

Information Note and Invitation to provide Comments

Ofcom's Intended Approach to Consulting on the Approval of PhonepayPlus' New Code of Practice

Ofcom is notifying stakeholders of the approach it intends to take when considering whether to approve PhonepayPlus' 12th Code of Practice (the '**New Code**'), which is currently being developed. At this stage, Ofcom intends to consult relevant stakeholders at the same time as PhonepayPlus issues a consultation document on proposed changes to the existing Code. It is anticipated that this consultation will be published later this year following the conclusion of relevant sections of Ofcom's recently published Premium Rate Service Scope Review.

The Respective Roles of Ofcom and PhonepayPlus

Under the Communications Act 2003 (the '**Act**'), Ofcom has overall responsibility for regulating Premium Rate Services ('**PRS**'). In accordance with the Formal Framework Agreement between Ofcom and PhonepayPlus,¹ PhonepayPlus carries out the day-to-day regulation of the PRS market, which it does through enforcement of its Code of Practice (the '**Code**').

Under the Act, Ofcom has the power to approve a Code, or modifications to an approved Code, made by PhonepayPlus.

How Stakeholders have been consulted in the Past

In the past PhonepayPlus has typically consulted stakeholders on proposed modifications to the Code, then submitted the Code to Ofcom for approval. Ofcom has subsequently undertaken its own consultation process on whether it should approve the Code – a process that often does not raise any issues that have not been previously canvassed through the PhonepayPlus consultation.

A More Co-ordinated Consultation Process

We are of the view that a more co-ordinated consultation process may be more appropriate to reflect the close working relationship between Ofcom and PhonepayPlus. There have been a number of recent developments that support this move:

- The Framework Agreement, signed between Ofcom and PhonepayPlus in December 2007, has formalised the working relationship between the two organisations and confirmed that PRS policy will be developed through dialogue between the two organisations;
- Ofcom and PhonepayPlus are now working closely together on matters of PRS policy. Relevant projects include the development of the New Code (Ofcom staff have been sitting on PhonepayPlus' 12th Code Programme Board), ongoing matters in broadcast PRS, and PhonepayPlus' recent review of mobile PRS; and

¹ See <http://www.ofcom.org.uk/consult/condocs/phonepayplus/formalframework.pdf>.

- Ofcom published a Scope Review in May 2009, proposing a number of initiatives, which, if pursued, would fall to PhonepayPlus to put into practice through changes to their Code.

It is Ofcom's intention to engage closely with PhonepayPlus at a pre-consultation stage and consult on whether to approve the proposed New Code at the same time as PhonepayPlus consults on the detail of the New Code. Both organisations will maintain distinctive functions and will be consulting on slightly different issues from different perspectives.

Stakeholders will have the ability to make submissions to both organisations on the proposed New Code. Both Ofcom and PhonepayPlus will consider the responses from stakeholders in light of their respective duties and legislative responsibilities.

Ofcom will take into account the earlier submissions that it has received when PhonepayPlus subsequently submits the New Code to Ofcom for approval. However, Ofcom will also consider whether it is appropriate to conduct further consultation if PhonepayPlus' final proposal materially departs from the Code on which stakeholders had been invited to comment.

The Relationship between the Scope Review and the New Code

Ofcom is currently consulting on its Scope Review of PRS regulation, with submissions due by 24 July 2009. As signalled in the consultation paper, if many of the initiatives were to go ahead, it would fall to PhonepayPlus to implement them through a revision of its Code. It is therefore logical that a statement from Ofcom on the outcome of its Scope Review will need to precede PhonepayPlus' formal consultation on its New Code. The sequencing of this process is likely to be:

1. PhonepayPlus publishes a Discussion Paper on the likely direction of the New Code, which while not part of the formal consultation process, will be a useful means for the organisation to stimulate industry feedback on its proposed direction (published 24 June 2009);
2. Ofcom publishes a statement on aspects of its Scope Review, including providing direction to PhonepayPlus on various initiatives that may merit inclusion in its New Code;
3. Ofcom and PhonepayPlus undertake co-ordinated consultation on PhonepayPlus' proposed New Code;
4. PhonepayPlus submits its proposed New Code to Ofcom for approval; and
5. Ofcom decides whether to approve the New Code, which, if appropriate, may be preceded by further consultation.

Although Ofcom and PhonepayPlus have a common understanding of the key regulatory challenges in the PRS sector, both organisations recognise that this proposed method of consultation may not prove to be practical, particularly if new issues emerge through the Scope Review. Based on the responses to this Information Note and any other relevant

issues which might potentially arise, Ofcom will take an informed view on whether to proceed with this proposed co-ordinated consultation process and will keep stakeholders informed in due course.

Ofcom's Criteria for the Approval of the Code

In order to approve the Code, Ofcom must be satisfied that:

- the Code has been made by any person for regulating the provision and contents of PRS, and the facilities made available in the provision of such services (see section 121(1)(a) of the Act);
- the Code contains provisions for regulating, to such extent as Ofcom thinks fit, the arrangements made by the providers of PRS for promoting and marketing those services (see section 121(1)(b) of the Act);
- all of the requirements in section 121(2) of the Act are met;²
- it is appropriate for Ofcom to approve the Code (see section 121(1)(c) of the Act, with Ofcom exercising its discretion in accordance with its duties under sections 3 and 4 of that Act);
- the Code meets the requirements set out in section 121(3) of the Act, concerning obligations imposed on a person who is a provider of the service by virtue only of section 120(12) of the Act; and
- the Code meets the requirements set out in section 121(5) of the Act, concerning the provisions for the enforcement of the Code.

Ofcom will continue to consider whether or not to approve the New Code against these criteria.

Stakeholder Engagement

Ofcom invites written views and comments on the proposed way to consult stakeholders in relation to PhonepayPlus' New Code.

To contribute, please email jeff.loan@ofcom.org.uk

² According to section 121(2) of the Act, Ofcom are not to approve a code for those purposes unless they are satisfied—

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

If you wish part or all of your contribution to remain confidential, including your personal details, can you please clearly indicate this and why you consider these details should be kept confidential. Please note, however, that Ofcom may still need to publish these contributions, including those which are marked as confidential, in order to meet legal obligations. Ofcom will seek to protect your personal data if indicated to do so. Also, if your contribution is submitted by e-mail, you agree that Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.