



Approval of the PhonepayPlus Code of Practice (fourteenth edition)

This consultation document seeks comments on whether Ofcom should approve, under section 121 of the Communications Act 2003, a new edition of the PhonepayPlus Code of Practice for regulating Premium Rate Services

Consultation

Publication date: 14 March 2016

Closing Date for Responses: 25 April 2016

About this document

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

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

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

Following implementation of the current 13th Code of Practice on 1 July 2015, PhonepayPlus has carried out and completed a separate review of the enforcement procedures set out in Part 4 of that Code. It has consulted on various changes to Part 4 which it has proposed should be introduced as part of a new 14th Code of Practice. Having taken account of consultation responses, PhonepayPlus published a decision document and final version of the draft 14th Code of Practice on 10 March 2016, which it has submitted to Ofcom for approval.

We are minded to approve the new Code, having assessed it against the relevant legal tests, and we invite stakeholders to comment on this provisional decision. This is a six-week consultation and the closing date for responses is 25 April 2016. At the same time as publishing this consultation, we will notify the European Commission of our intention to approve the draft Code which will initiate a three-month standstill period. Subject to responses to our consultation and/or from the European Commission or other Member States, we aim to publish a final decision by the end of June 2016.

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Section 1

Summary

- 1.1 Premium rate services ('PRS') typically offer some form of content, product or service that is charged to users' phone bills. They can offer information and entertainment services via fixed or mobile phone, fax, PC or interactive digital TV. Regulation of PRS is designed to ensure that consumers can use these services with confidence and have access to effective redress when they encounter problems.
- 1.2 Under the Communications Act 2003 (the 'Act') Ofcom approves PhonepayPlus' ('PPP') Code of Practice (the 'Code'). One overall effect is that PPP is the day-to-day regulator of PRS. PPP's Code regulates the provision and contents of PRS in the UK and facilities made available in the provision of such PRS. From time to time, PPP revises the Code to ensure it continues to provide a trusted environment for consumers and a fair and proportionate regulatory regime for the industry.
- 1.3 PPP embarked upon a review of the Code (12th edition) in mid-2013 and consulted on a revised Code (13th edition) in 2014. The consultation included proposals to make amendments aimed at providing clarity to stakeholders about the process for reviews, oral hearings and appeals as set out in Part 4 of the Code ('Part 4') – covering investigations, procedures and sanctions where there is an alleged breach of the Code.
- 1.4 In light of views expressed during the consultation on the proposed 13th Code, PPP decided not to carry through its proposals on Part 4 into the 13th Code (which came into effect on 1 July 2015). Instead, and with the exception of making some limited amendments to the Emergency Procedure (EP) provisions within Part 4, PPP commenced a separate and comprehensive review of Part 4 together with its "Investigations and Sanctions Procedures". Ofcom welcomed this further review as we note that respondents raised substantive points about PPP's proposed changes which required further consideration and discussion.
- 1.5 On 23 November 2015, following its review of Part 4, PPP published a consultation setting out a proposed draft 14th Code of Practice. In this consultation, PPP proposed a number of substantive changes to Part 4 of its Code. Having taken account of responses to that consultation, PPP published a decision document on 10 March on the draft 14th Code of Practice (the 'draft Code') for the regulation of PRS which it has submitted to Ofcom for approval.
- 1.6 This document is Ofcom's consultation on whether the draft Code meets the legal tests for being approved under section 121 of the Act.
- 1.7 The legal framework within which Ofcom considers approving the draft Code is set out in further detail in section 2 of this document. It is important to note that Ofcom and PPP have different roles and responsibilities:
 - PPP is responsible for drafting the Code and has already consulted on the substance of the draft Code. Its consultation examined the proposed changes from the 13th Code in detail and invited stakeholders to respond directly to PPP on the merits and detail of the draft Code. PPP submitted the draft Code to Ofcom for approval following a consideration of consultation responses.

- Ofcom is responsible for approving the draft Code and is now consulting on whether the draft Code submitted by PPP meets the legal tests set out in section 121 of the Act and should be approved by Ofcom with no material changes.

1.8 Respondents to this consultation are asked to bear in mind how Ofcom's role and responsibilities are different to PPP. In particular, responses to this consultation should focus on whether or not the draft Code meets the legal tests in section 121 of the Act and whether Ofcom should approve it in that form, and the reasons why respondents are of that view.

What are the key changes being proposed to PRS regulation?

1.9 The draft Code has been developed following stakeholder engagement and formal consultation by PPP. In November 2015, PPP issued a consultation on proposed changes to Part 4 of the Code¹. The consultation closed on 1 February 2016 and PPP received seven responses. PPP has assessed all responses to the consultation in developing a final version of the draft Code which it has published and formally submitted to Ofcom for approval².

1.10 Apart from Part 4 of the Code, many of the provisions in the draft Code are unchanged from the 13th Code which Ofcom has previously approved (or are subject to minor consequential changes as a result of the Part 4 changes). This consultation therefore focusses on the key changes to Part 4 of the Code which we have identified below and discuss further in this document:

- i) High-level criteria used by PPP to determine whether a case should be allocated to either a Track 1 or Track 2 investigation to be included in the Code.
- ii) Removal of the case allocation track currently known as the "Emergency Procedure", by bringing forward a consideration of interim measures – i.e. revenue withholds and/or service suspension orders – to an earlier stage in all Track 2 investigations.
- iii) The recommendations of the Investigations Team at various key stages of an investigation to be subject to oversight by senior members of PPP.
- iv) Replacement of the current Code Compliance Panel (CCP) with a new body, the Code Adjudication Panel (CAP), which will not include members of the PPP Board. This provides a separation between those who make the Code and those who enforce it. A Tribunal with members drawn from the CAP will need to ratify any decision to impose interim measures or to agree a settlement with a PRS provider ('provider'). Further, any final breach finding and sanction decision (where the parties are unable to settle) will be made by a Tribunal.
- v) A formal "Warning Notice" to be issued to providers to set out alleged breaches, supporting evidence and any recommended sanctions before the case is presented to a Tribunal for decision. This is expected to enhance the potential for

¹ <http://www.phonepayplus.org.uk/~media/Files/PhonepayPlus/Consultation-PDFs/000Nov2015/Part-4-Review--Code-Consultation-document.pdf>,
<http://www.phonepayplus.org.uk/~media/Files/PhonepayPlus/Consultation-PDFs/000Nov2015/Annex-A-Proposed-14th-Code-of-Practice-2015.pdf>

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

providers to settle cases once they have received the Warning Notice and prior to a hearing.

- vi) A more flexible hearing, which allows for different levels of oral and legal representation.
- vii) Replacement of the current post-adjudication review stages and the Independent Appeals Body (IAB) with a single, limited review procedure.

In addition, PPP has proposed that any Track 2 investigations started under the 13th Code would have to follow and be taken forward under the revised Part 4 procedures from the date the 14th Code takes effect.

- 1.11 It is important to note that aside from (i) above, these key changes will affect Track 2 investigations only. Such investigations follow a formal process and may result in a Tribunal decision. They differ from Track 1 cases where potential breaches may be resolved between PPP and a provider using measures which resolve complaints without recourse to full investigation such as agreeing to an action plan.
- 1.12 We are inviting respondents to comment on the key changes as outlined above, and any others they view as relevant to whether or not the legal tests in section 121 of the Act are met, and whether Ofcom should approve the draft Code with these changes.

Ofcom's provisional view of the proposed changes to PRS regulation

- 1.13 The 13th Code, which the final version of the draft Code will replace, remained focussed on consumer outcomes. We consider that this approach has provided an effective regulatory framework, successfully balancing the need to ensure consumers are protected while at the same time enabling industry to operate and innovate. The changes in the draft Code do not change the fundamentals of this approach. They instead propose changes to the enforcement process followed where PPP becomes aware of and/or becomes concerned about a providers' compliance with the rules in the Code. These changes are being proposed to deliver a more streamlined enforcement process whilst maintaining a fair, open and transparent process for all parties through which investigations will be conducted and concluded.
- 1.14 It is our provisional view that, subject to responses received through this consultation, the draft Code meets the legal tests for approval under section 121 of the Act, including, *inter alia*, being objectively justifiable, transparent, non-discriminatory and proportionate. We are inviting views on this provisional view and on our proposal that we should approve the draft Code as submitted to us by PPP.

What is the consultation process?

- 1.15 Ofcom is inviting stakeholder views on whether it is appropriate for the draft Code, as submitted by PPP, to be formally approved under section 121 of the Act. The deadline for responses is 5pm on 25 April 2016.
- 1.16 At the same time as publishing this consultation document, we will notify the European Commission and other Member States of our provisional decision to

approve the draft Code. This will begin a statutory three month standstill period under the EU Technical Standards Directive.³

- 1.17 Following consideration of all consultation responses (including any views expressed by the European Commission or other Member States), Ofcom aims to publish a final decision by the end of June 2016.

When will any new Code take effect?

- 1.18 Subject to the outcome of the consultation process, it is expected that the draft Code will come into force in July 2016. Achieving this aim will be subject to stakeholder responses to Ofcom's consultation and the nature of any subsequent modifications that may need to be made to the draft Code, and the ability of Ofcom to formally approve the draft Code without any further consultation.
- 1.19 Given that many of the provisions of the draft Code are unchanged, and that PPP has already consulted and issued a decision on the proposed changes to Part 4 of the Code, our view is that there need only be a short implementation period before the draft Code becomes binding. We would however welcome the views of stakeholders on the appropriate length of the implementation period.

³ Directive 2015/1535/EU.

Section 2

Background and legal framework

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

What are PRS?

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

2.3 These may be accessed by way of a conventional voice call, but may also be accessed in other ways, such as SMS, PC, mobile phone downloads or interactive digital TV. Common forms of PRS include TV voting lines, competitions, adult entertainment, chat lines, business information services, technical helplines, mobile phone ringtones and game downloads, horoscopes and directory enquiry services. They usually operate on numbers beginning 09, 118, 0871/2/3 or five to seven digit mobile text or voice shortcodes usually beginning with 6, 7 or 8.

2.4 PRS vary in cost. Ofcom's NGCS review⁵ resulted in the introduction of the unbundled tariff on 1 July 2015 for revenue-sharing numbers including the number ranges used for PRS. The unbundled tariff was introduced to enable consumers to better understand how much of their money is paid to their phone company and how much is passed to others, such as the organisation or service being called (such as the PRS provider). It requires that, instead of paying a single charge to their phone company, customers pay two separate charges:

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

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

⁴ PRS are defined in section 120(7) of the Act

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

The statutory definition of PRS

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

- “a. it is a service falling within subsection (8);*
- b. there is a charge for the provision of the service;*
- c. the charge is required to be paid to a person providing an electronic communications service by means of which the service in question is provided; and*
- d. that charge is imposed in the form of a charge made by that person for the use of the electronic communications service.”*

2.7 Section 120(8) says a service falls within that section if its provision consists in:

- “a. the provision of the contents of communications transmitted by means of an electronic communications network; or*
- b. allowing the user of an electronic communications service to make use, by the making of a transmission by means of that service, of a facility made available to the users of the electronic communications service.”*

How are PRS regulated in the UK

2.8 The current PRS regulatory framework comprises the following:

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

2.9 This framework works in the following way:

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

- The PRS Condition requires providers falling within its scope to comply with directions given by PPP in accordance with its Code and for the purposes of enforcing the provisions of that Code. Ofcom can ultimately take enforcement action for breaches of the PRS Condition.
- 2.10 The overall effect of this hierarchy of powers is that CPRS are regulated by the Code, administered and enforced by PPP, and communications providers ('CPs') and CPRS providers involved in their provision are subject to Ofcom's statutory backstop enforcement powers.

Legal tests under section 121 of the Act

- 2.11 PPP has responsibility for drafting the Code and consulted on the substance of the Code. Its consultation examined the proposed changes from the 13th Code in detail and invited stakeholders to respond directly to PPP on the merits and detail of the draft Code.
- 2.12 Ofcom has responsibility for whether or not to approve the Code. Under section 121(1) of the Act, Ofcom may approve the draft Code if it appears:
- “(a) that a code has been made by any person for regulating the provision and contents of premium rate services, and the facilities made available in the provision of such services;*
 - (b) that the code contains provision for regulating, to such extent (if any) as they think fit, the arrangements made by the providers of premium rate services for promoting and marketing those services; and*
 - (c) that it would be appropriate for them to approve that code for the purposes of section 120”*
- 2.13 Under section 121(2) of the Act Ofcom may not, however, approve the draft Code unless satisfied:
- “(a) that there is a person who, under the code, has the function of administering and enforcing it; and*
 - (b) that that person is sufficiently independent of the providers of premium rate services;*
 - (c) that adequate arrangements are in force for funding the activities of that person in relation to the code;*
 - (d) that the provisions of the code are objectively justifiable in relation to the services to which it relates;*
 - (e) that those provisions are not such as to discriminate unduly against particular persons or against a particular description of persons;*
 - (f) that those provisions are proportionate to what they are intended to achieve; and*
 - (g) that, in relation to what those provisions are intended to achieve, they are transparent.”*

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

Impact Assessment

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

Consultation period

- 2.18 Ofcom is inviting written views and comments by 5pm on 25 April 2016 on its proposed approval of the draft Code. Details of how to respond can be found in Annex 2. Consultation questions are in Annex 5.

Effective date

- 2.19 Subject to the outcome of the consultation process, it is expected that the draft Code will come into force in July 2016. This will depend on the responses provided by stakeholders (including the European Commission during the three-month standstill period required under the EU Technical Standards Directive⁶), the nature of any subsequent modifications that would need to be made to the draft Code, and whether in light of responses, Ofcom considers it can formally approve the draft Code without a further consultation.
- 2.20 If no substantive changes are required to the draft Code following this consultation, and Ofcom remains satisfied that it can approve the Code, it is our provisional view that there should only be a short period of time before the provisions become enforceable. This is because PPP has already consulted on the substance of the

⁶ Directive 2015/1535/EU.

draft Code and separately published a copy of the draft Code submitted to Ofcom for approval such that industry are already aware of the proposed changes to Part 4. We would however welcome views from stakeholders on this.

- 2.21 PPP has also proposed that any Track 2 investigations started under the 13th Code would, from the date the draft Code takes effect, have to follow and be taken forward under the revised Part 4 procedures set out in the draft Code. Subject to any stakeholder comments on this issue, Ofcom is currently satisfied that this approach is appropriate and should not prevent it from approving the draft Code. We would however also welcome views from stakeholders on this.

Section 3

Proposed changes

Introduction

- 3.1 We have summarised the key changes to Part 4 in paragraph 1.10 above.
- 3.2 PPP's consultation and decision documents and the draft Code are published on PPP's website at: <http://www.phonepayplus.org.uk/news-and-events/news/2016/march/statement-following-consultation-on-the-14th-code-of-practice>.
- 3.3 In addition to looking at and proposing changes to Part 4 of the Code, PPP's review also considered the Investigations and Sanctions Procedures document⁷ which, whilst not part of the Code, serves as a guidance document to support PPP's end-to-end enforcement process. As a result, this procedures document has been revised to reflect the proposed changes to Part 4 and was published on 13 January 2016 (entitled the "Code of Practice Supporting Procedures"), allowing stakeholders to read it in conjunction with PPP's consultation on the proposed changes to Part 4⁸. A final version of the Supporting Procedures will be published on implementation of the 14th Code.
- 3.4 The draft Code has been developed following stakeholder engagement and formal consultation by PPP as detailed above.
- 3.5 The changes discussed in this, and the next section, are those highlighted by PPP in its consultation and decision documents and also considered by Ofcom to be of most interest to stakeholders and/or are likely to have the greatest impact on stakeholders. They are, therefore, the focus of this consultation, and each of the key changes are summarised below and, in section 4, are examined in turn against the relevant legal tests.
- 3.6 For those provisions which remain (substantially) unchanged from the 13th Code, we are not aware of any reasons to suggest circumstances have changed significantly since we approved the 13th Code on 1 July 2015 such that it would be inappropriate for us to approve the draft Code containing all these provisions. We return to this point in section 4 below. We would, nonetheless, encourage all interested parties to read the precise details of the draft Code.

Changes to Part 4 of draft Code

i) Include allocations criteria in the Code

- 3.7 PPP uses a consistent set of criteria to determine whether to allocate a case to either a Track 1 or Track 2 investigation. However, these criteria are currently not published. In order to provide more certainty and transparency to providers as to the

⁷ http://www.phonepayplus.org.uk/~/_media/Files/PhonepayPlus/News-Items/2015July/Investigations-and-Sanctions-Procedure-July-2015.pdf

⁸ http://www.phonepayplus.org.uk/news-and-events/news/2016/january/phonepayplus-publishes-draft-code-14-supporting-procedures?utm_source=Newsweaver&utm_medium=email&utm_campaign=traffic+via+Newsweaver

factors which PPP will apply when deciding which Track to allocate a case, PPP has proposed to include high level criteria in the Code.

3.8 In particular, the draft Code explains that:

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

ii) Removal of the Emergency Procedure (EP)

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

- a) The decision to withhold revenues under Track 2 is taken by the PPP Investigations Team with no right of appeal for the provider. The current process only allows PPP to direct a withhold when a breach letter has been issued. In practice, the issuing of the breach letter can take longer than the 30-day period during which network operators are required to retain revenue.
- b) Where a case is allocated to the EP, a decision to impose an interim service suspension or revenue withhold measure is taken by three members of the CCP, with a right of review within two working days following the imposition of such an interim measure or where new information comes to light suggesting that the use of the EP is not appropriate.

3.10 PPP has proposed bringing forward the consideration of interim measures (i.e. both revenue withholds and/or service suspensions) to an earlier stage in all Track 2 investigations. PPP expects the new process will enable it to act quickly to protect the interests of consumers and, in the case of revenue withholds, ensure that any potential fines which may be levied in the future can be paid. PPP expects that withholds and suspensions will continue to be rarely used. In particular, the draft Code explains that:

- a) PPP may only seek an interim service suspension measure where it considers that an apparent breach of the Code is causing serious harm or presents a serious risk of harm to consumers or the general public and requires urgent corrective action; and
- b) PPP may only seek an interim withhold measure where it considers that a relevant party cannot or will not comply with any sanction that may be imposed by a Tribunal or administrative charge imposed by PPP.

3.11 PPP's proposal means that there will now be automatic consideration of whether a withhold and/or suspension order is necessary on commencement of all Track 2 investigations. This removes the need for the separate EP in the 13th Code of Practice, which PPP is proposing to abolish. It considers that this will result in a simpler and fairer procedure.

- 3.12 Unless there are important public interest reasons to the contrary, PPP will use reasonable endeavours to notify the relevant party of its initial findings and the proposed interim measure(s) which it considers is/are appropriate, in an “interim Warning Notice”, and invite that party to make representations to PPP. Providers will be entitled to consent to the recommended interim measure(s) (which would then require ratification by a Tribunal) or provide representations to PPP on alternative terms (such as the posting of a bond).
- 3.13 The final decision to implement interim measures will be taken by a Tribunal (see proposal (iv) below), with a right of review to another Tribunal made up of different CAP members if relevant new evidence comes to light which suggests that the application of interim measures is no longer appropriate or if the provider was not notified of the application for interim measures prior to their imposition. Once a Tribunal has ratified a decision to implement an interim measure, PPP will use reasonable endeavours to send the direction for the withholding of revenues or service suspension to the relevant party.

iii) Internal review of Investigations Team recommendations

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

iv) Creation of the Code Adjudication Panel (CAP)

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

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

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

3.20 It is important to note that although Board members will not be included in the CAP, they will be able to provide input into investigations and scrutinise the Investigation Team's recommendations insofar as they are included on the internal panel discussed at (iii) above.

3.21 When making an adjudication, three Tribunal members will examine the facts and the evidence presented in the case, and they will determine whether the breaches outlined in the Warning Notice have been established.

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

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

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

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

- 3.25 PPP expects that the new process of setting out alleged breaches, evidence and proposed sanctions in a Warning Notice will enhance the potential for providers to settle early and before the case goes to a Tribunal for decision. This is because the content of the Warning Notice should give providers complete clarity as to the case against them and therefore allow them to make a fully informed decision on whether to accept, challenge or seek a settlement in respect of each of the recommended breaches and sanctions at that stage. For this reason, the new process is likely to result in quicker and more efficient resolution of cases with reduced costs to PPP and providers under investigation. Irrespective of any impact on settlement, it will also give providers more transparency about the case against them and thereby ensure that the process is fair.

vi) Flexible hearings

- 3.26 Under the 13th Code of Practice, adjudication decisions are ordinarily taken by a Tribunal on the papers. Limited oral submissions from the relevant party may be made on the papers, although this does not happen in all cases. A relevant party can require that, instead of a hearing on the papers, a full oral hearing takes place, providing an opportunity for full or more detailed oral submissions. Under the draft Code, where providers choose to make oral submissions on the papers they will be given greater opportunity to provide counter-arguments/explanation than is currently the case with the intention that providers do not feel they have to request a full oral hearing to present their views properly.
- 3.27 Where a case is taken to a Tribunal for a final decision to be made, the draft Code makes clear that the case may continue to be decided either on the papers or, if the relevant party so requests, by way of an oral hearing. During an oral hearing, oral submissions (including legal) and oral evidence can be heard.
- 3.28 However, the draft Code also envisages that relevant parties will, if they so request, be entitled to make more limited oral representations to the Tribunal even where the case is being considered by the Tribunal on the papers. This will give the provider an opportunity to provide any clarification and/or context to the Tribunal if they have not already done so. New evidence or arguments will not be normally permitted at this stage unless there is a compelling reason why this new evidence could not have been presented at an earlier stage of the investigation.
- 3.29 PPP considers that the option of attendance at a Tribunal hearing on the papers will afford providers who cannot resolve a case following receipt of a Warning Notice suitable time to present technical or other arguments to their satisfaction without needing access to a full oral hearing. This would provide parties with greater flexibility over the level of their involvement (and associated costs) in the adjudication hearing and it should ensure that providers will not have to request a full oral hearing based solely on the perception that this is the only way they will be able to properly represent their arguments to a Tribunal.

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

- 3.30 Under the 13th Code of Practice, a number of options are open to relevant parties that wish to appeal an adjudication. In particular, they are entitled to:

- a) apply for a post-adjudication review on the grounds that there is a new issue of fact or law or that the Tribunal came to a decision that was so unreasonable that no reasonable Tribunal could have reached it (ordinarily within 10 working days from publication of the adjudication decision);
 - b) request an oral review hearing at which the matter would be considered afresh (ordinarily within 10 working days of a Tribunal decision being published);⁹ and/or
 - c) after an oral hearing, appeal the matter to the IAB - a separate body which, whilst governed by the the Code, does not include any PPP Board members - on the grounds that there has been an error of fact, law or the Tribunal exercised its discretion incorrectly.
- 3.31 Having considered stakeholder feedback and the use made by relevant providers of each of the above appeal mechanisms, PPP is now proposing to remove each of the above review mechanisms and replace it with a single, limited review procedure.
- 3.32 The proposed new review stage is set out in section 4.10 of the draft Code. In summary, the review will work as follows:
- The relevant party will have the opportunity to apply for a review of decisions on limited grounds, related to material errors of fact or process, errors of law or *Wednesbury* unreasonableness (irrationality).¹⁰
 - The decision to grant a review will be made by the Chair of the CAP (or another legally qualified member of the CAP if the Chair was involved in the original decision or is unavailable) on the application of either the provider or PPP.
 - The review (where granted) will be heard by three different members of the CAP to those who were involved in the original Tribunal decision. It will ordinarily be heard on the papers (with a right of limited oral representation if PPP or the relevant party so require) although the party or PPP may request that it take place as a full oral hearing. The reviewing Tribunal will have the power to confirm, vary or rescind any adjudications (in whole or part) made by the original Tribunal.
- 3.33 PPP considers that this single limited review procedure would simplify what can be seen to many as an overly-complex and time-consuming appeals process, particularly for those providers that wish to access review mechanisms beyond those provided by PPP (for example, judicial review). Further, past experience suggests that the IAB and post-adjudication oral hearings are rarely requested, and that post-adjudication reviews are perceived by many parties as unlikely to overturn the original decision (as the reviewing members are drawn from the same body, the CCP, as the original adjudication hearing).
- 3.34 Should the appeal be rejected upon review, the provider can, should they wish to, proceed to a Judicial Review.

⁹ We noted that this is distinct from oral *adjudication* hearings which, as discussed at (vi) above, PPP has proposed to maintain.

¹⁰ See ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223***. This case set the test for the judicial review ground of unreasonableness as being that “the reasoning or decision is so unreasonable that no reasonable authority could ever have come to it”.

Implementation

- 3.35 The draft Code submitted to Ofcom for approval currently envisages that it will apply automatically to all existing and new complaints and investigations from its commencement date, as PPP considers that the processes in the draft Code provide greater benefit to providers than the current 13th Code in terms of fairness and simplicity, for the following reasons:
- i) The proposed investigations and adjudications process is simpler, more streamlined, and more robust.
 - ii) It will provide earlier and more informed opportunities for settlement.
 - iii) It provides for a greater separation between those making and enforcing the Code.
 - iv) The sanctions available to a Tribunal under the draft Code are identical to those available under the 13th Code of Practice.
- 3.36 For all investigations opened under the 13th Code but not concluded before the commencement of the 14th Code, PPP will notify the parties under investigation that their case will be dealt with under the procedures in the 14th Code. This will ensure that providers are aware and can follow the correct process. It is important to note that the transitional arrangements only relate to the procedures by which a case will be investigated and adjudicated. This means that the breaches of the Code will continue to be raised under the provisions of the Code that applied at the time the breaches occurred.

Section 4

Approving the draft Code under section 121 of the Act

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

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

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

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

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

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

4.10 PPP last updated its Governance Statement in July 2013. This Governance Statement contains details relating to PPP’s constitution, regulation, strategy, funding, budget and levy setting procedures. This Governance Statement sits outside the draft Code.¹¹ We are satisfied with this approach, on the basis that adequate provisions remain within the draft Code to satisfy Ofcom that PPP is sufficiently independent of PRS providers.

4.11 In particular, the draft Code states that all Board members of PPP will be appointed in their individual capacities. Apart from a minority of Board members who are appointed on the basis of their contemporary industry knowledge, no member of the Board may have any commercial interest in the premium rate sector.¹²

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

(c) “that adequate arrangements are in force for funding the activities of that person in relation to the draft Code”

4.13 The draft Code does not make changes that Ofcom provisionally considers would have a bearing on the adequacy of PPP’s funding arrangements. We set out below why we continue to consider PPP has adequate arrangements in place.

4.14 PPP is a non-profit making organisation and is currently funded by a levy on outpayments from network operators to providers.

4.15 In addition, PPP receives some of its income from fines and administrative charges imposed on regulated persons who are found to have breached the Code. The

¹¹ http://www.phonepayplus.org.uk/~/_media/Files/PhonepayPlus/New%20Folder%20Structure/About%20PhonepayPlus/Governance/PhonepayPlus_Governance_Statement_September_2013.pdf

¹² See paragraph 1.4.1 the draft Code

rationale for the use of such fines and charges to fund PPP's activities is that those who place an additional cost burden on PPP, in terms of a need to carry out investigative and enforcement activities, should pay an increased share of PPP's expenditure rather than imposing higher costs on the majority of participants in the PRS industry who act responsibly and are complying with the Code.

- 4.16 We also note that PPP continues to operate the registration scheme by requiring registrants to pay a reasonable registration fee.¹³
- 4.17 PPP consults on its budget plans each year, following which the plans (and the level of the levy necessary to meet that budget) are submitted to Ofcom for consideration and approval. The funding arrangements for PPP are set out in more detail in Annex 1 of the draft Code and, in light of the foregoing, Ofcom is minded to be satisfied they meet the legal test for ensuring there are adequate funding arrangements in place.

(d) “that the provisions of the draft Code are objectively justifiable in relation to the services to which it relates”

- 4.18 Ofcom provisionally considers that the provisions of the draft Code are objectively justifiable in relation to the services to which it relates. We provisionally consider that when taken in its entirety, the draft Code will continue to provide an effective regulatory regime for PRS, without unnecessarily increasing the regulatory burden on the PRS industry, and indeed the changes are likely to result in improvements due to a more streamlined and simplified enforcement process.
- 4.19 We take account that we have previously considered objectively justifiable the provisions of the 13th Code (which were approved by Ofcom on 1 July 2015) that are unchanged. We are not aware of any reasons why that position should change.
- 4.20 With reference to what we consider to be the key changes which PPP proposes to include in the draft Code, our provisional conclusion is that each is, on its own and when taken together with the other proposed changes, objectively justified for the following reasons:
- a) The proposal to include the high level criteria used by PPP to determine whether a case is allocated to a Track 1 or Track 2 investigation will provide more transparency to providers as to the factors PPP applies when making such a decision.
 - b) The proposed removal of the EP from the draft Code, and the ability for PPP to consider imposing interim measures in all Track 2 cases (where certain criteria are met) is objectively justifiable. This achieves PPP's objective of simplifying its enforcement procedures and, where interim measures can be imposed in Track 2 cases, it is clear that this removes the need for the separate EP. The consideration of interim measures in all Track 2 cases is likely to ensure greater consistency in PPP's approach to interim measures, and allow PPP to impose such measures in a more timely fashion (in particular, without having to separately justify use of the EP before requesting that interim measures be imposed). This should enable consumer harm to be reduced and/or prevented earlier than under the current process and ensure that any consumer redress is ultimately available when an adjudication is made.

¹³ Paragraph 3.4.9 of the draft Code.

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

will allow providers to appeal a decision outside of PPP earlier than would be the case now (where they are generally required to exhaust the current appeals process in the 13th Code before they can seek a judicial review). We also note that the IAB and post-adjudication oral hearings have been very rarely used by providers.

- 4.21 In addition, PPP proposes that the revised Part 4 procedures should apply to all existing as well as new investigations from the date the draft Code takes effect. This means that all cases opened under the current Code will benefit from having to follow and being taken forward under the procedures in the 14th Code from the date the 14th Code takes effect.
- 4.22 Our provisional view is that PPP's proposals as summarised above will result in an improved and more streamlined enforcement process which is suitably accessible, fair, and proportionate. As such, we are minded to consider these changes to be objectively justifiable and, also, to consider it appropriate for these changes to apply to all existing as well as new investigations from the date the draft Code takes effect.
- 4.23 We are also minded to consider that the provisions of the draft Code which remain unchanged as against the 13th Code of Practice continue to be objectively justifiable in relation to the services to which they relate.
- 4.24 Accordingly, taking all these points together, our provisional view is that the draft Code as a whole meets the relevant objective justification requirement.

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

- 4.25 Ofcom provisionally considers that the provisions of the draft Code do not discriminate unduly against particular persons or against a particular description of persons. The draft Code will be applied uniformly to all relevant parties engaged in the premium rate sector, as defined under section 120 of the Act. The draft Code does not propose to make any changes which will lead to some parties, who are not currently subject to any obligations under the 13th Code, now being subject to obligations set out in the draft Code.

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

- 4.26 The central objective of PRS regulation is to protect consumers from the risks of harm that may accompany the use of such services. In pursuing that objective, any regulatory obligations should be proportionate to the nature of the consumer harm being addressed. Ofcom provisionally considers that the provisions of the draft Code are proportionate, in light of this objective, to what they are intended to achieve.
- 4.27 Ofcom has previously assessed that the provisions of the 13th Code meet this proportionality requirement. We are not aware of any reasons why this might have changed in respect of the provisions from the 13th Code that are unchanged in the draft Code. Ofcom provisionally considers that the key changes which are likely to have an impact on the proportionality of the draft Code are those changes previously identified in this document. We consider it unlikely that other, less significant changes in the draft Code will adversely affect its overall proportionality. Our further provisional view is that the proposed changes to Part 4 of the draft Code would be proportionate within the meaning of section 121 of the Act.

- 4.28 We note that the proposed changes are not intended to impose further obligations on parties than are already provided under the 13th Code. Rather, they are intended to simplify the procedures followed by the parties (and PPP) when investigating potential breaches of the Code. A number of the changes, such as the amendment to the right for parties to make oral representations when a matter is considered on the papers and the simplification of the internal review process, are intended to provide for a more proportionate enforcement process. Further, the introduction of a senior panel to oversee the recommendations of the Investigations Team should also help to ensure that any recommendations put forward by that Team in an interim or final Warning Notice are appropriate and proportionate.
- 4.29 We note that the proposal that PPP be able to consider imposing interim measures as part of all Track 2 investigations will mean that PPP is likely to consider the imposition of such measures on a more frequent basis than it currently does under the 13th Code of Practice. However, these are subject to safeguards including strict criterion which are set out in the draft Code which limit the circumstances in which PPP can recommend that interim measures be imposed and rights to notice and to make representations in appropriate cases. Where one or more of these criteria are met (and in light of the other safeguards), Ofcom is satisfied that it would be proportionate for PPP to recommend (and impose) interim measures.
- 4.30 We are also mindful of the fact that, except for the proposal to include allocation criteria in the draft Code, only providers subject to a Track 2 investigation will be affected by the proposed changes. In general, a greater number of cases are dealt with via the Track 1 procedure¹⁴ which is not subject to change. Costs associated with the process are likely to decrease for both providers and PPP as settlements are more likely to be agreed earlier than at present and in any case, a provider will be able to apply for judicial review of an adjudication earlier than is likely to be the case at present due to the replacement of the post-adjudication and IAB stages with a single, limited review procedure. We note that the IAB and post-adjudication oral hearings have been very rarely used by providers.
- 4.31 In forming our provisional view, we also take account of PPP's assessment of its proposals. In particular, PPP noted some of the qualitative benefits of the revised Part 4 process to be:
- Greater transparency on the criteria applied by PPP when deciding whether to allocate a case to a Track 1 or Track 2 investigation.
 - Enhanced opportunity for providers to settle a Track 2 investigation by agreement due to the Warning Notice and more flexible hearings.
 - Fewer cases overall going to a Tribunal hearing if more cases are settled earlier following the issuing of the Warning Notice.
 - An overall reduction in the time taken to go through the PPP enforcement process due to a reduction in the number of steps in the process.
- 4.32 On the basis of the foregoing, Ofcom's provisional view is that the draft Code as a whole, comprising the provisions unchanged from the 13th Code and the proposed changed provisions, each of which we are minded to consider proportionate, satisfies the proportionality requirement in section 121 of the Act.

¹⁴ Up to Q2 of 2015/16, 63% of cases were dealt with using the Track 1 procedure.

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

- 4.33 Ofcom provisionally considers that, in relation to what the draft Code is intended to achieve, the proposed provisions are transparent. Ofcom notes that, apart from Part 4, the provisions of the draft Code have not changed from the 13th edition (or are subject to minor consequential changes as a result of Part 4 changes).
- 4.34 We note the draft Code has been developed by PPP as a result of ongoing engagement with the PRS industry since the Part 4 Review was announced in March 2015 and in light of PPP’s experiences of enforcing the Code and stakeholder feedback. As noted above, PPP held stakeholder workshops in 2015 to get industry views on the proposed Part 4 changes and has already formally consulted on the proposed changes (over a 10-week period) which resulted in its decision document and final draft Code published on 10 March 2016.
- 4.35 Ofcom is at present minded to approve the draft Code. We consider that PPP’s consultation document, decision document and accompanying draft Code, clearly set out to industry the requirements that will apply to them, including proposed changes from the 13th Code, and do so in a transparent manner.
- 4.36 We also note that PPP published a draft ‘Code 14 Supporting Procedures’ document in January 2016¹⁵ and will publish a final version of this at the same time as the 14th Code is adopted. Whilst the Supporting Procedures document is not part of the draft Code, it serves to support the enforcement process and acts as a guidance document to PPP and industry for both informal and formal investigations.
- 4.37 The effect, in our provisional view, is that the draft Code has been proposed following a transparent process through stakeholder engagement and consultation. Its provisions are themselves transparent in relation to what they are intended to achieve and the Supporting Procedures document provides further clarity and details about the criteria applied by PPP when deciding whether to allocate a case to Track 1 or Track 2 investigation and the actions that may be taken in the course of any informal or formal action against providers who may be in breach of the draft Code provisions. In addition, the draft Code makes clear that any action commenced under the current Code, and which is still ongoing when the 14th Code takes effect, will have to follow the revised Part 4 procedures from their commencement date.

Having regard inter alia to the provisions of the draft Code, Ofcom is minded to decide that it is appropriate for Ofcom to approve it

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

¹⁵ http://www.phonepayplus.org.uk/news-and-events/news/2016/january/phonepayplus-publishes-draft-code-14-supporting-procedures?utm_source=Newsweaver&utm_medium=email&utm_campaign=traffic+via+Newsweaver

Section 3: Ofcom's general duties

- 4.39 Section 3(1) of the Act sets out the principal duties of Ofcom in carrying out its functions:
- a) to further the interests of citizens in relation to communications matters; and
 - b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.
- 4.40 Section 3(2) and 3(4) of the Act are also relevant. They set out matters Ofcom must secure and/or have regard to pursuant to our duties. Section 3(4) provides that, in performing its duties, Ofcom must have regard to “such of the following as appear to them to be relevant in the circumstances”, including:
- the desirability of promoting competition in relevant markets;
 - the desirability of promoting and facilitating the development and use of effective forms of self-regulation;
 - the desirability of encouraging investment and innovation in relevant markets;
 - the vulnerability of children and of others whose circumstances appear to Ofcom to put them in need of special protection;
 - the needs of persons with disabilities, of the elderly and of those on low incomes;
 - the desirability of preventing crime and disorder;
 - the opinions of consumers in relevant markets and of members of the public generally; and
 - the extent to which, in the circumstances of the case, the furthering or securing of the matters mentioned in subsections (1) and (2) is reasonably practicable.
- 4.41 Section 3(3) of the Act provides that, in performing their duties under subsection (1), Ofcom must have regard, in all cases, to:
- a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
 - b) any other principles appearing to Ofcom to represent the best regulatory practice.
- 4.42 Section 3(5) of the Act provides that Ofcom, in performing its duty of furthering the interests of consumers, must have regard, in particular, to the interests of those consumers in respect of choice, price, quality of service and value for money.

Section 4: The six Community requirements

- 4.43 Section 4 of the Act sets out the six Community requirements which Ofcom, in carrying out its functions under inter alia Chapter 1 of Part 2 of the Act, must act in accordance with.
- 4.44 In broad terms, the six requirements are as follows:

- i) to promote competition, including in relation (a) to the provision of electronic communications networks and services, and (b) to the provision and making available of services and facilities that are provided or made available in association with the provision of electronic communications networks or services to secure that Ofcom's activities contribute to the development of the European internal market;
- ii) to secure that Ofcom's activities contribute to the development of the European internal market;
- iii) to promote the interests of all persons who are citizens of the European Union (within the meaning of Article 20 of the EC Treaty¹⁶);
- iv) to take account of the desirability of Ofcom's carrying out its functions in a manner which, so far as practicable, does not favour (a) one form of electronic communications network, service or associated facility, or (b) one means of providing or making available such a network, service or facility, over another;
- v) to encourage (to such extent as Ofcom consider appropriate for certain purposes which are specified in section 4(8) of the Act) the provision of network access and service interoperability; and
- vi) to encourage such compliance with the standards specified in section 4(10) of the Act as is necessary for facilitating service interoperability and securing freedom of choice for customers of communications providers.

Conclusion

- 4.45 Ofcom has carefully considered the PPP draft Code and considers that, subject to the outcome of this consultation (and any comments from the European Commission or other Member States), it would be appropriate for Ofcom to approve it.
- 4.46 In reaching this provisional conclusion, Ofcom has had regard to its duties under section 3 of the Act. Ofcom believes that approval of the draft Code would be compatible with those duties, not only because the draft Code would be in line with Ofcom's primary duty to further the interests of citizens and consumers, but also because, amongst other things, it would promote greater consumer confidence in the PRS market and, as a result, encourage investment and innovation, and promote competition, in the sector.
- 4.47 In particular, Ofcom considers that effective competition can only exist where consumers are not misled about the cost or nature of services and where traders who cause consumer harm are held accountable. We are satisfied that the draft Code would further these aims.
- 4.48 Also, Ofcom provisionally considers that the proposed changes in the draft Code represent a transparent, accessible and proportionate set of enforcement proceedings, including adequate rights of defence and appeal for providers. Overall, it appears to Ofcom that the ability of parties under investigation to engage constructively with PPP during enforcement proceedings (including during adjudication decisions) and to have the opportunity to find an earlier resolution to their case, has been enhanced by a number of the proposed changes to the Code. This in turn is likely to be beneficial for consumers as earlier resolution of cases could

¹⁶ Ex Article 17, prior to the amendments introduced by the Treaty of Lisbon.

mean that consumer harm is addressed earlier and/or redress is made available sooner than would be the case under the current procedures.

- 4.49 Similarly, the proposal that PPP be entitled to consider the imposition of service suspensions or revenue withholds in all Track 2 investigations should allow PPP to impose such measures in a more timely manner and, in particular, without relying on the invocation of an EP. This in turn should facilitate PPP's efforts to prevent serious harm to consumers and ensure that revenues are able, where possible, to provide refunds to consumers.
- 4.50 At the same time, a significant amount of unnecessary complexity has been removed from the enforcement process (including through replacing the current appeals mechanisms with a single, limited review procedure) which should deter multiple spurious applications for review. We note, in particular, that parties genuinely seeking to contest the lawfulness of a decision reached by PPP will remain entitled to do so under the proposed new review procedure and would remain entitled to apply for judicial review of that decision in any event.
- 4.51 In these ways, and others described in this document, the provisions of the draft Code, in our provisional view, satisfy the sorts of principles of fairness, effectiveness and efficiency with which the Code must be consistent. This contributes to our provisional satisfaction that approving it would be in line with our duties.
- 4.52 Insofar as the majority of the provisions within the draft Code remain the same as those set out in the 13th Code of Practice (or have been subject to minor consequential amendments as a result of the changes to Part 4 discussed above), we remain provisionally satisfied that these are appropriate. We note, in particular, that Ofcom approved those provisions as recently as 1 July 2015, and that Ofcom is not aware of any material change in circumstances since that date which would make it inappropriate for Ofcom to approve the draft Code with them included.
- 4.53 We would draw stakeholders' attention to the fact, once more, that the role of Ofcom is different to that of PPP. PPP is responsible for drafting the Code and has already consulted on the substance of the draft Code and the merits of the proposed changes to Part 4. This consultation by Ofcom focuses on the extent to which the proposed changes to Part 4 meet the legal tests for approving the draft Code under the Act and Ofcom approving it would be appropriate. Stakeholders are strongly recommended to also read the PPP consultation and decision documents to understand the nature and reason for the proposed changes to Part 4.
- 4.54 Ofcom would like to invite views on its position that it would be appropriate for the draft Code to be formally approved under section 121 of the Act. The consultation period will close at 5pm on 25 April 2016.

Question 1: Do you consider Ofcom should approve PPP's 14th Code of Practice in its current form? Please provide an explanation to support your response.

Question 2: If the 14th Code of Practice were to be approved by Ofcom, do you disagree with PPP's view that a short implementation period would be sufficient before the Code becomes enforceable by PPP? Please provide an explanation to support your response.

Question 3: Do you disagree with PPP's view that the revised Part 4 procedures should apply to all existing as well as new investigations from the date the 14th Code of Practice takes effect? Please provide an explanation to support your response.

Annex 1

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

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

WHEREAS:

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

Ofcom has now considered the responses which it received to the consultation document [and comments received in response to notification to the European Commission and other Member States (as required by the Directive [if relevant])] and, for the reasons set out in the Statement which accompanies this Notification, Ofcom considers that the requirements for the purposes of approving a code set out in section 121 of the Act have been satisfied and

that it would be appropriate and in accordance with Ofcom's statutory duties now to approve the draft Code;

NOW, therefore:

1. Ofcom hereby gives its approval of the code for premium rate services set out in the Schedule hereto for the purposes of sections 120 and 121 of the Act, to take effect from, and including, [] 2016.

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

Signed by

Lynn Parker

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

[] 2016

Annex 2

Responding to this consultation

How to respond

- A2.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 25 April 2016**.
- A2.2 Ofcom strongly prefers to receive responses using the online web form at <http://stakeholders.ofcom.org.uk/consultations/approval-phonepayplus-14th-code-of-practice/howtorespond/>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 4), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A2.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email code14approval@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A2.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Carmen To
2nd floor
Consumer Protection
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- A2.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A2.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 5. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

- A2.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact carmen.to@ofcom.org.uk.

Confidentiality

- A2.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether

all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

- A2.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A2.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/website/terms-of-use/>

Next steps

- A2.11 Following the end of the consultation period (and subject to any responses), Ofcom intends to publish a statement by the end of June 2016.
- A2.12 Please note that you can register to receive free mail updates alerting you to the publications of relevant Ofcom documents. For more details please see: <http://www.ofcom.org.uk/email-updates/>

Ofcom's consultation processes

- A2.13 Ofcom seeks to ensure that responding to a consultation is as easy as possible. For more information please see our consultation principles in Annex 3.
- A2.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk. We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A2.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact the Secretary to the Corporation, who is Ofcom's consultation champion:

Secretary to the Corporation
Ofcom
Riverside House
2a Southwark Bridge Road
London SE1 9HA

Tel: 020 7981 3601

Annex 3

Ofcom's consultation principles

A3.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A3.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A3.3 We will be clear about who we are consulting, why, on what questions and for how long.

A3.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A3.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A3.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A3.7 If we are not able to follow one of these principles, we will explain why.

After the consultation

A3.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 4

Consultation response cover sheet

- A4.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- A4.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A4.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A4.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at <http://stakeholders.ofcom.org.uk/consultations/consultation-response-coversheet/> .
- A4.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing	<input type="checkbox"/>	Name/contact details/job title	<input type="checkbox"/>
Whole response	<input type="checkbox"/>	Organisation	<input type="checkbox"/>
Part of the response	<input type="checkbox"/>	If there is no separate annex, which parts?	

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

Ofcom intends to share all submissions with PhonepayPlus unless explicitly requested otherwise. Please indicate if you do not want this to occur:

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

Annex 5

Consultation questions

A5.1 Please find below a list of questions included in the consultation document.

Question 1: Do you consider Ofcom should approve PPP's 14th Code of Practice in its current form? Please provide an explanation to support your response.

Question 2: If the 14th Code of Practice were to be approved by Ofcom, do you disagree with PPP's view that a short implementation period would be sufficient before the Code becomes enforceable by PPP? Please provide an explanation to support your response.

Question 3: Do you disagree with PPP's view that the revised Part 4 procedures should apply to all existing as well as new investigations from the date the 14th Code of Practice takes effect? Please provide an explanation to support your response.

Annex 6

The draft 14th Code of Practice

- A6.1 The draft Code of Practice can be found on the PhonepayPlus website here:
<http://www.phonepayplus.org.uk/~media/Files/PhonepayPlus/News-Items/2016/Amended-14th-Code-of-Practice.pdf>.

Annex 7

Glossary of terms

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

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

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

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

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

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

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

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

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

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

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

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

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

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