

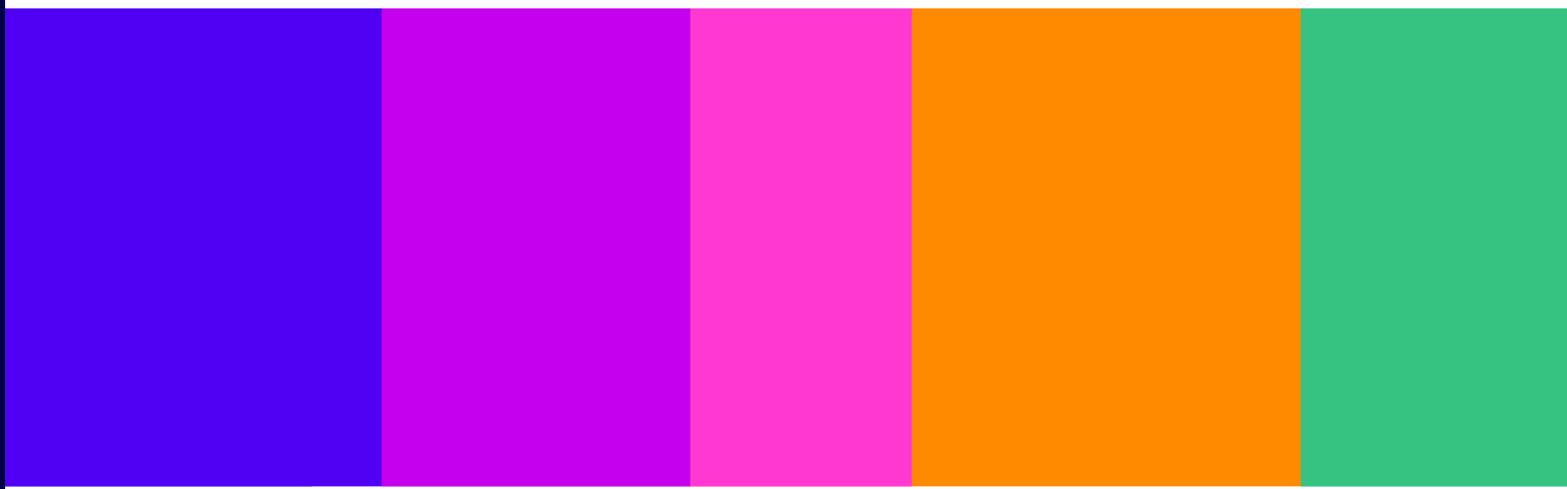
The future regulation of phone-paid services

Consultation on Ofcom's proposed Order under s122 of the Communications Act 2003 and proposed changes to the Premium Rate Services Condition

Consultation

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1. Overview

- 1.1 Consumers can access a range of interactive services via their landline and mobile phones, computers and digital TV. Where these services are charged for via the customer's telephone bill, they are known as phone-paid services. They include charity donations by text, music streaming, broadcast competitions, directory enquiries, voting on TV talent shows and in-app purchases. Those services are also commonly referred to as premium rate services (PRS).
- 1.2 Under the Communications Act 2003 (the Act), Ofcom has regulatory oversight for a subset of PRS known as Controlled PRS (CPRS). This role works as a statutory 'backstop', under which Ofcom first approves a 'Code' for the purposes of regulating CPRS. Under the current regulatory arrangements, Ofcom has designated the Phone-paid Services Authority (PSA), through approval of a Code, as the body to deliver the day-to-day regulation of the PRS market. In that role, the PSA regulates the content, promotion and overall operation of CPRS through the imposition of responsibilities and requirements on PRS providers.
- 1.3 The PSA's current Code, which has been in force since 5 April 2022, is entitled 'Code of Practice 2021 (Fifteenth Edition)' (Code 15).¹ The PSA has also made a number of subsequent modifications to Code 15. In our 'backstop' role, Ofcom has statutory powers to address any failures by PRS providers to comply with any directions given by the PSA under Code 15 through our enforcement of our PRS Condition (imposed on providers by Ofcom under section 120 of the Act).
- 1.4 In May 2022, Ofcom and the PSA announced that - subject to further approval from the Department for Science, Innovation and Technology (known as DSIT)² - regulatory responsibility for PRS is likely to transfer to Ofcom.³
- 1.5 This consultation document now sets out our proposals in effect to transfer the regulatory functions of the PSA to Ofcom, including associated proposed changes to the regulation of CPRS. Under these proposals, we intend to withdraw our approval for Code 15 and replace it with our own set of rules in an order that we propose to make under section 122 of the Act (draft PRS Order). When the PRS Order comes into force, Ofcom will assume day-to-day responsibility as regulator and enforcer of PRS regulation.

What we are proposing – in brief

To give effect to a smooth regulatory transfer of PRS regulation from the PSA to Ofcom, we are consulting on the following measures:

- our draft PRS Order, taking the form of a statutory instrument (see Annex 5);
- our proposed modifications to Ofcom's PRS Condition (see Annex 9);
- our proposed withdrawn approval for Code 15 (see Annex 10);

¹ This was approved by Ofcom on 20 October 2021 under section 121 of the Act.

² Previously, the Department for Culture, Media and Sport (or 'DCMS'). DSIT was established on 7 February 2023 to absorb some of the functions and responsibilities of (among others) DCMS.

³ <https://www.ofcom.org.uk/news-centre/2022/ofcom-to-take-on-responsibility-for-regulating-phone-paid-services>

- our proposed changes to our Regulatory Enforcement Guidelines (see Annexes 6 and 7).

Our overall proposed approach to our draft PRS Order is to retain the key principles and outcomes of the regulatory framework currently in place and delivered by the PSA through Code 15 in order to achieve broadly the same outcomes for consumers and stakeholders. This is because our assessment is that Code 15 is largely functioning well in enabling effective regulation that is benefitting consumers and industry.

In particular, we are proposing to retain many of the key principles and outcomes relating to the regulatory standards and requirements which are set out in Code 15, including:

- consumer protection standards and, specifically, requirements relating to transparency, fairness, customer care, vulnerable consumers and prevention of harm and offence;
- organisational standards and, specifically, requirements relating to registration, due diligence, risk assessment and control (DDRAC) and systems; and
- other responsibilities and obligations, including funding, information requirements and records retention.

We are, however, proposing to make some changes, including:

- retaining certain Code 15 requirements but streamlining these in order to reflect, albeit with different language, the effect of the corresponding provisions from Code 15;
- changing certain Code 15 requirements to ensure consistency with Ofcom's broader regulatory duties; and
- imposing new requirements in order to achieve our policy objectives, in particular, protecting consumers from harms associated with specific PRS, including Information, Connection & Signposting Services (ICSS).

While engagement and enforcement will remain a key part of our regulatory activity (as it is for the PSA under Code 15), we are proposing to apply Ofcom's existing enforcement approach to the PRS sector.

We are also proposing to introduce transitional arrangements to ensure that the PRS market continues to operate effectively until the transfer date and that, in particular, there are no gaps in regulation. The PSA will remain responsible for the PRS regulatory regime, until such time that the regime transfers to Ofcom, to ensure there are no gaps in regulation and enforcement.

- 1.6 We are inviting written views and comments by **23 January 2024** on these proposals. We currently intend to make the PRS Order (and lay it before Parliament), as well as to publish our final statement, in or around **Spring 2024**.
- 1.7 Finally, we propose an implementation period of around **3 months** from the date of making the PRS Order to enable industry members to make necessary preparations for complying with the new requirements under the PRS Order before it comes into force. We are currently working to bring the PRS Order into force on 1 October 2024.

2. Introduction & background

Summary of section

- 2.1 This section provides the background to PRS, explains the purpose of PRS regulation and describes how PRS are currently regulated in the UK, including under Code 15. It also provides a summary of our approach to impact assessments and equality impact assessments and provides a description of the legal framework.

What PRS are

- 2.2 The concept of PRS is broad. In general terms, PRS offer some form of content or facility (for example, to pay for goods and services) which are charged to a consumer's phone bill. Technically, they are services delivered via a telecommunications network. The consumer pays his or her communications provider for the use of its telecommunications service and the PRS is provided to the consumer via that service.⁴
- 2.3 These services may be accessed by way of a conventional voice call or SMS, but increasingly they are accessed in other ways, such as computers, smartphones or interactive digital TV. Common forms of PRS include charity donations by text, music streaming, broadcast competitions, directory enquiries, voting on TV talent shows and in-app purchases.
- 2.4 PRS vary in cost but tend to cost more than a normal phone call or text message. They usually operate on numbers beginning with 084, 087, 090, 091, 098, 118 or on five- or six-digit mobile voice and text shortcodes usually beginning with 6, 7 or 8. The cost of calling PRS numbers is made up of two parts: an access charge which goes to your phone company and a service charge which goes to (and is fixed by) the organisation you are calling. Certain service charges are subject to price caps. For example, directory enquiry services (i.e. 118 numbers) are subject to a price cap.⁵ Additionally, since September 2023, ICSS are capped at a maximum of £40 for a single call.⁶

Background to PRS regulation

- 2.5 PRS offer a convenient way to buy and enjoy content or facilities. Most PRS are for 'impulse' purchases and can be characterised by a relatively low expenditure. PRS are a simple means of purchasing a service because consumers can, for example, make the purchase using their telephone or mobile handset.
- 2.6 This means that PRS can be used by consumers as a convenient payment mechanism for buying relatively low expenditure content and services. However, there are also some characteristics of PRS that give rise to the potential for consumer harm. These may include:

⁴ Under the Act, a telecommunications network is referred to as an 'electronic communications network' and a telecommunications service is referred to as an 'electronic communications service'.

⁵ Ofcom imposed a price cap on the amounts DQ providers can charge of £3.65 (inclusive of VAT) per 90 seconds ([Statement: Directory Enquiries \(118\) Review \(ofcom.org.uk\)](#)).

⁶ [Statement following consultation on ICSS Code 15 amendments.ashx \(psauthority.org.uk\)](#)

- (a) **Lack of information:** There can be a lack of information, particularly (but not solely) on price, provided at point of purchase. This can lead to consumers either being deterred from making calls because they expect the price to be higher than it is or, alternatively, to consumers making calls that they would not otherwise have made had accurate price information been available. In the former case, consumers may not benefit from services made available to them, and, in the latter case, financial harm could be incurred.
 - (b) **Difficulty in getting redress:** The ability and incentive to seek redress are likely to be affected by the relatively limited value per transaction; the bill-supply separation, where the supplier of the PRS does not bill the consumer directly - making it hard to find out who was the actual supplier; which can also mean that consumers are passed from one provider to another. The hassle involved can therefore outweigh the benefit to be gained and may likely deter consumers from pushing for redress.
 - (c) **Offensive or inappropriate content:** Consumers may be exposed to content which they deem to be offensive and/or inappropriate. As a result, since PRS were introduced in the UK, they have been subject to specific regulatory provisions to target and prevent consumer harm in respect of those services which, based on their characteristics, could give rise to a particular type of risk and which may not otherwise be effectively covered by existing means of consumer protection.
- 2.7 As a result, a key rationale for PRS regulation is that certain services possess characteristics which cannot effectively be mitigated by existing general consumer protection laws. The regulatory framework, therefore, recognises that characteristics such as those mentioned above mean that PRS require specific (additional) regulatory provisions to target and prevent consumer harm, and that reliance on market forces and horizontal consumer legislation is insufficient.

How Ofcom and the PSA currently work together

- 2.8 Under the present regulatory arrangements, the PSA is an independent regulator responsible for the regulation of content, goods and services paid for through a phone bill (technically referred to as PRS). The PSA regulates through a Code of Practice which contains both the regulatory rules applicable to the sector and the institutional powers of the PSA (including, for example, enforcement and funding).
- 2.9 Ultimately, the PSA's regulatory role derives from Ofcom having exercised its statutory powers to give the PSA that role. Ofcom maintains oversight for ensuring the sector is effectively regulated. There are currently three key formal arrangements between the PSA and Ofcom:
- (a) First, the PSA's Code of Practice must be formally approved by Ofcom under section 121 of the Act.
 - (b) Second, in accordance with the current Ofcom/PSA MoU⁷, the PSA must seek Ofcom's approval for its business plan, budget, and Board appointments.
 - (c) Third, Ofcom has issued a PRS Condition under section 120 of the Act which identifies those service providers who must comply with the PSA's Code of Practice. The Code of Practice gives the PSA direct enforcement powers, including penalties and sanctions

⁷ [formalframework.pdf \(ofcom.org.uk\)](https://www.ofcom.gov.uk/consult/condocs/formalframework/formalframework.pdf)

against individuals, but Ofcom ultimately has the powers to secure compliance with such directions by enforcing the PRS Condition.

The PSA Code of Practice (Code 15)

Introduction

- 2.10 Code 15 set out a new regulatory approach for the PSA. It has three key aims:
- a) **Introducing standards in place of outcomes** - the PSA's expectation is that this would be clearer and easier for industry to implement, meet consumer expectations while allowing space for innovation.
 - b) **Focusing on prevention of harm rather than cure** - by introducing new provisions which enable the PSA to work with industry to build best practice and compliance, minimising the risk of consumer harm and the need for resource intensive enforcement.
 - c) **Being simpler and easier to comply with** – by, as far as possible, merging the previous Code (Code 14),⁸ special conditions and other documents, into a single consolidated document.

Standards and requirements

- 2.11 Code 15 has a number of consumer-orientated, organisation-orientated and service-specific standards and requirements. The regulatory standards are summarised below:
- **Integrity:** Providers must act with integrity and not bring the PRS market into disrepute.
 - **Transparency:** Consumers must receive clear, complete and timely information to enable them to make fully informed decisions when purchasing PRS.
 - **Fairness:** Consumers must be treated fairly throughout their experience of PRS, including by being charged for PRS only where they have provided informed and explicit consent to such charges.
 - **Customer care:** Consumers must receive excellent and timely customer care including the resolution of their complaints.
 - **Vulnerable consumers:** Services must be promoted and provided in a way that ensures they are not likely to cause harm or detriment to consumers who are, or may be, vulnerable as a result of their particular circumstances, characteristics or needs.
 - **Consumer privacy:** Consumer privacy must be respected and protected.
 - **Prevention of harm and offence:** Promotions and services must be provided in a manner that does not cause harm or unreasonable offence or distress to consumers or to the general public.
 - **Organisation and service registration:** Organisations and individuals involved in providing PRS must provide the PSA with timely, accurate and detailed information about themselves and the services they offer or intend to offer.
 - **DDRAC:** Organisations and individuals must perform effective due diligence on any person or organisation with whom they contract in relation to PRS. They must

⁸ [PSA Code of Practice 14th Digital.ashx \(psauthority.org.uk\)](https://psa.gov.uk/code-of-practice-14th-digital)

conduct a full and thorough assessment of potential risks arising from the provision, content, promotion, and marketing of PRS on an ongoing basis.

- **Systems:** All systems, including payment and consent verification platforms, used for the provision of and exit from PRS must be technically robust and secure.

2.12 In addition to these general standards, Code 15 also imposes specific requirements for certain services that it does not consider appropriate, or relevant, to apply more generally.⁹

Supervision and verification

2.13 Code 15 provides an increased focus on supervision and verification. This is to help deliver the PSA's goal of moving to a more proactive regulatory model to prevent harm in the first place rather than dealing with issues after the harm has occurred.

(a) **Supervision:** Code 15 includes a number of powers to enable the PSA to carry out supervisory activities which, among other things, enable it to assess a provider's compliance with the code, to identify and resolve issues and, ultimately, to reduce the risk of actual or potential harm to consumers resulting from such non-compliance or other issues.

(b) **Verification:** Code 15 also includes a number of requirements relating to DDRAC. This requires providers to undertake more thorough verification of their contracted partners by setting clearer and more extensive DDRAC requirements.

Engagement and enforcement

2.14 Code 15 provides a framework for both engagement and enforcement. This gives the PSA flexibility in terms of how it deals with any compliance concerns, including the opportunity for more cases to be dealt with through informal resolution rather than formal enforcement action.

Impact Assessment

2.15 Impact assessments (IAs) provide a valuable way of assessing the potential impact of our policy decisions before we make them. Section 7 of the Act requires Ofcom to carry out and publish an assessment of the likely impact of implementing a proposal which would be likely to have a significant effect on businesses or the general public, or when there is a major change in our activities.

2.16 More generally, IAs form part of good policy making and we, therefore, expect to carry them out in relation to a large majority of our proposals. They help us explain the policy decisions we have decided to take and why we consider those decisions best fulfil our applicable duties and objectives in the least intrusive way.

2.17 Specifically, pursuant to section 7, an IA must set out how, in our opinion, the performance of our general duties (within the meaning of section 3 of the Act) is secured or furthered by, or in relation to, what we propose.

⁹ These include services such as society lottery services, competition services and remote gambling services.

- 2.18 We make a variety of policy decisions in the interests of citizens and consumers, and where appropriate to promote competition. Our IA guidance, updated in July 2023, sets out our general approach to how we assess the impact of our proposed decisions.¹⁰
- 2.19 The analysis presented in this document constitutes an IA on our proposal to absorb the regulatory functions of the PSA into Ofcom. As explained more fully in section 4, our overall objective in the context of the proposed transfer of regulatory responsibilities from the PSA to Ofcom is to secure an effective and efficient transfer of the PRS regime to Ofcom and ensure that there are no gaps in regulation and enforcement as part of the transfer of responsibilities. To that end, the draft PRS Order on which we are consulting maintains many of the key principles and outcomes of Code 15 in order to achieve broadly the same outcomes for consumers and stakeholders. In this respect, our proposals continue to further the interests of consumers in respect of the PRS market and maintains a proportionate regulatory burden on providers.
- (a) In section 4 ('Our approach to PRS integration'), we explain in detail our proposals by reference to the existing rules and Code 15 and how we are proposing to reflect this, with any changes, in our draft PRS Order. We draw stakeholders' attention, in particular, to those areas where we are proposing to make changes necessary to secure effective regulation by Ofcom of PRS (see paragraph 4.4.), as well as to the Correlation table at Annex 8 which sets out comprehensively the differences between Code 15 and the draft PRS Order.
- (b) In section 5 ('Enforcement matters'), we detail the changes we are proposing to make to the procedures under which Ofcom will investigate and, where necessary, take enforcement action under the draft PRS Order and PRS Condition. These proposals reflect our 20 years of experience of investigating and enforcing against breaches of regulatory requirements in the communications sector to uphold the interests of citizens and consumers, whilst guaranteeing essential procedural protections for those subject to the rules.
- (c) In section 6 ('Provisional conclusions and next steps'), we draw together our proposals by explaining each of the legal documents necessary to give effect to these steps. In doing so, we explain why, in our assessment, our proposals satisfy the necessary legal tests.

Equality Impact Assessment

- 2.20 Section 149 of the Equality Act 2010 (EA 2010) imposes a duty on Ofcom, when carrying out its functions, to have due regard to the need to eliminate discrimination, harassment, victimisation and other prohibited conduct related to the following protected characteristics: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex and sexual orientation.
- 2.21 The EA 2010 also requires Ofcom to have due regard to the need to advance equality of opportunity and foster good relations between persons who share a protected characteristic and those who do not.
- 2.22 Section 75 of the Northern Ireland Act 1998 (NIA 1998) also imposes a duty on Ofcom, when carrying out its functions relating to Northern Ireland, to have due regard to the need to

¹⁰ [Statement: Impact assessment guidance - Ofcom](#)

promote equality of opportunity and regard to the desirability of promoting good relations across a range of categories outlined in the NIA 1998. Ofcom's Revised Northern Ireland Equality Scheme explains how we comply with our statutory duties under the NIA 1998.¹¹

- 2.23 To help us comply with our duties under the EA 2010 and the NIA 1998, we assess the impact of our proposals on persons sharing protected characteristics and, in particular, whether they may discriminate against such persons or impact on equality of opportunity or good relations.
- 2.24 When thinking about equality, we think more broadly than persons that share protected characteristics identified in equalities legislation and think about potential impacts on various groups of persons (see paragraph 4.7 of our IA guidance).
- 2.25 In particular, section 3(4) of the Act also requires us to have regard to the needs and interests of specific groups of persons when performing our duties, as appear to us to be relevant in the circumstances. These include:
- (a) the vulnerability of children and of others whose circumstances appear to us to put them in need of special protection;
 - (b) the needs of persons with disabilities, older persons and persons on low incomes; and
 - (c) the different interests of persons in the different parts of the UK, of the different ethnic communities within the UK and of persons living in rural and in urban areas.
- 2.26 We do not consider that our proposals for the draft PRS Order will affect any specific groups of persons (including persons that share protected characteristics under the EIA 2010 or NIA 1998) differently to the general population. This is because our proposals, which seek to transfer regulation from the PSA to Ofcom, aim to deliver improved outcomes, including enhanced consumer protection, for all UK consumers and citizens, all of whom have access to PRS.
- 2.27 We welcome any stakeholder views on our provisional assessment.

Consultation question 1: Do you agree with our assessment that our proposals will not affect any specific groups of persons (including persons that share protected characteristics under the EIA 2010 or NIA 1998)? Please state your reasons and provide evidence to support your view.

Welsh language impact assessment

- 2.28 The Welsh Language (Wales) Measure 2011 made the Welsh language an officially recognised language in Wales. This legislation also led to the establishment of the office of the Welsh Language Commissioner who regulates and monitors our work. Ofcom is required to take Welsh language considerations into account when formulating, reviewing or revising policies which are relevant to Wales (including proposals which are not targeted at Wales specifically but are of interest across the UK.)

¹¹ Ofcom, 2014 (updated 2019). [Revised-NI-Equality-Scheme.pdf \(ofcom.org.uk\)](#)

- 2.29 Where the Welsh Language Standards¹² are engaged, we consider the potential impact of a policy proposal on (i) opportunities for persons to use the Welsh language; and (ii) treating the Welsh language no less favourably than the English language. We also consider how a proposal could be formulated so as to have, or increase, a positive impact, or not to have adverse effects or to decrease any adverse effects.
- 2.30 We have considered our proposals on transferring regulatory responsibilities from the PSA to Ofcom under the Welsh Language Policy Making Standards.
- 2.31 Our proposals, as set out in this document, aim to deliver improved outcomes, including enhanced consumer protection, for all consumers of PRS. In our view, the implementation of these proposals would not have any adverse effects on the use and treatment of the Welsh language. We welcome stakeholders' views on our proposed assessment under the Welsh Language Policy Making Standards.
- 2.32 We welcome any stakeholder views on our provisional assessment.

Consultation question 2: Do you agree with our assessment of the potential impact of our proposal on the Welsh language? Do you think our proposal could be formulated or revised to ensure, or increase, positive effects, or reduce/eliminate any negative effects, on opportunities to use the Welsh language and treating the Welsh language no less favourably than English?

Legal framework

- 2.33 We set out below our powers and duties that are relevant to the proposals set out in this consultation. We explain how we propose to exercise these powers and take account of these duties in the context of our proposals in sections 4 and 5.

Our general duties

- 2.34 Ofcom's principal duty is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition.¹³
- 2.35 In performing our duties, we are required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent, and targeted only at cases in which action is needed, as well as any other principles appearing to us to represent best regulatory practice.¹⁴
- 2.36 We must also have regard, when performing our duties, to a number of matters, including the desirability of promoting competition in relevant markets; the desirability of encouraging investment and innovation in relevant markets; 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

¹² See Standards 84 – 89 of [Hysbysiad cydymffurfio](#) (in Welsh) and [compliance notice \(in English\)](#). Section 7 of the [Welsh Language Commissioner's Good Practice Advice Document](#) provides further advice and information on how bodies must comply with the Welsh Language Standards.

¹³ Section 3(1) Communications Act 2003. 'Consumer' is defined in section 405(5) of the Act and includes people acting in their personal capacity or for the purposes of, or in connection with, a business.

¹⁴ Section 3(3) Communications Act 2003.

generally; the different interests of persons in the different parts of the United Kingdom, of the different ethnic communities within the United Kingdom and of persons living in rural and urban areas.¹⁵

- 2.37 In addition, section 3(5) of the Act requires that, when performing our duty to further the interests of consumers, we must have regard, in particular, to the interests of those consumers in respect of choice, price, quality of service and value for money.

UK Government's Statement of Strategic Priorities

- 2.38 We have also had regard to the UK Government's Statement of Strategic Priorities (SSP) for telecommunications, management of radio spectrum and postal services.¹⁶ The SSP sets out the Government's strategic priorities for current and future telecoms consumers, including to:
- (a) Tackle harmful industry practices and improve the support available to vulnerable consumers, who can pay more than others.
 - (b) Address the difficulties that customers experience in navigating the communications market by giving them the right data, information, and support to boost their engagement.
- 2.39 The SSP also states that Ofcom should continue to take all opportunities to improve the consumer experience in the telecoms sector, particularly for vulnerable consumers, including those with disabilities.

Regulation of PRS

- 2.40 The Act provides a framework for the regulation of PRS at sections 120 to 124 of the Act. Section 120 of the Act sets out the power for Ofcom to set conditions for the "purposes of regulating the provision, content, promotion and marketing of premium rate services".
- 2.41 Under section 120(2), such conditions may be applied:
- "generally to every person who provides a premium rate service; or to every person who is of a specified description of such persons, or who provides a specified description of such services."
- 2.42 The Act identifies which services qualify as PRS and hence may be subject to such a condition. It provides that a service is a PRS if:
- (a) "it is a service falling within section 120(8) of the Act (see below);
 - (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

¹⁵ Section 3(4) Communications Act 2003. A range of further duties are set out in section 4 of the Communications Act 2003.

¹⁶ See section 2B(2)(a) of the Communications Act 2003; DCMS, October 2019.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/952627/SSP - as designated by S of S V2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/952627/SSP_-_as_designated_by_S_of_S_V2.pdf)

(d) that charge is imposed in the form of a charge made by that person for the use of the electronic communications service."

2.43 A service falls within section 120(8) if its provision consists in:

(a) "the provision of the contents of communications transmitted by means of an electronic communications network; or

(b) allowing the user of an electronic communications service to make use, by the making of a transmission by means of that service, of a facility made available to the users of the electronic communications service."

2.44 In accordance with this power, Ofcom has set a condition (the PRS Condition) that requires PRS providers to comply with directions given by the 'Enforcement Authority' in accordance with, or for the purposes of enforcement of, an 'Approved Code.' The PRS Condition applies only to certain PRS, known as CPRS. Section 47 of the Act sets out the conditions that we must apply when setting or modifying the PRS Condition, including obligations to consult.

2.45 Section 121 of the Act gives Ofcom the power to approve a code made by another party for regulating the provision and contents of PRS.¹⁷ The current code, Code 15, was drafted by the PSA, which administers and enforces the code, and was approved by Ofcom in October 2021.¹⁸ This is the fifteenth edition of PSA's Code of Practice (the Code). The PSA has also made some modifications to Code 15.

2.46 Code 15 sets out wide-ranging rules to protect consumers as well as setting out the processes that the PSA applies when enforcing the Code. It also provides for the PSA to be funded by way of a levy on industry. The PRS Condition requires relevant providers (i.e. CPRS providers) to comply with any directions made by the PSA for the purposes of enforcing the Code. If a provider fails to do so, Ofcom can take enforcement action for breaching the PRS Condition.

2.47 Section 121(7) of the Act confirms that Ofcom can withdraw its approval from an approved code at any time. Where we do so, we are required to publish a notification to this effect so that it is brought to the attention of affected persons.

Ofcom may regulate PRS directly by way of an Order

2.48 Section 122 of the Act gives Ofcom the ability to assume direct regulatory responsibility for PRS where we consider that there is no code in force to which we think it would be appropriate to give, or continue to give, our approval under section 121 of the Act.

¹⁷ Section 121(2) states that Ofcom is not to approve a code unless we are satisfied:

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

¹⁸ https://www.ofcom.org.uk/data/assets/pdf_file/0025/226951/statement-approval-of-phone-paid-services-authority-code-of-practice-fifteenth-edition.pdf

- 2.49 Specifically, under section 122 of the Act Ofcom can make an Order to do the following things:
- (a) impose requirements with respect to the provision and contents of PRS, and with respect to the facilities made available in the provision of such services (including provision about pricing);
 - (b) impose requirements with respect to the arrangements made by providers of premium rate services for the promotion and marketing of those services;
 - (c) provide for the enforcement of requires imposed by the Order; and
 - (d) make provisions for other arrangements for the purposes of (a)-(c).
- 2.50 The consent of the Secretary of State is required to make such an order.¹⁹
- 2.51 The Act explains that such an order is to take the form of a statutory instrument and provides for certain procedural requirements to be met, including that we must publish a notice of our proposals to those who will be affected by its implementation and consider any representations received.²⁰
- 2.52 Once any order is made by Ofcom, it must be sent to the Secretary of State and then laid before Parliament under a so-called negative resolution procedure. This procedure essentially means that the order becomes law once it is made by Ofcom and it automatically remains law unless a motion – or ‘prayer’ – to reject it is agreed by either House within 40 sitting days. However, even where it becomes law, the law as laid down in the order only becomes operative when its provisions are brought into force. This commencement is the date when the law in the order comes into force. We are currently working to bring this order into force on 1 October 2024.

Structure of this consultation

- 2.53 The remainder of this consultation is structured as follows:
- Section 3 sets out an overview of key consumer and market developments.
 - Section 4 sets out our proposed rules under the draft PRS Order (except for enforcement-related matters, which are dealt with in Section 5), including in relation to key definitions and various substantive provisions of Code 15.
 - Section 5 sets out our proposed approach to enforcement, including transitional arrangements.
 - Section 6 sets out our provisional conclusions and next steps, including our proposed implementation period, proposed modifications to the PRS Condition, and our proposed withdrawn approval of Code 15.
- 2.54 The annexes are set out as follows:
- Annex 1: Responding to this consultation.
 - Annex 2: Ofcom’s consultation principles.
 - Annex 3: Consultation coversheet.
 - Annex 4: Consultation questions.
 - Annex 5: Notice of draft PRS Order
 - Annex 6: Draft annex for Enforcement Guidelines - PRS Order

¹⁹ Section 122(6) of the Act.

²⁰ Sections 122(7) and 403 of the Act.

- Annex 7: Draft annex for Enforcement Guidelines - PRS Condition (also for SMP apparatus conditions)
- Annex 8: Correlation table.
- Annex 9: Notification: Proposed Modifications to the PRS Condition
- Annex 10: Notification: Proposed Withdrawal of the Approved Code

3. Consumer and market context

Summary of section

- 3.1 This section provides a brief overview of key consumer and market developments in the PRS market.

The changing regulatory landscape for PRS

- 3.2 The PSA has been an effective regulator for the PRS market for many years and delivered significant benefits for consumers, with complaints significantly reducing over recent years following a number of positive interventions by the PSA. To date, the market has been characterised by a large number of relatively small providers containing a small minority of companies that caused consumer harm. In that context, a focused, enforcement-orientated agency like the PSA has been effective.
- 3.3 The PRS market is, however, now undergoing significant change with legacy services in decline and the rapid growth of PRS provided by global tech platforms and a more compliant market. The PSA estimate that over 80% of market revenue is now provided by larger organisations such as Apple, Global, ITV, Sony and Google, all of whom are now major participants in the market.
- 3.4 To reflect that shift, the PSA began a strategic review in 2019 to ensure that its model of regulation remained fit for purpose in the changing market. This resulted in a new Code (Code 15), approved by Ofcom, and which came into force on 5 April 2022. Code 15 provides for a move away from a reactive outcomes-based enforcement model to a more pro-active approach, based on raising market standards and supervising conduct that is intended to better address potential consumer harm before it can arise. This approach to regulation brings the PSA's overall approach closer to the approach adopted by Ofcom, particularly in the telecoms markets.
- 3.5 In addition, as part of this strategic review, the PSA also considered that, in order to ensure the long-term effectiveness of the PRS regulatory framework, it would be more appropriate for Ofcom to bring these functions in-house.
- 3.6 A key factor behind the PSA taking this view was that Ofcom has greater powers and resources to deliver the PRS regulatory regime in the context of a rapidly changing market, and so ensure regulatory certainty and confidence. The PSA Board made a formal proposal to this effect. Ofcom agrees with the PSA's view that we are in a strong position to ensure the continued effective regulation of the PRS sector in light of these market changes.
- 3.7 On 24 May 2022, Ofcom announced that the Secretary of State for Digital Culture Media and Sport (now DSIT), had given provisional approval for the PSA and Ofcom to be brought together.²¹ As such, and subject to this consultation on the proposed legal means of doing so and then further formal approval from the Secretary of State, responsibility for the day-to-day regulation of PRS would be transferred to Ofcom. Under these arrangements, the PSA

²¹ <https://www.ofcom.org.uk/news-centre/2022/ofcom-to-take-on-responsibility-for-regulating-phone-paid-services>

will stop regulating PRS and, consequently, Ofcom will withdraw its approval for Code 15 and replace those provisions with an Order made under section 122 of the Act (the draft form of which is at Annex 6).

The PRS market

Introduction

- 3.8 This section sets out key shifts in the wider telecommunications market and how these have impacted the PRS market. The most significant shift has been consumers moving away from using voice-based services to mobile data services and, specifically, to use mobile data to access the internet and make payments via mobile devices.
- 3.9 We also note some current (and potential future) trends, including an increase in larger providers entering the market, which we expect will impact how the PRS market might evolve.

The wider communications market has changed

- 3.10 The telecoms market has undergone a significant transition over the past decade, from a market heavily characterised by voice-based services, to one which is more reliant on mobile data services, with consumers increasingly using smartphones to access the internet, and more purchases being made online.
- 3.11 Particularly, there has been a noticeable trend in consumers using their mobile to make purchases, with nearly nine in ten (89%) of UK consumers making a mobile purchase at least monthly and 43% doing so weekly. Mobile commerce in the UK is expected to grow at more than twice the rate of the overall e-commerce sector.
- 3.12 This shift to an increase in the use of mobile to access the internet and in mobile purchases has also provided opportunities in the PRS market, and consumer engagement with other digital payment methods has shaped what they expect from PRS.

The PRS market today

- 3.13 The PRS market has experienced significant change, with many more services now being purchased and consumed online.
- 3.14 These changes have also manifested in both the composition of the market and the revenues which it generates. In particular:
- (a) Voice-based services are declining:
- i) Directory Enquiries revenue has reduced significantly, with revenues dropping to £5.5 million in 2022/23²², down from over £135 million in 2013/14. This is as a result of both a decline in call volumes and a price cap in the cost of calls.
 - ii) 087 and 09²³ (including ICSS²⁴) are also declining, with revenues falling by £5.8 million between 2021/22 and 2022/23, as businesses continue to migrate services

²² See page 56 of Annual Market Review 2022/23 (psauthority.org.uk)

²³ See page 13 of [Annual Market Review 2022/23 \(psauthority.org.uk\)](https://psauthority.org.uk)

²⁴ Spend on ICSS was £18m in 2022/23 (see page 56 of [Annual Market Review 2022/23 \(psauthority.org.uk\)](https://psauthority.org.uk))

onto other number ranges and online, and consumers choose free or lower cost alternatives.

- (b) Mobile-based services account for nearly 90%²⁵ of consumer spend.
 - (c) Newer digital services, mainly delivered online, are thriving. In particular, games and entertainment services have been growing.
 - (d) Operator billing²⁶ continues to be the largest spending channel and in 2022/23 and it accounted for 49.6%²⁷ of total consumer spend on PRS. Games, entertainment and betting, gambling and lotteries were the three largest service categories using operator billing.
 - (e) Despite the growth of operator billing, Premium rate SMS (PSMS) continues to perform strongly driven largely by broadcast competitions. Broadcasters generated £174.5 million in 2021/22²⁸, making TV and radio engagement the largest service category in the market.
- 3.15 Market composition has also changed significantly. Ten years ago, the market was largely comprised of small and medium-sized businesses. While some smaller merchants continue to operate in the market, it increasingly features larger, established organisations. The PSA currently estimates that the mobile PRS market is heavily and increasingly comprised of major organisations providing high-quality services with clear consumer demand (over 90%). These include app stores; major gaming and music streaming providers; TV and radio broadcasters and leading charities. The PSA's assessment is that the entry of a number of larger established organisations and, in particular, app stores and streaming services, have driven growth and contributed to a more compliant market.
- 3.16 These organisations have also played a key role in influencing consumer expectations and best practice around what a digital payment experience should look like, including in relation to the sign-up process, service experience, and customer care and refund practices.
- 3.17 As a result, the PSA expects the market will further consolidate around the larger market segments and merchants, with consumer spending on TV and radio-based services, including broadcast competitions, expected to continue to account for a significant part of the market.
- 3.18 The PSA's assessment is that spending on games and entertainment, where larger merchants like Microsoft, Apple, Google and Spotify feature prominently, is expected to continue to grow incrementally. Voice-based services are expected to continue to decline, as consumers usage declines in line with general trends in consumer behaviour.

Who uses PRS?

- 3.19 The PSA's Annual Market Review²⁹ surveys 5,000 users of PRS every year and suggests that approximately 62% of the British population aged 16 or above used PRS in 2022–2023.³⁰
- 3.20 In particular, service penetration is the highest among those aged 21–30 and 31–40 (77%) and generally across the 18–50 age group; this is likely to be because many games and/or entertainment services appeal to a wide range of consumers across these age groups. As in

²⁵ See page 12 of [Annual Market Review 2022/23 \(psaauthority.org.uk\)](https://psaauthority.org.uk/annual-market-review-2022-23)

²⁶ Operator billing is where a consumer uses a CPRS by means of a mobile phone service and a charge for that use is set out in the bill in respect of that mobile phone service.

²⁷ See page 12 of [Annual Market Review 2022/23 \(psaauthority.org.uk\)](https://psaauthority.org.uk/annual-market-review-2022-23)

²⁸ See page 4 of [Annual Market Review 2022/23 \(psaauthority.org.uk\)](https://psaauthority.org.uk/annual-market-review-2022-23)

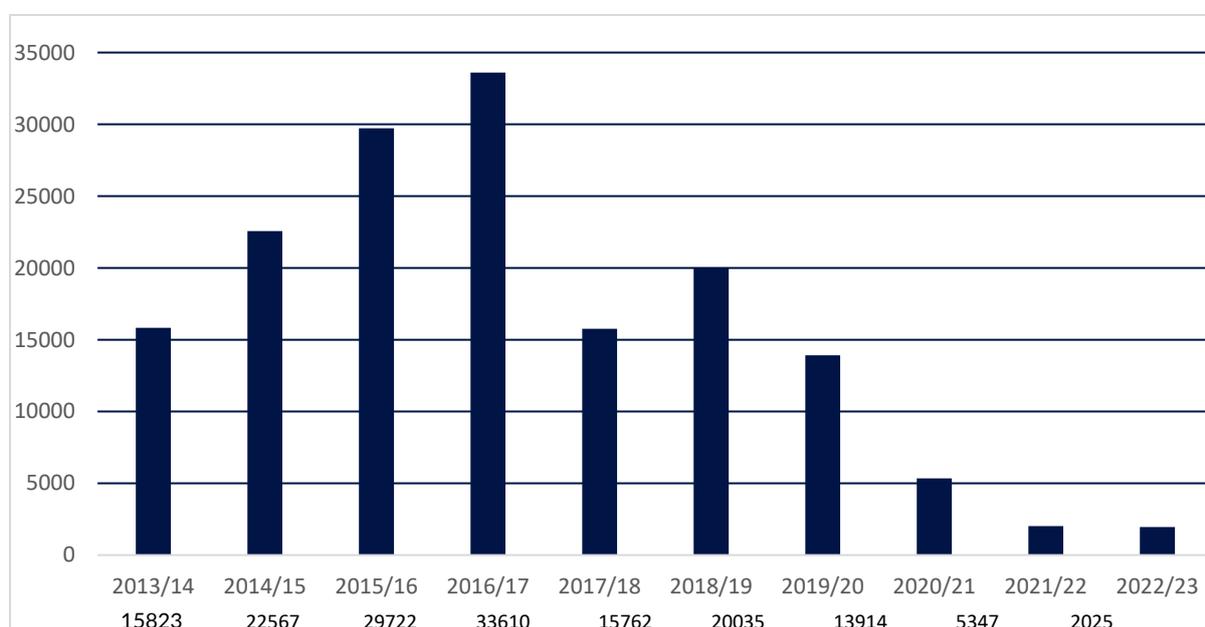
²⁹ [Annual Market Review 2022/23 \(psaauthority.org.uk\)](https://psaauthority.org.uk/annual-market-review-2022-23)

³⁰ See page 36 of [Annual Market Review 2022/23 \(psaauthority.org.uk\)](https://psaauthority.org.uk/annual-market-review-2022-23)

previous years, the penetration of PRS was significantly below-average among respondents aged 61 and above (47%).³¹

- 3.21 The review also highlighted that consumer confidence and trust in PRS is relatively high, with industry recording low levels of complaints. Despite this, there continue to be a significant proportion of consumers who report experiencing problems. 24% of survey respondents reported encountering a problem when using a service, although this is significantly higher in particular (and relatively small) service types, including sexual entertainment, connection services and relationship services.³²
- 3.22 Also as shown in Figure 1 below, complaints about PRS have declined dramatically in recent years, in line with a maturing market from a peak of over 33,000 in 2016/17 to 1,912 in 2022/23.

Figure 1: Consumer complaints about PRS made to the PSA³³



Source: Phone-paid Services Authority

- 3.23 Currently, ICSS are responsible for a high level of complaints and accounted for over a third of complaints to the PSA in 2022/23.
- 3.24 Other issues reported to the PSA by consumers include:
- (a) difficulties determining who to contact to receive a refund, or difficulty accessing a refund once one has been agreed with a provider;
 - (b) not signing up to a service;
 - (c) not realising they had called a premium rate number/the service came at a higher cost than expected;

³¹ See page 37 of [Annual Market Review 2022/23 \(psaauthority.org.uk\)](https://psa.org.uk/annual-market-review-2022-23)

³² The percentage of respondents who encountered a problem with sexual entertainment services remained static year on-year (30% in 2022–2023 and 30% in 2021–2022), but the number of those respondents who had issues with connection services (30% in 2022–2023 and 28% in 2021–2022) and personal and relationship services (29% in 2022–2023 and 28% in 2021–2022) increased compared with the previous year.

³³ 2013/14 to 2022/23 – 2022/23 is estimated.

- (d) bill shock;
- (e) the nature of service(s) being different to what was advertised; and
- (f) being unable to identify the service that had charged them from the information that was provided on their bill.

Likely future consumer and market trends

- 3.25 In our view, the evidence presented above indicates that PRS as a sector is increasingly compliant with regulatory obligations, with low levels of complaints and a wide range of services which consumers recognise and enjoy. Based on the PSA's own analysis and assessment, its expectations are that the following trends will continue to apply:³⁴
- (a) more engagement from larger and well-established organisations based on continued growth of app store purchases, including the possibility of new players entering the market;
 - (b) financial growth in the mobile market, through continued growth of operator billing and some PSMS services (such as radio and broadcast competitions) – offset by expected continued decline in some other services, such as voice-based services;
 - (c) consumers will continue to engage with PRS – driven by convenience, impulse purchasing and price, and that increased and ongoing blue-chip engagement will drive up consumer trust and confidence; and
 - (d) potential for the PRS market to grow as awareness and trust of the payment mechanism grows, particularly as a result of larger and well-established, organisations offering phone-payment as an option and, in some cases, as the default payment option on mobile.
- 3.26 The PSA also expects that games and entertainment services will continue to drive growth. They also anticipate that betting and gambling services, as well as TV and radio engagement delivered through PSMS will continue to grow.

³⁴ This largely reflects the AMR's forecast (see page 31 of [Annual Market Review 2022/23 \(psa.gov.uk\)](https://psa.gov.uk/annual-market-review-2022-23))

4. Our approach to PSA integration

Summary of section

- 4.1 This section sets out Ofcom’s proposed approach to dealing with current Code 15 requirements in the draft PRS Order, including key definitions, regulatory standards and requirements and other responsibilities and obligations from Code 15.

Approach to the draft PRS Order

- 4.2 As mentioned above, as part of the proposed arrangements for responsibility for the day-to-day regulation of PRS to be transferred to Ofcom, the PSA will stop regulating PRS. Consequently, Ofcom will withdraw its approval for Code 15 and replace those provisions with the draft PRS Order.
- 4.3 In the context of the proposed transfer of regulatory responsibilities from the PSA to Ofcom, we want to secure an effective and efficient transfer of the PRS regime to Ofcom and ensure that there are no gaps in regulation and enforcement as part of the transfer of responsibilities.
- 4.4 The draft PRS Order maintains many of the key principles and outcomes of Code 15 in order to achieve broadly the same outcomes for consumers and stakeholders, whilst making changes which we consider necessary for the purposes of Ofcom’s regulation. These changes include:
- (a) retaining certain Code 15 requirements but streamlining these in order to reflect, albeit with different language, the effect of the corresponding provisions from Code 15;
 - (b) changing certain Code 15 requirements to ensure consistency with Ofcom’s broader regulatory duties;
 - (c) imposing new requirements in order to achieve our policy objectives, in particular, protecting consumers from harms associated with specific PRS, including ICSS; and
 - (d) applying Ofcom’s existing enforcement regime to the PRS sector, including transitional arrangements to ensure that the PRS market continues to operate effectively until the draft PRS Order comes into force.³⁵
- 4.5 In addition, we note that Code 15 enables the PSA to issue non-binding guidance and advice to support compliance with Code 15,³⁶ as well as various permissions which are intended to provide greater flexibility for providers to achieve the objectives of Code 15 by alternative means.³⁷ Code 15 also includes a ‘prior permissions’ regime which means that particular categories of PRS must not be provided without the PSA’s prior written permission.

³⁵ These are explained in Section 5 of this document.

³⁶ See paragraphs 2.2.1 to 2.2.4 of Code 15.

³⁷ See paragraphs 2.6.1 to 2.6.5 of Code 15. This includes both bespoke permission and general permission. For permissions which have been issued see (1) <https://psauthority.org.uk/-/media/Files/PSA/OONEW->

- 4.6 We are not proposing to retain the various permissions, including ‘prior permissions’ within the draft PRS Order, or the ability to issue non-binding guidance and advice. This is because these are specific to how the PSA regulates PRS under Code 15 and not applicable to Ofcom.

Assessment of replacing Code 15 with the draft PRS Order

- 4.7 In this section, we set out a more detailed assessment of how we propose to carry over most of the Code 15 requirements into the draft PRS Order. We have structured our assessment, as follows:

Key definitions

- (a) Regulated services
- (b) Regulated providers and regulated activity

Organisational requirements

- (c) Registration
- (d) Due-diligence measures and risk assessments in dealing with others
- (e) Security testing

Consumer-protection requirements

- (f) Information provided to consumers in carrying out a regulated activity
- (g) Promotion and marketing
- (h) Pre-contract information and express consent for imposing certain charges
- (i) Provision of CPRS
- (j) Vulnerable consumers and harmful material
- (k) Competition and voting services
- (l) Other requirements in respect of certain controlled PRS

Other responsibilities and obligations

- (m) Ofcom’s expenditure
- (n) Additional requirements for network operators
- (o) Information requirements
- (p) Records

[website/For-business/Does-my-service-benefit-from-an-exemption/Code-15-exemptions/Registration-Exemption-16-02-2022.ashx](https://psaauthority.org.uk/-/media/Files/PSA/00NEW-website/For-business/Does-my-service-benefit-from-an-exemption/Code-15-exemptions/Registration-Exemption-16-02-2022.ashx); and (2) [https://psaauthority.org.uk/-/media/Files/PSA/00NEW-website/For-business/Does-my-service-benefit-from-an-exemption/June-2020-Updated-registration-exemption-notice-\(1\).ashx](https://psaauthority.org.uk/-/media/Files/PSA/00NEW-website/For-business/Does-my-service-benefit-from-an-exemption/June-2020-Updated-registration-exemption-notice-(1).ashx).

Key definitions

Regulated services

Summary

- 4.8 In Part 1 of the draft PRS Order, we set out our various proposed definitions that apply to concepts used throughout the draft PRS Order, including some key CPRS that are to be regulated.³⁸
- 4.9 We have broadly used the same or similar concepts under the draft PRS Order as in Code 15. However, some proposed definitions for regulated services in the draft PRS Order are framed differently to the definitions used in Code 15. This is mainly because we are seeking to provide clarity and certainty about their meanings and, in some instances, to simplify the definitions.
- 4.10 In section 2 of this document, we explain that the concept of PRS is broad, which is reflected in the statutory definition of PRS in section 120 of the Act. We propose to regulate a narrower set of PRS within that statutory definition under the umbrella term of CPRS. This includes both defined types of PRS and other types of PRS where they meet the charging thresholds set out in the PRS Condition. We refer to this latter group as ‘threshold services’.
- 4.11 The proposed definitions for CPRS that will always be regulated regardless of charging thresholds are set out below, along with the proposed definition for subscription services. Please note that proposed definitions for other types of PRS (which will be regulated as CPRS depending on whether they meet the relevant number and charging thresholds) are explained throughout this section, alongside specific requirements that will apply in respect of them.

Existing definitions for CPRS in Code 15

- 4.12 Code 15 imposes requirements that apply expressly to “*PRS*”. Paragraph D.1.1 of Code 15 states that:

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

- 4.13 In contrast, Ofcom’s PRS Condition applies to a much narrower group of PRS, called CPRS. Paragraphs 1.2.1 and 1.2.2 of Code 15 recognises that the PRS Condition refers only to a subset of PRS as compared to the statutory definition in section 120(7)³⁹.
- 4.14 Therefore, the existing requirements fall only on services which are set out in the PRS Condition. These are set out in more detail below.

Proposed definitions for CPRS and some key services in the draft PRS Order

- 4.15 As noted above, Part 1 of the draft PRS Order sets out our various proposed definitions for key service concepts that are used throughout the draft PRS Order. Those definitions are:
- (a) the meaning of CPRS (article 3 of the draft PRS Order),

³⁸ Part 1 of the draft PRS Order deals with the concept of CPRS and also sets out definitions for some specific types of CPRS. There are other types of specific CPRS that are dealt with in Part 6 of the Order – we explain those services and definitions later in the relevant sections of this document.

³⁹ The PSA has, however, confirmed that its intent is (and always has been) that it only regulates CPRS as defined in the PRS Condition. That said, however, the PSA’s Codes of Practice (including Code 15) have been drafted so that they apply on a voluntary basis to PRS that do not fall within the definition of CPRS.

- (b) the meaning of a threshold service (article 4 of the draft PRS Order),
- (c) the meaning of a chatline service (article 5 of the draft PRS Order),
- (d) the meaning of a sexual content service (article 6 of the draft PRS Order),
- (e) the meaning of ICSS (article 7 of the draft PRS Order); and
- (f) the meaning of a subscription service (article 8 of the draft PRS Order).

4.16 In terms of our proposed definitions relating to these services, we would note, in particular, the following:

- (a) our proposed definition for “**controlled PRS**” in article 3 of the draft PRS Order largely seeks to reflect the definition of a “Controlled Premium Rate Service” in Condition 2(e) of the PRS Condition. The definition in the PRS Condition makes clear that a PRS will be a “Controlled Premium Rate Service” where it:
 - i) meets either of the two monetary thresholds in Condition 2(e)(i) or (ii);⁴⁰ or
 - ii) falls within any of the definitions of a chatline service, an ICSS, a sexual content service, or being internet dialler software operated, regardless of whether it meets the monetary thresholds mentioned above;
- (b) however, we have made some changes in carrying over this definition to the draft PRS Order. One proposed change is to expand the range of telephone numbers that will qualify as a “premium rate number” (see article 3(8)(b)) of the draft PRS Order for this definition). The PRS condition currently defines a “PRS number” as a non-geographic number starting 087, 090, 091 or 118. We propose to also add the numbers “084” and “098” to reflect the number ranges used in PRS. Another change in our definition of “controlled PRS” from the PRS Condition is that we are proposing to remove services using internet dialler software (see paragraph 2(n) of the PRS Condition) from the scope of the draft PRS Order as these services are now largely obsolete. Such services (if any are made available to consumers) may still be subject to some requirements under the draft PRS Order where they satisfy the meaning of a threshold service (see below);
- (c) additionally, the monetary thresholds in the definition of a “Controlled Premium Rate Service” in the PRS Condition include references to charges for ‘calls’. In our proposed definition for “**controlled PRS**”, we have replaced the references to ‘call’ with “electronic communication” (as defined in article 2 of the draft PRS Order). This is because we are proposing to include a specific definition for “call” (also set out in article 2 of the draft PRS Order) which is limited to speech communication between two or more persons. Given that some PRS may not involve speech communication in this way, we have used “electronic communication” to ensure that our definition of CPRS catches all means by which consumers can use PRS;
- (d) we have included a new proposed definition for “**threshold service**” to capture bringing into scope of the draft PRS Order any PRS which are not a chatline service, a sexual

⁴⁰ Namely, (i) where 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; and (ii) the service is obtained other than through 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).

content service or an ICSS but still fall within the number and charging thresholds of a CPRS (see article 3(2) and (3) in the proposed draft PRS Order);

- (e) while we have made changes to the definition of “**chatline services**” which is found at paragraph 2(d) of the PRS Condition , we do not intend that those changes should materially affect the scope of the services which are currently captured under Code 15 (article 4 of the draft PRS Order). Instead, we have focused the changes on mirroring the language used to describe PRS in the Act – e.g. we have described a chatline service as one where the merchant makes available a facility where at least three consumers can speak on a call without knowing who they are speaking to beforehand. The use of “facility” mirrors that in the Act and makes clear that the core of this service is not the content but rather than facility that is being used to enable consumers to speak to one another. We have also amended the definition to exclude certain other types of CPRS from the definition. This is to ensure the definition does not contain definitional overlaps between other CPRS and chatline services where these do not arise in practice. For example, a chatline service will not be a children’s service as chatline services are for use by persons over the age of 18. To reflect this, we have excluded children’s services⁴¹ from the definition of chatline services;
- (f) the definition of “**sexual content services**” is based on the definition of “sexual entertainment services” in paragraph 2(v) of the PRS Condition, although with changes to more closely mirror the Act. For example, the name of the service, and the definition itself, now talks about “content”, which reflects the language used in section 120(9) of the Act when discussing the different ways in which a person can provide a PRS. We propose that the definition describes a sexual content service as one containing content where it is reasonable to assume that it was produced solely or principally for the purposes of stimulating the sexual interests or desires of the consumer. This will align the definition of these services more closely with the way services providing similar content are described in the Online Safety Act 2023. However, again, there is no intended change in terms of the services which are captured under this definition in Code 15 (article 5 of the draft PRS Order), i.e. we are not seeking to broaden or narrow the scope of what should be considered a sexual content service;
- (g) we have simplified the definition of “**ICSS**”, which is found at paragraph (2)(m) of the PRS Condition. Our proposed definition focuses on the key component of the service being the making available of a facility which can connect a consumer using the service to another person or organisation (other than a PRS). Again, we have included the term “facility” to align the definition with the way PRS is described in s120(9) of the Act. The intention is not to change the types of services which are currently captured under this definition in Code 15 (article 6 of the draft PRS Order); and
- (h) we have expanded upon the definition of “**subscription service**” which is at paragraph D.2.72 of Code 15. Our proposed definition makes clear the different types of contracts for CPRS that can come within the scope of a subscription service, including contracts where the provision of CPRS involves a free trial or is at reduced cost for a specified period of time. This is to ensure that any defined CPRS which can be provided as a

⁴¹ See paragraph 4.114 of this document for more information on the definition of children’s services.

subscription service, such as children’s services or professional advice services, are subject to the rules in the draft PRS Order on subscription services, as well as the other general and specific rules that will apply to those services.

- 4.17 We have also made changes to various other CPRS definitions, for example, live entertainment services and professional advice services. These generally are contained in specific provisions in the draft PRS Order dealing with that particular service, and are explained in more detail in the relevant sections below.
- 4.18 It is important to note, however, that our updated definitions are aimed at clarifying the various types of CPRS and to align more closely with the Act and, therefore, we are not making any material changes to the types of services which are currently regulated under Code 15. Therefore, we consider there will be minimal impact on PRS providers as a result of these proposed definitions. This is because those who are currently subject to Code 15 will continue to be regulated under the draft PRS Order, other than where the service is internet dialler software operated, in which case those services will only be regulated to the extent they meet the definition of threshold service under the draft PRS Order.

Consultation question 3: Do you have any comments about our proposed definitions in articles 3 to 8 of Part 1 of the draft PRS Order for key service concepts that are used throughout the Order?

Regulated providers and regulated activity

Summary

- 4.19 While we are intending to continue to regulate the same types of PRS providers as under Code 15, we propose to use different definitions in order to reflect the Act, in particular, sections 120(9) and 151 of the Act, which set out when a person is providing a PRS. Our proposed requirements relating to defining regulated providers are set out in article 9 of the draft PRS Order.

Existing definitions of PRS providers in Code 15

- 4.20 Code 15 currently defines three categories of a PRS provider, namely “*any network operator, intermediary provider or merchant provider*”. In summary, they are:
- (a) **Network operators:** these include terminating communications providers (TCPs) who provide the necessary network facilities to terminate calls on behalf of ‘intermediaries’ (see below). It is the TCP that has the commercial relationship with the intermediary and with whom the revenue from the cost of the call is shared.⁴² However, only TCPs (and not originating communications providers (OCPs), intermediaries or merchants) carry the burden under Code 15 to pay levies to fund the PSA's regulatory activities;
 - (b) **Intermediaries:** they essentially provide a platform which, through arrangements made with a network operator, another intermediary provider, or a merchant, enables the relevant PRS to be accessed by a consumer or provides any other technical service which

⁴² The revenue share arrangements are set up as follows: OCPs bill their customers for access to the PRS and retain a proportion of the money collected from the customer. An OCP passes on the balance to the TCP (or very often to a transit operator who would also retain a proportion and then pass the remainder on to the TCP). A proportion is retained by the TCP with the remainder being passed on to the intermediary. The intermediary then shares the balance with any other parties involved in the provision of the PRS, which often includes one or more 'merchants'.

facilitates the provision of the relevant PRS. In doing so, their role can cover a range of different functions, the packaging and promotion of the service, and the provision of the service platform. Often, however, their role is limited to providing the service platform and packaging the content. It is common for suppliers to operate only at the intermediary level. Barriers to entry are relatively low, requiring only modest investment in a technical interface with TCPs; and

- (c) **Merchants:** they control or are responsible for the operation, content and promotion of the relevant PRS and/or the use of any facility within the PRS. Their role will typically be to act as a service promoter and/or as a content provider. Barriers to entry are low and are largely limited to creative content production costs and the costs involved in marketing a service. There can also be other companies with whom merchants contract to support the promotion and delivery of PRS, such as marketing agencies, IT suppliers, fulfilment agencies and contact centres for outsourced customer services.

- 4.21 The definitions of PRS providers in Code 15 are not identical to those set out in sections 120(9), (10) and (11) of the Act, although the providers defined in Code 15 do fall within one of the definitions in those subsections of the Act by virtue of the services they provide. The reasons for the more granular definitions in successive PSA codes since the commencement of the Act was to make it easier for the PSA to target rules in their codes to regulated providers and to reflect technological and contractual changes within the value chain more closely, over the years since the Act came into force.

Proposed definitions of PRS providers in the draft PRS Order

PRS providers

- 4.22 Section 122 of the Act confers powers on Ofcom to impose various requirements with respect to the provision and contents of PRS, together with their promotion and marketing, on PRS providers. Section 151 of the Act states that “*provider*”, in relation to a PRS, is to be constructed in accordance with s120(9) to (12) of the Act (and that cognate expressions are to be construed accordingly). This means that the draft PRS Order can only be made in relation to “providers” falling within those statutory definitions.
- 4.23 We propose to preserve regulation of all the parties currently regulated by PSA, namely network operators, intermediaries and merchants.
- 4.24 However, as described above, we are proposing to use different definitions in terms of how we define each type of PRS provider in order to reflect the definitions set out in the Act, in particular, sections 120(9) to (11) which set out, for the purposes of the Act, when a person is providing a PRS. To that end:
 - (a) the expression of an “*intermediary*” has been defined to align with the provisions in s120(9)(c) and (d) of the Act (see article 9(2) of the draft PRS Order);
 - (b) the expression of a “*merchant*” has been defined to align with the provision in s120(9)(a) of the Act (see article 9(4) of the draft PRS Order); and
 - (c) the expression of a “*network operator*” has been defined to align with the provisions in s120(10) and 120(11) of the Act (see article 9(5) of the draft PRS Order).
- 4.25 However, while we have defined these categories of providers differently to Code 15, it is important to note that the substantive requirements which we propose to place on each of those PRS providers will nevertheless remain broadly consistent with Code 15.
- 4.26 We also propose to include article 9(8) and 9(9) of the draft PRS Order, which broadly reflects section 120(13) of the Act. Section 120(13) sets out who is to be regarded as the

“*provider*” as a matter of law where the PRS may involve other persons in the supply chain. By including these provisions, we are aiming to make clear how section 120(13) of the Act would apply in relation to the definitions under the draft PRS Order. For the purposes of the draft PRS Order, we have narrowed the application of section 120(13) by focusing article 9(8) and 9(9) of the draft PRS Order on intermediaries and merchants, as we consider that, in practice, only these providers will be involved with other persons in the supply chain for a CPRS. We consider our proposals for the definitions of PRS providers will have minimal impact on existing providers as we are simply aligning these definitions with the statutory language.

Regulated activity

4.27 We are also proposing to include a definition of “*regulated activity*” in article 9(12) of the draft PRS Order. This sets out the types of activities done by PRS providers in relation to CPRS which are within scope of the draft PRS Order. This will include where a merchant is providing a CPRS to a consumer, where an intermediary is providing a service which falls under article 9(2) of the draft PRS Order, and where a network operator makes available an electronic communications service, or an electronic communications network, in a way that meets the definitions in article 9(6)(a) or 9(7)(a) of the draft PRS Order. It also includes promotion and marketing of a CPRS. “*Regulated activity*” is used throughout the draft PRS Order, including in various articles where PRS providers are prohibited from carrying out regulated activity unless they have complied with the requirements of those articles. As with the proposed definition for PRS providers, we consider that our proposals for the definition of “*regulated activity*” will have minimal impact on existing providers as we are simply aligning these definitions with the statutory language.

Consultation question 4: Do you have any comments about our proposed definition for PRS regulated providers and regulated activity in article 9 in Part 1 of the draft PRS Order?

Organisational requirements

Registration

Summary

4.28 We propose to follow, in the main, the PSA's current approach in terms of registration requirements as we recognise the critical role that obtaining key information from PRS providers plays in ensuring that the regulator has appropriate oversight of CPRS. Our proposed requirements relating to registration are set out in Part 2 (articles 10 to 13) and Schedules 1 and 2 of the draft PRS Order.

Existing requirements in Code 15

Registration

4.29 Code 15 includes an ‘Organisation and service information Standard’ which requires organisations and individuals involved in providing PRS to provide the PSA with timely, accurate and detailed information about themselves and the services they offer or intend to offer. This includes the following requirements:

- (a) PRS providers must identify and provide contact details for the individuals within the organisation with responsibility for DDRAC, platform security, vulnerable consumers and overall regulatory compliance with PRS (Code 15, paragraph 3.8.3);
- (b) merchants must, before making a service accessible to consumers, provide to the PSA all information (including any relevant numbers and access or other codes) that the PSA requires (Code 15, paragraph 3.8.4 (a));
- (c) merchants must provide the identity of any other PRS providers involved in the provision of the service, as well as information about any other person contracted for, or otherwise involved in, the promotion and delivery of the service (Code 15, paragraph 3.8.4 (b));
- (d) PRS providers must keep all information provided to the PSA as part of registration up to date and notify the PSA of any changes promptly (and within five working days of the change) (Code 15, paragraph 3.8.6);
- (e) registration must be renewed annually or at another reasonable interval as determined by the PSA from time to time (Code 15, paragraph 3.8.7); and
- (f) PRS providers must pay a registration fee⁴³ (which is renewed annually), unless they are exempt (Code 15, paragraphs 4.35 to 4.39).

Registration exemptions

4.30 Code 15 currently includes a number of registration exemptions which are as follows:

Merchants' exclusive use of an intermediary

4.31 A merchant can contract exclusively with one intermediary in order to bring its PRS to market. In these instances, it is currently possible for these merchants to be exempt from registration under Code 15, subject to that intermediary making an application to the PSA should they wish the merchants they work with to benefit from this exemption.⁴⁴

Merchants' use of an app-store

4.32 A merchant's PRS can be found on app stores such as Google's Play Store or the Apple Store. App stores are a marketplace for applications some of which involve PRS. If a merchant's PRS operates through an app store (which by definition means that the app store is an intermediary), then it is possible for the merchant to be exempt from registration subject to the app store making a written request to the PSA.⁴⁵

Method of PRS access

4.33 PRS operating on 087 number range or on voice shortcodes which cost 20p or less are exempt from registration, unless the PRS is an ICSS, professional advice service or live entertainment service.⁴⁶

Registration fee exemptions

4.34 In addition, PRS providers are exempt from paying the registration fee if they:

- (a) have revenue below £10,000 per year;⁴⁷ or

⁴³ The current registration and renewal fee is £200+VAT.

⁴⁴ [PSA registration exemption notification, 5 April 2022](#)

⁴⁵ [PSA App store exemption notification, 5 April 2022](#)

⁴⁶ [Does my service benefit from an exemption? PSA website](#)

⁴⁷ In this case registration is free for the first year, but after the first year they are required to pay the renewal fee. During the year if their gross outpayments begin to exceed £834.00 per month then they are required to contact the PSA to discuss the exempt status.

- (b) are a registered charity operating a PRS.

Proposed requirements in the draft PRS Order

Requirements before carrying out regulated activity

- 4.35 We propose to retain a mandatory registration scheme for the PRS industry. This means that all PRS providers must register with Ofcom at least five working days before carrying out regulated activity unless they are exempt from registration requirements (see below). These proposed requirements are set out in article 10 of the draft PRS Order and are broadly similar to current requirements under paragraph 3.8 of Code 15, albeit we are proposing to reduce and simplify the amount of information requested. Further, we propose to rely on some existing information collected by the PSA from PRS providers prior to commencement of the draft PRS Order. This means providers will need to submit different information to Ofcom:
- (a) A PRS provider not previously registered with the PSA will need to submit the information contained in Schedule 1;
 - (b) a PRS provider who was previously registered with the PSA will need to submit the information contained in Schedule 2, which is ‘new’ information not previously collected by the PSA; and
 - (c) a PRS provider who was previously registered with the PSA will also need to review information in Ofcom’s register published under article 12 of the draft PRS Order in respect of information they have previously submitted to the PSA (which will be passed onto Ofcom by the PSA) to see whether this needs to be updated.
- 4.36 We also propose to include the following requirements relating to registration in the draft PRS Order:
- (a) PRS providers must give Ofcom all relevant information before carrying out any regulated activity (see above for what specific information providers are expected to give). In addition, they must give this information to Ofcom at least five working days before they carry out any regulated activity, unless they are a PRS provider who was previously registered with the PSA, in which case the registration requirements for transitional cases will apply (see below). Our proposed requirement for providers to submit certain information to Ofcom via Ofcom’s website, including when the information needs to be provided, are set out in article 10(2) of the draft PRS Order;
 - (b) we are broadly retaining the requirement for PRS providers to provide the name and contact details of individuals with overall responsibility and accountability for all purposes relating to the requirements under the draft PRS Order. This is currently set out at paragraph 3.8.3 of Code 15. However, we have amended this requirement to require PRS providers to appoint a person in senior management for various CPRS-related purposes – a “*generally authorised person*” – this is set out in article 10(1)(b) of the draft PRS Order. We describe those areas which we propose that this person must have authority to act on behalf of the PRS provider in article 10(4) of the draft PRS Order which includes, amongst others, risk assessments, security testing and approving the policies and procedures in relation to vulnerable consumers and complaints and enquiries; and
 - (c) we are proposing to retain the requirement that PRS providers must update Ofcom where information provided under these requirements is no longer accurate, within five working days of any changes. This is set out in article 10(3) of the draft PRS Order, and

largely reflects paragraph 3.8.6 of Code 15. This will also catch where a PRS provider intends to cease providing a regulated activity.

- 4.37 As mentioned above, we are proposing to streamline the amount of information requested from providers under article 10 of the draft PRS Order, in comparison to what is currently required under Code 15. In particular, we are proposing to remove the following current information requirements:
- (a) the fee classification which is no longer relevant given our proposal to remove the requirement for a registration fee to be paid by PRS providers (see paragraph 4.38 below);
 - (b) the requirement for registered providers to provide a service start and end dates; service delivery method; other service terms and conditions; service delivery domain; country of service provision and customer service information (service provider can input text to enable specific messaging);
 - (c) the requirement for brand images to be provided;
 - (d) information currently required under service type and payment and consumer bill details; and
 - (e) promotion start and end dates and details of the methods used to promote a service (from a defined list).
- 4.38 In addition, we are not proposing to retain the requirement for annual registration, as is currently required under paragraph 3.8.7 of Code 15.
- 4.39 As mentioned above, we are not proposing to require any separate registration fee or registration renewal fee to cover Ofcom's costs in dealing with registration. Instead, we propose to recover our costs as part of our administrative charges. Our proposed approach to cost recovery is set out in article 14 of the draft PRS Order and discussed in paragraphs 4.249 to 4.271 below. We consider this will be beneficial to existing providers as they will no longer be required to pay a separate registration fee.

Exemptions for certain merchants

- 4.40 We propose to retain some of the existing registration exemptions under Code 15 in the draft PRS Order. This is because we do not want to introduce unnecessary regulatory burdens for certain categories of services where we consider it is possible to meet the outcomes of the proposed requirements by alternative means.
- 4.41 However, it is not possible to create an equivalent model to the current exemptions regime under Code 15 given the nature of a section 122 Order which is not as flexible in nature, nor as easily amended, as Code 15. Therefore, we propose to carry across some of the existing exemptions currently recognised by the PSA into the draft PRS Order, but we will not be able to accommodate 'new' exemptions after commencement of the section 122 Order without the final Order being amended in accordance with the parliamentary process. The registration exemptions we are proposing to retain are as follows:
- (a) exemption from registration for merchants who are operating services exclusively through a single intermediary ("sole intermediary exemption") (see article 11(1)(a) of the draft PRS Order); and
 - (b) exemption from registration for merchants who are operating services through an intermediary provider app store ("app store exemption") (see article 11(1)(b) of the draft PRS Order).

- 4.42 Article 11 of the draft PRS Order includes a new definition of “*app store*”, which is not currently contained in Code 15, and associated definitions of “*online facility*” and “*operator*” in relation to the app store definition.
- 4.43 We do not propose to carry across the exemption for merchants operating PRS numbers starting with 087 and voice shortcodes costing 20p or less. This exemption under Code 15 benefited these merchants by permitting them not to have to register (thereby not to have to submit information to the regulator) nor pay a registration fee.
- 4.44 In considering how to set out our registration exemptions, we propose to require a notification to be submitted ahead of any merchant making use of the exemption under the draft PRS Order.
- 4.45 We do not think there would be any material difference for these merchants from being granted an exemption under our proposed approach as compared with requiring registration under our draft PRS Order. This is because there is no registration fee from which they can be exempted and, under our proposed approach, we would require information broadly equivalent to registration information to be given to us in order for those merchants to make use of the exemption.
- 4.46 Therefore, we consider it is appropriate to require registration, especially as our overall approach regarding registration is to gather key information about providers in order to maintain oversight over the market and to be able to serve enforcement notifications or other documents for the purposes of our regulation. We recognise that such merchants currently do not need to provide any information at all to the PSA in order to benefit from the exemption, and that our proposals will have an impact in this respect. However, we consider this impact to be low and proportionate to our policy aims and objectives for the reasons explained above.

Notification requirements for exempted merchants

- 4.47 Under the PSA’s current app store exemption, it is possible for intermediary provider app stores to obtain permission for their merchant provider clients – i.e. merchants who offer products for sale via that app store – to operate without the need to register with the PSA. There is no requirement for the intermediary app store to notify the PSA about which merchants are benefitting from the exemption.
- 4.48 The PSA’s app store exemption contrasts with the PSA’s sole intermediary exemption. In this latter case, the intermediary must provide the PSA with a list of merchants who benefit from the exemption. A key justification for this different approach relates to the volume (and scale) of potential merchants impacted for each of these exemptions. Our understanding is that there are far fewer merchants who benefit from the sole intermediary exemption than the app store exemption, meaning it is less onerous for an intermediary under the sole intermediary exemption to provide a list to the PSA.
- 4.49 While the PSA does not currently require a notification by app stores for the app store exemption to apply, we are proposing that all intermediaries who are working with merchants exempted under article 11(1)(a) or (b) of the draft PRS Order will need to:
- (a) keep a "relevant record" in respect of those merchants (see article 11(3)(a) and (4)(h) of the draft PRS Order). Accordingly, this will require merchants to provide certain information to intermediaries to enable any exemptions to apply to them;
 - (b) notify Ofcom that it retains such a relevant record; and

- (c) notify Ofcom that it has a process in place for dealing with consumer complaints in relation to the exempted merchant, which includes making the merchant's contact details available on the intermediary's website.
- 4.50 We consider the requirement for intermediaries whose merchants benefit from these exemptions to keep a relevant record to be justified, as Ofcom requires this information for the purpose of service of notifications and other legal documents on merchants, including electronically. Legal service on merchants needs to be effective in order for any enforcement process to be effective. In addition, Ofcom must comply with sections 394 and 395 of the Act in terms of service whereas these provisions are not applicable to the PSA. We consider that requiring intermediaries to collect this information will enable effective service on merchants and will also enable Ofcom to have visibility over which merchants are using the exemption, and their details for service, should any enforcement issues arise as respects those merchants.
- 4.51 We recognise that, in relation to the app store exemption, in particular, those intermediaries deal with a very large number of merchants. We are not proposing to require intermediaries to pass on the information they collect about every merchant benefiting from the exemption to Ofcom, unless Ofcom makes a request for the information. We are simply requiring intermediaries to collect and retain in this information. While we recognise this may require changes to existing contractual arrangements between intermediaries and merchants, albeit we consider any such changes are likely to be limited, we consider this approach is proportionate and takes steps to reduce the burden on intermediaries, while ensuring that the enforcement process is effective, in order to protect consumers.
- 4.52 We have considered the option of requiring intermediaries to submit key information regarding merchants who wish to benefit from the exemptions to Ofcom in advance of any registration exemption applying to those merchants. However, we are concerned that this approach may be disproportionate in light of the number of merchants who use the app store exemption, in particular, and this would likely undermine the purpose of the registration exemptions.
- 4.53 The requirement to have a consumer complaints process in relation to deal with complaints in relation to the exempted merchant corresponds to the requirements already in place under the PSA's current app store exemption for app developers to "*publish a website or email address within the store for consumer contact purposes*" and to "*commit to providing an escalation path for PRS consumers with unresolved complaints, either through the app store or by clear and explicit agreement with each contracted UK mobile network operator*".
- 4.54 In addition, we are proposing that intermediaries who submit a notification to establish exemptions for their merchants would need to do this "*at least last five working days*" before the CPRS is provided.⁴⁸ It is important to note that in the case of merchants who were previously operating under a PSA exemption from the requirement to provide information for the purposes of complying with section 3.8 of Code 15, the time period for the notification to be submitted to Ofcom by the intermediary is one month beginning with the commencement of the Order. This is a new and more specific requirement given that the PSA's current exemptions do not specify a timescale for the intermediary to make any application or request to the PSA. The new requirement proposed in the draft PRS Order

⁴⁸ See article 11(2)(b) of the draft PRS Order and article 11(4)(g) which explains what is meant by the "relevant period" for the notification to be submitted.

takes into account that there will need to be transitional arrangements for merchants who are currently able to use the PSA's app store exemption and sole intermediary exemption.

Ofcom duty to establish and maintain a register

4.55 Article 12 of the draft PRS Order imposes a duty on Ofcom to establish and maintain a register for the publication of information given to Ofcom under the registration and exemption requirements and, also, certain information relating to enforcement action taken against PRS providers by Ofcom. Article 12 of the draft PRS Order sets out the information it is proposed will be published in that register. Currently, the PSA maintains a register, which is referred to in paragraphs 3.8.2 and D.2.53 of Code 15. This provision in the draft PRS Order is a new duty on Ofcom, but this tracks to Code 15 as the PSA commits to publishing registration information on its website (see paragraph 3.8.4 (a) and (c) of Code 15)

Registration for transitional cases

4.56 In order to minimise the impact of Ofcom's registration requirements on existing PRS providers, we are proposing to include different registration requirements for those providers. Specifically, as set out at article 13 of the draft PRS Order, we propose that PRS providers who were previously registered with the PSA must give Ofcom the information specified at Schedule 2 of the Order no later than three months from the commencement of the Order. They must also ensure that information is kept up to date. The information in Schedule 2 is intended to capture information that PRS providers are not currently required to provide to PSA, but which Ofcom considers is necessary for the purposes of its regulation.

4.57 Ofcom will be using information which the PSA has collected in relation to these providers. In order to ensure this is accurate, we are proposing to include a requirement at article 13(5) of the draft PRS Order to require existing providers to check Ofcom's register in respect of information about them that is published and notify Ofcom where that information is not accurate.

Consultation question 5: Do you have any comments about our proposed approach to registration and registration exemptions in Part 2 of the draft PRS Order?

Due diligence measures and risk assessments in dealing with others

Summary

4.58 We are proposing to broadly retain requirements in the draft PRS Order relating to DDRAC albeit renaming these requirements as "*due diligence and risk assessments in dealing with others*".⁴⁹ We have broadly retained existing Code 15 requirements relating to DDRAC albeit we have looked to streamline these requirements and focus on what we consider to be the key issues which PRS providers need to address when looking to enter into arrangements with other PRS providers and third parties. Our proposed requirements are set out in Part 4 of the draft PRS Order.

Existing requirements in Code 15

4.59 Under Code 15, organisations and individuals must perform effective due diligence on any person or organisation with whom they contract in relation to PRS and must conduct a full

⁴⁹ We consider this is a more appropriate description for the purposes of our draft PRS Order.

and thorough assessment of potential risks arising from the provision, content, promotion and marketing of CPRS on an ongoing basis. This to ensure that network operators and intermediaries assess the integrity, including mitigating any potential risks, of those parties they contract with, and use the information established as a basis for ongoing checks throughout the lifetime of the relationship.

- 4.60 DDRAC is required to be undertaken by any party that contracts with another party in the delivery of a CPRS. These obligations, therefore, run downstream in the CPRS value chain - from network operators to intermediaries to merchants. As such, they also help all parties in the CPRS value chain to operate with confidence and assurance that the practices of those they contract with in the delivery of CPRS are compliant and effective.
- 4.61 Additionally, Code 15 requires network operators and intermediaries to impose DDRAC obligations upon parties they directly contract with in the provision of CPRS and ensure these parties do the same to others with whom they have a direct contractual relationship. Consequently, DDRAC obligations are not only imposed on regulated PRS providers; they also extend to persons who are not regulated themselves but are contractually involved in the provision of the PRS service (see paragraph 3.9.12 of Code 15).
- 4.62 Code 15 currently sets out DDRAC obligations in section 3.9 and includes a list of enforceable detailed due diligence requirements in Annex 2. Code 15 allows the PSA to update the DDRAC requirements and the period such DDRAC records should be kept from time to time.

Proposed requirements in the draft PRS Order

- 4.63 We propose to include the following requirements relating to due diligence and risk assessments in the draft PRS Order.

Prohibition on dealing with unregistered PRS providers

- 4.64 We are proposing to prohibit PRS providers from entering into arrangements with another PRS provider unless that PRS provider is registered. This article aims to replicate paragraph 3.9.4 of Code 15, which says that PRS providers must only enter into contracts relating to PRS with other PRS providers that are registered with the PSA unless exempted. We are intending to carry this provision over into the draft PRS Order as we believe this is a due diligence measure that acts as an important check on ensuring that any unregistered PRS providers are prevented from operating in the market. This proposed requirement is set out in article 15 of the draft PRS Order. Given this reflects 3.9.4 of Code 15, there should be minimal impact on existing PRS providers, including on their contractual arrangements, as they should already be doing this under Code 15.

Prohibition on dealing with persons on whom a relevant sanction has been imposed

- 4.65 We are proposing to retain the current prohibition from paragraph 3.1.4 of Code 15 that PRS providers should not engage with, or otherwise permit in the involvement of the provision of PRS, a PRS provider or other persons on whom a sanction under paragraphs 5.8.5(f) to (h) of Code 15 has been imposed. Under those sanctions the PSA can prohibit a PRS provider from:
- (a) providing or having any involvement in any PRS or promotion of a PRS for a defined period; and
 - (b) contracting with any other PRS provider at all, or subject to specific terms, for a defined period.

- 4.66 Again, this is intended to be a due diligence requirement. We consider it is important to ensure that where these sanctions have been previously imposed by PSA (or where corresponding sanctions have been imposed under previous Codes of Practice) and are still in effect, the draft PRS Order stops PRS providers from dealing with any persons subject to those sanctions so as to amount to a breach of those sanctions. We have, therefore, proposed reflecting this requirement at article 16 of the draft PRS Order.
- 4.67 In reflecting this requirement, we have extended the scope to cover specific directions that may be given by Ofcom under the draft PRS Order.⁵⁰ This would mean as well as any sanctions by the PSA, a PRS provider cannot contract with a person who is subject to specific directions given by Ofcom under the draft PRS Order. This will ensure again that specific directions given by Ofcom which prohibit, suspend, or restrict a PRS provider from carrying out a regulated activity, are further upheld in practice. We recognise that this will mean that providers are likely to have to look out for Ofcom directions (which is an additional requirement to those currently in Code 15) and may incur additional time and costs as it means checking more information before entering into agreements. However, we think any additional costs are likely to be minimal and are justified by reference to the policy objective of ensuring effective due diligence mechanisms.

Risk assessment requirements

- 4.68 We are proposing to merge much of the remaining due diligence and risk assessment requirements in Code 15 so that the draft PRS Order sets out in article 17:
- (a) the first risk assessment that must be done before entering into arrangements with another person (“the contracting party”) – this broadly reflects the due diligence measure that is required to be taken under paragraph 3.9.1 of Code 15; and
 - (b) how this risk assessment is then to be reviewed and updated throughout the life of the arrangement- this broadly reflects the risk assessment requirement in paragraph 3.9.2 of Code 15.
- 4.69 We are proposing that article 17 of the draft PRS Order is drafted so that PRS providers are prohibited from entering into an arrangement in respect of CPRS, unless the provider has carried out a risk assessment in respect of that arrangement. This specific prohibition is not contained in paragraph 3.9.2 of Code 15, which deals with risk assessment. However, as discussed above, the first risk assessment required to be carried out will act as a due diligence check and so, in that sense, keeps in line with what is set out in paragraph 3.9.1 of Code 15 which says that due diligence must be carried out prior to entering into any contracts.
- 4.70 Article 17(5) of the draft PRS Order requires that where the risk assessment identifies risks to consumers that arise from the proposed arrangement, the PRS provider has to take appropriate and proportionate measures to prevent adverse effects arising from those risks. Where they are unable to do so, article 17(6) of the draft PRS Order is clear that the PRS provider cannot proceed with the arrangement. Under article 17(7) and 17(8) of the draft PRS Order, PRS providers are required to keep the risk assessment under review and, again, deal with any new risks that they may identify. This generally reflects the requirement in paragraph 3.9.2 of Code 15 on PRS providers to “*take and maintain effective and ongoing steps to control and mitigate any risks identified*”, as well as the requirement at paragraph

⁵⁰ This is referring to a direction that can be given by Ofcom under articles 64(5), 64(6)(c), 65, 66(5) and 66(6)(c) of the draft PRS Order.

3.9.14 of Code 15 for PRS providers to use the information obtained through their DDRAC processes to *“inform their ongoing risk assessment and control in respect of each person with whom they contract and any associated services”*.

- 4.71 There is also a requirement at article 17(10) of the draft PRS Order that a risk assessment under this article must be signed off by the PRS provider’s generally authorised person (see paragraph 4.36(b) above in relation to registration). This generally reflects paragraph 3.9.7 of Code 15 which requires DDRAC to be reviewed and signed off by a director or equivalent person.
- 4.72 Under article 17(11) of the draft PRS Order, PRS providers are required to make and keep a record in writing of the risk assessments carried out under this article, which generally reflects the requirement in the PSA’s data retention notice that DDRAC data should be retained.⁵¹ Given this, and the other requirements mentioned above, are broadly reflective of Code 15 requirements, our expectation is that there should be minimal impact on existing PRS providers (including on their contractual arrangements) as they should already be doing this to ensure compliance with Code 15.
- 4.73 Whilst article 17 of the draft PRS Order broadly reflects the requirements around risk assessments in section 3.9 and Annex 2 of Code 15, we have made some changes to ensure that the risk assessments under the draft PRS Order are focused on reducing the risk of harm to consumers, and also that the risk assessments are not onerous for PRS providers to carry out in practice.
- 4.74 For example, one change is that all PRS providers will be subject to the requirements in article 17 of the draft PRS Order, including the due diligence measure in the form of undertaking the first risk assessment. This is slightly different to paragraph 3.9.1 of Code 15 which requires due diligence to be carried out by network operators and intermediaries only, although it should be noted that the requirement to undertake risk assessments in paragraph 3.9.2 of Code 15 applies to all PRS providers. Given that we have merged the requirement in paragraph 3.9.1 of Code 15 to perform effective due diligence into the more general requirement to undertake risk assessments, we have decided to take the approach in paragraph 3.9.2 of Code 15 and apply the requirement to all PRS providers. The effect of this will be that merchants will now be required to undertake effective due diligence measures, which only applied to network operators and intermediaries before. However, we consider that there should be minimal impact on merchants as these due diligence measures will form part of their risk assessment processes, which we believe they should largely already have in place given the obligations to carry out risk assessments under paragraph 3.9.2 of Code 15.
- 4.75 Another change is that we set out in article 17(2) to 17(4) of the draft PRS Order, the risks and information which we consider that PRS providers must take into account for the purpose of their risk assessments where this information is reasonably accessible. We have adapted these factors from Annex 2 of Code 15, albeit we have streamlined these so that the factors which PRS providers are required to take into account under the draft PRS Order are those factors which we consider to be critical to determining the suitability of the contracting party for the purposes of PRS. Another benefit of streamlining the factors to be taken into account is that this should be less onerous for PRS providers to carry out in

⁵¹ See [Data Retention Notice](#)

practice. The information to be assessed as part of the risk assessment includes the following:

- (a) corporate structure;
- (b) details of whether the contracting party is unable to pay its debts, or is likely to be unable to pay its debts;
- (c) details of the contracting party's involvement in any legal proceedings, including any previous or ongoing legal proceedings and judgments or any other decisions made by a court, tribunal or other body in respect of the counterparty;
- (d) the contracting party's use of sub-contractors; and
- (e) the contracting party's relevant regulatory history – where the contracting party is a PRS provider, this will include any decisions made by Ofcom or PSA in relation to their compliance with either the draft PRS Order and/or Code 15. In respect of PRS providers and other third parties, it will also include their compliance with other regulatory requirements which apply to them, including, for example, any data protection requirements enforced by the Information Commissioner's Office, and any financial services requirements enforced by the Financial Conduct Authority.

- 4.76 In terms of paragraph 4.75(e) above, we recognise that this may have an impact on PRS providers as it may take some time and money to check for relevant regulatory decisions. However, we consider this to be an important aspect of effective due diligence and risk analysis, and have tried to mitigate this impact by setting out in the draft PRS Order this is only required to be taken into account where it is reasonably accessible.
- 4.77 We also consider the impact of these proposed changes to be low given that we propose including a deeming provision at article 20 of the draft PRS Order, which will apply in respect of existing contractual arrangements that PRS providers will continue to have at the commencement of the draft PRS Order. See paragraph 4.82 below for more information.
- 4.78 Article 17(3)(d) of the draft PRS Order requires PRS providers, as part of their risk assessment, to take into account any sub-contractors who will be involved in the arrangements and so reflects paragraph 3.9.11 of Code 15. However, paragraph 3.9.11 of Code 15 only applies to network operators and intermediaries, whilst in article 17(3)(d) of the draft PRS order, we propose widening the scope of the obligation to all PRS providers. Whilst this is a change from the current position in Code 15, we anticipate there should be a minimal impact on existing merchants given the deeming provision at article 20 of the draft PRS Order, which will deem them to have already carried out a risk assessment under article 17 of the draft PRS Order in respect of existing contractual arrangements.
- 4.79 Under paragraph 3.9.3 of Code 15, the PSA is able to add to the requirements in Annex 2 from time to time. This will not be carried over into the draft PRS Order as Ofcom is unable to make any further provision outside of the draft PRS Order. This will also apply to the reference in paragraph 3.9.14 of Code 15 which states that PSA may issue guidance from time to time.

Suspension of arrangements by network operators and intermediaries

- 4.80 We set out our proposed requirements relating to suspensions of arrangements by network operators and intermediaries at articles 18 and 19 of the draft PRS Order. These articles require that:

- (a) Network operators suspend PRS arrangements with an intermediary where they have reasonable grounds for suspecting that there is a security compromise (or risk of this)⁵² in the intermediary's systems,⁵³ or where the intermediary is contravening, or has contravened, a requirement imposed on it under the draft PRS Order; and
- (b) intermediaries suspend PRS arrangements with merchants where they have reasonable grounds for suspecting that there is a security compromise (or risk of this) in the merchant's systems, or where the merchant is contravening, or has contravened, a requirement imposed on it under the draft PRS Order.

4.81 These articles largely reflect existing Code 15 requirements under paragraphs 3.9.8, 3.9.9, 3.10.8 and 3.10.9 of Code 15. There are, however, a number of key differences, including:

- (a) we have drafted articles 18 and 19 of the draft PRS Order to only require network operators and intermediaries to suspend arrangements with contracted parties where certain conditions are met (as set out above). We note there are currently no requirements in Code 15 as to when services should be suspended rather than terminated (or vice versa). Therefore, we have drafted the requirement as a requirement to suspend in order to reflect the minimum that is required by Code 15 (it is still open for relevant PRS providers to terminate even though this is not required under the draft PRS Order). As a result, we expect there to be minimal impact on existing PRS providers as a result of this change, as it is simply reflecting the minimum that they are already expected to do;
- (b) the relevant provisions in Code 15 require network operators and intermediary providers to ensure there are terms in their PRS contracts with their respective parties which allow them to suspend or terminate their contracts where those conditions are met. This is different to the draft PRS Order, which will require network operators and intermediaries to go ahead and suspend where the relevant conditions are met. However, we consider that the implications of the requirements in Code 15 is that by having these terms in their PRS contracts, network operators and intermediaries are currently expected to go ahead and suspend or terminate where it is appropriate to do so. This is supported by the PSA guidance to paragraph 3.9.8 of Code 15 which says there should be clear, documented consideration of whether the network operator or intermediary providers should be suspended or terminated. As a result, we expect there to be minimal impact to existing PRS provider and their contractual arrangements; and
- (c) the requirement at paragraphs 3.9.9 and 3.10.9 in Code 15 in respect of intermediary providers applies to their contracts with merchants and third-party consent verification providers. We have removed reference to third-party consent verification providers in the draft PRS Order, given our amended approach to consent requirements (see paragraphs 4.119 to 4.157 of this document). PRS providers may wish to update their contractual arrangements with third-party consent verification providers as a result of this, however, this is not mandated by the draft PRS Order.

Arrangements entered into before the commencement of the draft PRS Order

4.82 We are also proposing to include a new deeming provision at article 20 of the draft PRS Order. This will have the effect of ensuring that any PRS providers who have already complied with DDRAC requirements under Code 15 prior to the draft PRS Order coming into force and have, therefore, already entered into contractual arrangements in respect of PRS,

⁵² See article 21(10)(f) of the draft PRS Order for the definition of security compromise.

⁵³ See article 18(4)(b) of the draft PRS Order for the definition of "systems".

are deemed to have complied with the relevant provisions under the draft PRS Order in respect of those existing contracts. This is to ensure that any existing contracts are not affected by Part 4 of the draft PRS Order where the appropriate due diligence and risk measures have already been taken. It should be noted that this provision has been drafted so that PRS providers will still have to comply with the risk assessment reviews in article 17(7) of the draft PRS Order in respect of those contractual arrangements.

- 4.83 The aim of this is to minimise the impact of our proposals under Part 4 of the draft PRS Order by deeming existing PRS providers to have already complied with the relevant requirements, where appropriate.

Information gathering powers in respect of due diligence and risk assessments in the draft PRS Order

- 4.84 Paragraph 3.9.15 of Code 15 requires that PRS providers must make available to the PSA upon request, all DDRAC documentation within a reasonable time period specified by the PSA. For Ofcom's purposes, the draft PRS Order includes an information gathering power in article 57 which can be used to request due diligence and risk assessment information from PRS providers. See paragraphs 4.282 to 4.290 below for more information on Ofcom's information gathering powers.

Code 15 DDRAC requirements not being carried over into the draft PRS Order

- 4.85 Our approach to DDRAC in the draft PRS Order has been to set out what we consider are the key aspects of the regime, i.e., what steps PRS providers need to take before entering into arrangements in respect of PRS and what steps they will need to take should any risks arise during the course of those arrangements.
- 4.86 In taking this approach with the draft PRS Order, we are not carrying over several other requirements in section 3.9 of Code 15. These are as follows:
- (a) we are not replicating the reference to PSA being able to update due diligence requirements from time to time, as set out in paragraph 3.9.3 of Code 15. Under the rules relating to Statutory Instruments (such as the draft PRS Order), we will not be able to update the requirements relating to due diligence and risks in this way, as to do so would amount to unlawful sub-delegation. Accordingly, all requirements relating to due diligence and risks will need to be fixed in the draft PRS Order;
 - (b) we are not proposing to retain the requirement for network operators and intermediaries to have written DDRAC policies and procedures in place for the purposes of the draft PRS Order (paragraph 3.9.6 of Code 15). This is because we do not consider such a requirement is necessary as the draft PRS Order includes other provisions which requires ongoing monitoring of risk, including risk assessment requirements, security testing requirements and requirements in relation to suspending arrangements where an intermediary or merchant has acted in contravention of the requirements imposed on it under the draft PRS Order;
 - (c) we are not proposing to retain a requirement in the draft PRS Order which replicates paragraph 3.9.10 of Code 15. This provision states that network operators and intermediaries must include provisions in their contracts which require the contracting party to provide DDRAC information to the network operator or the intermediary, as well as to the PSA, on request. This is not being carried over because we do not have powers under the Act, in making the draft PRS Order, to impose obligations on, or enforce against, non-PRS providers. Where the contracting party is a PRS provider, Ofcom has its own information gathering powers under the draft PRS Order (see

paragraphs 4.282 to 4.290) which we can use to request from providers information relating to due diligence and risk. Additionally, if a network operator or an intermediary would outsource some aspects of the activity that is being regulated by the PRS Order, that provider would still remain liable for any breach;

- (d) similarly, we are not proposing to retain a requirement in the draft PRS Order for contractual control requirements, which requires that network operators and intermediaries to include provisions in their contracts requiring others in PRS value chain to comply with DDRAC obligations, and that information sharing is enabled across the PRS value chain (as currently set out in paragraph 3.9.12 of Code 15). As with the reasoning above at sub-paragraph (c), we are not carrying this over into the draft PRS Order as we do not have powers to impose obligations on non-PRS providers. Instead, we intend that any considerations in respect of sub-contractors in the value chain will be carried out under article 17(3)(d) of the draft PRS Order, which says that PRS providers are to take the use of sub-contractors into account when assessing the risk of entering into a proposed arrangement; and
- (e) we are not proposing to retain the requirement that network operators must undertake DDRAC with PRS providers where the PRS provider is acting in the capacity of both an intermediary and merchant, as required in paragraph 3.9.13 of Code 15. This is because we do not consider this provision to be necessary for the purposes of the draft PRS Order, which is clear that a risk assessment will need to be carried out in respect of any proposed arrangement and, so, will already catch a PRS provider who is acting as an intermediary and a merchant.

Consultation question 6: Do you have any comments on our proposed requirements relating to due diligence and risk assessment in Part 4 of the draft PRS Order?

Security testing

Summary

- 4.87 We are proposing to largely retain the core of the Code 15 obligations in relation to security testing for the purposes of the draft PRS Order. We have streamlined most of the requirements in Code 15 into one article, which focuses on a “security testing” requirement, specifically, rather than on having several other requirements in relation to systems and platforms. This is because we consider this is a more straightforward and targeted approach which will achieve the same broadly the same outcomes as Code 15, i.e. ensuring that payment platforms used by consumers are technically robust and secure.

Existing requirements in Code 15

- 4.88 The standard in section 3.10 of Code 15 states that all systems, including payment and consent verification platforms, used for the provision of and exit from PRS, must be technically robust and secure. This is to ensure that payment platforms are operated to a high standard and there are no vulnerabilities in payment platforms which could lead to consumers being charged for PRS without their consent.
- 4.89 Code 15 systems requirements and associated guidance, in particular, cover the following areas:

- (a) the need to appoint suitably qualified or experienced persons who will have overall responsibility for security and fraud and, specifically, for intermediaries to appoint a single point of contact who will act at the lead on systems and security issues⁵⁴;
- (b) the types of platform security measures that the PSA would expect providers to have in place, including the need for intermediaries to have their platforms security tested on an annual basis and act upon any security alerts or flags, as well as for network operators to assess any results of security testing that are submitted to them from intermediaries; and
- (c) a requirement that network operators and intermediaries must implement a co-ordinated vulnerability disclosure scheme⁵⁵ and act upon any issues reported.

Proposed requirements in the draft PRS Order

4.90 We propose to include the following requirements relating to security testing in the draft PRS Order.

Requirements relating to security testing

- 4.91 We set out in article 21 of the draft PRS Order, requirements relating to security testing and, in particular, that no intermediary may carry out regulated activity⁵⁶ unless they have carried out security testing of their payment platform for operator billing.⁵⁷
- 4.92 In coming to our position on the systems and security testing requirements to be included in the draft PRS Order, we have taken account of the recommendations from an independent report prepared by the security consultant, Copper Horse, which was commissioned by the PSA (with close involvement and input from mobile network operators).⁵⁸ This report looked into potential weaknesses in payment platforms, as the PSA and mobile network operators had identified issues with payment platforms for operator billing, which intermediaries were using in relation to PRS. The report led to PSA requiring in paragraph 3.10.4 of Code 15 that intermediaries must have their platform security-tested on an annual basis by a third party (except in relation to PRS which are voice-based).
- 4.93 We understand that the PSA's intention with paragraph 3.10.4 of Code 15 is that intermediaries are only required to carry out penetration testing of their payment platform for operator billing, which is what we have broadly incorporated into the testing requirement in article 21 of the draft PRS Order.
- 4.94 Article 21(1) of the draft PRS Order makes clear that an intermediary cannot carry out regulated activity unless it has carried out "*relevant security testing*", which is defined at

⁵⁴ See [Systems-Standard-guidance-note-16-02-2022.ashx \(psaauthority.org.uk\)](https://psaauthority.org.uk/systems-standard-guidance-note-16-02-2022.ashx) for examples of the types of skills and experience that security staff working in this area should have.

⁵⁵ Code 15 defines this as a scheme which is established to enable network operators and/or intermediary providers to work cooperatively with security researchers and other relevant persons to find solutions to remove or reduce any risks associated with an identified vulnerability in their services and/or systems. Such a scheme involves the reporting of vulnerabilities to network operators and/or intermediary providers by security researchers, and the coordination and publishing of information about a vulnerability and its resolution. The aims of vulnerability disclosure within such a scheme include ensuring that identified vulnerabilities are addressed in a timely manner; removing or minimizing any risks from any identified vulnerabilities; and providing users with sufficient information to evaluate any risks arising from vulnerabilities to their systems

⁵⁶ See paragraph 4.27 of this document for an explanation of regulated activity.

⁵⁷ See footnote 26 to this document for an explanation for operator billing.

⁵⁸ For more information on the Copper Horse report, see [Statement following consultation on revised Consent to Charge Guidance](#).

article 21(2)(a) of the draft PRS Order to mean a process “*which is undertaken for the purposes of determining whether the intermediary’s payment platform for operator billing is (in principle) at risk of any security compromises...*”. “*Security compromise*” is defined at article 21(10)(f) of the draft PRS Order and includes, amongst other things, anything that compromises the availability, performance functionality of the payment platform or any unauthorised access to, interference with or exploitation of the payment platform, or anything that enables such access, interference or exploitation, for whatever reason.

- 4.95 The relevant security testing must be signed off by a person appointed under article 21(3) of the draft PRS Order. This intends to generally incorporate the requirements in paragraph 3.10.2 of Code 15, which states that intermediaries must have a single point of contact in relation to systems issues and security, who is suitably qualified or experienced with technical expertise in systems issues and security. We are proposing to say in the draft PRS Order that this person needs to be in “*senior management (for the intermediary)*” (see article 10(5) of the draft PRS Condition for the definition of “*senior management*”) rather than a “*suitably qualified or experienced person with overall responsibility for security or fraud*” as currently contained in Code 15. In appointing this person for the purposes of article 21, intermediaries may wish to appoint a person who is an assigned Head of Security or other equivalent senior role, as set out in the PSA’s Code 15 Guidance note on Systems,⁵⁹ and who can meet the competences set out in the PSA’s guidance, namely:

“*demonstrable knowledge of the latest security thinking and threat modelling methods;*
ability to manage complex IT platform overhaul projects, if required
significant knowledge and experience of IT/web security to enable the effective identification, management and control of security and fraud risks;
and
significant knowledge and experience of security management systems and processes.”

- 4.96 Article 21(4) of the draft PRS Order makes clear that the appointed person cannot sign-off on the relevant security testing unless they are satisfied that there is no material risk of security compromises in the payment platform, or where there is such a risk, that the intermediary has in place measures which, in their opinion, will ensure that consumers are adequately protected. This broadly reflects paragraph 3.10.5 of Code 15, which requires intermediaries to act upon any security alerts or flags in a timely manner. The main difference for the purposes of the draft PRS Order is that the intermediary will be taking measures to mitigate risks of security compromises that the relevant security testing reveals, whereas the requirement in Code 15 talks about both alerts or flags that they spot themselves and are made aware of by others.
- 4.97 At article 21(5) of the draft PRS Order, we propose that intermediaries are required to keep an updated record of their relevant security testing. This reflects the PSA’s data retention notice,⁶⁰ which says that testing records are part of “*Relevant DDRAC data*” that must be retained.

⁵⁹ See [Systems-Standard-guidance-note-16-02-2022.ashx \(psaauthority.org.uk\)](https://psaauthority.org.uk/systems-standard-guidance-note-16-02-2022.ashx).

⁶⁰ See [Data Retention Notice](#)

- 4.98 We also propose to require that intermediaries share results of their relevant security testing with the network operators they have arrangements with where that network operator has requested the results. On receipt of the results, if the network operator reasonably believes that consumers are not being adequately protected from risks of security compromises in using the intermediary's payment platform for operator billing, the network operator must notify the intermediary of the same. Both providers are then required to stop carrying out the affected regulated activity. This is aimed at ensuring that, as well as intermediaries, network operators also play a role in checking that any risks of security compromises are dealt with so as to protect consumers. These provisions are based on the part of paragraph 3.10.4 of Code 15 which says that intermediaries must submit their test results to any network operators with whom they have a contractual relationship. Whilst we do propose a different approach in that sharing relevant security testing results will only be necessary where the network operator requests these, we anticipate in practice that most network operators will continue to ask to see such results.
- 4.99 We also propose to maintain in the draft PRS Order the exclusion that intermediaries are not required to carry out relevant security testing in relation to CPRS that are voice-based.
- 4.100 Overall, we recognise that there are likely to be cost implications for intermediaries in order to carry out this testing, albeit this is no change from existing requirement under Code 15. We also recognise that there may be some cost implications for network operators where they request the testing results and will need to analyse these results in order to come to a view about whether security compromises have been managed. However, we are proposing that test results should only be passed onto network operators where they ask for this and, therefore, this should be less burdensome than existing requirements under Code 15.

Requirements relating to PRS provider contracts

- 4.101 The requirements at paragraphs 3.10.8 and 3.10.9 of Code 15 are discussed above at paragraphs 4.80 and 4.81 of this document in relation to articles 18 and 19 of the draft PRS Order.

Code 15 requirements not being carried over to the draft PRS Order

- 4.102 In taking the above outlined approach in relation to security testing, there are some systems requirements in Code 15 which we are not proposing to retain. These are as follows:
- (a) we are not proposing to retain the requirement in paragraph 3.10.1 of Code 15. This requires network operators and intermediaries to appoint one or more suitably qualified or experienced persons with overall responsibility for security and fraud in respect of PRS. Given our approach of focusing on ensuring intermediaries are carrying out relevant security testing, the requirement is now on intermediaries to appoint a member of senior management to oversee and approve the relevant security testing, which will involve considering whether consumers are adequately protected from the risk of security compromises;
 - (b) we are not proposing to retain the requirement in paragraph 3.10.3 of Code 15 which states that intermediaries must comply with the technical standards at Annex 3 of Code 15. The PSA introduced Annex 3 in Code 15 on the basis that these standards would change from time to time (in line with technological advancements) and, originally, as part of Code 14 Guidance,⁶¹ the PSA said it would review them annually. However, we

⁶¹ See paragraph 33 of [General-Guidance-Note---Consent-to-Charge-13-02-2020.ashx](https://psa.gov.uk/general-guidance-note---consent-to-charge-13-02-2020.ashx) ([psauthority.org.uk](https://psa.gov.uk))

are not proposing to carry this over into the draft PRS Order given the need for content in the draft PRS Order to be fixed and future-proof, which means that if the technical standards are included in the draft PRS Order, they cannot be easily amended to keep up with developments in technology;

- (c) we are not proposing to retain the requirement in paragraph 3.10.6 of Code 15 – this requires that network operators have any test results that are submitted to them under paragraph 3.10.4 of Code 15 by suitably qualified or experienced staff. This is not carried over on the basis that it is duplicating the testing requirement that already applies to intermediaries. Instead, and as explained above, we propose that network operators can request the results of relevant security testing and come to a view on whether any measures the intermediary is taking following this is adequate to protect consumers;
- (d) we are not proposing to retain the specific requirement in paragraph 3.10.7 of Code 15 – this requires network operators and intermediaries to provide the results of the intermediary’s testing to the PSA. Ofcom will have its own information gathering powers under article 57 of the draft PRS Order, which can be used for the same purposes here;
- (e) for the same reason as set out at sub-paragraph (d) above, we are also not proposing to retain the specific requirement in paragraph 3.10.10 of Code 15 which requires any evidence created and stored in relation to paragraph 3.3.6-3.3.17 of Code 15 (obtaining consent to charge) to be provided to the PSA;
- (f) we are also not proposing to retain the requirement at paragraph 3.10.11 of Code 15 – this requires a PRS provider to ensure that their contracts with third-party consent verification providers mandate that the third-party consent verification provider supplies the PSA with any request information. Our reasoning is set out in paragraph 4.81(c) of this document, which applies equally here, as well as the point above that Ofcom has its own information gathering powers under article 57 of the draft PRS Order, which can be used for the same purposes;
- (g) we are not proposing to retain the requirement in paragraph 3.10.12 of Code 15. This requires that network operators ensure their contracts with intermediaries allow them to test the intermediaries’ platforms, including third-party platforms. This, again, appears to be duplicating the need to ensure that intermediary platforms are being adequately tested – which we consider article 21 of the draft PRS Order achieves without needing to have this specific requirement; and
- (h) we are not proposing to retain paragraph 3.10.13 of Code 15. This is a requirement that intermediaries and network operators must implement a ‘coordinated vulnerability disclosure scheme’.⁶² The aim of this provision is to ensure that network operators and intermediaries are working with security researchers and others to identify risks and vulnerabilities in their systems. Given that we propose to impose a higher and wider-ranging obligation on intermediaries and network operators under article 21 of the draft PRS Order in relation to dealing with security compromises, we do not consider that it is necessary to replicate this requirement in the draft PRS Order. Indeed, it may be that a

⁶² Code 15 describes this as “a scheme established to enable network operators and/or intermediary providers to work cooperatively with security researchers and other relevant persons to find solutions to remove or reduce any risks associated with an identified vulnerability in their services and/or systems. Such a scheme involves the reporting of vulnerabilities to network operators and/or intermediary providers by security researchers, and the coordination and publishing of information about a vulnerability and its resolution. The aims of vulnerability disclosure within such a scheme include ensuring that identified vulnerabilities are addressed in a timely manner; removing or minimizing any risks from any identified vulnerabilities; and providing users with sufficient information to evaluate any risks arising from vulnerabilities to their systems.”

network operator or intermediary considers that, in order to comply with their respective requirements under article 21 of the draft PRS Order, they need to make arrangements to continue to work with security researchers where such a scheme has already been set up. This will be up to the provider to determine, although we consider that continuing to run the scheme will be useful in such a scenario. Accordingly, we consider that the likely impact of removing this requirement is likely to be limited.

Consultation question 7: Do you have any comments about our proposed approach to security testing in Part 5 of the draft PRS Order?

Consumer protection requirements

Introduction

4.103 Our proposals for consumer protection requirements are set out in Part 6 of the draft PRS Order and cover the following areas:

- Misleading information⁶³ (Chapter 1)
- Promotion and marketing (Chapter 2)
- Pre-contract information and express consent for imposing certain charges (Chapter 3)
- Provision of controlled PRS (Chapter 4)
- Vulnerable consumers and harmful material (Chapter 5)
- Competition and voting services (Chapter 6)
- Other requirements in respect of certain controlled PRS (Chapter 7)

4.104 Part 6 of the draft PRS Order broadly gathers together requirements from five of the seven consumer standards in Code 15. We are not proposing to reflect the much of the integrity and consumer privacy standards into the draft PRS Order (sections 3.1 and 3.6, respectively, from Code 15), other than paragraph 3.1.4 of Code 15.⁶⁴ We are not proposing to reflect these as, firstly, we consider that the integrity standard is broad and is covered by the other consumer requirements contained in the draft PRS Order. Second, we consider that the consumer privacy⁶⁵ standard duplicates existing data protection legislation⁶⁶ and, therefore, it is not necessary to include in the draft PRS Order.

⁶³ Chapter 1 of the draft PRS Order contains article 22 which is titled “*Information provided to consumer in carrying out a regulated activity*” but will be referred to as ‘Misleading information’ in this consultation for ease of reference.

⁶⁴ For more information on how paragraph 3.1.4 of Code 15 will be reflected in the draft PRS Order, see paragraph 4.65 of this document and article 16 of the draft PRS Order.

⁶⁵ We note that paragraph 3.2.9 of Code 15 under the Transparency Standard, which requires that merchants notify consumers that calls are monitored and/or recorded at the beginning of the call, relates to issues of data privacy. For the same reason as for the Data Privacy Standard, we propose not to reflect this requirement in the draft PRS Order.

⁶⁶ The Data Protection Act 2018 and the UK General Data Protection Regulation.

Misleading information

Summary

4.105 We propose to include a number of requirements in Chapter 1 of Part 6 of the draft PRS Order relating to misleading information and, in particular, requirements not to mislead consumers.

Existing requirements in Code 15

4.106 Code 15 requires providers not to mislead consumers in any way (paragraph 3.3.2 of Code 15) and specifies that providers must not use any marketing technique, language or imagery which misleads or has the potential to mislead consumers with regards to which provider or organisation is associated with the offer (paragraph 3.3.3 of Code 15).

Proposed requirements in the draft PRS Order

4.107 Article 22 of the draft PRS order regarding misleading information aims to achieve the same outcome as the broad rule in paragraph 3.3.2 of Code 15. In order to achieve this end, we have made clear that article 22 of the draft PRS Order applies to all regulated activity which means the provision of a service or network used in the PRS value chain or the promotion and marketing of CPRS. This broad definition of regulated activity in the draft PRS Order means that providers may not carry out regulated activity that contains, or omits, material that is likely to mislead a consumer.⁶⁷

4.108 Applying this article to all PRS providers is consistent with paragraphs 6.2.7 and 6.2.9 of Code 15 which state that intermediaries and network providers who do anything which directly impacts consumers must also comply with those rules. We consider that it is appropriate to apply the requirements in this article widely throughout the CPRS value chain. However, for some other requirements discussed below, we have taken the view that merchants are to have responsibility for such consumer-facing issues.

4.109 Our proposals also require providers to take into account both vulnerable consumers and the “average consumer” (as defined within the article) when undertaking regulated activity. This is in line with our general policy objective, and the general obligation on providers in article 40 of the draft PRS Order in respect of vulnerable consumers, to ensure that all consumers are treated fairly and that the risk of harm posed by the promotion and marketing and provision of CPRS is reduced.

Promotion and marketing

Summary

4.110 We propose to include a number of requirements at Chapter 2 of Part 6 of the draft PRS Order relating to promotion and marketing on three targeted issues relating to:

- (a) promoting and marketing to children (article 23 of the draft PRS Order);
- (b) factual claims made in the promotion and marketing (article 24 of the draft PRS Order);
- and
- (c) usage requirements (article 25 of the draft PRS Order).

⁶⁷ Article 22 of the draft PRS Order goes into some detail regarding the nature of misleading information (including by omission) and introduces the concept of an ‘average consumer’ in order to frame the requirement in terms of misleading an average, or typical, consumer with regards to the average consumer’s transactional decisions.

4.111 The information about the service which the consumer needs to know in order to make an informed decision about purchasing the PRS is dealt with separately in Chapter 3 of the draft PRS Order relating to pre-contract information.

Existing requirements in Code 15

4.112 Code 15 specifies a number of requirements relating to the promotion and marketing of PRS. The requirements relevant to children's services, factual claims and usage requirements are found under the following rules from Code 15:

- (a) vulnerable consumers standard (paragraph 3.5.5 of Code 15) which states that where a service is aimed at or likely to appeal to children, any promotion must state that the bill-payer's permission is required and state any age requirements for use of the service. In addition, paragraph 3.5.9 of Code 15 states that as part of the promotion of the service (limited to a certain set of PRS), it must be made clear that the service must not be used by under 18s, the consumer must have the bill-payer's permission and that details of the service may appear on the bill;
- (b) obligation on merchants (paragraph 6.2.12 of Code 15) which states that before promoting or providing services, merchants must have evidence to substantiate any factual claims made in promotion and marketing;
- (c) responsibilities on providers of certain services (paragraph 3.5.9 of Code 15) to include certain information in their promotion of that service to consumers, include requirements such as: the service must not be used by anyone under the age of 18 years; the consumer must have the permission of the bill-payer in order to use the service; and that service details may appear on the bill; and
- (d) responsibilities on providers of remote gambling service (paragraph 3.14.1⁶⁸ of Code 15) to include certain information in their promotion of that service to consumers, in particular, that the service must not be used by anyone under the age of 18.

Proposed requirements in the draft PRS Order

Promotion and marketing of children's services

4.113 We propose in article 23 of the draft PRS Order to prohibit⁶⁹ any PRS provider from offering a children's service unless the PRS provider states within their promotion and marketing rules:

- (a) any relevant age requirements; and
- (b) if the consumer is not the bill-payer, the bill-payer's permission must be obtained.

4.114 The definition of "children's service" in the draft PRS Order, explains that it is "*a threshold service*⁷⁰ which consists in, or has as its principal feature, the provision of content or the making available a facility that is aimed at children or could reasonably be expected to appeal to a child". This broadly reflects the definition currently under Code 15. The words

⁶⁸ We are not proposing to reflect in the draft PRS Order the remainder of paragraph 3.14.1 of Code 15 (i.e. requirements other than 3.14.1(a)) because some of the requirements for the promotion of the remote gambling service relate information that is required under the pre-contract information requirements in Chapter 3 of Part 6 of the draft PRS Order.

⁶⁹ We note that this prohibition is a strengthening of the rule under paragraph 3.5.5 of Code 15 in which there is no prohibition. We do not consider that this is a material impact because it broadly reflects paragraph 3.5.5 of Code 15.

⁷⁰ See paragraph 4.16(d) of this document for an explanation of "threshold service" in our draft PRS Order.

“content” and “facility” mirror the language used in the Act to describe the different ways in which PRS can be provided.⁷¹ As we explain above, in order for providers to understand which requirements apply to them, we have provided clarity in the draft PRS Order as to whether overlaps apply and if, so, how. This article, therefore, also makes clear that facilities offered by services such as competition and voting services and recurring donation services are caught by the article, because we consider that those kinds of services may well also be aimed at children or could be said to be reasonably expected to appeal to children. Therefore, to the extent these services also meet the definition of a children’s service, they are covered by these rules as well.⁷² Article 23 of the draft PRS Order also provides a definition of “children” and “child” which correlates to the current definition under Code 15.

Factual claims in promotion and marketing

- 4.115 We propose in article 24 of the draft PRS Order to require PRS providers to make and keep a record in writing of all evidence necessary to substantiate claims made in promotion and marketing of a CPRS. This requirement applies to all PRS providers who undertake promotion and marketing whereas paragraph 6.2.12 of Code 15 applies to merchants only.
- 4.116 Our proposal to apply article 24 to all PRS providers is based on our view that promotion and marketing can be undertaken by any provider in the PRS value chain. This is, in part, based on paragraphs 6.2.7 and 6.2.9 of Code 15 which state that a network operator or intermediary which provides any part of a PRS which has a direct impact on consumers, including its promotion, will be responsible for compliance with the relevant rules with respect to the function in question. Therefore, under Code 15, all PRS providers are responsible for compliance with promotion and marketing rules such as paragraph 6.2.12 of Code 15 if they perform that function. As such, we consider that there should be no material impact on providers arising from our proposals in this respect.

Usage requirements for some types of PRS

- 4.117 We propose in article 25 of the draft PRS Order to prohibit PRS providers from offering certain types of CPRS unless the promotion and marketing of these services complies with promotion and marketing rules. Specifically, providers of chatline services, live entertainment services⁷³, remote gambling, sexual content services (including any subscriptions to sexual content) and virtual chat services must ensure that promotion and marketing for these services clearly states that:
- (a) the service must not be used by anyone under 18 years old;
 - (b) the bill-payer’s permission is required; and
 - (c) details of the service may appear on the bill.

⁷¹ s.120(9) of the Act.

⁷² In reality, even if competition and voting services or recurring donation services may appeal to children, we expect the majority of these services to only permit over 18s in any case. This is based on desk research of the terms and conditions of a representative sample of competition and voting services operated by a prominent merchant in which we found all were only allowed to be used by over 18s. However, there is a reasonable possibility for overlap and, therefore, we consider it is reasonable for such services to be caught by the requirements of this article.

⁷³ For the purpose of this article, any live entertainment service that appeals to children or is likely to appeal to children is excluded. Additionally, in order to avoid overlapping definitions, sexual content services are excluded from the definition of live entertainment service. However, any service which meets the definition of a sexual content service will be captured by this article in its own right.

- 4.118 Article 25 of the draft PRS Order provides the proposed definitions of “bill-payer” and “bill”. Unlike Code 15, we have not included consumer credit services within these requirements.⁷⁴ We have also added virtual chat service and sexual content subscription services.⁷⁵
- 4.119 Owing to Code 15’s definition of live entertainment services, which refer to chatlines services, and the fact live entertainment services were caught by age requirement rules under paragraph 3.5.9 of Code 15, we therefore considered that the draft PRS Order ought to reflect this by explicitly including chatline services (which we have defined separately to live entertainment services). For that reason, we do not consider this to be a change from what is currently required by Code 15. Insofar as we consider virtual chat services to be a very similar type of service to chatline services, the former has been added to these requirements. We do not consider there to be a material impact on the services in scope for this requirement. We appreciate there will be an impact on providers of virtual chat services to the extent that their arrangements for promotion and marketing will now need to be reviewed to ensure that they are reflecting the specified information, however, we consider that any costs are justified by the need to prevent harm to consumers by highlighting the specified information.

Consultation question 8: Do you have any comments about our proposed approach to misleading information and/or the promotion and marketing of PRS in Part 6, Chapters 1 and 2 of the draft PRS Order?

Pre-contract information and express consent for imposing certain charges

Summary

- 4.120 We propose to include a number of requirements in Chapter 3 of Part 6 of the draft PRS Order which require all merchants to provide certain information to the consumer before the consumer enters into a contract for CPRS.
- 4.121 This general requirement to provide all information which is listed in Schedule 3 of the draft PRS Order is supplemented by additional express consent requirements for certain specific types of CPRS. These are:
- (a) Subscription services⁷⁶ entered into online and remotely;⁷⁷

⁷⁴ We have not applied this requirement specifically to consumer credit services because we consider these services to be very seldom used by consumers. In any case, these services would be caught by the definition of a threshold service should they meet the price point requirements for this definition and, therefore, will continue to be regulated under the draft PRS Order where this applies. In addition, the only rules in Code 15 which relate explicitly to these services are age requirements in paragraphs 3.5.8 to 3.5.11. We do not consider it is necessary to apply our equivalent rules (Articles 25, 49 and 50 of the draft PRS Order) to these services because we do not consider consumer credit services would likely appeal to under 18s. This is because the underlying financial services (consumer loans/credit) cannot be applied for by those under 18.

⁷⁵ Sexual content subscription services have only been added as a result of the way the service types in the draft PRS Order have been defined. The definition of a subscription service makes clear that it can be a sexual content service at the same time. We want to ensure that the requirements in this article to apply to a subscription service which is also a sexual content service, given the potential consumer harm associated with sexual content.

⁷⁶ Excluding recurring donation services.

⁷⁷ The phrase “online and remotely” broadly reflects the concept of “online gateway” from Code 15. The draft PRS Order uses this phrase in relation to how the CPRS contract is entered into in order to be consistent with the express consent rules for other subscription services, namely those entered into via SMS.

- (b) Subscription services⁷⁸ entered into via SMS; and
- (c) ICSS.

4.122 The additional rules for these three groups of services prohibit a merchant from charging the consumer until the merchant meets the following two requirements:

- i) provides the consumer with a specific set of information directly before the consumer enters the contract; and
- ii) obtains consent from the consumer in a specific manner.

4.123 Our proposed pre-contract information rules broadly seek to reflect promotion and marketing and point of purchase rules from the Transparency Standard (section 3.2) in Code 15. Our proposed requirements reflect the key requirements in the Transparency Standard relating to information given to the consumer before making the CPRS purchase. We consider that our proposed requirements maintain the same level of consumer protection while allowing merchants greater freedom in how and when required pre-contract information is provided to consumers.

Existing requirements in Code 15

4.124 The PSA set out rules requiring consumers to be fully informed before giving their explicit consent to purchase PRS under the existing Transparency and Fairness Standards in Code 15. These rules are covered in paragraphs 3.2.1 to 3.2.4, 3.2.7 to 3.2.8, and 3.3.6 to 3.3.10 and relate to promotion, point of purchase, and multi-factor authentication.

4.125 Additionally, as of 18 September 2023, the PSA's amendments to Code 15 regarding ICSS came into force covering pre-contract information and specific consent rules.⁷⁹ These included the following:

(a) a requirement to state within the alert to be provided at the beginning of the call that:

- i) the organisation to which the service connects can be contacted directly for no or lower cost and provide the organisations official/direct contact number to assist consumers in contacting them directly;
- ii) the cost of the call – this was in addition to the previous requirement to state the cost of continuing the call; and
- iii) the cost to receive an SMS (where applicable);

(b) a requirement to obtain positive opt-in to continue with onward connection and/or receive a chargeable SMS (where applicable);

(c) a requirement that the service charge for a single call must be capped at a maximum of £40; and

(d) a requirement that consumers must be advised at the beginning of a call and before connection to the organisation that calls will cut off once the maximum service charge is reached.

⁷⁸ Excluding recurring donation services.

⁷⁹ <https://psauthority.org.uk/-/media/Files/PSA/00NEW-website/Research-and-consultations/Consultations/2023/ICSS-changes-to-Code-15/Statement-following-consultation-on-ICSS-Code-15-amendments.ashx>

Proposed requirements in the draft PRS Order

Information to be provided before entering into a controlled PRS contract

- 4.126 Article 26 of the draft PRS Order contains a general requirement on merchants to provide the necessary pre-contract information to consumers in a clear, comprehensible and prominent manner before the consumer enters into any CPRS contract.⁸⁰ The information which merchants are required to provide is listed in Schedule 3 of the draft PRS Order.
- 4.127 This article does not specify how or when the required information must be given to the consumer.
- 4.128 Unlike Code 15, we are not proposing to reflect the concept of ‘point of purchase’ in the draft PRS Order. Instead, our proposals reframe the consumer journey to consist in two distinct parts:
- (a) the consumer receives the required information necessary to make an informed decision regarding entering the contract for CPRS; and
 - (b) the subsequent consent is given by the consumer to enter the contract for CPRS.
- 4.129 We consider that reframing the consumer journey in this way should provide the merchant with discretion as to when the information listed in Schedule 3 of the draft PRS Order is given. For example, which information is provided as part of promotional material as respects the CPRS and which information is given at a later stage, up to the point directly before the consumer gives consent. Additionally, we are not proposing to specify in what form the information is provided although we do require the information to be given in a clear, comprehensible and prominent manner which is appropriate to the means of communication used. For example, a merchant could give some, or all, of the information orally on a radio broadcast advert or written on a billboard.
- 4.130 Likewise, other than in the specified cases explained in the paragraphs below, we do not specify how consumer consent should be obtained and, therefore, we do not propose to retain multi-factor authentication (“MFA”), as set out in paragraphs 3.3.7 to 3.3.9 of Code 15, as a concept for the purposes of the draft PRS Order. This is because we do not consider this concept is necessary to achieve our policy objectives in respect of the consumer journey. In particular, we note that as a matter of general contract law, it is already the case that merchants cannot charge consumers unless they first obtain consent from the consumer.⁸¹ Accordingly, our assessment is that it is not necessary to include MFA requirements in the draft PRS Order as this would be duplicative in terms of existing requirements to obtain the consumer’s consent. Additionally, we propose to include a general requirement for merchants to demonstrate that they have obtained consumer consent correctly by keeping records of consent (see article 36 of the draft PRS Order). Therefore, we do not consider there to be any material impact resulting from this proposed change.

⁸⁰ See definition in article 26(2) of the draft PRS Order

⁸¹ With regards to keeping records of consent, again we do not think it is necessary to require very prescriptive steps to be taken and instead merely mandate records of consent to be kept. Notwithstanding our non-prescriptive approach, we anticipate that merchants will continue to do many of the things set out in the MFA rules of Code 15 in order to appropriately evidence consumer consent.

Express consent for charges imposed under a subscription contract entered into online and remotely

- 4.131 In article 27 of the draft PRS Order, we propose to specify the information required to be given to consumers directly before they enter into a contract for a subscription contract entered into online and remotely.
- 4.132 This broadly reflects paragraphs 3.2.7 and 3.2.8 of Code 15 albeit without referring to the ‘point of purchase’, for the reasons we have explained above regarding our focus on the key aspects of the consumer journey to entering into the contract for CPRS.
- 4.133 The central reason for requiring merchants to provide some of the pre-contract information directly before the consumer enters into the contract in this case is because subscription services, unlike one-off purchases of PRS, charge the consumer multiple times, potentially indefinitely. Another reason for this requirement is that for some contracts entered into online and remotely, all it takes is a few ‘clicks’ or ‘taps’ on a web browser or app. Without the requirements in this article, consumers may enter into long-term contracts inadvertently, having only taken a few, very quick and easy steps.
- 4.134 Article 27 of the draft PRS Order proposes that consumers must be provided with the following information from paragraph 2 of Schedule 3, before they enter into such a contract:
- (a) a description of any contents offered by the CPRS, including the main characteristics of the contents, the information that the consumer will need to make use of that contents and, where applicable, the conditions, time limit, restrictions, limitations and procedures for using the contents;
 - (b) a description of any facility offered by the CPRS, including the main characteristics of the facility and, where applicable, the information that the consumer will need to make use of that facility, the conditions, time limit, restrictions, limitations and procedures for making use of the facility;
 - (c) where a facility for making a payment for goods, services or digital content is comprised in the controlled PRS, the information that the consumer will need to make use of that facility and, where applicable, the conditions, time limit, restrictions, limitations and procedures for making such a payment;
 - (d) the total charge payable for the provision of the controlled PRS inclusive of taxes, or where the nature of the controlled PRS is such that the charge cannot reasonably be calculated in advance, the manner in which the charge is to be calculated;
 - (e) where applicable, all additional charges and any other costs for or in connection with the provision of the controlled PRS including any access charge or, where those charges or costs cannot reasonably be calculated in advance, the fact that such additional charges or costs may be payable;
 - (f) in the case of a controlled PRS contract of indeterminate duration or a controlled PRS contract containing a subscription, the total costs per billing period or (where such contracts are charged at a fixed rate) the total monthly costs;
 - (g) an explanation that the charge will be applied to a bill;⁸² and
 - (h) the duration of the contract, where applicable, or if it is a subscription of indeterminate duration/extends automatically, the conditions for terminating the contract.

⁸² “Bill” is defined at article 23 of the draft PRS Order.

- 4.135 This information must be made available clearly and legibly on the merchant’s website adjacent to the button (or other similar function) by which the consumer gives consent.
- 4.136 Linked to the requirement discussed in the paragraph above, this article confirms that the consumer’s express consent is deemed to have been given in this case only when the consumer clicks a button (or similar feature of the webpage) which is labelled in an easily legible manner with a phrase such as “BUY NOW”.⁸³

Express consent for charges imposed under a subscription contract entered into by means of an SMS text message

- 4.137 In article 28 of the draft PRS Order, we propose to specify the information required to be given to consumers directly before they enter into a subscription contract entered into by means of an SMS.
- 4.138 The general correlation to Code 15 and the reasons why we consider that these requirements are necessary is as above for subscription services entered into online and remotely.
- 4.139 However, because the steps involved for the consumer to enter into the contract for the CPRS in this case are slower-paced in comparison to the steps involved when consumers enter into CPRS contracts online, we propose to require fewer pieces of information from the Schedule 3 list to be provided directly before the consumer gives consent. An additional reason for requiring less information from Schedule 3 is the fact that we are mandating that the consumer receives this information in an SMS and we recognise that merchants will be restricted in terms of the amount of information they are able to provide in each SMS due to a limit of 160 characters per SMS. Therefore, we consider it necessary to require only the most important information to be provided to the consumer in the SMS to avoid increasing costs for merchants to whom this requirement will apply. The pre-contract information required to be provided to the consumer in this case is found at Schedule 3 of the draft PRS Order and is summarised as follows:
- (a) a description of any contents offered by the CPRS, including the main characteristics of the contents, the information that the consumer will need to make use of that contents and, where applicable, the conditions, time limit, restrictions, limitations and procedures for using the contents,
 - (b) a description of any facility offered by the CPRS, including the main characteristics of the facility and, where applicable, the information that the consumer will need to make use of that facility, the conditions, time limit, restrictions, limitations and procedures for making use of the facility;
 - (c) where a facility for making a payment for goods, services or digital content is comprised in the controlled PRS, the information that the consumer will need to make use of that facility and, where applicable, the conditions, time limit, restrictions, limitations and procedures for making such a payment;
 - (d) the total charge payable for the provision of the controlled PRS inclusive of taxes, or where the nature of the controlled PRS is such that the charge cannot reasonably be calculated in advance, the manner in which the charge is to be calculated;
 - (e) where applicable, all additional charges and any other costs for, or in connection with, the provision of the controlled PRS including any access charge or, where those charges

⁸³ We understand that merchants offering these services will in any case already be obtaining consumer consent in this manner and, therefore, we do not consider there to be any impact from these proposals.

- or costs cannot reasonably be calculated in advance, the fact that such additional charges or costs may be payable;
- (f) in the case of a controlled PRS contract of indeterminate duration or a controlled PRS contract containing a subscription, the total costs per billing period or (where such contracts are charged at a fixed rate) the total monthly costs;
 - (g) an explanation that the charge will be applied to a bill;⁸⁴
 - (h) the merchant's name as provided to Ofcom for the purpose of the registration requirements (and any trading name);
 - (i) the geographical address at which the merchant is established and, if different from that address, the geographical address of the place of business of the merchant, and, where available, the merchant's website address, telephone number and e-mail address, to enable the consumer to contact the merchant;
 - (j) the name of the CPRS offering the contents or facility, as registered with Ofcom; and
 - (k) the duration of the controlled PRS contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract.

4.140 This set of information must be made available in a clear and prominent manner by way of an SMS sent by the merchant to the consumer. However, the information at a), b), c), g), h), i) and j) listed immediately above may be provided via the merchant's website as long as the mandated SMS contains a link to the webpage containing that information. This means that only the charging information – d), e) and f) – and the duration of the contract or conditions for termination, k), are required to be provided in the SMS.

4.141 This article requires that the consumer's express consent is deemed to have been given only when the consumer responds to the merchant's SMS containing the Schedule 3 information with a word such as "START".⁸⁵

Express consent for charges imposed under a contract for an ICSS

4.142 In article 29 of the draft PRS Order, we propose to require that merchants who offer ICSS⁸⁶ must provide specific pre-contract information to consumers *before* the consumer is charged for the service. We also require that the specific pre-contract information is provided in a clear, comprehensible and prominent manner by way of an automated message. This broadly corresponds to the amendments to Code 15 which came into force on 18 September 2023 (as summarised in paragraph 4.124 above), although we are proposing to require that the pre-contract information is provided free of charge.⁸⁷

4.143 We note the PSA considered that the information should be made available to consumers *before* the service charge is imposed. The PSA's statement explained:

⁸⁴ "Bill" is defined at article 23 of the draft PRS Order.

⁸⁵ As for express consent for subscription contracts entered into online and remotely, we understand that merchants are already obtaining consumer consent in this manner and, therefore, we consider any impact from these proposals to be minimal given that we consider that providers will only need to make slight amendments to standard SMS text message information to comply with our proposed requirements.

⁸⁶ Note that we do not apply this provision to Directory Enquiry ("DQ") services. This is because paragraph 3.2.10 of Code 15 is explicit that some of the requirements under that paragraph relate solely to ICSS. As this express consent article transposes ICSS-specific requirements from 3.2.10, DQ services are not included.

⁸⁷ <https://psauthority.org.uk/-/media/Files/PSA/00NEW-website/Research-and-consultations/Consultations/2023/ICSS-changes-to-Code-15/Statement-following-consultation-on-ICSS-Code-15-amendments.ashx>

“We remain of the view that a free alert upon connection would significantly reduce detriment in the market. Ultimately, we believe that consumers should not be charged until they have all the necessary information to make an informed decision and actually connect to the organisation they are seeking to speak to. However, we are not yet in a position to proceed with such a proposal as the Service charge price points that would make it possible are not currently available and PSA does not have the powers to require their introduction. We are encouraged by positive responses to our recommendation from industry and will continue to work with stakeholders to introduce such a requirement as soon as is practicable.”⁸⁸

- 4.144 As to the PSA’s comments that it did not have the powers to require the introduction of such proposals, we consider that Ofcom does have such powers, given that the proposals relate to pricing (falling within the scope of Ofcom’s powers under s.122(2)(a) of the Act). We discuss the issue of technical feasibility below.
- 4.145 We have considered the evidence provided by the PSA in its statement regarding the amendments to Code 15 in relation to ICSS, including the finding that consumers are unaware that they were using one and that consumers often believe that they are using an official number rather than the ICSS provider.⁸⁹
- 4.146 We also agree with their assessment of consumer harm and, in particular, the high levels of financial detriment suffered by consumers, many of whom do not know they are going to be charged:
- (a) the PSA's thematic review found high levels of consumer detriment in the market, particularly in relation to calls ending shortly after being initiated and those incurring very high call costs. The thematic review found that nearly two-thirds of calls to ICSS ended within the first minute, 3% of calls cost more than £40 and nearly 1% of calls cost more than £100;⁹⁰ in total, the PSA estimated that more than 50% of all consumer spend in this market should be considered detriment, equivalent to £9.99 million⁹¹, with £6 million occurring within the first minute;
 - (b) high number of complaints to the PSA about ICSS, relative to the size of the market – ICSS account for less than 5% of the phone-paid services market in revenue terms yet, as we explain in Section 3, they generate more than one third of consumer complaints received by the PSA. The PSA said it also receives large numbers of complaints from public and commercial organisations who are affected by ICSS;⁹² and
 - (c) the high levels of non-compliance in the market as evidenced by enforcement action which the PSA had to take against ICSS providers.

⁸⁸ Paragraph 177 of [Statement following consultation on ICSS Code 15 amendments.ashx](https://psaauthority.org.uk/statement-following-consultation-on-icss-code-15-amendments) (psaauthority.org.uk)

⁸⁹ Forward, paragraph 4 of [Statement following consultation on ICSS Code 15 amendments.ashx](https://psaauthority.org.uk/statement-following-consultation-on-icss-code-15-amendments) (psaauthority.org.uk).

⁹⁰ Paragraph 2, first bullet of [Statement following consultation on ICSS Code 15 amendments.ashx](https://psaauthority.org.uk/statement-following-consultation-on-icss-code-15-amendments) (psaauthority.org.uk)

⁹¹ Page 9 of <https://psaauthority.org.uk/-/media/Files/PSA/00NEW-website/Research-and-consultations/Consultations/2023/ICSS-changes-to-Code-15/Consultation-on-ICSS-amendments-01-03-2023.ashx>

⁹² Paragraph 2, second bullet of [Statement following consultation on ICSS Code 15 amendments.ashx](https://psaauthority.org.uk/statement-following-consultation-on-icss-code-15-amendments) (psaauthority.org.uk)

- 4.147 In line with our general consumer protection policy objectives, it is our view that consumers should be fully informed about the services they are buying so that they can make informed choices about what services to purchase. We do not consider that paying for that information is consistent with our duties to protect consumers, particularly those that are vulnerable.
- 4.148 We note that the PSA has found two thirds of consumers drop the call within the first 60 seconds once they become aware they are being charged, and without being onward connected to the organisation they thought they were calling. Therefore, consumers are paying for a service which, once informed about, they do not want. As we set out in paragraph 4.145(a) above, the PSA considers the consumer detriment from users who do not proceed beyond the first minute of the ICSS call to be in the region of £6 million.
- 4.149 Given this, it is our view that consumers should not be charged for ICSS until they have been given all the key pre-contract information and have given consent to continue with the service. We note the pre-contract information and consent for continuing the call are current requirements under Code 15, but we are now requiring for this to be provided before the customer is charged, so they can be fully informed, and decide whether to continue with the call on that basis.
- 4.150 We consider the free pre-contract information should be able to be provided to the consumer in less than 60 seconds (by way of an automated message). The pre-contract information which we are proposing should be provided as part of the initial, free 60 seconds of the call, is included at Schedule 3 of the draft PRS Order and includes the following:
- (a) a description of any contents offered by the CPRS, including the main characteristics of the contents, the information that the consumer will need to make use of that contents and, where applicable, the conditions, time limit, restrictions, limitations and procedures for using the contents;
 - (b) a description of any facility offered by the CPRS, including the main characteristics of the facility and, where applicable, the information that the consumer will need to make use of that facility, the conditions, time limit, restrictions, limitations and procedures for making use of the facility;
 - (c) where a facility for making a payment for goods, services or digital content is comprised in the controlled PRS, the information that the consumer will need to make use of that facility and, where applicable, the conditions, time limit, restrictions, limitations and procedures for making such a payment;
 - (d) the total charge payable for the provision of the controlled PRS inclusive of taxes, or where the nature of the controlled PRS is such that the charge cannot reasonably be calculated in advance, the manner in which the charge is to be calculated;
 - (e) where applicable, all additional charges and any other costs for, or in connection with, the provision of the controlled PRS including any access charge or, where those charges or costs cannot reasonably be calculated in advance, the fact that such additional charges or costs may be payable;
 - (f) the name of the merchant as notified to Ofcom for the purposes of registration, including any trading name; and
 - (g) the duration of the contract, where applicable, or if it is a subscription of indeterminate duration/extends automatically, the conditions for terminating the contract.

- 4.151 We propose to reflect paragraph 3.2.10 of Code 15, but to require that this information is provided to the consumer free of charge. However, we do not propose to require that the telephone number of the organisation/service to whom the consumer wishes to be connected is given to the consumer for free. We still require the target organisation/service's telephone number to be given to the consumer but only once the consumer has consented to the provision of the ICSS and before onward connection occurs.⁹³
- 4.152 We also propose to require, in line with our general requirements to prohibit a merchant from charging the consumer until the merchant obtains consent from the consumer in a specific manner, that express consent is deemed to have been given only when the consumer presses a button in response to the merchant's automated message.
- 4.153 As set out above, we consider that there is evidence of significant consumer harm which needs to be addressed. We have also taken into account that these proposals will have an impact on ICSS providers in that they will be required to provide the pre-contract information to consumers for free. Whilst this is likely to mean a loss of revenue we consider this is proportionate to ensure consumers are fully informed before they incur charges and to remove the detriment that consumers are experiencing when they unknowingly call an ICSS. As we explained in paragraph 4.147 of this document, two thirds of consumers drop the call within the first 60 seconds once they become aware they are being charged, and without being onward connected to the organisation they thought they were calling. The PSA estimates a consumer detriment in the region of £6 million.
- 4.154 We are therefore requiring this information to be provided for free in order to ensure that consumers are adequately protected.
- 4.155 We recognise that ICSS merchants and PRS providers with whom they contract will need to establish a means by which this automated message does not incur a service charge for the consumer. This will likely involve network operators establishing new service charge price points which allow the first minute to have no service charge but subsequent minutes to be charged as per the ICSS merchants' requests. We understand that industry has already started discussions about developing relevant service charge price points which would make such a requirement possible.⁹⁴ We discuss the time we consider to be appropriate for industry to implement our proposals in paragraph 6.33 below. We consider that industry will have sufficient time to make the necessary changes.

Express consent rules for CPRS entered into online which are not subscription contracts

- 4.156 We are not proposing to require express consent requirements for contracts entered into online for CPRS which are not subscription contracts. We consider that our proposed pre-contract information requirements, in conjunction with other requirements such as those relating to the prohibition of misleading information, are sufficient to protect consumers from harm which may result from entering into such CPRS contracts without their fully informed consent. Consumers who purchase CPRS online are only liable to pay charges under the contract if the merchant has provided the necessary information to the consumer

⁹³ This piece of information can be given once the charge has been imposed for the ICSS.

⁹⁴ In particular, we note that communications providers under Ofcom's General Conditions (B1.28 and B1.29 specifically) must be able to offer up to 100 different price points, and that these price points must reflect on a fair and reasonable basis the rates proposed by other providers. We note that there is already an existing service charge which has a zero-rated first minute and subsequent charging - service charge 073 - which is ready to use on relevant (ICSS) number ranges.

before the consumer entered into the contract, in accordance with article 26 and Schedule 3 of the draft PRS Order.

- 4.157 Our provisional view is that this type of one-off CPRS does not lead to the same level of financial impact as subscription services because they are one-off purchases. Therefore, we propose to apply regulation to all such one-off CPRS consistently, except for ICSS which, as explained above, continues to result in high levels of consumer detriment in the market.
- 4.158 In particular, we note the following:
- (a) one-off CPRS does not lead to long-term financial impact⁹⁵ and, therefore, as with other types of one-off PRS entered into via SMS or via a call, we do not consider it is proportionate to require express consent rules for one-off PRS entered into online;
 - (b) we note that the PSA in its Code 15 Statement made it clear that it was not proposing to apply MFA requirements for voice-based services or single transaction services that are accessed via PSMS,⁹⁶
 - (c) we consider that CPRS contracts entered into online must feature some form of verification of the end-user's use of the phone account to be charged for the CPRS in order to avoid the unlawful scenario in which a consumer charges someone else's phone account for CPRS without the permission/authority to do so; and
 - (d) we consider that other requirements in the draft PRS Order on network operators and intermediaries to undertake due diligence and risk assessment will also have a key role to play in terms of consumer protection from inadvertently signing up to one-off CPRS. In particular, we anticipate that where network operators and intermediaries contract with merchants who offer one-off CPRS, due diligence activities may likely include a review of the proposed consumer journey and its compliance with the general pre-contract information rules.

Consultation question 9: Do you have any comments about our proposed approach to pre-contract information and express consent for imposing certain charges in Part 6, Chapter 3 of the draft PRS Order?

Provision of CPRS

Summary

- 4.159 We include a number of requirements in Chapter 4 of Part 6 of the draft PRS Order to ensure that such necessary, albeit ancillary, aspects of the provision of CPRS are undertaken to benefit consumers. For example, the provision of information about their usage (past and future) ensures consumers are aware of their usage and can make informed decisions about continuation or termination of the service. We also propose to mandate that providers establish, and maintain, robust customer care policies and procedures that cover consumers' complaints, enquiries, refunds or other forms of redress.

⁹⁵ Taking into account that, by definition, subscription services lead to long-term financial impact because of the regular charges imposed on the consumer following the consumer giving consent once for the subscription contract.

⁹⁶ See paragraph 383, second bullet point, from the Code 15 statement (<https://psauthority.org.uk/-/media/Files/News/Research-and-Consultations/Consultations/2021/Code-15-Guidance/Statement-on-the-PSA-Code-of-Practice.ashx>).

Existing requirements in Code 15

4.160 Chapter 4 of the draft PRS Order broadly reflects some provisions from the transparency, fairness and customer care standards of Code 15.⁹⁷ Regarding virtual chat services, the PSA set out rules in Annex 1.7 of Code 15 and a separate virtual chat services exemption made under paragraph 2.6.4 of Code 15.⁹⁸

Existing requirements we propose not to transpose into the draft PRS Order

4.161 Some other existing consumer requirements under Code 15 relating to the provision of CPRS which we propose not to reflect in the draft PRS Order have been explained elsewhere in this document. However, below we explain our decision not to reflect the following three specific requirements under Code 15.

Related messages provided separately from CPRS itself

4.162 We propose not to reflect paragraph 3.2.11 of Code 15 which requires that any messages that the consumer needs to access to use or engage with a CPRS, but which are provided separately from the service itself, must be provided at no additional cost to the consumer. This is because our proposals contain provisions which require supplementary messages sent to the consumer (i.e. messages which do not constitute the CPRS itself) to be free of charge, e.g. reminder notices for subscription services. Therefore, a blanket provision such as in paragraph 3.2.11 of Code 15 is not required.

Excessive use

4.163 We are not proposing to reflect paragraph 3.3.5 of Code 15 which requires merchants to take reasonable and prompt steps to identify excessive use of their service(s) by any consumer and to inform the relevant consumer of that usage. This is because we consider that relying on pre-contract information and receipting requirements will result in consumers making informed decisions about their use of CPRS. We also consider that our proposals regarding vulnerable consumers will play an important role in protecting these consumers from harm resulting from excessive use of CPRS.

Setting up a recurring donation following a one-off donation

4.164 We are not proposing to reflect paragraph 3.3.10 of Code 15 which, in the context of a section of Code 15 relating to MFA, states that for recurring donation services only, where the consumer has donated on a one-off basis and through a confirmation message is provided with the opportunity to convert their one-off donation to a recurring donation, the message must specifically seek the consumer's consent to the recurring charge. Such consent must be given by way of an SMS sent by the consumer. This aspect of Code 15 is not reflected in the draft PRS Order because we consider that paragraph 3.3.10 of Code 15 is broadly covered by our proposals relating to pre-contract information and express consent.

⁹⁷ Specifically, paragraphs 3.2.12-3.2.15 of Code 15 relate to what we refer to as charging information (article 31 of the draft PRS Order); paragraphs 3.2.16-3.2.17 of Code 15 relate to the consumer's right to terminate subscriptions (article 33 of the draft PRS Order); paragraph 3.3.4 relates to providing CPRS within a reasonable time (article 30 of the draft PRS Order); paragraphs 3.3.6, 3.3.14-3.3.17 and 3.4.5 of Code 15 relate to records of consent (article 36 of the draft PRS Order); paragraphs 3.3.11-3.3.12 relate to reminder notices (articles 34 and 35 of the draft PRS Order); the majority of paragraph 3.4 of Code 15 relates to consumer complaints, enquiries and refunds (articles 37 to 39 of the draft PRS Order).

⁹⁸ <https://psauthority.org.uk/-/media/Files/PSA/00NEW-website/For-business/Does-my-service-benefit-from-an-exemption/Code-15-exemptions/General-Permission-for-SMS-Virtual-Chat-Services.ashx>

Proposed requirements in the draft PRS Order

Requirement to provide a controlled PRS within a reasonable time

4.165 In article 30 of the draft PRS Order, we propose to mandate that the merchant must provide the service to the consumer within a reasonable time if the CPRS contract (or an associated condition made known to the consumer) does not otherwise expressly fix the time for the provision of PRS.⁹⁹ This requirement reflects paragraph 3.3.4 of Code 15, although we have made clear for the proposed requirement under the draft PRS Order that it applies to merchants, given that merchants are concerned with the provision of CPRS to consumers.

Charging information for CPRS purchased through the use of a mobile phone service

4.166 Article 31 of the draft PRS Order aims to reflect existing 'receipting' requirements from Code 15 which cover mobile services, as set out in paragraphs 3.2.12 to 3.2.15 of Code 15. We propose to require merchants to provide consumers with the following information free of charge¹⁰⁰, via email or SMS, and without undue delay after the provision of CPRS:

- (a) the name of the merchant (including any trading name) as notified to Ofcom for the purposes of article 10 of the draft PRS Order and, where applicable, article 13 of the draft PRS Order;
- (b) the website of the merchant or, if the merchant does not have a website, the full name and contact details of the merchant for the purposes dealing with consumer enquiries and complaints;
- (c) where applicable, the total amount charged for the provision of the CPRS;
- (d) in the case of a subscription contract, the total costs per billing period or (where such contracts are charged at a fixed rate) the total monthly costs; and
- (e) clear instructions explaining how the consumer may terminate the provision of the service.

4.167 This article only applies to CPRS provided by means of a mobile phone service but excludes calls¹⁰¹ and virtual chat services. This is in line with paragraph 3.2.15 of Code 15, and reflects that separate requirements apply to virtual chat services under the draft PRS Order (discussed below).

Notifications of charges for virtual chat services

4.168 In article 32 of the draft PRS Order, we aim to reflect the concept of receipting taking into account the PSA's specific rules for virtual chat services mentioned above.¹⁰² We propose to require merchants to provide the consumer with a notification. That notification is to be provided to the consumer free of charge, sent via SMS, and is to be distinct and separate from the service itself or any promotion and marketing. It is to be provided without undue

⁹⁹ Note that what is a reasonable time is a question of fact. This means any assessment as to whether a merchant had complied with this requirement would have to take into account the specific facts and evidence in each case.

¹⁰⁰ We do not expect this to be a material impact on providers as Code 15 already requires receipts to be free of charge to the consumer.

¹⁰¹ We define "call" in article 2 of the draft PRS Order as "a connection established by means of a public electronic communications service allowing speech communication between two or more persons in real time"

¹⁰² Annex 1.7 and <https://psauthority.org.uk/-/media/Files/PSA/00NEW-website/For-business/Does-my-service-benefit-from-an-exemption/Code-15-exemptions/General-Permission-for-SMS-Virtual-Chat-Services.ashx>.

delay following the ‘£10 increment’ rule set out below. The following information must be provided to the consumer in the notification sent via SMS:

- (a) a statement of the fact that the consumer’s use has reached £10 or increased by the amount of at least £10;
- (b) the total charge the total amount of the charge for the use of the service imposed since the consumer first began using the service, or the last notification, whichever is the most recent;
- (c) the merchant’s name (and any trading name) as notified to Ofcom for the purposes of registration;
- (d) the website of the merchant or, if the merchant does not have a website, the full name and contact details of the merchant for the purposes of dealing with consumer enquiries and complaints; and
- (e) clear instructions explaining how the consumer may terminate provision of the service.

4.169 The ‘£10 increment’ rule mentioned above follows the PSA’s virtual chat services exemption and can be summarised as follows:

- (a) The merchant must provide the notification outlined above only once the consumer first spends £10 on the service; and
- (b) After the consumer has spent £10 i.e. after the initial notification, the merchant must issue a notification every time the charge for the use of service increases by at least £10.

4.170 For the purposes of the draft PRS Order, for the reasons explained above, we have defined virtual chat services to exclude any overlaps with other services. The definition of “virtual chat service” is at article 31(5)(f) of the draft PRS Order and broadly follows our definition of chatline services because of the similarity between virtual chat services and chatline services.¹⁰³

Right to terminate subscription contracts

4.171 In article 33 of the draft PRS Order, we propose to state that consumers may terminate subscription contracts at any time without giving any reason and without incurring any liability. The consumer must be able to terminate the subscription contract by any reasonable means including the same means used to enter into the contract. Our proposed definition of “subscription service”, to which subscription contracts relate, are explained above in paragraph 4.16. This proposed article aims to achieve a similar effect to the requirement in Code 15 relating to “method of exit” under paragraphs 3.2.16 and 3.2.17. However, article 33(4) of the draft PRS Order provides that every subscription contract is to be treated as including terms that the consumer may terminate the contract as provided by paragraphs (1) to (3) of article 33. This goes further than the Code 15 requirement in order to ensure that consumers are able to use this right to terminate in all relevant cases.

Reminder notices of cancellation of charges for recurring donation services

4.172 In article 34 of the draft PRS Order, we propose a requirement that that merchants must not impose any charge on a consumer under a contract for a recurring donation service, or a

¹⁰³ In order to align with our definition of chatline services, the number of participants on a virtual chat services is at least three, by definition. This aligns with the existing PRS Condition definition of chatline services which applies to more than two participants. We note that Code 15’s definition of virtual chat services at D.2.79 refers to two or more participants however we have chosen to align with chatline services in this respect. In any case, we do not expect there to be any material impact on the services in scope of the relevant rules for virtual chat services.

children's service that makes available a facility comprised in a recurring donation service, unless the merchant first provides that consumer with the following information free of charge, via SMS, not less than 24 hours before the next donation in the recurring service:

- (a) the specific date the charge for the donation is next due to be imposed; and
- (b) clear instructions on how the consumers may cancel that particular charge by means of an SMS.¹⁰⁴

Reminder notices of termination of subscription contracts

4.173 In article 35 of the draft PRS Order, we propose a requirement that merchants must not impose a charge¹⁰⁵ for a subscription service unless the merchant has first provided a notice to the consumer containing the following information, free of charge¹⁰⁶, via email or SMS:

- (a) a description of the service applicable to the contract; and
- (b) a reminder that:
 - i) in respect of a term-based subscription, the subscription will be automatically renewed for the same duration as previously specified, unless the consumer terminates the contract before the last cancellation date. The reminder must also provide detailed of the last cancellation date of the term-based subscription.
 - ii) In respect of a subscription of indeterminate duration, the subscription will continue indefinitely unless the consumer terminates the contract in accordance with the consumer's right under article 33, or otherwise.¹⁰⁷

4.174 For term-based subscriptions (i.e. a subscription service where a consumer automatically incurs a charge, or recurring charges, for a specified period duration only), the reminder notice must be sent between seven and 30 days before the last day on which the consumer can cancel the next provision and/or renewal.¹⁰⁸

4.175 For subscriptions with an indefinite duration (i.e., a subscription service where the period for the imposition of charges continues indefinitely), the reminder notice must be sent at least 14 days before each anniversary of the date on which the consumer entered into the subscription contract¹⁰⁹.

4.176 This article does not apply to recurring donation services, given that we propose to include a separate requirement for reminder notices to be sent to consumers for such services, as explained above.

¹⁰⁴ Note that this (Art. 34(4)(b)) aims to reflect 3.3.11 of Code 15 which refers to a command "SKIP" which the consumer can issue to the merchant following a reminder of an impending charge in order to cancel that particular donation.

¹⁰⁵ Although not explicit in Code 15, we consider that prohibiting further charges to consumers absent the necessary information relating to the subscription contract will not have a material impact on merchants because our rules reflect the requirement for reminder notices under paragraph 3.3.12 of Code 15.

¹⁰⁶ We consider that making it explicit for these reminder notices to be free of charge is not a material change from Code 15 because paragraph 3.2.11 of Code 15 states that any messages that the consumer needs to access in order to use or engage with a PRS but which are provided separately from the service itself, must be provided at no additional cost to the consumer. Therefore, reminder notices are already required to be provided free of charge.

¹⁰⁷ See article 35(2)(b) of the draft PRS Order.

¹⁰⁸ See article 35(3) of the draft PRS Order.

¹⁰⁹ See article 35(3) of the draft PRS Order.

Records of consent

- 4.177 In article 36 of the draft PRS Order, we propose that merchants must make and keep records of consumers' consent to enter into a CPRS contract and any charges imposed under the contract.
- 4.178 This is a general requirement which does not provide a detailed list of information that must be recorded, unlike the PSA's requirements in paragraph 3.3.14 to 3.3.17 of Code 15. Further, as mentioned elsewhere in this document, we don't propose to retain the concept of "data retention notices", given that this is specific to Code 15 and the PSA. We consider it is sufficient to set out this general requirement without referring to detailed information requirements. This is because compliance with the general requirement will necessarily involve the recording and retention of detail in order to appropriately evidence consent. This measure affords the consumer protection because it allows the consumer to make complaints or enquiries relating to the contract and/or charges knowing that the merchant has kept the appropriate records. We do not expect our proposed general requirement, as opposed to the PSA's more specific record requirement, will impact this consumer protection measure.
- 4.179 We also propose to narrow this requirement to apply only to merchants as merchants are the providers with whom consumers enter into contracts and who impose the charges on consumers. We note that under Code 15 intermediaries are also required to keep some records. However, we do not consider this is necessary given that the merchant is the provider with whom the consumer contracts. We consider this to be a proportionate measure as we are proposing to target regulation where we consider it is likely to tackle the identified harm.

Consumer complaints and enquiries

- 4.180 In articles 37 and 38 of the draft PRS Order, we propose that merchants must not provide CPRS to a consumer until they have met several requirements regarding consumer complaints and enquiries. We consider this to be a proportionate measure as we are proposing to target regulation where we consider it is likely to tackle the identified harm.¹¹⁰
- 4.181 We also propose to narrow the requirements to apply only to merchants (a change from Code 15).¹¹¹ This is because merchants are the providers with whom consumers enter into CPRS contracts and, therefore, have primary responsibility for their consumers' complaints and enquiries.

Policies & procedures

- 4.182 Merchants must establish and maintain written policies and procedures relating to the arrangements for handling consumer complaints and enquiries, refunds and other forms of redress. These policies and procedures must:
- (a) be clear and accessible to the public, free of charge, including on the merchant's website (if any);

¹¹⁰ We note that the prohibition on providing CPRS until these requirements have been met is new, but this is only strengthening the existing requirements under Code 15. We do not expect there to be any material impact on industry in complying with this newly-framed requirement. In any case, we consider complaints handling to be of such importance that we are minded to frame our requirement by way of a prohibition on provision until such complaints-handling measures are put in place.

¹¹¹ See paragraphs 3.4.1 to 3.4.10 of Code 15

- (b) include information relating to how consumers can complain to Ofcom (giving Ofcom's details) and up-to-date contact information for the merchant itself;
- (c) be approved by a generally authorised person;¹¹²
- (d) be kept up to date; and
- (e) be reviewed and revised where necessary.

Requirements on merchants relating to consumer complaints and enquiries.

4.183 Merchants must also comply with seven requirements, namely:

- (a) consumers must be able to make complaints and enquiries free of charge (or if made using a telephone number, at no more than the basic rate);
- (b) merchants must use best endeavours to ensure all consumer calls are answered between 9am-5pm on working days for the purposes of dealing with any enquiries and complaints;
- (c) complaints and enquiries made by means other than a call must be acknowledged by the merchant within 5 working days;
- (d) merchants must update consumers on the status and progress of complaints at appropriate intervals;
- (e) merchants must use best endeavours to resolve issues raised by consumers;
- (f) the merchant's determination of any enquiry or complaint must be provided to the consumer without undue delay; and
- (g) merchants must make and keep appropriate written records relating to complaints and enquiries and any decisions made in respect of them (i.e., decisions regarding refunds/redress).¹¹³

Additional requirements relating to refunds

4.184 Article 39 of the draft PRS Order sets out proposed requirements relating to refunds. As with certain other requirements in Part 6 of the draft PRS Order, we propose to impose these refund requirements solely on merchants, for the reasons we have explained above including our reasons for imposing complaints and enquiries requirements solely on merchants. We note that paragraph 3.4.15 of Code 15 specifies, in any event, that the merchant provider must take responsibility for providing any refund in the first instance. We propose that merchants must:

- (a) keep consumers up to date about the status and progress of their request for a refund;
- (b) provide notice of their decisions regarding refunds (i.e., whether a refund will be paid or not) without undue delay;
- (c) include within their decisions: the merchant's reasons, and, where applicable, the refund amount and the date on which it will be paid;
- (d) make any refund available to the consumer, paying the refund without undue delay (and within 14 calendar days),¹¹⁴ as credit to the consumer's next bill¹¹⁵ or, in such other manner, as the merchant and the consumer may expressly agree. We propose to specify that the merchant is not permitted to impose any charge for the refund, which reflects existing requirements.

¹¹² See paragraph 4.36(b) of this document.

¹¹³ See article 38 of the draft PRS Order.

¹¹⁴ Code 15 refers to 14 working days.

¹¹⁵ "Bill" has the meaning given in article 23 of the draft PRS Order.

Consultation question 10: Do you have any comments about our proposed approach to provision of CPRS in Part 6, Chapter 4 of the draft PRS Order?

Vulnerable consumers

Summary

4.185 We are proposing to retain a requirement in the draft PRS Order for relevant providers to take account of the needs of vulnerable consumers. We consider this to be a key obligation in order to reduce the risk of potential harm and ensure fair treatment of vulnerable consumers. We set out our proposed approach to vulnerable consumers in article 40 of the draft PRS Order.

Existing requirements in Code 15

4.186 The vulnerable consumer standard aims to ensure that services are promoted and provided in a way that they are not likely to cause harm or detriment to consumers who are or may be vulnerable as a result of their particular circumstances, characteristics or needs. This standard requires that measures are adopted for such consumers to ensure that they are protected from harm as far as is reasonably possible, and that they do not suffer detriment as a result.

4.187 This standard includes, amongst others, the following requirements:

- (a) the need to have a nominated person (or persons) within an organisation that has overall responsibility for ensuring that the organisation and the service it promotes and provides takes account of vulnerable consumers (paragraph 3.5.1 of Code 15)
- (b) the need to have policies and procedures in place for vulnerable consumers and to provide these to the PSA on request (paragraph 3.5.2 of Code 15)
- (c) the need for relevant providers to ensure that their customer care and complaint handling policies and procedures are robust and take account of the needs of all consumers, including those who are or may be vulnerable (paragraph 3.5.3 of Code 15).

Proposed requirements in the draft PRS Order

4.188 Article 40(1) of the draft PRS Order prohibits PRS providers from undertaking any regulated activity unless they have had regard to the interests of vulnerable consumers. This provision aims to replicate paragraph 3.5.1 of Code 15 albeit introduces a prohibition on providing services or carryout promotion and marketing until the requirements have been met, which Code 15 does not.

4.189 We are also proposing to extend this requirement to all PRS providers. This is different to Code 15 which only imposes requirements on intermediaries and merchants. This is because we consider that it is important to ensure that the regulations relating to vulnerable consumers cover all PRS providers who engage in the provision and promotion of regulated activity rather than just intermediaries and merchants. In particular, we note that many different PRS providers are present across the value chain, and the distinction between marketing and provision of services is at times blurred. We want to ensure that consumers are protected across their CPRS journey and, therefore, our provisional view is that it is both necessary and justifiable to extend the obligations to all PRS providers, not just merchant providers. The impact of this is that all regulated PRS providers who engage in the provision and promotion and marketing of CPRS will be required to have regard to the interests of vulnerable consumers.

4.190 We also include a requirement in article 40(2) of the draft PRS Order for PRS providers to have written policies and procedures in place which describe the means and methods for establishing compliance with these requirements. This provision aims to reflect paragraph 3.5.2 of Code 15 albeit, as with article 40(1) of the draft PRS Order, this has been extended to all PRS providers rather than just intermediaries and merchants. Also, as set out in article 10(1)(b) of the draft PRS Order, as part of the organisational requirements we set out above, we are proposing that PRS providers must appoint a person in senior management ("generally authorised person") to approve the policies and procedures in relation to vulnerable consumers. This provision aims to reflect the requirement in paragraph 3.5.1 of Code 15 that there must be a nominated person or persons within organisations that has overall responsibility in this area.

4.191 We propose to include a definition of vulnerable consumers in article 40(5) of the draft PRS Order. While we are proposing to broadly retain the principles behind the definition of vulnerable consumers from Code 15, we have proposed to re-draft the definition, as follows:

- a) "vulnerable consumer" means a consumer in respect of whom a PRS provider ought reasonably to be aware, that by reason of a specific characteristic, circumstance or need, the consumer is likely to take a decision they would not otherwise have taken concerning-
 - (i) whether, how and on what terms to purchase a controlled PRS, or
 - (ii) whether, how and on what terms to make payment or exercise a contractual right in relation to a controlled PRS, and
- b) specific characteristic, circumstance or need" includes, in particular, age, illness, physical or mental impairment which has an adverse effect on the carrying out of normal day-to-day activities, or emotional distress."

4.192 Given the nature of CPRS and the broad types of harms that might arise within this market, we consider it is important that the definition of vulnerability provides an appropriate balance between the need to be clear but also the need to be sufficiently broad and flexible so to ensure that vulnerable customers are adequately protected at all times. We believe that our proposed definition achieves a more balanced and inclusive definition of vulnerability, and is more closely aligned with Ofcom's definition as defined in Ofcom's general conditions and our specific duties under section 3 of the Act. We want to be as consistent as possible with Ofcom's broader approach to vulnerability as we consider it will enable us to take a more holistic approach to regulation across our sectors, so we are better equipped to protect vulnerable consumers effectively.

Consultation question 11: Do you have any comments about our proposed requirements relating to vulnerable consumers in Part 6, Chapter 5 of the draft PRS Order?

Harmful material

Summary

4.193 We are proposing to retain a requirement in the draft PRS Order relating to harmful material and, in particular, that PRS providers must not carry out any regulated activity that contains any material likely to incite violence or hatred against a group of persons or a member of a

group of persons based on specific characteristics. In addition, there is a general requirement that PRS providers must also take all reasonable steps to prevent the risk of regulated activity causing harm to consumers. This is set out in article 41(1) and 41(2) of the draft PRS Order and aims to reflect the requirements set out in paragraph 3.7 of Code 15.

Existing requirements in Code 15

- 4.194 Paragraph 3.7 of Code 15 imposes requirements in relation to the prevention of harm and offence when promoting or providing PRS. This standard aims to ensure that promotions and services are provided in a manner that do not cause harm or unreasonable offence or distress to consumers or to the general public.
- 4.195 This standard includes, amongst others, the following requirements:
- (a) that PRS must not promote or incite hatred in respect of any individual or identifiable group because of their characteristics, e.g. age, disability, sex, gender identity or reassignment, race, religion or belief, or sexual orientation (paragraph 3.7.1 of Code 15).
 - (b) that PRS must not encourage consumers to put themselves or others, amongst others, at financial, personal and/or health risks (paragraph 3.7.2 of Code 15).
 - (c) that PRS must not induce an unreasonable sense of fear, anxiety, distress or offence in consumers or among the general public (paragraph 3.7.3 of Code 15).

Proposed requirements in the draft PRS Order

- 4.196 We have sought to define relevant characteristics in article 41(4) of the SI. These broadly reflect those characteristics described in paragraph 3.7.1 of Code 15 although we are including a number of additional characteristics to more closely reflect existing legislation on protected characteristics under UK law and, specifically, section 4 of the Equality Act 2010 which provides for a number of additional protected characteristics: nationality; marriage and civil partnership; and pregnancy and maternity. Additionally, we consider that “language” is a relevant characteristic which should be included in the context of PRS provision.
- 4.197 We do not consider that our proposal to specify additional characteristics under the draft PRS Order should materially impact on the intended outcomes of Code 15. Rather, we believe these changes should make regulation clearer, and ensure that consumers with any of the listed characteristics are adequately protected from harmful material.

Consultation question 12: Do you have any comments about the proposed requirements relating to prevention of harm and offence in Part 6, Chapter 5 of the draft PRS Order?

Competition and voting services

Summary

- 4.198 We propose to include a number of requirements at Chapter 6 of Part 6 of the draft PRS Order relating to specifically to competition and voting services. These requirements will apply to merchants providing competition and voting services along with the other general requirements in relation to CPRS which are contained in the draft PRS Order.

Existing requirements in Code 15

- 4.199 Our proposals aim to reflect section 3.13 of Code 15 which specifically covers competition and voting services.

4.200 Section 3.13 of Code 15 sets out a number of requirements in relation to the running of competition and voting services, including dealing with what information needs to be provided about these services and how valid entries to the services are to be handled.

Proposed requirements in the draft PRS Order

Meaning of competition and voting service

4.201 In article 42 of the draft PRS Order, we set out our proposed definition of these services. This is a new definition, which makes clear that a competition and voting service is a threshold service¹¹⁶ which makes available to consumers a facility for entering a competition, claiming a prize, registering a vote or recording a preference. Notably, we exclude betting (within the meaning of sections 9 to 11 of the Gambling Act 2005) to prevent a definitional overlap with remote gambling services (see below at paragraph 4.247 of this document). This is so that any CPRS which make available a facility for gambling is treated as a remote gambling service and are subject to those specific rules.

4.202 At article 42(2) of the draft PRS Order, we propose to include provision making clear that a children's service (see paragraph 4.106 of this document) which makes available a facility for entering a competition, claiming a prize, registering a vote or recording a preference are also to be read as being a competition and voting service. This means that merchants who provide a children's service falling within article 42(2) of the draft PRS Order will be subject to the rules in relation to competition and voting services in the draft PRS Order, as well as the rules which will apply in respect of children's services.

Different ways of making use of competition and voting services

4.203 In article 43 of the draft PRS Order, we propose to ensure that where a merchant offers different ways of using a competition and voting service, the merchant must not encourage consumers to choose one particular way over another.

4.204 This reflects paragraph 3.3.8 of Code 15, which requires that where a competition and voting service contains multiple routes of entry, all routes of entry must be presented and displayed with equal prominence.

Valid ticket of entry for competition and voting services

4.205 In article 44 of the draft PRS Order, we propose a new definition of a valid ticket of entry.¹¹⁷ In particular, we propose that, in order to receive a valid ticket of entry, the consumer must use the facility made available in a competition and voting service before the time limit has expired and also meet any relevant conditions which are applicable to the service. Only consumers with valid tickets of entry can have their votes taken into account (where they have registered a vote or preference) or acquire a chance of winning the competition/claiming a prize.

4.206 This article is not based on an existing requirement in Code 15. Code 15 does not appear to have an express requirement about merchants stipulating a timeframe for entry into a competition or vote. Instead, it assumes that such a timeframe will be included in the promotional material (see, for example, para 3.13.3 of Code 15):

¹¹⁶ See 4.16(d) of this document for an explanation of when a CPRS is a threshold service.

¹¹⁷ See article 44(2) of the draft PRS Condition.

“All valid responses for entry into a competition or vote that are sent in by consumers within the timeframe set out in the promotional material...”.)

4.207 Such timeframe might be envisaged by the reference to “any other key information” in paragraph 3.2.2(g) of Code 15.

4.208 We propose dealing with timeframes in this article as we consider it is appropriate to deal with the other related aspects covered by Code 15 which are contingent on stipulating this requirement as a starting point (see below). This also links to the pre-contract information that needs to be provided under paragraph 2(d)(ii) of Schedule 3 of Code 15.

“the time limit of entering a competition or claiming a prize”.

4.209 In article 44(3) of the draft PRS Order, we propose to broadly reflect paragraph 3.13.6 of Code 15, which states that where the method of entry for a competition and voting service is via a phone call, any call that has commenced during the specified time period must be considered valid, even if the call has not been concluded prior to the end of the specific time period. We have adapted this for our purposes to refer to “connection” rather than a phone call.

Consideration of a valid ticket of entry for competition and voting services

4.210 In article 45 of the draft PRS Order, we propose to require merchants to consider all valid entries fairly. In practice, this means that all valid tickets of entry into a competition must be given equal chance of winning any prize that is offered, and all valid tickets of entry to register a vote or preference are taken into account when deciding the outcome of the competition or vote.

4.211 This article reflects the provisions of paragraphs 3.13.3 and 3.13.9 of Code 15.

(a) Paragraph 3.13.3 requires valid entries to be afforded sufficient time to be given full and equal consideration where these are sent within the specified timeframe.

(b) Paragraph 3.13.9 requires all valid entries to have the same chance of winning.

(c) Paragraph 3.13.11 of Code 15 requires a PRS provider to ensure that where that provider has made arrangements with third parties for the handling of excess peak traffic, those arrangements must ensure that all valid votes or entries are so handled in the same way as any entries which are received by the provider. This is not expressly reflected in the draft PRS Order, although we consider that the effect of article 45 achieves the aim of this provision as it follows that equal treatment must be given to all valid tickets of entry.

Claiming prizes free of charge

4.212 In article 46 of the draft PRS Order, we propose to require that merchants provide to consumers any prize which has been won free of charge.

4.213 This reflects paragraph 3.3.10 of Code 15, which requires that consumers must not be subject to any additional costs in order to claim prizes.

Attempted use of a facility comprised in a competition and voting service after a time limit has expired

4.214 In article 47 of the draft PRS Order, we propose to require merchants to comply with specific rules in the eventuality that a consumer attempts to use a competition and voting service after the time limit has expired. In particular, we require merchants:

- (a) not to impose a charge on any attempted use to use the competition and voting service after the expiry of the specified timeframe;
- (b) to refund any charge issued without undue delay where a charge has been imposed;
- (c) to provide the consumer with a confirmation that the attempt was unsuccessful without undue delay; and
- (d) either a confirmation that no charge was issued or, if a charge was issued, information relating to the refund.

4.215 This reflects paragraph 3.13.5 of Code 15 which says that consumers must not be charged for any entries outside of the specified timeframe, and that they must be informed that such an entry is invalid and will neither be entered into the competition or vote, nor charged for this. It also requires consumers are informed that they will be refunded where a charge has been incurred.

Code 15 requirements not being carried over to the draft PRS Order

4.216 There are some requirements in paragraph 3.13 of Code 15 which we are not proposing to carry over into the draft PRS Order. These are as follows:

- (a) we are not proposing to retain the requirement in paragraph 3.13.1 of Code 15. This states that any promotion of a competition and voting service must make clear that winning is not a certainty. This is not being carried over as we do not consider it necessary to set out in the draft PRS Order that entering a competition does not give a guarantee of winning. We consider that competitions are commonly understood as mere chances of winning, rather than being certain;
- (b) we are not proposing to retain the specific requirement in paragraph 3.13.2 of Code 15 in the draft PRS Order. Paragraph 3.13.12 sets out what information about the competition and voting service consumers must be provided prior to entering the service. We are not proposing to carry this specific requirement over as relevant provisions on pre-contract information in Chapter 3 of Part 6, and Schedule 3 (see especially paragraph 2(d)), will apply;
- (c) we are not proposing to retain paragraph 3.13.7 of Code 15. This says that where a TV or radio programme is repeated, the route of the entry must only remain open if the entries received will still be considered valid. Whilst this is not expressly referenced in the draft PRS Order, we consider that the effect of this provision is achieved by articles 44 and 47 of the draft PRS Order;
- (d) we are not proposing to retain the requirement in paragraph 3.13.11 of Code 15. This sets out that where a PRS provider makes arrangements for a third party to handle excess peak traffic in relation to TV and radio competitions or votes, that provider must ensure that all valid votes or entries are treated the same as any entries received by the provider. Again, this is not expressly referenced in the draft PRS Order, as we consider that article articles 45(2) and (3) of the draft PRS Order will already apply to ensure that all valid tickets of entry are considered in the same way; and
- (e) we are not retaining the requirement in paragraph 3.13.12 of Code 15, which says that there must be no amendments to the operational systems or procedures relating to the competition and voting service without senior management authorisation.¹¹⁸

¹¹⁸ Our assessment is that there is no evidence to suggest that retaining this requirement is necessary in order to protect consumers from harm. We consider that rules relating to the clarity of the conditions for entry are sufficient to protect consumers from harm relating to competition and voting services.

4.217 We consider there to be little or no impact to providers of our proposals concerning competition and voting services. This is because our proposals are consistent with Code 15 to a large degree and, where we have added new requirements, these are simply making explicit measures which we consider are already covered by Code 15 and/or are already being followed by industry. In any case, any new requirements are balanced by a number of requirements we are not proposing to transpose from Code 15.

Consultation question 13: Do you have any comments about our proposed approach to competition and voting services in chapter 6 of Part 6 the draft PRS Order?

Other requirements in respect of certain CPRS

Summary

4.218 Chapter 7 of Part 6 of the draft PRS Order includes a number of additional requirements targeted at certain types of CPRS. These requirements are set out in articles 48 to 56 of the draft PRS Order, and will apply to merchants providing those particular CPRS along with the other general requirements in relation to CPRS in the Order.

Existing requirements

4.219 Code 15 currently include a number of requirements, ranging from age limits to what prices can be charged, which apply to the following particular types of PRS (known as service-specific requirements):

- (a) society lottery services (paragraph 3.11);
- (b) professional advice services (paragraph 3.12);
- (c) competition and voting services (paragraph 3.13);
- (d) remote gambling services (paragraph 3.14);
- (e) live entertainment services (paragraph 3.15);
- (f) services using virtual currency (paragraph 3.16);
- (g) counselling services (Annex 1);
- (h) children's services (Annex 1);
- (i) ICSS (Annex 1);
- (j) sexual entertainment services (Annex 1);
- (k) virtual chat services (Annex 1); and
- (l) chatline services (Annex 1).

Proposed requirements in the draft PRS Order

Pricing restrictions for some types of CPRS

4.220 In article 48 of the draft PRS Order, we propose to require merchants of certain types of CPRS which are used by consumers by means of a call to inform the customer once certain charging thresholds have been met. This aims to reflect paragraphs 1.4 to 1.6 of Annex 1 to Code 15.

4.221 This article applies to merchants who provide one or more of the following services:

- (a) chatline services;¹¹⁹
- (b) live entertainment services;
- (c) professional advice services;

¹¹⁹ See paragraph 4.16(e) of this document.

- (d) sexual content services.¹²⁰
- 4.222 For the purposes of this article, the proposed definitions of live entertainment services in article 25(4)(b) of the draft PRS Order and professional advice services in article 53(3) of the draft PRS Order, will apply.
- 4.223 The definition of live entertainment services is based on the definition of live entertainment services in D.2.42 of Code 15, although we have made several changes for the purposes of the draft PRS Order, including defining this as a threshold service, which consists in, or provides as its principal feature, content which can be reasonably assumed to have been made solely or principally for the purposes of entertaining a consumer. The reference to “content” mirrors the language of PRS in the Act, and the definition also states that any service providing content which meets the definitions of children’s services or sexual content services will not meet the definition of a live entertainment services. This is to provide clarity to PRS providers that there are no definitional overlaps between live entertainment services and those services.
- 4.224 The definition of professional advice service is based on the definitions of “professional advice services” and “counselling services” at D.2.57 and D.2.22 of Code 15. The definition describes this as a threshold service which consists in, or has as its principal feature, the provision of advice or assistance by a qualified individual. For the purposes of the draft PRS Order, we do not consider that there needs to be a distinction between the two given that, in practice, counselling services are seen as a subset of professional advice services. Our proposed definition of professional advice service has, therefore, been drafted to also encompass what was previously caught by the counselling services definition i.e., it makes clear that references in the definition to advice includes advice or assistance which involves resolving matters of a personal nature.¹²¹ This will impact providers of a counselling service as they will become subject to the pricing restrictions in these articles, which they are not currently subject to under Code 15. However, as mentioned above, in practice counselling services are seen as a subset of professional advice services and so we consider it is appropriate and proportionate to merge the services in this way, in order to treat the two identically and, therefore, ensure consistency in how consumers are being charged for the services. Additionally, as mentioned below at paragraph 4.248(f) of this document, we are not aware that these services are in common use and, therefore, we expect little or no impact to consumers or industry.
- 4.225 Article 48 of the draft PRS Order will apply to require that a merchant of the above CPRS must notify the consumer each time the charge for the consumer’s use of the service has reached the following amounts (inclusive of VAT):
- (a) £15;
 - (b) £30 and only continue charging if the consumer gives consent; and
 - (c) £40 and not continue to charge the consumer unless the consumer makes another call.¹²²

¹²⁰ See paragraph 4.16(f) of this document.

¹²¹ The specific requirements relating only to professional advice services are included at article 53 of the draft PRS Order.

¹²² This is different to paragraph 1.6 of Annex 1 of Code 15 which requires the call to be terminated as soon as a charge of £40 is reached.

Prohibition on providing some CPRS to persons under the age of eighteen

- 4.226 In article 49 of the draft PRS Order, we propose to prohibit merchants of the following types of CPRS from providing these services to consumers under the age of 18:
- (a) Chatline services;
 - (b) Live entertainment services;
 - (c) Remote gambling services;
 - (d) Sexual content services;
 - (e) Subscription services;¹²³ and
 - (f) Virtual chat services.¹²⁴
- 4.227 This list of services is the same as the one referred to in article 25 of the draft PRS Order which requires that promotion and marketing to these services includes reference to the age requirements.
- 4.228 This prohibition is not expressly contained in Code 15 but the article has been introduced to accompany the requirements in paragraphs 3.2.18, 3.5.4, 3.5.8, and 3.5.10 of Code 15,¹²⁵ which subject these types of CPRS to age verification requirements. Therefore, there should be a minimal impact for existing PRS providers as a result of this article, because the age verification provisions under Code 15 should mean that providers of these services are already taking steps to prevent under 18s from using these services (which is what we consider the purpose of those age verification provisions to be). We consider that for the age verification requirements in article 50 of the draft PRS Order to work, we need to be clear that under 18s are not to use these types of CPRS, which is what the age verification requirements in the Order are aimed at preventing.
- 4.229 We consider that it is necessary to strengthen the requirement by making an explicit prohibition on provision of these services to under 18s given that the impact of harms from these services to under 18s could be high, firstly owing to the potential for financial detriment¹²⁶ and secondly, as the nature of these types of service may be highly inappropriate¹²⁷ for under 18s.

Age verification for some types of CPRS

- 4.230 In article 50 of the draft PRS Order, we propose that merchants who provide one or more services from the list at paragraph 4.117 of this document must undertake age verification. This accompanies the prohibition in article 49 of the draft PRS Order on persons under 18 from using these types of CPRS. This article reflects paragraphs 3.2.18, 3.5.4, 3.5.8, 3.5.9, and 3.5.10 of Code 15.
- 4.231 In particular, in this article we are proposing that merchants must:

¹²³ See paragraph 4.16(h) of this document.

¹²⁴ See paragraphs 4.117 to 4.119 of this document.

¹²⁵ 3.5.9(a) of Code 15 also makes clear that any promotion and marketing for these types of CPRS should say that the service must not be used by anyone under the age of 18. This is reflected in article 25, as part of the requirements in relation to promotion and marketing.

¹²⁶ We note that even if the content is not inappropriate for under 18s, there is a risk that owing to the addictive nature of chatline services, virtual chat services and remote gambling services, there is a high risk of financial detriment. With regards to subscription services, these have a long-term financial impact and therefore we consider it is necessary to prohibit their provisions to under 18s.

¹²⁷ In particular we have regard to the actual or potential adult nature of content in sexual content services, chatline services, virtual chat services, and live entertainment services.

- (a) establish and maintain procedures for obtaining and verifying the consumer's age;
- (b) carry out age verification before providing the service;
- (c) make and keep written records of the age verification undertaken; and
- (d) refund without undue delay where any consumers under the age of 18 have used the service.¹²⁸

4.232 We note that our proposals make explicit age verification measures which are not explicit under Code 15. However, we consider that there will be little or no impact to providers from these proposals because appropriate age verification measures are already required under paragraph 3.5.4 of Code 15.

Requirements for content provided, or facilities made available, to children

4.233 Article 51 of the draft PRS Order will apply to merchants who are providing children's services, or where they are providing the following CPRS which make available a facility within the meaning of children's service:

- (a) competition and voting service; and
- (b) recurring donation service.

4.234 For example, article 51 of the draft PRS Order would apply to a CPRS which is running a competition aimed at children. See paragraph 4.106 of this document for more discussion on the definition of children's services and its overlaps with the above CPRS.

4.235 In article 51 of the draft PRS Order, we propose two things: (i) to prevent merchants from exploiting the credulity, inexperience or sense of loyalty of any child; and (ii) to prevent merchants from charging more than certain thresholds.

4.236 This article aims to reflect paragraph 3.5.7 and Annex 1 paragraphs 1.10 and 1.11 of Code 15. Paragraphs 1.10 and 1.11 of Code 15 set out the charging thresholds for calls. However, for the purposes of the draft PRS Order, we have widened this so that the charging thresholds will apply to all children's services, regardless of the means by which they are used.¹²⁹ However, we do not consider that broadening the requirements in this way will have any material impact to industry because, as per Annex 1.10 to 1.11, the thresholds are already applied across multiple means of provision and, therefore, industry already has in place measures to prevent the thresholds from being exceeded across multiple means of CPRS provision.

4.237 In particular merchants must not charge above the following thresholds:

- (a) £5 for a single transaction;
- (b) £20 in total within a month irrespective of the number of transactions; and
- (c) £5 per month for subscription services in respect of these CPRS.

Charges for provision of ICSS

4.238 In article 52 of the draft PRS Order, we propose to prevent merchants from charging more than £40 (inclusive of VAT) for the provision of ICSS. The article makes clear that where the merchant does charge the consumer more than this, the consumer will not be bound by the ICSS contract. This article reflects paragraph 1.12 of Annex 1 of Code 15.

¹²⁸ Strictly speaking, the requirement is to refund the bill-payer (see article 23(3)(b) of the draft PRS Order for the definition of the same) but in some instances the bill-payer may be under 18. Nevertheless, the intention is to distinguish between the underage user and the bill-payer.

4.239 This article does not deal with paragraph 1.13 of Annex 1 of Code 15, which sets out that consumers of an ICSS must be told at the beginning of the call, and before connection to another organisation, that the call will be terminated once a charge of £40 is reached. Instead, this is reflected in article 29 and Schedule 3 of the draft PRS Order, which deals with express consent and pre-contract information requirements which will apply to ICSS. We do not consider there will be any impact to industry from our proposals given recent amendments to Code 15 by the PSA, which ICSS providers should already be complying with.

Relevant qualifications for professional advice services

4.240 In article 53 of the draft PRS Order, we propose to require merchants who provide professional advice services to take reasonable and proportionate steps to ensure that anyone working as part of the service to give such advice or assistance to consumers has the qualifications and experience necessary to do so.

4.241 This article builds on the requirement in paragraph 3.12.1 of Code 15, which requires promotional material for professional advice services to set out details of the person's qualifications and training which enables them to provide the professional advice service. Our proposal goes further than this by not limiting this to simply being stated in promotion and marketing information. Additionally, as explained at paragraph 4.224 of this document, our proposed definition of professional advice service encompasses counselling services as well. This means that we are also going further than Code 15 by requiring merchants to ensure that anyone employed or engaged to provide advice that presently, under Code 15, would constitute counselling, are also suitably qualified or experienced.

4.242 We note that there may be an impact on providers owing to the review of qualifications held and experience gained by those giving advice or assistance as part of the service. We note, in particular, that this may involve obtaining the necessary qualifications for those involved in the service; however, we think that the likely additional burden of this should be low given the existing requirement under paragraph 3.3.2 of Code 15 for providers not to mislead or be likely to mislead consumers in any way, which we consider extends to not misleading consumers about the qualifications or experience of the person they are seeking advice from. Therefore, we consider it is already the case that the qualifications and experience held by those involved in professional advice services must match what is necessary in order for the service to be a professional advice service lest consumers be misled.

4.243 In any case, should professional advice services need to invest time and resource into obtaining details of the necessary qualifications and/or experience, we consider that this impact is necessary and proportionate given the impact to consumers of receiving so-called professional advice from someone who is not duly qualified or experienced. We note, in particular, that the advice may relate to matters of a legal, financial, medical and personal nature (including family, relationships, psychological or other health problems). These areas can be of a highly sensitive and deeply significant nature and, therefore, our view is that only professionals with the necessary qualifications and experience ought to be involved in giving what consumers understand to be professional advice.

Consumer information relating to remote gambling services

4.244 In article 54 of the draft PRS Order, we propose to require that merchants of remote gambling services make available to consumers for the duration of their use of the service:

- (a) a record of the consumer's use including information about any wins and losses; and
- (b) the consumer's account information.

- 4.245 This article reflects paragraph 3.14.2 of Code 15, which requires consumers to be able to access their playing history and account information whilst using the service.
- 4.246 As part of this article, we have proposed a new definition of ‘remote gambling service’ that builds on the definition of the same in D.2.62 of Code 15. This new definition sets out that a remote gambling service is a threshold service which makes available a facility for gaming and betting (as defined in the Gambling Act 2005). This, again, reflects the language of PRS in s120(9) of the Act by focusing on the facility. Our proposed definition goes on to exclude other types of CPRS from coming within scope – such as betting tipster services (which are threshold services making available a facility for offering information relating to the placing of bets as opposed to the facility to make those bets), competition and voting services, or society lottery services. This is so that there is clarity for providers of those CPRS that those CPRS do not overlap with remote gambling services and therefore are out of scope of the remote gambling specific rules in the draft PRS Order. Given this article reflects existing requirements, we consider there will be little or no impact for providers of this service as they should already be in compliance with this requirement.

Code 15 requirements not being carried over to the draft PRS Order

- 4.247 We are not proposing to carry over into the draft PRS Order the following requirements currently in Code 15:
- (a) society lottery services will be defined in the order for the purposes of setting out additional requirements for network operators. However, we are not proposing to carry over into the draft PRS Order the specific requirements for these services which can be found at paragraph 3.11 of Code 15. This is because we consider these requirements are already reflected in this Order and in other legislation. For example, in relation to paragraph 3.11.2 of Code 15, we consider that these are reflected in provisions we are proposing to include in the draft PRS Order relating to pre-contract information, and so providers of society lottery services will need to comply with those requirements where they meet the definition of a threshold service under the draft PRS Order. We also consider that the aims of paragraphs 3.11.1 and 3.11.3 are achieved by existing legislation, such as the Gambling Act 2005. Therefore, there should be a minimal impact on providers of these services;
 - (b) whilst we are largely retaining the effect of paragraph 3.12.1 of Code 15 (albeit we expand the scope of this) in the draft PRS Order, we are not proposing to retain paragraph 3.12.1 of Code 15. We understand that this provision relates to an old requirement by the PSA for an agreement to be in place between the counsellor and the client for the use of a professional advice service, which is not currently in Code 15;
 - (c) we are not proposing to retain the specific requirement at paragraph 3.14.1 of Code 15 in relation to the promotion of remote gambling services. Instead, we intend to replace this with the requirements set out in the draft PRS Order relating to pre-contract information requirements, namely article 26 and Schedule 3 of the draft PRS Order;
 - (d) we are not proposing to retain the rules at paragraph 3.15 of Code 15 in relation to live entertainment services. These rules centre around the recording of calls made as part of live entertainment services. As the draft PRS Order will not mandate the recording of these calls, we do not consider it to be necessary to include these provisions. We note that this may result in cost savings for providers who no longer need to implement systems to record calls and store the relevant data;
 - (e) we are not proposing to carry over into the draft PRS Order the requirements at paragraph 3.16 of Code 15. These set out rules in relation to services that allow

consumers to purchase virtual currency. We consider that the proposed provisions in the draft PRS Order around information to be provided at the pre-contract stage (namely article 26 and Schedule 3 of the draft PRS Order) will achieve the same effect as these (and virtual currency will be caught under these rules by the reference to “digital content” in Schedule 3 of the draft PRS Order; and

- (f) as explained above the concept of ‘counselling services’ has been subsumed into the professional advice services definition, as we do not consider that, for the purposes of the draft PRS Order, there needs to be a distinction between the two services. As such, we are also not proposing to carry over into the draft PRS Order the specific requirements at paragraphs 1.8 and 1.9 of Annex 1 of Code 15. Additionally, we are not aware that these services are in common use nor that these measures continue to be necessary to protect consumers and, therefore, we expect little or no impact to consumers or industry.

Consultation question 14: Do you have any comments about our proposed requirements in respect of certain CPRS in chapter 7 of Part 6 our draft PRS Order?

Other responsibilities and obligations

Ofcom’s expenditure

Summary

- 4.248 We are proposing to broadly retain the PSA's approach to cost recovery for the purposes of the draft PRS Order. We set out our proposed approach in Chapter 3 of the draft PRS Order.

Existing requirements

- 4.249 The PSA is a not-for-profit company, with a current funding model based around a levy set out within Code 15. The levy is calculated as a proportion of the financial transactions within the PRS value chain and is in practice collected by network operators on behalf of the PSA. The size of this levy is determined following an extensive consultation with all industry stakeholders, and its collection is based on the principle that each provider pays a fair proportion of the total levy required.
- 4.250 The key elements in the calculation of the required levy are:
- (a) the company operating budget, after netting off Registration Scheme fee income and bank account interest. The PSA budget is subject to approval by Ofcom, and must be deemed sufficient by Ofcom for it to be able to deliver the required statutory obligations. It is not based upon any assumption as to the level of fines to be recovered, with all fine levels determined by independent tribunals;
 - (b) the amount of collected fines and administrative charges available to offset the total amount of levy required. The PSA has the power to impose fines for non-compliance with Code 15 and to charge administrative costs associated with investigating non-compliance; and
 - (c) the estimated size of the market, as measured by payments from networks to service providers in respect of the provision of PRS.
- 4.251 The levy is collected either monthly or annually from individual networks depending on the size of their share of the PRS market. The amount to be funded by the levy for 2023/2024 is

£3,647,494 (£3,797,494 (PSA budget) - £150k (PSA registration fees)). This represents 0.81% of the total sector revenue.

Proposed requirements in the draft PRS Order

- 4.252 We are proposing to broadly retain the PSA's approach to cost recovery for the purposes of the draft PRS Order – this is set out in Part 3 of the Order.
- 4.253 In deciding on our proposed approach, we have had regard to the following two key considerations:
- (a) in deciding on the funding model, and as per the statutory provisions in the Act which relate to the collection of administrative charges (sections 38 to 43), we will need to ensure that our funding model also works in accordance with our general statement of charging principles; and
 - (b) the principles must be such as appear to Ofcom, to be likely to secure, on the basis of an estimate of costs, on a year-by-year basis, that the aggregate amount of the charges payable to Ofcom is sufficient to meet the annual cost to Ofcom of carrying out certain functions as specified in the Act.
- 4.254 The draft PRS Order, in particular, covers the following areas related to how we propose to recover our administrative charges.

Funding model

- 4.255 We propose to retain the current PSA funding model which is a levy-based approach and is determined by the market size vs the amount to be funded by levy (see article 14(1) and 14(2) of the draft PRS Order). The market size will continue to be based on financial transaction data in the PRS value chain using outpayments (which are the sums payable by TCPs to intermediary and/or merchant providers in respect of revenue generated by PRS).

TCPs' liabilities to pay administrative charges

- 4.256 We propose that TCPs should be responsible for funding arrangements through introducing the term "*liable network operator*" (article 14(7)(b) of the draft PRS Order). This effectively retains the PSA's current approach to funding arrangements. In this regard, it is important to note that only TCPs fall within the "*network operator*" definition as defined in the Act. This is because only those persons would normally be expected to have arrangements or contracts directly with intermediaries or merchants. We, therefore, expect this to have little impact in terms of costs are currently recovered.

Defined thresholds

- 4.257 We understand that, currently, where the TCP's calculated levy currently falls below £100, the PSA abstains from recovering that sum, including from other TCPs. This is an operational decision by the PSA. We do not propose to follow this model and, instead, we propose to recalculate administrative charges to reflect where certain TCPs do not reach the defined threshold.
- 4.258 We consider that retaining a threshold under the draft PRS Order in terms of when TCPs are required to pay the administrative charges remains important and, therefore, we propose to exclude smaller TCPs from the funding arrangements who are below a designated minimum relevant turnover amount. However, going forward, we propose to apply the threshold instead to a de minimis level of outpayments of £10,000 or more in the relevant calendar year. This is covered under the definition of "*liable network operator*" (article 14(7)(b) of the draft PRS Order).

4.259 This will provide a more transparent model as individual providers with £10,000 worth of outpayments would know from the outset whether they will be required to pay a fee or not as opposed to waiting for Ofcom to run its fee calculation. However, while this is a different approach from how the PSA currently determine which TCPs are liable to pay, we consider this achieves a similar outcome and that there should be no significant impact and that any impact is likely to be positive as it should provide for a more transparent model.

Financial information

4.260 We intend to collect the 'outpayments' data from TCPs on an annual basis by using a published 'General Demand' for information (see article 57 of the draft PRS Order and paragraphs 4.282 to 4.290 for more information on Ofcom's information gathering powers). This effectively means that we will issue a single information notice that is addressed to all TCPs, as opposed to issuing individual notices to each TCP.

4.261 This is different to the PSA approach who currently collect this data quarterly from each TCP on an individual basis. However, this achieves a similar outcome and, therefore, any impact is limited as the only difference is that TCPs will be notified through a general demand rather than an individual demand.

Ofcom's proposed funding methodology

4.262 We are proposing to use the following formula, as set out in article 14(2) of the draft PRS Order, for the purposes of calculating a TCP's administrative charge (AC):

$$AC = [(DAE + O) \div TOP] \times NOS:$$

- (a) "DAE" - the total sum of our estimated relevant expenditure estimated to be incurred in the charging year in question, together with any adjustments to deal with a deficit or surplus;
- (b) "O" - a reasonable apportionment of our estimated overhead costs attributable to such expenditure for the charging year in question; and
- (c) we arrive at the AC by, firstly, dividing our total budgeted costs (i.e. DAE + O) with the total amount of outpayments of all TCPs in the relevant calendar year (shortened to "TOP") and, secondly, by multiplying the quotient with the total amount of outpayments of a TCP in the relevant calendar year (shortened to "NOS").

4.263 While there are some key differences compared to the PSA's regime, we have sought to align our methodology with the PSA's levy-funded model where possible.

4.264 Our recoverable costs seek to reflect the power under s.122(4) of the Act, namely:

"(4) An order under this section may require such providers of premium rate services as may be determined by or under the order to make payments to OFCOM in respect of expenditure incurred by OFCOM in connection with-

- (a) the establishment and maintenance, in accordance with such an order, of any body corporate or procedure; or
- (b) the making of other arrangements for the purposes of the requirements of such an order."

4.265 We reflect that power by defining the concept "relevant expenditure" accordingly in article 14(7)(g) of the draft PRS Order.

Charging & relevant calendar year

4.266 We are proposing to base outpayments on prior calendar years to save us having to adjust fees during the financial year. This reduces the administrative burden on both Ofcom and stakeholders. Therefore, the period for which charges will apply is called the "*charging year*" that will normally run between 1st April and 31st March. However, the relevant calendar year would be the period of twelve months beginning on 1st January in the last but one calendar year prior to the charging year in question. For example, 2024/25 fees would be based on the value of 2022 outpayments. This replicates the process in place for section 38 administrative charges which most of the PRS stakeholders already follow and, therefore, means there should be a limited impact on existing PRS providers. We define "*charging year*" at article 14(7)(a) of the draft PRS Order.

Outpayments

4.267 We are proposing to largely reflect the corresponding concept of "outpayments" as defined under paragraph 7.1.1(a) of Code 15. Our proposed definition of outpayments is set out at article 14(7)(d) of the draft PRS Order, as follows:

"means that total sum of the amounts payable by a liable network operator to intermediaries and merchants in respect of PRS revenue".

PRS revenue

4.268 We have a new definition of "PRS revenue" for the purposes of the draft PRS Order. Our proposed definition is set out at article 12(7)(e) of the draft PRS Order, as follows:

"...the total net amount passed on to a network operator by an originating communications provider in respect of charges imposed by the provider on its users of the electronic communications services for the provision of CPRS, together with any facilities made available to them";

4.269 The reason we have drafted this definition is because we believe that a TCP is unlikely to know the CPRS transactions which are made by the customers of an OCP where the TCP and OCP are different providers. In that regard, we understand from the PSA that the arrangements between the OCP and TCP are that the OCP typically passes on the service charge in full to the TCP, i.e. there is no revenue share that occurs between the OCP and TCP at this point. We also understand from the PSA that the OCP simply retains that access charge element of the service charge of the service.

Penalties

4.270 Unlike the PSA, we will not be able to use money collected through penalties to offset the amount of funds to be collected. All financial penalties imposed by Ofcom are transferred to HM Treasury or distributed to relevant Consolidated Funds. Ofcom does not receive any financial benefits from, nor is able to make use, of any financial penalties received.

Consultation question 15: Do you have any comments about our proposed approach to the recovery of Ofcom's expenditure in Part 3 of the draft PRS Order?

Additional requirements on network operators

Summary

4.271 For the purposes of the draft PRS Order, we are proposing to retain Code 15 requirements relating to specific responsibilities of network operators. These are as set out below.

Existing requirements

4.272 Code 15 includes a number of additional responsibilities and obligations on network operators (paragraphs 6.2.1 up to and including 6.2.8 of Code 15).¹³⁰ These range from rules around withholding payments in connection to PRS, as well as number records that network operators are required to keep.

4.273 There are also specific requirements in paragraph 6.2 of Code 15 which relate to intermediaries (paragraphs 6.2.9 to 6.2.10) and merchants (paragraphs 6.2.11 to 6.2.13).

4.274 In addition, paragraphs 6.2.14 to 6.2.19 of Code 15 provides the PSA with the powers to specify requirements relating to service charges and duration of calls with regards to defined service categories.

4.275 Finally, paragraphs 6.2.20 to 6.2.21 of Code 15 requires PRS providers to comply with any data retention notices issues by the PSA.

Proposed requirements in the draft PRS Order

Requirement on network operators to retain relevant payments

4.276 Article 55 of the draft PRS Order largely reflects paragraph 6.2.1 of Code 15, which requires network operators to withhold payments to another PRS provider for at least 30 days. We have also included the current exemption from the requirement under Code 15 in respect of payments relating to society lottery services.

4.277 We are not, however, proposing to include the more detailed requirements which are set out at paragraphs 6.2.2, 6.2.3 and 6.2.4 of Code 15 which we consider are PSA specific and, therefore, unnecessary to meet our policy objectives.

4.278 Our assessment is that retaining a broad requirement relating to withholding payments continues to perform a vital role in terms of protecting consumers as it significantly reduces the opportunity for PRS providers to engage in any activities which may have the potential of harming consumers. This is because such activities are likely to be detected by consumers or networks within a 30 day time period and, therefore, this rule acts as a deterrent for those PRS providers who may be inclined to harm consumers. We consider that in terms of impacts on network operators, this should be minimal as this provision reflects an existing requirement in Code 15 which network operators should already be complying with.

Requirement on operators to keep PRS number records

4.279 Article 56 of the draft PRS Order reflects the first requirement in paragraph 6.2.6 of Code 15 which requires network operators to retain records in writing of any PRS number which is being or has been: (a) transferred from the network operator to another person, or (b) used by another person without direction or control of the network operator. The article sets out what the record needs to contain, including the name of the person to whom the PRS

¹³⁰ It should be noted we are not planning to reflect sections 6.1 or 6.4 of Code 15 in the draft PRS Order as these are provisions specific to the PSA.

number¹³¹ has been transferred, and the name of the merchant using the PRS number where known and applicable. In relation to this article, again we consider there to be a minimal impact on network operators as a result of this as it reflects an existing requirement under Code 15.

Code 15 requirements not being transposed into the draft PRS Order

4.280 We are not proposing to specifically include most of the other requirements from paragraph 6.2 of Code 15. This is because we consider that the majority of these requirements are already captured within draft PRS Order. In particular:

- (a) we are not proposing to retain the second requirement in paragraph 6.2.6 of Code 15 which requires network operators to support to the PSA information about who has been given or in control of the relevant PRS number, as well as the name of the merchant using the relevant PRS number. This is PSA specific. Ofcom has its own information gathering powers under article 57 of the draft PRS Order which can be used for the same purposes;
- (b) we are not proposing to reflect paragraphs 6.2.7 to 6.2.13 of Code 15. These deal with what each of the three PRS providers will be considered to be responsible for e.g., paragraphs 6.2.7 and 6.2.9 of Code 15 respectively set out that where a merchant and intermediary provide any part of a PRS which has a direct impact on consumers, they will be responsible for compliance with Code 15 in relation to the functions it performs in respect of that PRS. We consider these provisions are unnecessary to replicate explicitly in terms of the overall draft PRS Order as we have sought to provide certainty throughout as to which PRS providers are responsible for specific provisions, and have also incorporated the effect of this where necessary e.g., the promotion and marketing requirements in Part 6 of the draft PRS Order apply to all PRS providers and not just merchants;
- (c) we are not proposing to retain paragraph 6.2.13 of Code 15, which relates to use of numbers not being used in contravention of any applicable restrictions which have been imposed by Ofcom. This is because we are already the regulator in charge of telephone numbers in the UK and, therefore, including additional provisions in the draft PRS Order is not necessary;
- (d) paragraphs 6.2.14 to 6.2.19 of Code 15 relating to PSA's ability to set specified service charges and duration of calls. As this is PSA specific, this has not been carried over into the draft PRS Order; and
- (e) similarly, we are not proposing to retain requirements relating to paragraphs 6.2.20 to 6.2.21 of Code 15 – these are PSA specific insofar as they refer to the PSA data retention notice. We have set out our proposed requirements relating to data retention in article 58 of the draft PRS Order.

Consultation question 16: Do you have any comments about our proposed approach to additional requirements on network operators in Part 7 of the draft PRS Order?

¹³¹ See article 56(3) for the definition of PRS number.

Information requirements

Summary

- 4.281 We propose to include in the draft PRS Order powers for Ofcom to ask PRS providers to provide information to Ofcom. This is because we consider it is critical that Ofcom is able to obtain all necessary information for the purpose of carrying out our functions under, or by virtue of, the draft PRS Order.
- 4.282 We set out our proposed information requirements at article 57 of the draft PRS Order.

Existing requirements

- 4.283 The PSA has specific information gathering powers to supervise and enforce the compliance of any requirements imposed on PRS providers under Code 15 as well as associated information gathering powers in the context of enforcement-related, funding-related, and other relevant purposes. These are set out in paragraphs 5.2.3, 5.2.4 and 5.2.5 of Code 15, although there are various other requirements in Code 15 setting out when PRS providers, and third parties that they contract with, are expected to provide information to the PSA upon request (for example, see paragraph 3.4.8 of Code 15).
- 4.284 Furthermore, paragraph 6.1 of Code 15 gives the PSA specific powers to direct any PRS provider to disclose information or documents for the purposes of supervision or enforcement. As mentioned above, we are not reflecting this in the draft PRS Order.
- 4.285 Code 15 also gives PSA powers to obtain information to ensure its funding by a levy. This is set out in paragraphs 7.1.2 and 7.5 of Code 15.

Proposed requirements in the draft PRS Order

- 4.286 Ofcom will require similar information gathering powers under the draft PRS Order, although as explained above in this document, Ofcom does not have the power to require information from persons who are not PRS providers.
- 4.287 Therefore, we are proposing that article 57 of the draft PRS order allows Ofcom to require information from PRS providers for any one or more of the following purposes:
- “(a) ascertaining whether a contravention of a requirement imposed under this SI has occurred or is occurring,
(b) ascertaining or verifying the charges payable by a person under Part 3,
(c) obtaining a copy of the results of relevant security testing carried out by intermediaries pursuant to article 20,
(d) assessing any steps taken, or arrangements made by a PRS provider to comply with this SI, including (without limitation) any written policies, procedures or other written documents recording any such steps or arrangements.”
- 4.288 Article 57(7) of the draft PRS Order includes information about the ability to request information for the purposes of part 3 of the draft PRS Order.
- 4.289 We do not consider these changes are likely to have any material impact on PRS providers as these proposals broadly reflect the breadth of information which can be requested, as well as the way that information is currently requested, by the PSA under Code 15.

Consultation question 17: Do you have any comments about our proposed requirements relating to information requirements in Part 8 of the draft PRS Order?

Record retention

Summary

4.290 We are proposing to retain the current PSA data retention periods of 2 years (where a relevant record relates to a requirement imposed on a PRS provider under Parts 2, 3, 5, 6 and 7 of the draft PRS Order)) and 3 years (where a relevant record relates to a requirement imposed on the PRS provider under Part 4 of the draft PRS Order i.e. relating to DDRAC requirements). We set out our proposed requirements at article 58 of the draft PRS Order. This includes what we define as “relevant records”¹³²

Existing arrangements in Code 15

4.291 Paragraph 6.2.20 of Code 15 requires that, to the extent permitted by law, PRS providers must comply with any data retention notice (“the Notice”) issued by the PSA, including (but not limited to) any data retention periods specified therein. The purpose of the Notice is to inform all PRS providers of the types of information that are necessary to retain, and the time periods for which such information should be retained. The PSA issued a Notice on 16 February 2022 to support Code 15, coming into force on 5 April 2022.¹³³

4.292 Under the PSA's current data retention notice, relevant data should be retained for two years as a minimum, with the exception of DDRAC data which should be retained for three years as a minimum, from the point at which it is collected. The reason the PSA’s require longer for DDRAC records is set out at paragraph 13 of the Notice, which states the following:

“The longer retention period for Relevant DDRAC data takes into account the fact that DDRAC concerns may, by their nature, emerge over a longer period of time. For example, where trends emerge (e.g., through supervision activities) which are suggestive of DDRAC failings at a higher point in the value chain (intermediary providers and network operators), potentially in respect of multiple services or providers, or where there is/are underlying merchant provider Tribunal adjudication(s), pointing to a potential DDRAC failing higher up in the value chain. The time it takes for such trends or concerns to emerge increases the likelihood that in some cases DDRAC engagement or enforcement activity would commence after the standard two-year period for Relevant Data has elapsed.”

Proposed requirements in the draft PRS Order

4.293 As above, we are satisfied that it is appropriate to retain the current PSA data retention periods. In particular, we note these were recently consulted upon by the PSA in 2019 and there is no evidence that the current retention periods are not sufficient.

4.294 However, and similarly to the PSA’s current approach to data retention periods, we are also proposing to include a requirement that providers must preserve relevant records above the

¹³² See article 58(2)(b).

¹³³ [Data-Retention-Notice-16-02-2022.ashx \(psauthority.org.uk\)](https://www.psa.org.uk/Data-Retention-Notice-16-02-2022.ashx)

normal data retention periods once Ofcom has notified them that an investigation has been opened, and for as long as that investigation is ongoing. This is covered in more detail in paragraph 5.38 of this document.

Consultation question 18: Do you have any comments about our proposal to retain current PSA data retention periods for 2 years (for consumer data) and 3 years (for DDRAC data) in Part 9 of the draft PRS Order?

5. Enforcement matters

Summary of section

- 5.1 This section sets out our proposed approach to how Ofcom intends to secure compliance with requirements proposed under the draft PRS Order (see annex 5). This proposed approach includes not only our expected approach in exercising our enforcement powers under Part 10 of the draft PRS Order but also the approach in enforcing the proposed modifications to the PRS Condition (see annex 9) by exercising our enforcement powers under sections 123 and 124 of the Act in relation to any breaches of that Condition.
- 5.2 In this section, we discuss, in particular:
- (a) the existing arrangements for the enforcement by the PSA under Code 15;
 - (b) our overall proposed approach to enforcement of above-mentioned matters;
 - (c) our proposed requirements in the draft PRS Order and the detailed proposals for each stage of an enforcement investigation;
 - (d) transitional arrangements for enforcement; and
 - (e) our proposed modifications to the PRS Condition.

Background – existing arrangements for enforcement

- 5.3 There are two distinct components to the current enforcement regime:
- (a) enforcement by the PSA of the requirements of Code 15, using the powers set out in the Code itself; and
 - (b) where a provider fails to comply with enforcement directions given by the PSA, enforcement by Ofcom of the PRS Condition under sections 94-96 and 123 of the Act.¹³⁴

The PSA's current enforcement of Code 15

- 5.4 The PSA has the principal responsibility for setting and enforcing rules in the PRS market through Code 15. In addition to the substantive rules which providers must comply with, Code 15 itself sets out the requirements on providers, the PSA and the PSA Code Adjudication Tribunals (Tribunals) in relation to enforcement procedures.
- 5.5 The PSA's overarching principles with regards to enforcement, as set out in Code 15, are that enforcement processes are effective and capable of producing proportionate, consistent and fair outcomes, and are clearly understood by industry.¹³⁵ Code 15 explains the range of formal and informal regulatory actions the PSA can take when it identifies potential or actual non-compliance with the Code.
- 5.6 Section 5 of Code 15 sets out the requirements in relation to enforcement and engagement. In summary, these are:

¹³⁴ See paragraphs 2.34 – 2.52 for a full description of the legal framework.

¹³⁵ See paragraph 411, [Consultation on a new PSA Code of Practice \(Code 15\)](#).

- (a) issue an enquiry letter to any participant in the PRS value chain, seeking a wide range of information¹³⁶ under the engagement process;
- (b) issue warning letters where it appears that a breach of Code 15 has occurred, or is likely to have occurred, setting out its concerns and requiring a response and/or corrective action to be taken within a specified timeframe, under the engagement process;
- (c) use a "formal notification" to notify a provider that the PSA suspect it has breached a rule;
- (d) serve a formal "enforcement notification" on a provider containing details of the alleged breach, evidence supporting the allegation and the proposed sanction;
- (e) impose interim measures on a provider during an investigation, where there is serious harm or a risk of serious harm, and it requires urgent corrective action;
- (f) to use the settlement process by agreement with a provider; and/or
- (g) refer a suspected breach to a tribunal or single legally qualified tribunal member to determine whether a breach has occurred and, where a breach is found, impose a sanction.

Ofcom's current enforcement of the PRS condition

Ofcom's statutory powers to enforce the PRS Condition

- 5.7 Where providers fail to comply with the PSA's directions given as part of its enforcement proceedings under Code 15, the PSA may refer providers to Ofcom to exercise its enforcement powers as the backstop regulator. Ofcom can do this this by enforcing the PRS condition.
- 5.8 Sections 94-96 and 123 of the Act specify how Ofcom can enforce the PRS Condition. This includes the power to fine a provider up to £250,000 per breach of the Condition. Ofcom's approach to the enforcement of the PRS condition is as set out in our Regulatory Enforcement Guidelines (see below).¹³⁷

Ofcom's approach to enforcing the PRS condition

- 5.9 As the independent regulator, competition authority and designated enforcer of consumer protection law for the UK communications sector, Ofcom has published Regulatory Enforcement Guidelines for investigations. This sets out how we normally approach the enforcement of regulatory requirements and consumer protection law relating to the industries for which we are responsible. This includes the approach we would take in relation to enforcing the PRS condition.
- 5.10 The Enforcement Guidelines set out the overarching regulatory principles that guide how we normally expect to operate, including:
 - (a) we operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required;
 - (b) we strive to ensure our interventions will be evidence-based, proportionate, consistent accountable and transparent in both deliberation and outcome; and
 - (c) we always seek the least intrusive regulatory mechanisms to achieve our policy objectives.

¹³⁶ A full list of information sought is listed at paragraph 5.2.4 of Code 15.

¹³⁷ Ofcom December 2022, [Regulatory Enforcement Guidelines for investigations](#). A non-exhaustive list of the regulatory investigations that the guidelines apply to can be found at paragraph 2.2.

- 5.11 Sections 3 to 5 of the Enforcement Guidelines describe the steps we generally take as part of our enforcement activity, including:
- (a) carrying out an initial assessment, which involves looking at the initial evidence to justify whether to open an investigation, considering all relevant factors and whether this is an administrative priority for Ofcom.
 - (b) investigating the purported breach by collecting information from providers.
 - (c) making a decision on whether a breach has occurred, including the consideration of any appropriate level of penalties, following an investigation. This decision is normally taken following a two-stage process; stage one by issuing a provisional decision and stage two by issuing a final decision.
 - (d) consideration of Ofcom taking any urgent actions and interim measures, where appropriate.
- 5.12 The Enforcement Guidelines contain regime-specific annexes which set out the legislative provisions supporting key parts of the enforcement process, highlighting notable additional points or exceptions relating to our normal general approach (as summarised above) for each area of Ofcom's regulatory responsibility. There is currently no specific annex for powers relating to PRS in our Enforcement Guidelines, although they do make clear that they apply unless otherwise stated and gives PRS as an example of a regime that is within scope.¹³⁸

Our overall proposed approach to enforcement

Proposed approach to enforcing the draft PRS Order and our proposed modified PRS Condition

- 5.13 We propose to keep two distinct components to our enforcement of PRS:
- (a) investigation and enforcement processes reflecting the provisions in the draft PRS Order (in place of the PSA's current enforcement under Code 15); and
 - (b) compliance obligations in the PRS Condition enabling Ofcom to take enforcement under sections 123 and 124 of the Act (applying sections 94 to 96 of the Act), where a provider fails to comply with our enforcement decisions given using the powers of the draft PRS Order (in place of failure Ofcom's current enforcement under the same sections to secure compliance with enforcement directions given by the PSA under Code 15).
- 5.14 We set out in detail our specific proposals below. In summary, we propose that:
- (a) the draft PRS Order contains enforcement provisions setting out procedural elements of the enforcement process relating to the substantive requirements of the Order (which are similar provisions to those set out in sections 96A-96C of the Act),¹³⁹
 - (b) the draft PRS Order replicates some of the powers in Code 15 in relation to sanctions (see paragraphs 5.111-5.124) of this document, directions (see paragraph 5.65 of this document), and interim measures (see paragraphs 5.136-5.159 of this document);

¹³⁸ See paragraph 2.1 - 2.2 and footnote 1: Ofcom December 2022, [Regulatory Enforcement Guidelines for investigations](#).

¹³⁹ These set out the enforcement procedure Ofcom must follow in relation to: significant market power service conditions; universal service conditions; the General Conditions of Entitlement; network security; and, other regulatory conditions and directions applicable to communications providers.

- (c) the proposed modified PRS Condition requires providers to comply with the provisions of the draft PRS Order (see paragraphs 5.191-5.199 of this document);
 - (d) in the case of potential non-compliance with requirements in the draft PRS Order or the proposed modified PRS Condition, we would normally follow our Enforcement Guidelines, which set out in general terms how we conduct investigations¹⁴⁰ (and we do not propose to amend the main part of the Enforcement Guidelines themselves for present purposes);
 - (e) to add two new annexes to the Enforcement Guidelines that will set out legislative components of the Act and draft PRS Order to deal specifically with our intended enforcement approach to the draft PRS Condition and the PRS Condition respectively. Those annexes will include details of the application of the general approach set out in the Enforcement Guidelines;¹⁴¹ and
 - (f) to follow the approach set out in Ofcom's Penalty Guidelines¹⁴² in imposing any penalty for breaching the requirements in the draft PRS Order and/or the compliance requirement in the PRS Condition (see paragraphs 5.97-5.99).
- 5.15 Overall, these proposals would mean that our enforcement activities would look very similar to those of other sectors we regulate and they would be broadly consistent with the current effect of Code 15.

Assessment of our proposed approach

- 5.16 As we have explained above, our overall objective in taking enforcement action to secure an effective and efficient transfer of the PRS regime to Ofcom and ensure that there are no gaps in regulation and enforcement as part of the transfer of responsibilities (see Section 4 of this document). In many cases, this involves drafting the draft PRS Order so that it closely reflects, albeit with different language, the effect of the corresponding provisions of Code 15.
- 5.17 In the case of enforcement procedures, however, we are proposing to align Ofcom's enforcement under the draft PRS Order with the approach we adopt across the rest of our regulatory remit for other sectors. As such, the draft PRS Order seeks to reflect many of those features of Code 15 which, when combined with Ofcom's existing procedures as set out in our Enforcement Guidelines, will provide a fair and effective enforcement procedure for regulated PRS providers.
- 5.18 Our existing enforcement procedures arise from our statutory duties in relation to several regulatory regimes (including PRS in terms of how Ofcom would use its powers to enforce the PRS Condition). They represent a fair, effective, transparent and proportionate approach that has been tried and tested over a number of years and has been subject to the scrutiny of the courts. For this reason, we consider it reasonable to apply this approach to all our enforcement activities in the PRS market.
- 5.19 By further aligning the approach and procedures for enforcement of the PRS market with other sectors that Ofcom is responsible for, Ofcom can apply its tested approach to the PRS market. In addition, we consider that aligning our existing enforcement processes allows us

¹⁴⁰ Ofcom December 2022, [Regulatory Enforcement Guidelines for investigations](#)

¹⁴¹ Ofcom December 2022, [Regulatory Enforcement Guidelines for investigations](#)

¹⁴² Ofcom September 2017, [Penalty guidelines - Section 392 Communications Act 2003](#)

to take advantage of operational efficiencies to deliver an enforcement function whilst making best use of our resources.

- 5.20 We assess below the specific impacts which we consider each of our detailed proposals will have on PRS providers and consumers.

Proposed requirements in the draft PRS Order and application of the Enforcement Guidelines

- 5.21 In this section, for each stage of an enforcement investigation, we set out:
- (a) how we propose to address potential non-compliance with the draft PRS Order by applying the Enforcement Guidelines;
 - (b) the requirements we propose to include in the draft PRS Order and any regime specific additions to, or exceptions from our general enforcement approach, that we propose to include in an annex to the Enforcement Guidelines (see annex 6: Draft annex for Enforcement Guidelines – PRS Order); and
 - (c) a comparison to the current arrangements and assessment of our proposed approach.
- 5.22 We summarise below the main features of our proposals for operating our enforcement functions.

Our initial assessment phase

Proposed application of the Enforcement Guidelines

- 5.23 When an issue of potential concern comes to our attention, we first carry out an initial assessment and decide whether to open an investigation into the matter. We propose to do so as described in the Enforcement Guidelines and then explain in the draft annex to the Guidelines (see annex 6 to this consultation) that Ofcom can enforce compliance with the requirements of the PRS Order under Part 10.
- 5.24 We do not make a substantive decision on whether or not there has been a contravention of a requirement during the initial assessment. Instead, we make a decision on whether or not to open a formal investigation to decide this. As part of this assessment, we may take account of all of our enforcement powers, including general consumer and competition law, and consider the most appropriate way of addressing our concerns. Where we decide not to open a formal investigation, we may also decide to take no further action, or we may decide to take steps to resolve the issue without formal enforcement.
- 5.25 Ultimately, we make decisions about whether to open investigations on a case-by-case basis, having regard to our statutory duties and all the matters that appear to us to be relevant. In doing so, we exercise our discretion to target action at cases in which we think action is needed, particularly those cases that are most likely to produce outcomes furthering the interests of citizens and consumers. The decision would be made by a senior member of Ofcom's staff, with appropriate Board-delegated authority.
- 5.26 Our decisions on case openings take account of whether:
- (a) the case is an administrative priority for Ofcom, including considering:
 - i) the risk of harm or seriousness of the alleged conduct;
 - ii) the strategic significance of addressing the alleged conduct and whether alternative proceedings are likely to achieve the same ends; and

- iii) the resource implications of conducting an investigation; and
 - (b) the evidence we have justifies opening an investigation, having considered all relevant factors.
- 5.27 As part of the initial assessment, we would normally give the provider whose conduct we are considering the opportunity to comment on any relevant issues and to provide information to assist us in making our decision. In certain circumstances, such as where we consider we have sufficient information, we may decide not to provide the subject of an investigation with an opportunity to comment or provide information.
- 5.28 Where Ofcom decides to open an investigation, we would generally announce that we have done so on the Ofcom website, as well as writing to the subject of the investigation to inform them. We would not usually publicise a decision not to open an investigation.
- 5.29 The approach we propose to follow for the initial assessment of cases subject to enforcement action under Part 10 of the draft PRS Order is set in more detail in Section 3 of the Enforcement Guidelines.

Proposed related requirements in the draft PRS Order and associated proposed additions to the Enforcement Guidelines

- 5.30 We propose that the draft PRS Order specifies that Ofcom may publish a notice on our website if we decide to open an investigation. Where we publish such a notice, we also propose that we give a notification to the provider who is being investigated. Our proposals are set out in article 59 of the draft PRS Order.
- 5.31 The fact that Ofcom enforces compliance with the requirements of the draft PRS Order, under Part 10 of the draft PRS Order, is referenced in the 'Why and how Ofcom opens cases' of the draft annex to the Enforcement Guidelines for the PRS Order (see annex 6 of this document).

Comparison to current arrangements and assessment

- 5.32 The initial assessment is similar to the PSA's approach as set out in paragraphs 5.1 to 5.3 of Code 15. The PSA's approach includes the use of enquiry and warning letters, as well as the PSA's discretion to choose the engagement and enforcement route or to take no further action. This approach enables the PSA to pursue a range of activities to investigate and address potential non-compliance. Paragraph 5.1.4 of Code 15 sets criteria for determining which engagement or enforcement route the PSA takes. We consider these grounds are captured by our assessment criteria in paragraph 3.6 of the Enforcement Guidelines (and summarised in paragraph 5.26 above).
- 5.33 We consider that our proposal would achieve the same effect as the PSA's approach in the opening of an investigation but in a way that is consistent to how we approach enforcement in other regulatory regimes. In addition, our assessment criteria in paragraph 3.6 of the Enforcement Guidelines are more specific than Code 15 in identifying on what grounds a case is opened. This will bring greater clarity for providers and consumers about the types of issues we take into account.
- 5.34 Overall, we think that there will be little impact on providers but that any impact is likely to be positive in terms of greater clarity in relation to the grounds for opening a case.

Investigating a breach

Proposed application of the Enforcement Guidelines

- 5.35 Where Ofcom decides to open an investigation following an initial assessment, we propose to conduct an investigation in accordance with our existing Enforcement Guidelines.
- 5.36 The Guidelines set out:
- (a) our likely engagement and contact with the subject of the investigation, complainants and third parties;
 - (b) the structure of case teams;
 - (c) timescales for investigations;
 - (d) information gathering (supported by our proposal to require the provision of information under article 57 of the draft PRS Order, see paragraph 5.39 below, together with our proposal to require records to be preserved when we open an investigation, see paragraph 5.38 below);
 - (e) publication of information and confidentiality;
 - (f) publicising cases; and
 - (g) how to raise concerns with Ofcom.
- 5.37 The approach we propose to follow in conducting investigations is set in more detail in Section 4 of the Enforcement Guidelines.

Proposed related requirements in the draft PRS Order and associated proposed additions to the Enforcement Guidelines

- 5.38 We propose that, where a provider is notified that we are investigating them, they would normally be required to make and keep, or obtain from others and keep, records that are relevant, or potentially relevant, to an investigation. We may also require a provider to obtain such records from another person (third party) and then keep them. Where we impose such record preservation requirements, we expect that a provider would normally be required to keep such records until our investigation has been completed. At that point, we would notify the provider as soon as reasonably practicable that the requirement to keep records no longer applies. This requirement is contained in article 60 of the draft PRS Order.
- 5.39 We also propose to include in the draft PRS Order a specific power to require providers to provide Ofcom with all necessary information for the purpose of us ascertaining whether a contravention of a requirement imposed under the draft PRS Order has occurred or is occurring. The powers for Ofcom to require information are contained in article 57 of the draft PRS Order and discussed in Section 4 (paragraphs 4.282 to 4.290).
- 5.40 We propose to clarify in the draft annex to the Enforcement Guidelines for the PRS Order (see annex 6 to this consultation) that Ofcom has the power to require the preservation and disclosure of information under articles 60 and 57 of the draft PRS Order, respectively, and that there are there are restrictions on disclosure contained in sections 26 and 393 of Act. See the 'Investigating' section of that draft annex.

Comparison to current arrangements and assessment

- 5.41 We consider that our proposed powers on the preservation and disclosure of information for the purposes of enforcement are equivalent to those that the PSA currently has under Code 15. Therefore, we consider that there would be minimal impact on providers from our proposals compared to the current arrangements.

- 5.42 The PSA currently requires that any information that may be of evidential value to the PSA during supervision or engagement and enforcement activities is available throughout the lifespan of any engagement or enforcement activity.¹⁴³ The PSA requires such data is retained until they are advised otherwise by the PSA. The PSA can also currently require providers to disclose information as part of an investigation.¹⁴⁴
- 5.43 Our proposals would similarly enable Ofcom to require that records are preserved during an investigation. However, instead of this being a general requirement on all providers under Code 15, Ofcom propose to be more targeted and only require the investigated provider to preserve records under the draft PRS Order. Ofcom would also be able to obtain other necessary information for investigations by exercising our information gathering powers under article 57 of the draft PRS Order.
- 5.44 However, many of the other issues covered by Section 4 of the Enforcement Guidelines are not addressed in Code 15. To the extent that the Enforcement Guidelines provide more information about how Ofcom would take enforcement action in practice, we consider that such issues would bring benefits to stakeholders in terms of greater clarity and certainty.

Provisional decisions

Proposed application of the Enforcement Guidelines

- 5.45 Except where we decide to close a case, the initial outcome of an investigation is a provisional decision (given to the subject of the investigation as a provisional enforcement notice). We propose to approach making provisional decisions according to our existing Enforcement Guidelines.
- 5.46 In particular, we propose that Ofcom would make a provisional decision at any time during an investigation. In some cases, we may have sufficient information to reach a provisional decision immediately and we may send the subject of an investigation a provisional decision at the same time we notify them that we are opening a case.¹⁴⁵
- 5.47 We would make a decision to issue a provisional decision where we have reasonable grounds for believing that the subject of the investigation is contravening, or has contravened, one or more requirements. The decision to issue a provisional decision would be taken by a nominated decision maker who would be senior member of Ofcom's staff with appropriate Board-delegated authority.
- 5.48 Our provisional enforcement notification would explain our reason for reaching our decision. At the same time, we would provide the subject of the investigation copies of, or access to, the evidence that we have considered, or relied on, in reaching our provisional view. This may include information provided by third parties. However, we would redact or withhold confidential third-party information where appropriate.
- 5.49 We generally expect the subject of an investigation to take steps to bring itself into compliance and remedy the consequences of any contravention to the fullest extent possible. Therefore, our provisional enforcement notice would generally set out the steps we think the subject should take. The notice would also set out the penalties we are minded

¹⁴³ PSA, [Notice on Data Retention](#), 05 April 2022, especially paragraph 15.

¹⁴⁴ For example, as part of an enquiry letter. See Code 15 5.2.4.

¹⁴⁵ See Enforcement Guidelines, paragraph 3.37.

to impose (see paragraphs 5.97-5.99 of this document) and any directions we are minded to give (see paragraph 5.66 of this document).

- 5.50 We would not normally publish the provisional decision, but we would update the case information on our website to indicate a provisional decision has been made and provide a brief summary.
- 5.51 In some cases, we may consider it appropriate to make a material change to the provisional decision. This could be, for example, as a result of representations made by the subject of the complaint. In such cases, we may withdraw the initial provisional enforcement notice and issue a new one. The subject would then have to opportunity to make representations on the new provisional decision in the same way as they have for the initial provisional decision.
- 5.52 Our proposed approach to making provisional decisions is set out in more detail paragraphs 5.4 to 5.13 and 5.24 to 5.25 of the Enforcement Guidelines

Proposed related requirements in the draft PRS Order and proposed additions to the Enforcement Guidelines

- 5.53 We propose to give Ofcom powers in the draft PRS Order to serve a provisional enforcement notice where we have reasonable grounds for believing that a provider is contravening, or has contravened, a requirement under the draft PRS Order.
- 5.54 We propose that the provisional enforcement notice must set out:
- (a) the determination made by Ofcom;
 - (b) the requirement we believe is, or has been, contravened;
 - (c) a period and manner in which the provider may make representations about our determination;
 - (d) the steps we think the provider should take to comply with the requirement and remedy the consequences of the contravention and the period in which those steps should be taken;
 - (e) any penalty we are minded to impose; and
 - (f) any direction we are minded to give for serious contraventions.
- 5.55 The provisional enforcement notice may relate to more than one contravention or a specific period for an ongoing contravention. We may withdraw a notice and subsequently issue a new notice so long as a penalty has not been imposed.
- 5.56 Our specific proposals are set out in article 61 of the draft PRS Order. We propose to briefly describe the Ofcom's powers to issue provisional decisions in accordance with article 61 in the 'Investigating' section of the draft annex to the Enforcement Guidelines for the PRS Order (see annex 6 to this consultation).

Comparison to current arrangements and assessment

- 5.57 Under our proposed approach, provisional decisions would be similar to the PSA's use of formal notifications and enforcement notices under paragraph 5.4 of Code 15.
- 5.58 Formal notifications enable the PSA to notify subjects of investigations that the PSA is concerned that a potential breach may have occurred. Its enforcement notices contain information on the alleged breach, the evidence relating to the breach and any proposed sanctions.

- 5.59 All the elements of the PSA's process are contained in our proposed approach for taking enforcement action under the draft PRS Order, and we consider that the effect and impact of our proposals for investigated providers would, in general, be similar to current arrangements under Code 15.

Representations and final decisions

Proposed application of the Enforcement Guidelines

- 5.60 We propose that Ofcom should give subjects of investigations the opportunity to make representations, make final decisions and issue final enforcement notices in accordance with our existing Enforcement Guidelines.
- 5.61 Following the serving of our provisional enforcement notice, the subject of an investigation would be able to make representations to Ofcom. Such representations could relate to the breach finding, as well as any steps we have indicated that we are minded to require, including any penalties that we are minded to impose or any directions for serious contraventions that we minded to give.
- 5.62 We would set out, in our provisional enforcement notice, how long a subject has to make representations taking into account the circumstances of the case. This would generally be at least 20 working days to make written representations, but the period could be longer for more complex cases. It could also be a shorter period where we consider the circumstances require it, for example, where we are considering suspending or restricting a provider's services (see paragraphs 5.111-5.124 below).
- 5.63 Ofcom may offer the subject of the investigation the opportunity to attend an oral hearing to make representations to the final decision maker in person. The offer of an oral hearing would be at Ofcom's discretion. Any oral hearing would normally be held 10 to 20 working days after the deadline for written representations has expired.
- 5.64 We propose that the final decision would be made by a nominated final decision maker. This person would be a senior member of Ofcom's staff with appropriate Board-delegated authority who would not have been involved in the investigation or the preparation of the provisional decision. They would make a decision having considered all the relevant evidence and any representations.
- 5.65 Once the final decision maker has made a decision, we would notify the subject of that decision. The outcomes at the final decision stage could be that we:
- (a) issue a final decision confirming a finding of all or some of the contraventions identified in the provisional decision;
 - (b) decide that, in light of the representations received and/or review of further evidence, no finding of contravention of any of the relevant regulatory requirement(s) can be maintained, and therefore the case should be closed with no further action; or
 - (c) close an investigation without Ofcom having reached a decision on the merits of the case.
- 5.66 Where we confirm a finding of a contravention we may also require:
- (a) the payment of a financial penalty by a specified the deadline;
 - (b) actions to be taken to comply with the relevant regulatory requirement(s), either immediately or by a given deadline;

- (c) action to be taken to remedy the consequences of the contravention(s), either immediately or by a given deadline; and/or
 - (d) the provider to comply with directions given by Ofcom.
- 5.67 A decision to close an investigation without Ofcom having reached a decision on the merits of the case could be for a number of reasons, including:
 - (a) for administrative reasons (for example, where significant further investigation would be needed to decide whether to issue a final decision and we consider that, due to other urgent or important work, our resources could be targeted more appropriately at other cases);
 - (b) where we are satisfied that the conduct we were concerned about has now ceased and the subject of the investigation has taken appropriate action to remedy any harm or has given us appropriate assurances that any harm would be remedied; or
 - (c) we judge that there is no further purpose to be served by continuing with the investigation in the particular circumstances of the case.
- 5.68 Where we make a final decision, we would notify the subject of the investigation of that decision and, where relevant, issue a final enforcement notice. We would update the details of the case on our website with a summary of our decision. We would publish a non-confidential version of the final decision on our website once we have finalised any redactions of confidential information.
- 5.69 Where we close a case without making a final decision, we may only publish a brief statement indicating case closure and the basis for doing so. In certain cases, we may consider that fairness requires us to provide an opportunity for relevant stakeholders to comment before we finalise our decision to close case without a final decision. For example, where the investigation was initiated following a complaint from a stakeholder, which may have further information relevant to the proposed decision.
- 5.70 Our proposed approach to final decisions is set out above in paragraphs 5.60 to 5.69 of this document and 5.26 to 5.34 of the Enforcement Guidelines.

Proposed related requirements in the draft PRS Order and proposed additions to the Enforcement Guidelines

- 5.71 We propose that the draft PRS Order specifies the powers for Ofcom to:
 - (a) serve a final enforcement notice on the subject of the investigation; or
 - (b) inform the subject we are satisfied with their representations and that no further action would to be taken.
- 5.72 Where we have previously served a provisional enforcement notice on a provider, we propose that the draft PRS Order only allows Ofcom to do either of the above, provided that the provider has had an opportunity to make representations about the matters notified and the deadline for making representations has passed.
- 5.73 We would only be able to serve an enforcement notice if, after considering any representations made, we are satisfied that the provider has been in contravention of a requirement notified in the provisional enforcement notice. The final enforcement notice would need to be given without delay and contain our reasons for concluding there has been one or more contravention(s) of the relevant requirement(s). It may also confirm requirements set out in the provisional enforcement notice to require any of the actions as set out in paragraph 5.66 above.

- 5.74 We propose that the draft PRS Order would require providers to comply with any requirement imposed in the final enforcement notice and to do so in the timeframe specified in the notice.
- 5.75 We do not consider that we need to specify the power to close an investigation without having reached a decision. Ofcom has the discretion to use its regulatory functions to target action at cases we think are needed. When closing a case without reaching a decision, we are exercising that discretion and, therefore, we do not consider that such an outcome needs explicitly providing for in the draft PRS Order.
- 5.76 Our proposals relating to final enforcement notices are set out in article 63 of the draft PRS Order. We propose to briefly describe Ofcom's powers in relation to representations and final decisions in the 'Outcomes of regulatory investigations' section of the draft annex to the Enforcement Guidelines for the PRS Order (see annex 6 to this consultation).

Comparison to current arrangements and assessment

- 5.77 Currently, alleged breaches of Code 15 are adjudicated by the Code Adjudication Panel ('CAP'). The CAP's members are appointed by the PSA Board and must have no commercial interest in the PRS sector.¹⁴⁶
- 5.78 Code 15 allows the CAP to make decisions with differing configurations of decisions makers and procedures.
- 5.79 The decision maker is either:
- (a) a single legally qualified member of the CAP; or
 - (b) a Code Adjudication Tribunal (a 'Tribunal') consisting of 3 members from the CAP.¹⁴⁷
- 5.80 The procedure used to make the decision is either:
- (a) 'on the papers'; or
 - (b) by a Tribunal with an oral hearing.

Decisions 'on the papers'

- 5.81 The proposed approach to decision-making by Ofcom is similar to the CAP's position where a decision is made 'on the papers'.
- 5.82 Decisions made by the CAP 'on the papers' can be made by either a single legally qualified member of the CAP or a Tribunal. Such decisions are made following consideration of a report from the PSA containing the enforcement notice, any representations from the subject of the investigation and relevant supporting evidence.
- 5.83 The PSA allows subjects of an investigation ten working days to respond to an enforcement notice, unless otherwise specified in the notice, before it submits papers to the single legally qualified CAP member or Tribunal. In exceptional circumstances, the PSA may set a different time period of between one and 20 working days.¹⁴⁸
- 5.84 Where the decision maker is a Tribunal only, the subject or the PSA may request an oral hearing to make representations to clarify any matter for the Tribunal. Representations in an

¹⁴⁶ Paragraph 6.3.1-6.3.3 of Code 15.

¹⁴⁷ Paragraphs 5.4.8 and 5.7.1 – 5.7.3 of Code 15.

¹⁴⁸ Code 15 paragraph 5.4.5

oral hearing can only be made with the permission of the Tribunal. The Tribunal may also request an oral hearing to clarify any matter.

- 5.85 The Tribunal or single legally qualified CAP member produces a written decision setting out whether they found the subject to have breached the Code and the sanction or sanctions they are imposing as a result. The decision will be published on the PSA's website.
- 5.86 We consider that, in comparison, our proposals will result in only small differences for subjects of investigations. In both arrangements, the final decision is made by a party who is independent of the investigation, is based on the written evidence provided by the investigating party and having considered the representations made by the subject of the investigation.
- 5.87 Our Enforcement Guidelines set the general timeframe to make representations at 20 days, which is longer than the PSA's ten days (although in both arrangement this timeframe can be varied). Subjects to investigations would also be able to request to make oral representations in our proposals as they can do now under Code 15.
- 5.88 The main difference compared to a decision 'on the papers' is that Ofcom would always make a decision using a single decision maker rather than sometimes using panel of decision makers as is currently the case. We think the approach of using a single decision maker, who is independent of the original investigation, provides for fair procedure for subjects of investigations and aligns with Ofcom's approach in other regulatory regimes. This is also the way the PSA decides some cases.

Decisions by Tribunal with an oral hearing

- 5.89 Our proposals differ more substantially from the circumstances in which cases are currently decided by a Tribunal with an oral hearing.
- 5.90 Currently, decisions by an oral hearing can only be made by a Tribunal, i.e. not by single legally qualified member of the CAP. An oral hearing enables both the PSA and the subject of an investigation to put their case to the Tribunal directly, present evidence and call witnesses. Both parties are entitled to cross examine witnesses and Tribunal members may also ask the witnesses questions.¹⁴⁹ The Tribunal makes its decision following consideration of the proceedings at the hearing.
- 5.91 Both the subject of an investigation or the PSA can request a decision by a Tribunal oral hearing. They must do so within ten working days of the enforcement notice being published. The Tribunal will only grant an oral hearing where there are serious and complex issues to be determined and a fair determination would not be possible without one. The PSA or the subject is expected to explain why they consider this to be the case when they make their application for an oral hearing. The Tribunal can decide whether to grant an oral hearing or may decide to hold one even in the absence of a request for one. In addition to holding oral hearing on request, under Code 15 subjects may require that an oral hearing is held where the proposed sanction is the prohibition of an individual from involvement in, or promotion of, PRS services.
- 5.92 Following the Tribunal hearing, the outcome of the decision is set out in a written report and published on the PSA's website in the same way as for decisions 'on the papers'.

¹⁴⁹ Paragraphs 392-396, [Code 15 Procedures](#)

- 5.93 Our proposals do not contain a decision-making process equivalent to the PSA's use of Tribunals. In effect, the future arrangements will only keep a process equivalent to the decision 'on the papers' procedure that is currently in place.
- 5.94 Therefore, our proposals mean that there would be only one decision-making procedure and one type of decision-maker. There will also be one sets of sanctions available in the single decision-making procedure. This is simpler than the PSA's current approach that has differing penalties available, depending on whether the decision-maker is a single legally qualified member of the CAP or a Tribunal. Cases also currently need to move between these decision-making procedures if differing sanctions are considered necessary or a request for a Tribunal is granted. This simplification will enable Ofcom to achieve an efficient operation of regulation of the PRS market and make best use of resources. It will also reduce the burden on providers who are subject to enforcement action.

Our overall assessment regarding our proposals our representations and final decisions

- 5.95 Overall, we consider that our proposals will create a fair, effective and transparent procedure for making final decisions. Subjects of investigation will be clearly informed of the allegation(s) against them, the reasons and evidence for those allegations and given an opportunity to make representations before a decision is made. The final decision would be made by someone who has not have been involved in the investigation or the preparation of the provisional decision thereby creating a degree of separation between the investigation and adjudication of the case. Additionally, those with a sufficient interest in our final decision may apply to the High (Administrative) Court for judicial review of that decision, something which we believe provides an appropriate ultimate safeguard.
- 5.96 Finally, our proposals would also bring our enforcement approach in the PRS market in line with how Ofcom makes decisions in enforcement cases in other markets that we regulate, bringing further clarity for providers and allowing Ofcom to achieve operational efficiencies.

Financial penalties

Proposed application of the Penalty Guidelines

- 5.97 We propose to follow our Penalty Guidelines to determine the amount of any penalty we impose under the draft PRS Order.¹⁵⁰ Indeed, we would be required to have regard to those Penalty Guidelines under section 392(6) of the Act in determining any penalty amount imposed under the draft PRS Order. We do not propose to amend the Penalty Guidelines at this stage to reflect our proposal specifically by reference to the draft PRS Order, but we intend to apply our Penalty Guidelines accordingly without the need for making such an amendment to them. As discussed below, the maximum financial penalty which we would be able to impose under the draft PRS Order is £250,000 per breach.
- 5.98 The Penalty Guidelines explain that central objective of imposing a penalty is deterrence and that we will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty.
- 5.99 They also explain that the amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement. They state that Ofcom will have regard to the size and turnover of a provider

¹⁵⁰ Ofcom September 2017, [Penalty guidelines - Section 392 Communications Act 2003](#)

when considering the deterrent effect of any penalty. Potentially relevant factors highlighted in the guidance and that we could take into account in setting any penalty are:

- (a) the seriousness and duration of the contravention;
- (b) the degree of harm, whether actual or potential, caused by the contravention;
- (c) any gain (financial or otherwise) made by the provider in breach (or any connected body) as a result of the contravention;
- (d) whether in all the circumstances appropriate steps had been taken by the provider to prevent the contravention;
- (e) the extent to which the contravention occurred deliberately or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur;
- (f) whether the contravention in question continued, or timely and effective steps were taken to end it, once the provider became aware of it;
- (g) any steps taken for remedying the consequences of the contravention;
- (h) whether the provider in breach has a history of contraventions (repeated contraventions may lead to significantly increased penalties); and
- (i) the extent to which the provider in breach has cooperated with our investigation.

Proposed related requirements in the draft PRS Order

- 5.100 We propose that the draft PRS Order specifies the maximum amount of any penalty that Ofcom can impose.
- 5.101 Under our proposals, Ofcom would be able to impose a penalty of up to £250,000 per breach, the maximum statutory cap, of an amount we consider to be appropriate and proportionate to the contravention. The amount of this proposed cap is aligned with the maximum statutory caps that apply both for any penalties imposed under codes (like Code 15) approved by Ofcom under section 121 of the Act (see section 121(5)(a)) and for any penalties imposed by Ofcom in enforcing the PRS Condition (see section 123(2) of the Act).
- 5.102 Where a case relates to more than one contravention, we proposed that Ofcom would be able to impose a single penalty in relation to all contraventions or separate penalties in relation to each contravention. This proposal is also aligned with any penalties imposed by Ofcom in enforcing the PRS Condition (see section 123(1B) of the Act).
- 5.103 As discussed above, we would need to set out the provisional enforcement notice the amount of any penalty we are minded to impose. We also propose that the final enforcement notice could confirm this amount or require the payment of a lesser amount in light of any representations made.
- 5.104 Our proposed provisions in the draft PRS Order relating to penalties are set out in articles 62 and 63(5)(d) of the draft PRS Order.

Comparison to current arrangements and assessment

- 5.105 We consider that our proposals are, in many respects, similar to the current arrangements for imposing penalties under Code 15.
- 5.106 Under Code 15, fines can be imposed up to £250,000 in respect of all breaches or in respect of each breach identified. The decision-maker determines the appropriate sanction by considering:
 - (a) the seriousness of the breach;
 - (b) the PSA's Procedures;

(c) any information put before by the PSA including:

- i) any history of Code breaches;
- ii) previous sanctions imposed;
- iii) the revenue earned from the services concerned; and
- iv) whether the subject has followed any relevant guidelines.

5.107 A Tribunal may impose a greater or lesser sanction than that proposed by the PSA.

5.108 The PSA's Procedures describe the considerations that should be made in setting the penalty and give indicative amounts for different degrees of seriousness.¹⁵¹

5.109 Under our proposals, the maximum amount of the penalty will remain at £250,000 in respect of all breaches or in respect of each breach identified. The factors set out in Code 15 and the PSA's procedures are also similar to those in Ofcom's Penalty Guidelines discussed above. We therefore consider that there will be no material change in the impact of these proposals on infringing providers, compared to current arrangements under Code 15.

5.110 However, unlike current arrangements under Code 15, we do not propose that Ofcom would be able to impose a penalty at the final decision stage that is higher than that proposed in our provisional decision. We believe that our proposed approach here would bring greater clarity and certainty for subjects to our investigations as to the potential penalty as a result of our investigation, and it also ensures that they have a proper and transparent opportunity to make representation about such penalties.

Prohibitions, suspensions, restrictions and withholding payments

Proposed application of the Enforcement Guidelines

5.111 We propose to retain the powers that the PSA currently has, as a sanction for non-compliance, to prohibit, suspend or restrict a service or provider from operating.¹⁵²

5.112 In addition, the PSA currently has powers to impose interim measures under Code 15¹⁵³ that enable it to instruct providers in the value chain to withhold payments due to other providers and, where further directed, make payments directly to customers. We propose that Ofcom should have equivalent powers.

5.113 We are proposing that Ofcom may impose such measures to deal with serious contraventions where certain pre-conditions apply. We are also proposing such measures can be used to address urgent actions (see paragraphs 5.136 to 5.159 below).

5.114 We propose to provide additional guidance in relation to these sanctions in the PRS Annex to the Enforcement Guidelines.

Proposed related requirements in the draft PRS Order and proposed additions to the Enforcement Guidelines

5.115 We propose that the draft PRS Order specifies the powers for Ofcom to prohibit, suspend or restrict a provider's working in connection with a regulated PRS activity, where we find that

¹⁵¹ Code 15 Procedures - paragraphs 474 to 487.

¹⁵² Paragraph 5.8.5 of Code 15.

¹⁵³ Section 5.6 of Code 15.

the provider has seriously contravened a requirement imposed under the draft PRS Order and where certain pre-conditions apply (which we discuss below).

- 5.116 We also propose that Ofcom has powers to give directions to providers other than a provider that is the main subject of an enforcement notice. Specifically, in relation to their dealings with the provider subject to the notice, we propose that Ofcom may direct that they:
- (a) must notify Ofcom of any payments owed to that provider;
 - (b) must withhold all, or part of, a payment owed; or
 - (c) are prohibited, suspended or restricted from dealing that provider.
- 5.117 Ofcom would also be able to impose consumer protection conditions on a provider alongside a direction to prohibit, suspend or restrict a service or withhold payments (whether on the provider subject to the enforcement notice or another provider). They would likely include requirements to make compensation payments for loss or damage or in relation to annoyance, inconvenience or anxiety arising as a result of a contravention.
- 5.118 Ofcom would have to set out the proposed direction in its provisional enforcement notice and confirm it in a final enforcement notice as described in the sections above.
- 5.119 Ofcom would only be able to impose these sanctions where:
- (a) it is appropriate and proportionate to the contravention;
 - (b) the provider is in serious contravention of a requirement of the SI; and
 - (c) the following pre-conditions apply to the provider in question, namely it either:
 - i) knowingly contravened the requirement;
 - ii) was reckless as to whether its conduct complied with the requirement; or
 - iii) where it was reasonably practicable for the provider to comply with the requirement but the provider failed to take all reasonable steps to prevent the serious contravention.
- 5.120 We also propose that Ofcom could impose these sanctions indefinitely from when they are notified to a provider or may delay their coming into effect. Ofcom would be able to revoke a direction at any time subject to compliance with any requirements we set out in the direction.
- 5.121 Our proposals relating to prohibitions, suspension, restrictions and withholding payments for serious contraventions are set out in article 66 of the draft PRS Order. We propose to describe the ability of Ofcom to apply these sanctions and the circumstances in which we can do so in the 'Outcomes of regulatory investigations' section of the draft annex to the Enforcement Guidelines for the PRS Order under the sub-heading 'Directions for serious contraventions' (see annex 6 to this consultation).

Comparison between current and proposed arrangements

- 5.122 The use of prohibitions, suspensions, restrictions and withholding of payments are all powers the PSA currently has under Code 15. Therefore, our proposals do not represent an extension of Ofcom's powers in comparison to the current arrangements.
- 5.123 However, our proposed arrangements contain some important limitations. We consider that these sanctions requirements would represent a potential significant intervention in providers carrying on business and therefore they may have significant detrimental consequences for subjects of investigations. Consequently, we expect that they would only be considered in the most serious of cases. Whilst Code 15 restricts the PSA applying some

sanctions only to serious cases where a provider knowingly breached the Code, such restrictions are not applied to all comparable sanctions. In contrast, our proposals apply additional limitations of the use of prohibitions, suspensions, restrictions and directions to withhold of payments in every circumstance. Therefore, our proposals seek to ensure a clear and consistent set of restrictions of Ofcom's use of our powers in relation to the most interventionist sanctions.

- 5.124 Overall, we consider that our proposals create arrangements similar to those currently in place under Code 15 for prohibitions, suspensions, restrictions and withholding payments. Consequently, providers would be under a similar risk of intervention in their operations as a result of a contravention of a requirement under the draft PRS Order as they currently would if they breached a requirement under Code 15. In addition, our proposals provide a consistent set of limitations on Ofcom's powers which will bring increased clarity and certainty for providers in the use of Ofcom most interventionist sanctions.

Settlement

Proposed application of the Enforcement Guidelines

- 5.125 The Enforcement Guidelines set out a settlement process, which we propose to apply in relation to enforcement action taken under the draft PRS Order.
- 5.126 Settlement is a voluntary process which leads to a formal and legally binding regulatory decision. In short, a settlement involves the subject of the investigation admitting it has contravened a relevant regulatory requirement(s) and accepting that the remainder of the investigation will follow a streamlined administrative procedure.
- 5.127 In such cases, Ofcom would apply a discount to the level of the penalty imposed on the subject in light of the resource savings involved. Settlement discounts as applied in line with the Enforcement Guidelines are separate from the application of the Penalty Guidelines under which we would take into account a subject's co-operation with an investigation in setting the appropriate level of penalty imposed. A settlement discount is intended to reflect resource savings achieved by Ofcom as a result of following the settlement process and is applied after other mitigating factors have already been taken into account in determining the appropriate level of the penalty.
- 5.128 To settle a case, Ofcom would require the subject of the investigation, via a letter from a senior member of the provider's executive, to:
- (a) make a clear and unequivocal written admission of liability in relation to the nature, scope and duration of the contravention.
 - (b) where applicable, cease the contravening behaviour immediately from the date it enters into a settlement process with Ofcom and refrain from engaging again in the same or similar contravening behaviour;
 - (c) confirm that it:
 - i) accepts that there will be a formal and published finding of contravention against it;
 - ii) will pay a penalty;
 - iii) will take any steps required to comply with the relevant regulatory requirement(s) and to remedy the consequences of the contravention (if relevant);
 - (d) will accept a streamlined administrative process; and
 - (e) will not challenge or appeal against any final decision.

- 5.129 Where a settlement process is concluded successfully, a final decision would contain the penalty amount, including a settlement discount. We would normally expect this discount to be:
- (a) up to a maximum of 30% where a successful settlement process is commenced before the provisional decision is issued;
 - (b) up to a maximum of 20% where a successful settlement process is commenced after the provisional decision is issued, but prior to written representations being received; or
 - (c) up to a maximum of 10% where a successful settlement process is commenced after the provisional decision is issued and after written representations are received.
- 5.130 More details about our approach to settlement are set out in Section 6 of the Enforcement Guidelines.

Proposed related requirements in the draft PRS Order and proposed additions to the Enforcement Guidelines

- 5.131 We do not consider that it is necessary to have any provisions in the draft PRS Order for us to apply a settlement process in relation to contraventions under that Order.
- 5.132 As regards the Enforcement Guidelines, under the 'Settlement procedure' sub-heading of the draft annex to the Enforcement Guidelines for the PRS Order (see annex 6 to this consultation), we propose to simply note that there are no additional points for the PRS Order as compared to the main guidelines.

Comparison to current arrangements and assessment

- 5.133 We consider that our proposed settlement process is similar to current arrangements under Code 15.
- 5.134 Under Code 15, the subject of an investigation can agree a settlement with the PSA at any stage before their case is put to a Tribunal or single legally qualified member of the CAP. A settlement agreement is binding and any breaches or sanctions agreed have the same effect as if they had been made by a Tribunal.
- 5.135 Our proposal does not represent a significant change in practice to these arrangements. Both arrangements require the subject of the investigation to admit to the breaches and agree the sanction(s) that will be proposed. The subject is also able to receive a discount on any penalty, which increases the earlier in the enforcement process the agreement is reached.

Urgent actions (interim measures)

Proposed application of the Enforcement Guidelines

- 5.136 We propose that Ofcom should have the power to take immediate action in urgent cases or where a provider is unlikely to pay its debts.¹⁵⁴ We propose that Ofcom would be able to impose the same measures as we would be able to for serious contraventions as described above, i.e. directions to prohibit, suspend or restrict a service or provider, or direct the withholding of payments.
- 5.137 We would only be able to give direction for urgent actions where:
- a) the giving of such a direction is appropriate and proportionate to the contravention;

¹⁵⁴ This means that the provider is at risk of being insolvent (if a company) or being bankrupt (if an individual).

- b) there are reasonable grounds for suspecting that the provider is contravening, or has contravened, a requirement; and
 - c) either
 - i) there are reasonable grounds for suspecting that the provider is unable, or is likely to be unable, to pay its debts as they fall due; or
 - ii) there are reasonable grounds for suspecting that the case is an urgent case, and the urgency of the case makes it appropriate for us to give an urgent action direction.
- 5.138 We propose that a case should be considered to be urgent if the contravention has resulted in, or creates an immediate risk of, serious harm to consumers or members of the public including, in particular, to vulnerable consumers.
- 5.139 As regards applying the Enforcement Guidelines, we propose that Ofcom should take urgent action in accordance with our existing Enforcement Guidelines on urgent actions.
- 5.140 In exercising these powers, we would have regard to other relevant considerations including the impact of the direction on the subject and any relevant third party interests, as well as on the interests of citizens and consumers.
- 5.141 Where we are minded to give a direction to prohibit, suspend or restrict a providers activities or to direct that payments are withheld, and where time allows, we would normally expect to inform the subject of this and provide them with an opportunity to comment on. This would normally only be a short period and may include written or oral representations, or both, as appropriate in the circumstances, having regard to the urgency of the case. However, we may decide that it is necessary and appropriate to give a direction without first consulting a provider or giving it the opportunity to comment.
- 5.142 Typically, we would issue a provisional decision alongside a direction to prohibit, suspend or restrict a provider’s activities or a direction that payments are withheld. We would then provide for a short period of representations on the provisional decision and the urgent action direction.
- 5.143 Under our proposals, Ofcom would be required to determine whether the relevant contravention did occur and whether the circumstances made a case justifying the direction as soon as reasonably practicable after the period for representations had ended. We would have to make such a decision within three months of giving the direction (with the possibility of one three-month extension to this period). Where possible, we would expect to follow the same process for reaching our decision as for reaching final decision in general as set out in Section 5 of the Enforcement Guidelines as discussed above.
- 5.144 As part of the proposed process, if Ofcom were to decide that the contravention occurred and the direction was justified, we would be able confirm the direction, but if not, we would be required to revoke it.
- 5.145 We would normally publish an update on our website stating when we give an urgent action direction and when we make a final decision on one.
- 5.146 More details about our approach to urgent actions are set out in Section 7 of the Enforcement Guidelines.

Proposed related requirements in the draft PRS Order and proposed additions to the Enforcement Guidelines

- 5.147 We propose that the draft PRS Order specifies Ofcom’s powers to impose urgent action (interim measures) in the circumstances discussed above.

- 5.148 In that regard, we propose that Ofcom should be able to give directions imposing urgent actions (interim measures) with the same effects as those it would be able to give for serious contraventions by having the powers to prohibit, suspend or restrict a provider's work in connection with a regulated PRS activity. We would also be able to give a direction to providers other than provider subject to an enforcement notice. They could be a direction, in relation to their dealings with the provider subject to the notice, that the other provider:
- (a) must notify Ofcom of any payments owed to that provider;
 - (b) must withhold all, or part of, a payment owed; or
 - (c) are prohibited, suspended or restricted from dealing that provider.
- 5.149 Ofcom would also be able to impose consumer protection conditions on a provider alongside a direction to prohibit, suspend or restrict a service or withhold payments (whether on the provider subject to the enforcement notice or another provider). They could include requirements to make compensation payments for loss or damage in relation to annoyance, inconvenience or anxiety arising as a result of a contravention. However, unlike the similar provisions relating to direction for serious contraventions, any such consumer protection conditions would only apply once the direction has been confirmed.
- 5.150 We also proposed that Ofcom should be able to impose these sanctions indefinitely from when they are notified to a provider or may delay their coming into effect. Ofcom would be able to revoke a direction at any time subject to compliance with any requirements we set out in the direction.
- 5.151 Further, we propose that the draft PRS Order requires Ofcom to give the provider subject to an urgent action direction an opportunity to make representations about the grounds for giving the direction and the effect of it, as well as an opportunity to propose any steps to remedy the situation. We would have to give these opportunities as soon as reasonably practicable after giving the direction.
- 5.152 As soon as reasonably practicable after the period for giving representations has ended, Ofcom would have to either confirm or revoke the direction. We would only be able to confirm a direction where we determine that the contravention did occur and the circumstances of the case justified the direction. If not, we would be required to exercise our power to revoke the direction.
- 5.153 We propose the draft PRS Order sets a time limit to make a decision to confirm or revoke a direction of three months of the direction been given. This could be extended once by three months if additional time to consider representations or gather additional information was required.
- 5.154 Our proposals relating to urgent actions are set out in articles 64 and 65 of the draft PRS Order. We propose to describe the ability of Ofcom to take urgent actions in the 'Interim measures and urgent action' sub-heading of the draft annex to the Enforcement Guidelines for the PRS Order (see annex 6 to this consultation).

Comparison to current arrangements and assessment

- 5.155 Our proposals have similarities to the PSA's use of its interim measures and sanctions regime under Code 15.
- 5.156 The PSA can use interim measures where it appears to the PSA that there has been a breach and there is a risk or serious harm to consumers that requires urgent action, or the PSA considers the provider may not comply with a financial sanction if issued. In such circumstances, the PSA may apply for a Tribunal to impose a suspension of services or the

withholding of payments by another provider. Therefore, the PSA can use its interim measures powers to instruct providers in the value chain to withhold payments due to other providers and its sanctions powers to require providers to make payments directly to customers.

- 5.157 We are not proposing to have an interim measures regime equivalent to that of the PSA. Instead, our proposals incorporate the powers the PSA has as interim measures into an urgent action regime that is more similar to the approach we take in other sectors. The overall effect of our proposals is that Ofcom would have similar powers to intervene and give directions to providers using either its urgent action procedure or its standard enforcement procedure. In either case, our decision-making process would be similar and the way we approach representations and publishing information would be similar. However, using our urgent action powers would allow Ofcom to give directions much more quickly and, as a consequence, the time and opportunity to make representations before a direction is issued would be reduced. We think this arrangement provides for a clearer and simpler set of procedures than current arrangements, whilst providing Ofcom with ability to address issues urgently.
- 5.158 Whilst largely similar, our proposed pre-conditions which would apply for when Ofcom can use its urgent action powers differ slightly from the circumstances that the PSA can use its interim measures powers. The PSA can apply for a provider's activities to be suspended or payments to be withheld where it considers the provider may not comply with a financial sanction (if imposed). In contrast, we propose that Ofcom may use its urgent action powers where there are reasonable grounds for suspecting that the provider is unable, or is likely to be unable, to pay its debts as they fall due. Therefore, Ofcom powers are different to the PSA's powers in that respect. We consider, however, that it is important to have the ability to prevent a contravening provider that is, in essence, at risk of being financially insolvent (or, if an individual, bankrupt) from operating in the market, and this consideration should not, in our view, be limited to whether that provider is unable to pay a financial sanction issued by an enforcement authority.
- 5.159 We consider that, in practice, our proposals enable Ofcom to pursue urgent matters in a similar way in which the PSA currently does. However, by having a consistent set out sanction powers to those available for non-urgent cases and operating both with similar procedures our proposals will be clear for providers.

Reviews and appeals

Proposed application of the Enforcement Guidelines

- 5.160 We do not propose to introduce under the draft PRS Order any subsequent review mechanism of our final decisions in relation to contraventions of the requirements of the draft PRS Order. We do not have a second-stage review mechanism for other enforcement decisions relating to telecommunications that we take under Part 2 of the Act under which our powers to make the draft PRS Order fall. We therefore consider that a consistent approach should be taken with regard to the draft PRS Order, so that our decisions at the outcomes of cases are final. However, providers have an additional safeguard in that they would be able to seek a judicial review of our decision in the High (Administrative) Court, if they wished to do so.
- 5.161 However, we propose that providers should be able to make a procedural complaint to Ofcom's Procedural Officer about an investigation. Specifically, we propose that providers

should be able to make such complaints in accordance with the existing process set out in Section 9 of the Enforcement Guidelines.

- 5.162 Procedural complaints can relate to:
- (a) deadlines for parties to respond to information requests, submit documents or provide representations;
 - (b) requests for redaction of confidential information in documents that Ofcom proposes to publish or disclose;
 - (c) requests for disclosure or non-disclosure of certain documents or information on Ofcom's case file;
 - (d) issues relating to the process for oral hearings; or
 - (e) other significant procedural issues that may arise during the course of an investigation.
- 5.163 However, procedural complaints cannot relate to decisions taken by Ofcom relating to substantive issues, for example, decisions on the scope of information requests or decisions relating to the scope and substance of an investigation.
- 5.164 Procedural complaints are handled by a Procedural Officer who is an experience member of staff with Board-delegated authority to act in that capacity. They will be independent from the investigation, case team and decision makers, and will not have been involved in the investigation.
- 5.165 As noted above, our approach to procedural complaints that we propose is applied to enforcement action taken under the PRS Order is set out in Section 9 of the Enforcement Guidelines.

Comparison to current arrangements and assessment

- 5.166 Our proposals differ from those of the PSA. Under Code 15, either the provider or the PSA can ask for the Tribunal's decision to be reviewed by a differently constituted tribunal or single legal qualified decision-maker on the basis the that:
- (a) the decision was based on a material error of fact;
 - (b) the decision was based on an error of law;
 - (c) there was a material error of process which resulted in an unjust decision; or
 - (d) the tribunal or single legally qualified decision maker came to decision that no reasonable person could have reached.¹⁵⁵
- 5.167 The PSA's framework using Tribunals and reviews is in part a reflection of the PSA's size. It is more difficult for a small organisation to have appropriately independent decision-makers on cases. In contrast, given Ofcom's size, we are more readily able to deploy qualified and experienced decision-makers that will be wholly unconnected to a case.
- 5.168 Ofcom's proposed decision-making process ensures the final decision is made by a person that would not have been involved in the investigation or the preparation of the provisional decision. Such a person would only make a decision having considered all the relevant evidence and any representations. We think this is a fair and effective procedure that enables the subject of an investigation an adequate opportunity to have their case heard. We do not consider that a further review procedure is necessary to ensure fairness.
- 5.169 The statutory framework that sets out our enforcement process for other regulatory regimes also does not contain a procedure for a separate review stage. This approach is also the

¹⁵⁵ Paragraph 5.10.2 of Code 15.

same as for our enforcement of the PRS Condition (see paragraphs 5.191-5.199). However, similar to all our other regimes (including our enforcement of the PRS Condition),¹⁵⁶ providers will be able to seek an external review of Ofcom's decision from the courts.

Supervision

Proposed approach

- 5.170 We are not proposing to include any specific provisions about supervision in the draft PRS Order.
- 5.171 We consider that effective monitoring of the PRS market would remain essential to achieve, and maintain, compliance with the requirements under the draft PRS Order, especially to ensure that consumers are protected. However, we consider that our proposed information requirements set out in Part 8 of the draft PRS Order are sufficiently broad to capture any information that we may require for the purposes of ensuring compliance with requirements under the draft PRS Order. We are also able to undertake other aspects of compliance monitoring and supervision without the need for any specific provisions under the draft PRS Order.

Comparison to current arrangements and assessment

- 5.172 The PSA's stated purpose of supervision¹⁵⁷ is to monitor compliance with Code 15 in order to achieve various aims, including to assess levels of compliance by PRS providers or particular PRS market sectors, and to promptly identify, proactively address and prevent actual and potential non-compliance or harm to consumers.
- 5.173 In that regard, the PSA uses a range of targeted compliance monitoring methods which are set out in paragraph 4.3.1 of Code 15. This includes assessing complaints and other intelligence, audits, periodic reporting of data and information, targeted information-gathering, thematic reviews, skilled persons reports, engaging with PRS providers and conducting pre-arranged visits (by consent) to the premises of PRS providers.
- 5.174 We do not consider that we need to provide specific powers in order for Ofcom to undertake compliance monitoring and supervision activities but would expect to continue to carry out some of these activities. Consequently, we consider our proposal will have no impact on providers.

Transitional arrangements under the draft PRS Order

Proposed general approach to transitional arrangements

- 5.175 The overall proposal in this consultation is that the requirements in Code 15 should be replaced by imposing corresponding requirements in the draft PRS Order. This would occur, in effect, when the draft PRS Order comes into force. Our proposal is also that we would withdraw our approval of Code 15 immediately before the day on which the draft PRS Order comes into force, except for directions already given in accordance with Code 15 by the PSA

¹⁵⁶ Where we take enforcement decisions in relation to the PRS Condition, persons affected by such decisions may appeal to the Competition Appeal Tribunal (CAT) under section 192 of the Act, but the CAT must determine such appeals by applying the same principles as would be applied by a court on an application for judicial review (see section 194A of the Act).

¹⁵⁷ See paragraph 4.2.4 of Code 15.

and for the purpose of enforcing its provisions (see annex 10 to this consultation). At that point, the PSA's regulatory responsibilities for the PRS sector would, in effect, have been transferred to Ofcom.

- 5.176 We propose that, after that transfer has happened, Ofcom should have the ability to take enforcement action in relation to any conduct not compliant with any of the PSA's codes (including Code 15) that occurred before the transfer and which conduct was not the subject to a (final) enforcement direction given by the PSA (which we refer to as 'historical cases'). In relation to such historical cases, we propose in the draft PRS Order essentially that Ofcom should be able to step into the PSA's shoes and take any enforcement action that the PSA would have been able to take in relation to the provider's conduct in question in accordance with the relevant code provisions. In taking any such action, the provider would be afforded rights broadly equivalent to those contained in the codes. Taken together, this proposed approach would ensure that there are no gaps in the enforcement regime for PRS services during and following the transfer to Ofcom.
- 5.177 Given that Ofcom does not currently operate a Tribunal system as under Code 15, our proposed transitional arrangements include some modifications to current arrangements. In order for these transitional arrangements to function properly, we propose, in particular, to specify in the draft PRS Order details of:
- (a) how Ofcom will appoint people to adjudicate on historical cases; and
 - (b) what will happen to historical cases referred to adjudication by the PSA but on which no decision has been made prior to transfer.

Proposed transitional provisions under the draft PRS Order

General 'authorisation' for Ofcom to perform the PSA's enforcement functions under relevant codes approved by Ofcom in the past

- 5.178 We propose that, after the transfer, the draft PRS Order authorises and requires Ofcom to do anything the PSA (and its predecessor names)¹⁵⁸ was authorised or required to do under the provisions of any of its approved codes for the purpose of, or in connection with, the carrying out of its functions. Those matters specifically include the enforcement of provisions of a relevant approved code, but they also include other matters to deal with PRS regulation more generally under such a code.
- 5.179 In addition, we propose that anything done by the PSA for the purpose of, or in connection with, the carrying out of its functions prior to transfer would have effect as if it were done by Ofcom. References in an approved code to the PSA would also have effect as if they were references to Ofcom.
- 5.180 Our specific proposals in this regard are contained in paragraphs 2 and paragraph 3 (1) of Schedule 4 to the draft PRS Order (see annex 5 to this consultation).

Appointments for the purposes of adjudication

- 5.181 As noted above, given that Ofcom does not manage a panel equivalent to the PSA's Code Adjudication Panel, we propose that the draft PRS Order specifies how provisions in approved codes should have effect in relation to Ofcom's adjudication of historical cases under our proposed transitional arrangements. Those proposals broadly seek to put in place

¹⁵⁸ The PSA was founded as the Independent Committee for the supervision of Standards of Telephone Information Services (ICSTIS) and subsequently known as PhonepayPlus.

equivalent arrangements to those applying currently under Code 15. Specifically, we propose that the draft PRS Order authorises Ofcom, on an ad hoc basis, to appoint:

- (a) where the PSA's code provides for the appointment of a single legally qualified member of the CAP to adjudicate cases, a sole adjudicator with not less than 10 years' experience practising as a lawyer; and
- (b) where the PSA's code provides for the appointment of a Tribunal to adjudicate a case, a panel of three people.

5.182 Where Ofcom appoints such a panel of three people, we propose that the panel would need to meet certain requirements, namely:

- (a) have a chair with not less than 15 years' experience practising as a lawyer;
- (b) make decisions by majority vote; and
- (c) where a member of a panel is unable to continue, continue the proceedings with the two remaining members and make decisions unanimously.

5.183 And, where proceedings continue with two members because the chair is unable to continue, the panel would:

- i) have a new chair appointed from amongst the remaining two members by the outgoing chair; and
- ii) where the new chair appointed is not a practising lawyer, have a practising lawyer of not less than 15 years' experience appointed to advise the panel on questions of law.

5.184 Our specific proposals in this regard are contained in paragraph 3(2) to 3(5) of Schedule 4 to the draft PRS Order (see annex 5 to this consultation).

Incomplete cases

5.185 We also propose that the draft PRS Order addresses what happens when a case has been referred to adjudication by the PSA, but the adjudicator has not carried out the function before the draft PRS Order comes into force.

5.186 In summary, we propose that the draft PRS Order specifies that in these circumstances:

- (a) Ofcom would not be liable for actions or omissions by the PSA unless these are shown to have been in bad faith;
- (b) Ofcom may appoint a new sole adjudicator or panel to consider the case afresh;
- (c) any person who made representations to the PSA must be offered the opportunity to make representations to the new Ofcom adjudicator or panel; and
- (d) Ofcom has the power to give directions in accordance with the provisions of an approved code.

5.187 Where the case relates to a review, we propose that the draft PRS Order make clear that Ofcom's powers include the ability to:

- (a) agree or refuse an application to carry out a review of a decision; and
- (b) where a PSA Tribunal has prior to transfer agreed to carry out a review, either confirm, vary or rescind the decision to review a case.

5.188 Our specific proposals in this regard are contained in paragraph 4 of Schedule 4 to the draft PRS Order (see annex 5 to this document).

Our assessment of proposed transitional arrangements

- 5.189 The general effect of our proposed transitional arrangements is to essentially maintain the PSA's enforcement regime under Code 15 in relation to historical cases. Our proposals seek to ensure that there is always a mechanism to ensure compliance with the rules that have been applied to the PRS market. This transitional regime is important to protect consumers where, for example, potentially non-compliant conduct was not identified by the PSA prior to the transfer or there was not enough time for the PSA to complete all stages of its enforcement process prior to the transfer. In such instances, our proposed transitional arrangement would enable Ofcom to step in to secure that consumers are protected.
- 5.190 We also consider that our proposals provide the practical mechanisms necessary to ensure that Ofcom can appropriately and effectively operate the PSA's enforcement regime for historical cases. Therefore, in relation to historical cases, providers would largely be in the same position that they would have been in had the PSA continued to enforce such historical cases.

Proposed modifications to the PRS Condition and application of the Enforcement Guidelines

- 5.191 We have set out above our proposed requirements in the draft PRS Order, together with our proposed application of the Enforcement Guidelines in associated respects. Taking enforcement action under the provisions of the draft PRS Order is the first component of our enforcement toolbox.
- 5.192 The second component is our potential enforcement of the PRS Condition, where a provider fails to comply with the provisions of the order for the time being in force under section 122 of the Act (which would at first be the draft PRS Order subject to consultation in this document).

Proposed modifications to the PRS Condition

- 5.193 We explain in the next section 6 of this consultation that the only purpose of the PRS Condition is to secure compliance with enforcement directions given by the PSA and, if there is no approved code (such as Code 15), to secure compliance with the provisions of the order for the time being in force under section 122 of the Act. The current PRS Condition already contains compliance requirements in both respects (even though there is currently no such order in force).
- 5.194 However, as we discuss in more detail in section 6, the main effect of our proposed modifications to the PRS Condition is essentially to deal with some definitional matters, especially so that the requirement to comply with an order applies to a "PRS provider" within the same meaning as in our proposed draft Order.
- 5.195 In short, therefore, our proposed modifications to the PRS Condition simply aim to ensure that we can take enforcement action using our additional statutory powers (with associated process requirements) under sections 123 and 124 of the Act against any PRS providers (as proposed to be defined in the draft PRS Order) for any failures to comply with any enforcement action that we take under Part 10 of the draft PRS Order itself.

Proposed application of the Enforcement Guidelines

- 5.196 As explained above, our proposed modifications to the PRS Condition does not involve any real substantive changes to the current Condition. We would therefore continue to address any non-compliance with the PRS Condition in the same way that we currently do using our powers under sections 123 and 124 of the Act, which also means us following the processes set out in sections 94 to 96 of the Act.
- 5.197 While we are not proposing to make any changes to how we currently apply our Enforcement Guidelines to enforcing the PRS Condition, we propose to add a new annex to the Enforcement Guidelines in that regard. See our proposed draft annex to the Enforcement Guidelines for the PRS Condition (as well as the SMP apparatus Condition) in annex 7 to this consultation.
- 5.198 We consider that this draft annex will give greater regulatory clarity for stakeholders as to our general approach to enforcement to enforcing the PRS Condition. That annex sets out the specific powers in the Act under which Ofcom can enforce compliance with the PRS Condition, including:
- (a) to require the provision of information (section 135) and impose financial penalties for non-compliance with the requirement to provide information (sections 138 – 144);
 - (b) to issue provisional decisions where there are reasonable grounds for believing that the subject of the investigation is contravening, or has contravened, the PRS Condition (section 94);
 - (c) to issue final decisions where we remain satisfied that the subject of the investigation has contravened the notified requirement and has not taken appropriate steps to comply or remedy the consequences of the contravention (section 95);
 - (d) to impose financial penalties of up to £250,000 for each contravention (sections 96 and 123); and
 - (e) take urgent actions to suspend or restrict a PRS service (section 124).

Comparison to current arrangement and assessment

- 5.199 We consider that our proposed changes to the PRS Condition will not have any significant impact on providers, being definitional changes in their nature. We also intend to continue to follow our general approach to enforcement as set out in the Enforcement Guidelines, something which is unaffected by our proposed modifications to the PRS Condition itself.

Consultation question 19: Do you have any comments about our proposed approach to enforcement in Part 10 of the draft PRS Order?

6. Provisional conclusions and next steps

Summary of section

- 6.1 This section sets out our overall proposals, including our assessment of the impact of those proposals, for taking over the PSA's day-to-day regulation and enforcement of the PRS sector. We conclude this section by explaining our consultation process and next steps.
- 6.2 In summary, we are proposing to take three specific measures to achieve this aim of a regulatory transfer from the PSA to Ofcom. Those measures are:
- First, Ofcom proposes to replace the requirements in Code 15 by imposing corresponding requirements in an order to be made under section 122 of the Act.
 - Second, Ofcom proposes to make modifications to the PRS Condition to secure compliance with the provisions of that order and past enforcement directions given by the PSA.
 - Third, in light of those proposals, Ofcom proposes to withdraw its approval from Code 15.

Notice of our proposed draft PRS Order

- 6.3 We explain in section 3 of this document, the Secretary of State for Digital Culture Media and Sport (now DSIT), has given provisional approval for the PSA and Ofcom to be brought together. As such, subject to this consultation on the proposed legal means of doing so and then further formal approval from the Secretary of State, responsibility for the day-to-day regulation of PRS will be transferred to Ofcom. Under these arrangements, the PSA will cease to exist as a regulator and, consequently, it will no longer be appropriate for Ofcom to continue to give our approval to Code 15 under section 121 of the Act. We, therefore, give notice in accordance with section 403(4) of the Act of our proposal to make the draft PRS Order set out in Annex 5 of this document.
- 6.4 The general effect of the draft PRS Order is:
- to impose new requirements with respect to the provision and contents of certain PRS (to which we refer in this consultation as CPRS), and with respect to the facilities made available in the provision of such PRS (including provision about pricing);
 - to impose new requirements with respect to the arrangements made by the providers for the promotion and marketing of those services;
 - to make provision for the enforcement of those requirements; and
 - to make provision for making other arrangements for the purposes of those requirements.
- 6.5 In doing so, we rely on our powers to make such provisions as Ofcom thinks fit under sections 122(2) to 122(4) of the Act, together with our powers under section 403(7) of the Act, namely:

- to make different provision for different cases (including different provision in respect of different areas);
 - to make provision subject to such exemptions and exceptions as Ofcom thinks fit; and
 - to make such incidental, supplemental, consequential and transitional provision as Ofcom thinks fit.
- 6.6 Our reasons for proposing to impose the above-mentioned requirements (including their details) are set out mainly in sections 4 of this document. Our reasons for making provision for the enforcement of those requirements are set out in section 5 of this consultation. In making these proposals, we have also considered in this consultation the likely impact of implementing them on businesses as well as on persons with protected characteristics (equality impacts).
- 6.7 In particular, we consider that many of our proposals will result in little difference in practice for providers compared to current arrangements. This is because our proposals replicate, or are very similar to, current arrangements. In the main, we have sought to ease the regulatory burden on industry, where appropriate. Where we have strengthened regulations, we consider these are objectively justifiable and necessary to ensure consumers are protected across their entire PRS journey. Consistent with our statutory duties, we have explained the impacts of our proposals on industry and consider these to be proportionate, reflecting the need to ensure that consumers continue to be protected from the potential harms arising from the use of CPRS.
- 6.8 As we have explained in section 4, our provisional assessment of the key impacts of our proposals insofar as they introduce additional requirements from Code 15, and which are likely to have the greatest impact, are as follows:
- (a) Registration exemptions for merchants operating PRS numbers starting with 087 and voice shortcodes costing 20p or less (see paragraphs 4.43 to 4.46 of this document);
 - (b) Notification requirements for exempted merchants (see paragraphs 4.47 to 4.54 of this document);
 - (c) Scope of regulated providers for the purposes of promotional and marketing activity and vulnerable consumers (see paragraphs 4.110-4.119 of this document); and
 - (d) ICSS (see paragraphs 4.142-4.155 of this document)
- 6.9 Also, we consider that our package of proposals dealing with enforcement matters will create a fair, effective and transparent procedure for enforcement of the requirements of the draft PRS Order. In particular, we highlight the following:
- (a) Single decision-making procedure (see paragraphs 5.45-5.59 of this document (on provisional decision) and paragraphs 5.60-5.96 of this document (on representations and final decisions));
 - (b) Prohibitions, suspensions, restrictions and withholding of payments (see paragraphs 5.111-5.124 of this document);
 - (c) Information gathering powers (see paragraphs 5.38-5.40 of this document); and
 - (d) Urgent action (interim measures) (see paragraphs 5.136-5.159 of this document).

Notification of our proposed modifications the PRS Condition

- 6.10 We have explained in section 2 of this document that the purpose of Ofcom’s PRS Condition is to secure compliance with directions given in accordance with an approved code (currently, Code 15) by the enforcement authority (the PSA) and for the purpose of enforcing its provisions. Indeed, this compliance-type provision is the only provision that may be made by the PRS Condition.¹⁵⁹
- 6.11 However, if there is no such code, section 120(3)(b) of the Act also envisages that Ofcom makes provision in the PRS Condition requiring the person to whom the Condition applies to comply, to the extent required by the Condition, with the provisions of the order for the time being in force under section 122. The current PRS Condition already contains such a provision,¹⁶⁰ despite the fact that there is currently no order in force under section 122 of the Act.
- 6.12 In light of our above-mentioned notice of Ofcom’s draft PRS Order we, therefore, publish a notification in accordance with section 120A(3) of the Act of our proposal to make some modifications to the current PRS Condition, as set out in Annex 9.
- 6.13 While we propose to retain substantively the two compliance-type provisions in the current PRS Condition, the effect of those proposed modifications is to define the persons to whom the new PRS Condition would apply as PRS providers within the meaning given by the draft PRS Order for the time being in force under section 122 of the Act (which, to start with, would be the draft PRS Order discussed above).
- 6.14 In other words, we propose to modify the PRS Condition so that every PRS provider must comply with the provisions of the order for the time being in force under section 122 of the Act. In contrast, the current PRS Condition applies to ‘Communications Providers’ and ‘Controlled Premium Rate Service Providers’, respectively, both of which are defined in that Condition.
- 6.15 However, we propose to continue to apply the new PRS Condition to those two separate types of providers (as currently defined in the current PRS Condition) to secure compliance with past enforcement directions given by the PSA under its codes (i.e. Code 15 as well as previous versions of a code approved by Ofcom). This compliance requirement (together with certain transitional arrangements proposed under Part 10 of the draft PRS Order) seeks to ensure a smooth transition from the PSA to Ofcom, especially so that no regulatory gaps arise.
- 6.16 Those are our reasons for proposing to make the modifications to the PRS Condition. In doing so, we are satisfied that the proposed modifications satisfy the test in section 47(2) of the Act.¹⁶¹ In particular, we are satisfied that our proposed modifications are:

¹⁵⁹ See section 120(3) of the Act.

¹⁶⁰ The current PRS Condition states: “1. *The Communications Provider and Controlled Premium Rate Service Provider shall comply with: (a) directions given in accordance with an Approved Code by the Enforcement Authority and for the purposes of enforcing the provisions of the Approved Code; and (b) if there is no Approved Code, the provisions of the order for the time being in force under section 122 of the Act.*”

¹⁶¹ The section 47(2) test also applies to modifications to the PRS Condition: see section 120(5) of the Act.

- **objectively justifiable** in that they are necessary for the PRS Condition to secure compliance against the same providers as those who are proposed to be defined as PRS providers in the draft PRS Order;
- **not such as to discriminate unduly** against particular persons or against a particular description of persons, since the PRS Condition would apply generally to every person falling within the meaning of a PRS provider (as defined in the draft PRS Order) without being directed to any particular person;
- **proportionate** to what the modifications are intended to achieve in that they are appropriate to address the aim of aligning the definitions in the PRS Condition with the draft PRS Order, and they are also required to address that aim; and
- **transparent**, since our proposed modifications are clearly drafted in the PRS Condition itself (when read together with the PRS Order) in relation to what they are intended to achieve.

6.17 We consider that the likely impact of implementing these proposed modifications on stakeholders will be low. This is because our intention is to capture broadly the same persons to whom the current PRS Condition applies.

Notification of our proposed withdrawn approval of Code 15

6.18 As a result of our above-mentioned proposals, we publish a notification of our proposal to withdraw our approval of Code 15 set out in Annex 10.

6.19 We propose that this withdrawal would take effect immediately before the day on which the draft PRS Order comes into force. However, enforcement directions given in accordance with Code 15 by the PSA would continue to apply, and therefore be unaffected by this withdrawal. As such, Ofcom would continue to have powers to secure compliance with such directions by enforcing the PRS Condition.

Our overall assessment of our package of proposals

6.20 We believe that the combined effect of our proposals set out in this consultation will result in significant benefits to all stakeholders having an interest in, or affected by, PRS.

6.21 The key provisions in the draft PRS Order are consumer protection measures to deal with potential significant harms to consumers. Those measures have evolved over the years through the PSA's regulation and we propose to largely retain most of such measures for the reasons they were adopted and approved by Ofcom in the first place. We have discussed in this consultation, however, instances where we are proposing to make material changes to the current position (whether by introducing new requirements, removing previous requirements or materially changing them). To further assist stakeholders' understanding of such material changes, we have included in Annex 8, a correlation table showing changes in the draft PRS Order compared to Code 15.

6.22 In reaching these proposals, we have generally had regard to our duties under section 3 of the Act and, so far as relevant, section 4 of the Act. We believe, in particular, that the draft PRS Order (the enforcement of which would be supported by our proposed modifications to the PRS Condition) would be compatible with those duties, not only because our proposals would be in line with Ofcom's primary duty to further the interests of citizens and

consumers, but also because they would promote greater consumer confidence in the PRS market and, as a result, encourage investment and innovation, and promote competition, in the sector.

- 6.23 We have also had regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed. We consider that the both the draft PRS Order and the proposed modifications to the PRS Condition comply with those principles in that we have carefully considered what current provisions in Code 15 are appropriate to retain or (as the case may be) remove, and what other provisions should be either added or changed. We also consider that the draft PRS Order provides clarity and certainty to all parties involved in the PRS sector.
- 6.24 We invite comments on this draft PRS Order before the consultation closes (see details below). We intend to disclose all responses (with associated information) that we receive on this draft PRS Order to DSIT for the purpose of facilitating the Secretary of State giving consent for the making by Ofcom of that Order under section 122(6) of the Act.

Consultation question 20: Do you agree with our provisional assessment that our proposals are justifiable, non-discriminatory, proportionate and transparent? Please provide further information or evidence to support your view.

Consultation process and next steps

Consultation period

- 6.25 We invite comments on the proposals set out in this consultation, including our draft PRS Order and our proposed modifications to the PRS Condition. Our consultation opens on **21 November 2023** and closes on **23 January 2024**.
- 6.26 We invite stakeholders to respond, in particular, to the specific questions asked in the previous sections in this consultation, which are summarised in Annex 4.
- 6.27 We consider that this nine-week consultation should provide sufficient time for stakeholders to comment on our proposals, noting that most requirements in the draft PRS Order are not substantively new. We accept, however, that we are proposing to introduce a few material changes and we also wish to give stakeholders some additional time over the Christmas holidays.
- 6.28 For stakeholders wishing to respond to this consultation, we request that you consider Annexes 1 to 3 of this document for relevant details.

Proposed implementation period

- 6.29 As regards our next steps, subject to our consideration of responses and Ofcom obtaining the consent of the Secretary of State, we intend to make the PRS Order (and lay it before Parliament) in or around **Spring 2024**. It will then be subject to Parliamentary scrutiny. We are currently working to bring the PRS Order into force on 1 October 2024. This commencement date for the PRS Order would also be aligned with Government policy on so-called 'Common Commencement Dates', which are 6 April and 1 October each year.

- 6.30 We also intend to publish our statement in or around the same time as making the PRS Order, with the final version of the PRS Order being published on the Government’s official website for legislation.¹⁶² In our statement, we intend to explain our decisions on various matters reflected in that final PRS Order, together with our decisions on the modifications to the PRS Condition and our formal withdrawn approval of Code 15, having regard to stakeholder responses to this consultation.
- 6.31 These anticipated timings between us making the PRS Order (and publishing our statement) and its commencement on 1 October 2024 mean that stakeholders would have ample time to make the necessary preparations to comply with the requirements under the PRS Order.
- 6.32 In case there would be a delay in us making the PRS Order, our view is that a period of around 3 months between us making the PRS Order and its commencement is enough time for affected parties to bring their activities (including any contractual arrangements with each other) into compliance.
- 6.33 In that regard, we have considered various aspects in the draft PRS Order and the kind of things that PRS providers need to do to be ready to comply with its requirements. In particular, we had regard to the following matters:
- (a) **Registration:** PRS providers who are currently carrying out activities in compliance with Code 15 (including its registration requirements) are likely to benefit from our proposed provision in article 13 of the draft PRS Order about registration in transitional cases. Such providers only need to provide some limited information (as set out in Schedule 2 to the draft PRS Order) to Ofcom and they would have up to 3 months after the Order’s commencement to provide this information. For other PRS providers, article 10 requires that they first register with Ofcom and, in effect, do not start carrying out their activities until at least 5 working days later. Article 10 also requires (like Code 15) that PRS providers need to appoint a ‘generally authorised person’ to do various things, including to approve various policies under the draft PRS Order. We consider that our proposed 3-month implementation period should be sufficient time for such appointments, including for PRS providers to take any governance steps in that regard. We also note that the exemption for some merchants in article 11 of the draft PRS Order means that merchants need some time to provide ‘relevant records’ (as defined in that article) to the intermediaries that they are dealing with. Again, we consider that the 3-month implementation period should be enough time to make preparations in that regard. Relevant intermediaries would then have up to one month to notify Ofcom that they comply with the requirements specified in article 13(3) of the draft PRS Order in respect of a previously exempt merchant under Code 15 or, in other cases, to notify Ofcom at least 5 working days before the start of the merchant’s provision of the CPRS in question.
 - (b) **Administrative charges:** Liable networks operators will not be required to pay our administrative charges under article 14 of the draft PRS Order until after Ofcom has collected the necessary information using our information gathering powers under article 57 of the draft PRS Order and then sent our invoices to them – see article 14(4) for timings to pay these charges depending on the amounts involved. In other words, no prior implementation period will be required in this context.

¹⁶² Namely, www.legislation.gov.uk

- (c) **Due diligence measures:** The DDRAC requirements in articles 15 and 16 of the draft PRS Order mainly involve PRS providers reviewing the PSA's and Ofcom's registers to ensure that they are not dealing with unregistered PRS providers or persons on whom sanctions have been imposed. We consider that no implementation period will be required in this context. At the time the PRS Order comes into force, Ofcom would not have imposed any sanctions, so PRS providers would simply need to review the PSA's register (as they should currently do under Code 15). Article 20 also deems compliance with certain arrangements entered into before the PRS Order's commencement.
- (d) **Risk assessments:** Article 20 of the draft PRS Order also deems compliance with certain arrangements entered into before the PRS Order's commencement relating to risk assessments, but some PRS providers may be subject to carrying out risk assessments under article 17 of the draft PRS Order immediately on the PRS Order's commencement. In that case, we consider our proposed 3-month implementation period should be enough time to prepare for such risk assessments.
- (e) **Suspended arrangements:** While we consider that articles 18 and 19 of the draft PRS Order will not require any implementation period as such, we anticipate that some PRS providers may wish to use our proposed 3-month implementation period to ensure that they have the necessary contractual arrangements in place to suspend any arrangements covered by these articles.
- (f) **Security testing:** under article 21 of the draft PRS Order, intermediaries must carry out security testing within 12 months ending with the day on which any regulated activity began (and at annual intervals from the most recent test). For example, if an intermediary began the regulated activity on 1 October 2023 (or earlier), that intermediary would have to carry out security testing in accordance with article 21 of the draft PRS Order by 1 October 2024 (i.e. the day on which we anticipate that the PRS Order will come into force). In contrast, if an intermediary began the regulated activity on (say) 17 November 2023, that intermediary would have to carry out security testing in accordance with article 21 of the draft PRS Order by 17 November 2024. We consider that our proposed 3-month implementation period should be enough time for intermediaries to carry out these security tests or to plan for new tests to be carried out (where they are due shortly after the Order's commencement).
- (g) **Consumer protection:** we do not expect that PRS providers (especially merchants) will require any implementation period for most requirements under Part 6 of the draft PRS Order, since corresponding requirements already apply under Code 15. However, we recognise that we are proposing to introduce some new provisions under Part 6 of the draft PRS Order and, to that extent, we consider that our proposed 3-month implementation period should be enough time to prepare for compliance. In particular, we note that the express consent provisions under articles 27 to 29 of the draft PRS Order may require merchants to review and ensure that their systems are set up appropriately, so that they can obtain express consent from consumers as proposed by these articles.¹⁶³ This may also include reviewing subscription contracts that they have already entered into with consumers, including to ensure that it is clear to consumers

¹⁶³ The express consent rules for ICSS will very likely involve the implementation of new service charges. We note that Ofcom decided that four months was sufficient to implement service charge changes following the Directory Enquiries 118 Review, following consultation with industry, see section 6 of Ofcom's [Directory Enquiries 118 Review, 2019](#). Given that only two service charges changes are likely to be required (99% of ICSS use only two service charges - £3.60/min or £6/call, see page 5 of the PSA's [Thematic Review of ICSS](#)), it is our view that industry will have sufficient time to make the necessary changes.

that they will have a right to terminate subscription contracts under article 33 of the draft PRS Order. Merchants offering professional advice services may also wish to use this implementation period to take the steps required by article 53 of the draft PRS Order to ensure that the individuals giving the advice to consumers have the necessary qualifications and experience.

(h) **Record-keeping:** We also consider that our proposed implementation period is sufficient for PRS providers to ensure that their systems are ready to comply with the general record-keeping requirement in article 58 of the draft PRS Order. We also suggest that PRS providers use this implementation period to review and ensure that their contractual arrangements with third parties enable them to obtain and keep records that may be relevant to preserving any records for investigation purposes under article 60 of the draft PRS Order.

6.34 We would welcome stakeholder views on our proposed 3-month implementation period. If stakeholders disagree and think they will need a longer period to implement any of the specific changes that we are proposing to make, we invite them to let us know in responding to this document, specifying the particular proposed changes which they think require a longer period and providing any evidence to support their reasoning.

Consultation question 21: Do you agree with our implementation period? Please state your reasons and provide evidence to support your view.

A1. Responding to this consultation

How to respond

- A1.1 Ofcom would like to receive views and comments on the issues raised in this document, by **5pm on 23 January 2024**.
- A1.2 You can download a response form from <https://www.ofcom.org.uk/consultations-and-statements/category-1/the-future-regulation-of-phone-paid-services>. You can return this by email or post to the address provided in the response form.
- A1.3 If your response is a large file, or has supporting charts, tables or other data, please email it to prsregulation@ofcom.org.uk, as an attachment in Microsoft Word format, together with the cover sheet.
- A1.4 Responses may alternatively be posted to the address below, marked with the title of the consultation:
- PRS Consultation Team
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- A1.5 We welcome responses in formats other than print, for example an audio recording or a British Sign Language video. To respond in BSL:
- send us a recording of you signing your response. This should be no longer than 5 minutes. Suitable file formats are DVDs, wmv or QuickTime files; or
 - upload a video of you signing your response directly to YouTube (or another hosting site) and send us the link.
- A1.6 We will publish a transcript of any audio or video responses we receive (unless your response is confidential)
- A1.7 We do not need a paper copy of your response as well as an electronic version. We will acknowledge receipt of a response submitted to us by email.
- A1.8 You do not have to answer all the questions in the consultation if you do not have a view; a short response on just one point is fine. We also welcome joint responses.
- A1.9 It would be helpful if your response could include direct answers to the questions asked in the consultation document. The questions are listed at Annex 4. It would also help if you could explain why you hold your views, and what you think the effect of Ofcom's proposals would be.
- A1.10 If you want to discuss the issues and questions raised in this consultation, please contact the PRS consultation team by email to prsregulation@ofcom.org.uk.

Confidentiality

- A1.11 Consultations are more effective if we publish the responses before the consultation period closes. This can help people and organisations with limited resources or familiarity with the issues to respond in a more informed way. So, in the interests of transparency and good regulatory practice, and because we believe it is important that everyone who is interested in an issue can see other respondents' views, we usually publish responses on the [Ofcom website](#) at regular intervals during and after the consultation period.
- A1.12 If you think your response should be kept confidential, please specify which part(s) this applies to and explain why. Please send any confidential sections as a separate annex. If you want your name, address, other contact details or job title to remain confidential, please provide them only in the cover sheet, so that we don't have to edit your response.
- A1.13 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and try to respect it. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.14 To fulfil our pre-disclosure duty, we may share a copy of your response with the relevant government department before we publish it on our website.
- A1.15 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's intellectual property rights are explained further in our [Terms of Use](#).

Next steps

- A1.16 Following this consultation period, Ofcom plans to publish a statement in **Spring 2024**.
- A1.17 If you wish, you can register to receive mail updates alerting you to new Ofcom publications.

Ofcom's consultation processes

- A1.18 Ofcom aims to make responding to a consultation as easy as possible. For more information, please see our consultation principles in Annex 2.
- A1.19 If you have any comments or suggestions on how we manage our consultations, please email us at consult@ofcom.org.uk. We particularly welcome ideas on how Ofcom could more effectively seek the views of groups or individuals, such as small businesses and residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.20 If you would like to discuss these issues, or Ofcom's consultation processes more generally, please contact the corporation secretary:

Corporation Secretary
Ofcom
Riverside House
2a Southwark Bridge Road
London SE1 9HA
Email: corporationsecretary@ofcom.org.uk

A2. Ofcom's consultation principles

Ofcom has seven principles that it follows for every public written consultation:

Before the consultation

A2.1 Wherever possible, we will hold informal talks with people and organisations before announcing a big consultation, to find out whether we are thinking along the right lines. If we do not have enough time to do this, we will hold an open meeting to explain our proposals, shortly after announcing the consultation.

During the consultation

A2.2 We will be clear about whom we are consulting, why, on what and for how long.

A2.3 We will make the consultation document as short and simple as possible, with an overview of no more than two pages. We will try to make it as easy as possible for people to give us a written response.

A2.4 We will consult for up to ten weeks, depending on the potential impact of our proposals.

A2.5 A person within Ofcom will be in charge of making sure we follow our own guidelines and aim to reach the largest possible number of people and organisations who may be interested in the outcome of our decisions. Ofcom's Consultation Champion is the main person to contact if you have views on the way we run our consultations.

A2.6 If we are not able to follow any of these seven principles, we will explain why.

After the consultation

A2.7 We think it is important that everyone who is interested in an issue can see other people's views, so we usually publish the responses on our website at regular intervals during and after the consultation period. After the consultation we will make our decisions and publish a statement explaining what we are going to do, and why, showing how respondents' views helped to shape these decisions.

A3. Consultation coversheet

Basic details

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

Confidentiality

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

- Nothing
- Name/contact details/job title
- Whole response
- Organisation
- Part of the response

If you selected 'Part of the response', please specify which parts:

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

Yes No

Declaration

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

Ofcom aims to publish responses at regular intervals during and after the consultation period. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

A4. Consultation questions

Consultation question 1: Do you agree with our assessment that our proposals will not affect any specific groups of persons (including persons that share protected characteristics under the EIA 2010 or NIA 1998)? Please state your reasons and provide evidence to support your view.

Consultation Question 2: Do you agree with our assessment of the potential impact of our proposal on the Welsh language? Do you think our proposal could be formulated or revised to ensure, or increase, positive effects, or reduce/eliminate any negative effects, on opportunities to use the Welsh language and treating the Welsh language no less favourably than English?

Consultation Question 3: Do you have any comments about our proposed definitions in articles 3 to 8 of Part 1 of the draft PRS Order for key service concepts that are used throughout the Order?

Consultation Question 4: Do you have any comments about our proposed definition for PRS regulated providers and regulated activity in article 9 in Part 1 of the draft PRS Order?

Consultation Question 5: Do you have any comments about our proposed approach to registration and registration exemptions in Part 2 of the draft PRS Order?

Consultation Question 6: Do you have any comments on our proposed requirements relating to due diligence and risk assessment in Part 4 of the draft PRS Order?

Consultation Question 7: Do you have any comments about our proposed approach to security testing in Part 5 of the draft PRS Order?

Consultation Question 8: Do you have any comments about our proposed approach to misleading information and/or the promotion and marketing of PRS in Part 6, Chapters 1 and 2 of the draft PRS Order?

Consultation Question 9: Do you have any comments about our proposed approach to pre-contract information and express consent for imposing certain charges in Part 6, Chapter 3 of the draft PRS Order?

Consultation Question 10: Do you have any comments about our proposed approach to provision of CPRS in Part 6, Chapter 4 of the draft PRS Order?

Consultation Question 11: Do you have any comments about our proposed requirements relating to vulnerable consumers in Part 6, Chapter 5 of the draft PRS Order?

Consultation Question 12: Do you have any comments about the proposed requirements relating to prevention of harm and offence in Part 6, Chapter 5 of the draft PRS Order?

Consultation Question 13: Do you have any comments about our proposed approach to competition and voting services in chapter 6 of Part 6 the draft PRS Order?

Consultation Question 14: Do you have any comments about our proposed requirements in respect of certain CPRS in chapter 7 of Part 6 our draft PRS Order?

Consultation Question 15: Do you have any comments about our proposed approach to the recovery of Ofcom's expenditure in Part 3 of the draft PRS Order?

Consultation Question 16: Do you have any comments about our proposed approach to additional requirements on network operators in Part 7 of the draft PRS Order?

Consultation Question 17: Do you have any comments about our proposed requirements relating to information requirements in Part 8 of the draft PRS Order

Consultation Question 18: Do you have any comments about our proposal to retain current PSA data retention periods for 2 years (for consumer data) and 3 years (for DDRAC data) in Part 9 of the draft PRS Order, with a preservation requirement following an investigation being opened?

Consultation Question 19: Do you have any comments about our proposed approach to enforcement in Part 10 of the draft PRS Order?

Consultation Question 20: Do you agree with our provisional assessment that our proposals are justifiable, non-discriminatory, proportionate and transparent? Please provide further information

Consultation Question 21: Do you agree with our implementation period? Please state your reasons and provide evidence to support your view?

A5. Notice of draft PRS Order

**NOTICE OF PROPOSED ORDER UNDER SECTION 122,
AND IN ACCORDANCE WITH SECTION 403(4), OF THE
COMMUNICATIONS ACT 2003**

A5.1 This Annex containing the draft PRS Order is published as a separate annex.

A6. Draft annex for Enforcement Guidelines – PRS Order

Compliance with requirements of an order made under section 122 of the Communications Act 2003

Regulatory requirements

6.35 Ofcom made an order under section 122 of the Communications Act 2003 on [*date to be inserted when order is made*] (SI 2024 No. [# TBC]), The Regulation of Premium Rate Services Order 2024 (the PRS Order). It came into force on [*date TBC*]. The PRS Order imposes various requirements on ‘PRS providers’ (as defined in its article 9 of the PRS Order). Those requirements include requirements for PRS providers to comply with enforcement decisions taken by Ofcom under Part 10 of the PRS Order.

Enforcement

6.36 The Regulatory Enforcement Guidelines set out our general approach to enforcement. We identify below the key provisions supporting enforcement under the PRS Order and some notable additional points and exceptions relating to this process.

Area of guidelines	Provisions and additional information
Why and how Ofcom opens cases	<p>Ofcom may take enforcement action using powers conferred on Ofcom under Part 10 of the PRS Order.</p> <p>We normally publish our case opening announcements on Ofcom’s website (see paragraphs 3.33 and 3.34 of the Enforcement Guidelines). Article 59 of the PRS Order contains a power for Ofcom to publish a notice of investigation, like our normal case opening announcements. Article 59 also empowers Ofcom to impose any requirement on the PRS provider who is being investigated to preserve records in accordance with article 60, as part of our notification given to the provider.</p>
Investigating	<p>Information gathering</p> <p>Ofcom can require that records are preserved during an investigation under article 60 of the PRS Order. We expect to normally obtain such records from the investigated provider when we exercise our information gathering powers under article 57 of the PRS Order.</p> <p>Confidentiality</p> <p>There are restrictions on disclosure contained in sections 26 and 393 of the Communications Act.</p>

Outcomes of regulatory investigations	<p>Provisional decision</p> <p>Where Ofcom decides that there are reasonable grounds for believing that the subject of the investigation is contravening or has contravened a requirement in the PRS Order, Ofcom will issue a provisional enforcement notice under Article 61 of the Order. The provisional enforcement notice will specify the contravention, specify the steps the subject should take to comply with the requirement and remedy the consequences of the contravention and the period in which those steps should be taken.</p> <p>Where Ofcom is minded to impose a financial penalty in accordance with article 62 of the PRS Order, it is required to include a provisional determination of that penalty in the provisional decision under article 61 of the PRS Order.</p> <p>Written and Oral representations</p> <p>No additional points to the main Regulatory Enforcement Guidelines.</p> <p>Final decision</p> <p>Where Ofcom remains satisfied that the subject of the investigation is contravening or has contravened any of the requirements of the Order, Ofcom will issue a final decision under article 63 of the PRS Order.</p> <p>Directions for serious contraventions</p> <p>Ofcom is able to direct the prohibition, suspension or restriction of a service or that a payment is withheld by a provider other than the subject of the enforcement notice under article 66 of the PRS Order. Ofcom can only do this where:</p> <ol style="list-style-type: none"> 1) it is appropriate and proportionate to the contravention; 2) the provider is in serious contravention of a requirement of the Order; and 3) the provider either: <ol style="list-style-type: none"> a) knowingly contravened the requirement; b) was reckless as to whether its conduct complied with the requirement; or c) where it was reasonably practicable for the provider to comply with the requirement, failed to take all reasonable steps to prevent the serious contravention. <p>Penalty</p> <p>The amount of penalty proposed must be appropriate and proportionate to the contravention. See article 62 of the PRS Order.</p> <p>Ofcom will determine the amount of the penalties which it imposes in accordance with its Penalty Guidelines.¹⁶⁴</p>
Settlement procedure	<p>No additional points to the main Regulatory Enforcement Guidelines.</p>

¹⁶⁴ [Penalty guidelines - Ofcom.](#)

<p>Urgent action (interim measures)</p>	<p>Ofcom has the power to take urgent action (interim measures) under article 64 of the PRS Order for contravention of a regulatory requirement imposed by the PRS Order.</p> <p>Ofcom can make a decision to prohibit, suspend or restrict a provider’s working in connection with a regulated PRS activity or to direct a provider withhold payments from another provider where:</p> <ol style="list-style-type: none"> 1) the giving of such a direction is appropriate and proportionate to the contravention; 2) there are reasonable grounds for suspecting that the provider is contravening, or has contravened, a requirement; and 3) either <ol style="list-style-type: none"> a. there are reasonable grounds for suspecting that the provider is unable, or is likely to be unable, to pay it’s debts as they fall due; or b. there are reasonable grounds for suspecting that the case is an urgent case, and 4) the urgency of the case makes it appropriate for us to give an urgent action direction. <p>Ofcom is required, as soon as reasonably practicable after giving an urgent action direction to give the provider an opportunity of making written representations to Ofcom about the grounds on which it was given and its effect, and an opportunity of proposing steps to remedy the situation under article 65 of the PRS Order.</p> <p>If Ofcom decides that the contravention occurred and the direction was justified, we may confirm the direction; but if not, we must revoke it. See article 65 of the PRS Order.</p>
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A7. Draft annex for Enforcement Guidelines – PRS Condition (also for SMP apparatus conditions)

Compliance with premium rate services (PRS) Condition under section 120 of the Communications Act 2003 (as well as with SMP apparatus conditions under section 93 of the Communications Act 2003)

Regulatory requirements in a PRS Condition

- A7.1 Ofcom has the power to set conditions under section 120 of the Communications Act for purpose of regulating the provision, content, promotion and marketing of premium rate services (PRS). The only provision that may be made by a PRS Condition is a provision requiring the person to whom the PRS Condition applies to comply, to the extent required by the Condition, with (i) the provisions of a code for the time being approved by Ofcom under section 121; (ii) directions given in accordance with an approved code by the enforcement authority and for the purpose of enforcing its provisions; and (iii) if there is no such code, the provisions of the order for the time being in force under section 122.
- A7.2 Section 123 of the Communications Act sets out that contraventions of a PRS Condition should be addressed in accordance with sections 94 to 96 (which contain the process for enforcing SMP apparatus conditions, discussed below). Section 123 also modifies the application of section 94 to 96 to the PRS Condition in some respects, such as the maximum penalty that may be imposed for a contravention of the PRS Condition.

Regulatory requirements in an SMP apparatus Condition

- A7.3 Ofcom has the power to set SMP apparatus conditions under section 93 of Communications Act, where it has made a determination that a person has significant market power in an identified apparatus market.
- A7.4 The process for enforcing an SMP apparatus condition is set out in sections 94 to 96 of the Communications Act.

Enforcement

- A7.5 The Regulatory Enforcement Guidelines set out our general approach to enforcement. We identify below the key provisions supporting enforcement under sections 94 to 96 of the Communications Act and some notable additional points and exceptions relating to this process.

Area of guidelines	Provisions and additional information
Why and how Ofcom opens cases	<p>Ofcom can enforce compliance with PRS conditions and SMP apparatus under sections 94 to 96 of the Communications Act.</p> <p>Before exercising our enforcement powers under section 94 of the Communications Act, we must consider if a more appropriate way of proceeding would be under the Competition Act. Where we decide that it is more appropriate to proceed under the Competition Act, we will state our reasons for doing so. Given that the PRS Order (made under section 122 of the Communications Act) contains requirements ultimately to protect consumers and the purpose of the PRS Condition is to secure compliance with provisions under the Order, it is unlikely that Ofcom would consider it more appropriate to proceed under the Competition Act in most cases.</p>
Investigating	<p>Information gathering</p> <p>Ofcom has wide powers to require the provision of information under section 135 of the Communications Act. Ofcom has powers to impose financial penalties and give directions to secure compliance with a statutory information request, as well as criminal sanctions for non-compliance under sections 138 to 144 of the Communications Act.</p> <p>Confidentiality</p> <p>There are restrictions on disclosure contained in sections 26 and 393 of the Communications Act.</p>
Outcomes of regulatory investigations	<p>Provisional decision</p> <p>Where Ofcom decides that there are reasonable grounds for believing that the subject of the investigation is contravening, or has contravened, the requirements of a PRS Condition (or, as the case may be, an SMP apparatus Condition), Ofcom will issue a provisional decision under section 94 of the Communications Act.</p> <p>The provisional decision will set out the contravention and specifies the period within which the subject can make representations, comply with the notified condition and remedy the consequences of the contravention. The period for doing these things will be a period of one month, unless Ofcom specifies a longer period or otherwise extends the period. Ofcom can specify a shorter period in the notification where it has reasonable grounds for suspecting the contravention is a repeated one.</p> <p>We will generally follow our general approach for issuing provisional decisions in relation to provisional decisions given under section 94 of the Communications Act.</p> <p>Written and Oral representations</p> <p>No additional points to the main Regulatory Enforcement Guidelines.</p> <p>Final decision</p>

	<p>Where Ofcom remains satisfied that the subject of the investigation is contravening or has contravened the notified requirement and has not taken appropriate steps to comply or remedy the consequences of the contravention, Ofcom will issue a final decision under section 95 of the Communications Act.</p> <p>We will generally follow our general approach for issuing final decisions in relation to final decisions given under section 95 of the Communications Act.</p> <p>Penalty</p> <p>Under section 96 of the Communication Act, Ofcom can impose a financial penalty along with the final decision.</p> <p>For penalties imposed for contraventions of an SMP apparatus Condition, section 97 of the Communications Act applies (with maximum penalties of 10% of relevant turnover). For penalties imposed for contraventions of the PRS Condition, section 123 of the Communications Act allows Ofcom only to impose a penalty of up to £250,000 for each contravention. Ofcom may also issue a separate penalty in respect of all the contraventions or separate penalties in respect of each contravention.</p> <p>The amount of any penalty imposed must be appropriate and proportionate to the contravention.</p> <p>Ofcom will determine the amount of the penalties which it imposes in accordance with its Penalty Guidelines.¹⁶⁵</p>
Settlement procedure	No additional points to the main Regulatory Enforcement Guidelines.
Urgent action	<p>There are no powers to take urgent action in relation to SMP apparatus Conditions.</p> <p>Ofcom has the power under section 124 of the Communications Act to give directions to suspend or restrict a PRS service in relation to a contravention of a requirement where we think it is urgently required for reasons of public policy.</p>

¹⁶⁵ [Penalty guidelines - Ofcom.](#)

A8. Correlation table

Introductory notes

- A8.1 Part 1 of the correlation table below lists in its first column the provisions in Code 15 against any corresponding provisions in the draft PRS Order (see annex 5) in the second column of the table. Where there are no such corresponding provisions, the absence of correlation is represented by a dash symbol in the second column.
- A8.2 Part 2 of the table contains provisions in the draft PRS Order that are entirely new and not contained in Code 15, including new definitions used in the draft PRS Order.
- A8.3 The third column in the table contains some brief remarks about the correlations. However, this table should be read together with the main body of this consultation document for a fuller understanding of Ofcom’s proposed future regulation of PRS.

Correlation table

PART 1 – CORRELATION OF PROVISIONS IN CODE 15 WITH THE DRAFT PRS ORDER		
Code 15	Order	Remarks
1: The PSA and the Code		
1.1.1-1.1.7	—	PSA specific.
1.2.1-1.2.2	—	Ofcom’s code approval process is irrelevant to the draft PRS Order.
1.3.1	Article 9	Definitions are based on the language used in s.120(9) of the Act.
1.4.1-1.4.2	—	PSA specific.
1.5.1	—	PSA specific.
1.6.1-1.6.4	—	PSA specific. Confidential information will be handled by Ofcom in accordance with the restrictions on disclosure in s.393 of the Act.
1.7.1	Article 9(5)	This also reflects the meaning of a “Controlled Premium Rate Service” in paragraph (2)(e) of the existing PRS Condition.
1.7.2-1.7.3	—	Information society services remain subject to the e-Commerce Regulations.
1.8.1-1.8.2	—	See Schedule 4 to the draft PRS Order for transitional arrangements.
1.9.1	—	Ofcom’s code approval process is irrelevant to the draft PRS Order.

PART 1 – CORRELATION OF PROVISIONS IN CODE 15 WITH THE DRAFT PRS ORDER

2: Regulatory Approach		
2.1.1-2.1.4	—	The draft PRS Order imposes requirements, not general standards.
2.2.1-2.2.4	—	PSA specific.
2.3.1-2.3.3	—	PSA specific.
2.4.1-2.4.5	—	PSA specific.
2.5.1-2.5.4	—	PSA specific.
2.6.1-2.6.5	—	PSA specific.
2.7.1-2.7.4	—	PSA specific.
3: Regulatory Standards and Requirements		
3.1.1	—	No corresponding requirement in the draft PRS Order.
3.1.2	—	No corresponding requirement in the draft PRS Order.
3.1.3	—	No self-standing integrity requirement in the draft PRS Order, but elements of paragraph 3.1.3 of Code 15 are present under various requirements in the draft PRS Order.
3.1.4	Article 16	This provision has been redrafted to also apply in relation to certain decisions by Ofcom under articles 64 to 66 of the draft PRS Order.
3.2.1	Article 26 and Schedule 3	—
3.2.2	Article 26 and Schedule 3	—
3.2.3	Article 26 and Schedule 3	—
3.2.4	Article 26 and Schedule 3	—
3.2.5	Article 9(9)	—
3.2.6	—	There is no corresponding provision in the draft PRS Order. Any promotion and marketing of CPRS, regardless of the means used, will be subject to the requirements of the draft PRS Order.
3.2.7	Articles 27 to 29	Concept of “point of purchase” not used in the draft PRS Order.
3.2.8	Articles 27 to 29	Concept of “point of purchase” not used in the draft PRS Order.
3.2.9	—	No corresponding provision in the draft PRS Order.

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3.2.10	Article 29	This article applies in respect of ICSS only and not directory enquiry services (<i>cf.</i> PSA's guidance to Code requirement 3.2.10).
3.2.11	—	No corresponding provision in draft PRS Order, but Chapter 3 of Part 6 contains similar information (messages) requirements.
3.2.12	Article 31	—
Virtual chat receipting exemption	Article 32	This article incorporates the PSA's general permission for virtual chat services regarding receipting.
3.2.13	Article 31	—
3.2.14	Article 31	—
3.2.15	Article 31	—
3.2.16	Article 33	—
3.2.17	Article 33	—
3.2.18	Articles 49 and 50	Paragraph 3.2.18 simply signposts requirements in relation to age verification.
3.3.1	—	There is no self-standing provision about fair treatment in the draft PRS Order, but treating consumers fairly and equitably may be a relevant consideration under other requirements under the draft PRS Order or general consumer law.
3.3.2	Article 22	—
3.3.3	Article 22	—
3.3.4	Article 30	—
3.3.5	—	No corresponding provision in the draft PRS Order.
3.3.6	Chapter 3 of Part 6 and Article 36	—
3.3.7	—	No corresponding provision in the draft PRS Order, but multi-factor authentication (MFA) requirements have generally been replaced with provisions on pre-contract information and express consent in Chapter 3 of Part 6.
3.3.8	—	Ditto.
3.3.9	—	Ditto.
3.3.10	—	No corresponding provision in the draft PRS Order, but provisions for conversion of one-off donations to recurring donations have generally been replaced with provisions on pre-contract information and express consent in Chapter 3 of Part 6.
3.3.11	Article 34	—

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3.3.12	Article 35	—
3.3.13	—	No corresponding requirement in the draft PRS Order, but see the requirement on merchants to keep records of consent at Article 36.
3.3.14	Articles 36 and 58	“Data retention notice” is PSA specific. Articles 36 and 58 contain requirements on records of consent and record keeping.
3.3.15	Articles 36 and 58	Ditto.
3.3.16	Articles 36 and 58	Ditto.
3.3.17	Articles 36 and 58	Ditto.
3.4.1	Articles 37 and 38	The draft PRS Order places responsibility for consumer complaints and enquiries solely on merchants and not on intermediaries.
3.4.2	Article 38(3)	Ditto.
3.4.3	Article 38(5) and 39(2)	Ditto.
3.4.4	Article 38(4)	Ditto.
3.4.5	Articles 36 and 58	Ditto.
3.4.6	—	No corresponding provision in the draft PRS Order, but other provisions in the Order impose requirements on merchants to keep consumers informed about complaints handling, e.g. articles 38(5) to (8) and 58.
3.4.7	Article 37(4)(b)(i)	The draft PRS Order places responsibility for consumer complaints and enquiries solely on merchants and not on intermediaries.
3.4.8	Article 57	—
3.4.9	—	No corresponding requirement in draft PRS Order.
3.4.10	Article 37	The draft PRS Order places responsibility for consumer complaints and enquiries solely on merchants and not on intermediaries.
3.4.11	Article 40	Article 40 imposes requirements on all PRS providers regarding vulnerable consumers in respect of all regulated activity.
3.4.12	Article 39(7)(a) and (b)	—
3.4.13	Article 39(3)	The draft PRS Order places responsibility for refunds solely on merchants and not on intermediaries.
3.4.14	Article 39(7)(a)	Redrafted so that refunds must be paid to the consumer without undue delay and within 14 calendar days (and not working days).

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3.4.15	—	No corresponding requirement in the draft PRS Order. As noted above, the Order places responsibility for refunds solely on merchants.
3.4.16	Articles 38(2), 38(7), 39(3) and 39(7)(c)	—
3.5.1	Articles 10(1)(b) and 40	—
3.5.2	Article 40	—
3.5.3	Article 40	—
3.5.4	Articles 49 and 50	—
3.5.5	Article 23	—
3.5.6	—	No corresponding requirement in the draft PRS Order.
3.5.7	Article 51(3)	—
3.5.8	Articles 49 and 50	Services added to age verification requirements in the draft PRS Order include virtual chat services and a subscription service comprised in a sexual content service. Consumer credit services are not defined in the draft PRS Order and not subject to age verification requirements.
3.5.9	Article 25	Ditto.
3.5.10	Articles 49 and 50.	There is no equivalent to paragraph 3.5.10(b) in the draft PRS Order.
3.5.11	Article 50(5)	Whilst the Order deals with the refunding aspect, there is no corresponding requirement in the Order about blocking the consumer from using the service.
3.6.1	—	No corresponding requirement in the Order. PRS providers remain subject to general data protection and privacy laws.
3.6.2	—	Ditto.
3.6.3	—	Ditto.
3.7.1	Article 41	—
3.7.2	Article 41	—
3.7.3	Article 41	—
3.8.1	Article 10(1)(a)	—
3.8.2	Article 10(2)(a) and Schedule 1	—

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3.8.3	Article 10(1)(b) and Schedule 1	Redrafted to require PRS providers to also provide details of a generally authorised person at the point of registering with Ofcom who is authorised to act on behalf of the provider in respect of various requirements under draft PRS Order.
3.8.4	Article 10(1)(b), Article 10(3), Article 12, and Schedule 1	—
3.8.5	Schedule 1(12)	The requirement to provide information about the means by which the service is used applies solely to merchants.
3.8.6	Article 10(3)	—
3.8.7	—	No corresponding requirement in the draft PRS Order. Instead, PRS providers are required to notify Ofcom of any changes to information provided upon registration.
3.8.8	—	No corresponding requirement in the draft PRS Order. Ofcom will not charge any separate registration fee or registration renewal fee but Ofcom’s costs in dealing with registration will be recovered as part of an administered charge (see article 14).
3.8.9-3.8.10	Article 11	The draft PRS Order only provides a registration exemption for merchants who operate through a sole intermediary or an intermediary app store.
3.8.11	—	PSA specific.
3.8.12	—	PSA specific.
3.8.13	Article 12	—
3.8.14	—	No corresponding requirement in the draft PRS Order. However, a PRS provider must notify Ofcom of any changes to information provided upon registration (see article 10(3)).
3.8.15	—	PSA specific.
App store exemption document Sole intermediary exemption document	Article 11	This provision incorporates PSA’s existing registration exemptions for app stores and sole intermediaries, with some new preconditions which will need to be met by intermediaries in order for these exemptions to apply.

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3.9.1	Article 17	The specific due diligence requirement has been replaced by setting out risk assessments requirements before entering into an arrangement in respect of a controlled PRS.
3.9.2	Article 17	—
3.9.3	—	No corresponding requirement in the draft PRS Order – article 17 sets out the information to be considered when conducting a risk assessment prior to entering into an arrangement in respect of a controlled PRS.
3.9.4	Article 15	—
3.9.5	—	No corresponding requirement in the draft PRS Order. However, PRS providers are required under article 17 to conduct a risk assessment before entering into an arrangement in respect of a controlled PRS.
3.9.6	—	No corresponding requirement in the draft PRS Order, but see article 17 which will apply.
3.9.7	Article 17(7)	This requirement applies to all PRS providers and not solely network operators and intermediaries.
3.9.8	Article 18	Redrafted to require network operators to suspend (and not suspend or terminate) arrangements with intermediaries where certain conditions are met.
3.9.9	Article 19	Redrafted to require intermediaries to suspend (and not suspend or terminate) arrangements with merchants where certain conditions are met. No reference to third-party consent verification providers.
3.9.10	—	No corresponding requirement in the draft PRS Order. However, there is an information gathering power for Ofcom in article 57.
3.9.11	Article 17(3)(d)	Redrafted to apply to all PRS providers and not solely network operators and intermediaries.
3.9.12	—	No corresponding requirement in the draft PRS Order. However, article 17(3)(d) will apply to require PRS providers to consider sub-contractors when conducting a risk assessment.
3.9.13	—	No corresponding requirement in the draft PRS Order, but see article 17 which will apply.
3.9.14	Article 17(8)	No corresponding requirement in the draft PRS Order to have regard to PSA’s guidance, since this is PSA specific. However, PRS providers must have regard to the factors set out in article 17(3) in reviewing the risk assessment - see article 17(8)(b).

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3.9.15	—	No corresponding requirement in the draft PRS Order. However, there is an information gathering power for Ofcom in article 57 which can be used for the same purposes.
3.10.1	—	No corresponding requirement in the draft PRS Order, but see article 21(3) which will apply.
3.10.2	Article 21(3)	Redrafted to require the appointed person to be a member of senior management.
3.10.3	—	PSA specific.
3.10.4	Article 21	Redrafted to refer to the intermediary’s platform for operator billing and to require an intermediary only to send results of security testing to the relevant network operator where this is requested. The reference to the NCSC Approved List has not been reflected, because it is an ambulatory reference.
3.10.5	Article 21(4)(b)	Redrafted so that the person appointed under article 21(3) is not to approve the intermediary’s security testing, unless any risk of a security compromise that is identified is materially reduced by the intermediary.
3.10.6	—	No corresponding requirement in the draft PRS Order, but see article 21(7) which will apply.
3.10.7	—	No corresponding requirement in the draft PRS Order. However, there is an information gathering power for Ofcom in article 57 which can be used for the same purposes.
3.10.8	Article 18	Redrafted to require network operators to suspend (and not suspend or terminate) arrangements with intermediaries where certain conditions are met.
3.10.9	Article 19	Redrafted to require intermediaries to suspend (and not suspend or terminate) arrangements with merchants where certain conditions are met. No reference to third-party consent verification providers.
3.10.10	—	No corresponding requirement in the draft PRS Order. However, there is an information gathering power for Ofcom in article 57 which can be used for the same purposes.
3.10.11	—	Ditto.
3.10.12	—	No corresponding requirement in the draft PRS Order.
3.10.13	—	No corresponding requirement in the draft PRS Order, but article 21 will achieve the same effect.

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3.11.1	—	No corresponding requirement in the draft PRS Order – society lottery services not subject to specific requirements in the Order.
3.11.2	—	Ditto.
3.11.3	—	Ditto.
3.12.1	Article 53	This is a more general requirement than just promotion and marketing.
3.12.2	—	No corresponding requirement in the draft PRS Order.
3.13.1	—	Ditto.
3.13.2	—	No corresponding requirement in the draft PRS Order, but see relevant provisions on pre-contract information in Chapter 3 of Part 6, and Schedule 3 (see especially paragraph 2(d)), which will apply.
3.13.3	Article 45(2)	—
3.13.4	Article 44(2)(b)	—
3.13.5	Article 47	—
3.13.6	Article 44(3)	This has been redrafted more widely than referring solely to a phone call.
3.13.7	—	No corresponding requirements in the draft PRS Order, but see articles 44 and 47 which will apply.
3.13.8	Article 43	—
3.13.9	Article 45(3)	—
3.13.10	Article 46	—
3.13.11	—	No corresponding requirement in the draft PRS Order, but see article 45(2) and (3) which will apply.
3.13.12	—	No corresponding requirement in the draft PRS Order.
3.14.1	—	No corresponding requirement in the draft PRS Order. However, see article 25 for promotion and marketing requirements and relevant provisions on pre-contract information in Chapter 3 of Part 6 of the Order, and Schedule 3, which will apply.
3.14.2	Article 54	—
3.15.1	—	No corresponding requirement to record or monitor calls in the draft PRS Order.
3.15.2	—	Ditto.
3.15.3	—	Ditto.
3.15.4	—	Ditto.

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3.16.1	—	No corresponding requirement in the draft PRS Order. However, see relevant provisions on pre-contract information in Chapter 3 of Part 6 of the Order, and Schedule 3 (see especially paragraph 2(c) and its reference to digital content), which will apply.
3.16.2	—	Ditto.
4: Supervision		
4.1.1 to 4.6.6	—	PSA specific.
5: Engagement and enforcement		
5.1.1 to 5.11.5	—	PSA specific, but see Part 10 of the draft PRS Order for Ofcom’s enforcement powers and Schedule 4 for transitional arrangements.
6: Additional powers, responsibilities and obligations		
6.1.1 to 6.1.6	—	PSA specific. There is an information gathering power for Ofcom in article 57 which will apply.
6.2.1	Article 55	Redrafted so that the requirement does not apply in respect of payments relating to society lottery services.
6.2.2	—	No corresponding requirement in the draft PRS Order.
6.2.3 to 6.2.4	—	Ditto.
6.2.5	—	No corresponding requirement in the draft PRS Order. However, there is an information gathering power for Ofcom in article 57 which can be used for the same purposes.
6.2.6	Article 56	A minimum record-keeping period under article 58 will apply, as will the information gathering power under article 57.
6.2.7 to 6.2.8	—	PSA specific.
6.2.9 to 6.2.10	—	Ditto.
6.2.11	—	Ditto.
6.2.12	Article 24	Redrafted to apply to all PRS providers and not only merchants.
6.2.13	—	PSA specific.
6.2.14	—	No corresponding requirements in the draft PRS Order, but see articles 32, 48, 51, 52 and 53.
6.2.15	—	Ditto.
6.2.16	—	Ditto.

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6.2.17	—	Ditto.
6.2.18	—	Ditto.
6.2.19	—	Ditto.
6.2.20 to 6.2.21	—	PSA specific.
6.3.1 to 6.3.3	—	PSA specific.
6.4.1 to 6.4.5	—	PSA specific.
7: Funding arrangements		
7.1.1 to 7.6.7	—	PSA specific, but see Part 3 of the draft PRS Order which contains a new requirement to pay Ofcom’s administrative charges.
D1: Definitions		
D.1.1	—	References in the draft PRS Order to a “premium rate service” (PRS) are automatically to be construed under the Order in accordance with section 120(7) of the Act: see section 151(1) of the Act and section 11 of the Interpretation Act 1978.
D.1.2	Article 3(1)	The PRS Condition currently includes a service that is Internet dialler software operated as one of several categories of PRS falling within the meaning of a “Controlled Premium Rate Service”. However, that specific category of service has been removed in the definition of a “controlled PRS” for the purposes of the draft PRS Order. Also, references to a “call” in the definition of a “Controlled Premium Rate Service” under the PRS Condition have been replaced with references to an “electronic communication” (as defined in article 2) in the definition of a “controlled PRS” for the purposes of the draft PRS Order.
D.1.3	—	The expressions of “General conditions of entitlement” and “Total metering and billing system” are not used in the draft PRS Order.
D.1.4	Article 9(5)	The expression of a “network operator” has been defined to align with the provisions in section 120(10) and 120(11) of the Act.
D.1.5	—	Given the new definition of a “network operator” in article 9(5), it is unnecessary to provide any specific provision dealing with PRS accessed through the use of Voice of Internet Protocol (VoIP).

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D.1.6	—	Whether a person will be treated in law as an intermediary or a network operator will depend on whether the definitions in article 9(2) or article 9(5) are met in relation to the person in question.
D.1.7	—	Whether a person will be treated in law as an intermediary or a merchant will depend on whether the definitions in article 9(2) or article 9(4) are met in relation to the person in question.
D.1.8	Article 9(2)	The expression of an “intermediary” has been defined to align with the provisions in section 120(9)(c) and (d) of the Act.
D.1.9	Article 9(4)	The expression of an “merchant” has been defined to align with the provision in section 120(9)(a) of the Act.
D.1.10	—	Whether a person will be treated in law as an intermediary or a merchant will depend on whether the definitions in article 9(2) or article 9(4) are met in relation to the person in question.
D.2.1	Article 2	[“Act”]
D.2.2	—	While Part 10 of the draft PRS Order deals with enforcement, it contains no provision about an “action plan” following a warning letter. Ofcom’s Regulatory Enforcement Guidelines for investigations published on 12 December 2022 set out how Ofcom will approach enforcement of regulatory requirements, which Guidelines will apply to enforcement also for the purposes of the draft Order.
D.2.3	—	The expression of “adjudication by consent” is PSA specific. Ofcom’s settlement procedure for regulatory investigations is explained in Section 6 of Ofcom’s Regulatory Enforcement Guidelines for investigations published on 12 December 2022.
D.2.4	—	The expression of “administrative charge” is PSA specific. However, Part 3 of draft PRS Order contains a new requirement to pay Ofcom’s administrative charges.
D.2.5	Article 50	[“age verification”]
D2.6	—	The expression of “associated individual” is not used in the draft PRS Order as such. However, the Order refers to two related concepts covering similar ground. Firstly, various provisions in the Order refer to “senior management” (as defined in article 10). Secondly, they also refer to a “generally authorised person” (as defined in article 10).

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D.2.7	—	The expression of “auto-populated field” is not used in the draft PRS Order.
D.2.8	—	The expression of “best practice information” is PSA specific.
D.2.9	—	The expression of “biometric technology” is not used in the draft PRS Order.
D.2.10	—	The expression of “the Board” is PSA specific.
D.2.11	—	The expression of “broadcast services” is not used in the draft PRS Order.
D.2.12	—	The expression of “call” in Code 15 corresponds to the new expression of “electronic communication” defined in article 2 of the Order. The Order also contains a definition of a “call”, but it is limited to a connection established by means of a public electronic communications service allowing speech communication between two or more persons in real time: see also article 2.
D.2.13	—	The expression of “Call TV Quiz Services” is not used in the draft PRS Order.
D.2.14	—	The expression of “CAP” is PSA specific.
D.2.15	Article 5	[“chatline service”]
D.2.16	Article 23	[“children”/ “child”]
D.2.17	Articles 31 and 32	The expression of “complaint” is not defined in the draft PRS Order, but articles 31 and 32 describe the requirements for complaints handling and complaint is to be construed by its ordinary meaning.
D.2.18	—	The expression of “compliance audit” is PSA specific.
D.2.19	—	The expression of “confidential information” is PSA specific. As noted above, Ofcom will be required to handle any information obtained under the Order in accordance with the restrictions on disclosure of information set out in section 393 of the Act.
D.2.20	—	The expression of “connected company or person” is not used in the draft PRS Order.
D.2.21	—	The expression of “coordinated vulnerability disclosure scheme” is not used in the draft PRS Order.
D.2.22	Article 53(3)	The expression of “counselling service” is not defined in the draft PRS Order, but is caught by the definition of “professional advice service”.
D.2.23	—	The expression of “consumer credit services” is not used in the draft PRS Order.

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D.2.24	—	The expression of “data controller” is not used in the draft PRS Order.
D.2.25	—	The expression of “data retention notice” is PSA specific.
D.2.26	—	The expression of “decision” is PSA specific.
D.2.27	—	The expression of “DDRAC” is not used in the draft PRS Order. However, Part 4 of the Order imposes corresponding requirements.
D.2.28	—	The expression of “e-Commerce Directive” is not used in the draft PRS Order.
D.2.29	—	The expression of “e-Commerce Regulations” is not used in the draft PRS Order.
D.2.30	—	References in the Order to an “electronic communications network” automatically has the meaning given by section 32 of the Act: see section 405(1) of the Act and section 11 of the Interpretation Act 1978.
D.2.31	—	References in the Order to an “electronic communications service” automatically has the meaning given by section 32 of the Act: see section 405(1) of the Act and section 11 of the Interpretation Act 1978.
D.2.32	—	The expression of “enforcement notice” is PSA specific.
D.2.33	—	The expression of “enquiry letter” is PSA specific.
D.2.34	—	The expression of “exemption” is PSA specific to the PSA. However, article 11 of the Order contains exemptions from the new requirement to register with Ofcom.
D.2.35	—	The expression of “formal notification” is PSA specific.
D.2.36	—	The expression of “Guidance” is PSA specific.
D.2.37	—	The expression of “independence” is not used in the draft PRS Order.
D.2.38	Article 7	[“ICSS”]
D.2.39	—	The expression of “Information Society Service” is not used in the draft PRS Order.
D.2.40	—	The expression of “interim measures” is PSA specific. However, article 64 of the Order contains a corresponding power for Ofcom to impose interim measures.
D.2.41	—	The expression of “interim enforcement notice is PSA specific.
D.2.42	Article 25	[“Live entertainment service”]

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D.2.43	—	The expression of “MO SMS” is not used in the draft PRS Order. Instead, the Order refers simply to a “short message service” (or “SMS”) as defined in article 2.
D.2.44	—	The expression of “MT SMS” is not used in the draft PRS Order. Instead, the Order refers simply to a “short message service” (or “SMS”) as defined in article 2.
D.2.45	—	The expression of “multi-factor authentication” is not used in the draft PRS Order.
D.2.46	Article 2	[“OFCOM”]
D.2.47	—	The concept of “online gateway” is not used in the draft PRS Order.
D.2.48	—	The expression of “originating network operator” is not used in the draft PRS Order. Instead, the Order refers to “originating communications provider” as defined in article 14(7)(c).
D.2.49	—	References in the Order to a “person” are automatically to be construed in accordance with Schedule 1 to the Interpretation Act 1978 (see its section 5) as including a body of persons corporate or unincorporate.
D.2.50	—	The expressions “personal data” and “data controller” are not used in the draft PRS Order.
D.2.51	—	The expression of “person with significant influence or control” is not used in the draft PRS Order.
D.2.52	Article 11(4)(f)	[“PSA”]
D.2.53	—	The expression “PSA’s register” is PSA specific.
D.2.54	—	The expression “prior permission” is PSA specific.
D.2.55	—	The expression of “Procedures” is PSA specific.
D.2.56	Article 92	[“PRS provider”]
D.2.57	Article 53(3)	[“Professional Advice Service”]
D.2.58	—	The expressions “promotion” and “promotional material” will be construed within their ordinary meaning and as referred to in section 122 of the Act.
D.2.59	Article 34(7)	[“Recurring donation service”]
D.2.60	—	The expression “refund” is not defined in the draft PRS Order, but it is referred to in Part 6 of the Order and to be construed with its ordinary meaning.
D.2.61	—	The expression “Relevant Party” is PSA specific.
D.2.62	Article 54(4)(a)	[“Remote Gambling Service”]

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D.2.63	—	The expression “Retention” is not used in the draft PRS Order, but corresponding requirements apply, such as in article 58.
D.2.64	—	The expression of “Requirements” is PSA specific.
D.2.65	—	The expression of “Service charge” is not used in the draft PRS Order.
D.2.66	Article 6	[“Sexual Content Service”]
D.2.67	—	The term “single point of contact” (“SPOC”) is not used in the draft PRS Order
D.2.68	—	The expression of “Skilled persons reports” is PSA specific.
D.2.69	Article 55(4)(b)	[“Society Lottery Service”]
D.2.70	—	The expression of “Service-specific Requirements” is not used in the draft PRS Order.
D.2.71	—	The expression of “Standards” is not used in the draft PRS Order.
D.2.72	Article 8	[“Subscription Service”]
D.2.73	—	The expression of “Supervision” is PSA specific.
D.2.74	—	The expression of “suspension direction” is PSA specific, but see similar directions in Part 10 of the draft PRS Order for interim measures and serious contraventions.
D.2.75	—	The expression of “terminating network operator” is not used in draft PRS Order.
D.2.76	—	The expression of “thematic review” is PSA specific.
D.2.77	—	The expression of “Tribunals” is PSA specific to the PSA.
D.2.78	Article 2	[“VAT”]
D.2.79	Article 31(5)(g)	[“Virtual Chat Service”]
D.2.80	Article 40	[“vulnerable consumer”]
D.2.81	—	The expression of “warning letter” is PSA specific.
D.2.82	—	The expression of “withhold direction” is PSA specific.
Annex 1: Specified service charges and duration of calls		
1.1-1.3	—	PSA specific.
1.4 – 1.6	Article 48	—
1.7	Article 32	—

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1.8-1.9	—	No corresponding requirements in the draft PRS Order, but counselling services are incorporated into the definition of professional advice services.
1.10-1.11	Article 51	Redrafted to remove reference to ‘call’ and also to incorporate requirement at paragraph 3.5.7 of Code 15.
1.12-1.13	Article 29, Article 52 and Schedule 3	—
<i>Annex 2: Due Diligence</i>		
	—	No corresponding requirement in the draft PRS Order – see article 17.
<i>Annex 3: Technical standards</i>		
	—	No corresponding requirement in the draft PRS Order – see article 21.

PART 2 – NEW PROVISIONS AND DEFINITIONS UNDER DRAFT PRS ORDER

<i>New provisions in the Order</i>		
—	Article 12	New provision imposing a duty on Ofcom to establish and maintain a register for the publication of information given to Ofcom.
—	Article 13 and Schedule 2	New provision and Schedule setting out transitional registration arrangements for PRS providers.
—	Article 14	New provision imposing a duty on PRS providers to pay Ofcom’s administrative charges for regulating the sector.
—	Article 20	New deeming provision applying to arrangements in respect of a controlled PRS which met the relevant corresponding requirements of Code 15.
—	Chapter 3 of Part 6 and Schedule 3	New provisions setting out pre-contract information and express consent needed in relation to contracts with consumers.
—	Article 49	New provision imposing prohibition on providing certain services to persons under the age of 18.
—	Article 53	New provision requiring that merchants ensure that individuals employed or engaged in a professional advice service have the relevant qualifications and experience.

PART 1 – CORRELATION OF PROVISIONS IN CODE 15 WITH THE DRAFT PRS ORDER

—	Article 57	New information gathering power for Ofcom.
—	Article 58	New record-keeping requirements but seeking to maintain PSA’s current approach to retaining records.
—	Part 10	New provisions concerning Ofcom’s powers of enforcement under the draft PRS Order.
—	Article 68 and Schedule 4	New provisions concerning transitional arrangements for enforcement under the draft PRS Order.
<i>New definitions in the Order</i>		
—	Article 2/ “2005 Act”	New definition.
—	Schedule 3 paragraph 1(a) / “access charge”	New definition linked to pre-contract information.
—	Article 11(4)(a) / “app store”	New definition.
—	Article 58(2)(a)/ “applicable period”	New definition linked to record-keeping.
—	Article 17(10)(a)/ “appropriate intervals”	New definition linked to risk assessment requirements.
—	Article 31(5)(a) / “appropriate medium”	New definition.
—	Article 54(4)(b) / “betting tipster service”	New definition.
—	Article 23(3)(a) / “bill”	New definition.
—	Article 23(3)(b) / “bill-payer”	New definition.
—	Art 2 / “call”	New definition.
—	Art 14(7)(a) / “charging year”	New definition (<i>cf.</i> expression of “financial year” in 7.1.1(c) of Code 15).
—	Article 23(3)(d) / “children’s service”	New definition.
—	Art 11(4)(b) / “Code 15”	New definition.
—	Article 42(1) / “competition and voting service”	New definition.

PART 1 – CORRELATION OF PROVISIONS IN CODE 15 WITH THE DRAFT PRS ORDER

—	Article 21(10)(a)/ “connected security compromise”	New definition.
—	Article 26(2)/ “controlled PRS contract”	New definition.
—	Schedule 3 paragraph 1(b)/ “digital content”	New definition linked to pre-contract information.
—	Article 2 / “electronic communication”	New definition.
—	Article 25(4)(c) 3 “excluded content”	New definition linked to live entertainment service definition.
-	Article 31(5)(h) / “excluded service”	New definition linked to new virtual chat service definition.
—	Schedule 4 paragraph 3(2)/ “former panel”	New definition linked to transitional arrangements.
—	Schedule 4 paragraph 3(2)/ “former sole adjudicator”	New definition linked to transitional arrangements.
—	Schedule 3 paragraph 1(c)/ “goods”	New definition linked to pre-contract information.
—	Article 35(6)(a)/ “last cancellation date”	New definition linked to reminder notices of termination of subscription contracts.
—	Schedule 4 paragraph 3(5)/ “lawyer”	New definition linked to transitional arrangements.
—	Article 14(7)(b) / “liable network operator”	New definition linked to funding.
—	Article 22(7)(a)/ “material information”	New definition linked to misleading information.
—	Article 21(10)(b) / “mobile phone service”	New definition (based on section 124S(10) of the Act).

PART 1 – CORRELATION OF PROVISIONS IN CODE 15 WITH THE DRAFT PRS ORDER

—	Art 3(8)(a) / “National Telephone Numbering Plan”	New definition (meaning as in section 56(1) of the Act).
—	Schedule 4 paragraph 3(3)/ “new panel”	New definition linked to transitional arrangements.
—	Schedule 4 paragraph 3(3) / “new sole adjudicator”	New definition linked to transitional arrangements.
—	Art 11(4)(c) / “online facility”	New definition linked to registration exemption.
—	Article 11(4)(d) / “operator”	New definition linked to registration exemption.
—	Article 21(10)(c) / “operator billing”	New definition.
—	Art 14(7)(c) / “originating communications provider”	New definition (<i>cf.</i> expression of “originating network operator” in D.2.47 of Code 15).
—	Art 14(7)(d) / “outpayments”	New definition (<i>cf.</i> expression of “outpayments” in 7.1.1(a) of Code 15).
—	Article 21(10)(d) / “payment platform”	New definition linked to systems.
—	Article 3(8)(b) / “premium rate number”	New definition.
—	Article 56(3)/ “PRS number”	New definition linked to Network operator record-keeping requirements.
—	Article 11(4)(b) / “previously exempted merchant”	New definition linked to registration exemption.
—	Article 9(10)/ “provides”	New definition linked to provision of PRS.
—	Art 14(7)(e) / “PRS revenue”	New definition (<i>cf.</i> expression of “outpayments” in 7.1.1(b) of Code 15).
—	Article 9(12)/ “regulated activity”	New definition.

PART 1 – CORRELATION OF PROVISIONS IN CODE 15 WITH THE DRAFT PRS ORDER

—	Schedule 4 paragraph 1(a)/ “relevant approved code”	New definition.
—	Article 17(4)/ “relevant compliance history”	New definition linked to risk assessment requirements.
—	Schedule 4 paragraph 1(b)/ “relevant enforcement authority”	New definition.
—	Art 14(7)(f) / “relevant calendar year”	New definition.
—	Article 14(7)(g) / “relevant expenditure”	New definition (based on section 122(4) of the Act).
—	Article 59(4) / “relevant investigation”	New definition.
—	Article 21(10)(e) / “relevant network operator”	New definition linked to security testing.
—	Article 55(4)(a)“relevant payments”	New definition linked to network operator retention of payments.
—	Article 64(11) / “relevant payments”	New definition linked to interim measures.
—	Article 66(11) / “relevant payments”	New definition linked to serious contravention.
—	Article 11(4)(g) / “relevant period”	New definition linked to registration exemption.
—	Article 58(2)(b) / “relevant record”	New definition linked to record-keeping.
—	Article 11(4)(h) / “relevant record”	New definition linked to registration exemption.
—	Article 21(2) / “relevant security testing”	New definition.

PART 1 – CORRELATION OF PROVISIONS IN CODE 15 WITH THE DRAFT PRS ORDER

—	Article 3(8)(c) / “relevant telephone number”	New definition.
—	Article 8(5)(a)/ “relevant threshold service”	New definition linked to definition of subscription service.
—	Article 21/ “security compromises”	New definition.
—	Article 10(5) / “senior management”	New definition.
—	Article 31(5)(b) / “SMS”	New definition. In contrast to the expressions of “MO SMS” and “MT SMS” in Code 15, the expression of “SMS” in the Order does not distinguish between the origination and termination of messages.
—	Article 40(5)(b)/ “specific characteristic, circumstance or need”	New definition linked to vulnerable consumer.
—	Article 41(4) / “specified characteristics”	New definition linked to harmful material.
—	Article 8(5)(b) / “subscription contract”	New definition.
—	Article 18(4)(b) / “systems”	New definition.
—	Article 4/ “threshold service”	New definition.
—	Article 22(7)(b)/ “transactional decision”	New definition linked to misleading information.
—	Article 44(2)(b) / “valid ticket of entry”	New definition linked to competition and voting service.
—	Art 2 / “working day”	New definition.

A9. Notification: Proposed Modifications to the PRS Condition

NOTIFICATION OF PROPOSED MODIFICATIONS TO THE PREMIUM RATE SERVICES (PRS) CONDITION PURSUANT TO SECTION 120A OF THE COMMUNICATIONS ACT 2003

BACKGROUND

- (A) Since Ofcom’s inception on 29 December 2003, Ofcom has had the overall responsibility for ensuring that certain premium rate services as defined in section 120(7) of the Act (“**PRS**”) are being appropriately regulated to ensure that consumers are adequately protected from harms that may arise from the misuse of PRS.
- (B) Ofcom has taken that overall responsibility by imposing a regulatory condition under section 120 of the Act. On 19 December 2018, following consultation, Ofcom published a statement¹⁶⁶ entitled ‘*Review of the Premium Rate Services Condition – Statement on extending the definition of Controlled Premium Rate Services to include all Information, Connection or Signposting Services*’ setting out its decision to modify that regulatory condition. That statement contains the latest version of the condition for the time being in force (“**PRS Condition**”).
- (C) Two categories of providers are currently bound by the PRS Condition, namely ‘Communications Providers’ and ‘Controlled Premium Rate Service Providers’. Under the PRS Condition, they are required to comply with “...*(a) directions given in accordance with an Approved Code by the Enforcement Authority and for the purposes of enforcing the provisions of the Approved Code; and (b) if there is no Approved Code, the provisions of the order for the time being in force under section 122 of the Act.*”
- (D) In that regard, the Phone-paid Services Authority (“**PSA**”) has made a code of practice for the purposes of its day-to-day regulation of PRS. The PSA’s code of practice for the time being in force (since 5 April 2022) is entitled ‘Code of Practice 2021 (Fifteenth Edition)’¹⁶⁷ (known as “**Code 15**”). On 20 October 2021, Ofcom approved Code 15 under section 121 of the Act.¹⁶⁸

¹⁶⁶ https://www.ofcom.org.uk/_data/assets/pdf_file/0015/131046/Statement-Review-of-the-premium-rate-services-condition.pdf

¹⁶⁷ [PSA Code of Practice 15th.ashx \(psauthority.org.uk\)](https://www.psa.gov.uk/psa_code_of_practice_15th.ashx)

¹⁶⁸ https://www.ofcom.org.uk/_data/assets/pdf_file/0025/226951/statement-approval-of-phone-paid-services-authority-code-of-practice-fifteenth-edition.pdf

- (E) On 24 May 2022, Ofcom announced¹⁶⁹ that, subject to further approval by the Department for Science, Innovation and Technology, responsibility for the day-to-day regulation of PRS is likely to be transferred to Ofcom. Accordingly, Ofcom is now proposing to take over the PSA’s regulation by making an order under section 122 of the Act. Ofcom publishes notice under section 403(4) of the Act of the proposed order in the accompanying consultation document.
- (F) In light of that proposed order, Ofcom is proposing in this Notification to make modifications to the PRS Condition as part of the new package of measures to regulate PRS going forwards.

PROPOSALS

1. Ofcom hereby proposes, in accordance with section 120A (and pursuant to its powers under section 120) of the Act, to modify the PRS Condition in order to make provisions for matters set out in that section 120.
2. The proposed modifications to the PRS Condition are—
 - (a) specified in the Schedule to this Notification, by replacing the text in the PRS Condition in its entirety with the text specified in that Schedule; and
 - (b) proposed to come into force on the day on which any order made by Ofcom under section 122 of the Act comes into force.
3. The effect of, and Ofcom’s reasons for making, these proposals are set out in the accompanying consultation document.

OFCOM’S DUTIES AND LEGAL TESTS

4. Ofcom is satisfied that these proposals satisfy the test in section 47 of the Act for modifying conditions, which test applies to these proposals by virtue of section 120(5) of the Act.
5. In making these proposals, Ofcom has considered and acted in accordance with its general duties set out in section 3 of, and the six requirements set out in section 4, of the Act. To the extent that these proposals are relevant to telecommunications, Ofcom has also had regard to the Statement of Strategic Priorities in making the proposals set out in this Notification.

MAKING REPRESENTATIONS

6. Representations may be made to Ofcom about the proposals set out in this Notification by no later than **5pm on 23 January 2024**.
7. Copies of this Notification and the accompanying consultation document have been sent to the Secretary of State in accordance with section 120A(7), and section 24A, of the Act.
8. By virtue of section 120A(5) of the Act, Ofcom may give effect to these proposals, with any modifications that appear to Ofcom to be appropriate, after—
 - (a) considering every representation about these proposals made to Ofcom within the period specified in **paragraph 6** of this Notification; and
 - (b) having regard to every international obligation of the United Kingdom (if any) which has been notified to Ofcom for the purposes of section 120A(5)(b) by the Secretary of State.

¹⁶⁹ <https://www.ofcom.org.uk/news-centre/2022/ofcom-to-take-on-responsibility-for-regulating-phone-paid-services>

INTERPRETATION

9. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them in this Notification and otherwise any word or expression shall have the same meaning as it has been ascribed for the purposes of Ofcom's functions under Chapter 1 of Part 2 of the Act, including (in particular) section 120.
10. In this Notification—
- (a) "**Act**" means the Communications Act 2003 (c.21);
 - (b) "**Ofcom**" means the Office of Communications;
 - (c) "**Statement of Strategic Priorities**" means the Statement of Strategic Priorities for telecommunications, the management of radio spectrum, and postal services designated by the Secretary of State for the purposes of section 2A of the Communications Act 2003; and
 - (d) "**PRS Condition**" has the meaning given to it in **recital (B)** to this Notification.
11. For the purpose of interpreting this Notification—
- (a) headings and titles shall be disregarded;
 - (b) expressions cognate with those referred to in this Notification shall be construed accordingly; and
 - (c) the Interpretation Act 1978 (c. 30) shall apply as if this Notification were an Act of Parliament.
12. The Schedule to this Notification shall form part of this Notification.

Signed by:



Cristina Luna-Esteban

Director of Consumer Protection

A person duly authorised by Ofcom under paragraph 18 of the Schedule to the Office of Communications Act 2002

21 November 2023

SCHEDULE

PREMIUM RATE SERVICES (PRS) CONDITION

Compliance with the provisions of the order for the time being in force under section 122 of the Act

1. Every PRS provider must comply with the provisions of the order for the time being in force under section 122 of the Act.

Compliance with directions given in accordance with an approved code by the enforcement authority and for the purpose of enforcing its provisions

2. Every Communications Provider and Controlled Premium Rate Service Provider must comply with directions given in accordance with an approved code by the enforcement authority and for the purpose of enforcing its provisions. For the avoidance of doubt, this requirement continues to apply notwithstanding the withdrawal by Ofcom of its approval for an approved code in a notification given in accordance with section 121(7) of the Act.

Interpretation

3. For the purposes of interpreting this Schedule—
 - (a) “**Act**” means the Communications Act 2003 (c.21);
 - (b) “**Communications Provider**” has the meaning given to it by paragraph 2(c) of the Schedule to the Previous PRS Condition Notification;
 - (c) “**Controlled Premium Rate Service Provider**” has the meaning given to it by paragraph 2(g) of the Schedule to the Previous PRS Condition Notification;
 - (d) “**Ofcom**” means the Office of Communications;
 - (e) “**Previous PRS Condition Notification**” means the notification of a modification to the Premium Rate Services Condition under section 120A of the Act, as published on 19 December 2018 by Ofcom in Annex 2 to its statement entitled ‘Review of the Premium Rate Services Condition – Statement on extending the definition of Controlled Premium Rate Services to include all Information, Connection or Signposting Services’;
 - (f) “**PRS provider**” has the meaning given to it by the order for the time being in force under section 122 of the Act;
 - (g) except in so far as the context otherwise requires, otherwise any word or expression in this Schedule shall have the same meaning as it has been ascribed for the purposes of Chapter 1 of Part 2 of the Act, including (in particular) section 120 of the Act;
 - (h) headings and titles shall be disregarded;
 - (i) expressions cognate with those referred to in this Schedule shall be construed accordingly; and
 - (j) the Interpretation Act 1978 (c. 30) shall apply as if this Schedule were an Act of Parliament.

A10. Notification: Proposed Withdrawal of the Approved Code

NOTIFICATION OF PROPOSED WITHDRAWAL OF THE APPROVED CODE FOR THE PURPOSES OF REGULATING PREMIUM RATE SERVICES PURSUANT TO SECTION 121(6) OF THE COMMUNICATIONS ACT 2003

BACKGROUND

- (A) Since Ofcom’s inception on 29 December 2003, Ofcom has had the overall responsibility for ensuring that certain premium rate services as defined in section 120(7) of the Act (“**PRS**”) are being appropriately regulated to ensure that consumers are adequately protected from harms that may arise from the misuse of PRS.
- (B) Ofcom has taken that overall responsibility by imposing a regulatory condition under section 120 of the Act. On 19 December 2018, following consultation, Ofcom published a statement¹⁷⁰ entitled ‘*Review of the Premium Rate Services Condition – Statement on extending the definition of Controlled Premium Rate Services to include all Information, Connection or Signposting Services*’ setting out its decision to modify that regulatory condition. That statement contains the latest version of the condition for the time being in force (“**PRS Condition**”).
- (C) Two categories of providers are currently bound by the PRS Condition, namely ‘Communications Providers’ and ‘Controlled Premium Rate Service Providers’. Under the PRS Condition, they are required to comply with “...*(a) directions given in accordance with an Approved Code by the Enforcement Authority and for the purposes of enforcing the provisions of the Approved Code; and (b) if there is no Approved Code, the provisions of the order for the time being in force under section 122 of the Act.*”
- (D) In that regard, the Phone-paid Services Authority (“**PSA**”) has made a code of practice for the purposes of its day-to-day regulation of PRS. The PSA’s code of practice for the time being in force (since 5 April 2022) is entitled ‘Code of Practice 2021 (Fifteenth Edition)’¹⁷¹(known as “**Code 15**”). On 20 October 2021, Ofcom approved Code 15 under section 121 of the Act.¹⁷² The PSA has also made some modifications¹⁷³ to Code 15.

¹⁷⁰ https://www.ofcom.org.uk/_data/assets/pdf_file/0015/131046/Statement-Review-of-the-premium-rate-services-condition.pdf

¹⁷¹ [PSACodeofPractice15thDigital-19-10-2023.ashx \(psauthority.org.uk\)](https://www.ofcom.org.uk/_data/assets/pdf_file/0025/226951/statement-approval-of-phone-paid-services-authority-code-of-practice-fifteenth-edition.pdf)

¹⁷² https://www.ofcom.org.uk/_data/assets/pdf_file/0025/226951/statement-approval-of-phone-paid-services-authority-code-of-practice-fifteenth-edition.pdf

¹⁷³ In particular, see (i) the PSA’s statement dated 20 April 2022 for modifications that came into force on 18 May 2022: <https://psauthority.org.uk/-/media/Files/PSA/00NEW-website/Research-and->

- (E) On 24 May 2022, Ofcom announced that, subject to further approval by the Department for Science, Innovation and Technology (known as “**DSIT**”), responsibility for the day-to-day regulation of PRS is likely to be transferred to Ofcom. Accordingly, Ofcom is now proposing to take over the PSA’s regulation by making an order under section 122 of the Act. Ofcom publishes notice under section 403(4) of the Act of the proposed order in the accompanying consultation document.
- (F) In light of that proposed order, Ofcom is proposing in this Notification to withdraw its approval of Code 15. Ofcom is also consulting on proposed modifications to the PRS Condition, which are set out in the accompanying consultation document, as part of the new package of measures to regulate PRS going forwards.

PROPOSALS

1. Ofcom hereby proposes, in accordance with section 121(7) (and pursuant to its powers under section 121(6)) of the Act, to withdraw its approval of Code 15 immediately before the day on which the proposed order referred to in **recital (E)** comes into force, except for directions given in accordance with Code 15 by the PSA and for the purpose of enforcing its provisions.
2. The effect of, and Ofcom’s reasons for making, this proposal are set out in the accompanying consultation document.

OFCOM’S DUTIES

3. In making this proposal, Ofcom has considered and acted in accordance with its general duties set out in section 3 of, and the six requirements set out in section 4, of the Act. To the extent that these proposals are relevant to telecommunications, Ofcom has also had regard to the Statement of Strategic Priorities in making the proposals set out in this Notification.

MAKING REPRESENTATIONS

4. Representations may be made to Ofcom about the proposals set out in this Notification by no later than **5pm on 23 January 2024**.
5. Copies of this Notification and the accompanying consultation document have been sent to the Secretary of State in accordance with section 24A of the Act.

INTERPRETATION

6. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them in this Notification and otherwise any word or expression shall have the same meaning as it has been ascribed for the purposes of Ofcom’s functions under Chapter 1 of Part 2 of the Act, including (in particular) section 120.
7. In this Notification—
 - (a) “**Act**” means the Communications Act 2003 (c.21);
 - (b) “**Code 15**” has the meaning given to it in recital (**D**) to this Notification;
 - (c) “**Ofcom**” means the Office of Communications;

[consultations/Consultations/2022/Code-15-amendment/Consultation-statement-on-minor-changes-to-section-313-of-Code-15.ashx](https://psauthority.org.uk/consultations/Consultations/2022/Code-15-amendment/Consultation-statement-on-minor-changes-to-section-313-of-Code-15.ashx) (psauthority.org.uk) ; and (ii) other minor amendments made by the PSA on 16 March 2023: <https://psauthority.org.uk/news/news/2023/march/minor-code-amendments> (psauthority.org.uk).

- (d) “**PSA**” has the meaning given to it in recital (D) to this Notification; and
- (e) “**Statement of Strategic Priorities**” means the Statement of Strategic Priorities for telecommunications, the management of radio spectrum, and postal services designated by the Secretary of State for the purposes of section 2A of the Communications Act 2003.

8. For the purpose of interpreting this Notification—

- (a) headings and titles shall be disregarded;
- (b) expressions cognate with those referred to in this Notification shall be construed accordingly; and
- (c) the Interpretation Act 1978 (c. 30) shall apply as if this Notification were an Act of Parliament.

Signed by:

A handwritten signature in blue ink, appearing to read 'Cristina', is written over a horizontal line.

Cristina Luna-Esteban

Director of Consumer Protection

A person duly authorised by Ofcom under paragraph 18 of the Schedule to the Office of Communications Act 2002

21 November 2023