



**Developing the next PhonepayPlus Code of
Practice**

A PhonepayPlus Discussion Paper

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Chairman's Foreword

As markets evolve, regulation must keep pace. As new services emerge to supply changing consumer demands, new rules may be necessary; and old ones obsolete. And as broader economic and public policy developments take root, we must adapt the rules in place to ensure consumers are protected.

In a market as dynamic as the phone-paid services industry this is especially true. At the cutting edge of convergence where traditional content, telecoms and technology businesses collide and new ones spring to life there are myriad opportunities for consumers, but also risks.

The role of PhonepayPlus, working in close collaboration with Ofcom and other regulators, is to ensure consumers are protected from harm while providing reputable businesses with every opportunity to succeed. At the heart of this is our Code of Practice which must provide the right incentives for businesses to operate responsibly and the right deterrents against those that would enter this market to exploit consumers.

The development of a new Code is always an exciting opportunity to reassess the role of regulation. This, its twelfth iteration, is perhaps more so than usual given the unique market circumstances before us. We have adopted a root-and-branch examination of the previous Code to determine what about it works and what might be improved in light of recent developments.

This document is not the twelfth Code. Rather it is a starting point; a statement of intent; an explanation of the direction we intend to take in the detailed drafting of provisions which will begin later in the year. It signals a number of significant departures from the status quo that will no doubt provoke thoughtful debate. But before we explain what is different I want to first explain why we must change the Code; and why now.

Apart from the fact that it is good regulatory practice to refresh the rule book every two to three years, there are a number of recent developments that we had to take into account. First, the explosion of mobile phone-paid services which now account for nearly half of revenues and an eye-watering 90% of complaints. Though the use of mobile devices to access phone-paid services is nothing new, it is clearly now mainstream and the dominant force in the market.

Second, the publication of Ofcom's PRS Scope Review on 15 May 2009 has given us an excellent understanding of the need for regulation to address certain market failings. It explains, from a policy perspective, the ways in which consumers may be harmed or inconvenienced and points toward some improvements in the current regulatory regime.

Third, we have learned valuable lessons from working with industry in the application of the current Code. We have learned the importance of tackling problems associated with a provider's approach to compliance across the board, rather than looking at individual services with the result that the same issues sometimes emerge over and over again. By and large we have learned that most providers want to comply and where we can work together to address systematic issues we must do so.

Finally, we are in the midst of a significant recession and companies are feeling the pinch. For some, this might translate into a temptation to make fast money at the expense of consumers. We must guard against this while relieving responsible businesses of as much red tape as possible.

There are four main proposed changes to the regulatory regime contained in this discussion paper that I would like to highlight.

- 1) The new Code will be based on identifying desirable outcomes, not prescribing a step-by-step guide to compliance. Businesses must be allowed the freedom to deliver consumer protection in ways that make the most sense to them and their customers. At the same time though, this must be balanced with the right amount of detailed rules to deliver clarity and ensure compliance.
- 2) Every business involved in the provision of a service will assume some degree of responsibility to ensure consumers are not harmed. Information Providers (IPs) will now be mainly responsible for the compliant promotion, operation and delivery of the service, especially in the mobile sector. Service Providers (SPs) and Terminating Connection Providers, on the other hand, must perform effective due diligence on, and have in place robust risk assessment and control mechanisms to monitor, the companies they contract with.
- 3) Subject to the outcome of the Ofcom Scope Review, and to facilitate due diligence and risk management, PhonepayPlus will examine the best way to build and maintain a database on which all SPs and IPs will be registered. This could list details of company Directors (and link to other companies in which Directors have an interest), breach history and highlight circumstances in which a potential partner has an outstanding debt to PhonepayPlus.
- 4) Consumers should be able to register a complaint and seek redress as quickly and easily as possible. Unfortunately, 60% of consumers of phone-paid services do not know who to turn to and only 17% think the problem will be resolved. This is unacceptable, and the new Code will lay out new rules to ensure adequate customer care and facilitate refunds.

We anticipate a great deal of interest in the development of the new Code at this and later stages. I cannot stress too highly how much we welcome your feedback, both now and throughout the process. It is essential that we all work together – regulators, consumer champions and businesses – to ensure the new Code delivers what is expected of it.

Section One - Background

About PhonepayPlus and the PhonepayPlus Code of Practice

1.1 Ofcom has formal responsibility for regulating premium rate services under the terms of the Communications Act 2003. Under the terms set out in section 121 of the Act Ofcom has recognised PhonepayPlus as the organization which delivers the day-to-day regulation of the premium rate phone-paid services market, and has accordingly approved the PhonepayPlus Code of Practice.

1.2 As the need arises, it is for PhonepayPlus to review the current Code and to make proposals to Ofcom regarding the strategic approach of any new Code. A draft Code will then be produced by PhonepayPlus in close development with Ofcom, which Ofcom will approve if they decide it meets the legal tests set out in The Communications Act.

About this document

1.3 This document is intended to provide a pre-consultative outline of what PhonepayPlus proposes the new Code should contain in terms of key content and new developments. It is not intended as a full first draft of the new Code. Detailed drafting will begin once we have had time to take account of any stakeholder comments about this document. At this stage we are interested to secure stakeholder feedback on our overall proposed approach as well as feedback as to likely cost/benefit impacts so that we can build this into our detailed design and drafting of our Code and related assessment of consumer and business impacts.

1.4 This document is available publicly on the PhonepayPlus website. As such we welcome comments from all interested parties, including consumers and their representative bodies, on the document generally or the questions which it raises. However this is not a formal consultation - that exercise will follow in autumn 2009 once a full version of the new Code has been drafted in light of responses to this document, and the conclusions of Ofcom's Scope Review, and has been approved for consultation by the PhonepayPlus Board.

Background to a Review of the 11th Code of Practice

1.5 The 11th edition of the PhonepayPlus Code of Practice has been in force since 2006. Over the last three years, the 11th Code has facilitated a more proactive approach to regulation, expressed through the "Pre-empt, prevent, protect" agenda which PhonepayPlus has adopted.

1.6 Developments in technology, the phone-paid market, and consumer protection make it necessary for PhonepayPlus to review its Code periodically, in order to ensure our rules, systems, and practices remain fit to ensure consumer trust and confidence in both the market and the regulator.

1.7 Since October 2008, the PhonepayPlus Executive has conducted a number of pieces of work in order to identify what the next edition of the Code should deliver. This started with a web-based questionnaire seeking to define broad stakeholder expectations, followed by programs of face to face interviews with other regulators and consumer

protection groups, and industry stakeholders from across the value chain. These discussions will continue throughout the drafting of the new Code. The Executive has also conducted research into the effectiveness of current sanctions, and the relevant UK and EU law of which we will need to consider when constructing a new Code of Practice.

1.8 In tandem with PhonepayPlus' activity, Ofcom has published its "Premium Rate Services Scope Review" (The Scope Review). The Scope Review highlights a number of outcomes that Ofcom, and we, see as being in the best interests of the phone-paid market. These outcomes are:

- Consumers should be able to purchase with confidence and, of course, the more this is the case the more vibrant and healthy the market will be
- Consumers should be confident when they purchase that they know (and can find out with relative ease) what price they are paying for that service, and whether the purchase is one-off or a subscription.
- To the greatest extent possible when purchasing a remote service, consumers should be able to understand the quality and facets of that service. The service should function as it has been represented to the consumer, and as part of that it should be possible for the consumer to exit without unnecessary delay and complexity.
- Consumers should receive the service they have purchased.

1.9 Taking into account these overarching outcomes from the Scope Review, and our own research amongst stakeholders and other regulators, PhonepayPlus has identified the following objectives which the proposed new Code should deliver:

- Continued focus on consumer protection, leading to increased consumer confidence
- A regulatory framework that is clearly expressed and understood
- Based on outcomes, which focus those involved in the provision of phone-paid services on specific consumer protection deliverables (such as "Transparency"). These outcomes should be supported by clear, simple rules, or guidance, where appropriate.
- Rules that enable a focus on systemic negligence by companies as well as on the individual phone-paid services they provide
- A consistent approach to enforcement
- The flexibility to utilise different types of investigation or informal procedures, dependent on the nature and severity of consumer harm
- Retention of the effective elements of the existing Code.
- To update existing terminology in the Code, and as far as possible to be future proof in the short to medium term as to the impact of new technology

Developments in Market Structure

1.10 As other sections of this document will set out, the mobile phone-paid market has grown significantly since the Code was last revised. Mobile phone-paid services now comprise around nearly half of all phone-paid sales and around 90% of complaints to PhonepayPlus. Whilst mobile is now the dominant delivery platform in terms of phone-paid market share, it is not the only new platform. Other delivery platforms such as VoIP and

red button exist or are in development, and have the potential to grow as the consumer base for the underlying technology does.

1.11 These delivery platforms differ from the traditional platform of a fixed telephone line in more than just technological terms. The chain of companies that are involved in providing a phone-paid service to the consumer has become more complex. The structure of the chain can differ between platforms, as can the roles of individual links within the chain. PhonepayPlus believes that in researching and drafting the new Code we should be mindful of this, and consider where regulation and responsibility is most appropriately targeted.

Developments in Investigation and Sanctions

1.12 Since the introduction of the 11th edition of the PhonepayPlus Code, PhonepayPlus has established the Code Compliance Panel (CCP), a body created by PhonepayPlus which is now responsible for adjudicating independently. As part of this arrangement, the CCP informs the PhonepayPlus Board and Executive of any areas of ambiguity or concern that have arisen with the application of the existing Code during its work, and any relevant policy or enforcement trends.

1.13 Whilst this inevitably highlights issues around individual provisions of the existing Code, something we do not intend to address at this stage of the new Code's development, it has also highlighted a number of overarching suggestions regarding future enforcement. These can be summarised as follows:

- A significant number of breaches, in the CCP's opinion, could have been prevented by more robust due diligence or control on the part of service providers over their clients
- The usage of a suspended sanction, in order to compel providers to address systemic compliance failings or submit to a compliance audit, has proven effective in reducing the breaches associated with that provider (albeit temporarily in some cases). As such perhaps systemic compliance should be codified
- The increasing complexity of some cases, especially with regard to who is involved in the revenue share, makes it increasingly important to be able to link companies or individuals to previous examples of consumer harm.

Consumer Protection

1.14 With an understanding of developing market structure and regulatory enforcement taken into account, consumer protection and confidence remains paramount. Whilst only 48% of adults had used a phone-paid service in 2008, research we have previously conducted indicates that the highest regular usage occurs among consumers from the lowest socio-economic groups. And across all socio-economic groups the highest regular usage occurs among children. Not only will these groups be most affected financially by consumer harm, but also our previous research has identified that these same consumers are the least likely to be aware of their rights, the rules that govern phone-paid services, and of how to make a complaint.

1.15 In reviewing the existing Code and constructing a new one, we must ensure that we have the means at our disposal to prevent consumer harm, especially that caused through wilful intent and recklessness, but also any neglect which puts consumers at risk. We must

also guard against an assumption that consumer confusion is acceptable in order that providers can use the most convenient or cost-effective systems. Our investigations process must be flexible enough to target all aspects of consumer harm as they occur, and our sanctions should dissuade further offending.

1.16 Critically we believe it is right that we should further embed pre-emption and prevention – in essence, regulatory activity that specifically forestalls or discourages consumer harm – into the suite of regulation at our disposal.

1.17 In what follows, we outline in Section 2 our proposed approach to setting regulatory standards using outcomes in the first instance supported by more detailed rules where necessary. In Section 3 we outline our considerations about where responsibilities for compliance in the value-chain for phone-paid services should rest, including considerations around the need to register providers. Section 4 focuses on our thinking about enforcement and finally Section 5 briefly addresses issues relating to definitions of providers in the value chain.

Section Two - Outcomes to deliver Consumer Protection

2.1 PhonepayPlus is keen for its new Code to focus providers of phone-paid services on the overarching goals of regulation as well as compliance with the wording of individual rules. Such a focus should apply to all participants, regardless of size. In considering how best to achieve this, we have considered three main factors, as set out below:

2.2 Analysis of PhonepayPlus investigations over the life of the 11th Code to date identifies the following:

- a) Five individual provisions of the Code make up 57% of all the breaches which the adjudication panel has upheld. The five provisions are 5.4.1a (Fairness), 5.8 (Contact Information), 5.7.1 (Pricing Information), 5.7.2 (Pricing Prominence) and 5.12 (Inappropriate Promotion)
- b) Adding the next five most upheld provisions raises this percentage to approximately 72%
- c) Approximately 69% of provisions in the 11th Code which could be raised as breaches have never been raised/successfully upheld

2.3 In looking at these statistics, we must of course take a holistic view. Whilst there are a large number of unused Code provisions, it is possible that some of them have acted as a deterrent and are necessary in order to ensure consumers are protected. Two specific examples of this might be the provision requiring prior permission for certain types of service, and that which governs internet diallers.

2.4 The second factor that we have considered is the types of harm which can be caused to consumers by phone-paid services. We believe it is important to make a link between the types of harm consumers suffer, and the outcomes which we set in order to prevent (and where appropriate, punish) that harm. We have identified the following broad types of consumer harm:

- Economic (both in terms of money lost to a misleading phone-paid service, and the subsequent cost of seeking redress)
- Inconvenience and wasted time (including dealing with an obstructive or circuitous complaints process)
- Invasion of Privacy (e.g. unauthorised marketing, charging without permission)
- Loss of Reputation or Dignity (e.g. enticement to do something unlawful, unsolicited sexual texts discovered by a partner)
- The access or receipt of content consumers perceive to be offensive or indecent
- Anxiety or Distress (including physical or mental trauma to consumers, or someone else to whom a service is directed by a consumer)

2.5 The third factor that we have considered is the variety of sometimes different, or poor, complaints handling procedures that consumers currently encounter, depending on the provider who they attempt to contact. Ofcom's Scope Review highlights market research that suggests 60% of respondents would not know where to go if they had a problem with a phone-paid service. Expectations of the problem being resolved are also low with only 17% confident the problem would be resolved, against 59% who lack confidence.

Q1. Do you agree with our broad assessment of the range of harms that may impact upon consumers? If not, why not?

2.6 In light of these three factors, the recommendations in the Scope Review, and a review of all the research undertaken to support the new Code, PhonepayPlus has determined that our regulation should stem from clearly defined outcomes. These outcomes should be geared towards the delivery of consumer trust and confidence, and, as appropriate, be supported by rules to provide as much certainty as is possible to providers and consumers alike.

2.7 It is our opinion that some service-specific prescription may be helpful to consumers, the industry and the regulator in certain circumstances. However, it is also our opinion that this prescription should be kept to the minimum necessary to ensure the broader goals of regulation are achieved.

2.8 We do not propose to list prescriptive rules at this stage in the drafting process. The supporting themes we list for most of the outcomes below are intended to be indicative examples of good behaviour and provisions, and arise from our practical experience of applying regulation to the phone-paid market. We would welcome stakeholder comments on areas where more specific requirements may be necessary, what those requirements should be, and whether these requirements are best presented within the Code itself or as guidance.

2.9 With this consideration in mind, PhonepayPlus proposes the following outcomes and supporting themes:

Legality

OUTCOME

“That phone-paid services comply with UK, and other relevant EU, legal requirements”

SUPPORTING THEMES

- Services, and their promotional material, must comply with the law
- Services, and their promotional material, must not incite unlawful activity

Appropriateness

OUTCOME

“That phone-paid services, and their promotional material do not cause unacceptable offence or distress to consumers”

SUPPORTING THEMES

- Services, and their promotional material, must not cause serious or widespread harm to consumers

- Services, and their promotional material, must not cause or promote hatred, or constitute inflammatory material, against any group identified by race, sexuality, age, or faith.
- Services, and their promotional material, must not encourage consumers to undertake dangerous practices
- Services, and their promotional material, must not promote or facilitate prostitution
- Services, and their promotional material, must not induce an unacceptable sense of fear, anxiety or distress
- Services, and their promotional material, should not be accessed by those for whom it is likely to be considered inappropriate

Transparency

OUTCOME

“That consumers are fully and clearly informed of all information necessary to purchase a phone-paid service with confidence”

SUPPORTING THEMES

- Consumers must be clearly informed of the price of a service, the name and contact details of the provider, and any other information likely to influence their decision to purchase, before they incur a charge
- Certain categories of services, and their promotional material, must include such additional information as PhonepayPlus requires
- Services and their promotional material must not mislead or be likely to mislead in any way
- Services must not charge consumers without their consent
- The service which a consumer intends to purchase must be delivered without undue delay
- Certain categories of services, as identified by PhonepayPlus, must deliver cumulative spend reminders, or disconnect consumers after a certain amount has been spent
- Services and their promotional material must not directly exhort children to purchase products or services, or take advantage of children
- Services must not take advantage of any vulnerable group, or any vulnerability caused to consumers by their personal circumstances
- Certain categories of services that have been identified by PhonepayPlus as being aimed at, or particularly attractive to, vulnerable groups may be subject to such additional rules as PhonepayPlus may prescribe
- Services must have a simple method of permanent exit of which the consumer is clearly informed prior to incurring any charge. This method of exit must take effect immediately upon the consumer using it. In certain circumstances PhonepayPlus may prescribe that method of exit.

Privacy

OUTCOME

“That consumers do not feel that their privacy has been invaded by contact from a phone-paid service provider”

SUPPORTING THEMES

- Providers of phone-paid services must not directly promote to consumers, or otherwise contact them, unless the consumer has previously purchased from them or otherwise given their express consent for such contact. Such express consent should be obvious to the consumer, and clearly auditable.
- Providers of phone-paid services must not gather data on consumers, or trade information with other companies, without their knowledge or consent.

Technical Quality

OUTCOME

“That phone-paid services, and the mechanisms used to deliver them to consumers, are of adequate technical quality”.

Complaint Handling

OUTCOME

“That consumers are able to seek appropriate redress from the providers of phone-paid services in a straight-forward and timely way, and that any refunds to which a consumer is entitled are also provided straight-forwardly.”

SUPPORTING THEMES

- All providers of phone-paid services must provide arrangements for complaints management , which is easily accessible to the consumer
- Consumer complaints must be handled within a reasonable time-frame at all stages, and with a process which is clear to the consumer
- Where a consumer is entitled to a refund, they must receive it in an easily accessible manner and within a reasonable time-frame
- Consumers who remain unsatisfied with a provider’s consideration of their complaint must be provided with a clear and simple means of contacting PhonepayPlus
- Providers of phone-paid services must provide to PhonepayPlus upon request such information as will allow PhonepayPlus to examine the way in which the provider has handled a consumer’s complaint.

2.10 In suggesting the above expectations as regards complaint handling, we are mindful of the need for any system to be proportionate to the size of the provider and the number of transactions which they handle. For example a niche service, operated by a relatively small provider, could perhaps be subject to a different level of detail with regards

to systems and processes than a highly popular service run by a large company in mass media.

Q2. Do you agree with our assessment, and the fitness for purpose of our suggested Outcomes and supporting themes? If not, why not?

Q3. Can you identify any Outcomes for consumer trust and confidence that you consider we may have overlooked?

Q4. Do you agree with our Outcome and supporting themes about complaints handling? Do you have any other suggestions?

Prior Permission

2.11 The 11th edition of the PhonepayPlus Code of Practice allows that certain categories of service, against which we identify a specific risk or risks, may be subject to a requirement to seek Prior Permission from PhonepayPlus to operate.

2.12 Such permission is granted or refused by PhonepayPlus' Code Compliance Panel after a consideration of whether the applicant is capable of providing a compliant service. The granting of permission is often subject to applicants agreeing to abide by additional conditions which PhonepayPlus prescribes.

2.13 It is our opinion that service types which carry specific risks to consumers should be subject to closer scrutiny, and adequate controls on that risk. For this reason we intend to retain the facility to require Prior Permission as part of the new Code.

2.14 However, it is clear that some categories of service require closer scrutiny as part of Prior Permission being granted than others. For example Broadcast PRS services were granted Prior Permission subject to a set of conditions which were new to many participants in the sector. As such there was a need to carefully scrutinize whether applicants had the necessary technology and systems in place to meet those conditions.

2.15 In contrast there are some types of service where the Prior Permission conditions do not impose any new technical or systemic requirements on applicants, merely a change in process which all providers are capable of making. An example of this would be the granting of Prior Permission to those wishing to provide subscription services costing more than £4.50 in any given 7-day period. In this circumstance there was little or no new technology to scrutinize in respect of the applicant's ability to provide a compliant service, merely a commitment to follow the process PhonepayPlus outlined and an understanding that failure to do so may result in permission being withdrawn.

2.16 For these reasons, it may be appropriate to consider dividing the current Prior Permission requirement into two categories, as set out below:

- a) Prior Permission – granted after an assessment of the applicant's technical and systemic ability to provide a compliant service, and whether the design of the service itself is compliant
- b) Prior Authorisation – granted after an undertaking on the part of the applicant to meet the conditions which PhonepayPlus outlines.

2.17 In both cases, it would still be possible to revoke permission or consent at any time where conditions have been breached.

2.18 In addition, and in light of the conclusions drawn in Section 3 of this document, we believe it is right to consider whether Prior Permission or Prior Authorization should be granted to information providers, service providers, or to both those parties where they are in a specific contractual relationship to provide services. Our initial opinion is that the new Code should provide the flexibility to require different parties from within the value chain to apply, dependent on the nature of the Prior Permission or Authorization which would be granted.

2.19 Lastly, in order to incentivize industry participants to consistently deliver processes which will ensure compliance, and retain a good attitude and approach towards it, we believe that any application for Prior Permission or Prior Authorization should be granted only after consideration of the applicant's previous breach history, and that of their present ownership and management. We would aim to make this explicit in the new Code.

2.20 It is our opinion that these changes will allow PhonepayPlus greater flexibility than at present when introducing new prior permission regimes, and will provide a greater incentive to industry to maintain a good compliance record.

Q5. Do you agree that PhonepayPlus is right to suggest that it should be able to revoke permission or authorization where it is proven that Conditions have been breached and where such an action would be justified and proportionate? If not, why not?

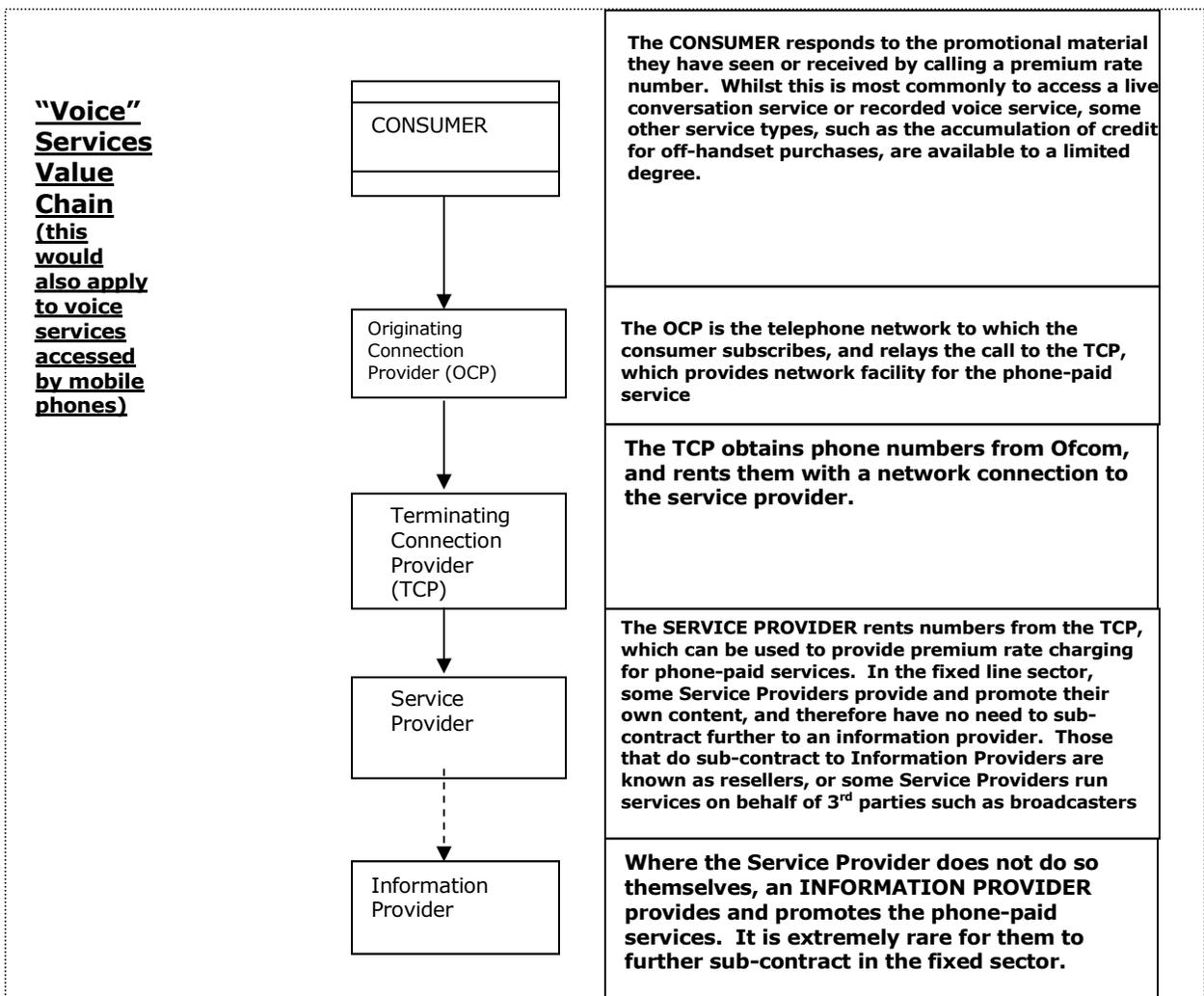
Q6. Do you agree that PhonepayPlus is right to consider allowing parties along the value-chain to apply for prior permission when in a contractual relationship to provide a service?

Q7. Do you agree that PhonepayPlus is right to suggest that an applicants previous breach record is a factor that it is entitled to consider as part of a consideration of an application for permission or consent? If not, why not?

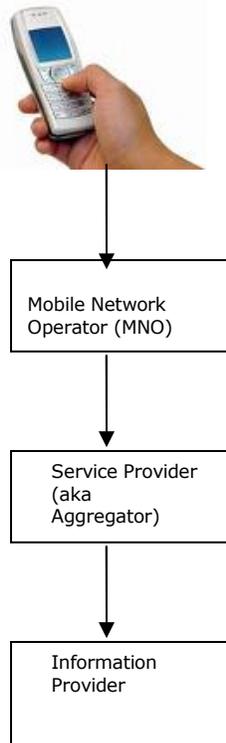
Section Three - Responsibility and Registration

3.1 Having considered the outcomes to deliver consumer protection, it is logical that we focus next on responsibility. More specifically, who within the phone-paid market, and the various stages in providing a phone-paid service to a consumer, should assume what responsibility for ensuring consumer harm does not occur?

3.2 It may be helpful first of all to provide a summary of the different value chains within the phone-paid market. The most marked differences occur between the voice and SMS value chains, as the following diagrams and explanations demonstrate:



“SMS”
Value
Chain



<p>The CONSUMER responds to the promotional material they have seen or received by texting a keyword to a specified mobile shortcode, or by accessing a website (where mobile shortcodes are used for charging purposes). Either of the latter methods can be used to access text messages, images, video clips, games, or other Phone-paid service types.</p>
<p>The MNO acts as both OCP and TCP, relaying text messages or calls from the consumer on to the service provider. They also relay any text messages or calls containing Phone-paid services or billing instructions back to the consumer. The MNO makes a charge to the consumer's phone bill, or deducts the amount from pre-paid credit. These charges are then shared with the Service Provider, which in turn shares it with the Info Provider</p>
<p>The SERVICE PROVIDER rents shortcodes from Mobile Networks, and connects to the network in order to facilitate the purchase of Phone-paid services and their delivery to the consumer's handset. In practice, Service Providers in the mobile sector are known as aggregators</p>
<p>Whilst service providers in the mobile sector could provide their own Phone-paid services for sale, in practice few do. The INFORMATION PROVIDER provides and promotes the Phone-paid services on offer. Increasingly the first Information Provider may sub-contract to another Information Provider in respect of some or all content and promotion.</p>

3.3 Whilst the two diagrams above set out marked differences in the structure of the value chain, other models for the provision of phone-paid services do exist, or are likely to develop in the near future. The value chains involved in these other models contain the same basic steps as those in the voice and SMS value chains, but the roles of Networks, Service Providers, and Information Providers may differ in terms of the applications their platforms allow them to provide and the actions they undertake. Examples of other models include SMS or MMS services which use the Payforit payment system, and voice services which use Voice Over Internet Protocol (VoIP) technology.

3.4 In practice, and regardless of the type of value chain, PhonepayPlus' regulatory powers are focused primarily on the service provider, albeit the obligations set out in our Code extend along the value chain. Currently the 11th Code allows for a breach to be “passed through” from a Service Provider to an Information Provider, if PhonepayPlus is satisfied the IP has caused the individual breaches and the IP accepts the pass-through.

3.5 Some mobile operators and other TCPs also offer their own Phone-paid services to consumers who contract with them, and where this is the case those TCPs can be considered to be a service provider, or even an information provider for the purposes of the Code. This situation is echoed where a service provider also provides and promotes its own services, and could therefore also be considered an information provider where it is appropriate to do so.

3.6 In considering the issue of appropriate responsibility, PhonepayPlus has also analysed investigations over the life of the 11th Code to date. The analysis illustrates the following:

- a) 64.88% of all upheld cases during the life of the 11th Code involve service providers which have breached the 11th Code on more than one occasion.
- b) 33.33% of all upheld cases involve information providers which have breached the 11th Code on more than one occasion
- c) 21.91% of all upheld cases contain at least one upheld breach against a provision which the same information provider was previously involved in breaching.

3.7 Again, we must look at these statistics holistically. Even though our current regulation is focused mainly upon the service provider, the majority of cases have both a service and information provider involved in the service – and so to some extent the breaches. With this in mind, and due to the relatively smaller number of service providers and their position in the value chain, they will inevitably be involved in more upheld breaches. However, even if we accept an argument that the current Code may hold some service providers responsible for a breach which they did not directly cause, the figure of 64.88% above might indicate that some service providers do not have effective systems to apply lessons learnt from previous mistakes to all their clients, or perhaps the motivation to apply them.

3.8 Having considered the various different permutations of the phone-paid value chain, the developing roles of those within them, and the above figures, PhonepayPlus remains of the opinion that every part of the value chain has some degree of responsibility to ensure consumers are not harmed. However, we do remain mindful of the restriction contained within the Communications Act 2003 on the placing of obligations on some types of network providers.

Q8. Do you agree with our assessment that ALL participants in the value chain for delivery of phone-paid services have responsibilities for compliance? If not, why not?

3.9 For this reason, we believe the new Code should facilitate the targeting of as many companies in a value chain as have been involved in causing consumer harm. Whilst it is right that we should target a company or individual which has directly caused the consumer harm, it is also right that we target any other party, sitting higher up the value chain, who has allowed consumer harm to occur either deliberately or through negligence.

Q9. Such a change in approach may have differential impacts on different providers in the value-chain. What are these impacts likely to consist of and what business or consumer benefits do you think will arise?

3.10 In addition we believe it is right that we are able to hold companies or individuals to account for general, systematic failings of compliance. We currently take action against such parties through the use of suspended sanction, a mechanism that has proven effective in focusing them on compliance leading to a reduced number (or in some cases a total absence) of breaches. We propose to consult on making a breach of general, systemic compliance more explicit in the new Code.

3.11 In practice, this could mean that the breaches of the outcomes set out in Section 2 of this document are more likely to be targeted at information providers, who most often own the content of the service and directly promote it. Although service providers or TCPs who are also acting as an information provider would still be found culpable in the same way.

3.12 Those further up the value chain who provide a service to the IP at the end of the chain, whether they are Information Providers (IPs), Service Providers (SPs), or Terminating Connection Providers (TCPs), we would expect to undertake a reasonable degree of due diligence, monitoring, and control in relation to their clients if this approach is to work. If they do not, then we feel it is right they should be held in breach of the Code as regards a systemic failing of compliance, and suffer penalties where appropriate.

3.13 Ultimately the possession of a connection to a phone-paid service is a fundamental benefit to all those who share revenue from it, be they TCPs, SPs, or IPs. So where a connection is sub-contracted to a client, we would expect the party which has sub-contracted it to deliver the following outcomes:

- Due Diligence
- Reasonable Risk Assessment and Control
- Timely and effective co-operation with PhonepayPlus in the event of investigations

Due Diligence

3.14 In the case of due diligence, we would expect TCPs, SPs, and IPs to collect a degree of information about their clients upon initially sub-contracting to them (or with respect to existing clients). This is largely to ensure that these clients can be reached in the event of any investigation by PhonepayPlus which needs to involve them. In respect of this, PhonepayPlus could propose the following requirements:

- a) retain contact details for a client's place of business
- b) retain a copy of each client's entry in the Companies' House register if appropriate
- c) retain the names and addresses of all owners and directors named on the register if appropriate
- d) obtain undertakings from the client that no other party is operating in the capacity of a shadow director under the Companies' Act if appropriate
- e) retain the names and details of any parent or ultimate holding company which the client is a part of, if appropriate
- f) verify that the client has a bank account within the EU – a suggested Code requirement
- g) make clients aware of PhonepayPlus and the Code of Practice

3.15 Where TCPs or SPs cannot provide us with such details that facilitate an investigation of their client, or where the details provided turn out to be manifestly false, then PhonepayPlus is of the opinion that the TCP or SP concerned could be in breach of its obligations of due diligence, depending on the circumstances of each case.

3.16 Where an IP is unable to provide us with such details that facilitate an investigation into a party with whom they contract, then PhonepayPlus is of the opinion that the IP itself

should be held responsible for individual breaches of the Code, and not just for a failure of due diligence. We are of the opinion that an IP is more likely to be involved, in one form or another, in the actual transmission of a phone-paid service, rather than acting as an enabler. As such we believe that this will provide an effective incentive for IPs to ensure their clients can be identified and held responsible in the event of consumer harm.

3.17 The key to such an arrangement working will be the requirement for all parties in the value chain to register with PhonepayPlus, a requirement discussed in further detail at paragraph 3.21 - 3.29 below

Reasonable Risk Assessment and Control

3.18 In terms of risk assessment and control, PhonepayPlus believes that prevention and mitigation of consumer harm are of greater benefit, both to consumers and the industry, than punishment of harm after the event.

3.19 To further facilitate this approach as part of the new Code, PhonepayPlus is of the opinion that any party which sub-contracts a connection to a client should have a reasonable awareness of the potential risk that such a client, and the services they run, poses to consumers. Further to this, PhonepayPlus believes it is not unreasonable to expect TCPs, SPs, or IPs under certain circumstances, to take steps to monitor and control that potential risk. If they fail to do so, then it is our opinion that they could face sanctions where breaches arise that could have been prevented had a reasonable awareness been adopted.

3.20 Whilst we are mindful of the different levels of involvement, and ability to record and analyse data within different sectors and levels of the phone-paid value chain, we could propose the following outcomes of assessment and control. These are by no means conclusive or exhaustive:

- Knowledge of a client's breach history (or the breach history of any other companies involved in phone-paid services to which that client's owners or directors are, or have been, involved) and their phone-paid services
- Evaluation and application of this knowledge to control risk and prevent consumer harm
- Continuous updating of knowledge in respect of new information about clients or service types. This would include lessons learned in-house, or information about clients or service types made available by PhonepayPlus or other sources.
- Availability of evidence to PhonepayPlus upon request

Q10. Do you agree with our analysis of the outcomes of Assessment and Control? If not, why not?

Registration

3.21. The Scope Review examined a number of options for a stand-alone reputational database for companies who provide premium rate phone-paid services. Paragraph 6.90 of the Scope Review recommends a specific option that Ofcom believes PhonepayPlus should examine, but also identifies substantial consumer and industry benefits from two

further options. The Scope Review also suggests that PhonepayPlus would be well placed to run such a scheme. The Scope Review will therefore determine whether a registration scheme / reputational database would aid effective regulation as well as deciding who is best placed to operate that.

3.22 We agree with Ofcom that changes in the phone-paid market calls for further consideration as to which points in the value chain regulation should be targeted, a position considered in this document at paragraphs 3.8-3.17. Ofcom's assessment of the various options for a database sits well with our consideration of the benefits of extending our current registration process beyond service providers to information providers.

3.23 We are of the initial opinion that it would facilitate due diligence and risk management if all SPs and IPs (whether they are directly connected to an SP or not) were required to register with an appropriate body which understands the market and has the integrity and independence that such a scheme will require. Such an approach would also support our proposals to distribute enforcement of the Code along the value-chain and away from the near exclusive enforcement that the current Code places on Service Providers. TCPs would still have to prove that they qualify as networks, but would not have to register if they did not also act as an SP or IP.

3.24 Registration with any new database could be automatic – i.e. it would not in itself imply any fitness for purpose – in order to create an easily accessible list of participants within the phone-paid market. This list could be linked to the breach histories of each registered party, and accessible by TCPs, and any other party which was themselves registered with us. Our initial opinion is that such a database could provide a useful starting point for providers in discharging the expectations set out in paragraph 3.13.

3.25 Whilst registration would not be subject to refusal in this scenario, PhonepayPlus could use registration numbers to bar companies from certain, or all, phone-paid activities for a period of time as we do at present.

3.26 We are aware that such an approach could be circumnavigated if an IP re-registered under a different name. In such a circumstance the database could be used to flag any links to any other registered IP (e.g. affiliates, owners, directors, company address, phone numbers), and PhonepayPlus could make it clear on that company's entry that these links exist.

3.27 Where a director of a newly registered company is discovered to be linked to a company with an outstanding debt to PhonepayPlus which has arisen as a result of an imposed penalty, then this could also be made clear, along with further information as appropriate. Whilst we are aware that this approach would not necessarily prevent a company or individual with a bad history from re-entering the market, it would make such re-entry more difficult.

3.28 Lastly, we have already stated that registration in this scenario would not be subject to refusal based upon any checks, and so would not imply any endorsement on the part of PhonepayPlus as to the provider's fitness to participate in the phone-paid market. So any new PhonepayPlus Code which did contain a registration requirement of this nature, would also prohibit the usage of such phrases as "approved by PhonepayPlus" on provider's promotional material, in such a way that implied endorsement or approval.

Q11. What thoughts do you have on our suggested approach to a registration scheme?

Co-operation with PhonepayPlus in the event of investigations

3.29 As the next section, which covers investigations, will set out in more detail, PhonepayPlus does not propose to automatically investigate the roles of all parties involved in providing a service every time a breach is alleged. However we do see it as reasonable that those who are not directly responsible for consumer harm are able to quickly demonstrate the due diligence, adequate technical quality, and adequate risk assessment and control when asked to do so.

3.30 We also consider it important that parties are quick to provide contact information, or other information such as call records, when asked to do so, and that they co-operate with PhonepayPlus in a timely way and to the best of their ability. This would include the provision of any information which a company believes might be helpful to an investigation at the earliest possible stage.

Q12. What other suggestions do you have for how we could create greater incentives for providers to co-operate with PhonepayPlus in the event of investigations?

Co-operation with PhonepayPlus as regards the number checker

3.31 Finally, we are of the opinion that it is important that consumers, and investigators, are able to identify services and those responsible for them as quickly as possible, something the Scope Review identifies as being equally important. Being able to swiftly identify a service, especially when a consumer can only provide a number in the event of unsolicited charges or marketing, empowers the consumer to seek redress and facilitates early enquiry by PhonepayPlus where appropriate.

3.32 The Ofcom Scope Review concludes that there are considerable benefits to be had from enhancing the PhonepayPlus Number Checker to cover nearly all numbers. We are currently working with the Industry Liaison Panel to assess how the overall effectiveness and accuracy of the Number Checker could be improved. It may be that one way to drive improvements will be to mandate through the next Code certain obligations upon providers to make available to PhonepayPlus on a timely basis certain core information about their number or shortcode allocations. If this is the case then those requirements will be consulted in the full Code consultation paper.

Section Four - Investigations and Sanctions

4.1 We have now considered outcomes which will deliver consumer protection, who should be responsible for their delivery, and what form that responsibility should take. However it is our opinion that this framework must be supported by an investigations and adjudications process that is both robust and flexible where appropriate.

4.2 We are keen to develop our current processes so that they allow a graduated response to complaints, dependent on the likely degree of consumer harm. Our investigations process should also allow us the flexibility to investigate different companies involved in a service in different ways.

Requests for Information

4.3 Section 2 of this document has already outlined our thoughts around responsibility. Most specifically the following:

- That regulatory action with regard to breaches of individual Code outcomes and rules should, wherever possible, be targeted at the provider which is directly responsible for the faults within the service that led to the alleged consumer harm
- That TCPs, SPs, and IPs should be able to provide such details as enable us to identify and deal with the party which has directly caused the consumer harm. Where TCPs and SPs cannot do this, they should (in the absence of any exceptional reasons) be considered in breach of due diligence; where IPs cannot do this, they should be held responsible for the individual breaches of the Code.
- That, in addition, TCPs, SPs and IPs should be able to provide satisfactory evidence of risk assessment and control in relation to their clients when asked to do so by PhonepayPlus, and face penalties if they cannot do so satisfactorily.

4.4 In practice it is most likely that we would initially contact SPs or IPs to establish the provider which caused the breach. Following this we would contact the provider which we suspected to be responsible for the breach, and ask them to respond to a breach letter.

4.5 At any stage after this, in response to further information or analysis, we may choose to contact another IP, SP or TCP which is involved in providing or enabling the service and request proof of risk assessment and control, or ask another information provider to respond to specific breaches. In addition we may ask the service provider to respond to breaches in respect of technical delivery, or correct use of number ranges.

4.6 In terms of resource, this is likely to impact most often upon service and information providers. However any provider which can prove their due diligence and risk control to our satisfaction should be swiftly eliminated from the investigation. Therefore the time spent developing, implementing, and recording risk assessments should be offset by the time saved in dealing with PhonepayPlus as part of numerous investigations.

Range of Investigations Procedures

4.7 At present PhonepayPlus has three different types of procedure into which consumer complaints can be allocated. The type of investigation used is based on PhonepayPlus' assessment of the likely severity of consumer harm. The three procedures are:

- Informal Procedure
- Standard Procedure
- Emergency Procedure

4.8 It is our view that where consumer harm is minor, and where it is likely to resolve a complaint and address any underlying issues more quickly than with a formal procedure, that informal means of dealing with complaints should be used.

4.9 However our current Informal Procedure requires the provider to accept that a breach has occurred, and we also currently publish a record of that breach on our website. In addition the current Informal Procedure requires the service provider to remedy the breach, but does not state there should be a time-based action plan to which the provider is held accountable.

4.10 It is our view that, despite its strengths, the current Informal Procedure does not appear informal enough to engage the industry, nor formal enough to act as a suitable, time-based deterrent.

4.11 In light of this, our initial opinion is that we should widen the scope of any informal procedure in order to make it more flexible. Such an approach would allow PhonepayPlus to require that a problem is quickly resolved where no consumer harm has occurred, or to require that a provider accepts a minor breach, and a specific set of actions to be completed within a set time. This could include requirements to amend promotional material, amend technical aspects of a service, refund consumers, or take action regarding general systems or processes to ensure compliance.

4.12 The approach PhonepayPlus took would depend on the relative severity of the breach, and any consumer harm that had occurred. Taking those factors into account, we would not ordinarily publish a record of individual procedures but there is an open question as to whether these should appear on a registrant's record for other providers to be aware of. Failure to adequately resolve a problem could be referenced as an aggravating factor in the event of further complaints which lead to an investigation, or in itself lead to a Standard Procedure.

4.13 It is our opinion that PhonepayPlus investigators should have the power to utilize these processes based not just on the level of consumer harm, but also on the breach history of the company concerned and the level of co-operation with PhonepayPlus that they display.

4.14 To reflect the changes proposed in paragraphs 4.11- 4.13, we will consider renaming the Informal Procedure to a Notification Procedure. This underlines that the procedure exists to inform providers of a breach, which they should remedy. We would welcome stakeholders' comments as to this suggested name change.

Q13. Do you agree with our proposed approach to reforming and renaming the Informal procedure? If not, why not?

4.15 It is also our opinion that the current Standard and Emergency Procedures should largely be retained. We would welcome stakeholders' views in this regard.

Q14. Do you agree with our proposal that our arrangements for Standard and Emergency procedures should be retained? If not, why not?

4.16 With reference to our stated intent to address direct consumer harm and negligence by involving more than one party in the same investigation where appropriate, it is our belief that this process should be flexible enough to allow different procedures to be applied in respect of direct consumer harm and negligence. For example, it may be appropriate to bring a Standard Procedure against an IP who has directly caused consumer harm, but instigate an action plan through an Informal Procedure in respect of a service provider whose control process was not robust enough to prevent the harm in the first place.

4.17 In an alternative example, it may be appropriate to use an Informal Procedure against an IP who had committed their first offence, but bring a Standard Procedure in respect of an SP, or even a TCP, if this was not the first example of inadequate risk control, or failure to learn from previous mistakes, on their part.

Q15. Do you agree with our approach and what regulatory impacts, costs and benefits do you foresee?

Sanctions

4.18 In reviewing the sanctions which the 11th Code provides to the Code Compliance Panel, PhonepayPlus interviewed a range of other regulators, and industry stakeholders, as regards appropriate sanctions and incentives. We consider that the phone-paid industry pays particular regard to the following factors which dis-incentivize bad behaviour and incentivize good behaviour:

- Reputation – being named as the responsible party where a breach is upheld can dissuade potential clients from conducting business and lead to loss of revenue
- Bureaucracy – the requirement to follow compliance advice, seek Prior Permission, or demonstrate suitable compliance systems can be an expensive commitment of management and staff time
- Financial – Fines represent an unplanned additional cost, and a bar on services is likely to result in a loss of revenue.

4.19 In respect of these factors, PhonepayPlus considers that the current suite of sanctions is well placed to deliver compliance as long as they are applied proportionately, but with appropriate severity to act as a deterrent. We are already able to levy a maximum fine of £250,000 for each single breach upheld, a figure which, if applied to several breaches at once, could create serious difficulty for any company involved in the provision of phone-paid services. In addition we are able to block a service or information provider from providing any or all services for up to two years (something the new Code could extend to associated individuals).

4.20 However we have, so far, identified two possible additions to the current range of sanctions. The first of which we feel would act as a considerable dissuasive factor in respect of consumer harm, and the second as a considerable preventative factor. We would welcome stakeholder suggestions as to other possible additions:

Requirement for Automatic Refunds

4.21 Of consumers who responded to our most recent Customer Satisfaction survey, 59% stated that they had not received a refund which was due to them as a result of PhonepayPlus sanction. They went on to state that:

- They would not chase a refund, due to the small amount concerned
- They were concerned about the cost and time involved in getting a refund

4.22 Some consumers felt it should be the responsibility of PhonepayPlus to obtain the refund, a view that we feel arises from the difficulty that consumers currently experience in obtaining a refund.

4.23 For these reasons, PhonepayPlus is very interested to hear views on proposals to expand the 11th Code sanction which requires refunds in two ways:

a) That, unless inappropriate, the refunds should be supplied to consumers in a manner as straightforward as that which they used to purchase the service. Alternatively a requirement would exist for all consumers of a service to be informed, free of charge, that they are entitled to a refund and provided with an easy mechanism to claim it.

b) That, unless inappropriate, the requirement to refund should extend to all those who have purchased a service, rather than just those who have complained to PhonepayPlus or otherwise claimed a refund. This would normally encompass circumstances where a PhonepayPlus Panel determines that a service has no intrinsic value, or that its promotion has been generally misleading to everyone who subsequently purchases.

Q16. What would be the costs and business impacts associated with such proposals? What consumer benefits do you think would accrue?

4.24 Recent developments within the industry have proven to PhonepayPlus that there are a number of relatively straightforward ways of contacting a consumer and giving them an access code to obtain a refund – either through a website or banking institution. As such we feel this practice should be embedded across the phone-paid market.

4.25 Whilst we accept that only a small minority of services will set out to deliberately deceive consumers, it is our opinion that where a service cannot possibly be operating in a compliant way then it is right to consider a full refund to all consumers. One such example of this would be the offer of a free IQ test, with a charged link to the results, where the charge is not stated to the consumer before they click the link.

4.26 In circumstances where a service has caused consumer harm through intent or serious negligence, and in addition to any punitive sanctions imposed, PhonepayPlus does not believe it is right that those involved with its provision should be able to keep any of the

revenue which the service has generated. It is also our opinion that the requirement to pay back all of the revenue, in addition to a fine, will act as a considerable dissuasive factor for those who intend to cause consumer harm.

4.27 Where a service provider can be proven to have failed in respect of due diligence or risk assessment and control, it may be appropriate to require such a refund from them if an information provider defaults or is otherwise unreachable. We would welcome stakeholder comments.

Requirement for Compliance Audit by a third party

4.28 At present, this is a power we have already used through suspended sanctions against a party who, in the Panel's view, has demonstrated general, systemic compliance failures. However we believe there are benefits in making such a sanction explicit in the new Code.

4.29 Such a sanction would require a provider to submit to, and pay for, and audit by an organisation that PhonepayPlus nominates. The provider would then have to implement the recommendations of that audit within a certain time from receiving them. It is our opinion that this sanction would not only prevent further failures leading to further consumer harm, but also be dissuasive in terms of the cost of engaging the auditor.

Fine Collection

4.30 Over the last few years PhonepayPlus has managed to improve its overall collection of fines. Our efforts to collect fines levied as sanctions have been helped by the introduction into the Code of the "30-day payment" rule, which requires that TCPs withhold payment to their clients until at least 30 days after it has been accrued. However, we remain concerned that a small but significant number of providers do still on occasion manage to evade payment of fines which undermines our commitment to the principle of "polluter pays".

4.31 We would be very interested to hear from stakeholders as to their thoughts on ways in which we could better secure fine collection and would be interested to hear whether an extension to the current 30-day rule, either in terms of time or along the value chain, would be of any assistance.

Q17. What thoughts do you have about improving PhonepayPlus' effectiveness of fine collection and do you have any specific proposals for how we could better secure fine collection through changes to the Code?

Section Five - Terminology

5.1 PhonepayPlus is aware that the Communications Act 2003 provides us with the scope to change the existing terms “Service Provider” and “Information Provider”, and that industry stakeholders have suggested that these terms are no longer relevant in the current market.

5.2 Any new terms would need to retain a level of consistency and understanding for consumers and the phone-paid industry. Based on our consideration this far, PhonepayPlus proposes that “Service Provider” could be replaced with PRS Supplier or Service Enabler and that “Information Provider” could be replaced with Content Provider. We would welcome any alternative terminology that stakeholders can suggest.

Q18. Do you agree with PhonepayPlus’ proposals for new terms in respect of the current terms “Service Provider” and “Information Provider”? If not, can you suggest alternative terms?

Section Six – Questions in the document

Q1. Do you agree with our broad assessment of the range of harms that may impact upon consumers? If not, why not?

Q2. Do you agree with our assessment and definition of Outcomes and supporting themes? If not, why not?

Q3. Can you identify any Outcomes for consumer that you consider we may have overlooked?

Q4. Do you agree with our Outcome and supporting themes about complaints handling? Do you have any other suggestions?

Q5. Do you agree that PhonepayPlus is right to suggest that it should be able to revoke permission or consent where it is proven that Conditions have been breached and where such an action would be justified and proportionate? If not, why not?

Q6. Do you agree that PhonepayPlus is right to consider allowing parties along the value-chain to apply for prior permission when in a contractual relationship to provide a service?

Q7. Do you agree that PhonepayPlus is right to suggest that an applicants previous breach record is a factor that it is entitled to consider as part of a consideration of an application for permission or consent? If not, why not?

Q8. Do you agree with our assessment that ALL participants in the value chain for delivery of phone-paid services have responsibilities for compliance? If not, why not?

Q9. Such a change in approach may have differential impacts on different providers in the value-chain. What are these impacts likely to consist of and what business or consumer benefits do you think will arise?

Q10. Do you agree with our analysis of the outcomes of Assessment and Control? If not, why not?

Q11. What thoughts do you have on our suggested approach to a registration scheme?

Q12. What other suggestions do you have for how we could create greater incentives for providers to co-operate with PhonepayPlus in the event of investigations?

Q13. Do you agree with our proposed approach to reforming the Informal procedure? If not, why not?

Q14. Do you agree with our proposal that our arrangements for Standard and Emergency procedures should be retained? If not, why not?

Q15. Do you agree with our approach and what regulatory impacts, costs and benefits do you foresee?

Q16. What would be the costs and business impacts associated with such proposals? What consumer benefits do you think would accrue?

Q17. What thoughts do you have about improving PhonepayPlus' effectiveness of fine collection and do you have any specific proposals for how we could better secure fine collection through changes to the Code?

Q18. Do you agree with PhonepayPlus' proposals for new terms in respect of the current terms "Service Provider" and "Information Provider"? If not, can you suggest alternative terms?

Section Seven – Responding to this document

This discussion paper remains open until the new Code of Practice is fully consulted. We will welcome would welcome the opportunity to discuss proposals and questions contained in this document throughout the development of the new Code. However, in order to facilitate drafting of the Code proper, we would appreciate any substantive responses by **1 August 2009**.

Where possible, comments should be submitted in writing and sent by e-mail to mcollins@phonepayplus.org.uk , and copied to compliance@phonepayplus.org.uk. Copies may also be sent by mail or fax to:

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If you have any queries about this discussion paper, please telephone or e-mail Mark Collins using the above contact details.

Confidentiality

We may make available all substantive responses received to this document. If you want all or part of your submission to remain confidential, you must make a specific request for this, along with your reasons for making the request.