



The new PhonepayPlus Code of Practice A PhonepayPlus Consultation

A PUBLIC CONSULTATION

**Issued by PhonepayPlus on 29 April 2010
The deadline for comment is 8 July 2010**

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Foreword

The new PhonepayPlus Code of Practice – the 12th edition since we began regulating the premium rate services (PRS) market over twenty years ago – has the same aim as every one of our previous Codes: to effectively protect consumers and build trust in phone-paid services.

However, the proposed new Code that this consultation document seeks your views on marks a significant departure from the regulatory regimes that have preceded it.

The new Code takes as its starting point the outcomes that consumers expect and deserve when they purchase a service, from transparency in pricing to receiving the goods or service they expected. Principles based on outcomes for consumers are the guiding force of this new Code.

However, we believe this new outcomes-based approach will benefit industry as much as it does consumers.

First, we want to achieve a Code that is as future-proof as it can be, allowing PhonepayPlus to respond in a flexible and nimble fashion to developments in this fast-changing market. By setting clear outcomes for consumers and then letting businesses make their own decisions on how to meet them, we are recognising that prescriptive rules on what can and cannot be done may act as a barrier to innovation and investment.

This does not mean we are leaving industry without clarity on how regulation will be enforced. We are working on a suite of Guidance to support the Code, from General Guidance on issues like due diligence and risk assessment, to Service-Specific Guidance for particular types of service that will describe the agreed practices for achieving compliance with the Code. This Guidance can be updated more frequently than the Code and will therefore ensure that the regulatory regime can stay up-to-date more easily, without the need for major Code revisions every few years. However, this Guidance will be non-binding on providers, allowing businesses to take other decisions if they are confident that these will also meet the stated consumer aims. We have published some early drafts of these Guidance notes for illustration alongside the draft Code. We will be carrying out a full public consultation on our Guidance later this year.

Second, we believe an effective Code is one that can pinpoint and prevent harm at key points in the value chain. As the arrangements between partner businesses delivering premium rate services both diversify and grow more complex, the responsibility to prevent consumer harm needs to rest clearly with those businesses who actually provide the content, and operate and promote the services, rather than technical providers who may not exercise control on the actual service.

Networks and aggregators will still have a duty to do due diligence on businesses they contract with but it will be the party that controls the service that will now have explicit responsibility to comply with the proposed Code and to achieve desirable consumer outcomes. Not only is this a fairer system, but it makes everyone in the value chain responsible for compliance with the Code and, ultimately, for preventing consumer harm.

As well as this shift of regulation across the value chain, the other significant innovation to the regulatory regime is the introduction of a new industry Registration Scheme.

The proposed Scheme will require all networks and providers involved in premium rate services to register their businesses and services before they can operate in the UK. The Registration Scheme aims to provide transparency about the businesses involved in the premium rate services industry, whether information is required by a consumer purchasing a service or by a business carrying out due diligence on a client it wants to contract with.

As a regulator who has worked with the premium rate services industry for nearly twenty-five years, PhonepayPlus is acutely aware that good compliance is built on good relationships with both industry and consumers. We cannot achieve the flexible, fair and proportionate Code we need without input from both of these stakeholder groups. We have listened to and learnt from the discussions we have already had with these stakeholders in relation to the new Code. As we embark on the formal consultation we ask for your continued support and input.

We particularly ask that those technical providers (called Service Providers in the current Code and Level 1 providers in the proposed Code) who already know us and work with us, to help us reach and engage with the providers you work regularly with and who will have new direct responsibilities under the proposed Code. It is critical that this group of providers is made aware of the new Code and engages with us on the detail of the changes proposed: in particular, networks and PRS providers will need to register to be able to enter into contracts with other registered businesses to deliver premium rate services in the UK market. If you wish to continue to do business with your current PRS partners, then it is in your interests to make them aware of this important change to regulation.

As a regulator and as an industry, we have reached a significant juncture for premium rate services. Since the last Code of Practice was published in 2006 (amended in April 2008), we have seen rapid changes in the premium rate services market, some of which were reflected in Ofcom's 2009 PRS Scope Review. At the forefront of that review was the shift of premium rate services from fixed-line to mobile.

But as we all know, the story doesn't end there.

In the last few years we have seen the rise of the smartphone and the explosion of apps. The market will inevitably continue to change and it is hard to predict exactly what the innovations will be that will shape the future of premium rate services.

But whatever that future looks like, we are convinced that an industry that builds consumer confidence is an industry that can adapt and grow with technological innovation.

PhonepayPlus' job is to provide a Code that is fit-for-purpose, that delivers to consumers and helps industry to achieve the best outcomes for consumers, whatever the future may hold.

We look forward to your responses.

A handwritten signature in black ink, reading "Alistair Graham". The signature is written in a cursive, flowing style.

Sir Alistair Graham
Chairman

1. Executive Summary

1.1 PhonepayPlus (formerly ICSTIS until 2007) has regulated premium rate phone-paid services since 1986. Whilst Ofcom has had formal responsibility for regulating Premium Rate Services (PRS) since the introduction of the Communications Act 2003 into law, Ofcom recognises PhonepayPlus as the organisation that delivers day-to-day regulation by approving our Code of Practice.

1.2 Our goal as a regulator of PRS is that everyone should be able to use premium rate phone-paid services with absolute confidence. In pursuit of this goal, we create, and from time to time update, a Code of Practice that sets appropriate standards for promotion, operation and content. We continually monitor the effectiveness of our Code and review and consult on revising it in light of developments. Any new PhonepayPlus Code is approved by Ofcom following consultation if it meets the legal tests set out in the Communications Act.

Review of the PhonepayPlus Code

1.3 In reviewing our current Code over the last 18 months, we recognised that the quickening pace of evolution (both of technology and products) in the premium rate phone-paid market would require a regulatory regime that could quickly assess the potential risks and benefits of new technology or services.

1.4 A new Code would need to be easily applied to the increasingly diverse chains of providers by which PRS are delivered to consumers and allow for a flexible investigation and enforcement process that facilitates swift identification of, and appropriate action against, any party involved in consumer harm.

1.5 Lastly, the new Code should allow the PRS industry to make confident decisions on how it can invest and innovate in services, by giving a clear framework for consumer protection. We considered whether a new Code that was more explicit about the outcomes for consumers rather than setting service specific rules might provide a clearer framework for regulatory compliance.

1.6 In order to test some of these assumptions and our initial thoughts on the direction of the new Code, we pre-consulted on many of the key proposals by releasing a New Code Discussion Paper in June 2009. The paper's key proposals were as follows:

- A shorter, easier to understand, Code;
- A less prescriptive Code, based on consumer protection outcomes and supported by Guidance where appropriate;
- Appropriate responsibility along the delivery chain for PRS;
- A requirement for all parties involved in PRS to register with PhonepayPlus, and for services themselves to be registered;
- A more flexible investigations procedure; and
- Two additional sanctions – a requirement to refund all consumers of a service (where no consumer could have gained any value from it), and a requirement for a provider to submit to an independent audit of their compliance.

1.7 Respondents to the Discussion Paper had a variety of comments, which helped us refine and improve our approach, but were in general agreement with these key proposals.

Ofcom's Scope Review

1.8 In light of increasing convergence, the wide diversity of services provided and the growth of premium rate phone payment as a micropayment mechanism, Ofcom published a consultation – “The PRS Scope Review” – in May 2009, just before the publication of PhonepayPlus' new Code Discussion Paper. This review discussed the risk of consumer harm in the absence of effective regulation, identified a number of key characteristics of premium rate phone-paid services, considered their potential to give rise to consumer harm, and invited views on Ofcom's analysis.

1.9 Recommendations from the Scope Review were published in October 2009, with a number of comments specific to PhonepayPlus and our regulatory framework. These recommendations were factored into our consideration as we drafted the new Code for consultation, alongside the responses we received to the Discussion Paper.

The new Code

1.10 The proposed new Code is now ready for public consultation. The version of the Code attached at Annex A is divided into five parts and three Annexes:

- Part One – Scope and Governance;
- Part Two – Outcomes and Rules to deliver consumer protection;
- Part Three – Registration and Responsibility;
- Part Four – Investigations, Procedures and Sanctions;
- Part Five – Definitions;
- Annex 1 – Funding arrangements;
- Annex 2 – Code Compliance Panel and Tribunals; and
- Annex 3 – Independent Appeals Body.

1.11 Each individual part of the Code is addressed in a separate section of this consultation document (sections 4 to 8), with the Annexes being addressed in a single section (section 9). Subsequent sections address:

- Provisions from the 11th edition of the Code which we propose to withdraw (section 10);
- The likely impact of our proposals on 087 services (section 11);
- A summary of the review into PhonepayPlus' funding model, and our proposals in respect of the new Code (section 12); and
- A Regulatory impact assessment (section 13).

1.12 A breakdown of proposals within each section is as follows:

Part One – Scope and Governance

- Governance arrangements (page 20);
- Terminology (pages 20-24, with our proposed new terms for the parties currently defined as “Service Providers” – Level 1 providers- and “Information Providers” – Level 2 providers - at paragraph 4.27); and
- Guidance (pages 24-29, with our proposals as to how current guidance provided by PhonepayPlus to support the Code should be updated).

Part Two – Outcomes and Rules to deliver consumer protection

- Application of the Outcomes and Rules (page 31 - our proposal that Part Two will apply to Level 2 providers, except where a network or Level 1 provider provides any part of a service which directly impacts on consumers, is set out in paragraphs 5.15 – 5.16);
- Legality - (page 32);
- Transparency and Pricing (pages 32-35);
- Fairness (pages 35-38);
- Privacy (pages 38-40 – this links to Data Protection at page 57);
- Avoidance of harm (page 40-41); and
- Complaint handling (pages 41-42).

Part Three – Registration and Responsibility

- General Responsibilities of all parties (pages 44-48 – including proposals around ensuring clients handle complaints appropriately; ensuring services are of adequate technical quality; internal risk Control; and risk assessment and control on clients);
- Responsibility to comply with PhonepayPlus directions (page 48);
- Contracts (page 48 – including proposals around Due Diligence on clients);
- Registration of provider and services with PhonepayPlus (pages 48-56);
- Requirement to withhold or retain payment (pages 56-57);
- Data Protection (page 57 – this links to Privacy at pages 38-40);
- Responsibilities specific to Network operators, Level 1 providers, or Level 2 providers (pages 57-58); and
- Prior Permission (pages 58-59).

Part Four – Investigations, Procedures and Sanctions

- General conduct of investigations (pages 60-61);

- Track 1 procedure (pages 61-62 – this is proposed to replace the Informal procedure in the 11th edition of the Code);
- Track 2 procedure (pages 62-63 – this updates the Standard procedure in the 11th edition of the Code);
- Emergency procedure (pages 63-64);
- Adjudications (page 64);
- Reviews (pages 64-65);
- Sanctions and Refunds (pages 66-67 – including consideration around two proposed new sanctions);
- Administrative charge (page 67);
- Oral hearings and Appeals (pages 68 – linked to Annex 3 of the proposed new Code, and so section 9 of this document); and
- Publication of Tribunal decisions (page 68).

Part Five – Definitions

- Delegation of powers by the PhonepayPlus Board (page 69);
- Reach of the Code (page 69); and
- Individual definitions (pages 69-71 – including proposed definitions for parties within the delivery chain at paragraphs 8.11-8.13).

Annexes to the Code

1.13 All three proposed Annexes to the new Code are discussed from pages 72-73 of this document.

Annexes to the Consultation

1.14 A number of supporting documents to this consultation are being published as annexes to this consultation document. They are:

- Annex A – the draft Code and its annexes;
- Annex B – a schedule showing the differences between the 11th edition of the Code of Practice and the proposed new Code;
- Annex C – illustrative draft Guidance notes, including one on due diligence and risk assessment, along with a list of proposed Guidance for the new Code. We will be issuing a full public consultation on the Guidance for the new Code later in the year, ahead of the new Code coming into force;
- Annex D – an executive summary of KPMG's review of PhonepayPlus' funding model; and

- Annex E – the Governance Statement, which will sit alongside the new Code.

Responding to the Consultation

x. We are seeking the views of all stakeholders on the proposals and questions contained in this paper by no later than **Thursday 8 July 2010 (10 weeks from the date of issue of this document)**.

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

Mark Collins, Head of Industry Affairs, PhonepayPlus Ltd, Clove Building, 4 Maguire Street, London SE1 2NQ

Tel: 020 7940 7412

Fax: 020 7940 7456

x. If you have any queries about this consultation, please telephone or email Mark Collins using the above contact details.

2. Background

About PhonepayPlus and the Code of Practice

2.1 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 that delivers the day-to-day regulation of the premium rate phone-paid services market by approving the PhonepayPlus Code of Practice.

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

2.3 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 it decides the Code meets the legal tests set out in the Communications Act.

2.4 Following a review of our current Code over the last 18 months, PhonepayPlus is now ready to consult publicly on proposals for a new Code of Practice. This document sets out our intended approach and our draft new Code, together with some of the proposed supporting Guidance, for public consultation.

2.5 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 specific questions set out within. The deadline for responses to the consultation is 8 July 2010.

2.6 In parallel with this consultation, Ofcom will also be consulting on whether to approve the Code of Practice. The Ofcom consultation is available on its website at: <http://www.ofcom.org.uk/consult/condocs/ppp/>. Stakeholders should respond to PhonepayPlus on the content of the Code and Guidance, and to Ofcom on the issues relating to approval of the Code. PhonepayPlus and Ofcom have committed to share all responses received to the consultation, unless they are marked as confidential.

Background to the new Code

2.7 Evolving markets and consumer expectations need an evolving regulator and standards. As new services, billing mechanics and practices emerge, PhonepayPlus has a duty to assess the risks and benefits they pose. On this basis, we have continually revised our Code of Practice to address any new risks that were presented by the market at that time. Historically, this has meant that we will add new rules where necessary to protect consumers and the reputation of the market, and remove old rules where they become obsolete.

2.8 The 11th edition of the Code of Practice, the version currently in force, continued in this vein of assessing the provisions and rules within the 10th edition of the Code against the risks and possibilities that the premium rate market presented in 2006. However, it was also structured to facilitate a more proactive approach to regulation. This allowed us to

successfully introduce our “pre-empt; prevent; protect” agenda at the same time the 11th edition of the Code was launched in 2006.

2.9 In reviewing the 11th edition of the Code and building a new one, we believed it was right to build on the “pre-empt; prevent; protect” strategy. To do this, we would need to make a more significant departure from the status quo of previous Codes, and increase the scope we have to regulate flexibly and proactively wherever it is appropriate that we do so. There were a number of overarching reasons that made this approach compelling:

Developments in regulation

2.10 The creation of PhonepayPlus’ Code Compliance Panel (CCP)¹ in 2008 created an independent adjudication panel that informs PhonepayPlus of any ambiguity or concern, or general market trends that it becomes aware of, in relation to the Code and how we enforce it. The CCP has made a number of observations with regard to the next Code. They are:

- A significant number of breaches could have been prevented by more robust due diligence or control on the part of service providers over their clients. Further research showed a third of all cases in the life of the 11th edition of the Code up to May 2009 involved information providers who breached the Code more than once, and almost two-thirds involved service providers who breached the Code more than once.
- That some providers have breached the Code on numerous occasions in similar ways (over a fifth of all cases under the 11th edition of the Code up to May 2009 contained a breach upheld against an information provider for the second time or more). When repeated breaches would indicate a generally slipshod approach to compliance by a provider, the Panel has imposed a bar on some or all of that provider’s services, suspended if the provider agrees to submit to an independent compliance audit and implement its recommendations. However, a requirement to have such systems in place as ensure compliance from the start would prevent incidents of repeated harm.
- That, as value chains grow increasingly complex, it becomes more important to link companies and/or related individuals to ensure their compliance history is clear to prospective business partners.

Industry developments

2.11 PRS have traditionally been delivered on fixed line and, more recently, mobile telecom networks. Mobile now comprises 60% of sales and around 90% of our complaints. Whilst mobile is dominant at the moment, the market will undoubtedly continue to develop, for example through platforms such as VoIP or red button, or newly-developed secure billing systems.

2.12 Each method of premium rate phone-paid delivery, whether new or established, carries with it a different delivery chain, with different roles for individual businesses within that chain (this range is set out in more detail on pages 21-22 of this document). This, in turn, required us to consider where regulation and responsibility was most appropriately targeted.

¹ The Code Compliance Panel is an independent body, made up of legally qualified and lay members, to whom PhonepayPlus delegates the function of adjudicating on whether PRS providers are in breach of the Code. This adjudication process takes place at fortnightly Tribunals – a Tribunal being made up of three members of the CCP, at least one of which will be legally qualified and chair the Tribunal in question.

2.13 In addition, the feedback we had from the industry, and other stakeholders, across the life of the 11th edition of the Code was that it could be more clearly and simply expressed, with a less prescriptive set of rules that are more easily adapted to new services or billing mechanics. There was also a view that some rules were rarely breached and too tied to promotional mechanics, which is supported in part by our analysis of all investigations heard by PhonepayPlus' Code Compliance Panel (CCP) up until 21 January 2010²:

- a) Five individual provisions of the Code make up 50% of all the breaches that the CCP has upheld. The five provisions are 5.4.1a (Fairness), 5.8 (Contact information), 5.7.1 and 5.7.2 (Pricing information), and 5.2 (Legality, especially as it relates to the Privacy and Electronic Communications Regulations around unsolicited promotional material);
- b) Adding the next five most frequently used provisions raises this percentage to approximately 67% of all breaches;
- c) Approximately 67% of provisions in the 11th Code that could be raised as breaches have never been raised/successfully upheld.

2.14 It is becoming clear that PRS providers are placing a greater focus on engaging with PhonepayPlus at an early stage in order to ensure that their services are compliant with the Code and thereby prevent consumer harm. As part of our service, PhonepayPlus provides free compliance advice on any aspect of a premium rate phone-paid service before it is made accessible to consumers. This could be advice about promotional material, operation of the service, the systems used to bill consumers, or a more general "diagnostic" of the service as a whole.

2.15 In 2008, PhonepayPlus' Compliance Advice team received a total of 2,813 individual requests for advice by either phone or email. In 2009, this total rose to 4,778 requests, an increase of 70% when the totals for the two years are compared. However, requests for compliance advice spiked significantly from May 2009 until the end of the year, and when the May to December totals for 2008 and 2009 are compared, the increase in requests for compliance advice becomes 125%.

2.16 The increase in requests during the later part of 2009 can be explained in part by the extension of our remit to cover 087 services in August³, with a commensurate rise in requests for information on the part of 087 providers to whom PhonepayPlus' regulation was new. However, requests from 087 providers do not by themselves account for the whole of the increase.

2.17 We believe that this increase in the trend of requests for compliance advice is also due to a rising number of industry participants who wish to prevent consumer harm, and in doing so, build consumer trust in their services and avoid breaching the Code. This could be for various reasons, for example some participants may be aware of the increasingly high sanctions which have been issued over the past year and so consider it more important to comply than before, but in building our new Code, we believe it is right to ensure that, wherever possible, the Code encourages and facilitates a proactive approach by participants in the premium rate phone-paid industry.

² This updates the statistics published in our Discussion Paper on the new Code, published in June 2009, which carried out the same analysis up until the end of May 2009.

³ From 1 August 2009, services operating on the 0871/2/3 number ranges became part of PhonepayPlus' regulatory regime.

Developments in consumer engagement

2.18 PhonepayPlus' most important objective is to enable consumers to use phone-paid services with confidence. We feel that appropriate protection builds consumer trust and confidence in new and innovative phone-paid services, and so should contribute to market growth.

2.19 Research we have previously conducted shows that at least 41% of adults had used phone-paid services in 2009. Whilst this figure may be slightly lower than the estimated 48% in 2008, it conceals a significant number of first-time users responding to initiatives by Comic Relief and Children in Need to facilitate donation to charity by text. Despite this, our research indicates that the highest regular usage occurs among consumers on lower incomes, and in particular children from lower income families. Not only do these consumers suffer most financial harm from any wrongdoing, our research suggested they are also the least likely to be aware of their rights, or the existence of a regulator.

2.20 We believe the new Code will make it easier for PhonepayPlus and other parties, including the industry itself, to communicate our principles and aims to consumers, which in turn will make them more aware of the standards they should expect of premium rate phone-paid services and their rights when something goes wrong.

The current economic climate

2.21 The current climate highlights that a recession may tempt some businesses to take more risks in attempt to drive up turnover. One such risk in the phone-paid market is that some billing platforms facilitate the charging of consumers without their permission. This is exacerbated as the consumer does not have an automatic right of return on products they purchase using PRS.

2.22 It is important we guard against this kind of behaviour and punish it. However, our overriding approach in developing the new Code is to create a flexible, future-proof and enabling regulatory regime, built on sound and tested consumer protection principles. The new Code will need to see us through and beyond the current period of recession to meet the challenges of a rapidly developing market.

Recommendations from the Ofcom Scope Review

2.23 In light of increasing convergence, the wide diversity of services provided and the growth of premium rate phone payment as a micro-payment mechanism, Ofcom published a consultation – “The PRS Scope Review” – in May 2009. This review discussed the risk of consumer harm in the absence of effective regulation, identified a number of key characteristics of premium rate phone-paid services, considered their potential to give rise to consumer harm, and invited views on Ofcom's analysis.

2.24 The Scope Review was helpful in framing PhonepayPlus' Discussion Paper on the new Code and our review of the 11th edition of the Code of Practice in general.

2.25 The final recommendations of this review were published in October 2009, and were grouped around three themes:

- Facilitating consumers to make informed decisions;
- Facilitating effective consumer redress;

- Empowering suppliers to act responsibly.

2.26 Recommendations specific to PhonepayPlus were as follows:

- PhonepayPlus should consult on strengthening its existing guidance on mobile pricing in advertising (in any media) in line with Ofcom's approach to PRS in TV programmes;
- PhonepayPlus should expand its Number Checker⁴ to better assist consumers needing to identify the provider responsible for a particular service;
- PhonepayPlus should consider introducing complaints handling obligations as part of the drafting of its new Code of Practice; and
- PhonepayPlus should introduce a mandatory registration scheme for both service and information providers.

2.27 We considered these recommendations, alongside the feedback we received to our Discussion Paper, and our conclusions and proposals emerging from the Scope Review are reflected through the remainder of this document. Broadly speaking, the new Code will place a greater onus on providers throughout the delivery chain to provide, and update, information about themselves and their services.

2.28 Relevant information will be made publicly accessible by PhonepayPlus, in order that consumers are able to more quickly identify a provider in the event of a complaint and that providers can make an initial assessment of another registered party when considering whether to do business with them.

2.29 The new Code will also place a greater responsibility on providers through the delivery chain to handle complaints, and take any action required for redress, quickly, transparently and fairly.

⁴ Number Checker is a free service for consumers to check premium rate numbers to identify the relevant service provider.

3. PhonepayPlus' initial proposals and stakeholders' responses

3.1 We issued a New Code Discussion Paper for public comment in June 2009⁵. It was not intended to set out the full 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 industry to engage in our policy development.

3.2 The Discussion Paper put forward a number of key proposals as to how the new Code could improve on the current edition and enable PhonepayPlus to better deal with the evolving market. Feedback from those stakeholders who responded to the Discussion Paper was generally supportive and highlighted a number of issues that have informed subsequent policy, both in relation to the new Code and our interpretation and enforcement of the 11th edition of the Code.

3.3 More specific feedback from those who responded to the Discussion Paper will be addressed, at the relevant area of the new Code to which it pertains, later on in this document. However, some feedback was common to the majority of respondents, and it is included below along with a summary of each of the Discussion Paper's key proposals.

A shorter, simpler to understand Code

3.4 The Discussion Paper acknowledged that many industry stakeholders, especially smaller providers and new entrants to the market, desired a Code that would be as easy to understand and reference as possible. Whilst providers want to be compliant with the Code, and recognise the benefits that consumer trust brings to market growth, these same providers would like to be as efficient as possible in the time they spend understanding and interpreting the Code.

3.5 Of course, a shorter, simpler Code brings with it the risk that readers may not gain as comprehensive an understanding of how the Code will be applied and interpreted – something which many of those who responded to the Discussion Paper, or less formally in discussion, highlighted. To this end, PhonepayPlus has recognised that a Code focused on outcomes would need to be supported by appropriate guidance, which again needs to be made easily accessible for the industry and other interested parties. We return to this point on pages 24-29.

A Code based around outcomes to deliver consumer protection

3.6 It was proposed that the core of the new Code would be a set of outcomes that, if delivered, would create a robust framework of consumer protection for phone-paid services. These outcomes would be supported by specific rules (and as much guidance) as necessary, but would represent a move away from prescriptive rules, especially around individual service types, wherever possible.

3.7 In the event of a breach of the Code, providers would need to demonstrate how their actions had been designed to comply with the Code. The final list of proposed outcomes, and the rules to support them, will be addressed in greater detail later in this document, but the outcomes that the Discussion Paper proposed were as follows:

- Legality
- Transparency

⁵ A link to this document, which is available on the PhonepayPlus website, can be accessed here: <http://www.phonepayplus.org.uk/upload/Code12-GreenPaper-FINALv2-June2009.pdf>

- Fairness
- Appropriateness (the final proposal has re-titled this as 'Avoidance of harm')
- Technical quality (this has since been removed as an Outcome, and placed in Part Three of the Code as a General responsibility)
- Privacy
- Complaint handling

3.8 Responses from industry and other stakeholders, and other regulators who shared the benefit of their experiences, highlighted that this approach to the Code will give greater certainty to providers, whilst introducing a greater degree of flexibility as to how and when PhonepayPlus' expectations and standards are changed.

3.9 Whilst an outcomes-based approach will undoubtedly necessitate some debate in the first year of operation as a degree of precedent is established, we believe that ultimately this will assist in giving clarity on the expectations consumers have of PRS services.

3.10 The Discussion Paper's proposal of a higher standard of requirements for complaint handling was generally welcomed, with much of the industry clearly eager to deal with complaints to a consumer's satisfaction before they are escalated to PhonepayPlus as the regulator. Some sectors of the delivery chain were worried that a formal requirement would impose an unreasonable burden on them, and we will address this in more detail later on in the document. See pages 41-42.

Appropriate responsibility along the delivery chain

3.11 In recognition of the changing market, the resulting growth in the number of different possible delivery chains, and the roles of individual providers within them, the Discussion Paper proposed a rethink of where responsibility for meeting the expected standards of premium rate phone-paid services should lie.

3.12 Under the proposals, information providers would carry the principal responsibility for the promotion, operation, content and delivery of their service. However, service providers, and to an extent network operators, would assume a responsibility to perform effective due diligence on any party with which they directly contracted. This would include an appropriate degree of risk assessment and control throughout the life of that contract. Pages 44-48 set out these issues in more detail.

3.13 The Discussion Paper recognised that effective due diligence would need to be clearly defined for those expected to perform it, and such definition would also be vital if PhonepayPlus was to effectively enforce against anyone who did not meet the expected standard.

3.14 Respondents to the Discussion Paper, and stakeholders in general, stated a common view that responsibility for any aspect of a premium rate phone-paid service should extend only as far down the delivery chain as the last party who controls the whole range of aspects of the provision of a phone-paid service (i.e. they co-ordinate promotion, operation and content).

3.15 PhonepayPlus agrees with this view and the reasoning behind it. Restricting responsibility to those in a delivery chain who wholly control phone-paid services would, amongst other benefits, avoid costly and time-consuming attempts to track down, for example, affiliate marketers to whom web-based promotions have been subcontracted, and hold them responsible for misleading material.

Requirement to register with PhonepayPlus for all parties in the delivery chain

3.16 The Discussion Paper set out proposals for two distinct types of registration as follows:

- Requirement to register for all parties in the delivery chain;
- Requirement to register details of premium rate services for use on the PhonepayPlus Number Checker.

3.17 These two proposals, and the general reaction to them by respondents, can be summarised as follows:

Requirement for all parties in the delivery chain to register

3.18 The Discussion Paper set out proposals for all parties, who are defined by PhonepayPlus as being part of the premium rate delivery chain, to register with PhonepayPlus. The Paper also set out the intent to place information provided by registrants on a central database. This information would, subject to varying degrees of restriction in order to ensure commercial confidentiality, be accessible to the public, others who had registered, and to PhonepayPlus.

3.19 The Discussion Paper also proposed that PhonepayPlus could link each registration to other information about that registrant, such as their breach history, any links that a company's directors or key staff had previously (or still) had with other businesses, and circumstances in which a business or individual has an outstanding debt to PhonepayPlus. This would not only allow providers an initial oversight of any entity with whom they are considering contracting, but also assist to make PhonepayPlus' own investigation procedures more efficient.

3.20 Registration of all parties within the value chain was regarded as a good thing by all respondents, and a significant number suggested it was essential for the proposed approach within the new Code to work. However, some expressed concerns about the amount and granularity of information that would be available to other registrants, a concern which we share if such information was commercially sensitive. See pages 48-56.

Requirement to register service details for use on the Number Checker

3.21 Currently, the Number Checker, accessible on the PhonepayPlus website, allows consumers to gain information quickly about a service, and the name of the provider, by entering a premium rate number or shortcode into it. At present, information is given by providers on a voluntary basis, and whilst the majority of numbers are covered, there are still instances where the Number Checker cannot provide consumers with any information.

3.22 The Discussion Paper emphasised the need for consumers to gain information about a service as quickly as possible, so that they can seek redress quickly and easily from the provider concerned, and highlighted that this is not currently happening in all cases. As such, the Discussion Paper proposed that a requirement on all providers to supply and update information about all their services, which could then be used to populate the Number Checker, would further empower consumers and other parties involved in enforcement. This approach would also allow PhonepayPlus to more rapidly identify the provider of a service.

3.23 The idea of a mandatory requirement to provide service information to the Number Checker was also largely welcomed, although some providers did worry that they would lose

sight of enquiries against services provided by their clients. PhonepayPlus does not consider this a difficult issue to resolve, and will address it later in the document.

3.24 Since the Ofcom Scope Review recommended a database with the broad characteristics that were set out in the Discussion Paper, we have explored a range of options for provision of a database. Such a database will be able to accept, retain and present information concerning both registration of parties in the value chain, and registration of service details. The primary purpose of this database will be to minimise consumer harm by providing a starting point for due diligence checks by networks or providers on prospective clients, rather than to be an integral part of the investigations and adjudications process.

3.25 Work on a Registration Scheme is now being taken forward as a separate project by PhonepayPlus, and we have set out some issues for consultation later in this document. We have also recently issued an interim update on progress with developing the Registration Scheme, which can be found on the PhonepayPlus website at: <http://www.phonepayplus.org.uk/upload/InterimRegistrationSchemeUpdate2010.pdf>.

A more flexible Prior Permission regime

3.26 The Discussion Paper explored the variations between individual Prior Permission regimes, and concluded that some regimes – for example, Broadcast PRS – required the provider to demonstrate that they could put in place new technology or processes in order to satisfy the conditions of the Prior Permission certificate. Other permissions, however important to mitigate risk, required no new development on the part of the provider, merely a binding commitment to adapt existing technology or systems in order to comply with the conditions of their permission.

3.27 As a result, the Discussion Paper proposed a more efficient Prior Permission regime, with only those regimes requiring advance proof of ability to comply or high-risk services needing approval from the Code Compliance Panel. Lower-risk regimes would be granted by the PhonepayPlus Executive, subject to a commitment on the part of the applicant to abide by the conditions. If any applicant was subsequently proven to have broken the conditions, they would still have their licence removed, possibly immediately. See page 58-59.

Extension of the “30-day” rule on revenue payment

3.28 The Discussion Paper explored options for ensuring PhonepayPlus has adequate time to investigate consumer complaints before the provider responsible has received its share of the revenue, and can then “disappear” in advance of an investigation.

3.29 Whilst the “30-day” rule currently prevents networks from sharing revenue with service providers for 30 days after the transaction is complete, it does not prevent service providers from paying to their clients in advance of the payment from the networks. This can undermine the principle of the 30-day rule, by allowing money to move through the value chain when consumer harm may have occurred. This has also caused a number of problems in terms of recovering fines, especially given that the number of information providers who operate outside the UK or EU has significantly increased in the mobile sector of the market since the introduction of the 11th edition of the Code.

3.30 This issue, and the conclusions PhonepayPlus has reached, are examined in more detail later in this document (see pages 56-57) but, in summary, the option of extending the 30-day rule along the entire delivery chain was the one most welcomed by respondents.

A more flexible investigations procedure

3.31 The Discussion Paper proposed that, if responsibility was to extend through the value chain, with different parties taking on different responsibilities for the most part, then PhonepayPlus' investigations procedure should be altered so that breaches can be raised against more than one party in the delivery chain in respect of the different roles they may have played (whether intentionally or through negligence) in the same case of consumer harm.

3.32 Whilst the Discussion Paper concluded that the "Standard" and "Emergency" investigation procedures should largely stay the same, it proposed replacing the current "Informal" procedure with a time-based action plan to rectify a minor breach, to which a provider must commit, and prove they have delivered upon.

3.33 By accepting the breach and delivering the action plan, the provider would avoid a case going to the Code Compliance Panel or publication of the breach (though a copy of the action plan would still be kept on record), but failure to prove they had met the action plan by the set date would result in a more serious breach, investigated under the Standard procedure.

3.34 Stakeholders generally welcomed a more flexible investigations procedure, in that it would enable regulation to be targeted at those directly responsible for consumer harm. However, we did not receive a significant level of feedback from information providers, who would inevitably be the target for much of our enforcement under our proposals for the new Code.

3.35 Respondents generally cautioned against using any facility to raise breaches against more than one party for the same case of consumer harm as an excuse to "carpet bomb" the delivery chain for every infraction. PhonepayPlus is happy to confirm this is not our intention, but that this facility would be used where we believe that a provider has failed to adequately assess and control the risk posed by their subcontracted client.

Additional sanctions

3.36 The Discussion Paper concluded that the sanctions that the 11th edition of the Code put at PhonepayPlus' disposal had worked well and should be retained. However, the Paper also looked to build on the existing suite of sanctions by exploring options for sanctions that would further disincentivise consumer harm and address systematic failings by any business or individual.

3.37 Two additional sanctions were therefore suggested:

- a requirement to provide automatic refunds to all consumers (as opposed to just those who had complained to PhonepayPlus); and
- a requirement to undertake and implement a compliance audit (at the party's own expense) by a third party of PhonepayPlus' choosing.

3.38 Some issues were raised with the two new sanctions we proposed. Some respondents urged us to consider the technical difficulties behind providing automatic refunds to those callers whose number is routinely withheld when they make a call. We will consider this matter in greater detail later in the document.

3.39 Respondents generally welcomed the concept behind an enforced compliance audit, but cautioned that PhonepayPlus should also set an end date, in order to prevent an independent auditor from unnecessarily prolonging an audit in order to inflate their charges.

3.40 The version of the Code that we present here for consultation (attached at Annex A) takes account of all the feedback we received to the Discussion Paper. As a result of this consideration, the following sections of this consultation each address an individual part of the proposed new Code:

- Scope and Governance
- Outcomes to deliver consumer protection
- Registration and responsibility
- Investigations and sanctions
- Definitions

The new PhonepayPlus Code of Practice

4. Part One – Scope and Governance

4.1 Despite the departure from the status quo that this Code represents, we believe it is still necessary to have an introductory section that sets out PhonepayPlus' goals and remit, and that references Governance arrangements.

4.2 Indeed, given the changes that this Code will make in terms of regulation, and how responsibility for it is applied, we consider it vital that an introductory section provides a clear explanation of the fundamental changes we have introduced.

4.3 As such, this section contains the following:

- A reference to Governance arrangements
- A reference to PhonepayPlus' independence
- Confidentiality arrangements
- Geographic reach of the Code
- Providers to whom the Code applies
- Types of Guidance and advice issued by PhonepayPlus and the status of them

4.4 Stakeholders should note the following in relation to the above list:

Governance arrangements

4.5 Governance arrangements are referenced in the new Code, but our proposal is that they no longer form part of it. Instead, we propose that such arrangements will form part of a separate document that will be permanently available on the PhonepayPlus website. The draft Governance Statement for the new Code is published in tandem with this consultation for comment.

4.6 Whilst we feel it is necessary, and wholly appropriate, to make reference to the fact that Ofcom is required to approve our Code under Section 121 of the Communications Act 2003, and that PhonepayPlus must have an independent Board and Code Compliance Panel (CCP), we do not believe it is necessary to codify exactly how many members the Board and CCP will have, or the exact approach they will take to strategy or treatment of risk. Instead, it is our intention to publish such matters in the separate Governance Statement. The reason for adopting this more flexible approach is that such a statement will then be alterable without the need to alter the Code, thereby helping to ensure the aim of extending the life of our Code of Practice.

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

Terminology

4.7 The new Code Discussion Paper invited comments around whether the current delivery chain terminology – i.e. “Network Operator”, “Service Provider” and “Information Provider” – was still appropriate given the changes to the phone-paid market over the life of the 11th edition of the Code. PhonepayPlus did not propose to change the term “Network Operator”, but the Discussion Paper did propose changes to the other two terms.

4.8 The response to the Discussion Paper's question around terminology was inconclusive. Some respondents expressed support for the terms PhonepayPlus had

suggested (“Service Enabler” and “Content Provider”), with others expressing support for terminology such as “Technical Provider” and “Merchant Promoter”. However, support was not overwhelming from respondents for any one set of terms.

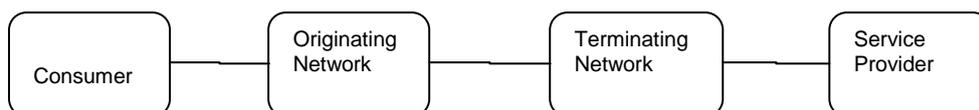
4.9 The suggested revisions to the existing terms and definitions, whilst clearly supported by some industry stakeholders, do not take account of the phone-paid delivery chain as defined in the Communications Act – i.e. that networks are distinct from other providers in the value chain and, as such, mobile aggregators could not have the same status as the mobile networks with whom they contract.

4.10 In addition, whilst descriptive terminology may be appropriate for some parts of the current market, there is no guarantee that the value chain will not evolve again in the future. A significant number of Discussion Paper respondents provided the viewpoint that the actual terms were of little importance. What was important was that PhonepayPlus was able to apply more than one term to a provider where it played more than one role in the value chain.

4.11 The Discussion Paper made a broad reference to the different types of delivery chain that exist in the premium rate phone-paid market. However, it only presented two generic types of chain, namely voice-based and text/download-based. On the basis of the responses we received around this issue, we have examined the different types of delivery chain in more detail.

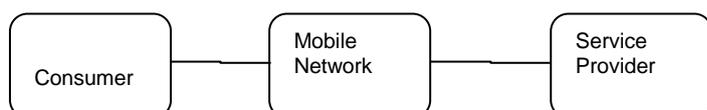
4.12 The six different business models set out below are not intended to be a comprehensive listing of every delivery chain in existence, but rather an illustration of how networks and providers relate to each other in some of the known value chains in the sector. They are intended to illustrate the different roles, or different types of expertise, that the same entity could potentially have across various different delivery chains. It is quite likely that, rather than one model replacing the others, they will co-exist for some time. In turn, this illustrates the difficulty involved in arriving at appropriate terminology to replace the terms “Service Provider” and “Information Provider”.

1) “Traditional” Voice-based (where an 09 number is dialled)



4.13 The consumer makes a call on his/her landline through his/her billing network (e.g. BT, Virgin, Kingston, etc., or any of the Mobile Networks). This is then relayed through a terminating network to the Service Provider, who is also the Information Provider in this instance. As with all subsequent delivery chains, the process is then repeated in reverse in order to provide the service to the consumer and charge him/her.

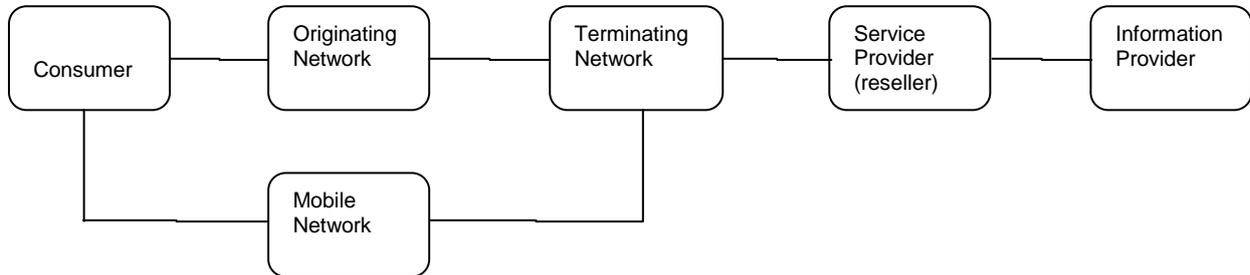
2) “Mobile” Voice-based (where a voice shortcode is dialled)



4.14 The consumer makes a call on his/her mobile. In this case, the Mobile Network acts as both the originating and terminating network. The Service Provider still acts additionally

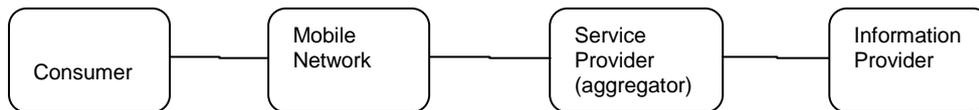
as the Information Provider in terms of our current Code definitions. Whilst this model does exist in the market, its use is still relatively limited.

3) “Reseller” Voice-based (where an 09 number is dialled)



4.15 The consumer makes a call on either his/her landline or his/her mobile. Depending on which, the call is relayed through the network(s) onto a reseller, who then relays the call onto the Information Provider who actually supplies the content of the service.

4) “Traditional” Text/Download-based



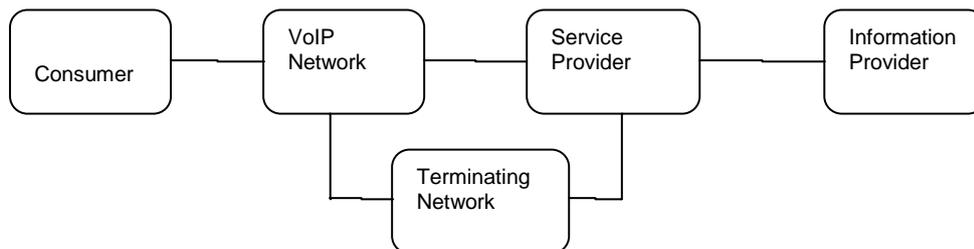
4.16 The consumer sends a text, or clicks on an icon on a WAP site, which is relayed through his/her mobile network onto an aggregator, who then relays the text/click onto an Information Provider who supplies the content of the service.

5) “Reseller” Text/Download-based



4.17 As before, the consumer sends a text, or clicks on an icon on a WAP site, and this is relayed through an aggregator. However, the information is also relayed through an Information Provider acting as a reseller, before arriving at the Information Provider who supplies the content back through the chain to the consumer.

6) “VoIP(Voice over Internet Protocol)”- based



4.18 The consumer makes a call through a virtual “VoIP” network, which is carried through internet-based systems rather than a PSTN⁶ network. In some instances, the VoIP network may relay the call onto a Service Provider by routing the call back into the PSTN network, and to do this they will need to use a Terminating Network. Usage of VoIP to provide PRS is still in early development. However, we can see that it may be possible for a Service Provider to also act as the Information Provider, or subcontract to an Information Provider further along the chain.

4.19 As the above example delivery chains make clear, the terms “Service Provider” and “Information Provider” can be found at different places in different delivery chains and the entities concerned may not always play the exact same role in the provision of the service to a consumer. The replacement of “Service Provider” and “Information Provider” with two other specific names, whatever those names are, will not alter this state of affairs.

4.20 We have further concluded that, despite the range of different delivery chains, only two types of responsibility exist in order to prevent consumer harm. They are:

- Due diligence and risk control of clients;
- Direct operational responsibility to ensure a service and its promotion do not breach the PhonepayPlus Code of Practice.

4.21 In all the example delivery chains set out previously, one party will have direct responsibility for the service on offer; the others will (with the possible exception of certain specific responsibilities around technical quality) be mainly responsible for due diligence and risk control around their direct client.

4.22 With these considerations in mind, PhonepayPlus proposes to term providers – as opposed to networks – either Level 1 or Level 2. Level 1 providers will be all those who are not networks, but which subcontract to other parties for the purposes of revenue share in respect of any premium rate phone-paid service. Level 2 providers will be the party in a premium rate delivery chain that is involved in the whole range of aspects of a phone-paid service (and, in nearly all cases, the party that receives the majority of the revenue from a consumer’s purchase). In practice, a delivery chain could contain multiple Level 1 providers, but only one Level 2 provider.

4.23 Whilst we are aware that one or more of the responsibilities for promotion, operation and content is sometimes contracted to another party – an example being electronic promotion that is subcontracted to a marketing affiliate – our consideration is that the party that is responsible for the promotion, operation and content of a premium rate service as a whole will be the Level 2, and will retain responsibility for each element of the service under the Code. As such, there will only be one Level 2 provider in any delivery chain.

4.24 It is worth noting that businesses involved in premium rate services may be both a Level 1 provider in relation to some of the services it operates, but a Level 2 provider for others. What defines whether a business is a Level 1 or Level 2 provider is its role in any given service; whether the business is subcontracted to other parties and the responsibility it has for the promotion, operation and content of the premium rate service in question. Level 1 providers who take contractual responsibility for certain aspects of the premium rate services that would otherwise be the responsibility of the Level 2 provider (for example, complaints handling or technical quality) could also be held accountable for any breaches of the Code of

⁶ Public Switched Telephone Network – i.e. the national network which carries calls made from fixed or mobile phones. This is based upon telephone exchanges or mobile masts which route calls from the start to end point through either digital/analog cables or mobile bandwidths.

Practice in these areas if they have failed to meet their contractual obligations to the Level 2 provider.

4.25 Such terminology is neutral in terms of technology, platform, or market, and is likely to remain future-proof. These terms still capture all those involved in the provision of services and allow PhonepayPlus to target regulation appropriately to all parties in a delivery chain, no matter how many links exist in it, whether that is responsibility for consumer protection outcomes or undertaking appropriate due diligence and risk control. In this way, we prevent abuse of the current system, whereby businesses who do not directly connect to a Service Provider are harder to trace, and thereby to enforce against.

4.26 It is also important to realise that this terminology facilitates our stated aim, supported by an overwhelming number of stakeholders who responded to the new Code Discussion Paper, of being able to effectively target regulation throughout the value chain. By assigning specific responsibilities to those who subcontract, as well as to those who we regard as being the party responsible for the promotion, operation and content of the service, we can create an environment that more effectively fosters compliance and that allows earlier identification, and a quicker, more targeted response, to consumer harm.

4.27 As such, paragraph 5.3.8 of the draft Code defines three parties who may be involved in the delivery of premium rate phone-paid services to a consumer. They are:

- Network operators,
- Level 1 providers (providers who are not Network operators but who subcontract to other parties), and
- Level 2 providers (the last contracted party in a PRS delivery chain who has responsibility for promotion, operation and content as a whole).

Q2 – Do you agree with these 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?

Guidance

4.28 The majority of respondents to the Discussion Paper, as well as the majority of general feedback we have received since the Discussion Paper was issued, emphasised the need for a more concise, outcomes-based Code to be adequately supported by appropriate guidance.

4.29 Many respondents welcomed the greater flexibility and opportunities to innovate that an outcomes-based approach would provide. An equal number of respondents warned that flexibility would have to be linked to ongoing clarity as to how the Code will be applied to specific types of service or industry practices. This is in order to ensure that all participants, whether large or small, new entrants or innovators, can proceed with confidence when devising and developing services.

4.30 Section 7 of the 11th edition of the Code contains rules that apply specifically to individual types of services, as defined by the product or service provided (e.g. Betting tipster services, Advice services), the mechanic by which a consumer is billed (e.g. Subscription services), or the likely consumer base for the service (e.g. Children's services).

4.31 The 11th edition of the Code is also supported by a number of different types of guidance or notifications. They are as follows:

- Statements of Expectation;
- Notices to Industry;
- Help Notes;
- Minutes of the Code Compliance Panel which, whilst not formally binding on subsequent sessions, may set a precedent for how future Code breaches are dealt with.

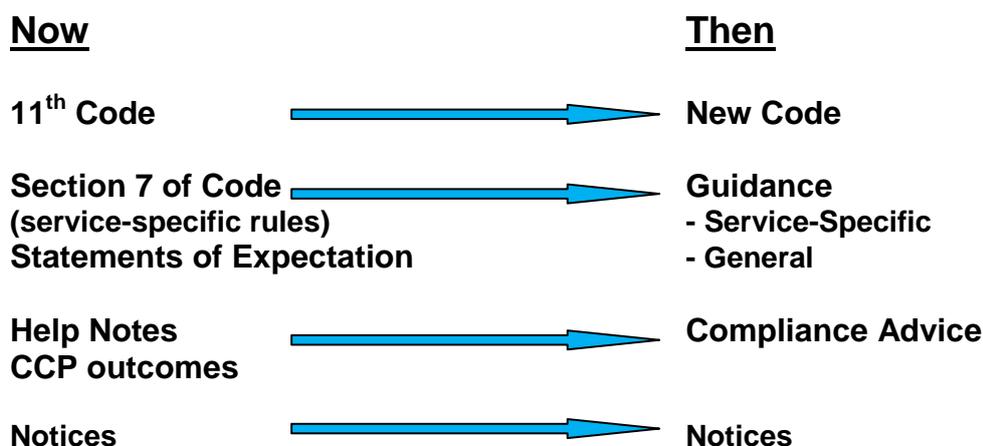
4.32 At present, none of these types of guidance are binding on PhonepayPlus' Code Compliance Panel – that is to say that the Panel is obliged to consider any such guidance when reaching a decision as part of a Tribunal⁷, but not to necessarily base its findings and conclusion upon it. However, the guidance does indicate how the Code Compliance Panel is likely to interpret the Code in most cases.

4.33 Whilst guidance and notifications have provided clarity through the life of the 11th edition of the Code, PhonepayPlus has received feedback from stakeholders (both in formal response to the new Code Discussion Paper and informally throughout the life of the 11th edition of the Code) suggesting that our current approach could be refined to better deliver three key outcomes:

- Consolidate guidance into the fewest possible number of sources.* The majority of industry stakeholders cite incidents where they have had to reference two or more pieces of guidance in order to gain “the full picture” around a particular service or practice. Whilst we link and cross-reference guidance on the PhonepayPlus website, this is not always easy to follow and the new Code provides us with an opportunity to review and consolidate existing guidance in a way that will increase clarity, especially for new entrants to the market.
- Quickly respond to newly-identified risks or unacceptable practice.* At present, any exploitation of new technology, or newly-discovered loopholes in regulation, that lead to consumer harm, often render a Code change impractical, due to reasons of time and the need to address the harm as quickly as possible. As such, PhonepayPlus is often required to create new guidance (or other requirements, such as a Prior Permission regime), which add to the volume of regulation or advice that providers must reference. As highlighted in the paragraph above, the greater the amount of guidance, the greater the potential administrative burden.
- Formalise the status of guidance and its relationship with the Code.* In doing so, PhonepayPlus expects to provide greater clarity to industry as to the required standard for consumer protection and how much weight the Code Compliance Panel is likely to attach to each type of guidance.

⁷ A Tribunal is where the Code Compliance Panel considers cases against PRS providers accused of breaching the Code of Practice.

4.34 Because of the consideration above, PhonepayPlus proposes that guidance around the new Code will be restructured as follows:



4.35 PhonepayPlus recognises that good guidance and advice to industry can only be achieved through proper engagement with industry and other stakeholders. For that reason, we are committed to carrying out appropriate pre-consultation with stakeholders on all guidance and advice to ensure that it is fit for purpose and workable. For guidance, we will also carry out a full public consultation to test the proposals before they are published. In this way we expect that guidance will become the agreed best practice standard for the industry and, as such, will carry significant weight within industry and with the PhonepayPlus Code Compliance Panel.

Section 7 of the 11th edition of the Code becomes Service-Specific Guidance

4.36 The service-specific rules currently contained within Section 7 of the 11th edition of the Code will be converted to Service-Specific Guidance. While the Code Compliance Panel is not bound by this Guidance issued by PhonepayPlus, it will carry greater weight than the current suite of guidance and advice, in that the CCP will consider whether a provider has followed the Guidance, or met the requirements of the Code by other means. We therefore expect this Guidance to be the starting point when providers consider the most effective means of achieving compliance.

4.37 Providers can choose not to follow Service-Specific Guidance that is relevant to their service, if they feel that the same standard and expectation of consumer protection can be met by other means. However, in such cases where complaints are referred to the CCP, the panel may examine whether compliance has actually been achieved through the provider's actions. If the CCP determines that a provider took no action to comply with the Code, or that the actions the provider took as an alternative to the Guidance did not deliver the same standard of consumer protection, then the behaviour is likely to be regarded as serious and will be reflected in the sanction.

4.38 We believe such an approach provides greater scope for providers who have a genuine desire to be compliant with the Code, but would prefer to achieve the aims of the Guidance by other means than set down by PhonepayPlus. To provide further support to providers wishing to achieve compliance with the Code through alternative means to the Guidance provided, PhonepayPlus operates a compliance advice service to industry, free of charge.

4.39 PhonepayPlus has identified eight areas where Service-Specific Guidance may be needed. In order to provide respondents with an illustration of this Guidance, we have attached illustrative drafts at Annex C to this document. The subjects are:

- Advice services
- Betting tipster services
- Children’s services
- Competitions
- DQ (directory enquires) services
- Fundraising and other charitable promotions
- Subscriptions
- Virtual chat and/or dating

4.40 This Service-Specific Guidance is attached only for comment and is still a work in progress, rather than a proposed draft. We welcome any comments from stakeholders on this illustrative Guidance at this stage, and we will issue revised Guidance for consultation later in the year.

4.41 Under the new Code, PhonepayPlus would reserve the right to alter existing pieces of Service-Specific Guidance, or create new ones, in order to quickly respond to emerging risks created by evolution in the phone-paid market. In all cases where Service-Specific Guidance is subject to change, or is newly introduced, the proposed new Code commits PhonepayPlus to a full period of consultation beforehand. As an interim measure, PhonepayPlus will, from time to time, issue “compliance updates” that will alert industry to issues with, or updates to, the current Guidance. This is to ensure that industry remains informed while the process of updating the full Guidance is carried out.

4.42 We believe that such a change is necessary in light of the increased diversity and pace of change in the phone-paid arena. Removing service-specific rules from the Code itself wherever possible will allow a greater flexibility than is currently viable. In practice, this will reduce the need for “emergency” changes to future Codes, as has previously happened with the risks arising from market developments, such as internet diallers.

4.43 Being able to quickly respond to identified risks in this way will ensure that consumers are quickly protected and that the industry has an ongoing opportunity – rather than only having the opportunity when the Code is reviewed – to comment and work with PhonepayPlus in arriving at Guidance, which will ensure consumer confidence and a level playing field for all providers.

Q4 – Do you agree with the proposal to convert Section 7 of the 11th edition of the Code into Service-Specific Guidance and to 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.

Statements of Expectation become General Guidance to industry

4.44 In a similar manner to the conversion of Section 7 of the 11th edition of the Code into Service-Specific Guidance, we propose to convert current Statements of Expectation into General Guidance to industry (Statements of Expectation are rarely specific to one type of service), and to create new General Guidance with full consultation as the need arises.

4.45 As with Service-Specific Guidance, this General Guidance will still not be binding on the Code Compliance Panel; however, as the agreed best practice standard, it should be the starting point when considering the most effective means of achieving compliance with the Code.

4.46 Providers can choose not to follow General Guidance that is relevant to their service, if they feel that the same standard and expectation of consumer protection can be met by other means. However, in such cases, the CCP may examine whether compliance has actually been achieved through the provider's actions. If the CCP determines that a provider took no action to comply with the Code, or that the actions the provider took as an alternative to the Guidance did not deliver the same standard of consumer protection, then the behaviour is likely to be regarded as serious and will be reflected in the sanction.

4.47 We believe that this change is necessary in order to ensure that providers have a clearer understanding from the outset, and a level playing field, in terms of the general standards that they must maintain in order to be regarded as being compliant with the Code.

4.48 Providers who wish to interpret the General Guidance in an alternative way will still be able to do so, and then will have the opportunity to justify their actions as having achieved the same level of consumer protection, as is currently the case with a Statement of Expectation.

4.49 As with Service-Specific Guidance, the creation of General Guidance, or indeed any changes to the General Guidance, will be subject to a full period of consultation.

4.50 Whilst we do not propose to issue illustrative drafts of all the General Guidance we propose at this stage, our view is that respondents to this consultation would benefit from seeing an illustrative draft General Guidance to industry that sets out our expectations around due diligence, risk assessment and control of clients. This is attached at Annex C for comments, but continues to be a work in progress.

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 to allow the creation of new General Guidance subject to appropriate consultation? If not, why not?

Q7 – Do you have any comments on the draft General 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.

Help Notes become Compliance Advice

4.51 In addition to the two types of Guidance, PhonepayPlus also proposes to continue to issue, and/or amend, advice as to the likely interpretation of the Code. As is currently the case, such advice would continue to be non-binding on the Code Compliance Panel, but would be considered by the CCP before they reached a verdict.

4.52 As is the current practice with Help Notes, we intend to issue Compliance Advice (or "compliance updates") as and when the requirement arises. Where necessary and practical, we would always seek to undertake pre-consultation and industry testing of Compliance Advice before publication. However, due to the frequency with which we foresee Compliance Advice being issued, we do not propose to carry out a full consultation on each proposal as we would with Service-Specific or General Guidance.

4.53 Our proposal to convert Help Notes and notification of outcomes from PhonepayPlus Tribunals is for two reasons. The first is to consolidate a number of different sources of information into one source, in order to make reference easier. The second is to ensure that, going forward, advice is linked, where necessary, to the outcomes of PhonepayPlus Tribunals. Such a process already happens at present, but we believe that these arrangements will provide greater clarity to the industry during the period in between a Tribunal outcome and the generation of any revised or new policy as a result of it. We believe, once again, that this approach will make non-binding advice easier to reference for our stakeholders.

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?

4.54 Notices to industry will remain as present, given they require mandatory action on the industry, for example by setting the rate of industry levy payable on premium rate services to fund regulation.

4.55 It is our opinion that the new approach to Guidance set out under the three headings above will allow PhonepayPlus to quickly and collaboratively respond to newly-identified risk. We believe this is in the interests of both consumers and those who participate in the industry compliantly. Our proposed approach will also concentrate all the necessary regulatory references into fewer documents, making it quicker to find and easier to cross-reference than at present.

4.56 Because the Service-Specific Guidance we propose will replace a Section of the existing Code, we have attached all the Service-Specific Guidance that we propose will take effect with the new Code for comment. We are currently undertaking an overarching review of existing Help Notes, Notices and Statements of Expectation, in order to ensure they are still relevant for the new Code. We therefore expect to consult on a revised set of General and Service-Specific Guidance later this year and in advance of publication of the new Code.

4.57 In the meantime, Annex C of this document makes reference to the need for new Guidance or advice, wherever we have identified a need. Respondents to this consultation are invited to comment on any other areas where they feel new Guidance or advice is necessary.

Q9 – Are there any other areas where Service-Specific Guidance or General Guidance to industry is necessary? Please state any areas you have identified.

5. Part Two – Outcomes to deliver consumer protection

Background to our proposals

5.1 The new Code Discussion Paper set out our consideration in respect of rules and provisions to be contained within the revised Code. We were, and are, keen for the new Code to focus providers of phone-paid services on the overarching goal of regulation, in addition to a focus on individual provisions. For this reason, the Discussion Paper set out the broad types of consumer harm that PhonepayPlus had identified as being relevant to the phone-paid market. The list was as follows and was generally agreed by respondents to the Discussion Paper:

- Economic (both in terms of money lost to a premium rate 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);
- 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 that consumers perceive to be offensive or indecent; and
- Anxiety or distress (including any concern caused to consumers, or someone else to whom a service is directed by a consumer).

5.2 The outcomes that we propose in this document reflect the need to prevent, where possible, or at least to mitigate, the types of consumer harm previously identified.

5.3 In addition to matching outcomes to deal with consumer harm, the market has evolved during the life of this Code to a point where some rules have been rendered obsolete by changes in technology, platform, marketing, or general provider practice.

5.4 As previously referred to on page 11 of this document, five individual provisions of the Code make up 50% of all the breaches that PhonepayPlus Tribunals have upheld. The five provisions concern Fairness, a failure to provide Contact information, a failure to provide clear and prominent Pricing information, and a requirement to act in line with the law (especially the Privacy and Electronic Communication Regulations as relates to unsolicited promotions). Adding the next five most successful provisions raises this percentage to approximately 67%.

5.5 Around two-thirds of provisions in the 11th edition of the Code that could be raised as breaches have never been raised/successfully upheld.

5.6 Whilst we must take a holistic view of these statistics – for example, some of the unused Code provisions may have acted as a suitable deterrent, hence why they remain unused – the proportion of provisions raised as breaches re-enforces our belief that some of the current Code’s provisions could be consolidated or removed.

5.7 Previous editions of the PhonepayPlus Code have clearly set out our expectations in respect of the phone-paid market at that time, and our new Code must continue to ensure this is done effectively. However, our goal is that this be achieved in a way that ensures the necessary level of protection is still delivered when technology or market practice changes.

5.8 We do not believe that consumers, or the market, benefit from rules that are overly difficult for the regulator to adapt to incorporate any risks presented by new technology or

market practice (particularly where they would necessitate a Code change). Such a situation can also place an inappropriate burden on the Code Compliance Panel regarding the interpretation of individual Code provisions.

5.9 Newly-identified problems can also necessitate the issuing of additional advice (such as a Statement of Expectation or a Help Note at present), or the creation of a Prior Permission regime. Whilst these actions allow us to ensure consumer protection and provide clarity to the industry, we do not believe that they represent optimum efficiency in terms of how PhonepayPlus uses time and resource.

5.10 Our proposal for the new Code, originally set out in the Discussion Paper, is to focus on outcomes first and foremost. These outcomes are supported by as many rules as are necessary to provide clarity. Some rules are then further supported by the Guidance referred to in the previous section.

5.11 By starting with the overarching outcomes we believe are necessary to avoid consumer harm, and so consequently ensure consumer trust, and then adding to them as necessary to provide clarity, we believe we have created a Code that will help consumers more easily understand their rights, and be able to quickly adapt to evolution in the market.

5.12 These proposals represent, in part, a departure from prescription and the status quo of previous Codes. In doing so, PhonepayPlus is aware that such an approach has the potential to reduce clarity in some areas, especially around requirements being introduced for the first time.

5.13 In order to ensure this does not happen, we will issue Guidance where necessary in order to clarify our expectations. Throughout the rest of this document, we will highlight any proposed parts of the new Code which we have already identified as requiring further Guidance. Respondents to this consultation are invited to highlight any other areas where they feel additional Guidance is required. (See Q9 above).

5.14 This section now goes on to provide a summary of our proposals in respect of each outcome. Many of the proposals will directly reference sections of the draft Code itself, which can be accessed here: <http://www.phonepayplus.org.uk/upload/New-Code-consultation-Annex-A-draft-Code.pdf>

Application of the Outcomes

5.15 The introduction to Part Two of the Code sets out that Level 2 providers will have responsibility for achieving compliance with the Outcomes (and Rules) in respect of the services they provide. Whilst Network operators and Level 1 providers will be required to take reasonable steps in the context of their roles to ensure the Outcomes and Rules are complied with, they will not normally be held in breach of any of the rules in Part Two themselves.

5.16 The exception to this norm is set out in sections 3.7 and 3.8 of the proposed new Code, which set out that, where a network or Level 1 provider provides any part of a service which directly impacts on consumers, then they (as opposed to any client) will be treated as a Level 2 provider for that particular part of the service and PhonepayPlus may raise breaches directly against them.

5.17 Respondents should also note paragraph 5.3.8c of the proposed new Code. This paragraph sets out that, where it is genuinely unclear whether a party is acting as a Level 1 or a Level 2 with respect to a specific premium rate phone-paid service, then PhonepayPlus

will decide who the Level 2 provider is with reference to any Guidance or schedule which we have previously issued.

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

Replication of Outcomes as Rules

5.18 PhonepayPlus intends this Code to focus on Outcomes first and foremost, so it is important that they themselves can be relied upon as enforceable obligations, and clearly linked to Guidance produced to support the Code. For this reason, the Outcomes below are also expressed as the first Rule in each of the six sections of Part Two.

Legality

Outcome – “That premium rate services comply with the law”

5.19 This Outcome will be supported by three Rules (2.1.1 to 2.1.3). In light of there being no arising concerns about whether Legality is appropriate to be included, and whether PhonepayPlus is able to enforce it, these Rules remain unchanged from paragraph 5.2 of the 11th edition of the Code. However, paragraph 5.2 of the 11th edition of the Code has now been split into three separate Rules in order to provide greater clarity at a glance for readers.

5.20 The phrase “services and their promotional material”, as used in the 11th edition of the Code, has been altered to the general term of “premium rate services”. This encompasses all aspects of a service, including promotional material.

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

Transparency and Pricing

Outcome – “That consumers of premium rate services are fully and clearly informed of all information likely to influence the decision to purchase, including the cost, before any purchase is made”

5.21 This Outcome will be supported by nine rules (2.2.1 to 2.2.9). However, for ease of reference, the draft Code splits them into two distinct groups:

- Service Transparency (all other information likely to influence a consumer’s decision to purchase)
- Pricing Transparency (all pricing information likely to influence a consumer’s decision to purchase)

Service Transparency

5.22 Rule 2.2.2 combines and updates the 11th edition of the Code's requirements (at section 5.8 and paragraph 3.3.5) around the need to provide the name of the provider, and a non-PRS UK contact number for consumer enquiries and complaints, in promotional material. Up until this point, PhonepayPlus has assumed that this is the responsibility of the Service Provider (or the Level 1 provider that connects with a Network operator, if new Code terminology is used). However, this, as with the majority of other Rules that support Outcomes, is now intended to be the responsibility of the Level 2 provider.

5.23 We recognise that promotion of premium rate phone-paid services is increasingly moving towards electronic media, especially text messages and pop-ups on PC screens. Both such media have limited space, especially so in the case of promotional text messages (limited to 160 characters). For this reason, we do not intend that this rule forces a provider to use their full, Companies' House name (i.e. "plc" or "ltd"). However we expect the name provided to be clearly identifiable to a consumer, and not abbreviated or in some other way confusing.

5.24 In addition, Rule 2.2.2 also requires that, where technically possible, promotional material should contain the relevant Level 2 provider's PhonepayPlus registration number. This requirement would not apply to, for example, promotional text messages which may not always contain enough characters to be able to provide a registration number in addition to other information that PhonepayPlus requires. However, any printed, broadcasted or web/WAP-based promotion would need to contain the provider's registration number, in effect: "PhonepayPlus registration number xxxx".

5.25 We believe that such a requirement will increase consumer awareness that premium rate services are regulated, which we believe will increase consumer confidence in the market. This would also provide another mechanism by which the provider can be easily identified by consumers.

5.26 Rules 2.2.3 to 2.2.5 update a number of different rules from the 11th edition of the Code, as follows:

- Rule 2.2.3 – applies parts of paragraph 5.7.2 of the 11th edition of the Code to all information likely to influence a consumer's decision to interact with a service (as opposed to just pricing information);
- Rule 2.2.4 – updates paragraph 5.13 of the 11th edition of the Code;
- Rule 2.2.5 – updates paragraph 6.2a of the 11th edition of the Code.

5.27 In all the above cases, there is no substantive change to the text used in the 11th edition of the Code.

Pricing Transparency

5.28 Rule 2.2.6 updates paragraph 5.7.2 of the 11th edition of the Code as relates specifically to pricing information, with one change. Para 5.7.2 of the 11th edition of the Code sets out that pricing information must be "*prominent, legible, horizontal, and presented in a way that does not require close examination*". The proposed new Code has altered this wording to read "*prominent, legible, visible, and proximate to the means of access to the service*". It is intended that the previous term "horizontal" be covered by the new term "visible", which takes account of the fact that pricing information may be horizontal, but still not visible. The key consideration here is that consumers should be able to easily identify pricing information before accessing a service, while recognising that the manner of achieving this may differ depending on the platform the service is being accessed through.

5.29 The new requirement that pricing information is "proximate to the means of access to the service", is intended to cover scenarios where pricing is prominent, legible and visible, but is not located closely to the number, shortcode, code or other means of access to the premium rate service. Numerous cases during the life of the 11th edition of the Code have highlighted examples where consumers have failed to notice pricing information that was situated apart from the shortcode (or other means of access).

5.30 This is a particular risk where websites, WAP sites or SMS messages are used to advertise, all of which might display a number, shortcode or clickable access icon (in the case of web or WAP sites) at the top of the page, but situate the price in such a way that requires the consumer to scroll down in order to read it.

5.31 By including a requirement for pricing information to be proximate to the means by which a PRS is accessed, we are aware that this could have a particular effect on web- or WAP-based technology, which often requires consumers to take more than one step in order to access, select and pay for a PRS. However, we believe the principle of pricing transparency for consumers ahead of accessing the service should be equally applied to services, regardless of the platform they operate on.

5.32 The 11th edition of the Code was published under an assumption that consumers would be able to access a service and confirm payment for it simultaneously, either with a telephone call or by texting a mobile shortcode. Whilst this was the case for all PRS, there was no need to clarify at which stage of the process consumers would need to know the price, as the only way a provider could comply was by including pricing information in promotional material.

5.33 With the growth of web- and WAP-based PRS that are sold using a secure mechanism for phone payment, where the consumer accesses a site in order to select from a range of PRS and then goes through subsequent stages for secure payment, this is no longer the case.

5.34 PhonepayPlus has considered the method by which secure mechanisms for phone-payment work and present information to consumers. We recognise that one of the aims behind them is that a consumer should always be clearly informed of the price before they consent to a charge. However, we also recognise that this does not guarantee that consumers are informed of the price of a PRS before they select it for purchase, only before they confirm payment. We have previously considered that a significant number of consumers, possibly the majority, may prefer to be informed of the price at the selection stage, rather than at the stage where they confirm payment.

5.35 We have received a number of views on this subject from industry stakeholders, many of whom are concerned that consumers fail to proceed with purchases if they are given too much information, or constantly informed of the price, at each stage. They cite that consumers are failing to purchase because they believe they are being charged more than once for the same service.

5.36 However, PhonepayPlus has not, to date, received conclusive evidence from any provider that consumers are failing to complete a purchase for this reason, despite inviting this evidence almost 18 months ago during our “Review of Mobile Phone-paid Services and their Marketing”. It is a fact that consumers make web-based purchases every day, during which they are informed of the price of a product during both selection and payment (e.g. Amazon.co.uk), and do so without any confusion or belief that they are being charged more than once.

5.37 We intend to conduct consumer research concurrently with the consultation of this document. The research will test the “Outcomes to deliver consumer protection” section of the new Code with consumers to ensure we have achieved our goal of focusing on the areas of risk that are of most relevance and concern to them. We intend to test consumer perceptions with regard to secure mechanisms for phone-payment as part of this research.

5.38 It is important to note that, regardless of the outcome of this research, PhonepayPlus does not intend to create specific rules in the new Code with regard to secure payment

mechanisms. To do so would be to go against the flexibility that is one of our goals. Instead, we propose to consider whether it is necessary to create Guidance around how Rule 2.2.6 will be interpreted once we have received feedback from our consumer research and from respondents to this consultation paper.

5.39 Rules 2.2.7-2.2.9 update a number of different rules from the 11th edition of the Code, as follows:

- Rule 2.2.7 – updates paragraph 5.7.6 of the 11th edition Code (please note that the phrase “operational and instructional” has been removed, in light of a number of cases where chargeable messages were not relevant to the consumer’s interaction with a service, but could not be classed as operational or instructional. As such, we propose to widen the scope of the Rule to include any charged messages that are not relevant to a service);
- Rule 2.2.8 – updates paragraph 5.7.4 of the 11th edition of the Code (please note that the ability to seek written permission to exceed the spending limit, or to be exempted from any other part of the new Code, would still exist under the proposed Prior Permission section – see pages 58-59);
- Rule 2.2.9 – updates paragraph 5.9.2 of the 11th edition of the Code.

5.40 In all the above cases, save for the notes added in brackets, there is no substantive change to the text used in the 11th edition of the Code.

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 issue 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?

Fairness

Outcome – “That consumers of premium rate services are treated fairly and equitably”

5.41 This Outcome will be supported by 12 Rules (2.3.1 to 2.3.12).

5.42 Rules 2.3.2, 2.3.3, and 2.3.10 update paragraphs 5.4.1a & b of the 11th edition of the Code. Rule 2.3.2 does not substantively change the text at paragraph 5.4.1a of the 11th edition of the Code.

5.43 Rule 2.3.10 changes the text at 5.4.1b of the 11th edition of the Code and highlights that PRS must not take advantage of any group that is vulnerable due to personal circumstances. This is in light of a number of cases where a PRS has targeted consumers who are on benefits, or who have suffered from financial hardship as the result of a widely publicised event (e.g. the collapse of Northern Rock).

5.44 Rule 2.3.3 is an additional rule, in order to clarify that consumers cannot be charged without their prior consent. An increasing number of cases of consumers being charged, or subscribed, without their knowledge and consent have come to light over the life of the 11th edition of the Code. In such cases, providers have attempted to prove consent to varying degrees of quality, and so we feel it is right to emphasise that proof of consumer consent must be clearly verifiable.

5.45 In practice, we are aware it is difficult to prove the specific action of consent by a consumer, which is an internalised decision on his/her part. However, where consumers allege that they have been charged without consent, we would look for a record that proved, beyond reasonable doubt, that a transaction had taken place. We would then couple such a record with promotional material to establish whether consumers entered into a transaction with all the necessary information required by the Code.

5.46 The final statement to our “Review of Mobile Phone-paid Services and their Marketing” set out what is acceptable proof of consent in terms of consumer opt-in, and this guidance will be reviewed at a slightly later stage in order to ensure it continues to provide clarity for the new Code.

5.47 Rule 2.3.4 updates paragraph 5.4.2 of the 11th edition of the Code. The text has been slightly altered to reflect that a growing number of PRS purchases are now downloads, as opposed to voice calls or text messages, and so these should also be delivered without delay after the consumer’s payment has been confirmed.

5.48 Rule 2.3.5 updates paragraph 5.4.3 of the 11th edition of the Code, with a slight, non-substantive change to the text.

5.49 Rule 2.3.6 is a new rule, proposed in order to address increasing concerns about consumers receiving unexpectedly high telephone bills that result from usage of premium rate phone-paid services – a phenomenon known as “bill shock”. Bill shock can result for two main reasons:

- Where a phone, most usually a fixed handset, is used by someone who is not the bill-payer to call voice-based PRS;
- Where a consumer repeatedly calls, texts or otherwise accesses a service without recognising the cumulative cost of doing so. This can happen even where a consumer has been clearly and transparently informed of the cost per minute, or per interaction, with the service.

5.50 In practice, Level 2 providers are able to track usage of their services by individual phone numbers in most circumstances (the possible exception is where a consumer’s number is ex-directory or otherwise withheld by his/her originating network). For this reason, we consider that Level 2 providers should identify any pattern of usage that could be considered unusually high (i.e. well above average for that particular service), and make reasonable and prompt efforts to alert the bill-payer to this.

5.51 In this way, bill-payers will be able to either identify misuse of their phone, rein in their usage of the service in order to keep within their own budget, or confirm that they are aware of the usage and are happy with it.

5.52 Rules 2.3.7 and 2.3.8 update paragraphs 6.3.1c & d of the 11th edition of the Code. The text has been altered so that it will also apply to providers of Virtual chat and/or dating services (which are most often adult in nature), as well as those who provide adult services. This is in light of a rising number of cases where children, or non-bill payers, have used Virtual chat or dating services and incurred large bills as a result.

5.53 In addition, we have emphasised that these rules apply to both Level 1 and Level 2 providers. Whilst we would not expect Level 1 providers to carry out constant monitoring of all their adult services, we do expect them to take steps to block any usage that they feel is unauthorised in the course of their due diligence monitoring of each client.

5.54 Rule 2.3.9 updates paragraphs 7.5.3a & c of the 11th edition of the Code and is aimed specifically at the protection of children. Rule 2.3.12b is also aimed specifically at the protection of children and updates the spending limit set out at paragraph 7.5.4a of the 11th edition of the Code, with no substantive change to the text. In addition to these rules, we intend to release Service-Specific Guidance around Children's services.

5.55 Rule 2.3.11 combines and updates paragraphs 5.14 and 7.12.6a of the 11th edition of the Code. Prior to the arrival of PRS on mobile, there was little need to specify a method of exit from PRS, as charges would end immediately as a consumer put down the phone. More recent editions of the Code have sought to specify the texted command 'STOP' as being the de facto method of exit from any PRS delivered to a mobile handset. The use of the 'STOP' command is now widely recognised among consumers of PRS, but some consumers do still express a worry that they will be charged when they text 'STOP' in order to opt out of a service.

5.56 The revised text that we propose seeks to recognise a growing number of different types of shortcode in the mobile PRS space, not all of which are able to receive 'STOP' commands at standard rate. Our understanding is that voice shortcodes cannot accept a 'STOP' command, and that services based around MMS text messages, as opposed to the widely used SMS, may end up costing the consumer more than a standard rate to exit if the 'STOP' command is used.

5.57 In order to ensure consumers continue to have a clear idea of how to opt out from any PRS, PhonepayPlus proposes to issue General Guidance to industry that sets out the circumstances that require that the 'STOP' command be the method of exit. This Guidance will set an expectation that the 'STOP' command should be used wherever it is technically possible to use it. If the 'STOP' command is not technically possible, then the method of exit should be made clear to the consumer before he/she incurs a charge.

5.58 Rule 2.3.12 updates a number of different paragraphs of the 11th edition of the Code around spending caps, or the requirement to send spending reminders after a certain amount has been spent.

5.59 Rule 2.3.12a updates paragraphs 7.6.11b of the 11th edition of the Code around spending caps, with no substantive change to the text. Rule 2.3.12b, as previously stated, updates the spending limit at paragraph 7.5.4a of the 11th edition of the Code.

5.60 Rule 2.3.12c updates paragraph 7.3.3 of the 11th edition of the Code, around the requirement for Virtual chat services to provide certain information, as well as require a reaffirmation of the consumer's original opt-in before continuing the service. This rule has been altered to reflect ongoing concerns about Virtual chat services. Consumers will now need to be informed that £10 has been spent (rather than the cost of the service) every time they have spent £10.

5.61 In addition, consumers will need to provide a positive response, separate from their interaction with the service, that they wish to continue before the service continues to charge them. This change is in response to a growing number of cases where a spend reminder has been provided to consumers within the text of a chat message, often one of an adult nature, and the consumer's reply to the chat element of the message is taken by the provider to be proof that the consumer wishes to continue.

5.62 Rule 2.3.12d updates paragraphs 7.12.4 and 7.12.5 of the 11th edition of the Code, with no substantive change to the requirements.

5.63 At present, Rule 2.3.12a-d does not change the spending caps, or thresholds, at which reminders must be provided, from the levels at which they are currently set in the 11th edition of the Code. If the current limits are carried across to the new Code, it would require a Code amendment to change them. We believe it is appropriate therefore to ask the industry whether the current levels are currently fit-for-purpose, as they have not been reviewed since the launch of the 11th edition of the Code in 2006. We should be clear that we have no evidence to suggest that the current limits are not appropriate for the market, so any requests for them to be changed should be accompanied by robust evidence as to why any change would be needed.

Implication by Chat or dating services that a meeting is possible

5.64 Over the last two years, we have received an increasing number of complaints, and opened investigations as a result, about services that imply that users will be able to meet other users of the service, with the implication often being that the meetings will be sexual.

5.65 We recognise that there is a certain fantasy element to all adult services, but we are aware that some consumers have accrued large bills in texting (or less frequently, calling) an operator employed by a provider, whom they believed was another private user of the service that would eventually meet them. This impression was re-enforced by advertising that often implies that consumers will be able to meet others almost straight away, and that these other users are keen to meet them.

5.66 In drafting the new Code, we considered an additional rule to set out our expectations clearly, in order to ensure that consumers are not misled into believing they can meet others, unless that is the case. We have decided against a specific Rule, but will add paragraphs to this effect to the Service-Specific Guidance around Virtual chat and/or dating, which have a clear link to the requirement not to mislead in Rule 2.3.2 of the new Code. In cases where we feel it is necessary, we will ask the provider to prove that the service actually offers genuine users the chance to talk to each other.

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.

Privacy

Outcome – “That premium rate services do not cause unreasonable invasion of consumers’ privacy”

5.67 This Outcome will be supported by four Rules (2.4.1 to 2.4.4).

5.68 This Outcome represents an amplification of the 11th edition of the Code, as we have previously used paragraph 5.2 of the 11th edition of the Code (Legality) to deal with any unreasonable invasion of consumers’ privacy, most often through unsolicited marketing.

5.69 Unsolicited marketing is covered in law by the Privacy and Electronic Communication Regulations (PECR) 2003, which are enforced generally by the Information Commissioner’s Office (ICO). Previously, PhonepayPlus has not sought to enforce PECR in respect of PRS, but rather take a view on whether PECR has been breached by using paragraph 5.2 of the 11th edition of the Code.

5.70 Whilst providers could, in theory, challenge any decision we take with the ICO, we have worked closely with the ICO to ensure that it is content with the views we take regarding unsolicited communication in the premium rate phone-paid market. The ICO has acknowledged that PECR was not written for any specific market and, as a result, recognises that PhonepayPlus has specific expertise in how consumers are affected by unsolicited communications that promote PRS.

5.71 As such, the ICO had early sight of our intentions to introduce a specific Outcome regarding Privacy, and the Rules that would support it. This decision was taken in light of the rise in complaints regarding unsolicited marketing, especially to mobile handsets, during the life of the 11th edition of the Code so far.

5.72 These complaints centre around the perception many consumers have that unsolicited marketing to their mobile handset – a device that many consumers clearly regard as more personal to them than a landline or PC – is particularly intrusive. This problem is compounded by the fact that, despite consumers of premium rate services being generally aware of the ‘STOP’ command, many of them equate promotional texts with “spam” emails, and so choose to ignore them in the hope that they will go away. A common consumer perception is that texting ‘STOP’ equates to replying to a spam email (i.e. it makes the business aware of your existence, and so attracts more promotional texts).

5.73 In addition, many consumers associate the receipt of a text from a mobile shortcode with being charged, and PhonepayPlus receives a significant number of complaints from consumers who are unaware whether they have been charged or not for a recently-received promotional text message.

5.74 The four proposed Rules attempt to provide clarity to providers as to our expectations when they market to consumers, something that was previously addressed in PhonepayPlus’ ”Review of Mobile Phone-paid Services and their Marketing”⁸, but which we now believe should be placed in the Code. The rules set out to cover the most frequent causes of consumer harm in terms of the invasion of privacy, which, on the basis of our investigations, are as follows:

- Contacting consumers without their previous consent, and/or failing to provide a clear and simple mechanism for consumers to opt out of any future contact;
- Providing inadequate evidence that consumer consent was previously given;
- Collecting or exchanging consumer details without consent (save where this is only to effect a refund);
- Making it clear to consumers how their data will be used before they consent to future marketing, and giving them the opportunity to accept (as opposed to refuse) such usage.

5.75 The last bullet point of those above addresses the issue of consumers having “unwittingly” consented to marketing of PRS directly to their handsets when they enter their mobile number into a website (usually in order to gain access to the website in order to browse the products on offer). The Privacy and Electronic Communication Regulations allow marketing to a consumer by any party from whom they have made a purchase, or with whom they have been in negotiations for purchase.

5.76 Where purchases such as furniture or a car are concerned, negotiations for a purchase will be of a nature that is clearly memorable to the consumer; not least because

⁸ A link to this document, which is available on the PhonepayPlus website, can be accessed here: http://www.phonepayplus.org.uk/upload/Mobile_White_Paper.pdf

the brand name of the supplier will be very visible. With a product such as premium rate phone-paid services, which are normally of a nature that suggests instant access and/or gratification, the consumer is unlikely to remember entering his/her number into a website, especially if a purchase is not subsequently made. As a result, a significant number of consumers, judging by complaints to PhonepayPlus, perceive later marketing to be unsolicited.

5.77 For these reasons, it has been suggested that consumers of premium rate phone-paid services would benefit from being clearly told of an intention to market at the time they provide personal data, and being given the opportunity to opt in to that marketing. Rule 2.4.4 and Rule 3.6.2 (see page 57) set out such a requirement in combination with each other, and we would welcome comments on whether this approach will provide consumer clarity.

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 in to 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 in to a service? If not, why not?

Avoidance of harm

Outcome – “That premium rate services do not cause harm or unreasonable offence to consumers or to the general public”

5.78 This Outcome will be supported by nine Rules (2.5.1 to 2.5.9).

5.79 Rules 2.5.1 to 2.5.5 update paragraphs 5.3.1 and 5.3.2 of the 11th edition of the Code; specifically, as follows:

- Rule 2.5.1 – updates paragraph 5.3.1e of the 11th edition of the Code;
- Rule 2.5.2 – updates paragraphs 5.3.1d & f of the 11th edition of the Code (with additional text to reflect a number of groups, as well as race);
- Rule 2.5.3 – updates paragraph 5.3.1c of the 11th edition of the Code;
- Rule 2.5.4 – updates paragraph 5.3.1g of the 11th edition of the Code;
- Rule 2.5.5 – updates paragraph 5.3.1b of the 11th edition of the Code.

5.80 Rules 2.5.6 and 2.5.7 update paragraph 5.12 of the 11th edition of the Code. As paragraph 5.12 is one of the most often raised breaches of the 11th edition of the Code, the paragraph has been split into two separate rules in order to give clarity at a glance to readers. Please note that, once again, we have specified that we will expect Level 1 providers to take any appropriate action in the course of carrying out ongoing due diligence.

5.81 Rule 2.5.8 updates paragraph 7.5.3b of the 11th edition of the Code, with no substantive changes in the text.

5.82 Rule 2.5.9 updates paragraph 7.4.1a of the 11th edition of the Code, with one substantive change requiring any advice given to consumers to be in line with any police advice around meeting strangers through a Contact or dating service. We believe this is good practice.

5.83 Please note that the Rules above do not, at a glance, incorporate paragraph 5.3.2 of the 11th edition of the Code. In reviewing this paragraph, which concerns PRS that contain violence, sadism, cruelty, or foul language, we must recognise that an element of all these may be available in some adult services. Whilst we will still review whether or not such services have been appropriately promoted and/or accessed, and whether they are in line with the law, we believe it is right to use Rule 2.5.1 to judge the circumstances of each case on its own merits in order to conclude whether serious or widespread offence has occurred.

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

Complaint handling

Outcome – “That consumers are able to have complaints resolved quickly and easily by the Level 2 provider responsible for the service and that any redress is provided quickly and easily.

5.84 This Outcome will be supported by six Rules (2.6.1 to 2.6.6).

5.85 This Outcome and the supporting Rules seek to significantly expand on paragraph 3.3.5 of the 11th edition of the Code. Para 3.3.5 was intended to ensure that consumers would be able to call a non-PRS UK number (stated in promotional material) and have their complaint dealt with by the provider concerned.

5.86 Our experience of enforcing this rule over the life of the 11th edition of the Code so far is that it has not provided enough clarity as to our expectations in respect of consumer complaint handling. Research we have conducted indicates that this is an issue that is important to consumers, with consumers having to make an average of between three and seven calls⁹ (depending on the severity of the complaint) in order to resolve their problem with a PRS.

5.87 Whilst not all providers handle consumer complaints badly, a significant number provide a non-PRS UK number but do not have staff in place to answer it at the advertised times. We have ourselves tested some complaint lines that seem never to have any staff available. Similarly, a significant number of providers, often those who have poor compliance records, have a complaint-handling process that is unclear, or sometimes deliberately confusing or confrontational.

5.88 Where this type of bad practice occurs, it is hard for us not to conclude it is a deliberate attempt to guide the consumer into abandoning his/her complaint. This is especially significant in a market such as premium rate, where the cost of a service (and so the eventual refund) is likely to be low. This increases the consumer’s propensity to abandon a complaint relatively quickly, on the grounds that the loss of a relatively small amount of money is unworthy of further effort. As a result, the original bad practice on the part of the provider is less easily identified and addressed.

5.89 We are currently conducting an extensive piece of work, in conjunction with the industry, around the experience of consumers when they complain, the conclusions of which will be tested separately from the Code, as they go further than the requirements we seek to place on Level 1 and 2 providers here. However, this work has, in part, informed our proposals and may inform General Guidance to industry to clarify our expectations further around Complaint handling.

⁹ Source: “What happened to customers who complained about a PRS?” – Recom June 2009.

5.90 It is important to stress that, in part, this Guidance will take account of the different sizes of business (or the existence of sole traders), different sizes in consumer base (and so different expectations around the capacity for handling consumer complaints) and different sectors that may carry different requirements in terms of compliant handling.

5.91 The Rules that support the Complaint handling Outcome seek to address the most common causes of consumer frustration, which, on the basis of our research and experience, are as follows:

- A failure to make consumers aware of how to complain;
- A failure to progress the consumer's complaint quickly and to explain to the consumer how this will be done;
- A failure to provide the contact details for another provider (if the first provider is not the most appropriate handler of a complaint);
- A failure to give refunds quickly (including any costs incurred in calling to complain) and in a manner that the consumer can access;
- A failure to provide PhonepayPlus' contact details to consumers who are unsatisfied with the way their complaint is being handled;
- A failure to prove how a consumer's complaint has been dealt with, when requested by PhonepayPlus.

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

6. Part Three – Registration and Responsibility

Background to our proposals

6.1 The Discussion Paper published in June 2009 acknowledged that the size and diversity of PRS delivery chains had grown since the launch of the 11th edition of the Code. The Discussion Paper set out two distinct types of chain – voice and SMS – but also identified that other models would develop in the near future around VoIP or broadband.

6.2 In addition, the Discussion Paper acknowledged that the roles of each party within the delivery chain – i.e. Networks, Service Providers and Information Providers (to use the terminology of the 11th edition of the Code) – may differ depending on the type of service offered or the billing mechanic used. We have provided a more detailed illustration of these differences at pages 21-22 of this document.

6.3 At present, the majority of the responsibility for the Code falls on the Service Provider. In deciding whether this was still appropriate, the Discussion Paper examined not only the changing and increasingly flexible roles that different parties take in PRS delivery, but also investigations over the life of the 11th edition of the Code up to June 2009. An analysis of investigations illustrated the following:

- a) 65% of all upheld cases during the life of the 11th edition of the Code involve Service Providers that have breached the 11th edition of the Code on more than one occasion;
- b) A third of all upheld cases involve Information Providers that have breached the 11th edition of the Code on more than one occasion;
- c) Over a fifth of all upheld cases contain at least one upheld breach against a provision that the same Information Provider was previously involved in breaching.

6.4 In looking at these statistics we had to acknowledge that the majority of cases involve both Service Providers and Information Providers, and that responsibility for breaches may involve more than one party in the value chain. Under current regulations, Service Providers will inevitably be involved in more upheld breaches, given their position in the delivery chain and the way that regulation is targeted.

6.5 However, in accepting an argument that the 11th edition of the Code may hold some Service Providers responsible for a breach that they did not directly cause, we also recognised that the figure of 65% 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.

6.6 The Discussion Paper's conclusions around the issues of where in the delivery chain responsibility should apply can be summarised as follows:

- Every part of the value chain should assume 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.
- The new Code should facilitate the targeting of as many parties within a delivery chain as have been involved in causing consumer harm. Whilst it is right that we should target a business or individual that has directly caused the consumer harm, it

is also right that we target any other party, sitting higher up the delivery chain, that has allowed consumer harm to occur, either deliberately, or through negligence.

- In order to target as many parties within a delivery chain as have been involved in causing or allowing consumer harm, PhonepayPlus would require more information about all parties, especially those lower down the delivery chain (i.e. Level 2 providers), than we currently have.
- In order that the above approach works, PhonepayPlus would need to consider extending some of our current requirements around provision of information; either to move them from being voluntary to mandatory, or to extend them along the delivery chain so the requirement could apply to all parties.

6.7 This section now goes on to set out our proposals in respect of the responsibilities that should lie with Network operators, Level 1 providers and Level 2 providers. Many of the proposals will directly reference sections of the draft Code itself, which can be accessed here: <http://www.phonepayplus.org.uk/upload/New-Code-consultation-Annex-A-draft-Code.pdf>

General Responsibilities

6.8 The paragraphs that cover General Responsibilities (3.1.1 to 3.1.8) update and add to the requirements set out at paragraphs 2.1 and 2.5 of the 11th edition of the Code, and extend those requirements from Network operators to also encompass Level 1 and Level 2 providers. These paragraphs – along with those in respect of Contracts later on in the document – also remove the need for sections 3 and 4 of the 11th edition of the Code (which applied specifically to Service Providers and Information Providers respectively).

6.9 Paragraphs 3.1.1 to 3.1.8 have therefore been updated accordingly, but stakeholders should also note four key additions to this section:

Requirement to ensure complaints are handled appropriately

6.10 We have made it clear in previous sections that responsibility for compliance with the Outcomes and Rules in Part Two rests with the Level 2 provider (with the exception of circumstances where a Level 1 provider provides any part of a service that directly impacts upon consumers). However, Network operators and Level 1 providers retain a responsibility to take reasonable steps in the context of their roles to ensure the Outcomes and Rules are complied with, a responsibility that is restated at paragraph 3.1.1a.

6.11 In the context of this responsibility, we would like to draw particular attention to the requirement set out at paragraph 3.1.1d for Network operators and Level 1 providers to ensure that complaints are being handled appropriately.

6.12 Whilst Level 2 providers retain the responsibility for handling consumer complaints, it is clear that consumers do not always complain directly to the Level 2 provider. Often complaints about services will be directed to the consumer's billing network in the first instance.

6.13 In the case of mobile services that operate on "shared" shortcodes (these are shortcodes that provide access to more than one service, with a consumer's preference most often being established by his/her use of a keyword, or selection of a particular icon on a WAP or mobile website) these will often be provided by more than one Level 2 provider. As a result, the Level 1 provider responsible for the shortcode may prefer to have its contact

details listed on PhonepayPlus' Number Checker in order that they can ensure any complaints arising from a consumer's use of the Number Checker are routed appropriately.

6.14 In either of these circumstances, paragraph 3.1.1d would reflect our consideration that consumers should be quickly provided with contact details for the Level 2 provider responsible for the service (and therefore for resolving the complaint).

6.15 PhonepayPlus is currently working with the Industry Liaison Panel on industry best practice for handling consumer complaints. One suggestion coming out of this work is that, in circumstances where a Level 1 provider (or Network operator who contracts directly with a Level 2 provider) discovers that a Level 2 provider is not meeting its responsibilities around complaint handling, they should have a degree of responsibility to ensure the complaint is progressed quickly and transparently.

6.16 As with other changes in the proposed new Code, we accept that Network operators and Level 1 providers will require a degree of Guidance around our expectations in respect of paragraph 3.1.1d. We expect our joint work with industry to reach some conclusions in the near future, at which point we plan to consult on the best practice arrangements proposed as a Guidance note to the new Code of Practice.

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

Requirement to ensure services are of adequate technical quality

6.17 Paragraph 3.1.8 requires that all Networks operators and providers (both Level 1 and Level 2) take reasonable steps, in the context of their roles, to ensure that services are of an adequate technical quality. This updates paragraph 3.3.3 of the 11th edition of the Code, with the only substantive change being a specific reference to technology that enables exit from a service.

6.18 The 11th edition of the Code applies this requirement only to Service Providers. It is clear that the increasingly diverse range of delivery chains, and different roles within them, means that the technology required to operate and deliver them is by no means always concentrated in the hands of a Level 1 provider, or any other one party in the chain. For this reason, we propose to extend this requirement to all parties in a delivery chain, within the context of their roles.

Q22 – Do you agree with the proposals around technical quality? If not, why not?

Internal risk control

6.19 Paragraph 3.1.5 requires that all Network operators and providers (both Level 1 and Level 2) have such arrangements in place to ensure they can comply with the Code, and to demonstrate those arrangements to PhonepayPlus upon request. In effect, this requires all terminating networks and providers to check that their own compliance procedures, whatever form those take, enable them to fulfil their responsibilities – in effect, to perform due diligence on themselves.

6.20 We believe that such a requirement will improve regulatory effectiveness by enabling PhonepayPlus to earlier address failings that do not relate to an individual service, but rather arise from a Level 1 provider's, Level 2 provider's or a Network operator's systematic failure to learn from their previous mistakes, or the publicised mistakes of others.

6.21 Where Networks operators or providers (Level 1 or Level 2) are involved in a series of breaches within a relatively short timeframe, we will require that they undertake an enforced compliance audit by an independent third party. Through this action, PhonepayPlus aims to address failings in internal compliance to prevent consumer harm caused by avoidable lapses in process.

Q23 – Do you agree with the proposals around internal risk control (paragraph 3.1.5 of the draft Code)? If not, why not?

Risk assessment and control on clients

6.22 Ultimately, the possession of a connection to a phone-paid service is a fundamental benefit to all those who share revenue from it, be it Network operators, Level 1 providers or Level 2 providers. So, where a connection is subcontracted along the delivery chain to a client, we would expect the party that has subcontracted it to deliver an appropriate degree of risk assessment and control on its clients on an ongoing basis.

6.23 The Discussion Paper set out PhonepayPlus' belief that prevention and mitigation of consumer harm are of greater benefit, both to consumers and the industry, than punishment of harm after the event. The Discussion Paper went on to identify due diligence, followed by an assessment of risk once a client is contracted, and then an action plan to monitor and control any risk, as one of the key steps towards preventing consumer harm from occurring.

6.24 Whilst we would not usually expect 24-hour blanket monitoring from any Network operator or provider, the Discussion Paper set out our opinion that any party that subcontracts with a client along the delivery chain should have a reasonable awareness of the potential risk that such a client, and the services they run, poses to consumers.

6.25 Further to this, the Discussion Paper stated PhonepayPlus' belief that it is not unreasonable to expect terminating networks or providers, under certain circumstances, to take steps to monitor and control that potential risk; and to face sanctions if consumer harm occurred as a result of reasonably identifiable and controllable risk.

6.26 To this end, 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.

6.27 In the case of those who do not contract directly with a Level 2 provider, PhonepayPlus acknowledges that it would be difficult, and unreasonable, to expect those parties to directly monitor services provided by a Level 2 provider further down the delivery chain. In such cases, we would expect that Level 1 providers carry out a reasonable assessment of their client's actions in regard to ensuring compliance further down the value chain.

Further consideration around the application of risk assessment and control to Network operators

6.28 With respect to terminating Network operators, the requirement to perform risk assessment and control becomes more complex due to the differing characteristics in the variety of PRS delivery chains. Some terminating Network operators, especially in delivery chains relating to voice-based services, contract directly with Level 2 providers. In such cases, we feel it is not unreasonable to expect that Network operator to carry out reasonable checks on their clients' services and their general compliance with the Code.

6.29 However, it is clear that by no means do all terminating Network operators connect directly with a Level 2 provider. In the case of some larger terminating Networks operators, in both the voice and text-based sectors of the market, they connect with a significant number of Level 1 providers, who, in turn, connect with a range of Level 2 providers. As such, the potential number of Level 2 providers, and the services that a terminating Network operator might have to monitor as part of a duty to check whether their client (the Level 1 provider) is controlling risk, is very high.

6.30 In light of the two paragraphs directly above, we have considered whether some, or all, terminating Networks operators should be exempted from the need to perform ongoing risk assessment and control, and be required only to perform due diligence on their clients (similar to their current responsibility in the 11th edition of the Code, and updated at paragraph 3.3.1 of the new Code).

6.31 As such, we present three straightforward options regarding the application of rules around risk assessment and control to terminating Network operators:

- a) Network operators are exempted from the need to perform risk assessment and control where they do not contract directly with a Level 2 provider;
- b) Network operators are required to perform risk Assessment and control to a reasonable degree on all their clients, with PhonepayPlus' expectations varying dependent on whether that client is a Level 1 or Level 2 provider;
- c) Network operators are exempted from the need to perform risk assessment and control on any of their clients, but, as with options a) and b), will have to perform due diligence on their clients.

6.32 We have already stated that we do not feel it is reasonable to expect some terminating Network operators to perform actual checks on services. However, this may not preclude Network operators from playing some part in ongoing risk control. We consider that Network operators can, to an extent, monitor the levels of traffic for Level 1 providers and take steps to inform PhonepayPlus of any unusual spikes in traffic that may suggest consumer harm. We note that the six Mobile Network Operators in the UK already take a proactive approach to this with their "Red and Yellow Card" scheme¹⁰.

6.33 Similarly, we consider that Network operators could inform PhonepayPlus of any information that might suggest a general failure of compliance on the part of a Level 1 client.

6.34 In light of the consideration in the two paragraphs directly above, we are currently minded to pursue option b), and this is reflected in the current draft of the new Code, which sets clear responsibilities for Network operators. However, we would welcome any feedback that respondents have to offer.

6.35 More generally, we are aware that Networks operators and providers may need a clearer picture of PhonepayPlus' expectations around due diligence, risk assessment and control, and what constitutes compliance with the rules set out in the draft Code. With this in mind, we believe it is appropriate to provide an illustrative draft of how General Guidance to industry around due diligence, risk assessment and control might look. This is attached at Annex C of this document, and we welcome comments from respondents as we continue to develop it.

¹⁰ Mobile Network Operators currently conduct their own programmes of monitoring to ensure that services are compliant with their contractual obligations around consumer protection, one of which is to comply with the PhonepayPlus Code of Practice. Services that do not comply with any contractual obligations can be given a "Yellow Card" (warning that service will be blocked unless the problem is resolved within 48 hours), or a "Red Card" (service is blocked until compliant), depending on the level of harm caused to consumers. Mobile Network Operators agree to inform PhonepayPlus when cards of either colour are issued.

Q24 – Do you agree with the proposals in regard to 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) in regard to the application of risk assessment and control to Network operators, then please state that preference, along with any reasoning you may have.

Directions

6.36 The paragraphs that cover Directions (3.2.1 to 3.2.3) update the previous requirements for Network operators to respond to instructions from PhonepayPlus in respect of its regulatory duties, and extend those requirements to Level 1 providers.

6.37 These paragraphs also require that Networks operators and all providers comply with any direction, notice or request for information issued by PhonepayPlus in pursuance of its duties as a regulator.

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

Contracts

6.38 The paragraphs that cover Contracts (3.3.1 to 3.3.4) update the previous requirements at paragraphs 2.3.1 and 2.3.2 of the 11th edition of the Code for Network operators to carry out thorough due diligence on their clients, and extend those requirements to Level 1 providers. The new paragraphs – along with those in respect of General Responsibilities earlier on in the document – also remove the need for sections 3 and 4 of the 11th edition of the Code (which applied specifically to Service Providers and Information Providers respectively).

6.39 Paragraph 3.3.2 requires that Network operators and Level 1 providers contract only with PhonepayPlus-registered parties, or parties that are eligible to register with PhonepayPlus, but that PhonepayPlus has exempted.

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

Registration

6.40 In October 2009, Ofcom published its statement on the scope of PRS regulation, which included a recommendation that PhonepayPlus introduces a mandatory registration scheme for all providers of PRS. Broad industry support for the introduction of registration has been shown in a number of consultations over the last year, including Ofcom's Scope Review, PhonepayPlus' Discussion Paper on the new Code of Practice and PhonepayPlus' 2010/11 Business Plan.

6.41 PhonepayPlus has done detailed work on these recommendations and identified the following main objectives of such a scheme:

- To identify and hold information on relevant PRS providers;
- To provide businesses with a better understanding about the regulatory risk of partnering with other providers;

- To allow PhonepayPlus to enforce the new Code easily and effectively;
- To ensure repeat offenders (both trading entities and individuals) are readily identifiable; and
- To provide consumers and providers with an effective premium rate number checking facility.

6.42 PhonepayPlus has identified a number of principles that have informed its thinking as it proceeds with the development of the Registration Scheme (the Scheme) and the database that serves it:

- It must set out to achieve an increase in compliance;
- The Scheme will apply to all eligible providers and deliver benefits to everyone involved in phone-paid transactions, including consumers;
- Only objective, factual evidence will be shared to help providers measure potential risk;
- The Scheme will not restrain trade for those who are entitled to provide PRS as registration will be low-cost and simple to complete;
- Benefits will be delivered in proportion to (and are likely to exceed) costs;
- The database will be secure in terms of access, data storage and stability; and
- The Scheme will be designed to cope with any increase in the number of industry participants and will be flexible enough to deal with changes to the market and regulatory regime.

6.43 The Registration Scheme will be made mandatory through rules set out in Section 3.4 of the new Code of Practice. We set out the background to the new rules below; however, we are also interested in hearing stakeholders' views on core issues around the Registration Scheme, such as:

- **Who should register?** What should be the criteria by which we consider possible exemptions and, based on these, which market segments do we plan to exempt from day one of the Scheme and why?
- **What should be registered?** What is the minimum information necessary to facilitate due diligence, allow PhonepayPlus to effectively enforce its Code and provide consumers with the necessary details to find prompt redress?
- **How does the Scheme relate to wider regulation?** Should providers be prevented from operating services without a registration number?
- **What is an appropriate registration fee?** Should it be accounted separately or incorporated into the Levy?

6.44 PhonepayPlus published an interim update on progress with developing the Registration Scheme on 13 April, which is available on the PhonepayPlus website¹¹. The update requests input from stakeholders on whether to proceed with implementation of the Scheme, alongside consultation on the Code of Practice. This is to ensure that the Scheme is ready for the introduction of the new Code. The deadline for responses on this matter is 25 May 2010.

Requirement to register

Requirement to register for all parties in the delivery chain

6.45 Paragraph 3.2.1 of the 11th edition of the Code requires that Service Providers (in the terminology of the 11th edition of the Code) register with PhonepayPlus prior to commencing operation. Para 2.1.2 of the 11th edition of the Code requires that Network operators demonstrate to PhonepayPlus that they meet the criteria to be regarded as a Network operator, and provide appropriate contact details. This is, in effect, also a form of registration.

6.46 At present, these registrations are kept on record, and PhonepayPlus allocates a reference number to each registered Service Provider in order to ensure that Network operators are able to prove a Service Provider's registration before they contract with them. However, Information Providers are not required to register and, as a result, little information, other than a breach history, is available to PhonepayPlus.

6.47 PhonepayPlus' review of this area as part of the new Code Discussion Paper concluded that requiring all Networks, Level 1 providers and Level 2 providers to register would facilitate due diligence and risk management, both on the part of those contracting with others in a PRS delivery chain, and on the part of PhonepayPlus in the course of carrying out its duties, if the details of their registration, along with their breach history where applicable, were held on a database.

6.48 PhonepayPlus proposes that registrants would have to be logged into the database in order to perform searches on providers' records. Consumers would be able to view historic adjudications and to search for information on any service.

6.49 It will be a requirement of the new Code of Practice that all Network operators, Level 1 providers and Level 2 providers must register before providing any PRS. A failure to do so will be regarded as a serious breach. The paragraphs which cover registration of all parties in the value chain (3.4.1 to 3.4.12) also set out the following:

- That some parties that fall within the definition of a Network operator, Level 1 provider or Level 2 provider may be exempted from the requirement to register by PhonepayPlus. In practice, such exclusions are likely to be granted only to providers of relatively low-risk service types (who only provide those low-risk service types).
- Registration will require the provision of certain information that PhonepayPlus decides is needed for regulatory purposes. This information must be accurate and kept up to date.
- That registration must be renewed annually and that PhonepayPlus will set a charge for each registration or annual renewal.

¹¹ Details of the Registration Scheme interim update and short consultation can be found here: <http://www.phonepayplus.org.uk/output/news/REGISTRATION-SCHEME-FOR-PREMIUM-RATE-SERVICE-PROVIDERS-AN-INTERIM-UPDATE-AND-SHORT-CONSULTATION.aspx>

- That information on any relevant breaches or sanctions imposed by PhonepayPlus will be linked to the company's registration details, as will any information regarding adjudications concerning directors, partners or other associated individuals connected with the company.
- That all publicly available information registered (subject to degrees of granularity) will be accessible to any other registered party, PhonepayPlus, Ofcom or any law enforcement agency with legitimate interest.
- That any party can deregister at any time, but the information about that company will be retained. This is to prevent businesses from deregistering before they suspect a PhonepayPlus investigation will begin, and then registering a new company almost immediately that does not then appear as being linked to the previous company. The obligation on all Network operators and Level 1 or Level 2 providers to register will of course remain, so any deregistered provider will be unable to operate for as long as they remain deregistered.
- That PhonepayPlus may suspend a party's registration with respect to any, or all, service types if they are barred by a sanction, or have failed to renew registration.

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

6.50 PhonepayPlus is keen that the requirement to register is proportionate and brings benefits to industry. For that reason we are carefully considering whether it is appropriate to require all services currently regulated by PhonepayPlus to register once the Scheme comes into force.

6.51 To determine the amount of risk each of the sectors above represents to the consumer, we have assessed the following:

- Number of complaints received;
- The enforcement action taken; and
- The value of any fines levied.

6.52 We have also considered other key objectives of registration, such as tracking Level 2 providers through complex value chains, to determine whether registration is justified for each of these sectors.

Q30 – Do you agree that these are the appropriate risk factors and measures to use when drawing up a framework for assessing which services should be required to register? Do you have any further suggestions on criteria we should consider?

6.53 PhonepayPlus took on the regulation of services operating on the 087 number ranges on 1 August 2009. At the time these services were brought into the PRS regulatory regime, it was noted by Ofcom and the industry that the potential consumer risk of these services was of a different order to other PRS services, given the maximum call charge could be 10p a minute from a BT landline (although mobile tariffs for 08 numbers can be considerably higher than this).

6.54 Given the lower level of consumer risk represented by 087 services, we agreed to initially take a lighter touch approach to regulating this sector, leading to a number of Code rules not being applied to the 087 market. In light of this light touch approach and the substantially lower levels of complaints, enforcement actions and fines against 087

providers, we are minded to exempt these services from registration initially. This position will be kept under review and should incidents of consumer harm become a concern, we would consider requiring registration of 087 services, following appropriate consultation.

Q31 – Do you agree that 087 services should be exempt from the requirement to register? If not, why not?

6.55 In terms of the information that Networks operators and Level 1 and Level 2 providers will have to provide to successfully register, we have decided that this should not be spelled out in the Code, but notified separately through Guidance. This is to ensure that the Registration Scheme can be updated as needed and that we maintain flexibility in the new Code of Practice. We are currently considering what information to require and our current thinking is that PhonepayPlus will mandate that the following accurate information must be provided to constitute a valid registration (where applicable):

- Business name;
- Companies House number (or foreign equivalent);
- Trading name(s);
- Previous name(s);
- Parent company/companies and their Companies House numbers (or equivalent);
- Previous parent company name(s);
- Nominated company director's address;
- Company address for receiving written instructions and regulatory contact number; and
- Date of incorporation

6.56 PhonepayPlus proposes that the above information must be available to all registrants on the database. Certain other information can be volunteered at the market's discretion. This may allow Level 1 providers greater autonomy in determining appropriate risk controls for Level 2 providers through their commercial contracts, rather than making such information mandatory for all. PhonepayPlus would welcome comments on what information may be volunteered in this way.

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?

6.57 In addition to mandatory information, PhonepayPlus will match information on breaches related to that particular entity or director. PhonepayPlus proposes that, subject to directions from the Code Compliance Panel, breach records will only be matched for three years (for Track 2 breaches) or five years (for breaches dealt with under the Emergency procedure) following the sanction taking effect.

Q33 – Do you agree that the publication of breaches should be limited by a period of time? Do you agree that three years for a Track 2 breach and five years for an Emergency procedure are appropriate timeframes?

6.58 PhonepayPlus considers that the body of evidence gathered throughout the life of previous Codes forms a vital component of effective due diligence. Our belief is that it is vital that we are able to match breaches under the 11th edition of the Code to the appropriate entities. As before, we propose that breaches be published for three years (for a Track 2 breach) and five years (for an Emergency breach).

6.59 In proposing this approach, we recognise that many of the breaches upheld using the 11th edition of the Code were against the Service Provider – the entity that is currently considered to have final responsibility for compliance with the Code. In order to match breaches of the 11th edition of the Code across to a registration database, will need to ensure that those examining the data are aware that the breach was relevant to a previous regulatory regime, and that the party found in breach at the time may not have been the only party involved in consumer harm. We would welcome views from respondents on how this can be best achieved.

Q34 – Do you have a view on whether breaches from the 11th edition of the Code 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.

6.60 Network operators and providers with gateway responsibilities (Level 1 providers) have argued that more regulatory information about the commencement of an investigation by PhonepayPlus would assist them in controlling any risk of consumer harm. PhonepayPlus has observed several instances where a Level 2 provider has had its services restricted by a responsible Network operator or Level 1 provider and, as a result, switched its contract to another Network operator or Level 1 provider who has no knowledge of its activities.

6.61 In considering how this issue is best addressed, we have considered the possible reputational impact of sharing any information about an investigation (as opposed to an adjudication) of a Level 2 provider with Network operators and Level 1 providers. One possibility would be to place a flag against a Level 2 provider’s database entry where they had an open investigation, with the caveat that such an investigation does not necessarily mean a breach has been upheld.

6.62 An additional consideration is that such a flag could be made available only to other parties registered with PhonepayPlus, rather than the general public.

6.63 We are keen to get respondents’ views on whether flagging open investigations is necessary and, if so, how this could be best achieved.

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, along with any supporting evidence you have.

6.64 We have proposed that, following publication of the new Code, registration will be a requirement in order to contract with Network operators or other PRS providers to deliver services to consumers. We believe this rule is necessary to ensure that all relevant parties in the value chain are registered, so that the new regulatory regime can be effective across the PRS sector. We will consider the failure to register to be a serious breach of the Code.

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

6.65 PhonepayPlus is committed to ensuring that the Registration Scheme is delivered efficiently and economically. We plan to levy a charge for registration that is designed purely to cover the costs of setting up and maintaining the Scheme. We do not believe that the charge will prevent a barrier to entry to the PRS market. Clearly, the final fee will be dependent on the number of registrants in the market and the final cost of the Scheme and the ongoing maintenance. We have been using the figure of £100 as an indicative figure, but we will not be able to be more specific until we have a clearer picture of the costs and number of registrants later this year.

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?

Requirement to register service details

6.66 The PhonepayPlus Number Checker is a searchable database of PRS numbers and shortcodes that assists consumers in identifying services on their bills. It has been in existence for a number of years and it can be accessed by the general public through PhonepayPlus' website.

6.67 The Ofcom Scope Review identified the Number Checker as crucial tool for Originating Networks (i.e. those who contract directly to a consumer), or for consumers in order to identify the provider of a specific PRS number or shortcode. There are around 85,000 hits on the Number Checker each month, and, at present, it can provide the name and a contact number for the Service/Information Provider for 85% of all in-remit searches.

6.68 Currently, information is provided to the Number Checker on a voluntary basis by Service Providers (as opposed to Information Providers). Where information is not provided – i.e. with the 15% of searches which do not return any information – the process of identifying the provider is more time-consuming.

6.69 Often the consumer, or any other party carrying out a search, must contact the Terminating Network operator in order to obtain the Service Provider's details. In practice, the Service Provider may then provide the searcher with the details of its client, another step in the process by which consumers seek redress, and by which PhonepayPlus and the industry gain information.

6.70 Ofcom's Scope Review concluded that it would be much simpler for the consumer if the database were able to identify the provider for all or most PRS numbers. PhonepayPlus agrees with this assessment, and would also add that there will be efficiency benefits for us and the industry in having all numbers accessible in this way.

6.71 Ofcom commissioned Indepen (an economics consultancy) to assess the feasibility of extending the Number Checker to include all PRS numbers. Indepen's cost benefit analysis identified that the major benefits would come as a result of the costs avoided by consumers and Originating Network operators in having a more direct route to identify a PRS provider than currently available.

6.72 Whilst costs would be incurred to set up and maintain the extended Number Checker database, the analysis suggested that there is very strong case for expanding the Number Checker to include most PRS numbers. The Net Present Value ('NPV') of the benefits was estimated at £3.1 million and the NPV of the costs at £0.6 million, giving a net benefit of £2.5 million over a five-year time period.

6.73 Given the strength of these findings, the Scope Review recommended that the Number Checker should be expanded to cover as close to 100% of PRS numbers as possible. The Scope Review went on to identify that, to achieve certain aspects of this proposal, a change in the PhonepayPlus Code of Practice may be required.

6.74 PhonepayPlus agrees with this assessment, but recognises it was carried out at a point when Ofcom could not be sure as to whether we would require all those involved in the provision of PRS to register with us.

6.75 With mandatory registration a proposed requirement of the new Code, and one which has been widely supported by industry feedback so far, PhonepayPlus has concluded that it is possible to require all Level 2 providers to provide up-to-date information to the Number Checker. This should, if carried out by all providers in compliance with the Code, provide 100% coverage. Where services have been excluded from registration, we would offer the opportunity for voluntary service registration. Additionally, we would continue to populate information on frequently searched numbers from service sectors excluded from the requirement to register.

6.76 To this end, paragraph 3.4.12 will require Level 2 providers to supply up-to-date, relevant details to PhonepayPlus that will enable their services to be:

- Clearly identified to consumers; and
- Clearly identified as being the responsibility of the provider concerned.

6.77 PhonepayPlus proposes that merely the name of the party responsible for customer service and a non-premium rate number (which is capable of effecting a successful enquiry or complaint) should be sufficient for these purposes.

6.78 When a level 2 provider fails to register its service in accordance with the rules, as well as opening an investigation, PhonepayPlus will also populate the affected service registration information with any relevant information. This will aim to assist affected consumers in seeking redress.

6.79 PhonepayPlus research indicates that many consumers use the existing Number Checker to self-serve their questions about their use of phone-paid services. To this end, PhonepayPlus proposes that Level 2 providers may choose to share the following information on a voluntary basis:

- Service name;
- Service category;
- Price; and
- Directions for enquiry.

6.80 Paragraphs 3.4.12b and 3.4.12c state that PhonepayPlus will include such details on a publicly accessible database and that any changes must be updated within two working days.

6.81 As previously stated, PhonepayPlus is currently undertaking work separate to the Code to identify the best option for a database and build it. This work will also cover the delivery of an expanded Number Checker and how best the information on it can be aggregated with the Registration Scheme database.

6.82 Initial feedback we have had from industry representatives indicates that the expansion of the Number Checker to facilitate an accessible record of all current services, their providers and their codes is a popular proposal.

6.83 Level 1 providers have raised some concern that, if the consumer is directed immediately towards a Level 2 provider in respect of a Number Checker search, then the respective Level 1 provider will be unaware that their client's service is being complained about, something which is especially pertinent given our proposals in respect of Paragraph 3.1.1d (the level of responsibility a Network or Level 1 provider should take to ensure that consumer complaints are being handled correctly). PhonepayPlus will therefore explore

whether this information can be automatically shared with Level 1 providers as part of the new database.

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

6.84 Following consideration of responses on the issues of registration raised in this consultation and the interim update, we plan to produce a Guidance note that will set out our considered position on registration. In line with all of our Guidance relating to the new Code, this will be subject to a further full period of consultation ahead of the Registration Scheme coming into force.

Requirement to withhold or retain payment

6.85 The 11th edition of the Code contains a requirement for Network operators to withhold payment for 30 days to Service Providers. Revenue gained from a consumer's purchase of a premium rate phone-paid service is divided between all those who have had a role in providing it – usually a Network operator, a Service Provider and an Information Provider, using the terminology of the 11th edition of the Code – according to pre-agreed contracts.

6.86 Historically, PhonepayPlus experienced some problems in investigating consumer harm where a business received its share of revenue from a service shortly after a transaction had taken place (often as soon as 24 hours afterwards). Once the business concerned had received its revenue, which could be substantial, following, for example, a scam perpetrated over a holiday weekend, it could cease to trade and, in effect, disappear from PhonepayPlus scrutiny by the time consumer complaints had been received.

6.87 So, in order to allow PhonepayPlus sufficient time to investigate any allegations of consumer harm, the 11th edition of the Code contained a requirement for Network operators to delay any revenue share “outpayment” to Service Providers by at least 30 days from the date of the transaction. In practice, this rule required businesses to exist for at least that amount of time – long enough for PhonepayPlus to receive complaints, begin an investigation and instruct Network operators to withhold all revenue share until the investigation was complete. This disincentivised the “fly-by-night scams” that had previously harmed consumers.

6.88 Whilst the “30-day rule” existed for Network operators, the requirement did not extend to Service Providers, or anyone else in the value chain that subcontracted to another client. As a result, some 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. Once again, this led to situations where the perpetrator of consumer harm was able to cease to trade, and so “vanish”, before PhonepayPlus could launch an investigation and stop revenue outpayments.

6.89 In these situations, a Service Provider (or Level 1 provider who connects directly with a Network operator) is currently held liable for breaches of the Code, and so also for any fines or other sanctions that are subsequently decided by the CCP.

6.90 Whilst the Level 1 provider certainly has some responsibility – i.e. for providing access to consumers to the perpetrator of the consumer harm, and for due diligence – the Discussion Paper acknowledged it is frustrating for Service Providers/Level 1 providers to be held liable for sanctions that relate to a specific breach they did not directly perpetrate. In addition, the current approach does not necessarily prevent the perpetrator of the harm from creating a new business and continuing to cause harm in the same way by connecting to another provider.

6.91 The Discussion Paper concluded that, if the new Code is to allow PhonepayPlus to investigate throughout the delivery chain, then the capacity to delay payment along the whole chain must also exist. The Discussion Paper explored a number of options, including a proposal to extend the “30-day” rule to 60 days. However, feedback we received from industry stakeholders suggests that this approach would create genuine cashflow problems for their clients, including those with no breach history with PhonepayPlus.

6.92 The Discussion Paper also proposed extending the “30-day” rule to all parties in the delivery chain, which would prevent any provider from paying out in advance of receiving any payment themselves. Such an approach would ensure PhonepayPlus had time to investigate the actions of all those in a delivery chain, allowing individuals associated with repeat offences to be identified and blocked in terms of their market access.

6.93 It would also level the playing field in terms of competitive advantage for Level 1 providers and prevent circumstances where those providers would subsequently become liable for a financial penalty that is unrelated to a breach that they are directly responsible for. With this consideration in mind, this is the approach that PhonepayPlus proposes in the draft Code, at paragraphs 3.5.1 and 3.5.2.

6.94 In addition to this extension of the 30-day payment rule along the delivery chain, paragraph 3.5.3 of the draft Code allows for the withholding of funds to be extended beyond 30 days, subject to a PhonepayPlus direction. As is currently the case, such a direction would take place in the context of an investigation.

6.95 In the case of both paragraph 3.5.1 and 3.5.3, a requirement to withhold would be placed on more than one Level 1 provider, if a Level 2 provider connected with multiple Level 1 providers in respect of a service.

6.96 Paragraphs 3.5.3 and 3.5.4 make clear that in the event of a failure to withhold payment the provider who failed to withhold may be directed to pay any fine or refund, up to the total of the money which should have been withheld.

Q39 – Do you agree with the proposals around withhold and retention of payments? If not, why not?

Data Protection

6.97 The paragraphs that cover Data Protection (3.6.1 and 3.6.2) update the requirements set out at section 2.2 and paragraph 3.4.3 of the 11th edition of the Code, and extend those requirements from Network operators to also include Level 1 and 2 providers. In addition the first sentence of 3.6.2 has had the phrase “and may be used in future” added to the end. This is to make clear that this requirement includes the need to make it clear to consumers that they may be marketed to in the future.

6.98 Otherwise, the text is not substantively changed.

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

Responsibilities specific to individual parts of the delivery chain

Network operator responsibilities

6.99 The paragraphs that cover the responsibilities specific to Network operators (3.7.1 to 3.7.4) update the requirements set out at paragraphs 2.1.2a, 2.1.6, 2.4.1 and 2.4.2 of the 11th edition of the Code.

6.100 Paragraph 3.7.2 is an addition, which states that that, where a Network operator provides any part of a service that directly impacts on consumers, then the Network operator (as opposed to any client) will be held responsible for that particular part of the service in respect of Part Two of the Code, and PhonepayPlus may raise breaches directly against the Network operator.

6.101 Otherwise, the text is not substantively changed.

Q41 – Do you agree with the proposals around Network operator responsibilities? If not, why not?

Level 1 provider responsibilities

6.102 The paragraph that covers the responsibilities specific to Level 1 providers (3.8.1), effectively states that, where a Level 1 provider provides any part of a service that directly impacts on consumers, then the Level 1 provider (as opposed to any client) will be held responsible for that particular part of the service in respect of Part Two of the Code, and PhonepayPlus may raise breaches directly against the Level 1 provider.

Level 2 provider responsibilities

6.103 The paragraphs that cover the responsibilities specific to Level 2 providers (3.9.1 and 3.9.2) update the requirements set out at paragraphs 3.3.1 and 3.3.2 of the 11th edition of the Code and apply them to Level 2 providers.

6.104 Otherwise, the text is not substantively changed.

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

Prior Permission

6.105 Paragraph 5.1 of the 11th edition of the Code 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.

6.106 The Discussion Paper set out that such permission is granted or refused by a Tribunal after a consideration of whether the applicant is capable of providing a compliant service. The granting of permission is most often subject to applicants agreeing to abide by additional conditions that PhonepayPlus prescribes.

6.107 The Discussion Paper confirmed that PhonepayPlus still saw Prior Permission as a useful way of controlling emerging risk, and proposed to retain Prior Permission for the new Code. However, the Discussion Paper also identified that some categories of service require closer scrutiny as part of Prior Permission being granted than others, and questioned whether all categories of Prior Permission needed to be considered by a Tribunal, rather than the PhonepayPlus Executive.

6.108 The Discussion Paper proposed altering the Prior Permission regime in three ways:

- a) The splitting of Prior Permission into “Prior Notification” (permission is granted by the Executive, subject to an undertaking to abide by the conditions), and “Prior Consent” (permission is granted by a Tribunal, subject to an assessment, as at present).
- b) The facility for PhonepayPlus to decide whether Prior Permission must be sought by Level 1 providers who connect directly with a Network operator, or Level 2 providers, or by any other combination of parties in a delivery chain (until this point, Prior Permission has always fallen on Service Providers).
- c) The facility for a Tribunal to assess an applicant’s recent breach history, as well as the applicant’s suitability to provide a service, when considering whether their application should be granted.

6.109 We received no negative feedback to these proposals, and so paragraph 3.10.3 includes an alteration in respect of c) above. The other two proposed alterations are not specifically referred to in the Code, but will be covered in Guidance on the subject of Prior Permission, to be drafted at a later stage. This will include details on which current Prior Permissions will be dealt with by the Executive (as “Prior Notifications”) and which will require Tribunal approval (“Prior Consent”).

6.110 As with the 11th edition of the Code, paragraph 3.10.5a retains the facility for providers to seek specific permission not to comply with any part of the Code, if they can satisfy a Tribunal that they can meet the objectives by other means.

6.111 We intend any changes to the Prior Permission regime to apply to new applications once the new Code of Practice comes into force. Existing Prior Permissions will remain valid.

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

7. Part Four – Investigations and Sanctions

Background to our proposals

7.1 Having considered Outcomes to deliver consumer protection, and the responsibility for delivering those Outcomes, the Discussion Paper published in June 2009 focused on how an investigations and adjudications process could best support our proposals in those other two areas.

7.2 We came to three main conclusions:

- Our investigations process should allow a graduated response to complaints, dependent on the degree, or likely degree, of consumer harm;
- We should have the flexibility to open different types of investigation into different parties involved in the provision of one service; and
- Our existing range of sanctions should be added to, if possible, in ways that further disincentivise or prevent consumer harm.

7.3 This section now goes on to set out our proposals in respect of investigations and adjudication procedures, and the sanctions arising from them. Many of the proposals will directly reference sections of the draft Code itself, which can be accessed here:

<http://www.phonepayplus.org.uk/upload/New-Code-consultation-Annex-A-draft-Code.pdf>

Investigations

7.4 The paragraphs that cover Investigations (4.2.1 to 4.2.9) update section 8.3 of the 11th edition of the Code, with some significant alterations, as noted below.

7.5 Paragraphs 4.2.1 and 4.2.2 update paragraphs 8.3.1 and 8.3.2 of the 11th edition of the Code (around PhonepayPlus' right to investigate complaints and initiate its own investigations through monitoring), with no substantive changes to the text.

7.6 Paragraph 4.2.3 updates paragraph 8.3.3 of the 11th edition of the Code, with a number of specific additions to the examples of information that PhonepayPlus may request as part of an investigation, as follows:

- Evidence of due diligence on the part of a Network operator or Level 1 provider;
- Evidence of risk assessment and control on the part of a Network operator or Level 1 provider; and
- Arrangements between any provider and another relevant party who does not fall under our requirement to register. We believe this is important given the increased use of affiliates, especially for web- and text-based marketing, or for complaint handling. In such circumstances, it may be necessary to ascertain, for example, whether an affiliate has been incentivised by the contracting provider in a way which is conducive to consumer harm or frustration.

7.7 Paragraphs 4.2.4 and 4.2.5 build on a number of responsibilities found in the 11th edition of the Code to disclose information to PhonepayPlus on request (specifically at paragraphs 2.5.1, 3.2.2, and 8.3.3), by requiring that Network operators or providers do not knowingly or recklessly provide false information, or omit to provide any information which

PhonepayPlus does not specifically request, but which may be illuminating in terms of an investigation. As with a number of proposed changes throughout this new Code, we believe that this will carry benefits in terms of efficiency, as PhonepayPlus will have an earlier and better picture of the totality of information around an incident of consumer harm.

7.8 Paragraphs 4.2.6 and 4.2.7 identify that PhonepayPlus may use any of three procedures when investigating, and that it may investigate as many parties in the delivery chain as is necessary when considering an incident of consumer harm. In practice, it is unlikely that multiple investigations will be opened where Level 1 providers and/or Network operators can prove the efficacy of their due diligence, risk assessment and control at an early stage. However, even where these processes have been carried out, consumer harm may occur as a result of, for example, a technical failure and, in this instance, we may look to the appropriate party in the value chain in order to investigate the consumer harm that arose.

7.9 Paragraph 4.2.7 highlights that PhonepayPlus may use different investigation procedures for different parties in respect of the same incident of consumer harm. In doing so, we will base the procedure selected for each party on the severity of their involvement and their breach history.

7.10 In terms of resource, the change of approach set out at paragraphs 4.2.6 and 4.2.7 is likely to impact most often upon Level 2 provider, and then Level 1 providers. However, any provider that can prove its due diligence and risk control to our satisfaction should be swiftly eliminated from an initial assessment of the consumer harm caused. Therefore, the time spent developing, implementing, and recording risk assessment and control should be offset by the time saved in dealing with PhonepayPlus as part of an investigation.

7.11 Further to the approach set out immediately above, paragraph 4.2.8 highlights PhonepayPlus' right to open investigations against different parties, either during or after an investigation. This allows PhonepayPlus to act against other parties, whenever the progress of an initial investigation (or new evidence, such as fresh consumer complaints) brings to light another party's involvement in consumer harm.

7.12 Lastly, Paragraph 4.2.9 highlights PhonepayPlus' right to withdraw, upgrade or downgrade an investigation at any stage, prior to the investigation going before a Tribunal, where new information or evidence comes to light. Obviously, this will be done with reasonable notice, especially where an investigation is upgraded.

Q44 – Do you agree with the proposals around PhonepayPlus' investigations? If not, why not?

Track 1 procedure (formerly Informal procedure)

7.13 The Discussion Paper set out our view that, despite its strengths, the Informal procedure presented in the 11th edition of the Code did not appear informal enough to engage the industry, or formal enough to act as a suitable, time-based deterrent.

7.14 We proposed an approach whereby the procedure could be used, depending on the provider's breach record, to deal with minor infringements of the Code by requiring that the provider accepts a time-based action plan from us to resolve the issue. The provider would have to prove to us that it had resolved any consumer harm to our satisfaction before the time limit had expired and pay an administrative charge for the time involved in compiling the action plan, as appropriate.

7.15 We do not intend to publish details of Track 1 procedures widely, for example via an email alert to all subscribers. However, willingness from providers to engage with us in this manner – and summary information on corrective action they have taken to address minor compliance issues – is likely to be of interest to potential commercial partners. For that reason, we are minded to link Track 1 resolutions to providers as part of the Registration Scheme, whilst emphasising that these are resolutions between PhonepayPlus and the party concerned, rather than adjudications.

7.16 This approach was welcomed by stakeholders who responded to the Discussion Paper, and the paragraphs of the draft Code that cover the Track 1 procedure (4.3.1 to 4.3.5) set out the following:

- That PhonepayPlus will contact the relevant party or parties (be it a Network operator, Level 1 provider or Level 2 provider) where it has decided to use a Track 1 procedure and provide them with an action plan and deadline for resolution.
- PhonepayPlus may charge for any reasonable administrative costs.
- The party concerned does not have to accept a formal breach, but must accept consumer harm has occurred and demonstrate the action plan has been followed by the deadline. A failure to do so may see a Track 2 procedure (formerly Standard procedure) being invoked, with a failure to implement a Track 1 plan as an aggravating factor.
- The party concerned can appeal any part of the action plan in writing, but if agreement cannot be reached, or if the infringement itself is disputed, then PhonepayPlus may invoke a Track 2 procedure.
- PhonepayPlus will keep a record of any such procedures and retain them for consideration in light of any further infringements of the Code by the same party.

7.17 We believe that making any actions time-based will ensure that minor non-compliance is quickly resolved and prevented from growing. The introduction of a reasonable administrative charge is a departure from the previous Code, but we believe that the majority of providers will find the payment of an admin charge preferable to the cost and time required for a formal investigation. This also ensures that the wider industry does not bear the burden of cost for our enforcement actions.

7.18 It is our opinion that these alterations to the practice used in the 11th edition of the Code serve to better integrate informal action into a graduated set of responses to consumer harm. In light of this integration, we propose to rename the augmented Informal procedure as a Track 1 procedure, and a Standard procedure (the next step along) as a Track 2 procedure.

Q45 – Do you agree with the proposals around the Track 1 procedure? If not, why not?

Track 2 procedure

7.19 The Discussion Paper concluded that the Standard procedure set out in the 11th edition of the Code should largely be retained, as it had no fundamental flaws, or aspects that would require change in order to better deliver the stated aims of the new Code. Responses to the Discussion Paper, and others who provided informal views through the last 12 months, suggests stakeholders are in agreement with this standpoint.

7.20 For this reason, the paragraphs that cover the Track 2 procedure (4.4.1 to 4.4.7) set out the following:

7.21 Paragraph 4.4.1 updates paragraph 8.5a of the 11th edition of the Code. With the exception of the change from “service provider” to “relevant party”, in order to reflect our move to regulate along the whole delivery chain, there are no other substantive changes to the text.

7.22 Paragraph 4.4.2 updates paragraph 8.5b of the 11th edition of the Code. With the exception of the addition of an upper time limit of 15 days for the setting of a longer time limit, there are no other substantive changes to the text.

7.23 Paragraph 4.4.3 updates paragraph 8.5c of the 11th edition of the Code. There are no substantive changes to the text, save the change to make a lack of a response an aggravating factor.

7.24 Paragraphs 4.4.4 and 4.4.6 update paragraphs 8.5d & e of the 11th edition of the Code respectively. Paragraph 4.4.6 has been altered to reflect that an informal representation may be refused or cut short, at the discretion of the Code Compliance Panel, if it contains no new evidence, or is considered unlikely to contain new evidence, in addition to the relevant party’s written response. This is in response to a Code Compliance Panel view that informal representations are often requested, but do not always provide any further cause for consideration or insight than that already provided in the relevant written response.

7.25 Paragraph 4.4.5 sets out that PhonepayPlus will inform the relevant party of the date of any Tribunal hearing in respect of the procedure. In practice, this has always been the case, but this addition formalises the practice and makes it transparent.

7.26 Paragraph 4.4.7 updates paragraph 8.5f of the 11th edition of the Code. The text has been altered to reflect that new breaches may be raised against others in the delivery chain in respect of the same consumer harm (e.g. a failure of risk control on the part of the Level 1 provider, where a Level 2 provider is already being investigated). As a result, the subject of the new investigation will need to be informed and possibly have their revenue (in respect of the service they are under investigation for) withheld.

Q46 – Do you agree with the proposals around the Track 2 procedure? If not, why not?

Emergency procedure

7.27 As with the Standard/Track 2 procedure, the Code Discussion Paper proposed that the Emergency procedure should largely be retained as it stands. In light of our intention that the Emergency procedure continues to be used only in cases of serious consumer harm that require urgent remedy and that, as such, its use will be widely publicised on our website to warn consumers and provide them with confidence that we are investigating, we feel it is right that we retain the name “Emergency procedure”, rather than rename it as a Track 3 procedure.

7.28 Again, respondents to the Discussion Paper did not signal disagreement with our intention to largely retain the Emergency procedure in its current form, except to identify the need to allow withheld funds to be paid if an Emergency procedure is downgraded on recognition of further evidence. With this in mind, the paragraphs that cover Emergency procedure (4.5.1 to 4.5.3) set out the following:

7.29 Paragraph 4.5.1 updates paragraph 8.6.1 of the 11th edition of the Code. The text contains few substantive changes, except for the following:

- The change in emphasis from “service provider” to “relevant party”.
- The addition of a right for PhonepayPlus to set a shorter time limit than five working days for the relevant party to respond, although that limit will never fall below two working days. Such a right would be exercised only where a service had caused very serious and widespread harm, which might potentially damage the reputation of premium rate phone-paid services as a whole. In such a circumstance, we believe that an ability to take swift action to progress an investigation will be of benefit.
- The addition of text that sets out that PhonepayPlus will inform the relevant party of the date of any Tribunal hearing arising from an Emergency procedure against it. As with a Track 2 procedure, this has always been the case in practice.
- The addition of text that sets out PhonepayPlus’ right to publish use of an Emergency procedure in any manner it sees fit. Again, this text serves to make an existing practice transparent.

7.30 Paragraph 4.5.2 updates paragraph 8.6.2 of the 11th edition of the Code. The text is not substantively changed.

7.31 Paragraph 4.5.3 updates paragraph 8.6.3 of the 11th edition of the Code. The text is not substantively changed, except for an addition that sets out under what circumstances an Emergency procedure may be downgraded to a Track 2 procedure. Where such a downgrading is approved, the paragraph also sets out a facility for previously withheld revenue to be released.

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

Adjudications

7.32 Paragraph 4.6.1 of the draft Code updates paragraph 8.8 of the 11th edition of the Code. The text has been slightly altered to additionally set out the following:

- That a Tribunal will make a decision based not just on evidence presented, but also on the extent to which the relevant party has followed any relevant Guidance published by PhonepayPlus, or attempted to comply with rules by alternative methods to following the Guidance.
- That a Tribunal decision may be published on the PhonepayPlus website and in any other manner PhonepayPlus determines.

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

Reviews

7.33 The paragraphs that cover Reviews (4.7.1 to 4.7.5) update section 8.10 of the 11th edition of the Code, with some additions and alterations.

7.34 Paragraph 4.7.1 updates paragraphs 8.10.1 of the 11th edition of the Code, with the addition that Tribunals may also review any determinations made in respect of administrative charges.

7.35 Paragraphs 4.7.2 and 4.7.3 update paragraph 8.10.2 of the 11th edition of the Code, with significant additions. Firstly, the right to request a review in writing has been extended to all relevant parties in the delivery chain. Secondly, any request for a review that is not supported by new evidence must be made within 10 working days of either the publication of a Tribunal's original decision, or receipt of the administrative charge invoice.

7.36 Additionally, we have considered whether any request for a review, even where it is supported by new evidence, must be made within a certain time of the original case, except in exceptional circumstances. This is to address circumstances where a provider who does not wish to comply with a sanction, especially a requirement to seek and implement advice from PhonepayPlus about its services, requests a review in order to delay the sanction further.

7.37 The proposed draft Code proposes a time limit of 30 days to request a review. However, we have also explored options up to, and including, 90 days. We would welcome any evidence respondents have as to whether a 30-day limit is appropriate, or whether a longer limit is required.

7.38 Lastly, Paragraph 4.7.3 sets out the criteria that any evidence supporting a request for a review must meet. The expectation is that an applicant must bring to light a new issue of fact or law, which was not available at the time of the original Tribunal hearing, or demonstrate that a Tribunal's original decision was so unreasonable that no reasonable Tribunal would have reached that conclusion.

7.39 These proposed additions are based upon a wish to resolve Tribunal decisions, and implementation of any sanctions that arise from them, as quickly as possible where there are no reasonable grounds for delay. Whilst these requirements will still allow reviews beyond either of the two time limits on reasonable grounds, it is our intention that they prevent providers from requesting reviews merely as a "delaying" tactic in terms of actioning a Tribunal's decision.

7.40 Paragraph 4.7.4 updates paragraph 8.10.3 of the 11th edition of the Code, with no substantive changes to the text.

7.41 Paragraph 4.7.5 updates paragraph 8.10.4 of the 11th edition of the Code, with significant additions. Whilst the Chair of the Code Compliance Panel (or any other legally qualified member of a Tribunal) may still suspend sanctions pending a review, the paragraph goes on to set out that the relevant party must request a suspension of sanction in writing, and that the Chair will only consider suspending a sanction for the following reasons:

- Where doing so will not give risk to public harm (e.g. delaying refunds to consumers);
- Where not doing so will give risk to create undue hardship;
- Where there are exceptional circumstances.

7.42 Paragraph 4.7.5 also sets out that, where a suspension of sanction is not granted in respect of a review, the right to a review may also be revoked if the sanction is not complied with.

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.

Sanctions and Refunds

7.43 The new Code Discussion Paper set out how, in reviewing the sanctions that the 11th edition of the Code provides to Tribunals, PhonepayPlus interviewed a range of other regulators, in addition to industry stakeholders. In reaching its recommendations, the Discussion Paper recognised that any additional sanctions would need to further disincentivise consumer harm, or have the effect of otherwise preventing consumer harm.

7.44 The Discussion Paper proposed that all the sanctions available in the 11th edition of the Code be retained. In particular, we recognised that the maximum fine of £250,000 for each single breach upheld, which we are already able to levy, is limited by statute. However, this level of fine could, if applied to several breaches at once, act as a suitable deterrent for any party involved in the provision of phone-paid services.

7.45 The Discussion Paper also proposed two new sanctions, as follows:

- A requirement to pay an automatic refund to all consumers, not just those who have complained to PhonepayPlus, where there is a serious breach of the Code – this was to reflect that the number of consumers who lodge a complaint with PhonepayPlus may be only a small fraction of the consumers who were harmed by the service. A sanction of this nature would ensure that all affected consumers received their money back.
- A requirement to seek, and implement, a compliance audit from an independent third party at the expense of the party found in breach – this sanction is designed to tackle providers who are found to repeatedly breach the Code of Practice, in an attempt to ensure they institute effective procedures to ensure future compliance.

7.46 Respondents to the Discussion Paper raised the following concerns about these sanctions:

Automatic refunds

7.47 A requirement to pay automatic refunds may be difficult to implement, given that not all networks have the facility for refunds to be credited directly to a consumer's phone bill. In addition, some consumer numbers may be withheld, making refunds difficult. Some respondents asked whether an equivalent amount could be donated to charity where refunds to consumers proved impossible.

7.48 PhonepayPlus considers that some of these problems can be overcome. We are aware, for example, of providers who have developed methods of contacting affected consumers and informing them that they are entitled to a refund, which they can collect either online, or from a local Post Office, on production of a unique code sent to their handset. However, where it is genuinely impossible to identify consumers in order to refund them, the draft Code makes provision for a charitable donation instead.

7.49 Lastly, we are aware that the requirement to make an automatic refund to a consumer does not take account of the revenue split through the delivery chain. In practice, the requirement for an automatic refund is likely to fall on a Level 2 provider, which will result in them being required to pay the full cost of a consumer's charge, even when that is more than the share of revenue the Level 2 provider made in the first place.

7.50 In addition, the full cost of a consumer's charge may also include an additional network charge, which is not premium rate. In such circumstances, it may, once again, fall

upon the Level 2 provider to repay this charge, given that it is included in the financial detriment a consumer suffered as a result of the service.

7.51 PhonepayPlus believes that, where a service was deliberately misleading and provided no intrinsic value to any consumer who was charged for it, it is right that the provider pays back the entire cost of the charge to each consumer, regardless of whether this will result in a financial penalty upon them. However, we consider that there may be circumstances where a Tribunal would only wish to require that the consumer was refunded for the premium rate element of their charge, and the proposals within the draft Code allow for this.

7.52 For these reasons, we are aware that a requirement to provide automatic refunds may have a heavy financial impact on any party who receives it as a sanction. As such, we would not seek to issue it unless a service was adjudged to have been deliberately misleading and provided no intrinsic value to any consumer who was charged for it.

7.53 Where a requirement to issue an automatic refund was imposed as a sanction, PhonepayPlus considers the possibility that any fine levied against the party concerned must be proportionate to the totality of the sanctions imposed, including the requirement to refund consumers.

Compliance audits by a third party

7.54 The concept of an enforced compliance audit was largely welcomed. However, some respondents cautioned that PhonepayPlus should set a time limit for when such an audit will need to be completed, in order that the auditor has no opportunity to artificially extend an audit in order to inflate their charges. In light of this, the draft Code sets such a time limit.

7.55 With the exception of the two additional sanctions above, paragraphs 4.8.1 to 4.8.6 update paragraphs 8.9.1 to 8.9.4 of the 11th edition of the Code. There are no substantive changes to the text.

7.56 The paragraphs that cover Refunds (4.9.1 to 4.9.4) update paragraph 8.9.6 of the 11th edition of the Code. Save for an extension of the requirements around refunds to Level 1 providers, there are no substantive changes to the text.

Q51 – Do you agree with the proposals around sanctions and refunds? If not, why not?

Administrative charge

7.57 The paragraphs that cover Administrative Charge (4.10.1 to 4.10.5) update section 8.12 of the 11th edition of the Code, with additional passages to require that Network operators and Level 1 providers must retain revenue, withhold numbers or other service access codes, or pass previously retained revenue to PhonepayPlus, in respect of an unpaid administrative charge.

7.58 In addition, the right of any party to request a review with respect to an administrative charge is set out at paragraph 4.10.5.

Q52 – Do you agree with the proposals around the administrative charge? If not, why not?

Oral hearings and Appeals

7.59 The paragraphs that cover oral hearings and appeals (4.11.1 to 4.11.3 and 4.12.1 to 4.12.4) set out the circumstances under which a relevant party can apply for an oral hearing or appeal (as currently contained within section 8.11 and Part 10 of the 11th edition of the Code). These circumstances remain substantively unchanged.

7.60 The 11th edition of the Code also set out the way in which oral hearings and appeals would be conducted. In the interests of making the new Code shorter and more easily accessible than previous Codes, we propose that the processes by which oral hearings and appeals will be conducted are set out in Annexes (see page 72). These Annexes will remain part of the Code, but may be published on the PhonepayPlus website, rather than in paper versions of the Code.

Q53 – Do you agree with the proposals around oral hearings and appeals? If not, why not?

Publication of Decisions

7.61 Lastly in Part Four of the proposed new Code, paragraph 4.13 updates paragraph 8.11.11 of the 11th edition of the Code. There are no substantive changes to the text from the current Code.

Q54 – Do you agree with the proposals around publication of decisions? If not, why not?

8. Part Five – Definitions

Background to our proposals

8.1 As this consultation document has already explained, one of our goals, which was welcomed by almost all respondents to the Discussion Paper who expressed a view, was for a shorter, more easily accessible Code. We believe that both consumers and providers will benefit from a Code that is structured and expressed in a manner that is as easy to understand and reference as possible.

8.2 With this in mind, we considered whether it was appropriate to include definitions, both in terms of the Communications Act 2003 and the Code itself, within the main body of the new Code. One option we considered was to reference definitions, and where they could be found on our website, in the new Code, but for the definitions not to form part of the Code itself.

8.3 This option was rejected in light of comments from members of PhonepayPlus' Code Compliance Panel, and a significant number of providers, to the effect that the Code would be easier to reference if the definitions followed directly after the main body of the Code, rather than in an annex or another document. So, in the interests of ensuring the Code is as efficient to reference and use as possible, we propose to retain definitions within the new Code.

8.4 This section now goes on to set out our proposals in respect of definitions. Many key definitions, including obviously those set out in the Communications Act 2003, remain unchanged from the 11th edition of the Code. Many of the proposals will directly reference sections of the draft Code itself, which can be accessed here:
<http://www.phonepayplus.org.uk/upload/New-Code-consultation-Annex-A-draft-Code.pdf>

Delegation of powers

8.5 Paragraph 5.1.1 updates paragraph 11.2 of the 11th edition of the Code, with no change to the text.

Q55 – Do you agree with the proposals around delegation of powers? If not, why not?

Reach of the Code

8.6 Paragraph 5.2.1 updates paragraph 1.3.2 of the 11th edition of the Code, with no substantive changes to the text.

8.7 Paragraph 5.2.2 updates paragraph 1.2.4 of the 11th edition of the Code, again with no substantive changes to the text.

Definitions

'Premium rate service'

8.8 Paragraphs 5.3.1 updates paragraph 11.3.1 of the 11th edition of the Code, there is no substantive change to the text.

Meaning of 'Controlled premium rate service'

8.9 Paragraph 5.3.2 updates paragraph 11.3.8 of the 11th edition of the Code. There is no substantive change to the text, other than to set out the current CPRS Condition¹² as issued by Ofcom, and to make clear that this is the Condition at the time the Code is published, as opposed to any future versions that have been altered.

8.10 Paragraph 5.3.3 updates paragraph 11.3.2 of the 11th edition of the Code, there is no substantive change to the text.

Definition of a 'Network operator'

8.11 Paragraphs 5.3.4 to 5.3.6 update paragraphs 11.3.3 to 11.3.5 of the 11th edition of the Code. Once again, there is no substantive change to the text.

Definitions of Level 1 and Level 2 providers

8.12 Paragraphs 5.3.7 and 5.3.8 replace the previous definitions of “service provider” and “information provider” as set out in paragraphs 11.3.6 and 11.3.7 of the 11th edition of the Code. We have already discussed the reasons behind updating our definitions of the various types of provider in the delivery chain, and our proposed terminology, in Part One of this document. However, for ease of reference, we propose the following:

- Level 1 providers (providers who are not Network operators but who subcontract to other parties), and
- Level 2 providers (the last contracted party in a PRS delivery chain with responsibility for the promotion, operation and content of the premium rate service).

8.13 As previously stated in this document, PhonepayPlus may choose to exempt some types of provider from the requirement to register with us. Where such exemptions are made, then PhonepayPlus will publish them on our website.

General

8.14 The following paragraphs repeat definitions as they appeared in the 11th edition of the Code, with no substantive changes to the text:

- Paragraph 5.3.9 – ('Associated individual')
- Paragraph 5.3.11 – ('Chairman of the Independent Appeals Body')
- Paragraph 5.3.12 – ('Chatline service')
- Paragraph 5.3.13 – ('Children')
- Paragraph 5.3.17 – ('Electronic communications network')
- Paragraph 5.3.18 – ('Electronic communications service')
- Paragraph 5.3.19 – ('Independent Appeals Body')
- Paragraph 5.3.21 – ('Ofcom')
- Paragraph 5.3.22 – ('Person')
- Paragraph 5.3.28 – ('Promotion')
- Paragraph 5.3.30 – ('Sexual entertainment service')
- Paragraph 5.3.32 – ('Subscription services')
- Paragraph 5.3.33 – ('Virtual chat services')

¹² Premium rate services are defined in Section 120 of the Communications Act 2003. Within this context, Ofcom publishes and updates from time to time a Controlled premium rate services (CPRS) condition. Premium rate phone-paid services that fall into the definition set out in this condition fall under the regulatory remit of PhonepayPlus.

8.15 Paragraph 5.3.10 defines the 'Board' of PhonepayPlus to mean the board of directors. This is to provide clarity to readers.

8.16 Paragraph 5.3.14 defines a 'Compliance audit', in order to provide clarity about the new sanction that PhonepayPlus proposes as part of the new Code.

8.17 Paragraph 5.3.15 defines a 'Connected company or person', in order to provide clarity to the definition of a Network operator's "own service" as set out at paragraph 1.2d of Annex 1 around funding arrangements.

8.18 Paragraph 5.3.16 provides the definition of a 'Data controller', as set out in the Data Protection Act 1998. This is for ease of reference for those providers who believe they may need to notify the Information Commissioner's Office of their status as a data controller as set out at paragraph 3.6.1 of the new Code.

8.19 Paragraph 5.3.20 provides the definition of 'Information society services', as set out in Article 1.2 of EC Directive 98/34/EC and as amended by EC Directive 98/48/EC. Again, this is for ease of reference.

8.20 Paragraphs 5.3.23 and 5.3.24 provide definitions of 'Personal data' and 'Personal information'. This is in order to provide clarity with regard to the new Code's proposed outcome and rules around privacy.

8.21 Paragraph 5.25 defines PhonepayPlus as being the employees of PhonepayPlus, save where the context requires otherwise. Again, this is to provide clarity to readers of the Code.

8.22 Paragraph 5.3.26 defines the 'PhonepayPlus Register', in order to provide clarity with regard to the requirements at Part Three of the new Code for all providers to register with PhonepayPlus.

8.23 Paragraph 5.3.27 defines a 'Premium rate service provider' as being any Network operator, or Level 1 or Level 2 provider. This is in order that the new Code can use this term as a catch-all term for all those parties who are regulated by it, thus reducing the need to list each type of provider each time they are referenced all together.

8.24 Paragraphs 5.3.29 and 5.3.34 define a 'Retention' of funds as being something that a provider does in response to an instruction from PhonepayPlus, and a 'Withhold' of funds as something which a provider does in order to comply with the requirement at Paragraph 3.5.1 of the new Code. This is in order to set a clear distinction between the two activities.

8.25 Paragraph 5.3.31 defines a 'Special Services Number' as a UK telephone number beginning with an 08 prefix. This definition has been added in order to reflect that PhonepayPlus now regulates 087 services.

Q56 – Do you agree with the proposals around definitions? If not, why not?

9. Annexes to the Code

9.1 The 11th edition of the PhonepayPlus Code of Practice contains two Annexes. They are as follows:

- Funding arrangements
- Procedures of the Independent Appeals Body

9.2 One of the stated aims of this new edition of the Code is to make it shorter and more accessible, whilst still ensuring that readers can reference information in a clear and straightforward manner. With this consideration in mind, we propose to retain the two current Annexes and add one new one, with the goal of taking some of the existing detail out of the main body of the Code and placing it where it will be easily accessible. So, the new Code would contain three Annexes, as follows:

- Annex 1: Funding arrangements;
- Annex 2: Code Compliance Panel and Tribunals;
- Annex 3: The Independent Appeals Body.

9.3 Annex 1 repeats the Annex regarding funding arrangements that appeared in the 11th edition of the Code, with the following changes to the text:

- Paragraph 1.2 introduces new definitions of “financial year” (at 1.2c), and “own service” (at 1.2d, intended to define where a Network operator also operates as a Level 2 provider in order to provide a service directly to consumers).
- Paragraph 4.2 slightly alters wording from the 11th edition of the Code around forecasting, in that in the absence of a forecast by a Network operator within a specified timeframe, PhonepayPlus may make a forecast of that Network operator’s likely outpayments and “own service” revenue during the forthcoming year.

9.4 Otherwise, there are no substantive changes to the text.

9.5 Annex 2 repeats the following sections of the 11th edition of the Code:

- Section 1.8 (Code Compliance Panel – with changes to the text to reflect that membership may now include up to ten lay members with adjudicatory experience, and up to three members of the current PhonepayPlus Board who are entitled to undertake regulatory functions);
- Section 8.1 (Composition of a Tribunal);
- Section 8.11 (Oral hearings)

9.6 Paragraph three of Annex 2 is an additional paragraph, which clearly sets out the functions delegated to the Code Compliance Panel by the PhonepayPlus Board. Otherwise, there are no substantive changes to the text.

9.7 Annex 3 repeats the Annex regarding the procedures of the Independent Appeals Body (IAB) in the 11th edition of the Code. There are two proposed changes to the text:

- Paragraph 1.2 states that PhonepayPlus itself will have the right to appeal to the IAB in respect of a decision made by a Tribunal (other than a decision by consent);
- Paragraph 11.1 proposes raising the current maximum costs the Tribunal can award in respect of the parties involved, or in respect of the provision of the Tribunal, by

£5,000 and £15,000 respectively. This would raise the current maximum award to any party to £30,000, and the maximum award in respect of costs to £25,000.

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

10. Withdrawn provisions from the 11th edition of the Code

10.1 In building and drafting the proposed new Code, we have made extensive efforts to make it shorter and simpler. This is in line with the stakeholder feedback we have received since the start of our Code review and with one of the objectives set by the PhonepayPlus Board.

10.2 In delivering this objective, one of the actions we have taken is to consolidate, adapt or alter rules from the 11th edition of the Code that are still relevant to our proposed new model for regulation, to make them clearer and more accessible.

10.3 Given that our proposal for the new Code represents a significant departure from the status quo, there are inevitably sections or individual provisions within the 11th edition of the Code that we propose should be withdrawn entirely. These are set out below for consideration:

Paragraph 5.6 – Internet diallers services

10.4 PhonepayPlus considers that these rules are covered by a requirement for anyone seeking to provide internet diallers to seek Prior Permission from us before they operate. As such, internet diallers are one of the categories of service requiring Prior Permission and will therefore be included in the full list of services requiring Prior Permission, which will be Annex 2 of the final version of the new Code of Practice.

10.5 At the time the 11th edition of the Code was published, internet diallers had recently been the source of significant consumer harm. As such, it made sense to publish what were, in effect, the conditions of Prior Permission as a set of rules in the Code itself. We consider that, since the advent of internet broadband in the large majority of homes, the risk posed by internet diallers no longer warrants specific rules in the Code, as they are effectively regulated through the relevant Prior Permission regime.

Paragraph 5.7.5 – The “50p exemption” rule on pricing

10.6 At the time the 11th edition of the Code was published, PhonepayPlus exempted those who provided services that would never cost more than 50p in total from the need to provide pricing information, except where they were subscription-based services, those aimed at children, or those accessed by automated equipment, such as burglar alarms or internet diallers.

10.7 During the life of the 11th edition of the Code, PhonepayPlus’ remit has been extended as a result of Ofcom’s decision to extend the Controlled PRS Condition to include fixed-line premium rate phone-paid services that cost between 5p and 10p a minute. This, in effect, encompasses most services delivered on the 087 number ranges.

10.8 PhonepayPlus consulted extensively on how it proposed to apply regulation to services provided on 087 numbers and concluded that it was important that consumers received the same pricing clarity on all premium rate phone-paid services. This is how we have applied the 11th edition of the Code in respect of 087-based services since we assumed regulation of them on 1 August 2009. Given the importance of ensuring pricing transparency to consumers and to ensure consistency of approach across regulated services, we have decided to remove this exemption on giving pricing information.

Paragraph 5.10 – Promotions with long shelf-lives

10.9 Again, we consider market developments have made this rule less relevant. An increasing percentage of promotions are now electronic rather than print-based, and so can be updated at any time to inform consumers of changes in price, service terms or the nature of the service offered.

10.10 This rule was originally intended to cover magazines that were published quarterly, and so may have contained outdated promotional information where a consumer purchased the magazine later on in the quarter. We would still consider it good practice to inform consumers of such magazines that information is correct at time of publication (and may subsequently change), but believe this is covered by the Transparency Outcome, as set out in the proposed new Code. We will consider whether it is necessary to release Guidance to this effect.

Paragraph 5.11 – Use of the word ‘free’

10.11 We consider that the specific requirements around the use of the word ‘free’ in promotional material can be more flexibly covered by the Fairness Outcome, set out in the proposed new Code, with specific reference to rule 2.3.1 around a requirement not to mislead consumers.

10.12 This approach will also allow more easy coverage of the use of words that are similar to ‘free’, such as ‘bonus’ or ‘extra’.

Section 6 – Provisions relating specifically to Live services

10.13 As with internet diallers, providers of Live services are required to seek Prior Permission from PhonepayPlus prior to operation. With the exception of paragraphs 6.2a, and 6.3.1a, c & d, which have been adapted into the new Code, we consider that the other requirements in this section are covered by the Prior Permission requirement.

Section 7 – Additional provisions relating to specific categories of service

10.14 The decision to remove these provisions and replace them with Service-Specific Guidance is explained in more detail on pages 24-29 of this document.

Paragraph 7.7 – Consumer credit services

10.15 Once again, Consumer credit services are required to seek Prior Permission from us in order to operate. As such we do not see any reason to include separate provisions around them in the new Code.

Section 9 – Additional procedures concerning Network operators

10.16 Pages 44-48 of this consultation document set out in detail PhonepayPlus’ rationale that all parts of the delivery chain should bear some responsibility for compliance with the Code, and so ensuring consumer harm does not occur. This section of the consultation goes on to set out our proposals that rules around due diligence, risk assessment and control, registration, Data Protection, withhold and retention of funds, Prior Permission, and a requirement to respond or comply with PhonepayPlus’ requests or instructions should apply along the delivery chain, as appropriate.

10.17 In light of this consideration, we consider there is no longer any need to set out a separate process for the investigation of Network operators.

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

11. 087 services and the new Code

Background

11.1 In 2006, Ofcom announced a number of proposals around the regulation of numbers beginning with an 087 prefix. The main objective was to increase the level of consumer protection, especially around pricing transparency for services offered on these number ranges.

11.2 One of Ofcom's key proposals was to re-categorise numbers beginning 0871 (and, as they come in to use, numbers beginning 0872 and 0873) which cost 5-10p per minute from a BT landline as "Controlled premium rate services". The effect of this reclassification was to bring 087 services (with the exception of 0870 numbers, which stayed under Ofcom's regulation) under the regulatory remit of the PhonepayPlus Code of Practice.

11.3 During 2007, PhonepayPlus consulted on our likely approach to regulation of these services. In February 2009, following its own consultation, Ofcom confirmed that PhonepayPlus would take on the day-to-day regulation of 0871/2/3 numbers which cost 5-10p per minute or more from a BT landline. After a six-month implementation period, this regulation began on 1 August 2009.

087 Statement of Application and Help Note

11.4 In setting out our likely approach to regulation of 087 services, PhonepayPlus produced a Statement of Application. In applying the 11th edition of the Code, which was not drafted with 087 services in mind, PhonepayPlus had to consider whether the nature of many 087 services (which are predominantly data capture or consumer support focused), required some provisions of the Code to be interpreted differently. The Statement of Application, and subsequent Help Note, confirmed a number of areas of the 11th edition of the Code that would either not be applied in respect of 087 services and providers, or interpreted differently.

11.5 These areas were as follows:

- Network operators' due diligence requirements (paragraph 2.3.1 of the 11th edition of the Code)
- Undue delay (paragraph 5.4.2 of the 11th edition of the Code)
- The "50p exemption" rule (paragraph 5.7.5 of the 11th edition of the Code)
- Customer service number (paragraph 3.3.5 of the 11th edition of the Code)
- Prior Permission (paragraph 5.1.1 of the 11th edition of the Code)

087 and the new Code

11.6 In building the new Code, we were aware that our consideration and recommendations should reflect that 087 is now part of our remit. As such, the protection of consumers with respect to 087 services should be consolidated into the fabric of the Code and its supporting documents, rather than continuing to be dealt with through a Statement of Application.

11.7 As the rest of this document sets out, PhonepayPlus' goal has been to create a shorter, simpler and more flexible Code. With this in mind, we do not consider this is best served by introducing specific rules to cover 087 services. However, we do acknowledge that even with a more flexible, outcomes-based set of rules, there will be a need to interpret

a small number of them differently in regard to 087 services. To do so, we propose to review the current 087 Help Note and update as part of our General Guidance to industry.

11.8 Whilst we do not propose to include a draft of this planned General Guidance as an Annex to this consultation, we would welcome comments on the proposals below in respect of how the new Code would be interpreted in respect of 087 services. This feedback can be used to inform the General Guidance around 087 as we continue to draft it.

Due diligence for Network operators

11.9 Our current position regarding due diligence for Network operators (the only part of the delivery chain to whom this responsibility currently applies) is that 087 providers are exempt from the need to perform some responsibilities in respect of their clients (i.e. 2.3.1 a-c of the 11th edition of the Code).

11.10 These responsibilities address:

- The collection of information about clients (and company directors where appropriate);
- The need for the Network operator to satisfy themselves that their client has provided accurate information; and
- The need to satisfy themselves that the client has sufficient financial, and other, resources to discharge their responsibilities in respect of the Code.

11.11 These responsibilities were originally not applied in respect of 087 providers due to the likelihood that networks would have a substantial number of clients, perhaps running into the thousands. For this reason, it appeared onerous to require that those providers collected information and made checks on clients who, in many cases, had operated for some time without causing any consumer harm.

11.12 Pages 44-48 of this document set out our proposals that responsibilities around due diligence and contracts, which have previously only applied to Network operators, should be extended along the delivery chain to apply to all participants. In addition, they set out our proposals that all parties involved in the provision of premium rate phone-paid services should register information about themselves with PhonepayPlus.

11.13 In light of these proposals, we consider that paragraph 2.3.1a of the 11th edition Code, the requirement for Network operators to collect information about their clients, is no longer relevant to any party, 087 or otherwise, because each party in the value chain will now have to provide information directly to PhonepayPlus in order to register and operate premium rate services.

11.14 Paragraph 3.4.2 of the proposed new Code sets out that PhonepayPlus may choose to exempt providers of certain categories of service from the need to register (where they do not provide any other categories of service that would require them to register). We will continue to consider whether those who solely provide 087 services should be exempted from this requirement.

11.15 Similarly, we consider the requirement for Network operators to ensure that information provided to them is not false is also rendered redundant, given that each individual party will be responsible for ensuring the details they provide directly to PhonepayPlus are correct.

11.16 Para 2.3.1b of the 11th edition of the Code relates to a requirement to ensure that clients have the resources to ensure compliant services, and the financial reserves to discharge responsibilities, such as fines or refunds imposed as a sanction. At present, we consider that businesses would wish to carry out these checks in respect of all new clients as a matter of course. However, we would welcome comments from those who solely provide 087 services as to the impact such an expectation might have on them.

Undue delay

11.17 Para 5.4.2 of the 11th edition of the Code states that “services must not be unreasonably prolonged or delayed”. In respect of voice services that are not on the 087 range, PhonepayPlus has, and will continue to, interpret any delay of more than 15 seconds as unreasonable.

11.18 In respect of 087 services, PhonepayPlus considered the following two factors when interpreting the 11th edition of the Code:

- That 087 services have a significantly lower cost per minute;
- That 087 services are often consumer support or data capture lines, where an element of “call queuing” is not unknown, and may be perfectly reasonable where an unforeseen circumstance or staff sickness has led to a higher ratio of calls to each operator than usual.

11.19 As a result, our decision was to not apply 15 seconds as a definition of undue delay for 087, and instead define whether the delay experienced by a consumer was undue on a case-by-case basis. The factors which PhonepayPlus would consider in each case are:

- Whether the consumer has been given an indication of the likely waiting time (in minutes);
- Whether the consumer has been given an indication of where his/her call sits in a queue (i.e. how many consumers are in front of him/her);
- Whether there is another, reasonable factor that would explain delay. This would include unexpected staff sickness (e.g. a number of staff being ill at once, or suffering from a contagious virus), or an unforeseeable event that would generate more calls to an 087 number than normal (e.g. a flood which would create a large number of calls to insurance claim centres).

11.20 Rule 2.3.4 of the new Code states “Premium rate services must be provided without delay after the consumer has done what is necessary to connect with the service and must not be unreasonably prolonged”. Whilst this text has slightly changed from the 11th edition of the Code, in order to better capture that the majority of premium rate phone-paid services are now delivered through text or mobile download, we do not consider that this changes our interpretation of undue delay in relation to 087. Our proposed General Guidance will continue to reflect the interpretation above in regard to 087 services.

The “50p exemption” rule

11.21 At the time the 11th edition of the Code was published, PhonepayPlus exempted those who provided services that would never cost more than 50p in total from the need to provide pricing information (save where they were subscription-based services, those aimed at children, or those accessed by automated equipment, such as burglar alarms or internet diallers).

11.22 The Statement of Application and Help Note that applied to 087 services reflected our conclusion that it was important that consumers received the same pricing clarity on all premium rate phone-paid services. This is how we have applied the 11th edition of the Code in respect of 087-based services since we assumed regulation of them on 1 August 2009. For this reason, we no longer see any reason to continue to provide an exemption to any premium rate services in respect of the requirement to provide pricing clarity.

Customer service number

11.23 The 11th edition of the Code requires that each provider has a non-premium rate UK phone number for the purpose of consumer enquiries, complaints and other services, and that this number is clearly supplied in all promotional material. Up until the change in definition of a Controlled premium rate service to include 0871/2/3 numbers, these numbers were regarded as acceptable, as they were relatively low in cost and did not fall under PhonepayPlus' regulatory remit.

11.24 PhonepayPlus' consideration was that, once 087 numbers were regarded as premium rate, they should no longer be usable as a customer service number for consumers of premium rate phone-paid services. However, we further considered that providers of 087 services, who had not had such a requirement placed on them before, would be unreasonably disadvantaged by the need to set up, maintain and advertise a separate customer service number on another, non-premium rate, range.

11.25 In light of this, the Statement of Application and 087 Help Note set out that providers of 087 services would be permitted to use an 087 number (or the same 087 number in the case of customer support or data capture lines), to receive questions or complaints about their services. This was with the proviso that, where a complaint was upheld, the cost of the consumer's complaint, as well as the cost of the original 087 service about which they had complained, should be refunded in full.

11.26 Since this rule was introduced, we have received no significant complaints from consumers about the way in which 087 providers operate customer support lines on 087 numbers. As a result, we propose that our revised General Guidance will not change this position.

Prior Permission

11.27 In applying the requirement to seek Prior Permission set out at paragraph 5.1.1 of the 11th edition of the Code, PhonepayPlus exempted a number of service types where they operated on 0871/2/3 numbers. This was in view of the lower cost and/or risk that these services carried. A list of these exemptions can be found at Annex B to the Statement of Application in respect of 0871/2/3 services, which is available on the PhonepayPlus website.

11.28 Since PhonepayPlus assumed regulation of 087 services on 1 August 2009, we do not consider that the risk to which consumers are exposed in respect of 087 services has changed. So, we propose to grant the same exemptions under the Prior Permission regime required at Paragraph 3.10.1 of the new Code, as we have granted under the existing 11th edition of the Code.

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?

12. PhonepayPlus funding model

How we are funded

12.1 PhonepayPlus is funded through a levy applied to all regulated premium rate services. The amount raised each year is designed to meet the approved budget for the organisation and ensure any necessary contingencies are set aside. The levy is collected from terminating Network operators who are expected to withhold the required amounts from the payments they collect and pass on to PRS providers, known as outpayments.

12.2 Through our enforcement action, our Code Compliance Panel can fine PRS providers who breach the PhonepayPlus Code. We endeavour to collect those fines, along with any awarded administration costs that are charged to cover the cost of the investigation. All fine income collected in a given financial year is set against the amount required to be levied in the following financial year; so, fines collected from April 2009 to March 2010 will help to pay for regulation in the 2010/11 business year. We believe that this approach to fine income means that the “polluter pays” a much higher proportion of the costs of regulation than other PRS providers. As a non-profit organisation, we also offset any other miscellaneous income, such as bank interest or Prior Permission application fees, against the amount we need to recover through the industry levy.

12.3 The other factor that impacts on the size of the levy in any given year includes the size of the UK regulated PRS market; the bigger the market, the more providers who are paying the levy, which means a lower overall rate. With a decrease in market size, we need to collect more from each provider, so the levy rises. As the market has contracted over the last few years, PhonepayPlus has looked to ensure that its budget takes account of this, so that our costs are justifiable. For example, we have cut our cash budget by 3% this year, which is in line with the decrease in overall market size for 2009.

12.4 Each year, following approval of our Business Plan and Budget by Ofcom, we calculate the amount of funding we will need to raise from industry, net of any cash surplus, and apply this to the projected market size. This produces the levy figure we collect, which is, in effect, a discounted rate, rather than the full amount we would need if there were no fines or other income generated.

12.5 With the new Code of Practice changing the regulatory model and Ofcom undertaking a review of the scope of PRS regulation, we decided to review the current funding model to see whether it was still appropriate, fair and fit for purpose. We commissioned KPMG to carry out a review and make suggestions as to whether changes were needed to the current arrangements. We felt that such a review should look at the potential for:

- Simplifying and reducing the complexity and cost of administering PRS regulatory funding;
- Aligning the costs of funding PRS regulation more closely to its benefits; and
- Ensuring the relevance of the funding model in a fast-moving PRS market.

The Funding Model Review

12.6 PhonepayPlus commissioned KPMG to carry out an independent review of the current funding model, with the aim of providing a fresh analysis of the dynamics and regulation of the PRS market. The review also examined the activities, costs, and sources of funding of PhonepayPlus. The review also considered related funding issues, such as the

effectiveness of financial sanctions policy. KPMG undertook primary and secondary research between May and July 2009, including:

- A review of existing market and PhonepayPlus stakeholder research;
- Discussions with members of the PhonepayPlus Board, management and staff;
- Appraisal of the funding model by KPMG; and
- Primary research with 23 stakeholders from 15 organisations, including Network operators, Service Providers and Ofcom.

12.7 The resulting report identified and evaluated options for improving the structure and operation of funding for PRS regulation. A copy of this report can be found at Annex D of this consultation.

12.8 KPMG believes that the current PhonepayPlus funding model is not fundamentally broken and is simple and cost-effective to administer. It is also in line with the funding framework of other regulatory bodies and compares favourably with international PRS regulatory funding models. Over 80% of stakeholders interviewed in July 2009 also stated it was generally 'fit for purpose'. KPMG did, however, consider there were certain refinements that could be made to the model. Further, the review found that there was a lack of stakeholder awareness over the nature and efficiency of PhonepayPlus activities and costs and the interaction between fines, charges and levy setting.

12.9 KPMG recommended a focus on improving stakeholder awareness and transparency in two aspects of funding: the communication of the nature and cost of regulatory activities, and the nature and interaction of funding sources (for example, how rising fines impact subsequent levies). We have already begun to implement this recommendation through a new presentation of our activities in costs in the recent consultation on our 2010/11 Business Plan and Budget. We also set out further background on the current funding model and levy calculation in the subsequent Business Plan statement, published in late March.

12.10 KPMG felt there was further scope to fund enforcement activity through reviewing administration charges applied to providers who are found to have breached the Code of Practice. Their assessment suggested that current admin charges did not fully reflect the costs of investigating cases and enforcing the Code. We are committed in the coming business year to reviewing our unit costs for carrying out our key functions, for example, calculating the cost of an average consumer contact, or of an average investigation. Once we have robust unit cost information, we will use this both to challenge our operational efficiencies and also to review whether there is further scope to recover some further costs through admin charges.

12.11 While we believe the current funding arrangements are still fit for purpose, we also understand the industry's desire to ensure that PhonepayPlus is efficiently run, and also that the financial burden on the industry is minimised and fairly apportioned. We do not think that the time is right for large-scale changes to our funding arrangements, but we are committed to further work to ensure the funding model meets the objectives we set for the review once the new Code and Registration Scheme are in place.

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

12.12 It is at present unclear what income will be generated by the industry Registration Scheme we are currently developing. Although the registration fees will be set at an amount designed to recoup the setting up costs and cover the operation of the Scheme, if many

more providers register than we project, we may be in a position where we have a cash surplus once all the costs of setting up and maintaining the Scheme have been met. It is our intention in such a situation to review the level of registration fee charged and return any funds to industry through offsetting this income against our levy requirements, in the same manner as fine income is currently handled.

13. Regulatory impact assessment

13.1 As highlighted in the “Background” section of this consultation, evolving markets need an evolving regulator. We believe that the Code proposed here will allow us to meet the needs of consumers in a more diverse market, not least by giving us greater scope to regulate flexibly and proactively where it is appropriate that we do so. However, we recognise that some of the proposals may impose new responsibilities, or shift existing ones.

13.2 This section looks to address what impact, if any, that these new or shifting responsibilities may have on industry participants. We have identified the following areas for consideration:

- Shifting of responsibility for compliance with Outcomes/Rules to Level 2 providers
- Requirement to perform due diligence and risk control on Network operators and Level 1 providers
- Extension of responsibility to withhold/retain outpayments to Level 1 providers
- Requirement to register with PhonepayPlus
- Publication of adjudications
- New sanctions

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

Shifting of responsibility for compliance with Outcomes/Rules to Level 2 providers

13.3 As previously explained in more detail (see page 44-48), the Service Provider has traditionally held responsibility for ensuring that all premium rate phone-paid services with which it is involved comply with the Code. Whilst at first glance, this would seem to absolve Information Providers of responsibility, in practice the current Code ensures that Information Providers currently take a degree of responsibility for their services:

- Whilst placing ultimate responsibility upon a Service Provider, the 11th edition of the Code requires that Information Providers comply with the Code where it is applicable to them, or their services (see paragraph 4.1 of the 11th edition of the Code), and;
- PhonepayPlus may deal directly with Information Providers in certain circumstances (see paragraph 8.3.3 of the 11th edition of the Code). Whilst this requires the agreement of the Information Provider concerned, most Service Providers make this consent part of their contracts with their clients.

13.4 As referred to in more detail earlier in this document (see pages 20-24), our proposed new terminology is as follows:

- Level 1 providers (providers who are not Network operators but who subcontract to other parties), and
- Level 2 providers (the last contracted party in a PRS delivery chain who is responsible for the promotion, operation and content of the service).

13.5 These terms are not completely analogous to the current terms “Service Provider” and “Information Provider”. But, in practice, many of the parties who currently regard themselves as Service Providers are likely to be regarded as Level 1 providers, and Information Providers are likely to be regarded as Level 2 providers.

13.6 Our proposals within the new Code would, except where Network operators or Level 1 providers were clearly responsible for an aspect of a service which a Level 2 provider would normally be responsible for (see Sections 3.7 and 3.8 of new Code), shift the responsibility for compliance with the Outcomes and Rules in Part Two of the Code to Level 2 providers.

13.7 Whilst not always the case, the majority of Level 2 providers are likely to have less staff, and possibly resource, than the Level 1 providers with whom they contract. This raises a consideration as to whether the new Code's proposals will cause additional administrative burdens around compliance for Level 2 providers, above and beyond that which the majority of Information Providers currently undertake.

13.8 PhonepayPlus considers that many Information Providers, the party most likely to be regarded as a Level 2 provider under proposals set out in the new Code, already undertake a degree of compliance activity. This is supported by the growing number of Information Providers who contact us directly for compliance advice concerning their services, enquiries which we estimate now make up half of all our monthly contacts.

13.9 When coupled with the consideration that many Information Providers are already contractually obliged to answer directly to PhonepayPlus for any harm caused by their services, we do not consider that the proposed shift in responsibility will create an additional burden for many established Information Providers. Whilst the proposed new Code will come with a suite of new Guidance, the concept of considering guidance should not be a new one, given that a variety of guidance that exists to support the 11th edition of the Code.

13.10 We accept that a significant number of parties currently classed as Information Providers, and likely to be classed as Level 2 providers by the new Code, may only run one premium rate phone-paid service, or a handful of services of a specialised nature. However, in such cases, the amount of compliance they will have to do, and Guidance they will need to consider, will be significantly less than a larger provider with more services. PhonepayPlus will continue to offer free advice to ensure services are compliant with the Code.

Requirement to perform due diligence/risk control on Network operators and Level 1 providers

13.11 The proposed requirement to perform risk control on clients, and the proposed extension of current due diligence requirements on Network operators to Level 1 providers, are discussed in more detail elsewhere in this document (see pages 44-48 and the illustrative draft General Guidance at Annex C).

13.12 In terms of extending a requirement to perform due diligence to Level 1 providers, we recognise that many parties who would normally be classed as Level 1 providers under the proposed new Code already perform a degree of due diligence on prospective clients. This due diligence is largely to ensure the legitimacy of their clients, and also whether these clients have the resource and inclination to pay any fines levied by PhonepayPlus (fines for which the Service Provider can be held liable under the current Code if the client defaults).

13.13 This suggests that many providers likely to be classed as Level 1 providers already perceive due diligence as a normal part of their business practice, and so an extension of the requirement would not impose any additional burden upon them.

13.14 Risk control, although a new requirement to both Network operators and Level 1 providers, is again something that many Level 1 providers and Network operators (especially Mobile Network Operators) already perform to some degree. A significant number of Level 1

providers, and an even greater number of the providers with the largest market share, already check their clients' promotional material, or at least require that it is checked by PhonepayPlus, prior to use.

13.15 Additionally, many Level 1 providers will already take steps to identify any unusual spikes in traffic or consumer complaints, which may suggest consumer harm. Whilst this harm is not always immediately flagged with PhonepayPlus at present, this is often due to a concern on the part of a provider that they will subsequently be held responsible for the harm. Our proposals in the new Code around responsibility should remove this concern.

13.16 As pages 44-48 of this document, and the illustrative draft General Guidance at Annex C, make clear, to expect any party to directly monitor services provided by a Level 2 provider further down the delivery chain would be unreasonable. However, we consider that any party who has, or wishes to achieve, long-term legitimacy should make a reasonable, and ongoing, assessment of the potential risk posed by its clients and, subsequently, take steps to consistently monitor its clients' activity in proportion to that risk.

13.17 We recognise that the requirement to make a formal, documented assessment of risk for each client, and tie this to recorded monitoring activity of each client going forward, could place a new administrative requirement on some Network operators and Level 1 providers. The time spent on this administration will, we consider, be offset by the time saved through changing the current investigations process (where a Level 1 provider acts as a focal point for requests for information from PhonepayPlus), to a model where PhonepayPlus deals, for the most part, directly with the Level 2 provider.

Extension of responsibility to withhold/retain outpayments to Level 1 providers

13.8 At present, Network operators are required to withhold payment of any funds accrued from premium rate phone-paid services by their clients for a minimum of 30 days from the date of the original transaction. They may also be required to retain these payments for a longer period where PhonepayPlus instructs (See pages 56-57).

13.9 In proposing these requirements are extended to Level 1 providers, we have considered two factors:

- Whether such a requirement places an administrative burden on Level 1 providers;
- Whether such a requirement would cause Level 2 providers unreasonable financial difficulties.

13.10 In terms of the first consideration, we do not foresee any additional complication. Level 1 providers will already have arrangements in place for the transfer of outpayments to their direct clients. There should be little or no difficulty in changing the timing of such payments to at least 30 days after transaction, or stopping these payments in the event of an instruction from PhonepayPlus to retain.

13.11 In terms of the second consideration, we are aware that most Level 2 providers will, in effect, already need to wait 30 days from the date of a transaction to receive outpayment of their share of the revenue. This is because Network operators already withhold the money for 30 days before releasing it to the Level 1 provider, with the money then being immediately released further down the delivery chain.

13.12 This situation will not change under the proposed new Code. However, some Level 1 providers currently pay out to their Level 2 clients ahead of receiving withheld funds from Network operators, and these "ahead of time" payments would be prevented.

13.13 The majority of Level 2 providers wait 30 days for outpayments and already have outpayments delayed where they are retained as part of an investigation. Neither of these situations would be altered by the proposed new Code, so we do not consider that a requirement for Level 1 providers to withhold for up to 30 days, or retain outpayments upon our instruction, would cause unreasonable financial difficulty to Level 2 providers.

Requirement to register with PhonepayPlus

13.14 In considering the potential impact of a requirement on all those defined as Network operator, Level 1 provider or Level 2 provider to register with PhonepayPlus, and for Level 2 providers to register details of all services with PhonepayPlus, we have focused on two areas:

- Whether the cost and time involved in registering as a provider is unreasonable;
- Whether the time required to register services could be unreasonable.

13.15 The proposals for registration are discussed in greater detail at pages 48-56 of this document. However, we envisage provider registration to be a process that can be completed through a web interface as quickly as possible, and with a charge that will not serve as a barrier to market entry for any provider.

13.16 In terms of the registration of individual services, we accept that the amount of administration will increase for providers in line with the number of services they operate. However, we must set this against the clear benefits to consumers and to PhonepayPlus, as a regulator, identified by the Ofcom Scope Review. We also note that currently around 85% of services are registered voluntarily on our Number Checker by providers, which suggests that many providers already see this administration as a normal, reasonable practice.

13.17 As before, our aim is to ensure that service registration is web-based and that services can be registered, or updated, as quickly as possible.

Publication of adjudications

13.18 The proposed paragraphs in the new Code around publication of adjudications (see page 64), set out that PhonepayPlus may publish an adjudication report on our website, or in any other manner we determine.

13.19 In considering whether this carries a reputational risk to industry participants who are found in breach of our Code, we would take the view that information about adjudications is already accessible to the general public. Our proposed amendment to the Code merely formalises that PhonepayPlus may take action to increase that accessibility.

13.20 In addition, we do not propose to publish details of Track 1 investigations. In practice, this means that relatively minor breaches of the Code will not be made publically available, but will be kept on record by PhonepayPlus.

New sanctions

13.21 The proposed new Code contains two new sanctions, as follows:

- A requirement to pay an automatic refund to all consumers, not just those who have complained to PhonepayPlus, where there is a serious breach of the Code;
- A requirement to seek, and implement, a compliance audit from an independent third party at the expense of the party found in breach.

13.22 A more detailed consideration of these sanctions is set out earlier in this document (see pages 66-67).

13.23 We recognise that a requirement to refund all consumers of a service, especially where that requirement includes the entire cost of the service, rather than just the share of the revenue a provider received, could have a significant impact upon a Level 2 provider. However, we have also committed to use this sanction only in circumstances where no consumer could be considered to have benefited from the service concerned.

13.24 A number of responses we received to our Discussion Paper highlighted the potential difficulty of ensuring all consumers receive a form of automatic refund, which could be time-consuming and potentially expensive; although we are aware that a number of providers have developed systems by which consumers can be automatically refunded.

13.25 We have signalled earlier in this document that we are prepared to accept a provider's best efforts to refund consumers and will consider a number of alternatives to an automatic refund to a consumers' phone bill. Where it can be proven that not all consumers can be refunded, we have further stated we will accept a donation to charity. In light of this, we do not consider that this requirement will be exercised in a disproportionate manner.

13.26 In the case of compliance audits by an independent third party, we have already signalled that any such requirement will have a time limit imposed. This is in order that the nominated third party cannot artificially inflate its charges. The party concerned will also have a right of appeal if they feel the recommendations arising from an audit are unreasonable in terms of cost or impact on business.

13.27 Lastly, we note that we have previously required that providers undertake similar audits, or face suspension of their right to provide premium rate phone-paid services. As such, this process is not entirely new to the industry.

13.28 In summary, we do not believe that the changes to the regulatory regime for premium rate services that will result from the new Code and the requirement to register will substantially increase the burden on the industry. This is because the changing requirements, with the exception of registration, are largely in effect codifying common industry practice. Given the new Code of Practice is based on Outcomes and created to provide a more flexible approach to regulation, we believe that the resulting regulatory regime will decrease the amount of resource required to ensure compliance with regulation for some businesses.

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.

Responding to the Consultation

We are seeking the views of all stakeholders on the proposals and questions contained in this paper by no later than **8 July 2010 (10 weeks from the date of issue of this document)**.

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

Mark Collins, Head of Industry Affairs, PhonepayPlus Ltd, Clove Building, 4 Maguire Street, London SE1 2NQ

Tel: 020 7940 7412

Fax: 020 7940 7456

If you have any queries about this consultation, please telephone or email Mark Collins using the above contact details.

Engagement with Level 2 providers

This consultation, and the attached Code, represent a significant departure from previous Codes in terms of where in the delivery chain responsibility will be placed. Previously, "Information Providers" have had a duty to comply with the Code in terms of the premium rate phone-paid services they provide, but no ultimate responsibility for doing so.

The proposals set out in this document will place a far larger responsibility upon Level 2 providers (i.e. Information Providers who are the final link in the delivery chain) than before, with the potential consequence that some Level 2 providers will have to adapt their current business processes in terms of compliance.

For this reason, we are eager to receive feedback to these proposals from those Information Providers who will likely be regarded as Level 2 providers in the new Code. We have conducted an extensive exercise, especially in the mobile sector, to identify known Information Providers, and have also worked with various trade associations to ensure we are able to bring this document to the attention of as many Information Providers as possible.

We would ask that Network operators and Service Providers bring this document to the attention of any of their clients who may be regarded as Level 2 providers under the proposals set out here, in order that we can receive feedback from a part of the delivery chain that has not traditionally responded to consultations in large numbers.

Confidentiality

We plan to publish the outcome of this consultation and to make available all responses received. 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.

List of questions in the document

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

Q2 – Do you agree with these 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 to 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 to allow the creation of new General Guidance subject to appropriate consultation? If not, why not?

Q7 – Do you have any comments on the draft General 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 where Service-Specific Guidance or General Guidance to industry is necessary? Please state any areas you have identified.

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 issue 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 in to 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 in to 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?

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

Q22 – Do you agree with the proposals around technical quality? 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 in regard to 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) in regard to the application of risk assessment and control to Network operators, then please state that preference, along any reasoning you may have.

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?

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

Q30 – Do you agree that these are the appropriate risk factors and measures to use when drawing up a framework for assessing which services should be required to register? Do you have any further suggestions on criteria we should consider?

Q31 – Do you agree that 087 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 three years for a Track 2 breach and five years for an Emergency procedure are appropriate timeframes?

Q34 – Do you have a view on whether breaches from the 11th edition of the Code 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, along with any supporting evidence you have.

Q36 – Do you support mandatory registration of all Network operators, Level 1 providers 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?

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?

Q44 – Do you agree with the proposals around PhonepayPlus' investigations? If not, why not?

Q45 – Do you agree with the proposals around the Track 1 procedure? If not, why not?

Q46 – Do you agree with the proposals around the Track 2 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 the administrative charge? 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?

Q56 – Do you agree with the proposals around definitions? If not, why not?

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

Q58 – Do you agree with this assessment of parts of the 11th edition of the Code that should be withdrawn completely going forward? Please list any specific provisions that 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?

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

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