRS Scope Review statement to help us decide how we should exercise our powers under the relevant regulatory framework. It included an analytical framework to help assess whether a type of PRS should be subject to regulation. Since that publication, MCPs have asked us to apply the analytical framework to certain PRS, to assess whether they should be subject to PRS regulation. Those services are:

- **own portal services:** These are services in which fixed communications providers (such as Sky, Virgin Media and BT Vision) offer their customers access to their own on demand content such as film and catch up television programmes. MCPs also offer their customers different types of on demand content, such as video clips, music, games and wall papers through their own websites.
- **PFI services:** PFI is a payment mechanism for WAP⁸ and web users, offered by all UK MCPs for the purchase of services from third party providers ('merchants'). It provides enhanced pricing transparency (compared to 'conventional' PRS) by enabling consumers, once they have selected their service from a WAP or website, to confirm their intention to purchase within a secure 'checkout' area before a charge for that product or service is made to their mobile phone bill or prepaid balance.

⁸ Wireless Application Protocol

- 2.33 Mobile stakeholders have, since 2005, questioned why mobile portal content services are subject to the Code, when seemingly similar fixed portal content services have not been explicitly included to date. They have also argued that PFI services should not be subject to PRS regulation. They consider that such services provide consumers with comprehensive price and merchant information prior to entering into a transaction and that the potential for consumer harm is therefore limited.
- 2.34 Taking into account what mobile stakeholders, in particular, had said to us, what we said in the PRS Scope Review statement, the analytical framework and other relevant evidence, in July 2011 Ofcom published the July 2011 Consultation. We carefully considered the need to ensure regulation is applied proportionately, focused where needed and in a technologically neutral way. Our proposals were that own portal services should be taken out of PRS regulation, but PFI services should continue to be regulated. We have now considered the responses to the July 2011 Consultation and in this statement we publish the decision we have made.

Impact Assessment

- 2.35 Together with the analysis set out in the July 2011 Consultation, the analysis in this document constitutes an impact assessment, as defined in section 7 of the Act. We have set out the relevant factors and options we have considered, including their impact on stakeholders (including both consumers and Communications Providers). It is for the reasons set out in those documents that Ofcom has reached its decision. For further information about Ofcom's approach to impact assessments, see the guidelines, *Better policy-making: Ofcom's approach to impact assessment*, which are available on Ofcom's website.⁹

Equality Impact Assessment

- 2.36 Ofcom is also required to assess the potential impact of all our functions, policies, projects and practices on the equality of individuals to whom those policies will apply¹⁰. Equality impact assessments ('EIAs') assist us in making sure that we are meeting our principal duty of furthering the interests of citizens and consumers regardless of their background or identity. We have given careful consideration to whether or not our proposal (now our decision) to amend the PRS Condition will have a particular impact on race, age, disability, gender¹¹, pregnancy and maternity, religion or sex equality¹².
- 2.37 We do not consider that our proposal and/or decision will have such an impact. Nor do we envisage any need to carry out separate EIAs in relation to race or gender equality or equality schemes under the Northern Ireland and Disability Equality Schemes. This is because we anticipate that our regulatory intervention will affect all stakeholders equally and will not have a differential impact in relation to people of different gender or ethnicity, on consumers in Northern Ireland or on disabled consumers compared to consumers in general. Similarly, we are not making a

⁹ See: http://stakeholders.ofcom.org.uk/binaries/consultations/better-policy-making/Better_Policy_Making.pdf

¹⁰ Equality Act 2010

¹¹ Including gender reassignment

¹² Including sexual orientation.

distinction between consumers in different parts of the UK or between consumers according to income. Again, we believe that our intervention will not have a particular effect on one group of consumers over another.

Structure of the document

2.38 The remainder of this document is structured as follows:

- Section 3 describes the PRS Scope Review statement and provides a summary of the analytical framework.
- Section 4 describes the services under review and summarises our consultation proposals and the reasons why we made them.
- Section 5 summarises the responses to the July 2011 Consultation.
- Section 6 explains Ofcom's consideration of the consultation responses, our decision and the amendments we make to the PRS Condition.

Section 3

The PRS Scope Review statement and summary of the analytical framework

- 3.1 In this section, we describe our review of the scope of PRS which led to the development of an analytical framework, the aim of which is to inform Ofcom considerations on whether the scope of regulation should be widened or narrowed.

The PRS Scope Review statement

- 3.2 There is no specific test in the Act as to when Ofcom should or should not exercise our powers under section 120 of the Act to designate a service as a CPRS. We must apply our general duties and seek to make decisions which reflect the purpose of the legislative provisions and address the harm they seek to address.

- 3.3 To facilitate a consistent approach towards meeting these duties and addressing the relevant harm, Ofcom carried out a review of the way in which PRS are regulated in light of market developments, in particular, the rapid growth in number and range of such services. This led to the development of an analytical framework, based on characteristics common to PRS and risks to which they may give rise. This was set out in the PRS Review Statement, published in October 2009.

- 3.4 The analytical framework does not replace the statutory regime, nor add an extra layer of regulation. But, as we said in the PRS Scope Review statement:

“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.....,” and

“... [it] 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.”

- 3.5 In particular, our principal duties under section 3(1) of the Act are, in carrying out our functions (including making and modifying PRS conditions):

“... 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.”

- 3.6 In carrying out these duties Ofcom must have regard to:

“... the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed;” and

“... any other principles appearing to OFCOM to represent the best regulatory practice.”

- 3.7 The analytical framework was developed so that consumers' interests in being protected from harm caused by PRS are furthered. The intention is that, through applying the framework, those interests are furthered in a transparent, proportionate and consistent way, where Ofcom intervention (by designation of a PRS as a CPRS to which the PRS Condition applies) is only targeted at PRS in respect of which action is needed.

The analytical framework

- 3.8 As set out in the PRS Scope Review statement, Ofcom developed the analytical framework by first identifying supply and demand-side characteristics common to PRS, and the risks to consumers to which those characteristics may give rise (especially from services having a number of these characteristics). Building on this higher level analysis of characteristics and risks, we then identified a framework of nine specific characteristics of services which give rise, individually or in combination, to the identified types of harm.
- 3.9 The identification of the high-level supply and demand supply-side characteristics was informed by particular PRS that had given rise to consumer harm in the past. This included, amongst others, consideration of the internet dialler scams and mobile phone-paid services described above.

Supply-side characteristics

- 3.10 The supply-side characteristics identified were:
- (i) the consumer's OCP is typically not the supplier of the PRS;
 - (ii) there is often a complex, fragmented value (or supply) chain;
 - (iii) there are often large numbers of suppliers operating at different levels in the chain; and
 - (iv) barriers to entry and exit are relatively low at the Information Provider ('IP')¹³ level of the value chain, so turnover of suppliers may be significant.
- 3.11 Ofcom noted three risks arising out of these characteristics:
- *"..... opportunistic behaviour towards consumers and other suppliers in the supply chain" incentivised by " the combination of the complex value chain, the high number and easy entry and exit of Information Providers ('IPs') , and rapid technological change, [which] may mean that some suppliers tend to be less concerned with maintaining a favourable reputation;"*
 - price differences for the same PRS sold by different OCPs, arising because, *".... a consumer's OCP sets the retail price of a PRS rather than the supplier of the service,"* which in turn makes it difficult for service and information providers to

¹³ The IP is a party who usually sits upstream of the service provider (the merchant) in the relevant PRS value chain, and will typically act as a service promoter and/or as a content provider. In some value chains, however, like those for PFI services, there may be a single party who is the IP and the merchant.

communicate prices to consumers and which may incentivise OCPs to raise prices; and

- “.... 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

3.12 The demand-side characteristics identified were:

- (i) PRS are experience goods, “... typically ‘consumed upon purchase’,” and, “..... consumers are only able to ascertain the quality of a PRS at the point at which it is consumed;”
- (ii) there is likely a long and complex supply chain, in which consumers access and pay for PRS via their OCP but the service is supplied by a third party service provider (merchant) along with an IP, and in which the parties are not all visible to, or in commercial relationships with, one another;
- (iii) consumers are billed by and pay their OCP for PRS via their bill (or pay-as-you-go credit), so charges are only apparent after the event and if the consumer receives a sufficiently itemised bill;
- (iv) although prices are higher than most ordinary telephone calls, a single PRS transaction is often low value compared to many other consumer purchases;
- (v) PRS are typically impulse purchases with easy sales processes requiring little effort or authentication;
- (vi) some PRS provide content that may be considered inappropriate by, or offensive to, a wider audience, including minors; and
- (vii) a significant number of PRS, such as ring tones and games, are marketed to or may appeal to children, many of whom have their own mobile phone handsets and make up a significant part of the market for certain PRS.

3.13 In relation to these demand side characteristics, Ofcom noted seven risks:

- as consumers cannot gauge the quality of experience goods until after purchase, “... if reputation is not very important PRS suppliers may have incentives to provide low quality or high price services;”
- a complex supply chain, and especially separation of the billing and supplying parties, may mean:
 - “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....;”
 - “... 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....;” and

- *“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;”*
 - the effect of the billing process is that at best, “ total charges for the service will only become apparent after the event,” but the nature of some billing (non-itemised or available only electronically or at extra cost) and pay-as-you-go payments means, “ 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;”
 - given the low transaction value, “.... 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,” and, “ may not consider it worth the effort to make a complaint about an individual PRS if they were not satisfied [and] may not be very likely to pursue it to its conclusion;”
 - impulse purchases with limited authentication processes mean, “ consumers can easily purchase a service without necessarily considering the implications,” and, in particular, “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....;”
 - material that might be considered inappropriate or offensive to some audiences (such as adult material) may be accessed inadvertently or by minors; and
 - there is a particular risk for children who “are unlikely to use a credit card to make ... purchases,” for whom, “....the payment mechanism for PRS may be attractive,” and who, “ .. may be more likely to enter into impulse 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.”
- 3.14 Based on these characteristics and risks, Ofcom devised a framework to be used to help assess whether the definition of CPRS in the PRS Condition remains appropriate (or should be narrowed or widened). The nine specific characteristics of PRS comprising the framework, which we identified as liable to give rise, individually or in combination, to the identified types of harm are set out in the following box.

- The consumer's Originating Communications Provider is not 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.
- There is separation between the party billing the consumer and the party supplying the service.
- The price of the PRS is low (in absolute terms), potentially discouraging consumers from shopping around before buying and from seeking redress.
- The purchase process involves little or no authentication, 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.

- 3.15 As set out in the PRS Scope Review statement, Ofcom applies this framework to particular PRS as part of our assessment of the consumer harm, or likely consumer harm, that a service is liable to cause, as a consequence of its supply and demand-side characteristics and, therefore, whether it should be a CPRS. As also set out, our application of the framework is neither a 'tick box' exercise, nor an addition to, or replacement of, the relevant statutory provisions. Rather, it is part of a rounded assessment of the overall risk of a particular type of PRS causing harm and of how the relevant statutory provisions should apply to it.
- 3.16 What can be said, however, in line with what we said in the PRS Scope Review statement, is that, whilst possession of some or all the specific characteristics does not mean definitively that a type of PRS should be a CPRS, possession of a number, or combination of them, gives rise to a prima facie case for regulation. Ofcom will consider the strength and implications of that prima facie case, together with other available evidence, in deciding whether the type of PRS concerned should be subject to regulation.
- 3.17 Of particular relevance in the present case, this assessment of other evidence will include considering:
- (i) the extent to which the PRS in question has previously caused consumer detriment and how PRS with broadly similar characteristics have given rise to harm in the past; and
 - (ii) whether there is other evidence or circumstances which serve to displace the prima facie case.
- 3.18 The outcome may, for example, be that, whilst a type of PRS shares some or all the specific characteristics set out in the framework, there is other evidence which mitigates the risk of consumer harm that could arise and displaces the prima facie case for regulation. Alternatively, it may be that the strength of the prima facie case, in combination in some cases with other evidence, means the case for regulation holds. In some instances, that case may be stronger than others. The level of regulation could then be adapted to the level of risk of consumer harm by modifying the application of the Code.

- 3.19 By setting out clearly, and applying, this approach, Ofcom is able to identify, in a transparent and consistent way, PRS for which regulation is appropriate and to which a proportionate level of regulation can be applied.

Section 4

Description of the services under review and summary of consultation proposals

- 4.1 This section describes the types of services within the scope of this review and provides a summary of the consultation proposals, including our assessment of the services against the analytical framework, the options we considered and our provisional views.

Description of the services under review

Own portal services

- 4.2 Portal services can be offered by mobile and fixed providers. Despite convergence in this area we consider it is helpful in the first instance to describe fixed and mobile portals separately and identify differences between the two types of portal services. Our focus is on the OCPs' own portal services, excluding third parties' portal services.

Mobile portal services

- 4.3 As explained in detail in the July 2011 Consultation, for the purpose of this review we have used the following definition for mobile portal content services:

“Mobile portal content services are digital content services that can be purchased by the MCP’s customer through ‘browse and click’, where the MCP carries out all retail activities regarding the content itself, including the promotion, delivery, billing and customer care and where the transaction is charged to the MCP’s customer’s bill or pay as you go credit.”

Fixed portal content services

- 4.4 As also explained in detail in the July 2011 Consultation, we have used the following definition of fixed portal content services in the review:

“Fixed portal content services are digital content services offered by fixed communication providers which can be accessed ‘on demand’ by a provider’s customer over an ECS (typically a broadband connection), where the provider carries out all retail activities regarding the content itself, the promotion, delivery, billing and customer care and where the transaction is charged to the customer’s communication provider’s bill”.

Payforit services

- 4.5 We have used the following definition of PFI services, again as explained in more detail in the July 2011 Consultation:

“Payforit is a payment mechanism offered by the UK MCPs which enables mobile phone users to purchase services over the Internet (WAP and web) and charge these purchases to their mobile phone accounts. Under the PFI mechanism, merchants contract with Accredited Payment Intermediaries

(‘APIs’) who in turn have contracts with all MCPs. In line with these contracts, merchants and APIs taking part in the scheme have to comply with the PFI rules and use the Payforit logo.”

4.6 The July 2011 Consultation also set out details of the parties involved in providing PFI services and administering the self regulatory rules devised by the MCPs (‘the Scheme Rules’). It described how the Scheme Rules should operate.

Summary of consultation proposals

Application of the analytical framework to the services under review

4.7 In the July 2011 Consultation we assessed the characteristics of the services under consideration against the analytical framework. We focused on whether each service displayed characteristics, or a combination of characteristics, which may cause consumer harm.

4.8 In undertaking this assessment, we took account of the conclusions set out in the PRS Scope Review statement that the nature and likelihood of the harm, which is not limited to financial detriment alone, are relevant considerations in whether a service should be regulated. This included taking into account three particular areas where consumer harm may arise:

- lack of information, particularly on price, where consumers may be deterred from making calls if they expect the price to be higher than it is or they make calls when, had they accurate price information, they would not have done;
- the exposure of consumers to offensive or inappropriate content; and
- the ability and incentive to seek redress.

4.9 Our detailed application of the analytical framework to each of the services under consideration was set out in section 4 of the July 2011 Consultation. This is summarised in Figure 2 below, in which we also include, for comparative purposes, an assessment of the characteristics of standard 09 based PRS and Premium Rate SMS (‘PSMS’).

Figure 2: Demand and supply side characteristics from the analytical framework, by service type

Characteristics from analytical framework	Own portal services	PFI Services	09 voice services	Premium SMS
Is the OCP the actual supplier of the PRS?	Yes	No, service is provided by a third party merchant. But MCP logo displayed on Payforit check-out screens.	No, service is typically provided by third party IP/merchant.	

Complexity and fragmentation of supply chain	Straight-forward from consumer's perspective, only OCP in the chain.	Three levels, MCP-API-Merchant.	Supply chain is likely to involve the following parties: OCP, Terminating communications provider and the third party IP/merchant. There may be more than one IP.	
Barriers to entry and exit	Barriers to both entry and exit high.	Barriers high for MCP, reasonably high for APIs, barriers to entry remain low for merchants (but depend on how the accreditation scheme is implemented).	Barriers to entry are low for IPs / merchants, but higher for SPs.	
Is service an experience good?	Yes			
Bill-supply separation	No – billed directly by OCP.	Yes, as merchant is providing the service but billed by MCP.		
Low expenditure?	Currently likely to be low in most cases, although subscriptions could lead to higher bills.	Likely to be low in most cases (and currently capped at £10 per transaction) although subscriptions could result in higher bills.	Price per minute / call relatively low, but long calls / high volume of calls could lead to higher bills.	Likely to be low in most cases, although subscriptions could lead to higher bills.
Susceptibility to impulse purchases? (Easy sales process)	Moderate, although browsing and clicking through screens could make transaction less impulsive.	Moderate to High, but additional check-out screen builds in extra step into sales process, allowing customer to see price and confirm intention to purchase before being billed. Less easy than PSMS.	High	
Inappropriate/offensive content?	Adult content is available.			
Appeal to children?	Sometimes for certain services.			

4.10 Based on this analysis, and our assessment of other factors as set out in the July 2011 Consultation and below, our provisional views, on which we consulted, were as follows:

Own portal services

4.11 Our detailed assessment in relation to own portal services is in paragraphs 4.10 to 4.45 of the July 2011 Consultation. In summary, we considered that there are some

significant differences between the characteristics of own portal services and conventional PRS and that these portal services are likely to lead to a significantly lower risk of consumer harm. In particular, we identified the following key differences:

- Own portal services are PRS provided by the consumer's OCP. It is sufficiently clear to the consumer who provides the service and to whom they should complain if there is any problem. Supply and demand-side risks relating to the difficulty of pursuing complaints, and that on the demand side of suppliers seeking to shift responsibility along the supply chain, are therefore more limited.
- The supply chain for own portal services has only one level as the OCP is responsible for all the retail activities regarding the content itself (including promotion, delivery, billing and customer care). It therefore lacks the length and complexity liable to give rise to risks on the supply-side relating to opportunistic behaviour, incentives to raise prices and consumer difficulties in identifying the supplier in case of problems. Similarly, the demand-side risks relating to shifting responsibility along the supply chain and avoiding liability for complaints are removed.
- Own portal services are unlikely to give rise to risks, such as opportunistic behaviour (on the supply-side) and low-quality, high priced services (on the demand-side), arising from low barriers to market entry and exit. In particular, fixed communications providers and MCPs providing both ECS and PRS content incur significant costs (including infrastructure, systems, staff costs, marketing, and branding). They are unlikely to be able to exploit a market and then exit it without remaining responsible for their conduct and sustaining ongoing reputational harm.
- The relevant services are an experience good, the quality of which is only ascertained at the point of consumption. However, this characteristic is linked to the risks of opportunistic behaviour (on the supply-side) and low-quality, high priced services (on the demand-side) offered by providers to whom reputation is not very important. Providers of own portal services, who are more likely to have an enduring presence and ongoing relationships with consumers in relevant markets, have to take direct responsibility for the services they provide and so are more likely to have reputational concerns which militate against these risks.
- There is no separation between the party billing the consumer and the party supplying the service. Rather, the opposite applies. The OCP supplies the service and bills for it, reducing the supply-side risks that providers have incentives to raise prices and that consumers cannot identify suppliers in order to seek redress for problems. This similarly reduces the demand-side risks of suppliers seeking to shift responsibility for problems along the supply chain

4.12 Based on this assessment, our provisional view was that own portal services do not possess a number of the characteristics set out in the analytical framework and/or do not do so in ways which we assess as liable to give rise to consumer harm. In particular, we noted there are important differences between own portal services and more conventional PRS whose characteristics have in the past given rise to consumer harm. Our preliminary conclusion, therefore, was that there was a case for removing own portal services from the PRS Condition, and that these services should not be regulated by PP+ as CPRS.

Payforit services

- 4.13 Having applied the same framework to PFI services, however, our analysis came to a different preliminary conclusion, as follows.
- 4.14 We acknowledged that these services possess some of the characteristics set out in the analytical framework only to a more limited extent than conventional PRS. We also acknowledged that there are some relevant differences between PFI services and other PRS which mean that they are less likely to give rise to some of the risks Ofcom has assessed as linked to those characteristics.
- 4.15 However, based on our assessment, our provisional view was that PFI services do, nevertheless, share sufficient of the relevant characteristics in such a combination as to give rise to a prima facie case for their regulation as CPRS. Moreover, we also considered these shared characteristics to include those which have in the past given rise to consumer harm. In addition, we also noted that PFI services have themselves given rise to some consumer harm in the past (albeit, we acknowledged, a limited amount).
- 4.16 We also considered whether there are countervailing factors which displace the case for regulation. In particular, whether there are sufficient brand and reputational incentives for MCPs involved in the provision of PFI services which mean that, absent regulation, they would continue effectively to enforce a self-regulatory scheme so as to prevent the harm that our assessment suggests is otherwise liable to arise.
- 4.17 Our provisional view was that there were not sufficient such factors. Nevertheless, in the July 2011 Consultation, we invited MCPs to provide us with explanations of, and assurances about, the steps they would take to ensure that the current levels of self-regulatory control are, at least, maintained, and that consumers would have an effective means of redress direct with relevant MCPs.
- 4.18 On balance, therefore, our overall assessment, on which we consulted, was that there is sufficient risk of consumer harm arising from PFI services as to warrant some measure of regulation. That risk, however, is, as described in the July 2011 Consultation, more limited than in the case of some other PRS.
- 4.19 Accordingly, our view was that the level of regulation should be correspondingly limited and proportionate to the identified risk of harm. We considered this could be achieved by asking PP+ to regulate PFI in a manner that takes into account the reduced potential for consumer harm in comparison to other forms of PRS.
- 4.20 We set out our assessment of the application of the analytical framework to PFI services, and our overall assessment of the risk of consumer harm, in paragraphs 4.46 – 4.77 of the July 2011 Consultation. We summarise it below.

Summary assessment of the application of the analytical framework to PFI

- 4.21 As to the characteristics set out in the analytical framework that PFI services possess only to a more limited extent, and/or in different ways (to other PRS) that limit the risk of harm, the first relates to whether there is an easy sales processes requiring little effort or authentication by consumers. That process for PFI, set out in the Scheme Rules, builds in additional steps. In particular, the confirmation and check-out screens, displaying the price of the service, described in the July 2011 Consultation. So long as this is maintained (and we note the latest update in the PFI Scheme Rules allows for greater use of one-click payments), it limits the opportunity for MCPs

to raise prices by taking advantage of price confusion and mitigates the supply-side risk of them doing so. It likewise places some limit on the demand-side risk of consumers making impulse purchases without considering their implications.

- 4.22 The second relates to the separation between the party which bills consumers (the MCP) and that supplying the service. Like other PRS, PFI shares this characteristic which, absent some mitigating features, feeds into the supply-side risk of communications providers raising prices. It also suggests there is a supply-side risk that consumers cannot identify suppliers where problems arise, and one on the demand-side of suppliers seeking to shift responsibility for those problems. Again, however, PFI services' check-out mechanism is such that, whilst it is in place, the risk of communications providers raising prices is lower than for other types of PRS.
- 4.23 The third relates to the likelihood of PFI services appealing to children. Such services are, on their face, likely to have such appeal. They offer the possibility, to which children are likely to be more susceptible, of making impulse purchases or of falling victim to scams or misleading advertising, using mobile telephones as a way to access what is essentially credit which is not generally available to children. These risks are again, however, more limited in respect of PFI services than they might otherwise be, again because of the transparency of the check-out process.
- 4.24 As to characteristics in the framework which PFI services possess more closely, as with many PRS and in contrast to own-portal services, the consumer's OCP is not the supplier of the content service. The supply and demand-side risks relating to the difficulty of pursuing complaints, and, on the demand side, of suppliers seeking to pass responsibility to others in the supply chain, are therefore liable to arise.
- 4.25 A possible mitigation of this risk is the close branding association between MCPs and PFI services. MCPs' logos appear on the PFI check-out screens. This association could provide the relevant MCPs with reputational incentives to ensure that risks do not arise and consumers are protected in respect of PFI services. In particular, that those MCPs have enduring presences and relationships with consumers in relevant markets such that they will protect consumers in order not to harm their reputations and to preserve those relationships.
- 4.26 Looking at the supply chain for PFI, it is not quite as complex and fragmented, with as many suppliers operating at different levels, as is the case with other PRS. It nonetheless has a greater degree of complexity and fragmentation than that for own portal services. The risks that are more likely to accompany a complex and fragmented chain are, therefore, not as great as for some PRS, but they remain relevant.
- 4.27 There are three levels in the PFI supply chain: the MCP, the API and the IP/merchant:
- The APIs deliver on-screen payment pages and manage the billing request in the ways described in more detail in the July 2011 Consultation. They have contracts in place with both the IPs/merchants and the MCPs. There are around a dozen APIs and, under the current Scheme Rules, they need to be accredited by each MCP separately to carry out payment processing on behalf of their customers. Each MCP carries out its own due diligence of APIs.
 - The IPs/merchants contract with the APIs and are, in effect, the provider of the online content comprised in the service. There are approximately 150

IP/merchants. The Scheme Rules currently provide for APIs to be “disciplined” by MCPs, using a system of yellow and red cards, for merchants’ breaches of those rules. Each MCP applies its own criteria in terms of assessing whether red or yellow cards are warranted in relation to any infraction of the Scheme Rules.

- 4.28 Each of these points places some limits on the supply-side risks of opportunistic behaviour and incentives to raise prices, and of consumers having difficulty identifying the supplier in case of problems, compared to some PRS. Likewise, in respect of the demand-side risks of consumers being unable to identify service providers, of suppliers being able to shift responsibility for problems along the supply chain and of consumers being denied redress for problems.
- 4.29 However, our provisional view was that those points did not remove, or even limit to the same extent as with own-portal services, complexity and fragmentation from the value (or supply) chain, nor the possibility of these risks arising. We considered that those characteristics and risks remain. In particular, we noted there are still always three levels in the chain. We also noted that the Scheme Rules do not require MCPs to take overall responsibility for complaints and the approach to complaint handling and redress differs between MCPs. This, we provisionally considered, means there remains some scope for the kinds of opportunistic behaviour, evasion of responsibility and ineffective redress outlined.
- 4.30 This is especially so given that any limits to the risks arising out of a complex and fragmented value chain depend on the effective maintenance of the self-regulatory scheme. If there are reasons which support the view that, absent formal regulation, MCPs may not have sufficiently strong reputational incentives to maintain, or enhance, that scheme, this would strengthen the case for PFI services to be regulated as CPRS.
- 4.31 A similar (provisional) assessment applies in respect of the (low) level of the barriers to entry and exit at the IP/merchant level. In the context of PFI services, IPs/merchants are the promoters and/or content providers of services: effectively the merchants in the supply chain. Barriers to entry are relatively low for them in a financial sense as, similarly with conventional PRS, all they need do is to connect their systems to the APIs.’ These connections often exist anyway, because of other, non-PFI, PRS which APIs and IPs/merchants provide, so additional costs are often small.
- 4.32 A key factor in market entry as a merchant/IP is satisfying APIs that the former will not act such as to jeopardise the latter’s accreditation with MCPs. If a sufficiently effective system of self-regulation is in place, this may create a barrier to market entry such as to protect consumers from harm. Absent such a system, however, the risk of such harm is liable to remain.
- 4.33 In light of these points, the view we consulted on was that there are some risks with PFI services associated with low barriers to market entry and exit. In particular, on the supply-side, of opportunistic behaviour and, on the demand-side, of low-quality, high priced (relative to quality) services.
- 4.34 Further, our assessment was that PFI services are also, as is generally the case with other PRS, experience goods. The quality of the service is generally only ascertained at the point of consumption. There are some services and games which may be provided on a “trial” basis, but this is no more or less true for PFI services than other PRS. This characteristic feeds into the risks of opportunistic behaviour (on the

supply-side) and low-quality, high priced (relative to quality) services (on the demand-side) offered by providers to whom reputation is not very important.

- 4.35 PFI transactions are also characterised by their low price (in absolute terms), like other forms of PRS. They are all below, and often well below, £10. This raises the demand-side risks of consumers investing only limited time and effort assessing their purchase and not shopping around, and considering it either not worth making, or not pursuing to any conclusion, complaints about services they are unhappy with. We said that, in our provisional view, the incentives to pursue concerns for individual consumers are, accordingly, very low.
- 4.36 We also considered it likely that some PFI services, like other PRS, will involve content that is inappropriate for, or considered offensive by, certain consumers. This gives rise to similar risks as for other PRS that such content may be accessed inadvertently or by minors.
- 4.37 In light of the above, our assessment, on which we consulted, was that PFI services possess to some extent most of the characteristics identified in the analytical framework. This, and the risks to which they are liable to give rise, means there is a prima facie case for some level of regulation to be applied to such services (as CPRS).
- 4.38 In particular, we considered there is a combination of low price (in absolute terms), experience goods, in respect of which the supply chain has some degree of complexity and fragmentation, where the supplier of the service is not the consumer's OCP and there are (in some respects) limited barriers to market entry and exit at the IP/merchant level. This means there are possibilities for (and consequent risks to consumers of) service providers acting opportunistically, to offer low quality services for high (relative to quality) prices, with consumers being unable easily to identify service providers to whom any complaints should be brought, and with opportunities for those in the supply chain to seek to pass on responsibility for such complaints, denying consumers proper redress mechanisms. These risks are heightened where there are operators in the supply chain to whom reputation is less important (and unless there are other operators to whom reputation is sufficiently important that they will (and will be able to) act effectively to limit these risks).
- 4.39 Put another way, our provisional view was that, while there are some differences, there are a number of similarities in the structural characteristics of PFI services and conventional PRS. These are characteristics which Ofcom has identified as associated with consumer harm (such as with internet diallers and mobile phone-paid services, for example).

Consultation options and preliminary conclusions

- 4.40 Having made the above assessments, we set out in the July 2011 Consultation two main options in relation to the services under review:
- **Option 1: Regulate the services.** Currently, own portal services and PFI services are CPRS (although fixed portal content services are not being actively regulated by PP+). Under this option, all the services, including fixed portal content services, would be actively regulated by PP+.

- **Option 2: Remove one or more of the services from the CPRS definition and rely on self regulation.** Under this option, the relevant services would not be regulated by PP+, and industry would be responsible for self-regulating them.

4.41 We also noted that it would be possible for mobile and fixed portal content services to be treated differently, with only one subject to PRS regulation - i.e. a type of asymmetric regulation. However, given the strong similarities in the demand and supply side characteristics for these services under our analytical framework, we did not consider there to be sufficient grounds to justify their different regulatory treatment. Therefore, we did not consider this option further.

4.42 The options which we proposed to adopt for each of the relevant services were as follows:

Own portal services

4.43 Based on our application of the analytical framework, and our overall assessment of the risk of consumer harm, as set out in the July 2011 Consultation and summarised above, our preferred option, on which we consulted, was to adopt Option 2 for all own portal services. This was on the basis that the risk of consumer harm is low enough to justify their removal from PRS regulation altogether.

PFI services

4.44 By contrast, our application of the analytical framework to PFI services, and our overall assessment of the risk of consumer harm from them, again as set out in the July 2011 Consultation and summarised above, meant our preferred option in respect of these services was that they should continue to be regulated within the PRS framework (Option 1). We acknowledged that there may be less risk of relevant harm with these services than with some PRS, but our analysis suggested the risk was too high to warrant their removal from the regulatory regime completely. We proposed that the appropriate course was to ask PP+ to consider how it would regulate PFI services to take into account their reduced potential for consumer harm. We consulted on this view.

4.45 We also said, however, that we would re-consider this position if MCPs gave us confidence that, were formal regulation not to apply, a sufficient self-regulatory scheme for PFI services would be maintained, and an effective means of redress for consumers direct with relevant MCPs introduced. We therefore invited them to provide us with relevant assurances, including an explanation of the steps they would take to ensure that the services would be sufficiently controlled and consumers would have appropriate access to redress. Our substantive aim was to obtain adequate assurance that consumers would be protected by a self-regulatory regime involving consistent monitoring, enforcement and redress across providers.

4.46 Taking this into account, we set out in the July 2011 Consultation minimum objectives MCPs would need to undertake to achieve as part of giving Ofcom the necessary confidence about self-regulation:

- to continue to monitor compliance with the Scheme Rules and to take consistent action against APIs (and they in turn against merchants) where breaches of the rules are found;
- to take responsibility for pursuing a complaint on behalf of a consumer if there is an allegation that the merchant and/or API is not properly examining the

complaint, and to secure resolution of individual complaints in these circumstances;

- not to let an API or its merchant clients have access to the PFI scheme if it or they are prohibited by PP+ from providing PRS, or are listed on Ofcom's Number Refusal List; and
- to inform Ofcom of any changes to the Scheme Rules and explain how the changes compare with the requirements of the Code.

4.47 The consultation was published on 29 July 2011. In it, Ofcom invited views and comments on the following three high level issues:

- Whether respondents agreed with our proposal that own portal services should be removed from regulation?
- Whether respondents agreed with our proposal that PFI services should continue to be regulated, albeit subject to a lighter touch regime?
- Whether our proposed amendments to the PRS Condition properly achieved the intention of including services which are paid for on communications bills via payment mechanisms (PFI services), whilst excluding mobile and fixed portal services?

4.48 The consultation closed on 7 October 2011. Ofcom received 30 responses, all from industry stakeholders. Non-confidential versions of these responses have been published on the Ofcom website¹⁴. A list of respondents can be found at Annex 1.

¹⁴ <http://stakeholders.ofcom.org.uk/consultations/review-premium-rate-services/?showResponses=true>

Section 5

Responses to the consultation

- 5.1 Ofcom has considered every response to the July 2011 Consultation. In this section of the statement, we summarise those responses, as follows:
- responses to our proposal that own portal services should be removed from regulation;
 - responses to our proposal that PFI services should remain subject to PRS regulation; and
 - responses on whether our proposed amendments to the PRS Condition properly reflected our proposals on own portal and PFI services.

Responses to our proposal that own portal services should be removed from regulation

- 5.2 All respondents agreed with our analysis in relation to own portal services and our proposal to remove these from PRS regulation. The only specific points made about the application of the analytical framework to these services were from BT and Talk Talk.

- 5.3 BT stated in its response:

“But removing these mobile and fixed services from PRS regulation does beg a wider question about the application of regulation to PRS services more generally. Given that portal content services can be used as an alternative and competing delivery mechanism for comparable content delivered using PRS, it’s arguably not consistent for the identical services to be highly regulated if delivered over one route (PRS) and not regulated at all if delivered over another (portals). The issues of consumer harm, privacy and pricing transparency affect both equally.”

- 5.4 Ofcom agrees with BT that there may be a problem if identical services are treated differently in regulatory terms. However, our assessment is that the own portal services with which this review is concerned do not share enough characteristics with other PRS such as to warrant the same regulation. If they did, our view as to their regulation might well be different.
- 5.5 Talk Talk, meanwhile, while agreeing with our proposal to remove own portal services from regulation, said we should only do so with the proviso that the risk of consumer harm remains as it is today. Ofcom agrees.

Responses to our proposal that PFI services should remain subject to the PRS regulatory framework

- 5.6 BT and Jersey Telecom were the only respondents who agreed with our proposal that PFI services should remain subject to PRS regulation. BT agreed that a clear distinction could not be drawn between PFI services and other PRS so as to justify the removal of regulation from the former. Jersey Telecom believed that most PRS,

including PFI services, benefit from appropriate regulation by an independent regulatory body with robust enforcement powers to quickly prevent consumer harm. It was concerned that the introduction of more regulatory bodies or self-regulation by MCPs would be a backward step in sustainable PRS growth in the UK.

- 5.7 The majority of respondents questioned our reasoning and disagreed with our proposal. Their responses had the following four main themes:
- Ofcom's assessment of PFI services against the analytical framework did not reflect the perceived or actual level of consumer harm from those services;
 - there is only limited evidence of actual consumer harm (e.g. complaints) arising out of the services;
 - MCPs (and other parties) have incentives that make them committed to the success of PFI services and to a self-regulatory model; and
 - PFI services are not PRS as defined in section 120 of the Act.
- 5.8 In light of these points, respondents said there is insufficient evidence to indicate that removing PFI services from regulation would lead to an increase in consumer harm. Consumers benefit from PFI service's significantly greater price transparency compared to conventional PRS. If the Scheme Rules are properly policed and enforced, consumers know exactly how much they will be billed before they make even an impulse purchase. Regulating PFI services is, they said, "regulation by association" (to other PRS), and not based on a need to regulate.
- 5.9 In that latter regard, the Mobile Broadband Group ('MBG') and Three submitted that self-regulation would be consistent with Ofcom's duties, on the basis Ofcom should only regulate where there is clear evidence that doing so is required. Clarification was sought as to how our proposal is consistent with our duties.
- 5.10 Some respondents also argued that formal regulation of PFI services would create a competitive disadvantage against other forms of micropayment. Boku, in particular, said all mobile micro-payment services should be subject to the same regulation, to avoid market distortion.
- 5.11 We summarise more fully below the consultation responses, by reference to the four themes identified in paragraph 5.7 above. There is, of course, some overlap between the themes and responses.

Responses on Ofcom's application of the analytical framework to PFI services

- 5.12 A number of respondents challenged Ofcom's application of the analytical framework to PFI services, as follows. We deal with the characteristics in the order they are set out in the framework.

The supply chain is complex and fragmented

- 5.13 The Association for Interactive Media and Entertainment ('AIME')¹⁵, disputed that PFI services have a complex or fragmented supply chain giving rise to risks of opportunistic behaviour and incentives to raise prices, and of consumers having difficulty identifying the supplier and being denied redress for problems. It said:

"We believe that the Ofcom analysis places undue weight on the complexity of the supply chain as consumers wishing to query PFI purchase are able to do so upon receipt of the bill. The MNO identity associated with PFI payment screens ensures customer recognition that the payment process at point of sale with the merchant is associated with their MNO".

- 5.14 O2 said in its response that;

"PFI operates with a controlled number of API's who have to meet stringent criteria in order to achieve accreditation. They must adhere to the rules of the scheme and formally contract with the MNO's under strict terms. They in turn contract with a limited number the merchants and ensure their clear identification to the consumer through on-screen display of their company name and contact details providing transparency of information. In many cases a receipt is also issued via SMS which contains the contact details of the merchant, providing further clarity to consumers."

- 5.15 O2 also disputed that the value chain provides opportunities for suppliers to whom reputation is unimportant, which may result in harm arising out of low quality or high priced services:

"We disagree with Ofcom's suggestion that reputation may be unimportant and therefore suppliers have an incentive to provide low quality or high priced services. O2 has invested a significant amount of time and money in the PFI scheme and is totally committed to its success."

Barriers to entry (and exit) are low (at the IP level) for merchants and APIs

- 5.16 AIME and O2 both disputed that barriers to entry in respect of PFI services are relatively low. They argued that the Scheme Rules require merchants to develop complex technical interfaces, which acts as such a barrier to entry.
- 5.17 AIME said the Scheme Rules' safeguards prevent the "fly by night" entrants who have caused harm in some traditional PRS in the past. It said this mitigates risks of a lack of pricing transparency and/or unauthorised charging.
- 5.18 O2 contended that it actively polices compliance with due diligence obligations:

"O2 ensures that the API's we contract with conduct due diligence and we always take a firm stance on enforcing their compliance with the obligations of the scheme. In addition the introduction of the mandatory PP+ registration scheme which came into force on 1st September 2011 provides

¹⁵ A UK-based trade association, representing the commercial interests of member companies across all elements of the interactive media and entertainment industries (like APIs and merchants in the context of PFI services).

an additional safeguard and acts as a strong barrier to entry for potential rogue merchants. All API's and merchants will be registered and this enables due diligence checks to be carried out quickly and easily in line with the new obligations."

- 5.19 Three, meanwhile, agreed that barriers to entry were low. It questioned, however, the correlation between low such barriers and risks of consumer harm.

Separation between the party billing the consumer and the service supplier

- 5.20 Some respondents contended that the Scheme Rules mean this separation of the relevant parties is unlikely to lead to consumer harm. In particular, those rules provide for price transparency and for consumers to be given clear information about the identity of service providers via the check-out screens. This stops parties avoiding responsibility for complaints and denying consumers redress.

- 5.21 AIME commented:

"We welcome Ofcom's recognition that the Scheme Rules ensure that 'the consumer should be clear about who the merchant is and how to contact them (merchant details are provided on the check-out screen, in addition customers may receive an SMS receipt or be able to see the contact number on their bill...)'. Against this background, we find it odd that Ofcom highlights elsewhere in the document alleged difficulty consumers have in contacting suppliers. PFI screens are branded with consumers' MNO identity so customers should have no difficulty in making contact in that quarter even if they eschew the published customer care line.

As noted above, given the cost of complaint-handling, it is widespread industry practice to make 'no quibble' refunds as long as abuse by the consumer is not suspected.

.... Consumers are naturally more likely to gravitate to their MNO with queries over billed amounts and it would seem logical to build upon this existing relationship to strengthen consumer redress. Think Tank research, cited in the consultation document, suggests a low awareness of PP+ and therefore to address consumer awareness issues we see potential for consumers to be better served through an ADR framework, whereby dissatisfied consumers could be directed to Pp+ at the conclusion of the MNO's own complaint resolution process, should a decision need to be reviewed."

- 5.22 O2, meanwhile, said:

"We do not agree with Ofcom that consumers may not be aware of the identity of the third party supplier and may have difficulty contacting the party responsible for providing the service that they are dissatisfied with.

One of the core strengths of PFI is the guaranteed clarity of information provided in the purchase screens. Merchants are clearly identified by their name, contact number and postal address. This ensures consumers are fully aware of who is providing the service and they have the ability to easily contact them should they need to do so. In addition, these details are often provided via an SMS receipt and contact numbers included on their bill. The provision of customer care details ensures that a clear path for redress is

available to the consumer in the event of issues arising or the need to lodge a complaint.

....In addition [to transparent pricing messages] the name, customer contact number and postal address of the merchant that the customer is purchasing from is provided for every purchase.

....In order to protect against consumer harm, PFI scheme rules dictate strict procedures which must be adhered to throughout the value chain including the clear provision of customer helpline details to enable consumers to obtain assistance or redress. In addition the MNO logo is displayed to the customer on the purchase screens.

.... The formal structure of the scheme and strict rules on transparency of information, along with the active monitoring and enforcement provides robust protection against consumer harm and the inability to seek redress. This ensures the correct provision of information and clarity regarding the identity of the company that the consumer is purchasing the service from. We believe this provides the right incentives for all parties and results in a safe and secure environment for consumers.”

5.23 Three, similarly, commented:

“MNOs have placed a high degree of emphasis through the PFI framework on advising the consumer prior to purchase what the product is, what the price is and who the merchant is in case of issues. With this prior information, incorrect purchases are rare leaving only products that do not function / are not as described to be resolved between the provider of the service and the consumer.

In a PFI service, if a customer complains about the service to the MNO, the MNO will refer the user to merchant. If user does not receive a satisfactory response, they generally return to MNO for escalation. At this point, the MNO will have incurred handling costs far in excess of margin made from the purchase and is therefore incentivised to take penalising action against the Merchant for non compliance with the requirements of their individual contracts.”

Low price

5.24 O2 did not agree with Ofcom’s assessment that the low price (in absolute terms) of PFI services could give rise to consumer harm:

“We do not agree with Ofcom’s assumption that a low value transaction acts as a deterrent to consumers pursuing complaints and making requests for refunds. We have first hand experience that customers are easily able to contact us in this respect, and readily do so. In such cases we resolve any issues and process refunds accordingly. We therefore do not agree that there are barriers to seeking redress within the PFI scheme and assert that there is a low risk of consumer harm.”

Responses relating to evidence of actual harm

5.25 A number of respondents, including AIME, ImpulsePay, MBG, Three and O2, questioned the evidence of actual consumer harm from PFI services, as

demonstrated by the number of complaints. They submitted that this evidence is limited and the harm low. They noted that since 2006, PP+ had investigated and adjudicated on only one PFI-related case (and they questioned whether even this was PFI-related).

- 5.26 AIME noted Ofcom's acknowledgment that there is little evidence about PFI usage and that it is difficult to carry out meaningful research on specific services. It said this means there is no evidence of significant consumer harm from PFI services, which conclusion, it said, is reinforced by the limited number of complaints (four in 2011). AIME said:

"In realitycomplaint levels for Payforit are negligible and often reflect consumer confusion rather than commercial malpractice."

- 5.27 O2 said its review of PFI services under the analytical framework suggests those services pose little risk of consumer harm. It submitted that the effectively policed Scheme Rules provide a high level of consumer protection. It argued that the low complaint numbers are testament to the robust nature of the PFI payment mechanism and the MCPs' commitment to self-regulation.

- 5.28 ImpulsePay noted that PP+'s quarterly report¹⁶ stated that PFI services had £14.3m of revenue in 2010 and generated 94 complaints to PP+: 0.000066 complaints per pound spent. This compares to 0.000023 complaints per pound for PSMS - 5,218 complaints on £227.1m revenue - which is 3.5 times higher. It also expressed concern that some of the 94 complaints were likely to be customer care enquiries incorrectly logged as complaints by PP+. And, it noted that complaints had fallen 91%, to 4, in 2011.

Responses on self-regulation

- 5.29 A number of respondents made submissions to the effects that:
- the Scheme Rules adequately protect consumers and stop harm arising; and
 - MCPs and other providers are committed to the success of the PFI payment mechanism and have incentives to self-regulate effectively.

- 5.30 On the effect of the Scheme Rules, Mobile Entertainment Forum ('MEF')¹⁷, said:

"The PFI Scheme Rules ensure that the cost of a service or product purchased is clearly stated prior to a consumer making a purchase, and that contact details for the merchant are given. The mobile network operator logo is also mandatory on the PFI pages.

If, as Ofcom rightly states, the Scheme rules are properly policed and enforced, then the consumer will know how much they are about to be billed, even if they are making an impulse purchase, before they commit. The consumer will also have the means to seek redress if they are unhappy,

¹⁶ ImpulsePay did not specify which quarterly report.

¹⁷ A trade organisation representing providers across the whole of the mobile value chain from MNOs, Level 1 and 2 providers and mobile payment platform providers.

even if a service or product is provided by a third party merchant. Unlike portal services, although an MNO does not have the direct relationship with a consumer in supplying a service or product, their brand is intrinsically linked to PFI.”

- 5.31 We have already noted above some of O2’s and Three’s comments about the way the Scheme Rules work. O2 also said:

“The formal structure of the scheme and strict rules on transparency of information, along with the active monitoring and enforcement provides robust protection against consumer harm and the inability to seek redress. This ensures the correct provision of information and clarity regarding the identity of the company that the consumer is purchasing the service from. We believe this provides the right incentives for all parties and results in a safe and secure environment for consumers.”

- 5.32 O2’s conclusion on the effect of the Scheme Rules was:

“The strict scheme rules, in-built protections and transparency along with pro-active monitoring and effective enforcement provides a high level of protection and delivers the right outcomes for consumers....

... The level of control is evident by the fact that the scheme rules are in some cases stricter than the PP+ Code of practice. For example as well as insisting on the merchant displaying the company name and helpline, the scheme rules also mandate the provision of their full postal address, whereas the PP+ Code of practice only requires the company name and helpline. In addition PP+ actually exempts certain services from the Prior Permission regime if they operate under PFI demonstrating a high level of confidence in their control.”

- 5.33 A number of respondents emphasised MCPs’ and other providers’ commitment to the success of PFI services and their incentives to self-regulate.

- 5.34 In this regard, we note again, for example, O2’s statement that it, *“...has invested a significant amount of time and money in the PFI scheme and is totally committed to its success.”* It said that commitment means it continues to work hard at monitoring and enforcing compliance with the Scheme Rules. It commented that, in 2011, it issued audit standards and transparency guidelines to its partners and has held workshops and industry meetings explaining its compliance policy and programme. It said these measures have improved compliance rates and significantly reduced more serious infringements.

- 5.35 We likewise note the comments respondents made about the connections between PFI services and MCPs’ brands, which may give them incentives for effective self-regulation.

- 5.36 So, for example, we note again MEF’s comment that, *“Unlike portal services, although an MNO does not have the direct relationship with a consumer in supplying a service or product, their brand is intrinsically linked to PFI.”* Similarly, again that O2’s response observed that, *“...the MNO logo is displayed to the customer on the purchase screens.”* Likewise, AIME’s comments that, *“... PFI screens are branded with consumers’ MNO identity so customers should have no difficulty in making contact in that quarter even if they eschew the published customer careline....,”* and, *“The MNO identity associated with PFI payment screens ensures customer*

recognition that the payment process at point of sale with the merchant is associated with their MNO...”

- 5.37 Some respondents also contended that the incentives for effective self-regulation are aligned for all parties in PFI services’ value chain. AIME, for example, said:

“..... Poor customer service is not a characteristic of PFI and no element of the value chain has any incentive to maintain low standards. All are trying to maintain and grow custom, not slash and burn as with premium rate scams from the bad old days. The incentives to comply with the Scheme Rules rely on both the carrot of future growth and the stick of disconnection. Similarly, the MNOs have invested significant sums in the creation of PFI and have every financial incentive to make it a consumer-facing success in order to recoup their investment. These fundamental incentives would remain irrespective of any potential threat of regulatory action by PP+. And where redress is concerned, the relatively low value of most PFI transactions referred to elsewhere in the document means that, in practice, refunds are readily available as it is usually cheaper to achieve swift compensation for the consumer than to argue. This represents a much better way of retaining a customer.....”

- 5.38 O2 said the Scheme Rules’ requirements that APIs be accredited by MCPs gave the APIs clear incentives to conduct due diligence checks on all merchants with whom they contract. It submitted that APIs are clearly aware that failure to comply with the Scheme Rules can result in suspension from the scheme and even withdrawal of accreditation, closing their revenue stream and harming their reputation. O2 said it has taken such enforcement action in the past and may in future, sending a clear message it is serious about compliance. It said :

“API’s are mindful of the fact that one rogue merchant could put their Payforit accreditation in jeopardy. This provides the right incentives and ensures a high level of protection for consumers whilst purchasing content via their mobile device”.

- 5.39 In the context of providing consumers with redress where problems arise with PFI services and of enforcing compliance with the Scheme Rules, AIME also said:

“Where a complaint reaches a MNO, it will normally take penal action against the merchant if there has been non-compliance with the Scheme Rules. Apart from any question of consumer championship, this recovers the administrative costs the MNO has incurred in becoming involved in the resolution issue. All parties in the value chain thus have a shared self-interest in minimising the number of complaints and readily offering redress where they occur. This current reality is in stark contrast to the tone of the consultation document”; and

“.... With PFI the MNO has the power to suspend or remove the licence from API’s for bad practice, a sanction that has already been applied in some cases. MNOs are continuing to increase the robustness of their response to bad practice in order to protect their investment in the PFI brand. The present system already provides a higher level of protection than exists in some other transactional environments.”

- 5.40 We also note, again, on a similar point, Three’s comments that:

“At this point [where a consumer complaint reaches a MCP], the MNO will have incurred handling costs far in excess of margin made from the purchase and is therefore incentivised to take penalising action against the Merchant for non compliance with the requirements of their individual contracts.”

- 5.41 In light of reasons like those described above, respondents submitted that a system of self-regulation is adequate for PFI services.
- 5.42 In respect of self-regulation generally, O2 said:
- “Self-regulation is both simple and effective, enabling independent monitoring to be conducted without the unnecessary intervention of formal regulation which can result in rigid and unwieldy rules which do not provide the right balance between serving and protecting consumers whilst also securing innovation and allowing the market to deliver to consumers.”*
- 5.43 In respect of PFI services and the Scheme Rules specifically, O2 said confidence in the service and its price, content and delivery are all evident under the current self-regulatory model. It believes there is clear evidence that sufficient controls are in place effectively to monitor and enforce compliance with the Scheme Rules and to deal with complaints and refunds.
- 5.44 Both the MBG and Three asserted their belief that the Scheme Rules are adequately policed by the MCPs. The MBG referred to the WMC survey¹⁸ which it said showed found much lower levels of compliance in respect of formally regulated services (like PSMS and 09xx, which have compliance levels of 9% and 28%, respectively) than in respect of PFI services governed by the Scheme Rules (65% compliance).
- 5.45 The MBG further submitted that the following factors make a strong case for self-regulation of PFI services:
- i) APIs have invested heavily in obtaining authorisation from MCPs and do not wish to jeopardise such business;
 - ii) MCPs carry out extensive due diligence on APIs;
 - iii) there is functional separation between the merchant and the payment provider, reducing the opportunity to mislead customers; and
 - iv) the authority for charging is solely in the hands of the consumer being charged and away from the merchant and downstream promoters.
- 5.46 The MBG also asserted its view that self-regulation would be consistent with Ofcom's duty only to regulate where there is clear evidence regulation is required. O2 agreed, saying it did not see a requirement for Ofcom intervention in respect of the relevant services.
- 5.47 Notwithstanding whatever else they said about self-regulation, however, no MCPs provided the specific assurances as to self-regulation which Ofcom sought in the July 2011 Consultation. O2 did say its ongoing commitment to PFI services, APIs' incentives to ensure merchants do not jeopardise their accreditation under the

¹⁸ See paragraphs 4.71 to 4.77 of the July 2011 Consultation.

Scheme Rules and PFI services' price transparency, should give Ofcom the assurance necessary to support self-regulation. Similarly, Three made submissions about a self-regulatory environment in which an agency to oversee compliance with Scheme Rules, and provide ADR if necessary, could be appointed. But, none made the specific commitments we set out in the July 2011 Consultation.

- 5.48 In the same regard, MEF welcomed the possibility of self-regulation. It acknowledged, however, that if MCPs were unable to give Ofcom satisfactory assurances, it would support regulation of PFI services by PP+.
- 5.49 Ofcom also met with MCPs after the consultation closed, to discuss what we considered necessary for a sufficient self-regulatory regime. MCPs subsequently responded by submitting an agreed Mobile Operator's Code of Practice for the Management and Operation of PFI together with individual submissions about their approach and processes ('the MCP's PFI Code'). This is attached at Annex 2 of this statement (and discussed further in section 6 (paragraphs 6.95 to 6.115)).

PFI services are not PRS within the meaning of section 120

- 5.50 In its response, Three stated that it continued to dispute Ofcom's interpretation of section 120 of the Act and that PFI services are PRS falling within that section. Likewise, that PFI services are CPRS for the purposes of the PRS Condition. It said its response was made without prejudice to this position. The basis of Three's position appears to be that the charge for a PFI service is not a charge for the use of an ECS. The MBG also contended that PFI services do not fall within the definition of CPRS.

Responses on proposed amendment to the PRS Condition

- 5.51 There was some limited support for Ofcom's proposed amendments to the PRS Condition. For example, although it suggested that the proposed definition of 'Payment Mechanism' could be clearer and more precise, TalkTalk said it believed the proposed drafting achieves the intended purpose (provided the relevant definition is no wider than section 120 of the Act). Other respondents, however, disagreed with the proposed amendments.
- 5.52 Action4, for example, queried whether the proposed drafting intended to exclude own portal services would cover fixed portal services where consumers pay one provider via a telephone bill (e.g. BT) for services delivered to them by another (e.g. Sky).
- 5.53 AIME and Three were concerned that the proposed drafting would not prevent other payment facilities operating outside regulation, risking significant consumer harm. They said the condition must be capable of applying to such facilities. They also said it should exempt services operating explicitly under the PFI Scheme Rules and any developments thereof.
- 5.54 MEF, meanwhile, agreed the proposed drafting may exclude mobile and fixed portal services from the definition of 'Payment Mechanism'. But, it could, MEF suggested, capture all micro-payment services, including those which enable consumers to purchase virtual and digital goods they consume on non-mobile platforms like their PC.
- 5.55 Boku, by contrast, was concerned that, by being overly prescriptive, the definition of 'Payment Mechanism' risks inadvertently excluding some providers of mobile

payment services. It said that whatever regulatory regime PFI services are subject to (whether or not PRS), it should apply to all mobile micro-payment services. Boku's concern is that there is a material risk of market distortion.

Section 6

Ofcom's decision

6.1 This section sets out our consideration of the consultation responses, our decision and our amendments to the PRS Condition.

Own portal services

6.2 We note that respondents substantially agreed with our analysis and proposals in respect of own portal services. Given this, and our assessment of the limited risk of consumer harm arising from such services, we have decided that these should be removed from regulation as proposed.

PFI services

6.3 Unlike own portal services, the majority of respondents disagreed with our analysis and proposals in respect of PFI services. We have, therefore, considered again our provisional views and further considered relevant evidence, taking account of the consultation responses. Having done so, we have, nonetheless, decided to adopt our proposal. In this section of this document we explain why we have done so.

6.4 To re-iterate, Ofcom's approach, in line with what we said in the PRS Scope Review statement, is to make an overall assessment of whether a type of PRS is likely to cause harm to consumers such that, consistent with our duties under the Act, it should be subject to regulation under section 120 as a CPRS. We do this, first, by applying the analytical framework.

6.5 The PRS regulatory framework, as a whole, recognises that the inherent characteristics of PRS mean market forces and consumer law may insufficiently protect consumers. Specific regulation may be required. We developed the analytical framework, informed by PRS which have harmed consumers in the past, to identify the particular characteristics of PRS to which this specific regulation may need to apply. We use the framework to assess whether a particular type of PRS has characteristics which suggest consumer harm may arise from it. If it does, there may be a prima facie case for regulation.

6.6 We test that prima facie case by looking at other relevant factors, to see if the case holds or there are reasons why it is displaced. This helps us assess whether there is a likelihood of harm which makes some measure of regulation appropriate.

6.7 These other relevant factors include an assessment of:

- the evidence of actual harm caused by the PRS in question;
- evidence and submissions put to us in consultation responses;
- whether the PRS shares characteristics with others which have given rise to consumer harm in the past; and
- any other relevant factors that suggest the harm will, or will not, materialise absent regulation, such as the existence of sufficient schemes of self-regulation and/or incentives for providers to limit that harm.

- 6.8 What we put forward in the July 2011 Consultation was consistent with this overall approach. That approach is the context in which we have considered the consultation responses and is the basis on which we now make our decision.
- 6.9 Applying this approach, our overall assessment is that the risk of harm means PFI services should not be outside any formal PRS regulation. Instead, a limited amount of such regulation should apply. The reasons for our decision, explained in more detail below, are as follows.
- 6.10 In line with what we said in the July 2011 Consultation, we agree with the consultation responses that PFI services do not possess all of the characteristics in the analytical framework to the same extent as some PRS. In particular, we agree the value or supply chain is slightly less fragmented and complex than in some, more conventional PRS. Similarly, that the Scheme Rules, and the services' pre-purchase confirmation/check-out screens, mean they have greater transparency in terms of price and provider identity than some PRS. We agree these factors place some limits on the risks of, for example, providers exploiting price confusion and raising prices, of consumers making ill-considered impulse purchases, and of those with complaints being unable to identify providers and being denied redress.
- 6.11 However, the services possess other relevant characteristics, and the consultation responses do not wholly address or displace our analysis in respect of them. Particularly, PFI services are low price, experience goods, whose supply chain has some fragmentation (and the supplier is not the OCP) and there are some limits to the barriers to market entry and exit.
- 6.12 These relevant characteristics give rise to possibilities (and some risks to consumers) of providers acting opportunistically, offering low quality services for high prices, with potential for consumers to be unclear about identifying providers to whom complaints should be brought and for those in the supply chain to seek to pass on responsibility, limiting the prospects for proper redress. These risks are heightened where there are operators in the supply chain to whom reputation is less important (unless there are others to whom it is important who will act effectively to limit these risks).
- 6.13 The prima facie case for regulation derived from applying the analytical framework, therefore, remains, notwithstanding the consultation responses. However, we have again tested this case, in light of those responses.
- 6.14 As to the evidence of actual consumer harm that has arisen in the past out of PFI services, we consider there is some (albeit it is limited). A relevant question, however, is whether that harm would continue to be so limited absent PRS regulation in future. It is, therefore, legitimate for Ofcom to assess whether PFI services share characteristics with other PRS which have given rise to harm and whether the Scheme Rules and particular features of PFI services would prevent the sorts of harm that have arisen from PRS in the past. Likewise, whether there are reasons, such as appropriate reputational incentives, to consider that self-regulation would continue to prevent any such harm materialising.
- 6.15 Having undertaken those considerations, and for the reasons set out below, our assessment is that:
- PFI services do share such characteristics (albeit with some differences and limitations) and the differences between PFI services and other PRS do not fully remove the risk of consumer harm; and

- there are reasons, derived from, for example, MCPs' variable approach to enforcement of the Scheme Rules and their failure to give Ofcom sufficient assurance on the matter, to consider that self-regulation would not adequately protect consumers from the risk of harm.
- 6.16 The case for regulation of PFI services is not, therefore, displaced. The risk of consumer harm from PFI services, absent such regulation, is not as great as with other (more conventional) PRS, but there is some. Regulation should be targeted at, and proportionate to, that risk.
- 6.17 The rest of this section, which explains our reasoning in more detail, is structured in the following way:
- further assessment of the application of the analytical framework;
 - further consideration of the evidence of actual historical consumer harm arising from PFI services;
 - further comparison between PFI services and other PRS which have in the past caused harm to consumers;
 - assessment of the likely adequacy of self-regulation;
 - consideration of whether PFI services are PRS within the meaning of the Act; and
 - consideration of consultation responses about the amendments to the PRS Condition.

Application of the analytical framework

- 6.18 Having taken account of responses, we note that respondents commented predominantly on Ofcom's assessment of four of the characteristics described in the analytical framework. These are:
- the complexity and fragmentation of the value or supply chain;
 - barriers to entry;
 - the separation between the service providing and billing parties; and
 - low price.
- 6.19 Their submissions, in respect of the first three at least, were to the effect that the Scheme Rules mean PFI services do not possess the characteristics which we had suggested and/or that the risks of consumer harm that Ofcom posited would not materialise.
- 6.20 In general terms, however, these submissions address points which we had taken into account, and/or to which we did not attribute a significant risk of harm, in our application of the analytical framework (see section 3 above). They did not address other aspects of our assessment and do not wholly address or displace the prima facie case for regulation derived from that assessment.

- 6.21 In respect of the complexity and fragmentation of the supply chain, we note that both AIME and O2 said the Scheme Rules and accreditation requirements mean consumers are given information about the service provider's identity. They said this prevents consumer harm arising from any fragmentation or complexity in the chain.
- 6.22 As set out in section 3 above, we acknowledge the relevant supply chain is not as complex or fragmented as for other PRS. We similarly agree, as we said, that the Scheme Rules, so long as properly applied and enforced, offer consumers some protection.
- 6.23 We note again, however, that the Scheme Rules do not require MCPs to take overall responsibility for consumer complaints and MCPs' approaches to complaint handling and redress differ. We also note AIME's comment that PFI services' payment screen, "*.....ensures customer recognition that the payment process is associated with their MNO,*" whereas O2's response refers to the APIs' and merchants' responsibilities. This, in Ofcom's assessment, demonstrates the potential for consumer confusion about responsibility and liability for complaints about PFI services.
- 6.24 There is, therefore, the possibility of some consumer harm arising out of the nature of the services' value chain, which Ofcom took account of in our provisional assessment. The Scheme Rules and the consultation responses do not wholly address and resolve that.
- 6.25 As to barriers to entry, we have noted AIME's and O2's contentions to the effect that the Scheme Rules require technical arrangements, API accreditation and due diligence processes that all act as such barriers. In our provisional assessment, we took account of the point that, again where the Scheme Rules are properly applied, the relevant accreditation and due diligence requirements would act as relevant barriers, as they do with other PRS. We also noted, however, that relevant technical interfaces between APIs and merchants are often already in place in respect of other PRS, meaning they act only as a more limited restriction on market entry.
- 6.26 Given that latter point, it appears to Ofcom a plausible assessment that barriers to entry are, in one aspect at least, limited. It is similarly plausible that some, but we agree limited, risk of consumer harm, should be attributed to this characteristic.
- 6.27 In relation to the separation of the parties providing and billing for PFI services, we have had regard to AIME's and O2's contentions that, again, the Scheme Rules protect consumers. In this regard, they are said to do so by providing information about service providers' identities which enable consumers to pursue complaints. We have similarly considered Three's submission that MCPs refer complaints to merchants and that, where merchants do not satisfactorily resolve them, MNOs have incentives to penalise merchants.
- 6.28 We agree that, properly applied, the Scheme Rules would give consumers some protection in this regard, especially in terms of consumers being protected against providers raising prices. We took account of this in our provisional assessment, as set out in section 3 above, and did not weigh the separation of providing and billing parties as, in itself, a significant factor in that assessment. The consultation responses do not, therefore, change our assessment of this part of the case for regulation.
- 6.29 That point notwithstanding, we again also note the comments AIME made about consumers taking complaints to MCPs and those O2 and Three made about referring

complaints to merchants. Again, these demonstrate the potential for consumer confusion about responsibility for complaints and unsatisfactory redress. This is a relevant factor in our assessment of the need for some level of regulation.

- 6.30 As to O2's submission that the low price of PFI services has no effect on consumers' pursuit of redress, and that it resolves issues and provides refunds when redress is sought, Ofcom agrees that the potential for consumer harm would be limited if:
- the Scheme Rules required MCPs to take responsibility for complaints and to provide refunds;
 - all MCPs did so; and
 - consumers knew they did.
- 6.31 The Scheme Rules, however, do not require this. There is no evidence all MCPs do take such responsibility and provide refunds and/or that consumers know they do.
- 6.32 Accordingly, we consider it remains a plausible assessment, and part of a prima facie case for regulation of PFI services, that the low price (in absolute terms) of those services has the potential to feed into a risk that consumers will not have proper redress where problems arise with those services.
- 6.33 The consultation responses do not, therefore, substantially change Ofcom's assessment of the application of the analytical framework to PFI services. A prima facie case that they are liable to cause some consumer harm and accordingly require some level of regulation remains.
- 6.34 In particular, that PFI services are low price, experience goods whose provider is not the OCP, the supply chain for which has a degree of complexity and fragmentation and the barriers to market entry and exit have some limitations. Their characteristics mean there are some risks of service providers acting opportunistically, offering low quality services for high prices. There is potential for consumers to be unclear about identifying providers to whom complaints should be brought and for those in the supply chain to seek to pass on responsibility, limiting the prospects for proper redress.

Evidence of actual consumer harm arising from PFI services

- 6.35 In the July 2011 Consultation, we considered the evidence of past consumer harm arising out of PFI services. Our provisional view was that there is some such evidence, but it is limited. We noted the following:
- Between 2006 and publication of the July 2011 Consultation, PP+ had adjudicated one case that a provider of a PFI service had breached the Code. The service in question involved customers not being shown the check-out screens and unknowingly being entered into a subscription.¹⁹

¹⁹ See <http://www.phonepayplus.org.uk/For-Business/Adjudications/2009/11/792423.aspx>

- A “mystery shopper” audit by PP+ in 2010 showed 65% compliance with the Code by providers of PFI services. We acknowledged this was significantly higher than for other PRS, in respect of which the compliance rate was only around 18%.
- 6.36 In light of the consultation responses about the limited evidence of actual consumer harm from PFI services, we have considered such evidence again (again as part of our testing of the prima facie case for regulation). We have done so in two respects:
- by updating the evidence; and
 - by considering what it, and its limitations, mean(s).
- 6.37 In terms of updating the evidence, PP+ has told Ofcom that, between April 2011 and April 2012, PP+ received 8,499 complaints about PRS. Of these, 17 were recorded as relating to PFI services. This suggests such complaints make up 0.2% of the total, against PFI services’ 3.9% share of the PRS market in 2011-12. However, PP+ also indicated to Ofcom that it is possible complaints about PFI services are substantially under-reported for two reasons.
- 6.38 First, PP+ have informed us that complaints are classified at the time of initial consumer contact with PP+, and the majority who experience problems with a PFI service do not necessarily identify it as such to PP+. Additionally, some complaints are subsequently discovered to relate to PFI services when formal investigations are begun. So, for example, in one investigation there were ultimately found to have been 239 complaints. Added to the total, this would make 256 complaints about PFI services in 2011-12, 3% of the total (near to PFI services’ share of the PRS market).
- 6.39 Second, PP+ said that, under the terms of an interim agreement, the majority of calls to it about PFI services are forwarded to MCPs in the first instance. As such, they are logged by PP+ on its database as enquiries rather than complaints.
- 6.40 Ofcom has also considered the action PP+ has taken since the 12th edition of the Code came into force in September 2011. Of the 16 investigations upheld by a PP+ Tribunal, up to 24 May 2012, two concern PFI services (and a third related case concerned due diligence into a service that included a PFI element). Even if this due diligence is not categorised as a PFI case, this means 12.5% of all formal investigations brought to tribunal under the 12th Code to date relate to PFI services, against their 3.9% market share.
- 6.41 As to the detail of these investigations, the first related to the provider Switchfire operating a service which charged consumers per image or video viewed on a mobile website. The first time a consumer selected content to view they were invited to consent to the charge using PFI. However, they were not clearly informed of the cost of viewing subsequent images or videos during the same browsing session, or that subsequent charges would be made via PSMS with no further consent sought.
- 6.42 A PP+ Tribunal found this service to have misled consumers about the costs. Whilst the primary cause of harm was in the operation of the Premium SMS service (the PFI screen worked properly), the Tribunal concluded that the mixing of PFI and PSMS in the service had confused customers and made them less aware they were also being charged for the subsequent PSMS transactions. The related due diligence investigation was into the risk assessment and control carried out on Switchfire by Openmarket, the aggregator with whom they were contracted in respect of the

service in the preceding paragraphs. Breaches were also upheld against Openmarket in respect of their risk control.

- 6.43 The second PFI case concerned the provider Mobile Minded. It marketed a quiz service via Facebook links which offered £100 worth of Morrisons vouchers. Facebook users who wished to take advantage of this offer had first to forward the link to other Facebook users to whom they were connected. When they clicked on the link they were re-directed to the quiz service. Whilst consumers who chose to enter the quiz were clearly informed of the price via the PFI checkout screen, there was no evidence they received any Morrisons vouchers.
- 6.44 In addition, there was evidence consumers who consented to be charged for the quiz via the PFI checkout screen were subsequently overcharged by as much as £24.
- 6.45 We have considered the implications of all the evidence of actual harm arising out of PFI services. The first point to make is that we acknowledge that the evidence is limited. The further evidence we have considered does not change the position. Ofcom does not rely on it as indicating substantial evidence of actual historical harm.
- 6.46 A second point is that, even with its limits, the evidence demonstrates that the risks to which Ofcom assesses PFI services as being liable are not wholly notional. They have arisen even whilst PFI services are subject to the Scheme Rules and to PRS regulation.
- 6.47 The evidence indicates that, absent the application of, and adherence to, an effective system of rules, PFI services have the potential to cause, and in a small number of cases have caused, consumer harm in ways linked to relevant characteristics identified in the application of the analytical framework. Given that such harm has arisen in some cases even when regulation is in place, it is plausible to suppose that it is more likely to arise absent that regulation.
- 6.48 In particular, the cases adjudicated by PP+ demonstrate that the Scheme Rules, and PFI services' check out screens and the presence of MCPs in the supply chain, do not necessarily prevent consumer harm. They show that services involving PFI have given rise to some of the risks indicated by applying the analytical framework, especially if the Scheme Rules are not complied with. Most of all, that the fragmentation of the supply chain means the retailer of the service can act in an opportunistic way (including misleading consumers) independently of the MCPs, so as to commit breaches of the Code. This also demonstrates the need for effective redress mechanisms.
- 6.49 As to the "mystery shopper" audit by PP+, notwithstanding the relative positivity of the results, they indicate some degree of harm in a large minority of PFI cases. Moreover, according to the results, the leading sources of non-compliance were:
- i) non-functional content due to technical issues;
 - ii) failure to display merchant's contact details on check-out screens; and
 - iii) non-functioning or unresponsive helplines.
- 6.50 These instances of non-compliance are consistent with our assessment of the characteristics of PFI services and the risks associated with them, including:

- scope for opportunistic behaviour, involving the provision of low-quality services; and
 - some propensity for providers to exploit the fragmented supply chain, where the consumer's OCP is not the service provider, presenting consumers with difficulty in identifying the provider and seeking redress where problems arise.
- 6.51 The third point to make, in light of the previous two, is that the limited evidence of past harm does not, therefore, wholly displace the prima facie case for some regulation of PFI services, based on the application of the analytical framework. The evidence of that harm is consistent with our assessment of those characteristics and their associated risks. Its limited extent might point to a limitation of the extent of regulation, but not to the absence of a need for any regulation at all.
- 6.52 A final point is that, in some respects, the limitations of the evidence are not wholly surprising. Ofcom would expect a higher level of compliance when PFI services are, as currently, subject to regulation by PP+, and there is an ongoing review of the scope of regulation. Providers have greater incentive effectively to self-regulate in these circumstances.
- 6.53 In those circumstances, and given the prima facie case for regulation derived from Ofcom's application of the analytical framework to the relevant services and the (albeit limited) evidence of actual harm, it is also legitimate to further consider the shared characteristics of PFI and other PRS which have in the past caused consumer harm. Similarly, whether PFI services' characteristics – the Scheme Rules, for example – would remove the possibility of that consumer harm. These are relevant parts of the assessment of likely harm and the need for regulation. This is what we have sought to do below.

Comparison of PFI services and other PRS

- 6.54 Ofcom has further considered both:
- the kinds of consumer harm that have arisen from PRS generally in the past; and
 - specific types of PRS which have caused consumer harm.
- 6.55 The purposes of doing so are two-fold. First, to assess whether PFI services are liable to give rise to such consumer harm because they share characteristics with services which have in the past led to harm. Second, to take a view on whether those services are sufficiently different, in the other characteristics they possess, from other PRS that such consumer harm would not arise.
- 6.56 We described in paragraphs 2.23 to 2.30 above the kinds of wrongdoing and consumer harm that have in the past arisen from PRS. To re-iterate, these are:
- misleading promotions;
 - unsolicited promotions;
 - inappropriate promotions;
 - inappropriate content;
 - failure to respond to STOP commands;

- charging (for subsequent services) without consent; and
 - over-consumption.
- 6.57 We said these demonstrated some of the characteristics of services which are liable to give rise to consumer harm and the need for regulation.
- 6.58 Of these, our assessment is that PFI services are only materially less likely to cause consumers inadvertently to over-consume. We agree the Scheme Rules, if adhered to and enforced, mean consumers should receive clearer pricing information at the point of purchase (through the PFI check-out screen). So long as this is done, consumers are at much less risk of harmful over-consumption.
- 6.59 Our assessment is that the differences between PFI services and other PRS are unlikely materially to reduce the scope for the other six kinds of wrongdoing and harm, however. In particular, the key difference between the services (namely, the clearer pricing and provider information at PFI services' point of purchase) is unlikely to offer sufficient additional protection to control or prevent the relevant risks of harm. We set out our reasons below.
- 6.60 We also note that these kinds of wrongdoing and harm continue to generate high numbers of complaints to PP+. Indeed, according to PP+, it categorised 74% of the 7,394 complaints relating to mobile-based services it received between April 2011 and April 2012 as falling within these categories. Similarly, based on information supplied by PP+, at least one of those six types of wrongdoing/harm has been present in each of the 30 cases PP+ has opened since the current version of the Code came into force last September²⁰.
- 6.61 As to misleading promotions, there have been a number of cases involving consumers being misled in connection with the use of PRS. We refer in section 2 to cases involving cards posted through letterboxes, designed specifically to mislead the consumer into believing there is a parcel awaiting collection and to call a premium rate number.
- 6.62 We are also aware that web-based links or pop-ups are used within social media accounts to inform consumers they have won a prize and that they need to click on a link to claim it. The link takes consumers to a page which suggests they must sign up to a PRS to qualify for the prize.
- 6.63 In these examples, the PFI checkout process would make the cost of a service clearer to a consumer, limiting the harm that could arise. Nonetheless, there would be no additional barriers, beyond those in place for conventional PRS, to prevent the consumer being misled into believing that signing up for a PRS, when they might otherwise not have done so, will allow them to collect whatever is purportedly offered.
- 6.64 With regard to unsolicited and inappropriate promotions, one example of such promotion involved a merchant sending consumers sexually graphic promotional texts to which they had not consented. When required to do so, it could not verify that it had obtained that consent. The sexual nature of the messages contravened rules that require promotions to be appropriate to previous consumer consent or purchases.

²⁰ Cases opened as at May 2012.

- 6.65 As far as inappropriate content is concerned, there are many examples of PRS involving such content. PFI services are similarly liable to involve such, at least if APIs do not take steps to prevent the merchants with whom they deal from making it available.
- 6.66 In relation to each of unsolicited and inappropriate promotions, and inappropriate content, once more the PFI checkout process would provide transparency as to the price of the relevant services. Once again, however, it would not have prevented other harm. In these cases, the inappropriate marketing messages being sent, unsolicited, and/or the distribution of the relevant content, in the first place.
- 6.67 As to charging for subsequent services and ineffective 'STOP' commands, there are many examples of consumers being charged for PRS without their proper consent and/or providers failing to cease services in response to consumers' instructions. Cases where consumers are misled and/or are unaware of the subscription, rather than one-off, nature of services, are an example of the former. We referred to one such case, relating to the Crazy Frog ringtone, in section 2 above. There are also a number of cases in which providers have used applications ('apps') to disguise malware which generates texts from the consumer's phone to a PSMS shortcode without the consumer's knowledge or consent.
- 6.68 These are all yet further examples where PFI services' check-out screens would offer increased price transparency. That should limit the possibility of consumers being misled into purchasing subscription services. However, it would not address the possibility of providers using ineffective 'STOP' commands. Neither would it prevent the use of apps to disguise malware in the way described, since that malware instructs the handset to text directly to the relevant shortcode. Additionally, the malware does not respond to the STOP command, and must be uninstalled in order to stop the consumer incurring further charges.
- 6.69 Putting these points another way, the PFI services' checkout process provides improved pricing transparency. As far as other issues which have resulted in large numbers of consumer complaints are concerned, however, it does not provide added assurance beyond measures already in place for other PRS. There are, therefore, some grounds for the view that PFI services are liable to give rise, to some extent, to at least some of the kinds of harm to which PRS have in the past given rise.
- 6.70 To test this hypothesis, we have further compared PFI services and other PRS. We have done so starting with the prima facie view, derived from our application of the analytical framework, described elsewhere in this document. That is:
- PFI services are low price, experience goods, whose supply chain has some fragmentation (and the supplier is not the OCP) and there are some limits to the barriers to market entry and exit; and
 - these characteristics give rise to risks of service providers acting opportunistically, offering low quality services for high prices, with potential for consumers to be unclear about identifying providers to whom complaints should be brought and being denied proper redress.
- 6.71 We have further considered whether the following other types of PRS which have caused consumer harm shared the same characteristics. We have also assessed whether PFI services are sufficiently different in other respects so as to mitigate the possibility of consumer harm. The relevant PRS were:

- PSMS (including services using subscription billing);
- internet diallers;
- public Information, connection, and/or signposting services ('PICSS');
- 'Quiz TV' services;
- virtual text chat;
- 'Babe TV' live chat services; and
- missed call scams.

6.72 Our overall assessment is that these PRS, which all gave rise to significant consumer harm, do share characteristics with PFI services. Like PFI services, they are provided by a third party who is not the consumer's OCP. There are three (or more) levels in the relevant supply chains. The barriers to entry are limited at the IP/merchant level, albeit the exact level and type of barriers differ in some cases. The services provided are experience goods, whose price in absolute terms is low, and there is separation between the party providing it (the IP/merchant) and the party billing for it. We agree, as we have said, that PFI services' other characteristics, like the greater price transparency derived from the Scheme Rules, mitigate (to some extent) the risks to consumers, but they do not remove them. We make specific points relating to each service as follows.

Premium SMS (including subscriptions billed via reverse billed SMS messages)

- 6.73 PSMS are a means by which consumers can enter and pay for subscriptions to buy ring tones. They are a specific type of mobile PRS, and with which, as indicated in the table in Figure 2, PFI services perhaps most closely share characteristics.
- 6.74 In 2007/8, PP+ received over 8,010 complaints about mobile PRS. A review it undertook indicated that over 50% of these were about services using subscription billing, the main causes being:
- failure to provide pricing or other information informing the consumer they are purchasing a subscription;
 - false or misleading implications that a product or service is free, when it depends on the consumer signing up to a subscription; and
 - charging a joining fee to the consumer without clearly informing them prior to the service being purchased.
- 6.75 These are all types of harm liable to arise where services have the characteristics identified in the analytical framework (see Section 3). PSMS demonstrate, for example, how the risks of providers engaging in opportunistic behaviour (including misleading consumers), exploiting the fragmentation of the supply chain to provide low quality services at high (relative to quality) prices, have been realised.
- 6.76 It is possible that PFI services' check-out screens are a significant difference between those services and Premium SMS. In particular, that they would preclude the kind of misleading price information that has caused harm in relation to the latter.

Our assessment, however, is that, while a properly operated PFI service might well preclude misleading pricing information, it would not prevent other harm, such as the provision of other types of misleading information.

Internet diallers

- 6.77 During 2004 PP+ received 57,743 complaints about services using internet dialler software. These included consumers being misled into clicking on an icon or banner, or accessing a website, which, without their knowledge, would trigger the download of software to their PC. That software then used their internet dial-up account to call premium rate numbers operated by the dialler software's owner.
- 6.78 This scam demonstrates how a fragmented supply chain, with separation between the service provider and the billing party, can be exploited in an (unlawfully) opportunistic way. The greater transparency of PFI services would not prevent this harm. Rogue software can be embedded in such a way as to circumvent any verifiable method of consumer consent to charges (like a PFI checkout).

Information, Connection and Signposting Services

- 6.79 These are PRS that are promoted prominently on search engines and sometimes on classified advertisement websites. They typically either provide information which is provided elsewhere by public or commercial services, or connect or signpost consumers to the numbers of specific public service or commercial organisations they are seeking to call. In 2009 PP+ received complaints from public bodies about a service advertising a premium rate number in such a way as to mislead consumers that it was a genuine method of accessing publicly available information about housing or child benefit. The subsequent PP+ adjudication identified as misleading, especially to vulnerable consumers, the use by the service provider of Search Engine Marketing ('SEM') to place the advertisement of a PRS number next to relevant public service websites.
- 6.80 In 2012, PP+ has received a number of complaints from consumers, consumer groups, and public bodies themselves about a growing number of similar services. These often either provide information, via a PRS, which is available free elsewhere or directly connect the consumer to a public helpline but at a premium rate. These services continue to advertise using SEM and misleading websites, seeking to imply an association with the relevant public service where none exists.
- 6.81 Again, these services demonstrate the exploitation of a fragmented supply chain to provide a low-quality service, to which risks PFI services are also vulnerable. PFI services' checkout screens would not prevent the sort of misleading conduct involved.

'Quiz TV' services

- 6.82 TV Quiz services are part of the wider genre of (viewer) participation TV and are often funded by premium rate revenues. They generally comprise competitions with the following features:
- a puzzle or question is set on air and viewers are repeatedly asked to call a premium rate number in order to solve it;
 - there is often little or no other content than a presenter reiterating the puzzle, the prize, the telephone number and the cost of calling;

- all viewers' calls are 'connected' and therefore charged for;²¹
- a very small proportion of callers are randomly selected and put through to the studio to give their answer; and
- the vast majority of callers do not get an opportunity to give their answer and instead hear a recorded message that they have been unsuccessful.

6.83 In 2005 and 2006, when Quiz TV services were at their peak, both PP+ and Ofcom received substantial numbers of complaints about them. In 2005 Ofcom received 450 such complaints and in 2006 over 800. Approximately 25% of these related to the promotion and/or operation of the premium rate phone lines. The main issues complained of were:

- consumers being misled by on screen graphics and announcements that suggested time was running out for them to call;
- consumers being misled by presenter assertions that no-one was currently trying to get through, implying that their call would stand a good chance of reaching the studio even when this was not the case;
- answers to quizzes being deliberately obscure; and
- unexpectedly high bills for consumers unclear about the cumulative cost of their calls.

6.84 There is a reasonably significant barrier to entry to the provision of these kinds of services. The provider would need to hold, or operate in commercial partnership with a party holding, a broadcast licence. Complaints of the nature described suggest that, even where there is such a barrier, there is a real risk of providers exploiting a fragmented supply chain, taking the opportunity to provide a low quality product relative to the price. It is not clear to Ofcom that the use of a PFI checkout screen in connection with a service would mitigate these risks.

Virtual text chat

6.85 Virtual text chat services, in which consumers receive premium rate-charged text messages as part of exchanges with an operator or other service users, continue to attract complaints to PP+. These often involve consumers being sent an unsolicited message, worded to imply it is from someone acquainted with them, where the provider does not make clear the cost of the service or that a reply would serve as consent to a premium rate charge.

6.86 There have been complaints to PP+ about these kinds of virtual text chat services, peaking as part of an overall spike in complaints during 2008, when PP+ received 21,341 complaints about mobile PRS in total. Particular concerns about these complaints have arisen where their promotion, and subsequent operation, misled consumers to believe they are exchanging texts with other users, with the possibility of meeting them. The reality was that consumers were exchanging texts with

²¹ Free entry via a website is usually also possible – the degree to which this is publicised varies but tends to be somewhat limited compared with the premium rate route.

operators employed by the provider. PP+ has also upheld complaints of breaches of the Code where providers have offered 'add-on' content, such as downloadable pictures, which was of poor quality and/or incompatible with the consumer's phone handset.

- 6.87 It is possible PFI services' checkout screens would prevent some of this harm. In particular, properly operated, they would make clear the cost of a service prior to a consumer's consent to the charge for it. The complaints about these chat services, however, demonstrate the potential for services with similar characteristics to cause harm which PFI services' additional features would not necessarily prevent. The checkout screen would not, for example, prevent the sorts of misleading promotion, or provision of low quality services, described.

'Babe TV' live chat services

- 6.88 These services offer consumers the chance to chat about sex with an operator, sometimes live on television. In some aspects, these services have characteristics which should limit their potential to harm consumers. Like Quiz TV services, the need for a broadcast licence would act as a barrier to entry to the provision of these services. In addition, and unlike most of the other forms of PRS considered here, a consumer contact number is displayed on screen making consumer contact, for the purpose of seeking redress for problems, easier.
- 6.89 However, despite these features which should operate to protect consumers, harm has still arisen in connection with these services. For example, PP+ monitoring of them has, on a number of occasions, identified services offering callers the opportunity to talk about sex with an operator visible on screen during a live, unencrypted, daytime broadcast. In addition, PP+ receives a moderate, but inconsistent, level of complaints that such services have provided sex chat to underage callers. These types of harm which relate to inappropriate content, are associated with characteristics these services share with PFI services. The additional features of the latter services would not necessarily address and prevent that sort of harm.

Missed call scams

- 6.90 These scams involved consumers receiving an unsolicited call to their handset (which rang only once but stored the caller's number). The intention was to deceive the consumer to return the call by using a number in the 070 range, a premium rate range which resembles a mobile handset number. Consumers were not provided with pricing information, and so were unaware that by calling the number they would incur a premium rate charge. Some scams also connected consumers to a voice recording designed to give the impression the person called could not hear the consumer, tacitly encouraging them to call again and incur a further charge.
- 6.91 PP+ conducted a number of investigations into these scams in 2009. The consumer harm involved could be substantial. In one case, consumers were misled into making over 850,000 calls, at a total cost of over £320,000.
- 6.92 Were a scam of a similar kind operated in a text-based format (e.g. the consumer receives an unsolicited text from an 070 number) a properly operated PFI check-out screen could well provide a significant level of consumer protection. The consumer would not be charged without first consenting to a charge as part of their reply to any text they receive. That mechanism would not, however, prevent unsolicited texts being sent to the consumer in the first place. This is the kind of misleading conduct to which services sharing the characteristics are liable to give rise.

- 6.93 The analysis described in this section demonstrates that, even though there are limits to the analogies that can be drawn between them, PFI services have characteristics in common with other PRS which have caused significant harm to consumers. The distinguishing features of PFI services would not necessarily prevent harm of similar kinds in relation to those services.
- 6.94 In other words, our assessment is that PFI services are not so different from other PRS that they should be outside regulation. They share characteristics that indicate that, absent some other factors which would address the risk of harm, there is a case for some level of regulation. This is a significant factor in the case for some (if limited) regulation to be applied to such services, in light of the prima facie case derived from the application of the analytical framework and the (limited) evidence of actual harm arising out of them.

Assurances provided by MCPs

- 6.95 Ofcom acknowledges that, the above notwithstanding, our assessment of the harm to which PFI services are liable to give rise depends in part on:
- the ability of operators in the supply chain to whom reputation is not important to adversely affect consumers' experience of the services; and
 - there not being a sufficient system of self-regulation, or other circumstances, which is, or are, likely to prevent consumer harm arising.
- 6.96 This is why, in the July 2011 Consultation, we considered, and sought, assurances about self-regulation that MCPs would need to give us, as part of providing us with greater confidence that PFI services could be removed from PRS regulation without increasing the risk of consumer harm.
- 6.97 Similarly, many of the points put to Ofcom in the consultation responses (in support of the view that PFI services should not be subject to regulation) depend on the effective application of the Scheme Rules. As we note above, MEF, for example, said, "*If, as Ofcom rightly states, the Scheme rules are properly policed and enforced, then the consumer will know how much they are about to be billed, even if they are making an impulse purchase, before they commit.....*" It also acknowledged that, if MCPs were unable to give Ofcom satisfactory assurances as to future self-regulation, it would support regulation of PFI services by PP+.
- 6.98 Given these points, Ofcom has further considered whether, absent PRS regulation, a sufficient system of self-regulation is likely to be maintained. In particular, whether the MCPs have sufficient reputational incentives to maintain the Scheme Rules. We have considered, in this connection, their responses to what we said in the consultation document about self-regulation, their current records on the enforcement of the Scheme Rules and the effect of supposed reputational incentives in other contexts involving MCPs.
- 6.99 As indicated in section 4 above, in the July 2011 Consultation we said the following:
- "5.39 *Our preferred option, therefore, is to keep these services within the PRS regulatory framework. However, we acknowledge that PRS sold via Payforit carry less risk of consumer harm than some conventional PRS and, in light of this, we have considered what would be needed to provide us with greater confidence that these*

services could be removed from PRS regulation without increasing the risk of consumer harm.

5.40 *We would need to be persuaded that MCPs would take the necessary steps to ensure that the current levels of self regulatory control are at least maintained, and that consumers would have an effective means of redress direct with the MNO. MCPs would need to undertake, as a minimum, that they would achieve the following objectives, and to explain how they would secure them:*

- *to continue to monitor compliance with Payforit rules and to take action against APIs (and they in turn against merchants) where breaches of the Payforit rules are found;*
- *to take responsibility for pursuing a complaint on behalf of a consumer if there is an allegation that the merchant/API is not properly examining the complaint, and to secure resolution of individual complaints in these circumstances;*
- *not to let an API or its merchant clients have access to the Payforit scheme if it or they are prohibited by PP+ from providing PRS, or are listed on Ofcom's Number Refusal List; and*
- *to inform Ofcom of any changes to the Payforit Scheme Rules and explain how the changes compare with the requirements of the PP+ Code of Practice.*

.....

5.43.... if MCPs provide adequate details giving confidence that they will take steps to ensure that the service is controlled (as indicated above) such that we are confident that consumer harm will not result from the removal, and that consumers will have easy access to redress, this would be sufficient for Ofcom to consider [removal of formal regulation of PFI services] to be appropriate."

6.100 As indicated in section 5, we have met with the MCPs to clarify the assurances we required to re-consider our position on PFI services. MCPs subsequently submitted to Ofcom the MCP's PFI Code (at Annex 2 of this statement).

6.101 We have assessed the MCP's PFI Code in light of the assurance we sought in the July 2011 Consultation. Having done so, we acknowledge it contains statements that, at a high level, go to the issues on which we sought such assurance. In particular, it sets out the following:

- on monitoring, that each MCP will actively and regularly monitor compliance with the Scheme Rules by its APIs and merchants and will share intelligence with other MCPs about breaches of Scheme Rules identified;
- on enforcement, that if breaches of Scheme Rules are identified, MCPs will take appropriate enforcement action, using the yellow and red card system, and serious or repeated breaches could result in a merchant or API being barred from using PFI indefinitely; and

- on redress of complaints, each MCP will ensure that they deal with complaints in line with their regulatory obligations under General Condition 14, and they make reference to securing resolution of complaints not resolved by merchants.

6.102 Nonetheless, whilst these are welcome steps in the appropriate direction, Ofcom continues to have concerns as to the likely effectiveness of a self-regulatory model for PFI services absent formal regulation. We note that there would remain no agreed or standardised single approach to compliance and enforcement monitoring processes. Neither would there appear to be a consistent approach between MCPs to taking responsibility for pursuing and resolving complaints. This is demonstrated by the fact that MCPs have annexed to their code individual submissions about their different approaches and processes.

6.103 These points continue to cause Ofcom concern in light of the following:

- based on the responses received from, and discussions with, MCPs, it is evident that not all take a similarly robust and consistent approach to monitoring and enforcement of the Scheme Rules, nor to how they will provide consumers with effective redress mechanisms; and
- this difference of approach is particularly noticeable when looking at how each MCP deals with the process for yellow and red cards.

6.104 As to the latter point in particular, we note that in the 6 months to September 2011, there have been 118 yellow cards issued by MCPs. Of those, however, 116 were by O2, with Three having issued two. Vodafone and Everything Everywhere did not issue any.

6.105 We consider that the position has two main implications. The first is that, in Ofcom's assessment, it illustrates that MCP's reputational incentives effectively to self-regulate are weaker than might be supposed (and as contended in the consultation responses). It appears that, even where formal regulation applies, only one MCP is taking seriously the enforcement of the Scheme Rules. The disparity in the numbers of cases suggests the others are not so concerned about their reputations as effectively to enforce those rules.

6.106 A plausible interpretation of the position is that, had the relevant incentives been sufficiently strong, it ought not to have been problematic for the MCPs to provide specific assurances about self-regulation that Ofcom could more comfortably have regarded as sufficient. Doing so would have indicated that their interests are properly aligned with consumers'. That the MCPs have not done so suggests those interests are not (sufficiently) aligned (or as closely aligned as has been suggested).

6.107 In this connection, we also note that there have been other, analogous cases in which consumer harm has arisen at least, in part, because of the conduct of third parties in circumstances where MCPs might have been expected to have reputational interests that should have limited that harm. A particular example relates to problems caused by mobile mis-selling and mobile cashback. We describe these below.

6.108 One feature of the market for mobile phone airtime contracts is that they are often sold by third party retailers independently of the MCPs who will provide the relevant services. Mis-selling typically occurs where consumers are given misleading or inaccurate information causing them to enter into contracts they otherwise would not.

Mobile cashback schemes are, or were, one specific form of such mis-selling in the mobile market.

- 6.109 Mobile cashback schemes are or were a form of promotion offered to consumers entering into contracts for mobile phone services. Under such schemes, a consumer entered, or enters, via an independent retailer, into a contract for access to a MCP's network. In return, the independent retailer promises the consumer payment of a certain amount of money.
- 6.110 A mobile service deal with cashback attached therefore usually consisted, or consists, of two formally independent pricing components – a tariff for the service paid by the consumer to the MCP and cashback received by the consumer from the retailer as an incentive to contract. Nevertheless, given the close connection between the two, consumers may have been likely to view them together, the latter off-setting the price of the former, with the net price of the deal being the service contract tariff less the cashback. Ofcom was aware in 2007 of many independent retailers advertising mobile services quoting line rental tariffs calculated this way.
- 6.111 Ofcom identified three types of problems involving cashback schemes. Namely, independent retailers:
- refusing to pay out on cashback offers on the basis of consumers failing to comply with the unduly onerous terms of the offer, about which consumers had been misled (such terms had the effect of reducing the consumer redemption rate, enabling independent retailers to offer very attractive deals which, if fully redeemed, were unlikely to be financially viable);
 - refusing to pay cashback even when consumers did comply with the redemption terms (in some cases the terms gave the retailer sole discretion to refuse applications); and
 - going out of business and therefore being unable to honour cashback offers (which may in part have been attributable to larger than expected cashback claims).
- 6.112 This is, or was, therefore, an area in which consumer harm was at least partly attributable to third parties. As with PFI services, MCPs are, or were, not directly the provider of the relevant service or potential consumer benefit, but there was a close association between it and their brand. In particular, for the reasons described above, consumers may have regarded the service and the potential benefit together and to be the MCP's responsibility. Indeed, evidence Ofcom drew on in our mobile mis-selling project²² indicated that, when consumers who had experienced general mis-selling were asked who gave them incorrect advice, 85% reported a MCP and 10% an independent retailer.
- 6.113 Given this, we consider it plausible to suppose that MCPs would have had reputational incentives to prevent and redress consumer harm, similar to those that might be supposed in respect of PFI services. However, despite being given the opportunity to demonstrate this, through the application of a self-regulatory code of practice, consumer harm was not adequately addressed and Ofcom considered it

²² <http://stakeholders.ofcom.org.uk/binaries/consultations/mobmisselling/statement/statement.pdf>

appropriate formally to regulate mobile mis-selling (via General Condition 23). This is indicative that reputational incentives, derived from associations with services provided by third parties, will not necessarily effectively and adequately remove, or limit, consumer harm.

6.114 The second implication (of MCPs' failure to provide us with sufficient assurance about self-regulation) is that Ofcom's concerns about the following remain in place. Namely, that:

- providers to whom reputation is less important, would be in a position adversely to influence consumers' experience of PFI services and to cause the kinds of harm described in the July 2011 Consultation and this statement; and
- redress mechanisms would, absent formal regulation, be inadequate.

6.115 Putting this another way, the concerns which led Ofcom to seek the assurance about self-regulation in the first place have not been sufficiently addressed. To the extent at least that it turns on those concerns, the case for the formal regulation of PFI services is not displaced.

Whether PFI services are not PRS within the meaning of section 120

6.116 On the subject of whether PFI services are PRS under section 120 of the Act, we appreciate that different respondents have different views on statutory interpretation. It was implicit in the July 2011 Consultation that it is our view that PFI services are capable of being CPRS because they fall within the definition of PRS under section 120.

6.117 Our consultation was concerned with the policy decision as to whether PFI services should be regulated as CPRS, rather than statutory interpretation. We note, nonetheless, that we remain of the view that the four conditions set out in section 120(7) are each met in respect of PFI. Of particular relevance to stakeholder responses, it is our view that the underlying services paid for via the PFI mechanism are delivered by means of an ECS, and are payable to the provider of the ECS. There are differences in the precise way in which MCPs present PFI transactions on the face of bills, with some identifying the underlying service (e.g. game or video) more clearly than others. However, we consider that, in all cases, the charge is imposed in the form of a charge for the use of the ECS.

Conclusion: PFI services should remain subject to PRS regulation

6.118 In light of all the above, Ofcom's conclusion is that PFI services should be subject to (some level of) PRS regulation.

6.119 Applying the analytical framework to PFI services gives rise to the prima facie case for their regulation which we have described. There is some, but we agree limited, evidence of those services having caused actual consumer harm in the past. Moreover, the services share characteristics with other PRS which have in the past caused consumer harm (which harm is consistent with our assessment of PFI services' characteristics and their associated risks). PFI services do have some different features which offer consumers protection and limit the risk of harm to which those services are liable to give rise. But, in our judgement, they are not so different to other PRS as to remove that risk.

- 6.120 We have considered whether there are countervailing factors which displace the case for regulation. In particular, whether there are sufficient brand and reputational incentives for MCPs involved in the provision of PFI services to mean that, absent PRS regulation, they would continue effectively to enforce a self-regulatory scheme so as to prevent the consumer harm that our assessment suggests is otherwise liable to arise. For the reasons set out, we do not consider that there are.
- 6.121 Our overall assessment, therefore, is that there is sufficient risk of consumer harm arising from PFI services as to warrant some measure of regulation. We agree that regulation should be more limited and more light-touch than for some other PRS, reflecting the more limited risk of consumer harm. That is achieved by adapting the application of the Code, not taking PFI services outside regulation entirely.
- 6.122 To this end, we have had discussions with PP+ about a proportionate regulatory model. PP+ has noted that there are already key differences in the way it handles complaints about PFI services compared to conventional PRS, including that:
- there are certain Prior Permissions exemptions for subscriptions (as PP+ agrees that the checkout screens can give clear subscription cost messages);
 - the 12th Code has a clause which means prices messages and key terms no longer need to be given to consumers at all stages of the purchase process; and
 - there is a more flexible approach to enforcement which means minor harm can be resolved informally.
- 6.123 PP+ has also noted that the 12th Code was designed with the improved pricing clarity offered by PFI services in mind. Additionally, PP+ has outlined the following steps towards a lighter-touch regulatory model:
- it will consider referring customer service-related PFI complaints back to the merchant in the first instance (PP+ considers this will allow it to act as backstop for customer service-related issues while keeping frontline responsibility for PRS-related complaints); and
 - it will look to set up an advisory group, comprising industry stakeholder representatives, to act as a liaison and consultation point for the regulatory scheme and to ensure it is proportionate to the facets of the PFI scheme as it changes over time.
- 6.124 Ofcom will work with PP+ and MCPs to help further develop a proportionate model for continued regulation of PFI services.

Changes to the PRS Condition

- 6.125 In light of the above, we have decided to proceed with a modification to the PRS Condition which is, substantially, the same as that set out in the July 2011 Consultation and detailed in Annex 3 of this statement. However, we note that some respondents expressed concern as to whether the form of the modification set out in that document achieved its substantive aim. We have made some minor changes to the way we modify the Condition as a result.
- 6.126 We intended the proposed change to the PRS Condition explicitly to exclude own portal services, where a service delivered over an ECS is charged by a communications provider to a customer's bill, but where the communications provider

is also responsible for the content itself. At the same time, we intended to confirm that, other than own portal services, a service delivered by means of an ECS and charged by means of a 'Payment Mechanism' falls within the meaning of CPRS. The term 'Payment Mechanism' is defined as "a mechanism whereby the charge for a service delivered by means of an [ECS] is paid to the Communications Provider providing the [ECS]".

- 6.127 The first point to note is that the PRS Condition is already drafted such that CPRS encompasses nothing that is not PRS within the meaning of section 120 of the Act, in particular, by reference to the four cumulative criteria in section 120(7). The revised definition seeks to make it clear that "Payment Mechanisms", that is PFI services and services akin to PFI services where payments are made to a provider of an ECS for services delivered by others over the ECS, are a form of CPRS (but that, by virtue of other amendments made to the definition of CPRS, fixed and mobile portal services are not). We have made a minor change to the proposed amended drafting to make the point clearer still, but the substantive effect is the same as that proposed.
- 6.128 The purpose is to be sufficiently broad to ensure that services analogous to PFI services, and not just the named service, are covered (to prevent avoidance by introducing a substantially similar service) whilst not having the unintended consequence of encompassing very different services. No definition can be entirely future-proofed. It may be that services are developed in future which are encompassed by the definition but arguably do not raise analogous concerns to PFI. Equally, it may be that the definition needs to be changed in future to encompass new services which are not covered but raise concerns. But, in either case, further changes to the definition would need to be considered.
- 6.129 Action4 questioned whether the proposed drafting intended to exclude own portal services would cover fixed portal services where consumers pay one provider via a telephone bill for services delivered to them by another. Ofcom considers that it does not and should not: such services would not necessarily possess the characteristics on the basis of which Ofcom considers own portal services should be excluded from regulation (for example, the provider of the ECS and the provider of the PRS delivered by means of the ECS would not be the same).
- 6.130 We have, however, further considered the scope of the exclusion, and amended the way it is drafted, in light of Action4's response. It now makes clear that any own portal service (as defined in the July 2011 Consultation and this statement) delivered by ECS and provided by the ECS provider is excluded from regulation. PRS provided by someone other than the ECS provider, but charged to the customer by the ECS provider, which otherwise fall within the definition of CPRS, will continue to be regulated. There is no basis to exclude them, nor reason to amend the Condition further to cover them.
- 6.131 AIME and Three say we should exempt services operating explicitly under the Scheme Rules and any developments thereof. However, we have explained above why we do not think we should exempt such services.
- 6.132 MEF was concerned the definition of "Payment Mechanism" may encompass all micropayment services, including those enabling consumers to purchase virtual and digital goods they consume on non-mobile platforms like their PC. We do not consider this is the case given that payment mechanisms, particularly on PCs, tend not to involve charges in the form of a charge for provision of an ECS, and indeed tend not to involve the communications provider in billing at all.

- 6.133 Boku was concerned that regulation should apply to all mobile micro-payment mechanisms due to the risk of market distortion due to different levels of regulation. We consider this could involve extending regulation to services even where a risk of consumer harm of the sort discussed above was negligible, and this would be inappropriate. Different risks of harm justify different levels of regulation.
- 6.134 We have noted the comments received and, in particular, concern that the definition would not prevent other telecoms provider based payment facilities from operating without mandatory regulation. However, the scope of this review is purely to look at own portal services and PRS purchased using PFI. The essential point is that we are maintaining regulation in respect of PFI services, and analogous services falling within the regulatory definitions used, because we have assessed the risk of harm arising from them as sufficient to warrant some regulation. We have not considered other forms of telecoms based payment facilities that may be beyond the scope of section 120 of the Act²³. We would also comment that we are limited in terms of those services which we are able to consider to those which only fall within the definition of PRS s defined in section 120 of the Act.
- 6.135 We therefore consider the definition on which we consulted, with the amendments described above and shown in Annex 3, does give effect to the intended exclusion from regulation of own portal (mobile and fixed portal) services.
- 6.136 Similarly, and as noted above, we are keeping a PFI services, and any like services, within the PRS regulatory framework. The modifications we have decided to make to the PRS Condition mean these services will to continue to be subject to the definition of CPRS.

Tests under the Act

- 6.137 In making the relevant decisions, Ofcom must meet certain legal requirements. As set out in section 2 above, in exercising our powers under section 120 of the Act, we must comply with our general duties. We must also meet various tests set out in the Act. The following sets out Ofcom's assessment of how we have done so in connection with the modification to the PRS Condition.

Section 3 – Ofcom's general duties

- 6.138 Ofcom's principal duties, under section 3(1) of the Act, are set out in paragraph 3.5 above. For the reasons set out in detail in the July 2011 Consultation and this statement, Ofcom considers that, in making our decision to modify the PRS Condition, with the effect that own portal services are outside regulation but PFI services are within it, we have met these duties.
- 6.139 In particular, the modification reflects our proper assessment of the harm associated with the relevant services and the regulation of them that is consequently required (and in the case of own portal services not required) to further the relevant citizen and consumer interests. Most especially, that modification makes clear that PFI and like services, delivered by means of an ECS and charged by means of a Payment Mechanism, fall within the meaning of CPRS for the purposes of the PRS Condition.

²³ Ofcom understands that PP+, AIME, MEF and UKCTA have submitted a joint letter to DCMS setting out their view that regulation of micropayments should be considered in the Government's Communications Review.

This ensures that consumers are protected in respect of the risk of harm arising out of such services.

- 6.140 It is also in industry stakeholders' and regulatory bodies,' as well as consumers,' interests that there is clarity, rather than uncertainty, about which PRS are subject to PRS regulation. Uncertainty or confusion about the scope of regulation gives rise to doubts on providers' parts about whether they must comply with PP+ directions. That is not only unhelpful and undesirable, but is also not in consumers' interests (as they depend on the effectiveness of PP+ and its ability to secure immediate compliance with its directions, for their protection against harm).
- 6.141 Moreover, the modifications to the relevant Condition are consistent with the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and with other principles appearing to Ofcom to represent the best regulatory practice, as set out in section 3(3) of the Act. Ofcom has applied the previously consulted on, and published, analytical framework to the relevant services, and considered relevant evidence of harm and likely harm, all as set out in the July 2011 Consultation and this statement. In doing so, we have also considered the case for self, rather than formal, regulation (in line with section 3(4) (c) of the Act). We have transparently identified services which require some measure of formal regulation and those which do not. We have made decisions that enable the extent of such regulation, where required, to be limited so as to correspond with the extent of the assessed harm.
- 6.142 Ofcom has also considered the need of the requirement in sections 3(4) (b) and (d) of the Act that, in performing our duties, we must have regard, amongst other things to the desirability of promoting competition in relevant markets and of encouraging investment and innovation in relevant markets. Ofcom's assessment is that the modification of the PRS Condition is consistent with these provisions. In particular, ensuring regulation is targeted appropriately at services in connection with which consumer harm is liable to arise (as set out in this statement), is likely to promote greater consumer confidence in, and up-take of, PRS. This will facilitate competition in the market, encouraging investment and innovation.

Section 4 – European Union obligations

- 6.143 Section 4 of the Act requires Ofcom in carrying out our functions under section 120 to act in accordance with specified Community requirements. These include, for example, requirements relating to the promotion of competition and of the interests of all EU citizens. Ofcom considers that the modification of the PRS Condition is in accordance with these requirements. For example (to the extent relevant), the modification will promote competition as set out in the preceding paragraph. There is no conflict between the modification and any of the Community requirements.

Section 47 – Test for modifying conditions

- 6.144 By virtue of section 120(5), section 47 of the Act applies to the modification of the PRS Condition. Under section 47(1), when modifying a condition, Ofcom must be satisfied that the test set out under section 47(2) has been met. Namely, that the modification of the condition is:
- a) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;

- b) not unduly discriminatory against particular persons or against a particular description of persons;
- c) proportionate to what it is intended to achieve; and
- d) transparent in relation to what it is intended to achieve.

6.145 Ofcom is satisfied that the test is met in respect of the modification of the PRS Condition we have decided to make. In particular, on the bases set out in the July 2011 Consultation and this statement, it is:

- *objectively justifiable*: it reflects the harm which is liable to arise in respect of the PRS under consideration;
- *not unduly discriminatory*: it applies equally to all relevant providers in connection with own portal services and to all relevant providers in connection with PFI services, in respect of each of those types of PRS and, where it treats providers in connection with the former differently to providers in connection with the latter, that is because the services and the associated risks of harm are different;
- *proportionate*: in that Ofcom has identified the extent of harm liable to arise in respect of the relevant services and made decisions which enable the extent of such regulation, where required at all, to be limited so as to correspond with the extent of that harm; and
- *transparent*: in that Ofcom consulted on, published and applied the analytical framework, consulted on the proposed modification to the Condition setting out the bases for, and effect of our proposal and now sets out clearly the bases on which we now make the relevant modification.

Section 120A – Procedure for setting or modifying conditions

6.146 Section 120A(1) of the Act says that conditions under section 120 are to be modified by publication of a notification setting out the modification. Section 120A(3) requires Ofcom, before modifying such a condition, to publish a notification setting out the proposed changes, their effect, the reasons for them and specifying a period within which representations may be made to Ofcom about the proposal. Section 120A(3) states that the minimum period for receiving representations is no less than one month after the day the notification was published. Section 120A(5) says Ofcom may give effect to a proposed modification, with any modification that appears to us appropriate, after considering every representation made to us about the proposal during the period for representations and having regard to every international obligation of the UK (if any) notified to us by the Secretary of State. Under section 102A(6) publication of a notification by Ofcom must be in such manner as we think appropriate for bringing its contents to the attention of those we think likely to be affected, and under section 120A(7) Ofcom must send a copy of every notification to the Secretary of State.

6.147 Ofcom has complied with these requirements. Notification of the proposed modification of the PRS Condition was published in the July 2011 Consultation (on Ofcom's website) on 29 July 2011, with 10 weeks after that date provided for representations to be made to us. The consultation document included an explanation of the effect of the proposed modification and the reasons for it. Ofcom has now considered every representation made to us. The Secretary of State did not notify any UK international obligations to Ofcom. Ofcom now published on our

website with this statement a notification giving effect to the modification we have decided to make to the PRS Condition (with the modifications that we consider it appropriate to make to our proposal). Ofcom has sent a copy of that notification to the Secretary of State.

- 6.148 The effect of all the above is that the PRS Condition is modified in accordance with the relevant statutory requirements, such that own portal services are outside and PFI services are within the Condition

Implementation

- 6.149 This modification to the PRS Condition (which is outlined in Annex 3) will be effective from 1 September 2012.

Annex 1

List of respondents

A1.1 The following stakeholders submitted non-confidential responses to our consultation. The responses can be found at:

<http://stakeholders.ofcom.org.uk/consultations/review-premium-rate-services/?showResponses=true>

- Patel, S
- Judd, J
- Hayes, M
- Action4
- AIME
- Boku
- BT
- Hastie, D
- Turner, T
- Stewart, C
- Backhouse, A
- Wells, J
- Impulse Pay
- Paterson, P
- Jersey Telecom
- Billingham, J
- MEF
- MBG
- Hawker, M
- Hudson, K
- Warren, R
- Smith, P

Review of Premium Rate Services

- Janjua, U
- Corn, M
- Hassan, M
- Christian, B
- Talk Talk Group
- Telecom Express
- Three
- Telefonica UK Limited

Annex 2

Mobile Operators' Code of Practice for the management and operation of PFI

Background

Payforit's role is to provide a safe and trustworthy environment under which mobile phone users may purchase goods and services and charge the cost to their mobile phone accounts.

First announced in March 2006, the Payforit scheme has been developed by the UK's mobile operators to promote a consistent standard for paying by mobile, so that consumers can buy with confidence when they are making one-off payments or setting up subscription services via their phone.

The Code

1. The Scheme Rules

Payforit operates under the Payforit Scheme Rules, as amended from time to time. The current version (v3.0 28/2/2010) of the Scheme Rules can be found at <http://www.payforituk.com>. The mobile operators enforce the scheme rules through contractual arrangements between each operator and their authorised payment intermediaries. The Scheme Rules are administered by the Payforit Management Group ("PMG").

2. Changes to scheme rules

Changes to scheme rules will be notified to Authorised Payment Intermediaries ("API"), in accordance with contractual terms. Changes will all also be notified promptly [within 14 days?] to Ofcom by the PMG.

3. Monitoring

Each mobile operator will actively monitor the adherence of APIs and merchant clients to the scheme rules. Monitoring will be carried out regularly with a view to identifying breaches of scheme rules that could give rise to consumer harm. Mobile operators will share intelligence with each other about breaches of scheme rules that are identified.

4. Enforcement

If breaches of scheme rules are identified, each mobile operator will take appropriate enforcement action, using the yellow and red card system²⁴. Serious or repeated breaches

²⁴ A yellow card is issued to a merchant for less serious breaches and the merchant is given 2 working days to remedy the breach. A Red card is issued if the breach is more serious and likely to lead to consumer detriment OR if the merchant has failed to respond to a yellow card in time.

of scheme rules could result in a merchant or API being barred from using Payforit indefinitely. Mobile operators will inform each other about red and yellow cards they have issued but each will decide independently what enforcement action to take.

5. Customer resolution and redress

Each mobile operator will take responsibility for ensuring that customer queries and complaints are dealt with in accordance with their regulatory obligations under General Condition 14. This includes resolving complaints directly or ensuring that the API or merchant clients resolve them in accordance with its internal processes and contractual obligations. If there is an allegation that an API or merchant is not properly dealing with the complaint, a mobile operator will secure resolution of that complaint directly.

6. Merchants banned from using Premium Rate Services (PRS)

An API or its merchant clients that have been barred from using the PRS payment mechanism as a consequence of an adjudication made by PhonepayPlus will not be allowed to transfer any barred service to the Payforit environment, so long as the PhonepayPlus disbarment remains in force.

An API or its merchant clients that appears on Ofcom's Number Refusal List will not be allowed to operate in the Payforit environment.

APPENDICES

Mobile operator specific processes for monitoring, enforcement and customer resolution

Telefonica O2 UK

Monitoring

Monitoring is undertaken by WMC, a specialist company contracted by O2 to monitor the Payforit service. They carry out their work on a daily basis.

When a violation is identified, it is classified as a red or yellow card offence details are applied and sent to Mike Round (Head of Interactive Messaging Products) weekly.

Enforcement

On receipt of the summary from WMC, Telefonica O2 sends a yellow or red card (as appropriate) to the relevant Level 1/Level 2 provider, who is then requested to make the necessary changes, so as to be in line with Telefonica's audit standards and the PhonepayPlus Code of Practice.

The usual Red/Yellow card standards are applied as agreed by all networks in the past (Red for more serious consumer harming behaviour; yellow for less serious violations that have to be remedied within two working days)

Resolution of customer queries and complaints

O2 Prepay or contract customer contacts the relevant care agent.

Care agent undertakes security check on Prepay confirms data for Postpay and then looks up via Your Companion (online tool) to identify the shortcode and the services using that shortcode and the Level1/Level2 contact details.

On discussion with the consumer if they wish to call the Level1/Level 2 themselves the appropriate telephone number is given as displayed on the care form so that the consumer can call direct to query the charges.

If the consumer does not wish to call separately then the care agent would complete the relevant online form on behalf of the customer which is then automatically sent to the Telefonica O2 offshore team that deals with escalations. The consumer is kept up to date via SMS messages.

If the consumer does not get any satisfaction from calling the Level1/Level2 and calls back to us to resolve the issue we would then complete the online form and the details would be sent automatically to our offshore team to deal with.

The offshore team would then contact the appropriate Level 1 provider and request the call logs to confirm what issues the consumer has raised.

The offshore team then return these findings to the relevant care agent who initially dealt with the consumer query and they then contact the consumer to confirm the findings and apply credits if appropriate.

Hutchison 3G - Three

Customer Care and Resolution Process for Customers of Three who have used a Payforit service or have a Payforit charge on their mobile bill.

Guiding Principles

All billing for services charged through the Payforit scheme, which utilises the “direct billing” capability of the network, carries a billing description that details for the customer;

- What was purchased
- The Merchant name
- The Amount charged
- The Contact telephone number of Merchant

This information is available to both customers and to Three’s Customer Support.

It is Three’s intention that customers who have used Premium rate shortcode and Payforit charged services are able to discuss the issue that they may have directly with the Merchant, Promoter or the agent of the Merchant in order to gain first call resolution where possible.

Three places a considerable amount of emphasis on ensuring that the information available to its customers using these services is comprehensive and widely available and that the Merchant is providing the correct level of support.

Self Help

Customers are able to use My3 on their handset and on the web to navigate their account and view bills. My3 on the handset, provides a summary of Payforit charges (Payforit is listed as a separate line item). Web based My3 provides a detailed breakdown of the charges including the billing text containing the detail as discussed above.

Customer Support

At first contact from a customer regarding a Payforit billed service, Three will encourage the customer to contact the Merchant first and to come back to Three if there is no resolution between the Merchant and the customer.

Often, if the Customer Service call queue is light, the Customer Service Agent will contact the Merchant directly and if possible conduct a three-way conversation.

However, most Merchant help lines are voicemail systems so this generally results only in a message being left. Our most common enquiry is regarding cessation of a previously entered subscription service where the shortcode for the stop command is being sought (usually as the initial subscription message has been lost by the customer).

Most Merchants that have subscription services ask consumers to leave their phone number details if they want to be unsubscribed.

On a second contact from a customer to Three's Customer Services, or if the customer is expressing dissatisfaction, the issue is escalated to the Payment Services department for detailed investigation. Based on the outcome of the investigation, Payment Services department will contact the customer with the findings from the investigation and one of three outcomes is possible;

- The customer is offered a full refund
- The customer is offered a good will gesture
- The customer is advised in detail how they engaged with the service and accepted the terms of the service as they passed through the payment pages and that the investigation did not find anything incorrect with the service.

Any customers dissatisfied with the outcome of the investigation (very rare) will be advised of their current ADR options.

Monitoring and enforcement

In relation to the Payforit scheme, Three conducts random monitoring of services, particularly if a service is increasing in usage volumes and applies three tests of the service compliance to the Payforit scheme rules;

1. Does the Accredited Payment Intermediary (API) consistently apply the scheme rules in respect of presentation of textual information to the Three customer?
2. Does the API send out the relevant text message based information to the customer, particularly for subscription services?
3. Does the API or the Merchant have an operational help line for their service. Three's test of "operational" is that the help line number is active, it is answered and any enquiry responded to within 1 working day.

Any non-operational help line would receive a warning (yellow card) escalating to a Red Card if the issue persists or the Merchant / API is a repeat offender.

Three places less emphasis on style and screen layout unless it a) causes the textual information to become ambiguous or unreadable or b) brings the Payforit brand into disrepute. A Red card would be issued in these situations.

Furthermore, any service that results in a Customer Services escalation to the Payment Services Team or has been passed over for investigation by PhonepayPlus or has appeared in an online complaint forum such GrumbleText is also investigated. The complete consumer flow is recreated from any initial promotion through to the final Payforit presentation. This investigation may result in a recommendation to improve the Merchant purchasing journey, Merchant information or Merchant advertising. Rarely is there a need to recommend improvements to the API presentation as this is defined in the scheme rules. A Yellow Card would be issued in this situation, escalating to a Red Card if the issue remains or is disputed.

Everything Everywhere

Monitoring

- Any queries/ complaints that come through from front line as an escalation point are investigated on a case by case basis and can result in red/ yellow cards being issued. Any API's found to be consistently in breach are then taken action against which can again result in red/yellow cards being issued
- In a self-regulated environment, EE are happy to put in place a third party entity to monitor API behaviour to make sure that payment flows, merchant contact details, delivery of digital goods etc are all in compliance with the scheme rules.

Enforcement Process

- If an API has been found to be in breach of the scheme rules, there is a dedicated team that works on issuing a red or yellow card depending on the severity of the breach and the potential for consumer harm. In some cases, if a yellow card is issued and the problem has not been resolved within 48 hours, then a red card may be issued.
- As PhonepayPlus is aware, information on breaches is quickly shared with the rest of the operators for information purposes only. In a similar manner, we appreciate information shared to us by other operators. All red/yellow card decisions are made purely on an individual basis only.

Customer Resolution Process

- If a customer has a query on a Payforit charge which shows on their bill or is deducted from their Pay As You Go allowance and do not have the details of the third party, they would initially turn to their MCP customer service line (by dialling 150 from their handsets) . Our customer service call centre advisers on both T-Mobile and Orange are provided with and trained on systems that can identify Payforit transactions as well as the associated API (on Orange) and API/ merchant (on T-Mobile). Central support systems are also in place within the call centres for both T-Mobile and Orange, and any information the advisor may need on the Payforit service, how it works, who to contact etc is all detailed within these support systems.
- An example Orange Payforit support system for front line customer services:

agent group: none

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 URL: [URL](#)

Payforit

Payforit is a mobile payment service provided by third party vendors, such as 2ergo, Bango and Dialogue. Here you'll find help on how to investigate billing issues and how to support customer queries.

what is it?

The Payforit service operates on all UK Mobile Networks and allows our mobile customers to buy goods and services while surfing the web on their mobile, for example:

- Ringtones
- Navigation services
- Music
- Video

The transactions are processed by one of our Payforit third party vendors and customers will see the Payforit logo (shown above) at the point of purchase. The cost will either be added to their next bill, or get deducted from their outstanding credit balance.

When using Payforit, customers will be told about:

- The trading company.
- A description of the service.
- The cost of their purchase.
- A contact number for any enquiries.
- The terms and conditions relating to their purchase (for example, if their purchase is a one-off selection or a subscription service).

costs

Charges vary from 25p to £30 per purchase and will show on the customer's bill as "**Payforit**". For more information on Payforit bills go to tab two: **'support'**.

supporting calls about Payforit

If you're contacted by a customer querying a transaction, don't raise any credits; instead, refer them to the third party company who provided the Payforit service. For a list of these companies and instructions on how to identify them, go to the second tab: **'support'**.

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- If a customer contacts the Orange or T-Mobile customer service call centres about a transaction they didn't make via Payforit, our frontline agent for Orange would be able to identify the API that billed for the service and would then either pass the customer to the API by providing them with the API's phone number/ email address or they may just refund the amount if it was a small amount. On T-Mobile, the merchant can be identified using the MT service ID that appears on the customer's bill and the customer would then be passed to the merchant by means of providing them with a phone number/ email address or a refund may be issued if it is a small amount. The MT service id range on T-Mobile for Payforit is different to that of PSMS so both types of transaction can be identified from their service ids straight away. There is also a different bill description which states "Payforit charge" for Payforit and "Premium Text" for PSMS.

- If the customer does not get any satisfaction from calling the API or merchant and calls back to Everything Everywhere to resolve the issue, Everything Everywhere would then pursue the matter to resolution directly with the API or merchant.
- T-Mobile customers can now use an online tool (<https://www.t-mobile.co.uk/pricing-data/sms-code-check/result/>) where they can input either a Service ID from the bill (e.g 700030099) or a shortcode to obtain details of the third party. The above URL is also printed on the back of customer bills.
- Any query that cannot be resolved by front line customer service advisors are routed through an escalation process for which we have a designated team:

Orange – Issues are escalated by frontline agents using a tool called 'Merlin'. These are then managed by a back office team in our Plymouth call centre who contact the API and resolve the issue on the customer's behalf. If a refund is due then the team will apply this directly to the customer's bill for contract customers, or provide airtime credit to if PAYG. The refund will be clawed back from the API. The back office team will also include the details of the issue in a report which is sent to the Operation Team on a weekly basis so that they have visibility of the escalations which they can then monitor and review (and where necessary issue warnings and red/yellow cards).

T-Mobile – Escalations are sent to the Operations Team via a follow-up email and these are then dealt with in the same way as Orange escalations above.

Vodafone

Submission to OfCom on the subject of the Management and Operation of the Payforit Scheme rules.

Introduction

In July 2011 OfCom issued a “Review of Premium Rate Services- An application of the analytical framework” and the Mobile Broadband Group led by Hamish MacLeod facilitated the MCP response to the review.

Following a meeting at OfCom offices on the 2nd November 2011 it was agreed by the MCP attendees to supply OfCom with a document outlining the current management and operation of the Payforit Scheme rules particular to each MCP.

This document is submitted by Vodafone UK to OfCom and should be viewed in conjunction with submissions from the other UK MCPs in support of the principal that the UK MCPs continue to self-regulate the Trusted Mobile Payment Framework and associated Scheme Rules known as ‘Payforit’.

Vodafone Background:

It is important that key elements of the context in which Payforit sits within Vodafone UK is outlined before detailing specific initiatives relating to its management.

1. **Customer Focus:** Vodafone UK holds to business principles that includes a requirement for each and every employee to place Vodafone UK’s customers’ satisfaction central to each proposition delivered and in support of this and requires aggregator partners to sign contracts that look to protect Vodafone UK’s customers’ best interests in terms of clear and fair pricing and simple methods of redress should the situation arise.
2. **Partner Rationalisation:** To ensure Vodafone UK only works with trustworthy partners, over the last two years it has been reducing the number of aggregator partners who are allowed to directly connect to the Vodafone UK network to provide content using MPay (Payforit), SMS, MMS or Voice/video services to Vodafone UK’s end customers.

The effect of this rationalisation is that those that remain are highly professional and diligent and effectively manage the risk that some of their end customers may pose to Vodafone UK’s customers

3. **Proactive Partner Management:** In September 2011 Vodafone UK launched an aggregator partner program. This looks to refine this attitude still further, a number of categories were defined and these are broadly based on products that they have with Vodafone UK, the volume of business transacted and Vodafone UK’s view of the way aggregator partners do business with it.

It is fully Vodafone UK’s intention to have Aggregator Partners categorised based on performance which will act as an incentive for aggregator partners to behave in a trustworthy and customer centric way.

Management and Operation of the Payforit Scheme rules within Vodafone UK.

Payforit Scheme Rules Summary:

- The Payforit Scheme Rules are designed to protect the Consumer and ensure the Merchants and their Payment Intermediaries deliver a great user experience to ensure satisfied customers return to the service.
- The Scheme Rules exist in parallel and are distinct from the other PRS services regulated by the PhonePay Plus 12th Code of Practice (CoP).
- In fast paced environment in which the aggregators and MCPs function, Payforit has adapted and will continue to adapt at a speed unlikely to be achieved by any formal regulation.

Vodafone UK initiatives and Processes to manage Payforit internally:

1. Contracts with Accredited Payment Intermediaries (APIs/Aggregators)

Each Aggregator Partner has signed contracts that stipulate compliance with English Law, Payforit Scheme rules, Vodafone PRS CoP, Vodafone 3rd Party Content Standards and other relevant Advertising CoP and PRS CoP.

2. Vodafone UK monitoring programme

- Vodafone UK's Fraud, Risk & Security (FRS) teams actively monitor data/voice traffic to identify fraudulent patterns of activity. Product Managers (PM) are required to escalate, block traffic and/or withhold revenues to aggregator partners when requested.
- The Red/Yellow card alerts issued by MCPs are monitored and Vodafone UK would insist that the agreed alteration is carried through for use on the Vodafone network
- Close, effective working relationships with Phonepay Plus established and maintained in other areas of PRS enforcement are considered useful for intelligence on general fraud issues in the industry
- Vodafone UK conducts independent security access audits to ensure secure protocols are used by aggregator partners to access its Age Verification (AV) systems. AV is based on a contractual undertaking between Vodafone UK and the end customer. Customer Services log complaints and approach product managers to resolve issues as required.
- Product Managers conduct audits of aggregator partners and their adherence to Payforit Scheme Rules. Each aggregator partner is subject to spot audits and requests for information to support any investigation.

3. Vodafone UK enforcement process.

- Financial claw-backs. A system of claw-backs exists whereby credits, disputed revenues and costs incurred to Vodafone UK are removed from Out Payments in line with contractual terms.

- Red & Yellow Card System. Vodafone UK has signed up to the Red and Yellow Card scheme and takes the protection of our customers seriously. If Vodafone UK has issued a Red/Yellow card then the aggregator partner is obliged to rectify as specified. All Red card issued are to be complied with by the aggregator partners Vodafone UK contracts with. In summary this means; Red card, comply immediately and/or remove the service from network immediately; the yellow card stipulates fix and/or respond within two days. Failure to remedy leads to a Red card. Vodafone UK has not issued any Red and Yellow cards in the last 12 months for 2 principle reasons;
 - i. Issues that are common to all MCPs tend to be reported quickly via the automated system that O2 has installed.
 - ii. As the number of Aggregator Partners has been drastically reduced and the BDM management ensures the dialogue between Vodafone UK and its Aggregator Partners manages conflict effectively.
- Aggregator partners that materially fail to comply with their Vodafone UK contract will be terminated and as Information Providers look for the 'one-stop shop' loss of access to a single network ensures ever increasing management of risk by Aggregator Partners. [Note: We are unlikely to terminate for minor breaches of contract]

4. Vodafone UK customer resolution process

1. Customer contact to query an item on the bill
2. Agent records the contact and description of enquiry
3. Using their training and a support script the agent identifies the shortcode and provides the merchant's name and contact number and advises the customer in the first instance to approach the merchant for an explanation and/or refund.
4. If the customer returns to Vodafone UK dissatisfied with the outcome then the Vodafone customer services agent will take responsibility for remedying the situation and crediting the customer directly.
5. The customer care team keep a central log of complaints and issues to help resolve customer experience. If a merchant is flagged as a recurring problem then the product manager is informed and asked to investigate the cause of the customer dissatisfaction.
6. Credit is moved to the Out Payments team who clawback the credits and costs pertaining to the customer.

When the customer does not receive satisfaction, a Case History:

This was brought forward by PP+ on 10th November 2011 to ask what had been done to support this customer)

Mrs GM, 07786 xxx xxx

PP+ quote: *"Samsung Galaxy receiving charges for KKO Mobile". "I've had no texts, no nothing, I've been charged since May. any apps I get are free, I haven't clicked on any adverts. I only found out after I checked my banking and noticed that my bill was £70 this month."*

Vodafone UK Outcome.

The customer was directly credited £210 by Vodafone UK on the 31.10.11 when the 'due process' had been followed to determine the validity of the claim. The customer logs show that she signed up online for a service on 31/03/11 and has had regular charges of £18 a month £4.50x4.

This case was resolved in a single day by the Vodafone UK Customer Care team in the normal process (with no prompting from external parties) and the customer was satisfied with the prompt resolution that Vodafone UK delivered for her.

This case was not escalated to the product manager as the issue was not deemed to contain fraud and would have been included in the weekly credit report.

Conclusion:

Vodafone UK believes it has the processes in place to fully support customers and the desire to see this sector of the market grow and it believes this can be done with the current self-regulatory frame work in place.

Annex 3

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

Notification of a modification under section 120A (1) of the Act

Modification of a condition under section 120 of the Act which is set out in a Notification under Section 48(1) of the Act published by OFCOM on 23 December 2003 (as amended¹) ('the PRS Condition').

WHEREAS

- A) Section 120A(1) of the Act states that the way in which conditions are to be modified under section 120 is by the publication of a notification setting out the modification;
- B) Section 120A(3) requires Ofcom, before modifying such a condition, to publish a notification stating that we are proposing to modify the condition, setting out the effect of the proposed modification and the reasons for the proposal and specifying a period within which representations may be made to Ofcom about the proposal (which must end no less than one month after the day of the publication of the notification);
- C) OFCOM issued a notification pursuant to section 120A(3) of the Act on 29 July 2011 proposing to modify the PRS Condition ('the Notification of Proposed Modification');
- D) In the Notification of Proposed Modification and accompanying consultation document OFCOM set out the reasons for, and effect of, the proposed modification of the PRS Condition and invited representations on the proposal set out therein by 7 October 2011;
- E) By virtue of section 120A(5) of the Act, OFCOM may give effect to the proposal to modify the PRS Condition as set out in the Notification of Proposed Modification, with or without modification, after:
 - i) considering every representation about the proposal made to us within the period specified in the Notification of Proposed Modification; and
 - ii) having regard to every international obligation of the United Kingdom (if any) notified to us for this purpose by the Secretary of State;
- F) OFCOM received responses to the Notification of Proposed Modification and has considered every such representation made to us in respect of the proposal set out in it and the accompanying consultation document; and

¹ The latest version of the PRS Condition was published in the 29 July 2011 statement "*Modifying who is subject to the Premium Rate Services Condition; Statement on amending the PRS Condition to mirror the remit of PhonepayPlus under its new Code of Practice,*" at

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

- G) The Secretary of State did not notify to Ofcom any international obligation of the United Kingdom for the purpose of section 120A(5).

THEREFORE OFCOM NOTIFIES THE FOLLOWING MODIFICATION

1. OFCOM, in accordance with the procedures in section 120A of the Act, hereby makes the following modification to the PRS Condition under section 120 of the Act.
2. The modification is set out in the Schedule to this Notification.
3. The effect of, and OFCOM's reasons for making, the modification referred to in paragraph 1 above are set out in the statement, "*Review of Premium Rate Services Decision on an application of the analytical framework*," published by Ofcom on its website at www.ofcom.org.uk and at Annex 3 to which is a copy of this Notification.
4. OFCOM is satisfied that the modification referred to in paragraph 1 above complies with the requirements of section 47(2) of the Act, as applied by section 120(5), as appropriate and relevant to each of the changes made to the PRS Condition.
5. In making the modification set out in this Notification, Ofcom has considered and acted in accordance with our general duties in section 3 of the Act and the six Community requirements in section 4 of the Act.
6. Copies of this Notification, and the accompanying statement, have been sent to the Secretary of State in accordance with section 120A(7) of the Act.
7. In this Notification:
 - (i) "the Act" means the Communications Act 2003; and
 - (ii) "OFCOM" means the Office of Communications;
8. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them in this Notification and otherwise any word or expression shall have the same meaning as it has in the Act.
9. For the purpose of interpreting this Notification:
 - (i) headings and titles shall be disregarded; and
 - (ii) the Interpretation Act 1978 shall apply as if this Notification were an act of Parliament.
10. The Schedule to this Notification shall form part of this Notification.
11. The modification set out in the Schedule to this Notification shall take effect from 1 September 2012.

Signed by

Claudio Pollack

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

2 July 2012

Schedule

Modification of a condition under section 120 of the Act which is set out in a Notification under Section 48(1) of the Act published by OFCOM on 23 December 2003 (as amended²).

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

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

² The latest version of the PRS Condition was published in the 29 July 2011 statement "*Modifying who is subject to the Premium Rate Services Condition; Statement on amending the PRS Condition to mirror the remit of PhonepayPlus under its new Code of Practice,*" at

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

- (iii) a person who:
 - (A) is the provider of an Electronic Communications Network used for the provision of a Controlled Premium Rate Service; and
 - (B) has concluded an agreement relating to the use of the Electronic Communications Network for the provision of that Controlled Premium Rate Service with a Controlled Premium Rate Service Provider;
- (d) “Chatline Service” means a service which consists of or includes the enabling of more than two persons (the participants) to simultaneously conduct a telephone conversation with one another without either:
 - (i) each of them having agreed with each other; or
 - (ii) one or more of them having agreed with the person enabling such a telephone conversation to be conducted, in advance of making the call enabling them to engage in the conversation, the respective identities of the other intended participants or the telephone numbers on which they can be called. For the avoidance of any doubt, a service by which one or more additional persons who are known (by name or telephone number) to one or more of the parties conducting an established telephone conversation can be added to that conversation by means of being called by one or more of such parties is not on that account a Chatline Service, if it would not otherwise be regarded as such a service;
- (e) “Controlled Premium Rate Service” means a Premium Rate Service (other than a service which is only accessed via an International Call or a service which is delivered by means of an Electronic Communications Service and is provided by the person who is also the provider of the Electronic Communications Service) in respect of which:
 - (i) the service is obtained through a Special Services Number (except an 0843/4 number), and the charge for the call by means of which the service is obtained or the rate according to which such call is charged is a charge or rate which exceeds 5 pence per minute for BT customers inclusive of value added tax; or
 - (ii) the service is obtained other than through a Special Services Number, and the charge for the call by means of which the service is obtained or the rate according to which such call is charged is a charge or rate which exceeds 10 pence per minute inclusive of value added tax (and which also includes, for the avoidance of any doubt, a service delivered by means of an Electronic Communications Service which is charged by means of a Payment Mechanism and for which the charge exceeds 10 pence inclusive of value added tax); or
 - (iii) the service is a Chatline Service; or
 - (iv) the service is Internet Dialler Software operated; or
 - (v) the service is a Sexual Entertainment Service;

- (f) “BT” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989 and the Companies Act 2006;
- (g) “Controlled Premium Rate Service Provider” means a person who:
 - (i) provides the contents of a Controlled Premium Rate Service;
 - (ii) exercises editorial control over the contents of a Controlled Premium Rate Service;
 - (iii) packages together the contents of a Controlled Premium Rate Service for the purpose of facilitating its provision; or
 - (iv) makes available a facility comprised in a Controlled Premium Rate Service;
- (h) “Dial-up Telephone Number” means the telephone number used by an end user’s computer that connects it to the Internet;
- (i) “Enforcement Authority” means, in relation to an Approved Code, the person who under the code has the function of enforcing it;
- (j) “Facility” includes reference to those things set out in section 120(14) of the Act;
- (k) “International Call” means a call which terminates on an Electronic Communications Network outside the United Kingdom;
- (l) “Internet Dialler Software” is software that replaces a Dial-up Telephone Number with a different Dial-up Telephone Number; other than where it is used so that:
 - (i) an end-user’s existing Internet Service Provider replaces the Dial-up Telephone Number; or
 - (ii) an end-user moves from his existing Internet Service Provider to another Internet Service Provider or is so moved with his consent;
- (m) “Internet Service Provider” means a person who provides end-users, by means of a Dial-up Telephone Number, with connection to the Internet in the ordinary course of its business;
- (n) “National Telephone Numbering Plan” means a document published by Ofcom from time to time pursuant to sections 56 and 60 of the Act;
- (o) “Premium Rate Service” shall have the meaning ascribed to it by section 120(7) of the Act;
- (p) “Payment Mechanism” is a mechanism whereby the charge for a service delivered by means of an Electronic Communications Service is paid to the Communications Provider providing the Electronic Communications Service;

- (q) “Sexual Entertainment Service” means an entertainment service of a clearly sexual nature, or any service for which the associated promotional material is of a clearly sexual nature, or indicates directly, or implies, that the service is of a sexual nature; **and**
 - (r) “Special Services Number” means a telephone number designated by Ofcom in the National Telephone Numbering Plan as Special Services basic rate, Special Services higher rate or Special Services at a Premium Rate.
3. For the purposes of interpreting this Condition, except in so far as the context otherwise requires, words or expressions shall have the same meaning as ascribed to them in paragraph 2 above and otherwise any word or expression shall have the same meaning as it has been ascribed in the Act.

Annex 4

Glossary

Abbreviations and Technical Terms

ADR:	Alternative Dispute Resolution
API:	Accredited Payment Intermediary
CPRS:	Controlled Premium Rate Service
ECS:	Electronic Communications Service
ICSTIS:	Independent Committee for the Supervision of Standards of the Telephone Information Services
IP:	Information Provider
MCP:	Mobile Communications Provider
MNO:	Mobile Network Operator
OCP:	Originating Communications Provider
PP+:	PhonepayPlus
PRS:	Premium Rate Services
SMS:	Short Message Services
SP:	Service Provider
WAP:	Wireless Application Protocol