

**Statement following consultation  
on the 13<sup>th</sup> edition  
of the Code of Practice**

**Statement by PhonepayPlus dated 26 March 2015**

**Consultation closed on 10 September 2014**

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## **Section 1: Introduction**

1.1 PhonepayPlus is recognised by Ofcom as the regulator with day-to-day responsibility for premium rate services (PRS), a role we have undertaken since 1986. Our vision is that anyone can use PRS with absolute confidence in a healthy and innovative market. In pursuit of this vision, we maintain a Code of Practice ('the Code') that establishes the appropriate standards for the operation, content and promotion of PRS in the UK. From time to time, we revise the Code to ensure it continues to provide a trusted, protected environment for consumers and a fair and proportionate regulatory regime for the industry.

1.2 The twelfth edition of the Code, launched in September 2011, was a significant transition in the regulation of PRS away from prescription and towards a focus on outcomes to achieve consumer trust and confidence. The decision to distribute responsibility along the value chain, allowing proportionate and targeted enforcement action, was also welcomed by industry stakeholders.

### **Scope of the Review**

1.3 However we considered that after nearly three years of applying the twelfth edition of the Code, there were good reasons to conduct a review. Perhaps the most compelling was the need to ensure the Code would align with changes arising from Ofcom's review of Non-Geographic Call Services (due to come into effect in July 2015). This also provided us with the opportunity to examine emerging trends, other regulatory changes, and our own experience in enforcing the twelfth Code, with a view to identifying revision and improvement in any areas which required it.

1.4 Early on in the review process, we expressed the view as part of a Call for Inputs that the six outcomes to ensure consumer confidence which underpin the Code – Legality, Transparency, Fairness, Privacy, Avoidance of Harm and Complaint Handling - remained sound. Feedback confirmed that the great majority of stakeholders agreed with this.

1.5 In addition, our Call for Inputs specifically sought views as to whether existing areas and provisions of the Code remained fit for purpose, given market developments and other emerging trends.<sup>1</sup> With the exception of areas and issues referred to below, and in more detail in later sections of this statement, we did not receive any feedback - either to the Call for Inputs or consultation of the proposed thirteenth Code - that identified specific Code provisions which were no longer fit for purpose.

1.6 As such, and with the exception of issues set out in the rest of this statement, we are not aware of any provisions in the thirteenth Code which are unchanged from the twelfth which would, due to market or other developments, no longer meet the

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<sup>1</sup> Q5 of the Call for Inputs read as follows: "Are there areas or provisions of the Code that are not fit for market innovations or emerging trends that we have not identified in this document?"

relevant statutory tests which Ofcom applies. For this reason a significant number of provisions which remain unchanged from the twelfth Code have been transposed across to the thirteenth, and the outcomes and rules within Part Two of the twelfth Code have been retained as the cornerstone of our regulatory framework.

1.7 However, changes were proposed in five areas:

1. Amendments resulting from the implementation of Ofcom's Review of Non-Geographic Call Services (NGCS)
2. Changes to ensure the Code is future-proofed for current and future market developments (Future Proofing)
3. Technical amendments to Part Three, Four and Five of the Code to streamline and clarify processes (Technical and Enforcement Review)
4. A new approach to existing prior permissions regimes (Special Conditions)
5. Improvements to support the principle of 'polluter pays' (Polluter Pays)

### **The Code review process**

1.8 PhonepayPlus embarked upon the review of the twelfth edition of the Code in mid-2013. We published a Call for Inputs in September 2013 that set out the scope of the review and our initial considerations. Stakeholders were invited to comment on the issues outlined in the Call for Inputs to help shape the revised Code.

1.9 In addition, PhonepayPlus hosted a number of workshops with industry and consumer groups that both discussed proposals as well as garnered useful feedback from a range of stakeholders. These also influenced our approach to many of the initial proposals set out in the Call for Inputs.

1.10 Following feedback, we reflected on the scope and breadth of our initial proposals. A number were considered no longer feasible, while further reflection also led us to consider additional revisions to the Code. Details of both were communicated in a Code update paper in February 2014. Again, stakeholders were invited to comment on the scope and detail of the considerations in the Code update paper, and those comments were taken into account in the final draft Code and accompanying consideration which was released for consultation in July 2014.

### **Responses to the Consultation and Next Steps**

1.11 The consultation closed on 10<sup>th</sup> September 2014, and in the interim period PhonepayPlus has been analysing responses, and conducting follow-up conversations with some respondents to clarify their positions on certain of our proposals.

1.12 Respondents were supportive of most of the proposed changes, additions, or subtractions from the twelfth Code in order to form a thirteenth edition. As a result the following key changes will form part of the final version of the thirteenth Code which we have provided to Ofcom (or are changes made in consequence of the amendments in the thirteenth Code, such as the amounts of spending caps and thresholds), and which they will in turn submit, via the Department for Business,

Innovation and Skills, to the European Commission for comment, before final sign-off:

- A new rule requiring providers to possess any qualifications and/or licences necessary in law before operating a PRS
- An updated rule around the requirement not to take advantage of vulnerable consumers - which has been further amended following consultation to cover circumstances where the risk of harm could have been identified with reasonable foresight
- The removal of any spending caps currently contained within the Code or prior permission regimes - with the amounts and actions associated with them to be set outside the Code for individual service types, and any changes to be fully consulted
- The raising of the “forced release” cap on live chat and sexual entertainment services from £30 to £45 per call – with the introduction of the requirements to clearly inform consumers when they have spent £15 and require them to clearly opt in to continue when they have spent £30
- The raising of the existing single purchase cap, and monthly subscription cap, on Children’s Services from £3 to £5 (incl. VAT), and the introduction of a new purchase cap for Children’s Services of £20 (incl. VAT) per service in any given billing cycle
- The removal of a requirement for all PRS to supply and promote a non-PRS UK phone number for consumer enquiries – although Guidance will make clear that a number should still be provided where this is the most appropriate medium for consumer contact
- The introduction of special conditions to apply to defined higher risk service types – these will replace existing “prior permissions” regimes, and providers will no longer have to apply for permission to operate higher risk services as long as those services are compliant with any special conditions that are applied to that service type.

### **Responses raising issues concerning Part Four of the Code**

1.13 There were a number of proposals about which respondents were generally less supportive, and a significant number expressed concerns. The majority of these concerned proposals to streamline and clarify investigation, adjudication and review procedures contained within Part Four of the Code. Indeed some respondents supplied feedback that went beyond just the proposed changes, and also commented on whether some of the underlying framework could be improved going forward.

1.14 These views, and follow-up discussions, indicated a number of perceptions about the transparency, independence, and equanimity of the current framework.

Some respondents, a trade association and a law firm who provide advice to a number of PRS providers, suggested that a wider review of the current framework take place. Whilst we did not agree with all the views expressed, which are set out and considered in greater detail later in this document, we have recognised the need to conduct a deeper review of investigatory and adjudicatory procedures. This will ensure that any eventual changes are appropriate and proportionate, and provide clarity and certainty for all parties.

1.15 As a result we do not intend to take forward our originally proposed changes to “Track 2” investigations procedures, Reviews, Oral Hearings, and the Independent Appeals Body as part of this edition of the Code. Instead PhonepayPlus will begin a separate review of investigations, adjudications and reviews, which will commence immediately. The review will ensure that stakeholder views are sought and taken into account.

1.16 We note that we have also made a few amendments elsewhere within Part Four of the final thirteenth Code as attached at Annex A. These amendments include a small change relating to the Track 1 procedure and some to provide greater transparency on matters our CCP Tribunals already take into account as a matter of practice and under the law. All these amendments are set out in greater detail within Section Four of this statement. As explained below, we have also inserted certain safeguard amendments into Rule 4.5 of the Code of Practice in light of the recent High Court judgment in the case of *R (Ordanduu GmbH and Optimus Mobile GmbH) v PhonepayPlus Ltd [2015] EWHC 50 (Admin)*.

1.17 We note the concerns which were expressed by some respondents that some current provisions within Part 4 of the Code, which will now be retained pending the outcome of the review referred to directly above, are flawed. However whilst we recognise these concerns signal the need for a review to determine whether the current provisions can be revised and improved, we do not consider that they demonstrate that the current Part 4 provisions no longer meet the relevant statutory tests within the Communications Act.

### **Changes to the Code following judicial review judgment**

1.18 In between the Code consultation closing and PhonepayPlus concluding its analysis of responses, the High Court delivered its judgment in relation to the judicial review case brought by Ordanduu and Optimus Mobile against PhonepayPlus. This was in response to PhonepayPlus’ initiation of its Emergency Procedure against Ordanduu and Optimus in 2013.

1.19 The judgment found flaws in the way in which the Emergency Procedure had been applied. As a result, PhonepayPlus and Ofcom have agreed that certain limited safeguards should be inserted, with immediate effect, into the Emergency procedure provisions of the twelfth edition of the Code. These amendments will also read across to the final version of the thirteenth edition attached at Annex A, which will now be submitted to the European Commission for consideration.

1.20 Further, as noted above, we will conduct a comprehensive review of Part 4 of our Code of Practice together with our “*Investigations and Sanctions Procedures*”. Stakeholders will be encouraged to comment on the Emergency Procedure provisions as part of this review.

### **Responses raising issues concerning a requirement for spoken pricing information in audiovisual promotions**

1.20 Separately, four respondents – including one DQ provider and a number of trade or professional bodies involved in broadcast or audiovisual advertising – objected to the requirement at Rule 3.12.3 for pricing information to be spoken as well as displayed in any audiovisual promotion where the relevant service is likely to cost above a defined threshold (at present £3.83 plus VAT, or £4.60 inclusive of VAT). Their objections questioned whether the requirement, which has existed within successive editions of the Code in a largely unaltered form since 2004, remained proportionate, non-discriminatory, and objectively justifiable.

1.21 One of these respondents had previously expressed concerns about the amount of the threshold at which pricing must be spoken, which the wider removal of the amounts of spending caps from the Code, thus making them easier to review and alter as appropriate, addresses. However we had not received objections or concerns about the requirement within the rule itself at earlier stages of Code development, such as the Call for Inputs.

1.22 We recognise the need to gather further evidence in order to establish that the rule is justified under the tests which Ofcom is required to apply at s121(2) of the Communications Act 2003. We have, therefore, removed rule 3.12.3 from the thirteenth edition of the Code as submitted to the EU. Subject to a review of the relevant evidence, which is ongoing, however, we intend shortly to issue a consultation on the possible amendment of the thirteenth Code to re-introduce this rule. The European Commission will be informed of these matters and that, if the inclusion of Rule 3.12.3 is found to be justified, it will be re-introduced into the Code.

1.23 The rest of this statement is divided into the five thematic sections noted above that detail the proposed changes to the Code. Each proposed amendment is detailed in the appropriate section. The final thirteenth edition of the Code as will be submitted to the EU is included at Annex A. Annex B is a Notice setting out the amounts and actions that will apply to those services to which spend reminders, caps, or reminders with opt-ins apply.

1.24 Subject to final sign-off within the European Commission, the thirteenth edition of the Code will be published in June 2015, and take effect on 1<sup>st</sup> July 2015. It would be amended to include Rule 3.12.3 in due course, if that is the outcome of any further consultation.



## Section 2: NGCS

2.1 Ofcom published its NGCS policy statement<sup>2</sup> in December 2013 that set out their decision to change the regulation of calls to 080, 084, 087, 09, 116 and 118 number ranges. Of particular relevance to the PRS industry was the introduction of a new unbundled tariff structure and increased caps on the 09 number range.

2.2 The unbundling tariff will separate the amount paid to the phone company which originates the call ('the access charge') and the amount paid to the service provider ('the service charge'). This is intended to increase consumer awareness of the price of the call and how this is split between the consumer's Network operator and the service provider. This will also ensure consistent treatment across all revenue-sharing number ranges, including those which fall into PhonepayPlus' remit (09x, 118x, 087x and in some limited cases 084x).

2.3 The new price point cap, set at £3 per minute plus VAT, replaces the current cap of £1.28 per minute plus VAT from a BT landline. Ofcom is also introducing a new £5 plus VAT price point cap on single drop charges on the 09 number range. Because caps have only previously applied to BT landlines, this also ensures consistency across all originating networks around the maximum total which consumers can pay per minute or for a drop charge. The new tariff structure and caps will come into force on July 1st 2015.

2.4 Given the potential impact of the changes on the PRS industry, PhonepayPlus consulted on proposed changes to spending caps on live and sexual entertainment services, and two definitions detailed in Part Five of the Code

### Spending caps for live services

2.5 The introduction of new price point caps on the 09 number range led PhonepayPlus to reflect on the appropriateness of a number of total spend cap limits that exist within our regulatory framework. Spending caps had previously existed at Rule 2.3.12 (a), (b), (c) and (d) in the Code for sexual entertainment services, services aimed at or which are particularly attractive to children, virtual chat services and a monetary threshold at which point reminders must be sent to users of subscription services. There were also a number of other service-specific caps contained within prior permissions regimes that effectively perform the same function as the codified caps.

2.6 Having determined that caps are still necessary – our research suggested that 91% of consumers still welcomed them – we then considered whether caps attached to live and sexual entertainment services should be revised upwards. Whilst a significant number of consumers of live services (54%) supported a cap at £20 or below, a significant minority (20%) supported a higher cap than £30. With this in mind, but also the consideration that the current cap does not serve consumers who want to pay less than £30, and constrains providers from potentially making use

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<sup>2</sup><http://stakeholders.ofcom.org.uk/consultations/simplifying-non-geo-no/final-statement>

of the opportunities afforded by Ofcom's higher price point caps, PhonepayPlus proposed to raise the current forced release cap to £45.

2.7 However we wished to provide additional confidence to consumers who wanted greater control over their spending, as evidenced by the 54% who favoured setting a cap lower than £20. But to also allow consumers who were willing to keep spending to continue with a call if they were enjoying the service being provided. For these reasons we also proposed to introduce new requirements for an in-call spend reminder at £15, and the requirement that consumers opt into any further spending when a call has reached £30. We asked the following related consultation question:

**Q1. Do you agree with our graduated approach to caps on live services and the proposed points of intervention? Please evidence your response.**

2.8 Responses generally welcomed the proposal to raise the forced release cap, with no real challenge to the threshold of £45, or a requirement for further opt-in at £30, which for a live service can be achieved by a consumer confirming to an operator that they wish to continue with the call having been informed they have spent £30.

2.9 Consultation feedback on the proposed in-call reminder at £15 was initially less supportive, in some cases questioning the need for any kind of reminder at a lower threshold than the £30 at which consumers have been used to a forced release. In particular a trade association representing a significant number of providers supplied such feedback. However a further formal meeting with this trade association, and informal discussions with a small number of other respondents, clarified that their main concern was around the nature of the reminder which would be required. In their view an obtrusive reminder - either from an operator or from a break in the service - could spoil the service for some consumers who would then be more likely to hang up even if they were satisfied with their spending at that point.

2.10 We are strongly of the view, for the reasons set out in our consultation document, that consumers need to have greater control over their spending if forced release caps for live services are to rise, but we also accept that any earlier actions leading up to a £45 forced release should be graduated in order to be proportionate. As such we have not altered our original proposal for an in-call reminder when £15 has been spent, or our wider graduated approach to caps on live services and the proposed points of intervention, but we have considered how the requirement for a spend reminder can be met in a way which is technically feasible and not overly obtrusive.

2.11 The attached Notice at Annex B sets out one clear method by which the requirement to provide an in-call reminder at £15 spend on live or sexual entertainment services can be met, as follows. As always, other means which achieve the same effect can be tested with PhonepayPlus prior to implementation:

- 1) Playing the consumer an alert sound – such as a repetitive beep – as part of the pricing and service information which is provided to a consumer immediately upon connection.
- 2) Telling the consumer at the same time that they will hear this alert sound again when they have spent £15 on the service charge (and not including the access charge) for the call.
- 3) Playing the same alert when £15 has been spent, excluding network access charges.

## **Spending caps**

2.12 More widely than just live services, PhonepayPlus also proposed to simplify all the current caps contained within the Code and within prior permissions requirements by consolidating all of the service to which caps apply in one place – rule 3.12 of the Code – and also consolidating the power to require one, or a combination, of forced release, positive opt-in and spend reminder within the same rules.

2.13 This meant that the amounts of any caps, and the actions associated with them, can in future be set for each service type outside the Code following full consultation. In turn this provides greater flexibility to amend caps, or actions, in a timely fashion in response to developments in the market or to systemic consumer harm, without the need for a Code change. In order to ensure this flexibility to amend caps and/or actions is exercised swiftly where appropriate, PhonepayPlus will continue to monitor, and where necessary review, amounts going forward.

2.14 Our proposal was to remove Rules 2.3.12a), b), c) and d) of the twelfth Code and replace them with the following at a new paragraph 3.12:

### *3.12 Specified Service Charges and Duration of Calls*

*3.12.1 PhonepayPlus may, in relation to the service categories set out in paragraph 3.12.2 below, specify:*

- a) the service charges which may be spent per call or calls taken together in any 24 hour period or monthly billing cycle;*
- b) the duration permitted for a call or calls to a service in any specified time period;*
- c) the actions which must be taken at specified intervals, or after specified service charges or call durations have been reached, including but not limited to:*
  - i. the provision of spend and call duration reminders;*

- ii. *the immediate termination of the service after provision of a spend or call duration reminder unless the consumer positively confirms a wish to continue to use the service; or*
- iii. *the immediate termination of the service.*

3.12.2 *The service categories to which paragraph 3.12.1 refer are:*

- a) *Sexual entertainment services;*
- b) *Virtual chat services;*
- c) *Live entertainment services (excluding sexual entertainment services);*
- d) *Chatline services;*
- e) *Remote gambling services;*
- f) *Professional advice services;*
- g) *Counselling services;*
- h) *Subscription services;*
- i) *services aimed at, or which should have been expected to be particularly attractive to children; and*
- j) *any services in respect of which special condition (d) at Annex 2 of the Code has been imposed.*

3.12.3 *PhonepayPlus may specify the advertised cost of a service that is promoted on television or in any other audio/visual format, above which pricing information must be clearly visually presented and spoken.*

3.12.4 *Any service charge, call duration, action or advertised cost specified under paragraph 3.12, must be fair and proportionate.*

3.12.5 *Before any such amounts, call duration, action or advertised cost is specified under paragraph 3.12, PhonepayPlus will consider all factors that are relevant and within its reasonable contemplation, and will consult relevant stakeholders and consider every representation about that proposal that is made to it within the period specified for comment.*

3.12.6 *PhonepayPlus shall publish a full list of all such specified amounts, call duration and actions and the service categories to which they relate on their website.*

**Q2. Do you agree with the new consolidated mechanism being introduced at 3.12 to govern spending caps and our proposal to sit the monetary values outside the Code? Please evidence your response.**

**Q5. Do you agree with our proposed change to Rule 2.2.7? (now 3.12.3) Do you agree with our intention to retain the level at which point this requirement is triggered at £3.83 plus VAT? Please evidence any response.**

2.15 In general these proposals were welcomed. However concerns were raised in relation to two of the service types we proposed to include. Firstly subscription services, as at 3.12.2h), and secondly services which are advertised in audio-visual format and cost above a specified threshold, as at Rule 2.2.7 in the twelfth Code and Rule 3.12.3 in the thirteenth.

2.16 In relation to subscription services concerns were expressed by two respondents, one of them a trade association representing a number of member's views, that this could result in future requirements to opt in to further spending, or to automatically release the consumer from a subscription. At present providers of subscription services are required only to remind consumers that they are subscribed, and provide exit and other key service information, every month or £20 spent.

2.17 Some respondents requested that the draft be changed so that Rule 3.12.1c) ii & iii could not apply to subscription services in the future. We are not minded to do so for the reasons set out below.

2.18 Firstly, that this request pre-supposes to an extent that PhonepayPlus intends to apply the actions at ii & iii to subscription services in the future. At present we have no plans to do so, as the controls which are either currently in place or immediately available – double opt-ins, spend reminders, and Code provisions around transparency and bill shock – are understood to work in the current subscriptions market.

2.19 However should there be radical changes to subscription mechanics at some point in the future, which serve to change how a subscription service is understood or even defined, then we would wish to be able to consider controls such as forced release caps and further opt-ins. To reiterate, we are not aware of anything in the current market which would warrant the introduction of such changes. But given the ever-faster pace of evolution in the PRS sector, we do not see a compelling reason to exempt subscription services altogether from the possibility that Rule 3.12.1c) ii & iii would need to be applied.

2.20 Secondly, the removal of subscription services from Rule 3.12.1c) ii & iii would not actually remove PhonepayPlus' right to impose caps or further opt-ins to this service type. Rule 3.11, in conjunction with the special conditions at Annex 2 of the Code, would allow PhonepayPlus to develop proposals to apply forced release caps or further opt-ins at any time it became necessary to consider such measures. We did not receive any comments regarding the potential to apply caps and opt-ins to subscription services using Rule 3.11 as part of consultation responses, and follow-up discussions with some trade associations have confirmed that they understand this and are content with it.

2.21 Whether PhonepayPlus sought to apply caps or opt-ins using Rule 3.12.1c) or using Rule 3.11, we would be required to fully consult and provide a compelling evidence base that our actions were proportionate, and fully consider all feedback to the consultation including any from Ofcom.

2.22 Given that all other services where some kind of spending threshold currently applies will be included within Rule 3.12.2, and therefore be covered by Rule 3.12.1c), we consider it clearer and more transparent to include subscription services here, rather than using Rule 3.11 to apply special conditions to the exact same effect. As such the consultation responses do not cause us to take a different approach from our original proposal to include subscription services within the list of service categories at Rule 3.12. For the reasons set out here and in the consultation, we have decided to proceed as proposed, and subscription services are included in the list (at Rule 3.12.2h) within the Code attached at Annex A.

### **Spoken pricing information when promotion is audiovisual**

2.23 Our proposed Rule 3.12.3 required that pricing information is spoken as well as displayed where a service is promoted in an audiovisual format and the total cost can be above a certain threshold (at present £3.83 plus VAT, or £4.60 inclusive of VAT). This provision was not changed from the previous Code, save being moved from Rule 2.2.7 to be part of Rule 3.12.3, and indeed had been in place with largely the same wording since it was first introduced to the Code in 2004.

2.24 We had received some comment about the amount of the current threshold during the Call for Inputs and in response to our Code Update in February 2014. But this had been solely about the threshold – the amount of which we proposed to move outside the Code in order that it could be reviewed and altered more flexibly – and not the rule itself. We had asked in the Code consultation for any views or evidence that would support the raising of the amounts of any current thresholds.

2.25 However in response to the Code consultation we received feedback from one Directory Enquiry (DQ) provider, and a number of organisations involved with audiovisual promotion, which questioned whether the rule itself remained proportionate, non-discriminatory, and objectively justifiable. This was largely due to the greater expense of speaking as well as displaying pricing information, which the respondents asserted would usually require a longer timeslot at greater cost, set against the low number of breaches in relation to the rule or complaints about providers advertising in audiovisual formats.

2.26 We carefully considered these responses, but do not necessarily agree with them. Whilst we recognise that breaches and complaints are historically low, this may be as a direct result of the provision being in place rather than because there is a reduced risk against which the requirement is now disproportionate. On the last occasion we conducted research into consumer perception and expectations around premium rate pricing information in both print and audio-visual promotions on TV, consumers identified a number of problems as follows:

- 1) Written information can be small and difficult to read

- 2) Written information can be displayed on-screen with moving images, which is distracting/more difficult to see
- 3) Written information is not always on the screen for long enough

2.27 Whilst this research took place in 2004, it is not obvious to us why these issues should not continue to present problems to consumers, especially those who are visually impaired or whose perceptive abilities are reduced by temporary circumstances such as tiredness – e.g. chat and adult services which would be captured by the requirement often advertise late at night.

2.28 In our preliminary view, we are not minded to see the requirement as unduly discriminatory. It is not aimed at one type of service or provider and in fact captures a variety of different service types which do, or have, advertised audiovisually. Whilst the requirement does apply only to those using audiovisual promotions, the issues set out above, and which the requirement is intended to address, are unique to audiovisual promotions.

2.29 We note that the Advertising Standards Authority, whose Broadcast Code of Practice also covers audiovisual advertising, does not have a similar requirement. However we also note that the Broadcast Code of Practice (BCAP) contains a specific provision requiring compliance with the PhonepayPlus Code of Practice, which in our view achieves the same effect. The ASA has confirmed this to PhonepayPlus, and stated that their last consultation of the BCAP in 2009 was in no way intended to re-open or question any of PhonepayPlus' requirements around pricing in promotions.

2.30 We consider that there may be a number of reasons which might make a rule to address pricing information in audiovisual promotions by means of a spoken pricing requirement appropriate. We recognise, however, the need to further test and evidence whether it is objectively justifiable and proportionate. We have, therefore, removed rule 3.12.3 from the thirteenth edition of the Code as submitted to the EU. We are undertaking a further review, subject to which we intend shortly to publish a consultation on the possible amendment of that edition of the Code so as to re-introduce Rule 3.12.3. As part of its consideration, the EU will also be informed of these matters, and that, if Rule 3.12.3 is found in due course to be justified it will be re-introduced into the Code.

2.31 Lastly, some respondents questioned the meaning of “audiovisual” as set out in the current rule 2.2.7 and proposed rule 3.12.3. We can confirm that in this context audiovisual refers to promotions which possess both a visual and an audio component – e.g. broadcast television commercials – and do not apply to promotions which take place, for example, on radio where there is only an audio component.

### **Additional paragraph to clarify intent of rule 3.12**

2.32 The Code consultation set out the following in relation to spending caps on page 9:

*“To simplify [the different spending caps currently within the Code and prior permissions regimes], we also plan to consolidate the different types in one Code provision. Currently there are caps on total cost of a call, length of call and total spend. We also plan to consolidate the power to require one, or a combination of forced release, positive opt-in and spend reminder – as outlined above for live services – in one place.”*

2.33 The above text demonstrates our intention that section 3.12 of the Code provides us the power to regard any failure to comply with properly specified amounts, durations or actions as a breach of the Code. In order to make this abundantly clear on the face of the Code, and to improve transparency, we have added a further paragraph to section 3.12. As such paragraph 3.12.5 will now read as follows, with the previous paragraph 3.12.5 which was consulted upon becoming paragraph 3.12.6:

*3.12.5 Any reference to compliance with the rules or obligations under this Code shall include compliance with all specified amounts, call durations and actions set by PhonepayPlus under paragraph 3.12.1. A breach of any specified amount, duration or action set under that paragraph shall be a breach of the Code.*

*3.12.6 PhonepayPlus shall publish a full list of all such specified amounts, call duration and actions and the service categories to which they relate on their website.*

## **Spending caps for Children’s Services**

2.34 PhonepayPlus also reviewed whether a cap for cumulative purchases over a billing cycle was now necessary for Children’s Services, with the question being further extended to the existing limits of £3 per single purchase and £3 per monthly subscription. This was in light of market developments which include not just the higher price points which will be introduced by Ofcom, but also the increased likelihood that children will make repeat purchases from app stores or websites to augment an app or game they already own.

2.35 As with live services consumer research demonstrated that a high number of, in this case, parents were in favour of caps on one-off purchases (95%), and cumulative caps (88%). In both cases, it is important that any cap not only protects children but also allows for market innovation.

2.36 Over 50% of parents in our survey had suggested that a cap should be kept at below £2 for one-off purchases, with the average across all those surveyed being £3.50. However we also recognised that not all parents shared this view, and that the most recent Halifax Annual Pocket Money Survey had identified a weekly average of £5.98. Therefore whilst we initially proposed that the one-off cap be kept at £3, we had signalled we were open to submissions that it should be raised.

2.37 In terms of a cumulative cap, which is a new regulatory requirement, we proposed that this should be £12 per service over a monthly billing cycle. At present



it is unrealistic to set a cap for purchases across all services, because this could only be tracked by the mobile networks who do not currently offer this facility as standard. In proposing £12, we noted that 25% of parents who responded to our survey favoured a cap at around £20, and so we welcomed views on whether a cumulative cap should be set at £12 or £20.

**Q8. Do you support the intention to maintain a one-off cap on children's services at £3? Please evidence your response.**

**Q9. Do you support the introduction of a cumulative cap on children's services? And if so, should this be set at £12, £20 or an alternative amount per month? Please evidence your response.**

2.38 A significant number of respondents suggested that the proposed caps were too low in both cases. A number of respondents argued that some app stores are already offering one-off purchases at £5 which are purchased in large numbers by children even if they are not specifically aimed at them. This has not resulted in a high number of complaints about the cost of individual purchases. We also note that the average weekly pocket money for children is now almost double the proposed cap of £3, and so we have determined that the cap should be raised to £5 as part of the introduction of the thirteenth Code.

2.39 Whilst PhonepayPlus has received some significant complaints about bill shock involving children, these are uniformly due to repeated purchases from the same service rather than the cost of individual purchases, and as such, a monthly cumulative spend cap will be more relevant. Once again, we note that £20 is in line with, and slightly below, average monthly pocket money, and that a significant minority (25%) of parents favoured setting a cap at that level. As such we have determined that the cumulative cap should also be set higher than our original proposal, at £20 per provider over a billing cycle.

2.40 We also note that it may be technically possible in the near future for some providers to agree a cap with the parents of each of their customers who are children. Whilst we welcome any developments which will provide parents with greater visibility and control over their child's spending, we do not see this as a reason in itself not to set caps. Where such facilities become available, we will review the position at that time, taking into account factors such as how extensive, effective and widespread the facilities are.

2.41 Lastly, a small number of respondents questioned whether the current definition of a Children's Service was still fit for purpose. Children's Services are currently defined in the PhonepayPlus Code as *"services aimed at, or which should have been particularly attractive to children"*. Further to this Guidance on Children's Services sets out that PhonepayPlus will use the following criteria when deciding whether a service is particularly attractive to children:

- a) Any data which indicates how many readers, viewers, or listeners of a publication, broadcast, or other media where the service is promoted, are children, and;

- b) The style, content, and composition of the promotional material (i.e. does it contain factors likely to make it particularly attractive to children, or which would suggest children had been targeted?).

2.42 In light of the growing number of children who have access to smart devices and a wide range of apps to download, coupled with a concern that definitions of a children's service should be complementary across different regulators, we recognise there will be a need in future to review the current definition. We will review this separately as part of wider, ongoing work around vulnerability.

## **Definitions**

2.43 Both the direct and indirect changes proposed in response to Ofcom's review of NGCS also required amendments to a number of definitions within the Code. In addition, existing definitions that currently sit in prior permissions regimes would have to be brought into the Code. The Code consultation outlined that these are all routine changes, and our view that none of them have any material impact on the regulation of PRS.

2.44 Ofcom's NGCS review also amended the definition of a Controlled Premium Rate Service (CPRS), and we proposed to replace the current version of this which we have at Rule 5.3.2 of the Code with the new text as follows:

*'Controlled premium rate service' has the meaning set out in and is to be construed in accordance with the Condition issued by Ofcom under Section 120 of the Act effective from time to time. At the date of publication of this Code the Condition provides that 'Controlled premium rate service' means:*

*A premium rate service (other than a service which is only accessed via an International Call or a service which is delivered by means of an Electronic Communications Service and is provided by the person who is also the provider of the Electronic Communications Service) which falls within one or more of the following categories:*

*(i) until the Effective Date, the service is obtained through a Special Services Number (except an 0843/4 number), and the charge for the call by means of which the service is obtained or the rate according to which such call is charged is a charge or rate which exceeds 5 pence per minute for BT customers inclusive of value added tax; or*

*(ii) from and including the Effective Date, the service is obtained through a PRS Number and the Service Charge for the call by means of which the service is obtained is a rate which exceeds 5.833 pence per minute or 5.833 pence per call, exclusive of value added tax;*

*(iii) the service is obtained other than through a Special Services Number, or a PRS Number, and the charge for the call by means of which the service is obtained or the rate according to which such call is charged is a charge or rate which exceeds 10 pence per minute inclusive of value added tax (and*

*which also includes, for the avoidance of any doubt, a service delivered by means of an Electronic Communications Service which is charged by means of a Payment Mechanism and for which the charge exceeds 10 pence inclusive of value added tax);*

*(iv) the service is a Chatline Service;*

*(v) the service is Internet Dialler Software operated; or*

*(vi) the service is a Sexual Entertainment Service.*

2.45 In order to ensure full understanding, we will set out clearly on our website and in other material which number ranges fall under our regulatory remit and in what circumstances.

2.46 In addition Ofcom's separation of service charge from network access charge made it important, in our view, to insert their definition of a service charge into the Code. This is in order that the caps and other thresholds we set should be clearly understood to apply to the service charge as defined in the text below, which was set out in the consultation:

*5.3.35 'Service Charge' has the meaning set out in the Condition issued by Ofcom under section 120 of the Act effective from time to time.*

2.47 Likewise, our proposal to consolidate all codified and non-codified spending caps into one place led us to also propose that a number of service definitions be set out in the Code for the first time. These changes represent no material difference as they are consistent with definitions currently included in the relevant prior permissions regimes:

*5.3.17 'Counselling service' means a service whereby a caller is seeking advice in relation to a personal problem such as marital, relationship, emotional and other such personal problems. The service may consist of actual advice as to the personal problem or information as to where the caller may obtain advice.*

*5.3.23 'Live entertainment service' means a service which allows the caller to speak live with a live operator or one or more other consumers for entertainment purposes, including, but not limited to, one-to-one Chatline (sexual or non-sexual), psychic or tarot services.*

*5.3.31 'Professional advice service' means a service that consists of the provision of specialist advice to consumers, that is, advice which requires knowledge and skill obtained through extensive study and specialised training (including, but not limited to, that required of doctors, lawyers, vets and accountants) and in relation to which membership of a professional body is normally required.*

*5.3.33 'Remote gambling service' means a premium rate service which enables gaming or betting to take place remotely, that is delivered at a*

*distance electronically or by voice telephony not including prize competition services or betting tipster services.*

*5.3.36 'Sexual entertainment service' has the meaning set out in the Condition issued by Ofcom under section 120 of the Act effective from time to time.*

**Q3. Do you have any comments regarding the changes being proposed to the definitions listed above in response to Ofcom's NGCS review?**

2.48 We received few comments on any of the proposals set out above, all of which give consequential effect to other regulatory changes. What feedback we did receive was supportive. As such, and for the reasons set out in our consultation, the proposed changes and additions above are retained in the final version of the thirteenth Code attached at Annex A.

2.49 One respondent, BT, suggested that while they welcomed the updated definition of Controlled PRS (CPRS) PhonepayPlus should also provide further guidance or other material setting out how exactly the thirteenth Code applies to services using any number within the national numbering plan. Their view was that this would ensure that nothing within the Code definition could be left open to interpretation.

2.50 We will examine how best to take this suggestion forward, with a view to providing clear messages to the industry about how the thirteenth Code applies. In particular the revised CPRS allows for the possibility that a limited number of 084x services will fall into PhonepayPlus' remit where they are charged at higher than 5.833 pence per minute. We will consider whether it is necessary to update existing Guidance, but will also consider the provision of other supporting material.

## Section 3: Future Proofing

3.1 The introduction of the twelfth edition of the Code marked an important transition from a prescriptive-based to an outcomes-based approach to regulation. The increased flexibility of this approach made it naturally more suited to an increasingly complex and convergent marketplace. Despite this inbuilt flexibility, we are conscious that no regulatory framework is perfect and our Code can and should be reviewed periodically to ensure it continues to offer appropriate levels of consumer protection.

3.2 PhonepayPlus developed and consulted on a number of changes under this review with the intention of achieving further future proofing of the Code. These changes relate to transparency and pricing, vulnerability, complaint handling and registration.

### Transparency and pricing

3.3 Rule 2.2.1 and sub-paragraphs (a) and (b) set out a number of requirements relating to the promotion of a service. These were originally envisaged as three separate provisions of the Code with equal importance. However, due to the structure of Rule 2.2.1, the introductory paragraph is not always understood as its own, free-standing provision. So the consultation proposed to make this clearer by separating 2.2.1 into the three standalone provisions. This change was purely designed to achieve greater clarity and the consultation expressed our view that it would not materially affect the regulatory framework.

3.4 In addition, we proposed to ensure that Rule 2.2.1 (b) (*now listed as Rule 2.2.2*) was consistent with proposed changes to Rule 2.6.2 (also consulted on, and discussed below). These changes are also consistent with requirements set out in new UK legislation brought in to implement the EU Consumer Rights Directive.<sup>3</sup> So our proposal was to change Rule 2.2.1 to the following:

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

~~(a)~~ 2.2.2 Promotional material must contain the name (or brand if part of the name) and the ~~non-premium rate UK telephone number~~ *contact details* of the Level 2 provider of the relevant premium rate service except where otherwise obvious. *If the contact details include a telephone number, it must be a UK number and not at premium rate.*

~~(b)~~ 2.2.3 PhonepayPlus may specify categories of promotions in respect of which promotional material must contain reference to the Level 2

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<sup>3</sup> Directive (2011/83/EC). For more information on these changes and their impact on PRS, please see: <http://www.phonepayplus.org.uk/For-Business/Code-and-Help/Code-Compliance-Updates/Effect-of-changes-in-consumer-law-on-the-use-of-premium-rate-numbers.aspx>

provider's registration with PhonepayPlus and its registration number. PhonepayPlus shall publish a list of any such specified categories on its website.

**Q4. Do you agree with our proposed changes to Rule 2.2.1? Please evidence your response.**

3.5 What feedback we did receive to this proposal was supportive. As such we do not have any reason to re-assess the reasons set out in the consultation or make changes. We have retained this proposal in the final version of the thirteenth Code.

**Vulnerability**

3.6 PhonepayPlus sees the protection of vulnerable consumers as an important strand of our work. As such we looked to review and improve Code provisions which are aimed at ensuring vulnerable groups do not suffer and are not targeted because of their vulnerability. In keeping with an outcomes-based Code, this should, as far as possible, focus on the outcome of harm caused to vulnerable groups, or those made vulnerable by circumstance.

3.7 The twelfth edition of the Code introduced a revised provision at Rule 2.3.10 to protect vulnerable consumers, which in our view at the time improved upon previous iterations. The current rule states that: *"premium rate services must not seek to take advantage of any vulnerable group or vulnerability caused to consumers by their personal circumstances."*

3.8 However the use of this provision requires proof that a service actually intended to take advantage of vulnerable consumers, which is often difficult to establish. We therefore considered whether alternative wording would add clarity, and better protect vulnerable consumers in circumstances where they may have been affected by reckless behaviour or design rather than by direct intent on the part of a provider. In doing so we tested a number of different alternatives, and sought to combine the best elements of the eleventh and twelfth Code versions of the provision.

3.9 In doing so we were clear that a Tribunal would still need to be satisfied that a service took unfair advantage of vulnerable consumers. It was not our intent that the rule should be used whenever a vulnerable consumer was affected in any way by a PRS, whether their vulnerability was a factor or not.

3.10 We proposed to change the vulnerability provision to:

2.3.10 Premium rate services must not ~~seek to take advantage~~ *be promoted or provided in such a way that it results in an unfair advantage being taken of* any vulnerable group or any vulnerability caused to consumers by their personal circumstances.

**Q6. Do you agree with our proposed change to the vulnerability provision? Please evidence your response.**

3.11 Respondents generally agreed with the intent to ensure vulnerable consumers are not disadvantaged. However a number of them expressed concern that the proposed wording would still lead to breaches being upheld for simple cases of bill shock involving vulnerable consumers, where there was neither intent nor recklessness which unfairly targeted them. This was not our intention.

3.12 We remain of the view that the protection of vulnerable consumers should focus on the outcome of harm having been caused, rather than the existence of deliberate intent to cause it. This is not only consistent with an outcomes-based approach to regulation but also focuses on ensuring that vulnerable consumers are not unfairly disadvantaged. However we also accept that not all harm caused to vulnerable consumers could have been prevented by better diligence on the part of the provider. More widely we accept that not all harm caused to consumers who happen to be vulnerable is as a result of their vulnerability.

3.13 In light of this consideration and in light of alternative wording proposed by respondents to the consultation, PhonepayPlus has further altered the proposed wording as per the underlined text which follows:

2.3.10 Premium rate services must not ~~seek to take advantage~~ *be promoted or provided in such a way that it results in an unfair advantage being taken of* any vulnerable group or any vulnerability caused to consumers by their personal circumstances *where the risk of such a result could have been identified with reasonable foresight.*

3.14 This addition will prevent the Rule being raised where harm has not been caused from intent or recklessness. As before, apart from demonstrating that the consumers were vulnerable PhonepayPlus would also have to demonstrate that the harm (i.e. the unfair advantage taken) had been caused as a result of a provider's action or inaction and the risk of such harm was foreseeable. This would prevent any application this rule in any case which simply involves vulnerable consumers.

## **Complaint handling**

3.15 The Code's complaint handling outcome requires Level 2 providers to resolve consumer complaints quickly and easily. In order that no consumer is discouraged or excluded from seeking redress should they need to, Rule 2.6.2 of the Code requires Level 2 providers to maintain a non-premium rate UK telephone complaint line.

3.16 However market developments during the life of the twelfth Code had led us to consider whether a phone line remains the most natural and accessible means of complaint or enquiry. An example is app stores which require consumers to register with their email address, and therefore are most likely to receive emailed complaints or enquiries.

3.17 As a result we questioned whether the prescriptive legacy at Rule 2.6.2 was still necessary. In our view it would be possible to maintain a clear outcome, and to set out that any complaints process must still be effective, accessible and low-cost regardless of whether it is offered through a phone line or alternative means. In

addition the Code consultation stressed that the change would merely allow providers to offer alternative means of complaint where this was more suited to their user base.

3.18 We proposed to change Rule 2.6.2 to:

~~2.6.2 Level 2 providers must provide a proportionate complaints process which is easily accessible through a non-premium rate UK telephone number and must be effectively publicised on an appropriate and effective complaints process which is free or low cost.~~

**Q7. Do you agree with our intention to amend Rule 2.6.2 to make it more flexible and outcomes-focused? Please evidence your response.**

3.19 The great majority of responses welcomed the approach and were in agreement with the wording which, for the reasons in the consultation and above, and in light of the following, we have decided to adopt. Where concerns were expressed they fell into two groups. Firstly, the question of how PhonepayPlus would clarify when it was still important to have non-PRS UK numbers available for consumers. Accompanying Guidance, on which we will shortly consult, will set out clear criteria as to whether the use of a phone line is likely to be necessary or not. We would welcome comments in response to that consultation as to whether the draft Guidance is clear and whether it could be further improved.

3.20 Secondly, a number of respondents commented that not all consumer contacts are complaints, and asked that this be reflected in the wording of the Code. We fully accept that not all calls or contacts will be to complain. However within the context of the Code, we feel it is appropriate to refer to any consumer contact as a “complaint” as in all cases, whether an actual complaint or a simple enquiry, the consumer should still be able to receive a quick and satisfactory resolution. If providers can use diligent handling to prevent some initial enquiries becoming complaints, then PhonepayPlus welcomes this.

## **Registration**

3.21 Introduced to support the introduction of responsibility along the PRS value chain in the twelfth edition of the Code, the Registration Scheme has become a central tenet of PhonepayPlus’ regulatory regime. Welcomed by industry, we believe that the scheme has made a significant contribution to the regulation of PRS.

3.22 While PhonepayPlus maintains this view, we reviewed whether the requirement is flexible enough to regulate new entrants as the market changes. Currently, under Rule 3.4.2, the Code grants PhonepayPlus the power to exempt particular categories of service from registration. Notably, 087 numbers have qualified from an exemption under this Rule.

3.23 However, Rule 3.4.2 only allows PhonepayPlus to exempt whole categories of service. We considered that there might be a case for refining this and making it more targeted so that, where there is justification for doing so, PhonepayPlus could,



for example, exempt a certain service type or provider without having to exempt the whole category of provider.

3.24 The consultation confirmed that in exempting any service type or provider in the future, we would have to be satisfied that the relevant Code outcomes and the objectives of the Registration Scheme could be met by other means – as is the case with the 087 example.

3.25 In light of our consideration, we proposed to change and augment Rule 3.4.2 to:

*3.4.2 PhonepayPlus may make exemptions from the duty to register in accordance with paragraph 3.4.3.*

*3.4.3 PhonepayPlus may identify particular categories of premium rate service in respect of which registration will not be required ('exempt services'). PhonepayPlus will provide public notice of any such exempt service and will publish a full list of exempt services from time to time. Network operators, Level 1 or Level 2 providers and the circumstances in which the duty to register will not apply to them ("the exemption").*

*3.4.4 Network operators, Level 1 and Level 2 providers who provide a premium rate service that operates within an exemption under paragraph 3.4.3, are not, in relation to that service, required to register with PhonepayPlus.*

*3.4.5 PhonepayPlus will publish on their website a full up to date list of exemptions.*

**Q10. Do you agree with the proposed changes to allow for greater flexibility to exempt services or providers from registration? Please evidence your response.**

3.26 Responses were mixed, with some responses supportive, some conditionally supportive, and some against this proposal. In terms of those who were conditionally supportive or against, concerns can be grouped as follows:

3.27 Firstly, that the proposed powers should be used rarely rather than becoming the norm. Some respondents felt that to do otherwise could inadvertently create a two-tier system, leading to the perception that those who still had to register were somehow "higher risk".

3.28 Because such powers would be exercised in response to requests from providers, we would have to assess each request on its merits. In each case we could only grant an exemption if the objectives of the Code could demonstrably be met by other means, and where appropriate we were satisfied that the need to register was lessened. In assessing this we would look at one or more factors:

- 1) The existence of robust methods by which unregistered parties would be able to fully co-operate with PhonepayPlus and provide all necessary information to it in the event of any investigation.
- 2) The existence of characteristics which significantly lessen the risk caused by the services or provider. These could include, but not be limited to, service characteristics (such as the lower costs and low complaints history associated with 087x) and/or robust systems or mechanisms which significantly reduce the likelihood of consumer harm.

3.29 PhonepayPlus will only grant an exemption where such criteria are met. As such there would be significant work involved in obtaining an exemption under Rule 3.4.2, and we would not ordinarily expect that such exemptions will be granted frequently.

3.30 Secondly was a concern about the change from exempting services to exempting providers. We can clarify that it will still be possible to exempt types of service, the exemption will just be worded in such a way to apply to the provider(s) for as long as they only provide the identified service type(s).

3.31 Lastly was a concern that fewer registered parties would mean a higher Levy on the outpayments of the fewer remaining parties who are registered. We can confirm that any exemption will be only from the need to register, and that all PRS will continue to be subject to the Levy. Whilst a greater number of exempted parties could theoretically drive the cost of registration upwards, we do not consider it likely at this stage and will keep this under review moving forward. Given all these points, and for the reasons in our consultation and above, we have decided to adopt our proposed approach.

## Section 4: Enforcement and Technical Review

4.1 The enforcement and technical review theme contained the largest number of proposed changes to the Code. A number of the proposed changes within this area were relatively minor, and sought merely to clarify aspects of the Code. However some other proposed changes – to investigation procedures, oral hearings, reviews and appeals – were more potentially significant.

4.2 In relation to some of these more significant proposals, some respondents supplied feedback that went beyond just the proposed changes, and also commented on some of the underlying framework of Part 4 of the Code. These views, expressed in both consultation responses and follow-up discussions, can be summarised as follows:

- A perception that the Code Compliance Panel (CCP) is not independent. This was based on it throwing out very few cases in their entirety which are brought before it (as opposed to individual breaches within a case which are thrown out more regularly), and the inclusion of PhonepayPlus Board members among its ranks.
- A perception that in some cases Tribunals have not allowed providers to properly present explanation or context, and that this has resulted in the CCP Tribunals mistakenly finding providers to be in breach.
- A perception that the review processes – i.e. reviews and oral hearings - aren't fair because reviews in the first instance are heard by the same body (the CCP) that heard the original case (albeit that the composition of the panel will be different).

4.3 Whilst not all responses shared these views, a significant number did, especially in relation to proposals around the right to access oral hearings. We did not agree with all the individual views expressed in relation to the proposals. But they did cause us to reflect on previous internal discussions as to the benefits that a full review of investigations, adjudications and reviews could bring. In particular that such a review might identify where processes could be further improved, and that it would help build better industry understanding of our enforcement framework and procedures.

4.4 In further considering a review of Part 4 of the Code ("Part 4 review"), two further factors have become clear. Firstly, that the procedures around investigations, adjudications and reviews are, to a greater or lesser extent, interconnected. As a result any changes to one area will be likely to have consequential effects for another, and so in most cases it would be difficult to go ahead with our proposals in relation to one aspect without it having an effect on others.

4.5 Secondly, that any Part 4 review could not be conducted properly within the current timeline to introduce the thirteenth edition of the Code. Because of the changes Ofcom will implement on 1<sup>st</sup> July 2015 as part of its NGCS Review, there

are parts of our Code – detailed in Section 2 of this statement – which must be changed and have taken effect before then. Given that our proposed changes to investigations, adjudications and reviews do not need to be in place at this point, we have decided to not proceed with most of them in this thirteenth edition of the Code.

4.6 As a result we do not intend to take forward our originally proposed changes to “Track 2” investigations procedures, Reviews, Oral Hearings, and the Independent Appeals Body as part of the thirteenth edition of the Code. Instead PhonepayPlus will begin a separate review of investigations, adjudications and reviews (covering both Part 4 of its Code of Practice and its “*Investigations and Sanctions Procedures*”). This will commence immediately and will ensure that stakeholder views are sought and taken into account.

4.7 We note the concerns of some respondents that some current provisions within Part 4 of the Code, which we had proposed to change but will now be retained pending the outcome of any review, and the processes which they support are flawed. We recognise that a review will determine whether these provisions can be improved, but in the meantime we consider that the current Part 4 provisions continue to meet the statutory tests at s121(2) of the Communications Act 2003.

4.8 In particular, the current provisions provide the identified needs for rights of defence and appeal which are designed to ensure the Code can be enforced fairly and properly, and which apply to all providers. In addition the current provisions allow for “final” appeal to the Independent Appeals Tribunal. That body and all its members are demonstrably independent of PhonepayPlus and the PRS industry. As such we would consider that the current provisions are fit for purpose whilst a review takes place.

### **Response to the “Ordanduu and Optimus” judgment**

4.9 In between the Code consultation closing and PhonepayPlus concluding its analysis of responses, the High Court delivered its judgment in relation to the judicial review case brought by Ordanduu and Optimus Mobile. The judgment concerned PhonepayPlus’ initiation of its Emergency Procedure against Ordanduu and Optimus in 2013.

4.10 The judgment found flaws in the way in which the Emergency Procedure had been applied by PhonepayPlus. As a result, PhonepayPlus and Ofcom have agreed that certain limited safeguards should be inserted, with immediate effect, into the Emergency procedure provisions of the twelfth edition of the Code. These amendments will also read across to the final version of the thirteenth edition attached at Annex A, which will now be submitted to the European Commission for consideration.

4.11 The immediate safeguard amendments relate to paragraphs 4.5.1 and 4.5.2 of both the twelfth and thirteenth Code editions. Paragraph 4.5.2 is removed in its entirety and paragraph 4.5.1 is amended as follows:

- 4.5.1 ~~In appropriate cases w~~Where an apparent breach of the Code has taken place and which is serious and requires urgent remedy, PhonepayPlus ~~may~~ will use the Emergency procedure. In such circumstances, there shall be the following procedural stages:
- (a) PhonepayPlus will conduct an immediate preliminary investigation.
  - (b) On completion of its preliminary investigation, PhonepayPlus ~~will~~ shall (unless there are important public interest reasons to the contrary) use its best endeavours to notify the relevant party of its initial findings and invite that party to make representations to PhonepayPlus. If PhonepayPlus decides to proceed, it will notify the three members of the CCP of its findings and of the representations, if any, provided by the relevant party. Where it has not been possible or appropriate to notify the relevant party prior to notifying the three members of the CCP, PhonepayPlus will use its best endeavours to provide the three members of the CCP with all facts material to its decision including any material which it considers might reasonably have been relied upon by the relevant party. notify its findings to three members of the CCP. The three ~~people~~members of the CCP notified will decide whether the situation is sufficiently serious and urgent to warrant the use of the Emergency procedure.
  - (c) If all three people agree on the use of the Emergency procedure, PhonepayPlus will use its best endeavours to inform the relevant party that its service appears to be in breach of the Code and that the Emergency procedure is being used. PhonepayPlus will, as far as is deemed appropriate and proportionate, also take the following actions.:
    - (i) Use its best endeavours to inform the relevant party that its service appears to be in breach of the Code, that the Emergency procedure is being used and ~~e~~Direct ~~it~~the relevant party to suspend the service immediately.
    - (ii) Direct any relevant Network operator or Level 1 provider to retain any payments outstanding in respect of the service under investigation.
    - (iii) Direct any relevant Network operator or Level 1 provider to bar access to the relevant service or numbers immediately if the party under investigation cannot be contacted or does not immediately suspend the service.

- (iv) ~~PhonepayPlus shall p~~ublish its use of the Emergency procedure in such manner as it sees fit.
- (d) Once the service has been suspended, PhonepayPlus will provide the relevant party with all necessary information about the alleged breaches of the Code. This will include details of the service and/or promotional material and will refer to the relevant sections of the Code;
- (e) The relevant party will then have five working days in which to respond and provide any information requested. In exceptional circumstances, PhonepayPlus may set a shorter time limit;
- (f) All relevant information, including any response from the party under investigation, will be placed before a Tribunal as soon as is reasonably practicable after the relevant party has responded, or the deadline for response has passed;
- (g) The relevant party will be informed by PhonepayPlus of the date of the Tribunal consideration and entitled to make informal representations to it on that date in person in order to clarify any matter.

~~4.5.2 If, within ten working days of the Emergency procedure being agreed under sub-paragraph 4.5.1(c) above, another case with substantially similar characteristics comes to light, PhonepayPlus may invoke another Emergency procedure with the consent of one CCP member. PhonepayPlus will immediately inform the Chairman of the CCP of such an action.~~

4.12 To reiterate, the above changes will take effect immediately within the twelfth edition of the Code, and will read across into the thirteenth edition.

4.13 Further, as noted above, we will conduct a comprehensive review of Part 4 of our Code of Practice together with our *“Investigations and Sanctions Procedures”*. Stakeholders will be encouraged to comment on the Emergency Procedure provisions as part of this review.

### **Further transparency changes**

4.14 In addition, we have made minor additions to paragraph 4.8.2 of the Code in order to provide greater transparency on matters that our CCP Tribunals already take into account as a matter of practice and under the law. These are as follows:

- Confirmation at paragraph 4.8.2 that the Tribunal will have regard to any prevailing sanctions guide that has been published by PhonepayPlus, and will generally set sanctions in a manner which is appropriate and proportionate.

- Confirmation at paragraph 4.8.2d) that any fine imposed will not exceed the maximum amount permitted by law

4.15 The rest of this section sets out responses to the original proposals that we made, but will make clear where we have decided not to proceed with the proposal at this point, pending the Part 4 review. In all cases we would consider that the current Code provision, which will now be retained pending the outcome of the forthcoming review, is fit for purpose and will continue to meet the relevant statutory tests.

### **Registration and responsibility**

4.16 We had set out two proposed changes to Part Three of the Code under this theme in the Call for Inputs. The first change was to Rule 3.3.3 (b), which allows PhonepayPlus to enforce the relevant terms of any contract between two parties that provide a PRS under the Contracts (Rights of Third Parties) Act 1999. However, this Rule currently also applies to providers registered in certain foreign countries where this Act has no jurisdiction.

4.17 Given that more and more PRS providers operating in the UK are based overseas, this creates a compliance difficulty for providers based in foreign countries. In order to ensure that the regulation of PRS in the UK is consistent, we proposed to insert an addition to Rule 3.3.3 so that it covers contracts formed in and governed by foreign jurisdictions.

4.18 As a result we proposed to alter Rule 3.3.3b) to read as follows:

3.3.3 Such contracts must include provisions that:

- (a) each party is bound to comply with the Code and any directions made by PhonepayPlus in accordance with it; and
- (b) ~~pursuant by reference~~ to section 1 of the Contracts (Rights of Third Parties) Act 1999 *(or where the contract is not governed by English law, any other relevant law having equivalent effect)* PhonepayPlus may directly enforce the relevant term(s) of that contract.

### **Q11. Do you agree with our proposed change to Paragraph 3.3.3 (b)? Please evidence your response.**

4.19 We received a limited number of responses to this proposal, with some fully supportive and others raising objections. These objections were made by one industry stakeholder, whose view was that such an amendment would make it possible for PhonepayPlus to dictate the terms of contracts drawn up under the jurisdiction of other EU Member states, without first ceding such a right to that Member state's equivalent regulator.

4.20 Whilst we note this view, we believe that the nature and effect of the changes we propose at Rule 3.3.3b) has been somewhat misunderstood.

4.21 The proposed change to paragraph 3.3.3b) seeks to clarify the position on providing PhonepayPlus with the ability to enforce any relevant contractual terms

where a PRS provider governed by the Code has elected, for whatever reason, to enter into a contract governed by the law and jurisdiction of a country outside the UK. This creates a level playing field in the application of the existing provision between providers covered by the Code, regardless of law and jurisdiction clauses they have chosen for their own contracts. The proposed change is not an attempt to extend jurisdiction to providers who would not otherwise be covered by the Code, or to circumvent relevant requirements of any applicable EU law. The provision as proposed will be subject to EU law (to the extent applicable) insofar as it applies to providers established in other EU member states. However we would make clear that the proposed provision will apply to contracts governed by laws of countries outside the EU such that PhonepayPlus will be able to, for example, enforce the relevant terms of a contract between a UK based Level 1 provider and a provider based in the United States if the governing US law allows for third party enforcement.. It should also be borne in mind that for countries (whether or not within the EU) that do not have equivalent to the Contracts (Rights of Third Parties) Act 1999 the proposed provision will simply not apply. Further we believe that the wording of the provision is sufficiently clear that it does not provide PhonepayPlus with any power to dictate any terms of the contract between providers, but rather only allows it to enforce any relevant terms that have been agreed between the providers, subject to any prevailing law.

4.22 As such we have not changed the proposed wording, which will be retained in the final version of the thirteenth Code submitted to the EU.

### **Registration of Services**

4.23 The consultation also set out our intention to amend Rule 3.4.12 sub-clause (a) to ensure it is consistent with sub-clause (c). Sub-clause (c), which covers updated information for an already registered service, refers to two working days. However at present sub-clause (a), which covers initial service registration, has no such stipulation.

4.24 For the sake of clarity and consistency, we proposed to change Rule 3.4.12 (which will sit at Rule 3.4.14 due to changes to Rule 3.4.2):

#### **3.4.14 Numbers**

(a) Level 2 providers must, *within two working days of the service becoming accessible to consumers*, provide to PhonepayPlus relevant details (including any relevant access or other codes) to identify services to consumers and must provide the identity of any Level 1 providers concerned with the provision of the service.

(b) PhonepayPlus will include all such details on the PhonepayPlus Register and those details will be available to be checked directly by consumers.

(c) Whenever the information provided under sub-paragraph 3.4.14(a) above changes, the updated information must be provided to PhonepayPlus within two working days of the change.



**Q12. Do you agree with our proposed change to the requirement to register numbers? Please evidence your response.**

4.25 All respondents who fed back on this proposal welcomed it. One respondent questioned whether the limit of two working days could be extended to five for initial service registration. However a number of other respondents agreed two working days was appropriate, and we do not consider registration within two working days an onerous requirement.

4.26 Some respondents also highlighted that they saw the requirement at Rule 3.14.4a) to provide the identity of any Level 1 providers concerned with service provision to be unnecessary. This was for three reasons. Firstly, that providing Level 1 information as well as information about the Level 2 provider could be confusing to consumers using the PhonepayPlus Number Checker. Secondly, that Level 1 information is provided routinely in response to the first request for information which PhonepayPlus makes in any preliminary investigation. Thirdly, that the registration area of the PhonepayPlus website does not currently require Level 1 provider details even though the rule does.

4.27 We are unsure how Level 1 information would confuse consumers using Number Checker. The information provided to a consumer who looks up a number on the Number Checker is normally that of the Level 2 provider, with Level 1 details only being provided in the case of a “shared” mobile shortcode so that the Level 1 can take initial consumer calls and refer them onward. Where Level 1 details are otherwise provided to a consumer, it will normally be by PhonepayPlus call centre staff where the consumer’s complaint has not been handled satisfactorily by the Level 2. However as part of Code implementation we will review the way in which this information is presented on Number Checker.

4.28 We accept that Level 1 information is provided in preliminary investigation requests. However we have received much feedback recently from providers who are concerned about the level of information they have to provide in response to those requests, which would strengthen the case for continuing to provide such information upon registration of a service.

4.29 In addition not all Level 2 providers respond to requests for information when an investigation is launched. This is sometimes the precursor to them attempting to disappear without answering the alleged harm they have caused. Having the details of associated Level 1 providers makes it easier for PhonepayPlus to act quickly to direct a service be blocked or to contact Level 1 providers, who can take action if they believe it is appropriate to do so. As such we do not consider that the responses to this question cause us to re-assess the reasons set out in the consultation or make changes to our original proposal, and we have retained it in the final version of the thirteenth Code.

4.30 However we do accept that the registration interface on the PhonepayPlus website can be difficult for those who are registering or changing details on a substantial number of services at once. We do not think the system is difficult to use where only a small number of services are being registered, but we do offer an

alternative facility for bulk uploads. This can be accessed by contacting PhonepayPlus directly. We would underline that it remains a requirement of the PhonepayPlus Code at Rule 3.14.4a) for providers registering services to provide the details of any associated Level 1 provider.

## Investigations

4.31 The transition from the ‘formal’ and ‘informal’ procedures to the Track 1 and Track 2 procedures instigated by the twelfth edition of the Code has been largely successful. Therefore the consultation set out our view that they did not require comprehensive reform, but that some amendments were required in order that they could operate as originally intended.

4.32 Detailed at Paragraph 4.3, the Track 1 procedure is intended for Code breaches that require redress but do not warrant formal investigation. As per the twelfth Code, the current measure for use of a Track 1 procedure is where “...an apparent breach of the Code had caused little or no consumer harm...”

4.33 Our proposal was that a more appropriate and flexible definition would allow for a broader range of issues to be addressed through a Track 1 procedure, leaving the Track 2 procedure for more serious Code breaches. This was welcomed by stakeholders during our pre-consultation engagement. Although, clearly, any decision to utilise the Track 1 procedure beyond its current remit would be at the discretion of PhonepayPlus and not the party under investigation.

4.34 We proposed to change the introductory wording at Paragraph 4.3 to:

### 4.3 Track 1 procedure

In appropriate cases, *including* where an apparent breach of the Code has caused little or no consumer harm or offence to the general public, PhonepayPlus may *in its discretion* use the Track 1 procedure.

4.35 Paragraph 4.4 details the Track 2 procedure, which is used for more serious Code breaches. This is a more formal process that starts, according to the current Paragraph 4.4.1, once a breach letter detailing all necessary information related to the alleged breach(es) has been sent to the relevant provider. In reality, a breach letter is sent after a significant period of investigation into a service.

4.36 Where clear evidence of a breach exists, any delay in issuing of the breach letter can lead to both continued consumer harm and an inability of PhonepayPlus to ensure revenues from a service causing harm are withheld before being paid out when it is appropriate to do so.

4.37 In light of this risk, we proposed formally notifying providers that a Track 2 investigation has started before a full breach letter is issued. PhonepayPlus would then be able to seek a withhold at any time from that point where there is adequate justification for doing so. This would not mirror the Emergency procedure, which is only used where an apparent breach of the Code has taken place and which is serious and requires urgent remedy.

4.38 In order to achieve the ability to seek an earlier withhold, we proposed to add a new paragraph to Section 4.4:

#### 4.4 Track 2 procedure

When PhonepayPlus receives or initiates a complaint, the Track 2 procedure will be used:

*4.4.1 PhonepayPlus will notify the relevant provider that the Track 2 procedure is initiated. The notification will identify the service in question and contain a summary of the alleged consumer harm or offence to the general public.*

4.4.2 PhonepayPlus will *subsequently* provide the relevant party with all necessary information about the alleged breach or breaches of the Code. This will include details of any service and/or promotional material and will refer to the relevant provisions of the Code.

### **Q13. Do you agree with the changes we propose to the Track 1 and 2 procedures? Please evidence your response.**

4.39 The great majority of respondents welcomed the proposed changes to the wording around a Track 1 procedure, allowing Track 2 to be kept for more serious infringements. Whilst we set out at paragraph 4.4 above our general view that it would be difficult to make changes to individual provisions within Part 4 in isolation at this stage, we consider changes to Track 1 will not have any consequential effect on Track 2 investigations, save to slightly alter the delineation between them. Neither will they affect adjudications or reviews which do not form part of the Track 1 process.

4.40 As such whilst Track 1 procedures will continue to be considered as part of the forthcoming review, it is our view that this change can be made in isolation at present notwithstanding any subsequent changes as a result of the review. For this reason, and in light of consultation responses, the proposed change is retained in the final version of the thirteenth Code.

4.41 In relation to Track 2 proposals, feedback was more mixed. The principle of ensuring Track 2 was for serious Code breaches was widely supported. As was the related intention to effect earlier withholds where it was suspected providers might abscond. However concerns were expressed about the criteria for commencing a Track 2, given the risks to providers if one was begun in error.

4.42 The key risks cited were the possibility that a Level 2 provider would have its contract terminated by a Level 1 provider on the false premise of breaching the Code. Or, linked to our proposals to alter paragraph 4.4.7, that an earlier commencement of withhold instructions which would remain in place during any review of a live investigation could have a serious effect on a business' day to day cashflow. This would be compounded if an investigation lasted longer than the normal average of 16 weeks because of complications in gathering evidence. A

related concern was that a withhold instruction would quickly become the norm when any Track 2 was commenced, rather than the exception.

4.43 Respondents, both in consultation responses and other engagement, offered a number of solutions which might mitigate these risks. Principle among them were the development and publication of criteria for when a withhold would begin at the same time as a Track 2, or a guarantee that any cases involving a withhold would be concluded within a shorter timeframe than at present.

4.44 Whilst we considered these inputs with interest, we also considered the wider, consequential, links of such a change in isolation. Given our stated intention to undertake a wider review of investigations, we do not wish to make any changes at this point which might prejudice the forthcoming review.

4.45 In addition, introducing earlier commencement of a Track 2 procedure in isolation, and thus the ability to instruct an earlier withhold, could be likely to increase the number of requests for oral hearing. Given PhonepayPlus' objective to ensure providers go through first stage investigations processes without attempting to begin later reviews first, we have decided this would be counter-productive in the short term.

4.46 As such we have decided not to proceed with the proposal in the thirteenth Code, and the relevant paragraphs will continue to read as they did in the twelfth Code. Track 2 investigations will form part of our Part 4 review, and any necessary changes will be made following the review's recommendations.

4.47 As mentioned immediately above, PhonepayPlus proposed to make one further change to Section 4.4. This change was designed to make clear that if a Tribunal's determination is reviewed, any withhold in place will remain until further notice. The reasoning being to ensure that revenue garnered from harmful services is not dissipated as a result of the transition from one enforcement process to another. It would also ensure that the review or oral hearing process is not misused such that providers cannot apply for a review or oral hearing simply to release a revenue withhold.

4.48 In order to achieve this, we proposed to amend paragraph 4.4.7 as such:

4.4.7 At any point during the course of the Track 2 procedure, PhonepayPlus may direct a Network operator or Level 1 provider to retain any outstanding payment relating to the service in question from the relevant party. *Any such retention will remain in place until lifted by PhonepayPlus or PhonepayPlus directs payment of such retention under paragraph 3.2.3(b) or (c) of the Code.*

**Q14. Do you agree with the proposed change to 4.4.6 (now 4.4.7) to ensure the effective retention of revenue made from harmful services and prevent abuse of the review and oral hearing processes? Please evidence your response.**

4.49 As before, the response was mixed, but with significant concerns raised. Chiefly that PhonepayPlus had underestimated the effect that a withhold could have on a provider's business, especially if withholds started earlier and lasted longer

during a prolonged investigation. Given the seriousness some respondents attached to the impact of a withhold, a small number of respondents suggested that no such action could, or should, be undertaken until enough evidence had been gathered to affirm the exact nature of the consumer harm and the Code breaches alleged.

4.50 We are not entirely convinced that a withhold will have such a serious impact on many providers – most providers will provide more than one service, and it is unlikely that any “withheld” service will form the greatest part of a provider’s revenue. However we do recognise the need to conduct further analysis given the link between this proposal and our proposals in other areas of investigation and review.

4.51 As such we have decided not to proceed with the proposal in the thirteenth Code, and the relevant paragraphs will continue to read as they did in the twelfth Code. As before, the question of when and how withholds could be applied will form part of our Part 4 review.

### **Reviews, oral hearings and appeals**

4.52 As part of any Code review, we are inclined to ensure that the reviews, oral hearings and appeals procedures continue to be clear, accessible and proportionate. Proposed changes in this area were designed to provide clarity and streamline processes, and maintain a level playing field in terms of a provider’s right to justice.

### **Review of Emergency Procedures**

4.53 Rule 4.5.3 sets out a provider’s right to apply for an urgent review of the decision to initiate an Emergency procedure. To avoid doubt, we proposed to make clear that a provider cannot continually review this decision unless further evidence not reasonably available within two working days of the use of the Emergency procedure comes to light. This would not affect a provider’s right to review the initial decision.

4.54 We also proposed to clarify that a provider can legitimately review the decision to instigate an Emergency procedure at any time prior to adjudication, provided new information becomes available that was not available in the initial period allocated to request a review. This right would not be affected if a provider has already had a decision reviewed.

4.55 As such we proposed to change Rule 4.5.3 to the following:

#### **4.5.3 Review of Emergency procedure**

- (a) *Where the relevant party considers that the use of the Emergency procedure is not appropriate, it may, within two working days following the making of a direction under paragraph 4.5.1(c) ~~or at any time prior to adjudication in the event that new information comes to light suggesting that the use of the Emergency procedure is not appropriate, the relevant party may apply to PhonepayPlus for an~~ urgent review of the use of the Emergency procedure in the particular*

*case. The relevant party may also apply for such a review at any time prior to adjudication (whether or not a review has been heard previously under this paragraph) in the event that new information comes to light suggesting that the use of the Emergency procedure is not appropriate, but only where the new information was not reasonably available to the relevant party by the expiry of the initial two working day period.*

- (b) The application for review must be made in writing, must include any supporting evidence and must set out:
  - (i) *where the application for review has been made on the basis of new information, what that information is and why it was not previously available;*
  - (ii) the grounds on which the relevant party considers that the Emergency procedure should not have been used; and/or
  - (iii) the grounds on which the relevant party considers that access to the service or numbers should no longer be prevented.

**Q15. Do you support the changes proposed to 4.5.3? Please evidence your response.**

4.56 Some respondents expressed concern that the change could allow PhonepayPlus to take a subjective decision about whether evidence submitted after two days had passed could actually have been submitted within the two-day deadline. Two separate respondents suggested that a two day deadline assumed that every provider had the legal resource and manpower to collate such evidence within two working days, or that such evidence was retrievable within that time (e.g. from a stored archive). They suggested either the limit be raised to five days or that the provider could be able to immediately inform PhonepayPlus if, and why, evidence would take longer to gather than two working days.

4.57 Some respondents further suggested that a provider may not be able to provide all relevant evidence as to why an Emergency Procedure against them should be reviewed, unless they had received all relevant evidence from PhonepayPlus. Whilst a number of respondents stressed the need for better dialogue between providers and PhonepayPlus in the event of an Emergency Procedure, a good number of those stressed the need for providers to have all evidence against them in order for this to be effective.

4.58 We saw few objections per se to the intent behind this proposed change. Indeed a significant minority of respondents openly supported it. However in light of the concerns expressed about how such a change would be enacted we have decided not to proceed with it at this time. Instead Emergency Procedures will be more generally considered as part of our Part 4 review, notwithstanding the changes we have made to paragraph 4.5.1 as a result of the Ordanduu and Optimus judgement as outlined above (paragraphs 4.9 to 4.12).

## Review of Tribunal decisions

4.59 Section 4.7 of the Code sets out a party's right to seek a review of a Tribunal decision. Currently the right to review, set out at paragraph 4.7.3, is based on a party demonstrating that *"... the Tribunal came to a decision which was so unreasonable that no reasonable Tribunal could have reached it."* The Code consultation set out our view that this test (commonly known as the 'Wednesbury unreasonableness' test in UK law) is too high a barrier for parties to be granted a review where one may be properly warranted.

4.60 The consultation proposed to change this so that a review would be granted if there is a *"...good prospect that that a Tribunal may, on review, come to or impose a substantially different decision, finding or sanction."* This proposed test is less onerous for those legitimately seeking review but does present sufficient barrier to deter multiple spurious applications for review.

4.61 The consultation also set out our proposal to add clarity to paragraph 4.7.2, which sets out the process for applying for review. Currently receipt of any application is required within ten working days of the publication of the Tribunal decision, unless there is new information not reasonably available at the date of the original adjudication when up to 30 days can be granted. In highly exceptional circumstances reviews applied for in excess of 30 days can be granted. For the sake of clarity, the insertion details what information should be included in any application after the initial ten day period.

4.62 Given these two changes, Section 4.7 was proposed to read as follows:

### 4.7 Reviews

4.7.1 Tribunals may, ~~at their discretion,~~ *in accordance with paragraphs 4.7.2-4.7.3,* review any determinations made in respect of applications for prior permission, adjudications, sanctions and/or administrative charges.

4.7.2 The relevant party or PhonepayPlus may request a review by setting out in writing the grounds for a review. Except where new information, not reasonably available at the ~~date~~*time* of the original determination, has come to light, a request for a review must be made within ten working days of the publication of the relevant determination, or the sending to the relevant party of the prior permission decision or the administrative charge invoice. In any case, except in highly exceptional circumstances, a request for a review must be made within 30 days of the publication of the relevant determination, or receipt of the prior permission decision or the administrative charge invoice. *Where a request for review is made after the ten working day period, it must include details of the new information and why it was not previously available or the highly exceptional circumstances, as relevant.*

4.7.3 ~~Where the application for a review is in respect of a determination made by a Tribunal, it must raise a new issue of fact or law that was not reasonably available at the time of the original Tribunal or demonstrate that the Tribunal~~

~~came to a decision which was so unreasonable that no reasonable Tribunal could have reached it.~~

~~4.7.3 Having received a request for a review~~*When a review has been requested, the Chairman of the CCP (or other legally qualified member of the CCP) will consider the grounds of the application and decide whether a review is merited*~~there is a good prospect that a Tribunal may, on review, come to or impose a substantially different decision, finding or sanction, as the case maybe.~~*If it is decided that the review is merited*~~If the Chair considers this to be the case, a Tribunal will carry out a review of the relevant decision(s), limited to a consideration of the grounds of review put forward under paragraph 4.7.2, as soon as is practicable.~~

**Q16. Do you agree with the changes being proposed to reviews? Please evidence your response.**

4.63 Feedback was almost unanimously in support of this proposal, with a couple of respondents just seeking assurance that the lower barrier would not result in PhonepayPlus itself frequently requesting reviews of cases which are not upheld at Tribunals.

4.64 Whilst there was overwhelming support for this change, feedback also illustrated that any change here is linked to the wider processes which we have already undertaken to review separately. As such we will not proceed with the proposed change at this time, and the test for reviews will be more generally considered as part of our Part 4 review.

**Oral Hearings**

4.65 The Code consultation also set out a number of issues which have emerged around oral hearings, because some providers have improperly sought an oral hearing prior to – and in effect in lieu of – a normal Tribunal hearing purely for the purpose of achieving lower sanctions by way of a settlement, and thereby driving up the cost of regulation. Our view was that it was necessary to clarify the rationale for the existence of an oral hearing procedure and how it should be used.

4.66 Our belief, as set out, is that all cases should pass through the paper-based Tribunal unless there are exceptional reasons for them not to. The proposals in the Code consultation sought to avoid misuse of the oral hearing process where used inappropriately in an attempt to secure a more favourable outcome. This in turn drives up the costs of regulation for compliant providers, and creates an uneven playing field as not all providers can afford the legal costs involved in immediately requesting an oral hearing before a paper-based Tribunal.

4.67 The consultation also confirmed that an oral hearing was still available to any party once a paper-based Tribunal had taken place. A provider would also retain the opportunity to demonstrate to the satisfaction of the Chair of the Tribunal that there are exceptional circumstances that require an oral hearing ahead of a normal paper-based Tribunal. Lastly the proposals would not remove a provider's right to make



representations in person as part of the paper-based Tribunal process to clarify any matter.

4.68 Although this change is relatively minor in terms of procedure, the impact on Section 4.11 was significant. We also proposed to consolidate some of the information relating to the oral hearing in Annex 2, Section 4.4. Therefore, we proposed to replace the existing text at 4.11 with the following:

*4.11.1 Save in exceptional circumstances, allegations of breaches of the Code under the Track 2 procedure will be determined by a Tribunal without an oral hearing with an opportunity for the relevant party to make representations in person to the Tribunal in order to clarify any matter, if that party so requests. A relevant party or PhonepayPlus may however within ten working days of the relevant party's receipt of the information about the alleged breach(es) in accordance with paragraph 4.4.2, make an application to the Chair of the CCP (or other legally qualified member if unavailable) for an oral hearing. It will be for the party making an application under this paragraph to demonstrate that an oral hearing is warranted.*

*4.11.2 The Chair of the CCP (or other legally qualified member if unavailable) shall decide further to an application under paragraph 4.11.1, whether there are exceptional circumstances which warrant an oral hearing. Where the Chair is not so satisfied, the matter will be determined without an oral hearing, with the opportunity for the relevant party to make representations in person to the Tribunal in order to clarify any matter, if that party so requests.*

*4.11.3 A relevant party or PhonepayPlus may within ten working days of the relevant party's receipt of the following decision, that is:*

- a) a Tribunal decision where there has been no prior oral hearing;*
- b) refusal of an application for a review or the outcome of a review; or*
- c) the outcome of a review in respect of prior permission or the attachment of conditions to it,*

*apply for an oral hearing. In these circumstances, a Tribunal will hold an oral hearing at which it will consider matters afresh.*

*4.11.4 An associated individual, the relevant party or PhonepayPlus may, within ten working days of the receipt by the associated individual and relevant party (whichever is the later date) of the notification under paragraph 4.8.7, or receipt of a Tribunal prohibition decision made otherwise than at an oral hearing apply for an oral hearing. In these circumstances, a Tribunal will hold an oral hearing.*

*4.11.5 For the purposes of paragraphs 4.11.3 and 4.11.4, the date of receipt will be deemed to be the day on which the decision or notification, as the case maybe, was sent by fax or email to a fax number or email address provided by the relevant provider for registration with PhonepayPlus. If sent*

*by first class pre-paid post to an address provided by the relevant provider for registration, the decision will be deemed to be received on the second working day after posting. In relation to an associated individual, the above provision will apply as if the contact details given on registration, were instead the last known address and email address of the associated individual.*

*4.11.6 Details of the procedures governing oral hearings are set out in 'Code Annex 3: The Code Compliance Panel and Tribunals' which is published on the PhonepayPlus website, and in Guidance which is also published on the PhonepayPlus website.*

4.69 To make clear a party's rights at the initial paper-based Tribunal stage, the new section at 4.11 referred to the "... *opportunity for the relevant party to make representations in person to the Tribunal in order to clarify any matter, if that party so requests.*" Previously this was known as an 'informal representation', a term that was in our view ill-defined.

4.70 Given the change to 'informal representation' at paragraph 4.11.1 above, the consultation also proposed to change other references in the twelfth edition of the Code to informal representations at paragraphs 4.4.5 (now 4.4.6) and 4.8.6 (now 4.8.7), reading as follows:

4.4.6 The relevant party will be notified by PhonepayPlus of the date of the Tribunal consideration, ~~and entitled to make informal representations to it on that date~~ *be given the opportunity to make representations in person to it in order to clarify any matter, if that party so requests*

4.8.7 If a Tribunal considers that it may wish to make a prohibition under subparagraph 4.8.2(f), 4.8.2(g) or 4.8.2(h) in respect of any ~~named~~ associated individual, PhonepayPlus shall first make all reasonable attempts ~~to so inform~~ notify the individual concerned and the relevant party in writing. It shall inform each of them that any of them may request an opportunity to make ~~informal~~ representations *in person* to the Tribunal and of the right of any of them (or PhonepayPlus itself) to *instead* require an oral hearing.

4.71 Lastly we also proposed to amend Section 3 of Annex 2 (now Annex 3 due the addition of special conditions at Annex 2 – detailed in the following section) in line with our proposed changes elsewhere, as follows:

### 3 Oral hearings

3.1 *Oral hearings may be applied for in accordance with paragraphs 4.11.1-4.11.4. Where such an application is made under paragraph 4.11.1 the relevant party shall demonstrate that there are exceptional circumstances which warrant an oral hearing. Any relevant party may, by notice in writing, require that an oral hearing be held:*

~~(a) after a review (applied for or carried out) in respect of prior permission or the attachment of conditions to it;~~

- ~~(b) — where the party has received communication from PhonepayPlus alleging a breach or breaches of the Code;~~
- ~~(c) — in respect of any adjudication made by a Tribunal without an oral hearing; or~~
- ~~(d) — where it is the Tribunal's intention to prohibit a relevant party or associated individual from involvement in or promotion of any or all service types for a defined period, or from contracting with another party, see paragraphs 4.8.2(f), 4.8.2(g), 4.8.2(h) and 4.8.6.~~

3.2 Within any written ~~notice requiring~~*application for* an oral hearing, the relevant party must provide details of the allegation or *relevant* decision ~~in respect of which oral hearing is required~~ and set out clearly the applicant's case in respect of it.

3.3 Such written notice ~~may~~*must* be provided to PhonepayPlus ~~at any time up to ten working days after receipt of a decision, or at any time prior to an adjudication where the oral hearing is required following an allegation of a breach of the Code in accordance with the time limits set out in paragraphs 4.11.1-4.11.5~~

3.4 Oral hearings shall take place before a Tribunal appointed for the purpose.

3.5 The relevant party is entitled to appear at the oral hearing in person or to be represented. PhonepayPlus will attend the oral hearing to present its case and may instruct a representative to act on its behalf.

3.6 The enforcement of sanctions imposed pursuant to an adjudication is not automatically suspended by written notice requiring an oral hearing. The relevant party may apply in writing to the ~~Chairman~~ of the oral hearing Tribunal ('the ~~Chairman~~') setting out the grounds on which the sanction should be suspended. Unless the ~~Chairman~~ considers that there are exceptional reasons in the particular case to grant the application, he will only do so if he is satisfied that not to do so would give rise to undue hardship, and that to do so would not give rise to any risk of public harm. If a relevant party has not been granted a suspension of sanction but has failed to comply with the sanction, the ~~Chairman~~ may stay the oral hearing.

3.7 The ~~Chairman~~ shall give such directions as he considers necessary for a fair and speedy hearing.

3.8 If the relevant party is neither present nor represented at the hearing, and the Tribunal has no cause to believe there is good reason for the relevant party's absence, the matter shall be determined by the Tribunal as it sees fit in the absence of the relevant party.

3.9 Where a relevant party or *associated individual, as the case may be,* ~~requires~~*applies for* an oral hearing ~~pursuant to the right set out in Paragraph~~

~~4.11 of the Code~~ but the relevant party or *associated individual* fails, without good cause, to appear (~~itself~~ *in person* or through a representative) at an oral hearing which is properly established, then the oral hearing Tribunal may make such finding as it considers fit.

**Q17. Do you support our intended changes to oral hearings? Please evidence your response.**

4.72 The majority of those who responded were not supportive of these proposals. Some understood the desire to reduce costs to the industry and to PhonepayPlus, but a number of respondents suggested that the proposal could have the opposite effect if providers became convinced they now needed legal advice for paper-based Tribunals too.

4.73 Others suggested that if the issue was abuse where the current process was used inappropriately, then perhaps the answer was to introduce sanctions where this was evident. A significant number of others suggested that a better solution would either be to review the current paper-based Tribunals, so that those currently requesting oral hearings had more confidence in them, or to streamline the oral hearing process to make it more cost effective.

4.74 We also received a significant amount of feedback suggesting the Chair of the CCP should not determine whether an oral hearing should be granted. This was on the grounds of a perceived lack of independence.

4.75 In light of this feedback PhonepayPlus has decided not to proceed with these proposals at this time. Oral hearings and, more widely, the different stages of the investigations and appeals process, will form part of the Part 4 review.

**Appeals and the Independent Appeals Body**

4.76 Should a party exhaust the review and oral hearing procedures, it has the right to appeal to the Independent Appeals Body (IAB). Annex 3 details the workings of the IAB, and we proposed to make two changes to it as part of the Code consultation.

4.77 Firstly, the members of the IAB have asked to be known as the Independent Appeals Tribunal (IAT). Therefore, we proposed to reflect this new name in the Code, effective from the date of publication of the new Code.

4.78 Secondly, Annex 3, paragraph 11 details the maximum award for costs in respect of an appeal brought before the IAB/IAT. PhonepayPlus proposed raising the levels detailed so that they more accurately reflect the costs that can be incurred by the parties in progressing lengthy and complex cases to the IAB/IAT. Following discussion with the IAB, they proposed to raise the maximum award for the costs of the parties from £30,000 to £100,000. The IAB believed the maximum costs for the provision of the Tribunal should remain the same, and so we proposed they remained unchanged.

4.79 In light of these proposed changes, Annex 4<sup>4</sup> relating to the Independent Appeals Tribunal would read as follows (please note that this only details paragraphs 1 and 11 – all other references to the IAT’s new name would also be changed accordingly):

Annex 3~~4~~Independent Appeals ~~Body~~ Tribunal

1 Appeals

1.1 A relevant party (in this Annex referred to as an ‘appellant’) may, after an oral hearing at which the appellant or its representative has appeared, appeal to the Independent Appeals ~~Body~~Tribunal (*‘IABT’*) against decisions and adjudications (other than any adjudication by consent) *of the Tribunal (in this Annex referred to as the “CCP Tribunal”)*.

1.2 PhonepayPlus may appeal to the *IABT* against *CCP* Tribunal decisions and adjudications (other than any adjudication by consent).

[and so on throughout Annex 4 and elsewhere in the Code]

11 Cost of hearing

The Appeal Tribunal shall make such award for costs of the parties as it considers reasonable and proportionate, subject to a maximum of ~~£30,000~~£100,000 (inclusive of disbursements and VAT). In addition, the Appeal Tribunal shall award the costs of the provision of the Tribunal as it sees fit, subject to a maximum of £ 25,000 (inclusive of VAT).

**Q18. Do you agree with the changes to the appeals process? Please evidence your response.**

4.80 We received little feedback directly related to these proposals. Although some wider feedback was received suggesting that providers should be able to recover costs if successful in a challenge at an earlier stage than the IAB/IAT. This will, again, be considered as part of the Part 4 review.

4.81 What direct feedback we did receive suggested that the impact of raising the costs of the parties should be kept under review if introduced. This was in order to monitor whether it proves too dissuasive to smaller providers.

4.82 Whilst we did not receive any significant objections to the proposed changes, we do not wish to assume that the IAB/IAT, or any other aspect of the review process, will continue in the same form after a Part 4 review. Therefore we have decided not to proceed with these proposals at this time, pending the Part 4 review Panel’s recommendations.

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<sup>4</sup> Note that the relevant annex will now appear at Annex 4 of the thirteenth edition of the Code as opposed to Annex 3 in the twelfth edition of the Code. This is due to the addition of a ‘special conditions’ annex at Annex 2.

## Definitions

4.83 The enforcement and technical review theme also contained proposals related to two definitional changes to the Code to clarify the scope of PRS regulation and, in effect, ensure the Code reflects current practice. The first relates to paragraphs 1.7.2 and 5.2.1, where we set out an intention to make clear that the Code can be enforced against providers based in other European Union Member States who provide PRS that are also ‘information society services’<sup>5</sup> but that in doing so PhonepayPlus must adhere to European law requirements.<sup>6</sup> The changes proposed read as follows:

1.7.2 Some premium rate services may also be ‘information society services’ in which case *enforcement of the Code will be subject to Directive 2000/31/EC*. This is further set out in Part Five below. These services are typically premium rate services which are available on the internet.

4.84 And 5.2.1 to:

5.2.1 ‘*Information society services*’

- (a) Some premium rate services may also be ‘information society services’ (see definition at paragraph 5.3.242 below). Information society services are required to be regulated in accordance with Directive 2000/31/EC on Electronic Commerce (‘the E-Commerce Directive’). The Code ~~will apply to~~ *may be enforced in respect of* such services when the Level 1 or Level 2 provider responsible for the provision of those services under the Code is:
  - (i) established in the United Kingdom; or
  - (ii) established in another EEA member state, ~~but only where:~~ *and the services are being accessed or may be accessed from within the United Kingdom*
- (b) *If a Level 1 or 2 provider’s establishment and provision of such services fall within paragraph 5.2.1(a)(ii) above, the Code may only be enforced where the conditions set out in Article 3.4 (read, as appropriate, in accordance with Article 3.5) of the E-Commerce Directive are satisfied.*

4.85 We also proposed to amend paragraph 5.3.8 (c) in relation to the classification of a provider as a Level 1 or Level 2 provider. The rationale for this amendment is for the Code to reflect the current process followed if there is any confusion as to the status of a provider. Currently the provision is ambiguous.

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<sup>5</sup> Information society services are defined within Directive 98/34/EC, as amended by Directive 98/48/EC.

<sup>6</sup> Directive 2000/31/EC (E-Commerce Directive).

4.86 Our proposal read as follows:

5.3.8c) In respect of any relevant premium rate service where ~~it is not clear~~ *PhonepayPlus considers there to be a material doubt* whether a person involved in any way in the provision of the service and/or who receives directly or indirectly any part of the charges made to the consumer for provision of the relevant premium rate service is a premium rate service provider falling within (a) or (b) above, PhonepayPlus shall determine whether that person is a premium rate service provider and whether the person is a Level 1 or Level 2 provider with reference to Guidance which it shall issue from time to time.

**Q19. Do you agree with the changes planned to 1.7.2, 5.2.1 and 5.3.8 (c)? Please evidence your response.**

4.87 The feedback we received supported these changes. One respondent questioned whether the wording at 5.3.8c) would prevent PhonepayPlus' consideration from being challenged even if it was unreasonable. However given that the paragraph would only be invoked in the case of an investigation, we can confirm that a provider could challenge our decision in the same way as they can challenge any other aspect of an investigation.

4.88 As such we will be proceeding with these proposals in the final version of the thirteenth Code.

### **Funding arrangements**

4.89 Lastly, PhonepayPlus proposed to make a change to Annex 1 of the Code to reflect the current Memorandum of Understanding between PhonepayPlus and Ofcom. The proposed change was to paragraph 3.2, and read as follows:

3.2 Having considered the comments received under paragraph 3.1, PhonepayPlus will review and then *consult with Ofcom in relation to* ~~present~~ its proposed *business plan and budget and activity plan to Ofcom for* ~~comment and approval.~~

4.90 The consultation confirmed that PhonepayPlus will, as now, give full consideration to any such comments from Ofcom before finalising its business plan.

**Q20. Do you agree with our proposed change to Annex 1, paragraph 3.1? Please evidence your response.**

4.91 Whilst we did not receive a large amount of feedback in relation to this proposal, what feedback we did receive expressed some concern. The general view was that in the absence of Ofcom, another independent body should have approval over PhonepayPlus' budget.

4.92 We had intended this change merely to reflect the current Memorandum of Understanding we have with Ofcom. In practice, Ofcom would still have full overview of our budget. Given that under the Communications Act 2003 they would have to be

sure it was appropriate to continue to devolve regulatory responsibility to us, the proportionality of our budget would be a large factor in that ongoing decision. However we also recognise that some certainty is required, and so we will not be proceeding with this change.



## **Section 5: Prior Permissions and Special Conditions**

5.1 Prior permissions, to date, have formed an important part of PhonepayPlus' regulatory framework. First introduced alongside the eighth edition of the Code, there are currently 17 regimes in operation covering a range of higher risk services from pay-per-page and subscription services over £4.50 a week through to counselling and remote gambling services.

5.2 However, the transition to an outcomes-based Code has left prior permissions as a slightly anachronistic legacy where conditions can be binary and often become obsolete, and where the need to seek prior authorisation is often disproportionately time consuming for both industry and regulator. This is in contrast to a Code which is inherently flexible as well as technology and service neutral.

5.3 Prior permissions remain an important tool in dealing with immediate risk caused by higher risk services which use previously unseen practices or technology. But whilst the Code consultation set out our intention to retain the power to introduce prior permissions regimes, it also confirmed our intent to do so far more sparingly in future.

5.4 Given this, the Code consultation set out our proposals to introduce a new set of special conditions, with the flexibility to apply and dis-apply a range of conditions to services which are defined as higher risk. Providers would have to comply with special conditions which applied to their services as soon as they began to operate them, but would not have to seek prior authorisation before operating.

5.5 A general set of special conditions would sit in a new Annex to the Code (Annex 2), and more specific details as to which special conditions would apply to individual service types, and how they would need to comply with them, would be set out in an appropriate Notice to industry published on the PhonepayPlus website. For example, special condition u) sets out the power to introduce a bond in relation to a defined service type. The monetary level of that bond, and how it would be administered, would then be set out in the relevant Notice.

5.6 Any application of conditions to a new service type, or changes in how they would need to be complied with, would take place only after a full consultation where we consider all stakeholder comments including Ofcom's. New conditions could not be introduced to Annex 2 – and consequently applied - without a change in the Code.

5.7 The consultation also set out our intention, and the evidence behind it, to dissolve all current prior permission regimes. Where appropriate these would be translated into special conditions regimes, which will largely retain the same or similar conditions as currently exist (with the exception of conditions like spending caps, which can now be set and reviewed separately using Rule 3.12 of the Code). In the case of some existing regimes – for example Anonymous SMS or Internet Diallers – it may be that the Code is now flexible enough to regulate them without

added conditions. We will consult shortly on the translation of existing prior permissions regimes to new special conditions.

5.8 For illustrative purposes only, the consultation contained an annex setting out three examples of how we were minded to interpret and implement the new special conditions.

5.9 Therefore, we proposed that a new Section 3.11 would read as follows:

### *3.11 Special Conditions*

*3.11.1 Where PhonepayPlus is satisfied there is or is likely to be a risk of:*

*a) a significant level of consumer harm; or*

*b) unreasonable offence to the general public,*

*arising from a particular category of premium rate service (“a high risk service”), it may impose conditions (“special conditions”) for the purpose of ensuring compliance with the Code’s outcomes. The conditions which may be imposed are the conditions set out in Annex 2 and any related conditions which are necessary for the proper functioning of those conditions.*

*3.11.2 Before imposing any conditions under paragraph 3.11.1 PhonepayPlus will consult with relevant stakeholders and will consider their representations where made within the period specified for comment. In urgent circumstances and notwithstanding paragraph 3.12.4, PhonepayPlus may carry out the consultation after imposition of the special conditions and, within a reasonable period, consider whether or not the conditions should be maintained, amended or removed in light of any consultation responses.*

*3.11.3 Any reference to compliance with the rules or obligations under this Code shall include compliance with obligations imposed under the special conditions. A breach of any special condition in respect of a high risk service imposed under paragraph 3.11.1 shall be a breach of the Code.*

*3.11.4 Upon determining to attach special conditions to a category of high risk services PhonepayPlus shall forthwith publish on its website a description of the relevant category of high risk service and the special conditions which apply.*

5.10 In addition we proposed that a new Annex 2 to the Code – detailing the 24 conditions covering a variety of standards that can be introduced as per the process outlined – would read as follows (please note that the headings within square brackets are not intended to transfer across to the Code but are merely included here for ease of reference and understanding):

### *Annex 2*

#### *Special Conditions*

*The conditions referred to in paragraph 3.11.1 are:*

[clarity and responsibilities]

*(a) requirements as to contractual arrangements and the management of roles across a chain of providers in relation to a high risk service;*

[exiting from a service, where a STOP command is insufficient]

*(b) requirements as to the mechanism and processes used to deliver services to, and to enable exit from services by, consumers;*

[technical standards, where there is further need to stipulate requirements]

*(c) requirements to ensure that there is an adequate technical quality to the provision of the high risk service;*

[spending caps]

*(d) the specification of service charges, call durations and action to be taken once those specified limits have been met;*

[age restriction and verification]

*(e) specified action required in order to and as a consequence of verifying or a failure to verify the age of callers;*

*(f) steps to be taken to ensure that a high risk service is not used by or promoted in such a way as to make it particularly attractive to persons under the age of 18 years old;*

*(g) the denying of access by users under the age of 18 years old to a high risk service or by all users where the relevant handset is not verified as being owned by someone aged 18 years old or over;*

*(h) promotional material aimed at persons aged 18 or younger not to be displayed or presented in close proximity to or within promotional material aimed at adults;*

[recording equipment]

*(i) required recording equipment of voice based high risk services and the use and standard of that equipment;*

*(j) the retention of such recordings and their provision with related information to PhonepayPlus;*

[pre call announcements, in call reminders and/or receipts]

*(k) information that is required to be given to callers in promotional material or at various stages before and during provision of a high risk service (including as to receipts);*

[double charging, particularly in reference to pay per page]

*(l) callers not being charged twice for services they have already received;*

[transparency]

*(m) the provision of defined information to PhonepayPlus and the intervals at which it is to be given and the manner to which it is provided;*

[opt-ins]

*(n) requirements for caller agreement before a high risk service proceeds before the caller is charged;*

[membership and compliance]

*(o) membership of professional bodies, training and supervision to have been and be undertaken and qualifications, licences and insurance required to be held by relevant providers or relevant individuals engaged in the provision of the high risk services and the evidence of such that may need to be provided to PhonepayPlus;*

*(p) compliance with the requirements of relevant regulators and professional bodies;*

[monitoring and recording]

*(q) the monitoring of the use of high risk services and in particular the information to be given to callers and action to be taken in the course of such monitoring;*

*(r) PhonepayPlus' access to premises in order to monitor the compliance of a high risk service with the Code and any relevant special conditions;*

*(s) facilitate the carrying out by PhonepayPlus or an approved third party of an audit of compliance of a high risk service with the Code and any relevant special conditions.*

[withholds]

*(t) the retention of revenue generated from a high risk service;*

[bonds]

*(u) the lodging with PhonepayPlus, prior to commencement of a high risk service, of a legally binding document ("a bond") by which a third party*

*guarantees a relevant provider's payment of sums, as security for meeting compensation claims in relation to unauthorised use of the service;*

*(v) the relevant provider's handling and payment of such claims and the ceasing of a high risk service if one or more claim is not paid in accordance with an award made by a legally qualified member of the CCP (the process for which may be set out in the condition);*

*(w) requirements as to callers' rights to refunds and information to be provided to callers in relation to refunds;*

[notification]

*(x) providers of higher risk services to notify PhonepayPlus at commencement of such services and provide any related information required by PhonepayPlus within a specified time period.*

**Q21. Do you agree with our new approach to existing prior permissions regimes? Please evidence your response.**

**Q22. Is the process of implementing the new regime clear?**

**Q23. Do the three illustrative examples attached to this consultation at Annex 2 help explain how we intend to implement this new system?**

**Q24. Are the 24 special conditions fit for purpose? Have we missed anything?**

5.11 Feedback was very supportive of the proposals in general. In terms of clarity as to how they will be implemented, some questions were raised about how a higher risk service will be defined. Whilst we recognise there are a number of different factors in defining risk, it is also the case that we will be required to fully consult and evidence commensurate risk on each occasion we propose to define a service type as being higher risk and apply special conditions to it.

5.12 We received little comment on the illustrative examples we attached to the consultation, but what feedback we did receive was positive and described them as clear. No additional special conditions were suggested, however comments were made on a number of the proposed conditions as follows:

5.13 It may be difficult to define "close proximity" as set out in special condition h) where online marketing is concerned. We are aware that the nature of some online marketing – e.g. pop-ups, banners – makes it difficult to guarantee that adult promotions and promotions aimed at children will not appear nearby to each other. In consulting on the application of this particular condition to service types, we will be mindful of this.

5.14 Maximum and minimum retention periods for recordings, as set out in special condition j), will be defined in each case where it is applied.

5.15 Special condition l) currently reads that consumers must not be charged twice for services they have already received. Some respondents pointed out that this introduces a potential loophole where consumers could be charged more than twice. As such we will alter the text of this condition to read as follows:

l) callers not being charged ~~twice~~ *more than once* for services they have already received;

5.16 We will consider a reasonable notice period wherever we apply special condition r) – right of entry to inspect premises - and evidence that appropriately in consultation.

5.17 A number of respondents requested that we examine whether the use of special condition u) (setting of a bond) will achieve the same effect as special condition t) (extending outpayment withhold beyond 30 days) before special condition t) is applied. We will do so, and evidence our consideration appropriately, whenever we consult on the application of special condition t).

5.18 For the avoidance of doubt, special condition v) will not introduce one-member Tribunals. The wording simply reflects that only awards against a provider in respect of compensation claims secured with a bond will be made by a legally qualified member of the CCP.

5.19 Having carefully considered all the responses as set out above, we have decided to amend special condition l) as described at paragraph 5.15. The other responses were generally supportive of all our other proposals, and do not cause us to change our reasons for making them. Therefore we will retain the proposals at Rule 3.11 and Annex 2 of the final version of the thirteenth Code.

### **Requirement to hold licences and qualifications required in law**

5.20 PhonepayPlus also proposed to introduce one further Rule to the legality outcome under Part Two of the Code. This is designed to replicate, and simplify, the requirement on providers and individuals to hold the legally required licences, permissions and qualifications currently detailed in various prior permissions regimes.

5.21 The consultation made clear that we had considered including this requirement in the proposed Annex 2 to the Code, but were of the view that adherence to this principle should be wider and is consistent with our legality outcome. Therefore our proposal read as follows:

*2.1.4 Premium rate service providers and relevant individuals engaged in the provision of a service must all hold licences, permissions and qualifications required by law.*

### **Q25. Do you agree with the insertion of this Rule at 2.1.4? Please evidence your response.**

5.22 Generally feedback was supportive of this proposal, with two provisos.

5.23 Firstly, some respondents expressed a view that in the event of a provider failing to hold necessary licences or qualifications for the service they are providing this should be a matter for the relevant enforcement body rather than for PhonepayPlus.

5.24 While we accept to a degree the need to work with licensing bodies as appropriate – an example would be the Gambling Commission – we do not believe this prevents us from also raising a breach of our Code in every circumstance. Indeed where we raise a breach of the Legality outcome, we are in effect taking a view, often in a quicker timeframe that is more amenable to consumer redress, and not enforcing the law on behalf of another body who would still be at liberty to take their own view, which may support or override ours.

5.25 We would also point out that not all bodies, especially those who issue professional qualifications, can take further enforcement action. This is especially so where an individual is not a member of their organisation and so cannot be sanctioned by being ‘struck off’.

5.26 Secondly, one respondent asked that we be mindful of the extra burden this places on a Level 1 or directly connected network in terms of due diligence. Previously a provider would have had to declare their intention to PhonepayPlus and their contractor ahead of providing a service which required a licence or qualification. Given no permission was granted without evidence of a qualification or licence this meant the contractor was not obliged to check, but without the existence of prior authorisation they would be.

5.27 We accept this could be the case. However this will be mitigated in part by the application of special condition x) to known higher risk regimes where a qualification or licence is necessary. Special condition x) requires that a provider of a defined service type inform us that they are operating services within 24 hours of commencement. In addition they would have to supply any information we specify, which may include proof that they hold the relevant licences.

5.28 As such, we will retain the proposal in the final version of the thirteenth Code, for the reasons set out above and in the consultation.

## Section 6: Polluter Pays

6.1 The polluter pays principle is central to PhonepayPlus' business plan and strategy and has long been supported by industry. Simply, we believe providers found in breach of the Code should pay their fair share and, as much as possible, their malpractice should not be at the expense of compliant members of industry. Indeed, a successful polluter pays approach can reduce the cost of regulation faced by compliant members of industry.

6.2 To this end the consultation set out proposals to improve the current sanctioning powers available to the Tribunal – detailed at Section 4.8 - can be improved to ensure that they are clear, effective and proportionate.

6.3 These included amendments to both Rules 4.8.2 (i) and (j) to ensure that the Tribunal can impose more targeted sanctions. For example, should a group of consumers be duped into entering a service, while a proportion enter into it in a fair and transparent way, it would be disproportionate for the Tribunal to require a universal refund for all consumers. In future, however, by introducing amendments to both (i) and (j), the Tribunal could specify that certain groups of consumers should be refunded whereas others should not.

6.4 In addition, we proposed to remove the process detailed at 4.8.2 (j) and insert it as a standalone provision. This was because it is not a sanction and therefore should not have previously been listed under paragraph 4.8.2.

6.5 Paragraph 4.8.2 (k) currently allows a Tribunal to request a compliance audit of a provider to be conducted by a third party approved by PhonepayPlus. However, there have been cases where an audit has not been conducted to a professional standard, calling into question its quality. While the proposal reflected that PhonepayPlus should not second guess the conclusions of detailed audits, it did introduce a measure of rigour to ensure that audits are completed to acceptable and widely recognised standards.

6.6 Our proposals in respect of Rules 4.8.2 (i), (j) and (k), read as follows (please note that this included a new provision at 4.8.3):

### 4.8.2

...

(i) require that refunds are paid within a specified time period to all *or any specified group of* consumers who claim a refund, for the full amount spent by them for the relevant service or for a specified lesser amount, save where there is good cause to believe that such claims are not valid, and provide evidence to PhonepayPlus that such refunds have been made;

(j) require in circumstances where there has been a serious breach of the Code and/or serious consumer harm, *or unreasonable offence to the general public* that refunds for the full amount spent or a specified lesser amount are paid within a specified time period to all *or any specified group of* consumers



who have used the service, regardless of whether they have claimed a refund. ~~Such refunds should be credited directly to the consumer's account with his or her originating communications provider. Where there is no such originating communications provider account, consumers must be notified of their right to a refund and be given an easy method of obtaining the refund. Where it is not technically or legally possible to notify consumers, PhonepayPlus may direct the relevant party to donate an amount of money equivalent to the refunds to an appropriate registered charity selected by PhonepayPlus. Evidence must be provided to PhonepayPlus that refunds have been made or payment to the selected charity has been made;~~

(k) require the relevant party to submit to a compliance audit *carried out* by a third party approved, *and to a standard prescribed*, by PhonepayPlus, the costs of such audit to be paid by the relevant party. Such an audit must be completed and the recommendations implemented within a period *specified* defined by PhonepayPlus.

*4.8.3 Where refunds have been ordered under paragraph 4.8.2 j) they shall be credited directly to the consumer's account with his or her originating communications provider. Where there is no such originating communications provider account, consumers must be notified of their right to a refund and be given an easy method of obtaining the refund. Where it is not technically or legally possible to notify consumers, PhonepayPlus may direct the relevant party to donate an amount of money equivalent to the refunds to an appropriate registered charity selected by PhonepayPlus. Evidence must be provided to PhonepayPlus that refunds have been made or payment to the selected charity has been made.*

**Q26. Do you agree with the changes to 4.8.2? Please evidence your response.**

6.7 Respondents were universally in favour of the proposal to alter 4.8.2j), regarding the extra granularity as being more relevant given the growth in multi-faceted marketing routes directing to one service going forward. All but one respondent agreed with the changes to 4.8.2k), with the minority response merely expressing a view that this should be reviewed if the cost of an audit becomes too great. As such, and for the reasons set out in the consultation and also directly above, we have decided to adopt both proposals in the final version of the thirteenth Code.

6.8 Whilst respondents agreed generally with the wording at 4.8.3, one respondent suggested that they already support recognised charities. In the event that they are required to donate to charity in lieu of a refund they would rather donate to their own charity, provided we approve it, than have PhonepayPlus select one for them. We accept this suggestion, as if a charity is registered, clearly recognised as such, and already has a standing relationship with a provider, we would see no reason not to approve a donation under Rule 4.8.3. As such we have revised the wording to read as follows:

*4.8.3 Where refunds have been ordered under paragraph 4.8.2 j) they shall be credited directly to the consumer's account with his or her originating communications provider. Where there is no such originating communications provider account, consumers must be notified of their right to a refund and be given an easy method of obtaining the refund. Where it is not technically or legally possible to notify consumers, PhonepayPlus may direct the relevant party to donate an amount of money equivalent to the refunds to an appropriate registered charity selected or approved by PhonepayPlus. Evidence must be provided to PhonepayPlus that refunds have been made or payment to the selected charity has been made.*

#### Definition of Associated Individual

6.9 A Tribunal can currently decide to prohibit an individual from operating in the market should it deem there to be good cause to do so. If a Tribunal does decide to prohibit an individual, PhonepayPlus is required to make all reasonable attempts to contact that individual in writing to inform them of that decision.

6.10 Paragraph 4.8.6, which sets out this process, refers to a “named individual”, which is inconsistent with paragraphs 4.8.2 and 5.3.9, which refer to an “associated individual” as defined in the latter provision. In order to ensure consistency across the Code, we proposed to amend this by changing the word “named” to “associated”.

6.11 The proposal read asset out immediately below. Please note that this provision will appear at Rule 4.8.7 (given the addition of a new Rule 4.8.3). The provision as set out also changes ‘informal representations’ to ‘representations in person’. This particular change related to the same change to other parts of the Code discussed in Section 4 and which we have confirmed we will no longer pursue at this time:

4.8.7 If a Tribunal considers that it may wish to make a prohibition under sub-paragraph 4.8.2(f), 4.8.2(g) or 4.8.2(h) in respect of any ~~named~~*associated* individual, PhonepayPlus shall first make all reasonable attempts to ~~se~~ ~~inform~~*notify* the individual concerned and the relevant party in writing. It shall inform each of them that any of them may request an opportunity to make ~~informal~~*representations in person* to the Tribunal and of the right of any of them (or PhonepayPlus itself) to *instead* require an oral hearing

#### **Q27. Do you agree with the change being proposed to the naming of individuals provision? please evidence your response.**

6.12 No objections were raised to the changes as proposed. As such, and for the reasons set out in the consultation and above, we will retain them, but in light of paragraph 6.11 above the final wording in the thirteenth Code will read as follows:

4.8.7 If a Tribunal considers that it may wish to make a prohibition under sub-paragraph 4.8.2(f), 4.8.2(g) or 4.8.2(h) in respect of any ~~named~~*associated* individual, PhonepayPlus shall first make all reasonable attempts to ~~se~~ ~~inform~~*notify* the individual concerned and the relevant party in writing. It shall

inform each of them that any of them may request an opportunity to make informal representations to the Tribunal and of the right of any of them (or PhonepayPlus itself) to require an oral hearing

### **Retention of revenues for the purpose of refunds**

6.13 Finally, the Code consultation proposed to amend paragraph 4.9.3, which relates to the *“obligation on any party holding a retention to make refunds on behalf of a party in breach of the Code.”*

6.14 This obligation currently ends three months after the end of an adjudication process, and we have found that this time limit is not sufficient. For example, the time limit imposed by Tribunals for a Level 2 provider to pay refunds following an adjudication may be such that the obligation must be met at a time beyond the time limit in paragraph 4.9.3 for PhonepayPlus to issue a direction to a Level 1 or Network operator to pay refunds out of any retained monies.

6.15 In such circumstances, the power may prove redundant and the impact of the Code provision nullified. This was never the intention and was not foreseen. As such we proposed to increase the time limit stipulated from three to four months as follows:

4.9.3 The obligation on any party holding a retention to make refunds on behalf of a party in breach of the Code shall end if PhonepayPlus has not issued a direction as set out in paragraph 4.9.2 ~~three~~ *by four* months after the completion of the adjudication process, provided that any reasonable time for any appeals has also passed.

### **Q28. Do you agree with the proposed change to 4.9.3? Please evidence your response.**

6.16 Of those who responded, there was unanimous agreement. As such, and for the reasons set out in the consultation, we will adopt the proposed wording in the final version of the thirteenth Code.

## Section 7: Impact Assessment

7.1 Finally, the consultation included a consideration of the impact of our proposed changes. The impact assessment focused on the following perspectives:

- The impact of proposed changes on industry and the wider market
- The impact on consumers
- The impact on PhonepayPlus

7.2 In doing so, our consideration was of the seven major changes which we had proposed. We deliberately did not consider the impact of Ofcom's NGCS changes in the round, an exercise which had already been conducted by Ofcom as part of their NGCS consultations. The seven major changes were:

- 1) Spending caps
- 2) The vulnerability provision
- 3) Rule 2.6.2 regarding complaint handling
- 4) Investigations
- 5) Reviews, oral hearings and appeals
- 6) Prior permissions
- 7) Sanctions

**Q29. Are there other areas of change that we have not considered here but should? If so, please provide appropriate evidence of the likely impact of the change.**

7.3 There was relatively little feedback to this question. A few respondents suggested that a review of administration costs would be welcome, especially in terms of giving providers the ability to claim back the costs for breaches which are not upheld. Given the forthcoming independent review of our investigations, adjudications and reviews procedures, we will be able to consider questions around administration costs then.

7.4 A couple of respondents suggested that the definitions of a Children's Service should be reviewed. As mentioned earlier at paragraph 2.31 of this statement, we will consider the definition of a Children's Service as part of wider, ongoing work around vulnerability.

7.5 A similar number of respondents also suggested that the current suite of Guidance was quite varied and could sometimes be difficult to penetrate for smaller firms. This is a point that was also raised during pre-consultation and consultation workshops.

7.6 Our review of Guidance will be in two stages. In March 2015 we will consult on changes and additions to Guidance which we consider to be vital before the publication of the thirteenth Code. This first tranche of Guidance will be as follows:

- i) Due diligence, risk assessment and control (DDRAC)
- ii) Promoting PRS

- iii) Complaint handling
- iv) Lower cost services
- v) Definitions (including parties in the value chain)
- vi) Privacy and consent to charge; and
- vii) Virtual chat services

7.7 Once the Code is published, we will then consult on a further set of changes and additions which, whilst still important, are not quite as imperative. During both stages of this process, we will continue to consider where appropriate how Guidance can be made shorter, more concise, and easier to navigate.

7.8 Lastly one respondent helpfully pointed out two small errors in the drafting of Rules 3.7.4b) and 3.10.5. Both Rules reference another rule within the Code, but in both cases typing errors meant the rules referenced were the wrong ones. We have now made the necessary changes to both these Rules in the final version of the Code attached at Annex A.

### **Assessment of Impact**

7.9 The consultation summarised that the thirteenth Code is intended as an improvement on the twelfth, rather than a wholesale reworking, and so should be relatively simple to apply. We also set out our view that the majority of changes would serve to provide greater clarity, or reduce complexity or regulatory burden.

**Q30. Do you agree with our assessment of the potential impact of the changes proposed to the Code in this consultation? Please provide appropriate evidence to support any assertion.**

**Q31. Do you have any comments about the contents of this document? To you agree with our overall approach to the thirteenth edition of the Code? Have we neglected anything?**

7.10 In relation to Q30, we received little comment. A number of respondents actually stressed that they had already fed back in terms of the impact of proposed changes in their answers to other questions. Where we did receive specific feedback it repeated considerations which we received in earlier answers from other respondents, and was included along with this earlier feedback in the earlier sections of this statement.

7.11 A couple of respondents stressed the importance of delivering a published Code, Special Conditions Notices, and essential Guidance by April/May 2015. This was in order that they and others would have time to prepare for and implement any changes. We are on track to deliver all of these by May 2015. In the meantime the version of the thirteenth Code attached at Annex A can help with early preparation, as it will be the final published version subject to EU approval.

7.12 In relation to Q31 a number of respondents again confirmed that they had expressed any relevant views during their answers to earlier questions. A couple of respondents raised an ongoing issue around the clarification of PhonepayPlus' fining powers, but this is being addressed separately from the Code.

7.13 A significant number of respondents added that they welcomed the thirteenth Code as a further improvement, which is attuned to the evolving PRS market. Some of them stressed the need for ongoing collaboration between PhonepayPlus and the industry to ensure the Code is implemented sensibly and proportionately. We remain committed to such activity.

7.14 Having considered all the consultation responses, as set out above and in other parts of this statement, our view is that our assessment of the proposals we have decided to adopt is appropriate. For the reasons set out in our consultation and this statement, these proposals are, amongst other things, objectively justified and proportionate.