



Statement following public consultations on the Code of Practice (12th Edition) and supporting Guidance

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1. Background

About PhonepayPlus and the Code of Practice

1.1 Ofcom has formal responsibility for regulating premium rate services (PRS) through the Communications Act 2003. Under the terms set out in section 121 of the Act, Ofcom has recognised PhonepayPlus as the organisation which delivers the day-to-day regulation of the premium rate services market by approving the PhonepayPlus Code of Practice.

1.2. PhonepayPlus (formerly ICSTIS until 2007) has regulated premium rate services since 1986. PhonepayPlus' goal is that everybody should be able to use premium rate services with absolute confidence. In pursuit of this goal, PhonepayPlus creates a Code of Practice which sets appropriate standards for promotion, content and operation of all premium rate services. In applying these standards, PhonepayPlus has particular regard to vulnerable people, especially children.

1.3 PhonepayPlus continually monitors the effectiveness of the Code of Practice and, as the need arises, reviews the Code and makes proposals to Ofcom for producing a revised version. A draft Code is then developed by PhonepayPlus and consulted on, with Ofcom giving approval if they decide it meets the legal tests set out in the Communications Act.

Background to the new Code

1.4 In reviewing the 11th edition prior to drafting a proposed new Code, PhonepayPlus took into account a range of considerations which can be summarised under the following broad headings:

- *Developments in the PRS market* (e.g. developments in technology such as VoIP and secure billing systems, and the increased market share for PRS delivered to mobile handsets – all leading to increased complexity within the PRS delivery chain).
- *Developments in Regulation* (e.g. the recognition by the independent Code Compliance Panel that many breaches of the 11th Code were repeat occurrences by the same providers – pointing to a need for a Code that required a greater level of proactive risk assessment and control from the industry).
- *Developments in Accessibility* (e.g. the need for a Code which is accessible as possible, both for consumers seeking assurance that they can use PRS with confidence and for an industry looking to innovate and grow the market).
- *Recommendations from Ofcom's 'PRS Scope Review'* – This review made a number of specific recommendations to PhonepayPlus. These were:
 - A strengthening of guidance around mobile pricing in advertising,
 - An expansion of PhonepayPlus' 'Number Checker' to better assist consumers in identifying the provider responsible for a particular service,
 - The introduction of complaint-handling obligations,
 - The introduction of a mandatory Registration Scheme.

1.5 Following extensive engagement with stakeholders, both from industry and other areas, PhonepayPlus issued a [New Code Discussion Paper](#) in June 2009. This paper was not intended to set out the detail of the new Code, but was rather an indication of the direction we wished to take when we began the actual drafting process and an invitation for all with an interest in the PRS industry to engage in our policy development.

1.6 This direction can be briefly summarised as follows:

- 1) A Code based on outcomes, not prescription. There would only be as many rules as were necessary to support the outcomes.
- 2) All those involved in the provision of a PRS would assume appropriate regulatory responsibility for their role in providing that service.
- 3) A requirement for all those involved in providing PRS to register with PhonepayPlus. PhonepayPlus would, subject to the conclusions of the then ongoing Ofcom Scope Review (which subsequently recommended a database), examine the best way to build and maintain a database which would provide a public reference tool and link providers with areas such as their breach history.
- 4) New rules to ensure consumer complaints are quickly and simply dealt with, and that consumers receive appropriate redress or refunds as quickly as possible where necessary.

1.7 Responses to the Discussion Paper were generally supportive of the key proposals, and highlighted a number of issues that PhonepayPlus addressed as the proposed New Code itself was subsequently drafted.

1.8 In addition, responses to the Discussion Paper highlighted that whilst the flexibility of interpretation provided by outcomes was welcome, there would be a loss of certainty if there was less prescription. As such, there would be a need for more Guidance to support the new Code, and to give a degree of certainty around how rules would be likely to be interpreted.

1.9 Having drafted a new Code of Practice, PhonepayPlus issued a public consultation from 29 April 2010 to 15 July 2010¹. We received a record number of written responses to this consultation (55 in total), and a further 91 noted responses which we received verbally, either at individual workshops or one-to-one meetings during the consultation period. The full responses can be found on the PhonepayPlus website².

1.10 The Code consultation document asked a total of 62 different questions. Some of these were specific in scope but many were broader, inviting comment on a section of the Code rather than an individual paragraph. As a result, the majority of respondents did not answer specific questions, but rather raised individual issues which were of concern to them.

1.11 80 separate issues were identified during our analysis of responses. These issues ranged from straightforward comments on the draft Code itself, through concerns about how the Code might be interpreted or enforced, to comments about the Registration Database. The issues, and our conclusions in relation to them, are set out in Section 2 of this policy statement.

1.12 Following consideration of the issues raised, and some alterations to the Code as a result, the final draft was presented to the European Commission in October 2010 for consideration by other EU member states. The Code was approved by the Commission in January 2011.

Background to Guidance in support of the new Code

1.13 PhonepayPlus' public consultation of the new Code also proposed a consolidation and rationalisation of our current suite of guidance in line with the new Code. Service-specific rules in the current Code would become Service-Specific Guidance. Statements of

¹ <http://www.phonepayplus.org.uk/upload/New-Code-consultation-Final.pdf>

² <http://www.phonepayplus.org.uk/output/ConsultationResponses-12thCode.aspx>

Expectation and a significant number of Help Notes would be reviewed and amalgamated into General or Service-Specific Guidance as appropriate. Guidance would be amended or added to, as appropriate, in the future, following full public consultation.

1.14 PhonepayPlus committed to consult on a full suite of new Guidance to support the new Code later in 2010. This consultation took place from 27 October 2010 to 19 January 2011³, and we consulted on 20 separate pieces of Guidance, both General and Service-Specific, with the following goals:

- a) To produce Guidance that clearly sets out PhonepayPlus expectations in relation to specific service types and general practices that stretch across the PRS market;
- b) To retain useful information from existing guidance, but to add, subtract or change information, wherever necessary or desirable;
- c) To significantly reduce the number of individual pieces of Guidance, in order that multiple sources of information can be consolidated into one accessible source wherever possible, and to design Guidance for a web-based environment so that links can be made to other relevant information; and
- d) To express Guidance clearly and plainly.

1.15 We received 22 responses to this consultation, which highlighted 112 separate issues. The full responses can be found on the PhonepayPlus website⁴. Some alterations have been made to the majority of the Guidance as a result, and the issues, and our conclusions in relation to them, are set out in Section 3 of this policy statement.

1.16 We will continue to review Guidance – both existing Guidance and the possible need for new Guidance – on an ongoing basis. Where significant changes to Guidance are made, or new Guidance is proposed, it will be subject to public consultation.

³ <http://www.phonepayplus.org.uk/output/Consultation-on-Guidance-for-Code12.aspx>

⁴ <http://www.phonepayplus.org.uk/output/Responses-Guidelines-on-the-New-Code.aspx>

2. The new Code of Practice: response to consultation

Public consultation of the new Code

2.1 Having drafted a new Code of Practice, PhonepayPlus issued a public consultation from 29 April 2010 to 15 July 2010. We received a record number of written responses to this consultation (55 in total), and a further 91 noted responses which we received verbally, either at individual workshops or one-to-one meetings during the consultation period.

2.2 The Code consultation document asked a total of 62 different questions. Some of these were specific in scope but many were broader, inviting comment on a section of the Code rather than an individual paragraph. As a result, the majority of respondents did not answer specific questions, but rather raised individual issues which were of concern to them.

2.3 There were 80 separate issues identified during our analysis of responses. These ranged from straightforward comments on the draft Code itself, through concerns about how the Code might be interpreted or enforced, to comments about the Registration Scheme.

2.4 This section of the policy statement has grouped these issues into a number of categories, rather than assigning each of them to individual questions within the original document. For ease of reference, the response to each category below also includes the questions originally asked in relation to each category.

2.5 The categories are as follows:

- Governance
- Definitions and Guidance
- Outcomes and Rules
- Due Diligence, Risk Assessment and Control
- Responsibility
- Registration
- Investigations and Sanctions
- Other

Governance

2.6 The questions asked in PhonepayPlus' original consultation document were as follows:

Q1 – Do you agree with the proposals as to how Governance arrangements are taken forward? If not, why not?

Q57 – Do you agree with the proposals around Annexes? If not, why not?

Q60 – Do you agree with our assessment that now is not the right time to review our funding model? If not, why not?

2.7 There was little comment on PhonepayPlus' proposals that Governance arrangements (such as the number of members the Board will have or exactly how they will approach strategy) be referenced in the new Code, but not form part of it and rather be contained in a separate document which will be permanently available on the PhonepayPlus website. What comment there was agreed with this approach.

2.8 We did not receive any specific comment regarding Annexes or funding model. As a result, the Annexes to the new Code will be as per the consultation versions, and funding arrangements will continue to be as currently exists for the 11th edition of the Code.

Commercial confidentiality

2.9 Two substantive issues were raised around Governance. The first was to question whether PhonepayPlus Tribunals should include in their written adjudications any or all material supplied by a provider in their defence, even where that material was commercially sensitive. We can confirm that the new Code will continue to contain an undertaking about confidentiality around commercially sensitive information (e.g. billing technology, client contracts or revenues), except where there is a need to pass that information onto another regulator or law enforcement body. As such, the wording as contained at Paragraph 8.11.11 in the 11th edition of the Code is retained at paragraph 4.13 in the new Code.

Relationship with other regulatory bodies

2.10 One trade association and one broadcaster who uses PRS within their output asked whether it should be necessary for the Code to include a note about PhonepayPlus' relationship with other regulatory bodies such as Ofcom, the Office of the Information Commissioner (ICO), and the Gambling Commission.

2.11 Section 1.2 of the new Code covers our relationship with Ofcom in terms of the scope set out by the Communications Act, and paragraphs 5.3.1 & 5.3.2 set out the relevant parts of that Act as expressed at the present time. As concerns other regulatory bodies we agree that we should be clear about those relationships, including any Memoranda of Understanding we have with others, but we are reluctant to codify those relationships should they change, for whatever reason, over time.

Definitions and Guidance

2.12 The questions asked in relation to Definitions and Guidance in the original consultation document were as follows:

Q2 – Do you agree with the proposed terms and definitions? If not, why not?

Q3 – Are you aware of any premium rate delivery chains where the proposed distinction between Level 1 and Level 2 providers will be problematic? Are there other factors that we need to consider in relation to the distinction between Level 1 and Level 2 providers in a premium rate delivery chain?

Q4 – Do you agree with the proposal to convert Section 7 of the 11th edition of the Code into Service Specific Guidance, and allow the creation of new Service Specific Guidance subject to appropriate consultation? If not, why not?

Q5 – Do you have any comments on the draft Service Specific Guidance attached at Annex C? Please set out any comments you have and the reasoning behind them.

Q6 – Do you agree with the proposal to convert Statements of Expectation that support the 11th edition of the Code into General Guidance to Industry, and allow the creation of new General Guidance subject to appropriate consultation? If not, why not?

Q7 – Do you have any comments on the draft Guidance to Industry regarding due diligence, risk assessment and control attached at Annex C? Please set out any comments you have and the reasoning behind them.

Q8 – Do you agree with the proposal to convert the Help Notes and Tribunal notifications that support the 11th edition of the Code into Compliance Advice (or compliance updates)? If not, why not?

Q9 – Are there any other areas [than those identified by PhonepayPlus in the consultation document] where Service Specific or General Guidance is necessary? Please state.

2.13 A total of nine substantive issues, three around Definitions and six around Guidance, were raised. However, there was general support for an approach that apportioned responsibility appropriately throughout the PRS delivery chain, and for Guidance which took the place of prescriptive rules within the Code and so could be more easily adapted or updated if necessary.

2.14 The three issues in relation to Definitions were as follows:

How a Level 2 provider will be defined

2.15 A large number of respondents from across the delivery chain had questions about how and when they might be defined as a Level 2 provider – and so principally responsible for ensuring services comply with the outcomes and rules which Part Two of the new Code provides.

2.16 However the key suggestion was that the definition of a Level 2 provider at paragraph 5.3.8(b) of the Code be altered to establish that a Level 2 provider was also responsible for “promotion” in addition to “operation and content”, and that the words “last contracted party” be removed from the same paragraph in order to acknowledge that there may be affiliates further along the delivery chain who would not be defined as being Level 2, and so under PhonepayPlus regulation.

2.17 As a result of the changes, paragraph 5.3.8(b) of the new Code now reads:
5.3.8(b) A Level 2 provider is the person who controls or is responsible for the operation, content and promotion of the relevant premium rate service and/or the use of a facility within the premium rate service

2.18. As a secondary concern, some respondents said that Guidance would need to be drafted setting out clearly how the definitions of Level 1 and Level 2 providers set out in the new Code will work in practice.

2.19 This Guidance was drafted and consulted upon as part of the later Guidance consultation and, as such, is addressed in further detail in the next section of this document. However PhonepayPlus has stressed that organisations can play different roles in the delivery chain in relation to different services, and so Level 2 responsibility during any investigation will be assigned on a case-by-case basis after an examination of each party’s role in any consumer harm.

Retraction and restart where the wrong party is identified as responsible

2.20 As a related point to the one immediately above, one trade association who responded asked if PhonepayPlus could retract and restart an investigation where it became clear that the wrong party had been identified as causing consumer harm, for whatever

reason. We can confirm this is the case, and were the wrong party to be identified initially, we would always look to close and restart a case if compelling evidence came to light.

How a “nearest similar party” is nominated in the absence of a Network operator

2.21 Lastly, paragraph 5.3.5 of the new Code provides that if there is no readily identifiable Network operator in a PRS delivery chain (for example, because the service is accessible only through VoIP technology), then for the purposes of regulation, PhonepayPlus will regard the provider of the facility through which the consumer accessed the service.

2.22 One respondent held the view that this might go beyond the concept of a terminating network. However, this paragraph is not an addition to the new Code, but rather has been carried across from the 11th edition. With this consideration in mind, and given that it has not been subject to challenge from the European Union on either occasion, we see no reason to alter or remove paragraph 5.3.5.

Guidance

2.23 The issues in relation to Guidance were as follows:

- a) *That Service-Specific Guidance Notes take into account the likely interpretation and expectation of consumers;*
- b) *That compliance advice should clearly link with Guidance as appropriate;*
- c) *That compliance with Guidance should be binding on Tribunals, or at least offer significant mitigation;*
- d) *That Guidance should align with Mobile Network Operator rules for services;*
- e) *That the General Guidance Note on the ‘Complaint-handling process’ should remain voluntary for Network operators who act as Originating Call Providers (OCPs).*

2.24 As previously stated, a significant number of issues related to Guidance, or were better dealt with as Guidance was produced, so where appropriate they are dealt with in more detail in the next section of this document. However, we can confirm the following here:

- a) We have endeavoured to tailor all Guidance, Service-Specific or General, to assume a reasonable expectation by consumers.
- b) It will be essential that compliance advice, whether given as updates to all registered parties, or as part of individual advice, links back to Guidance as appropriate in order to provide a clear steer to the industry around Code compliance.
- c) PhonepayPlus Tribunals sit independently of the PhonepayPlus Executive and Board, and so we cannot bind them to Guidance. However, the revised Investigations and Sanctions Procedure, which PhonepayPlus has published alongside this statement, reflects that genuine attempts to comply with the Guidance’s recommendations, or other actions taken to ensure Code outcomes are met, will serve as a mitigating factor.
- d) The suggestion that PhonepayPlus’ Code and Guidance align completely with Mobile Network Operator rules was not popular with many others in the delivery chain, many of whom expressed a view that Mobile Network Operator rules could sometimes be over-prescriptive. As such, we do not see alignment as being in keeping with an outcomes-based Code.
- e) Currently the General Guidance Note on the ‘Complaint-handling process’ (as drafted) is only voluntary for those Network operators who act as OCPs. This would not change without further consultation.

2.24 Lastly, we received two specific suggestions as to Guidance which we might wish to consider. They were Guidance on 'Competitions' and Guidance on 'Contact and dating Services'. Guidance on 'Competitions' was included in the Guidance on which PhonepayPlus consulted from November 2010 to January 2011. We did not see a compelling need for Service-Specific Guidance on 'Contact and dating services' at this time, but remain open to it once the Code and initial suite of supporting Guidance has been launched.

Outcomes and Rules

2.25 The questions asked in relation to Outcomes and Rules in the original consultation document were as follows:

Q10 – Do you agree with the proposals around how responsibility for Part Two of the Code would be applied? If not, why not?

Q11 – Do you agree with the proposed Outcome and supporting rules around Legality? If not, why not?

Q12 – Do you agree with the proposed Outcome and supporting rules around Transparency and Pricing? If not, why not?

Q13 – Do you have a view as to whether there is a need to introduce Guidance that interprets how rule 2.2.6 (around pricing proximity to the means of access) is applied where secure mechanisms for phone-payment are used to purchase a PRS?

Q14 – Do you agree with the proposed Outcome and supporting rules around Fairness? If not, why not?

Q15 – Do you agree that the spending caps and thresholds for reminder messages set out at Rule 2.3.12a-d are appropriate? If not, then please suggest alternative levels, and please provide the evidence you have to support them.

Q16 – Do you agree with the proposed Outcome and supporting rules around Privacy? If not, why not?

Q17 – Do you agree with our assessment that consumers benefit from being clearly informed that their data may be used for marketing and being given an opportunity to opt into this? If not, why not?

Q18 – Will rules 2.4.4 and 3.6.2 of the proposed new Code deliver clarity to consumers when they opt into a service? If not, why not?

Q19 – Do you agree with the proposed Outcome and supporting rules around Avoidance of Harm? If not, why not?

Q20 – Do you agree with the proposed Outcome and supporting rules around Complaint Handling? If not, why not?

2.26 Unsurprisingly, given that Outcomes and Rules are the most immediately important part of the Code to those responsible for PRS, we received substantive feedback on 28 issues around this subject – over a third of the total number of issues.

2.27 We have grouped the issues around Outcomes and Rules below, under the outcome to which they are relevant.

Outcomes and Rules – Legality

2.28 A number of respondents from a cross-section of the market objected to an outcome around Legality, even though rules around legality are a carry-over from the previous edition of the Code, on the grounds that breaking the law is a matter for courts to decide upon.

2.29 PhonepayPlus accepts that a Tribunal cannot directly enforce the law, but Tribunals do not do so. Instead, they will take a view as to whether the law has been broken, a view which can always be challenged later in a court of law if a provider feels it necessary to do so. We would contend that such an approach is more helpful to consumers, allowing PhonepayPlus to investigate and adjudicate in a timeframe which is comparably much quicker than if consumers sought resolution in a court of law.

Outcomes and Rules – Pricing and Transparency

Use of the word 'free' in advertising

2.30 Paragraph 5.11 of the 11th edition of the Code contained requirements around how and when the word 'free' could be used in PRS advertising. Due to the fairly prescriptive nature of this rule, it was removed from the proposed new Code which was consulted. Instead, use of any word to mislead will be captured under a broader requirement not to mislead consumers.

2.31 This was not challenged by respondents, but a number of them did ask whether the use of 'free', and similar words like 'bonus' or 'extra', would be addressed in Guidance in order to provide clarity to industry stakeholders. We can confirm that a section around the use of words which imply all or part of a service carries no charge has been included in the General Guidance Note on 'Promotions and promotional material'.

Addition of 'key' to rule 2.2.1 around information to consumers

2.32 The proposed version of the new Code upon which we consulted specified the following at Rule 2.2.1:

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

2.33 A number of respondents from across the delivery chain, including trade associations, expressed concern that a failure to highlight only key information in advertising would lead to adverts which were filled with information (as was the case some years ago). This overload of information would potentially confuse consumers as much as too little information. As such, it was suggested that PhonepayPlus consider inserting the word 'key' into rule 2.2.1 between "all" and "information".

2.34 While PhonepayPlus recognises the risk which is highlighted, we also recognise that information which could reasonably be regarded as key will vary depending on the service type. For this reason, we have determined a change is not necessary to the rule, but that Guidance, both now and in the future, should be clear about "information likely to influence the decision to purchase".

Requirement for promotions to contain provider name and contact details

2.35 Rule 2.2.2 of the proposed consultation version of the new Code replicated a requirement of the 11th edition of the Code for promotional material to contain reference to the name, and non-PRS contact number, of the provider. This is in order that consumers are able to quickly contact the provider should they need to make enquiries or seek any form of redress.

2.36 A number of respondents, especially broadcasters, suggested that the rule as drafted omitted a previous exception where contact details were otherwise obvious – e.g. a PRS advertised as part of a TV show does not need a contact number and name, as consumers would generally know they could contact the broadcaster if they had the need, and find out a contact number with relative ease. The broadcasters went on to point out that if they were required to advertise a non-PRS contact number on screen alongside a PRS during an event, then this would not only cause potential confusion, but also lead to consumers calling the non-PRS number in the belief they could vote or enter the on-screen event.

2.37 For these reasons the final version of the new Code re-instates the words “except where otherwise obvious” at the end of the proposed rule 2.2.2, which has also been renumbered to rule 2.2.1(a).

Requirement for PhonepayPlus registration to be displayed where technically possible

2.38 Rule 2.2.2 in the consulted draft of the new Code also contained a requirement for a provider’s PhonepayPlus registration number to be displayed in advertising where it was technically possible to do so – e.g. WAP links and SMS advertising, where there are character restrictions, would be among those forms of advertising exempt from this rule.

2.39 A number of respondents, again with a particular emphasis on broadcasters, expressed concern that such a requirement, while technically possible on-screen, would serve to clutter the screen and cause potential confusion.

2.40 As a result of this point raised, we have altered this rule so that “where technically possible” is replaced by “PhonepayPlus may specify categories of promotions”. This will allow a greater level of flexibility in how PhonepayPlus applies this rule than the previous wording. As before, this part of the proposed rule 2.2.2 has been renumbered to rule 2.2.1(b) of the final version of the new Code.

Requirement for access or instructional messages to be free of charge

2.41 Rule 2.2.7 of the consultation draft of the new Code read as follows:

Any messages that are necessary for a consumer to access, use or engage with a service but are provided separately from the service itself must be free of charge.

2.42 This rule was new, and was intended to stop a practice whereby consumers are charged for messages sent, for example, to wish them luck during ongoing competitions. In such an example the consumer has no option as to whether they wish to be charged for such messages, which are not integral to their participation in the service itself.

2.43 Whilst no objections to this rule were raised by respondents, a number of respondents queried whether it would accidentally capture text-based services which used multiple messages to collect legitimate payment (e.g. 2x £1.50 SMS messages to collect a £3 charge), or ‘STOP’ commands which are charged at standard rate.

2.44 PhonepayPlus can confirm that this will not be the case in either of the examples cited. It is not our intention to penalise legitimate charges, or legitimate routes to exit a

service which charge at standard rate. Lastly, this rule has been renumbered to Rule 2.2.6 in the final version of the new Code.

Where a PRS is promoted by a non-PRS communications service

2.45 Rule 2.2.6 of the consulted draft version of the new Code was carried over from the 11th edition of the Code, and reads as follows:

Where a premium rate service promotes or is promoted by a non-premium rate electronic communications service both services will be considered as one where, in the opinion of PhonepayPlus, it is reasonable to do so

2.46 Some respondents expressed a concern that, in a rapidly developing and convergent market, this rule might inadvertently classify Google, or other search engines, as being PRS.

2.47 While we understand the concern, the rule has always stated that such a classification would only happen where, in the opinion of PhonepayPlus, it was reasonable to do so. This rule was intended to prevent cross-promotion which would be misleading to consumers, and we would not consider Google or other search engines to fall into that category. The wording of this rule remains unchanged for the final version of the new Code, although the rule is renumbered to Rule 2.2.3.

Hours of operation

2.48 Rule 2.2.5 of the consulted draft of the new Code, again a carry-over from the 11th edition of the Code, stated that:

Unless a service is available 24 hours a day, its hours of operation must be stated in UK time on the promotional material

2.49 One broadcaster fed back that they would be reluctant to state the hours of operation of a service on-screen, again due to the potential of too much information on the screen causing consumer confusion. As a result, while we have not changed the Code, we have used Guidance to make our expectations clear in respect of broadcast events and stated hours of operation. This rule remains unchanged, but has been renumbered to Rule 2.2.4 in the final version of the new Code.

Rules around pricing transparency

2.50 A number of respondents from across the delivery chain expressed a view that pricing rules, especially those around proximity of price to a means of access, be moved to Guidance in order to ensure technology neutrality going forwards. An example which was of particular concern to respondents would be one where pricing relating to all numbers on the page was prominently displayed at the top of a full-page advert. In such a case, would this approach be in breach for a failure to list the same pricing information next to every number?

2.51 The final version of the new Code contains only one rule, Rule 2.2.5, which contains a reference to proximity. This rule reads as follows:

In the course of any promotion of a premium rate service, written or spoken or in any medium, the cost must be included before any purchase is made and must be prominent, clearly legible, visible, and proximate to the premium rate telephone number, shortcode, or other means of access to the service.

2.52 We consider that this rule ensures technology neutrality going forwards by not specifying means of access to a service. We do, however, accept that Guidance must take account of existing or developing technology, or advertising, which might affect the providers' ability to make pricing proximate to the method of access in all cases. We consider this can be achieved through Guidance, and that there is no need to remove references to proximity from the Code.

Requirement to display price before the consumer commits to pay

2.53 In light of the development of purchase methods for PRS, often web-based, in which a consumer completes the purchase in stages a number of providers questioned the wording of Rule 2.2.6 in the draft consultation version of the new Code (now Rule 2.2.5 in the final version). Respondents, which included a trade association, suggested this rule was altered to require only that price is displayed before the consumer commits to pay, not before the consumer takes the first steps to access a service.

2.54 Following consideration of this suggestion, PhonepayPlus has altered the original wording of this rule, to remove "in any promotion, and before the consumer commits to pay" with "in the course of any promotion of a premium rate service". Providers should be aware that any attempt to mislead consumers at an earlier stage of any promotion – e.g. by advertising a different price to the price displayed at the consent to payment stage, or by implying the service is free – may be viewed as misleading by a PhonepayPlus Tribunal.

Threshold above which pricing information must be spoken as well as displayed in an audio/visual format

2.55 Rule 2.2.8 (renumbered to 2.2.7 in the final version of the new Code), reads as follows:

Where promotional material is transmitted on television or in any other audio/visual format, pricing information must be clearly visually presented and spoken if the advertised cost of the service generally exceeds £3.83 plus VAT.

2.56 A small number of respondents, but inclusive of two broadcasters, questioned whether this rule is in line with Ofcom's Broadcast conditions and therefore whether it should be dropped.

2.57 This rule is carried over from the 11th edition of the Code, with an increase in the price threshold from £2 to £3.83 to take account of inflation. Upon further review, Ofcom has confirmed that there is nothing within their current Broadcast conditions that would prevent this rule. In addition, given this rule is within the new Code, it will automatically become a requirement of Ofcom's BPRS condition. As such, we see no need to remove it.

Statement of price during radio broadcasts

2.58 Lastly around pricing and transparency, two radio broadcasters expressed concern that until now it has not been necessary for them to state a price every time a PRS event is mentioned on air. Instead, PhonepayPlus has taken the view that the cost must be stated at least once during the average time that listeners spend listening to the radio station in question, with evidence of that average listening time needing to be substantive and supplied upon request. We can confirm that this will still be the case for the new Code, and this has been reflected in the General Guidance Note on 'Promotions and promotional material'.

Outcomes and Rules – Fairness

Virtual chat – positive response once spending cap reached

2.59 As a result of ongoing concerns about virtual chat services, the draft consultation version of the new Code changed rules around virtual chat services as expressed in the 11th edition of the Code. The most important of these changes was that consumers would be required to provide a positive response, separate from normal chat interaction with the service, that they wished to continue chatting once the £10 spend limit had been reached.

2.60 This was due to a growing number of cases where a spend reminder had been provided within the context of a chat message (often adult in nature), and the consumer's reply to the chat element of the message was taken by the provider as proof that the consumer consented to a further £10 spend.

2.61 A number of aggregators and content providers suggested that there was no need for the consumer's response to be separate as long as the provider's spend reminder was a separate message containing no chat, and making it clear that if the consumer continues to exchange messages then they will consent to a further £10 of spending. PhonepayPlus has accepted this suggestion, and changed Rule 2.3.12(c) in the final version of the new Code accordingly.

Method of exit – possible prevention of legitimate charges after exit

2.62 PhonepayPlus' Code Compliance Panel (CCP), which sits independently of PhonepayPlus and therefore responded separately to the consultation, suggested that Rule 2.3.11, around method of exit from a service, should be altered. This is to distinguish between latency issues (where a legitimate charge incurred before the consumer exited is charged after they have exited) and illegitimate re-tries (attempts to continue billing after exit).

2.63 Given that this will provide greater clarity to PhonepayPlus Tribunals (who are made up from the members of the CCP) and industry stakeholders around when it is reasonable to continue attempting to charge after a consumer has exited, we have added the words "except where those charges have been legitimately incurred prior to exit" to the end of Rule 2.3.11 in the final version of the new Code.

Consent to charge – what is considered to be auditable?

2.64 A number of respondents, including trade associations, highlighted their view that rule 2.3.3 of the draft consultation version of the new Code would only be effective if there is clarity about what PhonepayPlus will and will not regard as legitimate forms of auditable consent. Rule 2.3.3 has not been changed in the final version of the new Code, and reads:

Consumers must not be charged for premium rate services without their consent. Level 2 providers must be able to provide evidence which establishes that consent.

2.65 PhonepayPlus fully accepts that there is a need for clear Guidance around this issue, and, as such, an extensive section around consent to charge is contained within our General Guidance Note on 'Privacy and consent to charge', which was consulted on with other Guidance from November 2010 to January 2011.

Undue delay

2.66 Rule 2.3.4 of the new Code was carried over from the 11th edition of the Code. However, the wording was slightly altered to remove the word “undue”, and express a goal that premium rate services are provided without delay.

2.67 However, a number of industry stakeholders cited cases where there may be a reasonable delay involved in the provision of a service. Examples would include novelty alarm services (where there would be a delay from the purchase and setting of the alarm to it sounding), and football or lottery results services (which would be unavailable at time of purchase, but provided to the consumer as soon as they became available). On this basis, PhonepayPlus has reinserted the word “undue” before “delay” in the final version of the new Code.

Removal of spending caps from the Code

2.68 Two related issues were raised around spending caps contained within the draft consultation version of the Code. They were:

- A recommendation from a trade association and two major aggregators that all rules around spending caps or reminders be removed from the Code, and put instead into Guidance, and;
- A recommendation from a wide cross-section of industry stakeholders that the requirement for forced releases at rules 2.3.12(a) & (c) of the new Code be removed.

2.69 While we are sympathetic to the first of these recommendations, because doing so would allow greater flexibility to alter spending caps where there was sudden change to the market or to inflation, we are unable to do so under the terms of the Communications Act by which Ofcom charges us with the regulation of PRS. We have, however, changed spending caps and reminder thresholds within the new Code to be exclusive of VAT, which will allow providers to pass on increases in tax, as has happened recently.

2.70 The second recommendation came either from those who felt spending caps should be scrapped altogether, on the grounds spend reminders should be sufficient if they are clearly expressed, or from those who would like to see the level of the current caps raised.

2.71 We do not accept that spending caps should be removed altogether. While there is less need for them if consumers are given clear spend reminders and are allowed to consent to continue, this does not happen in all cases and there is then the potential for consumers to run up large bills, which impact on the reputation of the industry as a whole. Those who wish to be exempted from the need to perform a forced release at a set spending threshold can still seek exemption under 3.10.4(a) of the new Code.

2.72 While a number of respondents suggested that the current levels of spending caps for sexual entertainment services (2.3.12(a)) and virtual chat services (2.3.12(c)) be raised, no one provided a suggestion as to what the new levels should be or any evidence in support of a raise. In light of this, and Ofcom’s current review of Non-Geographic Calls Services which will address transparency in terms of network access charges, we can see no compelling reason to raise the current spending caps until that review is complete.

Provisions around bill shock

2.73 Rule 2.3.6 of the draft consultation version of the new Code read as follows:

Level 2 providers must take reasonable and prompt steps to identify excessive use of its service or services by a consumer and to inform the relevant consumer of that usage.

2.74 This was a new addition to the Code, and reflected concerns expressed over the life of the 11th edition of the Code about “bill shock” – i.e. where a consumer is aware of their usage of a PRS, and the cost, but not the cumulative cost of their repeated use and so is shocked by the amount of a phone bill.

2.75 A significant number of providers from across the fixed and mobile delivery chains questioned the need for this rule, many arguing that spending caps should, in themselves, be enough to prevent over-usage.

2.76 It is certainly true that PhonepayPlus will need to continue to discuss with the industry what is reasonable in terms of identifying and controlling bill shock, and possibly consult on Guidance post the launch of the new Code. It is also true that PhonepayPlus will need to take account of some technical limitations on a Level 2 provider, for example that not all consumers’ numbers will be visible to them as they may have been withheld by the network.

2.77 However, we reject the argument that spending caps are, in themselves, enough to control excessive spending. Spending caps release consumers from a call or sequence of texts by forced release, but there is nothing to stop the consumer immediately opting back in, often by picking up the phone and redialling. This presents a particular risk where the consumer is not themselves the bill-payer, and so the bill shock will not fall on the consumer who is aware of pricing and other information about the service they repeatedly opt into.

2.78 In light of this consideration, Rule 2.3.6 remains unchanged in the final version of the new Code. PhonepayPlus will discuss and consult on Guidance around this area post launch of the Code.

Use of the term ‘forced release’

2.79 Lastly, it was suggested by one stakeholder that PhonepayPlus’ use of the term ‘forced release’ was perhaps too specific to voice-based services. PhonepayPlus concedes this is the case, and so rules 2.3.12(a) & (c) have been changed to remove reference to ‘forced release’ as a term.

Outcomes and Rules – Privacy

2.80 Only one issue was raised in connection with the outcome around Privacy. This was similar to the objections to an outcome around Legality, in that Rules 2.4.2 to 2.4.4 of the draft consultation version of the new Code are covered by the Privacy and Electronic Communication Regulations (PECR), and so there is no need for the new Code to repeat, or in some cases go beyond, them. Where PECR is breached, it can be pursued by the Information Commissioner’s Office (ICO) through the courts.

2.81 As with the outcome and rules around Legality, PhonepayPlus accepts that a Tribunal cannot directly enforce the law, but again we would remind stakeholders that Tribunals do not do so. Instead, they will take a view as to whether the law has been broken, a view which can always be challenged later in a court of law if a provider feels it necessary to do so.

2.82 As before, we would contend that such an approach is more helpful to consumers, allowing PhonepayPlus to investigate and adjudicate in a timeframe which is comparably much quicker than if consumers sought resolution in a court of law.

2.83 PECR sets out that opt-in must be clearly auditable, but it does not cover what an acceptable form of verifiable opt-in would be in the context of PRS. We do not accept that

our rules go beyond PECR, but rather establish expectations around the collection of opt-in to a PRS and any subsequent marketing. This approach has been extensively discussed with the ICO, and checked by data protection experts, and neither has found it to be ‘ultra vires’ of PECR itself.

Outcomes and Rules – Avoidance of Harm

2.84 Two substantive issues were raised around the Avoidance of Harm outcome. No objection was raised to the outcome itself, most likely because it and many of the rules supporting it have been carried over from the 11th edition of the Code. The issues were as follows:

Subjectivity of wording

2.85 A number of respondents, mostly from the aggregator community, suggested that Rules 2.5.1 and 2.5.6 (which set out expectations around harm and offence, and inappropriate promotion respectively) used language which was subjective, and so should either be omitted or altered.

2.86 We accept that there is a degree of subjectivity around terms like “harm” (in the context of offence or danger) and “inappropriate” (in the context of promotion). However, we feel this does not warrant deletion, but rather that any enforcement is carried out with a due understanding of the circumstances of alleged harm or inappropriateness. In light of these rules being little used during the life of the 11th edition of the Code, we do not see this situation changing and so have not prioritised the production of Guidance in this area. However, we will reconsider if there is evidence to the contrary.

Promotion to those for whom the material or service might be harmful

2.87 Secondly a trade association, major aggregator and a broadcaster all suggested Rule 2.5.7, around ensuring promotion does not reach those to whom it, or the service might be harmful, was changed to read as follows:

Level 2 providers must use all reasonable endeavours to ensure that promotional material is not targeted at or provided directly to those for whom it, or the services which it promotes, is likely to be regarded as being offensive or harmful

2.88 PhonepayPlus agrees with this suggestion, and has changed Rule 2.5.7 accordingly for the final version of the new Code.

Outcomes and Rules – Complaint Handling

2.89 Lastly, two substantive issues were raised in connection with the Complaint Handling outcome. The outcome itself is new to this edition of the Code, but was not substantively questioned by respondents.

Broadcaster handling of complaints

2.90 A number of respondents, not just broadcasters themselves, who are part of delivery chains for broadcast PRS expressed concern that Rule 2.5.1 would change the current arrangements for complaints about Broadcast PRS. Currently the broadcaster takes the complaint from the consumer, but refers it on to the aggregator or fixed-line service provider with whom they contract.

2.91 PhonepayPlus can confirm that we do not see the current arrangements, as outlined above, changing, and will not seek to enforce against any of the rules supporting Complaint Handling if they do not. Where Broadcast PRS is concerned, we agree that the aggregator or service provider is often best placed to handle a complaint once it has been collected and referred. In addition, Broadcast PRS will remain covered by a prior permission regime, for which the aggregator or service provider who holds permission will continue to be held responsible for any breaches.

2.92 However, we do not see any reason to remove the rule or rules as they apply to the rest of the PRS industry. The role of broadcasters can be better highlighted in the General Guidance Note on the 'Complaint-handling process', which also provides greater flexibility should the role of some broadcasters change in future.

Where consumers remain dissatisfied with provider handling of a complaint

2.93 Rule 2.6.5 of the draft consultation version of the new Code is worded as follows:

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

2.94 One respondent, a broadcaster, suggested that the first part of this rule be changed to read "consumers who express that they remain dissatisfied with the handling of their complaint". On consideration, we do not see that this change would provide any further clarity. We would see it as implicit that the provider can only be aware of the consumer's dissatisfaction if the consumer expresses it, and would investigate any complaints from consumers on that basis.

Due Diligence, Risk Assessment and Risk Control

2.95 The questions asked around Due Diligence, Risk Assessment and Control in the original consultation were as follows:

Q21 – Do you agree with the proposals around the level of responsibility Network operators and Level 1 providers should take as regards their direct clients' handling of consumer complaints (paragraph 3.1.1d of the draft Code)? If not, why not?

Q23 – Do you agree with the proposals around Internal Risk Control (paragraph 3.1.5 of the draft Code)? If not, why not?

Q24 – Do you agree with the proposals as regards Due Diligence, Risk Assessment and Control (paragraphs 3.1.1a, 3.1.7 and 3.3.1 of the draft Code)? If not, why not?

Q25 – Do you agree with the draft General Guidance around Due Diligence, Risk Assessment and Control set out at Annex C? If not, why not?

Q26 – If you have a preferred option (a, b, or c) as regards the application of Risk Assessment and Control to Network Operators then please state it, and any reasoning you may have.

2.96 A total of five substantive issues were raised in relation to Due Diligence, Risk Assessment and Control. These included comments on an illustrative draft of what Guidance supporting the new Code in this area might look like. The issues can be summarised as follows:

Responsibility of Network operators to control risk

2.97 The original consultation document set out PhonepayPlus' belief that possession of a connection to a phone-paid service is a fundamental benefit to all those who share revenue from it, be they Network operators, Level 1, or Level 2 providers. As such, PhonepayPlus proposed that paragraphs 3.1.3 and 3.1.7 of the draft Code require that all parties in a delivery chain carry out a reasonable risk assessment of any party with whom they contract, and then carry out reasonable monitoring of that client's services and general compliance, based on their ongoing risk assessment of that client.

2.98 We received a significant number of comments from Network operators, both fixed and mobile, with three different themes:

- That Network operators cannot be expected to constantly monitor and control risk in relation to parties with whom they have no direct contract;
- That many fixed-line Network operators connect directly to a large number of providers who would be likely to be classed as being Level 2 in a new Code investigation. As such, they doubted they would be able to monitor all those clients to PhonepayPlus' proposed expectations, without the need to increase staffing and other costs. This could lead to some large fixed-line networks questioning whether they wished to continue being involved in providing PRS;
- A suggestion as to how network operator risk control could look in final Guidance.

2.99 In response to the first of these themes, we can confirm that it is not our expectation that networks have risk assessment and control plans in place for those who are not their direct clients. This is reflected in the final version of the Guidance in support of this area. While we do expect that Network operators address any ongoing issues caused by direct Level 1 clients in relation to Due Diligence or Risk Control, or other areas such as technical quality, and also address any issues that they pick up through consumer complaints or normal monitoring, we would stress that we do not envisage this creating more work than the normal monitoring and intervention which most networks carry out as a matter of course where PRS is concerned.

2.100 In response to the second theme, and to clarify our expectations in relation to risk assessment and subsequent action plans for risk control, we accept that a fixed-line Network operator which connects to a large number of Level 2 providers will not have any reason to expect the majority of them to cause any consumer harm. In these cases, and where there is no obvious evidence to the contrary, it would be acceptable for a Network operator not to have a specific control plan and just address arising issues. However, where a client, or potential client, has caused significant consumer harm we would expect Network operators to control that harm as soon as identified, and to look to control future risk.

2.101 Lastly, the suggested steps for network operator risk control by one trade association were very helpful, and have been included in the General Guidance Note on 'Due diligence and risk assessment and control on clients'.

Records of number exportation

2.102 One trade association representing a number of Network operators stated a view that networks should not have to keep a record of what exported numbers are being used for, their argument being that exported numbers are often passed on a number of times again to parties who are not their direct clients.

2.103 While PhonepayPlus accepts it may not always be necessary to keep such records, it is our view that all registered parties, whether Network operators or not, should keep records

of who they have exported numbers to. This is in order to help PhonepayPlus follow a chain of exportation and address the right party quickly when investigating.

2.104 In addition, we would stress the importance of making some enquiries around the use to which number ranges like 070 and 076, which are increasingly involved in PRS-related scams, are being put when exporting them.

Responsibility for clients who do not register with PhonepayPlus

2.105 A number of aggregators asked how PhonepayPlus might regard responsibility where a client is not in themselves a party which has to register with PhonepayPlus. Examples would be companies contracted to provide web-based affiliate marketing, or those contracted just to supply content which is then packaged, marketed and sold as PRS under the control of a registered provider.

2.106 Ultimately, PhonepayPlus would regard the Level 2 provider in any delivery chain to be responsible for the actions of any unregistered affiliates with whom it contracts. While we accept that some affiliates may not act as they are instructed by a provider, it is ultimately a business decision for that provider whether they wish to continue contracting with an affiliate and exposing themselves to any risk. The General Guidance Note on 'Due diligence and risk assessment and control on clients' sets this out clearly.

Risk control in proportion to the level of risk posed by a client

2.107 A number of trade associations and aggregators, and one Network operator, cited that any Guidance on risk control should specify that risk control should be in proportion to the level of risk posed by a client.

2.108 PhonepayPlus agrees that any level of risk control, and action plan to control risk, should be proportionate to the level of risk that a client poses. A client with no breach history from PhonepayPlus, who has been operating low-risk services in the UK market for some time, might generally be considered to pose less risk than a client with breach history who runs high risk services, or a client who is new to the UK market (at least until the level of risk they pose is established).

2.109 As such, we might expect some action plans for lower-risk clients merely to state that a party will monitor services as part of normal monitoring, and deal with any arising issues as soon as they become aware of them. Obviously, in the event of the client causing consumer harm, we would expect such an action plan to be reviewed.

2.110 We will continue to identify what successful and unsuccessful risk control and monitoring of clients looks like over the life of the new Code. This will be disseminated to industry stakeholders through a variety of media, including regular 'Compliance Updates' and additions to Guidance where necessary.

Raising of breaches against a Level 1 provider for failure of due diligence or risk control

2.111 One aggregator suggested that no Level 1 provider be investigated for a failure of due diligence or risk control, without investigations also being opened into other parties within the delivery chain. Their argument was that, in order to have a full picture of where failings may have occurred in any investigation, it will also be necessary to have disclosure of information from the other parties involved.

2.112 In practice, this is not an issue for the Code, but rather one of how it will be enforced. This issue will be considered as PhonepayPlus continues to prepare for the implementation

of the new Code, but while it would seem sensible in many cases to request information from other parties in the delivery chain, it may not always be appropriate to begin a formal investigation.

Responsibility to ensure clients have adequate financial strength

2.113 Lastly, the illustrative version of Guidance on ‘Due diligence and risk assessment and control on clients’, which was sent out with the original consultation on the proposed Code, contained a requirement for Level 1 providers to ensure that clients have the financial strength to meet any obligations under the Code before contracting with them.

2.114 As a number of aggregators pointed out, such a requirement would, in effect, require that all existing or potential clients had reserves of £250,000 (the current maximum fine for a breach of the Code). Very few clients currently do, and to require that they did by, in effect, barring providers from giving them access to consumers would have a significant effect on the number of current players and new entrants to the PRS market. As a result, this requirement has been removed from the final version of General Guidance Note on ‘Due diligence and risk assessment and control on clients’.

Other Responsibility Issues

2.115 The questions asked around Responsibility Issues (other than Due Diligence, Risk Assessment and Control) in the original consultation were as follows:

Q22 – Do you agree with the proposed outcome and supporting rule around Technical Quality? If not, why not?

Q27 – Do you agree with the proposals about Directions? If not, why not?

Q28 – Do you agree with the proposals about Contracts? If not, why not?

Q39 – Do you agree with the proposals around Withhold and Retention of Payments? If not, why not?

Q40 – Do you agree with the proposals around Data Protection? If not, why not?

Q41 – Do you agree with the proposals around Network Operator Responsibilities? If not, why not?

Q42 – Do you agree with the proposals around Level 1 and Level 2 provider responsibilities? If not, why not?

Q43 – Do you agree with the proposals around Prior Permission? If not, why not?

2.116 A total of five substantive issues were raised around this area. However, respondents were generally in agreement with the approach proposed by PhonepayPlus. Issues can be summarised as follows:

Requirement for Level 1 providers to withhold payment for at least 30 days

2.117 The rule around withhold of outpayments in the 11th edition of the Code, which only applied to networks, required that networks did not share any money accrued from PRS for at least 30 days from the transaction. This requirement did not extend to service providers, or anyone else in the value chain that subcontracted to another client.

2.118 As a result, some Level 1 providers, in order to stimulate business in an environment with heavily competitive margins, began the practice of paying out to clients in advance of their actual receipt of the money from Network operators. This led to situations where the Level 2 perpetrator of consumer harm was able to cease to trade, and so 'vanish', before PhonepayPlus could launch an investigation and stop revenue outpayments. This was a similar situation to the one which had existed previously, when networks had been able to pay out ahead of 30 days from the transaction date.

2.119 For this reason, PhonepayPlus had proposed in the consultation version of the Code that all networks, and Level 1 providers, be restricted from paying out to clients for the first 30 days after any PRS transaction.

2.120 A significant number of Level 1 providers responded that they would prefer to continue to be able to pay out ahead of 30 days. They suggested that, if they did so to a client who subsequently vanishes before they can be held accountable for a breach of the Code, then they as Level 1 providers can be held in breach of their responsibilities around due diligence and risk control.

2.121 We agree with this assessment and, as such, all reference to a need for Level 1 providers to withhold payment has been removed from paragraphs 3.5.1, 3.5.3 and 3.5.4 of the final version of the new Code.

Requirement for services to be of adequate technical quality

2.122 A number of respondents suggested that any sanction under this requirement, at paragraph 3.1.8 of the new Code, is proportionate to the level of technical failure.

2.123 We agree that this is certainly one factor in any consideration, but so is the level of harm caused by a technical failure, and the action taken by the provider to deal with any harm caused. Notes on mitigating factors, which cover technical quality as they do other requirements of the Code, are set out in our Investigations and Sanctions Procedure, which has recently been revised in line with the new Code and is available for reference on the PhonepayPlus website.

Requirement to provide refunds to all consumers (not just those who have complained to PhonepayPlus)

2.124 A new sanction available to a PhonepayPlus Tribunal, and set out at paragraph 4.8.2(j) of the Code, is that a party found in breach could be required to refund all consumers who have used a service, not just those who have complained to PhonepayPlus. Where the party concerned has vanished, or does not have the available revenue to make full refunds, then PhonepayPlus may instruct Network operators or providers higher up the delivery chain to release any withheld funds pertaining to the party in breach in order that they can be used to provide refunds.

2.125 A number of respondents asked how this would work in practice where there isn't enough money to refund consumers, even with the release of funds that have been withheld or retained by those higher up the delivery chain.

2.126 In practice, it may be a due diligence or risk control failure that sufficient funds have not been retained in the course of an investigation. However, where that is not the case, PhonepayPlus would consider allowing the amount of released funds to be donated to charity.

'Whistleblowing' policy

2.127 One aggregator suggested a ‘whistleblowing’ policy, whereby any provider who makes PhonepayPlus aware of consumer harm in which they are involved is then exempt from investigation.

2.128 PhonepayPlus considers that it is vital that providers, especially those likely to be classed as Level 1’s during an investigation, do make us aware of harm as soon as it becomes apparent. However, we consider this is a responsibility under risk control requirements, rather than an action for which providers should need an incentive.

2.129 In addition, immunity from any investigation would make it more likely that a provider who had caused harm would make allegations against others in order to protect themselves. As a result, we have not altered the approach in this area.

Prior permissions

2.130 One respondent to the consultation stated their opinion that the prior permission regime, as set out in the 11th edition of the Code, does not meet the needs of industry. This is one of the reasons that PhonepayPlus has proposed a new regime, and we will set out how the process of application and consideration will work in the next few months, ahead of the new Code coming into force.

2.131 One substantive question was whether the breach history of a provider might be considered before permissions are granted. This is certainly our intention, although a significant breach history will not be the only area of consideration before it is decided to grant a permission or not. In addition, any decision made in respect of a prior permission can be appealed.

Registration

2.132 The questions asked around PhonepayPlus’ proposals to create a requirement to register for some parties within the delivery chain, and a new database for Registration, were as follows:

Q29 – Do you agree with the proposed Code rules around Registration? If not, why not?

Q30 – Do you agree that Directory Enquiry services should be exempt from the requirement to register? If not, why not?

Q31 – Do you agree that 0871/2/3 services should be exempt from the requirement to register? If not, why not?

Q32 – Have we captured the correct mandatory information to include on the registration scheme to meet our regulatory objectives and assist businesses in carrying out due diligence on their contracted partners? Is there other mandatory information we should require registrants to provide?

Q33 – Do you agree that the publication of breaches should be limited by a period of time? Do you agree that 3 years for a Track Two breach and 5 years for an Emergency Procedure are appropriate time frames?

Q34 – Do you have a view on whether 11th Code breaches should be matched across to the proposed registration database, and/or how this could be best achieved? If so, please provide it along with any supporting evidence.

Q35 – Do you have a view on whether open investigations against Level 2 providers should be flagged to other parties registered with PhonepayPlus, and/or how this can be best achieved? If so, please provide it, and any supporting evidence you have.

Q36 – Do you support mandatory registration of all networks, Level 1 and Level 2 providers of eligible services? If not, why not?

Q37 – What do you consider to be an appropriate fee for registration? Do you agree that the Registration Scheme should be funded by fees or should its cost be incorporated into the general industry levy that funds PRS regulation?

Q38 – Do you agree with the proposals around Registration of service details? If not, why not?

2.133 We received ten different substantive comments in relation to the requirement to register and the implementation of a Registration Scheme. All of these concerned how the database would be implemented, and the information that would be asked for.

2.134 These comments were passed to the registration project team as the database and web interface were built. Our consideration and actions as a result are as follows:

Suggestion that the lead-in time for registration needs to be adequate

2.135 Some respondents expressed the concern that, if existing registrations were not ported across to the new database (PhonepayPlus currently requires all those classed as 'service providers' under the 11th edition of the Code to register, however this scheme is narrower in scope and is not connected to a public database), then a substantial lead-in time would be required for Network operators and Level 1 providers to check all their clients are registered under the new Scheme.

2.136 In response to this concern, PhonepayPlus has decided that there will be a lead-in time of five months from the launch of the Code to the date on which it takes effect. The database will be launched soon after the Code, which should give Network operators and Level 1 providers ample time to ensure clients are registered prior to the new Code being enforced.

Suggestion that PhonepayPlus conduct spot checks on registration – especially of Level 2 providers

2.137 PhonepayPlus will take necessary steps to ensure that data placed by industry on the Registration Scheme is accurate. This will include monitoring of the data and carrying out validation of entries through a range of activities including spot checks.

Suggestion that registration includes bank account numbers, passports, and names of associated companies

2.138 We consider that, while passports and bank account numbers might be an attractive proposition in terms of having information at a single reference point for those providers performing due diligence on clients, there is also a risk that this might act as a barrier for market entry to companies which do not have PRS as their principal business. As such, we do not propose that the database require provision of passports and bank account numbers at this time.

2.139 In regard to associated companies, we will require that registrants list the full names, and dates of birth, of all their directors. Companies with the same director would then be automatically flagged by the database for future reference.

Concern that directors may carry breaches with them when they move companies, even if they had no involvement with a breach

2.140 We consider there must be an assumption that directors of a company have responsibility for the actions of those companies, and a change of company should not automatically erase association with a breach or breaches from a director's name. In practice, the database will list periods of time when directors were with registered parties, and this can then be checked against that party's breach history during that period. This allows any potential employers, or prospective business partners of a company where a director is now employed, to qualify the level of association that director had with a breach during their due diligence processes.

Suggestion that breach records associated with previous editions of the Code are either wiped from the database, or clearly flagged as such

2.141 PhonepayPlus does not agree that breaches associated with previous editions of the Code should be wiped. Ultimately, these breaches still signal evidence of consumer harm, even where the exact breach or the party responsible for it might be different in a new edition. Breach history will be placed on the database for three years for serious breaches, five years for very serious. A link to the details of those breaches, which will be held on the PhonepayPlus website, will make it clear whether the breach is associated with a current or previous edition of the Code.

Suggestion that open investigations are not flagged against the relevant party on the database

2.142 In response to industry requests and in order to ascertain the exact commercial effect of flagging open investigations, PhonepayPlus will do so for the first six months after the new Code takes effect, and review the practice after six months. Investigations will only be flagged once a formal breach has been raised, rather than in preliminary stages of a complaint.

Question as to whether every company within a holding group should register, or just the holding company

2.143 PhonepayPlus believes that where a holding company itself is not active within PRS, then we would not expect them to register, only the subsidiary that undertakes PRS activity. While we do not expect individual brands within the same company to register separately with us, where companies within a holding group are separate subsidiaries, then they will each be required to register.

Suggestion that broadcasters should not have to register with PhonepayPlus

2.144 Broadcasters would likely be considered a Level 2 provider for PRS events which are part of broadcasts and, as such, we do not see a compelling reason why they should not register with PhonepayPlus.

2.145 However, broadcasters are more widely governed by Ofcom under their Broadcast licensing conditions – one of which is that they comply with the PhonepayPlus Code where applicable. In addition, Broadcast PRS on television is governed by our prior permissions

regime, and as such complaints about the PRS element of a TV broadcast would be referred to the Level 1 provider associated with the broadcaster.

2.146 We can clarify that, while we expect broadcasters to register with us, we do not expect the arrangements under the prior permission regime to change, or broadcasters to have to answer complaints directly rather than referring them to a Level 1 provider as they do now. While we will expect broadcasters to either register their individual PRS with us themselves or ensure the Level 1 provider does so, we will still accept provision of the Level 1 contact details as the consumer contact number, or subsequent referral of complaints to the Level 1 provider.

Registration of multiple keywords for an individual shortcode could be problematic

2.147 PhonepayPlus agrees that it may be problematic to register upwards of 100 keywords in respect of the same shortcode. As such, we have made the provision of keywords associated with a shortcode voluntary, rather than mandatory, where the customer service for the shortcode is managed by one provider. The key information is the provision of a consumer contact number against the shortcode, from where consumers can make enquiries about any of its services.

Registration fee a disincentive for smaller providers

2.148 The registration fee will be set at £100 plus VAT for the financial year 2011/12. We do not believe this is an unrealistic figure for most providers within the industry. In addition, providers whose PRS revenue totals less than £5,000 per annum will be required to register, but will be exempt from paying any fee. This exemption will be reviewed after 12 months, once we can better assess the impact of charging for registration on different sectors of the market.

Investigations and Sanctions

2.149 The questions asked around PhonepayPlus' proposals for Part Four of the new Code, which concerns Investigations and Sanctions, were as follows:

Q44 – Do you agree with the proposals around Investigations? If not, why not?

Q45 – Do you agree with the proposals around the Track One Procedure? If not, why not?

Q46 – Do you agree with the proposals around the Track Two Procedure? If not, why not?

Q47 – Do you agree with the proposals around the Emergency Procedure? If not, why not?

Q48 – Do you agree with the proposals around Adjudications? If not, why not?

Q49 – Do you agree with the proposals around Reviews? If not, why not?

Q50 – Do you have an opinion on what time limit should be imposed (except in exceptional circumstances) for seeking a Review after publication of a Tribunal's decision? If so, please state it.

Q51 – Do you agree with the proposals around Sanctions and Refunds? If not, why not?

Q52 – Do you agree with the proposals around Administrative Charges? If not, why not?

Q53 – Do you agree with the proposals around Oral Hearings and Appeals? If not, why not?

Q54 – Do you agree with the proposals around Publication of Decisions? If not, why not?

Q55 – Do you agree with the proposals around Delegation of Powers? If not, why not?

2.150 Nine different substantive issues were raised in relation to Investigations or Sanctions. They are as follows:

Admin fee for Track 1 procedures

2.151 One aggregator asked whether an administration fee for Track 1 procedures was necessary, and whether the existence of such a fee would encourage PhonepayPlus to 'sweep' for minor infringements of the Code in order to collect as many charges as possible.

2.152 We can confirm that this is not our intention. Any admin fee for a Track 1 procedure is to pay for the time involved in preparing an action plan to resolve consumer harm informally. This is as an alternative to the potentially much higher admin fees involved in a full investigation, and the cost of any financial sanctions.

2.153 At present, there are no plans to exercise the right that paragraph 4.3.1 of the new Code gives the PhonepayPlus Executive, and charge an admin fee for a Track 1 procedure. However, we will keep this under review, as if the amount of Track 1 procedures begins to rise as we enforce more and more proactively then we may need to consider recouping admin costs.

Publication of Emergency procedures prior to their being upheld

2.154 A number of aggregators and trade bodies questioned whether it was necessary to publish notifications that an investigation has been opened using an Emergency procedure, as PhonepayPlus currently does. The rationale was that this could prejudice consumers or potential clients against a company whether they were subsequently adjudged to be in breach or not.

2.155 Upon consideration, PhonepayPlus has not changed this practice and it will continue with the new Code. While we consider it important to stress that a notification of an Emergency procedure is not an adjudication, we would also see it as important that consumers are informed of action to investigate a service when significant and widespread harm (the rationale for opening an Emergency procedure) is alleged.

Automatic refunds to consumers

2.156 A new sanction available to a PhonepayPlus Tribunal, and set out at paragraph 4.8.2(j) of the Code, is that a party found in breach could be required to refund all consumers who have used a service, not just those who have complained to PhonepayPlus. One respondent, a trade association whose response was specifically endorsed by a number of its members, questioned that this may not be feasible in practice due to technical constraints.

2.157 PhonepayPlus accepts that it will not always be technically possible to effect an automatic refund to all consumers who have used a service. This could be because of technical constraints, or that networks are unable to pass all the CLIs or MSISDNs of those who were charged for a service due to data privacy issues. For these reasons, the General Guidance Note on 'Consumer refunds' sets out that automatic refunds must be used wherever possible, but otherwise offers a variety of alternatives, including donation of an equivalent amount to charity as a last resort.

Request that a provider has the automatic right to representation at a Tribunal

2.158 Upon consideration of the arguments put forward in support of this request – i.e. that there is more at stake now that fines are generally higher, and that as such it may be helpful for a provider to attend in person to contextualise written evidence – PhonepayPlus has added to paragraph 4.4.5 of the new Code that the relevant party in any investigation will have the right to attend on the notified date in order to make representations on any matter. However, it is important to note that should a provider not be able to attend on the notified date, PhonepayPlus may not alter the date without exceptional reason.

Operational guidelines for administration charges

2.159 A number of aggregators and one trade association suggested that operational guidelines should be drawn up for administration charges during investigations. A concern was expressed that PhonepayPlus could prolong cases in order to charge greater admin fees.

2.160 This concern was not supported by any evidence, and is not backed up by case history which suggests that it is providers who sometimes prolong cases by requesting extensions. As such, we do not propose to draw up operational guidelines in this area, but would draw attention to the fact that admin fees are already broken down and clearly attributed to different staff and time costs involved and will continue to be so.

Suggestion that investigated parties see the investigation report that goes to a Tribunal

2.161 Providers who are being investigated will receive the same case report as that which is provided to the Tribunal. In addition, the revised Investigations and Sanctions Procedure to support the new Code will be publicly available and so completely visible and transparent. This is, we believe, an unprecedented step amongst regulators.

Tribunals which review a case should not be made up of anyone who was a member of the original Tribunal that heard the case

2.162 While PhonepayPlus accepts that this is desirable, and endeavours to use different Tribunal members wherever possible for a Review, there are only a finite number of members of the Code Compliance Panel, the independent body from which Tribunal members are drawn. As such, and for reasons of expediency, a Review may sometimes take place with one Tribunal member who sat on the original Tribunal.

Cost of appeals

2.163 This was a point made by one aggregator, who pointed out that there is a perception that PhonepayPlus have nothing to lose following an adjudication, whereas providers must pay the costs of any appeal.

2.164 In response, we would make the point that the full cost of an appeal is not necessarily borne by the provider. The Tribunal, which is independent of PhonepayPlus, will determine the percentage of costs to be paid by each party when an appeal is lodged.

Application of sanctions

2.165 A single provider requested that Rule 4.8.2 of the consultation version of the new Code, which deals with sanctions, should include provision for defined periods of time by which sanctions such as a requirement to seek compliance advice will end.

2.166 Timeframes for the payment of fines are already set by the Executive, and will continue to be so. Usually the timeframe is ten days. Other sanctions, such as the requirement to seek compliance advice to the satisfaction of the Executive, do not have a set timeframe by which the imposition of a sanction must be complete. This is to give the provider time to present material to the Executive and then the Executive time to consider it and agree any changes needed.

2.167 To introduce set timeframes may prevent such sanctions from being completed to the Executive's satisfaction, as it may create an incentive for providers to stall the process until it is timed out. As a result, we do not consider this necessary.

Other Questions in the Code consultation

2.168 The remaining questions in the Code consultation invited general comments on PhonepayPlus decisions to leave some paragraphs of the 11th edition of the Code out of the new Code, and invited respondents to highlight any other issues they felt we had not considered. The questions were as follows:

Q58 – Do you agree with this assessment of parts of the 11th Code which should be withdrawn completely going forward? Please list any specific provisions which you feel should be preserved in some form, and provide your reasons.

Q59 – Do you agree with PhonepayPlus' assessment, and proposals around how the new Code will be interpreted in respect of 087 services? If not, why not?

Q61 – Are there any other areas of change within the proposed new Code that carry an impact you feel we should consider? If so, please provide them, and provide any evidence you have of the likely impact.

Q62 – Do you agree with our assessment of the potential impact caused by the proposed new Code? If not, then please provide any areas of consideration you feel we have missed, and any supporting evidence for them.

2.169 We did not receive any substantive comments around any of these questions, other than those relating to specific areas of the Code which we have already covered earlier in this consultation response.

2.170 Some Network operators and providers whose only involvement in PRS is around 087 services responded that they agreed with our view – i.e. that those only involved in providing 087 services within the PRS market should not have to register with PhonepayPlus. As previously stated, 087-only providers will be exempted from a requirement to register, but will be required to comply with the rest of the new Code.

3. Guidance: response to consultation

3.1 PhoneyPayPlus' public consultation of the new Code also proposed a consolidation and rationalisation of our current suite of guidance in line with the new Code. Service-specific rules in the current Code would become Service-Specific Guidance. Statements of Expectation and a significant number of Help Notes would be reviewed and amalgamated into General or Service-Specific Guidance, as appropriate. Guidance would be amended or added to, as appropriate, in the future, following full public consultation.

3.2 PhoneyPayPlus committed to consult on a full suite of new Guidance to support the new Code later in 2010. This consultation took place from 27 October 2010 to 19 January 2011, and we consulted on 20 separate pieces of Guidance, both General and Service-Specific.

3.3 The Guidance consultation document set out a total of ten questions designed to elicit feedback on all 22 individual pieces of Guidance attached to it. Four of these questions were around the general style and language of the Guidance. Six questions addressed specific issues within individual pieces of Guidance.

3.4 From the responses received to this Guidance consultation, 112 separate issues were identified. These ranged from comments about the content or tone of the individual pieces of Guidance themselves to concerns about the practical and commercial implications of having to adhere to newly created concepts, such as *Due diligence and risk assessment and control*. Some respondents also asked how some areas of Guidance would be interpreted by the Code Compliance Panel.

3.5 As with Section 2 of this policy statement, Section 3 has grouped these issues into a number of categories, rather than assigning each of them to individual questions within the original document. For ease of reference, the responses below have generally been grouped to align with the headings as reflected in the individual guidance notes themselves. Although where it is expedient to do so for the purposes of presentation, we have aligned two pieces of Guidance on a similar theme (such as Complaint handling & consumer refunds) into a single heading.

- 3.6 The categories are as follows;
- General presentation/ additional Guidance
 - Definitions
 - Due diligence & risk assessment and control
 - Promotions and pricing
 - Method of exit
 - Complaint handling & consumer refunds
 - Conduct of live services & undue delay
 - Privacy
 - Appropriate use of number ranges
 - Lower-cost services
 - Service-Specific Guidance

General presentation / additional Guidance

Consistency issues around presentation

3.7 All prices as stated in the supporting Guidance have been expressed to be exclusive of VAT so as to align with how pricing information is stated in the Code.

3.8 As an additional point of clarification, PhonepayPlus has amended the Guidance to reflect that all compliance requests will be responded to within five working days.

3.9 Similarly, and as a general presentational point, there was a desire amongst many respondents for the Guidance to use language which is familiar to consumers. As such, a thorough review has been undertaken with certain terminology (e.g. network charges) being altered wherever possible.

Interlinking of all compliance information on the PhonepayPlus website

3.10 Concerns were raised as to how industry would be expected to keep a pace with Tribunal decisions, particularly where an individual adjudication may have a direct bearing on the interpretation of an individual outcome and/or particular guidance note.

3.11 In response, PhonepayPlus has developed an interactive website for the Code and Guidance. This means that all online Guidance Notes, where applicable, will be cross-referenced to other relevant notices and 'Compliance Updates'.

Information about how Guidance will be regarded by Tribunals

3.12 Given the importance of Guidance, a number of respondents asked that each Guidance Note contain some clarity about the status of Guidance. This was especially important around how individual guidance notes are to be interpreted at Tribunals.

3.13 To this end, PhonepayPlus has included a standard clause within all Guidance Notes, both General and Service-Specific, which clarifies their status.

3.14 This wording highlights how the content is neither binding upon nor supersedes what is contained in the Code, but is instead designed to help providers understand the practical steps needed to achieve compliance.

Additional Guidance

3.15 Suggestions from respondents for additional Guidance notes encompassed the following subjects:

- The use of in-app marketing and billing (including e-money and virtual currency)
- Broadcast PRS
- Sexual entertainment services
- Contact and dating services
- Updating consumers to avoid bill shock

3.16 PhonepayPlus is aware that the continued evolution of the premium rate market will create innovation which will create the need for certainty about the risks and how to control them. As a result, PhonepayPlus will review these suggestions once the Code and first tranche of Guidance have been launched, and consult on the introduction of new Guidance wherever there is a compelling case to do so.

Guidance on Definitions

Status of affiliate marketers

3.17 Some respondents, likely to be considered as the Level 2 provider in any investigations into their services carried out using the new Code, were concerned as to whether the Code was flexible enough to be able to apportion blame on an individual company (e.g. an affiliate marketer) who has carried out an activity beyond their instructed remit. Such activities could include marketing to consumers without providing clear and transparent pricing, or other information, or using web-based marketing to 'push' the consumer into a purchase when they think they are only clicking on a link for more information.

3.18 PhonepayPlus' position, as reiterated at paragraph 3.6 of the General Guidance Note on 'Definitions of those involved in providing PRS', is that any Level 2 provider remains responsible for the actions of their affiliates. While paragraph 4.3 of the same General Guidance Note does set out that PhonepayPlus will look at what reasonable steps and efforts a provider has made to 'control' the activities of a dishonest or over-zealous affiliate, the Guidance is clear that this will only be a mitigating factor and does not change the provider's responsibility.

Prohibited behaviour for Network operators

3.19 Clarification was sought by a number of Network operators as to whether paragraph 3.2 of the General Guidance Note on 'Definitions of those involved in providing PRS' should add the practices of AIT (Artificial Inflation of Traffic) and 'self-dialling' as additional forms of prohibited behaviour. These are practices whereby a provider hacks into a telephone exchange box, or the internal phone system of an organisation, in order to dial PRS either in the UK or abroad from which they then receive revenue.

3.20 While PhonepayPlus acts to inform Network operators of the existence of AIT or self-dialling, wherever it is reported to us, we do not regulate AIT under the remit of either the 11th edition or the new edition of the Code. While AIT is a form of fraudulent activity, it does not in itself harm consumers of PRS. As such, PhonepayPlus has not included either of these terms into the final draft of this Guidance. We will continue to issue general notices to inform all Originating Network providers about individual incidents of AIT, but this remains fundamentally a network issue.

Broadcast PRS and the role of TV broadcasters

3.21 A specific issue raised by many broadcasters was the need to have a heading contained in the Guidance which was specific to Broadcast PRS services. PhonepayPlus is receptive to such a request and has added a separate heading to the guidance note at paragraphs 3.9 – 3.11. This heading confirms the status of broadcasters in practice, in that Broadcast PRS, as a service category, is subject to prior permission. So any breach is most likely the responsibility of the Level 1 provider in the delivery chain rather than the broadcaster with whom they have contracted.

Registration of services

3.22 Further to comments made by various respondents, paragraph 5.3 of the General Guidance Note on 'Definitions of those involved in providing PRS' has been removed. Providers will not have to register services, only provide the customer care numbers for individual premium rate numbers (PRNs) and shortcodes.

Registration as an annual requirement

3.23 In respect of the list of ‘responsibilities’ expected of Network operators and/or Level 1 providers in accordance with Section Three of the Code, and as set out at paragraph 3.2 of the General Guidance Note on ‘Definitions of those involved in providing PRS’, a suggestion was made that an additional requirement to register annually should be stated.

3.24 On reflection, PhonepayPlus has not included this as an additional requirement to those listed at paragraph 3.2. However, we have confirmed that the annual registration fee has been set at £100 + VAT. This was set out in most recent Registration Scheme Update circulated to the industry in March 2011⁵.

Due diligence and risk assessment and control

Proportionate responsibility

3.25 The consultation document asked two specific questions around Due Diligence, Risk Assessment and Control. The first was as follows:

Q5 – In your view, would the current requirement for risk assessment and monitoring of Level 2 clients be disproportionate to the level of risk involved? Please provide evidence of current practice in relation to identifying and controlling risk with direct clients.

3.26 A major concern as raised by the industry was the need for the Guidance to be pragmatic about the different levels or risk associated with different services and clients. In particular, that there should be no standard requirement placed on industry to regularly ‘risk-assess’ clients unless there is a proven track record or obvious reason to do so.

3.27 PhonepayPlus recognises that this Guidance sets out concepts around risk assessment and control that, while they may not be new to the industry as a whole, are new to PhonepayPlus’ interpretation and enforcement of the Code.

3.28 We agree that any level of risk control, and action plan to control risk, should be proportionate to the level of risk that a client poses. A client with no breach history from PhonepayPlus, who has been operating low-risk services in the UK market for some time, might generally be considered to pose less risk than a client with breach history who runs high-risk services, or a client who is new to the UK market (at least until the level of risk they pose is established).

3.29 To this end, paragraph 4.10 of the General Guidance Note on ‘Due diligence and risk assessment and control on clients’ reiterates that the obligations being placed on the industry are not intended as a uniform or blanket requirement on providers to monitor their clients at all times. Rather, any assessment of risk should be proportionate to the level of risk the client poses, and the level of control the provider has to the operation, promotion and content of the PRS service in question.

3.30 We will continue to identify what successful and unsuccessful risk control and monitoring of clients looks like over the life of the new Code. This will be disseminated to

⁵ <http://www.phonepayplus.org.uk/output/news/PhonepayPlus-Registration-Scheme-March-Update.aspx>

industry stakeholders through a variety of media, including regular 'Compliance Updates' and additions to Guidance, where necessary.

Inclusion of a set list of examples indicating what action should be taken where problems are encountered

3.31 A comment made by an individual trade association was the absence from the General Guidance Note on 'Due diligence and risk assessment and control on clients' of any advice, or indication of steps that providers should take, where consumer harm has occurred or otherwise been identified.

3.32 PhonepayPlus is sympathetic in doing as much as it can to help guide the industry to perform effective due diligence and risk assessment and control. However, we do not feel, especially at this stage, that it is possible to provide a definitive list of examples that can be made sufficiently robust enough that is able to indemnify the Network operator and/or provider concerned.

3.33 Such an approach is consistent to the general approach set out at paragraph 1.1 of the Guidance Note, which highlights that there can be no uniform standard of due diligence and/or risk assessment that can be universally applied, as the commercial arrangements an individual network and/or provider has with their respective client base will differ. We will continue to keep this approach under review as best practice emerges for the conduct of due diligence risk assessment and control through the life of the Code.

Breach histories under the 11th edition of the Code

3.34 The Guidance note has been altered, at paragraph 5.1, to contextualise how previous breaches will be treated and recorded on the Registration Database.

3.35 A concern raised by some respondents was that any search carried out on the PhonepayPlus database by a prospective client or contractor might indicate breaches from a previous Code, where the exact breach or the party responsible for it might be different in a new edition

3.36 While PhonepayPlus does not agree that breaches associated with previous editions of the Code should be wiped, the inclusion of this wording should ensure that breaches from previous Codes are placed in context.

Requirements for commercial broadcasters

3.37 A number of respondents, including two broadcasters, asked that we include wording to the effect that levels of due diligence may be lessened for those contracting with major broadcasters or other well-known companies or organisations.

3.38 PhonepayPlus has, on consideration, not included any wording of this type. The 'Due diligence and risk assessment and control on clients' General Guidance Note reflects that the obligations placed on Network operators and providers are proportionate to the control the contracting party has over the operation, promotion and content of the PRS in question. As such, due diligence may be easier to perform on a well-known and respected entity, but the requirement does not lessen.

Requirement to check individual passport details

3.39 The second specific question around due diligence, risk assessment and control was as follows:

Q6 – At present, the Due Diligence, Risk Assessment and Control Guidance does not contain any requirement or recommendation to check the passports of directors of prospective clients. Is it appropriate to recommend this in some form?

3.40 There was almost a unanimous response that such checks should be left to the contracting party following any initial assessment of the risk posed by a potential client. As such, no such requirement has been added.

Due diligence obligations placed on Terminating Communications Providers (TCPs)

3.41 Some fixed-line networks suggested that the extent of their obligations, in their capacity as the Terminating Communications Provider (TCP), should be restricted to checks that are appropriate to the network's role as part of the delivery chain (e.g. identifying unusual traffic patterns) and not engaged in costly systematic monitoring of their individual client bases.

3.42 Though this is not made explicit in the 'Due diligence and risk assessment and control on clients' General Guidance Note, clear emphasis is made upon the importance of 'proportionality' and 'foreseeability'. This, in turn, implies that, in most instances, the Network operator's role will be confined and restricted to the types of activity we would associate as being the conventional role of a Network operator when operating as part of the delivery chain.

3.43 However, our expectations might change where the network directly contracts with a Level 2 provider which has a clear breach history with PhonepayPlus or with another regulator, either in the UK or abroad. In this case, there may be an expectation on the Network operator to 'control' the risk being that is posed by the services on offer. This may require the network to conduct a degree of systematic monitoring to pre-empt harm caused to consumers.

Failure to register with PhonepayPlus

3.44 Finally, a request was made to have any failure by a provider to require their clients to register (where those clients meet the definitions of a party who must register) as being an unequivocal breach of their due diligence obligations.

3.45 PhonepayPlus has considered this argument but appreciates that human error or miscommunication can occur, meaning that such an oversight should not be given such unequivocal status. As such, we have refrained from including this as an explicit requirement set out at paragraph 3 of the Guidance Note.

Promotions and pricing

Clarification of how 'legible and visible' applies to radio broadcasts

3.46 Some radio broadcasters expressed concern that prices cannot reasonably be legible or visible when mentioned on air. They suggested this requirement should have a caveat so that they did not have to adhere to it literally.

3.47 As a result, PhonepayPlus has inserted an extra heading at paragraph 2.16 of the 'Promotions and promotional material' General Guidance Note, specifying how this would apply in the context of a radio broadcast. This covers a range of scenarios as to how the pricing information should be conveyed 'on-air' and during a PRS event.

Usage of the pound (£) sign

3.48 A number of aggregators believed that the 'Promotions and promotional material' General Guidance Note should allow for the use of 'GBP', as a recognised term, in instances where the handset or Mobile Network Operator cannot technically provide a '£' sign.

3.49 Following discussions with the industry about how often such a technical restriction occurs, PhonepayPlus believe this argument to be insufficient to justify 'GBP' as a universally recognised alternative. Instead, paragraph 2.4 of the 'Promotions and promotional material' Guidance note sets out the proportionate response we would take in instances where it is proven to be technically impossible for a network to handle the pound sign (£).

Pricing information and the 'total cost'

3.50 Respondents felt that pricing information should be limited to the total cost of a service with repeat charges (such as virtual chat), as opposed to specifying the number of individual messages or the cost per message. These arguments are based on the premise that certain services send a number of instructional MT messages when only one message is actually charged for.

3.51 PhonepayPlus' stance is that pricing information is a fundamental piece of information that must be displayed so that consumers are fully and clearly informed before committing to a purchase.

3.52 What PhonepayPlus deems the '*total cost*' is set out at paragraph 1.3 of the 'Promotions and promotional material' General Guidance Note and includes the price per minute and/or text to be inclusive of any initial charge (e.g. joining fee), where this is applicable.

Proximity and prominence

3.53 A number of respondents identified that where proximity and prominence were mutually exclusive concepts, then pricing prominence should take precedence where relevant and based on the promotion in question. An example would be where a promotion carries a number of different PRNs or shortcodes that possess the same cost. In such a case, it might be acceptable for the provider to list one price prominently, rather than the same price individually next to all the access numbers or codes.

3.54 PhonepayPlus concedes that there are circumstances where this could be the case, and, as such, this has been reflected in paragraph 2.12 of the 'Promotions and promotional material' General Guidance Note. However, we do not consider this a generally acceptable practice.

3.55 An important consideration, which the 'Promotions and promotional material' General Guidance Note explicitly states at paragraph 3.16, is that industry can contact PhonepayPlus in an attempt to resolve any difficulties or issues before copy is forwarded to be published and circulated in the public domain. This service is provided free of charge.

WAP-push messaging

3.56 Some respondents suggested that the Guidance needed to clarify the status of a WAP-push message, which they expressed is only activated when a consumer clicks on a link. However, this is not always the case as far as we are aware. Some WAP-push

messages do take consumers directly to a website and this has been reflected at paragraph 2.19 of the 'Promotions and promotional material' Guidance.

Inappropriate promotions

3.57 Respondents felt that the scope of paragraph 6.2, in explaining what we deem an inappropriate promotion to be, should focus in covering the promotion of adult services to those who have not requested it.

3.58 PhonepayPlus would reiterate that only one of the four bullet points that have been listed at paragraph 4 in the 'Promotions and promotional material' Guidance – relating to the protection of those individuals who have English as a second language or who are otherwise vulnerable – does not relate to the promotion of adult services. PhonepayPlus sees no reason why this last bullet point should be removed.

Promotion of 'free' trial periods

3.59 The consultation document asked one specific question in relation to 'free trial' periods, which was as follows:

Q7 – Should the section around free trial periods be revised so that, if the consumer is clearly informed at the beginning of a trial period, then it is acceptable to charge without further opt-in as long as charging commences as soon as the free trial is over?

3.60 Many respondents believed that, if a consumer has consented to a free trial and has been fully informed that a charge will commence at a later date, and when that charge will commence, there is no need to re-inform the consumer when the charge is about to be levied.

3.61 An argument to substantiate this approach is that many consumers are already familiar with this model given the widespread popularity of 'LoveFilm'. PhonepayPlus has some agreement with this view and has set out its expectations as to how this model should be promoted in practice in the bullet points listed at paragraph 3.10 in the 'Promotions and promotional material' General Guidance Note.

Exemption of services that cost less than 50p in total – will this continue?

3.62 A requirement of the new Code is that all premium rate services must state the pricing information in their promotional advertising regardless of whether the cost of the service falls above or below the previous £0.50p threshold set out in the 11th edition of the Code. Previously, and until PhonepayPlus took over the regulation of PRS on the 087 number range in 2009, any service falling below this threshold was exempted from the need to include pricing information in advertising. This is provided here for clarification following questions raised by respondents

Suggested wording around price and network charges for broadcast events

3.63 PhonepayPlus has accepted a request made by many broadcasters request to have a form of provisional wording for price and network charges, included as a separate 'cost type' to cover all 'broadcasting events'. PhonepayPlus has accommodated this at paragraph 2.7 of the 'Promotions and promotional material' Guidance note.

Clarification about the use of '/' in place of 'per'

3.64 As a point of clarification, PhonepayPlus has explicitly stated that the use of the standard abbreviation of 'per' to (/) (for example 50p/min) is an accepted standard in its abbreviated form.

Miscellaneous

3.65 A small number of providers advocated that the 'Promotions and promotional material' Guidance Note sets out in proscriptive form what PhonepayPlus views as being acceptable forms of differing pricing information. Included as part of this was a request that providers should be given a degree of flexibility to display an array of different prices that may be inclusive or exclusive of VAT.

3.66 PhonepayPlus believes that to have a prescriptive set of promotional standards stands in direct contrast against the rationale of having a flexible new Code, which is an approach supported in large part by all respondents who have responded.

3.67 In terms of allowing the industry a degree of flexibility to display prices either by being exclusive or inclusive of VAT, PhonepayPlus has rejected this viewpoint based on its fears that this would likely create a degree of confusion amongst consumers if pricing information differed from advert to advert.

Method of exit

Use of the 'STOP' command

3.68 The following points were raised by various stakeholders in relation to the use of the 'STOP' command:

- That acknowledgement should be given to fact that the 'STOP' command should be recognised in upper or lower case letters, as well as any combination thereof.
- That consumers should not always have to be able to send 'STOP' to the shortcode they originally used to subscribe – it was argued that there are circumstances where it may prove too costly to do so.
- That it should be possible to use an alternative to 'STOP' in adverts, as long as the 'STOP' command does still function in relation to that service.

3.69 PhonepayPlus agreed with these points and, as a result, we have altered and re-drafted several paragraphs within this section of the Guidance.

3.70 One specific question was asked in the consultation document in relation to the Guidance Note on 'Method of exit from a service'. It was as follows:

Q8 – At present, Guidance does not recommend that providers take steps to be able to recognise a consumer's intent to exit, even when they have not sent "STOP" or another correct keyword. Should this be the case?

3.71 The response to this question was almost unanimous in suggesting that specialist software that recognises alternatives to the 'STOP' command was not needed, provided that providers committed to offer refunds to consumers who had genuinely attempted to exit the service using something other than 'STOP'. In light of this, no change has been made to the Guidance.

Consumer refunds & complaint handling

Clarifying the consumer refund sanction

3.72 Respondents generally endorsed the approach as set out in the ‘Consumer refunds’ General Guidance Note, but requested for there to be greater clarity by making it explicit that any refund only applies where it has been formally issued as one of a range of sanctions imposed by a Tribunal.

3.73 PhonepayPlus agrees with this contention and has modified the Guidance Note to provide greater clarification, at paragraph(s) 1.4 & 1.5, around the circumstances of when a Tribunal will likely raise a refund imposed as a sanction.

3.74 A specific concern of many aggregators was that paragraph 3.2 be deleted as any action taken as part of a Track 1 procedure is an informal process and does not constitute a breach of any of the outcomes or individual rules set out in the Code. PhonepayPlus has not deleted this wording, but has modified it to reflect that where a Track 1 procedure suggests a refund the provider has the right to dispute this.

Proactive stance in refunding consumers

3.75 Aggregators have asked whether in circumstances where a proactive stance had been taken if this would be deemed as mitigation if a case were presented at Tribunal.

3.76 PhonepayPlus has set out, in its revised Investigations and Sanctions Procedure⁶, how a proactive stance in refunding consumers would be regarded if an investigation were raised against an individual provider. Where a proactive stance is taken, it will likely be deemed a mitigating factor so lessening the severity of the seriousness level and the likelihood of sanctions being imposed.

Unclaimed refunds and contributions made to charity

3.77 It was suggested by some providers that it may be difficult to provide charitable donations of an ‘equivalent amount’ in instances where refunds remain unclaimed, because of claimants withholding their contact details (e.g. where the end users telephone details are withheld).

3.78 PhonepayPlus accepts that it will not always be technically possible to affect an automatic refund to all consumers who have used a service. This could be because of technical constraints, or that networks are unable to pass all the CLIs or MSISDNs of those who were charged for a service due to data privacy issues. For these reasons, the Guidance Note on ‘Consumer refunds’ sets out that automatic refunds must be used wherever possible, but otherwise offers a variety of alternatives including donation of an equivalent amount to charity as a last resort.

3.79 We believe that the wording ‘an equivalent amount’ offers providers enough flexibility to make a judgement call to determine what a suitable sum would be to donate to a charity.

Apportioning refunds

3.80 A request made from Network operators was recognition that, in certain circumstances, the refunds sanction imposed by the Tribunal may provide that a Level 1 or Level 2 provider should refund the whole cost, but, equally, at other times the total amount being requested might be restricted to a share of the revenue generated with the remainder borne by the Terminating Communicating Provider (TCP) concerned.

⁶ <http://www.phonepayplus.org.uk/upload/2011-Investigations-and-Sanctions-Procedure-new-Code.pdf>

3.81 PhoneyPayPlus accepts that this may be the case dependent on the circumstances of the case and has included wording to this effect set out at paragraph 2.2 in the 'Consumer refunds' General Guidance Note.

Complaint handling

3.82 A Level 2 provider suggested that it may not always be possible for consumers to have gained a refund within one month of their complaint being received, as sometimes clarification or information is needed from a Level 1 provider or a Mobile Network Operator.

3.83 PhoneyPayPlus considered this response, but ultimately decided that this would not be included in the Guidance as this is something which would most likely be an exceptional circumstance.

3.84 A Level 1 provider suggested that it be made a requirement for a billing and marketing shortcode to be the same so as to make complaint handling much simpler.

3.85 PhoneyPayPlus views this as a best practice policy, rather than something industry should adopt at this stage, and the Guidance Note does not include this at this stage.

3.86 A broadcaster suggested that Guidance should make clear that PRS complaint-handling rules did not apply to any complaints about an editorial aspect of a broadcast (i.e. which do not relate to PRS at all). The same broadcaster also suggested that in cases where complaints were received about both the editorial and PRS elements, it would be up to the broadcaster to apply a common complaints resolution process which complies with any minimum requirements set out by PhoneyPayPlus.

3.87 PhoneyPayPlus agreed with the points made here and has added a new section to the Guidance Note following to reflect this.

The conduct of live services & undue delay

The conduct of live services

3.88 Stakeholders suggested that the Guidance should reflect that where consumers have positively consented to a call going beyond £30 (and there is an audit trail for it), this should be permitted.

3.89 PhoneyPayPlus has not agreed to this approach as a matter of course. However, we have updated Guidance to reflect that any providers wishing to do this may seek permission to be exempted from section 2.3.12 of the Code.

Undue delay

3.90 There was a concern from industry that a prohibition on long service introductory messages is tempered by the recognition that some services will require legitimately long introductions in order to instruct consumers on how to use them. Additionally, some services also have an explicit delay in order to ensure sufficient revenue has been added to a consumers' phone bill before the service is provided (pay-for-product and some PIN issue services, for example).

3.91 PhoneyPayPlus has added a new paragraph to the General Guidance Note on 'The avoidance of undue delay' to reflect this point.

3.92 With specific regard to pay-for-product services, industry noted that some physical goods, such as concert tickets which may not have been printed at the time of purchase, would not be able to be delivered in the ‘timely fashion’ the Guidance recommended.

3.93 PhonepayPlus has made alterations to the Guidance Note on ‘The avoidance of undue delay’ to reflect this point.

Privacy

Consent to marketing

3.94 Respondents felt that the Guidance Note should be split into distinct parts to reflect the differences between ‘*charging consent*’ and ‘*marketing consent*’. The latter dealing more specifically with how the Privacy and Electronic Communications (EC Directive) Regulation 2003 (‘PECR’) would be subsequently interpreted.

3.95 The Privacy Guidance note has, in light of these comments, been split into three parts; Consent to charging, Consent to marketing and General formatting for marketing.

3.96 With regard to our explanation around ‘Consent to marketing’, an important point of clarification as explained in the ‘Privacy and consent to charge’ Guidance Note, at paragraph 4.6, is that PECR does not specifically set out what ‘acceptable validation’ looks like and specifically in the context of PRS.

3.97 Instead, and as set out at paragraph(s) 5.1 – 5.3 and 5.12, the Guidance Note explains that the level of validation will depend on the type of consent to marketing (soft opt-in/hard opt-in) that has been obtained from the consumer in the first instance. PhonepayPlus implicitly accepts that isolated mistakes will not be evidenced by a need to provide an independent audit trail.

3.98 However, the Guidance on ‘Privacy and consent to charge’ explicitly states that, for any systematic mis-marketing or where a provider places reliance on a marketing list from a list of previously obtained ‘hard opt-ins’, those opt-ins would need to be robustly verifiable in the event of any complaints, no matter how small or large the scale.

Independence and verification of data

3.99 A general question amongst many of the aggregators was why an independent Level 1 provider (of the delivery chain for a service) could not act as an independent dispatcher and verifier of a PIN confirming consent for web-based purchasing.

3.100 PhonepayPlus does not accept that the suggestion that information is secure solely by the fact of it being held by an independent Level 1 provider. However, we have amended the wording at paragraph 2.10 of the ‘Privacy and consent to charge’ Guidance Note to reflect that such an approach is possible, where appropriate security is in place to prevent tampering with existing data or creation of new data to give the impression of consumer consent.

3.101 Finally, the proposal to have ‘independent third parties’ able to link the original opt-in to the promotional advertisement that the end-user would have seen upon inputting their details was commented on as being unachievable by the industry due to ‘technical constraints’ that makes this unfeasible. As such, we have removed paragraph 4.7 from the ‘Privacy and consent to charge’ Guidance note.

Latency of time between original opt-in and future marketing

3.102 There was a general acceptance amongst many respondents that a six-month gap between a consumer's last interaction with a service and the point at which marketing must cease is adequate for marketing purposes. However, it was requested for the 'Privacy and consent to charge' Guidance Note to make explicit mention that certain services (e.g. seasonal services and/or birthday alerts) should be exempted.

3.103 PhonepayPlus comments on this explicitly at paragraph 9.1 in the 'Privacy and consent to charge' Guidance Note, reiterating our position that an original consent to marketing can deteriorate over time and that any substantial delay from when consent was first obtained is likely to be construed as an intrusion the longer the intervening period.

3.104 Respondents had expressed a concern that the time at which marketing data ceases to be valid should be referenced by how often marketing takes place, as well as the threshold of time from the point of consent to the receipt of future marketing.

3.105 The 'Privacy and consent to charge' Guidance Note reflects the likely approach PhonepayPlus will adopt, where an investigation is raised, by taking into account how soon subsequent marketing occurs from when the initial purchase and/or original consent was obtained.

Appropriate use of number ranges

Aesthetic changes made to the final draft

3.106 Most comments made by respondents centred upon formatting changes to the Guidance Note itself, or around clarification about some of the individual number ranges in use.

3.107 As a result the range of short-codes in this Guidance has been corrected to read '71000 – 77999' and not '71000 – 78999'.

Lower-cost services

International call routing services

3.108 The only comment made in relation to any type of lower-cost services was clarification as to whether international dialling services costing less than £0.05p require prior permission.

3.109 Paragraph 4.3 of the 'Lower-cost services' Guidance Note makes clear that international call routing services, operating below a £0.05p threshold, would not be considered a 'controlled' PRS under Ofcom's PRS condition.

Service-Specific Guidance

Betting tipster services

3.110 One respondent suggested a change of wording at paragraph 3.1 of the consultation version of this Guidance Note, so that it would read "providers of betting tipster services should be able to provide evidence to substantiate claims included in the promotion of the service." PhonepayPlus has accepted that form of wording, and changed the Guidance Note as a result. In addition, the paragraph has been renumbered to 1.1 in the final version.

3.111 Secondly, one trade association suggested that paragraph 3.2 of the consultation version be removed on the premise that the examples given add little, if any practical value.

3.112 PhonepayPlus rejects this notion and would argue that each of the examples helps clarify our expectations when regulating this type of service category.

Children's services

3.113 One aggregator expressed the view that there should be a greater degree of explanation given at paragraph 3.3. This paragraph set out a requirement for children's service to cost no more than £3 in any given month before terminating by forced release, and the aggregator who commented suggested that this would not give clear guidance about how many times children could make one-off purchases in any given month, and to what total spend.

3.114 PhonepayPlus agrees that there should be guidance around the amount that children can spend in total during a week or month, whether on calls or SMS-based services in a series of one-off purchases. However, in light of there being no evidence at present as to what a suitable amount would be, PhonepayPlus intends to further research this issue before consulting on an update to the Guidance, if necessary.

3.115 Secondly, a single Network operator gave the view that paragraph 3.1 of the consultation version (now paragraph 1.1) fails to specify what information would be sufficient to validate whether the bill-payer's permission (i.e. a parent or guardian) has been obtained.

3.116 PhonepayPlus accepts that it may be necessary for providers to prove that the bill-payer's consent to a charge has been obtained prior to a child accepting the charge themselves. However, once again, in light of there being no evidence as to what would constitute best practice in this area, PhonepayPlus proposes to do further research and consult on an update to this Guidance in due course. In the meantime, providers who wish to seek advice about a method to verify bill-payer's permission can contact PhonepayPlus.

Competitions – definition of competitions

3.117 Respondents wished to have greater clarification around the term 'competitions' and whether this implies the actual Code definition, or whether this is being incorporated as part of the Gambling Act.

3.118 PhonepayPlus has amended the 'Competitions and other games with prizes' Service-Specific Guidance Note with a separate section, inserted at paragraph 5 of the note, which deals with how 'competitions' are treated, and subsequently interpreted, when applied in the context of the Gambling Act.

Competitions – restrictions on space for information in certain media

3.119 One trade association suggested that paragraph 3.2 (now changed and referred to as paragraph(s) 1.2 & 1.3 in the final draft) should recognise the space restrictions in certain forms of marketing media against the requirements to provide key information. (e.g. SMS/WAP).

3.120 This specifically deals with the point that for these types of messages they may be unable to accommodate all of the salient terms and conditions that PhonepayPlus would normally expect to be displayed.

3.121 PhoneyPayPlus has altered the Guidance note, acknowledging the technical restrictions placed on certain types of SMS messaging (e.g. Binary SMS) at paragraph(s) 1.2 & 1.3, as well as setting out the practical steps that providers should take to have the salient terms displayed elsewhere.

Competitions - Closing times for competitions

3.122 A further point of clarification was around the correct interpretation of paragraph 3.2 (now referred to at paragraph 1.1 in the final draft of the 'Competition and games with prizes' Guidance Note). This paragraph reiterates that, where no closing time is stipulated within promotion, this presumes that the competition 'closes' at midnight on the day of the promotion itself.

3.123 PhoneyPayPlus has not explicitly altered the Guidance Note, but acknowledges that the 'default position' at paragraph 1.1 of the final version could be altered where a competition is ongoing. In such instances, and so long as this is being made clear to consumers in the promotional material, then this should be sufficient.

Aesthetic and typographical changes made to the guidance note

3.124 A number of typographical corrections were raised in connection with the Guidance Note on 'Competitions and other games with prizes'. These have been dealt with as below:

- Paragraph 5.1 - the words '*where applicable*' should be inserted between 'should' and 'be' in the first line. PhoneyPayPlus has incorporated this wording into the final draft at paragraph 3.1 of the 'Competitions and other games with prizes' Service-Specific Guidance note.
- Paragraph 4.4 has been prefaced with the wording '*unless stated*', as requested, to alter the wording as it previously appeared at paragraph 6.4 in the consultation version.
- Paragraph 5.1, has been modified so that the second sentence, when applying the statutory test at section 14(5) of the Gambling Act, is based on a '*reasonable expectation*' of deterring or preventing a significant proportion of participants from entering when determining if an '*element of skill*' has been added to an entry mechanic.
- Paragraph 5.2 has been amended to reflect wording suggested by the industry, which in our opinion is clearer than that which we originally proposed. The new wording is: '*the distinction between a free draw and a lottery is that no-one is required to pay over and above the normal rate to enter into a free draw. The route of entry will be free if the participant does not have to pay any premium rate charge for entering the competition.*'

Competitions – definition of independence where judging winning entries

3.125 Finally, in light of concerns raised by broadcasters, more clarity has been added to clarify what we mean by 'independence' in the context of where a subjective assessment being made in the selection of winning entries.

3.126 PhoneyPayPlus defines independence as being '*where an individual has no commercial interest in the competition or associated premium rate service concerned*', set out at paragraph 4.3 of the Guidance Note.

Fundraising and other charitable donations – checklist of information for promotional material

3.127 One trade association, explicitly supported by a number of its members, suggested that PhonepayPlus adopt a checklist they suggested of information which should be included in promotional material for fundraising services. This wording has been incorporated in the respective bullet points listed in paragraph 1.1 of the final version of the 'Fundraising and other charitable promotions' Guidance Note.

3.128 Similarly, and following requests made by aggregators, the Guidance note now makes specific reference to the Mobile Data Association (*'Framework for Charitable Donations using the UK mobile networks'*) issued in June 2009 and as implemented by all of the respective Mobile Network Operators.

3.130 Wording has been altered at paragraph 1.3 of the Guidance Note to correct a previously made assertion that designated charitable shortcodes cannot be used for services that possess a competition element to them.

3.131 In addition, paragraph 1.2 of the Guidance Note has been amended to show that designated charitable shortcodes (70xxx) cannot always be sourced. This has been explicitly stated, and added to the Guidance Note, in order to assure providers that they will not be penalised where a designated shortcode cannot be sourced to a charitable service.

Subscription services

3.132 The consultation document asked two specific questions in relation to Subscription services. The first was as follows:

Q9 – Should Guidance on subscription services contain a recommendation to send an initiation message containing stipulated information, as per paragraph 7.12.4 of the 11th edition of the Code? If not, why not?

3.133 PhonepayPlus has proposed initially that, if advertising was clear, then there was no longer a need to send a free subscription initiation message to consumers detailing the same information about the service (e.g. price, frequency of charges, how to exit) as should have already been contained within the promotional material.

3.134 There was strong feeling amongst aggregators that the free subscription initiation message at the service sign-up/opt-in stage should remain something PhonepayPlus strongly recommends within Guidance. Aggregators who responded reasoned that having this message in place helped them to know that the consumer has received the correct information at service initiation.

3.135 We have added a new section to the Service-Specific Guidance Note on 'Subscription services' based on these responses – please refer to Section 2, Subscription initiation messages. Essentially, although the sending of initiation messages is no longer mandated, Guidance has been altered to state that it remains a strong recommendation.

Exemptions from the need to provide subscription reminder messages

3.136 Industry suggested that Guidance should reflect the fact that there are some exemptions from the requirement to provide subscription reminder messages, e.g. football or cricket alert services.

3.137 PhonepayPlus agrees that this point should be reflected in within the Guidance, and has added a new paragraph at 3.2 to reflect this.

Referencing Code provisions within the Guidance

3.138 A single aggregator suggested that Code provisions should be referenced in the Guidance with regard to subscription reminder messages. PhonepayPlus agrees with this suggestion, and has updated the Guidance accordingly to reflect this.

3.139 Lastly, the second question asked in relation to 'Subscription services' Guidance Note was as follows:

Q10 – Should Guidance on Subscription Services be in line with requirements around text and font size contained in providers' contractual obligations with Mobile Network Operators?

3.140 This had been suggested by Mobile Network Operators, in order to provide consistency between the Code and their contractual obligations on their clients. However, the response from others was overwhelmingly against such a move. This was largely due to a perception that text and font sizes are overly restrictive, and unnecessary.

3.141 While PhonepayPlus recognises the right of Mobile Network Operators to create contractual obligations for their clients around consumer protection, it is our opinion that adding these obligations to our 'Subscription services' Guidance Note would create a level of prescription which goes against the greater flexibility of the rest of the new Code and Guidance. As such, we have made no change.

Quiz TV Services

3.142 It was noted that the third point in the quick summary list at the top of the Guidance should be altered, replacing the word 'practically' with 'reasonably'.

Public information services

3.143 Some respondents expressed the opinion that this Guidance Note be scrapped as its contents may already be covered by other law. It was thought that such Guidance could prevent 'legitimate' services from being provided, e.g. weather reports.

3.144 PhonepayPlus agree that we should be careful not to inadvertently capture any 'legitimate' services. However, this is an area of significant consumer concern and so PhonepayPlus felt that this Guidance should not be removed at this time.

Virtual chat services – 'reasonable' steps to prevent underage usage

3.145 Industry thought that the Guidance stating that 'all reasonable steps' to prevent underage use of virtual chat services required further explanation.

3.146 In response, PhonepayPlus has made substantial amendments to Section 1 of the final version of the Guidance. Amendments include the fact that any form of age verification which can apply to all of a provider's 18+ services must be robust from an auditable point of view, and must also have a three-month time-limit in place before another age check will be required.

3.147 Also, a single provider requested that the Guidance make reference to blacklisting systems where consumers give an indication that they may be under the age of 18.

3.148 PhonepayPlus agrees with this point and has added it to paragraph 1.4.

Where a lull in interaction by a consumer is then regarded as an opt-out

3.149 A significant number of respondents were of the opinion that Guidance should stipulate the maximum allowable period where a lull in interaction with a virtual chat service is then regarded as a complete opt-out. After which, any further promotional MT messages would again be required to contain all regulatory information (pricing information, etc).

3.150 PhonepayPlus agree with this point and has added a new section (section 5) to the Guidance to reflect this.

Different headings to reflect different platforms on which Virtual Chat is delivered

3.151 One provider asked that we consider splitting the Guidance up into separate headings for each of the different type, or platform, of virtual chat – user-to-user, user-to-operator, text based, web-based, etc.

3.152 PhonepayPlus considers that splitting the Guidance into separate headings, as described above, would risk referencing the same information over and over again, as many of the standards for these services types will be the same regardless of the platform. Instead, a new paragraph listing the various platform types has been added to page 1 of the Guidance to identify these different platform types and illustrate that there may be different ways of achieving compliance with some of them.

Information in promotional material about the cost and number of messages consumers will receive

3.153 Section 2 of the Service-Specific Guidance Note on ‘Virtual chat services’ sets out that consumers should be made aware in promotional material of the likely cost of the service once they initiate it. This would include an indication of the number of messages the consumer will receive in response to each message they send, and also the total cost of receiving those messages.

3.154 One provider suggested that the examples shown should be split into two different possibilities. Promotional material should clearly state either the total cost of all messages, or the total number of messages sent and associated message cost. The rationale was that both of these options clearly state pricing information to the consumer, and requiring all the information contained within both could burden the consumer with duplicate pricing information in two formats, possibly causing confusion.

3.155 The messages were previously written as follows:

For example, if for every one message the consumer sends, three are received, promotional material should clearly state either:

- *The total cost of all messages (e.g. Total cost per one message sent = £4.50).*
- *The cost of each text message (e.g. £1.50 per text message received); and*
- *The number of messages the consumer will receive (e.g. you will receive 3 replies for every 1 message sent).*

3.156 PhonepayPlus has altered this paragraph (2.2) to now read as follows:

For example, if for every one message the consumer sends, three are received, promotional material should clearly state either:

- *The total cost of all messages (e.g. Total cost per one message sent = £4.50);*
or

- *The cost of each text message and the number of messages the consumer will receive (e.g. You will receive 3 replies at £1.50 per message for every 1 message sent).*

3.157 PhonepayPlus recommends it is best practice to do both of the above in order to provide complete clarity to consumers.

4. Broadcast PRS

4.1 There are distinct arrangements for the regulation of Broadcast PRS. By virtue of their broadcast licences, broadcasters are accountable to Ofcom rather than PhonepayPlus. However, a concern that emerged amongst broadcasters though the consultation process is many broadcasters who control the operation, promotion and content of a PRS will now meet the definition of a Level 2 provider and might therefore have to comply with PRS rules established by PhonepayPlus in addition to their licence obligations to Ofcom.

4.2 It was never the intention of Ofcom or PhonepayPlus to change the existing regulatory arrangements for in-programme broadcast PRS. We wish to clarify for stakeholders that under the new Code Ofcom will continue to have responsibility for the regulation and enforcement associated with the use of in-programme PRS by licensed broadcasters. Ofcom will continue to investigate complaints about the use of in-programme PRS, while PhonepayPlus will continue to have regulatory remit to investigate the compliance of other parties in the value-chain associated with in-programme PRS, including Network operators and Level 1 providers.

4.3 Broadcasters who responded to our consultations around the new Code and supporting Guidance asked a number of questions as to their status and responsibilities under the new Code. In addition, they raised a number of points as relate to the outcomes and supporting rules set out in Part Two of the new Code, and questioned how these might relate to Broadcast PRS as a service type.

4.4 The issues raised by, or of particular interest to, broadcasters and others involved in providing Broadcast PRS, and our response and any actions, are set out throughout this policy statement. However, for ease of reference, we have collected them together below.

Code Outcomes - Transparency

Requirement for promotions to contain provider name and contact details

4.5 Rule 2.2.2 of the proposed consultation version of the new Code replicated a requirement of the 11th edition of the Code for promotional material to contain reference to the name, and non-PRS contact number, of the provider. This is in order that consumers are able to quickly contact the provider should they need to make enquiries or seek any form of redress.

4.6 A number of respondents, especially broadcasters, suggested that the rule as drafted omitted a previous exception where contact details were otherwise obvious – e.g. a PRS advertised as part of a TV show does not need a contact number and name, as consumers would generally know they could contact the broadcaster if they had the need, and find out a contact number with relative ease. The broadcasters went on to point out that, if they were required to advertise a non-PRS contact number on-screen alongside a PRS during an event, then this would not only cause potential confusion, but also lead to consumers calling the non-PRS number in the belief they could vote or enter the on-screen event.

4.7 For these reasons the final version of the new Code re-instates the words “except where otherwise obvious” at the end of the proposed rule 2.2.2, which has also been renumbered to rule 2.2.1a.

Requirement for PhonepayPlus registration to be displayed where technically possible

4.8 Rule 2.2.2 in the consulted draft of the new Code also contained a requirement for a provider's PhonepayPlus registration number to be displayed in advertising where it was technically possible to do so – e.g. WAP links and SMS advertising, where there are character restrictions, would be among those forms of advertising exempt from this rule.

4.9 A number of respondents, again with a particular emphasis on broadcasters, expressed concern that such a requirement, while technically possible on-screen, would serve to clutter the screen and cause potential confusion.

4.10 As a result of this point raised, we have altered this rule so that “where technically possible” is replaced by “PhonepayPlus may specify categories of promotions”. This will allow a greater level of flexibility in how PhonepayPlus applies this rule than the previous wording. As before, this part of the proposed Rule 2.2.2 has been renumbered to Rule 2.2.1(b) of the final version of the new Code.

Hours of operation

4.11 Rule 2.2.5 of the consulted draft of the new Code, again a carry-over from the 11th edition of the Code, stated that:

Unless a service is available 24 hours a day, its hours of operation must be stated in UK time on the promotional material

4.12 One broadcaster fed back that they would be reluctant to state the hours of operation of a service on-screen, again due to the potential of too much information on the screen causing consumer confusion. As a result, while we have not changed the Code, we have used Guidance to make our expectations clear in respect of broadcast events and stated hours of operation. This rule remains unchanged, but has been renumbered to Rule 2.2.4 in the final version of the new Code.

Threshold above which pricing information must be spoken as well as displayed in an audio/visual format

4.13 Rule 2.2.8 (renumbered to 2.2.7 in the final version of the new Code), reads as follows:

Where promotional material is transmitted on television or in any other audio/visual format, pricing information must be clearly visually presented and spoken if the advertised cost of the service generally exceeds £3.83 plus VAT.

4.14 A small number of respondents, but inclusive of two broadcasters, questioned whether this rule is in line with Ofcom's Broadcast conditions and therefore whether it should be dropped.

4.15 This rule is carried over from the 11th edition of the Code, with an increase in the price threshold from £2 to £3.83 to take account of inflation. Upon further review, Ofcom has confirmed that there is nothing within their current Broadcast conditions that would prevent this rule. In addition, given this rule is within the new Code, it will automatically become a requirement of Ofcom's BPRS condition. As such, we see no need to remove it.

Statement of price during radio broadcasts

4.16 Lastly around pricing and transparency, two radio broadcasters expressed concern that, until now, it has not been necessary for them to state a price every time a PRS event is mentioned on air. Instead, PhonepayPlus has taken the view that the cost must be stated at least once during the average time that listeners spend listening to the radio station in question, with evidence of that average listening time needing to be substantive and supplied upon request. We can confirm that this will still be the case for the new Code, and this has been reflected in Guidance on Promotions.

Code Outcomes – Complaint Handling

Broadcaster handling of complaints

4.17 A number of respondents, not just broadcasters themselves, who are part of delivery chains for Broadcast PRS expressed concern that Rule 2.5.1 would change the current arrangements for complaints about Broadcast PRS. Currently, the broadcaster takes the complaint from the consumer, but refers it on to the aggregator or fixed-line service provider with whom they contract.

4.18 PhonepayPlus can confirm that we do not see the current arrangements, as outlined above, changing, and will not seek to enforce against any of the rules supporting complaint handling if they do not. Where Broadcast PRS is concerned, we agree that the aggregator or service provider is often best placed to handle a complaint once it has been collected and referred. In addition, broadcast PRS will remain covered by a prior permission regime, for which the aggregator or service provider who holds permission will continue to be held responsible for any breaches.

4.19 However, we do not see any reason to remove the rule or rules as they apply to the rest of the PRS industry. The role of broadcasters can be better highlighted in the General Guidance Note on the ‘Complaint-handling process’, which also provides greater flexibility should the role of some broadcasters change in future.

Code – Registration

Suggestion that broadcasters should not have to register with PhonepayPlus

4.20 Broadcasters would likely be considered a Level 2 provider for PRS events which are part of broadcasts and, as such, we do not see a compelling reason why they should not register with PhonepayPlus.

4.21 However, broadcasters are more widely governed by Ofcom under their Broadcast licensing conditions – one of which is that they comply with the PhonepayPlus Code where applicable. In addition, Broadcast PRS on television is governed by our prior permissions regime and, as such, complaints about the PRS element of a TV broadcast would be referred to the Level 1 provider associated with the broadcaster.

4.22 We can clarify that, while we expect broadcasters to register with us, we do not expect the arrangements under the prior permission regime to change, or broadcasters to have to answer complaints directly rather than referring them to a Level 1 provider as they do now. While we will expect broadcasters to either register their individual PRS with us themselves or ensure the Level 1 provider does so, we will still accept provision of the Level 1 contact details as the consumer contact number, or subsequent referral of complaints to the Level 1 provider.

Guidance – Additional future Guidance

4.23 Among suggested areas where future Guidance could be produced is around Broadcast PRS. We will keep this under review as the new Code is implemented.

Guidance – Definitions

Broadcast PRS and the role of TV broadcasters

4.24 A specific issue raised by many broadcasters was the need to have a heading contained in the Guidance which was specific to Broadcast PRS services. PhonepayPlus is receptive to such a request and has added a separate heading to the Guidance Note at paragraphs 3.9 – 3.11. This heading confirms the status of broadcasters in practice, in that Broadcast PRS, as a service category, is subject to prior permission. So, any breach is most likely the responsibility of the Level 1 provider in the delivery chain rather than the broadcaster with whom they have contracted.

Guidance – Due Diligence, Risk Assessment and Control

Requirements for commercial broadcasters

4.25 A number of respondents, including two broadcasters, asked that we include wording to the effect that levels of due diligence may be lessened for those contracting with major broadcasters or other well-known companies or organisations.

4.26 PhonepayPlus has, on consideration, not included any wording of this type. The General Guidance Note on ‘Due diligence and risk assessment and control on clients’ reflects that the obligations placed on Network operators and providers are proportionate to the control the contracting party has over the operation, promotion and content of the PRS in question. As such, due diligence may be easier to perform on a well-known and respected entity, but the requirement does not lessen.

Guidance – Promotions and Pricing

Clarification of how ‘legible and visible’ applies to radio broadcasts

4.27 Some radio broadcasters expressed concern that prices cannot reasonably be legible or visible when mentioned on air. They suggested this requirement should have a caveat so that they did not have to adhere to it literally

4.28 As a result, PhonepayPlus has inserted an extra heading at paragraph 2.16 of the ‘Promotions and promotional material’ General Guidance Note, specifying how this would apply in the context of a radio broadcast. This covers a range of scenarios as to how the pricing information should be conveyed ‘on air’ and during a PRS event.

Guidance – Complaint Handling

4.29 A broadcaster suggested that Guidance should make clear that PRS complaint-handling rules did not apply to any complaints about an editorial aspect of a broadcast (i.e. which do not relate to PRS at all). The same broadcaster also suggested that in cases where complaints were received about both the editorial and PRS elements, it would be up to the broadcaster to apply a common complaints resolution process which complies with any minimum requirements set out by PhonepayPlus.

4.30 PhonepayPlus agreed with these points and has added a new section to the Guidance following to reflect this – please refer to section 5: ‘Guidance on broadcast complaint-handling processes’.

Guidance – Competitions

Competitions – definition of independence where judging winning entries

4.31 In light of concerns raised by broadcasters, more clarity has been added to clarify what we mean by ‘independence’ in the context of where a subjective assessment being made in the selection of winning entries.

4.32 PhonepayPlus defines independence as being ‘*where an individual has no commercial interest in the competition or associated premium rate service concerned*’ set out at paragraph 4.3 of the Guidance Note.

5. Next steps

5.1 The new Code of Practice has been published on 30 March 2011, and can be found on the PhonepayPlus website⁷. In addition, 22 pieces of supporting Guidance have also been published on 30 March 2011, and can also be found on the website⁸.

5.2 As the Notice of Implementation for the 12th edition of the PhonepayPlus Code of Practice makes clear⁹, the new Code will take effect on 1 September 2011. The interim period is to allow providers and Network operators the time to ensure they have systems in place to comply with the Code, including any due diligence or risk control responsibilities they will have.

5.3 The period between the launch of the Code on 30 March 2011 and the date on which it comes into force (1 September 2011) will also allow all those who will be required to register themselves and their services the time to do so. The Registration Database will be launched during April, and providers can register at any time after that launch.

5.4 Lastly, PhonepayPlus has also published an Investigations and Sanctions Procedure in support of the new Code¹⁰. This is also available on the website from 30 March 2011, and the publication of an investigations and sanctioning process to make it entirely transparent is, we believe, unprecedented for a regulator.

5.5 Any party who needs advice on any aspect of compliance with the new Code can contact PhonepayPlus' compliance team by calling 0845 026 1060 (calls provided by BT will be charged at up to 2p per minute, with an 11p set-up charge; mobile and other providers' charges may vary, and are likely to cost more), or by emailing compliance@phonepayplus.org.uk. Ordinarily we will respond to enquiries within five working days, and advice is free of charge.

⁷ <http://www.code.phonepayplus.org.uk/pdf/PhonepayPlusCOP2011.pdf>

⁸ <http://www.code.phonepayplus.org.uk/pdf/PhonepayPlusCOP2011Guidance.pdf>

⁹ <http://www.phonepayplus.org.uk/output/news/PUBLICATION-AND-IMPLEMENTATION-OF-THE-12TH-EDITION-OF-THE-PHONEPAYPLUS-CODE-OF-PRACTICE.aspx>

¹⁰ <http://www.phonepayplus.org.uk/upload/2011-Investigations-and-Sanctions-Procedure-new-Code.pdf>