

The Fourteenth Edition of the Code of Practice A PhonepayPlus Consultation

A PUBLIC CONSULTATION

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Executive Summary

The 13th edition of the PhonepayPlus Code of Practice was approved by Ofcom and came into force on 1 July 2015. Before that, in March 2015, PhonepayPlus announced that we would separately be reviewing Part 4 of the Code, and specifically the investigations, adjudications and appeals procedures contained within it. The review would also look at PhonepayPlus' "Investigations and Sanctions Procedure" (I&SP), which whilst not part of the Code serves to support the enforcement process.

The Terms of Reference for the review set out that it would identify where the regulatory framework, including the Code and also supporting procedures, could be revised and to make clear recommendations for any improvement. In doing so this sought to build better industry and stakeholder understanding of, and confidence in, our ongoing enforcement framework and process.

The review is now complete, and has made recommendations in respect of four core areas:

- Independence
- Transparency and certainty
- Fairness
- Proportionality and consistency

Whilst not a core area, the review also had the goal of improving the efficiency and cost effectiveness of the process.

These recommendations form the basis for the proposed 14th edition of the Code on which we are now consulting. Whilst we do not formally consult on changes to supporting procedures, a draft version of those "Part 4 supporting procedures" ('supporting procedures') will be published for stakeholder comment in due course, allowing an opportunity for any necessary changes before a final version is published. The supporting procedures will provide additional detail on how provisions of Part 4 of the Code will be applied, including setting out more detailed criteria for decision-makers.

In line with the objectives of the review, the proposed new Code delivers a much more streamlined process than previously, which reduces the number and complexity of steps involved. The key changes can be summarised as follows:

- Bringing forward the consideration of interim measures – i.e. withholds and/or suspensions – to an earlier stage in all Track 2 investigations. This will remove the need for the current Emergency procedure, which we propose to abolish.
- Replacement of the current Code Compliance Panel (CCP) with a new body, the Code Adjudication Panel (CAP) which will no longer contain members of the PhonepayPlus Board. This provides a separation between those who make the Code – the Board – and those who enforce it.
- An internal mechanism to review the recommendations of the Investigations team before breaches and sanctions are outlined to the provider in a "Warning Notice".
- Enhanced potential for providers to settle cases once they have received the Warning Notice, and prior to a hearing.
- A more flexible hearing, which allows for different levels of oral and legal representation.

- A more streamlined, simplified process which significantly reduces the complexity of the current Part 4 by removing post adjudication reviews and the Independent Appeals Body (IAB) stage.

A copy of the proposed 14th edition of the Code – which includes the changes to Part 4 and some consequential changes to other parts of the 13th edition – is attached at Annex A to this consultation. Because the 13th edition was only launched in July 2015, we are satisfied that there has been no material change in circumstances since then which would bring into question the remainder of the existing Code provisions. For this reason we have not reviewed, or proposed changes to, any of those provisions. We now invite stakeholders to respond to the Code and consultation by 1st February 2016.

Section One - Background

1.1 Following an initial review and Call for Inputs in 2013, PhonepayPlus consulted on the 13th edition of the Code in 2014. Whilst respondents were supportive of the majority of proposed changes, there was significant concern about proposals to streamline and clarify investigation, adjudication and review procedures contained within Part Four of the Code. Indeed some respondents supplied feedback that went beyond just the proposed changes, and also commented on whether some of the underlying framework could be improved going forward.

1.2 Also in between the Code consultation closing and PhonepayPlus concluding its analysis of responses, the High Court delivered its judgment in relation to the judicial review (JR) case brought by Ordanduu and Optimus Mobile against PhonepayPlus. This was in response to PhonepayPlus' initiation of its Emergency Procedure against Ordanduu and Optimus in 2013. The judgment found a number of flaws with the way in which the Emergency procedure had been applied. However, during the permission stage of the JR the court commented on the perceived complexity of our appeals procedures.

1.3 As a result our Statement following consultation announced that, in response to respondents' concerns about our proposals for Part Four investigation adjudication and appeals procedures, we would not take forward our originally proposed changes to sections of Code 13 around "Track 2" investigations procedures, Reviews, Oral Hearings, and the Independent Appeals Body. Instead PhonepayPlus would undertake a separate review of the investigations, adjudications and reviews procedures set out at Part 4 of the 13th edition of the Code.

1.4 The Terms of Reference of this "Part 4 Review" were published by PhonepayPlus in May 2015. They set out that the review would output recommendations in respect of four core areas, which would then form the basis to revise and consult on a fourteenth edition of the Code of Practice with new Part 4 provisions. The four core areas concerned are as follows:

- Independence
- Transparency and certainty
- Fairness
- Proportionality and consistency

1.5 This review is now complete, and PhonepayPlus has developed a proposed 14th edition of the Code which revises the previous investigations, adjudications and appeals procedures. It is this proposed 14th Code which is the basis of this consultation. Because the 13th edition was only launched in July 2015, we are satisfied that there has been no material change in circumstances since then which would bring into question the remainder of the existing Code provisions. As such the substance of other aspects the Code remains unchanged from the current 13th edition, and we have not reviewed or proposed changes to other parts of the Code.

1.6 In addition the review has made separate recommendations around Executive capability, quality assurance, and other procedures which support the smooth flow of investigations and adjudications procedures. These do not form part of the consultation, but will support the Code and more broadly ensure PhonepayPlus is able to make decisions which are sound, fair and lawful.

1.7 As a result PhonepayPlus has also produced Part 4 supporting procedures in line with the review's recommendations. Whilst we do not formally consult on the supporting procedures, a draft version will be published in due course for stakeholder comment. Depending on the comments we receive we will make any necessary changes before publishing the final version.

1.8 The next section sets out the proposals in more detail and the reasoning behind them. A copy of the proposed 14th edition of the Code – which includes changes to Part 4 and some consequential changes to other parts of the 13th edition – is attached at Annex A to this consultation. In addition a table setting out the key differences between the 13th edition of the Code and the proposed 14th edition is attached at Annex B.

Code Review Process

1.9 Having embarked upon the Part 4 Review in April 2015, PhonepayPlus conducted a number of meetings with key stakeholders during June and July. In particular we were keen to discuss in more detail comments about Part 4 which were made by respondents to our consultation of the 13th Code.

1.10 On 22nd July 2015 PhonepayPlus held a workshop for stakeholders where we outlined our initial thinking in relation to proposals to revise Part 4 and supporting procedures. This workshop and other meetings provided useful feedback which has influenced our approach, and the response from stakeholders to our direction of travel was generally positive. We also gave an overview of the new process we are proposing in this consultation document at our Industry Forum on 4th November. The response at the stakeholder workshop and to our presentation of the proposed new process has been broadly positive.

1.11 This consultation sets out a number of questions, and we would welcome views from across our range of stakeholders and other interested parties. To provide sufficient time for respondents to comment, we require responses by 29th January 2016. This is ten weeks from the publication date of this consultation. Details on how to respond can be found in Section 4 – Next Steps – of this document.

1.12 Following receipt and appropriate consideration of responses, PhonepayPlus plans to issue a Final Statement in mid-February 2016. Shortly afterwards, Ofcom plans to release a consultation on approval of the 14th edition of the Code, and at the same time submit the Code to the European Parliament. Subject to there being no comment - either from respondents to Ofcom's consultation or from other EU member states - which would necessitate further review and changes as appropriate, we plan to publish the finalised 14th edition of the Code in July 2016.

Section Two - Proposals

Summary of the proposed process

2.1 The overall process which we have developed can be simply explained as follows. A flowchart showing the progress through each stage of the process is also provided below:

Stage One – Establishing Jurisdiction:

2.2 PhonepayPlus receives information which suggests a potential compliance issue. This could be through enquiries and/or evidence obtained from monitoring. Whilst providers may be asked to provide basic information about the service, no investigation has yet been opened.

2.3 The first action the PhonepayPlus Investigations team takes is to ascertain whether there are any jurisdictional issues. These potentially arise if the service in question is defined as an “Information Society Service” under EU law, and its provider is located elsewhere in the EU. If jurisdictional issues do exist, then the Executive will communicate with the regulator in the relevant territory so that they can investigate further and take action themselves or where they do not do so (or do so inadequately) PhonepayPlus will take derogation. Assuming there are no jurisdictional issues, or PhonepayPlus takes derogation, the Executive would proceed to Stage Two.

2.4 Whilst the actions at Stage One are already codified, further procedural steps will be set out in the supporting procedures which will ensure the process is robust and therefore provide greater certainty and confidence in the process to all parties during any relevant investigation procedure.

Stage Two – Investigation:

2.5. The key changes proposed at this stage are as follows:

- Bringing forward the consideration of interim measures – i.e. withholds and/or suspensions – to an earlier stage in all Track 2 investigations. This will remove the need for the current Emergency procedure, which we propose to abolish.
- Replacement of the current Code Compliance Panel (CCP) with a new body, the Code Adjudication Panel (CAP) which will no longer contain members of the PhonepayPlus Board – the CAP will provide members for individual PhonepayPlus Code Adjudication Tribunal (P-CAT) hearings to ratify any interim measures.

2.6 The next action the Investigations team takes is to determine, having regard to criteria set out in the Code and supporting procedures, whether to proceed with an investigation. If the determination is that an investigation is appropriate, then as at present we would allocate to either a Track 1 “action plan” route or a Track 2 procedure. Should the determination be that a Track 2 procedure is necessary, an internal panel of senior executives and PhonepayPlus Board members will consider, again having regard to set criteria and after providers have had the opportunity in most cases to make representations to the Executive, whether to make a recommendation to the PhonepayPlus Code Adjudication Tribunal (P-CAT) for any interim measures – revenue withhold and/or service suspension – pending adjudication.

2.7 Imposition of any recommended interim measures will be done by the revised and separate P-CAT. Readers should note that the body from which individual P-CATs will be

drawn – the Code Adjudication Panel (CAP) - will no longer contain members of the PhonepayPlus Board, which in our view delivers greater confidence in transparency and independence in terms of the separation of decision-making and strategic roles.

2.8 Because consideration of withholds, and in extremis service suspensions, will form part of all Track 2 investigations, PhonepayPlus considers this removes the need for a separate Emergency procedure, and so proposes no longer to set out such a procedure within the Code. It is our view that doing so contributes to a more simplified and fairer procedure.

2.9 During the course of an investigation the Investigations team will gather further information and evidence to determine whether or not there have been breaches of the Code. They will initially notify the provider of any identified concerns¹, and will ordinarily ask for further information, and communicate back and forth with them. At any time during this process a provider will have the opportunity to provide the Investigations team with any information it considers relevant to the matter. This is to ensure the provider has every opportunity to provide input during this stage. As is currently the case in the 13th Code, where a Track 2 case has begun the Investigations team will retain the ability to downgrade it to a Track 1 or to close it altogether if relevant information comes to light.

Stage Three – Decision on breaches and sanctions:

2.10 The key changes proposed at this stage are as follows:

- An internal mechanism to review the recommendations of the Investigations team before breaches and sanctions are outlined to the provider in a “Warning Notice”.
- Replacement of the current Code Compliance Panel (CCP) with a new body, the Code Adjudication Panel (CAP) which will no longer contain members of the PhonepayPlus Board – the CAP will provide members for individual PhonepayPlus Code Adjudication Tribunal (P-CAT) hearings for any ratification of settlements and consideration of cases that follow the issuance of Warning Notices.
- Removal of post adjudication reviews, oral hearings and appeals heard by a body controlled by PhonepayPlus and/or governed by the Code. This includes the removal of the Independent Appeals Body (IAB) stage.

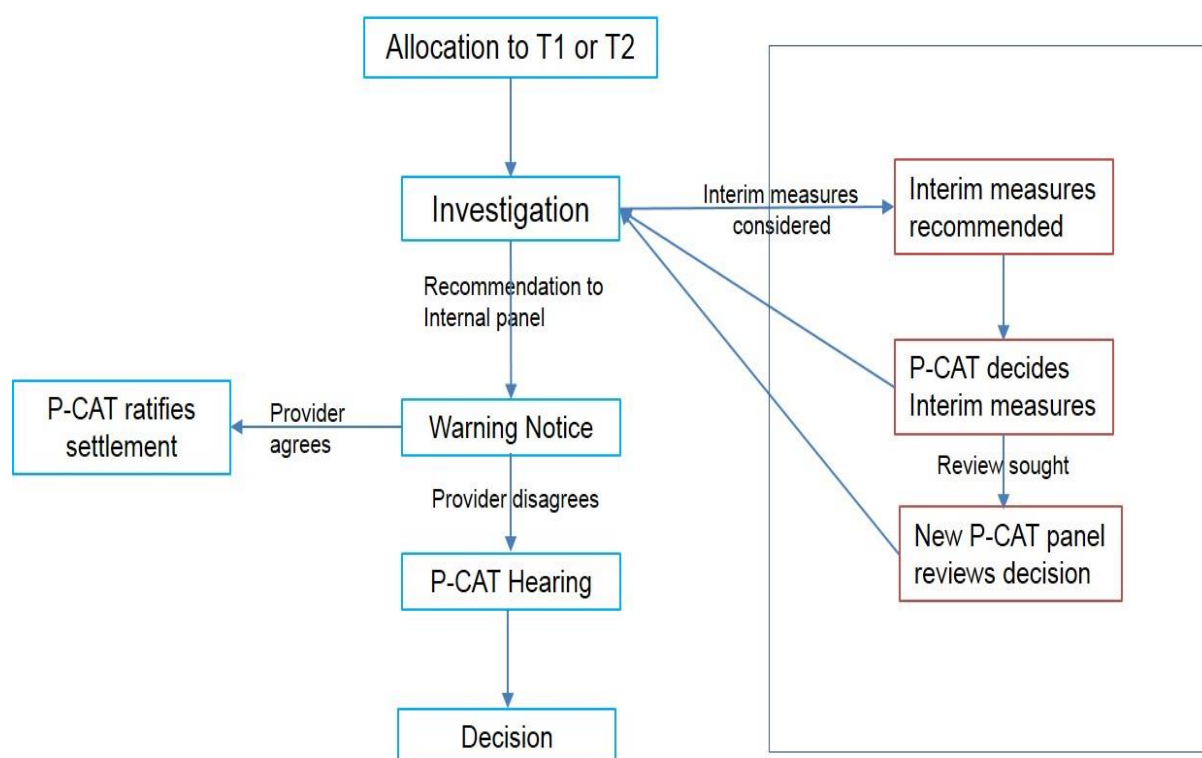
2.11 Once the Investigations team has concluded its investigation, they will prepare a “Warning Notice”, setting out the alleged breaches, supporting evidence and any proposed sanctions. This will be considered and then issued by the same internal panel of senior executives and members of the PhonepayPlus Board that is outlined above in relation to interim measures. The Warning Notice will then be sent to the provider concerned giving them a chance to respond and decide one of a number of options set out below, prior to any consideration by the P-CAT.

2.12 Once the provider receives the Warning Notice, they can elect to accept the breaches and sanctions at that stage, which would then be ratified by the P-CAT without a hearing. If a provider wished instead to accept the breaches in sanctions in part, then this would involve further discussion with the internal panel and any settlement subsequently reached would be subject to P-CAT consideration and ratification. In either case the case would conclude if the acceptance was ratified by the P-CAT. Alternatively the provider can choose to reject the breaches and sanctions as currently outlined. If the provider chooses

¹ Whilst this is not formally identified within the Code, a provider will be informed at the same time as a Request for Information is sent out as at paragraph 4.2.1 of the proposed new Code. In addition further information will also be supplied within supporting procedures

this option, the case moves to a full consideration by the P-CAT. The Investigations team will liaise with the provider as to the date of the hearing on the papers, and ascertain whether they wish to attend to provide any oral clarification to the P-CAT. The provider will have the ability to instead elect for a more formal oral hearing where they can be legally represented, and legal arguments and witness evidence can be heard.

2.13 Once the P-CAT has made its Final Decision, whether on the papers or after a formal oral hearing, the investigations and adjudications process outlined in the Code is complete. Flowcharts of the proposed process and the current process contained within the 13th Code are set out in detail at Annex B of this document. However a simplified diagram of the proposed process is set out directly below.



2.14 A table setting out detailed differences between this proposed process and the current process are attached to this document at Annex B. However the following table sets out the key differences:

	13 th Code	Proposed 14 th Code
Allocations Process Withholds	No documented criteria	High-level criteria provided within the Code, and expanded upon in supporting procedures
	Decision taken by PhonepayPlus Investigations Team with no right of appeal	Decision taken by P-CAT with right of appeal to another P-CAT if there is new evidence or if the provider was not notified of the application for interim measures prior to their imposition
Suspensions	Decision to suspend a service taken by members of the CCP with right of appeal to a Tribunal	Decision taken by P-CAT with right of appeal to another P-CAT if there is new evidence or if the provider was not notified of the application for interim measures prior to their imposition
Emergency Procedure	Yes	No. Instead there will be an automatic consideration of whether a suspension is necessary on commencement of all Track 2 cases. In practice suspensions will continue to be extremely rare
Membership of Tribunals	Tribunals drawn from the Code Compliance Panel, which contains both legally qualified and lay members, some of whom also sit on the PhonepayPlus Board	PhonepayPlus Code Adjudication Tribunals (P-CATs) drawn from the newly created Code Adjudication Panel, which contains both legally qualified and lay members, but does not contain any members of the PhonepayPlus Board.
Track 2 Cases	Provider is sent a formal letter setting out breaches at the start of an investigation. The case is then prepared by the Investigations Team and automatically presented to a Tribunal. The Tribunal then makes a final decision on the breaches, and sets sanctions.	Provider is informed of an investigation commencing ² , and interim measures are considered. The Investigations Team prepares a formal Warning Notice setting out breaches and recommended sanctions. Once this has been signed off by an internal panel of senior Executives and Board Members, it is sent to the provider. The provider can choose to accept the breaches and recommended sanctions or seek to settle – which may involve further discussion with the internal panel and will need to be ratified by a P-CAT. Alternatively if the provider cannot accept or settle then they can proceed to a P-CAT and the P-CAT will make a final decision.
Appeals	Providers can automatically request a post-adjudication review of the Tribunal decision. After this they can request an oral hearing if they have not previously done so. The membership of these review panels is drawn from the Code Compliance Panel. If the provider remains unhappy with the decisions of a review or oral hearing Tribunal, they can request a review by the Independent Appeals Tribunal (IAT), a separate body which whilst governed by the Code does not contain any PhonepayPlus Board Members.	Once the P-CAT has made its decision, there is no further appeal under the PhonepayPlus Code.

² Whilst this is not set out in the Code, the provider will be informed when a Request for Information is sent out as at paragraph 4.2.1 of the proposed new Code. In addition further information will also be provided within supporting procedures

Consideration of the proposed process

2.15 As the last section referenced, the review has concentrated on four core areas, and the balances between them. They are:

- 1) Independence
- 2) Transparency and certainty
- 3) Fairness
- 4) Proportionality and consistency

2.16 In arriving at the proposed process set out above, PhonepayPlus considered a wide variety of factors, and potential alternatives. The proposal generally covers all four core areas, even if some of the proposed changes within it contribute more to some areas and less to others. The merits of our proposal, both of itself and in comparison to alternatives, are set out directly below:

Allocation to Track 1 or Track 2

2.17 At present whilst consistent criteria are used to support the decisions to allocate complaints to either a Track 1 or a Track 2 investigation, these criteria are not documented. In order to provide more transparency and certainty to providers under investigation, we have proposed that high level criteria is provided within the Code, and expanded upon in the associated procedures document.

2.18 The relevant part of the Code is proposed to read as follows:

4.3.2

- a) In determining the allocation of a case, PhonepayPlus will take into account all relevant considerations as shall be set out in Procedures published by PhonepayPlus from time to time.;*
- b) Such considerations shall include, but not be limited to: the seriousness of the apparent breach, potential severity of the consumer harm and the breach history of the party or parties concerned.*

2.19 If there is sufficient evidence to suspect breach(es) of the Code, members of the PhonepayPlus Executive will decide which Track to allocate a case to. When making this determination, they will consider the following factors:

- (a) the level of harm caused by 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 PhonepayPlus considers is likely to be received from the party under investigation;
- (h) whether PhonepayPlus 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.

Q1 – Do you agree with the proposal to set out allocation criteria at a high level within the Code?

Interim Measures

Suspensions

2.20 In relation to service suspension our proposed process has sought to simplify the current separation between a Track 2 investigation and an Emergency Procedure. This is by building an automatic consideration of whether a suspension is necessary into each Track 2 investigation, rather than a suspension being an automatic part of an Emergency Procedure.

2.21 The general criteria for a service suspension will be codified (at paragraph 4.5.1a). Where appropriate an initial recommendation as to whether to suspend a service will be made by the internal panel of senior executives and PhonepayPlus Board members. Providers will generally be able to agree to the recommended suspension or seek to negotiate alternative suspension terms. Any agreement reached would need to be ratified by the P-CAT. If no agreement is reached a decision on the recommended sanction will be made by a P-CAT before it takes effect. The criteria within the Code will be supported by further detail set out in the supporting procedures, including the following:

Before seeking the imposition of any interim measures [in this case a suspension], PhonepayPlus will consider the following (where relevant):

- *The severity of the breaches being investigated;*
- *Whether any alternative action can be taken that would negate the need for interim measures*
- *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;*

2.22 These supporting procedures will, in addition to the Code, set out that prior to approaching the P-CAT for interim measures the Investigations team will use all best endeavours to contact the relevant provider, inform them of initial findings, and allow them a reasonable timeframe – taking into account the urgency – in which to respond. Also if the provider does not respond, or cannot be contacted, that the internal panel will use best endeavours to present all material facts to the P-CAT, including anything which the relevant provider might reasonably have relied upon.

2.23 As such we do not see any practical grounds to retain the Emergency Procedure as currently outlined in the 13th Code. We believe this simplifies the process, and is therefore consistent with the broader terms of the review. As such the proposed new Code removes the current section setting out Emergency Procedures, and procedures and considerations around withholds and suspensions are instead built into a revised Track 2 procedure (at section 4.5) and a newly created section 4.6 around Interim Measures.

2.24 Whilst the retention of a formal Emergency Procedure would continue to provide a high-profile deterrent, this is both a pro and a con. Some providers can perceive the high visibility of the Emergency Procedure as having a disproportionate effect on their reputation, which increases their incentive to challenge it. Given that the practical benefits which were derived from the Emergency Procedure remain available to PhonepayPlus as part of the proposed new process, we believe this outweighs the “deterrent value” of a separate procedure.

Withholds

2.25 In terms of withholds the current system places responsibility for decisions about withholds in any Track 2 case on the Investigations team. Some industry stakeholders perceived that this had led to unnecessary withholds, which had impacted disproportionately on providers when set against the nature and level of alleged consumer harm.

2.26 To address this, we have proposed that decisions around withholds be subject to the same level of robustness as for decisions around suspensions, which is a greater degree than at present. As before, these changes are set out at sections 4.5. and 4.6 of the proposed new Code.

2.27 The initial recommendation for a withhold will be made by an internal panel made up of senior executives and Board members, which will be separate from the Investigations team, rather than being made by the Investigations team themselves as at present. As with suspensions, providers will generally be able to agree to a recommended withhold or seek to negotiate an alternative withhold level. Any agreement reached would need to be ratified by the P-CAT. If no agreement is reached a decision on the recommended withhold will be made by the P-CAT in accordance with criteria set out within the supporting procedures, some of which we have listed at paragraph 2.21 of this document. In addition to those criteria listed at paragraph 2.21, in the case of a withhold all those involved – the Investigations team, the internal panel and the P-CAT – would give particular consideration to the following:

- *Any available information relating to the financial status of the relevant party and its capacity to meet its responsibilities under the Code*

2.28 Providers will be able to challenge a decision to withhold where new information comes to light, or where it was not appropriate or possible to notify providers of the application for a withhold prior to its imposition. Where a challenge is made the initial decision will be reviewed by a P-CAT consisting of different CAP members (as set out at paragraph 4.6.6 of the proposed new Code). The supporting procedures would recommend that in order for a provider’s representations to carry any weight they should supply credible and 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.*

Without notice suspensions and/or withholds

2.29 As set out above, where suspensions and/or withholds are used, PhonepayPlus will be required to make every reasonable effort to inform the provider and give them an

appropriate opportunity to respond. If a provider does not respond within a reasonable timeframe then PhonepayPlus will, as set out at paragraph 4.6.3b) of the proposed new Code, proceed on the reasonable assumption that the provider does not wish to respond.

2.30 However there may be circumstances where there are important public interest reasons why it is necessary to suspend a service, and/or withhold revenue, without any delay. For example where consumer harm was already widespread, and likely to grow further if the service continued in its current form, and the provider could not be immediately contacted then there may be good reason for a P-CAT to approve a 'without notice' suspension. Similarly there may be public interest reasons for an immediate without notice withhold where there is a real risk that a provider would transfer monies beyond reach or otherwise go to ground were they to receive an imminent, sizeable out-payment in respect of a service under investigation.

2.31 In both cases paragraph 4.6.4 of the proposed new Code sets out that without notice suspensions and/or withholds will require the Investigations team to use best endeavours to present all material facts to the internal panel and subsequently the P-CAT. This includes anything which the relevant provider might reasonably have relied upon. In addition the Investigations team will be required to attempt to inform the provider of the suspension and/or withhold as soon as possible after it has been approved. The provider would thereby be entitled to seek a review of the decision, as set out at paragraph 4.6.6 of the proposed new Code.

Earlier consideration of withholds

2.32 The current system only allows PhonepayPlus to direct a withhold once a breach letter has been issued. Therefore the issuance of a breach letter is currently the point at which a Track 2 investigation begins. In practice the issue of a breach letter can take longer than the 30-day period during which network operators are required to retain revenue, which has sometimes led to the bulk of revenue being paid out to a provider who then disappears with it or otherwise seeks to place monies beyond our reach once an investigation is formally opened and a withhold instructed. Whilst some networks or Level 1 providers have voluntarily withheld out-payments beyond 30 days, others have legal difficulty in doing so absent of a PhonepayPlus investigation having formally commenced, even if there is already considerable evidence of consumer harm.

2.33 In such cases the swift withhold of revenue can be the only method of ensuring that affected consumers receive refunds if their complaints are upheld, and that any fines levied by PhonepayPlus are paid, so strengthening the polluter pays principle. For this reason we propose to make the opportunity to request withholds available from the point that a case is allocated to Track 2 rather than withholds being available at the later point when the provider is presented with alleged breaches.

2.34 Whilst the provider will not be presented with the alleged breaches, at the point the case is allocated to Track 2 in most cases they will be presented with the evidence of consumer harm and any other evidence which, in PhonepayPlus' view, justifies a recommendation of a withhold to the P-CAT. Providers will be able to agree to a recommended withhold or seek to negotiate an alternative withhold level. In the circumstances previously set out at paragraph 2.28 above, providers will also be able to challenge any withhold imposed by a P-CAT to a differently constituted P-CAT should they wish to do so. Lastly, the recommendation to a P-CAT to withhold will be made by the internal panel outlined above, which we believe will be a more robust process than before. It is our view that these factors act to balance the earlier consideration of withholds.

Q2 – Do you agree with our proposal to consider interim measures automatically, and at an earlier stage, in all Track 2 cases?

Q3 – Consequent to Q2, do you agree with our proposal to remove the Emergency procedure from the Code?

Q4 – Do you agree with our proposal to introduce a P-CAT review of its decision to withhold revenue or suspend a service if the provider requests it?

Warning Notice and P-CAT Tribunals

2.35 Industry stakeholders had expressed opinions in three main areas, in relation to investigations and the subsequent hearing.

2.36 Firstly, it was clear that an appetite existed to settle breaches at an earlier stage of an investigation, without recourse to any Tribunal hearing. Secondly, that Tribunals do not allow providers to properly present explanations for or provide context in respect of alleged breaches. Whilst informal representations are already offered, it was perceived this still did not prevent Tribunals from mistakenly finding providers in breach, or levying sanctions which were disproportionate to the mischief.

2.37 Lastly, industry stakeholders had previously expressed a desire that decision-makers have a greater degree of separation, and thereby a perception of independence, from the PhonepayPlus Board and Executive than currently. This was based on the perception that the current Code Compliance Panel was biased due to the inclusion of members of the PhonepayPlus Board.

Warning Notices and earlier settlement

2.38 The first of the above issues is addressed by the greater opportunity for settlement that is now built into the process. Providers will be able to discuss individual breaches and/or sanctions once a Warning Notice is issued, but prior to any consideration by a P-CAT which would then be binding. It is our view that this gives the provider complete clarity as to the case against them and potential sanctions. This allows them to make a fully informed decision on whether to accept, challenge, or seek a settlement in respect of each of the recommended breaches and sanctions in respect of the case.

2.39 The Warning Notice improves on the clarity the provider currently derives when they receive the “breach letter” outlined in the 13th Code, as they will now have clarity as to the potential sanctions in addition to the breaches.

2.40 Changes to the current Track 2 procedure to reflect this approach are set out at paragraphs 4.5.3 to 4.5.6 of the proposed new Code.

2.41 An alternative would have been for a Warning Notice to make recommendations on breaches only – leaving a subsequent P-CAT hearing to set sanctions in all cases, whether the provider agreed the breaches or not. However we must balance this against the increased opportunities for settlement if a provider is also fully informed of potential sanctions prior to any finally binding Tribunal decision.

2.42 It is our view that the inclusion of proposed breaches and sanctions in a Warning Notice provides the greatest potential for a quicker and more efficient resolution with reduced costs to both sides, whilst still ensuring a robust and independent process. We also note that criteria around the setting of sanctions already exist in the current I&SP, and

will continue to exist within the new supporting procedures. This will also ensure that the sanctions recommended within a Warning Notice are proportionate and consistent.

Q5 – Do you agree with our proposal to issue a Warning Notice to providers, setting out both breaches and sanctions in advance of any P-CAT consideration, in order to allow the potential for the case to be resolved prior to a hearing?

Oral representations to the P-CAT

2.43 Not every adjudicated party will agree with an adjudication, regardless of the robustness of its conclusion. However it is clear that some industry stakeholders were of the view that a revised process should guard against any tendency to underestimate the importance of issues, especially technical ones, which were open to dispute, or to mitigation if properly explained. As an adjunct to this consideration, some providers who have previously been found in breach of the Code had expressed concern that the PhonepayPlus Executive did not always properly disclose relevant information to Tribunals in situations where the provider was not present.

2.44 In response to this our proposed process retains the provider's ability to make oral submissions to a P-CAT in one of two ways: Either by requesting attendance in person to make oral representations where the case is being considered by a P-CAT on the papers (which will give the provider an opportunity to provide all necessary clarification and/or context to the P-CAT), or by requesting a formal oral hearing where oral submissions (including legal) and oral evidence can be heard. These options are set out and described further within paragraph 4.7.4 of the proposed new Code.

2.45 The option of attendance at a P-CAT consideration on the papers will afford providers who cannot resolve a case following receipt of a Warning Notice suitable time to provide any counter-arguments or explanation they think necessary. Whilst not limited to technical issues, this should have the effect of ensuring that providers will always be able to present technical or other arguments to their satisfaction without needing access to a full oral hearing. This maintains the robust process by which the members of a P-CAT hearing can have all the evidence and arguments from both parties during a paper-based consideration before reaching any decision.

2.46 As already stated, providers will also have the right to request a full oral hearing if they desire to do so. However the proposed change should ensure that providers do not have to request a full oral hearing based solely on the perception that this is the only way they will be able to properly represent their arguments to a P-CAT.

Composition of P-CAT hearings

2.47 In relation to the membership and operation of Tribunals, the proposal is to establish a new body (the Code Adjudication Panel, or "CAP") from which members of individual decision-making Tribunals (P-CATs) will be drawn. PhonepayPlus Board members will be excluded from the CAP. However in doing so we will also continue to ensure the CAP retains the right mix of commercial, technical, consumer-based, legal and adjudicatory expertise. We will also ensure that the CAP members are sufficiently independent of providers of PRS (see also para 2.66-2.67 below). CAP is codified by changes to various parts of the proposed Code, in particular the start of Part Four, and the newly created sections 4.3 and 4.7, and Annex 3. Changes to section 1.4 of the proposed new Code clarify that Board members will be excluded from the CAP.

2.48 However we intend that Board members will continue to be involved at an early stage in the process when interim measures and Warning Notices are considered internally and

prior to any P-CAT hearing. Whilst a process entirely without the involvement of PhonepayPlus Board members might be considered preferable in terms of the perception of independence, we have balanced this against three considerations.

2.49 Firstly, the initial, internal recommendations relating to the issuing of Warning Notices for interim measures and subsequently breaches and sanctions are not decisions on those measures or breaches/sanctions. Secondly, continued Board member involvement in the process by way of involvement in the issuing of Warning Notices, including recommendations, provides them with ongoing, practical, experience of the Code and its application during enforcement. It is our view that this is a benefit to longer-term decision making around the Code and regulatory framework for PRS. Thirdly, that the inclusion of non-Executive directors – who will not have been involved in the conduct of the investigation and so will come to the matter afresh - in early stage internal recommendations provides a greater degree of internal scrutiny, and therefore robustness than if only PhonepayPlus staff are involved.

2.50 Whilst interim measures and the procedures around them are set out at a new section 4.6. of the proposed new Code, and the issuance of a Warning Notice and what it will need to contain is set out at paragraphs 4.5.3 to 4.5.6, we have not proposed to codify the involvement of PhonepayPlus Board members in those processes as such involvement is intended to be an internal arrangement only. However, criteria in relation to the making and formulation of Warning Notices will be included in the supporting procedures in order to ensure that this process is also transparent and objective .

Q6 – Do you agree with our proposal to establish a new decision-making panel capable of bringing independent judgement to bear, from which PhonepayPlus Board Members will be excluded?

Appeals

2.51 Of particular concern to industry stakeholders was a perception that current appeals processes following an initial Tribunal hearing – i.e. reviews and Oral Hearings – are not fair because such reviews are heard by the same body that heard the original case (albeit where a Tribunal was composed of different members). In addition the current structure of appeals was considered to be over-complex and time-consuming if a provider wished to access review mechanisms beyond our process.

2.52 In responding to this, our proposal is to simplify the current process considerably. We propose to remove the current post-adjudication review, oral hearing, and IAB Appeal Hearing, leaving the P-CAT hearing and decision as the final stage in our process before a provider can, should they wish to, proceed to a judicial review. This has the effect of removing sections 4.7, 4.11 and 4.12 of the current Code, as well as Annex 4 and various references to post-adjudication reviews and IAB throughout the Code. A new proposed paragraph at 4.7.4 sets out the different circumstances in which providers can now appear before the P-CAT.

2.53 Whilst providers have continued to request post-adjudication reviews, in recent years they have been perceived as increasingly redundant by providers who have gone through the investigations and adjudication process. This is largely because the panel for the review hearing was drawn from the same body – the Code Compliance Panel – as the original adjudication hearing, and as a result there was a perception that other members of the same body were unlikely to overturn the original decision.

2.54 In the current 13th edition of the Code, the process allows for oral hearings to be held either after a paper-based Tribunal hearing or after a review, or in place of a paper-based

Tribunal hearing. The trend over recent years has been for providers to request an oral hearing at the start of an investigation – i.e. in place of a paper-based Tribunal – rather than post-adjudication. This has been for two reasons, first because of a perception that an oral hearing provides a fuller presentation and assessment of the facts and matters of a case than a paper-based Tribunal. Second, because it affords an opportunity to negotiate a settlement which does not currently exist anywhere else in the process.

2.55 In removing access to an oral hearing after a P-CAT decision from the proposed new process, we have retained these two desired benefits. Providers will retain an enhanced ability to make oral representations to a P-CAT hearing, or instead elect a full oral hearing if they feel it necessary. The opportunity for early settlement is now built into the new process in between the issuance of a Warning Notice and any subsequent P-CAT consideration.

Q7 – Do you agree with our proposal to remove post-adjudication reviews and Oral Hearings?

2.56 We are also proposing to remove the current Independent Appeals Body (IAB) hearing from the process. In considering this we considered that an opportunity for internal appeal may, in a limited and low number of cases, offer a cost effective opportunity to challenge the process which preceded it. However we must balance that view against the fact that in practice the IAB route has rarely been used, with none since 2011.

2.57 Also proposed changes to earlier points within the process will build in greater robustness and give providers greater opportunity for discussion with the Executive prior to a P-CAT hearing. In addition the provider will be able to make oral representations during any P-CAT consideration. It is our view that this further increases the likelihood that the IAB would, if retained, add an unnecessary layer of complexity and increase time and cost to both parties which would outweigh any perceived benefits.

Q8 – Do you agree with our proposal to remove the current Independent Appeals Body hearing, on the grounds set out above?

Commencement and Transitional Arrangements

2.58 Whenever PhonepayPlus introduces a new edition of the Code it is necessary to set out the date on which the new Code will commence. Also what transitional arrangements will exist where an investigation commences whilst one Code is in force, and does not finish until after the new Code has superseded the old one.

2.59 For the 12th and 13th editions of the Code, transition arrangements were set out in a separate Notice. However for this edition of the Code the arrangements we propose are simpler, and therefore we further propose to include them in the new Code. These are set out at the new paragraphs 1.8.1 and 1.8.2.

2.60 The proposed paragraphs set out a commencement date for the 14th edition of the Code, and that from the commencement date the new Code and associated procedures would automatically apply to all existing complaints and investigations. This would include all breaches raised under the 13th Code. In practice this would mean that any complaints or monitoring which was being considered before the proposed new Code took effect would be, from the date that Code commences, dealt with using the processes within the new Code. In the same way any investigations which were already underway or breaches raised at the time the new Code took effect would, from that point onwards, be dealt with using the new Code processes.

2.61 In proposing this, we have formed the view that the processes in the proposed new Code provide greater benefit to providers than the 13th Code in terms of fairness and simplicity: We believe the investigations and adjudication process would be simpler, more streamlined, more robust, provide effective opportunities for oral representations and full hearings, provides earlier and more informed opportunities for settlement (at both the interim measures and substantive consideration stages) and has a greater separation between those involved in the investigation and/or policy and the decision makers. We believe that these benefits significantly outweigh any perceived disadvantage to a provider under investigation that could be occasioned by not using the procedures of the 13th edition to investigate or adjudicate on breaches of the 13th Code. In arriving at this conclusion we have also taken into account the fact that the sanctions available to the P-CAT under the proposed new Code are identical to those available under the 13th Code.

Q9 – Do you agree with our proposal to set out transitional arrangements that allow the new Code procedures to apply from the commencement date to all investigations, and/or complaints or monitoring which commenced under the 13th Code?

Meeting the statutory tests at s121 of the 2003 Communications Act

2.62 In approving any new edition of the PhonepayPlus Code, Ofcom is required to consider whether the Code meets the legal tests set out at s121 of the 2003 Communications Act. In particular Ofcom must consider the seven requirements within s121(2) of the Act, all of which must be met if they are to approve the draft Code.

2.63 The seven requirements are as follows:

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

2.64 What follows is our assessment of our proposed Code with regard to these statutory tests. Whilst this is divided into separate headings based on each requirement, some of the considerations may be relevant to more than one of them.

Existence of a person to administer and enforce the Code

2.65 PhonepayPlus would continue to have responsibility for administering and enforcing the proposed Code, as is currently the case with the 13th edition. Within PhonepayPlus the administration of the Code will remain with the Board and Executive whilst its enforcement will be the responsibility of the new Code Adjudication Panel. As such we do not expect any assessment against this test to differ from when the 13th Code was introduced. We believe this test remains satisfied.

Independence from PRS providers

2.66 The proposed Code continues to state that all Board Members will be appointed in their individual capacities, and that apart from a minority of Board Members who have contemporary industry knowledge no member of the board may have any commercial interests in the PRS. The proposed new Code goes a step further through newly introduced provisions to ensure that Board Members, whether with industry experience or not, do not form part of the Code Adjudication Panel.

2.67 As such we consider the proposed new Code continues to assure that PhonepayPlus remains sufficiently independent from PRS providers and as noted at 2.47 above we will ensure that CAP members are also sufficiently independent of PRS. In addition we consider that the removal of all Board Members from the newly created Code Adjudication Panel will increase the separation between those who create the Code and those who enforce it.

Adequacy of Funding Arrangements

2.68 The proposed new Code does not make any changes to the levy-based funding model that PhonepayPlus currently employs. We also continue to operate a self-funding Registration Scheme.

2.69 Whilst our proposal to consider withholds at an earlier stage during Track 2 investigation would strengthen the polluter pays principle, by ensuring that affected consumers are able to receive refunds if alleged breaches are upheld, and that any fines levied by PhonepayPlus are paid, the imposition and collection of such fines are not integral to PhonepayPlus' core funding.

Objective Justifiability

2.70 We note that Ofcom has previously considered the provisions which remain unchanged from the 13th Code to be objectively justifiable.

2.71 In terms of our proposed changes, it is our view that more visible, codified criteria for allocation and interim measures, supported by further detail within the supporting procedures, provide greater clarity and therefore enable greater understanding for any provider who wishes to challenge any decision. Leading on from this, the introduction of P-CAT hearings to make withhold decisions, together with a newly introduced automatic right of appeal which did not previously exist for withholds, will provide a proportionate balance against the earlier consideration of withholds during an investigation.

2.72 The proposed new investigations process provides earlier opportunities for settlement, and the Warning Notice gives providers a greater degree of information about potential sanctions so that they can make a more informed decision as to whether to progress to the P-CAT or not. We consider this provides greater certainty, and also has the potential to reduce costs and other resources on both sides – i.e. for providers and for PhonepayPlus. The proposal also removes the current practice whereby providers request an oral hearing prior to a paper-based Tribunal hearing in order to negotiate a settlement, which was not the intention of the current process.

2.73 Lastly, the proposals provide a high degree of flexibility for providers in presenting their case by retaining the ability for providers to decide whether or not they wish to make any oral submissions, and if so, whether during a P-CAT hearing on the papers or by way of a formal oral hearing. We therefore believe that the proposed new Code with the proposed changes meets the test of objective justifiability.

Undue Discrimination

2.74 The proposed changes would be applied (as is the case with the current procedures) uniformly to all relevant parties engaged in PRS, and would therefore affect only those providers who are the subject of Track 2 investigations. The proposed new Code does not contain any changes which would lead to parties who are not currently subject to Code obligations being subjected to any obligations. Therefore we do not believe that the proposed changes introduce any undue discrimination and that this test is therefore met.

Proportionality

2.75 The central objective of PRS regulation is to protect consumers from the risks of harm that may arise from their use of such services. In pursuing that objective it is important that any obligations and enforcement processes are proportionate to any harm being addressed.

2.76 We note that only providers who are subject to a Track 2 investigation (which will also include previous Emergency Procedures) would be affected by the new proposals. Given the majority of cases are dealt with via a Track 1 investigation – which remains unchanged – the majority of providers, either overall or under investigation, will be unaffected.

2.77 As previously, it is our view that more visible, codified criteria for allocation and interim measures, supported by further detail within the supporting procedures, provide greater clarity and therefore greater understanding. Whilst we have proposed earlier consideration of withholds than is currently the case, this is balanced by the introduction of the ability to ‘settle’ interim measures, a requirement for withholds to be determined by a P-CAT hearing – and not the PhonepayPlus Investigations team as at present – and an automatic right of appeal against an imposed withhold. As such the consideration and imposition of withholds would be, we believe, a more robust process than before.

2.78 In terms of the proposed Warning Notice, we consider that this provides greater certainty to the provider which facilitates their decision to either settle any alleged breaches or go to a P-CAT hearing. This not only has the potential to reduce regulatory and legal costs, but also acts as a suitable balance to the proposed removal of reviews, oral hearings post adjudication and IAB appeals from the Code. Similarly, the proposals provide greater flexibility for providers to choose an appropriate level of oral representation at the P-CAT hearing.

2.79 In proposing to remove all post-adjudication reviews and oral hearings, and appeals to a body which is governed by the Code, we have noted that an opportunity for internal appeal may, in a limited and low number of cases, offer a cost effective form of challenge. However we have balanced this against two main considerations. The first being the cumulative effect of our proposals will make earlier stages of an investigation more robust and give providers more information and greater opportunity for discussion with the Executive. Secondly, the current appeals process is widely considered to be overly-complex and such complexity may carry with it unnecessary costs and time. We note the IAB, the last stage of the current appeals process, has been very rarely used by providers. Having considered the views of industry stakeholders we believe that the proposed changes address industry concerns without creating more obligations on providers. We therefore believe that our proposals are proportionate to what both PhonepayPlus and industry has sought to achieve and the test is thereby met.

Transparency

2.80 We note that Ofcom has previously considered all provisions from the 13th Code which remain unchanged to be transparent. In terms of the proposed changes, it is our view that they considerably simplify the current investigations and adjudications process, and therefore provide greater clarity and accessibility to stakeholders in general.

2.81 The proposed changes in new Code and the terms of reference for making those changes, were developed following ongoing dialogue with industry stakeholders, including specific meetings with key stakeholders and a workshop in July 2015 where we outlined our initial thinking. We are therefore satisfied that the proposed changes and reasons for them have been, and continue to be, fully transparent thereby meeting the test.

Section Three - Impact and Costs

3.1 One of the key objectives of the review of investigations and sanctions procedures was to simplify our processes and procedures. The proposed process reduces the number of steps in the process and simplifies them. We expect some of the qualitative benefits of the new process to be:

- Greater transparency and certainty at an earlier stage for providers subject to the Track 2 process provided by the Warning Notice;
- Enhanced opportunity for providers to settle a Track 2 investigation by agreement;
- Fewer cases overall going forward to a P-CAT hearing as we expect at least some cases will be settled following the issue of a Warning Notice;
- Reduction in the number of steps in the process should lead to an overall reduction in the time it takes to go through the full PhonepayPlus process.
- The possibility in a small number of Track 2 cases, of interim measures being implemented earlier in the process than is currently the case, raises a greater possibility of ensuring that there are funds available for consumer redress where a P-CAT determines a breach.

3.2 It is difficult to provide anything more than speculative quantitative estimates of costs and savings associated with the benefits outlined above, as we cannot know at this point how many Track 2 cases we will see under the new Code and what proportion would go forward to a P-CAT hearing. We have however done some analysis of recent case data to inform our thinking.

One-off Costs and Savings

Code Adjudication Panel Costs

3.3 The creation of a new decision-making body (the Code Adjudication Panel) from which P-CAT members will be drawn will carry associated costs with recruitment. On the basis of previous recruitments, we estimate that to recruit legal and lay members of the required calibre would cost a few thousand pounds (£3-5k) for each member that we need to recruit. Members of the current Code Compliance Panel and Independent Appeals Body will be eligible to apply for posts on the newly created CAP, and we expect that this would significantly reduce recruitment search costs. Under the current process, we regularly need to recruit new members of the CCP and IAB when their terms of office come to an end. We therefore do not expect the overall recruitment and set up costs of the new panel to have a significant impact on the PhonepayPlus budget.

Provider Costs

3.4 We have not identified significant quantifiable costs associated with implementation of or familiarisation with the new Code that would fall on providers, but would be interested in consultees' views on that assumption.

Recurring Costs

Costs to PhonepayPlus of Track 1 cases

3.5 The Track 1 procedure is essentially unchanged under our proposals for the new Code. We therefore do not anticipate any significant costs (or savings) associated with the Track 1 procedures set out in the proposed new Code.

Costs to PhonepayPlus of Track 2 cases

3.6 The major changes affecting the costs of the Track 2 procedure are:

- Introduction of an internal panel consisting of senior executives and Board members to consider the Investigations Team proposals and issue Warning Notices
- Abolition of the IAB
- Introduction of the earlier consideration of potential interim measures, which includes the possibility of a hearing by the P-CAT
- Abolition of the separate Emergency Procedure.

3.7 We expect that in general the costs of investigations will be largely unchanged by the new proposals and that the costs of a P-CAT hearing will not differ significantly from the costs of a CCP hearing. For reference, our analysis of cases suggests that PhonepayPlus's costs for a paper-based CCP hearing are typically in the range £2-3k, but that the costs of oral hearings are considerably higher, in the range £17-70k with a median cost of around £40k. The increase in costs is largely a result of having to engage external legal advisors. The number of oral hearings is, however, very low, with five having taken place in the last two years.

3.8 We expect that the introduction of the Warning Notice, with a clear statement of alleged breaches and recommended sanctions will lead to more cases being settled than is currently the case and consequently a lower overall number of P-CAT hearings when compared with CCP hearings. If that assumption proves to be correct, then we can expect to see a reduction in the overall costs to PhonepayPlus, but it is not possible at this stage to provide a credible estimate of how many fewer cases we can expect to see go to a P-CAT hearing.

3.9 We do not consider at this point that the work of the internal panel of senior executives and Board members will require the recruitment of additional staff or significant additional staff costs. The time that this panel spends considering cases will be a recoverable administrative cost. On the basis of these assumptions we do not expect the introduction of the internal panel into the process to impact on our overall budget, although the costs of running the panel will need to be carefully monitored for the purposes of allocating administrative costs to cases.

3.10 The Independent Appeals Board's members are currently retained by PhonepayPlus at a total annual cost of between £10-15k. We expect to be able to save these costs.

3.11 We expect the costs to PhonepayPlus of earlier consideration of possible interim measures to be small. While we do expect interim measures to continue to be infrequently used, we expect that they are likely to be considered and recommended slightly more frequently than is currently the case. As set out at paras 2.32-2.34, this is because the proposed new process allows for an earlier consideration of withholds than is currently the case, which in turn is expected to lead to a greater number of cases where withholds may be considered effective prior to a provider receiving an out-payment.

3.12 While this implies a small increase in workload for the Investigations team and the internal panel, as per our analysis at 3.8 above, we do not expect this to lead a need to increase staff numbers. The costs associated with the time spent considering the imposition of interim measures would also be a recoverable administrative cost. We expect the costs associated with the P-CAT's consideration of recommendations of interim measures would be small. We expect that the possibility provided for in the procedure of a hearing to consider a review of interim measures to be infrequently used and so the costs would also be small and manageable within the PhonepayPlus budget.

3.13 The Emergency Procedure is rarely used (there have been no instances since 2013). We are therefore not assuming any savings to PhonepayPlus arising from the abolition of the Emergency Procedure.

Costs to providers of Track 2 cases

3.14 Since we are not proposing significant changes to the way we investigate Track 2 cases, we do not expect providers to see changes to the costs to them associated with investigations.

3.15 The introduction of the internal panel overseeing investigations and issuing Warning Notices is an additional step which could lead to providers being charged additional administrative costs. However, we consider that the Warning Notice offers an enhanced opportunity to settle a case without proceeding to a full P-CAT hearing and that where a provider does settle at the Warning Notice stage, the associated administrative costs to the provider would be significantly lower on average. We consider that the provider's own internal costs (e.g. internal administration and legal advice) are also likely to be lower where a case is settled before a hearing.

3.16 We consider that the proposed Warning Notice offers other benefits. The fact that the Warning Notice would set out clearly both the alleged breaches and the recommendations for sanctions responds to informal feedback from the industry, that a clear understanding of a provider's liability in a Track 2 case would be more likely to lead more cases being settled prior to a P-CAT hearing. This in turn would lead to an earlier conclusion of the case, allowing the provider to move forward sooner.

3.17 We do not consider that the earlier consideration of interim measures would add significant costs to industry. As noted above, we consider that interim measures would continue to be infrequently used – even though slightly more frequently than is currently the case for the reasons set out at paragraph 3.11. The addition of a potential review by the P-CAT adds the possibility of some additional administrative costs being incurred.

3.18 As for PhonepayPlus, we do not consider that the abolition of the Emergency Procedure would offer significant savings to the industry, although we do consider that the alternative of earlier consideration of interim measures provides more clarity and certainty to providers.

Impact on PhonepayPlus recovery rate for fines and administrative charges

3.19 PhonepayPlus aims to recover its costs and collect the full amount of fines where breaches are upheld and sanctions imposed by a Tribunal. This underlines the polluter pays principle, and ensures that any necessary enforcement operates as efficiently and cost effectively as possible.

3.20 In this regard we consider that the measures we are proposing including bringing a decision on interim measures – in particular withholds – forward in the process will make it more effective and improve both our current collection rate and consumer redress post-adjudication. Our collection rate in the last financial year was 67% for fines, and 51% for admin charges. Were this to increase to 80% for both, we estimate that we could collect an additional £275,000 in fines and £92,000 in admin charges, assuming that these charges are consistent with 2014-15.

Q10: Do you agree with our assessment of the potential impacts both on PhonepayPlus and providers? Do you have any further information or evidence which would inform our views?

Section Four - Next Steps

4.1 From this point, we aim for the proposed new Code to be submitted to the European Parliament for consideration – the EU “standstill” period – during Spring 2016, and for the 14th edition of the Code to be launched and take effect in July 2016. An overview of key milestones is set out directly below:

Publication of draft Code and consultation document	Nov 15
Industry seminar	Dec 15
Consultation closes	Feb 16
Draft supporting procedures published	Jan 16
Ofcom consults	Spring 16
EU standstill period	Spring 16
Implementation of new Code	July 16

4.2 PhonepayPlus welcomes responses to the questions set out in this document by no later than **1st February 2016**. This means the deadline for responses will be 10 weeks from the publication of this paper. This also allows us to fully consider any comments that stakeholders may have.

4.3 Responses should be submitted by email to Mark Collins mcollins@phonepayplus.org.uk. Copies may also be sent by mail to:

Mr Mark Collins
Head of Policy Projects
PhonepayPlus
25th Floor
40 Bank Street
Canary Wharf
London E14 5NR

Tel: 020 7940 7412

Confidentiality

4.4 We plan to publish the outcome of this consultation and make all responses available in due course. If you want all or part of your submission to remain confidential, you must make a specific request for this, along with the reasons for making this request.

List of Questions in the document

Q1 – Do you agree with the proposal to set out allocation criteria at a high level within the Code?

Q2 – Do you agree with our proposal to consider interim measures automatically, and at an earlier stage, in all Track 2 cases?

Q3 – Consequent to Q2, do you agree with our proposal to remove the Emergency procedure from the Code?

Q4 – Do you agree with our proposal to introduce a P-CAT review of its decision to withhold revenue or suspend a service if the provider requests it?

Q5 – Do you agree with our proposal to issue a Warning Notice to providers, setting out both breaches and sanctions in advance of any P-CAT consideration, in order to allow the potential for the case to be resolved prior to a hearing?

Q6 – Do you agree with our proposal to establish a new decision-making panel capable of bringing independent judgement to bear, from which PhonepayPlus Board Members will be excluded?

Q7 – Do you agree with our proposal to remove post-adjudication reviews and Oral Hearings?

Q8 – Do you agree with our proposal to remove the current Independent Appeals Body hearing, on the grounds set out above?

Q9 – Do you agree with our proposal to set out transitional arrangements that allow the new Code procedures to apply from the commencement date to all investigations, and/or complaints or monitoring which commenced under the 13th Code?

Q10: Do you agree with our assessment of the potential impacts both on PhonepayPlus and providers? Do you have any further information or evidence which would inform our views?

Key Differences between proposals and existing 13th Code procedures

	13 th Code	Proposal for 14 th Code	Relevant 14 th Code provisions	Relevant consultation Questions
Criteria for Allocation	No documented criteria	High-level criteria documented in Code and expanded on in the supporting procedures document	4.3.2	Q1
Decision to Withhold	Taken by the Executive after a breach letter is issued	Recommendation made by senior staff and PhonepayPlus Board Members (in appropriate cases) after a case is allocated to Track 2. Decision is made by P-CAT and can be appealed to another P-CAT	4.5; 4.6	Q2
Criteria for Interim measures	No codified criteria for withhold	High-level criteria codified	4.6	Q2; Q3
Right of Appeal for Interim measures	No right of appeal for withhold. Right of appeal for suspensions limited to where a provider can present new evidence	Right of representation to the Executive and P-CAT for both suspensions and withholds, subject to there being new evidence come to light or where it was not possible to notify the provider of the application interim measures before they were imposed	4.6.6	Q4
Emergency Procedure	Yes, separate procedure codified	No separate Emergency Procedure. Changes provide flexibility to consider interim measures (including suspension) for all Track 2 cases as a matter of course	No direct replacement. Consideration of service suspension at 4.5.1b)	Q3
Tribunal membership	Tribunals drawn from a pool comprising of legal and lay members, including PhonepayPlus Board Members	Members drawn from a pool comprising of legal and lay members, excluding PhonepayPlus Board Members. Some PhonepayPlus Board Members involved in separate	1.4; 4.3; 4.7; Annex 3	Q6

Settlement options		internal panel with senior executives which makes initial recommendations in Warning Notice, all of which are referable to P-CAT.		
	Limited to when oral hearing procedure has commenced at a provider's request	Automatically available from the point at which a provider receives formal notification of alleged breaches and sanctions in a Warning Notice	4.5.2 to 4.5.5	Q5
Breach decisions	Taken by PhonepayPlus Tribunal (CCP)	Consideration and recommendation made by senior executives and PhonepayPlus Board Members in Warning Notice. Can be accepted or negotiated by the provider and agreed by consent, otherwise formal decision taken by P-CAT	4.7	Q5; Q6
Sanction decisions	Taken by PhonepayPlus Tribunal (CCP)	Consideration and recommendation made by senior executives and Board Members in Warning Notice. Can be accepted or negotiated by the provider and agreed by consent, otherwise formal decision taken by P-CAT	4.8	Q5; Q6
Appeals	<p>Tribunal decisions can be reviewed at the discretion of the Chair of the CCP. Whilst there is a commitment for reviews not to contain the same individuals as the original case, this is not codified.</p> <p>If this review is rejected or upholds the original verdict, then the provider can request an oral hearing if they have not</p>	If a P-CAT hearing reaches a conclusion which the provider contests, they can separately request Judicial Review.	None	Q7

Code Compliance Panel	<p>previously done so.</p> <p>If this is rejected or reaches a decision the provider still contests, then they can request the case is referred to the Independent Appeals Tribunal on limited grounds. If the provider disagrees with the IAB findings they can proceed to Judicial Review</p>			
	The Code Compliance Panel provides members for the initial Tribunal, any subsequent Review and Oral Hearings.	The PhonepayPlus Code Adjudication Tribunal (P-CAT) provides members for any hearing regarding interim measures or following a Warning Notice. The members provided for hearings in respect of a case will always be different from those provided for any previous hearings in respect of that case. ³	1.4; 4.3; 4.7; Annex 3	Q6
Independent Appeals Body	The Independent Appeals Tribunal provides members for the final appeal of the process, if providers have first had an oral hearing	None. If a P-CAT hearing reaches a conclusion which the provider contests, they can separately request a Judicial Review.	None	Q8

³ Whilst this is not directly set out within the Code, it will be set out within supporting procedures

Decision process diagrams (high level)

