EXPLANATORY MEMORANDUM TO

THE REGULATION OF PREMIUM RATE SERVICES ORDER 2024

2024 No. 1046

AND

THE TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) (TRANSFER OF STAFF TO THE OFFICE OF COMMUNICATIONS) REGULATIONS 2024

2024 No. 1047

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Science, Innovation and Technology ("DSIT") and is laid before Parliament by Command of His Majesty.

1.2 This explanatory memorandum covers two instruments. Firstly, The Regulation of Premium Rate Services Order 2024 (the "Order"). Secondly, The Transfer of Undertakings (Protection of Employment) Transfer of Staff to the Office of Communications Regulations 2024 (the "Regulations").

2. Declaration

2.1 Peter Kyle, Secretary of State at the Department for Science, Innovation and Technology confirms that this Explanatory Memorandum meets the required standard.

2.2 Holly Creek, Deputy Director, for Wireless Infrastructure, Spectrum and Consumer policy at the Department for Science Innovation and Technology confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Tom Raynsford at the Department for Science, Innovation and Technology, email: PSA_consolidation@dsit.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 The Order introduces new provisions imposing requirements with respect to the provision and contents of certain premium rate services ("PRS"). PRS, sometimes referred to as "phone-paid services," are, broadly speaking, content, goods or services charged to a phone bill. The Phone-paid Services Authority ("PSA"), which to date has regulated providers of these services, states that payment charged in this way are[1]:

[1] The Phone-paid Services Authority, 'Why have I been charged?', https://psauthority.org.uk/For-Consumers/Why-Have-I-Been-Charged (viewed 7 October 2024)

… a popular and easy way of paying for a range of services, such as music subscriptions, games, donations to charity and voting on TV talent shows. This means that when you call or send texts to premium numbers, make in-app purchases or play games and quizzes on your phone, you can add the costs to your phone bill or pay-as-you-go credit.

4.2 Overall, the Order enables the transfer of day-to-day regulatory responsibility for PRS from the PSA to the Office of Communications ("OFCOM") and replaces, but broadly replicates the requirements and provisions of the code that has been enforced by the current regulator, the PSA, until now.

4.3 The Order provides for its requirements to be enforced by OFCOM. OFCOM have made certain complementary decisions under the Communications Act 2003 (the "2003 Act") in connection with the making of the Order. One of these is to withdraw OFCOM's statutory approval of the current regulatory code that the PSA has made (see below) and under which the PSA administers and enforces the code. That will take effect at the same time the Order comes into force, on 1 February 2025. Another decision modifies a condition imposed on providers of PRS. That too will take effect when the Order comes into force and, apart from in relation to some exceptions for the purpose of maintaining continuity of regulatory oversight, will require certain providers to comply with the provisions of the Order, instead of the code, from 1 February 2025 onwards. In this way the regulator of PRS will change from the PSA to OFCOM, and the legal means by which obligations are imposed on providers of PRS (and to some extent the content of the obligations themselves) will also change.

4.4 The purpose of the Regulations is to transfer the employment contracts of certain staff who are employed by the PSA to OFCOM, with protections similar to that afforded by the main part of the Transfer of Undertakings (Protection of Employment) Regulations 2006 as amended (the "TUPE Regulations"), including preservation of continuity of service and existing terms and conditions of employment. The staff transfer date as defined in the Regulations is drafted to coincide with the coming into force of the Order.

Where does the legislation extend to, and apply?

4.5 The extent of the Order (that is, the jurisdictions which the instrument forms part of the law of) is England and Wales, Scotland and Northern Ireland.

4.6 The territorial application of this Order (that is, where the instrument produces a practical effect) is England and Wales, Scotland and Northern Ireland.

4.7 The extent of the Regulations (that is, the jurisdictions which the instrument forms part of the law of) is England and Wales, and Scotland.

4.8 The territorial application of the Regulations (that is, the jurisdictions which the instrument forms part of the law of) is England and Wales, and Scotland.

5. Policy Context

What is being done and why?

5.1 OFCOM have had the overall responsibility for ensuring that PRS are being appropriately regulated since 29 December 2003, and this includes ensuring that consumers are adequately protected from harms that may arise from the misuse of PRS or certain practices in respect of it e.g. billing practices. Under section 120 of the 2003 Act, OFCOM have the power, for the purpose of regulating the provision,

content, promotion, and marketing of PRS, to set conditions (known as 'PRS Conditions') that bind the persons to whom they are applied.

5.2 A PRS Condition may be set by OFCOM to bind a person to comply with the provisions of an 'approved code,' that is, a code approved under section 121 of the 2003 Act. A code will include provisions allowing an enforcement authority identified in the code to take enforcement action by means of directions, and a PRS Condition may oblige persons to comply with those enforcement directions. OFCOM have the power to provide that only certain persons are bound by the condition, and they may limit the application of the code in respect of those persons. If there is no such code, a PRS Condition may bind persons to the provisions of the order for the time being in force under section 122 of the 2003 Act and to the extent the OFCOM may specify.

5.3 The day-to-day regulation of PRS has, since the enactment of the 2003 Act, been carried out by the PSA exclusively through the various codes it has made and which were approved by OFCOM under section 121; there has never been an order made under section 122. Each code gave the PSA the function of administering and enforcing it. The PSA existed, prior to the enactment of the 2003 Act, as ICSTIS (the Independent Committee for the Supervision of Standards of the Telephone Information Services), an industry-funded, non-profit-making regulatory body for PRS. The policy reason for the code approval mechanism in the 2003 Act was to enable the PSA, or a similar such body, to be able (to continue) to regulate PRS by means of its code.

5.4 The PRS market has undergone significant change with legacy services (especially those based on voice calls) in decline and the rapid growth of PRS provided by global tech platforms and a more compliant market. To reflect that shift, the PSA began a strategic review in 2019 to ensure that its model of regulation remained fit for purpose in the changing market. This resulted in the latest code, *Code of Practice 2021 (Fifteenth Edition)* ("Code 15"). On 20 October 2021, OFCOM approved Code 15 under section 121 of the 2003 Act and it came into effect on 5 April 2022. Consequently, the PSA has continued to be the enforcement authority for the purposes of the regulation of PRS under that code.

5.5 The PSA also concluded in its strategic review that, in order to ensure the long-term effectiveness of the PRS regulatory framework, it would be more appropriate for OFCOM to undertake the regulation of the provision, content, promotion and marketing of PRS. A key factor behind the PSA taking this view was that OFCOM have greater powers and resources to deliver the PRS regulatory regime in the context of a rapidly changing market, and so ensure regulatory certainty, confidence and consumer protection.

5.6 On 24 May 2022, after discussions, OFCOM and the PSA announced that, subject to further approval by the Secretary of State, responsibility for the day-to-day regulation of PRS would be transferred to OFCOM.

5.7 In anticipation of making an order under section 122, OFCOM now consider that there is no code in force to which they think it would be appropriate to give, or to continue to give, their approval under section 121. As such, they have decided to withdraw their approval of Code 15 in accordance with section 121(6) of the 2003 Act. OFCOM have accordingly decided to make an Order under section 122 of the 2003 Act, to ensure continued and seamless regulation of the provision, content, promotion and marketing of PRS. Under the Order, and a complementary PRS Condition, OFCOM will regulate PRS and the PSA will no longer have such a

function. The consent of the Secretary of State is required for the making of an order under section 122, and the Secretary of State has given that consent.

5.8 The Cabinet Office Statement of Practice confirms that the government is committed to ensuring that staff involved in all such transfers are treated fairly and consistently and their rights respected to encourage a co-operative, partnership approach to the modernisation of the public sector with consequential benefits for all citizens. The guidance states that in order to meet these guiding principles, there must be a clear and consistent policy for the treatment of staff, founded upon the provisions of the TUPE Regulations.

5.9 The TUPE Regulations are the usual legal mechanism by which employees' employment is transferred, and their terms and conditions are protected when the business or service in which they work is transferred from one employer to another. However, the transfer in question is of administrative functions between public administrative authorities and accordingly falls within the exception found in regulation 3(5) of the TUPE Regulations. The TUPE Regulations are therefore not expected to apply in this case.

5.10 The Regulations are made by the Secretary of State under the powers conferred by section 38(1) of the Employment Relations Act 1999 to provide for the transfer of staff from the PSA to OFCOM, taking account of the Cabinet Office Statement of Practice. The effect of the Regulations is that the transfer will be conducted in a similar manner as if certain provisions of the TUPE Regulations had applied, and employees transferring will not be subject to less favourable terms and conditions as a result of the transfer.

5.11 As with a transfer under TUPE Regulations, the Regulations do not transfer contractual occupational pension entitlements (relating to benefits for old age, invalidity or survivors). The PSA and OFCOM have ensured that appropriate pension options are available for staff.

What was the previous policy, how is this different?

5.12 The previous policy was for the regulation of the provision and contents of PRS, the facilities made available in their provision, and the arrangements made for their promotion and marketing, to be carried out by the PSA. The new policy is that OFCOM will carry that out.

5.13 Also, the day-to-day regulation of the PRS has been carried out (by the PSA) through Code 15, which is not a statutory instrument, but is given the force of law through its approval and application under the 2003 Act. The Order is of course a statutory instrument. The Order broadly retains the provisions in Code 15 with some minor amendments to requirements imposed on providers of PRS under Code 15. Those amendments mainly relate to ensuring that the provisions in the Order are compliant with sections 120 and 122 of the 2003 Act. It also makes some amendments compared to Code 15 to ensure it complies with proper legislative practice and to remove ambulatory references (references to a document as it has effect from time to time). The most significant changes introduced by this Order, which OFCOM believe are objectively justifiable and necessary to protect consumers using PRS, are:

(i) the removal of registration exemptions for merchants[2] operating PRS numbers starting with 087[3] and voice shortcodes[4] costing 20p or less. Prices for using these services can vary based on the access and service charges imposed. Removal of this exemption is estimated to bring a small number of additional PRS providers into regulation, estimated to be around 50, and is being introduced to inform and assist regulatory oversight;

(ii) changes to conditions that must be met to enable merchants in defined circumstances to be exempt from registration. For a merchant to be exempt from registration, its qualifying intermediary[5], must provide a general undertaking (assurance) that it meets the exemption conditions, including keeping records to that effect and providing these records to OFCOM on request. These new requirements seek to improve oversight and encourage compliance by those merchants who are exempted from registration; and

(iii) extending requirements to all PRS providers that they are unable to engage in any regulated activity unless they take reasonable and proportionate steps to identify potential risks to the interests of vulnerable consumers and to mitigate any identified risks, in addition to having policies and procedures in writing which describe the means and methods for complying with the relevant article in the Order[6]. This extended requirement intends to improve the protections offered to vulnerable users of PRS.

5.14 The Regulations are made to facilitate the policy changes introduced by the making of the Order in respect of regulating PRS. As such, they do not themselves change policy. They give effect to broader government policy on staff transfers referred to in paragraph 5.8.

6. Legislative and Legal Context

How has the law changed?

6.1 From 1 February 2025, requirements with respect to the provision, content, promotion and marketing of PRS, provisions for the enforcement of those requirements, and other arrangements for the purposes of those requirements (such as funding and registration arrangements) will apply under the Order, rather than under a code approved under section 121 of the 2003 Act. Those requirements, provisions and arrangements are, substantively, the same or similar in most respects to those under Code 15. The main change will be that OFCOM become the sole regulator of PRS.

6.2 This Order is the first use of the powers in section 122 of the 2003 Act.

[2] Any person who controls or is responsible for the operation, content and promotion of a premium rate service and/or any part of the facilitation of PRS.

[3] 087 numbers are Non-Geographical Numbers (NGN). These service numbers are commonly used by organisations for sales or enquiry lines. The cost of calling 087 numbers is made up of two parts: an 'access charge' from the consumer's network operator, and a 'service charge' set by the organisation using the number that the consumer is seeking to call.

[4] Voice short codes enable UK mobile phone users to dial a 5 or 6-digit shortcode as an alternative to a standard geographic (e.g. 01 or 02 prefixes) or non-geographic (e.g. 03, 08 or 09 prefixes) long telephone number. Voice shortcodes are charged through a single 'drop charge' (as opposed to pence per minute charging).

[5] An intermediary is any person or organisation who provides a platform which, through arrangements made with a network operator, another intermediary provider or other merchant, enables PRS to be accessed by a consumer or provides any other technical service which enables the provision of the PRS. To be a qualifying intermediary, the intermediary must be 1. the only intermediary used by the merchant in question, or 2. be an app store.

[6] Article 39 of the Order.

Why was this approach taken to change the law?

6.3 Section 122 of the 2003 Act provides a clear alternate statutory mechanism for establishing OFCOM as the regulator of PRS in the circumstances described above.

6.4 The Cabinet Office Statement of Practice observes that transfers at the instigation and under the control of central government will usually be effected through legislation. However, apart from the power in section 38 of the of the Employment Relations Act 1999, there are no other relevant statutory powers enabling the transfer of staff from the PSA to OFCOM in this context e.g. there is no applicable power for the Secretary of State to make a scheme for their transfer. It is possible that contractual arrangements could have been entered into to arrange for the transfer of staff, for example, with OFCOM making offers of employment to PSA employees. However, the Cabinet Office Statement of Practice recognises that unless legislation is relied upon to transfer employment, there will be no legal requirement for staff to transfer. This approach could create difficulties, for example, if employees do not accept offers of employment but rather prefer to be made redundant by PSA (and be paid a redundancy payment) as an alternative to transfer. This could potentially result in a loss of skills and experience, leaving OFCOM with staffing gaps. Further, even if all employees were to accept offers of employment from OFCOM, there are certain employment rights which cannot be fully replicated unless employees transfer by operation of law, for example, the right to resign if the transfer were to involve a substantial change to working conditions to the employee's detriment.

7. Consultation

Summary of consultation outcome and methodology

7.1 OFCOM published on their website a consultation document on 21 November 2023[7] which set out their overall proposals, including an assessment of the impact of those proposals, for taking over the PSA's day-to-day regulation and enforcement of the PRS sector. In that consultation document, OFCOM published a notice of its draft Order in accordance with section 403 of the 2003 Act. OFCOM also published a notification of its proposed modifications to the PRS Condition.

7.2 In summary, OFCOM proposed to take three specific measures to achieve the aim of a regulatory transfer from the PSA to OFCOM. Those measures were:

(i) OFCOM replacing the requirements in Code 15 by imposing corresponding requirements in an order to be made under section 122 of the 2003 Act,

(ii) OFCOM making modifications to the PRS Condition to secure compliance with the provisions of that order and past enforcement directions given by the PSA,

(iii) in light of those proposals, OFCOM withdrawing their approval from Code 15.

7.3 Additionally, to the publication of the consultation document on their website, OFCOM alerted stakeholders via a telecoms mailing list. The PSA also made stakeholders – particularly industry participants – aware of the consultation through its website, mailing list and regular contacts with the industry.

7.4 OFCOM's consultation closed on 23 January 2024. OFCOM received 31 responses in total, including from network providers, merchants (including broadcasters and

[7] OFCOM, 2023, 'Consultation: The future regulation of phone-paid services', https://www.ofcom.org.uk/consultations-and-statements/category-1/the-future-regulation-of-phone-paid-services, (viewed 7 October 2024)

charities), trade associations, and consumer bodies. All non-confidential responses are published on OFCOM website.[8]

7.5 Respondents were generally supportive of the proposed transfer – none opposed. However, there were a number detailed policy, legal and technical points raised in relation to the draft PRS order. In the main, these comments were about seeking clarity on some of the proposals, including highlighting potential inconsistencies between the draft Order and Code 15. Particular issues raised (the majority of which were in relation to requests for further clarification) included the following:

(i) definitions for PRS regulated providers and regulated activity;

(ii) the scope of the regulations, including whether regulation was being extended in parts;

(iii) exemptions from registration requirements for defined PRS providers and certain PRS; and

(iv) pre-contract information to be provided to consumers and express consent requirements for certain PRS categories.

7.6 Having considered the consultation responses, OFCOM have decided to largely adopt the proposals contained in OFCOM's draft PRS Order, subject to certain amendments which OFCOM made in the light of stakeholder comments and their further considerations. In particular, OFCOM have sought to address requests for clarifications, including any potential inconsistencies. OFCOM have also removed proposed new regulations, taking account of stakeholder comments, including, for example, the proposal to require a free first minute for information, connection, and sign-posting services (ICSS) such that PRS providers must not charge consumers for ICSS until they have been provided with all the necessary pre-contractual information.

7.7 OFCOM's statement responding to the consultation will be published on GOV.UK on 25 October 2024 these regulations are laid in Parliament.

7.8 There was no requirement to consult publicly on the making of the Regulations and a public consultation on them was not otherwise recommended.

8. Applicable Guidance

8.1 The Order does not require guidance, except in relation to OFCOM's enforcement under Part 10 of the Order and of the PRS Condition (see further in section 12 of Part 3 below). In taking any such enforcement action, OFCOM will follow their general approach set out in their guidelines entitled 'Regulatory Enforcement Guidelines for investigations' published on 12 December 2022, available on OFCOM's website.[9] In OFCOM's above-mentioned consultation document, they proposed to revise those Enforcement Guidelines by inserting two new annexes to explain additional points and exceptions relating to OFCOM's general approach to enforcement for Part 10 of the Order and the PRS Condition, respectively. The final versions of those two annexes will be published as part of OFCOM's above-mentioned statement.

8.2 The Regulations do not require guidance.

[8] OFCOM, 2023 'Consultation: The future regulation of phone-paid services', https://www.ofcom.org.uk/consultations-and-statements/category-1/the-future-regulation-of-phone-paid-services, (viewed 7 October 2024)
[9] OFCOM, 2022, 'Regulatory Enforcement Guidelines for investigations', https://www.ofcom.org.uk/__data/assets/pdf_file/0029/249095/enforcement-guidelines.pdf, (viewed 7 October 2024)

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for the Order because the impacts are expected to be minimal and fall below the de minimis threshold as set out in section 1.2 of the Better Regulation Framework guidance dated March 2020[10]. There are two relevant factors in this regard:

(i) this Order is predominantly intended to effect a transfer of regulatory authority from one regulatory body (the PSA) to another (OFCOM) and not aimed at introducing new regulations; and

(ii) OFCOM's proposals replicate, or are very similar to, the regulatory framework currently in place and delivered by the PSA through Code 15.

9.2 As such, OFCOM expect that there will be little difference in practice for PRS providers compared to the current regulatory arrangements. OFCOM, therefore, do not expect the direct impacts on business to exceed £5 million a year. The Better Regulation Framework interim guidance requires a full impact assessment if the Net Direct Impact to Business is expected to exceed £5 million per year, hence a de minimis assessment was undertaken for the Order.

9.3 In particular, in terms of costs and benefits to industry, OFCOM consider that the way that PRS are provided by industry to consumers will be largely unchanged as a result of the transfer.

9.4 We consider the three most significant changes in paragraph 5.13.13 are objectively justifiable and necessary to protect consumers using PRS.

9.5 In addition, OFCOM have quantified the following industry-wide costs and benefits: (i) a one-off transition cost of £800,000, (ii) registration fee savings of £120,000 per year, (iii) a one-off time cost of approximately £1,000 for the small number of 087 providers who now need to provide registration information and (iv) familiarisation costs to PRS providers of understanding the Order compared to the previous Code 15 of approx. £270,000. Using the standard methodology for calculating Equivalent Annual Net Direct Cost to Business (EANDCB), this would result in a net cost to industry of £40,000 over 10 years.[11] OFCOM have also identified other potential benefits and costs to industry which they have not been able to quantify due to a lack of data but expect these to be small and below the £5 million threshold.

Impact on businesses, charities and voluntary bodies

9.6 There is no significant impact on business, charities or voluntary bodies from the Order. This is because the Order does not impose any significant new legal obligations on business and other persons involved in the provision of PRS. Where it does, we expect this to be minimal.

9.7 The Order does not significantly impact small or micro businesses for the same reasons as set out in paragraphs 9.1 and 9.2. No specific action is proposed to minimise the impact of the requirements on small or micro businesses because the impact of the instrument on such businesses is expected to be minimal.

[10] Department for Business, Energy & Industrial Strategy, 2020, 'Better Regulation Framework - Interim guidance', https://assets.publishing.service.gov.uk/media/5f5b2b1ee90e0718dffc749d/better-regulation-guidance.pdf, (viewed 7 October 2024)

[11] Discounted using the 2024 price base year and 2024 present value base year, and a discount rate of 3.5%. We use these years because we expect the costs and benefits of this proposal to occur from 2024 onwards.

9.8 There is no significant impact on the public sector from the Order, other than the effect of OFCOM taking on functions of regulating PRS that are similar to those the PSA exercised, together with taking on most of the staff of the PSA (and as a result, the winding up of the PSA).

9.9 There is no significant impact on business, charities or voluntary bodies from the Regulations.

9.10 There is no significant impact on small or micro businesses from the Regulations.

9.11 There is no significant impact on the public sector from the Regulations.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The approach to monitoring and reviewing the Order is through normal audit activity and ongoing supervision and compliance monitoring, periodic reviews of the overall market and trends, as well as regular communication with persons who, in OFCOM's opinion, are likely to be affected by this regulation.

10.2 The duty to review regulatory provisions in secondary legislation in section 28 of the Small Business, Enterprise and Employment Act 2015 does not apply to OFCOM. As a result, there is no requirement to include a statutory review clause in the Order.

10.3 The effect of the Regulations will be monitored through consultation with the affected staff, planned to commence in November 2024 through to the end of January 2025. Informal discussions with staff in scope to transfer began in May 2024.

10.4 The duty in section 28 of the Small Business, Enterprise and Employment Act 2015 does not apply to the Regulations because in making them the Secretary of State is not making regulatory provision in relation to any qualifying activity, as defined in that Act, or amending regulatory provision made in relation to such activity. As a result there is no requirement to include a statutory review clause.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 Part 10 of the Order contains provision for the enforcement of requirements imposed under the Order. There is also an enforcement mechanism in the parent Act. This essentially creates two distinct stages to OFCOM's enforcement of requirements imposed under the Order:

(a) For any breaches of requirements imposed by Parts 2 to 9 of the Order, OFCOM would expect to use one of the two main forms of enforcement procedure under Part 10. The first form is the serving of a provisional enforcement notice under article 59, together with any penalties proposed to be imposed in accordance with article 60 or directions proposed to be given under article 64, followed by a final enforcement notice (FEN) served under article 61. The second form is any direction given under article 62 for interim measures followed by any confirmation of such directions under article 63. For both forms, OFCOM will follow their enforcement approach set out in the enforcement guidelines concerning Part 10 of the Order mentioned in section 10 of Part 1 above.

(b) For any breaches of any requirements to preserve evidence in accordance with article 58, to comply with a FEN in accordance with article 61(6), to comply with a direction for interim measures in accordance with article 62(10), to comply with any

confirmation of directions in accordance with article 63(8), to comply with any directions for serious contraventions in accordance with article 64(10) and to comply with any decisions under the transitional arrangements under article 66 and Schedule 4, OFCOM will follow their enforcement approach set out in the enforcement guidelines concerning enforcement of the PRS Condition mentioned in section 10 of Part 1 above. In so doing, OFCOM will be adhering to the enforcement procedures under section 123 of the 2003 Act (applying sections 94 to 96 of the 2003 Act) and, where applicable, section 124 of the 2003 Act.

11.2 There is a statutory appeal right in respect of both Part 10 enforcement procedures and enforcement of the PRS Condition, governed by section 192 of the 2003 Act.

12. European Convention on Human Rights

12.1 As the Order and the Regulations are instruments subject to the negative procedure there is no need for a human rights statement.

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").