

## **Memorandum of understanding (“MoU”)**

### **Between the Office of Communications and PhonepayPlus**

#### **Background**

- A. The Office of Communications (“Ofcom”) has functions and powers, set out in sections 120 – 124 of the Communications Act 2003 (the “2003 Act”), relating to the regulation of premium rate services (“PRS”)<sup>1</sup>. So, too, by virtue of provisions contained in those sections, does PhonepayPlus (“PP+”).
- B. Ofcom’s powers include that to set conditions for the purpose of regulating the provision, content, promotion and marketing of PRS (referred to in this document as a “PRS Condition”). They also include those to approve a code for the regulation of PRS made by another person or, in the absence of such an approved code, to make an order for such regulation.

#### **Approving another person’s code**

- C. In particular, Ofcom has the power, under section 121 of the 2003 Act, to approve a code made by another person for regulating the provision and contents of PRS, and the facilities made available in the provision of such services.
- D. Ofcom may approve such a person’s code where it appears to Ofcom that (a) the code contains provision for regulating, to such extent (if any) as Ofcom think fit, the arrangements made by the providers of PRS for promoting and marketing those services; and (b) it would be appropriate for Ofcom to approve that code. Under section 121(4) an approved code may include, in particular, provisions about the pricing of PRS and for enforcing the code.
- E. Ofcom may only, however, approve another person’s code if, amongst other things, Ofcom is satisfied that:
- a. the person who, under the code, has the function of administering and enforcing it is sufficiently independent of the providers of PRS;
  - b. adequate arrangements are in force for funding the activities of the person in (a) in relation to the code; and
  - c. the provisions of the code are:
    - i. objectively justifiable in relation to the PRS to which it relates;
    - ii. not unduly discriminatory against particular persons or a particular description of persons; and
    - iii. proportionate to, and transparent in relation to, what they are intended to achieve.
- F. Under section 121(6) of the 2003 Act OFCOM may, at any time, approve modifications to an approved code or withdraw approval from such a code.

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<sup>1</sup> As defined in section 120 of the 2003 Act

### **Ofcom's order making power**

- G. Where Ofcom consider that there is no code in force to which Ofcom think it would be appropriate to give, or to continue to give, such approval under section 121 of the 2003 Act, Ofcom may make an order under section 122.
- H. An Ofcom order under section 122 may make provisions with respect, amongst other things, to the:
- a. provision and contents of PRS, and to the facilities made available in the provision of such services (including about pricing);
  - b. arrangements made by the providers of PRS for the promotion and marketing of those services; and
  - c. enforcement of requirements imposed by virtue of paragraphs (a) or (b).

### **Conditions**

- I. The PRS Conditions Ofcom may make under section 120 of the 2003 Act, that bind the persons to whom they are applied, are prescribed by that section.
- J. The only provision a PRS Condition may make is to require the person to whom it applies to comply with either:
- a. directions given by another enforcement authority in accordance with the code approved by Ofcom and for the purpose of enforcing its provisions; or
  - b. if there is no such approved code, the provisions of an order by Ofcom under section 122 of the 2003 Act.
- K. Under sections 123 and 124 of the 2003 Act Ofcom may take action for breach of a PRS condition against a person to whom it applies.

### **Ofcom and PP+**

- L. In accordance with the provisions set out above, Ofcom has, most recently, approved PP+'s 13<sup>th</sup> code which came into effect on 1 July 2015. Ofcom made a PRS Condition in December 2003, requiring relevant persons to comply with directions given by PP+ in accordance with its approved code and for the purpose of enforcing it, in accordance with section 120 of the 2003 Act. The Condition has since been amended a number of times, most recently February 2015.
- M. PP+'s code provides for the regulation of the provision, content, promotion and marketing of PRS, and the facilities made available in the provision of such services. PP+'s code also contains provision for PP+ to enforce the code and for PP+ to issue directions to those to whom the code applies.
- N. The code also provides that, in accordance with section 120 of the 2003 Act, PP+ may refer to Ofcom a person's failure to comply with a direction issued by PP+. Ofcom may then take action in accordance with the statutory provisions relating to the PRS Condition.
- O. PP+ is accordingly responsible for the application and enforcement of its code approved by Ofcom in the regulation of PRS and other relevant facilities. Ofcom is responsible for the application and enforcement of the PRS Condition. Ofcom may also, amongst other things, withdraw approval from PP+'s code in accordance with section 121 of the 2003 Act.

P. In order to facilitate Ofcom's and PP+'s performance of their functions in accordance with the provisions of the 2003 Act and PP+'s code, they have agreed this MoU in respect of the matters set out in it.

**Ofcom and PP+ have agreed the following:**

***Relationship management***

1. Ofcom and PP+ acknowledge that it is for PP+ alone to exercise its regulatory, governance and operational functions in respect of the application and enforcement of the code and in accordance with its own Articles of Association. In doing so, PP+ is subject to the relevant provisions of the Act. Ofcom's powers are limited as set out in the Act and, in particular, it has no role in PP+'s application and enforcement of the code (save where PP+ refers to Ofcom a person's failure to comply with a direction PP+ has issued).
2. Ofcom and PP+ agree that solely for the purposes of managing the relationship between their organisations in accordance with the relevant statutory provisions, a senior Ofcom officer, referred to in this MoU as "the Sponsor," will be appointed by Ofcom.
3. Ofcom and PP+ agree that the Sponsor, or alternate, is entitled to attend PP+ Board meetings as an observer. They agree that, amongst other things, this means PP+ will provide the Sponsor with such information as is reasonably required for the following purposes:
  - a. to ensure that the agreed terms of this MoU are being met; and
  - b. to ensure that the Sponsor is adequately informed of the matters discussed and about which the PP+ Board makes decisions.

***Governance***

4. As final responsibility for the regulation of PRS rests with Ofcom, Ofcom and PP+ have agreed the following:
  - a. PP+ will consult with Ofcom as to the decisions PP+ proposes to make for the short-listing, interviewing and appointing (or re-appointing) of PP+'s Board members and of its Chief Executive;
  - b. PP+ will invite an Ofcom representative to sit on the appointment or re-appointment panels of members of PP+'s Board members and of its Chief Executive;
  - c. all such appointments and re-appointments shall be subject to approval by Ofcom; and
  - d. PP+ will appoint its Board members for fixed terms of three years, and they will serve a maximum of two consecutive terms.
5. Ofcom and PP+ will agree annual and medium term objectives, strategies and related funding arrangements. Final decisions on these matters rest with Ofcom but will be informed by recommendations from the PP+ Board based on their knowledge of the sector and relevant trends.

***Funding arrangements***

6. In order to facilitate compliance with the statutory requirements relating to ensuring that adequate funding arrangements are in place for PP+'s activities in relation to the code, Ofcom and PP+ agree that:

- a. PP+ will consult on an annual basis with Ofcom in relation to PP+'s proposed business plan, which shall include its operational and policy plans and targets, and its budget;
- b. the PP+ budget and business plan shall be subject to approval by Ofcom on an annual basis and shall be set within the framework of the PP+ three year strategic plan; and
- c. PP+ will provide Ofcom with regular (monthly and quarterly) updates on its performance in relation to its business plan and budget, in addition to providing updates on such matters to the Sponsor when attending its Board meetings.

***Operational matters***

7. In light of the provisions of sections 120 – 124 of the 2003 Act, and section 121 in particular, Ofcom and PP+ agree that PP+ will:
  - a. keep under review, and consult with Ofcom as to, the markets for PRS and related facilities, and any developments liable to give rise to consumer harm and/or otherwise require regulatory intervention; and
  - b. keep under review, and consult with Ofcom as to, the appropriateness of the provisions of the code and any proposals PP+ contemplates for amending the code.
8. Ofcom and PP+ also agree that, where required by urgent or exceptional circumstances, information about matters falling within paragraph 7.a. will be shared without delay.

***Other matters***

9. Ofcom and PP+ agree that the information PP+ provides to Ofcom under this MoU shall be provided in such forms and at such times as Ofcom reasonably requires for the purposes for which it is provided.
10. PP+ agrees that, before it makes any relevant decision, PP+ will have due regard, in light of the relevant provisions of the 2003 Act described above, to any views expressed by Ofcom as part of any consultation between Ofcom and PP+ in respect of the matters covered by this MoU.
11. Ofcom and PP+ agree that this MoU may be the subject of review and variation from time to time.