



PhonepayPlus

Code 14 Supporting Procedures

January 2016

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Section 1

Introducing the Supporting Procedures

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

| Glossary terms | Explanation |
|---------------------|---|
| PhonepayPlus | Defined at paragraph 5.3.26 of the Code and within the explanation at paragraph 1.1 of the Code: 'PhonepayPlus' means the employees of PhonepayPlus and/or members of the Board save where the context otherwise requires. It is an enforcement authority with responsibility for enforcing the Code, which regulates the use of premium rate services (PRS). |
| Executive | PhonepayPlus' functioning executive body. This generally excludes the non-executive members of the Board of Directors. However, the Investigations Oversight Panel (IOP) generally includes both senior executive and non-executive members, and as such is included within the term "Executive". |
| Investigations Team | Part of the Executive that holds expertise in evidence gathering, handling and analysis. The Investigations Team is tasked with case management and day-to-day enforcement activities under the Code. |

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| Investigation Oversight Panel (IOP) | An internal panel composed of senior executives and non-executive Board members that will consider matters of case management and quality control during the progress of investigations. Its role is explained at Section 8 of the Supporting Procedures. |
| Allocation Team | This usually comprises the Head of Investigations, Head of Customer Services, an In-house lawyer and a Policy team representative. The group considers information held in relation to any complaint, monitoring work or based on engagement with relevant parties at the 'enquiry stage' of the process. The group will then follow the 'allocation' process (see below) triggering an investigation where necessary. |
| PhonepayPlus Board | The Board of Directors of PhonepayPlus Limited – a not-for-profit organisation limited by guarantee. The Board govern the strategy, policy setting and operations of PhonepayPlus. Board members do not take part in any adjudicatory activity or decision-making in relation to Code enforcement. Non-executive Board members sit on the Investigations Oversight Panel (IOP) as required. |
| PhonepayPlus Code Adjudication Panel (PCAP) | A panel of experts who undertake adjudicatory activity and decision making in relation to Code enforcement on behalf of PhonepayPlus. The PhonepayPlus Code Adjudication Panel (PCAP) is constituted separately from the PhonepayPlus Board, and its functions are governed by section 4.7 of the Code and Annex 3 to the Code. |
| PhonepayPlus Code Adjudication Tribunal (PCAT) | Tribunals are constituted of three members of the PhonepayPlus Adjudication Panel (PCAP). Details of the process followed in advance of, and during, Tribunals are set out in Sections 11-13 of the Supporting Procedures. |
| Enquiry stage | The enquiry stage is undertaken by the Executive when it first becomes aware (either through receipt of complaints or monitoring) of potential issues with a PRS. This involves the gathering of information to assist with the Executive's initial decision making, including allocation decision. |
| Derogation process | Where PRS providers are based in non-UK EU or EEA countries, there may be legal steps to be taken prior to allocation. Details of this derogation process are provided at Section 3 of the Supporting Procedures. |
| Allocation | The process by which all cases are allocated to either Track 1 or Track 2. The allocation process reviews information gathered during the enquiry stage and considers whether any investigation is required or whether enforcement action is unjustified at that time. Details of this process are set out at Section 7 of the Supporting Procedures. |
| Track 1 procedure | An investigation of potential breaches of the Code, which may be resolved between PhonepayPlus and the relevant PRS provider via an agreed Action Plan. The Track 1 procedure does not require an adjudication by the PCAT. The procedure is set out in the Code at section 4.4, and further details are set out in Section 7 of the Supporting Procedures. |

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| Track 2 procedure | An investigation into potential breaches of the Code, which may require more extensive efforts to gather information and evidence relating to the potential breaches of the Code. This formal process is set out in the Code at section 4.5, and explained in greater depth across Sections 7-14 of the Supporting Procedures. |
| Interim measures | Suspensory or withhold directions which may be issued to parties in the PRS value chain prior to a final adjudication on breaches of the Code by PCAT. The withholding of revenues from the Level 2 provider ensures financial security during the investigatory process; and urgent suspension of services enables the prevention of further consumer harm pending the completion of the investigation. Details of these interim measures and how they are invoked are set out in the Code at section 4.6, and in Section 9 of the Supporting Procedures. |
| Withhold directions | Directions issued to either a Network operator or Level 1 provider to prevent out-payments of PRS revenues being shared with providers lower in the value chain pending payment of any sums due following sanctions being imposed by the PCAT. Details of the process associated with these directions are set out in Section 9 of the Supporting Procedures. |
| Suspensions | Directions issued to parties in the value chain to suspend a PRS. Suspensions may be imposed on services where there is evidence of a serious breach of the Code and the need to suspend is urgent, pending completion of the investigation. Details of the process associated with these directions are set out in Section 9 of the Supporting Procedures. |
| Review of interim measures | A review undertaken by a PCAT of the decision to impose interim measures. Details of this process are found in Section 9 of the Supporting Procedures. |
| 4.2.1 Direction | A direction made under paragraph 4.2.1 of the Code to require a party to supply specified information or documents to the Executive. Failure to comply with such a direction may be a breach of the Code. Information gathered as a result of 4.2.1 Directions may form part of the evidence relied upon by the Executive when preparing an Action Plan or issuing a Warning Notice. |
| Action plan | Action plans are established as part of the Track 1 procedure to address and remedy breaches of the Code. They can be proposed by either the PRS provider or PhonepayPlus, but must be agreed by both parties. |
| Interim Warning Notice | Correspondence which notifies a party that PhonepayPlus intends to impose interim measures, and invites the recipient to respond urgently with any representations. The Interim Warning Notice will contain appropriate information based on the stage of the investigation and the nature of the interim measure proposed. If the case progresses a full Warning Notice will be prepared in the usual way later in the investigation. |

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| Warning Notice | A formal submission produced by the Executive and sent to a relevant PRS provider, outlining a description of the service and potential breaches identified, providing supporting evidence, and providing a recommendation of sanctions. It will also set out instructions to the PRS provider relating to how it can respond to the Warning Notice. Details of this key stage in the investigation can be found in Section 10 of the Supporting Procedures. |
| Tribunal bundle | The bundle of documents prepared for the use of the PCAT and the parties after a Warning Notice or Interim Warning Notice is issued. The bundle includes all the relevant documentation, including any response from the relevant PRS provider. |

Section 2

Purpose of PhonepayPlus investigations and enforcement

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

Section 3

PhonepayPlus' remit and jurisdiction

How the Communications Act 2003 and our Code frames our remit

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

Derogation process relating to providers based in the EEA

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

¹ 'Information society services' are defined under paragraph 5.3.22 of the Code as, '...any services normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services (as defined in Article 1.2 of Directive 98/34/EC as amended by Directive 98/48/EC), subject to the exceptions set out in the Directive.' Further explanation and examples are provided at Annex A.

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

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

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

(a) the measures shall be:

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

— the protection of consumers, including investors;

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

on factors that are considered in determining whether a service is an information society service is included at Annex A.

17. The procedure for making a referral is as follows. Where necessary, referrals will be made prior to allocation of a case for investigation.
- Before making a referral, enquiries will normally be asked of the provider. Where it is practical to do so, PhonepayPlus will also make informal contact with the relevant home Member State authority at this early stage to inform them that the Investigations Team is concerned that the service is or may be prejudicing the objective of consumer protection, and that enquiries are being made prior to any formal referral being made and prior to the Code being invoked.
 - Upon receiving such notification, we expect providers to take appropriate action at an early stage to remedy the Investigations Team's concerns, which may include seeking and acting upon compliance advice, and providing refunds to affected consumers. If providers do so, we recommend that they provide sufficient evidence to PhonepayPlus that they have done so.
 - Following review of any responses received from the provider, where there remain concerns about the service, a formal referral will be made.
 - PhonepayPlus uses the Internal Market Information ("IMI") portal to formally refer matters to the relevant home Member State authority. PhonepayPlus will provide such relevant information as it has about the service through the IMI portal, and request that the home authority take adequate action to investigate and resolve any concerns.
 - Providers will normally then be contacted by email to inform them that a formal referral regarding the service they operate has been made. Any relevant Level 1 provider and/or Mobile Network Operator(s) will also be informed of the fact that a referral has been made.
 - PhonepayPlus expects the home Member State authority to conduct such investigation of the service as it deems necessary.
 - Where providers take appropriate steps to remedy the Investigations Team's concerns, and provide sufficient evidence to PhonepayPlus that they have done so, PhonepayPlus will normally provide confirmation of this to the nominated regulator for the home Member State. It is anticipated that in many cases, this will promote the early resolution of a case without the need for either PhonepayPlus or the home authority to take measures.
 - Where the authorities in the relevant Member State do not take any measures or where the measures taken are inadequate (for example, where the measures only partly address the harm, or the harm appears to still be continuing after the measures have been taken), PhonepayPlus may decide (where the requirements of Article 3(4) of the E-Commerce Directive are satisfied) to take appropriate measures itself. This may include taking enforcement action pursuant to the Track 1 or Track 2 procedure.

(iii) proportionate to those objectives;

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

- asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,
- notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.

18. In cases of urgency, the E-Commerce Directive allows PhonepayPlus to take measures without first referring the matter to the relevant Member State, again where the requirements of Article 3(4) of the E-Commerce Directive are satisfied.³ However, where such measures are taken, the Member State and the Commission must be notified as soon as possible thereafter. Such notification will be as comprehensive as possible (to include full details of the measure(s) taken by PhonepayPlus and any action(s) taken by the provider itself) and will be made via the IMI portal. Either the Executive or the PCAT will normally seek legal advice prior to taking urgent measures. Such advice will be subject to legal professional privilege.
19. These procedures are subject to change from time to time, including as a result of the legal and procedural requirements mandated by the EU and the Department for Culture Media and Sport. In the event of conflict between these Supporting Procedures and such legal or procedural requirements, those legal and procedural requirements shall prevail.

³ Directive 2000/31/EC Art. 3 para. 5.

Section 4

Sources of intelligence and the enquiry stage

Monitoring

20. The Executive conducts monitoring of premium rate services. The Executive may decide to monitor a specific service as a result of complaints received, as a result of reports received from the industry or security consultants, as a result of information found online, as part of a planned sweep in relation to a particular issue, or for other reasons. The Executive may change its monitoring policies and strategies from time to time in order to respond to changing technologies and behaviours.
21. Our monitoring function involves gathering intelligence for a range of regulatory activities, many of which are unrelated to enforcement of the Code. However, when evidence of non-compliance is found in the market, a report will be prepared and provided to the Head of Investigations and Enforcement for consideration. The Executive may initiate an investigation where its monitoring appears to show a breach of the Code (Code paragraph 4.1.2). If the Head of Investigations and Enforcement considers that the nature and quality of the evidence is sufficient to warrant an investigation, the information will be presented to the allocation team for further assessment⁴.
22. If the monitoring highlights a potential breach of the Code, the Executive may decide to notify the relevant Level 2 provider(s) and associated industry stakeholders of the findings of the monitoring report prior to any further investigation into the matter. This provides the PRS provider with greater visibility of the issue, if it is not already apparent to them, and gives relevant industry stakeholders the opportunity to respond. This response may be to provide an explanation to the Executive of the issue and any root cause, or involve remedial action to improve compliance standards. If the case has not been allocated at this point, the information provided by any relevant parties will be considered by the allocation team as appropriate.
23. Given the fast-moving nature of the industry, some investigations may proceed after remedial action is taken. This may be necessary to fully understand the issue and to ensure it does not arise again in future.

Security intelligence and other enforcement bodies

24. As indicated above, one trigger for monitoring work may be a report from a security intelligence source. However, depending on the information given, the Executive may launch an investigation based on intelligence shared by security consultants or other enforcement bodies in the UK and globally.
25. PhonepayPlus has built a strong network of contacts with such groups, working with the Consumer Concurrence Group in the UK hosted by the Competition and Markets Authority (CMA) and Operation LINDEN coordinated by the Information Commissioner's Office (ICO). PhonepayPlus constantly raises awareness of its role and remit to other enforcement bodies to make sure accurate and helpful information is shared with the PRS regulator as appropriate.
26. PhonepayPlus has a number of memorandums of understanding with such bodies to ensure information is shared effectively and decisions are taken as to appropriate regulatory activities.

⁴ See Section 7 below.

Consumer complaints

27. Members of the public can contact PhonepayPlus directly to provide information about services for a number of reasons, including the receipt of PRS promotional material, the receipt of PRS charges, or where PRS has affected a relative or other phone user. Consumers may contact PhonepayPlus to make enquiries about such services, and therefore not every contact will provide evidence of a breach of the Code or lead to an investigation. However, each piece of information given by consumers, whether it forms part of a complaint or an enquiry, may be used by the Executive to understand the services on the market and their compliance with the Code.
28. PhonepayPlus considers a complaint to equate to a negative report relating to a PRS indicating some discrepancy between consumer expectations and service delivery or operation. Complaints will be tested against information held relating to the service, including any registration data, monitoring evidence, or other consumer information.
29. As part of the complaints procedure, consumers are usually given information about the Level 2 providers operating the service allowing them to take up the matter directly. If the consumer requires more information, we may need to send the consumer back to their Network operator to establish where the charges originated from.
30. The Executive may also contact the service provider directly to seek information relating to consumers' engagement with the service if circumstances require it⁵. Service providers therefore will often have the opportunity to investigate and rectify any underlying issue, including providing redress where appropriate, before PhonepayPlus determines that it needs to investigate further. Prior to any investigation, the usual allocation process will be followed (see Section 7 below).
31. The Executive may in its discretion decide not to investigate a complaint if it has not been made to PhonepayPlus within a reasonable time. When considering what is reasonable, the Executive will take into account when a consumer could first have been reasonably expected to know of the matters giving rise to the complaint.

Industry reports and complaints

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

⁵ Such requests at the early enquiry stage may not be in the form of a formal direction for information under paragraph 4.2.1 of the Code. While a specific consumer contact may not be a formal complaint, recent dialogue with a PRS provider or a previously completed investigation may warrant some further review as a result of such contacts. Any such enquiries will be made with a view to understanding the current service operation and promotion and may not lead to any case allocation.

34. Whether an investigation is launched as a result of a complaint made by a member of the public or a member of the industry, the investigation will follow the same process set out in Section 7 and 8 below.

Section 5

Signposting and referrals

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

Section 6

Engagement with PhonepayPlus

39. The Executive will inform relevant PRS providers across the value chain of any concerns about their services and/or any other evidence of potentially non-compliant activity at an appropriate time. This may coincide with a request for information or other form of enquiry about the relevant service(s)⁶.
40. Where possible, providers are encouraged to proactively take steps to limit and address risks of consumer harm, including but not limited to taking action when they become aware of consumer complaints. Providers are also encouraged to proactively alert the Executive to any issues regarding their own or third party services. Such proactive co-operation will be considered by the Executive when they are deciding on the most appropriate enforcement procedure to be used (if any) and/or may mitigate any sanctions imposed by a Tribunal. In light of evidence about what steps have or have not been pro-actively taken, the Executive may also consider whether a provider's systems are sufficient to comply with any risk assessment and control obligations, and any obligation to ensure that consumers are treated equitably⁷.
41. In the course of its work, the Executive is required to make a number of decisions based on the information known to it at the time. This includes decisions on allocation of a case to a Track for investigation, whether to refer a case to a different enforcement body, and whether to apply for interim orders such as suspension of the service or withhold of revenue. PhonepayPlus therefore considers that it is in the best interests of providers to pro-actively provide the Executive with information which they consider is relevant to such decisions at an early stage, including evidence of any pro-active steps taken to eliminate risks of consumer harm. Information which is provided prior to such decisions being made will be more helpful when considering market issues. When making case management decisions, the Executive cannot be expected to take into account information of which it is not aware because a provider has not volunteered it.
42. Network operators and providers will appreciate that PhonepayPlus has an obligation to consider complaints and where appropriate investigate apparent breaches of the Code. An investigation will only proceed after the allocation process has been followed, however some engagement with PRS providers may take place at the enquiry stage. At any point during an investigation, or when enquiries are being made, PRS providers are able to share information and make representations to the Executive⁸. This may be in response to an RFI or other correspondence, but there is no restriction on PRS providers. Any information may assist PhonepayPlus to understand the situation being considered.
43. During an investigation, PhonepayPlus expects Network operators or providers associated with services under investigation to fully co-operate with the Executive leading the investigation and to comply with requests for information made under paragraph 4.2.1 of the Code in a timely, straightforward and thorough manner. Information supplied to the Executive must be accurate to the best of the Network operator's or provider's knowledge. Where a service is found to be in breach and sanctions are considered necessary, any deviation from the expected standard of co-operation during the investigation may be treated as either an

⁶ A full list of the points at which PRS providers may be contacted is found in Section 7, paragraph 70-71 below.

⁷ PhonepayPlus has published guidance on due diligence, risk assessment and control to help equip industry to respond effectively to issues and increase compliance standards in the PRS market:

<http://www.phonepayplus.org.uk/~media/Files/13th-Code-of-Practice/Guidance-and-Compliance/Due-diligence-risk-assessment-and-control.pdf>

⁸ This is provided for at paragraph 4.5.2 of the Code. Normally such representations would be made via the Investigations Team member in charge of the case, but other channels can be used as appropriate.

aggravating or mitigating factor, which may have an impact on the severity of the sanctions imposed. Further guidance on this can be found below under 'Aggravation' and 'Mitigation'.

44. Where a party fails to co-operate and/or provides false or inaccurate information it is likely to have a negative impact on PhonepayPlus' role as a regulator (particularly in relation to investigations) and trust in the premium rate industry. Therefore, the Executive will take robust action which may include using a more formal enforcement procedure, raising additional breaches of the Code and/or aggravating factors.
45. Where a company or individual within the premium rate service value-chain provides information that is found to be incomplete, false or inaccurate, the company or individual who provides the information and seeks to rely upon it may be found to be in breach of the Code by a Tribunal⁹. It is recommended that the source of the information is identified to the Executive when it is provided.

⁹ Potential breaches of paragraphs 4.2.2 or 4.2.3 of the Code will be set out in a Warning Notice in the usual way with relevant parties able to respond to the allegations before any adjudication by the Tribunal.

Section 7

Allocation

Allocation criteria

46. As set out in Part Four of the Code, there are two procedures available to the Executive when dealing with potential breaches of the Code. The decision as to which procedure is appropriate in any given case is a decision for the Allocation Team¹⁰, based on the evidence available at the time. However, cases are assessed internally on a regular basis and, where information is obtained that warrants a change in approach, it will be given due consideration and relevant parties will be notified of any change.¹¹
47. Where the Allocation Team determines that there is a need to investigate a service in greater depth and/or to take action in respect of a suspected breach of the Code, the allocation Team will determine which is the relevant procedure to use (“allocation”), following the process set out at paragraph 4.3 of the Code.
48. Prior to allocation, the Executive will make informal enquiries to assist it to determine which if any procedure is appropriate for the investigation in all the circumstances.
49. Where information has been requested informally prior to allocation and a provider has not answered a question put by the Executive, the Executive may draw a negative inference where it is reasonable to do so. This may be considered when assessing which procedure is appropriate.
50. The Allocation Team will first consider evidence held which gives rise to a suspicion of breach(es), and if such allegations are sustainable. Such evidence may include but is not limited to:
 - Complaints (including an assessment of the consistency between consumer accounts, and dates on which complaints were received);
 - Documentary evidence submitted (including any provider responses);
 - Monitoring evidence available relating to the alleged breaches.
51. If there is sufficient evidence to suspect breach(es) of the Code, the Allocation Team will exercise its discretion in deciding what Track to allocate a case to. When making this determination, the Executive will take into account the following factors, insofar as they are relevant in that case. :
 - (a) *the level of harm caused by the apparent breaches ;*
 - (b) *whether the apparent breaches have caused offence to the general public;*
 - (c) *the seriousness of the apparent breach(es);*
 - (d) *whether the provider has taken effective steps to remedy any consumer harm or offence to the general public and ensure that the service does not have potential to cause any such harm or offence, prior to allocation to an enforcement track;*

¹⁰ This usually comprises the Head of Investigations, Head of Customer Services, an In-house lawyer and a Policy team representative.

¹¹ A full list of the points at which PRS providers may be contacted is found in Section 7, paragraph 70-71 below.

- (e) *the breach history of the party under investigation;*
 - (f) *whether the apparent breach(es) are of a nature that can be addressed through any given enforcement procedure;*
 - (g) *the level of cooperation PhonepayPlus considers is likely to be received from the party under investigation;*
 - (h) *whether PhonepayPlus considers that an effective regulatory outcome is likely to be achieved through the use of any given enforcement procedure; and*
 - (i) *any public interest reason(s) that may make the case more suitable for any given enforcement procedure.*
52. Information relevant to the assessment might include the evidence set out at paragraph 50, any evidence of widespread harm or harm to vulnerable consumers, whether the provider has been pro-active in ensuring that the suspected breaches will not re-occur and in compensating consumers in full, the degree to which the provider may have gained due to the suspected breach, any failures to heed compliance advice, and whether the suspected breach appears to be part of a pattern of repeated disregard for the Code, as well as any other relevant information. The initial allocation assessment will be documented.
 53. Whilst the Allocation Team will consider the number of complaints as a percentage of service usage if the provider supplies PhonepayPlus with reliable evidence of this, such percentage will not determine the Track a case is allocated to. In practice, the number of complaints the Executive receives in respect of services varies according to a number of factors, including the nature of the service and the way in which the Code has been breached. Where the Executive receives a significant number of complaints in respect of a service and there is evidence to support an allegation of Code breach, the public interest may support bringing a Track 2 case even if the number of complainants represents a small percentage of the provider's customer base.
 54. Absence of factor(s) which would usually indicate that a case should follow the Track 2 procedure, such as evidence of deliberate breach of the Code, will not by itself indicate that a case is appropriate for the Track 1 procedure.
 55. A Track 1 procedure will only be offered if the Allocation Team is satisfied that such a procedure is appropriate based on an assessment of the factors and other relevant information set out at paragraphs 51 and 52 above.
 56. Where there is one allegation of breach which is appropriate for the Track 2 procedure, the presumption is that all allegations of breaches in respect of that service will be taken through the Track 2 procedure.
 57. There is no pre-determined weight attached to any particular factor, or type of evidence, and there is no presumption that if a majority of factors indicate a particular Track, then that Track is the most appropriate. The Allocation Team will use its discretion, having considered the above factors and the information available to it in the round, to attach weight to each factor and to decide what Track to allocate each case to. The Executive will communicate its allocation decision to the relevant parties¹².

¹² A full list of the points at which PRS providers may be contacted is found in Section 7, paragraph 70-71 below.

Track 1 procedure

58. The purpose of any Track 1 investigation is to fully understand the issues affecting the relevant service; to agree upon which Code provisions are being breached; and to establish a means to remedy those breaches. Where the Executive in its discretion uses this procedure, it will develop an agreed action plan to remedy potential breaches identified.
59. The Investigations Team may gather (including through use of its powers under para. 4.2.1 of the Code, and as set out at Section 4 of these Supporting Procedures) information associated with the promotion and operation of the service and set out the potential breaches. An action plan will be proposed by the Investigations Team. Where it is agreed, the provider may need to document the implementation of changes to the service or business systems. The Executive may undertake routine monitoring of the service to test implementation. Any dispute relating to the action plan, or failure to implement it, may result in a Track 2 procedure being initiated.
60. The Executive will consider re-allocating a case to Track 2 if:
 - a. the relevant party disputes that any of the breaches has occurred;
 - b. The Executive and the relevant party fail to agree on an appropriate deadline for response to the offer and/or action; or
 - c. The Executive and the relevant party fail to agree on any other terms of an action plan; or
 - d. the relevant party fails to comply with any part of the action plan, including evidencing compliance, payment of any administrative costs invoiced and/or payment of refunds.

Track 2 procedure

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

Closure of investigations

67. At allocation stage or at any point thereafter, the Executive may decide to take no further action at that time if it:
- holds insufficient evidence at that time to allege a breach of the Code and does not believe that such evidence will be obtained; or
 - considers that there has been a breach but, in its view, the overall regulatory benefit which may be achieved (including any general deterrent effect) is disproportionate to the resources required to pursue regulatory action.¹³
68. In such cases, the Executive may decide not to take further enforcement action at that stage, but will communicate its view on the breaches investigated to the provider. Potential actions to improve consumer engagement may be recommended by the Executive and the relevant parties ought to consider what appropriate steps to take based on the information gathered.
69. Where no further action is taken, or a Track 1 action plan is agreed, this does not prevent the Executive taking action in respect of the same or similar allegations in the future, for instance where new and relevant information comes to the attention of the Executive.

Communications to industry stakeholders

70. There are various points at which it may be appropriate for the Executive to correspond with relevant parties associated with the operation and delivery of a PRS. These include the following:
- Provision of monitoring reports to raise awareness of identified issues;
 - Requests for information to clarify service information and check information held on the registration database, based on monitoring and/or on consumers contacting PhonepayPlus directly;
 - Notification following case allocation;
 - Requests for information during enquiries or investigations;
 - Notification of intention to use interim measures, including suspension powers under the Code;
 - Directions to withhold revenues, provide information, or suspend services;
 - Issue of Warning Notices and any subsequent Tribunal preparatory notifications or directions;
 - Provision of adjudication reports and alerts ahead of any publications.
71. Whilst the Executive will normally communicate with stakeholders at these points as a minimum, it may not be practical or appropriate in all cases to communicate at every stage, depending on the facts of each case (such as where the Executive has determined that it is in the public interest to seek interim measures without prior notice to a provider).

¹³ One possible example is where upon consideration of the present status of the PRS industry as a whole, the Executive is of the view that cross-industry compliance can be better achieved by taking alternative steps instead of (rather than in addition to) formal enforcement action. Note that before deciding to take no further action on this ground, the Executive will give the matter careful consideration and may still decide to take enforcement action where other public interest factors support taking enforcement action.

Section 8

Role of PhonepayPlus' Investigation Oversight Panel

72. The Head of Investigations and Enforcement has primary control over ongoing investigations and enforcement action undertaken by the Executive. The person in this role manages the Investigations Team undertaking the tasks associated with those enforcement activities. The new PhonepayPlus Investigation Oversight Panel (IOP) includes members of the Leadership Team and non-executive PhonepayPlus Board members. Given the potential reliance necessary on legal advice during case management, whilst the General Counsel who sits on the Leadership Team will be involved in the IOP, s/he will not take part in considering any investigation in which s/he has been previously involved. Furthermore, the Chairman of PhonepayPlus will focus on leading the organisation and will not be involved in the IOP.
73. The IOP acts as a group providing oversight and quality assurance of investigations in support of the Head of Investigations and Enforcement. At specific stages of any investigation members of the IOP give consideration to the planned enforcement activities undertaken by the Investigations Team and may make recommendations and endorse proposed activities.
74. The key stages of any Track 2 investigation may include:
- Assessment of any required interim measures;
 - Assessment of potential breaches and sanctions in draft Warning Notices;
 - Assessment of any acceptance of breaches and sanctions by relevant parties, with the possibility of settlement
75. At each of these stages, the Investigations Team will submit requisite information to designated members of the IOP for consideration¹⁴, for which a meeting may be convened. When an IOP recommendation is required, normally three (and no less than two) eligible members will be convened for a meeting either in person or via conference call. This would normally involve:
- up to two members of the Leadership Team; and,
 - a non-executive Board member¹⁵. Where there is no Board member sitting at the meeting, a report summarising the outcome will be made to the Board after the meeting.
76. Also attending the meeting of the IOP will be a Secretariat for the panel, the Head of Investigations and Enforcement, and the relevant Investigations Team member working on the case, who will coordinate any actions required based on the recommendations of the IOP. This may involve making further enquiries to gather or test evidence; switching the case from Track 2 procedure to a Track 1 based on a review of evidence gathered; issue a formal notification to a relevant provider in accordance with the Code, such as a Warning Notice; or consider the closure of the case and other regulatory activities.

¹⁴ The information required will vary depending on the stage of the investigation. Where not otherwise obvious, the Investigations Team member will also provide a paragraph summarising the nature of the service, and PhonepayPlus' concerns.

¹⁵ The eligible members include industry non-executives on the Board who may bring their expertise to any assessment of enforcement activities, except where any conflict of interest exists.

Section 9

Interim measures during investigations

77. Interim measures include a range of powers set out in the Code to offer security and consumer protection where necessary prior to any formal adjudication of potential breaches of the Code, or other suitable resolution of the matter. These include the options to impose a withhold of revenues across a value chain, or to suspend services pending a Tribunal hearing (or until changes are made to a service to remedy apparent serious breaches of the Code).
78. Before seeking to rely on any interim measures, the Executive will consider the following (where relevant):
- The nature and severity¹⁶ of the breaches or harm to consumers being investigated (including whether or not there is a risk that such breach or harm would not be effectively remedied without such interim measures), and any necessity for urgent action;
 - The potential impact flowing from the potential breaches, to both consumers and the relevant party under investigation, including likely fine amounts that may be imposed as a sanction;
 - What information is available relating to the financial status of the relevant party and its capacity and/or willingness to meet its responsibilities under the Code¹⁷.
79. Further details relating to each of these interim measures are set out below.

Withholds

80. PhonepayPlus will seek to use its power to withhold service revenue where a case has been allocated to Track 2, a breach of the Code appears to have taken place, and it considers that a provider will not be able or willing to pay such refunds, administrative charges and/or financial penalties as it estimates a PCAT may impose in due course¹⁸.
81. When a case is allocated to Track 2, the Investigations Team will conduct an assessment of the provider using the general criteria at para 78 and further specific risk factors set out at Annex B. The Investigations Team may seek relevant information for these purposes, including published financial data in respect of the provider, details of revenue payment dates, and whether there are any sums available to be withheld.
82. Where the assessment indicates that the criteria for a withhold may be fulfilled, the Investigations Team will draft an “Interim Warning Notice” and refer the matter to the IOP, who will convene a meeting in accordance with the procedure set out above at paragraph 75 and make a recommendation.
83. The assessment will be based on the information known to the Investigations Team at the time. Where credible information is not made available to the Investigations Team the Executive may draw a negative inference where it is reasonable to do so.
84. If the IOP considers that a withhold direction is appropriate, the Investigations Team will (unless there are important public interest reasons to the contrary) use its best endeavours to notify the party under investigation of its initial findings and confirm the amount of the

¹⁶ See paragraph 177 for a list of non-exhaustive criteria the Executive may consider in assessing the severity of breaches

¹⁷ See paragraphs 81 and 85 for further details of the evidence that may be considered.

¹⁸ The estimate of sanctions is not binding on the PCAT who will make an assessment based on information available to them at the time they make such determinations.

proposed withhold, and invite that party to make representations to the Executive within a timescale which is reasonable, taking into account the urgency of the matter.

85. The provider may make urgent representations about the level of the withhold. In order to carry any weight, any representations must be supported by credible evidence which is sufficient to confirm that the provider is willing and able to meet any sanctions that may be imposed, or administrative charges that may be invoiced. PhonepayPlus anticipates that to support such representations it will be necessary as a minimum for providers to supply credible and up-to-date evidence of the following:
- the provider's current cash and asset position (including any overdraft facility or similar);
 - evidence of projected income and outgoings, including evidence of the date payments are due;
 - evidence of the sources and amounts of all recent and projected income; and
 - evidence of any refunds given to date.
86. In order to be considered, such representations and evidence must be provided by the deadline set by the Investigations Team, which will usually be no longer than 48 hours. The Investigations Team may vary this deadline upon request, provided that a response will still be received by no later than two weeks before the next known outpayment date.
87. The provider also has the opportunity to agree a mutually satisfactory withhold direction with the Executive, and/or to provide a bond as an alternative. Where a provider consents to the terms of a withhold, the PCAT can approve the proposed measures under a simplified procedure, pursuant to Code Annex 3 para. 4.2, which will reduce the potential administrative charge.
88. The Investigation Team's assessment, the interim Warning Notice, and the provider's response to that notice will be provided to three members of the PCAP.
89. The three PCAP members (constituted as a Tribunal) will decide whether the conditions in Code paragraph 4.5.1(b) are satisfied to warrant the imposition of a withhold, on the basis of the evidence presented to them. When considering whether or not to impose a withhold, the three members will have regard to the general criteria listed at paragraph 78 where relevant, and the further specific risk factors set out at Annex B, and will have regard to the principle of proportionality¹⁹. The PCAT will set out its findings and reasons in writing, and these will be provided to the Executive and to the relevant party. Upon a withhold being directed (the decision being reached unanimously), the Executive will immediately issue the withhold direction to any relevant parties in the value chain.

Bond arrangements and other alternative security measures

90. The purpose of imposing a withhold on revenue flowing through the value chain to the Level 2 provider is to prevent monies linked to potentially non-compliant services being dissipated without securing proper payment of any refunds or fines imposed as a sanction, and any administrative charges owed to PhonepayPlus. However, similar levels of security for such payments may be established without restricting the flow of revenue being made.
91. Following notification of an intention to adopt interim measures, a provider may offer a sufficient alternative security arrangement, such as placing a suitable bond. The requisite

¹⁹ In considering proportionality the PCAT will consider whether the withhold is suitable and necessary to achieve a legitimate aim but is the least onerous way of doing so in the circumstances. A withhold direction might not be proportionate where for instance it was unlimited in amount, or a party had provided sufficient alternative security in the requested amount.

sum to be secured by a payment into a bond, or otherwise, is not subject to negotiation; however, relevant parties who are subject to an investigation may give an indication as to what is feasible.

92. Where a bond is arranged, the relevant party will need to lodge a bond with an agreed trusted financial institution. This is usually a bank, but it does not necessarily have to be. Providers should inform the Executive at the outset if they are considering lodging a bond with a financial institution that is not a UK bank. The Executive will then make the necessary checks on that organisation, prior to making a decision as to whether it can be used for bond purposes.
93. Where a bond can be arranged to the Executive's satisfaction an interim consent order will be drawn up for ratification by a PCAT. Where a bond cannot be arranged satisfactorily, the Executive may resort to seeking directions for a withhold of revenue.
94. Where a bond is ratified by the PCAT it may issue a direction to withhold an equivalent sum of money from the revenue due to the relevant party pending the bond monies being lodged with the financial institution. Any withhold direction may be revoked as soon as practicable following confirmation of the bond arrangements being shared with the Executive, thereby releasing revenue to flow as per normal contractual arrangements between parties in the value chain.

Suspension of service pending investigation and/or remedial action

95. Where a case has been allocated to Track 2 and it appears to the Investigations Team that an apparent breach of the Code has taken place, which is causing serious harm to consumers or the general public, and requires urgent suspension of part or all of the service, it may seek such suspension pending investigation. A requirement for urgent suspension will be deemed where such harm is likely to continue (e.g. because the provider cannot be contacted or has failed to amend the service sufficiently such as to remove or significantly reduce the harm) and/or separate or additional serious harm is likely to be triggered as a result of such harm continuing, before the substantive matter can be determined by a P-CAT or addressed through the settlement process. Such cases may result in the instant barring of partial or full access to the service in question.
96. Where the Investigations Team's assessment indicates that the criteria for a suspension may be fulfilled, the Investigations Team will refer the matter to the IOP, who will convene a meeting in accordance with the procedure set out above at paragraph 75 and make a recommendation.
97. If the IOP recommends an application for a suspension, the Executive will provide evidence of the seriousness and urgency of the case, the background information obtained during the initial investigation and an explanation of potential breaches to the three members of the PCAT.
98. Prior to presenting the matter to the PCAT the Executive will (unless there are important public interest reasons to the contrary) use its best endeavours to notify the party under investigation of its initial findings and invite that party to make representations to the Executive within a timescale which is reasonable, taking into account the urgency of the matter.
99. The provider also has the opportunity to agree a mutually satisfactory suspension direction with the Executive. Where a provider consents to the terms of a suspension, the PCAT can approve the proposed measures under a simplified procedure, pursuant to Code Annex 3 para. 4.2, which will reduce the potential administrative charge. Where a suspension direction can be agreed with the provider an interim consent order will be drawn up for ratification by a PCAT.

100. Where a suspension direction cannot be agreed the matter, including any representations from the provider, will be considered by the three members of the PCAP (constituted as a Tribunal). When considering whether or not to impose a suspension, the three members will have regard to the general criteria listed at paragraph 78 where relevant, and will have regard to the principle of proportionality. If the PCAT (reaching its decision unanimously) subsequently directs that a suspension be imposed, directions will be issued (as far as is deemed appropriate and proportionate) to take immediate action, which may include; directing the relevant party to suspend the service immediately, directing a Network Operator or Level 1 provider to bar access to the relevant service, and publication of the fact that a suspension has been ordered. The PCAT may also direct a retention of payments in respect of the service in accordance with the above procedure for withholding revenue.

“Without notice” procedure

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

Proceeding with investigations

103. After the PCAT has made a decision on interim measures, the Executive will proceed with its Track 2 investigation in accordance with Code paragraphs 4.5.2 – 4.5.6.
104. Whilst the use of interim measures will be first considered after allocation to Track 2, the above procedures may be instigated by the Executive at any subsequent point prior to adjudication.

Release of interim measures

105. Due to developments in a case, the Investigations Team may form the view that any interim measures are no longer justified, or are not justified to the extent currently in place. Examples may include where the Executive holds satisfactory evidence that the issues giving rise to a suspension have been comprehensively resolved, or where a provider has supplied the Executive with alternative security which can replace a withhold.
106. In such a case, the Investigations Team will notify the relevant party, and the IOP of its intention to revoke or amend the directions. Where the relevant party and the IOP confirms agreement to the proposal, a revised interim consent order will be sent to the PCAT for approval in accordance with Code Annex 3 paragraph 4.2.
107. At any time prior to adjudication on the alleged breaches placed before the PCAT, the relevant party may apply to the Executive for an urgent review of the interim measure(s) by a differently constituted Tribunal of the PCAP. A provider may only seek such a review where:

- it has not been possible or appropriate to notify the relevant party of the application for interim measures prior to the decision of the Tribunal; and/or
 - new information comes to light suggesting that the application of interim measures was not or is no longer appropriate.
108. The application for review must be made in writing, must include any supporting evidence and must set out:
- the grounds on which the relevant party considers that the interim measure(s) should not have been used and/or;
 - the grounds on which the relevant party considers that interim measure(s) should no longer be applied.
109. Where having considered the application, the IOP agrees to any suggested variation, an interim consent order will be sent to the PCAT for urgent approval in accordance with Code Annex 3 paragraph 4.2.
110. Whether or not an agreement is reached, subject to any requirement for further information, a PCAT will consider the matter within two working days of receipt of an application for review and will determine whether interim measure(s) should continue pending completion of the investigation of the case, or whether the interim measure(s) should be varied. The PCAT determination will involve consideration of the new information and an assessment of the requirement for interim measures based on the considerations at paragraph 89 and/or 100 (as appropriate) of the supporting procedures above.
111. At the request of the relevant party, the Executive or the PCAT, the relevant party or the Executive may make oral representations to clarify any matter for the Tribunal. In light of the required timescales for the review procedure, the Executive will not reschedule the Tribunal to accommodate a party's unavailability, and such representations may be limited to attending the hearing via a conference call.

Section 10

Warning notices and settlements

112. In accordance with paragraph 4.5.2 of the Code, where the Investigations Team has decided it has sufficient evidence of a potential breach of the Code by a Network operator, Level 1 provider, or Level 2 provider, a formal Warning Notice will be prepared. The Warning Notice will set out a description of the service and potential breaches identified, and provides supporting evidence. The Warning Notice will set out the background to the investigation; describe the service when considering Part Two rules and/or the business processes when considering Part Three or Part Four responsibilities; document any monitoring and testing undertaken; and provide details of any complaints, where relevant. The Warning Notice will present the potential breaches, explaining the evidence and facts obtained during the investigation, and an assessment of their severity. The Warning Notice will also set out the sanctions that the Investigations Team considers are appropriate for a PCAT to impose for the potential breach(es) of the Code.
113. The Investigations Team will refer the matter to the IOP, who will convene a meeting in accordance with the procedure set out above at paragraph 75. The IOP will consider and make a recommendation on what sanctions to recommend to the PCAT. In assessing what sanctions to recommend, the IOP will have regard to Section 12 of these Supporting Procedures, which set out criteria for assessing the seriousness of a case.
114. The Warning Notice will be served on the party alleged to be in breach ('the relevant party'), giving it an opportunity to set out in writing its response to the potential breaches and sanctions. In certain cases, it may also be served on other parties in the value chain as appropriate.²⁰
115. The Warning Notice will contain instructions on how to respond. The Warning Notice will request that the provider responds formally to the breaches raised. The Executive expects responses to be supplied promptly, usually within 10 working days, and Network operators and providers need to have systems in place to meet such deadlines. The Executive may set a longer time limit but only in exceptional circumstances. A provider seeking an extension must supply sufficient details and supporting evidence of such circumstances when requesting an extension. Such an extension will never take the time for response to more than 20 working days from the date of the Warning Notice. If the relevant party fails to respond within the specified time, the Executive will compile a Tribunal bundle to send to the PCAT for adjudication without any response to the Warning Notice included.
116. In its response, the provider can accept the breaches and recommended sanctions, make representations that different sanctions are appropriate, or defend some or all of the alleged breaches. If the provider wishes to defend any or all of the alleged breaches, it must supply with its response to the Warning Notice any evidence on which it wishes to rely. The provider in its response should also indicate whether its preference is to have a paper hearing (and whether they wish to make oral representations as part of the paper hearing process) or a formal oral hearing. The paper-based and oral hearing processes are set out in further detail in Section 11 below.
117. Where a provider makes representations that different breaches and/or sanctions are appropriate, the Investigations Team may respond to any representations made by the provider and ask further questions if appropriate. The provider may respond to the Investigations Team. Thereafter, the IOP may concur with a reasonable settlement proposal

²⁰ See paragraphs 70 and 71 of these Procedures

put forward by the provider. In most cases, there will be advantages to both parties in concluding an appropriate early settlement.²¹

118. The IOP will only concur with settlement proposals which in its view are sufficient to address the Executive's concerns, and secure a satisfactory regulatory outcome. Where settlement discussions take place over a period of time, the Executive will require its increased administrative and legal costs to be paid as a condition of any settlement. If providers wish to make settlement proposals, they are therefore encouraged to do so at an early stage, prior to papers being submitted to the Tribunal, and on a well-reasoned basis.
119. Where the parties reach agreement on the breaches to be upheld and sanctions and administrative charges to be imposed by a PCAT, the Executive will place the details of the matter and the agreement reached before a PCAT for approval in accordance with Annex 3 para. 4.2 of the Code. The procedure will be conducted solely via a review of the agreement (including the draft adjudication by consent) and any other relevant papers, without oral representations. Unless there are exceptional reasons not to approve the agreement²², the PCAT will approve it. Where the PCAT approves the agreement, the Executive and the relevant party will be notified and the adjudication by consent will then be implemented.
120. Where the provider and the IOP do not reach full agreement on each breach and the appropriate sanctions, the entirety of the breaches alleged in the Warning Notice and sanctions recommended will be put to the PCAT for adjudication (see Section 11). If the provider accepts the breaches in full, but not the proposed sanctions, the PCAT will proceed to make an assessment of the appropriate sanction (see Section 12).
121. Unless the IOP concurs with the provider's representations, or the provider accepts the breaches and recommended sanctions, within 14 days from the date of the Warning Notice, then the Warning Notice and any response to alleged breach supplied, will be forwarded for consideration by the PCAT.
122. After the Warning Notice and any response received are forwarded for consideration by the PCAT in accordance with paragraph 119 above, the matter will then proceed to adjudication at a hearing unless the matter is settled in accordance with paragraph 118 above. The PCAT is not bound by the IOP's recommendations and may choose not to uphold alleged breaches and/or impose different sanctions, or sanctions at a higher or lower level than those recommended.

²¹ These advantages are likely to include an earlier resolution and avoidance of additional administrative costs relating to contested hearings. If a settlement is reached more than 3 weeks before the Tribunal date, inclusion of the Tribunal cancellation fee within the administrative charge may be avoided.

²² PhonepayPlus considers that, in order for there to be such exceptional reasons, PCAT would need to find that the assessment of the breaches and the sanctions agreed upon are grossly out of proportion to the agreed facts (being either too onerous or too lax), having had regard to the guidance in these procedures at Sections 12 and 13, and any relevant precedent cases.

Section 11

Adjudications by the PhonepayPlus Code Adjudications Tribunal (PCAT)

Paper based tribunals

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

Preparation of the bundle and first listing of hearings

125. A Tribunal bundle²³, including the Warning Notice and any responses from relevant parties, will be presented to three Tribunal members selected from the PCAP. This will usually happen ten days in advance of the hearing, so that members will have time to read the papers prior to meeting for the Tribunal.
126. Copies of the evidence in the Tribunal bundle will have been provided to the party in alleged breach of the Code over the course of the investigation. The Tribunal bundle will be made available in electronic format for the party under investigation, and a hard copy is available at the PCAT for any party providing any representations.
127. The entirety of the documentation to be relied on by both parties in the paper-based procedure should be exchanged by the date specified in the Warning Notice. However where in its response to the Warning Notice, a provider raises a new matter which has not previously been investigated by the Executive, the Executive may undertake appropriate investigations and will allow the provider the opportunity to respond to the outcome of these investigations in writing prior to the date of the PCAT hearing. Both the Executive's findings and any response made by the provider will be supplied to the PCAT as an addendum to the bundle.
128. Where neither the provider nor the Executive confirm before papers are sent to the PCAT that they wish for the hearing to proceed by way of an oral hearing, the paper-based PCAT process will be used.

²³ The Tribunal bundle is the bundle of documents relating to the case, including the breaches raised by the Executive with supporting evidence and any responses and evidence sent in by the Network operator or provider. The Tribunal bundle also includes revenue information provided by the Level 1 and/or 2 provider, and a schedule of administrative charges, which sets out the costs incurred by PhonepayPlus up to the point at which the Tribunal bundle is fully compiled. Further costs may be incurred between the compilation of the Tribunal bundle and the Tribunal hearing and where this occurs a revised schedule will be available at the hearing. The Tribunal bundle does not include the past breach record of the party, which is provided to the Tribunal during the hearing, after all potential breaches of the Code have been determined.

Where either party later submits that it wishes to use the oral hearing procedure, the paper-based hearing will be vacated. If the costs relating to any vacated paper-based hearing would have been avoided by an earlier notification by a provider that it wishes to use the oral hearing procedure, these costs will be included in the administrative charge.

129. In respect of all PCAT hearings, providers should recognise that any request made after a hearing is listed which results in moving the hearing date will increase administrative costs as may be invoiced under para 4.10.1 of the Code, and will have the effect of extending the period of any withhold of revenue or suspension as may have been directed. Such requests are likely to be declined in any event unless they are supported by evidence which demonstrates that a provider could not reasonably have been expected to prepare in time for the appointed hearing date.

PCAT considerations

130. When making an adjudication, the three PCAT members will examine the facts and the evidence presented in the case report, and they will determine by a majority decision whether any breaches raised by the Executive have been established.
131. The presentation of individual breaches will be the same whether the Executive has raised a breach of a rule under Part Two of the Code, or a responsibility set out in Part Three or Part Four of the Code. The provision of the Code will be interpreted in context by reference to the common usage of words as written in the Code. The PCAT may also make reference to any definitions found at paragraph 5.3 of the Code and any Guidance published, from time to time, by PhonepayPlus.
132. The PCAT will consider the reasons given by the Executive for its consideration that the breach has occurred, referring to any evidence that it considers relevant. The PCAT will consider any response given by a relevant party and examine the information supplied by the Network operator or provider, referring to any evidence that it considers relevant. The PCAT will expect the Executive to have made all reasonable enquiries for information and evidence held by the Network operator or provider during the course of its investigation.
133. Where breaches are disputed, the PCAT will examine the evidence using the standard of proof applicable in civil law cases: that is on the 'balance of probabilities'. This means that the PCAT will consider the submissions made by both parties and consider whether it is more likely than not that the breach has occurred. This does not mean that the PCAT weighs up one set of submissions against the other; rather, it considers all the submissions, and the evidence in support of them, to determine if it is more likely than not that the breach has occurred.
134. The PCAT will adjudicate on each breach separately, and when it has made a decision, it will declare a breach either 'upheld' or 'not upheld'. The PCAT will then proceed to assess sanctions in accordance with Sections 12 and 13 below.
135. PCATs are supported by a clerk to assist with procedures and the consistent application of PhonepayPlus' sanctions policy, and to take a record of the matters discussed and decided at PCATs and assist in drafting full written decisions. The clerk also maintains a databank of key decisions affecting the interpretation of the Code, to ensure consistency between PCATs.
136. Members of the Panel have an obligation, in conjunction with other members, to ensure that PCAT hearings are conducted properly, fairly and in accordance with good practice and the relevant law. Each case must therefore be dealt with in the most expeditious manner compatible with the interests of justice and in accordance with the provisions of the Human Rights Act 1998.

137. Where a party can satisfy the Chair of the PCAT that the circumstances justify an adjournment of the hearing²⁴, a PCAT may grant an adjournment of the hearing. The Chair may issue directions upon an adjournment as they see fit in order to ensure that the case is ready to be heard on the next occasion.

Representations based on the papers

138. Prior to a case being considered by the PCAT in the paper-based process, time will be given to the relevant party to make representations to the PCAT members in person on the day of the hearing, if they so elect. These representations offer a chance for the relevant party to clarify the facts of the case, and the response that it has submitted within the papers, to the PCAT in person. It is also the PCAT's opportunity to explore and ask questions to gain a fuller understanding of the issues involved and of the actions of the parties concerned. Because of the nature of the clarification that may be useful to the PCAT, it is preferable for a director or employee with direct knowledge of the promotion and operation of services, or alternatively a person responsible for compliance with the Code, to attend.
139. These representations must not be confused with an Oral hearing. It is an opportunity for the Network operator or provider to emphasise those parts of its written case which it wishes to highlight to the PCAT and to clarify any factual issues that remain unclear. New evidence or arguments (either written or oral) will not normally be permitted at this stage.
140. Such representations are usually not expected to exceed 30 minutes, as this should be enough time for clarification of necessary matters within the papers. However where a provider is of the view that it needs more time to make representations, the provider should make this clear with its response to the Warning Notice, including an explanation of why more time is needed, and specifying the time period requested for representations. The Executive will forward the request to the Chair of the PCAT who will, prior to the hearing, decide on the appropriate length of time to be allocated for representations.
141. Whether a provider has requested an opportunity to make representations or not, the PCAT may have questions for the Executive arising from the evidence submitted. Prior to the PCAT's adjudication, the PCAT may require the Executive to attend in order to clarify the evidence gathered or submitted during the investigation.
142. Any questions from the PCAT to the person making representations will usually be asked in the presence of the Investigations Team member. The PCAT may also have questions to ask the Investigations Team member to seek clarification of the Executive's case, and should a party choose to attend to make representations, such questioning will take place in the presence of the person making representations.
143. Providers and/or the Executive may make an application for the representations to be recorded. All applications must set out the reasons for the request in writing and be made prior to the hearing. The Chairman of the PCAT will determine the application in advance of the PCAT.

Expert evidence in the papers

144. In their response to the Warning Notice, a relevant party may include written evidence from an expert (either internal or external), including technical evidence. Where such evidence is

²⁴ PhonepayPlus anticipates that adjournments will be exceptional. Delays caused by a party's own failure to act promptly (for instance, in seeking information or professional advice), or unavailability of a particular individual during a response period, will not ordinarily justify an adjournment. To justify an adjournment, the circumstances should be such that, due to circumstances beyond the reasonable control of the parties, PCAT cannot fairly adjudicate on the issues before it.

provided, in order for a PCAT to give weight to the evidence it should as a minimum fulfil the following criteria:

- (i) The expert's relevant qualifications and present employer should be stated;
 - (ii) The expert should list what material they have been supplied with and relied upon for the purposes of giving their view;
 - (iii) Where the expert is of the view that a technical matter was the cause of a breach, the expert should give full details of the known ways in which such a technical matter might arise. The relevant party's evidence should provide factual details which support the explanation(s) offered and set out any remedial or investigative steps undertaken in respect of the technical matter;
 - (iv) Where there is a range of opinion on the matters dealt with in the report, the expert should summarise the range of opinions; and give reasons for their own opinion;
 - (v) The expert should make it clear when a question or issue falls outside their expertise; or when they are not able to reach a definite opinion, for example because they have insufficient information;
 - (vi) The expert should state who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision; and
 - (vii) The report should contain a statement that the expert is aware of these requirements.
145. Where the evidence submitted by a relevant party gives rise to a new issue which is significant, and in the Executive or provider's view cannot properly be resolved simply by reading the relevant party's evidence and the Executive's evidence, the Executive or the provider is at liberty to request that the PCAT take place as an oral hearing.

Oral hearings

146. Oral hearings perform the same function as a paper based hearing and serves to reach an adjudication of:
- the facts based on the evidence;
 - the potential breaches of the Code as alleged and defended; and,
 - where breaches are upheld, the potential sanctions to be imposed, if any, based on an assessment of the case in the round.
147. As such, they ought to be arranged as soon as possible following the issue of a Warning Notice to avoid any delay in resolving any dispute between the relevant party and PhonepayPlus. Along with a swift adjudication, there is the need for any issues in the market to be resolved quickly and effectively. For this reason a decision as to whether an oral hearing is required ought to be made within **10 working days** of the issue of a Warning Notice (unless an extension has been granted to the provider for a response to the Warning Notice)²⁵.
148. Two groups can initiate an oral hearing unilaterally or by agreement, and they are:

²⁵ A relevant party may decide to opt for an oral hearing after this period but only have up to a further 10 working days to do so (i.e. within 20 working days of the issue of the Warning Notice). Requests made during this latter 10 working days will be subject to consideration by the Chair of the Tribunal. Arrangements initiated at this time by the relevant party may lead to additional costs being incurred, to be paid as part of the administrative charge for the investigation.

- a. The relevant party (the party to whom the Warning Notice has been issued); and
 - b. the Executive.
149. Oral hearings are initiated by either the relevant party or the Executive with the submission of a written notification to the PCAT. In this notification, the person making the submissions must set out clearly what is agreed and what remains in dispute between parties, and / or the details of any evidence which may require the oral hearing to test it.
150. Where three members of the PCAP have been designated to undertake a paper based adjudication, the Chair of the PCAT may notify the Executive that an oral hearing is necessary, setting out the reasons. The Executive will immediately notify the relevant party and begin the process of arranging such a hearing.

Pre-hearing process

151. The Code sets out at Annex 3, Paragraph 3 the protocol for an oral hearing. While PhonepayPlus will arrange the hearing and carry out the administration of the process, responsibility for ensuring (through the use of effective case management directions) an efficient and effective process resides with the Chair of the PCAT. Any concerns that due process is not being followed can be set out in writing to the Chair of the PCAT, who on considering those submissions may make directions in accordance with Annex 3 to the Code.
152. The Chair of the PCAT will establish a clear timeline for the oral hearing using directions in accordance with Annex 3, Paragraph 3.6, setting a date for the hearing itself to suit all parties, and indicating clear milestones for:
- (i) the exchange of statements of case,
 - (ii) the admission of facts before the hearing,
 - (iii) the disclosure of documents,
 - (iv) the provision of expert reports,
 - (v) the exchange of witness statements,
 - (vi) the preparation of agreed bundles of documents,
 - (vii) the submission and exchange of outline arguments,
 - (viii) the imposition of any interim measures (including the provision of security for the administrative charges of PhonepayPlus).
 - (ix) the date by which the respondent must be notified in writing of the listing of the oral hearing,
 - (x) the date by which the respondent must inform the Executive in writing of whether they intend to appear in person at the hearing, and the name of any person who will be representing them at the hearing.
153. The Chair of the PCAT may convene a conference for the purpose of providing directions or may deal with directions by correspondence or phone, as they see fit.

Failure to cooperate on the part of the relevant party

154. Where the oral hearing is initiated by the relevant party and that person causes undue delay or otherwise is not cooperative with the pre-hearing arrangements, the Executive may ask the Chair of the PCAT to give directions for an expedited disposal of the case, and/or to strike out the relevant party's case in accordance with Annex 3 paragraph 3.12. Such a request will be copied to the relevant party. Where the Chair of the PCAT considers that such

an order ought to be made, the relevant party will be invited to make any final representations in writing within **5 working days**²⁶. The expedited hearing will then take place based on the papers where possible to do so.

The hearing

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

Expert representations

160. Where the case is proceeding by way of oral hearing, the Chair may give directions in respect of expert evidence. Such directions may include but are not limited to:
 - Directions to allow each party to rely on specified expert evidence;
 - Directions to allow each party to put written questions to the other party's expert, with responses to be supplied by a specified deadline; and/or
 - Directions to require the experts to convene to discuss the issues, in order for them to produce a written statement which clarifies the extent of the agreement between them, the points of (and short reasons for) any disagreement, the action, if any, which may be taken to resolve any outstanding points of disagreement; and any further material issues not raised and the extent to which these issues are agreed.
161. Experts will give evidence at the hearing in the same way as other witnesses, subject to any directions previously made by the Chair of the PCAT requiring their evidence to be given in another way or otherwise limiting their evidence.

²⁶ This is to avoid any further undue delay to the process.

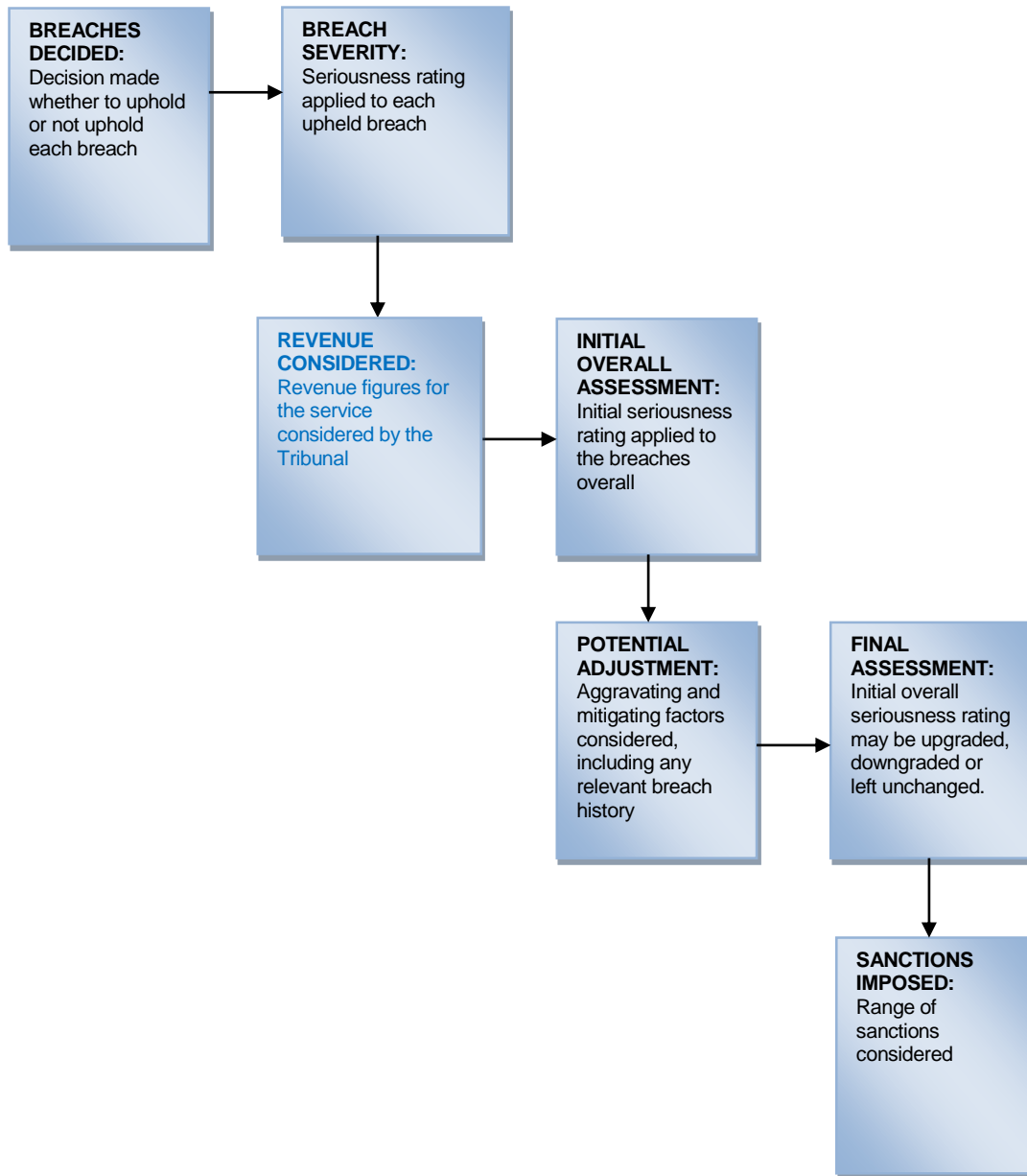
Section 12

Assessing potential breaches and imposing sanctions

The purpose of imposing sanctions

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

Sanction-setting process diagram:



Establishing whether breaches have occurred

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

Establishing the severity of the breaches and setting sanctions

172. If the PCAT determines that a breach has occurred, it can apply a range of sanctions depending on the seriousness with which it regards the breaches and taking all relevant circumstances into account. The PCAT must have regard to these Supporting Procedures when considering the seriousness of the breaches and determining which sanctions (if any) to impose (paragraph 4.8.2 of the Code). The PCAT is not bound by the IOP's recommendations and may impose different sanctions, or sanctions at a higher or lower level than those recommended.
173. When establishing the seriousness of the case, the PCAT will take the following steps:
 - Establish the level of seriousness of each breach;
 - Consider the revenue information provided and determine whether it is relevant;
 - Determine the initial overall seriousness of the case as a whole;

- Consider any aggravating and/or mitigating factors which may affect the overall seriousness of the case; and
 - Establish the final seriousness rating of the case as a whole.
174. Sanctions will be imposed by the PCAT with reference to the final assessment of the seriousness rating of the case as a whole.
175. Both the severity level of the individual breaches and the case as a whole are assessed on a five-step scale:
- Minor
 - Moderate
 - Significant
 - Serious
 - Very serious
176. PhonepayPlus considers any breach of the Code to warrant attention and remedial action so as to improve compliance standards. Severity levels associated with particular service characteristics may vary from case to case, depending on the circumstances.
177. A non-exhaustive list of the criteria a PCAT may consider in assessing the severity of the breaches include the following:
- The significance of the breach, including the potential impact on the average consumer's ability to make a free and informed transactional decision and/or the impact on the enforcement of the Code in order to protect the interests of consumers and other industry participants;
 - The severity and/or extent of actual consumer, societal or market harm, and the potential for further consumer harm;
 - The effect on children or others who may be in a position of vulnerability²⁷;
 - The potential for loss of confidence by consumers in premium rate services in general;
 - The actual and potential revenue generated by the service; and
 - The extent to which the service is able, through its design and operation, to deliver its purported value to consumers.
178. Where a PCAT is assessing the severity of a breach in relation to any responsibilities set out in Part Three of the Code, the PCAT may consider both the adequacy of the business systems, as put in place by the relevant party, their development, operation and maintenance, and the actual or potential impact caused by that relevant party's failure to meet those responsibilities.

²⁷ 'A position of vulnerability' may be created by a person's character or circumstances, such as children who might fail to understand the costs involved in a service, or where a public information service targets its marketing at a particular group of consumers based on the general economic circumstances facing them. Where a breach of the Code appears to have a significant impact on people in a position of vulnerability, the severity level given to the case overall is likely to be serious or very serious, depending on the Tribunal's view of the facts.

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

Establishing the seriousness of each breach and the initial overall assessment

180. The PCAT will consider each breach that it has upheld and allocate a provisional severity rating for each breach, using the five-step scale set out in paragraph 175 above. In doing so, the PCAT will be guided by the descriptors and examples set out below (see paragraph 185). These descriptors and examples are not binding on the PCAT, but are to support its assessment and serve as an aid to consistency.
181. Where only one breach is upheld, the severity given to that individual breach will usually be declared as the initial overall assessment of the case.
182. Where two or more breaches are upheld, a PCAT will usually consider it appropriate to declare the initial overall assessment as matching the highest severity level given to one or more breaches. One possible reason for setting a different severity level may be that several breaches of a less serious nature, being upheld and considered together, appear to warrant a higher initial overall assessment than any of the individual breaches.

Descriptions and examples to be considered in establishing the seriousness of the breach

183. This section sets out some illustrations of the level of seriousness that may be applied by a PCAT to individual breaches, from 'minor' up to 'very serious'. Most of the examples are illustrations of the seriousness ratings imposed by the PCAT in previous cases. The descriptors and examples are non-exhaustive and are not binding on any PCAT that may consider similar cases.
184. PhonepayPlus considers that a breach of a responsibility set out in Part Three of the Code may directly and/or indirectly affect consumers. For example, where a Network operator or Level 1 provider fails to meet its responsibility to conduct due diligence, or undertake adequate risk assessment and control of providers, that breach of the Code may indirectly impact on consumers when non-compliant services are permitted access to the network and consumers are harmed as a result. Evidence of any indirect impact on consumers may be presented to a PCAT when addressing breaches of responsibilities under Part Three of the Code.
185. The examples below may be considered when analysing the seriousness, or potential seriousness, of individual breaches. The descriptors for each severity level are intended to assist the PCAT in its assessment of severity. A PCAT may be further assisted by reference to the examples provided. However, the decision as to severity is ultimately left to the PCAT who will consider all the circumstances surrounding the breaches upheld, alongside the particular facts and circumstances of the case, which always differ and have a specific context.

185.1 Minor

Descriptors:

Minor cases are likely to have had little or no direct or indirect impact on consumers and have shown little evidence of potential harm arising.

and/or

The nature of the breaches is likely to have had little or no detrimental effect on consumer confidence in premium rate services and complaints have been narrowly defined and directed at the party in breach.

and/or

The cost incurred by consumers may be minimal, with the breaches having the potential to generate limited revenue streams.

and/or

Breaches found within services that provide value to consumers and which were designed to provide a legitimate product or service may be considered 'minor'.

Examples may include:

- A technical issue had rendered a service temporarily unavailable to consumers contrary to what was stated in its promotion. There is little or no material impact on a consumer's use of the service;
- The Level 2 provider inadvertently provided consumers with inaccurate (or out of date) information concerning the service in an isolated incident that had limited actual or potential effect on consumers;
- There has been non-compliance resulting from an administrative error that has no effect on the operation of the service and/or consumers would have been unaware of its occurrence;
- Promotional material for a service that is not available 24 hours per day does not contain the hours of operation.

185.2 Moderate

Descriptors:

Moderate cases are likely to have a discernable effect, directly or indirectly, on consumers and/or show evidence of some potential harm likely to affect consumers.
and/or
The breaches, if continued, may also be capable of having a slight impact on consumer confidence in premium rate services.
and/or
The cost incurred is more likely to be material to consumers, with the breaches capable of inflating revenue streams relating to the service.
and/or
Breaches found within services that are still capable of providing some purported value to consumers and which were designed to provide a legitimate product or service may be considered 'moderate'.

Examples may include:

- A small-scale service having limited marketing and reach is advertised inaccurately and may be capable of impairing the transactional decision of consumers;
- There has been an isolated and unintentional incident where a limited number of consumers received unsolicited promotions for a service and such promotions were for a limited period of time;
- A Network operator or provider has failed to register as an organisation operating premium rate services, but has sought to rectify this at the earliest opportunity when put on notice of the non-compliance.

185.3 Significant

Descriptors:

Significant cases are likely to have had a material impact, directly or indirectly, on consumers and show potential for substantial harm to consumers.

and/or

The nature of the breaches is likely to have caused, or have the potential to cause, a drop in consumer confidence in premium rate services.

and/or

The cost incurred is likely to be material to consumers, with the breaches likely to generate considerably inflated revenues for the service. The service itself is still capable of providing some purported value to consumers.

and/or

The nature of the breaches is such that the service has limited value to consumers.

Examples may include:

- The service has purposely or recklessly been promoted in such a way so as to impair the consumer's ability to make an informed transactional decision;
- A Network operator, Level 1 or Level 2 provider has negligently failed to comply with a PhonepayPlus requirement, such as registration of the organisation or its services, or submission of Network operator annual or quarterly returns;
- A service failed to supply adequate details relating to the provider of the service, including non-premium rate contact details;
- A service collecting consumers' personal information does not inform consumers of the purpose for which their personal information was required and how it could be used in future;
- A service uses wording within a subscription reminder message which is not sufficiently clear and thereby demonstrates some harm to consumers.
- A service fails to provide spend reminders in accordance with the requirements of the Code. Spend reminders which are particularly unfit for purpose, or are entirely missing from service message flows, may be deemed serious or very serious depending on the seriousness of the harm caused as a result;
- The Level 2 provider fails to adhere to its own terms and conditions for the service. This issue could be deemed serious or even very serious if the failure causes serious consumer harm;
- Key terms for or aspects of the service are not easily accessible and clearly legible (either as a result of being located below the fold of online promotions or otherwise) and/or pricing is insufficiently clear (i.e. 'GBP' has been used instead of the '£' sign to describe pricing).

185.4 Serious

Descriptors:

Serious cases have had a clear detrimental impact, directly or indirectly, on consumers and the breaches have a clear and damaging impact or potential impact on consumers.

and/or

The nature of breaches means the service would have damaged consumer confidence in premium rate services.

and/or

The cost incurred by consumers may be higher, and/or the service had the potential to generate higher revenues, as a result of the breaches.

and/or

The service has been operated in such a way that demonstrates a degree of recklessness or intention of non-compliance with the Code.

Examples may include:

- Promotional material has been designed with the intention to omit key information regarding the service or the costs associated with it;
- A Network operator, Level 1 or Level 2 provider has deliberately or repeatedly failed to comply with a PhonepayPlus requirement such as registration of the organisation or its services, or submission of Network operator annual or quarterly returns;
- A service generates substantial revenues through a recklessly non-compliant promotion that misleads consumers, for example a competition service promoted using material that misleads consumers into thinking they have won a prize, by using terms such as “Congratulations”;
- A service promoted using typosquatting (also known as domain name traffic) and/or one which mimics the branding of well-known websites, with the effect of misleading consumers into believing the service was affiliated or otherwise connected with a trusted brand;
- A Network operator or Level 1 provider has failed to develop and/or consistently use effective due diligence and/or risk assessment and control processes for its clients, which may have had a detrimental impact on the investigation and enforcement of the Code. Dependent on the extent of the non-compliance this may be considered ‘very serious’;
- A Level 2 provider unreasonably fails to register its organisation and/or numbers with PhonepayPlus for an extended time period or at all;
- A Level 2 provider contacts consumers without their consent or is unable to provide satisfactory evidence establishing that consent.
- A service is aimed at, or is particularly attractive to, children, and contains inappropriate content.
- Consumers experience significant undue delay when using the service in order to increase revenue.
- A virtual chat service contains no effective mechanism for age verification.
- Pricing information is not sufficiently prominent and/or proximate to the means of access to the service.

- A service is promoted in such a way that it results in unfair advantage being taken of a vulnerable group and/or people in vulnerable circumstances.
- A service harms consumers through the use of third parties to promote or otherwise operate a function of the service without effective due diligence, control or monitoring;
- A Network operator or Level 1 provider has taken some steps to risk assess and control a service, but has failed to implement adequate risk assessment and control systems;
- A Network operator, Level 1 or Level 2 provider has negligently failed to comply with a PhonepayPlus requirement such as a need to obtain prior permission, operate in accordance with a special condition or a condition of a prior permission, or exceeded a specified service charge or call duration.

185.5 Very Serious

Descriptors:

Very serious cases have a clear and highly detrimental impact or potential impact, directly or indirectly, on consumers.
and/or
The nature of the breaches, and/or the scale of harm caused to consumers, is likely to severely damage consumer confidence in premium rate services.
and/or
Consumers have incurred an unnecessary cost, or the service had the potential to cause consumers to incur such costs, and the service is incapable of providing any purported value.
and/or
The service was designed with the specific purpose of generating revenue streams for an illegitimate reason, which is likely to be considered 'very serious'.
and/or
Where the nature of the breaches is such as to cause distress or offence, or takes advantage of a consumer who is in a position of vulnerability.
and/or
The breaches demonstrate fundamental non-compliance with the Code in respect of a high exposure/revenue generating service, or a 'scam'.

Examples may include:

- A service purports to provide a service or product that does not, and has never, existed (i.e. a scam) and/or seeks to leverage vulnerable consumers (e.g. children) in order to generate income;
- A service exposes consumers to content that is likely to cause widespread and substantial distress, harm or offence, such as an adult entertainment service containing references which suggest or imply the involvement of persons under 18 years of age;
- A service seeks to generate revenue through intentionally misleading promotions or design, such as a gambling service that has fundamental errors in its systems or malware;
- A Network operator or provider has failed to comply with a PCAT's decision, resulting in a breach of sanction being upheld against it and/ or has failed to pay an administrative charge;
- A Network operator or provider has deliberately supplied inaccurate, false or misleading information, or deliberately provides limited, or no, response to directions to provide information.
- The way a competition service operates results in some or all entrants having no chance of winning and/or claiming a prize.
- A service has a billing mechanic that causes significant overcharging.
- A Network operator or Level 1 provider has failed to put in place any due diligence and/or risk assessment systems and/or has failed to take any steps to carry out due diligence and/or risk assessment on a party it contracted with.
- A Level 2 provider charges consumers without obtaining robustly verifiable evidence of consent to charge.
- A service is operated in such a way that consumers have not been given a suitable method of exiting the service, or informed of such a method of exit.

- A service fails to provide pricing information in promotional material which contained the means of access to the service. This may be downgraded to 'serious' where partial pricing information is provided.
- A Network operator, Level 1 or Level 2 provider has deliberately, recklessly or repeatedly failed to comply with a PhonepayPlus requirement such as a need to obtain prior permission, operate in accordance with a special condition or a condition of a prior permission, or exceeded a specified service charge or call duration.

Adjustment and final assessment

186. Having determined the initial overall seriousness of the case, the PCAT then considers whether there are any relevant factors arising from the facts of the case, and the evidence presented, which may result in an adjustment of the severity level of the case. The PCAT may find supplementary aggravating and/or mitigating factors in addition to those advanced by the parties. The PCAT has the discretion to adjust the severity upwards or downwards within the five bands above. The adjustment will be made by reference to any aggravating and/or mitigating factors as set out below.
187. Where there are factors of aggravation and mitigation considered together, these may be balanced by the PCAT. Any adjustment to the initial overall assessment of the case must ensure the final decision remains proportionate to the overall impact and detriment caused, or potentially caused, to consumers and/or regulatory enforcement. For example, in most cases where the initial overall assessment is declared 'serious', it is unlikely factors of mitigation will reduce the severity level to 'minor' or 'moderate'. Equally, it is unlikely that a PCAT would consider factors of aggravation capable of increasing the severity level declared at the initial overall assessment from 'moderate' to 'very serious'.
188. Where any PCAT decides to use its discretion to adjust the level of severity, it will give its reasons for doing so and declare a final assessment, which will be published. It is the final assessment rating that will be used by the PCAT when considering which sanctions, if any, are appropriate and proportionate to impose.

Aggravation

189. The following provides a non-exhaustive list of factors which may warrant an increase in the severity of the seriousness level and the sanctions to be imposed (aggravation):
- Failure to follow available Guidance, or failing to take appropriate alternative steps, which, had it been followed, would have meant the breach was unlikely to have occurred;
 - Continuation of the breach after relevant parties have become aware of the breach, or have been notified of the breach by PhonepayPlus;
 - The fact that the breaches occurred after a prior notice has been given to industry, such as the publication of a 'Compliance Update' or an adjudication, in respect of similar services or issues;
 - The harm occurred following the supply of compliance advice to a provider where that advice has not been fully implemented;
 - Any past record of the party, or of a relevant director, being found in breach may be considered relevant:
 - For breaches of the same nature
 - For any other breaches of the Code;
 - Failure to fully co-operate with the investigation, including falsified, delayed or incomplete responses to information requests, which fail to meet the level expected by PhonepayPlus (see Section 6 above).

Mitigation

190. The following provides a non-exhaustive list of factors which may warrant a decrease in the severity of the seriousness level and the sanctions to be imposed (mitigation):
- Some, or all, of the breaches were caused, or contributed to, by circumstances beyond the control of the party in breach, except where they could reasonably have been prevented by meeting obligations set out in Part Three of the Code. For the avoidance of doubt, circumstances beyond the control of the party in breach do not include circumstances where other parties are engaged to promote or operate services on behalf of the party in breach.
 - The Network operator or provider has taken steps in advance to identify and mitigate against the impact of external factors and risks that might result in the breach, and has notified PhonepayPlus of this action and/or had sought compliance advice prior to launching the service.
 - The Network operator or provider has taken steps to end the breach in question and to remedy the consequences of the breach in a timely fashion, potentially reducing the level of consumer harm arising from the initial breach(es).
 - The Network operator or provider has adopted a proactive approach to refunding users, including complainants, which is effective in relieving some consumer harm arising from the breach(es).
 - The Network operator or provider has proactively engaged with PhonepayPlus in a manner that goes beyond the level of co-operation that is generally expected. Network operators or providers who voluntarily provide information before it is requested, and/or who fully respond to requests for information far in advance of any specified deadline may be considered to have engaged in a manner that goes beyond the expected levels of cooperation.
 - The Network operator or provider has taken action to ensure that the risks of such a breach reoccurring are minimised (including through a review and overhaul of its internal systems, where necessary) and that any detriment caused to consumers has been remedied.
 - The Network operator or provider has, in the course of corresponding with PhonepayPlus, admitted one or more of the alleged breaches raised against it.
191. Having decided on applicable aggravating and mitigating factors, the PCAT must seek to reach a final assessment that remains proportionate to the breaches identified, ensures that compliance standards and behaviour remain high and that consumers are protected in the future.

Section 13

Sanctions

The range of sanctions available – paragraph 4.8 of the Code

192. PhonepayPlus has a range of sanctions which PCATs can impose. These are set out at **paragraph 4.8.3** of the Code. PCATs are mindful of the overall impact a combination of sanctions may have upon a service and/or the provider, including the fine, barring provisions and refund provisions. When imposing a combination of sanctions, the PCAT will take into consideration all relevant circumstances, and seek to ensure sanctions are appropriate and proportionate in all the circumstances.
193. The different sanctions may be considered useful in achieving different regulatory outcomes. The PCAT seeks to ensure sanctions are imposed effectively and appropriately, so that any regulatory action is targeted and that “polluters pay” and bear the cost of regulation.
194. A formal investigation, and the imposition of sanctions, is not an end in itself, but a trigger for improved compliance standards alongside clarity of interpretation of the Code.
195. The final assessment may be considered a useful guide as to what sanction(s) are to be imposed, so that regulatory action is proportionate. Revenue statistics and other relevant financial information, where appropriate, may also guide a PCAT when imposing sanctions that may have a financial impact, so that proportionality in the round is achieved.
196. The PCAT may consider previous adjudications, where relevant, to assist in determining the appropriate sanction to impose, in order to ensure regulatory action is consistent.
197. When imposing sanctions, PCAT may direct a withhold to ensure that any sanctions it imposes, and that any administrative charge it recommends, will be met as far as is possible (see Section 9).
198. The Registration Database will be maintained effectively to assist PhonepayPlus in ensuring the purpose of any imposed sanction is delivered following a PCAT adjudication (see Section 14).

A formal reprimand and/or a warning

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

Remedy the breach

201. Any breach, from 'minor' to 'very serious', will usually require some attention from the party in breach, and remedial action will be necessary in order to improve compliance standards. However, the PCAT can specifically require the relevant party to remedy the breach. Such an order may be made, for example where there has been reluctance to make changes evidenced during the investigation.
202. Where this sanction is imposed, the Executive is likely to initiate a new investigation raising a further breach (for non-compliance with a sanction), if evidence arises suggesting remedial action has not been taken, or has not been adequately implemented, within a reasonable period of time, as specified by the PCAT.

Compliance advice and prior permission

203. This is given or granted for a set period of time by the Executive directly to individual providers at any point within the chain of provision of premium rate services. It is given by the Executive, following an assessment of service information and promotional material, which is supplied by the provider requiring the advice or permission; or, alternatively, the provision of information relating to internal business systems. Advice seeks to guide the provider's conduct, both present and future, so as to improve the provider's knowledge and understanding of Code compliance. It is also intended to establish effective dialogue between a Network operator or Level 1 provider and the Executive, and ensure the implementation of effective due diligence and risk assessment and control procedures that may pre-empt future compliance issues and protect consumers.
204. Where a PCAT has concerns relating to potential consumer harm arising from the service, or similar services in future, it has the power to order a party in breach to pursue and implement compliance advice, or seek prior permission to operate a service from PhonepayPlus. Prior permission²⁸ may be imposed in order to ensure current and future services are not operated, or launched, in a manner that is non-compliant with the Code.

Compliance audit

205. This is a thorough examination to a prescribed standard²⁹, by an independent party agreed by the Executive, of the internal procedures a Network operator or provider has in place to

²⁸ Note that certain types of premium rate services may be more broadly considered by PhonepayPlus to pose a greater risk of harm to users because of their content; examples include live chat, gambling and counselling. These services must comply with the Special Conditions for such services published by PhonepayPlus. A breach of a Special Condition is treated as a breach of a Code obligation (Code paragraph 3.11.3). Separately, PhonepayPlus has the power to require specific services to seek written prior permission from PhonepayPlus before they operate, which may set further service-specific conditions on Network operators or providers.

²⁹ Such standards will be set on a case-by-case basis, prescribed to ensure the objective set out in paragraph 206 is achieved by the specific audit undertaken. However in every case PhonepayPlus considers that an audit will supply, as a minimum, comprehensive details of what evidence of the current status of the party was examined by the auditor, the auditor's conclusions on the root causes of the breaches established by PhonepayPlus, and a comprehensive list of the auditor's recommendations to the relevant party. This will enable the Executive to establish if the audit was done to the required standard.

ensure that it complies with its obligations under the Code. PhonepayPlus will usually require the independent party conducting the audit to be both competent and independent and s/he must normally be accredited and/or experienced in relevant auditing. All costs incurred in respect of the audit will be the responsibility of the party in breach.

206. The compliance audit is intended to identify and address issues that may have led to non-compliance in the past and pre-empt future compliance issues to protect consumers. The sanction may be considered appropriate to use in cases where there is a breach history, or where there is evidence that the business systems adopted by the party in breach contributed to the non-compliance demonstrated within a service.
207. The definition and scope of the audit will vary on a case by case basis. The PCAT, where it decides to impose an audit sanction, will generally look to set the broad parameters of the audit but will require the precise terms to be set by the Investigations Team in a proportionate and targeted manner and through liaison with the provider. An audit may for example consider due diligence undertaken when a Network operator or provider is making commercial arrangements for the provision of premium rate services, access to telecommunications networks, or the technology required to operate premium rate services for the benefit of consumers. It may also consider staff training and a Network operator's or provider's understanding of the Code of Practice, as well as the development of new services and their compliant operation and promotion.
208. An audit can provide verification of compliance standards through a review of objective evidence, for example compliance with required processes, assessment of how successfully processes have been implemented, judgment on the effectiveness of achieving any defined target levels, and provision of evidence concerning reduction and elimination of problem areas. An audit may not only report non-compliance and corrective actions but also highlight areas of good practice and provide evidence of compliance to enable the organisation being audited to positively change their working practices as a result and achieve improvements.
209. The audit must be completed to the satisfaction of the Investigations Team and any recommendations implemented within a period specified by PhonepayPlus. A failure to follow any recommendation contained in the audit report without the prior approval of PhonepayPlus may be treated as a further breach of the Code in itself.

Barring of numbers and/or services

210. The PCAT has the ability to impose bars on a Network operator or provider. These can relate either to number ranges on which the service operates, and/or particular service types, and can be applied to some, or all, of the number range and/or service type, depending on the severity of the breach. The length of any bar is determined by the seriousness of the breach and all other relevant factors particular to the case.
211. A bar must be imposed for a defined period of time. This may be given in days, months or years; or it may be defined according to a specific action that the relevant party must do, such as making a service compliant, or payment of an outstanding invoice for a fine or administrative charge owed to PhonepayPlus.

Prohibitions

212. The PCAT may restrict the business operations of a relevant party for a defined period, so as to address consumer harm, give time to enable effective improvement to services, or to punish a relevant party and/or an associated individual³⁰ for the non-compliant services it has operated or permitted to operate. There are three different types of prohibition:
- Prohibition from any involvement in specified types of service – paragraph 4.8.3(f);
 - Prohibition from any involvement in all premium rate services – paragraph 4.8.3(g);
 - The prohibition from contracting with any specified party registered with PhonepayPlus – paragraph 4.8.3(h).
213. The first two prohibitions are only applicable in cases where the relevant party and/or the associated individual have been found to have been knowingly involved in a serious breach, or series of breaches, of the Code. The severity of the cases, and in particular the number of repeated breaches of the Code, may impact on the PCAT's decision as to the extent of the prohibition.
214. The third prohibition focuses on the relationship between two or more contracting parties in the premium rate value-chain. Under the 14th Code, registration is an important obligation for all relevant members of the industry, which is designed to aid the exercise of due diligence responsibilities set out in Part Three of the Code and to improve compliance standards. Where these standards fall, and relevant parties are found in breach of the Code, the PCAT may consider it appropriate to prohibit a relevant party from contracting with any specified registered parties (or any parties that ought to be registered).
215. Each prohibition must be imposed for a defined period of time. This may be given in days, months or years; or it may be defined according to a specific action that the relevant party must do, such as completion of a compliance audit under a separate sanction imposed in accordance with paragraph 4.8.3(k) of the Code.

Prohibiting an associated individual

216. An associated individual may be prohibited by way of sanction by a PCAT under paragraphs 4.8.3(f) or 4.8.3(g) as set out above. However, in relation to associated individuals, PhonepayPlus is required to follow the procedure set out in paragraph 4.8.6 of the Code before a decision on the prohibition can be made.
217. Where the PCAT considers there is sufficient evidence that an associated individual has been or may have been knowingly involved in a serious breach or a series of breaches, the

³⁰ An associated individual is any sole trader, partner or director or manager of a premium rate service provider (i.e. those who are likely to be listed as 'Responsible Persons' within the Registration Scheme), anyone having day to day responsibility for the conduct of its relevant business and any individual in accordance with whose directions or instructions such persons are accustomed to act, or any member of a class of individuals designated by PhonepayPlus (paragraph 5.3.9).

Executive will make all reasonable attempts to notify the individual concerned (and the party found to have been in breach of the Code). The Executive will set out the evidence that it proposes to present to the PCAT with regard to this matter and provide the associated individual with the opportunity to respond to the evidence as appropriate. If the associated individual wishes for the matter to be dealt with instead by way of an oral hearing he/she ought to request such a hearing within 10 working days of receiving the evidence.

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

Fines

220. Fines serve a dual purpose in that they remove some, or all, of the benefit or profit made from the non-compliant services and equally serve as a strong deterrent against future non-compliant activity being initiated by the party in breach, or by other members of industry intent on operating similar services.
221. The fine seeks to play a strong role in pre-empting further similar harm, and protecting consumers from such harm reoccurring. A PCAT may consider using a refund sanction in conjunction with a fine to address the harm caused, further establish a deterrent and seek redress for consumers directly affected by the breaches upheld.
222. Alternatively, where refunds have proactively been given by the party in breach, significantly reducing the consumer harm and affecting the profit made from the breaches, the PCAT may consider this when deciding what level of fine is proportionate.
223. Fines may be imposed of up to £250,000 per breach (as is permitted by law) but, so as to be proportionate on the facts of the individual case, all the guide fine levels are without a lower limit, meaning each range begins at £0. The PCAT will consider the final assessment of the seriousness rating when making a decision as to a proportionate fine. The bands of case seriousness and the usual levels of fines they may attract are:
- Minor: up to £5,000 per case
 - Moderate: up to £20,000 per case
 - Significant: up to £100,000 per case
 - Serious: up to £175,000 per case
 - Very serious: up to £250,000 per breach
224. A fine may be appropriate in all cases. In determining whether a fine should be applied, the PCAT will have regard to the principles set out in paragraph 164 above. If a fine is considered to be appropriate, the PCAT may also consider whether or not the level of

revenue received by the provider adequately reflects the measure of potential consumer or regulatory harm and detriment and if so, set the fine at that level. A relevant party should provide evidence in support of any argument that it is inappropriate for the PCAT to take into account the whole service revenue, for example the non-compliance only affected part of the service or was limited to a short time period. The relevant party should therefore ensure they provide a clear breakdown of revenue by service and/or duration. Notwithstanding this, where the PCAT considers that the measure of consumer or regulatory harm is greater than the level of revenue received by the provider, it may impose a fine in excess of the revenue received.

225. The fine levels set out above are for guidance purposes and actual fines may exceed these levels if justified where, for example, a higher fine may be required to act as an adequate deterrent from future non-compliance, or where it may be required to impose a fair or proportionate sanction.

Refunds – including refund directions under paragraph 4.9 of the Code

226. Where a service has operated in breach of the Code and the breach has had an impact on consumers, PhonepayPlus expects a premium rate provider to consider making refunds directly to affected consumers. This sanction may be used to restore consumers to the position they would have been in, had the breaches not occurred or the service in breach had not operated. The refund sanctions available may be imposed in any case, regardless of whether it relates to breaches of rules under Part Two of the Code or responsibilities under Parts Three or Four of the Code. A refund sanction may have regard to consumers who are either directly, or indirectly, affected by a Network operator's, Level 1 or Level 2 provider's breach of the Code.
227. Paragraph 2.6.4 of the Code states "*where refunds are provided to consumers they must be provided promptly and in an easily accessible manner*". This is true in relation to refunds made following dialogue with consumers, engagement with the Executive or following an order by a PCAT as a sanction under paragraph 4.8.3 of the Code.
228. To ensure refunds are made to consumers in an easily accessible manner, providers are expected to consider the size of refund when selecting a method of redress. Any refund process must not act as a barrier to consumer redress, either by placing any unreasonable burden on the consumer when making a claim, or by making receipt of the refund so difficult that it deters consumers from completing the process.
229. A PCAT may consider it appropriate to make a general order for refunds to either all or any specified group of consumers under paragraph 4.8.3(i) of the Code, for example when:
- An identifiable (and possibly excessive) financial detriment to consumers has occurred;
 - Consumers were either deceived or misled with reckless or wilful intent, or through negligence;
 - The product or service was not supplied, or was of unsatisfactory quality;
 - The marketing or promotional material misled consumers into purchasing. This would include promotional material that stated a lower price than the amount the consumer is actually charged, or suggested that a service was free, when it was not.

230. Under paragraph 4.8.3(j) of the Code, a universal refund will require the provider to issue a refund to all (or any specified group of) consumers who have used the service, even where they have not made a complaint. This sanction will only be used in circumstances where the service has failed to provide its purported value, and/or there has been very serious consumer harm or unreasonable offence has been caused to the general public, or a very serious breach of the Code of Practice has occurred. Universal refunds are therefore typically imposed in cases involving scams.
231. Providing refunds to consumers in appropriate cases is important in resolving non-compliance. It is recognised in the Code at paragraph 4.9 that monies may be retained by different parties in the value-chain, such as the Network operator or Level 1 provider. In order that refunds are awarded appropriately and without delay, systems need to be established so that relevant parties can assist in the provision of refunds from revenue retained by a Network operator or Level 1 provider in response to a PhonepayPlus direction ('a retention', as defined in paragraph 4.9.1 of the Code).
232. The Executive can intervene where relevant parties fail to pay refunds promptly in response to a PCAT sanction, and it will do so in accordance with paragraph 4.9.2 of the Code. A direction will be sent to the Network operator or Level 1 provider ordering it to make the refund payments. The relevant party will be responsible for any associated administrative costs. In relation to the obligation to make refunds on behalf of a party in breach, there is a four-month limitation period set in paragraph 4.9.3 of the Code. This period runs from the completion of the adjudication process, provided that any reasonable time for any appeals has also passed.
233. Refund sanctions are payable before fines or any administrative charge due to PhonepayPlus. Paragraph 4.9.4 of the Code makes it clear that monies outstanding, because of the failure of the relevant party to pay a fine or administrative charge to PhonepayPlus, may be paid out of funds from a retention; however, this will only be ordered in a direction once refunds are made, or the four-month limitation period has passed.

Administrative charges

234. PhonepayPlus' policy is to ensure that, where resources and costs are incurred through investigating Network operators or providers in breach of the Code, these costs are met by those parties, rather than from the general industry levy.
235. For these reasons, all relevant parties found to be in breach of the Code can expect to be invoiced for the administrative and legal costs of the work undertaken by the Executive. Where prohibition proceedings are brought against associated individuals arising from the imposition of sanctions against a provider found to be in breach of the Code, administrative charges related to such proceedings will be imposed on the relevant provider, rather than the associated individual, unless the individual is also the relevant provider (i.e. acting as a sole-trader).
236. The charges related to this activity are published annually by PhonepayPlus and are agreed with PhonepayPlus' external auditors. In cases where it has been determined that one or more breaches have occurred, the PCAT will make a recommendation to the Executive for the administrative charge to be imposed on the Network operator or provider. This may be

imposed on a full cost recovery basis or, exceptionally, on a percentage basis, where circumstances justify this. Examples of the latter include where the PCAT has not upheld a major part of the case brought by the Executive.

237. The Executive will give due consideration to that recommendation when using its discretion to invoice a Network operator, or a provider, for administrative costs in relevant cases.

Section 14

Post-adjudications

Publication of PCAT decisions

238. The decision of a PCAT, in relation to the alleged breaches, the seriousness rating of the case and the sanctions set, is formal in nature. The PCAT will prepare, with the assistance of the Clerk to the PCAT, an adjudication report setting out the decision.
239. Adjudication reports are published (including on its website) by PhonepayPlus following a PCAT, in accordance with paragraph 4.11 of the Code. Their usual format is as follows:
- A description of the service;
 - The key facts leading to the Executive's raising of potential breaches and aggravating or mitigating factors;
 - The submissions from the responding Network operator, Level 1 provider or Level 2 provider; and
 - The decision of the PCAT.
240. The sanctions imposed in published cases may assist in improving compliance standards, not just by the party in breach, but in other parts of the industry.
241. The Executive will usually notify the party found to be in breach (and any other relevant Network operators, Level 1 or Level 2 providers, as appropriate), of the decision at the beginning of the second working week following the date of the PCAT hearing. The written decision will usually be published two weeks after the PCAT hearing. It will be provided to relevant parties prior to publication.
242. Details of all adjudications will be recorded on a party's record on the PhonepayPlus Registration Scheme, as well as being published on the PhonepayPlus website, including:
- The date of the PCAT;
 - The breaches raised, both upheld and not upheld;
 - The seriousness rating for the case;
 - Revenue band within which the service falls which will be recorded as one of the following:
 - Band 1: £1,000,000+;
 - Band 2: £500,000 - £999,999;
 - Band 3: £250,000 - £499,999;
 - Band 4: £100,000 - £249,999;
 - Band 5: £50,000 - £99,999;
 - Band 6: £5000 - £49,999;
 - Band 7: £1- £4,999
 - Sanctions imposed; and
 - Any other key information associated with the investigation.
243. The PhonepayPlus Registration Scheme will record breach history records associated with relevant providers or their directors, including any adjudication by a PCAT, for three years

from date of publication of the relevant decision. In cases where the final assessment given to the case is 'very serious', the adjudication will be recorded on the Registration Scheme for five years, from date of publication of the relevant PCAT decision. This information is provided on the Registration Scheme to assist due diligence searches conducted by Network operators or providers on their current, or prospective, business partners. The Registration Scheme acts as one of many sources of information that may be relevant to contracting parties.

244. Previous adjudications may offer additional guidance to the industry on the criteria used by the PCAT to assess seriousness ratings in different cases. They also act as an incentive to improve compliance standards across the industry, as a deterrent against the adoption of non-compliant service models or promotional material, and assist in providing clarity in the interpretation of the Code.

Reviews of PCAT decisions

245. Decisions of the PCAT may be subject to judicial review. Judicial review is the procedure by which someone can seek to challenge in Court a decision, action or failure to act of a body exercising a public law function. Normally, a claim for judicial review must be filed promptly and in any event no later than three months after the grounds to make the claim first arose (*correct as at date of publication of this document*). Providers who are considering seeking judicial review of a decision are encouraged to seek independent legal advice urgently.

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

Guidance current as at 5 January 2015

Directives 98/48/EC and 2000/31/EC

The Electronic Commerce (EC Directive) Regulations 2002

The definition of ISS (D98/48/EC)

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

For the purposes of this definition:

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

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

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

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

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

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

- providing access to a communication network or in hosting information provided by a recipient of the service;
- which are transmitted point to point, such as video-on-demand; or
- the provision of commercial communications by electronic mail are information society services.

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

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

1. Services not provided 'at a distance'

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

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

2. Services not provided 'by electronic means'

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

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

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

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

- (a) voice telephony services;
- (b) telefax/telex services;
- (c) services provided via voice telephony or fax;
- (d) telephone/telefax consultation of a doctor;
- (e) telephone/telefax consultation of a lawyer;
- (f) telephone/telefax direct marketing.

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

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

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

Additional exemptions (D2000/31/EC)

This Directive shall not apply to:

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

- gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.

Guide to classification by premium rate service types

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

List of Countries

EU Member States

Austria
Belgium
Bulgaria
Croatia
Cyprus
Czech Republic
Denmark
Estonia

Finland
France
Germany
Greece
Hungary
The Irish Republic
Italy
Latvia
Lithuania
Luxembourg

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

The UK (but not the Channel Islands)

EEA Member States

Iceland
Liechtenstein
Norway

ANNEX B – Withhold Assessment Risk Factors

At the commencement of the Track 2 procedure, a debt collection risk assessment will be undertaken, which will involve an assessment of the factors set out below under the headings “Company Information” and “Consumer harm”, and numbered 1 – 13. Each of the factors will be considered in turn and any factors that indicate that PhonepayPlus is as a result at risk of not recovering any fines or administrative charges imposed, or of refunds required not being paid, will be assessed as high, medium or low. If any factor indicates that there is a high risk (for factors 1 – 8 and 13), or a significant number of factors indicate a medium or higher level of risk, a withhold will normally be recommended. If all the factors are low risk it is unlikely that a withhold will be recommended.

If the risk factors indicate that a withhold should be recommended, a further assessment (considering the criteria at 2, 5-6, 9-13 set out below) will be conducted to assess what amount of revenue should be proportionately withheld. Although this list has been set out to ensure that key factors are considered, each assessment will be conducted on a case by case basis and PhonepayPlus may exercise its discretion to make a decision regarding the withhold otherwise than in accordance with the risk indicators where there is good reason to do so.

| | Criteria | Findings | Risk rating |
|---|--|----------|-------------|
| 1 | Company residence and presence: Note in findings if company is resident overseas, or has only a nominal presence in England and Wales; High risk if either of the above. | | |
| 2 | Credit rating: 20 is poor so considered High risk. If over 35, the credit is deemed Low risk. | | |
| 3 | CCJ's: Are there outstanding unpaid court judgements with a low credit rating? If yes, High risk. Details of all CCJ's to be noted in findings. | | |
| 4 | Date of incorporation: Date of incorporation inputted into findings. High risk if less than 2 full years of accounts. | | |
| 5 | Filed accounts: Date of last filed accounts inputted. High risk if no recently filed accounts. Note if company is dormant or has no filings recorded. | | |
| 6 | Latest balance and profit figures: Details of latest balance sheet and profit and loss accounts to be provided. If the net assets are negative or low, consider High risk rating. | | |

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| 7 | Barred directors and shareholders: Have listed directors and shareholders other directorships or shareholdings? High risk if on Companies House website list of barred persons. Any applicable names of barred directors/shareholders to be inputted. | | |
| 8 | Untraceable companies: High risk if the company is based abroad, cannot be located by CreditSafe or if the provider is a sole-trader or a partnership. | | |

Consumer Harm

| | Criteria | Findings | Risk rating |
|----|--|----------|-------------|
| | Potential breaches identified so far The nature of consumer harm? <i>(e.g. attractive to children, STOP command not working, consent to charge)</i> | | N/A |
| 9 | Seriousness of potential breaches identified so far: High risk if potential breaches are serious or very serious in nature. How widespread are the breaches? Were all users of the service affected or is there only evidence that some/all complainants were affected by the breaches? | | |
| 10 | The provider history regarding payment of fines and admin charges: High risk for outstanding debts | | |
| 11 | Other facts or circumstances relevant to the specific case and/or provider: High risk if provider has a breach history or a breach history for the same potential breaches identified. | | |
| 12 | Similar cases – has Tribunal previously adjudicated on a similar matters and if so what was the seriousness and the fine level. | | |
| 13 | Other relevant information: (Revenue generated by the service and amount currently retained by the L1/NO) | | |

ANNEX C – Examples of “important public interest reasons”

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

1. Breach of one of the provisions of Code rule 2.5, in respect of which consumers have been seriously harmed or are at risk of serious harm and/or consumers are being threatened, and the Executive reasonably believes that notifying the provider before directions to suspend the service are issued will either (a) exacerbate the harm, or the possible extent of that harm; or (b) cause or allow the serious harm to occur whilst awaiting the respondent's response.
2. Breach of one of the provisions of Code rules such as 2.3.3 or 2.3.11, or *wangiri*, on a sufficiently widespread scale that the Executive reasonably believes that serious, widespread and irremediable financial detriment would occur to consumers whilst awaiting the respondent's response.
3. Breach of Code rule 2.3.10 (vulnerable consumers) which the Executive reasonably believes will result in serious and irremediable harm to such consumers whilst awaiting the respondent's response.
4. Where related activity is under investigation by law enforcement agencies (including the Police or other regulators) and the Executive reasonably believes that prior notification of a provider would prejudice investigation of criminal or regulatory offences.
5. Where serious harm (or a law enforcement investigation) is occurring and the Executive reasonably believes that allowing the provider time to respond to the allegations prior to direction of a withhold will result in relevant PRS revenue necessary to provide consumer redress and meet other regulatory sanctions being dissipated (note that in this case the Executive should consider all information available to it regarding the financial and corporate status of the respondent, the amount held by the Level 1 provider, and the dates on which such payments are due).
6. Where the criteria for interim measures are fulfilled but the responsible Level 2 provider cannot be identified, and the Executive reasonably considers that the harm cannot be effectively addressed otherwise than through use of interim measures. This may include cases where there is reason to believe that the respondent is aware of an investigation but has been deliberately evading contact.