



Approval of the PhonepayPlus Code of Practice (thirteenth Edition)

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

(draft)
Statement

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About this document

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

Ofcom has overall responsibility to make sure that premium rate services are regulated appropriately and that consumers are thereby protected. To assist in achieving this, Ofcom has designated PhonepayPlus to carry out the day-to-day operations associated with regulating 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. Ofcom has powers over whether or not to approve the Code, but may only do so if it meets certain legal tests.

On 2 July 2014, PPP published a consultation on a proposed new Code for the regulation of premium rate services. The proposed new Code – PPP's 13th Code – reflected the current 12th Code in many important respects, but also included changes in a number of areas. On the same day, Ofcom published a consultation document which invited comments on its provisional view that the proposed new Code met the legal tests for approval under the Communications Act 2003.

Having carefully considered responses from stakeholders, and PPP's response to points made by stakeholders in relation to its own consultation, and on the basis that the 13th Code also includes certain safeguard amendments in order to address the problems identified by the High Court in *R (Ordanduu GmbH and Optimus Mobile GmbH) v PhonepayPlus Ltd* [2015] EWHC 50 (Admin), Ofcom is satisfied that the criteria set out in the Act have been met and that it would be appropriate to approve the proposed new Code. That approval, and this draft statement, is subject to notification to the European Commission and to the Commission's response.

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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 On 2 July 2014, PPP published a consultation on its draft Code of Practice (the 'draft Code') for the regulation of PRS.¹ On the same day Ofcom published a consultation document, noting that Ofcom provisionally considered the draft Code met the legal tests for approval under the Act.²
- 1.4 Further, in between PPP's consultation closing on the 13th Code and PPP concluding its analysis of responses, the High Court delivered its judgment in relation to the judicial review case of *R (Ordanduu GmbH and Optimus Mobile GmbH) v PhonepayPlus Ltd [2015] EWHC 50 (Admin)*. In light of this judgment, PPP and Ofcom have agreed that certain limited safeguards be immediately inserted into Rule 4.5 of Code 12 and that these safeguard amendments also be inserted into PPPs 13th Code. We discuss these amendments briefly from paragraph 1.13 below.
- 1.5 Having carefully considered responses from stakeholders as well as the Ordanduu and Optimus Mobile judgment, Ofcom is now satisfied that the criteria set out in the Act have been met and that it would be appropriate to approve, under section 121 of the Act, the 13th Code.
- 1.6 This draft Statement sets out Ofcom's approval of a new PPP Code of Practice (thirteenth Edition) ('the 13th Code') for the regulation of PRS under section 121 of the Act. That approval, and this draft statement, is subject to notification to the European Commission under Directive 98/34/EC (as amended by Directive 98/48/EC)³ and to the Commission's response.
- 1.7 The legal framework within which Ofcom considered approving the 13th Code is set out in further detail in section 2 of this document.

¹ <http://www.phonepayplus.org.uk/News-And-Events/News/2014/7/Consultation-on-new-Code-of-Practice-for-PhonepayPlus.aspx>

² <http://stakeholders.ofcom.org.uk/consultations/ppp-code/>

³ <http://www.bis.gov.uk/policies/innovation/standardisation/tech-standards-directive>

What are the key changes being proposed to PRS regulation?

- 1.8 The approval of the 13th Code has been preceded by over 18 months of stakeholder engagement by PPP. This included a Call for Inputs⁴, consumer and industry workshops, a Code Update Paper⁵ and separate consultations by Ofcom and PPP.⁶
- 1.9 Our consultation set out that, from Ofcom's perspective, the most significant proposed changes from the twelfth Code of Practice (twelfth Edition) ('the 12th Code') were:
- i) implementation of Ofcom's review of Non-Geographic Call Services ('NGCS Review');⁷
 - ii) changing the rules on spending cap limits, such that the 13th Code provides for caps, but the specific monetary value of spending cap limits is removed from the 13th Code and set separately by PPP following consultation (and it now proposes new limits for live services);
 - iii) introducing in-call spend reminders and a positive opt-in for live services where the consumer needs to positively confirm their wish to continue to use the service;
 - iv) introducing a cumulative monthly spending cap for children's services of either £12 or £20;
 - v) amending the provision concerning vulnerability;
 - vi) providing further clarity in the Code about reviews, oral hearings and appeals; and
 - vii) replacing the current Prior Permissions regime with a new Special Conditions regime which will be annexed to the 13th Code.
- 1.8 It is noted that, in light of stakeholder comments received, PPP has decided not to proceed with proposals in relation to point (vi) above on reviews, oral hearings and appeals, pending a further review.

Ofcom's view of the changes to PRS regulation and of the 13th Code

- 1.10 The 13th Code ensures that changes impacting the PRS industry, introduced as a result of the NGCS Review, which itself followed extensive consultation and analysis by Ofcom, will (subject to any comments by the European Commission) be introduced in time to allow the premium rate industry to benefit from the

⁴ http://www.phonepayplus.org.uk/For-Business/Consultations-and-Invitations-to-Tender/Previous-consultations/~media/Files/PhonepayPlus/Consultation%20PDFs/2013_Discussion_paper_Code_Review_Call_for_Inputs.pdf

⁵ http://www.phonepayplus.org.uk/For-Business/Consultations-and-Invitations-to-Tender/Previous-consultations/~media/Files/PhonepayPlus/Consultation%20PDFs/2013_Code_Review/2014_Code_Review_Update_Paper.pdf

⁶ <http://stakeholders.ofcom.org.uk/consultations/ppp-code/> and <http://www.phonepayplus.org.uk/News-And-Events/News/2014/7/Consultation-on-new-Code-of-Practice-for-PhonepayPlus.aspx>

⁷ <http://stakeholders.ofcom.org.uk/consultations/simplifying-non-geo-no/final-statement>

implementation of the NGCS Review on 1 July 2015. These benefits include increased pricing transparency for PRS, the introduction of rules to allow the PRS industry to benefit from increased price points on PRS numbers and the introduction of rules that provide added protection to consumers of PRS.

- 1.11 Ofcom recognises the need for the PRS industry to be able to compete with alternative payment mechanisms and supports the changes being proposed by PPP which will allow it to react quickly to market developments and consumer harm when setting relevant price points for PRS. This will increase the ability of the premium rate industry to innovate and compete with alternative payment mechanisms but will also allow PPP to put in place safeguards where there is evidence of consumer harm occurring.
- 1.12 It is our judgment that, subject to the European Commission's comments, the 13th Code meets the legal tests for approval under the Act – including being objectively justifiable, transparent, non-discriminatory, proportionate, and appropriate, to be approved by Ofcom.

What changes are being made to the Emergency Procedure in the 12th and 13th Code?

- 1.13 In between PPP's consultation closing on the 13th Code and PPP concluding its analysis of responses, the High Court delivered its judgment in the case of *R (Ordanduu GmbH and Optimus Mobile GmbH) v PhonepayPlus Ltd [2015] EWHC 50 (Admin)*.
- 1.14 In light of this judgment, Ofcom has conducted a review to ensure that PPP takes all necessary actions to address the problems identified in that judgment and to ensure that they do not re-occur. As a result of this review, PPP and Ofcom have agreed that immediate safeguards should be inserted into the Emergency Procedure provisions of PPPs Code of Practice. These safeguards are being inserted, with immediate effect, into the 12th Code. Ofcom has approved the 13th Code of Practice on the basis that it also includes these safeguard amendments.
- 1.15 As explained later in this document, Ofcom and PPP have also agreed that PPP will conduct a comprehensive review of Part 4 of its Code of Practice. This review will commence immediately and involve public consultation. Stakeholders will therefore be encouraged to comment on the Emergency Procedure provisions as part of that review. However, we note that Ofcom considers these immediate safeguard amendments to meet the criteria set out in Section 121 of the Communications Act 2003, notwithstanding that a further review is due to take place.
- 1.16 Further detail on these immediate safeguard amendments to Rule 4.5 of the 12th and 13th Codes is provided in PPPs statement on Code 13.

When will the 13th Code take effect?

- 1.17 The 13th Code and a copy of the draft Statement were today submitted by the Department for Business, Innovation and Skills (on Ofcom's behalf) to the European Commission, as required by Directive 98/34/EC. Should the requisite three month standstill period lapse without any comments being received that require material changes to be made to it, the 13th Code, with Ofcom's approval, will come into force on 1 July 2015.

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.⁸ 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, directory enquiry services and 0871 calls.
- 2.4 PRS vary in cost, currently ranging between 5 pence and £1.28 plus VAT per minute/call for calls from UK landlines. However, these price points are changing as a result of the NCGS Review.⁹ The new price points will set a maximum per minute Service Charge for calls to 09 numbers of £3 per minute plus VAT for calls from a UK landline and will additionally see a new maximum one-off Service Charge cap for calls to 09 numbers of £5 per call plus VAT. These changes are scheduled to come into effect on 1 July 2015.

The statutory definition of PRS

- 2.5 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."*
- 2.6 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*

⁸ PRS are defined in section 120(7) of the Act

⁹ <http://stakeholders.ofcom.org.uk/consultations/simplifying-non-geo-no/final-statement>

- 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

2.7 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.

2.8 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.

2.9 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 test under section 121 of the Act

2.10 Ofcom and PPP have distinct functions and consulted on different issues.

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 12th 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 and consulted on whether it met the legal tests set out in section 121 of the Act and should therefore

be approved if it were to be formally submitted by PPP to Ofcom with no material changes to its current form.

2.13 Under section 121(1) of the Act, Ofcom may approve the 13th 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”*

2.14 Under section 121(2) of the Act Ofcom may not, however, approve the 13th 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.”*

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

The Consultation Process

2.16 The process that has led to this approval of the 13th Code has taken over 18 months and has provided stakeholders with the ability to shape policy formation through several consultations. The 13th Code represents an improved approach to PRS regulation, remaining consistent with the ‘outcomes’ based approach to regulation.

PhonepayPlus Code Review

- 2.17 PPP carried out a review to identify improvements it considered could be made to the 12th Code.
- 2.18 PPP engaged with stakeholders to seek to ensure that there was good visibility of possible changes including publishing a Call for Inputs in September 2013.¹⁰ This covered four broad areas:
- the NGCS Review¹¹ with a primary focus on how the changes would impact upon current spending cap limits in the Code;
 - “Future Proofing”;
 - “Enforcement and Technical Review”; and
 - “Polluter Pays”.
- 2.19 On 17 September 2013, PPP held an industry forum which included a discussion on the Call for Inputs. PPP also hosted a number of workshops with industry and consumer groups to discuss the initial proposals with a variety of stakeholders. This resulted in feedback being gathered by PPP which contributed to the changes that were proposed in the draft Code.
- 2.20 On 26 February 2014, PPP published a Code Review Update Document. It confirmed the four broad themes outlined above, which it intended to take forward. It also noted the following further proposals:
- the introduction of a new approach to prior permissions;
 - more detail on a new approach to spending cap limits in light of consumer research and industry input; and
 - changes to proposals to revise the investigations and adjudications procedures.
- 2.21 These themes were carried through into the draft Code which went to consultation on 2 July 2014.

Consultations on the draft Code

- 2.22 In June 2009, Ofcom published an ‘information note’ outlining its intended approach to consulting on the approval of the PPP Code.¹² This set out that Ofcom would carry out its consultation on whether the PPP Code should be formally approved in parallel with PPP’s consultation on the substance of the draft Code.

¹⁰ http://www.phonepayplus.org.uk/For-Business/Consultations-and-Invitations-to-Tender/Previous-consultations/~/_media/Files/PhonepayPlus/Consultation%20PDFs/2013_Discussion_paper_Code_Review_Call_for_Inputs.pdf

¹¹ <http://stakeholders.ofcom.org.uk/consultations/simplifying-non-geo-no/final-statement>

¹² http://stakeholders.ofcom.org.uk/binaries/consultations/prs_scope/informationnote.pdf

- 2.23 Ofcom and PPP followed this process again for the recent consultations and on 2 July 2014 the draft Code was published by PPP and both organisations published their consultations on the draft Code.¹³
- 2.24 PPP received 19 responses to its consultation¹⁴, while Ofcom received four consultation responses.¹⁵ This document primarily addresses responses to Ofcom's consultation, but we have been mindful of issues raised in response to PPP's consultation to the extent relevant to statutory tests set out in section 121, and where they have led to changes in PPP's proposals, in particular. We have considered whether changes in PPP's proposals may make further consultation by Ofcom appropriate, and have concluded they do not.
- 2.25 The 13th Code and a copy of the draft Statement were today submitted by the Department for Business, Innovation and Skills (on Ofcom's behalf) to the European Commission, under Directive 98/34/EC. Subject to the outcome of the requisite three month standstill period that follows, the 13th Code, with Ofcom's approval, will come into force on 1 July 2015.

PhonepayPlus Consultation on Guidance

- 2.26 Since PPP moved to an 'outcomes' based approach to regulation, it has produced a number of pieces of guidance to accompany the Code, about how the rules would be interpreted. As part of the Code Review process, PPP is also consulting on accompanying guidance which are predominantly revisions of the current suite of guidance that PPP has previously published.
- 2.27 This consultation process is not directly relevant to Ofcom's consideration of the 13th Code under the Act. However, we do consider that this process will allow industry to help shape the guidance and provide extra clarity as to how some of the new provisions of the 13th Code will be implemented and interpreted.

¹³ <http://stakeholders.ofcom.org.uk/consultations/ppp-code/> and <http://www.phonepayplus.org.uk/News-And-Events/News/2014/7/Consultation-on-new-Code-of-Practice-for-PhonepayPlus.aspx>

¹⁴ <http://www.phonepayplus.org.uk/For-Business/Consultations-and-Invitations-to-Tender/2014-Code13-Consultation.aspx>

¹⁵ <http://stakeholders.ofcom.org.uk/consultations/ppp-code/?showResponses=true> . A list of respondents to the Ofcom consultation can be found at Annex 1.

Section 3

The key aspects of the 13th Code: consultation responses and Ofcom's position

- 3.1 The draft Code that PPP consulted on retained the fundamentals of the approach set out in the current 12th Code and many of the provisions of that edition of the Code are unchanged in the 13th Code. The changes PPP has brought into the 13th Code are because PPP considers they are appropriate and/or necessary. These changes have been introduced for different reasons, including PPP's experience of administering and enforcing the 12th Code, the need to reflect changes to regulation by Ofcom, and strengthening consumer protection where necessary.
- 3.2 From Ofcom's perspective, the most significant changes that were proposed were:
- i) implementation of Ofcom's NGCS Review;
 - ii) changing the rules on spending cap limits, such that the draft Code provided for caps, but the specific monetary value of spending cap limits was removed from the draft Code and set separately by PPP following consultation (and it also proposed new limits for live services);
 - iii) introducing in-call spend reminders and a positive opt-in for live services where the consumer needs to positively confirm their wish to continue to use the service;
 - iv) introducing a cumulative monthly spending cap for children's services of either £12 or £20;
 - v) amending the provision concerning vulnerability;
 - vi) providing further clarity in the draft Code about reviews, oral hearings and appeals; and
 - vii) replacing the current Prior Permissions regime with a new Special Conditions regime which will be annexed to the draft Code.
- 3.3 We indicated in our consultation that we were minded to support all of these changes and that our provisional view was that the draft Code met the legal tests for approving a code under the Act.
- 3.4 The remainder of this section examines each of these main proposals and summarises the main responses of stakeholders. It then outlines Ofcom's assessment of the responses and conclusions, and subsequent amendments made before the 13th Code was formally submitted by PPP for Ofcom's approval.
- 3.5 We focussed in our consultation document on changes in the draft Code compared with the 12th Code, noting that we were unaware of significant changes in circumstances which would lead us provisionally to conclude that other, unchanged, provisions of the Code no longer met the statutory tests for approval. However, we

were mindful that we were considering whether or not to approve the Code as a whole. That remains the position.

- 3.6 In the responses to our consultation, some issues were raised which our consultation document did not focus on, including in relation to substantively unchanged aspects of the draft Code. We have since considered these responses and PPP's proposals to address them in the 13th Code. Our consideration of these is set out in more detail later in this section.

i) Implementation of Ofcom's NGCS Review¹⁶

- 3.7 In our consultation, we noted that, as part of the NGCS Review, Ofcom concluded that there was substantial consumer detriment arising from confusion about the costs to call non-geographic numbers and we recommended a reform of the non-geographic calls market, including simplification of the system, to protect consumers from that harm.
- 3.8 In the December 2013 NGCS statement, we included several decisions that would affect the regulation of PRS. In particular, we decided:
- to separate out the Communications Providers' Access Charge (which is the charge paid to the phone company originating the call) from the Service Charge (which is the charge paid to the phone company which terminates the call and may be shared with the PRS provider);
 - to set a maximum per minute Service Charge for calls to 09 numbers of £3 per minute plus VAT which represents an increase in the current price point; and
 - to set a maximum per call Service Charge for calls to 09 numbers of £5 per call plus VAT, which also represents an increase in the current price point.
- 3.9 In previous editions of the Code, including the 12th Code, all prices that PPP referred to were for the total cost of a call or service obtained via PRS. Through the draft Code, PPP proposed to make clear that caps relate to, where appropriate, the Service Charge element of the new unbundled tariff. It did this by proposing new rules at section 3.12 which refer to '*Specified Service Charges and Duration of Calls*'. This plays an important part in helping Ofcom achieve its policy objectives, including increasing the pricing transparency for non-geographic numbers which operate PRS and was a key driver for PPP conducting a Code Review to be complete for the implementation of the NGCS Review on 1 July 2015.

Consultation responses

- 3.10 Ofcom did not receive any industry comments on the implementation of Ofcom's NGCS Review. This was perhaps not surprising given that Ofcom has engaged extensively with industry on these changes during the course of the NGCS Review.
- 3.11 We note, however, that in response to the PPP consultation, BT expressed the view that the way in which PPP positioned these changes in its consultation document was potentially misleading. BT considered PPP did not state the benefits of the changes in terms of real pricing transparency. It also noted that, for many, the changes will represent a decrease to the cost of services rather than an increase as stated in the consultation document. BT submitted that the draft Code was not

¹⁶ <http://stakeholders.ofcom.org.uk/consultations/simplifying-non-geo-no/final-statement>

sufficiently clear in relation to how NGCS numbers can be used by Service Providers, when the Code applies and to what level of effect.

- 3.12 BT also asked PPP to provide greater clarity in its statement and supporting guidance as to how the revised definition of CPRS applies to services using any number within the UK National Numbering Plan, including 087 and 09 Service numbers charged in excess of 10 pence per minute inclusive of VAT.

Ofcom's position on the implementation of the NGCS Review

- 3.13 Having carefully considered our decisions in the NGCS Review, PPP's proposals, the consultation responses and PPP's decisions, we are satisfied that the changes in the 13th Code appropriately implement the changes, as set out above, that are being introduced as a result of the NGCS Review. PPP has made it clear in the 13th Code that any caps it sets relate only to the Service Charge element of the call. This is consistent with the NGCS Review. PPP has also amended the definition of CPRS so it is now consistent with the revised Ofcom definition.
- 3.14 We note BT's submissions about the way in which PPP communicated these changes in the consultation document and also about clarity in the draft Code relating to NGCS numbers. In considering BT's comments, we note that one of the statutory tests that Ofcom must be satisfied is fulfilled is that the provisions of the Code are transparent as to what they are intended to achieve.
- 3.15 In light of this, we agree that additional clarity would be helpful in this regard. To this end, we note that PPP has now included in its statement a reference to the benefits of the changes and, in particular, that they will enable more consistent treatment across all revenue-share numbers, within its statement. We consider this provides sufficient transparency to meet the statutory test but also note, in terms of the application of the PPP Code to NGCS numbers more generally, that PPP has also set out in its statement an intention to further assist stakeholders on the application of its Code to NGCS numbers, either through updating existing Guidance or through the provision of other supporting material.
- 3.16 We are satisfied, having taken into account BT's comments and PPP's response, that, in respect of changes to implement the NGCS Review, the statutory tests for approval of the Code by Ofcom are met. In particular, and as set out more fully in section 4 of this document, they are objectively justified in that they give effect to our properly conducted NGCS Review, doing so in a transparent way applying to all relevant providers, and are proportionate in that they do not go further than is necessary to give effect to our review.

ii) Amended spending cap rules (and new limits for live services)

- 3.17 In our consultation, we noted that protecting vulnerable consumers is an important part of PPP's work. This has become even more important in an increasingly digital world where the most vulnerable groups, such as children and the elderly are particularly at risk. Spending cap limits have been present in the Code for some time and, in the 12th Code, there were spending cap limits for live sexual entertainment services, services aimed at children, virtual chat services, subscription services and services promoted on television or in any other audio/visual format. These spending cap limits are of particular importance because the live and compulsive nature of some of these services (such as sexual entertainment services and psychic reading services) can make it more difficult for consumers to monitor and control the cost of calls.

- 3.18 In assessing whether spending cap limits remain necessary, PPP had commissioned research indicating that the overwhelming majority of consumers (91%) welcome caps, suggesting they promote consumer confidence in PRS.
- 3.19 In the draft Code, PPP proposed maintaining, in a single, consolidated section, rules providing for spending cap limits for specified services in respect of which it assesses caps are appropriate. This provided for the specific monetary value of spending cap limits to be removed from the draft Code and set separately by PPP taking account of factors that are relevant and within its reasonable contemplation and following consultation. In this latter connection, PPP noted that, under the current regime, if it wants to amend any spending cap limits, it can only do this through amending the Code. This meant that changes to spending cap limits could not be introduced promptly in response to market developments and/or evidence of consumer harm.
- 3.20 Our consultation noted that PPP also proposed to revise the specific spending cap limit for live services before forced release from £30.65 (including VAT)¹⁷ to £45 (including VAT) for several reasons:
- a) Ofcom's NGCS Review introduces higher price points for 09 numbers from 1 July 2015 subject to Ofcom consultation. The current price point is £1.28 per minute plus VAT but this will increase to £3 per minute plus VAT. There will also be a new £5 plus VAT price point cap on single call charges on the 09 number range.
 - b) The current level of spending cap limits has been in place for more than 16 years and the increase is broadly consistent with inflation during this period.
 - c) PPP had commissioned consumer research on spending cap limits to understand what consumers consider to be appropriate levels for caps for live services. It had sought to balance consumer protection with enabling the industry to offer new, innovative, value added services in the light of research findings.

Consultation responses

- 3.21 Ofcom did not receive any responses relating to the changes to the spending cap rules outlined above. However, we did receive a response from The Number UK Limited ('TNUK') relating more generally to a rule which has remained substantively unchanged from the 12th Code. This is Rule 3.12.3 in the draft Code, which states, *"PhonepayPlus may specify the advertised cost of a service that is promoted on television or in any other audio/visual format, above which pricing information must be clearly visually presented and spoken."*
- 3.22 TNUK argued that, whilst it understood why Ofcom's consultation focussed on changed aspects of the Code, Ofcom was required to consider whether all provisions met the legal tests in section 121(2) of the Act. TNUK submitted that neither Rule 3.12.3 itself nor the cost at which it applies (£3.83 excluding VAT) meet such tests and particularly TNUK considered:
- a) the rule was not objectively justified and represented a *"legacy of previous prescriptive and rule-based Editions of the Code, which run entirely contrary to the outcomes-based approach which was meant to be introduced by the 12th Edition"*,

¹⁷ This limit used to be equivalent to £30 including VAT prior to the VAT increase in 2011.

- b) the rule was unduly discriminatory against television advertisers (compared with print and online advertisers);
 - c) the rule was not proportionate, particularly as regards the cost level at which it applies compared (for example) with the cost level at which spending reminders for higher risk, live services apply.
- 3.23 TNUK noted the role of ASA/BCAP, since 2004, as expert regulators in broadcast advertising. TNUK also expressed the view that PPP had taken what TNUK considered to be an inconsistent approach to reviewing this Rule when comparing it to the approach taken for live services, where the monetary values have increased significantly.
- 3.24 Whilst they did not respond to Ofcom's consultation, we are also aware that PPP's consultation received responses from a number of respondents (including TNUK, Zenith Optimedia, the Institute of Practitioners in Advertising, the Advertising Association, and the Incorporated Society of British Advertisers) objecting to the retention of this rule and broadly supporting TNUK's submission. Respondents expressed a concern, which is particularly relevant to Ofcom's assessment of proportionality, that the rule impacts providers' ability to use TV to advertise these services due to the typical ten second slots many advertisers use. Additionally, AIME and Telecom 2 both raised issues which are potentially relevant to Ofcom's assessment of transparency, namely that the term "*audio/visual*" could be open to interpretation beyond broadcast.
- 3.25 Another respondent to PPP's consultation (but not Ofcom's) raised a point which is potentially relevant to Ofcom's assessment. Mobjizz argued that there should not be any spending caps for live services such as sexual entertainment services and that adults should be accountable for the products/services they choose to consume.
- 3.26 On the whole, the majority of respondents to PPP's consultation document were in support of removing the monetary value of the spending caps from the 13th Code itself and sitting them outside of the 13th Code. They were also in broad agreement with setting a level of £45 +VAT for each call for live services before forced release. However, there was also broad agreement that PPP should commit to review these spending caps on a regular basis with The Mobile Broadband Group ('MBG') suggesting that PPP develops a framework for reviewing the level of the caps.

Ofcom's position on the spending cap rules

- 3.27 As set out in our consultation document, the focus of our consultation was on what we considered to be the most significant changes to the 12th Code. We also set out our preliminary view that, where provisions were unchanged from the 12th Code, we were not aware of any reasons to suggest circumstances had changed significantly so as (in our provisional view) to mean that Ofcom may not and/or that it would be inappropriate, and not in accordance with the relevant statutory tests, for us to approve the draft Code containing all these provisions. We did, nonetheless, encourage all interested parties to read the precise details of the draft Code.
- 3.28 TNUK's response to our consultation (and PPP's consultation) focused on Rule 3.12.3 which was not part of the central focus of our consultation due to it largely remaining unchanged from the 12th Code. As TNUK stated in its response, Ofcom should consider whether all of the provisions in the Code meet the legal tests contained in section 121(2) of the Act. On this basis, we have considered the points raised by TNUK (and Zenith Optimedia, the Institute of Practitioners in Advertising,

the Advertising Association and the Incorporated Society of British Advertisers) and consider them to be substantive points which need to be assessed against the relevant legal tests to justify the inclusion of Rule 3.12.3 in the 13th Code.

- 3.29 We have discussed this further with PPP and based on these submissions, PPP has now removed Rule 3.12.3 in its entirety from the 13th Code pending the outcome of a further review, currently being undertaken by PPP, of the evidence which goes to the issue of whether the rule should be included in the Code and, if so, the level at which it should be applied.
- 3.30 We recognise that there are a number of reasons why it may be appropriate for there to be a rule which explicitly addresses provision of pricing information in audio/visual advertising of PRS. For example, the distracting nature of moving images may make written information less effective. These distinguishing features mean that, in our preliminary view (contrary to TNUK's submission), such a rule may be likely to meet the statutory tests in relation to being objectively justified and not unduly discriminatory against audio/visual advertising compared with print advertising. However, it is also important that the rule is proportionate to what it is intended to achieve in light of what it addresses, in addition to existing rules. We acknowledge that further work may be helpful in relation to whether this test is met by the inclusion of the draft Rule 3.12.3 or a similar such rule.
- 3.31 We therefore agree that it is appropriate for the provision to be removed from the 13th Code pending further review. We would take a view on the re-introduction of this or a similar rule if the PPP review demonstrates that its inclusion meets the relevant statutory legal tests.
- 3.32 We do not agree with Mobjizz's submission that there should not be any spending caps for live services such as sexual entertainment services. Such services continue to have (as in previous iterations of the Code) features in common with other services to which spending caps apply, being compulsive in nature and particularly difficult for consumers to monitor expenditure. Accordingly, we consider, taking into account PPP's assessments of the relevant evidence and reasoning, that having clear additional protection mechanisms in place for such services, which protections apply to all relevant providers, properly addresses an identifiable risk in no more burdensome a way than necessary, and so meets the relevant statutory tests. We take account of the fact that the level has been set, and will continue to be set, to appropriately balance the risk to consumers with the freedom of businesses to provide, and adults to use, such services.
- 3.33 We are also satisfied that the 13th Code should include the amendments to remove the monetary value of spending caps from the Code and instead sit them outside of the Code.
- 3.34 As set out at paragraph 3.17 and 3.18 above, and for the reasons and in light of the evidence on which PPP relies, spending caps are an important consumer protection mechanism, particularly for vulnerable consumers and are widely supported by consumers of PRS. They are justified, in particular, for services which have a live and compulsive nature (e.g. live sexual entertainment or virtual chat services), with recurring payments (i.e. subscription services) and for services promoted particularly for children. On the matter of regularly reviewing the level of spending caps, we note that PPP has set out in its consultation document and its statement that sitting the monetary value of the spending caps outside of the 13th Code will provide PPP with greater flexibility to amend caps, either higher or lower, in a timely fashion in response to market developments and/or evidence of harm to consumers.

- 3.35 With regard to the level at which PPP has proposed to set caps for live services, we note that these will now sit outside of the 13th Code. We further note that PPP has made a change to the 13th Code in order to make abundantly clear on the face of the Code that any failure to comply with properly specified amounts, durations or actions would be considered a breach of the Code. We note that this intention was made clear within the PPP Consultation Document and we agree that this addition to the 13th Code will improve transparency.
- 3.36 Ofcom's view is that PPP, in setting the initial level of the caps, call durations and other actions, has given full and proper consideration to all relevant factors and stakeholder representations as part of the consultation process. We further note that, under Rule 3.12.4, PPP is required to consult relevant stakeholders and consider all representations before making changes in future, and that it is required to publish a full list under Rule 3.12.6. Sitting levels outside the Code, thus allowing the flexibility to make changes between editions of the Code in the future, following proper consultation, was broadly supported by respondents to PPP's consultation. Our judgment, in light of these factors and as more fully set out in section 4 below, is that including in the Code the relevant rules and requirements providing for PPP to set spending caps and other spending controls, meets the statutory tests for approval by Ofcom.

iii) Introducing in-call spend reminders and a positive opt-in for live services

- 3.37 In our consultation, we noted that the proposed increase in spending cap limits, whilst having potential benefits as noted above, also gives rise to increased potential for consumer harm and unexpectedly high bills ('bill shock'). In the draft Code, PPP proposed to mitigate this risk through the inclusion in the draft Code of rules relating to in-call reminders and opt-ins, particularly for live services.
- 3.38 In particular, PPP proposed rules enabling it to specify actions that PRS providers of specified services must take at specified intervals, or after specified service charges or call durations have been reached. These rules included in-call spend reminders and positive opt-ins to continue calls after spend or call duration reminders have been issued. Again, in specifying actions, the proposed rules require that PPP take account of factors that are relevant and within its reasonable contemplation and consult on proposals.
- 3.39 In its consultation document, PPP also made two proposals for it to set separately, and with appropriate consultation, specific in-call reminders and opt-ins relating to set monetary spend values. These proposals were made with the intention of them coming into effect at the time the 13th Code comes into force.
- 3.40 The first proposal was that providers would be required to provide an in-call reminder, for live services, when a consumer's spend reaches £15 including VAT. The second proposal was that, where the cost of a call to a live service exceeds the current spending cap limit (£30.65 including VAT), consumers can only continue the call up until the proposed new level of £45 including VAT, if they have consented in the form of a positive opt-in.

Consultation responses

- 3.41 Ofcom received one response specifically concerning the application of these rules to subscription services. AIME had concerns that the inclusion of subscription services

in the list in Rule 3.12.2 creates scope for PPP to apply forced termination provisions to such services as well as to live services. It said this had not been consulted upon, and that subscription services have different characteristics from live services which it would be appropriate to deal with in a separate section. Telecom 2 raised a similar point in its response to the PPP consultation.

- 3.42 We are aware that PPP received numerous submissions concerning these rules and the levels at which they were proposed to be set. Generally, industry was supportive of these new rules, particularly the rule allowing a consumer to opt-in to continue a call once the cost of that call has reached a certain point, in this case £30 including VAT. This is also true of the proposal to increase the cost of a call before forced release to £45 including VAT. However, Mobjizz and Action 4 both considered that, for live services, sexual entertainment/adult services in particular, consumers should have the ability to decide what and where they wish to spend their money. Action 4, AIME and Telecom 2 also submitted that in-call spend reminders and caps in general could lead to bill shock. This is due to the discrepancies between charges mobile providers levy for accessing these services and those fixed line operators levy.
- 3.43 AIME also submitted to PPP that spend reminders should be time based rather than value based, that they should be unobtrusive so they do not act against the consumers' enjoyment of the call and that the introduction of a spend reminder should be kept in reserve and reviewed once unbundling has been in place for at least one year and fresh consumer research conducted.

Ofcom's position on in-call spend reminders and a positive opt-in for live services

- 3.44 The introduction of rules relating to in-call spend reminders and positive opt-ins are designed to help mitigate against the risks arising from increased spending caps for live services. They are also intended to ensure the relevant protection measures for sexual entertainment services, children's services, virtual chat services and subscription services that were in place in 12th Code carry through to the 13th Code. Our assessment is that the introduction of these rules is an important and proportionate mechanism available to PPP in order to protect consumers from the potential harm of these increased spending caps and the higher price points being introduced as a result of the NGCS Review.
- 3.45 We note that in response to AIME's and Telecom 2's concerns around subscriptions services being included in the list in Rule 3.12.2 of the draft Code, PPP has clearly set out in its statement that it is not its intention to apply these rules in relation to a forced release at the current time or in the immediate future. This recognises the differences pointed out by respondents between subscription and live services.
- 3.46 However, at the same time, PPP has noted, in its statement, that by sitting subscription services at 3.12.2 of the draft Code, it could consider further controls such as forced release caps and further opt-ins, should market conditions require the introduction of such measures. This recognises that there are also similarities in the types of consumer harm that can arise from subscription services as there are arising from live services. In order to do this, PPP is required by the 13th Code to consult on the introduction and level of any such caps or opt-ins. As PPP has specifically looked to consolidate all these rules in one section of the 13th Code, we do not consider it would be appropriate, proportionate or necessary for purposes of transparency to single out subscription services as requiring its own section in the 13th Code. Given the above, in particular the requirement to consult on the introduction of such

measures, we are satisfied that it is appropriate for PPP to include subscription services in the list in Rule 3.12.2 of the 13th Code.

- 3.47 We also take into account the reasons and evidence PPP relied upon in its consultation and statement. We have carefully considered relevant consultation responses and note the absence of general submissions to Ofcom concerning rules enabling PPP to specify actions PRS providers of specified services must take at specified intervals, or after specified service charges or call durations have been reached. Given all these, and for reasons detailed in section 4, we are satisfied that it is appropriate and proportionate, and in accordance with the other statutory criteria, for these provisions to be included in the 13th Code.
- 3.48 With respect to the submissions of Mobjizz and Action 4 that spending caps should only be in place where an adult has specifically requested them, for the same reasons as set out in paragraph 3.17, 3.18 and 3.32 above, we consider it is appropriate for PPP to have rules in place where it can set the levels at which consumer protection mechanisms, such as in-call spend reminders, positive opt-ins and forced release, can easily be implemented.
- 3.49 We also note points raised by AIME, Action 4 and Telecom 2 that in-call spend reminders and caps, in general, could lead to bill shock. We are aware that, currently, prices can vary significantly between fixed lines and mobile operators when making outbound calls to PRS numbers. However, we consider the risks of this causing bill shock are offset through the changes being introduced as part of the NGCS Review. These changes will lead to greater transparency for all consumers as service providers will be required to set a single Service Charge for a service regardless of whether the service is consumed by mobile or fixed phones. In addition, all originating communications providers will be required to publicise the amount of the Access Charge for each tariff package they offer consumers.
- 3.50 We do not agree with AIME's view that spend reminders should be time based rather than value based. We agree with PPP's view that it is more important for consumers to be informed about the cost of the service they are consuming rather than the time spent doing so. We note that, following careful consideration of the relevant consultation responses and for the reasons referred to in its statement, PPP has decided to introduce the £15 in-call spend reminder (and its other opt-in and cap limits). We acknowledge the issues raised by AIME about any in-call spend reminders being unobtrusive. We understand that PPP has been in discussions with industry about potential technical solutions, and in its statement has suggested ways in which its decisions on reminders could be given practical and compliant effect, whilst still being technically feasible and not obtrusive to the consumer experience. PPP has invited providers who wish to develop alternative solutions to engage with it on an ongoing basis
- 3.51 In conclusion, we consider that, in relation to in-call spend reminders and positive opt-ins, the 13th Code meets the statutory tests for approval by Ofcom. Again, that assessment is explained more fully in section 4 below.

iv) Introducing a cumulative monthly spending cap for children's services of £20

- 3.52 As noted in our consultation, the draft Code proposed the inclusion of rules enabling PPP to set caps including cumulative spending cap limits per set period, again taking into account factors that are relevant and within its reasonable contemplation and

following consultation. One of the service categories to which PPP proposed these rules would be applicable were services aimed at children. As with spending cap limits for live services, PPP proposed that it would set separately, and with appropriate consultation, the specific monetary level of any spending cap limits.

- 3.53 The current spending cap limit for children's services, in the 12th Code, is £2.56 plus VAT.¹⁸ This spending cap limit applies to one-off purchases and subscription services over a period of a month. In the 12th Code, there is no monthly cumulative cap for children's services. However, PPP's consultation proposed to introduce a monthly cumulative cap of either £12 or £20 per month for children's services. It also proposed to maintain the current one-off purchase spending cap limit at roughly the same level (£3 including VAT) at which it is currently set.
- 3.54 PPP proposed to introduce a monthly cumulative cap as it remains concerned that younger consumers can be vulnerable to large cumulative spends over a set period. This is evidenced by a number of complaints to PPP, including cases where consumer bills are in excess of £1,000. PPP's own research and monitoring suggest that in-app purchases are often the cause for this type of bill shock on children's services.
- 3.55 PPP commissioned consumer research to support its understanding of caps on children's services. Three key findings of this research were that:
- i) parents welcomed a one-off cap similar to the current level;
 - ii) 88% of survey respondents supported the introduction of a monthly cumulative cap; and
 - iii) 25% of parents favoured a monthly cumulative cap of around £20 which is broadly consistent with average monthly pocket money.¹⁹
- 3.56 In the Call for Inputs, PPP proposed that the monthly cumulative cap should be four times the one-off cap, i.e. £12. Responses to the Call for Inputs were broadly supportive of this proposal with one respondent suggesting that the one-off cap should rise in line with average pocket money which would result in the one-off cap rising to approximately £10.

Consultation responses

- 3.57 Ofcom did not receive any responses on the proposed introduction of cumulative caps for children's services.
- 3.58 We are aware that PPP received numerous submissions from industry, both on the amount of the cumulative cap but also on the one-off cap. There were also submissions relating to the presence of caps for children's services. A number of respondents also wanted clarification of the definition of children's services.
- 3.59 Telecom 2, Mobjizz, Buongiorno and AIME submitted that the level of the one-off spending cap for children's services should be increased, with a figure of about £5 including VAT per call being proposed by several respondents. They suggested this increase in order to enable PRS to be viable for many mainstream digital children's

¹⁸ <http://code.phonepayplus.org.uk/childrens-services.html>

¹⁹ This is according to the most recent Halifax Annual Pocket Money Survey which states average weekly pocket money is £5.98.

products on the market and due to the fact the current level has remained the same for a number of years. MBG and NebuPay both questioned the relevance of a one-off cap in light of the current market and alternative ways to consume children's services where there are no equivalent caps. MBG submitted that if PPP can present evidence that the category is worth preserving then it would be proportionate to review the level of the cap. NebuPay submitted that the existence of the cap and its level should be subject to further industry discussion. Telecom 2 agreed with the current level of the cap but submitted if a L2 provider can demonstrate a reason for an increase this should be looked at via special conditions. Buongiorno submitted that PPP should consider excluding children's services where there are parental locks.

- 3.60 Most respondents were of the view that a cumulative monthly limit of £20 would be preferable to £12. Action 4, AIME and Telecom 2 submitted that the cumulative cap should be set at around the £20 level but could in reality be higher, noting a responsibility on parents to educate children and suggesting the possibility of a parental opt-in to spend more than £20. AIME and NebuPay both noted that the future existence of EU legislation about parental spend control could impact upon the need for cumulative monthly caps. There were also concerns raised by AIME, Telecom 2 and Openmarket that such a cap could be difficult to enforce and lead to bill shock as it is only applicable to a particular service rather than applying to all services which would need to be applied by MNOs directly. Buongiorno also submitted that consideration should be given to six monthly/yearly subscriptions which can be used for educational services.
- 3.61 Following responses to its consultation document, PPP has decided that the monthly cumulative cap should be set at £20 per month. It has also altered the spending cap limit for one-off purchases and has now proposed that this should be set at £5.

Ofcom's position on children's spending caps

- 3.62 We consider it is important that there are appropriate measures in place to protect children from harm, including limiting the ability to generate significantly high bills as a result of PRS. For this reason, we consider it is appropriate, addressing clearly an identifiable risk of harm, that the 13th Code includes the proposed rule allowing PPP to set spending caps for services which are particularly attractive to children. That rule will apply to all relevant providers and, in our judgment, provides a mechanism going no further than necessary to address the relevant risk of harm.
- 3.63 We do not agree with the views expressed by MBG and NebuPay calling into question the continued relevance of a one-off cap for children's services. We have also taken account of AIME's alternative approach set out in its response to PPP that protection for children from over-spending could be adequately dealt with by implementing the new OFT guidance and under existing Code provisions governing excessive use. Similarly, we do not agree with this view. We consider that children are a particularly vulnerable group of consumers who require additional protection measures when consuming products and services such as PRS. We also note that this view is strongly supported by parents as shown by PPP's research findings. We, therefore, consider a one-off cap for children's services is a proportionate and objectively justifiable measure to the identified harm.
- 3.64 In its statement, PPP concluded that it should raise the one off spending cap to £5 including VAT and the monthly cumulative cap to £20. These limits were broadly supported by stakeholder responses and properly take into account the need for proportionality in light of evidence including on levels of complaints in respect of

lower value purchases of apps, and average pocket money. Accordingly, we consider this approach to be appropriate.

- 3.65 We also note that there were a small number of responses which questioned whether the definition of “Children’s Services” was still fit for purpose. We note that the current definition of these services is *“services aimed at, or which should have been particularly attractive to children”*. We also note that PPP, additionally, uses various criteria when deciding whether a service is particularly attractive to children including, amongst others, relevant data which indicates how many readers, viewers, or listeners are children as well as the style, content, and composition of the promotional material. While we consider this definition currently works well, we nevertheless note that PPP has committed to review the current definition separately as part of wider, ongoing work around vulnerability. We support this proposal.

v) Amending the provision concerning vulnerability

- 3.66 As set out in our consultation, we noted that protecting vulnerable consumers is an important part of PRS regulation. The 12th Code introduced a revised provision to protect vulnerable consumers. The current rule states that: *“premium rate services must not seek to take advantage of any vulnerable group or vulnerability caused to consumers by their personal circumstances.”*
- 3.67 While PPP considered this revision to be an improvement on the previous definition, PPP nevertheless considered that it still did not adequately protect vulnerable consumers as it stands. The current rule requires proof that a service intended to take advantage of vulnerable consumers, which is often difficult to establish.
- 3.68 As a result, PPP considered a number of alternative wordings of the provision in order to ensure it can better protect vulnerable consumers who may have been disproportionately affected by a non-compliant PRS where intent may be difficult to establish. The amended wording proposed by PPP is found at paragraph 2.3.10 of the 13th Code. PPP considers this amended wording will better protect vulnerable consumers and is more in line with the outcomes-focused nature of the Code.

Consultation responses

- 3.69 Ofcom received responses from AIME and NebuPay on the proposed amendment to the vulnerability provision. Both AIME and NebuPay submitted that ‘intent to take unfair advantage’ should remain as a main principle of the application of the vulnerability definition. They also submitted that, in cases where a vulnerable person has been impacted by a service where there was no intent to take unfair advantage, the matter should be resolved by the issuing of refunds rather than the application of broad sanctions.
- 3.70 AIME also submitted that PPP should align vulnerability definitions with other bodies such as Ofgem and the NHS. It was also concerned that the proposed definition creates business uncertainty which will stifle innovation and investment in new consumer services.
- 3.71 NebuPay submitted that a distinct and transparent definition of vulnerability should be stated and defined for each major service type. It also submitted that the proposed change is not objectively justifiable or transparent and, therefore, does not meet the legal tests set out in section 121(2)(g) of the Act.

- 3.72 PPP received numerous responses about the vulnerability definition with only two respondents, Mobjizz and Buongiorno, fully supporting the proposed amendment to the definition. M-Law, MBG, AIME, NebuPay, Telecom 2, BT, BBC and ITV were all in broad agreement that the proposed definition was too wide, subjective and that intent should remain as a main factor when considering whether ‘unfair advantage’ has been taken. A number of respondents submitted that, where there is no obvious intent, any matter should be dealt with by the way of refunds and sanctions should only be used where intent can be proved. M-Law submitted that even without this change, vulnerable consumers will still have the protection of other provisions of the Code. BBC, ITV and BT all suggested different wordings of the provision to take account of “recklessness”, “foreseeability”, and “reasonable foresight”. There was also broad agreement among respondents that PPP should provide clear guidance on vulnerability, how assessment of vulnerability is to be approached and what circumstances might constitute a provider taking unfair advantage.

Ofcom’s position on the vulnerability provision

- 3.73 Based on stakeholder submissions, PPP has amended the vulnerability provision which it has taken through to the 13th Code. It now states, *“Premium rate services must not be promoted or provided in such a way that it results in an unfair advantage being taken of any vulnerable group or any vulnerability caused to consumers by their personal circumstances where the risk of such a result could have been identified with reasonable foresight.”* The underlined words are an addition to those originally proposed.
- 3.74 As a result of the change, it is clear that PRS providers would only be in breach where an unfair advantage has in fact resulted and the PRS provider could have identified the risk of such a result with reasonable foresight. PPP has also made clear in its statement that the intention of the amended provision is not for the provision to be enforced every time a vulnerable consumer was a victim of bill shock. We consider the amendment provides useful additional transparency.
- 3.75 Regarding the responses from AIME and NebuPay to the Ofcom consultation, we do not agree that intent should remain as the only principle of the application of the vulnerability definition. Rather, we consider it is appropriate that vulnerable consumers are protected from unfair advantage whether it is subjectively intended or a risk that should reasonably have been foreseen by the provider. This places a clear responsibility on providers to give due consideration to the consequences of promotions (whilst limiting this to the exercise of reasonable foresight). Limiting the definition just to cover intent would be inconsistent with the outcomes-focused approach to PRS regulation and one of the bedrocks of PRS regulation, which is a need to protect vulnerable consumers.
- 3.76 Specifically addressing NebuPay’s submissions to Ofcom on transparency, we consider that PPP has appropriately clarified how the provision will be applied through an amendment to the text of the Code as set out above, and has further expanded on the purpose behind the amended provision and how it intends to apply the provision in practice in its statement. In regard to the concerns about objective justification, protecting vulnerable consumers is an important part of PRS regulation based on evidence of actual and potential harm to such consumers. PPP has noted that intent is often difficult to establish and the harm to consumers is the same whether it is intentional or the result of failing to identify or act in response to a reasonably identifiable risk. It is noted that the changes also brings the provision in line with the outcomes-focused nature of the Code.

- 3.77 We also consider that the new wording of the vulnerability provision will appropriately deal with AIME's concern that the wording in the draft Code would create business uncertainty. The new provision does not become applicable simply because a vulnerable person has been impacted upon financially by PRS; it only becomes active should the harm arise as a result of that person's vulnerability and, where the premium rate provider could have identified the risk of such harm occurring with reasonable foresight. As such, we do not consider providers who are exercising reasonable foresight to properly consider risks to vulnerable consumers are exposed to inappropriate uncertainty. The provision is clear and transparent and provides certainty to the PRS industry on how the provision will be enforced.
- 3.78 On the basis that PPP has now clarified the intention behind the new vulnerability provision and the fact it has now amended the definition in the 13th Code to take account of industry submissions, we are satisfied that the new definition meets the relevant legal tests. Our assessment and judgment is set out more fully in section 4 below.

vi) Providing further clarity about reviews, oral hearings and appeals

- 3.79 In its draft Code, PPP proposed to make amendments aimed at providing clarity to stakeholders about the process for reviews, oral hearings and appeals.
- 3.80 Currently the right to seek a review of a Tribunal decision requires that a PRS provider is able to demonstrate that "*... the Tribunal came to a decision which was so unreasonable that no reasonable Tribunal could have reached it.*" PPP provisionally considered this test may be too high a barrier and proposed to change the test so that it is less onerous for those legitimately seeking review but does present a sufficient barrier to deter multiple spurious applications for review.
- 3.81 PPP also proposed in the draft Code to amend the oral hearings procedure to clarify the rationale for its existence and how it should be used. PPP provisionally considered that, before applying for an oral hearing, unless there are exceptional reasons, PRS providers should pass through the paper-based Tribunal process. This was to avoid an increasing abuse of the oral hearing process which drives up the cost of regulation for compliant providers. PPP also noted that some providers may have been ill-advised to pursue an oral hearing ahead of a paper-based Tribunal resulting in significant, and arguably, unnecessary cost. The draft Code proposed that the Chair of the Code Compliance Panel ('CCP') will be responsible for deciding whether there were exceptional reasons for an oral hearing to take place.
- 3.82 With regard to the right to review the decision to initiate an Emergency Procedure ('EP'), PPP proposed changes to the draft Code to make it clear that a provider cannot continually review the decision unless further evidence, not reasonably available within two working days of the use of the EP, comes to light. PPP also proposed to clarify that a provider can legitimately request a review of the decision to instigate an EP at any time prior to adjudication if new information becomes available that was not available in the initial period allocated to request a review. Neither of these rights were to be affected if a provider already had a decision reviewed
- 3.83 Finally, in the draft Code, PPP proposed that the Independent Appeals Body (IAB) was to be known as the Independent Appeals Tribunal (IAT). PPP also proposed that when an appeal was brought before the IAT, the maximum award for costs would be raised from £30,000 to £100,000.

Consultation responses

- 3.84 Ofcom received three responses from AIME, NebuPay and M-Law who all submitted that Ofcom should not approve the draft Code insofar as it included changes to oral hearings. There was broad agreement between them that removing the right for an oral hearing from the outset will not allow a provider to defend its case and clarify any questions which the Tribunal might have. In addition, this process was seen as opening up the potential for bias as the decision criteria to allow an oral hearing is not independent of PPP and that, as an oral hearing will only be heard after a paper based tribunal, any conclusions will be influenced from the results of the tribunal and remove the right to a presumption of innocence. They were concerned that this may lead to an increase in legal challenges to PPP which will only increase the administrative costs to all parties involved. AIME also submitted that introducing a Withhold when a Track 2 investigation is instigated may cause a provider to become insolvent prior to a hearing by a Tribunal.
- 3.85 AIME, NebuPay and M-Law all argued that changes relating to enforcement procedures should be excluded from the 13th Code and be subject to a wider review outside of the current process. NebuPay and M-Law, both referenced the recent judicial review against PPP as a reason to carry out a wider review of enforcement procedures, as did AIME in its response to PPP's consultation.
- 3.86 PPP received a large number of responses on these points with broad consensus amongst industry that the majority of the proposals around enforcement procedures (particularly oral hearings) should not be carried through into the 13th Code. In addition to this view, a number of responses were concerned that the Chair of the CCP was not sufficiently independent and should not be the person charged with deciding whether an oral hearing or a review is granted.
- 3.87 In this regard, AIME and M-Law provided more detailed submissions setting out their views on the proposals in the draft Code. Both AIME and M-Law submitted that, except when the changes will have a positive impact, PPP should stay all proposed changes and undertake a separate full consultation on enforcement procedures. AIME argued that there is no urgency to changes of the enforcement procedures inside the 13th Code as the current timetable is being governed by the NGCS Review. AIME proposed that PPP should work with industry and legal specialists to review the complete procedures and application of the procedures to ensure that a proportionate, fair and legally robust system is proposed for a future consultation. M-Law was in agreement with AIME's proposal and also stated its concern with the current regime in place, noting, in particular, the difficulty in challenging decisions of the Executive. This, it argued, is demonstrated by the fact that, according to the PPP web search facility, in the last three years, no case has been before the IAB and only five cases have been brought before the Oral Hearing Tribunal which, in its opinion, indicates the current system is flawed.
- 3.88 M-Law also made a submission to the effect that the Code should make clear the maximum penalty that PPP may impose and the bases for its imposition. In particular, whether the maximum penalty may be imposed on a 'per case' or 'per Code breach' basis. It also made submissions on other matters PPP included in its proposals relating to enforcement of the Code, including on proposed changes to Rule 3.3.3 and their consistency with EU law.

Ofcom's position on the proposed amendments to reviews, oral hearings and appeals

- 3.89 We note that PPP's proposals for changes to its reviews, oral hearings and appeals processes, resulted in a high level of industry opposition including some substantive points which may benefit from further consideration and discussion. In light of this, PPP has decided not to carry through a number of enforcement procedure proposals from the draft Code into the 13th Code. Those that it has not carried through to the 13th Code include all of the substantive changes we referred to in our consultation.
- 3.90 Instead, and with the exception of several proposals which have limited impact and the immediate safeguard amendments referred to below, and which are clearly set out in the PPP Statement, PPP has set out its intentions to conduct a further review of Part 4 of the Code and its *"Investigations and Sanctions Procedures"*.
- 3.91 Ofcom welcomes this further review. In our consultation, we noted our provisional view that the changes being proposed in the draft Code would add clarity to the current procedures. However, after carefully considering the points raised by stakeholders, we share their and PPP's view that a more thorough explanation of where the relevant Code provisions might be improved is preferable to immediate changes. In reaching this view, we have considered the High Court judgment in *R (Ordanduu GmbH and Optimus Mobile GmbH) v PhonepayPlus Ltd [2015] EWHC 50 (Admin)*, which we note expressed concern with the way PPP applied the emergency enforcement procedure. As a result of that judgment (and as explained in paragraphs 1.13 - 1.16 above), Ofcom and PPP have agreed that certain limited safeguard amendments be inserted into the 12th Code, with immediate effect, and the 13th Code. However, we note that stakeholders will be encouraged to comment on these revised Emergency Procedure provisions as part of this further review. We also take into account that the timetable of the present Code Review is driven by that of the NGCS Review, as well as the views expressed by the industry on PPP's proposals. Without expressing any pre-emptive view on the outcome of such a further review, we agree with PPP that further consideration of the matters raised is appropriate prior to further changes to the Code.
- 3.92 We note the support expressed by respondents for lowering the threshold to seek a review of a Tribunal decision (albeit that respondents considered the Chair of the CCP was not the appropriate person to make such a decision). However, consideration of this by PPP is best handled as part of the impending, wide ranging, review of PPP enforcement procedures.
- 3.93 We also note that M-Law raised some general concerns about what it considers to be flawed within the current process and penalty provisions. A legislative amendment to the Act, with the aim of providing additional clarity to the meaning of the existing statutory maximum penalty and its application on a 'per breach' basis, is currently before Parliament.²⁰ Taking that into account, we consider most of M-Law's broader concerns may best be aired as part of the wider review. We do not, however, consider that the concerns are such that they call into question whether the statutory tests for approval of the Code are met as far the enforcement provisions that will remain in it for the time being it are concerned. Neither do we read the High Court judgment above as having that effect, as its focus was on the way PPP applied the emergency procedure in that case, rather than the provisions of the 12th Code itself. In particular, on an overall assessment, the current Code enforcement provisions (including the safeguard amendments referred to in paragraphs 1.13 – 1.16 above)

²⁰ <http://www.publications.parliament.uk/pa/bills/cbill/2014-2015/0134/15134.1-7.html>

provide for rights of defence and appeal designed to ensure the Code can be enforced fairly and properly, including where appropriately applied in emergency cases, and for enforcement that is consistent with EU law. That they may be open to the possibility of improvement does not mean the requirements of the Act are not met.

- 3.94 On the bases of the above, we appreciate the reasons for withdrawing the relevant proposed amendments to Code rules on reviews, oral hearings and appeals. We consider the remaining provisions of the Code – which closely reflect the 12th Code – continue to meet the relevant statutory tests for approval.

vii) Replacing the current Prior Permissions regime with a new Special Conditions regime which will be annexed to the 13th Code

- 3.95 As set out in our consultation, PPP currently has 17 Prior Permissions regimes in operation which require providers of particular services to obtain prior permission from PPP before operating that service.²¹ These regimes also include conditions which providers must meet in order to secure compliance with the Code. These regimes cover services assessed as involving a higher risk of harm to consumers on account of the particular characteristics they exhibit, evidence of harm and their potential to cause it. They include, amongst others, Broadcast PRS, Call Quiz TV, live services, for example, live chat, and certain services costing more than £1.28 plus VAT per minute.
- 3.96 PPP's preliminary view was that the Prior Permissions regime is largely a legacy of a relatively prescriptive-based approach to regulation, and is not consistent with the current outcomes-focused approach.
- 3.97 PPP therefore reconsidered the current Prior Permissions regimes including an assessment of each of the 155 unique conditions across the 17 existing regimes. It considered that only 54 of these unique conditions are currently not covered by specific provisions of the 12th Code.
- 3.98 Therefore, PPP proposed to introduce 24 new Special Conditions as an Annex to the 13th Code to cover those 54 conditions. The Special Conditions (and any related conditions which are necessary for the proper functioning of those conditions) could be applied to services that PPP is satisfied will, or are likely to, involve a risk of significant consumer harm or unreasonable offence to the general public. They set out criteria which relevant service providers would have to meet for the purpose of ensuring compliance with outcomes set out in the 13th Code.
- 3.99 Unlike the Prior Permissions regime, providers of services covered by the Special Conditions would not be required to seek authorisation from PPP before offering these services to consumers. They would, however, be required to notify PPP that they are operating these services and to meet any Special Conditions that are applied to them.
- 3.100 The proposed Special Conditions were drafted in such a way as to provide PPP with a degree of flexibility to adapt their proposed implementation and application of these conditions to newly emerging service types, in order to adequately protect consumers

²¹ <http://www.phonepayplus.org.uk/for-business/prior-permission.aspx>

and the market from harm without the need to revert to use of prior permissions unless exceptional circumstances require.

- 3.101 While these proposals would mean that PPP had greater flexibility in implementing and applying Special Conditions to particular services, PPP would only be able to do this as set out in the relevant provisions and following stakeholder consultation, including Ofcom.

Consultation responses

- 3.102 Ofcom only received one response concerning the new Special Conditions and this was from AIME. AIME generally viewed this change as positive but raised an issue about the new conditions on subscription services at Rule. 3.12.2(h) of the draft Code. This is discussed in more detail above in paragraphs 3.44 -3.46 and has not been discussed further in this section.
- 3.103 In response to PPP's consultation, there was broad agreement across industry with the proposed approach and introduction of Special Conditions. BT was the sole respondent to raise concerns with the removal of all the Prior Permissions. BT submitted there must be some Prior Permission requirements left in place to protect against the risk of higher risk services leading to significant consumer harm.
- 3.104 Some respondents²² submitted that there was a lack of clarity about how the Special Conditions would be applied and communicated which requires the need for further industry engagement before any Special Conditions are finalised. Specific issues were raised about the wording of Special Conditions g), h), j), l), r), t), u) and v), although these were not material and were simply seeking clarity of wording and potential application of the Special Conditions.
- 3.105 ITV submitted that PPP did not require Annex 2 as PPP could simply introduce Special Conditions which relate to a specific high risk service and which further the outcomes set out in the Code in relation to that service. ITV submitted that PPP should either have the Code Rules and the specific Conditions without Annex 2 or rework Annex 2 into a general set of Conditions which apply to all high risk services and then have specific Conditions in addition to that.

Ofcom's position on the introduction of Special Conditions

- 3.106 In relation to the comments on the content of the Special Conditions, we note that PPP has amended Special Condition l) in line with the several stakeholder submissions. We also note that PPP has provided additional clarity in its statement following submissions from stakeholders about how some of the Special Conditions are likely to be applied in practice. In addition, PPP is also consulting on the content of the Special Conditions in early 2015. This will allow industry to have input into the development and application of these Special Conditions. We are therefore satisfied that changes made to the Special Conditions in the 13th Code are appropriate and meet the relevant statutory tests for approval, as set out more fully in section 4 below.

²² Telecom 2, Action 4, Openmarket, Mobjizz, Nebupay and Buongiorno.

Comments on other changes to the draft Code

- 3.107 Ofcom received submissions on a further issue in the draft Code that was not covered in detail in our consultation document. This related to funding arrangements of PPP and is discussed below.

Consultation responses on PPP funding arrangements

- 3.108 Ofcom received submissions from AIME, NebuPay and M-Law concerning the proposed amendments to the funding arrangements of PPP. Specifically, the issue raised concerned the amended wording at paragraph 3.2 of Annex 1 of the draft Code which removed the requirement for Ofcom to approve the PPP business plan and budget each year. Instead, the amended wording only required PPP to consult with Ofcom. AIME, NebuPay and M-Law all submitted that Ofcom should not approve a Code which allows PPP to set its own business plan and budget and that it is important that the business plan and budget is subject to a third party approval. AIME and NebuPay submitted that if the removal of Ofcom sign-off was intentional then it would be appropriate to set up another third party body to approve the PPP business plan and budget.
- 3.109 PPP received a large number of responses concerning this proposal with the vast majority of respondents objecting to the proposal that PPP should be in charge of setting its own funding arrangements without approval from Ofcom or another third party body.

Ofcom's position on PPP funding arrangements

- 3.110 We note that the proposed changes to the wording of Ofcom's involvement in PPP's funding arrangements were not intended to remove Ofcom oversight of PPP's budget. However, based on stakeholder submissions and to provide appropriate transparency, PPP has now reverted to the wording of the 12th Code. In light of the submissions made, we consider it is appropriate that PPP reverts to its previous position and are supportive of the change.

Comments on changes to the 13th Code

- 3.111 We are satisfied that the 13th Code ensures that changes impacting upon the PRS industry, introduced as a result of the NGCS Review, will be introduced in time to allow the PRS industry to benefit from the implementation of the NGCS Review on 1 July 2015 (subject to Ofcom consultation). These benefits include increased pricing transparency for PRS, the introduction of rules to allow the premium rate industry to benefit from increased price points on PRS numbers and the introduction of rules that provide added protection to consumers of PRS.
- 3.112 Ofcom recognises the need for the PRS industry to be able to compete with alternative payment mechanisms and supports the changes being introduced by PPP which will allow it to react quickly to market developments and consumer harm when setting relevant price points for PRS. This will increase the ability of the premium rate industry to innovate and compete with alternative payment mechanisms but will also allow PPP to put in place safeguards where there is evidence of consumer harm occurring.
- 3.113 We consider the changes made to the 13th Code following the consultation to be appropriate and are satisfied they take carefully into account concerns raised by

stakeholders. In particular, the removal of proposed changes to oral hearings, tribunals and reviews and the commitment to undertake a fundamental review of enforcement procedures will ensure that industry retains a right to access oral hearings and will have more substantial input into future changes to enforcement procedures.

- 3.114 The key changes examined by Ofcom in this section are not the only changes that were proposed in the draft Code, but they are the areas we consider are most likely to have the biggest impact on PRS providers and consumers.
- 3.115 We also note that the consultation process, together with a consideration by Ofcom and PPP of the findings of the High Court in the *Ordanduu* and *Optimus Mobile* case, resulted in a number of changes being made between the draft Code that was consulted upon and the 13th Code which has today been submitted to the EC. We have identified the substantive differences above. Other specific changes to the provisions of the 13th Code are fully discussed in PPP's statement.
- 3.116 The following section now assesses whether the entirety of the 13th Code formally submitted by PPP to Ofcom for approval meets the requisite legal tests for approving a code under the Act.

Section 4

Approving the 13th Code under section 121 of the Act

- 4.1 This section sets out the reasons why Ofcom has decided it would be consistent with the tests set out in section 121 of the Act to approve the 13th Code.
- 4.2 The legal tests are set out in section 121 of the Act, and summarised in section 2 of this document.
- 4.3 In relation to section 121(1)(a) of the Act, Ofcom considers that the 13th Code, developed by PPP, the co-regulatory body for PRS, *“has been made by a person for regulating the provision and contents of PRS, and the facilities made available in the provision of such services”*. In Ofcom’s view, that is clear from the provisions of the 13th Code and there is no change in this respect compared with the current 12th Code.
- 4.4 In relation to section 121(1)(b) of the Act, Ofcom considers that the 13th Code, *“contains provision for regulating, to such extent (if any) as they think fit, the arrangements made by the providers of premium rate services for promoting and marketing those services”*. Ofcom considers that this requirement is met. We have previously assessed and were satisfied that the 12th Code met this requirement. We consider, for the reasons set out in this draft Statement, that the changes proposed in the 13th Code are, amongst other things, objectively justified and proportionate measures that address relevant regulatory needs. On that basis, and on the basis we are not aware of material changes that affect our assessment of provisions of the 12th Code that are unchanged in the 13th Code, our view is that the 13th 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.
- 4.5 In relation to section 121(1)(c) of the Act, Ofcom considers, *“it would be appropriate for them to approve that code [the 13th 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 13th Code unless all seven such requirements are met.
- 4.6 Those seven requirements, and our reasons for considering that they, and the overall requirement that it is appropriate to approve the 13th Code, are met, are set out in detail below. While we have set out our assessment under each, some of our considerations are relevant to more than one requirement. We have taken all these considerations into account in assessing whether we think all the requirements are met.
- (a) “that there is a person who, under the code, has the function of administering and enforcing it”**
- 4.7 Ofcom is satisfied that PPP would continue to have responsibility for administering and enforcing the 13th Code under section 121 of the Act, as it did under the current 12th Code.

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

- 4.8 The 13th 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.
- 4.9 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 13th Code.²³ We are satisfied with this approach, on the basis that adequate provisions remain within the 13th Code to satisfy Ofcom that PPP is sufficiently independent of PRS providers.
- 4.10 In particular, the 13th Code states that all Board members of PPP will be appointed in their individual capacities. A minority of Board members may have commercial interests in the sector (and be appointed on the basis of their contemporary industry knowledge), but any such members will be prohibited from taking part in the adjudication processes provided for by the Code.²⁴
- 4.11 We consider that the 13th Code also contains appropriate provisions to guarantee the independence of the bodies responsible for making adjudications. The 13th Code precludes more than one Board member from sitting on a Tribunal that adjudicates on provisions of the Code (and that this Board member must be a minority on the Tribunal).²⁵
- 4.12 As with the current 12th Code, the 13th Code makes provision for parties to apply for a review and/or oral hearing of adjudications. Following an oral hearing, relevant parties have the right to appeal decisions to the Independent Appeals Body (IAB). The powers and procedures of the IAB are outlined in Annex 4 of the 13th Code. All members of the IAB are independent of PPP and of the PRS industry.²⁶
- 4.13 For the above reasons we are therefore satisfied that the requirement in section 121(2)(b) is met.

(c) “that adequate arrangements are in force for funding the activities of that person in relation to the 13th Code”

- 4.14 The 13th Code does not make changes that Ofcom considers would have a bearing on the adequacy of PPP’s funding arrangements. We set out below why we continue to consider PPP has adequate arrangements in place.
- 4.15 PPP is a non-profit making organisation and is currently funded by a levy on out-payments from Network Operators to Service Providers.
- 4.16 In addition, PPP receives some of its income from fines and administrative charges imposed on regulated persons who are found to have breached the Code. The rationale for the use of such fines and charges to fund PPP’s activities is that those

²³

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

²⁴ See paragraph 1.4.1 and 1.4.2 of the 13th Code

²⁵ See paragraph 1.4.3 of the 13th Code.

²⁶ It is worth noting, that in light of stakeholder responses to the PPP consultation, PPP will be conducting a wide ranging review which will consider the relevant points raised concerning these processes.

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

- 4.17 We also note that PPP continues to operate the registration scheme which will be self-funding by requiring registrants to pay a reasonable registration fee.²⁷
- 4.18 PPP consults on its budget plans each year with both industry and Ofcom and, as a result, Ofcom is satisfied they meet the legal test for ensuring there are adequate funding arrangements in place. We are therefore satisfied that the requirement in section 121(2)(c) is met.

(d) “that the provisions of the 13th Code are objectively justifiable in relation to the services to which it relates”

- 4.19 Having carefully considered PPP's proposals, reasoning and evidence, consultation responses and PPP's assessment and decisions, Ofcom's judgment is that the provisions of the 13th Code are objectively justifiable in relation to the services to which it relates. We consider that when taken in its entirety, the 13th 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.
- 4.20 We take into account that we have previously considered objectively justifiable the provisions of the 12th Code that are unchanged. Although our consultation focused on changed parts of the Code, we also considered whether we knew of changes in circumstances meaning that aspects of the Code which were previously considered objectively justified ought no longer to be so considered. Where matters were raised by respondents to our consultation in relation to unchanged aspects of the Code, we have engaged with, and responded, to these points above. With reference to what we consider to be the key changes which PPP includes in the 13th Code, our consideration as to objective justification is as follows:
- a) Amendments resulting from the implementation of the NGCS Review²⁸ will introduce a new unbundled tariff structure and increased caps on the 09 number range. We consider these changes flow from the NGCS Review and, as such, are objectively justifiable as a means to implement those conclusions.
 - b) As to the proposed rules providing for there to be spending cap limits, we note that PPP's research suggests the overwhelming majority of consumers (91%) welcome caps, suggesting they often promote consumer confidence in PRS. We also note that the proposed rules specify services in respect of which PPP, as expert regulator, has assessed caps are necessary. Likewise, that the rules provide for PPP to set the specific monetary value of caps for these services separately from the 13th Code, taking into account, in its expert regulatory judgment, factors that are relevant and within its reasonable contemplation and following consultation (in which matters such as objective justification will be relevant). Our assessment is that this will enable the caps to be set promptly in response to market developments and evidence of consumer harm, and also fairly and at levels commensurate with prevailing market circumstances and risks

²⁷ Paragraph 3.4.9 of the 13th Code.

²⁸ <http://stakeholders.ofcom.org.uk/consultations/simplifying-non-geo-no/final-statement>

of consumer harm. On these bases, we consider these provisions objectively justifiable.

- c) As to the specific monetary limits PPP has decided to set for live services, and so far as an objective justification requirement is applicable, we note that raising the spending cap limit for live services to £45 including VAT seeks to ensure that caps are set at an appropriate level to take account of the increased price points which will be implemented as part of the NGCS Review. By raising the limits, PPP also seeks to ensure that the caps are set at a level which takes account of market developments since the cap for live services was first introduced, over 16 years ago. These developments include increasing competition from other payment mechanisms with no cap, inflation and 20% of consumers who are willing to spend over and above the current spending cap limit²⁹. Taking these factors into account, we consider that an increase of the spending cap limit for live services to £45 including VAT achieves its purpose, as set out above, and as such would be objectively justifiable.
- d) Considering the introduction of in-call spend reminders and opt-ins, we take into account that rules under which total spending caps may be raised carry increased potential for consumer harm and unexpectedly high bills (bill shock). Likewise, that the live and compulsive nature of relevant services (e.g. sexual entertainment services) are liable to make it more difficult for consumers to monitor and control the cost of calls. For this reason, we consider that rules enabling PPP, using its judgment as expert regulator, to take into account factors that are relevant and within its reasonable contemplation and after consultation, address this risk. These rules will enable PPP to specify actions that PRS providers must take at specified intervals, or after specified Service Charges or call durations have been reached, in respect of those services assessed as requiring this protection. Such actions, include, but are not limited to, in-call spend reminders and positive opt-ins to continue calls after spend or call duration reminders have been issued. Therefore, our view is that the provisions in the 13th Code in this regard are objectively justifiable.
- e) Looking to the specific monetary limits in connection with spend reminders and opt-ins which PPP has decided to set, and again so far as an objective justification requirement is applicable, we note that PPP introduce two measures to provide consumers with the ability to have more control over their spend on live services and prevent consumers experiencing bill shock as a result of the higher spending cap limit on live services. The first measure is an in-call spend reminder which needs to be played to the consumer once the value of the call has reached £15 including VAT. The second measure is that once the cost of the call has reached £30 including VAT (which is close to the current spending cap limit which is set at £30.65 including VAT), consumers will have to positively opt-in to continue the call, up until the forced release at £45 including VAT. We consider that these two measures will provide consumers with greater ability to control their spending and, therefore, limit the risk of bill shock occurring. In light of this, and to the extent necessary, we consider these changes would be objectively justifiable. We note again the requirements for PPP, as expert regulator, to take into account factors that are relevant and within its reasonable contemplation and to consult in setting the monetary value of the caps and other limits, which it has done in respect of the relevant in-call reminders, opt-in and caps it has decided to adopt here. We also note that PPP has already discussed with industry how these decisions could be given practical effect unobtrusively

²⁹ This is according to the consumer research on live services which was commissioned by PPP.

and technically feasibly. It has outlined in its statement ways in which this could occur. We further note that the statement also invites providers with alternative solutions to engage with them on an ongoing basis. This will help address industry concerns.

- f) The purpose of PPP including, in the 13th Code, rules providing for a monthly cumulative cap is to reduce the risk of children making repeat purchases of PRS which can lead to bill shock. This takes account of evidence such as complaints to PPP, including cases where consumer bills are in excess of £1000. Likewise, PPP's research findings of support amongst parents, and PPP research and monitoring suggesting that in-app purchases are often the cause for this type of bill shock on children's services. It similarly takes account of the general, and in Ofcom's view reasonable, hypothesis that children are susceptible to being more easily misled. For these reasons, Ofcom's judgment is that the rules in this regard meet the objective justification requirement.
- g) In relation to Children's Services, the level of that cap that PPP has introduced for a cumulative monthly spend is £20. It has also decided to increase the one-off cap from approximately £3 to £5. On the basis of the information PPP has gathered and relied upon, including stakeholder responses to the PPP consultation document, we consider that a monthly cumulative cap of £20 will provide increased protection to children from making repeat purchases on a particular service which may lead to bill shock. We also consider that increasing the one-off cap to £5 is justified on the basis that services are already marketed at this price and it allows the PRS industry to better compete with other payment mechanisms for these services. We therefore consider these aspects of PPP's decisions would be objectively justifiable (to the extent such a consideration applies to it).
- h) PPP is concerned that the current vulnerability provision does not adequately protect vulnerable consumers from non-compliant PRS as it focuses on the intention to take advantage which is often difficult to establish. In order to address this, it has amended the provision to make it more outcomes-focused, whilst also including a requirement that premium rate providers use reasonable foresight to identify the risk of unfair advantage being taken of vulnerable consumers through the promotion or provision of PRS. PPP considers this amendment will provide it with a more effective mechanism to protect vulnerable consumers from harm. Given the protection of vulnerable consumers remains a key aspect of PRS regulation, our judgment is that what is important is the effect of a provider's activity on vulnerable consumers including reasonable foresight of such effect, not necessarily just its intent. On that basis, we consider that this change is objectively justifiable.
- i) PPP had proposed a number of amendments to the reviews, oral hearings, and appeals procedures. In light of responses to PPP's consultation, the substantive changes have been withdrawn for further consideration and review. The proposals in the 13th Code therefore reflect a continuation of those in the 12th Code. In relation to these, we have considered whether circumstances have changed since approval of the 12th Code such that the provisions are no longer objectively justifiable, and have concluded that they remain objectively justifiable. In particular, there is a need for enforcement provisions and processes which allow for fair and effective enforcement of the Code, including rights of defence and appeal, and fairly applied emergency procedures, as well as for enforcement that is consistent with EU law. The existing provisions, together with the immediate safeguard amendments made to Rule 4.5, meet that need for the time

being, notwithstanding the possibility they could be improved, and we welcome the exploration of that possibility in a further review.

- j) The introduction of Special Conditions is designed to bring the regulation of higher risk services, currently covered under the Prior Permissions regimes, in line with the outcomes-focused approach to regulation. In particular, by removing conditions of Prior Permissions regimes which duplicate specific provisions of the Code, making the regulatory regime simpler, more transparent and more flexible such that it can achieve the required outcomes to protect consumers in respect of higher risk services. The new regime will enable PPP, exercising its expert regulatory judgment, to identify services it is satisfied will, or are likely to, involve a risk of significant consumer harm or unreasonable offence to the general public. In respect of these services it will be able to apply specific Special Conditions for the purpose of ensuring compliance with outcomes set out in the 13th Code. Moreover, the 13th Code provides for PPP to consult over proposals for the specific application of Special Conditions to particular services, which will involve taking into account factors that are relevant and matters going to objective justification. On these bases, we consider that these rules meet the purpose, and regulatory needs, for which they were intended and, as such, are objectively justifiable.

- 4.21 Ofcom considers that an effective regulatory regime is vital in order to protect consumers and the reputations of legitimate PRS operators, as well as to keep pace with changes in technology and the PRS industry. We consider that the overall approach of the 13th Code is consistent with the current 12th Code. In as far as they are unchanged from the 12th Code, our careful judgment is that the provisions of the 13th Code continue to be objectively justifiable in relation to the services to which they relate. In relation to changes introduced in the 13th Code, our judgment is that each of these is objectively justifiable in respect of the services involved. Accordingly, taking all these points together, we are therefore satisfied that the requirement in section 121(2)(d) is met by the 13th Code .

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

- 4.22 Ofcom is satisfied that the provisions of the 13th Code do not discriminate unduly against particular persons or against a particular descriptions of persons. The 13th Code will be applied uniformly to all relevant parties engaged in the premium rate sector, as defined under section 120 of the Act. The 13th Code does not propose to make any changes which will lead to some parties, who are not currently subject to any obligations under the 12th Code, now being subject to obligations set out in the 13th Code.
- 4.23 There are some changes to the 13th Code which will have an impact on particular categories of PRS providers and, particularly, those who provide live services, children’s services and those services deemed to be of a higher risk. We discuss these briefly below and the basis behind our view that these changes, to the extent they discriminate in relation to certain providers, do so on grounds that make such discrimination justified rather than undue. We also note that they will apply to all providers of the relevant PRS. On those footings, we consider that the relevant proposals are not such as to discriminate unduly against particular persons or against a particular descriptions of persons. We also take the assessment and reasoning below into account in our views as to the objective justification and proportionality of the measures referred to.

- 4.24 In terms of live services, we take account that these are often compulsive in nature and the fact that they are 'live' can make it difficult for consumers to monitor and control the cost of calls to these services (such as sexual entertainment services and psychic reading services). With the higher risk of vulnerable consumers being adversely affected by these live services likely to increase as a result of the proposed rise in spending cap limits to £45 including VAT, we consider there is particular importance that measures providing for in-call spend reminders and positive opt-ins are included for providers of live services. We consider this will ensure consumers, particularly vulnerable consumers, are appropriately protected.
- 4.25 In terms of children's services, we note that there is already a one-off cap on children's services of £2.56 plus VAT which is currently below the new cap of £5. We further note that this one-off cap does not take account of the susceptibility of children to be misled and generate a large cumulative spend over a short period. This increases the risk for children to be the victims of bill shock. Accordingly, we consider that the introduction of rules relating to a cumulative cap (which PPP has decided to set at £20 per month) for children's services justifiably provides enhanced protection for children.
- 4.26 In terms of higher risk services, as mentioned above, the requirement to comply with the Special Conditions only applies to PRS providers whose services PPP, in its expert assessment, is satisfied will, or are likely to, involve a risk of significant consumer harm or unreasonable offence to the general public. Similarly, PPP is required to consult on the application of specific Special Conditions to particular services. The former is, in practice, similar to the current Prior Permissions regime which requires providers of designated higher risk services to obtain prior permission from PPP before operating the service (which may be made subject to prior permission conditions). On this basis, it is Ofcom's view that there is at most limited change in this respect compared with the current 12th Code and/or the existing regulatory regime, in which PPP has exercised its judgment properly to assess which services present higher risk. Further, and in any event, on these bases the new measures are likely in our view to affect particular services in cases where the effect is justified and, accordingly, the new rules are not unduly discriminatory. We are therefore satisfied that the requirement in section 121(2)(e) is met by the 13th Code.
- 4.27 As to the proposed amendments to the reviews, oral hearing and appeals procedures that PPP has decided for the time being not to make, and the consequent retention in the 13th Code of relevant provisions included in the 12th (including the safeguard amendments referred to in paragraphs 1.13. – 1.16 above), we note those provisions provide for enforcement processes capable of fair application consistent with EU law that apply to all providers to whom the Code applies, giving them rights of defence and appeal. They therefore, in Ofcom's judgment, meet the requirement not unduly to discriminate, even though we note they are subject to a review that might in turn lead to their improvement.

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

- 4.28 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 considers that the provisions of the 13th Code are proportionate, in light of this objective, to what they are intended to achieve.

- 4.29 Ofcom has previously assessed that the provisions of the 12th Code meet this proportionality requirement. However, we have also considered whether circumstances have changed such that measures previously seen as proportionate may no longer meet that requirement. Our responses to points raised in relation to this in consultation responses are addressed in section 3 of this document.
- 4.30 As noted in section 3, TNUK's response to Ofcom's and PPP's consultations raised objections to the inclusion of the new Rule 3.12.3 which replaced (but did not substantively change) Rule 2.2.7 in the 12th Code. It argued that the Rule was not proportionate now (even if had been previously). In particular, it noted the role of ASA/BCAP and stated that it has been unable to find any equivalent (or even similar) obligation elsewhere in broadcast advertising regulation which requires pricing information to be spoken when the cost of a product or service reaches a certain level, let alone as low as £4.60 including VAT. TNUK considered the provision to be extremely onerous and compared this provision to higher risk live services where PPP is imposing a far less onerous form of regulation with higher pricepoints.
- 4.31 We have carefully considered the arguments made by TNUK and note that PPP has now removed the relevant rule entirely from the 13th Code. The rule is subject to a review of the evidence relating to its possible re-introduction and the monetary level, if any, at which it should be applied. We are supportive of this review and note that removal should not be seen as pre-judging the outcome of that review. There are apparent differences between audio/visual and other forms of advertising which may make additional protection appropriate, albeit further consideration and evidence would be useful in determining what if anything would be proportionate.
- 4.32 We are, however, not aware of any other reasons why the other unchanged provisions of the 13th Code would not meet the relevant proportionality requirements (as previously assessed). Ofcom considers that the key changes which are likely to have an impact on the proportionality of the 13th Code are those changes previously identified in this document. We consider it unlikely that other, less significant changes in the 13th Code will adversely affect its overall proportionality.
- 4.33 We are satisfied that the inclusion in the 13th Code of rules providing, in principle, for spending cap limits, in-call reminders, positive opt-ins and monthly cumulative spends on children's service would be proportionate within the meaning of section 121. We take this view on the basis of the evidence and reasoning referred to in PPP's consultation and statement documents and relied upon by it in its decisions, and as referred to elsewhere in this document. That evidence and reasoning includes, for example, that relating to the compulsive nature of live services and the difficulty of monitoring spend on them, especially for vulnerable consumers, the propensity for children to be misled and/or to make poor judgments and repeat purchases and the research evidence on which PPP relies. The 13th Code provides for rules relating to these matters, in principle, in respect of services that PPP as the industry expert regulator assesses as requiring such rules. It enables PPP as such to set requirements at appropriately adapted financial levels, taking into account factors that are relevant and within its reasonable contemplation after consultation (which will include taking into account factors going to proportionality).
- 4.34 In forming our view, we also take account of PPP's assessments of its proposals, relating to in-call spend reminders, positive opt-ins and caps on spending on children's services.
- 4.35 In particular, PPP has noted that some stakeholders are concerned that the proposal requiring in-call spend reminders, which PPP has decided will be set at £15 including

VAT, will impact on their business. This was further evidenced in some responses to the PPP consultation document where concerns were raised that in-call spend reminders could have a negative impact unless they were unobtrusive. PPP considers that the in-call spend reminder will provide greater price transparency for consumers which will not only benefit them but will also benefit the PRS industry. This is because this increased price transparency for consumers will also increase their trust in live services. PPP also considers that in light of the new higher price points for 09 numbers as a result of the NGCS Review, the increased price transparency is important to protect consumers from bill shock. Nonetheless, PPP is also in consultation with industry about the implementation of in-call spend reminders and stakeholder feedback will help shape how these in-call spend reminders are implemented.

- 4.36 PPP also identified similar benefits for stakeholders when considering the introduction of a positive opt-in for live services, which it has decided will be set at £30 including VAT. In addition to the consumer benefits of this proposal, which are better price transparency for live services and increased protection from the new higher price points, PPP consider industry stakeholders will benefit, again, from improved consumer trust in live services, and also from the opportunity for calls to go beyond the current maximum of £30.65 including VAT. This will allow PRS to better compete with other payment mechanisms, including credit card. Additionally, consumers will be less likely to fall victim of bill shock and those who wish to go above the current spending cap limit, will benefit by being able to do so.
- 4.37 For children's services, PPP has noted that a monthly cumulative cap has the potential to impact on industry and, in particular, new market entrants. However, while PPP does not wish to hinder market innovation, it notes that children's services are not primarily delivered through subscriptions (as they used to be) but rather through repeat purchases such as in-app purchases in online games. PPP further notes that the one-off cap of £2.56 plus VAT per call also currently applies over a monthly period for subscription services. PPP considers that it is important that regulatory controls respond to movements in the market if they are to remain effective. The propensity for children to be misled and/or to make poor judgments and repeat purchases should be diminished by the new monthly cumulative cap, which will be set at £20, which in turn should also lead to the avoidance of bill shock. This will benefit consumers but will also benefit industry by increasing consumer confidence in these services, and by enhancing its reputation.
- 4.38 Ofcom has considered these assessments by PPP and is of the view that its assessment of the impact of these changes is reasonable. In particular, we agree with PPP's assessment of consumer benefits with regard to greater transparency and increased trust of PRS. We also agree that these changes will result in benefits to the industry through increased consumer confidence but also by being able to compete on a more equal footing with other payment mechanisms due to the increased spending cap limit for live services. Again, we note that the way the 13th Code provides for rules to these effects, in principle. This provides for PPP as expert regulator to set requirements at appropriate financial levels, taking into account factors that are relevant and within its reasonable contemplation and after consultation. This means that, in our judgment, the new rules provide mechanisms that will do no more than is necessary to address the relevant risks of harm and so they are proportionate to what they are intended to achieve within the meaning of section 121.
- 4.39 As to the vulnerability provision in the 13th Code. We note that the amended provision is more closely aligned with the outcomes-focused nature of the Code than is the

equivalent provision in the 12th Code. In our assessment of whether this is proportionate, we have also considered PPP's assessment of the proposed provision and the amendments made to it, based on stakeholder submissions. PPP has noted that this amended provision will lower the barrier to use this provision which may result in it investigating more services. However, PPP has also confirmed it was not its intention that the amended provision would mean that all investigations will establish that "*unfair advantage*" had been taken where a vulnerable consumer experienced some type of harm. To that effect, the vulnerability provision in the 13th Code has been amended to include an element of 'reasonable foresight' as suggested by several stakeholders.

- 4.40 PPP considers this amended vulnerability provision is proportionate. It will benefit vulnerable consumers. That will, in turn, benefit industry as non-compliance and the unfair treatment of vulnerable consumers should be reduced thus improving industry's reputation. Having considered this, we are of the view that, in light of the need to ensure there is adequate protection of vulnerable consumers against non-compliant PRS, and that the provision will only take effect where there is evidence that unfair advantage has been taken of any vulnerable consumers and where the risk of such a result could have been identified with reasonable foresight, the amended vulnerability provision is proportionate and will not unduly impact upon the PRS industry.
- 4.41 We further consider that the introduction of Special Conditions is also proportionate to what it is intended to achieve. We take this view on the basis of the evidence and reasoning referred to in PPP's consultation and statement documents that it relies upon in making its decisions, and that referred to elsewhere in this document and our following considerations, including our consideration of PPP's assessment.
- 4.42 On one hand, we note that the approach PPP has decided upon has the net effect of reducing the regulatory burden on providers of higher risk services; it removes the requirement to obtain prior permission from PPP to operate such services. These providers will simply need to provide notification to PPP that they are operating such services and then comply with any conditions applied by PPP (in the way they do now when any conditions are imposed following the need to obtain prior permission).
- 4.43 On the other hand, the Special Conditions (and any related conditions which are necessary for the proper functioning of those conditions) are to be applied to services that PPP is satisfied, on an objective assessment, in its judgment as expert regulator, involve or are likely to involve a risk of:
- a significant level of consumer harm; or
 - unreasonable offence to the general public; and
 - accordingly, give rise to the need for Special Conditions for the purpose of ensuring compliance with outcomes set out in the 13th Code.

In those cases, PPP may apply specific conditions for that purpose. The conditions themselves are drafted in such a way as to permit their implementation in a manner adapted to fit the risk of consumer harm or offence they seek to address. The Special Conditions provide for PPP to apply them after appropriate consultation, which will involve taking into account factors that are relevant including those going to proportionality. In light of these points, we consider the proposals as making provision for rules necessary, but going no further than necessary, to address relevant regulatory aims and needs.

- 4.44 We noted in our consultation that PPP had identified that industry might seek greater clarity in how PPP intends to impose the new Special Conditions regime. To this end, PPP included three illustrative examples as an Annex to its consultation document which were designed to provide a degree of clarity around the interpretation and implementation of the Special Conditions. These illustrative examples generally received positive feedback in consultation responses. However, there was a small number of stakeholders that would like further clarity on exactly how these will be shaped and implemented. To this effect, PPP will be consulting in early 2015 on all the Special Conditions it proposes to introduce alongside the 13th Code. PPP considers that the core expectations placed on providers of services requiring prior permission today will transfer over to the new regime, ensuring regulatory continuity.
- 4.45 PPP also considers that the new system will place greater emphasis on providers' Due Diligence Risk Assessment and Control ('DDRAC') processes. Level 1 providers will need to ensure that their clients adhere to the appropriate Special Conditions. It believes this is consistent with the more proportionate distribution of responsibility introduced through the 12th Code. Overall, therefore, PPP believe that changes to prior permission will have a positive impact on industry and, consistent with its outcomes-focused approach to regulation, will continue to ensure appropriate levels of consumer protection. We have considered PPP's assessment and agree that these changes will provide an overall benefit to the industry.
- 4.46 On the basis of the foregoing, Ofcom is of the view that the 13th Code as a whole, comprising the provisions unchanged from the 12th Code and the changed provisions, each of which we consider proportionate, as set out, and we are therefore satisfied that the requirement in section 121(2)(f) is met.
- 4.47 Turning again to the proposed amendments to the reviews, oral hearing and appeals procedures PPP has decided for the time being not to make, and the consequent retention in the 13th Code of relevant provisions included in the 12th Code (including the immediate safeguard amendments referred to in paragraphs 1.13 – 1.16 above), we again note those provisions provide for processes designed to ensure fair and effective enforcement of the Code, including rights of defence and appeal, and emergency enforcement procedures capable of fair application, consistent with EU law. They therefore, in Ofcom's judgment, meet the requirements of proportionality, notwithstanding that the scope for their improvement will be the subject of further review.

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

- 4.48 Ofcom considers that, in relation to what the 13th Code is intended to achieve, its provisions are transparent. Ofcom notes that the provisions of the 13th Code have been drafted with a view to ensuring a sensible balance between (1) setting out clearly the circumstances in which, and the purposes for which, they apply; and (2) the need to reflect the fast-moving and dynamic PRS industry which delivers PRS across various different platforms.
- 4.49 In particular, the rules providing for spending caps, in-call reminders and opt-ins specify the services to which those measures may be applied. Those providing for the application of Special Conditions describe by reference to relevant risks the services to which they may be applied and the purposes for which they may be applied. Moreover, in all those cases, the rules provide for PPP to consult on the decisions it proposes to make, which will involve explaining and inviting submissions on its proposals.

- 4.50 We also take account that the 13th Code has been developed by PPP as a result of ongoing dialogue with the PRS industry, including consideration of stakeholders responses to the PPP consultation document and in light of PPP's experiences of regulating that industry. A number of the provisions of the 13th Code which represent changes to the existing PPP regime stem from the NGCS Review, which has meant it was necessary for PPP to consider the level of spending cap limits for live services and at the same time, consider new rules to protect consumers from bill shock due to PRS being delivered on higher price points. As noted above, PPP also issued a Call for Inputs in September 2013 on the development of its 13th Code, which sought initial industry views on the direction of its 13th Code as well as issuing a Code Review Update Paper in February 2014.
- 4.51 Ofcom is therefore satisfied it is appropriate to approve the 13th Code in this regard. We consider that the Call for Inputs, Code Review Update Paper and the consultation document, clearly set out to industry the requirements that would apply to them, including the proposed changes from the 12th Code, and did so in a transparent manner. The PPP statement has also provided additionally clarity on the purpose of changes to the vulnerability provision and how it intends to enforce the provision. This is relevant when considering the submission from NebuPay about the transparency of this amended provision. We also note PPP is reviewing its current non-binding guidance, which supports the 13th Code, and that it will be consulting on this guidance in early 2015. This will provide further clarity around the how the 13th Code will be implemented, with particular emphasis on how in-call reminders and positive opt-ins will be expected to be implemented.
- 4.52 The effect, in our view, is that the 13th Code has been drafted following a transparent process. Its provisions are themselves transparent in relation to what they are intended to achieve. They set out, in particular, that spending cap limits, in-call reminders, positive opt-ins, the amended vulnerability provision and Special Conditions apply so as to protect consumers, and allow for their application in specific cases following further consultation. Accordingly, we are satisfied that the requirement in section 121(2)(g) is met.

Having regard inter alia to the provisions of the 13th Code, Ofcom is minded to decide that it is appropriate for Ofcom to approve it

- 4.53 Ofcom may not approve the 13th 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 the Code. 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 assessment as to those matters, and on approval of the 13th Code overall, below.

Section 3: Ofcom's general duties

- 4.54 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.

4.55 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.

4.56 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.

4.57 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

4.58 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.

4.59 In broad terms, the six requirements are as follows:

- i) to promote competition, including in relation (a) to the provision of electronic communications networks and services, and (b) to the provision and making available of services and facilities that are provided or made available in association with the provision of electronic communications networks or services to secure that Ofcom’s activities contribute to the development of the European internal market;
- ii) to secure that Ofcom’s activities contribute to the development of the European internal market;

- iii) to promote the interests of all persons who are citizens of the European Union (within the meaning of Article 20 of the EC Treaty);
- 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.

Ofcom's overall assessment of the appropriateness of approving the 13th Code

- 4.60 Ofcom has carefully considered the entirety of the 13th Code and considers that it is appropriate to approve it. The 13th Code reflects the implementation of Ofcom's NGCS Review. It will improve the regulatory regime by providing PPP with more flexibility to respond to market developments: by maintaining the ability to set caps while separating the specific monetary levels of the spending caps from the 13th Code, so as to enable PPP to set appropriate limits (including in respect of children's services); by including provision for two measures to protect consumers from bill shock as a result of live services; by removing the requirement for intent to be proven when enforcing the vulnerability provision and by including Special Conditions which PPP can apply when it assesses a service as a higher risk service to which such conditions should apply to ensure compliance with outcomes set out in the 13th Code. We take note of the measures to protect against the vulnerability of children and others whose circumstances put them in need of special protection. We consider the 13th Code will also promote greater consumer confidence in the PRS market and, as a result, will encourage investment and innovation, and promote competition, in the sector.
- 4.61 We examine below the most significant changes from the existing 12th Code and summarise Ofcom's views on why we consider it appropriate to approve the 13th Code. The following should be read in conjunction with the foregoing analysis setting out our views as to the meeting of the other requirements of section 121 of the Act.
- 4.62 We re-iterate that we also take into account what we say in this document about provisions of the 12th Code that are unchanged in the 13th Code. Likewise, the more limited effect of lesser changes included in the 13th Code. These, too, go to our overall assessment of the appropriateness of approving the 13th Code.

Implementation of Ofcom's NGCS Review

- 4.63 The NGCS Review will implement several decisions that will affect the regulation of PRS. Specifically:
- separating out the CPs Access Charge from the Service Charge;
 - setting a maximum per minute Service Charge for calls to 09 numbers of £3 per minute plus VAT; and

- setting a maximum per call Service Charge for calls to 09 numbers of £5 per call plus VAT.
- 4.64 We consider that the 13th Code appropriately addresses these changes by clearly setting out that spending cap limits, where appropriate, relate to the Service Charge element of calls to these numbers and by reflecting the increase in price point for 09 numbers and the introduction of the one-off charge cap per call.

Amended spending cap rules (and new limits for live services)

- 4.65 In assessing that it is appropriate for PPP to include in the 13th Code rules providing for spending caps, to remove specific monetary values for such caps from the Code and to set them separately, and to increase the level of the current spending cap limit for live services to £45 including VAT, we consider that it has taken account of relevant factors in including these rules. These include:
- i) the research and other evidence of the need for caps;
 - ii) the application of the rules to services which have been assessed as requiring spending caps;
 - iii) the need to have regard to factors that are relevant and within its reasonable contemplation in setting, and to consult on setting, the monetary value of spending caps;
 - iv) consumer research commissioned by PPP to further understand consumers attitudes and views regarding their use of live PRS;
 - v) Ofcom's NGCS Review which raises the price points for calls to 09 numbers from £1.28 per minute plus VAT to a maximum per minute Service Charge for calls to 09 numbers of £3 per minute plus VAT and also introduces a new maximum one-off Service Charge for calls to 09 numbers of £5 per call plus VAT;
 - vi) the fact that the monetary value of this spending cap limit has not changed for over 16 years;
 - vii) the relative level of inflation since the spending cap limit was first introduced;
 - viii) market developments including increasing competition from other payment mechanisms; and
 - ix) relevant consultation responses.
- 4.66 In our assessment of these relevant factors, we consider the rules PPP includes in the 13th Code and the increased monetary level of spending cap limits that PPP has set strike the right balance between protecting consumers from the potential for bill shock as a result of the higher spending cap limit and ensuring the PRS market remains competitive in an increasingly complex and competitive environment.
- 4.67 We also note that removing the monetary values of spending cap limits from the 13th Code enables PPP to respond quickly and positively, as the expert regulator, where appropriate. Under these provisions, PPP can consult on raising or lowering the value of, not just the spending cap limit for live services, but for all services where a cap is applied and there is sufficient evidence of a need for the cap to be increased or evidence of consumer harm arising. In doing so, PPP is subject to requirements to

take account of factors that are relevant and within its reasonable contemplation and to engage in appropriate consultation. This allows the PRS regulatory framework to be adapted, where necessary, so that spending cap limits remain appropriate and proportionate to the harm (or likelihood of its occurrence).

- 4.68 We consider these measures are sufficient to ensure that a rise in the level of spending cap limits to £45 including VAT for live services is appropriate.
- 4.69 We have also considered the submissions from TNUK to the Ofcom consultation regarding Rule 3.12.3, and a number of other stakeholders who responded to PPP's consultation, supporting TNUK, and agree that this rule should be removed pending a further review. This is on the basis that we consider that further justification is needed on whether there is sufficient evidence to justify the inclusion of this rule and, in particular, the extent to which it meets the statutory legal tests. These are explained in more detail at paragraphs 3.21 - 3.24 and 3.27 – 3.31 above.

Introducing in-call spend reminders and a positive opt-in for live services

- 4.70 Ofcom's reasons for approving rules in the 13th Code relating to in-call spend reminders and, our positions on PPP's decisions to set them at £15 including VAT, and to include positive opt-in at £30 including VAT for live services, are set out above at paragraphs 3.44 – 3.51 above.
- 4.71 In summary, Ofcom notes that these measures, including the positive opt-in at £30 including VAT, will remove the risk of bill shock occurring as result of the increase in the overall level of the spending cap limit for live services to £45 including VAT. The introduction of the in-call spend reminder, will also address issues identified in the research commissioned by PPP on live services, particularly that consumers feel that calls cost more than they should do, with 79% welcoming in-call spend reminders. We note that some stakeholders raised concerns about in-call spend reminders, particular the need for them to be unobtrusive. We consider that by consulting on guidance, in early 2015, as to how these will be implemented, stakeholders will have sufficient input into the implementation of these in-call spend reminders that will alleviate concerns around their obtrusiveness.

Introducing a cumulative monthly spending cap for children's services of £20

- 4.72 Ofcom's reasons for approving in the 13th Code rules relating to a monthly cumulative spending cap on childrens' services, which PPP has decided to set at £20, are set out above at paragraphs 3.62 – 3.64 above.
- 4.73 In summary, Ofcom considers that a monthly cumulative cap on childrens' services will help address the concern of children running up high PRS bills. Ofcom considers it a reasonable hypothesis that children are more susceptible to being misled and/or to making inappropriate judgments as to expenditure than adults and, as a result of this, PPP need to have the ability to put appropriate levels of protection in place to ensure children are not vulnerable to large cumulative spends over a set period. By introducing this monthly cumulative cap, PPP has put in place measures that should prevent children from running up large bills for a particular service. This measure also takes account of the PPP commissioned research which found that 88% of parents support the introduction of such a cap.

Amending the provision concerning vulnerability

- 4.74 Given that the protection of vulnerable consumers remains a key aspect of PRS regulation, we consider that by amending the vulnerability provision, as discussed in paragraphs 3.73 – 3.78, PPP will be more effective at enforcing the vulnerability provision in cases which result in an unfair advantage being taken of any vulnerable group or any vulnerability caused to consumers by their personal circumstances where the risk of such a result could have been identified with reasonable foresight.
- 4.75 We note that the previous provision required PPP to determine intent, which was often difficult to establish and meant adverse effects on vulnerable consumers were liable to go unaddressed. The new provision is more consistent with the outcomes-focused approach of the 13th Code; it places greater focus on the effect on the relevant consumer than the attitude of the PRS provider while also protecting the premium rate provider from circumstances where it is not reasonable for them to have foresight of such unfair advantage occurring. We agree with this change on the basis that it should ensure that where the reasonably foreseeable effect of a PRS provider's action is to take unfair advantage of a vulnerable consumer, PPP can take relevant action.

Replacing the current Prior Permissions regime with a new Special Conditions regime which will be annexed to the 13th Code

- 4.76 The current Prior Permissions regime was developed at a time when premium rate rules were prescriptive, binary and restrictive, and often became quickly obsolete. Now that the PPP Code is outcomes-focused, PPP has concluded that the majority of conditions in the 17 current Prior Permissions regimes are already in specific provisions of the 12th Code. As a result, it has consolidated the remaining conditions, not currently in such specific provisions, into 24 Special Conditions in an Annex to the 13th Code.
- 4.77 It is important that these Special Conditions still afford appropriate protections to consumers of higher risk services but at the same time, do not add unnecessary burden on industry in complying with them. Those conditions that are not in specific provisions of the 12th Code are now set out as 24 Special Conditions which establish standards that could be activated where a higher risk service is identified and PPP assesses, in its judgment as the regulatory expert in the area, and after consultation, that there is a need to apply Special Conditions to ensure compliance with outcomes set out in the 13th Code. Ofcom considers that the Special Conditions identified provide PPP with suitable flexibility to apply them to different types of higher risk services but do not extend beyond the current powers PPP has under the current Prior Permissions regime.
- 4.78 By setting out standards that could be activated and providing some working examples in the consultation document, PPP has provided stakeholders with sufficient information to allow them to understand what PPP might consider to be a higher risk service and what specific conditions might be introduced in relation to that higher risk service to secure compliance with the 13th Code. The regulatory burden on stakeholders has been reduced as prior permission is no longer required. Instead, any PRS provider who is providing such a higher risk service at the time of notification, or intends to start providing such a service, will need to notify PPP that it is operating such a service.
- 4.79 On this basis, we consider that the introduction of the new 24 Special Conditions will improve the regulatory regime, provide a clear and transparent approach to the regulation of PRS and be less burdensome on PRS providers.

Conclusion

- 4.80 Ofcom has carefully considered the PPP 13th Code, published today in draft format, and considers it meets the legal test for Ofcom approval. On this basis, the Department for Business, Innovation and Skills has submitted a version of the 13th Code (on Ofcom's behalf) to the European Commission on 22 January 2015, as required by Directive 98/34/EC (as amended by Directive 98/48/EC).³⁰ The 13th Code will now sit with the European Commission for a period of three months where it will have the opportunity to make comments on the appropriateness of approving the 13th Code.
- 4.81 Ofcom considers that the 13th Code will further protect consumers from the risks of harm that may accompany the use of PRS. Some of the key provisions that are likely to ensure that the 13th Code provides further protection to consumers are the inclusion of rules relating to spending caps, the introduction of in-call spend reminders and a positive opt-in for live services, a monthly cumulative cap on children's services and an amendment to the vulnerability provision which will mean PPP is able to more effectively enforce this provision.
- 4.82 At the same time, there have been other changes proposed which will ensure the 13th Code keeps pace with market developments and the higher price points introduced as a result of the NGCS Review. In particular, the separation of the Code rules and the specific monetary value for spending cap limits will allow PPP to respond more quickly to market developments where there is a case to raise the monetary value of any cap or, in the case of evidence of consumer harm, lower them. The increase in spending cap limits for live services to £45 including VAT will allow PRS to compete against other payment mechanisms such as credit card and benefit from consumers who are willing to spend more than the current spending cap limit. There will also be greater regulatory certainty for stakeholders as a result of the introduction of Special Conditions to replace the Prior Permissions regime.
- 4.83 In concluding that it is appropriate to approve the 13th Code, Ofcom has had regard to its duties under section 3 of the Act. Ofcom believes that approving the 13th Code is compatible with those duties, not only because the 13th Code is in line with Ofcom's primary duty to further the interests of citizens and consumers, but also because, amongst other things, it promotes legitimate competition in the provision of PRS. 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 13th Code will further these aims.

³⁰ See <http://www.bis.gov.uk/policies/innovation/standardisation/tech-standards-directive>

Annex 1

List of Respondents

The following stakeholders submitted non-confidential responses to our consultation. The responses can be found at <http://stakeholders.ofcom.org.uk/consultations/ppp-code/?showResponses=true>

- AIME
- M Law LLP
- NebuPAY Holdings Limited
- The Number UK Limited

Annex 2

[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 02 July 2014 PhonepayPlus (PPP) published a draft Code of Practice (“the draft Code”) and a consultation document seeking stakeholder views on its content;
- (C) on 02 July 2014 Ofcom also 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 10 September 2014;
- (D) on 6 January 2015 PPP formally submitted to Ofcom the 13th Code with a request that Ofcom approve it pursuant to section 121 of the Act; and
- (E) on [] March 2015 the Department for Business, Innovation and Skills submitted the 13th Code to the European Commission, in line with Technical Standards and Regulations Directive 98/34/EC (as amended by Directive 98/48/EC).

Ofcom has now considered the responses which it received to the consultation document [and comments received in response to notification to the European Commission (as required by Directive 98/34/EC [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 PPP Code of Practice (thirteenth Edition);

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, 1 July 2015.
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

Claudio Pollack

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

[] 2015

Annex 3

Glossary of terms

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

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

CCP: Code Compliance Panel

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

EP: Emergency Procedure

IAT: Independent Appeals Tribunal is a body of persons, independent of PhonepayPlus, appointed to hear appeals after an oral hearing has taken place in respect of Tribunal decisions and adjudications (other than any adjudication by consent).

PPP: Phonepay Plus 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.

Annex 4

The 13th Code of Practice

This follows on the next page.

PhonepayPlus Code of Practice (13th edition)

**CODE FOR PREMIUM RATE SERVICES
APPROVED UNDER
SECTION 121 OF
THE COMMUNICATIONS ACT 2003**

**Code of Practice 2015
(Thirteenth Edition)**

**CODE OF PRACTICE
PhonepayPlus**

**As approved by the Office of Communications for the purposes
of Sections 120 and 121 of the Communications Act 2003**

on []

This Thirteenth Edition of the Code of Practice

came into force

on []

PART ONE

Introduction to PhonepayPlus

1.1 PhonepayPlus is an enforcement authority with responsibility for enforcing this Code of Practice, which regulates the use of premium rate services (PRS). Our aim is to provide a safe environment for consumers using PRS and a fair, proportionate and robust regulatory regime for industry. This Code of Practice, our thirteenth, is based on over twenty years' experience of regulating this market and we have refined the Code to focus on the underlying principles of consumer protection to achieve a regulatory regime that gives greater clarity and more flexibility to providers of PRS.

1.2 Scope of the Code

1.2.1 The Communications Act 2003 ("the Act") provides Ofcom with the power to approve a Code for the purposes of regulating PRS and Ofcom has approved this Code under Section 121 of the Act. Certain providers of PRS are obliged, pursuant to the Condition set by Ofcom under the Act and Section 120(3)(a) of the Act, to comply with directions given by PhonepayPlus in accordance with its Code of Practice for the purpose of enforcing its provisions.

1.2.2 The Condition set by Ofcom applies to controlled premium rate services ("CPRS"), the definition of which is contained within Part Five of this Code. The definition of CPRS is a subset of the definition of PRS contained in the Act. Insofar as the particular PRS is not within the definition of CPRS, this Code applies to it but compliance is voluntary.

1.3 Providers of premium rate services

PhonepayPlus regulates through the imposition of responsibilities on providers of PRS. Three categories of providers are defined in Part Five: essentially these are Network operators, Level 1 providers (who form part of a premium rate value chain) and Level 2 providers (the end provider of the service). A provider of PRS may fall within more than one of these categories.

1.4 Independence

1.4.1 PhonepayPlus operates in an entirely independent manner. All members of the Board of PhonepayPlus are appointed in their individual capacities. Apart from a minority of 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.

1.4.2 Any Board member with such commercial interests will take no part in the adjudication process.

- 1.4.3 Board members constitute a minority on Tribunals that adjudicate on the provisions of the Code, and no more than one Board member may sit on such a Tribunal.

1.5 Guidance and advice

- 1.5.1 Part Two of the Code sets the outcomes expected by PhonepayPlus and the rules with which providers must comply. To assist PRS providers, PhonepayPlus will also publish non-binding Guidance to accompany the Code. This Guidance will inform providers about how the required rules will be expected to apply to the provision of PRS, both generally and in relation to specific service types.
- 1.5.2 Guidance is intended to assist those involved in the provision of PRS to comply with the Code; it does not form part of the Code. Compliance with Guidance will be taken into account in the consideration of any alleged breach of the Code and/or the setting of sanctions, as set out further in Part Four below. The extent to which a party attempted to comply with the Code by any alternative methods will also be taken into account.
- 1.5.3 Guidance may be amended from time to time on reasonable notice and following appropriate consultation.
- 1.5.4 PhonepayPlus may from time to time issue and/or amend non-binding compliance advice concerning any provisions of the Code.

1.6 Confidentiality

Confidential information (such confidentiality being judged on an objective basis) received by PhonepayPlus will be kept in confidence by PhonepayPlus and will not be divulged to any third party other than PhonepayPlus employees, officers, professional advisors and Ofcom or other proper authority without consent (such consent not being unreasonably withheld or delayed). PhonepayPlus may divulge confidential information if it is necessary for it to do so in order to discharge its responsibilities under the Code. Confidential information may also be disclosed in response to a request from a regulator or other lawful authority, or shared with law enforcement agencies for the purpose of investigating fraud or other offences, or if it enters the public domain or becomes lawfully available from a third party free from any confidentiality restriction.

1.7 Reach of the Code

- 1.7.1 Save as is provided below, this Code applies to all PRS which are accessed by a user in the United Kingdom or provided by a Level 1 or Level 2 provider which is situated in the United Kingdom.

- 1.7.2 Some PRS may also be ‘information society services’ in which case enforcement of the Code will be subject to Directive 2000/31/EC. This is further set out in Part Five below. These services are typically PRS which are available on the internet.

This Code is approved by the Office of Communications (Ofcom) for the purposes of sections 120 and 121 of the Communications Act 2003.

This Code was notified in draft to the European Commission in accordance with Directive 98/34/EC as amended by Directive 98/48/EC.

General, compliance and media enquiries

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PART TWO

2. Required outcomes and rules relating to all premium rate services

The outcomes which PRS are expected to achieve are set out below. They are followed by sets of rules which have to be complied with.

References to a PRS or services in this Code include all aspects of a service including content, promotion and marketing and any technical matters including those relating to delivery and quality of sound or picture.

Level 2 providers have responsibility for achieving these outcomes by complying with the rules in respect of the provision of the relevant premium rate service. All Network operators and Level 1 providers involved in providing PRS must take all reasonable steps in the context of their roles to ensure the rules are complied with¹.

2.1 Legality

Outcome

“That PRS comply with the law.”

Rules

2.1.1 PRS must comply with the law.

2.1.2 PRS must not contain anything which is in breach of the law, nor omit anything which the law requires.

2.1.3 PRS must not facilitate or encourage anything which is in any way unlawful.

2.1.4 PRS providers and relevant individuals engaged in the provision of a service must hold all licences, permissions and qualifications required by law.

2.2 Transparency and Pricing

Outcome

“That consumers of PRS are fully and clearly informed of all information likely to influence the decision to purchase, including the cost, before any purchase is made.”

2.2.1 Consumers of PRS must be fully and clearly informed of all information likely to influence the decision to purchase, including the cost, before any purchase is made.

¹ See Part 3 below and in particular paragraphs 3.7 and 3.8

- 2.2.2 Promotional material must contain the name (or brand if part of the name) and the contact details of the Level 2 provider of the relevant PRS except where otherwise obvious. If the contact details include a telephone number, it must be a UK number and not at premium rate.
- 2.2.3 PhonepayPlus may specify categories of promotions in respect of which promotional material must contain reference to the Level 2 provider's registration with PhonepayPlus and its registration number. PhonepayPlus shall publish a list of any such specified categories on its website.
- 2.2.4 All written information which is material to the consumer's decision to purchase a service must be easily accessible, clearly legible and presented in a way which does not make understanding difficult. Spoken information must be easily audible and discernable.
- 2.2.5 Where a PRS promotes or is promoted by a non-premium rate electronic communications service both services will be considered as one where, in the opinion of PhonepayPlus, it is reasonable to do so.
- 2.2.6 Unless a service is available 24 hours a day, its hours of operation must be stated in UK time on the promotional material.

Rules relating to pricing

- 2.2.7 In the course of any promotion of a PRS, written or spoken or in any medium, the cost must be included before any purchase is made and must be prominent, clearly legible, visible and proximate to the premium rate telephone number, shortcode or other means of access to the service.
- 2.2.8 Any messages that are necessary for a consumer to access, use or engage with a service but are provided separately from the service itself must be free of charge.
- 2.2.9 Where a service involves a consumer being charged for an international call this must be made clear in any promotional material.

2.3 Fairness

Outcome

"That consumers of PRS are treated fairly and equitably."

Rules

- 2.3.1 Consumers of PRS must be treated fairly and equitably.
- 2.3.2 PRS must not mislead or be likely to mislead in any way.

- 2.3.3 Consumers must not be charged for PRS without their consent. Level 2 providers must be able to provide evidence which establishes that consent.
- 2.3.4 PRS must be provided without undue delay after the consumer has done what is necessary to connect with the service and must not be unreasonably prolonged.
- 2.3.5 PRS must not be of a nature which encourages unauthorised use by non bill-payers.
- 2.3.6 Level 2 providers must take reasonable and prompt steps to identify excessive use of its service or services by any consumer and to inform the relevant consumer of that usage.
- 2.3.7 Level 2 providers of sexual entertainment services must take all reasonable steps to discourage use by non-bill payers and to prevent use by those under 18 years of age.
- 2.3.8 Level 2 providers of virtual chat services must take all reasonable steps to discourage use by non-bill payers and to prevent use by those under 18 years of age. However, non-sexual entertainment text and picture-based virtual chat services may be used by those aged 16-17 provided that no advertising for the service has occurred in media where the target audience is below 16 years of age.
- 2.3.9 PRS must not directly appeal to children to purchase products or take advantage of children's potential credulity, lack of experience or sense of loyalty.
- 2.3.10 PRS must not be promoted or provided in such a way that it results in an unfair advantage being taken of any vulnerable group or any vulnerability caused to consumers by their personal circumstances where the risk of such a result could have been identified with reasonable foresight.
- 2.3.11 Where the means of termination is not controlled by the consumer there must be a simple method of permanent exit from the service, which the consumer must be clearly informed about prior to incurring any charge. The method of exit must take effect immediately upon the consumer using it and there must be no further charge to the consumer after exit except where those charges have been legitimately incurred prior to exit.

2.4 Privacy

Outcome

"That PRS do not cause the unreasonable invasion of consumers' privacy."

Rules

- 2.4.1 Level 2 providers must ensure that PRS do not cause the unreasonable invasion of consumers' privacy.
- 2.4.2 Consumers must not be contacted without their consent and whenever a consumer is contacted the consumer must be provided with an opportunity to withdraw consent. If consent is withdrawn the consumer must not be contacted thereafter. Where contact with consumers is made as a result of information collected from a PRS, the Level 2 provider of that service must be able to provide evidence which establishes that consent.
- 2.4.3 Level 2 providers must ensure that consumers' personal information is not collected without their consent or passed to any other person other than for the sole purpose of facilitating a refund to a consumer.
- 2.4.4 Where services involve the collection of any personal information such as names, postal and email addresses and telephone numbers, the purpose for which the information may be used must be made clear to consumers before the information is collected.

2.5 Avoidance of harm

Outcome

"That PRS do not cause harm or unreasonable offence to consumers or to the general public."

Rules

- 2.5.1 PRS must not cause or be likely to cause harm or unreasonable offence to consumers or to the general public.
- 2.5.2 PRS must not promote or incite or be likely to promote or incite hatred in respect of any group or individual identified by age, disability, gender, race, religion or belief, sexual orientation or transgender status.
- 2.5.3 PRS must not encourage or be likely to encourage consumers to put themselves or others at risk.
- 2.5.4 PRS must not promote or facilitate prostitution.
- 2.5.5 PRS must not induce and must not be likely to induce an unreasonable sense of fear, anxiety, distress or offence.
- 2.5.6 Level 2 providers must ensure that their services are not promoted in an inappropriate way.
- 2.5.7 Level 2 providers must use all reasonable endeavours to ensure that promotional material is not targeted at or provided directly to those for whom it, or the service which it promotes, is likely to be regarded as being offensive or harmful.

2.5.8 PRS aimed at or likely to be particularly attractive to children must not contain anything which a reasonable parent would not wish their child to see or hear in this way.

2.5.9 Where PRS involve the possibility that two or more consumers might be able to exchange contact details or make arrangements to meet, then clear advice should be given regarding appropriate safeguards, in line with any generally available police advice.

2.6 Complaint handling

Outcome

“That consumers are able to have complaints resolved quickly and easily by the Level 2 provider responsible for the service and that any redress is provided quickly and easily.”

Rules

2.6.1 Level 2 providers must ensure that consumers of their services are able to have complaints resolved quickly, easily and fairly and that any redress is provided quickly and easily.

2.6.2 Level 2 providers must provide an appropriate and effective complaints process which is free or low-cost.

2.6.3 Consumer complaints must be handled promptly at all stages within a process which is clear to the consumer.

2.6.4 Where refunds are provided to consumers they must be provided promptly and in an easily accessible manner.

2.6.5 Consumers who remain dissatisfied with the handling of their complaint must be informed that they may complain to PhonepayPlus and be provided with its contact details.

2.6.6 Level 2 providers must provide upon request to PhonepayPlus such information that allows examination of how they have handled any consumer complaint.

PART THREE

Registration and Responsibility

3. General Responsibilities

3.1 All Network operators, Level 1 and Level 2 providers must:

3.1.1 ensure that PhonepayPlus regulation is satisfactorily maintained by:

- (a) taking all reasonable steps in the context of their roles, including the adoption and maintenance of internal arrangements to ensure that the rules set out in Part Two are complied with and the outcomes achieved in respect of all PRS with which they are concerned, and
- (b) carrying out their own obligations under the Code promptly and effectively, and
- (c) taking all reasonable steps to prevent the evasion of, and not to undermine, the regulation of PRS, and
- (d) taking all reasonable steps to ensure that consumer complaints are resolved quickly and fairly and that any redress is provided quickly and easily.

3.1.2 have regard to the funding provisions which are set out in Annex 1 to the Code and comply with such provisions where so required.

3.1.3 assess the potential risks posed by any party with which they contract in respect of:

- (a) the provision of PRS; and
- (b) the promotion, marketing and content of the PRS which they provide or facilitate

and take and maintain reasonable continuing steps to control those risks.

3.1.4 act on any direction, instruction, notice or request for information given by PhonepayPlus in pursuance of its duties as a regulator. Where PhonepayPlus specifies a timeframe for action or response that timeframe must be adhered to or an extension promptly requested in writing setting out clear reasons. Any such extension will be granted only in exceptional circumstances.

3.1.5 not engage or permit the involvement in the provision of PRS of a Network operator, Level 1 or Level 2 provider and/or associated

individual in respect of whom a sanction, which has been published, has been imposed under paragraphs 4.8.2(f), (g) or (h) or any previous version of those provisions so as to enable such person to operate in breach of that sanction.

- 3.1.6 carry out reasonable monitoring of PRS provided by any Level 1 or Level 2 provider with which they have contracted.
- 3.1.7 use all reasonable endeavours in the context of their roles to ensure that all of the PRS with which they are involved are of adequate technical quality, including the mechanisms used to deliver services to and to enable exit from services by consumers.

3.2 Directions

- 3.2.1 Any direction, instruction, notice or request for information issued by PhonepayPlus will be effective immediately upon being sent by fax or email to a fax number or email address provided by the relevant PRS provider for registration with PhonepayPlus. If a direction, instruction, notice or request for information is sent by PhonepayPlus by first class pre-paid post to an address provided by the relevant PRS provider for registration with PhonepayPlus, then it will be effective on the second working day after posting.
- 3.2.2 When directed to do so by PhonepayPlus all Network operators and Level 1 and Level 2 providers shall immediately:
 - (a) terminate access to such PRS and/or numbers as PhonepayPlus may specify;
 - (b) terminate access to all numbers that are allocated to any specified Level 1 or Level 2 provider;
 - (c) terminate access to some or all numbers over which a specified PRS or type of service may be operated.
- 3.2.3 When directed to do so by PhonepayPlus all Network operators and Level 1 providers shall immediately:
 - (a)
 - (i) retain such amount of money as PhonepayPlus may require out of monies payable by any Network operator or Level 1 provider to a Level 1 or Level 2 provider until permitted by PhonepayPlus to do otherwise, or
 - (ii) retain some or all money payable to a specified Level 1 or Level 2 provider in respect of certain numbers or PRS (as may be specified) until permitted by PhonepayPlus to do otherwise, or
 - (iii) retain all money payable to a specified Level 1 or Level 2 provider until informed by PhonepayPlus that it may do otherwise;

- (b) pay over to PhonepayPlus such an amount of money retained pursuant to 3.2.3(a) or withheld pursuant to paragraph 3.5 below, as PhonepayPlus may require in order to satisfy outstanding fines and/or administrative charges, such payments to be made within 30 days of such direction;
- (c) pay refunds on behalf of Level 1 or Level 2 providers when so required by PhonepayPlus in accordance with paragraph 4.9.1 or 4.9.2 below.

3.3 Contracts

- 3.3.1 All Network operators and Level 1 providers must perform thorough due diligence on any party with which they contract in connection with the provision of PRS and must retain all relevant documentation obtained during that process for a period that is reasonable in the circumstances.
- 3.3.2 In connection with the provision of PRS which are not exempt services (see paragraph 3.4.2 below), Network operators, Level 1 and Level 2 providers must only contract with other Network operators, Level 1 or Level 2 providers which are registered with PhonepayPlus.
- 3.3.3 Such contracts must include provisions that:
 - (a) each party is bound to comply with the Code and any directions made by PhonepayPlus in accordance with it, and
 - (b) by reference to section 1 of the Contracts (Rights of Third Parties) Act 1999 (or where the contract is not governed by English law, any other relevant law having equivalent effect) PhonepayPlus may directly enforce the relevant term(s) of that contract.
- 3.3.4 Any breach of these provisions concerning the obligations of Network operators and Level 1 and Level 2 providers in respect of contracts will be regarded as very serious Code breaches.

3.4 Registration

- 3.4.1 Before providing any PRS all Network operators, Level 1 and Level 2 providers must register with PhonepayPlus subject only to paragraph 3.4.3 below.
- 3.4.2 PhonepayPlus may make exemptions from the duty to register in accordance with paragraph 3.4.3.
- 3.4.3 PhonepayPlus may identify particular categories of Network operators, Level 1 or Level 2 providers and the circumstances in which the duty to register will not apply to them ("the exemption").

- 3.4.4 Network operators, Level 1 and Level 2 providers who provide a PRS that operates within an exemption under paragraph 3.4.3, are not, in relation to that service, required to register with PhonepayPlus.
- 3.4.5 PhonepayPlus will publish on their website a full up-to-date list of exemptions.
- 3.4.6 Registration will require the provision of such information as PhonepayPlus may from time to time require for the purpose of efficient and effective regulation of PRS.
- 3.4.7 Information provided to PhonepayPlus for the purposes of registration must be updated as soon as practicable.
- 3.4.8 Registration must be renewed annually or at intervals determined by PhonepayPlus.
- 3.4.9 PhonepayPlus will make a reasonable charge for such registration and for annual renewal of registration. PhonepayPlus will set the amount of the charge, giving reasonable notice to interested parties. All Network operators, Level 1 and Level 2 providers who wish to register must pay the charge.
- 3.4.10 All breaches and sanctions imposed under the Code (this edition and any previous editions) on any Network operator, Level 1 or Level 2 provider will be linked to that Network or provider's registered details together with any relevant information arising from adjudications concerning associated individuals or any other relevant information which is publicly held.
- 3.4.11 Certain categories of information held on the PhonepayPlus Register under this provision will be accessible at any time by relevant parties or regulators and any law enforcement agency with a legitimate interest.
- 3.4.12 A registered party which is not providing any PRS or is providing a PRS which operates only within an exemption may de-register at any time but their details will continue to be held by PhonepayPlus for a reasonable period.
- 3.4.13 PhonepayPlus may make clear on the Register any sanction imposed under the Code (this edition and any previous editions) and any failure to renew registration within such period as PhonepayPlus may reasonably require and may identify any director partners or other associated individuals involved.

3.4.14 Numbers

- (a) Level 2 providers must, within two working days of the service becoming accessible to consumers, provide to PhonepayPlus relevant details (including any relevant access or other codes) to identify services to consumers and must provide the identity of any Level 1 providers concerned with the provision of the service.
- (b) PhonepayPlus will include all such details on the PhonepayPlus register and those details will be available to be checked directly by consumers.
- (c) Whenever the information provided under sub-paragraph 3.4.14(a) above changes, the updated information must be provided to PhonepayPlus within two working days of the change.

3.5 Withhold

- 3.5.1 Network operators shall not make, and shall withhold, payments due to any provider for a period of at least 30 days after the use of the PRS to which the payments relate.
- 3.5.2 Where PhonepayPlus so directs, in accordance with the provisions of this Code, payments must be retained for a period in excess of 30 days.
- 3.5.3 Any Network operator who pays money to any provider, contrary to the obligation to withhold payments pursuant to paragraph 3.5.1 or after receipt of a direction by PhonepayPlus to retain money from that provider, may be directed by PhonepayPlus to pay to it an amount no more than the amount of the fines, administrative charges or refunds that have not been paid by, or on behalf of, the provider when due without prejudice to any other action which might be taken by PhonepayPlus against that Network operator.
- 3.5.4 The amount payable by the Network operator to PhonepayPlus under paragraph 3.5.3 shall be no more than the amount that should have been withheld or retained by the Network operator in accordance with the Code.

3.6 Data Protection

3.6.1 All Network operators, Level 1 and Level 2 providers:

- (a) must make a notification to the Office of the Information Commissioner under the Data Protection Act 1998 and must, in their notification:
 - (i) disclose PhonepayPlus as the potential recipient of personal data; and
 - (ii) state that data collected from consumers may be used by PhonepayPlus for regulatory purposes.
- (b) must not give any undertaking to consumers, suppliers, other Networks Operators, Level 1 or Level 2 providers or others which could preclude any information being given to PhonepayPlus in confidence. Level 1 and Level 2 providers must warn consumers that any data collected may be passed to PhonepayPlus.

3.6.2 Services which involve the collection of personal information, such as names, addresses and phone numbers (which includes the collection of Calling Line Identification (CLI) or caller display information), must make clear to consumers the purpose for which the information is required and may be used in the future. The service must also identify the data controller (if different from the Network operator, Level 1 or Level 2 provider) in any different use to which the personal information might be put and give the consumer a clear opportunity to prevent such usage.

3.7 Responsibilities of Network operators

3.7.1 Prior to commencement of any PRS Network operators must supply PhonepayPlus with such information as it may require and which will establish that the Network operator meets the criteria necessary to be recognised as a Network operator for the purposes of the Code.

3.7.2 If a Network operator provides any part of a PRS which directly impacts on consumers, whether in respect of its promotion or otherwise, the Network operator shall be responsible for compliance with the rules and obligations set out in this Code in relation to the functions it performs in respect of that PRS.

3.7.3 If pursuant to an investigation carried out under Part 4 of the Code PhonepayPlus considers that a Network operator is involved in a breach of the Code in relation to its own functions in respect of a premium rate service then PhonepayPlus may raise a breach of the Code against that Network operator and proceed against it. It shall be treated in all respects concerning that breach of the Code as though it was a Level 2 provider.

3.7.4 Number Exportation

- (a) Network operators must maintain a record of premium rate numbers which, having been allocated or exported to them, are exported by them to another Network operator or over which they cease to have control for any reasons.
- (b) Network operators must supply to PhonepayPlus on request without any delay in relation to any number to which paragraph 3.7.4(a) applies, the name of the Network operator to whom the number has been exported or who has control over it and, if known, the name of the Level 2 provider.

3.8 Responsibilities of Level 1 providers

- 3.8.1 If a Level 1 provider provides any part of a PRS which directly impacts on consumers, whether in respect of its promotion or otherwise, the Level 1 provider shall be responsible for compliance with the rules and obligations set out in this Code in relation to the functions it performs in respect of that PRS.
- 3.8.2 If pursuant to an investigation carried out under Part Four of the Code PhonepayPlus considers that a Level 1 provider is involved in a breach of the Code in relation to its own functions in respect of a PRS then PhonepayPlus may raise a breach of the Code against that Level 1 provider and proceed against it. It shall be treated in all respects concerning that breach of the Code as though it was a Level 2 provider.

3.9 Responsibilities of Level 2 providers

- 3.9.1 Before promoting or providing services, Level 2 providers must have readily available all documentary and other evidence necessary to substantiate any factual claims made. This material, together with a statement outlining its relevance to the factual claim in question must be provided without delay if requested by PhonepayPlus.
- 3.9.2 Where certain premium rate number ranges, shortcodes or other means of access to services have been designated by either Ofcom or a Network operator for use only for particular purposes or for the provision of particular categories of service, or where Ofcom or a Network operator has restricted certain premium rate number ranges, shortcodes or other means of access to services from being used for particular purposes or for the provision of particular categories of service, those number ranges, shortcodes or means of access must not be used in contravention of these restrictions. Ofcom's designations will have precedence over any issued by a Network operator.

3.10 Prior Permission

- 3.10.1 PhonepayPlus may require that particular categories of service must not be provided without its prior written permission. PhonepayPlus will give reasonable notice of such requirement and the category of service to which it applies, and will publish a full list of such service categories on its website from time to time.
- 3.10.2 Prior permission may be refused or granted by PhonepayPlus subject to the imposition of additional conditions following consideration of all relevant factors including the compliance record of those concerned with the provision of the service. Prior permission may be withdrawn or varied upon reasonable grounds and with notice in writing.
- 3.10.3 If a party who has applied for prior permission is not satisfied with any aspect of the determination made by PhonepayPlus it may apply to the Chair of the CCP for a review of the determination.
- 3.10.4 (a) Where a Level 1 or Level 2 provider can demonstrate to the satisfaction of PhonepayPlus in relation to a particular service that any objective of the Code can be adequately satisfied by means other than strict adherence to the Code provisions, PhonepayPlus may give prior written permission (which may be given subject to conditions) for the service to be provided by such alternative means. Such permission may be withdrawn or varied by PhonepayPlus subject to the giving of reasonable notice.
- (b) Where PhonepayPlus considers following reasonable consultation that any objective of the Code can be adequately satisfied by means other than strict adherence to the Code provisions it may issue a Statement of Application which will set out such alternative means and any conditions applicable. A Statement of Application may be withdrawn or varied by PhonepayPlus on the provision of reasonable notice.
- 3.10.5 Whenever PhonepayPlus grants permission under sub-paragraph 3.10.4(a) it will publish on its website prior to the permission taking effect the details of the permission, the relevant parts of the Code to which it applies and any conditions attached to it, but shall not be required to publish commercial confidential information.
- 3.10.6 A breach of any condition imposed in connection with prior permission granted by PhonepayPlus in accordance with the Code shall be a breach of the Code.
- 3.10.7 PhonepayPlus may require the payment of reasonable charges in respect of dealing with applications for prior permission.

3.11 Special conditions

3.11.1 Where PhonepayPlus is satisfied there is or is likely to be a risk of:

- (a) a significant level of consumer harm; or
- (b) unreasonable offence to the general public,

arising from a particular category of premium rate service (“a high risk service”), it may impose conditions (“special conditions”) for the purpose of ensuring compliance with the Code’s outcomes. The conditions which may be imposed are the conditions set out in Annex 2 and any related conditions which are necessary for the proper functioning of those conditions.

3.11.2 Before imposing any conditions under paragraph 3.11.1 PhonepayPlus will consult with relevant stakeholders and consider their representations where made within the period specified for comment. In urgent circumstances and notwithstanding paragraph 3.12.4, PhonepayPlus may carry out the consultation after imposition of the special conditions and, within a reasonable period, consider whether or not the conditions should be maintained, amended or removed in light of any consultation responses.

3.11.3 Any reference to compliance with the rules or obligations under this Code shall include compliance with obligations imposed under the special conditions. A breach of any special condition in respect of a high risk service imposed under paragraph 3.11.1 shall be a breach of the Code.

3.11.4 Upon determining to attach special conditions to a category of high risk services PhonepayPlus shall forthwith publish on its website a description of the relevant category of high risk service and the special conditions which will apply.

3.12 Specified Service Charges and Durations of Calls

3.12.1 PhonepayPlus may, in relation to the service categories set out in paragraph 3.12.2 below, specify:

- (a) the service charges which may be spent per call or calls taken together in any 24 hour period or monthly billing cycle,
- (b) the duration permitted for a call or calls to a service in any specified time period,

- (c) the actions which must be taken at specified intervals, or after specified service charges or call duration have been reached, including but not limited to:
 - i. The provision of a spend or call duration reminders;
 - ii. The immediate termination of the service after provision of a spend or call duration reminder unless the consumer positively confirms a wish to continue to use the service;
 - iii. The immediate termination of the service.

3.12.2 The service categories to which paragraph 3.12.1 refer are:

- (a) Sexual entertainment services;
- (b) Virtual chat services;
- (c) Live entertainment services (including sexual entertainment services);
- (d) Chatline services;
- (e) Remote gambling services;
- (f) Professional advice services;
- (g) Counselling services;
- (h) Subscription services;
- (i) services aimed at, or which should have been expected to be particularly attractive to children; and
- (j) any services in respect of which special condition (d) at Annex 2 of the Code has been imposed.

3.12.3 Any service charge, call duration, action or advertised cost under paragraph 3.12 must be fair and proportionate.

3.12.4 Before any such amounts, call duration, action or advertised cost is specified under paragraph 3.12, PhonepayPlus will consider all factors that are relevant and within its reasonable contemplation, and will consult relevant stakeholders and consider every representation about the proposal that is made to it within the period specified for comment.

3.12.5 Any reference to compliance with the rules or obligations under this Code shall include compliance with all specified amounts, call durations and actions set by PhonepayPlus under paragraph 3.12.1. A breach of any specified amount, duration or action set under that paragraph shall be a breach of the Code.

3.12.6 PhonepayPlus shall publish a full list of all such specified amounts, call duration and actions and the service categories to which they relate on their website.

PART FOUR

4. Investigations, Procedures and Sanctions

4.1 Tribunals

Details concerning the Code Compliance Panel ('CCP') and Tribunals are set out in '*Code Annex 3: The Code Compliance Panel and Tribunals*' which is published on the PhonepayPlus website.

4.2 Investigations

- 4.2.1 PhonepayPlus will consider, and where appropriate investigate, all complaints which it receives, provided the complaint is made within a reasonable time from when it arose.
- 4.2.2 PhonepayPlus monitors PRS, and may initiate an investigation itself where there appears to be a breach of the Code.
- 4.2.3 During an investigation PhonepayPlus may direct any Network operator, Level 1 or Level 2 provider (referred to in this section as a party) to disclose, subject to the confidentiality provision set out in paragraph 1.6, and within a time period which PhonepayPlus may specify, any relevant information or copies of documents. This may include, but is not limited to:
 - (a) call volumes, patterns and revenues;
 - (b) details of numbers allocated to any relevant party;
 - (c) details of any services operating on any specified premium rate number, shortcode or other means of access;
 - (d) evidence of consumer consents;
 - (e) evidence of consumer complaint handling;
 - (f) evidence of due diligence;
 - (g) evidence of risk assessment and control;
 - (h) arrangements between Network operator and PRS providers;
 - (i) arrangements between any PRS providers and any other relevant party.
- 4.2.4 A party must not knowingly or recklessly conceal or falsify information, or provide false or misleading information to PhonepayPlus (either by inclusion or omission).

- 4.2.5 A party must not fail to disclose to PhonepayPlus when requested any information that is reasonably likely to have a regulatory benefit in an investigation.
- 4.2.6 Taking into account the severity of the consumer harm alleged, and the breach history of the party or parties concerned, PhonepayPlus will decide whether to use the Track 1, Track 2 or the Emergency procedure when conducting an investigation.
- 4.2.7 Where breaches are raised against more than one party as part of the same investigation, PhonepayPlus is not obliged to use the same investigation procedure for each party involved. It will decide the most appropriate procedure to use on a case by case basis, based on each party's involvement and history.
- 4.2.8 During or following an investigation, PhonepayPlus may raise breaches of the Code against any party it considers to be involved in breaching the Code.
- 4.2.9 If further relevant information comes to light during the course of an investigation, and the case has not yet been placed before a Tribunal, PhonepayPlus may change the investigation procedure used, or withdraw an allegation of any or all breaches, at its discretion. If the investigation procedure is so changed PhonepayPlus shall allow adequate time to the party concerned to deal with the matter.

4.3 Track 1 Procedure

In appropriate cases, including where an apparent breach of the Code has caused little or no consumer harm or offence to the general public, PhonepayPlus may in its discretion use the Track 1 procedure.

Factors including the seriousness of the apparent breach and the case history (including any previous use of the Track 1 procedure) of the party under investigation ('the relevant party') will be taken into account when deciding whether the Track 1 procedure should be used.

In the event of the Track 1 procedure being used, the following will occur:

- 4.3.1 The relevant party will be contacted and informed of the apparent breach. PhonepayPlus will provide the relevant party with a set of actions which it believes is necessary to remedy the breach and prevent any repetition together with a deadline for the actions ('the action plan'). PhonepayPlus may invoice the relevant party for its reasonable administrative costs.
- 4.3.2 If the action plan is accepted, the relevant party must demonstrate to PhonepayPlus that it has been followed and the breach remedied on or before the deadline. If this is not done PhonepayPlus will assume that the breach has not been remedied and the Track 2 procedure may be invoked.

- 4.3.3 Where the relevant party does not agree to any part of the action plan (including the deadline), it must clearly set out its disagreement in writing within five working days of receipt by it of the action plan. PhonepayPlus will consider such representations and may decide to alter the action plan as a result. If no agreement can be reached, the Track 2 procedure may be invoked.
- 4.3.4 If the relevant party disputes that a breach has occurred, the Track 2 procedure may be invoked.
- 4.3.5 PhonepayPlus will keep a record of the use of the Track 1 procedure. A Tribunal may take into account the previous use of the Track 1 procedure if considering any breaches by the same or any connected party in the future.

4.4 Track 2 Procedure

When PhonepayPlus receives or initiates a complaint, the Track 2 procedure will usually be used:

- 4.4.1 PhonepayPlus will provide the relevant party with all necessary information about the alleged breach or breaches of the Code. This will include details of any service and/or promotional material and will refer to the relevant provisions of the Code.
- 4.4.2 The relevant party will be given a reasonable period of time in which to respond and provide any information requested. A response will normally be required within 10 working days. In exceptional circumstances PhonepayPlus may set a shorter or longer time limit but it will never be less than one working day, nor longer than 15 working days.
- 4.4.3 If the relevant party fails to respond within the required period, PhonepayPlus will proceed with the case on the assumption that it does not wish to respond.
- 4.4.4 PhonepayPlus will prepare a report of its allegations and investigation including any responses from the relevant party, together with relevant supporting evidence, which will be placed before a Tribunal to adjudicate on the matter.
- 4.4.5 The relevant party will be notified by PhonepayPlus of the date of the Tribunal consideration, and entitled to make informal representations to on that date in person in order to clarify any matter.
- 4.4.6 At any point during the course of the Track 2 procedure, PhonepayPlus may direct a Network operator or Level 1 provider to retain any outstanding payment relating to the service in question from the relevant party.

4.5 Emergency Procedure

4.5.1 Where an apparent breach of the Code has taken place which is serious and requires urgent remedy, PhonepayPlus may use the Emergency procedure. In such circumstances, there shall be the following procedural stages:

- (a) PhonepayPlus will conduct an immediate preliminary investigation.
- (b) On completion of its preliminary investigation, PhonepayPlus shall (unless there are important public interest reasons to the contrary) use its best endeavours to notify the relevant party of its initial findings and invite that party to make representations to PhonepayPlus. If PhonepayPlus decides to proceed, it will notify the three members of the CCP of its findings and of the representations, if any, provided by the relevant party. Where it has not been possible or appropriate to notify the relevant party prior to notifying the three members of the CCP, PhonepayPlus will use its best endeavours to provide the three members of the CCP with all facts material to its decision including any material which it considers might reasonably have been relied upon by the relevant party. The three members of the CCP notified will decide whether the situation is sufficiently serious and urgent to warrant the use of the Emergency procedure.
- (c) If all three people agree on the use of the Emergency procedure, PhonepayPlus will use its best endeavours to inform the relevant party that its service appears to be in breach of the Code and that the Emergency procedure is being used. PhonepayPlus will, as far as is deemed appropriate and proportionate, also take the following actions:
 - (i) Direct the relevant party to suspend the service immediately.
 - (ii) Direct any relevant Network operator or Level 1 provider to retain any payments outstanding in respect of the service under investigation.
 - (iii) Direct any relevant Network operator or Level 1 provider to bar access to the relevant service or numbers immediately if the party under investigation cannot be contacted or does not immediately suspend the service.
 - (iv) Publish its use of the Emergency procedure in such manner as it sees fit.
- (d) Once the service has been suspended, PhonepayPlus will provide the relevant party with all necessary information about the alleged breaches of the Code. This will include details of the service and/or promotional material and will refer to the relevant sections of the Code.

- (e) The relevant party will then have five working days in which to respond and provide any information requested. In exceptional circumstances, PhonepayPlus may set a shorter time limit.
- (f) All relevant information, including any response from the party under investigation, will be placed before a Tribunal as soon as is reasonably practicable after the relevant party has responded, or the deadline for response has passed.
- (g) The relevant party will be informed by PhonepayPlus of the date of the Tribunal consideration and entitled to make informal representations to it on that date in person in order to clarify any matter.

4.5.2 Review of Emergency procedure

- (a) Within two working days following the making of a direction under paragraph 4.5.1(c), or at any time prior to adjudication in the event that new information comes to light suggesting that the use of the Emergency procedure is not appropriate, the relevant party may apply to PhonepayPlus for an urgent review of the use of the Emergency procedure in the particular case.
- (b) The application for review must be made in writing, must include any supporting evidence and must set out:
 - (i) the grounds on which the relevant party considers that the Emergency procedure should not have been used and/or;
 - (ii) the grounds on which the relevant party considers that access to the service or numbers should no longer be prevented.
- (c) Subject to any requirement for further information, a Tribunal will consider the matter within two working days of receipt of an application for review and will decide, through whatever process it decides, whether the prevention of access to the services or numbers should continue pending completion of the normal Emergency procedure process, or whether access should be permitted to some or all of the services or numbers concerned, and if so upon what, if any, conditions. The Tribunal may also decide whether the Emergency procedure should be changed to a Track 2 procedure and/or whether PhonepayPlus should direct any relevant Network operator, Level 1 provider or Level 2 provider to cease retaining any payments outstanding in respect of the service under investigation.

4.6 Adjudication

- 4.6.1 The Tribunal will make a decision as to whether the Code has been breached on the basis of the evidence presented to it. When considering whether there has been a breach of the Code, a factor the Tribunal may take into account where relevant is the extent to which the relevant party followed any relevant Guidance published by PhonepayPlus. Relevant parties will be informed in writing of the outcome of the case. A full reasoned decision (the 'Tribunal decision ') will be prepared and provided to the relevant party. The relevant party will be informed of its right under the Code to apply for a review and/or an oral hearing. The Tribunal decision will be published on the PhonepayPlus website, and in any other way that PhonepayPlus shall determine.

4.7 Reviews

- 4.7.1 Tribunals may, at their discretion, review any determinations made in respect of applications for prior permission, adjudications, sanctions and/or administrative charges.
- 4.7.2 The relevant party or PhonepayPlus may request a review by setting out in writing the grounds for a review. Except where new information, not reasonably available at the time of the original determination, has come to light, a request for a review must be made within 10 working days of the publication of the relevant determination, or the sending to the relevant party of the prior permission decision or the administrative charge invoice. In any case, except in highly exceptional circumstances, a request for a review must be made within 30 days of the publication of the relevant determination, or receipt of the prior permission decision or the administrative charge invoice.
- 4.7.3 Where the application for a review is in respect of a determination made by a Tribunal, it must raise a new issue of fact or law that was not reasonably available at the time of the original Tribunal or demonstrate that the Tribunal came to a decision which was so unreasonable that no reasonable Tribunal could have reached it.
- 4.7.4 Having received a request for review, the Chair of the CCP (or other legally qualified member of the CCP) will consider the grounds of the application and decide whether the review is merited. If it is decided that the review is merited, a Tribunal will carry out a review of the relevant decision(s) as soon as is practicable.
- 4.7.5 The enforcement of sanctions imposed pursuant to an adjudication is not automatically suspended by written notice requiring a review. The relevant party may apply in writing to the Chair of the CCP setting out the grounds on which the sanction should be suspended. Unless the Chair (or other legally qualified member of the CCP) considers that there are exceptional reasons in the particular case to grant the application, he will only do so if he is satisfied that not to do so would give rise to undue hardship, and that to do so would not give rise to a significant risk of public harm. If a relevant party has not been granted

a suspension of sanction and has failed to comply with any sanction, the Chair (or other legally qualified member of the CCP) may stay the review.

4.8 Sanctions

4.8.1 Once a Tribunal has determined that the Code has been breached, PhonepayPlus will put before it any breach history of the party in breach, any previous sanctions imposed, the revenue earned from the service or services and any other relevant information. This will include, but is not limited to, the extent to which the party in breach has followed any relevant Guidance published by PhonepayPlus and/or the extent to which the party in breach attempted to comply with the Code by any alternative methods. A Tribunal will generally consider failure to comply with Guidance combined with failure to consider alternative methods to comply with the Code to be a serious aggravating factor. Following Guidance will be considered a mitigating factor.

4.8.2 The Tribunal can apply a range of sanctions depending upon the seriousness with which it regards the breach(es) upheld. In considering the seriousness of the breaches and determining the sanctions to impose the Tribunal will have regard to any prevailing sanctions guide that has been published by PhonepayPlus. Having taken all relevant circumstances into account, the Tribunal may impose any of the following sanctions singularly or in any combination in relation to each breach as it deems to be appropriate and proportionate:

- (a) require the relevant party to remedy the breach (including requiring a party to register in the PhonepayPlus Register if it has not previously done so);
- (b) issue a formal reprimand and/or warning as to future conduct;
- (c) require the relevant party to submit some or all categories of service and/or promotional material to PhonepayPlus for compliance advice or prior permission for a defined period. Any compliance advice given must be implemented within a specified period to the satisfaction of PhonepayPlus and a reasonable administrative charge for such advice may be charged to be paid to PhonepayPlus;
- (d) impose a fine not exceeding the maximum amount permitted by law on the relevant party to be paid to PhonepayPlus;
- (e) require that access is barred to some or all of the relevant party's services or numbers for a defined period, or until compliance advice has been implemented to the satisfaction of PhonepayPlus, and direct any Network operator, Level 1 or Level 2 provider accordingly;

- (f) prohibit a relevant party and/or an associated individual found to have been knowingly involved in a serious breach or a series of breaches of the Code from providing, or having any involvement in, specified types of service or promotion for a defined period;
- (g) prohibit a relevant party and/or an associated individual found to have been knowingly involved in a serious breach or series of breaches of the Code from providing, or having any involvement in, any PRS or promotion for a defined period;
- (h) prohibit a relevant party from contracting with any specified party registered (or which should be registered) in the PhonepayPlus Register save on specified terms or at all for a defined period;
- (i) require that refunds are paid within a specified time period to all or any specified group of consumers who claim a refund, for the full amount spent by them for the relevant service or for a specified lesser amount, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made;
- (j) require in circumstances where there has been a serious breach of the Code and/or serious consumer harm, or unreasonable offence to the general public that refunds for the full amount spent or a specified lesser amount are paid within a specified time period to all or any specified group of consumers who have used the service, regardless of whether they have claimed a refund;
- (k) require the relevant party to submit to a compliance audit carried out by a third party approved, and to a standard prescribed, by PhonepayPlus, the costs of such audit to be paid by the relevant party. Such an audit must be completed and the recommendations implemented within a period specified by PhonepayPlus.

4.8.3 Where refunds have been ordered under paragraph 4.8.2(j) they shall be credited directly to the consumer's account with his or her originating communications provider. Where there is no such originating communications provider account, consumers must be notified of their right to a refund and be given an easy method of obtaining the refund. Where it is not technically or legally possible to notify consumers of their right to a refund, PhonepayPlus may direct the relevant party to donate an amount of money equivalent to the refunds to an appropriate registered charity selected or approved by PhonepayPlus. Evidence must be provided to PhonepayPlus that refunds have been made or payment to the selected charity has been made.

- 4.8.4 All breaches upheld and sanctions imposed against a Network operator, Level 1 or Level 2 provider under Track 2 or the Emergency procedure will be noted on the PhonepayPlus Register and will be available to public scrutiny.
- 4.8.5 The failure of any relevant party to comply with any sanction within a reasonable time will result in:
- (a) PhonepayPlus issuing a direction to a Network operator, Level 1 or Level 2 provider to suspend access to some or all premium rate numbers, shortcodes and/or any other means of access to services or other codes allocated to the relevant party until full compliance with the sanction(s) has been achieved. Such suspension would also include any premium rate numbers, shortcodes or other means of access to services, or other codes allocated during the period of suspension; and/or
 - (b) a further breach of the Code by the relevant party, which may result in additional sanctions being imposed; and/or
 - (c) PhonepayPlus taking such other action as it is entitled to do by law.
- 4.8.6 If a Network operator fails to comply with a sanction direction issued following the process set out in this Part (including any appeal to the Independent Appeals Tribunal) PhonepayPlus may (without prejudice to any other action available to it) refer the matter to Ofcom in accordance with Section 120 of the Act for it to take such action as it shall see fit.
- 4.8.7 If a Tribunal considers that it may wish to make a prohibition under sub-paragraph 4.8.2(f), 4.8.2(g) or 4.8.2(h) in respect of any associated individual, PhonepayPlus shall first make all reasonable attempts to notify the individual concerned and the relevant party in writing. It shall inform each of them that any of them may request an opportunity to make representations in person to the Tribunal and of the right of any of them (or PhonepayPlus itself) to instead require an oral hearing.

4.9 Refunds

- 4.9.1 Where a Tribunal has directed a relevant party to pay refunds to consumers, either under paragraph 4.8.2(i) or 4.8.2(j), and the relevant party can satisfy PhonepayPlus that it cannot do so without recourse to money which has been retained by a Network operator or Level 1 provider in response to a PhonepayPlus direction ('a retention'), then it may pass a list of consumers to whom refunds are due to the party which holds a retention, which will then make the payments due from the retention. In such cases, the relevant party will be responsible for any reasonable administration costs which the party who has a retention may incur. Those costs may be deducted from the remainder of a retention after all refunds are made.

- 4.9.2 If a relevant party fails promptly to pay refunds in response to a PhonepayPlus sanction, PhonepayPlus may (without prejudice to other action) direct a Network operator or Level 1 provider which holds a retention to make refunds from the retention. In such cases, the relevant party will be responsible for any reasonable administration costs which the party with a retention incurs as a result of making payments on its behalf. Those costs may be deducted from the retention after all refunds are made.
- 4.9.3 The obligation on any party holding a retention to make refunds on behalf of a party in breach of the Code shall end if PhonepayPlus has not issued a direction as set out in paragraph 4.9.2 by four months after the completion of the adjudication process, provided that any reasonable time for any appeals has also passed.
- 4.9.4 If funds from a retention remain following the payment of all refunds, or after the three month period mentioned above, it must be used to pay in whole or in part any outstanding PhonepayPlus fines or administrative charge owed by the party in breach.

4.10 Administrative charge

- 4.10.1 A relevant party found to be in breach of the Code may be invoiced for the administrative and legal costs of work undertaken by PhonepayPlus ('the administrative charge').
- 4.10.2 Non-payment of the administrative charge within the period specified by PhonepayPlus will be considered a breach of the Code and may result in further sanctions and/or legal action.
- 4.10.3 PhonepayPlus may instruct a relevant Network operator or Level 1 provider to retain revenue, and/or not to provide further numbers, until the administrative charge is paid.
- 4.10.4 PhonepayPlus may direct the relevant Network operator or Level 1 provider to pass any previously retained funds to it up to the value of the administrative charge owed.
- 4.10.5 If a relevant party considers that an administrative charge invoiced to it is excessive it may challenge the level of the administrative charge by requesting a review in accordance with the process set out at paragraph 4.7 above.

4.11 Oral Hearings

- 4.11.1 A relevant party or PhonepayPlus can require that an oral hearing by a Tribunal takes place whenever PhonepayPlus has made an allegation that the relevant party has breached the Code or within 10 working days of the sending of a Tribunal decision to the relevant party. The matter will then be considered afresh.

4.11.2 An oral hearing may also be required by a relevant party following a review (applied for or carried out) in respect of prior permission or the attachment of conditions, to it or in the circumstances set out in paragraph 4.8.6 above.

4.11.3 Details of the procedures governing oral hearings are set out in '*Code Annex 3: The Code Compliance Panel and Tribunals*' which is published on the PhonepayPlus website, and in Guidance which is also published on the PhonepayPlus website.

4.12 Appeals

4.12.1 Level 1 and Level 2 providers, applicants for prior permission, associated individuals and Network operators ('appellants') may, after an oral hearing at which the appellant or his representative has appeared, appeal to the Independent Appeals Body ('IAB') against Tribunal decisions and adjudications (other than any adjudication by consent).

4.12.2 PhonepayPlus may also appeal to the IAB against Tribunal decisions and adjudications (other than any adjudication by consent).

4.12.3 Appeals may be made on the following grounds:

- (a) The disputed decision was based on error of fact;
- (b) The disputed decision was wrong in law; or
- (c) The Tribunal exercised its discretion incorrectly in reaching its decision.

4.12.4 The powers and procedures of the IAB are set out in '*Code Annex 4: The Independent Appeals Body*' which is published on the PhonepayPlus website.

4.13 Publication of Decisions

All adjudications, whether reached by written or oral process, will be published by PhonepayPlus and may identify any party. Adjudications will be published on the PhonepayPlus website and in any other way that PhonepayPlus shall determine.

PART FIVE
FRAMEWORK

5.1 Delegation of powers

5.1.1 The Board may delegate its powers to employees of PhonepayPlus and/or the Code Compliance Panel ('CCP') as it sees fit. Delegated powers may not be sub-delegated.

5.2 Reach of the Code

5.2.1 'Information society services'

(a) Some PRS may also be 'information society services' (see definition at paragraph 5.3.22 below). Information society services are required to be regulated in accordance with Directive 2000/31/EC on Electronic Commerce ('the E-Commerce Directive'). The Code may be enforced in respect of such services when the Level 1 or Level 2 provider responsible for the provision of those services under the Code is:

- i. established in the United Kingdom; or
- ii. established in another EEA member state, and the services are being accessed or may be accessed from within the United Kingdom.

(b) If a Level 1 or 2 provider's establishment and provision of such services fall within paragraph 5.2.1(a)(ii) above, the Code may only be enforced where the conditions set out in Article 3.4 (read, as appropriate, in accordance with Article 3.5) of the E-Commerce Directive are satisfied.

5.2.2 Nothing in the Code shall be construed as requiring any person, or as enabling PhonepayPlus to require any person, to provide any information in circumstances where:

- (a) the requiring of that person to provide information would be, or
- (b) the making of provision in the Code for PhonepayPlus to be able to require that person to provide that information would have been,

contrary to Directive 2000/31/EC including Article 15 thereof.

5.3 Definitions

Framework

5.3.1 'Premium rate service' has the meaning set out in Section 120 of the Communications Act 2003 ("the Act").

Subsection (7) provides:

"A service is a premium rate service 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."

Subsection (8) provides:

"A service falls within this subsection if its provision consists in:

- (e) the provision of the contents of communications transmitted by means of an electronic communications network;
- (f) 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."

Subsection (14) provides:

"References in this section to a facility include, in particular, references to:

- (g) a facility for making a payment for goods or services;
- (h) a facility for entering a competition or claiming a prize; and
- (i) a facility for registering a vote or recording a preference."

5.3.2 'Controlled premium rate service' has the meaning set out in and is to be construed in accordance with the Condition issued by Ofcom under Section 120 of the Act effective from time to time. At the date of publication of this Code the Condition provides that 'Controlled premium rate service' means:

“a premium rate service (other than a service which is only accessed via an International Call or a service which is delivered by means of an Electronic Communications Service and is provided by the person who is also the provider of the Electronic Communications Service) which falls within one or more of the following categories:

- (i) until the Effective Date, the service is obtained through a Special Services Number (except an 0843/4 number), and the charge for the call by means of which the service is obtained or the rate according to which such call is charged is a charge or rate which exceeds 5 pence per minute for BT customers inclusive of value added tax; or
- (ii) from and including the Effective Date, the service is obtained through a PRS Number and the Service Charge for the call by means of which the service is obtained is a rate which exceeds 5.833 pence per minute or 5.833 pence per call, exclusive of value added tax;
- (iii) the service is obtained other than through a Special Services Number, or a PRS Number, and the charge for the call by means of which the service is obtained or the rate according to which such call is charged is a charge or rate which exceeds 10 pence per minute inclusive of value added tax (and which also includes, for the avoidance of any doubt, a service delivered by means of an Electronic Communications Service which is charged by means of a Payment Mechanism and for which the charge exceeds 10 pence inclusive of value added tax);
- (iv) the service is a Chatline Service;
- (v) the service is Internet Dialler Software operated; or
- (vi) the service is a Sexual Entertainment Service.”

5.3.3 ‘General conditions of entitlement’ means the general conditions set by Ofcom pursuant to Section 45 of the Act which are applicable at the material time.

‘Total metering and billing system’ has, for the purposes of this Code, the same meaning as in Condition 11 of the general conditions of entitlement.

‘A lead network’ means an electronic communications network provider who is obliged to obtain approval for its total metering and billing system in accordance with Condition 11 of the general conditions of entitlement.

5.3.4 Subject to paragraphs 5.3.5 and 5.3.6 below, ‘Network operator’ means, for the purposes of this Code in respect of any PRS, a person who falls within Section 120(10) or Section 120(11) of the Act and:

- (a) who is a lead network; or
- (b) has a direct network connection and has direct billing arrangements in respect of that connection with the lead network; or
- (c) through arrangements made with a lead network, provides electronic communication services to the public and bills the public directly, and can perform or can require the performance of all the obligations that are set out in Section 3 of the Code; or
- (d) if no-one falls within (a), (b) or (c) above, the Network operator shall be the person who falls within Section 120(10) or (11) and, in respect of the PRS or services in question, provides or has, in the reasonable opinion of PhonepayPlus, the closest or most substantial connection with the provision of the communications network used for the provision of the premium rate service.

A direct network connection exists when a person provides switching equipment (to currently accepted industry standards), which by interconnection arrangements made between that person and the lead network, enables the conveyance of signals between the lead network and that person.

- 5.3.5 If a PRS is provided which is accessible only through the use of VoIP technology or in any other form so that, in respect of that service, there is no Network operator identifiable under paragraph 5.3.4 above, then the Network operator, for the purposes of this Code, is the person who provided the facility through which the user gained access to the service.
- 5.3.6 If the primary function of a person is to aggregate or collate content of services for third parties and/or acquire network access through wholesale arrangements which it then provides to third parties on a retail basis, that person is a Level 1 provider for the purposes of this Code and is not a Network operator, unless there is no other Network operator identifiable who is involved in the provision of the relevant premium rate service.

Level 1 and Level 2 providers

- 5.3.7 Any person who falls within Section 120(9)(a)-(d) or Section 120(10) or (11) of the Act who is engaged in the provision of a PRS ("the relevant PRS") and who is not a Network operator in respect of that service may be a Level 1 and/or Level 2 provider.
- 5.3.8 (a) A Level 1 provider is a person who provides a platform which, through arrangements made with a Network operator or another Level 1 provider, enables the relevant PRS to be accessed by a consumer or provides any other technical service which facilitates the provision of the relevant premium rate service.

- (b) A Level 2 provider is the person who controls or is responsible for the operation, content and promotion of the relevant PRS and/or the use of a facility within the PRS.
- (c) In respect of any relevant PRS where PhonepayPlus considers there to be a material doubt whether a person involved in any way in the provision of the service and/or who receives directly or indirectly any part of the charges made to the consumer for provision of the relevant PRS is a PRS provider falling within (a) or (b) above PhonepayPlus shall determine whether that person is a PRS provider and whether the person is a Level 1 or Level 2 provider with reference to Guidance which it shall issue from time to time.

General

- 5.3.9 'Associated individual' is any sole trader, partner or director or manager of a premium rate service provider, anyone having day to day responsibility for the conduct of its relevant business and any individual in accordance with whose directions or instructions such persons are accustomed to act, or any member of a class of individuals designated by PhonepayPlus.
- 5.3.10 'Board' means the board of directors of PhonepayPlus.
- 5.3.11 'Call' means any communication which passes through an electronic communications network whether initiated by a user or initiated by or facilitated by a PRS provider and 'caller' shall be construed accordingly.
- 5.3.12 'Chair of the Independent Appeals Body' is the person, being a qualified solicitor or barrister of not less than 10 years' standing, appointed to be Chair of the Independent Appeals Body.
- 5.3.13 'Chatline service' has the meaning set out in the Condition issued by Ofcom under Section 120 of the Act effective from time to time.
- 5.3.14 'Child' or 'Children' means a person/people under 16 years of age.
- 5.3.15 'Compliance audit' is the process of thorough examination of the internal procedures a PRS provider has in place to ensure that its obligations under the Code are complied with.
- 5.3.16 'Connected company or person' means any company or person connected within the meaning of Section 839 Income and Corporation Taxes Act 1988.
- 5.3.17 'Counselling service' means a service whereby a caller is seeking advice in relation to a personal problem such as marital, relationship, emotional and other such personal problems. The service may consist of actual advice as to the personal problem or information as to where the caller may obtain advice.

- 5.3.18 'Data controller' means a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed (as set out in the Data Protection Act 1998).
- 5.3.19 'Electronic communications network' has the meaning given to it in Section 32(1) of the Act.
- 5.3.20 'Electronic communications service' has the meaning given to it in Section 32(2) of the Act.
- 5.3.21 'Independent Appeals Body' is a body of persons, independent of PhonepayPlus, appointed to hear appeals after an oral hearing has taken place in respect of Tribunal decisions and adjudications (other than any adjudication by consent).
- 5.3.22 'Information society services' are any services normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services (as defined in Article 1.2 of Directive 98/34/EC as amended by Directive 98/48/EC), subject to the exceptions set out in the Directive.
- 5.3.23 'Live entertainment service' means a service which allows the caller to speak live with a live operator or one or more other consumers for entertainment purposes, including, but not limited to, one-to-one Chatline (sexual or non-sexual), psychic or tarot services.
- 5.3.24 'Ofcom' is the Office of Communications. References to Ofcom and to any statutory authority or other regulatory body include any replacement successor bodies.
- 5.3.25 'Person' means any natural or legal person.
- 5.3.26 'Personal data' means data which relate to a living individual who can be identified (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual (as set out in the Data Protection Act 1998).
- 5.3.27 'Personal information' is any information about a person, including but not limited to names, addresses, telephone numbers, other contact details, occupations and other personal details.
- 5.3.28 'PhonepayPlus' means the employees of PhonepayPlus save where the context otherwise requires.
- 5.3.29 'PhonepayPlus Register' is the online database maintained by PhonepayPlus which contains such information about PRS providers as PhonepayPlus may require for the purpose of efficient and effective regulation of PRS.

- 5.3.30 'Premium rate service provider' means any Network operator, Level 1 or Level 2 provider.
- 5.3.31 'Professional advice service' means a service that consists of the provision of specialist advice to consumers, that is, advice which requires knowledge and skill obtained through extensive study and specialised training (including, but not limited to, that required of doctors, lawyers, vets and accountants) and in relation to which membership of a professional body is normally required.
- 5.3.32 'Promotion' means anything where the intent or effect is, either directly or indirectly, to encourage the use of PRS, and the term promotional material shall be construed accordingly.
- 5.3.33 'Remote gambling service' means a PRS which enables gaming or betting to take place remotely, that is delivered at a distance electronically or by voice telephony not including prize competition services or betting tipster services.
- 5.3.34 'Retention' is an outstanding payment due to a Network Operator, Level 1 or Level 2 provider which has been retained by a Network Operator, Level 1 or Level 2 provider in response to a PhonepayPlus direction. 'Retain', 'retaining' and 'retained' shall be construed accordingly.
- 5.3.35 "Service Charge" has the meaning set out in the Condition issued by Ofcom under section 120 of the Act effective from time to time."
- 5.3.36 'Sexual entertainment service' has the meaning set out in the Condition issued by Ofcom under section 120 of the Act effective from time to time.
- 5.3.37 'Special condition' means a condition imposed under paragraph 3.11.1.
- 5.3.38 'Special Services Number' means a UK telephone number beginning 08.
- 5.3.39 'Subscription services' are services which incur a recurring premium rate charge.
- 5.3.40 'VAT' means value added tax at the rate applicable from time to time.
- 5.3.41 'Virtual chat services' are not live conversation services but enable two or more users to exchange separate messages, whether by recorded voice, text or pictures, while engaged in the service.
- 5.3.42 'Withhold' refers to payments held by a Network Operator or Level 1 provider in accordance with the 30 day rule, as set out in paragraph 3.5.1.

CODE ANNEX 1 – GENERAL FUNDING ARRANGEMENTS

1. General provisions

- 1.1 Information obtained by PhonepayPlus under these provisions shall be confidential, save that PhonepayPlus may share it with Ofcom to the extent that is reasonable for the proper regulation of PRS.
- 1.2 For the purposes of these funding provisions, the following definitions shall apply:
 - (a) 'Outpayments' are sums payable by Network operators to Level 1 or Level 2 providers in respect of revenue generated by PRS.
 - (b) 'Revenue' is the sum received by a Network operator in respect of or attributable to the provision of a PRS, gross of any sum that may be due to third parties arising out of the provision of the said service.
 - (c) 'Financial year' means the financial year of PhonepayPlus as set from time to time, which at the date of publication of this edition of the Code is 1st April to 31st March.
 - (d) 'Own service' is any PRS provided by a Network operator operating as a Level 2 provider itself or through any associated company or any connected company or person.
- 1.3 The provisions of the Code apply to this Annex. In particular the General Responsibilities in paragraphs 3.1.4 and 3.1.5 of the Code are applicable to the funding provisions of this Annex.

2. Timetable

- 2.1 PhonepayPlus will publish a timetable for its annual budgetary and forecasting procedures as set out below. It will specify the dates by which various activities should be carried out by Network operators and/or PhonepayPlus.
- 2.2 PhonepayPlus may, upon giving reasonable notice to interested parties, vary some or all of the dates set out in the timetable.

3. Budget and activity plan

- 3.1 As far as is practicable, by 31 December each year, PhonepayPlus will publish a proposed budget and activity plan for the forthcoming financial year for wide consultation and scrutiny.
- 3.2 Having considered the comments received under paragraph 3.1, PhonepayPlus will review and then present its proposed budget and activity plan to Ofcom for comment and approval.

- 3.3 PhonepayPlus will then announce its proposed budget, specifying the amount it intends to collect ('the Budgeted Figure') for the forthcoming financial year through the levy, as defined below, having regard to its available and required reserves.

4. Forecasting

- 4.1 Network operators may provide PhonepayPlus by the date specified in the timetable with a forecast of the value of outpayments (gross of the levy – see Section 5 below) to be made by the relevant Network operator and of any own service revenue anticipated during the forthcoming financial year and such forecast shall be used for calculating levy payments under paragraph 6.2 below.
- 4.2 In the absence of a forecast in accordance with paragraph 4.1 above, or by agreement PhonepayPlus will issue a direction to the Network operator requiring the provision of a forecast and/or may make its own forecast of the outpayments likely to be made by the relevant network operator and of own service revenue during the forthcoming financial year. This will be based on such information as PhonepayPlus may have concerning the Network operator's outpayments and own service revenue in previous years, information received from other Network operators and PhonepayPlus' own knowledge of the market and the industry.
- 4.3 Own service revenue forecasted will be multiplied by the industry standard outpayment margins as determined by PhonepayPlus in order to identify the Network operators' receipts as a Level 1 or Level 2 provider for the purposes of this Annex ("own receipts").
- 4.4 Where a Network operator has provided PRS over its own electronic communications network or service for a period longer than 3 months in the first financial year of service provision, PhonepayPlus will forecast for the following financial year the outpayments likely to be made and the likely level of own service revenue by reference to the revenue likely to be generated by such services multiplied by the industry standard outpayment margins as determined by PhonepayPlus.
- 4.5 Where a Network operator intends to provide PRS over its electronic communications network or service and has not previously done so or has not done so for more than 3 months in the current financial year, no forecast will be made and payment of the levy will be made in accordance with paragraph 6.4 below.

5. Levy

- 5.1 PhonepayPlus will determine the proportion of every outpayment and own receipts that need to be retained and paid to PhonepayPlus ('the levy'). PhonepayPlus may from time to time vary the rate or rates at which the levy is set to ensure that it continues to receive adequate funding to carry out its activities as the regulatory agency for PRS.

- 5.2 PhonepayPlus will advise Network operators (in writing) and other interested parties (by publication on its website) of the levy to be applied to outpayments from time to time and issue directions accordingly. The levy will be expressed as the proportion of each outpayment and own receipt that must be retained (e.g. 0.XX pence per £1).
- 5.3 Following receipt of notification under paragraph 5.2 above, Network operators must inform everyone to whom they make outpayments of the level at which the levy has been set and that they (the Network operator) will deduct the levy at source from every outpayment that is made and pay the deducted amount to PhonepayPlus.
- 5.4 Network operators are responsible for deducting the levy notified under paragraph 5.2 from every outpayment that they make. Where a Network operator fails to deduct the levy, the Network operator will remain liable to PhonepayPlus as though it had in fact deducted the levy.

6. Payments

- 6.1 In accordance with the timetable, PhonepayPlus will advise each Network operator whose outpayments and/or own service revenue for the forthcoming year have been forecast under paragraph 4 of this Annex, of the total amount that the Network operator is expected to collect in the forthcoming financial year by the application of the levy notified for the time being under paragraph 5.2 ("its contribution").
- 6.2 Each Network operator's contribution will be calculated by multiplying its forecasted outpayments and own service receipts for the forthcoming year by the applicable levy for the time being (e.g. £1,000,000 x 0.XX).
- 6.3 Upon being advised of its contribution by PhonepayPlus pursuant to paragraph 6.1 above, a Network operator must pay its contribution to PhonepayPlus by 12 equal monthly instalments payable by the last day of each month commencing on the following 31st March. Wherever possible, Network operators should arrange to make payments by electronic transfer.
- 6.4 Where a Network operator falls within paragraph 4.5 above the Network operator will, during the balance of the first financial year of service provision, make monthly payments to PhonepayPlus calculated by multiplying its actual outpayments each month by the applicable levy.
- 6.5 All invoices provided by PhonepayPlus to Network operators will add a charge for VAT where appropriate at the applicable rate.
- 6.6 All Network operators must provide PhonepayPlus with quarterly reports upon the actual levels of outpayments that they are making as soon as is reasonably practicable following 30th June, 30th September, 31st December and 31st March in each year.

- 6.7 Network operators may, in exceptional circumstances, seek PhonepayPlus' agreement to a recalculation of their forecasts and the consequential payments required of them under paragraph 6.3 above.

7. Late payment

- 7.1 If a Network operator fails to pay to PhonepayPlus monies due in accordance with the timescales set out in this Code and/or in accordance with directions issued by PhonepayPlus, the Network operator will be liable to pay interest in respect of such monies at the rate of 3% above the prevailing base rate for the time being of HSBC plc from the date on which the relevant payment became due

8. Adjustments

- 8.1 At the end of each year and in any event by no later than 30th April, Network operators must provide PhonepayPlus with a statement of the actual aggregate outpayments that they have made, and the revenue that they have received in their capacity as a Network operator and their own service revenue during the preceding year. The statement must identify all cases in which the Network operator has provided PRS in respect of which there is no identifiable outpayment (see paragraph 10 of this Annex). Where it has supplied no such services, the Network operator must state this in the statement.
- 8.2 Following receipt of the statement referred to in paragraph 8.1 above or an auditors' report pursuant to paragraph 9.1 below, PhonepayPlus will determine in respect of each Network operator the aggregate amount that ought to have been collected pursuant to paragraph 5.4 above and the aggregate amount that has been paid pursuant to paragraph 6 of this Annex by that Network operator.
- 8.3 Where a Network operator's payment to PhonepayPlus based on forecast outpayments exceeds actual outpayment levels, the Network operator will be entitled to have the excess amount repaid. PhonepayPlus will recalculate this sum based on information provided under paragraph 8.2 above.
- 8.4 Where PhonepayPlus concludes, pursuant to paragraph 8.2, that a Network operator ought to have collected an amount in excess of that actually paid to PhonepayPlus, the Network operator will be liable to PhonepayPlus for the difference which will be payable forthwith on demand.
- 8.5 PhonepayPlus will not make a calculation pursuant to paragraph 8.2 in respect of a Network operator which has not provided a declaration of its actual outpayments for the entire financial year pursuant to paragraph 8.1 above.

9. Auditors

- 9.1 The PhonepayPlus auditor for the time being ('the Auditors') have the power to request from a Network operator direct confirmation by audited statement of the actual level of outpayments it made and the actual revenue it retained in respect of PRS supplied by it as a Network operator during any relevant period. Such audited statement may be provided (by arrangement) by the Auditors, or by a Network operator's auditors who must provide such a statement within such reasonable time as the Auditors may request and/or PhonepayPlus may direct.
- 9.2 Network operators will not be subject to a request under paragraph 9.1 above more than once in every four years, save where previous audited statements have revealed significant inconsistencies or where information provided to or obtained by PhonepayPlus or the Auditors may give the Auditors cause for concern.
- 9.3 A Network operator or a Network operator's auditors shall, at the request of the Auditors, supply such further information and/or explanation of such matters as the Auditors may consider necessary to satisfy themselves as to the accuracy of the Network operator's figures in such a format as may be prescribed (including by further statement).
- 9.4 If an auditors' report obtained under paragraph 9.1 above indicates that the actual outpayments made by a Network operator during the relevant year were different from those declared under paragraph 8.1 above, the Auditors will make such adjustments as are necessary pursuant to paragraph 8.
- 9.5 If the Auditors advise it to be necessary for the proper administration of this part of the Code, PhonepayPlus may direct that a Network operator subjects itself to assessment by an agreed independent auditor for the purpose of establishing whether the Network operator has fully complied with its obligations under this part of the Code. The costs of any such assessment shall be borne by PhonepayPlus unless the independent auditor concludes that the Network operator was not in all material respects complying with its obligations under this part of the Code or where the independent auditor was unable to reach any conclusion because of non-co-operation by the Network operator, in which case the costs will be borne by the Network operator.
- 9.6 Where an audit conducted under paragraphs 9.1 or 9.5 above has revealed material inconsistencies in the information previously supplied to PhonepayPlus by a Network operator, PhonepayPlus may take enforcement action under the Code.

10. No identifiable outpayment

- 10.1 Where PhonepayPlus has received notification under paragraph 8.1 above that a Network operator has supplied service(s) for which there is no identifiable outpayment, it may direct the relevant Network operator to explain the reasons for the lack of any identifiable outpayment(s) and/or to supply details of the level of revenue it has generated in respect of those services.
- 10.2 If PhonepayPlus considers it appropriate to do so, it will direct the Network operator to treat the revenue it has generated in respect of such service(s) or such a portion of that revenue as PhonepayPlus may determine as though it were in fact an outpayment.

CODE ANNEX 2 – SPECIAL CONDITIONS

1. Special conditions

1.1 The conditions referred to in paragraph 3.11.1 are:

- (a) requirements as to contractual arrangements and the management of roles across a chain of providers in relation to a high risk service;
- (b) requirements as to the mechanism and processes used to deliver services to, and to enable exit from services by, consumers;
- (c) requirements to ensure that there is an adequate technical quality to the provision of the high risk service;
- (d) the specification of maximum service charges, length of calls and specified action to be taken once those limits have been met;
- (e) specified action required in order to and as a consequence of verifying or a failure to verify the age of callers;
- (f) steps to be taken to ensure that a high risk service is not used by or promoted in such a way as to make it particularly attractive to persons under the age of 18 years old or younger;
- (g) the denying of access by users under the age of 18 years old to a high risk service or by all users where the relevant handset is not verified as being owned by someone aged 18 years old or over;
- (h) promotional material aimed at persons aged 18 or younger not to be displayed or presented in close proximity to or within promotional material aimed at adults;
- (i) required recording equipment of voice based high risk services and the use and standard of that equipment;
- (j) the retention of such recordings and their provision with related information to PhonepayPlus;
- (k) information that is required to be given to callers in promotional material or at various stages before and during provision of a high risk service (including as to receipts);
- (l) Callers not being charged more than once for services they have already received;
- (m) the provision of defined information to PhonepayPlus and the intervals at which it is to be given and the manner to which it is provided;

- (n) requirements for caller agreement before a high risk service proceeds before the caller is charged;
- (o) membership of professional bodies, training and supervision to have been and be undertaken and qualifications, licences and insurance required to be held by relevant providers or relevant individuals engaged in the provision of the high risk services and the evidence of such that may need to be provided to PhonepayPlus;
- (p) compliance with the requirements of relevant regulators and professional bodies;
- (q) the monitoring of the use of high risk services and in particular the information to be given to callers and action to be taken in the course of such monitoring;
- (r) PhonepayPlus' access to premises in order to monitor the compliance of a high risk service with the Code and any relevant special conditions;
- (s) facilitate the carrying out by PhonepayPlus or an approved third party of an audit of compliance of a high risk service with the Code and any relevant special conditions;
- (t) the retention of revenue generated from a high risk service;
- (u) the lodging with PhonepayPlus, prior to commencement of a high risk service, of a legally binding document ("a bond") by which a third party guarantees a relevant provider's payment of sums, as security for meeting compensation claims in relation to unauthorised use of the service;
- (v) the relevant provider's handling and payment of such claims and the ceasing of a high risk service if one or more claim is not paid in accordance with an award made by a legally qualified member of the CCP (the process for which may be set out in the condition);
- (w) requirements as to callers' rights to refunds and information to be provided to callers in relation to refunds;
- (x) providers of higher risk services to notify PhonepayPlus at commencement of such services and provide any related information required by PhonepayPlus within a specified time period.

CODE ANNEX 3: The Code Compliance Panel and Tribunals

1. Code Compliance Panel

1.1 PhonepayPlus has established a Code Compliance Panel (“CCP”) which comprises:

- (a) The Chair of the CPP who is a qualified barrister or solicitor with not less than 15 years relevant experience; and
- (b) Two legally qualified members who are qualified barristers or solicitors with not less than 10 years relevant experience; and
- (c) Up to ten lay members with adjudicatory experience; and
- (d) Up to three members of the PhonepayPlus Board entitled to undertake adjudicatory functions.

1.2 The Chair of the CCP is appointed by the PhonepayPlus Board, and reports to the Board on the work of Tribunals. The legally qualified members and lay members are appointed by the Board in consultation with the Chair of the CCP.

1.3 The PhonepayPlus Board has delegated to the CCP the function of undertaking adjudications or reviews of adjudications (including a review of any sanction or administrative charge imposed) in respect of alleged breaches of the PhonepayPlus Code of Practice currently in force (‘the Code’) and reviews of determinations made by PPP in relation to prior permission, including the imposition of conditions upon which prior permission is granted.

2. Tribunals

2.1 A Tribunal consists of three members comprising:

- (a) The Chair of the CCP or such of the two legally qualified CCP members as he shall nominate (who shall sit as Chair of that Tribunal); and
- (b) One person drawn from the lay members of the CCP and one person drawn from the PhonepayPlus Board members of the CCP.

- (c) The Tribunal may consist of two lay members of the CCP sitting with the Chair of that Tribunal and no PhonepayPlus Board member if the Chair of the PhonepayPlus Board so consents in any particular case.

3. Oral Hearings

- 3.1 Any relevant party may, by notice in writing, require that an oral hearing be held:
- (a) after a review (applied for or carried out) in respect of prior permission or the attachment of conditions to it;
 - (b) where the party has received communication from PhonepayPlus alleging a breach or breaches of the Code
 - (c) in respect of any adjudication made by a Tribunal without an oral hearing; or
 - (d) where it is the Tribunal's intention to prohibit a relevant party or associated individual from involvement in or promotion of any or all service types for a defined period, or from contracting with another party (see paragraphs 4.8.2(f), 4.8.2(g), 4.8.2(h) and 4.8.6). Oral hearings may be applied for in accordance with paragraphs 4.11.1-4.11.4. Where such an application is made under paragraph 4.11.1 the relevant party shall demonstrate that there are exceptional circumstances which warrant an oral hearing
- 3.2 Within any written application for an oral hearing, the relevant party must provide details of the allegation or relevant decision and set out clearly the applicant's case in respect of it.
- 3.3 Such written notice may be provided to PhonepayPlus at any time up to 10 working days after receipt of a decision, or at any time prior to an adjudication where the oral hearing is required following an allegation of a breach of the Code.
- 3.4 Oral hearings shall take place before a Tribunal appointed for the purpose.
- 3.5 The relevant party is entitled to appear at the oral hearing in person or to be represented. PhonepayPlus will attend the oral hearing to present its case and may instruct a representative to act on its behalf.
- 3.6 The enforcement of sanctions imposed pursuant to an adjudication is not automatically suspended by written notice requiring an oral hearing. The relevant party may apply in writing to the Chair of the oral hearing Tribunal ('the Chair') setting out the grounds on which the sanction should be suspended. Unless the Chair considers that there are exceptional reasons in the particular case to grant the application, he will only do so if he is satisfied

that not to do so would give rise to undue hardship, and that to do so would not give rise to any risk of public harm. If a relevant party has not been granted a suspension of sanction but has failed to comply with the sanction, the Chair may stay the oral hearing.

- 3.7 The Chair shall give such directions as he considers necessary for a fair and speedy hearing.
- 3.8 If the relevant party is neither present nor represented at the hearing, and the Tribunal has no cause to believe there is good reason for the relevant party's absence, the matter shall be determined by the Tribunal as it sees fit in the absence of the relevant party.
- 3.9 Where a relevant party or associated individual, as the case may be, applies for an oral hearing but the relevant party or associated individual fails, without good cause, to appear (in person or through a representative) at an oral hearing which is properly established, then the oral hearing Tribunal may make such finding as it considers fit.
- 3.10 The Chair shall generally conduct the pre-hearing process and the hearing itself as set out in the guidelines published on the PhonepayPlus website. However he shall have the power to conduct the pre-hearing process and the hearing as he sees fit according to the interests of justice, including deciding to adjourn the hearing.
- 3.11 The Chair may require the provision of security by the relevant party for the administrative charges of PhonepayPlus.
- 3.12 The Chair shall have the power to strike out a case in the event of serious or persistent failure to comply with case management directions which have been ordered.
- 3.13 The Tribunal shall be entitled to consider and act upon confidential information without directly or indirectly disclosing to the applicant (or PhonepayPlus as the case may be) the source of that information, provided that the other party is given a reasonable opportunity to rebut its substance.
- 3.14 A sound recording shall be made of the oral hearing. Recordings will be made available to PhonepayPlus and the applicant.
- 3.15 An oral hearing shall be conducted in private, unless the applicant or PhonepayPlus otherwise requires. If an oral hearing is in public, either party may request that any part of the hearing be conducted in private and any such application shall itself be heard in private.
- 3.16 The oral hearing Tribunal shall decide the matter entirely afresh. For the avoidance of doubt, the Tribunal:

- (a) may impose a greater or lesser sanction than that originally imposed;
- (b) may reverse a decision to issue or refuse a prior permission;
- (c) may set such conditions on a prior permission as it sees fit;
- (d) must agree to impose such sanctions, prior permission and/or conditions, and administrative charges or otherwise dispose of the matter as may be jointly agreed by PhonepayPlus and the applicant and which has been agreed by the Chair of the CCP or, if he is unavailable, by one of the legally qualified CCP members ('adjudication by consent').

3.17 The Tribunal shall, as soon as is practicable after the hearing, provide a reasoned written decision. All decisions will be published by PhonepayPlus and may identify any Network Operator, Level 1 or Level 2 provider concerned.

CODE ANNEX 4: Independent Appeals Body

1 Appeals

- 1.1 A relevant party (in this Annex referred to as an 'appellant') may, after an oral hearing at which the appellant or its representative has appeared, appeal to the Independent Appeals Body ('IAB') against decisions and adjudications (other than any adjudication by consent) of the Tribunal (in this Annex referred to as the "Tribunal").
- 1.2 PhonepayPlus may appeal to the IAB against Tribunal decisions and adjudications (other than any adjudication by consent).
- 1.3 Appeals may be made on the following grounds:
 - (a) the disputed decision was based on error of fact
 - (b) the disputed decision was wrong in law, or
 - (c) the Tribunal exercised its discretion incorrectly in reaching its decision.
- 1.4 In order to institute an appeal, the appellant must provide a written notice of appeal setting out the grounds upon which the appeal is made and the facts and matters upon which it is based, to be received by the clerk to the IAB ('the Clerk') within 20 working days of the issue of the Tribunal adjudication or determination which is the subject of the appeal.
- 1.5 The notice of appeal must be accompanied by:
 - (a) the written adjudication
 - (b) the case bundle used at the Tribunal oral hearing
 - (c) a security deposit of £5,000 or an application (to be determined by the Chair of the IAB) to waive or reduce such a security deposit setting out the grounds for such waiver or reduction
 - (d) a description of any new evidence upon which the appellant intends to rely and which, for good reason, was previously unavailable
 - (e) if the notice of appeal and/or any necessary accompanying documents are being provided to the Clerk more than 20 working days after the issue of the Tribunal adjudication, the appellant must also provide an application (to be determined by the Chair of the IAB) for the appeal to proceed, setting out the reasons for the delay and the grounds for such application.
- 1.6 If an appellant or his representative failed to appear in person at an oral hearing for good reason, but the oral hearing proceeded in his absence and PhonepayPlus has refused to permit a further oral hearing, the appellant may apply to the Chair of the IAB to request him to require that PhonepayPlus holds a further oral hearing.
- 1.7 The procedures which follow are those laid down by the IAB and are under its control.

2 The procedures of the Independent Appeals Tribunal

- 2.1 The IAB is able to hear any appeal lodged with the Clerk to the IAB ('the Clerk') in accordance with the provisions of paragraph 4.12 of the Code.
- 2.2 The Clerk shall forthwith, upon receipt of the notice of appeal, provide a copy of it and of the accompanying documents to the Chair of the IAB ('the Chair') and to PhonepayPlus.
- 2.3 In the event that an appellant was, for good reason, unable to attend a Tribunal oral hearing but the oral hearing proceeded in his absence, then the appellant may apply to the Chair of the IAB. The Chair shall obtain the views of the Chair of the hearing panel in writing, or in a hearing at which the appellant may also attend. The Chair may require that PhonepayPlus provides a further oral hearing. The Chair shall have the discretion to award the costs of the application.

3 The Appeal Tribunal

- 3.1 Upon receipt of a notice of appeal, the Chair shall appoint an Appeal Tribunal, consisting of three members, to deal with the appeal. The Chair or Deputy Chair (if any) shall be the Chair of the Tribunal ('the Tribunal Chair').
- 3.2 If the appellant has applied for a waiver or reduction in respect of the provision of the required security deposit and for the appeal to proceed despite the notice of appeal having been lodged out of time, then as soon as reasonably practicable, the Tribunal Chair shall convene a hearing at which any such application shall be considered and at which PhonepayPlus may be heard.
- 3.3 In respect of an application for a waiver of the requirement to provide the security deposit, the Tribunal Chair shall waive the deposit (or reduce the required level of security) if he determines that there appears to be plain merit in the grounds of appeal and that exceptional hardship will result from the requirement that the security be provided.
- 3.4 PhonepayPlus shall be entitled to apply to the Tribunal Chair for a determination that the appeal should not be permitted to proceed unless the security deposit is increased to a higher level and/or that a sum is lodged as security for costs. The Tribunal Chair may make such a determination entirely at his discretion.

- 3.5 In respect of an application for an appeal to proceed despite having been made late, the Tribunal Chair shall grant such application if he is satisfied that, in all the circumstances, it is fair to do so and he may impose such conditions as he sees fit as to the further conduct of the appeal or as to lodgment of security for costs.

4. Suspension of sanctions

- 4.1 The enforcement of sanctions imposed by PhonepayPlus is not automatically suspended by the provision of a notice of appeal. An appellant may apply to the Tribunal Chair, by written application to the Clerk, setting out the grounds upon which the sanction should be suspended. The Clerk will forthwith provide a copy to the Tribunal Chair. Unless the Tribunal Chair considers that there are exceptional reasons in the particular case to grant the application, he will do so only if he is satisfied that not to do so would give rise to undue hardship, and that to do so would not give rise to a significant risk of public harm. He shall seek the views of PhonepayPlus on those matters prior to making a decision and may convene a hearing to deal with such applications.
- 4.2 If an appellant has not been granted a suspension of sanction, and has not complied with the sanction imposed, the Tribunal Chair may stay the appeal on the application of PhonepayPlus or on his own volition. Appeals stayed for more than six months shall be automatically struck out and may not be recommenced.

5 Representation

- 5.1 The appellant shall be entitled to appear before the Appeal Tribunal in person and be represented.
- 5.2 PhonepayPlus shall attend as respondent to any appeal before the Appeal Tribunal and may instruct a representative to act on its behalf.

6 Pre-hearing process

- 6.1 The Tribunal Chair may, at his own discretion, or upon the application of either party to the appeal, convene a conference of the parties at which he may give such directions as he considers necessary for the fair and speedy hearing of the appeal.

Such directions may include, for example, directions for:

- (a) the admission of facts before the hearing
- (b) the disclosure of documents
- (c) the provision of expert reports

- (d) the exchange of written statements
- (e) the preparation of agreed bundles of documents
- (f) the submission and exchange of outline arguments.

6.2 Directions may be given as to the date by which such actions shall be taken.

6.3 For the avoidance of doubt, the Chair shall have the power to make directions for disclosure of documents and any other directions relating to evidence as though the appeal was a first hearing of the matter which is the subject of the appeal.

6.4 Not less than 10 working days before the date of the hearing of the appeal, the Clerk shall send written notice of the day, time and place of the hearing of the appeal to the last known address of the appellant and to PhonepayPlus.

6.5 Within five working days of receipt of the notice specifying the date of the hearing, both the appellant and PhonepayPlus shall each inform the Clerk in writing of whether they intend to appear at the hearing and the name of any person who will be representing them at the hearing.

7 The hearing

7.1 The appellant shall outline the grounds of his appeal and call such witnesses and refer to such documents as he is entitled to do.

7.2 PhonepayPlus shall then be entitled to respond to the case put by the appellant and to call such witnesses or present any written statements or other documents.

7.3 The appellant shall then be entitled to address the Appeal Tribunal.

7.4 A witness in person may be cross-examined by the other party in the appeal.

7.5 A witness who has been cross-examined may be re-examined.

7.6 The Tribunal Chair may question any witness at any time.

7.7 The Tribunal Chair shall have the power to vary any of these procedures at any time and to adjourn the hearing if satisfied that it is in the interests of justice to do so.

7.8 If the appellant is neither present nor represented at the hearing and the Appeal Tribunal has no cause to believe there is a good reason for the appellant's absence, the appeal may be dismissed.

8 Confidential information

The Appeal Tribunal shall be entitled to consider and act upon confidential information without directly or indirectly disclosing to the appellant (or PhonepayPlus as the case may be) the source of that information provided that the appellant (or PhonepayPlus) is given a reasonable opportunity to rebut its substance.

9 Recording

A sound recording shall be made of the proceedings before the Appeal Tribunal. Recordings will be made available to PhonepayPlus and the appellant.

10 Public hearing

An appeal hearing shall be conducted in private, unless the appellant or PhonepayPlus otherwise requires. If an appeal hearing is in public, either party may request that any part of the hearing be conducted in private and any such application shall itself be heard in private.

11 Costs of hearing

The Appeal Tribunal shall make such award for costs of the parties as it considers reasonable and proportionate, subject to a maximum of £30,000 (inclusive of disbursements and VAT). In addition, the Appeal Tribunal shall award the costs of the provision of the Tribunal as it sees fit, subject to a maximum of £25,000 (inclusive of VAT).

12 Powers of the Appeal Tribunal

12.1 The Appeal Tribunal shall consider all documentation and evidence produced at the Tribunal oral hearing and may, at its discretion, rehear any witness called before the Tribunal oral hearing and hear new evidence which for good reason was not available at the Tribunal oral hearing.

12.2 The Appeal Tribunal may:

- (a) Confirm, vary or rescind an adjudication or determination or any part of it made by a Tribunal and substitute such other finding as it considers appropriate.
- (b) Confirm, vary or rescind any sanction imposed by a Tribunal pursuant to its adjudication. For the avoidance of doubt, the Appeal Tribunal may impose a greater sanction (or sanction direction) than that imposed by a Tribunal, provided that such a sanction could have been imposed by a Tribunal.

(c) Confirm, vary or rescind the imposition of an administrative charge made by PhonepayPlus.

13 Decision and publication

The Appeal Tribunal shall, as soon as is practicable after the hearing, provide a reasoned written decision. This written decision shall be published by PhonepayPlus.

14 Further appeal

There is no further appeal through PhonepayPlus' procedures or those of the IAB.