

# Code 14 Supporting Procedures

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# Contents

- Section 1 ..... 5**
  - Introducing the Supporting Procedures..... 5*
- Section 2 ..... 10**
  - Purpose of PSA investigations and enforcement..... 10*
- Section 3 ..... 11**
  - PSA’s remit and jurisdiction ..... 11*
    - How the Communications Act 2003 and our Code frames our remit ..... 11
    - Derogation process relating to providers based in the EEA..... 11
- Section 4 ..... 14**
  - Sources of intelligence and the enquiry stage..... 14*
    - Monitoring..... 14
    - Security intelligence and other enforcement bodies ..... 14
    - Consumer complaints..... 15
    - Industry reports and complaints ..... 16
- Section 5 ..... 17**
  - Signposting and referrals ..... 17*
- Section 6 ..... 18**
  - Engagement with the PSA..... 18*
- Section 7 ..... 20**
  - Allocation..... 20*
    - Allocation criteria..... 20
    - Track 1 procedure..... 22
    - Track 2 procedure..... 23
    - Closure of investigations..... 24
    - Communications to industry stakeholders ..... 24
- Section 8 ..... 26**
  - Role of the PSA’ Investigation Oversight Panel..... 26*
- Section 9 ..... 28**
  - Interim measures during investigations..... 28*
    - Withholds..... 28
    - Bond arrangements and other alternative security measures ..... 30
    - Suspension of service pending investigation and/or remedial action..... 30
    - “Without notice” procedure..... 32

Proceeding with investigations.....	32
Release of interim measures.....	33
<b>Section 10.....</b>	<b>35</b>
<i>Warning notices and settlements</i> .....	35
<b>Section 11.....</b>	<b>38</b>
<i>Adjudications by the PSA Code Adjudications Tribunal (CAT)</i> .....	38
Paper based tribunals.....	38
Preparation of the bundle and first listing of hearings.....	38
CAT considerations.....	39
Oral representations based on the papers.....	40
Expert evidence in the papers.....	41
Oral hearings.....	42
Pre-hearing process.....	43
Failure to cooperate on the part of the relevant party.....	44
The hearing.....	44
Expert representations.....	44
<b>Section 12.....</b>	<b>46</b>
<i>Assessing potential breaches and imposing sanctions</i> .....	46
The purpose of imposing sanctions.....	46
Establishing whether breaches have occurred.....	48
Establishing the severity of the breaches.....	48
Setting sanctions.....	57
<b>Section 13.....</b>	<b>61</b>
<i>Sanctions</i> .....	61
The range of sanctions available – paragraph 4.8 of the Code.....	61
A formal reprimand and/or a warning.....	61
Remedy the breach.....	62
Compliance advice and prior permission.....	62
Compliance audit.....	63
Barring of numbers and/or services.....	64
Prohibitions.....	64
Prohibiting an associated individual.....	65
Fines.....	66
Refunds – including refund directions under paragraph 4.9 of the Code.....	68
Suspension of sanctions.....	70

Administrative charges.....	70
<b>Section 14.....</b>	<b>72</b>
<i>Post-adjudications.....</i>	<i>72</i>
Publication of CAT decisions .....	72
Reviews of CAT decisions .....	73
Review of administrative charges under paragraph 4.11.5.....	75
<b>ANNEX A - Guidance on the application of the E-Commerce Directive to PRS that are information society services (“ISS”) .....</b>	<b>76</b>
<b>ANNEX B - Withhold Assessment Risk Factors .....</b>	<b>80</b>
<b>ANNEX C - Examples of “important public interest reasons” .....</b>	<b>88</b>

## Section 1

### Introducing the Supporting Procedures

1. This document aims to be a comprehensive set of supporting procedures to the Phone-paid Services Authority Code of Practice (the Code) ('Supporting Procedures') and applies equally to all parties in the premium rate services (PRS) value-chain. Phone-paid Services Authority (PSA) has established the procedures set out in this document pursuant to paragraph 4.1.4 of the Code. The purpose is to provide both transparency and clarity around the informal investigation process designed to achieve swift remedial actions, and more formal investigative procedures used by the PSA in enforcing the Code.
2. The Supporting Procedures are not a substitute for the Code (the provisions of which override those in this document in the event of conflict). The Supporting Procedures also seek to clearly set out all the details of the adjudications process, including that used by the Code Adjudication Tribunal (CAT) to determine fair and reasonable sanctions, as well as the rights of a provider (including Network operators) should it find it is the subject of a PSA investigation and/or sanction. It is essential that our processes are not only effective and capable of producing a proportionate, consistent and reasonable outcome, but that they can be clearly understood by industry.
3. The Supporting Procedures may be used by all stakeholders, including consumers, but will be particularly useful to Network operators, Level 1 providers and Level 2 providers. These are collectively defined as PRS providers in the Code. The Supporting Procedures seek to clarify our expectations as to the responsibilities of the relevant PRS providers when the PSA investigates. The Supporting Procedures may be updated from time to time and published accordingly.
4. To assist all readers we provide a glossary of terms below. These consider the various people and roles involved in the investigations process, the stages of the investigation and adjudication, and the key documents used for enforcement activities.

Glossary terms	Explanation
Action plan	Action plans are established as part of the Track 1 procedure to address and remedy breaches of the Code. They can be proposed by either the PRS provider or the PSA, but must be agreed by both parties.

Allocation	The process by which all cases are allocated to either Track 1 or Track 2. The allocation process reviews information gathered during the enquiry stage and considers whether any investigation is required or whether enforcement action is unjustified at that time. Details of this process are set out at Section 7 of the Supporting Procedures.
Allocation Team	This usually comprises the Head of Investigations and Enforcement, Head of Contact Management, an in-house lawyer and a Policy team representative. The group considers information held in relation to any complaint, monitoring work or based on engagement with relevant parties at the 'enquiry stage' of the process. The group will then follow the 'allocation' process (see below) triggering an investigation where necessary.
Code Adjudication Panel (CAP)	A panel of experts who undertake adjudicatory activity and decision making in relation to Code enforcement on behalf of the PSA. The Code Adjudication Panel (CAP) is constituted separately from the PSA Board, and its functions are governed by section 4.7 of the Code and Annex 3 to the Code.
Code Adjudication Tribunal (CAT)	Tribunals are constituted of three members of the Code Adjudication Panel (CAP). Details of the process followed in advance of, and during, Tribunals are set out in Sections 11-13 of the Supporting Procedures.
Derogation process	Where PRS providers are based in non-UK EU or EEA countries and they provide qualifying Information Society Services, there will normally be legal steps to be taken prior to allocation. Details of this derogation process are provided at Section 3 of the Supporting Procedures.
4.2.1 Direction	A direction made under Code para. 4.2.1 to require a party to supply specified information or documents to the Executive. Failure to comply with such a direction may be a breach of the Code. Information gathered as a result of 4.2.1 Directions may form part of the evidence relied upon by the Executive when preparing an Action Plan or issuing a Warning Notice.

Enquiry stage	The enquiry stage is undertaken by the Executive when it first becomes aware (either through receipt of complaints or monitoring) of potential issues with a PRS. This involves the gathering of information to assist with the Executive’s initial decision making, including allocation decision.
Executive	The PSA’s functioning executive body. This generally excludes the non-executive members of the Board of Directors. However, the Investigations Oversight Panel (IOP) generally includes both senior executive and non-executive members, and as such is included within the term “Executive”.
Interim measures	Suspensory or withhold directions which may be issued to parties in the PRS value chain prior to a final adjudication on breaches of the Code by CAT. The withholding of revenues from the Level 2 provider ensures financial security during the investigatory process; and urgent suspension of services enables the prevention of further consumer harm pending the completion of the investigation. Details of these interim measures and how they are invoked are set out in the Code at section 4.6, and in Section 9 of the Supporting Procedures.
Interim Warning Notice	Correspondence which notifies a party that PSA intends to impose interim measures, and invites the recipient to respond urgently with any representations. The Interim Warning Notice will contain appropriate information based on the stage of the investigation and the nature of the interim measure proposed. If the case progresses a full Warning Notice will be prepared in the usual way later in the investigation.
Investigation Oversight Panel (IOP)	An internal panel composed of senior executives and non-executive Board members that will consider matters of case management and quality control during the progress of investigations. Its role is explained at Section 8 of the Supporting Procedures.
Investigations Team	Part of the Executive that holds expertise in evidence gathering, handling and analysis. The Investigations Team is tasked with case management and day-to-day enforcement activities under the Code.

PSA	Defined at paragraph 5.3.26 of the Code and within the explanation at paragraph 1.1 of the Code: 'PSA' means the employees of the PSA and/or members of the Board save where the context otherwise requires. It is an enforcement authority with responsibility for enforcing the Code, which regulates the use of premium rate services (PRS).
PSA Board	The Board of Directors of the PSA Limited – a not-for-profit organisation limited by guarantee. The Board govern the strategy, policy setting and operations of the PSA. Board members do not take part in any adjudicatory activity or decision-making in relation to Code enforcement. Non-executive Board members sit on the Investigations Oversight Panel (IOP) as required.
Review of interim measures	A review undertaken by a CAT of the decision to impose interim measures. Details of this process are found in Section 9 of the Supporting Procedures.
Suspensions	Directions issued to parties in the value chain to suspend a PRS. Suspensions may be imposed on services where there is evidence of a serious breach of the Code and the need to suspend is urgent. Details of the process associated with these directions are set out in Section 9 of the Supporting Procedures.
Track 1 procedure	An investigation of potential breaches of the Code, which may be resolved between the PSA and the relevant PRS provider via an agreed Action Plan. The Track 1 procedure does not require an adjudication by the CAT. The procedure is set out in the Code at section 4.4, and further details are set out in Section 7 of the Supporting Procedures.
Track 2 procedure	An investigation into potential breaches of the Code, which may require more extensive efforts to gather information and evidence relating to the potential breaches of the Code. This formal process is set out in the Code at section 4.5, and explained in greater depth across Sections 7-14 of the Supporting Procedures.

Tribunal bundle	The bundle of documents prepared for the use of the CAT and the parties after a Warning Notice or Interim Warning Notice is issued. The bundle includes all the relevant documentation, including any response from the relevant PRS provider.
Warning Notice	A formal submission produced by the Executive and sent to a relevant PRS provider, outlining a description of the service and potential breaches identified, providing supporting evidence, and providing a recommendation of sanctions. It will also set out instructions to the PRS provider relating to how it can respond to the Warning Notice. Details of this key stage in the investigation can be found in Section 10 of the Supporting Procedures.
Withhold directions	Directions issued to either a Network operator or Level 1 provider to prevent out-payments of PRS revenues being shared with providers lower in the value chain pending payment of any sums due following sanctions being imposed by the CAT or a decision by the CAT to lift or amend the withhold direction. Details of the process associated with these directions are set out in Section 9 of the Supporting Procedures.

## Section 2

### Purpose of PSA investigations and enforcement

5. The purpose of the PSA Code of Practice is to set an effective and proportionate regulatory framework for the premium rate services (PRS) industry that builds consumer trust and confidence in using PRS in a healthy and innovative market. Our approach is always to try and work with industry to build compliance into services using the principles of the Code, through issuing Guidance, offering bespoke compliance advice and working consultatively and collaboratively on managing risks to consumers and the market.
6. The purpose of investigations into PRS and the providers that operate them is to explore potential issues in the market and test compliance standards. Issues in the market may be flagged to the regulator in a number of ways, and this document considers some of the key sources of intelligence. However, it is the investigations process that gives the PSA the opportunity to fully understand these issues and to ask specific questions about potential breaches of the Code that may be the root cause.
7. When the PSA seeks to establish the facts of any given situation, it is searching for, and gathering together, information. As the evidence comes in and is assessed the investigation may find that the original complaint or reported issue is based on misinformation or some lack of understanding. This document sets out when investigations may be closed without need for enforcement action or any form of adjudication.
8. Although Level 2 providers are ultimately responsible for the content, promotion and operation of a service, we expect all Level 1 providers and Network operators to carry out a satisfactory level of due diligence and risk assessment when contracting with providers, to achieve the outcomes set out in the Code and supporting Guidance. Where we find evidence of a failure in meeting these responsibilities, we may initiate an investigation into that party. We may also pursue parallel investigations into various parties at different levels within the value-chain in relation to the same service.
9. There are various stages to an investigation, and we have sought to address each of these in turn in this document. Investigations will lead to enforcement action where such action is considered a proportionate way of achieving our regulatory goals, which include remedying Code breaches, improving compliance standards in the industry, and resolving underlying issues which trigger them.
10. To achieve the best regulatory outcome, we aim to progress all investigations promptly. The length of any given investigation / adjudicatory process may vary depending on the facts of each particular case. Where interim measures have been imposed, the PSA will give special consideration to prioritise the progress of such an investigation.

## Section 3

### PSA's remit and jurisdiction

#### How the Communications Act 2003 and our Code frames our remit

11. The Communications Act 2003 ("the Act") established the regulatory regime for telecommunications services, and established Ofcom as the regulatory body for such services.
12. In respect of PRS, the Act provides Ofcom with the power to approve a Code for the purposes of regulating PRS. Ofcom has approved the PSA' Code of Practice under Section 121 of the Act. The scope of the PSA' remit is set out in the definition of "controlled PRS", contained within the PRS Condition made by Ofcom (which is reproduced within Part Five of the Code).
13. Ofcom has designated the PSA, through approval of the Code, as the body to deliver the day-to-day regulation of the PRS market. The PSA regulates the content, promotion and overall operation of controlled PRS through the imposition of responsibilities on providers of PRS in the Code.
14. Where the Code is breached, the PSA is empowered to apply sanctions as set out in the Code at paragraph 4.8. The Code is revised from time to time to ensure it continues to provide a trusted environment for consumers, and remains a fair and proportionate regulatory regime for the industry.
15. Ofcom retains overall responsibility for regulating premium rate services, and where necessary the PSA may refer providers of PRS to Ofcom.

#### Derogation process relating to providers based in the EEA

16. Whilst the PSA has jurisdiction over controlled PRS which are accessed by a user in the United Kingdom, or provided by a Level 1 or Level 2 provider situated in the United Kingdom, the PSA is first required to take additional steps prior to taking any measures against a provider of an "information society service"<sup>1</sup> that is based in an EEA country. In such a case, the PSA is generally required to refer its concerns to the Member State in which the provider is based before opening a formal investigation, and to notify the European Commission (through the Department of Digital Culture, Media and Sport) where enforcement measures are taken. This is due to the application of the E-Commerce Directive.<sup>2</sup> Guidance on factors that are

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<sup>1</sup> 'Information society services' are defined under paragraph 5.3.22 of the Code as, '...any services normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services (as defined in Article 1(b) of Directive 2015/1535/EU), subject to the exceptions set out in the Directive.' Further explanation and examples are provided at Annex A.

<sup>2</sup> Article 3 of Directive 2000/31/EC states that:

"(2) Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State..."

(4) Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

considered in determining whether a service is an information society service is included at Annex A.

17. The procedure for making a referral is as follows. Where necessary, referrals will be made prior to allocation of a case for investigation.
- Before making a referral, enquiries will normally be asked of the provider. Where it is practical to do so, the PSA will also make informal contact with the relevant home Member State authority at this early stage to inform them that the Investigations Team is concerned that the service is or may be prejudicing the objective of consumer protection, and that enquiries are being made prior to any formal referral being made and prior to the Code being invoked.
  - Upon receiving such notification, we expect providers to take appropriate action at an early stage to remedy the Investigations Team’s concerns, which may include seeking and acting upon compliance advice, and providing refunds to affected consumers. If providers do so, we recommend that they provide sufficient evidence to the PSA that they have done so.
  - Following review of any responses received from the provider, where there remain concerns about the service, a formal referral will be made.
  - The PSA uses the Internal Market Information (“IMI”) portal to formally refer matters to the relevant home Member State authority. The PSA will provide such relevant information as it has about the service through the IMI portal, and request that the home authority take adequate action to investigate and resolve any concerns.
  - Providers will normally then be contacted by email to inform them that a formal referral regarding the service they operate has been made. Any relevant Level 1 provider and/or Mobile Network Operator(s) will also be informed of the fact that a referral has been made.
  - The PSA expects the home Member State authority to conduct such investigation of the service as it deems necessary.

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(a) the measures shall be:

(i) necessary for one of the following reasons...

– the protection of consumers, including investors;

(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

(iii) proportionate to those objectives;

(b) before taking the measures in question... the Member State has:

– asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,

– notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.

- Where providers take appropriate steps to remedy the Investigations Team’s concerns, and provide sufficient evidence to PSA that they have done so, the PSA will normally provide confirmation of this to the nominated regulator for the home Member State. It is anticipated that in many cases, this will promote the early resolution of a case without the need for either the PSA or the home authority to take measures.
  - Where the authorities in the relevant Member State do not take any measures or where the measures taken are inadequate (for example, where the measures only partly address the harm, or the harm appears to still be continuing after the measures have been taken), the PSA may decide (where the requirements of Article 3(4) of the E-Commerce Directive are satisfied) to take appropriate measures itself. This may include taking enforcement action pursuant to the Track 1 or Track 2 procedure.
18. In cases of urgency, the E-Commerce Directive allows the PSA to take measures without first referring the matter to the relevant Member State, again where the requirements of Article 3(4) of the E-Commerce Directive are satisfied<sup>3</sup>. However, where such measures are taken, the Member State and the Commission must be notified as soon as possible thereafter. Such notification will be as comprehensive as possible (to include full details of the measure(s) taken by the PSA and any action(s) taken by the provider itself) and will be made via the IMI portal. Either the Executive or the CAT will normally seek legal advice prior to taking urgent measures. Such advice will be subject to legal professional privilege.
19. These procedures are subject to change from time to time, including as a result of the legal and procedural requirements mandated by the EU and the Department for Digital Culture, Media and Sport. In the event of conflict between these Supporting Procedures and such legal or procedural requirements, those legal and procedural requirements shall prevail.

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<sup>3</sup> Directive 2000/31/EC Art. 3 para. 5.

## Section 4

### Sources of intelligence and the enquiry stage

#### Monitoring

20. The Executive conducts monitoring of PRS. The Executive may decide to monitor a specific service as a result of complaints received, as a result of reports received from the industry or security consultants, as a result of information found online, as part of a planned sweep in relation to a particular issue, or for other reasons. The Executive may change its monitoring policies and strategies from time to time in order to respond to changing technologies and behaviours.
21. Our monitoring function involves gathering intelligence for a range of regulatory activities, many of which are unrelated to enforcement of the Code. However, when evidence of non-compliance is found in the market, a report will be prepared and provided to the Head of Investigations and Enforcement for consideration. The Executive may initiate an investigation where its monitoring appears to show a breach of the Code (Code para. 4.1.2). If the Head of Investigations and Enforcement considers that the nature and quality of the evidence is sufficient to warrant an investigation, the information will be presented to the Allocation Team for further assessment<sup>4</sup>.
22. If the monitoring highlights a potential breach of the Code, the Executive would normally decide to notify the relevant Level 2 provider(s) and associated industry stakeholders of the findings of the monitoring report prior to any further investigation into the matter<sup>5</sup>. This provides the PRS provider with greater visibility of the issue, if it is not already apparent to them, and gives relevant industry stakeholders the opportunity to respond. This response may be to provide an explanation to the Executive of the issue and any root cause, or involve remedial action to improve compliance standards. If the case has not been allocated at this point, the information provided by any relevant parties will be considered by the Allocation Team as appropriate.
23. Given the fast-moving nature of the industry, some investigations may proceed after remedial action is taken. This may be necessary to fully understand the issue and to ensure it does not arise again in future.

#### Security intelligence and other enforcement bodies

24. As indicated above, one trigger for monitoring work may be a report from a security intelligence source. However, depending on the information given, the Executive may launch an investigation based on intelligence shared by security consultants or other enforcement bodies in the UK and globally.

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<sup>4</sup> See Section 7 below.

<sup>5</sup> See paragraph 39 below.

25. The PSA has built a strong network of contacts with such groups, working with the Consumer Concurrence Group in the UK hosted by the Competition and Markets Authority (CMA) and Operation LINDEN coordinated by the Information Commissioner's Office (ICO). The PSA on an ongoing basis raises awareness of its role and remit to other enforcement bodies to make sure accurate and helpful information is shared with the PRS regulator as appropriate.
26. The PSA has a number of memorandums of understanding with such bodies to ensure information is shared effectively and decisions are taken as to appropriate regulatory activities.

### Consumer complaints

27. Members of the public can contact the PSA directly to provide information about services for a number of reasons, including the receipt of PRS promotional material, the receipt of PRS charges, or where PRS has affected a relative or other phone user. Consumers may contact the PSA to make enquiries about such services, and therefore not every contact will provide evidence of a breach of the Code or lead to an investigation. However, each piece of information given by consumers, whether it forms part of a complaint or an enquiry, may be used by the Executive to understand the services operating in the market and their compliance with the Code.
28. The PSA considers a complaint to equate to a negative report relating to a PRS indicating some discrepancy between consumer expectations<sup>6</sup> and service delivery or operation. Complaints will be tested against information held relating to the service, including any registration data, monitoring evidence, or other consumer information.
29. As part of the complaints procedure, consumers are usually given information about the Level 2 providers operating the service allowing them to take up the matter directly. If the consumer requires more information, we may need to send the consumer back to their Network operator to establish where the charges originated from.
30. The Executive may also contact the service provider directly to seek information relating to consumers' engagement with the service if circumstances require it<sup>7</sup>. Service providers therefore will often have the opportunity to investigate and rectify any underlying issue, including providing redress where appropriate, before the PSA determines that it needs to investigate further. Prior to any investigation, the usual allocation process will be followed (see Section 7 below).
31. The Executive may in its discretion decide not to investigate a complaint if it has not been made to the PSA within a reasonable time. When considering what is reasonable, the Executive will

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<sup>6</sup> Including consumer expectations that the service promotion can be inspected without a purchase being made – i.e. visiting a webpage but not purchasing anything is possible without risk of unwanted PRS charges.

<sup>7</sup> Such requests at the early enquiry stage may not be in the form of a formal direction for information under paragraph 4.2.1 of the Code. While a specific consumer contact may not be a formal complaint, recent dialogue with a PRS provider or a previously completed investigation may warrant some further review as a result of such contacts. Any such enquiries will be made with a view to understanding the current service operation and promotion and may not lead to any case allocation.

take into account when a consumer could first have been reasonably expected to know of the matters giving rise to the complaint.

### **Industry reports and complaints**

32. In order to limit and address consumer harm, providers are encouraged to proactively alert the PSA to any issues regarding its own or third party services. Such proactive co-operation will be taken into account by the Executive when considering the most appropriate enforcement procedure to be used (if any) and/or may mitigate any sanctions imposed by a Tribunal.
33. Industry members can report any matters relating to Code compliance to the Head of Investigations and Enforcement. Any such information will be treated sensitively while initial enquiries are made to understand the issues. Depending on the nature of the information and whether claims made can be further evidenced by reference to service data, complaint information or monitoring reports, there may be a need for industry reports to be used as evidence during an investigation. In this case the relevant party would normally expect to receive information about the source of the evidence.
34. Whether an investigation is launched as a result of a complaint made by a member of the public or a member of the industry, the investigation will follow the same process set out in Sections 7 and 8 below.

## Section 5

### Signposting and referrals

35. As well as being referred to the service provider, depending on the nature of their complaint or enquiry a consumer may also be provided with information about other bodies that may be able to assist them. For instance, consumers may be advised to contact the Network operator, Ofcom, the Information Commissioner's Office (ICO), Trading Standards, Action Fraud, or an entity providing alternative dispute resolution (ADR).
36. Depending on the nature of our concerns, the Executive may choose to refer concerns, and share information, with other enforcement bodies. Such bodies may include Ofcom, the ICO, the Competition and Markets Authority, Trading Standards, the Financial Conduct Authority, the Advertising Standards Authority, the Gambling Commission, City of London Police, or the Serious Fraud Office. In some cases the PSA has concluded memoranda of understanding with other regulatory bodies to facilitate such referrals.
37. Any such referral is without prejudice to the PSA's powers to take action under the Code where this is thought necessary. However in such a case, the Executive will seek to coordinate enforcement action with the other enforcement body so as to avoid any duplication of regulatory effort, where it is practical to do so<sup>8</sup>.
38. In certain cases where a provider is based in an EEA country, the PSA is obliged to refer its concerns to the Member State in which the provider is based, and notify the European Commission. The procedure for such cases is set out above at paragraphs 16 to 19.

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<sup>8</sup> See reference to inter-regulatory working at paragraphs 24-26 above.

## Section 6

### Engagement with the PSA

39. The Executive will inform relevant PRS providers across the value chain of any concerns about their services and/or any other evidence of potentially non-compliant activity at an appropriate time. This may coincide with a request for information or other form of enquiry about the relevant service(s)<sup>9</sup>.
40. Where possible, providers are encouraged to proactively take steps to limit and address risks of consumer harm, including but not limited to taking action when they become aware of consumer complaints. Providers are also encouraged to proactively alert the Executive to any issues regarding their own or third party services. Such proactive co-operation will be considered by the Executive when they are deciding on the most appropriate enforcement procedure to be used (if any) and/or may mitigate any sanctions imposed by a Tribunal. In light of evidence about what steps have or have not been pro-actively taken, the Executive may also consider whether a provider's systems are sufficient to comply with any risk assessment and control obligations, and any obligation to ensure that consumers are treated equitably<sup>10</sup>.
41. In the course of its work, the Executive is required to make a number of decisions based on the information known to it at the time. This includes decisions on allocation of a case to a Track for investigation, whether to refer a case to a different enforcement body, and whether to apply for interim orders such as suspension of the service or withhold of revenue. The PSA therefore considers that it is in the best interests of providers to pro-actively provide the Executive with information which they consider is relevant to such decisions at an early stage, including evidence of any pro-active steps taken to eliminate risks of consumer harm. Information which is provided prior to such decisions being made will be more helpful when considering our response to market issues. When making case management decisions, the Executive cannot be expected to take into account information of which it is not aware because a provider has not volunteered it.
42. Network operators and providers will appreciate that the PSA has an obligation to consider complaints and where appropriate investigate apparent breaches of the Code. An investigation will only proceed after the allocation process has been followed, however some engagement with PRS providers may take place at the enquiry stage. At any point during an investigation, or when enquiries are being made, PRS providers are able to share information and make representations to the Executive<sup>11</sup>. This may be in response to a request for information or

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<sup>9</sup> A full list of the points at which PRS providers may be contacted is found in Section 7, paragraph 72-73 below.

<sup>10</sup> The PSA has published guidance on due diligence, risk assessment and control to help equip industry to respond effectively to issues and increase compliance standards in the PRS market:  
<http://www.psauthority.org.uk/~media/Files/13th-Code-of-Practice/Guidance-and-Compliance/Due-diligence-risk-assessment-and-control.pdf>

<sup>11</sup> This is provided for at paragraph 4.5.2 of the Code. Normally such representations would be made via the Investigations Team member in charge of the case, but other channels can be used as appropriate.

other correspondence, but there is no restriction on PRS providers. Any information may assist the PSA to understand the situation being considered.

43. During an investigation, the PSA expects Network operators or providers associated with services under investigation to fully co-operate with the Executive leading the investigation and to comply with requests for information made under Code para. 4.2.1 in a timely, straightforward and thorough manner. Information supplied to the Executive must be accurate to the best of the Network operator's or provider's knowledge. Where a service is found to be in breach and sanctions are considered necessary, any deviation from the expected standard of co-operation during the investigation may be treated as either an aggravating or mitigating factor, which may have an impact on the severity of the sanctions imposed. Further guidance on this can be found below under 'Aggravation' and 'Mitigation'.
44. Where a party fails to co-operate and/or provides false or inaccurate information it is likely to have a negative impact on the PSA's role as a regulator (particularly in relation to investigations). Therefore, the Executive will take robust action which may include using a more formal enforcement procedure, raising additional breaches of the Code and/or aggravating factors.
45. Where a company or individual within the premium rate service value-chain provides information that is found to be incomplete, false or inaccurate, the company or individual who provides the information and seeks to rely upon it may be investigated for a potential breach under Part 4 of the Code<sup>12</sup>. It is recommended that the source of the information is identified to the Executive when it is provided.

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<sup>12</sup> Potential breaches of paragraphs 4.2.2 or 4.2.3 of the Code will be set out in a Warning Notice in the usual way with relevant parties able to respond to the allegations before any adjudication by the Tribunal.

## Section 7

### Allocation

#### Allocation criteria

46. As set out in Part Four of the Code, there are two procedures available to the Executive when dealing with potential breaches of the Code. The decision as to which procedure is appropriate in any given case is a decision for the Allocation Team<sup>13</sup>, based on the evidence available at the time. However, cases are assessed internally on a regular basis and, where information is obtained that warrants a change in approach, it will be given due consideration and relevant parties will be notified of any change.<sup>14</sup>
47. Where the Allocation Team determines that there is a need to investigate a service in greater depth and/or to take action in respect of a suspected breach of the Code, the Allocation Team will determine which is the relevant procedure to use (“allocation”), following the process set out at Code para. 4.3.
48. Prior to allocation, the Executive will make informal enquiries to assist it to determine which if any procedure is appropriate for the investigation in all the circumstances.
49. Where information has been requested informally prior to allocation and a provider has not answered a question put by the Executive, the Executive may draw a negative inference where it is reasonable to do so. This may be considered when assessing which procedure is appropriate.
50. The Allocation Team will first consider evidence held which gives rise to a suspicion of breach(es), and if such allegations are sustainable. Such evidence may include but is not limited to:
  - Complaints (including an assessment of the consistency between consumer accounts, and dates on which complaints were received);
  - Documentary evidence submitted (including any provider responses);
  - Monitoring evidence available relating to the alleged breaches.
51. Investigations may be opened where it appears to the Executive that a breach of the Code has occurred or is occurring. The Executive may take the view that there is an apparent breach of the Code which requires investigation, even where it holds evidence both in support of and against a suspected breach. For instance, where a service generates a significant number of complaints that consumers have not consented to be charged, but the provider has supplied evidence of consent, the existence of the significant complaints will still be sufficient grounds for the Executive to consider that a breach of the Code has

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<sup>13</sup> This usually comprises the Head of Investigations, Head of Contact Management, an In-house lawyer and a Policy team representative.

<sup>14</sup> A full list of the points at which PRS providers may be contacted is found in Section 7, paragraph 72-73 below.

occurred or is occurring and therefore commence a formal investigation. Through the formal investigation the Executive will have the opportunity to properly consider the evidence it has obtained from both consumers and the providers using an appropriate enforcement track and requesting further information.

52. If there are sufficient grounds to suspect breach(es) of the Code, the Allocation Team will exercise its discretion in deciding what Track to allocate a case to. When making this determination, the Executive will take into account the following factors, insofar as they are relevant in that case:
- a. the level of harm or risk of harm caused by, or which may result from, the apparent breaches;
  - b. whether the apparent breaches have caused offence to the general public;
  - c. the seriousness of the apparent breach(es);
  - d. whether the provider has taken effective steps to remedy any consumer harm or offence to the general public and ensure that the service does not have potential to cause any such harm or offence, prior to allocation to an enforcement track;
  - e. the breach history of the party under investigation;
  - f. whether the apparent breach(es) are of a nature that can be addressed through any given enforcement procedure;
  - g. the level of cooperation the PSA considers is likely to be received from the party under investigation;
  - h. whether the PSA considers that an effective regulatory outcome is likely to be achieved through the use of any given enforcement procedure; and
  - i. any public interest reason(s) that may make the case more suitable for any given enforcement procedure.
53. Information relevant to the balanced assessment may include the evidence set out at paragraph 50, any evidence of widespread harm or harm to vulnerable consumers, whether the provider has been pro-active in ensuring that the suspected breaches will not re-occur and relevant consumers are compensated in full, the degree to which the provider may have gained due to the suspected breach, any failures to heed compliance advice, and whether the suspected breach appears to be part of a pattern of repeated disregard for the Code, as well as any other relevant information. The initial allocation assessment will be documented.

54. The Allocation Team will consider the number of complaints as a percentage of service usage if the provider supplies the PSA with reliable evidence of this. When determining allocation such percentages will be considered together with other information available to the Executive at the time. In practice, the number of complaints the Executive receives in respect of services varies according to a number of factors, including the nature of the service and the way in which the Code may have been breached. Where the Executive receives a significant number of complaints in respect of a service and there is evidence to support an allegation of a Code breach, the public interest may support bringing a Track 2 case even if the number of complainants represents a small percentage of the provider's customer base.
55. Absence of factor(s) which would usually indicate that a case should follow the Track 2 procedure, such as evidence of deliberate breach of the Code, will not by itself indicate that a case is appropriate for the Track 1 procedure.
56. A Track 1 procedure will only be offered if the Allocation Team is satisfied that such a procedure is appropriate based on an assessment of the factors and other relevant information set out at paragraphs 50 to 53 above.
57. It is unhelpful to deal with potential breaches arising from the operation or promotion of a single service via different channels. Where there is one allegation of a breach which is appropriate for the Track 2 procedure, the presumption is that all identified potential breaches in respect of that service will be taken through the Track 2 procedure and resolved together.
58. There is no pre-determined weight attached to any particular factor, or type of evidence, and there is no presumption that if a majority of factors indicate a particular Track, then that Track is the most appropriate. The Allocation Team will use its discretion, having considered the above factors and the information available to it in the round, to decide what Track to allocate each case to. The Executive will communicate its allocation decision to the relevant parties<sup>15</sup>.

### **Track 1 procedure**

59. The purpose of any Track 1 investigation is to fully understand the issues affecting the relevant service; to agree upon which Code provisions are being breached; and to establish a means to remedy those breaches. Where the Executive in its discretion uses this procedure, it will develop an agreed action plan to remedy potential breaches identified.
60. The Investigations Team may gather (including through use of its powers under paragraph 4.2.1 of the Code, and as set out at Section 4 of these Supporting Procedures) information associated with the promotion and operation of the service and set out the potential breaches. An action plan will be proposed by the Investigations Team. Where it is agreed, the provider may need to document the implementation of changes to the service or business systems. The Executive may undertake routine monitoring of the service to test implementation. Any dispute relating to the action plan, or failure to implement it, may result in a Track 2 procedure being initiated.

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<sup>15</sup> A full list of the points at which PRS providers may be contacted is found in Section 7, paragraph 72-73 below.

61. The Executive will consider re-allocating a case to Track 2 if:
  - a. the relevant party disputes that any of the breaches have occurred; or
  - b. the Executive and the relevant party fail to agree on an appropriate deadline for response to the offer and/or action; or
  - c. the Executive and the relevant party fail to agree on any other terms of an action plan; or
  - d. the relevant party fails to comply with any part of the action plan, including evidencing compliance, payment of any administrative costs invoiced and/or payment of refunds.
62. When a case is re-allocated from Track 1 to Track 2, a provider will be allowed reasonable time (having considered the nature of the case) to make representations on re-allocation before a Warning Notice is issued. Bearing in mind that a provider is also allowed to make representations as part of that process, this will usually be a short period of time. A provider will receive a notice of re-allocation to allow them to make such representations.

### **Track 2 procedure**

63. Track 2 procedures are initiated when the Executive has determined that a case is not suitable for a Track 1 procedure. This may be because the actual or potential consumer harm involved is more serious, for instance. Track 2 is also likely to be used in cases where there appears to have been a serious failure to comply with the regulatory regime (for instance, a breach of the obligation to comply with sanctions which have previously been imposed by a CAT). The purpose of any Track 2 investigation is to gather evidence with a view to conducting a detailed review of the promotion and operation of a service, so that any recommendation to impose sanctions can be properly supported.
64. In the course of the Track 2 procedure, the Investigations Team will investigate by gathering information (including through use of its powers under para. 4.2.1 of the Code, and as set out at Section 3 above).
65. After a decision to allocate a case to Track 2 has been made, the Executive (having sought the views of the IOP) may recommend to a CAT that Interim measures are imposed. See section below on “Interim measures during investigation”.
66. During the course of a Track 2 investigation a relevant party may provide the Investigations Team with any information it considers relevant to the investigation, whether this is information required under Code para. 4.2.1, or otherwise.
67. After the Investigations Team has concluded its investigation, where it has found sufficient evidence of breach of the Code, a Warning Notice will be prepared. See section below on “Warning Notices and settlements”.
68. Alternatively, at this point the Executive may change to a Track 1 procedure, or take no further action, if considered appropriate in all the circumstances. Where such a change has been made, the provider will be notified.

## Closure of investigations

69. At allocation stage or at any point thereafter, the Executive may decide to take no further action at that time if it:
- holds insufficient evidence at that time to allege a breach of the Code and does not believe that such evidence will be obtained; or
  - considers that there has been a breach but, in its view, the overall regulatory benefit which may be achieved (including any general deterrent effect) is disproportionate to the resources required to pursue regulatory action.<sup>16</sup>
70. In such cases, the Executive may decide not to take further enforcement action at that stage, but will communicate its view on the breaches investigated to the provider. Potential actions to improve consumer engagement may be recommended by the Executive and the relevant parties ought to consider what appropriate steps to take based on the information gathered.
71. Where no further action is taken, or a Track 1 action plan is agreed, this does not prevent the Executive taking action in respect of the same or similar allegations in the future, for instance where new and relevant information comes to the attention of the Executive.

## Communications to industry stakeholders

72. There are various points at which it may be appropriate for the Executive to correspond with other parties involved in the operation and delivery of the relevant PRS. These include the following:
- Provision of monitoring reports to raise awareness of identified issues;
  - Requests for information to clarify service information and check information held on the registration database, based on monitoring and/or on consumers contacting the PSA directly;
  - Notification following case allocation;
  - Requests for information during enquiries or investigations;
  - Notification of intention to use interim measures, including suspension powers under the Code;
  - Directions to withhold revenues, provide information, or suspend services;
  - Issue of Warning Notices and any subsequent Tribunal preparatory notifications or directions;

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<sup>16</sup> One possible example is where upon consideration of the present status of the PRS industry as a whole, the Executive is of the view that cross-industry compliance can be better achieved by taking alternative steps instead of (rather than in addition to) formal enforcement action. Note that before deciding to take no further action on this ground, the Executive will give the matter careful consideration and may still decide to take enforcement action where other public interest factors support taking enforcement action.

- Provision of adjudication reports and alerts ahead of any publications.
73. Whilst the Executive will normally communicate with such stakeholders at these points as a minimum, it may not be practical or appropriate in all cases to communicate at every stage, depending on the facts of each case (such as where the Executive has determined that it is in the public interest to seek interim measures without prior notice to a provider).

## Section 8

### Role of the PSA's Investigation Oversight Panel

74. The Head of Investigations and Enforcement has primary control over ongoing investigations and enforcement action undertaken by the Executive. The person in this role manages the Investigations Team undertaking the tasks associated with those enforcement activities. The new PSA IOP includes members of the Leadership Team and non-executive PSA Board members. Given the potential reliance necessary on legal advice during case management, whilst the General Counsel who sits on the Leadership Team will be involved in the IOP, s/he will not take part in considering any investigation in which s/he has been previously involved. Furthermore, the Chairman of the PSA will focus on leading the organisation and will not be involved in the IOP.
75. The IOP acts as a group providing oversight and quality assurance of investigations in support of the Head of Investigations and Enforcement. At specific stages of any investigation members of the IOP give consideration to the planned enforcement activities undertaken by the Investigations Team and may endorse proposed activities or suggest alternative ones.
76. The key stages of any Track 2 investigation may include:
- Assessment of any required Interim measures;
  - Assessment of potential breaches and sanctions in draft Warning Notices;
  - Assessment of any acceptance of breaches and sanctions by relevant parties, with the possibility of settlement.
77. At each of these stages, the Investigations Team will submit requisite information to designated members of the IOP for consideration<sup>17</sup>, for which a meeting may be convened. When an IOP consideration is required, normally three (and no less than two) eligible members will be convened for a meeting either in person or via conference call. This would normally involve:
- up to two members of the Leadership Team; and,
  - a non-executive Board member<sup>18</sup>. Where there is no Board member sitting at the meeting, a report summarising the outcome will be made to the Board after the meeting.
78. Also attending the meeting of the IOP will be a Secretariat for the panel, the Head of Investigations and Enforcement, and the relevant Investigations Team member working on the case, who will coordinate any actions required based on the recommendations of the IOP. This may involve making further enquiries to gather or test evidence; switching the case from Track

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<sup>17</sup> The information required will vary depending on the stage of the investigation. Where not otherwise obvious, the Investigations Team member will also provide a paragraph summarising the nature of the service, and PSA's concerns.

<sup>18</sup> The eligible members include industry non-executives on the Board who may bring their expertise to any assessment of enforcement activities, except where any conflict of interest exists.

2 procedure to a Track 1 based on a review of evidence gathered; issue a formal notification to a relevant provider in accordance with the Code, such as a Warning Notice; or consider the closure of the case and other regulatory activities.

## Section 9

### Interim measures during investigations

79. Interim measures include a range of powers set out in the Code to offer security and consumer protection where necessary prior to any formal adjudication of potential breaches of the Code, or other suitable resolution of the matter. These include the options to impose a withhold of revenues across a value chain, or to suspend services pending a Tribunal hearing (or until changes are made to a service to remedy apparent serious breaches of the Code).
80. Before seeking to rely on any Interim measures, the Executive (including the IOP), taking a balanced approach, will consider the following (where relevant):
- The nature and severity<sup>19</sup> of the breaches or harm to consumers being investigated (including whether or not there is a risk that such breach or harm would not be effectively remedied without such Interim measures), and any necessity for urgent action;
  - The potential impact flowing from the potential breaches, to both consumers and the relevant party under investigation, including likely fine amounts that may be imposed as a sanction;
  - What information is available relating to the financial status of the relevant party and its capacity and/or willingness to meet its responsibilities under the Code<sup>20</sup>.
81. Further details relating to each of these interim measures are set out below. None of the Interim measures can be imposed without a decision from a CAT.

#### Withholds

82. The PSA will seek to use its power to withhold service revenue where a case has been allocated to Track 2, a breach of the Code appears to have taken place, and it considers that a provider will not be able or willing to pay such refunds, administrative charges and/or financial penalties as it estimates a CAT may impose in due course<sup>21</sup>.
83. When a case is allocated to Track 2, the Investigations Team will conduct a balanced assessment of the provider using the general criteria at paragraph 80 and further specific factors set out at Annex B. The Investigations Team may seek relevant information for these purposes, including published financial data in respect of the provider, details of revenue payment dates, and whether there are any sums available to be withheld.

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<sup>19</sup> See paragraph 186 for a list of non-exhaustive criteria that may be considered in assessing the severity of breaches.

<sup>20</sup> See paragraphs 83 and 87 for further details of the evidence that may be considered.

<sup>21</sup> The estimate of sanctions is not binding on the CAT who will make an assessment based on information available to them at the time they make such determinations.

84. Where the assessment indicates that the criteria for a withhold may be fulfilled, the Investigations Team will draft an “Interim Warning Notice” and refer the matter to the IOP, who will convene a meeting in accordance with the procedure set out above at paragraph 77 to consider the Executive’s recommendations.
85. The assessment will be based on the information known to the Investigations Team at the time. Where credible information is not made available to the Investigations Team, the Executive may draw a negative inference where it is reasonable to do so.
86. If the IOP considers that a withhold direction is appropriate, the Investigations Team will (unless there are important public interest reasons to the contrary) use reasonable endeavours to notify the party under investigation of its initial findings and confirm the amount of the proposed withhold, and invite that party to make representations to the Executive within a timescale which is reasonable, taking into account the urgency of the matter. This timescale will normally be no less than 1 working day.
87. The provider may make urgent representations about whether a withhold is justified and the appropriate level of any withhold. In order to carry any weight, any representations must be supported by evidence which is sufficient to confirm that the provider is willing and able to meet any sanctions that may be imposed, or administrative charges that may be invoiced. The PSA anticipates that to support such representations it will be necessary as a minimum for providers to supply up-to-date evidence of the following:
  - the provider’s current cash and asset position (including any overdraft facility or similar);
  - evidence of projected income and outgoings, including evidence of the date payments are due;
  - evidence of the sources and amounts of all recent and projected income; and
  - evidence of any refunds given to date.
88. In order to be considered, such representations and evidence must be provided by the deadline set by the Investigations Team. The Investigations Team may vary this deadline upon request, provided that a response will still be received by no later than two weeks before the next known outpayment date.
89. The provider also has the opportunity to agree a mutually satisfactory withhold direction with the Executive, and/or to provide a bond as an alternative. Where a provider consents to the terms of a withhold, the CAT can approve the proposed measures under a simplified procedure, pursuant to Code Annex 3 para. 4.2, which will reduce the potential administrative charge.
90. The Investigation Team’s assessment, the interim Warning Notice, and the provider’s response to that notice (or where there is no response, evidence of the attempts made to serve the documents) will be provided to CAT.
91. The CAT will decide whether the conditions in Code para. 4.5.1(b) are satisfied to warrant the imposition of a withhold, on the basis of the evidence presented to them. When considering whether or not to impose a withhold, the CAT will have regard to the general criteria listed at

paragraph 80 where relevant, and the further specific factors set out at Annex B, and will have regard to the principle of proportionality<sup>22</sup>. The CAT will set out its findings and reasons in writing, and these will be provided to the Executive and to the relevant party. Upon a withhold being directed (the decision being reached unanimously), the Executive will immediately issue the withhold direction to any relevant parties in the value chain.

### **Bond arrangements and other alternative security measures**

92. The purpose of imposing a withhold on revenue flowing through the value chain to the Level 2 provider is to prevent monies linked to potentially non-compliant services being dissipated without securing proper payment of any refunds or fines imposed as a sanction, and any administrative charges owed to the PSA. However, similar levels of security for such payments may be established by other acceptable action, without restricting the flow of revenue being made.
93. Following notification of an intention to seek interim measures, a provider may offer a sufficient alternative interim security arrangement, such as placing a suitable bond. The requisite sum to be secured by a payment into a bond, or otherwise, is not subject to negotiation; however, relevant parties who are subject to an investigation may give an indication as to what is feasible.
94. Where a bond is arranged, the relevant party will need to lodge a bond with an agreed trusted financial institution. This is usually a bank, but it does not necessarily have to be. Providers should inform the Executive at the outset if they are considering lodging a bond with a financial institution that is not a UK bank. The Executive will then make the necessary checks on that organisation, prior to making a decision as to whether it can be used for bond purposes.
95. Where a bond can be arranged to the Executive's satisfaction an interim consent order will normally be drawn up for ratification by a CAT. Where a bond cannot be arranged satisfactorily, the Executive will generally resort to seeking directions for a withhold of revenue until such time as an acceptable bond is established by the provider.
96. Where an interim consent order in relation to a bond is ratified by the CAT it may still issue a direction to withhold an equivalent sum of money from the revenue due to the relevant party pending establishment of the bond. Any withhold direction will be revoked as soon as practicable following of the Executive's receipt of an acceptable bond, thereby releasing revenue to flow as per normal contractual arrangements between parties in the value chain.

### **Suspension of service pending investigation and/or remedial action**

97. Where a case has been allocated to Track 2 and it appears to the Investigations Team that an apparent breach of the Code has taken place, which is causing serious harm or presents a serious risk of harm to consumers or the general public, and requires urgent suspension of part

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<sup>22</sup> In considering proportionality the CAT will consider whether the withhold is suitable and necessary to achieve a legitimate aim but is the least onerous way of doing so in the circumstances. A withhold direction might not be proportionate where for instance it was unlimited in amount, or a party had provided sufficient alternative security in the requested amount.

or all of the service, it may seek such suspension pending investigation. Urgent suspension will be deemed necessary where such harm is likely to continue (e.g. because the provider cannot be contacted or has failed to amend the service sufficiently such as to remove or significantly reduce the harm) and/or separate or additional serious harm is likely to be triggered as a result of such harm continuing, before the substantive matter can be determined by a CAT or addressed through the settlement process. In such cases a CAT may, as an urgent interim remedy, bar access to the service in question, either fully or partially.

98. Where the Investigations Team's assessment indicates that the criteria for a suspension may be fulfilled, the Investigations Team will refer the matter to the IOP, who will convene a meeting in accordance with the procedure set out above at paragraph 77 to consider the Executive's recommendations.
99. If the IOP agrees with the Executive's recommendation for an application for a suspension, the Executive will provide evidence of the seriousness and urgency of the case, the background information obtained during the initial investigation and an explanation of potential breaches to the CAT, plus any response supplied by the provider (or where there is no response, evidence of the attempts made to serve the documents on the provider).
100. Prior to presenting the matter to the CAT the Executive will (unless there are important public interest reasons to the contrary) use reasonable endeavours<sup>23</sup> to notify the party under investigation of its initial findings and invite that party to make representations to the Executive within a timescale which is reasonable, taking into account the urgency of the matter. This timescale will normally be no less than 1 working day.
101. The provider also has the opportunity to agree a mutually satisfactory suspension direction with the Executive. Where a provider consents to the terms of a suspension, the CAT can approve the proposed measures under a simplified procedure, pursuant to Code Annex 3 para. 4.2, which will reduce the potential administrative charge. Where a suspension direction can be agreed with the provider an interim consent order will be drawn up for ratification by a CAT. It

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<sup>23</sup> The following processes give an example of what is likely to constitute "reasonable endeavours" to deliver a communication in a typical PSA case:

1. send the communication to the registered electronic mail address the PSA has on file for the recipient, with a delivery and read receipt;
2. post the communication to the registered address the PSA has on file for the recipient via 1<sup>st</sup> class "signed for" delivery, and also a company's registered address (where applicable); and
3. call the recipient using the primary contact number the PSA has to check that they have received the communication (leaving a message where it is an available option).

Providers are reminded of their responsibilities to have registered their up-to-date and active contact details with the PSA.

A record of all means used to send the communications and all attempts to contact the recipient will be maintained so that this can be provided to a Tribunal for evidential purposes.

is also open to a provider, in response to the interim warning notice, to suggest other corrective action which may be equally as effective in addressing the serious harm (and any risk of serious harm) as a service suspension. The PSA will not consider such suggestions as acceptable unless they, as a minimum, fully and clearly address the apparent breach and the harm (or risk of harm) which have been identified immediately, and provide for a robust mechanism through which the Executive can verify that the proposed steps are being taken. Note that where a provider identifies actions which would mitigate harm, the PSA would not expect a provider to delay putting such steps into effect until they obtain the PSA's response to their proposal.

102. Where a suspension direction or other corrective action cannot be agreed, the matter (including any representations from the provider) will be considered by the CAT. When considering whether or not to impose a suspension, the CAT will have regard to the general criteria listed at paragraph 80 where relevant, and will have regard to the principle of proportionality. If the CAT (reaching its decision unanimously) subsequently directs that a suspension or other corrective action be imposed, directions will be issued (as far as is deemed appropriate and proportionate) to take immediate action, which may include: directing the relevant party to suspend part or all of the service immediately or take other corrective action, directing a Network Operator or Level 1 provider to bar access to the relevant service, and publication of the fact that a suspension has been ordered. The CAT may also direct a retention of payments in respect of the service in accordance with the above procedure for withholding revenue.

#### **“Without notice” procedure**

103. The PSA may impose interim measures without notice to a provider:
- where it has not been possible to notify them prior to notifying the CAT; and/or
  - where the PSA considers that it is not appropriate to notify them, because there are important public interest reasons to the contrary prior to notifying the CAT. Some examples of ‘important public interest reasons’ are set out at Annex C.
104. In such cases, the Executive will use reasonable endeavours to:
- provide the CAT with all facts material to its decision including any material which it considers might reasonably have been relied upon by the relevant party; and
  - inform the relevant party, as soon as is reasonably possible after the CAT's decision, that its service appears to be in breach of the Code, that interim measures have been imposed by the CAT, and of the availability of the right to a review pursuant to Code para. 4.6.6(a)(i).

#### **Proceeding with investigations**

105. After the CAT has made a decision on interim measures, the Executive will proceed with its Track 2 investigation in accordance with Code para. 4.5.2 – 4.5.6.

106. Whilst the use of interim measures will be first considered after allocation to Track 2, the above procedures may be instigated by the Executive at any subsequent point prior to adjudication.

### Release of Interim measures

107. Due to developments in a case, the Investigations Team may form the view that any interim measures are no longer justified, or are not justified to the extent currently in place. Examples may include where the Executive holds satisfactory evidence that the issues giving rise to a suspension have been comprehensively resolved, or where a provider has supplied the Executive with alternative security which can replace a withhold.

108. In such a case, the Investigations Team will notify the relevant party, and the IOP of its intention to revoke or amend the directions. Where the relevant party and the IOP confirms agreement to the proposal, a revised interim consent order will be sent to the CAT for approval in accordance with Code Annex 3 paragraph 4.2.

109. At any time prior to adjudication on the alleged breaches placed before the CAT, the relevant party may apply to the Executive for an urgent review of the interim measure(s) by a differently constituted Tribunal of the CAP. A provider may only seek such a review where:

- it has not been possible or appropriate to notify the relevant party of the application for interim measures prior to the decision of the Tribunal; and/or
- new information comes to light suggesting that the application of interim measures was not or is no longer appropriate. Such new information may include, for example, robust evidence that the issue which gave rise to the need for the interim measure has now been fully resolved, or evidence that a provider was not reasonably able to obtain prior to the original decision. The PSA expects providers to act promptly in bringing all relevant information and evidence to its attention.

110. The application for review must be made in writing, must include any supporting evidence and must set out:

- the grounds on which the relevant party considers that the interim measure(s) should not have been used and/or;
- the grounds on which the relevant party considers that interim measure(s) should no longer be applied.

111. In order to prevent the Tribunal being presented with reviews which impose unnecessary burdens on the PSA' regulatory regime (including costs burdens), the Executive has a power to make a referral to the Chair of the CAP for a ruling that a review request is "frivolous or vexatious" (Code para. 4.6.6(a)(iii)). This is most likely to occur if a provider has previously had a review request refused by a Tribunal, and the Executive is of the view that the provider's application for a review does not satisfy paragraph 4.6.6(a)(ii) of the Code.

112. Where the Executive makes such a referral, a provider will be entitled to make written representations for presentation to the Chair of the CAP. Whilst a referral of a review request

pauses the timescale set out at Code para. 4.6.6(d), the Executive still intends to treat applications for reviews as urgent, and so normally a provider will not be given more than 1 working day in which to provide written representations.

113. A review request will be deemed “frivolous” by the Chair of CAP (or other legally qualified CAP member asked to consider the application) if it has no reasonable chance of succeeding. This may be either because it fails to fulfil the requirements of Code para. 4.6.6.(a)(i) or (ii), or because there is no reasonable prospect of the arguments presented resulting in the interim measures being varied.
114. A review request will be deemed “vexatious” if it is a manifestly unjustified, inappropriate or improper use of the procedure. Examples include where the review seeks to argue matters which have already been adjudicated upon without presenting relevant new evidence, or the review appears to be primarily intended to subject the PSA to inconvenience, harassment or expense.
115. Where such a referral by the Executive is upheld, the provider may still be liable in due course for the administrative costs caused by the review request. In addition, subsequent Tribunals will be informed of the ruling of the Chair. For this reason, the PSA encourages providers to ensure that requests for reviews are carefully considered and supported by sufficient relevant evidence.
116. Where having considered the application, the IOP agrees to any suggested variation, an interim consent order will be sent to the CAT for urgent approval in accordance with Code Annex 3 paragraph 4.2.
117. Whether or not an agreement is reached, subject to any requirement for further information, a CAT will consider the matter within two working days of receipt of an application for review and will determine whether Interim measure(s) should continue pending completion of the investigation of the case, or whether the interim measure(s) should be varied. The CAT determination will involve consideration of the new information and an assessment of the requirement for Interim measures based on the considerations at paragraph 91 and/or 102 (as appropriate) of the Supporting Procedures above.
118. The “relevant party” or the Executive may make oral representations to clarify any matter for the Tribunal. Such representations can be requested by the “relevant party”, the Executive or the CAT. In light of the required timescales for the review procedure, the Executive will not reschedule the Tribunal to accommodate a party’s unavailability, and such representations may be limited to attending the hearing via a conference call.

## Section 10

### Warning Notices and settlements

119. In accordance with Code para. 4.5.3, where the Investigations Team has decided it has sufficient evidence of a potential breach of the Code by a Network operator, Level 1 provider, or Level 2 provider, a formal Warning Notice will be prepared. The Warning Notice will set out:
- a. The background to the investigation, including a description of the service when considering Part Two rules and/or the business processes when considering Part Three or Part Four responsibilities, and details of any monitoring and testing undertaken and/or any complaints received, as relevant.
  - b. The potential breaches, together with supporting evidence (with explanation) and facts obtained during the investigation, and a preliminary assessment of their severity. The potential breaches raised ought to deal with all matters identified during the course of the investigation. However, the Executive will seek to avoid duplication where the same facts point towards multiple Code breaches. In these circumstances, due consideration will be given to what breaches are most appropriate to address the types of harm identified.
  - c. Any evidence the investigator compiling the Warning Notice is aware of that s/he reasonably considers may undermine the case set out in the Warning Notice (or might reasonably be relied on by the provider), except where the investigator believes that this evidence is already known to or reasonably accessible by the provider<sup>24</sup>.
  - d. The sanctions that the Investigator considers are appropriate for a CAT to impose for the potential breach(es) of the Code.
120. The Investigations Team will refer the matter to the IOP, who will convene a meeting in accordance with the procedure set out above at paragraph 77. The IOP will consider the sanctions being recommended by the Executive to the CAT. In assessing what sanctions to recommend, the Executive (and the IOP when reviewing) will have regard to Section 12 of these Supporting Procedures, which set out criteria for assessing the seriousness of a case.
121. The Warning Notice will be served on the party alleged to be in breach ('the relevant party'), giving it an opportunity to set out in writing its response to the potential breaches and sanctions. In certain cases, it may also be served on other parties in the value chain as appropriate.<sup>25</sup>
122. The Warning Notice will contain instructions on how to respond. The Warning Notice will request that the provider responds formally to the breaches raised. The Executive expects responses to be supplied promptly, usually within 10 working days, and Network operators and providers need to have systems in place to meet such deadlines. The Executive may set a longer

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<sup>24</sup> For instance, information originally supplied by the provider, or which is publicly available information, would not need to be included.

<sup>25</sup> See paragraphs 72 and 73 of these Procedures.

time limit but only in exceptional circumstances. A provider seeking an extension must supply sufficient details and supporting evidence of such circumstances when requesting an extension.<sup>26</sup> Such an extension will not take the time for response to more than 20 working days from the date of the Warning Notice. If the relevant party fails to respond within the specified time, the Executive will compile a Tribunal bundle to send to the CAT for adjudication without any response to the Warning Notice included.

123. In its response, the provider can accept the breaches and recommended sanctions, make representations that different sanctions are appropriate, or defend some or all of the alleged breaches. If the provider wishes to defend any or all of the alleged breaches, it must supply with its response to the Warning Notice any evidence on which it wishes to rely. The provider in its response should also indicate whether its preference is to have a paper hearing (and whether they wish to make oral representations as part of the paper hearing process) or a formal oral hearing. The paper-based and oral hearing processes are set out in further detail in Section 11 below.
124. Where a provider makes representations that different breaches and/or sanctions are appropriate, the Investigations Team may respond to any representations made by the provider and ask further questions if appropriate. The provider may respond to the Investigations Team. Thereafter, the IOP may concur with a reasonable settlement proposal put forward by the provider. In most cases, there will be advantages to both parties in concluding an appropriate early settlement.<sup>27</sup>
125. The IOP will only concur with settlement proposals which in its view are sufficient to address the Executive's concerns, and secure a satisfactory regulatory outcome. Where settlement discussions take place over a period of time, the Executive will require its increased administrative and legal costs to be paid as a condition of any settlement. If providers wish to make settlement proposals, they are therefore encouraged do so at an early stage, prior to papers being submitted to the Tribunal, and on a well-reasoned basis.
126. Where the parties reach agreement on the breaches to be upheld and sanctions and administrative charges to be imposed by a CAT, the Executive will place the details of the matter and the agreement reached before a CAT for approval in accordance with Annex 3 paragraph 4.2 of the Code. The procedure will be conducted solely via a review of the agreement (including the draft adjudication by consent) and any other relevant papers, without oral representations. Unless there are exceptional reasons not to approve the

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<sup>26</sup> Delays caused by a party's own failure to act promptly (for instance, in seeking information or professional advice), or unavailability of a particular individual during a response period (except for public holidays, including Christmas, New Year and Easter), will not ordinarily justify an extension. To justify an extension, the circumstances should be such that, due to circumstances beyond the reasonable control of the parties, a provider cannot have been expected to respond before the original deadline. Please note public holidays will normally be given due consideration by the Executive when setting deadlines in regular correspondence.

<sup>27</sup> These advantages are likely to include an earlier resolution and avoidance of additional administrative costs relating to contested hearings. If a settlement is reached more than 3 weeks before the Tribunal date, inclusion of the Tribunal cancellation fee within the administrative charge may be avoided.

agreement<sup>28</sup>, the CAT will approve it. Where the CAT approves the agreement, the Executive and the relevant party will be notified and the adjudication by consent will then be implemented.

127. Where the provider and the Executive (as approved by the IOP) do not reach full agreement on each breach and the appropriate sanctions, the entirety of the breaches alleged in the Warning Notice and sanctions recommended will be put to the CAT for adjudication (see Section 11). If the provider accepts the breaches in full, but not the proposed sanctions, the CAT will proceed to make an assessment of the appropriate sanction (see Section 12).
128. Unless the Executive concurs with the provider's representations, or the provider accepts the breaches and recommended sanctions, within 10 working days from the date of the Warning Notice, then the Warning Notice and any response to alleged breach supplied, will be forwarded for consideration by the CAT.
129. After the Warning Notice and any response received are forwarded for consideration by the CAT in accordance with paragraph 126 above, the matter will then proceed to adjudication at a hearing unless the matter is settled in accordance with paragraph 124 above. The CAT is not bound by the Executive's recommendations and may choose not to uphold alleged breaches and/or impose different sanctions, or sanctions at a higher or lower level than those recommended.

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<sup>28</sup> PSA considers that, in order for there to be such exceptional reasons, CAT would need to find that the assessment of the breaches and the sanctions agreed upon are grossly out of proportion to the agreed facts (being either too onerous or too lax), having had regard to the guidance in these procedures at Sections 12 and 13, and any relevant precedent cases.

## Section 11

### Adjudications by the PSA Code Adjudications Tribunal (CAT)

#### Paper based tribunals

130. Adjudications involve the analysis and assessment of an investigation and the evidence gathered during it. They are made by a panel of three members of the PSA Code Adjudications Panel (CAP), who constitute a tribunal. Where there is a dispute between the relevant party responding to the potential breaches and the Executive, the paper based hearing is the most cost effective and simple means of reaching an adjudication of:
- the facts based on the evidence;
  - the potential breaches of the Code as alleged and defended; and,
  - where breaches are upheld, the potential sanctions to be imposed, if any, based on an assessment of the case in the round.
131. While the paper based tribunals focus on the papers submitted during the investigation into the relevant PRS and the parties operating and promoting it, there is an opportunity to make oral representations to the CAT before the members of CAT make their decision. Such representations will allow the parties to fully explain their case, including clarifying any observations or submissions on the breaches and sanctions recommended by the Executive.

#### Preparation of the bundle and first listing of hearings

132. A Tribunal bundle<sup>29</sup>, including the Warning Notice and any responses from relevant parties, will be presented to three Tribunal members selected from the CAP. This will usually happen ten working days in advance of the hearing, so that members will have time to read the papers prior to meeting for the Tribunal.
133. Copies of the evidence in the Tribunal bundle will have been provided to the party in alleged breach of the Code over the course of the investigation. The Tribunal bundle will be made available in electronic format for the party under investigation, and a hard copy is available at the CAT for any party providing any representations.
134. The entirety of the documentation to be relied on by both parties in the paper-based procedure should be exchanged by the date specified in the Warning Notice. However where in its response to the Warning Notice, a provider raises a new matter which has not

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<sup>29</sup> The Tribunal bundle is the bundle of documents relating to the case, including the breaches raised by the Executive with supporting evidence and any responses and evidence sent in by the Network operator or provider. The Tribunal bundle also includes revenue information provided by the Level 1 and/or 2 provider, and a schedule of administrative charges, which sets out the costs incurred by PSA up to the point at which the Tribunal bundle is fully compiled. Further costs may be incurred between the compilation of the Tribunal bundle and the Tribunal hearing and where this occurs a revised schedule will be available at the hearing. The Tribunal bundle does not include the past breach record of the party, which is provided to the Tribunal during the hearing, after all potential breaches of the Code have been determined.

previously been investigated by the Executive, the Executive may undertake appropriate investigations and will allow the provider the opportunity to respond to the outcome of these investigations in writing prior to the date of the CAT hearing. Both the Executive's findings and any response made by the provider will be supplied to the CAT as an addendum to the bundle.

135. Where neither the provider nor the Executive confirm before papers are sent to the CAT that they wish for the hearing to proceed by way of an oral hearing, the paper-based CAT process will be used. Where either party later submits that it wishes to use the oral hearing procedure, the paper-based hearing will be vacated. If the costs relating to any vacated paper-based hearing would have been avoided by an earlier notification by a provider that it wishes to use the oral hearing procedure, these costs will be included in the administrative charge.
136. In respect of all CAT hearings, providers should recognise that any request made after a hearing is listed which results in moving the hearing date will increase administrative costs as may be invoiced under para 4.10.1 of the Code, and will have the effect of extending the period of any withhold of revenue or suspension as may have been directed. Such requests are likely to be declined in any event unless they are supported by evidence which demonstrates that a provider could not reasonably have been expected to prepare in time for the appointed hearing date.

### **CAT considerations**

137. When making an adjudication, the three CAT members will examine the facts and the evidence presented in the case report, and they will determine by a majority decision whether any breaches raised by the Executive have been established.
138. The presentation of individual breaches will be the same whether the Executive has raised a breach of a rule under Part Two of the Code, or a responsibility set out in Part Three or Part Four of the Code. The provision of the Code will be interpreted in context by reference to the common usage of words as written in the Code. The CAT may also make reference to any definitions found at paragraph 5.3 of the Code and any Guidance published, from time to time, by the PSA.
139. The CAT will consider the reasons given by the Executive for its consideration that the breach has occurred, referring to any evidence that it considers relevant. The CAT will consider any response given by a relevant party and examine the information supplied by the Network operator or provider, referring to any evidence that it considers relevant. The CAT will expect the Executive to have made all reasonable enquiries for information and evidence held by the Network operator or provider during the course of its investigation.
140. Where breaches are disputed, the burden of proof in relation to those breaches remains with the Executive. However, where a provider makes its own assertion the burden of proof in relation to that assertion will rest with the provider. The CAT will examine the evidence using the standard of proof applicable in civil law cases: that is on the 'balance of probabilities'.

141. This means that the CAT will consider the submissions made by both parties and consider whether it is more likely than not that the breach has occurred. This does not mean that the CAT weighs up one set of submissions against the other; rather, it considers all the submissions, and the evidence in support of them, to determine if it is more likely than not that the alleged breach has occurred. The admission of late or further evidence shall be a matter for the CAT subject to the requirements of relevance and fairness.
142. The CAT will adjudicate on each breach separately, and when it has made a decision, it will declare a breach either 'upheld' or 'not upheld'. The CAT will then proceed to assess sanctions in accordance with Sections 12 and 13 below.
143. CATs are supported by a clerk to assist with procedures and the consistent application of the PSA's sanctions policy, and to take a record of the matters discussed and decided at CATs and assist in drafting full written decisions. The clerk also maintains a databank of key decisions affecting the interpretation of the Code, to ensure consistency between CATs.
144. Members of the Panel have an obligation, in conjunction with other members, to ensure that CAT hearings are conducted properly, fairly and in accordance with good practice and the relevant law. Each case must therefore be dealt with in the most expeditious manner compatible with the interests of justice and in accordance with the provisions of the Human Rights Act 1998.
145. Where a party can satisfy the Chair of the CAT that the circumstances justify an adjournment of the hearing<sup>30</sup>, a CAT may grant an adjournment of the hearing. The Chair may issue directions upon an adjournment as they see fit in order to ensure that the case is ready to be heard on the next occasion.

### **Oral representations based on the papers**

146. Prior to a case being considered by the CAT in the paper-based process, time will be given to the relevant party to make oral representations to the CAT members in person on the day of the hearing, if they so elect. These representations offer a chance for the relevant party to clarify the facts of the case, and the response that it has submitted within the papers, to the CAT in person. It is also the CAT's opportunity to explore and ask questions to gain a fuller understanding of the issues involved and of the actions of the parties concerned. Because of the nature of the clarification that may be useful to the CAT, it is preferable for a director or employee with direct knowledge of the promotion and operation of services, or alternatively a person responsible for compliance with the Code, to attend.
147. These representations must not be confused with an Oral hearing. It is an opportunity for the provider to provide any further explanation of their case, particularly to emphasise those parts

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<sup>30</sup> The PSA anticipates that adjournments will be exceptional. Delays caused by a party's own failure to act promptly (for instance, in seeking information or professional advice), or unavailability of a particular individual during a response period, will not ordinarily justify an adjournment. To justify an adjournment, the circumstances should be such that, due to circumstances beyond the reasonable control of the parties, CAT cannot fairly adjudicate on the issues before it.

that it considers important to highlight to the CAT and to clarify any factual issues that remain unclear. Providers can also use the opportunity to clarify its observations or submissions (or make submissions if not previously done) on the breaches and sanctions recommended by the Executive. New evidence will not normally be permitted at this stage although the CAT will have the discretion to permit such as stated in paragraph 140 above. Note however that where significant late evidence is permitted, the CAT may also decide to adjourn the hearing, which may result in additional administrative costs being payable.

148. Such representations are generally not expected to exceed 30 minutes. However where a provider is of the view that it needs more time to make such representations, the provider should make this clear with its response to the Warning Notice, including an explanation of why more time is needed, and specifying the time period requested for representations. The Executive will forward the request to the Chair of the CAT who will, prior to the hearing, decide on the appropriate length of time to be allocated for such representations.
149. Whether a provider has requested an opportunity to make oral representations or not, the CAT may have questions for the Executive arising from the evidence submitted. Prior to the CAT's adjudication, the CAT may require the Executive to attend in order to clarify the evidence gathered or submitted during the investigation.
150. Any questions from the CAT to the person making oral representations will usually be asked in the presence of the Investigations Team member. The CAT may also have questions to ask the Investigations Team member to seek clarification of the Executive's case, and should a party choose to attend (including by telephone) to make oral representations, such questioning will take place in the presence of the person making the representations. Once the oral representations have been made both the Investigations Team member and the provider will leave the hearing and the CAT will commence its deliberations.
151. A providers subject to investigation and/or the Executive may make an application for the representations to be recorded and made available after the hearing. All applications must set out the reasons for the request in writing and be made prior to the hearing. The Chairman of the CAT will determine the application in advance of the CAT.

### **Expert evidence in the papers**

152. In their response to the Warning Notice, a relevant party may include written evidence from an expert (either internal or external), including technical evidence. Where such evidence is provided, in order for a CAT to give weight to the evidence it should as a minimum fulfil the following criteria:
  - a. The expert's relevant qualifications and present employer should be stated;
  - b. The expert should list what material they have been supplied with and relied upon for the purposes of giving their view;
  - c. Where the expert is of the view that a technical matter was the cause of a breach, the expert should give full details of the known ways in which such a technical matter might

arise. The relevant party's evidence should provide factual details which support the explanation(s) offered and set out any remedial or investigative steps undertaken in respect of the technical matter;

- d. Where there is a range of opinion on the matters dealt with in the report, the expert should summarise the range of opinions; and give reasons for their own opinion;
  - e. The expert should make it clear when a question or issue falls outside their expertise; or when they are not able to reach a definite opinion, for example because they have insufficient information;
  - f. The expert should state who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision; and
  - g. The report should contain a statement that the expert is aware of these requirements.
153. Where the expert evidence submitted by either party gives rise to a new issue which is significant, and in the Executive or provider's view cannot properly be resolved by the CAP simply by reading the relevant party's evidence and the Executive's evidence, either party (or both) may consider it appropriate to exercise the right to request that the case is determined through an oral hearing rather than a paper-based hearing. Any such request must be made within the prescribed timescales.

### Oral hearings

154. Oral hearings perform the same function as a paper based hearing and serves to reach an adjudication of:
- the facts based on the evidence;
  - the potential breaches of the Code as alleged and defended; and
  - where breaches are upheld, the potential sanctions to be imposed, if any, based on an assessment of the case in the round.
155. As such, they ought to be arranged as soon as possible following the issue of a Warning Notice to avoid any delay in resolving any dispute between the relevant party and the PSA. Along with a swift adjudication, there is the need for any issues in the market to be resolved quickly and effectively. For this reason a decision as to whether an oral hearing is required ought to be made within **10 working days** of the issue of a Warning Notice (unless an extension has been granted to the provider for a response to the Warning Notice)<sup>31</sup>.

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<sup>31</sup> A relevant party may decide to opt for an oral hearing after this period but only have up to a further 10 working days to do so (i.e. within 20 working days of the issue of the Warning Notice). Requests made during this latter 10 working days will be subject to consideration by the Chair of the Tribunal. Arrangements initiated at this time by the relevant party may lead to additional costs being incurred, to be paid as part of the administrative charge for the investigation.

156. Two groups can initiate an oral hearing unilaterally or by agreement, and they are:
- a. The relevant party (the party to whom the Warning Notice has been issued); and
  - b. the Executive.
157. Oral hearings are initiated by either the relevant party or the Executive with the submission of a written notification to the CAT. In this notification, the person making the submissions must set out clearly what is agreed and what remains in dispute between parties, and/or the details of any evidence which may require the oral hearing to test it.
158. Where a CAT has been designated to undertake a paper based adjudication, the Chair of the CAT may notify the Executive that an oral hearing is preferred, setting out the reasons. If the Executive agrees, it will immediately notify the relevant party and begin the process of arranging such a hearing.

### **Pre-hearing process**

159. The Code sets out at Annex 3, paragraph 3 the protocol for an oral hearing. While the PSA will arrange the hearing and carry out the administration of the process, responsibility for ensuring (through the use of effective case management directions) an efficient and effective process resides with the Chair of the CAT. Any concerns that due process is not being followed can be set out in writing to the Chair of the CAT, who on considering those submissions may make directions in accordance with Annex 3 to the Code.
160. The Chair of the CAT will establish a clear timeline for the oral hearing using directions in accordance with Annex 3, paragraph 3.5, setting a date for the hearing itself to suit all parties, and indicating clear milestones for:
- a. the exchange of statements of case,
  - b. the admission of facts before the hearing,
  - c. the disclosure of documents,
  - d. the provision of expert reports,
  - e. the exchange of witness statements,
  - f. the preparation of agreed bundles of documents,
  - g. the submission and exchange of outline arguments,
  - h. the imposition of any interim measures (including the provision of security for the administrative charges of the PSA).
  - i. the date by which the respondent must be notified in writing of the listing of the oral hearing,
  - j. the date by which the respondent must inform the Executive in writing of whether they intend to appear in person at the hearing, and the name of any person who will be representing them at the hearing.

161. Any application for the hearing to be held in public should also be made at this stage.
162. The Chair of the CAT may convene a case management conference for the purpose of providing directions or may deal with directions by correspondence or phone, as they see fit.

### **Failure to cooperate on the part of the relevant party**

163. Where the oral hearing is initiated by the relevant party and that person causes undue delay or otherwise is not cooperative with the pre-hearing arrangements, the Executive may ask the Chair of the CAT to give directions for an expedited disposal of the case, and/or to strike out the relevant party's case in accordance with Annex 3, paragraph 3.12. Such a request will be copied to the relevant party. Where the Chair of the CAT considers that such an order ought to be made, the relevant party will be invited to make any final representations in writing within **5 working days**<sup>32</sup>. The expedited hearing will then take place based on the papers where possible to do so.

### **The hearing**

164. The hearing begins with short introductory remarks from representatives of both the Executive and the relevant party. The former will outline the background of the case, the agreed facts and where any central disputes arise. The representative for the relevant party may provide an overview of the disputed facts and an outline of the defence.
165. In respect of alleged breaches of the Code of Practice the Executive shall outline the grounds of the case, and call such witnesses and refer to such documents as it is entitled to do.
166. The relevant party shall then be entitled to respond to the case put by the Executive and to call such witnesses or present any written statements or other documents as he is entitled to do.
167. A witness in person may be cross-examined. A witness who has been cross-examined may be re-examined. The Chair of the CAT may question any witness at any time, and may invite questions from the other CAT members.
168. The representative for the Executive shall then be entitled to address the CAT. The representative for the relevant party shall be entitled to reply, and will make the final submissions to the CAT.

### **Expert representations**

169. Where the case is proceeding by way of oral hearing, the Chair may give directions in respect of expert evidence. Such directions may include but are not limited to:
  - Directions to allow each party to rely on specified expert evidence;
  - Directions to allow each party to put written questions to the other party's expert, with responses to be supplied by a specified deadline; and/or

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<sup>32</sup> This is to avoid any further undue delay to the process.

- Directions to require the experts to convene to discuss the issues, in order for them to produce a written statement which clarifies the extent of the agreement between them, the points of (and short reasons for) any disagreement, the action, if any, which may be taken to resolve any outstanding points of disagreement; and any further material issues not raised and the extent to which these issues are agreed.
170. Experts will give evidence at the hearing in the same way as other witnesses, subject to any directions previously made by the Chair of the CAT requiring their evidence to be given in another way or otherwise limiting their evidence.

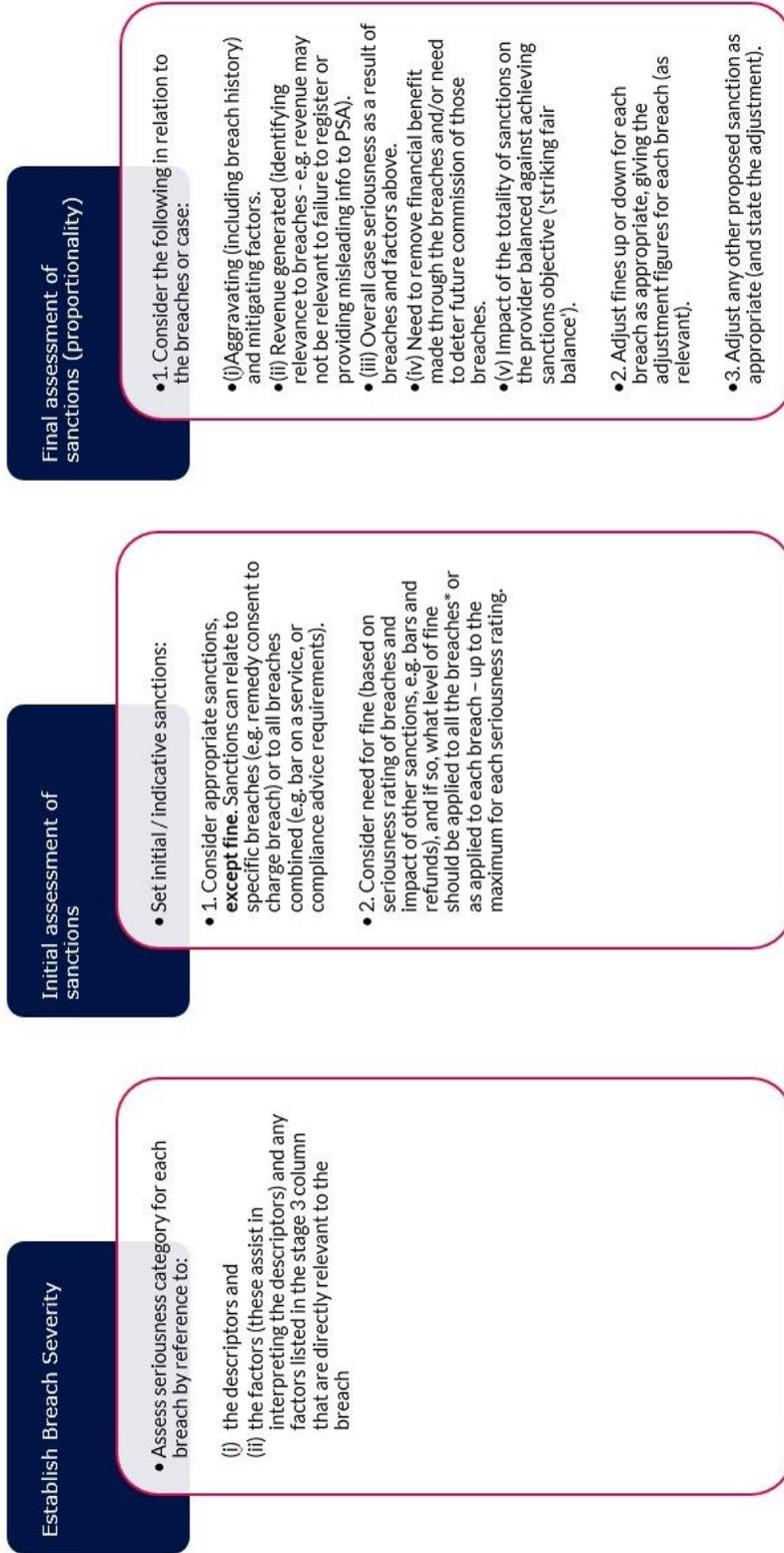
## Section 12

### Assessing potential breaches and imposing sanctions

#### The purpose of imposing sanctions

171. Sanctions may only be applied in cases where a CAT has determined that a Network operator, Level 1 provider or Level 2 provider has conducted its business, or operated a service, in breach of one or more rules or responsibilities set out in the Code.
172. Each case is decided on its own merits and sanctions applied may vary depending on the CAT's analysis of impact and culpability, service revenue data, potential for consumer harm and any mitigating and/or aggravating factors. Some, or all, of the sanctions can be applied in any case, depending on the circumstances. The CAT will take into consideration the principles of good regulation when imposing sanctions: that any regulation, or indeed any action to enforce regulations, should be transparent, accountable, proportionate, consistent and targeted (meaning only used in cases where action is needed).
173. When applying sanctions, the CAT will be guided by:
  - The need to protect both actual or potential consumers and build consumer confidence in the premium rate services market (including the need for any harm caused to be remedied where this is practicable);
  - The need to ensure as far as is possible that the breach of the Code in question will not be repeated by the party in breach, or others in the industry;
  - The need to ensure as far as possible that the party in breach does not benefit from that non-compliant conduct
  - The need to maintain high standards of compliance within the industry to maintain due diligence, good regulation and confidence in the industry;
  - The need for sanctions to be appropriate and to be targeted at the point in the value-chain that is most likely to ensure continued compliance with the Code;
  - The degree of responsibility for provision of the service in breach, or for managing the provider of such a service;
  - The fair distribution of responsibility for consumer protection and Code compliance across the value-chain;
  - The need to ensure sanctions are proportionate having regard to the desire to achieve compliant innovation in the market; and
  - The need to provide clarity and regulatory certainty as to the way the offending service, and services of a similar nature, are to be delivered in future.

Sanction-setting process diagram:



\* Where there is an early view achieved that the seriousness of the breaches combined will justify a fine well below £250,000, a fine need not be applied to each breach. Instead a single fine under £250,000 for all breaches can be set.

### **Establishing whether breaches have occurred**

174. The presentation of individual breaches will be the same whether the Executive has raised a breach of a rule under Part Two of the Code, or a responsibility set out in Part Three or Part Four of the Code.
175. The provision of the Code will be interpreted in context by reference to the common usage of words as written in the Code. The CAT may also make reference to any definitions found at paragraph 5.3 of the Code and any Guidance published, from time to time, by the PSA.
176. The CAT will consider the reasons given by the Executive for its consideration that the breach has occurred, referring to any evidence that it considers relevant.
177. The CAT will consider any response given by a relevant party and examine the information supplied by the Network operator or provider, referring to any evidence that it considers relevant. The CAT will expect the Executive to have made all reasonable enquiries for information and evidence held by the Network operator or provider during the course of its investigation.
178. Where breaches are admitted, the CAT will consider the facts, assess the Executive's interpretation of the Code and consider the Network operator's or provider's admissions. If the Executive's interpretation is accepted, the CAT will probably uphold the admitted breaches.
179. Where breaches are disputed, the burden of proof in relation to those breaches remains with the Executive. However, where a provider makes its own assertion the burden of proof in relation to that assertion will rest with the provider. The CAT will examine the evidence using the standard of proof used in civil law cases: on the 'balance of probabilities'. This means that the CAT will consider the submissions made by both parties and consider whether it is more likely than not that the breach has occurred. This does not mean that the CAT weighs up one set of submissions against the other; rather, it considers all the submissions, and the evidence in support of them, to determine if it is more likely than not that the alleged breach has occurred.
180. The CAT will adjudicate on each breach separately, and when it has made a decision, it will declare a breach either 'upheld' or 'not upheld'.<sup>33</sup>

### **Establishing the severity of the breaches**

181. If the CAT determines that a breach has occurred, it can apply a range of sanctions depending on the seriousness with which it regards the breaches and taking all relevant circumstances into account. The CAT must have regard to these Supporting Procedures when considering the seriousness of the breaches and determining which sanctions (if any) to impose (Code para. 4.8.2). The CAT is not bound by the Executive's recommendations and may impose different sanctions, or sanctions at a higher or lower level than those recommended.

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<sup>33</sup> Where the CAT considers that a breach is proven but substantially overlaps with another upheld breach raised in the Warning Notice (see above at paragraph 119 c), the CAT will make a determination to this effect, which will be reflected in the sanctions imposed.

182. The severity level of the individual breaches and the case as a whole are assessed on a five-step scale:
- Minor
  - Moderate
  - Significant
  - Serious
  - Very serious
183. The PSA considers any breach of the Code to warrant attention and remedial action so as to improve compliance standards. Severity levels associated with particular service characteristics may vary from case to case, depending on the circumstances.

*Descriptors of seriousness*

184. In deciding which level of severity is most appropriate, the CAT will consider the descriptors set out in paragraph 192 below. The CAT will consider factors relevant to the four categories that follow to assess which seriousness category a breach falls into:
- A. the **impact** (or potential impact) of the breach
  - B. the **nature** of the breach
  - C. whether the breach was **deliberate or reckless**
  - D. whether the breach was **negligent**
185. Factors relevant to A. the impact of a breach may include:
- the financial harm or risk of financial harm to consumers and the level of actual or potential financial gain as a result of the breach;
  - the impact or potential impact on the average consumer's ability to make a free and informed transactional decision and/or the impact on the enforcement of the Code in order to protect the interests of consumers and other industry participants;
  - the extent of other harm, distress or inconvenience caused to consumers, and the potential for further consumer harm, including any effect on children or others who may be in a position of vulnerability where a breach of rule 2.3.10 is upheld<sup>34</sup>;

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<sup>34</sup> 'A position of vulnerability' may be created by a person's character or circumstances, such as children who might fail to understand the costs involved in a service, or where a public information service targets its marketing at a particular group of consumers based on the general economic circumstances facing them. Where a breach of the Code appears to have a significant impact on people in a position of vulnerability, the severity level given to the case overall is likely to be serious or very serious, depending on the Tribunal's view of the facts.

- the potential for loss of confidence by consumers in premium rate services in general.
186. Factors relevant to B. the nature of a breach. The term nature focusses on the circumstance in which the breach occurred and has regard to the underlying need for relevant rules and provisions. Such factors may include:
- the purpose for which the specific Code rule, Special conditions or Guidance that were not complied with were created;
  - the frequency and duration of the breach;
  - the adequacy of the business systems and controls as put in place by the relevant party, their development, operation and maintenance;
  - whether senior management was aware or should have been aware of the breach;
  - the extent to which the service is able, through its design and operation, to deliver its purported value to consumers.
187. Factors indicating C. that a breach was deliberate or reckless may include:
- the breach was intentional, in that it or its consequences, were intended or foreseen;
  - the breach was reckless, in that the relevant party was aware of the risk that its actions could result in a breach or in consequences that amount to a breach, and took such action regardless;
  - the revenue of the relevant party was generated largely or solely as a result of the breach;
  - the relevant party has failed to properly implement compliance advice provided by the PSA or to comply with the terms of a Track 1 Action Plan;
  - the action or inaction resulting in the breach was not in accordance with the relevant party's internal procedures;
  - the breach was committed in such a way as to avoid or reduce the likelihood of detection;
  - those responsible were influenced to commit the breach because they thought it might not be detected or punished.
188. Factors indicating D. that a breach was negligent may include:
- the relevant party gave due consideration to its relevant obligations under the Code but failed to realise that its action or inaction would result in a breach;
  - the relevant party appreciated that their action or inaction might result in a breach and took reasonable steps to mitigate that risk but failed to achieve the Code outcome;
  - the relevant party gave due consideration to its relevant obligations under the Code but the oversight, internal procedures, standards and/or controls it provided as a result were insufficient to prevent the breach.

189. Where a CAT is assessing the severity of a breach in relation to any responsibilities set out in Part Three of the Code, it is recognised that an isolated case of a Level 1 provider failing to implement control mechanisms in relation to a perceived risk may result in a very significant level of consumer harm. Alternatively, a serious and repeated failure to undertake due diligence, or undertake risk assessments on clients, may result in only low-level consumer harm. A CAT may give extra weight to the adequacy of the business systems put in place, but is likely to consider the impact felt either directly, or indirectly, by consumers as a factor by which proportionate levels of severity are found.

*Descriptions to be considered in establishing the seriousness of the breach*

190. The CAT will consider each breach that it has upheld and allocate a provisional severity rating for each breach, using the five-step scale set out in paragraph 182 above. In doing so, the CAT will be guided by the descriptors set out below (see paragraph 192) and the factors set out above. These descriptors and factors are non-exhaustive and are not binding on the CAT, but are to support its assessment and serve as an aid to consistency.
191. This section sets out a number of descriptors for each severity level. They are a set of factors that are more likely to be present, either alone or in combination, in cases of each level of seriousness. It is not necessary for all the listed descriptors to be present for a case to fall into a particular category of seriousness. They are intended to assist the CAT in adopting a broad consistency of approach when assessing seriousness and are not binding on the CAT. In some cases, descriptors from more than one level of seriousness may apply and the facts of the case may in some respects fit more than one category of seriousness. The decision as to severity is ultimately left to the discretion of the CAT following consideration of the facts, the context of the particular case and the impact and nature of the breaches.
192. The PSA considers that a breach of a responsibility set out in Part Three of the Code may directly and/or indirectly affect consumers. For example, where a Network operator or Level 1 provider fails to meet its responsibility to conduct due diligence, or undertake adequate risk assessment and control of providers, that breach of the Code may indirectly impact on consumers when non-compliant services are permitted access to the network and consumers are harmed as a result. Evidence of any indirect impact on consumers may be presented to a CAT when addressing breaches of responsibilities under Part Three of the Code.

## 192.1 Minor

Descriptors<sup>35</sup>:

Little or no direct or indirect impact on consumers and little or no potential harm arising.

and/or

The breaches are likely to have had little or no detrimental effect on consumer confidence in premium rate services.

and/or

The cost incurred by consumers may be minimal.

and/or,

The breaches have the potential to generate only limited revenue streams.

and/or

The service is capable of providing the purported value to consumers and is designed to provide a legitimate product or service.

and/or

The breach was committed inadvertently.

and/or

The breach was an isolated incident and there is no evidence that it demonstrates a wider problem at the relevant party.

and/or

The breach was of a short duration.

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<sup>35</sup> These cases involve breaches that are likely to be addressed using the Track 1 procedure. However, a CAT is free to assess the facts and judge the matter to be “minor” where appropriate. The CAT may reduce the level of administrative charges in cases where it determines “minor” breaches could have been dealt with by other means.

## 192.2 Moderate

Descriptors:

A discernible effect, directly or indirectly, on consumers and/or some harm or potential harm arising.

and/or

May have had a slight impact or potential impact on consumer confidence in premium rate services.

and/or

The cost incurred is likely to be of some significance to consumers.

and/or

The breaches are capable of inflating revenue streams relating to the service.

and/or

The service is capable of providing some value to consumers and is designed to provide a legitimate product or service.

and/or

The breach was committed inadvertently or negligently.

and/or

The breach was an isolated incident and there is no evidence that it demonstrates a wider problem at the relevant party.

and/or

The breach was of short duration.

### 192.3 Significant

Descriptors:

A material impact, directly or indirectly, on consumers and show potential risk substantial harm to consumers.

and/or

Likely to have caused, or have the potential to cause, a drop in consumer confidence in premium rate services.

and/or

The cost incurred is likely to be of significance to consumers.

and/or

The breaches are likely to generate considerably inflated revenues for the service.

and/or

The service has limited scope or ability to deliver the purported value to consumers.

and/or

The breach was committed negligently.

and/or

The breach may not be an isolated incident and may indicate a wider problem at the relevant party.

and/or

The breach was of significant duration.

## 192.4 Serious

Descriptors:

A clear detrimental impact, directly or indirectly, on consumers.

and/or

The service would have damaged consumer confidence in premium rate services.

and/or

The cost incurred by consumers may be high.

and/or

The service had the potential to generate higher revenues, as a result of the breaches.

and/or

The service has very limited or no scope or ability to provide the purported value to consumers.

and/or

The breach was committed intentionally or recklessly.

and/or

The breach indicates a wider problem in the procedures and controls of the relevant party.

and/or

The breach was repeated.

and/or

The breach was of a significant duration.

## 192.5 Very Serious

Descriptors:

A clear and highly detrimental impact or potential impact, directly or indirectly, on consumers.

and/or

Likely to severely damage consumer confidence in premium rate services.

and/or

Consumers have incurred a very high or wholly unnecessary cost, or the service had the potential to cause consumers to incur such costs.

and/or

The service is incapable of providing the purported or any value to consumers.

and/or

The service was designed with the specific purpose of generating revenue streams for an illegitimate reason.

and/or

The service has or is likely to cause distress or offence, or takes advantage of a consumer who is in a position of vulnerability.

and/or

The breach was committed intentionally or recklessly.

and/or

The breaches demonstrate a fundamental disregard for the requirements of the Code.

and/or

The breach was repeated.

and/or

The breach was of a significant or lengthy duration.

## Setting sanctions

### *Initial indication on appropriate sanctions*

193. The CAT will then indicate what sanctions it considers appropriate from the range available. Where a fine sanction is considered appropriate, they will indicate what the starting fine amount should be.

### *Proportionality adjustment: factors considered*

194. The CAT will then apply its mind to proportionality and consider various factors that may impact on the initial assessment of appropriate sanctions, including where relevant the following:

#### *A. Aggravation and mitigation*

195. The CAT will consider any aggravating and mitigating factors. There may be factors that are relevant to the breaches raised or they may be relevant to the general conduct of the relevant party and the case as a whole. Where it is the former, the CAT will consider whether it is appropriate to adjust the severity rating of the upheld breach(es) or the level of sanctions at the indicative sanctioning stage to reflect the relevant aggravating or mitigating factors. Where there are multiple breaches, the CAT may find that certain aggravating or mitigating factors are of relevance to one, some or all of the breaches. Where it is the latter the CAT may at the proportionality consideration stage consider adjusting some or all of the sanctions that were set at the indicative sanctions stage as it deems appropriate in order to reflect the non-breach related aggravating and mitigating factors and achieve sanctioning objectives that are also proportionate. The CAT may find supplementary aggravating and/or mitigating factors in addition to those advanced by the parties.
196. Where there are factors of aggravation and mitigation considered together, these may be balanced by the CAT. Any adjustment to the overall assessment of the case must ensure the final decision remains proportionate to the overall impact and detriment caused, or potentially caused, to consumers and/or regulatory enforcement.

## *Aggravation*

197. The following provides a non-exhaustive list of factors which may warrant an increase in the severity of the seriousness level and the sanctions to be imposed (aggravation):
- Failure to follow available Guidance, or failing to take appropriate alternative steps, which, had it been followed, would have meant the breach was unlikely to have occurred;
  - Continuation of the breach after relevant parties have become aware of the breach, or have been notified of the breach by the PSA;
  - The fact that the breaches occurred after a prior notice has been given to industry, such as the publication of a 'Compliance Update' or an adjudication, in respect of similar services or issues;

- The harm occurred following the supply of compliance advice to a provider where that advice has not been fully implemented;
- Any past record of the party, or of a relevant director, being found in breach may be considered relevant:
  - For breaches of the same nature;
  - For any other breaches of the Code;
- Failure to fully co-operate with the investigation, including falsified, delayed or incomplete responses to information requests, which fail to meet the level expected by the PSA (see Section 6 above).

### *Mitigation*

198. The following provides a non-exhaustive list of factors which may warrant a decrease in the severity of the seriousness level and the sanctions to be imposed (mitigation):

- Some, or all, of the breaches were caused, or contributed to, by circumstances beyond the control of the party in breach, except where they could reasonably have been prevented by meeting obligations set out in Part Three of the Code. For the avoidance of doubt, circumstances beyond the control of the party in breach do not include circumstances where other parties are engaged to promote or operate services on behalf of the party in breach.
- The Network operator or provider has taken steps in advance to identify and mitigate against the impact of external factors and risks that might result in the breach, and has notified the PSA of this action and/or had sought compliance advice prior to launching the service.
- The Network operator or provider has taken steps to end the breach in question and to remedy the consequences of the breach in a timely fashion, potentially reducing the level of consumer harm arising from the initial breach(es).
- The Network operator or provider has adopted a proactive approach to refunding users, including complainants, which is effective in relieving some consumer harm arising from the breach(es).
- The Network operator or provider has proactively engaged with the PSA in a manner that goes beyond the level of co-operation that is generally expected. Network operators or providers who voluntarily provide information before it is requested, and/or who fully respond to requests for information far in advance of any specified deadline may be considered to have engaged in a manner that goes beyond the expected levels of cooperation.
- The Network operator or provider has taken action to ensure that the risks of such a breach reoccurring are minimised (including through a review and overhaul of its internal systems, where necessary) and that any detriment caused to consumers has been remedied.

- The Network operator or provider has, in the course of corresponding with the PSA, admitted one or more of the alleged breaches raised against it.
199. Having decided on applicable aggravating and mitigating factors, the CAT must seek to reach a final assessment that is proportionate, ensures that compliance standards and behaviour remain high and that consumers are protected in the future. Sanctions ought to be set at an appropriate level, taking into account any aggravation or mitigation considered to have impacted the initial severity level of the breaches themselves.

#### *B. Revenue*

200. The CAT will then consider the relevant revenue generated by the service.
201. The CAT will consider to what extent the level of revenue received by the provider was generated or potentially generated by the non-compliant conduct, and to what extent the revenue adequately reflects the measure of potential consumer or regulatory harm. As with aggravating and mitigating factors revenue may be relevant to either specific breaches or to the case as a whole and therefore the considerations set out in paragraph 195 above will also apply. The Executive will provide evidence to the CAT to assist in any assessment of revenue. A relevant party should provide evidence in support of any argument by it that the revenue was generated other than by the non-compliant conduct and that the CAT should therefore not take it into account. In such circumstances the relevant party should ensure they provide a clear breakdown of revenue by service and/or duration, with supporting evidence.

#### *C. Overall case seriousness*

202. Having decided on applicable aggravating and mitigating factors and any revenue flowing or potentially flowing from the breaches, the CAT will decide the overall seriousness of the case. They will seek to reach an overall assessment which is reasonable and proportionate, taking into account all the circumstances of the case.

#### *D. Deterrence*

203. The CAT will consider the need to:
- a. ensure that a party is not seen to benefit financially from a breach of the Code; and
  - b. achieve credible deterrence.
204. The CAT will consider the relevant revenue and turn to consider whether the sanctions or range of provisional sanctions either alone or in combination are sufficient to reduce or eliminate the financial gain attributable to the breaches. A relevant factor for consideration will be whether penalties should be set at levels which, having regard to that revenue, will have an impact on the body that deters it from misconduct in future and which provides signals to other bodies that misconduct by them would result in penalties having a similar impact.
205. The CAT will consider whether it is appropriate to uplift any financial penalty or combination of financial penalties to ensure that a provider does not profit from a breach of the Code. The CAT will impose penalties that are appropriate and proportionate, taking into account all the circumstances of the case.

206. Where an investigation has been lengthy and as a result relevant service revenue has been generated over a prolonged period, a Tribunal has discretion to take only part of this revenue into account (though the Tribunal may consider it an aggravating factor if a provider has continued a breach after it should reasonably have been aware of it). Conversely, where a service has only been in operation for a short time, a fine in the amount of the service revenue may not be sufficient to reflect the seriousness of the case (though the Tribunal may consider it a mitigating factor where this is because a provider has pro-actively remedied the breach).
207. The CAT will also consider the range of initial sanctions determined and whether they are sufficient, either alone or in combination, to deter future non-compliance by the provider in breach or by others. Where it is considered necessary and proportionate to do so, the CAT may also uplift any financial penalty or combination of financial penalties in order to achieve the aim of deterrence. Similarly, it will consider whether any non-financial penalties indicated at the initial stage should be altered or strengthened in order to have greater deterrent effect. Some of the factors the CAT may consider in determining whether it is necessary to achieve deterrence are:
- The provider already has a breach history and/or similar concerns have previously been raised with the provider by the case assessment team.
  - Sanctions previously imposed in respect of similar non-compliance have failed to achieve any improvement in the relevant standards of compliance of industry.
  - There is a risk of similar non-compliance in the future by the party in breach or by other members of industry in the absence of a sufficient deterrent.
  - The sanction is too small to meet the objective of deterrence.

#### *E. Totality of sanctions*

208. The CAT will then consider the effect of the sanctions decided individually and in combination and whether they are proportionate, taking into account the assessments made at all other stages above. The CAT will decide the appropriate proportionality adjustments (if any) to be made to the initial sanctions assessment taking into account the outcomes of the assessments made at A. to E.

## Section 13

### Sanctions

#### The range of sanctions available – paragraph 4.8 of the Code

209. The PSA has a range of sanctions which the CAT can impose. These are set out at Code para. 4.8.3. The CAT are mindful of the overall impact a combination of sanctions (e.g. the fine, barring and refund provisions) may have upon a service and/or the provider. The provider may also already have incurred costs in taking remedial action on a voluntary basis. When imposing a combination of sanctions, the CAT will take into consideration all relevant circumstances, and seek to ensure sanctions are appropriate and proportionate in all the circumstances.
210. The different sanctions may be considered useful in achieving different regulatory outcomes. The CAT seeks to ensure sanctions are imposed effectively and appropriately, so that any regulatory action is targeted and that “polluters pay” and bear the cost of regulation.
211. A formal investigation, and the imposition of sanctions, is not an end in itself, but a trigger for improved compliance standards alongside clarity of interpretation of the Code.
212. The CAT will consider previous adjudications, where relevant, to assist in determining the appropriate sanction to impose and in order to ensure regulatory action is consistent. However the CAT may depart from precedent depending on the facts and the context of each case, which may result in significantly different penalties being imposed, for example where it is necessary to have deterrent effect. As such, the CAT will not regard the amounts of previously imposed financial penalties as placing upper thresholds on the amount of any penalty. The key focus of the CAT is to follow due process when determining effective sanctions in the case before them in order that the objectives set out at paragraph 173 of these Supporting Procedures are met.
213. The Registration Database will be maintained effectively to assist the PSA in ensuring the purpose of any imposed sanction is delivered following a CAT adjudication (see Section 14).

#### A formal reprimand and/or a warning

214. These are distinct sanctions available to the CAT. A formal reprimand is a severe reproof or rebuke. This is an indication of wrongdoing that usually warrants immediate and effective action by the party in breach, and potentially those associated with the provision of the service across the value-chain.
215. A warning involves the declaration of words of caution, giving notice of concerns regarding a party’s conduct. This may involve a description of the object of concern and a call to act promptly, so as to avoid similar problems in future. To ignore such a sanction may result in current, or future, services being investigated and higher penalties, if there are further adjudications against a provider.

## Remedy the breach

216. Any breach, from 'minor' to 'very serious', will usually require some attention from the party in breach, and remedial action will be necessary in order to improve compliance standards. However, the CAT can specifically require the relevant party to remedy the breach. Such an order may be made in any cases where there is any doubt that a breach has been fully and permanently remedied. It is likely to be especially relevant where there has been reluctance to make changes evidenced during the investigation. Where a provider has demonstrated an unwillingness or failure to understand how to comply with its obligations, the Tribunal may direct how the provider is to remedy the breach. In imposing a remedy the breach sanction, a CAT will usually require a provider to provide evidence to the satisfaction of the PSA that a breach has been remedied.
217. Where this sanction is imposed, it is likely that some further inquiries will be necessary to make sure remedial action has been taken, and the service(s) are operating in compliance with the regulations. It is in the provider's best interests to remedy breaches at the earliest opportunity after they have been identified, and providers should keep records of remedial steps taken, including evidence of their impact.
218. Where this sanction is imposed, the Executive is likely to initiate a new investigation raising a further breach (for non-compliance with a sanction) in the following situations:
- a. The provider refuses to take any steps to remedy the breaches explicitly;
  - b. There is evidence suggesting remedial action has not been taken, regardless of statements to the contrary being made by the provider; or
  - c. There is a lack of evidence that remedial steps have been adequately implemented within a reasonable period of time (which may have been specified by the CAT).
219. Depending on the nature of the breach and the immediacy of the required remedy, this sanction may be imposed alongside prohibitions or a bar on the service to give adequate time for remedial action to be taken while preventing the occurrence of any ongoing consumer harm.

## Compliance advice and prior permission

220. This is given or granted for a set period of time by the Executive directly to individual providers at any point within the chain of provision of premium rate services. It is given by the Executive, following an assessment of service information and promotional material, which is supplied by the provider requiring the advice or permission; or, alternatively, the provision of information relating to internal business systems. Advice seeks to guide the provider's conduct, both present and future, so as to improve the provider's knowledge and understanding of Code compliance. It is also intended to establish effective dialogue between a Network operator or Level 1 provider and the Executive, and ensure the implementation of effective due diligence and risk assessment and control procedures that may pre-empt future compliance issues and protect consumers.

221. Where a CAT has concerns relating to potential consumer harm arising from the service, or similar services in future, it has the power to order a party in breach to pursue and implement compliance advice, or seek prior permission to operate a service from the PSA. Prior permission<sup>36</sup> may be imposed in order to ensure current and future services are not operated, or launched, in a manner that is non-compliant with the Code.

### Compliance audit

222. This is a thorough examination to a prescribed standard<sup>37</sup>, by an independent party agreed by the Executive, of the internal procedures a Network operator or provider has in place to ensure that it complies with its obligations under the Code. The PSA will usually require the independent party conducting the audit to be both competent and independent and s/he must normally be accredited and/or experienced in relevant auditing. All costs incurred in respect of the audit will be the responsibility of the party in breach.

223. The compliance audit is intended to identify and address issues that may have led to non-compliance in the past and pre-empt future compliance issues to protect consumers. The sanction may be considered appropriate to use in cases where there is a breach history, or where there is evidence that the business systems adopted by the party in breach contributed to the non-compliance demonstrated within a service.

224. The definition and scope of the audit will vary on a case by case basis. The CAT, where it decides to impose an audit sanction, will generally look to set the broad parameters of the audit but will require the precise terms to be set by the Investigations Team in a proportionate and targeted manner and through liaison with the provider. An audit may for example consider due diligence undertaken when a Network operator or provider is making commercial arrangements for the provision of premium rate services, access to telecommunications networks, or the technology required to operate premium rate services for the benefit of consumers. It may also consider staff training and a Network operator's or provider's understanding of the Code of Practice, as well as the development of new services and their compliant operation and promotion.

225. An audit can provide verification of compliance standards through a review of objective evidence, for example compliance with required processes, assessment of how successfully processes have been implemented, judgment on the effectiveness of achieving any defined

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<sup>36</sup> Note that certain types of premium rate services may be more broadly considered by the PSA to pose a greater risk of harm to users because of their content; examples include live chat, gambling and counselling. These services must comply with the Special conditions for such services published by the PSA. A breach of a Special Condition is treated as a breach of a Code obligation (Code para. 3.11.3). Separately, the PSA has the power to require specific services to seek written prior permission from the PSA before they operate, which may set further service-specific conditions on Network operators or providers.

<sup>37</sup> Such standards will be set on a case-by-case basis, prescribed to ensure the objective set out in paragraph 212 is achieved by the specific audit undertaken. However in every case the PSA considers that an audit will supply, as a minimum, comprehensive details of what evidence of the current status of the party was examined by the auditor, the auditor's conclusions on the root causes of the breaches established by the PSA, and a comprehensive list of the auditor's recommendations to the relevant party. This will enable the Executive to establish if the audit was done to the required standard.

target levels, and provision of evidence concerning reduction and elimination of problem areas. An audit may not only report non-compliance and corrective actions but also highlight areas of good practice and provide evidence of compliance to enable the organisation being audited to positively change their working practices as a result and achieve improvements.

226. The audit must be completed to the satisfaction of the Investigations Team and any recommendations implemented within a period specified by the PSA. Where remedial steps have been, or are being, taken as a result of the audit, any breaches of the Code identified by the audit will normally be resolved without further investigation being necessary. However, a failure to follow any recommendation contained in the audit report without the prior approval of the PSA may be treated as a further breach of the Code in itself.

### **Barring of numbers and/or services**

227. The CAT has the ability to impose bars on a Network operator or provider. These can relate either to number ranges on which the service operates, and/or particular service types, and can be applied to some, or all, of the number range and/or service type, depending on the severity of the breach. The length of any bar is determined by the seriousness of the breach and all other relevant factors particular to the case. A bar may be imposed not only to prevent ongoing harm, but may also be imposed as a sanction which is intended to deter future non-compliance, provided it is proportionate to do so.
228. A bar must be imposed for a defined period of time. This may be given in days, months or years; or it may be defined according to a specific action that the relevant party must do, such as taking remedial action, making a service compliant, or payment of an outstanding invoice for a fine or administrative charge owed to the PSA.
229. A bar may be particularly appropriate where there is any risk that the same type of harm may be ongoing or may re-occur, for instance, in the case of a subscription service where a serious or very serious breach has taken place that potentially affected consumers who are already subscribed to the service (not limited to those who have complained to the PSA). A CAT may take the view that a bar is appropriate in order to prevent the risk of those other subscribers being further impacted (e.g. being billed again before the breach is remedied). In such circumstances, a bar is likely to be imposed at least until the party provides evidence to PSA that it has implemented compliance advice (e.g. to unsubscribe consumers for whom it does not hold adequate evidence of consent) so that there is no risk of further harm to existing subscribers.

### **Prohibitions**

230. The CAT may restrict the business operations of a relevant party for a defined period, so as to address consumer harm, give time to enable effective improvement to services, or to punish a

relevant party and/or an associated individual<sup>38</sup> for the non-compliant services it has operated or permitted to operate. There are three different types of prohibition:

- Prohibition from any involvement in specified types of service – paragraph 4.8.3(f);
- Prohibition from any involvement in all premium rate services – paragraph 4.8.3(g);
- The prohibition from contracting with any specified party registered with the PSA – paragraph 4.8.3(h).

231. The first two prohibitions are only applicable in cases where the relevant party and/or the associated individual have been found to have been knowingly involved in a serious breach, or series of breaches, of the Code. The severity of the cases, and in particular the number of repeated breaches of the Code, may impact on the CAT's decision as to the extent of the prohibition.
232. The third prohibition focuses on the relationship between two or more contracting parties in the premium rate value-chain. Under the 14th Code, registration is an important obligation for all relevant members of the industry, which is designed to aid the exercise of due diligence responsibilities set out in Part Three of the Code and to improve compliance standards. Where these standards drop, and relevant parties are found in breach of the Code, the CAT may consider it appropriate to prohibit a relevant party from contracting with any specified registered parties (or any parties that ought to be registered).
233. Each prohibition must be imposed for a defined period of time. This may be given in days, months or years; or it may be defined according to a specific action that the relevant party must do, such as completion of a compliance audit under a separate sanction imposed in accordance with Code para. 4.8.3(k).

### **Prohibiting an associated individual**

234. An associated individual may be prohibited by way of sanction by a CAT under paragraphs 4.8.3(f) or 4.8.3(g) of the Code as set out above. However, in relation to associated individuals, the PSA is required to follow the procedure set out in Code para. 4.8.8 before a decision on the prohibition can be made.
235. Where the CAT considers there is sufficient evidence that an associated individual has been or may have been knowingly involved in a serious breach or a series of breaches, the Executive will make all reasonable attempts to notify the individual concerned (and the party found to have been in breach of the Code). The Executive will set out the evidence that it proposes to present to the CAT with regard to this matter and provide the associated individual with the opportunity

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<sup>38</sup> An associated individual is any sole trader, partner or director or manager of a premium rate service provider (i.e. those who are likely to be listed as 'Responsible Persons' within the Registration Scheme), anyone having day to day responsibility for the conduct of its relevant business and any individual in accordance with whose directions or instructions such persons are accustomed to act, or any member of a class of individuals designated by the PSA (paragraph 5.3.9).

to respond to the evidence as appropriate. If the associated individual wishes for the matter to be dealt with instead by way of an oral hearing he/she ought to request such a hearing within ten working days of receiving the evidence.

236. Where an oral hearing has not been requested, the Executive will present its findings and any representations from the associated individual and/or relevant parties to a CAT, which will determine whether to impose a further sanction as against the associated individual in relation to an earlier adjudication.
237. The associated individual and/or the relevant party will be given the opportunity to make representations in person prior to any decision being taken by a CAT to impose this sanction. Prior to this, an individual will usually also be given advance notice that a CAT has made a recommendation that a prohibition case against them as an associated individual be investigated.

### Fines

238. Fines serve a dual purpose in that they remove some, or all, of the benefit or profit made from the non-compliant services and equally serve as a strong deterrent against future non-compliant activity being initiated by the party in breach, or by other members of industry intent on operating similar services.
239. Fines should not usually be considered as the principle way of securing compliance with the Code of Practice. Tribunals will seek to ensure that any risk of ongoing non-compliance is addressed via its other sanctioning powers so far as is possible, before considering whether the use of a fine is appropriate in order to ensure that a company does not profit from a breach, and that future non-compliant activity is deterred, thus protecting consumers from such harm reoccurring.
240. A CAT may consider using a refund sanction in conjunction with a fine to address the harm caused, establishing a further deterrent and seeking redress for consumers directly affected by the breaches upheld. Where evidence has been provided to the satisfaction of the CAT that refunds have proactively been given by the party in breach, significantly reducing the consumer harm and affecting the profit made from the breaches, the CAT may consider this as a mitigating factor, following the process set out above. This would also be the case where a provider supplies sufficient evidence that it has relieved itself of the benefits of any breach of the Code by making a donation to an agreed charity.
241. Fines may be imposed of up to £250,000 per breach (as is permitted by law). The bands of case seriousness and the usual levels of fines they may attract at the indicative sanctions stage are:

Minor:	up to £5,000 per breach
Moderate:	up to £20,000 per breach
Significant:	up to £100,000 per breach

Serious: up to £175,000 per breach

Very serious: up to £250,000 per breach

242. The law permits the imposition of fines up to £250,000 per breach meaning the above figures are a guide. The CAT may adjust the indicative sanctions previously set at the proportionality stage, having taken into account any non-breach related aggravation and mitigation or revenue generated, and any need to remove the financial benefit from the breach and/or the need to achieve credible deterrence. Where a CAT chooses to adjust the sanctions it will explain its decision.
243. In determining whether a fine should be applied (having considered other sanctions first), the CAT will have regard to the principles set out in paragraph 173 above. The level of any penalty must be sufficiently high to have the appropriate impact on the regulated body at an organisational level. It should incentivise the management (which is ultimately responsible for the conduct and culture of the regulated body) to change the conduct of the regulated body as a whole and bring it into compliance, achieving this, where necessary, by changing the conduct at different levels within the organisation. The level of the penalty should be high enough that the management recognises that it is not more profitable for a regulated body to fail to comply with the Code and pay the consequences, than it is to comply with the Code in the first instance, and that it should therefore discourage bad conduct and encourage good practices and a culture of compliance across the organisation.
244. A relevant factor in securing this objective of deterrence is the revenue generated by the service subject to the penalty. Penalties should be set at levels which, having regard to that revenue, will have an impact on the body that deters it from misconduct in future and which provides signals to other bodies that misconduct by them would result in penalties having a similar impact. That is, it must be at a level which can also change and correct any non-compliant behaviour, or potential non-compliant behaviour, by other providers. In determining the level of fine the CAT may therefore consider to what extent the level of revenue received by the provider was or may have been generated by the non-compliant conduct and to what extent the revenue reflects the measure of potential consumer or regulatory harm and detriment.
245. It may be appropriate for the CAT to set the fine at or above the level of revenue received by the provider as a result of the non-compliant conduct where the CAT is of the view that this is necessary to ensure that a provider does not profit from a breach of the Code, and/or to adequately deter providers from serious misconduct (for instance, in cases where a provider did not implement a system which collected adequate evidence of consent to charge). In doing so, the CAT may recognise that the number of complaints received by the Executive is not necessarily indicative of the full scale of the impact of any breaches, and that the loss or impact for consumers may be higher than the actual service revenue obtained by the Level 2 provider.
246. The intention is to achieve the sanctioning objectives set out at paragraph 173, not to establish a direct linear relationship between the revenue of a service and the level of the penalty. While a service with a larger revenue might face a larger penalty in absolute terms, a service with a smaller revenue may be subject to a penalty which is larger as a proportion of its revenue, for example. The CAT will impose the penalty which is appropriate and proportionate, taking into account all the circumstances of the case in the round together with the objective of deterrence.

247. The Executive will provide evidence to the CAT with regard to revenue that has been generated by the non-compliant conduct. A relevant party should provide evidence in support of any argument that the revenue was generated other than by the non-compliant conduct and that the CAT should therefore not take it into account. In these circumstances the relevant party should ensure they provide a clear breakdown of revenue by service and/or duration, with supporting evidence. Notwithstanding this, where the CAT considers that the measure of consumer or regulatory harm is greater than the level of revenue received by the provider, it may impose a fine in excess of the revenue received.
248. Where an investigation has been lengthy and as a result relevant service revenue has been generated over a prolonged period, a CAT has discretion to take only part of this revenue into account (though the Tribunal may consider it an aggravating factor if a provider has continued a breach after it should reasonably have been aware of it). Conversely, where a service has only been in operation for a short time, a fine in the amount of the service revenue may not be sufficient to reflect the seriousness of the case (though the Tribunal may consider it a mitigating factor where this is because a provider has pro-actively remedied the breach).
249. If, in making its assessment in any particular case, the CAT considers that the level of penalties set in previous cases is not sufficient effectively to enforce against the regulatory contravention concerned, and to deter future breaches, the CAT may set higher penalties under these revised guidelines. Services which have generated a large revenue, for example, may be subject to higher penalties in order for a deterrent effect to be achieved. CAT has the flexibility to impose higher penalties in appropriate cases and penalties CAT has previously imposed should not be seen as placing upper thresholds on the amounts of penalties CAT may impose. Conversely, the penalty may be reduced to take into account any proof of genuine financial hardship which has been supplied by a provider, as long as this does not prejudice the objectives set out in paragraph 173 above.
250. Where there is more than one breach of the Code upheld, and the CAT is of the view that in order to ensure that its sanctions are effective, it is necessary to fine a provider more than £250,000, the CAT may fine a provider up to £250,000 per breach. Where this approach is taken, the CAT will indicate the fine it would impose in this case for each contravention (regardless of their seriousness rating) if brought individually. The CAT will then adjust the cumulative fine imposed on a *pro rata* basis if (having taken account of the need for any fine to provide an effective deterrent effect), such an adjustment is nevertheless necessary to ensure a proportionate outcome (for instance, a downward adjustment may be where the CAT identifies that there is an overlap in the mischief addressed by a number of breaches, or it is not a case where it is appropriate for the fine to exceed the provider's revenue). An upward adjustment should never result in a fine for any breach exceeding £250,000.

### **Refunds – including refund directions under paragraph 4.9 of the Code**

251. Where a service has operated in breach of the Code and the breach has had an impact on consumers, PSA expects a premium rate provider to consider making refunds directly to affected consumers. This sanction may be used to restore consumers to the position they would have been in, had the breaches not occurred or the service in breach had not operated. The refund sanctions available may be imposed in any case, regardless of whether it relates to breaches of rules under Part Two of the Code or responsibilities under Parts Three or Four of

the Code. A refund sanction may have regard to consumers who are either directly, or indirectly, affected by a Network operator's, Level 1 or Level 2 provider's breach of the Code.

252. Paragraph 2.6.4 of the Code states "*where refunds are provided to consumers they must be provided promptly and in an easily accessible manner*". This is true in relation to refunds made following dialogue with consumers, engagement with the Executive or following an order by a CAT as a sanction under Code para. 4.8.3.
253. To ensure refunds are made to consumers in an easily accessible manner, providers are expected to consider the size of refund when selecting a method of redress. Any refund process must not act as a barrier to consumer redress, either by placing any unreasonable burden on the consumer when making a claim, or by making receipt of the refund so difficult that it deters consumers from completing the process.
254. A CAT may consider it appropriate to make a general order for refunds to either all or any specified group of consumers under Code para. 4.8.3(i), for example when:
- An identifiable (and possibly excessive) financial detriment to consumers has occurred;
  - Consumers were either deceived or misled with reckless or wilful intent, or through negligence;
  - The product or service was not supplied, or was of unsatisfactory quality;
  - The marketing or promotional material misled consumers into purchasing. This would include promotional material that stated a lower price than the amount the consumer is actually charged, or suggested that a service was free, when it was not.
255. Under Code para. 4.8.3(j), a universal refund will require the provider to issue a refund to all (or any specified group of) consumers who have used the service, even where they have not made a complaint. This sanction will only be used in circumstances where the service has failed to provide its purported value, and/or there has been very serious consumer harm or unreasonable offence has been caused to the general public, or a very serious breach of the Code of Practice has occurred. Universal refunds are therefore typically imposed in cases involving scams.<sup>39</sup>
256. Providing refunds to consumers in appropriate cases is important in resolving non-compliance. It is recognised in the Code at paragraph 4.9 that monies may be retained by different parties in

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<sup>39</sup> Where a Tribunal is satisfied that a provider is willing and able to provide a universal refund to consumers (and imposes such a sanction), a significantly lower fine will usually be imposed.

However, in many "scam" cases, a Tribunal will usually elect to impose a higher fine combined with a general refund sanction instead of a universal refund sanction, unless it is satisfied that the provider is willing and able to effect a full refund to the affected group of consumers, and/or to to relieve itself of the profits of any breach of the Code. This is to avoid a real risk that the universal refund sanction will not be complied with (or that it will not be clear to the Executive whether it has been complied with), and thereby the time it takes the PSA to effectively sanction seriously non-compliant service providers will simply be increased.

the value-chain, such as the Network operator or Level 1 provider. In order that refunds are awarded appropriately and without delay, systems need to be established so that relevant parties can assist in the provision of refunds from revenue retained by a Network operator or Level 1 provider in response to a PSA direction ('a retention', as defined in Code para. 4.9.1).

257. The Executive can intervene where relevant parties fail to pay refunds promptly in response to a CAT sanction, and it will do so in accordance with Code para. 4.9.2. A direction will be sent to the Network operator or Level 1 provider ordering it to make the refund payments. The relevant party will be responsible for any associated administrative costs. In relation to the obligation to make refunds on behalf of a party in breach, there is a four-month limitation period set in Code para. 4.9.3. This period runs from the completion of the adjudication process, provided that any reasonable time for any appeals has also passed.
258. Refund sanctions are payable before fines or any administrative charge due to the PSA. Code para. 4.9.4 makes it clear that monies outstanding, because of the failure of the relevant party to pay a fine or administrative charge to the PSA, may be paid out of funds from a retention; however, this will only be ordered in a direction once refunds are made, or the four-month limitation period has passed.

### **Suspension of sanctions**

259. The Tribunal may direct that a sanction it imposes is suspended, and provide that the sanction will only come into force upon certain events occurring. It will not ordinarily be appropriate for a Tribunal to do so. If a Tribunal is of the view that the imposition of a sanction is appropriate, there is unlikely to be any reason to delay the imposition of that sanction.
260. One example of a situation in which a Tribunal may wish to impose a suspended sanction is where a provider has been fined in respect of a serious or very serious breach of the Code, in which the provider was knowingly involved. This would mean that the Tribunal is able to prohibit the provider for a defined period (as set out at paragraph 230 to 233 above). However, a Tribunal may decide that it is proportionate to give the provider an opportunity to comply with the other sanctions imposed by the Tribunal, and therefore direct that the prohibition will only come into effect if the provider fails to comply with other specified sanctions.

### **Administrative charges**

261. The PSA policy is to ensure that, where resources and costs are incurred through investigating Network operators or providers in breach of the Code, these costs are met by those parties, rather than from the general industry levy.
262. For these reasons, all relevant parties found to be in breach of the Code can expect to be invoiced for the administrative and legal costs of the work undertaken by the Executive. Where prohibition proceedings are brought against associated individuals arising from the imposition of sanctions against a provider found to be in breach of the Code, administrative charges related to such proceedings will be imposed on the relevant provider, rather than the

associated individual, unless the individual is also the relevant provider (i.e. acting as a sole-trader).

263. The charges related to this activity are revised regularly and published by the PSA. In cases where it has been determined that one or more breaches have occurred, the CAT will make a recommendation to the Executive for the administrative charge to be imposed on the Network operator or provider. This may be imposed on a full cost recovery basis or, exceptionally, on a percentage basis, where circumstances justify this. Examples of the latter include where the CAT has not upheld a major part of the case brought by the Executive.
264. The Executive will give due consideration to that recommendation when using its discretion to invoice a Network operator, or a provider, for administrative costs in relevant cases.

## Section 14

### Post-adjudications

#### Publication of CAT decisions

265. The decision of a CAT, in relation to the alleged breaches, the seriousness rating of the case and the sanctions set, is formal in nature. The CAT will prepare, with the assistance of the Clerk to the CAT, an adjudication report setting out the decision.
266. Adjudication reports are published (including on its website) by PSA following a CAT, in accordance with Code para. 4.12. Their usual format is as follows:
- A description of the service;
  - The key facts leading to the Executive's raising of potential breaches and aggravating or mitigating factors;
  - The submissions from the responding Network operator, Level 1 provider or Level 2 provider; and
  - The decision of the CAT.
267. The sanctions imposed in published cases may assist in improving compliance standards, not just by the party in breach, but in other parts of the industry.
268. The Executive will usually notify the party found to be in breach (and any other relevant Network operators, Level 1 or Level 2 providers, as appropriate), of the decision at the beginning of the second working week following the date of the CAT hearing. The written decision will usually be published two weeks after the CAT hearing. It will be provided to relevant parties prior to publication.
269. Details of all adjudications will be recorded on a party's record on the PSA Registration Scheme, as well as being published on the PSA website, including:
- The date of the CAT;
  - The breaches raised, both upheld and not upheld;
  - The seriousness rating for the case;
  - Any relevant revenue information<sup>40</sup>;
  - Sanctions imposed; and
  - Any other key information associated with the investigation.

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<sup>40</sup> Such information may be given in relation to the revenue made by relevant services across the full period considered by the Tribunal, and monthly revenue levels may be indicated as appropriate to assist the reader of adjudication reports in understanding the scale of the market issues identified, the severity of the case, or the rationale for imposing sanctions.

270. The PSA Registration Scheme will record breach history records associated with relevant providers or their directors, including any adjudication by a CAT, for three years from date of publication of the relevant decision. In cases where the final assessment given to the case is 'very serious', the adjudication will be recorded on the Registration Scheme for five years, from date of publication of the relevant CAT decision.<sup>41</sup> This information is provided on the Registration Scheme to assist due diligence searches conducted by Network operators or providers on their current, or prospective, business partners. The Registration Scheme acts as one of many sources of information that may be relevant to contracting parties.
271. Previous adjudications may offer additional guidance to the industry on the criteria used by the CAT to assess seriousness ratings in different cases. They also act as an incentive to improve compliance standards across the industry, as a deterrent against the adoption of non-compliant service models or promotional material, and assist in providing clarity in the interpretation of the Code.

### Reviews of CAT decisions

272. Any determination made by an original CAT pursuant to Code para. 4.5.6 may be reviewed by a Review Tribunal, save for where an adjudication has been reached by consent between the parties. Reviews may be requested by either the party found in breach of the Code, or by the PSA.
273. Code para. 4.10.3 provides time limits for when requests are to be made. In ordinary circumstances, the request must be submitted within 10 working days of the publication of the decision. In "exceptional circumstances" a review may be requested after this deadline, but should still be initiated as soon as possible taking into account those circumstances. Please refer to the guidance at paragraph 122 of this document on what may constitute "exceptional circumstances." In the context of reviews, such circumstances might also include, for example, where third party evidence needed to be obtained to show that data relied upon to establish a breach of the Code was faulty and the breach ought not to have been upheld, and such evidence could not be obtained within the 10 working day deadline. In such exceptional circumstances, the PSA considers that requests for reviews must still be made in a timely fashion and in any event within 30 days of publication of the decision. Where a request is made in this time period, the provider should provide an explanation and evidence to show why it was not possible to make the request any earlier.
274. An application for review must not be frivolous. Code para. 4.10.2 sets out the grounds for review. Where the application for review is in respect of a determination made by the CAT it must be able to establish that either:
- a. The relevant decision was based on a material error of fact. It will not be sufficient to simply assert that the Tribunal came to a finding on the evidence with which the applicant

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<sup>41</sup> Note that a Tribunal, when considering a provider's previous enforcement history, is not limited to considering adjudications which are less than three or five years' old.

disagrees; an applicant must be able to demonstrate that there was a clear factual error which was material to the decision reached;

- b. The relevant decision was based on an error of law;
- c. The Tribunal reached its decision through a material error of process in respect of procedures set out in the Code and/or Procedures published by the PSA from time to time; or
- d. The Tribunal came to a decision that no reasonable Tribunal could have reached.

275. When setting out their grounds for the review, PSA recommends that:

- the applicant identifies their grounds of review clearly and provides all their evidence in support of the ground(s);
- where new evidence or arguments are produced, the applicant explains why the evidence or arguments were not provided to the original CAT and indicate the reasons why the Review Tribunal should review the decision in light of it.

276. Applications will be presented to the Chair of the CAP, or another legally qualified member of the CAP, in accordance with Code para. 4.10.4. The Chair will consider the grounds, together with any written submissions the Executive has provided in response (which will also be sent to the applicant), and decide whether a review of some, or all, of the original adjudication is merited. If the application is merited, a date for the review will be fixed as soon as is practicable.

277. Applications for review do not automatically suspend the sanctions imposed. In many cases, it may not be appropriate for sanctions to be suspended and any invoices, or other requests associated with sanctions, must be met by the relevant party. If the relevant party wishes the sanctions to be suspended, either wholly or partially, it must make an application in writing for suspension, along with its request for a review. This will be presented to the Chair of the CAP (or other legally qualified member of the CAP) in accordance with Code para. 4.10.5. Unless there are exceptional reasons in the particular case to grant the suspension, the Chair will only suspend sanctions if a review has been granted, and the Chair is satisfied, on the basis of robust evidence provided by the relevant party, that undue hardship would result from not granting the suspension and that there would be no significant risk of public harm in granting it. If the sanctions are not suspended, they must be complied with. The review may be stayed if the sanctions are not complied with.

278. Upon the review request being authorised by the Chair of the CAP, arrangements will be made for the review to be considered promptly on the papers or, where applied for, by way of an oral hearing under Code para. 4.7.4 as appropriate. When permitting a review, the Chair of the CAP may also give directions for the parties to follow if they wish to adduce further evidence, as they consider appropriate. Only evidence which is relevant to the permitted review ground(s) will be permitted. A review may be resolved prior to the hearing via a settlement under the process set out in Annex 3 of the Code, paragraph 4.

279. The hearing will not be a full re-hearing of the original case, and will be limited to the matters which the Chair of the CAP has confirmed, in accordance with Code para. 4.10.2, may be pursued. Accordingly, the Tribunal may decline to hear further evidence or re-examine evidence previously submitted to a Tribunal, where the evidence is not relevant to the permitted grounds of review.

#### **Review of administrative charges under paragraph 4.11.5**

280. Pursuant to Code para. 4.11.5, a party may also apply for a review of the level of the administrative charge invoiced to it following any determination of breaches by a CAT. A party can either do this jointly with a challenge to the determination itself, or without challenging the determination itself, on the grounds that the charge is excessive. Where a provider wishes to challenge both the determination and the administrative charge it must make this clear in its review request. Any request for a review of the administrative charges without challenging the determination itself must be made within 10 working days of publication of the decision. All reviews of administrative charges, whether or not accompanied by a challenge to the determination itself, will be determined by the Chair of the CAP (or other legally qualified member) and not a CAT (although any accompanying requests for a review of the determination itself, where granted by the Chair of the CAP, will still proceed to the CAT).

## **ANNEX A - Guidance on the application of the E-Commerce Directive to PRS that are information society services (“ISS”)**

*Guidance current as at 5 January 2015*

Directives 2015/1535/EU and 2000/31/EC

The Electronic Commerce (EC Directive) Regulations 2002

### **The definition of ISS (Directive 2015/1535/EU)**

‘Service’ - any ISS, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

- ‘at a distance’ means that the service is provided without the parties being simultaneously present,
- ‘by electronic means’ means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,
- ‘at the individual request of a recipient of services’ means that the service is provided through the transmission of data on individual request.

### **Expanded definition (recital 18 of D2000/31/EC)**

Information society services span a wide range of economic activities which take place on-line. These activities can, in particular, consist of selling goods on-line (activities such as the delivery of goods as such or the provision of services off-line are not covered).

Information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as:

- those offering on-line information or commercial communications; or
- those providing tools allowing for search, access and retrieval of data.

Information society services also include services consisting of the transmission of information via a communication network:

- providing access to a communication network or in hosting information provided by a recipient of the service;
- which are transmitted point to point, such as video-on-demand; or

- the provision of commercial communications by electronic mail are information society services.

(NB: the use of electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an information society service; the contractual relationship between an employee and his employer is not an information society service; activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not information society services.)

### **Exemptions / Indicative list of services not covered by the definition of ISS**

#### 1. Services not provided 'at a distance'

Services provided in the physical presence of the provider and the recipient, even if they involve the use of electronic devices

- (a) medical examinations or treatment at a doctor's surgery using electronic equipment where the patient is physically present;
- (b) consultation of an electronic catalogue in a shop with the customer on site;
- (c) plane ticket reservation at a travel agency in the physical presence of the customer by means of a network of computers;
- (d) electronic games made available in a video-arcade where the customer is physically present.

#### 2. Services not provided 'by electronic means'

– Services having material content even though provided via electronic devices:

- (a) automatic cash or ticket dispensing machines (banknotes, rail tickets);
- (b) access to road networks, car parks, etc., charging for use, even if there are electronic devices at the entrance/exit controlling access and/or ensuring correct payment is made,

– Off-line services: distribution of CD roms or software on diskettes,

– Services which are not provided via electronic processing/inventory systems:

- (a) voice telephony services;
- (b) telefax/telex services;
- (c) services provided via voice telephony or fax;

- (d) telephone/telefax consultation of a doctor;
- (e) telephone/telefax consultation of a lawyer;
- (f) telephone/telefax direct marketing.

### 3. Services not supplied 'at the individual request of a recipient of services'

Services provided by transmitting data without individual demand for simultaneous reception by an unlimited number of individual receivers (point to multipoint transmission):

- (a) television broadcasting services (including near-video on-demand services), covered by point (a) of Article 1 of Directive 89/552/EEC;
- (b) radio broadcasting services;
- (c) (televised) teletext.

### **Additional exemptions (D2000/31/EC)**

This Directive shall not apply to:

- (a) the field of taxation;
- (b) questions relating to information society services covered by Directives 95/46/EC and 97/66/EC (data protection);
- (c) questions relating to agreements or practices governed by cartel law;
- (d) the following activities of information society services:
  - the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority,
  - the representation of a client and defence of his interests before the courts,
  - gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.

## Guide to classification by premium rate service types

Competition services	Gambling activities including lotteries and betting (specific exclusion)
On demand 'video' services	Live customer support (where this is voice telephony)
Adult entertainment services / non adult entertainment services	Live advice/information (where this is voice telephony)
Recorded advice/ information	DQ (where this is voice telephony)
Mobile download	Multi-party chat (voice telephony)
Purchase (consumer not present/ not material content i.e. ringtone/ minutes)	Purchases where goods are physically delivered
Missed call (automated calling equipment)	Fax back (telefax exemption)
Online virtual chat/ contact and dating services	Missed call (no service/where this is voice telephony)
Charitable giving by SMS made to a provider in an EEA member state	

### List of Countries

#### EU Member States

Austria  
Belgium  
Bulgaria  
Croatia  
Cyprus  
Czech Republic  
Denmark  
Estonia

Finland  
France  
Germany  
Greece  
Hungary  
Ireland  
Italy  
Latvia  
Lithuania  
Luxembourg

Malta  
The Netherlands  
Poland  
Portugal  
Romania  
Slovakia  
Slovenia  
Spain (but not the  
Canary Islands)  
Sweden

The UK (but not the  
Channel Islands)

#### EEA Member States

Iceland  
Liechtenstein  
Norway

## **ANNEX B – Withhold Assessments**

### **Introduction**

The Track 2 procedure is commenced after it has been determined that there appears to be a breach of the Code and the Phone-paid Services Authority (PSA) considers, having considered the factors set out at paragraph 4.3.2 of the Code, that it is appropriate to allocate the case to Track 2. At the commencement of the Track 2 procedure, a withhold assessment will be undertaken, which will involve an assessment of the factors set out below under the headings “Factors capable of demonstrating a provider’s inability/unwillingness to pay” and “Factors that are suggestive but not determinative of a provider’s inability/unwillingness to pay”. The heading “Factors that may suggest that a provider is able or willing to comply” will also be considered to ensure that any such factors are fully taken into account.

### **Factors**

The factors under the first heading “Factors capable of demonstrating a provider’s inability/unwillingness to comply” are those that, where present, are generally probative on a balance of probabilities (either in isolation or in combination with any of the factors listed under the second heading) that the provider will be unable and/or unwilling to comply with any likely sanction or administrative charge imposed in due course.

The factors under the second heading “Factors that are suggestive but not determinative of a provider’s inability/unwillingness to comply” are those that maybe suggest a likelihood that the provider will be unable and/or unwilling to comply with any likely sanction or administrative charge. However, they are insufficient in and of themselves (and in the absence of any other probative factor/s) to show on a balance of probabilities that the provider will be unable and/or unwilling to comply and thereby justify the imposition of a withhold.

The factors under the third heading “Factors that suggest that a provider is or may be able or willing to comply” enables an assessment of any facts that are apparent within the case that may suggest that on a balance of probabilities a provider will or may be able and/or willing to comply with a sanction or administrative charge imposed.

### **Assessments**

If the assessment of the circumstances of the case and of the provider (by reference to all considered factors) indicates on a balance of probabilities that a provider cannot or will not comply with likely sanctions or administrative charge, a further assessment will be conducted to assess what amount of revenue should be withheld, followed by an overall assessment of the proportionality of the proposed withhold.

Although the factors listed under the headings have been set out to ensure that they are considered, each assessment will be conducted on a case by case basis and the PSA retains a discretion to take other factors or matters into account in arriving at a decision regarding the withhold where it is appropriate and proportionate to do so.

Note that withhold assessments are based on the PSA’s knowledge of the service and service provider at the time the assessments are made. Such assessments do not limit the PSA’s ability to take a different view on potential breaches or their seriousness following further investigation into the service and provider.

**1. Factors capable of demonstrating a provider’s inability/unwillingness to comply**

Factor	Comments
<p><b>1</b></p>	
<p><b>Incorporation:</b></p> <p>Is there evidence to suggest that the company was incorporated in order to generate non-compliant revenue? If so, what is the evidence?</p>	
<p><b>2</b></p>	<p><b>Financial information:</b></p> <p>Does the financial information indicate that the provider has insufficient funds available to pay any likely fine and/or refund sanction and/or administrative costs?</p> <p>Relevant financial information may include:</p> <p>Accounts</p> <p>Bank Statements</p> <p>Balance sheet</p> <p>Profit and Loss accounts</p> <p>Details of any overdraft facility</p> <p>Evidence of sources and amounts of recent/projected income</p> <p>Revenue currently retained voluntarily by a Level 1 provider and/or an MNO that PSA is advised will not be made available to the provider.</p> <p>Any other relevant information, including information supplied by the provider (such as information suggesting it has insufficient funds to pay refunds).</p>

	How does such financial or other information show that there are insufficient funds available?	
<b>3</b>	<p><b>History of non-compliance with sanctions or admin charges:</b></p> <p>Does the provider have a history of non-compliance with sanctions imposed (this includes any previous history of non-compliance by another provider, where that provider and the current provider have the same sole director)? Briefly explain why the circumstances of the previous non-compliance suggests there would be non-compliance in this case.</p>	
<b>4</b>	<p><b>Level of co-operation:</b></p> <p>Has the provider previously failed to co-operate with the PSA? Briefly explain why such failure to co-operate is significant enough to indicate that the provider would also be unlikely to comply with any sanctions or administrative charge imposed.</p>	
<b>5</b>	<p><b>Dissolution:</b></p> <p>Has the provider sought to dissolve the company (such dissolution either having been stopped or restored by the PSA)?</p> <p>Briefly explain why such behaviour suggests the provider is likely to be unwilling and/or unable to comply with any sanctions or administrative charge imposed (e.g. <i>“the provider sought to dissolve the company at Companies House after receipt of notification that an investigation had commenced, the effect of which is to create a position where there is no legal entity for the PSA to adjudicate against.</i></p> <p><i>This apparent attempt to evade/frustrate an adjudication is good evidence that the</i></p>	

	<i>provider would also be unwilling to comply with sanctions”)</i>	
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**2. Factors that are suggestive but not determinative of a provider’s inability/unwillingness to comply**

Factor		Comments
<b>1</b>	<p><b>Company residence and presence:</b></p> <p>Is the company based in a country/territory where the domestic rules enable companies to avoid public visibility of its financial affairs? Briefly explain why the provider’s presence in that territory/country may suggest that the company is or may be seeking to keep funds out of the reach of the PSA or other regulatory authority.</p>	
<b>2</b>	<p><b>Credit rating/CCJs:</b></p> <p>Does the company have an adverse credit rating or history and what are the reasons for that adverse rating?</p> <p>Briefly explain why the adverse credit rating or history suggest that the provider may be unable and/or unwilling to comply with any sanctions or administrative charge imposed?</p>	

<p><b>3</b></p>	<p><b>Absence of financial information:</b></p> <p>Has the provider failed to respond to requests for financial information or stated that it is unwilling to supply such information?</p> <p>Briefly explain why the failure by the provider to supply requested financial information may suggest that the provider may be unable and/or unwilling to comply with any likely sanctions or administrative charge.</p>	
<p><b>4</b></p>	<p><b>General misconduct of the company:</b></p> <p>Has the company been barred in other jurisdictions and if so, what were the reasons for such barring? Briefly explain why such barring may suggest that the provider may be unable and/or unwilling to comply with any likely PSA sanctions or administrative charge.</p>	
<p><b>5</b></p>	<p><b>Controls and accountability:</b></p> <p>Is there an absence of safeguards and/or controls in relation to the management of the provider (such as a sole trader or partnership) which increases the risk that the provider would be unwilling to comply with any likely sanction or administrative charge?</p> <p>Are there any Directors or associated individuals of significant influence within a provider who have previously been involved in non-payment of fines/administrative charges and refunds?</p> <p>If yes, provide further details.</p>	

**3. Factors that suggest that a provider is or may be able or willing to comply**

<p><b>1</b></p>	<p>Are there any factors in the case that suggest that the provider would be able and/or willing to pay examples may include:</p> <p>evidence of refunds having already been paid to consumers</p> <p>finances (and/or other sanctions) having been previously paid (or complied with)</p> <p>the existence of other PRS operated by the provider/other sources of revenue (including revenue currently voluntarily withheld by any L1 or Network operator) that may become available to a provider to pay a fine and admin charges.</p> <p>Briefly describe the factor and explain how it is relevant.</p>	
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**4. Factors relevant to the level of withhold**

<p><b>1</b></p>	<p><b>Seriousness of potential breaches identified so far including:</b></p> <p>The impact and duration of the apparent breaches. What was the impact of the breaches on consumers or PSA? How long did the apparent breaches go on for?</p> <p>The extent of consumer harm. Were all users of the service affected or is there evidence that only some consumers were affected by the potential breaches?</p> <p>The nature of the consumer harm? What type of harm was caused and/or in what circumstances was the harm caused?</p> <p><i>(e.g. promotion was targeted at, or attractive to children, consumers could not stop charges because STOP command not working,</i></p>	
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	<i>charges made where consumers had no knowledge of them)</i>	
2	<p><b>Other factors (as are apparent at that point) relevant to the specific case or to the provider including:</b></p> <p>Details of any relevant breach history of the provider.</p> <p>Any apparent aggravating or mitigating factors</p> <p>The revenue generated by the service</p> <p>The determinations reached in relevant precedent cases</p> <p>The perceived need for deterrence</p>	
3	<b>Likely financial sanction if breach(es) upheld</b>	

## 5. Proportionality Assessment

1	<p>Based on the evidence obtained to date, does it appear that a breach of the Code has taken place which, considering its seriousness, is likely to result in sanctions being imposed by the CAT?</p> <p>What sanctions and level of sanctions are considered likely? (As this is not an exact science and assessment is based solely on information available to date, sanctions may be expressed as a range, e.g. a fine of an amount between “£150,000 – £250,000”).</p>	
2	Based upon the available information and the assessment conducted under headings 1, 2 and 3 above is there a need for a withhold to be imposed prior to determination of the substantive case and imposition of any sanctions by a CAT?	

<p><b>3</b></p>	<p>If so, what proportion of the revenue should be withheld to address the risk of non-compliance with any sanctions?</p> <p>(Where revenue currently voluntarily withheld by any L1 or Network operator is due to be returned to the provider this should be taken into account).</p>	
<p><b>4</b></p>	<p>Can the risk of non-compliance with sanctions be remedied without the imposition of the recommended withhold?</p> <p>On the information currently available regarding the potential impact of the recommended withhold on the provider, balanced against the assessment of the nature and severity of the apparent breaches and harm/ potential consumer harm, does the recommended withhold level strike a fair balance?</p> <p>(if so, give brief reason(s)).</p> <p>If not, what level of withhold or alternative interim security do you consider to be appropriate and strikes a fair balance?</p>	

## ANNEX C – Examples of “important public interest reasons”

The following is a non-exhaustive list of examples of circumstances which may pass this test.

1. Breach of one of the provisions of Code rule 2.5 (harm and offence), in respect of which consumers have been seriously harmed or are at risk of serious harm and/or consumers are being threatened, and the Executive reasonably believes that notifying the provider before directions to suspend the service are issued will either (a) exacerbate the harm, or the possible extent of that harm; or (b) cause or allow the serious harm to occur whilst awaiting the respondent’s response.
2. Breach of one of the provisions of Code rules such as 2.3.3 (charging without consent) or 2.3.11 (termination of a PRS charge), or a missed call scam (aka *wangiri*), on a sufficiently widespread scale that the Executive reasonably believes that serious, widespread and irremediable financial detriment would occur to consumers whilst awaiting the respondent’s response.
3. Breach of Code rule 2.3.10 (impacting vulnerable consumers) which the Executive reasonably believes will result in serious and irremediable harm to such consumers whilst awaiting the respondent’s response.
4. Where related activity is under investigation by law enforcement agencies (including the Police or other regulators) and the Executive reasonably believes that prior notification of a provider would prejudice investigation of criminal or regulatory offences.
5. Where serious harm (or a law enforcement investigation) is occurring and the Executive reasonably believes that allowing the provider time to respond to the allegations prior to direction of a withhold will result in relevant PRS revenue necessary to provide consumer redress and meet other regulatory sanctions being dissipated (note that in this case the Executive should consider all information available to it regarding the financial and corporate status of the respondent, the amount held by the Level 1 provider, and the dates on which such payments are due).
6. Where the criteria for interim measures are fulfilled but the responsible Level 2 provider cannot be identified, and the Executive reasonably considers that the harm cannot be effectively addressed otherwise than through use of interim measures. This may include cases where there is reason to believe that the respondent is aware of an investigation but has been deliberately evading contact.