



# Approval of the ICSTIS Code of Practice (11<sup>th</sup> Edition)

A statement and Notification on approval of the  
ICSTIS Code of Practice (11<sup>th</sup> Edition)

Statement

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# Contents

<b>Section</b>		<b>Page</b>
1	Summary	1
2	Background and legal framework	3
3	Responses to the consultation and Ofcom's comments	9
4	Reasons for approving the draft Code under section 121 of the Act	29
<b>Annex</b>		<b>Page</b>
1	List of respondents to the consultation	42
2	Notification of approval of a Code for Premium Rate Services under section 121 of the Communications Act 2003	43

## Section 1

# Summary

- 1.1 'Ofcom (the Office of Communications)' exists to further the interests of citizens and consumers through a regulatory regime which, where appropriate, encourages competition. Effective competition delivers choice and lower prices to consumers as well as opportunities for new services and providers. However, consumers may need protection from inappropriate behaviour by certain providers that may undermine confidence in the market as well as causing consumer detriment.
- 1.2 One such example is in relation to the regulation of Premium Rate Services ('PRS'). PRS offer consumers with some form of content, product or service via fixed or mobile telecoms lines, and are charged to users via their telephone bills. While the great majority of PRS are welcomed by consumers and generate considerable consumer benefits, these benefits can be obscured by problems involving the use of PRS to mislead or even defraud consumers. In addition, inappropriately marketed PRS may give rise to a risk of consumers running up high phone bills without being aware of the charges they are incurring.
- 1.3 This statement sets out Ofcom's approval under section 121 of the Communications Act 2003 ('the Act') of the Independent Committee for the Supervision of Standards of Telephone Information Services ('ICSTIS') Code of Practice (11th Edition) ('the draft Code').
- 1.4 Section 121(1) of the Act provides that Ofcom may approve a code of practice which has been made by another person for the purpose of regulating PRS. Ofcom approved the ICSTIS Code of Practice (10th edition) on 29 December 2003. On 4 August 2005, Ofcom published its Notification of approval of an emergency code amendment to the ICSTIS Code of Practice (10th edition). The amended Code (10th edition, as amended) ('the approved Code'), and Ofcom's approval of it, remains in force.
- 1.5 On 8 June 2006 Ofcom published a consultation document which set out that, having given preliminary consideration to the provisions of the draft Code, Ofcom was minded to approve the draft Code on the basis that it was satisfied that:
  - a) the Code contains provisions for regulating, to such extent as Ofcom thought fit, the arrangements made by the providers of PRS for promoting and marketing those services (the test in section 121(1) of the Act);
  - b) that all of the requirements in section 121(2) have been met (these tests are set out further below); and
  - c) that, having regard inter alia to the provisions of the Code, it is appropriate for Ofcom to approve it.
- 1.6 Ofcom's consultation document is available on the Ofcom website at: <http://www.ofcom.org.uk/consult/condocs/icstiscode/icstiscode.pdf>
- 1.7 Ofcom received a total of eight responses. A list of the respondents who submitted responses is attached at Annex 1. The responses themselves are available for

viewing on the Ofcom website at:

<http://www.ofcom.org.uk/consult/condocs/icstiscode/responses/>

- 1.8 Having carefully considered the responses to the consultation, Ofcom remains satisfied that those criteria have been met and, in particular, that it would be appropriate, and in line with Ofcom's duties, to approve the 11<sup>th</sup> edition of the ICSTIS Code under section 121 of the Act.<sup>1</sup>

### Effective date

- 1.9 Having considered comments from stakeholders with regard to the adequacy or otherwise of the proposed implementation timescale of four weeks, Ofcom has decided that the approval of the Code (the Notification of which is formally set out at Annex 2) should not come into force until eight weeks from the date of publication of this Statement and Notification.

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<sup>1</sup> The version of the draft Code which Ofcom is now approving under section 121 of the Act is essentially the same as that which was attached to Ofcom's consultation document of 8 June 2006. The significant differences between the two versions are (i) the replacement of the text of paragraph 1.3.2, (ii) the insertion of a new paragraph numbered 1.2.4. These changes have been made to ensure that there is no scope for misunderstanding with respect to the compatibility of the Code's requirements with Directive 2000/31/EC ('the E-commerce Directive'). The only other significant difference is the insertion of a new paragraph numbered 2.3.4 to provide additional clarity on retrospective application of the new due diligence requirements for NO's. There have also been minor drafting changes to paragraphs 2.3.2(b) and 7.11.6(b) for the sake of consistency and clarity.

## Section 2

# Background and legal framework

### Premium Rate Services

- 2.1 PRS are defined in section 120 of the Act. In broad terms, PRS offer some form of content, product or service via fixed and mobile telecoms lines. These may be accessed by conventional voice services or using SMS text, line telephone, PC (e-mail, internet, bulletin board), mobile phone or interactive digital TV. Services typically include TV voting lines, competitions, scratchcards, adult entertainment, chat lines, business information services, technical helplines, mobile phone ringtones and game downloads, horoscopes and interactive TV games.
- 2.2 In the UK, PRS are typically accessed by calling numbers prefixed by '09', although similar, and in some cases identical, services may also be accessed from numbers on other numbering ranges, including those prefixed by '08' as well as access codes. Those accessed via SMS on mobile phones are often accessed via short codes starting with an '8' or a '6'. Directory enquiry services (118xxx numbers) also fall within the definition of PRS for the purposes of the Act.
- 2.3 PRS are defined in section 120(7) of the Act, which provides that a service is a PRS if:
- a) it is a service falling within subsection (8)<sup>2</sup>;
  - b) there is a charge for the provision of the service;
  - c) the charge is required to be paid to a person providing an electronic communications service by means of which the service in question is provided; and
  - d) that charge is imposed in the form of a charge made by that person for the use of the electronic communications service.

### The regulatory framework and PRS

- 2.4 A new regulatory framework for electronic communications networks and services came into force on 25 July 2003. This new framework aims to reduce entry barriers and foster prospects for effective competition to the benefit of consumers.
- 2.5 Under the regulatory framework, Ofcom must have regard to its principal duty set out in section 3 and, in particular 3(1) of the Act, which states that "*it shall be the principal duty of Ofcom, in carrying out their functions –*
- a) *to further the interests of citizens in relation to communications matters; and*

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<sup>2</sup> A service falls within this section if its provision consists in:

- (a) the provision of the contents of communications transmitted by means of an electronic communications network; or
- (b) allowing the user of an electronic communications service to make use, by the making of a transmission by means of that service, of a facility made available to users of the electronic communications service.

*b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.”*

- 2.6 In addition, it is the duty of Ofcom to act in accordance with the six Community requirements (which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive.)<sup>3</sup>.
- 2.7 The relevant statutory provisions governing the regulation of PRS are set out under sections 120 to 124 of the Act. These provisions give Ofcom the power to set conditions (“the PRS Condition”) that bind the persons to whom they are applied, for the purpose of regulating the provision, content, promotion and marketing of PRS. Where Ofcom has approved a code which has been made by any person for regulating the provision and contents of PRS and the facilities made available in the provision of such services, the PRS Condition can only require the persons to whom it applies to comply with directions given in accordance with the approved code by that code’s enforcement authority. Any condition set under section 120 must comply with section 47 of the Act, i.e. it must be objectively justifiable, not unduly discriminatory, proportionate and transparent. It must also comply with the notification and consultation requirements in section 48 of the Act.

### **How are premium rate services currently regulated in the UK?**

- 2.8 The regulatory arrangements for PRS follow a self- and co-regulatory approach, with the primary role of consumer protection falling to ICSTIS. ICSTIS is the industry-funded regulatory body for all premium rate-charged telecommunications services, and has responsibility for regulating the content and promotion of services through the approved Code. Ofcom has approved that edition of the ICSTIS Code under section 121 of the Act.
- 2.9 ICSTIS is responsible for receiving and investigating complaints from consumers and other persons about suspected breaches of the approved Code. ICSTIS has powers under that Code to give directions to, and in some cases impose sanctions on, certain categories of person involved in the provision of PRS. ICSTIS exercises those powers so as to protect consumers and ensure that the approved Code is respected and upheld, thus promoting the maintenance of public confidence in the PRS industry.
- 2.10 The provisions set out in the approved Code are targeted primarily at the parties with direct responsibility for the content and promotion of PRS (parties which the Code refers to as “Service Providers” (“SPs”)), rather than parties who do no more than provide the electronic communications networks and services which are used to provide PRS. ICSTIS has a range of sanctions that it can impose on SPs if they breach the Code. These include obtaining assurances about future behaviour, requiring that refunds be offered, imposing fines, barring the provision of particular services, and prohibiting particular individuals from operating services for a set period.
- 2.11 Although the obligations in the approved Code are focused on SPs, the approved Code also contains provisions directed at specified categories of providers of electronic communications networks and services which are used for the provision of PRS. These parties are referred to in the approved Code as “Network Operators” (“NO’s). ICSTIS may give directions to those parties in order to assist it in carrying

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<sup>3</sup> Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.

out its responsibilities under the approved Code. Typical examples of such directions include a direction to cease dealing with a particular business or individual, a direction to block access to particular numbers or services, and a direction to withhold revenues from a particular SP or in respect of a particular service. ICSTIS' ability to give directions to NO's is vital to ICSTIS' ability to uphold and enforce the approved Code, particularly in cases where urgent action needs to be taken to prevent serious harm being caused to consumers by an SP whose services appear to be being provided or promoted in an irresponsible, misleading or fraudulent way.

- 2.12 Under the current version of the approved Code, however, ICSTIS has not had the power itself to impose sanctions on NO's who fail to comply with their obligations under the Code. In such cases, ICSTIS' only enforcement option has been to refer the matter to Ofcom, which could then take action against the relevant NO under its "backstop powers". This is discussed below.

### **The role of Ofcom**

- 2.13 Ofcom has the power under section 120 of the Act to set conditions for the purpose of regulating the provision, content, promotion and marketing of PRS. Pursuant to section 120(3) the only provision that may be made by conditions imposed under that section is provision requiring the person to whom the condition applies to comply, to the extent required by the condition, with:

*“(a) directions given in accordance with an Approved Code by the Enforcement Authority and for the purpose of enforcing the provisions of the Approved Code; and*

*(b) if there is no such code, the provisions of the order for the time being in force under section 122.”*

- 2.14 The PRS Condition which regulates the provision, content, promotion and marketing of PRS took effect from 29 December 2003. The effect of the PRS Condition is to bind each and every person falling within the definition of "Communications Provider" in the PRS Condition to comply with (a) and (b) above. In general terms, that definition embraces providers of electronic communications networks and services which are used to provide PRS, but excludes mere content providers.
- 2.15 It is only in the event of an apparent failure by a person falling within that definition to comply with a direction given by ICSTIS under the approved Code that Ofcom's powers of enforcement would apply. Those powers to deal with a breach of the PRS Condition (i.e. a failure, by a "Communications Provider", to comply with an ICSTIS direction) are set out in sections 94, 95, 96, 123 and 124 of the Act and may, depending on the circumstances, include issuing an enforcement notification, imposing a financial penalty, or requiring the contravening provider to suspend (for an indefinite period) the provision of PRS provided by it.

### **Ofcom's review of the regulation of premium rate services**

- 2.16 In August 2004 Ofcom was asked by the DTI to undertake an urgent review of the regulatory framework for PRS in order to assess whether consumers were being adequately protected.
- 2.17 That request was prompted in part by the serious and widespread consumer harm which was then being caused by 'rogue' internet dialler software that was capable of being installed on consumers' home computers without the knowledge of those

consumers. Such software had the effect of changing the telephone number which the computer dialled in order to obtain 'dial-up' internet access, usually changing it to a telephone number carrying a high premium rate charge.

- 2.18 The review was also prompted by broader concerns relating to the PRS regulatory regime as a whole. In particular there was concern, shared by Ofcom, that the problems caused by internet diallers were only the latest in a series of examples of irresponsible and unethical behaviour carried out in connection with PRS that had caused considerable consumer detriment and damaged consumer confidence in the PRS industry. ICSTIS had also experienced serious problems in securing compliance from a number of SPs and, in some cases, NOs, in cases where it had been necessary to take urgent action to stop consumers being harmed by the apparent provision of PRS in ways which were deliberately designed to mislead or defraud. Such problems were felt both to be causing a high level of harm to consumers, and to be damaging the reputation and interests of companies in the PRS industry who were seeking to provide their services in a responsible and code-compliant way.
- 2.19 Ofcom's review was carried out between August and November 2004. During the course of the review, Ofcom identified a number of problems with the current regulation of PRS.
- 2.20 Ofcom's report, *The Regulation of Premium Rate Services*, was published on 9 December 2004. It is available on the Ofcom website at:  
[http://www.ofcom.org.uk/telecoms/ioi/nwbnd/prsindex/ntsprsditi/prs\\_review.pdf](http://www.ofcom.org.uk/telecoms/ioi/nwbnd/prsindex/ntsprsditi/prs_review.pdf)
- 2.21 The report made a number of detailed and incremental recommendations which Ofcom considered had the potential to significantly reduce the scope for consumer detriment arising from the use of PRS.
- 2.22 Recommendations 2, 3, 4, 8, 9, and 13 were requirements which were intended to be implemented by way of changes to the approved Code. These were set out in the report as follows:
- Recommendation 2: The Code should be amended to require Terminating Communications Providers ('TCPs') to provide ICSTIS with detailed information on the identities of the SPs with whom they contracted, including an address for service, emergency contact details and a UK customer service telephone number. They should also provide evidence of identity of relevant individuals. The Code should be amended to include an obligation on TCPs to take all reasonable steps to ensure that the information supplied to ICSTIS is accurate. The purpose of this obligation was to encourage TCPs to carry out proper due diligence on the SPs hosted on their networks. These changes were intended to make it more difficult for SPs to provide false information as well as discouraging fraudulent individuals from seeking to enter the market.
  - Recommendation 3: Additional obligations should be placed on TCPs under the Code to provide ICSTIS with information about exported numbers and the TCPs to which they have been exported when directed to do so.
  - Recommendation 4: The Code should be amended to include an obligation on TCPs not to make payments to their SPs for at least 30 days after calls have been made. This was intended to give ICSTIS more time to identify breaches of the Code and, where appropriate, to issue Directions to TCPs requiring them to withhold funds pending the outcome of an investigation.

- Recommendation 8: Where redress is ordered as a sanction against the SP and when directed to do so by ICSTIS, TCPs should make funds withheld by them available for consumers to claim redress for three months after an adjudication under the Code.
- Recommendation 9: SPs should be required in the Code to have adequate customer service and redress mechanisms, including a UK customer service telephone number. ICSTIS should monitor compliance with these obligations, including a programme of 'mystery shopping', and work with the industry to develop best practice guidance on customer service.
- Recommendation 13: The Code should be amended to enable ICSTIS to use Directions to impose sanctions, including fines, directly on TCPs where they fail to meet their obligations under the Code.

2.23 In light of evidence that current payment structures continued to result in networks releasing monies to SPs rapidly, and represented a significant risk to the effective regulation of PRS, Ofcom, ICSTIS and DTI agreed to introduce the requirement to withhold funds (recommendation 4) on an emergency basis in advance of the more general consultation on the Code. In particular, there was concern that commercial practices which were then prevalent allowed the outpayment to SPs of revenues accrued in respect of their PRS on a weekly or twice-weekly basis. Consequently, 'rogue' SPs were able to generate illegitimate profits quickly and divert those profits for the benefit of the individuals behind the scams before ICSTIS had time to investigate complaints relating to those services and require the relevant NOs to withhold revenue payments.

2.24 Accordingly, on 15 April 2005, ICSTIS published a consultation document on a proposed emergency code amendment to the then current (10th) edition of the approved Code seeking comments on including a specific obligation on NOs not to make payments to SPs for at least 30 days after the calls were made. ICSTIS received 20 responses to its consultation document and, in light of comments received, concluded that the proposed emergency amendment should be made. ICSTIS published a statement on 13 June 2005 setting out its conclusions.

2.25 On 27 June 2005 Ofcom published a document inviting comments on whether Ofcom should approve the proposed amendment. In light of the comments received, Ofcom decided to approve the amendment under section 121(6) of the Act. The Notification of Ofcom's approval of the emergency code amendment is available on the Ofcom website at: <http://www.ofcom.org.uk/consult/condocs/icstis/statement/ecpa.pdf>

2.26 Ofcom's other recommendations which were intended to be implemented by way of changes to the ICSTIS Code were not, however, implemented at that time.

### **ICSTIS' development of the draft Code**

2.27 In the course of developing the draft Code, ICSTIS has considered carefully the recommendations put forward by Ofcom in its report to the DTI. Provisions have been included in the draft Code with the effect of implementing the relevant recommendations made in that report.

2.28 However, ICSTIS' review was not confined solely to implementation of Ofcom's recommendations. ICSTIS re-examined all areas of the operation of the current ICSTIS Code and the appropriateness of the standards set out in the Code.

- 2.29 ICSTIS issued a consultation document on 28 July 2005 seeking comments on an earlier version of the draft Code. The consultation document is available on the ICSTIS website at: <http://www.icstis.org.uk/pdfs/11thCodeCondoc280705.pdf>
- 2.30 ICSTIS received 29 responses to its consultation document and, in light of the comments received, made further modifications to the draft Code, and submitted the draft Code to Ofcom for approval on 18 May 2006. ICSTIS' statement setting out the version of the draft Code for the purpose of Ofcom approval was published on the same day. The statement is available on the ICSTIS website at: [http://www.icstis.org.uk/pdfs\\_code/11thCode\\_final\\_statement.pdf](http://www.icstis.org.uk/pdfs_code/11thCode_final_statement.pdf)
- 2.31 The version of the draft Code which was submitted to Ofcom by ICSTIS was a modified version to that which ICSTIS consulted on. This was because ICSTIS has made certain modifications to the draft Code in the light of the consultation responses it received in response to its consultation document and following discussions with Ofcom.

### **Ofcom's consultation document**

- 2.32 On 8 June 2006, Ofcom published a consultation document, *Approval of the ICSTIS Code of Practice (11<sup>th</sup> Edition)*, in which it invited written views and comments on its proposed approval of the draft Code by 10 July 2006. In its consultation document, Ofcom set out that that, having given preliminary consideration to the provisions of the draft Code, it was minded to approve the draft Code on the basis that it was satisfied that:
- a) the Code contained provisions for regulating, to such extent as Ofcom thought fit, the arrangements made by the providers of PRS for promoting and marketing those services (the test in section 121(1) of the Act);
  - b) that all of the requirements in section 121(2) had been met (these tests are set out further below); and
  - c) that, having regard inter alia to the provisions of the Code, it was appropriate for Ofcom to approve it.
- 2.33 Ofcom's consultation document is available on the Ofcom website at: <http://www.ofcom.org.uk/consult/condocs/icstiscode/icstiscode.pdf>

## Section 3

# Responses to the consultation and Ofcom's comments

- 3.1 Ofcom received a total of eight responses on its proposed approval of the draft Code. A list of the respondents who submitted responses is attached at Annex 1. The responses themselves are available for viewing on the Ofcom website at: <http://www.ofcom.org.uk/consult/condocs/icstiscode/responses/>

## Respondents' comments

- 3.2 **BT** raised no objections to the proposed approval of the draft Code, and was pleased to see that ICSTIS had taken on board many of the comments raised by both BT and industry. BT was also pleased to see that the draft Code allowed for every part of the PRS value chain to be regulated, ensuring that it would be clear which party could be held accountable should problems arise. BT was also pleased that the code was becoming more technology neutral and therefore more 'future proof'.
- 3.3 **Victoria Russell and Emanuela Lecchi of Charles Russell LLP, in their joint response with Juliette Levy, (together, 'VR')** opposed the approval of the draft Code, arguing that it would subject industry players to unprecedented levels of scrutiny without applying the safeguards usually adopted in the context of public bodies. It also argued that the timing for the introduction of the draft Code was inappropriate and premature in view of the forthcoming Ofcom review of the PRS regulatory regime and the outstanding ICSTIS consultation on consumer refunds. VR argued that approval of any new version of the ICSTIS Code should await the completion of the Ofcom review and the ICSTIS consumer refunds consultation.
- 3.4 VR was, in particular, concerned about the legality of the proposals in the draft Code which, when considered in the light of all duties, functions and factors to be taken into account by Ofcom (and, by implication, by ICSTIS) under the Act, appeared to be illegal because:
- they seemed to run contrary to the proportionality principle;
  - they appeared to be contrary to the principle that the regulator would exercise its powers with a bias against intervention;
  - they did not seem to respect the principle that when regulation is imposed it should be the least intrusive possible regulation;
  - they appeared to be being introduced without a proper benefit analysis and impact assessment review.
- 3.5 VR also feared that some of the proposals might result in the delegation by ICSTIS of its regulatory powers to NOs and might therefore be contrary to principles of administrative law. In addition, VR was concerned by the level of burden which the draft Code would impose on NOs (for example, with regard to establishing the identities and credentials of the SP customers).

- 3.6 VR also argued that there was no imminent or significant risk to consumers that required the immediate implementation of the draft Code, and that measures introduced by Ofcom/ICSTIS over recent months had already adequately dealt with recent instances of fraud and abuse. It noted that ICSTIS already had the power to shut down high risk/fraudulent services, and that any residual concerns related predominantly to the application and enforcement of the Code by ICSTIS. In that regard, VR made a number of points concerning ICSTIS' enforcement of the existing Code, arguing that ICSTIS seemed to get away with a style of regulation that the established regulators would not be allowed to contemplate. VR also stated that the draft Code would enable ICSTIS to act in a cavalier fashion, picking and choosing who it enforced requirements against (whether the NO, SP or Information Provider ('IP')) irrespective of that party's own culpability.
- 3.7 **Coulomb** had two concerns.
- 3.8 The first was the short period for consultation given that the draft code Ofcom was seeking comments on was significantly different to the version published by ICSTIS for the purpose of its consultation.
- 3.9 The second related to the definition of NO and, in particular, the distinctions between the various sorts of NO found in paragraph 11.3 of the draft Code onwards. Coulomb stated that the new definition would have the effect that its customers would no longer be able to defined as NO's under the draft Code meaning that they would therefore be responsible for the code breaches of their clients.
- 3.10 Coulomb argued that this would place it at a competitive disadvantage when compared to other networks who would be obliged to obtain approval for its metering and billing system, and therefore suggested that the definition of "lead network" be rewritten to encompass providers of Publicly Available Telephone Services (PATS).<sup>4</sup>
- 3.11 Coulomb also raised concerns that, as drafted, the provisions of the draft Code breached the requirements of section 121(3) of the Act, and, in addition, failed to meet their objectives since an ISDN-2 circuit from BT connected to a PABX could be convincingly argued to meet the requirements of paragraph 11.3.3(iii) (which formed part of the definition of 'NO' in the draft Code).
- 3.12 **H3G** opposed approval of the draft Code as it did not believe that the application, impact and effectiveness of the draft Code could be reasonably assessed until Ofcom had clarified the scope of PRS services covered by the Code. It stated, in that regard, that industry and Ofcom had differing interpretations of the current PRS Condition which set out the scope of Ofcom's remit, and that stakeholders were not in a position to consider whether the draft Code was fit for the purpose until Ofcom had concluded its consultation on proposed amendments to the PRS Condition.
- 3.13 H3G requested that Ofcom first carry out a policy review of premium rate regulation in order to properly determine the appropriate scope of such regulation. In addition,

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<sup>4</sup> The majority of traditional voice services in the UK fall within the definition of PATS, as set out in Article 2 of the Universal Services Directive (Art 2 of the USD). PATS is defined as follows: "a service available to the public for originating and receiving of national and international calls and access to emergency services through a number of number sin a national or international telephone numbering plan, and in addition may, where relevant, include one or more of the following services: the provision of operator assistance, directory enquiry services, directories, provision of service under special terms, provision of special facilities for customers with disabilities or with special social needs and/or the provision of non-geographic services"

H3G placed on record its deep concern at Ofcom's approach to premium rate regulation, and argued that if Ofcom sought to apply regulation to all mobile services, and specifically own portal services, without first reviewing the current scope and underlying policy of such regulation, Ofcom would fail to satisfy its statutory duties and would be acting without a proper factual and legal basis. H3G's reasons for this were as follows:

- *Transparent:* H3G argued there could be no transparency in the consultation on the draft code as Ofcom had yet to determine which services would be covered under the draft Code. This was because it had yet to conclude its consultation on the PRS condition which would define those categories of PRS to which the draft Code would apply.
- *Accountable:* In H3G's view, Ofcom had not sought to be accountable to the industry in its review of premium rate regulation and that, in particular, that Ofcom had failed to address points raised about premium rate regulation prior to proposing further regulatory activities.
- *Proportionate:* H3G argued that there was no justification for assuming that Ofcom was seeking to approve the draft Code to apply to all mobile services, including own portal services. It noted that Ofcom's justification for applying regulation to all mobile services, including own portal services, was predicated on the basis that the supposed ambiguity of the existing PRS condition resulted in consumer harm. However, as it explained in detail in its response to the June 2006 consultation on the PRS condition it argued this justification was unfounded and that there was no evidence that such ambiguity has caused any consumer harm.
- *Consistent:* H3G argued that if Ofcom would be unable to satisfy the regulatory principle of consistency should it give approval to the draft Code before first determining the appropriate policy and scope.
- *Targeted:* H3G argued the combined effect of extending the PRS Condition and the approval of the draft code would be to apply PRS regulation to own portal services. H3G argued there was no evidence to suggest that own portal services give rise to consumer harm, and therefore this would be contrary to the principle of targeted regulation.

3.14 H3G, without prejudice to its legal position, made comments to cover a situation where the PRS Condition was extended to cover mobile information services provided by parties other than the mobile network operators. In particular, it argued one of the key issues was that the draft code would need to be amended so that it worked effectively for data services (e.g. the regulations would need to cover various forms of pricing (and not just timed calls) as well as various methods of communicating pricing and service information to customers).

3.15 H3G also stated that it had consistently commented that the approved Code and associated guidelines fell short in providing the relevant protection for consumers of mobile information services that are supplied by, and promoted by, third parties. It therefore welcomed the opportunity to reiterate its commentary to the wording of the draft code which it initially made in response to the ICSTIS consultation on the draft code. In particular, H3G believed that the language and references used should be relevant to the forms of technology and the use by consumers of this technology. It argued that it found the language was still predominantly biased toward the premium

rate fixed-line telephony services and made little attempt to encompass the mobile sector.

3.16 Accordingly, H3G argued that if the PRS Condition were to be extended to mobile services (which it disagreed with), it must at a minimum be amended to take account of the ways in which such services were being provided. H3G provided a list of a number of specific changes to the wording of the draft Code which it suggested it would be necessary to make.

3.17 **Mobile Broadband Group ('MBG')** strongly supported the 18 recommendations and was reasonably content that the draft Code implemented the relevant recommendations. It commented, however, that it was unfortunate that approval was being sought ahead of Ofcom's review of the scope of PRS regulation. It noted that the prior permissions regime and the 30 day payment withhold rules appeared to have dealt with the worst excesses, and there was therefore less urgency, and that a more logical approach would have been to review the scope of regulation first.

3.18 MBG also stated there were two points of detail outstanding:

- the first was in relation to *subscription services, and mandating the availability of the STOP command*. MBG argued that this was not always relevant – e.g. for subscription services delivered via i-mode, or TV or magazines in which the monthly payment buys the subscriber access into the service. It noted that these models were increasingly prevalent in the mobile market and it was important for the code to be clear that the subscription services to which the STOP command applies are only SMS subscription services; and
- secondly, it raised a point on concern *on section 9.3 of the draft Code*. It suggested that it was wrong that utilisation by an NO of the procedure for appealing against an ICSTIS direction did not immediately result in the direction being suspended. In cases where the ICSTIS direction was for a service to be suspended, and where that direction was given prior to the NO having an opportunity to state its case, – the procedure looked a bit like 'suspend first and ask questions later'. Given the reference to any of the procedures in 9.1, it would be a more equitable and proportionate process if ICSTIS could only suspend after at least 9.1 a-c had taken place - i.e. once an operator has had a chance to state its case.

3.19 MBG also argued that the code review missed the opportunity to undertake a major overhaul of the code, so that only the broad principles were written into the code, with the detailed service by service rules held in guidance notes.

3.20 **Network for Online Commerce ('NOC')** opposed approval of the draft Code on the basis of the following outstanding areas of concern:

- *consumer refunds*: there was an outstanding ICSTIS consultation which had not yet completed involving consumer refunds, and it was not appropriate that this should be included in the draft Code at this time.
- *definition of NO*: NOC was unhappy with the proposed definition and requested further clarification. In particular, it noted that the proposed definition did not appear to differ significantly from the current version and therefore was not clear about the purpose of the proposed change.

- *due diligence*: while NOC supported the use of the terms ‘reasonable’ and ‘satisfactory’ as a movement away from an overly prescriptive code, it stated that it was essential that supporting guidelines, help notes or statements of expectation were in place to offer guidance on how these provisions would be interpreted.
- *directors’ information*: NOC did not agree with the requirements listed under section 2.3.1, and argued that much of this information was available from Companies House. It also noted that this appeared under section 3.2.2.(d) where SPs are required to provide personal information on company directors.
- *retrospective enforcement*: NOC requested clarification on whether the draft Code, as written, would apply to new NO and SP obligations retrospectively. It argued that if this was the intention it would not be acceptable.
- *implementation timescales*: NOC argued four weeks was impractical, and that implementation of the obligations for new contracts would require time to plan and introduce. It considered a period of between 12 and 16 weeks would be reasonable.

- 3.21 The **United Kingdom Competitive Telecommunications Association (“UKCTA”)** raised similar issues.
- 3.22 First, on *consumer refunds*, UKCTA believed that Ofcom should not approve the draft Code because the issue of consumer refunds remained outstanding. It noted that ICSTIS had issued a consultation on this matter on 11 November 2005 which had not been concluded. UKCTA argued that this was a complex issue and following publication of the ICSTIS consultation, UKCTA and other industry representatives held discussions with ICSTIS to explain the complexity and the very real practical issues for effecting the actual payment to consumers.
- 3.23 On the *definition of NOs*, UKCTA was concerned that the proposed definition set out in Section 11.3.3 was inadequate to ensure that less scrupulous providers did not benefit from the protection that is offered through the draft Code. It understood the original intention was to frame the definition in such a way so as to enable the regulator to clearly identify the NO in the PRS value chain through linking to Ofcom’s metering and billing definition. While the proposed new definition continued to encompass this, UKCTA was unclear why the two additional limbs had been added, and was concerned that these substantially diluted the concept of who would be considered an NO to the extent that the definition was now very close, if not the same, as the definition used in the approved Code.
- 3.24 UKCTA also argued that the draft Code would have a significant impact on NOs and that the proposed implementation period of four weeks was inadequate in light of the work required to ensure compliance with the draft Code. UKCTA therefore strongly urged Ofcom to extend the implementation period to eight weeks.
- 3.25 UKCTA also requested confirmation from Ofcom that none of the requirements in the draft Code would be subject to retrospective application. UKCTA highlighted the example of whether compliance with the due diligence requirements would only be applicable to contracts signed after the draft Code comes into force.
- 3.26 In addition, UKCTA welcomed the ICSTIS concept of Help Notes, Statements of Expectation and Notices.

- 3.27 **Thus** fully supported the submissions made by UKCTA and NOC, and argued that Ofcom should not approve the draft Code on the same grounds, namely:
- *consumer refunds*: the ICSTIS consultation on consumer refunds remained outstanding and required further work.
  - *definition of NO*: the proposed definition of NO was confusing and diluted ICSTIS's original intentions for narrowing the definition.
  - *due diligence requirements*: the draft Code imposed significant obligations on NOs, and the proposed period for implementation did not provide sufficient time to bring into force these measures. It also argued that it was not clear whether the draft Code applied retrospectively to its existing customers and therefore their contracts. It also felt that there was a need for ICSTIS to provide guidelines, help notes or statements of expectation to ensure the proper interpretation of the new provisions by NOs.
  - *implementation*: the implementation period should be extended to eight months in order to ensure that there was sufficient time to fully implement the changes required by the draft Code, particularly those around due diligence.

### Ofcom's comments

- 3.28 Ofcom has carefully considered all responses received. Of the responses received, only BT raised no objections to approval of the draft Code. All other responses raised concerns relating to approval of the draft Code, and argued that it was inappropriate for Ofcom to approve the draft Code at the current time. The main areas of concern raised by respondents during the consultation were as follows.

### Refunds

- 3.29 While there was broad support in terms of the principle of providing refunds to consumers, different views are held within the industry as to how this should work in practice. In order to address some of the outstanding concerns in relation to refunds, Ofcom notes that ICSTIS held a workshop on consumer refunds and hosted a series of working sessions on implementation issues arising from the ICSTIS Code at which the issue of consumer refunds was raised. This culminated in ICSTIS publishing a statement, *Statement on the provision of refunds to consumers and the development of industry best practice for customer service*, on 3<sup>rd</sup> October 2006. The ICSTIS statement is available on the ICSTIS website at: [http://www.icstis.org.uk/pdfs\\_news/Statement\\_Refunds.pdf](http://www.icstis.org.uk/pdfs_news/Statement_Refunds.pdf)
- 3.30 The ICSTIS statement sets out the criteria it would use when awarding consumer refunds as part of a sanction when its Code is breached. The statement also clearly defines what was meant by a refund and the forms it should take. In publishing its statement, ICSTIS consulted extensively and received near unanimous support from across the industry for most of its proposals. The possible combinations of circumstances which are likely to trigger an order to pay refunds include those where:
- there was an identifiable financial detriment to a consumer and a consequential gain to the SP;
  - there was wilful intent by the SP to deceive the consumer;

- the product or service was not supplied or was of a manifestly unsatisfactory quality;
  - the marketing or promotional material was fundamentally misleading in some way and misled consumers into purchasing something they would not otherwise have wanted; and
  - the product or service was inappropriately priced to disguise its true cost (for example, describing the service as “free” when it is clearly not).
- 3.31 In addition, as part of its statement, ICSTIS also announced that it would be inviting the industry to create a taskforce to develop best practice for customer care within the industry. Ofcom welcomes this initiative.
- 3.32 In light of these developments, Ofcom is satisfied that concerns raised in relation to consumer refunds have been to a large extent addressed, and that ICSTIS is continuing to address these issues in consultation with both industry and consumer groups. Furthermore, Ofcom notes that at almost any point in time there will be some area of PRS regulation (including, or affecting, the requirements of the ICSTIS Code) which is subject to debate or consultation, and that it would therefore be inappropriate to delay approval of any new version of the ICSTIS Code until all such issues had been finally resolved. PRS regulation will continue to evolve in the light of technological and other developments, and it remains possible for the Code to be modified (with Ofcom’s approval) where modifications are later thought to be desirable.

### **Network operator definition**

- 3.33 Coulomb, H3G, NOC, Thus and UKCTA raised concerns in respect of the proposed definition of NO. Also, a number of VR’s comments were related to the new definition of NO in the draft Code.
- 3.34 Coulomb was concerned that the new definition would mean that its customers would no longer be able to defined as NO’s and thereby avoid being held responsible for the code breaches of their clients. Coulomb argued that this would place it at a competitive disadvantage when compared to other networks who were obliged to obtain approval for their metering and billing systems, and whose customers would therefore have the status of NO. Coulomb suggested that the definition of “lead network” be rewritten to encompass operators which offered PATS services.
- 3.35 As noted in its consultation document, Ofcom acknowledges the revised definition of NO may lead to some parties being subjected to obligations under the draft Code as NOs and SPs who were not subject to those obligations previously. However, as Ofcom also set out it, it does not believe that it follows that the draft Code discriminates unduly or that the new definitions of those parties is unnecessary or inappropriate.
- 3.36 ICSTIS has historically faced difficulties in securing compliance with Code requirements from certain persons who were either SPs or NOs under the approved Code, but were either unable, or unwilling, to properly discharge their obligations as such. The effectiveness of PRS regulation is dependent on ICSTIS’ ability to secure prompt compliance with urgent directions to suspend services and/or withhold revenues. This is because irresponsible, misleading or fraudulent PRS have the potential to cause a very high degree of harm to consumers within a very short period of time (a weekend, days or even a few hours). ICSTIS’ ability to protect consumers

is therefore dependent on its being able to immediately identify, locate, and issue urgent directions to, the parties with responsibility for, and control over, the network being used to provide any particular PRS, and the new NO definition has been drafted with this in mind. That definition is designed to focus NO obligations on the parties with genuine 'physical' responsibility for providing the electronic communications networks and/or services used to provide the PRS – i.e. the persons in the best position to immediately suspend services, and/or withhold revenues, where required.

- 3.37 In addition, it is also necessary for ICSTIS to be able to identify a person with responsibility for the content and promotion of any particular PRS, even where a number of different entities contribute to the provision of the service, and that is why the definition of SP refers to the person who enters into a contract or arrangement with an NO. The ability of ICSTIS to identify NOs is therefore vital to the underpinning of the identification of SPs, particularly in circumstances of increasingly complex chains of commercial entities contributing to the provision of particular PRS.
- 3.38 Thus, while Ofcom understands Coulomb's concerns, Ofcom considers that it is appropriate for persons who do not themselves have physical responsibility for an electronic communications network to not normally be treated as NOs. Moreover, Ofcom believes that it is both appropriate and necessary that the persons with physical responsibility for the terminating network (e.g. Coulomb) should be required to comply with ICSTIS directions (for example, to terminate a service urgently or withhold revenues from its customers).
- 3.39 Further, Ofcom considers it to be appropriate that Coulomb's customers should be treated as SPs if they fall within paragraph 11.3.6 of the draft Code, which would only be the case if those customers fell within section 120(9)(a)-(d) of the Act. A person will only fall within section 120(9)(a)-(d) if he provides, or exercises editorial control over, the contents of a service, packages together the contents of the relevant service for the purpose of facilitating its provision, or makes available a facility comprised in the relevant service. Ofcom does not accept that it is inappropriate for a person who does one of these things to be held responsible if the service he is involved in providing is provided or marketed in a way which contravenes the requirements of the draft Code.
- 3.40 NOC, Thus and UKCTA all expressed concern about the purpose of the revised definition and, in particular, that this definition was inadequate to ensure that less scrupulous providers were not able to evade being captured. UKCTA, in particular, was unclear why the two additional limbs under section 11.3.3 (iv) had been included.
- 3.41 In responding to this concern, the first point to make is that getting this definition right is critical given the fundamental role played by NOs as part of the PRS regulatory regime. That said, there will always be an element of difficulty involved given the complex and varied nature of the 'value chains' by which PRS are provided. As already stated, it was evident that the current definition of NO was beset by various difficulties, and that a new definition which sought to apply a more objective and transparent test, was required. Following numerous discussions with ICSTIS, Ofcom considers that the definition adopted in the draft Code represents the best possible solution to a difficult problem, focusing NO obligations on lead networks and the parties who directly contract with lead networks (where such parties also fall within section 120 (10) or (11) of the Act), while at the same time retaining a 'saving' provision (in paragraph 11.3.3(iv)) to ensure that the potential for value chains in which there is no NO is avoided.

- 3.42 Ofcom therefore continues to believe that the new NO definition would focus regulation more clearly on the parties in the value chain who are best able to secure compliance with the obligations in the draft Code (whether by carrying out those obligations themselves or requiring other parties with whom they contract to carry out those obligations). Ofcom also believes that the new definition will lead to greater clarity, certainty and transparency in relation to the identities of the NO and SP in the value chain, enabling both ICSTIS and the regulated parties to understand much more easily the identities of the parties who are subject to NO and SP obligations under the draft Code.
- 3.43 Ofcom has also considered H3G's concerns that the proposed definition was too vague, and that, for example, there were a number of premium rate SMS SPs who were directly connected to H3G for the purposes of providing services, and that neither H3G or the provider would regard themselves as an NO in this context. Ofcom notes, however, that the draft Code expressly carves out from the NO definition those parties whose primary function is "to aggregate or collate content of services for third parties and/or to acquire network access through wholesale arrangements which it then provides to third parties on a retail basis" unless "there is no other network operator identifiable who is involved in the provision of the relevant premium rate service" (paragraph 11.3.5). Whether or not H3G or their SPs would be caught within the definition depends entirely on what their role is in relation to the provision of the PRS, and whether or not they fall within paragraph 11.3.3 of the draft Code, not on how those parties perceive themselves.
- 3.44 Ofcom notes that two alternative definitions were proposed – one by Coulomb and another by H3G. Coulomb suggested that the definition of "lead network" be rewritten to encompass operators which offer PATS services. H3G suggested that the definitions in section 32 of the Act offered a possible alternative, and that expressions such as 'communications network provider' and 'communications service provider' have more meaning than the notion of an NO which has implications of the previous licensing regime.
- 3.45 Having carefully considered these suggestions, Ofcom remains of the view that the proposed definition as set out in its consultation document remains a more effective option.
- 3.46 In respect of Coulomb's proposal, Ofcom believes that the suggested approach of linking the definition of NO to PATS providers would potentially widen the definition to an extent that would be contrary to the objective of capturing the persons with genuine physical control over the relevant electronic communications networks and tightening the NO definition to provide greater clarity, certainty and transparency in respect of the identification of NOs.
- 3.47 In respect of H3G's comments, it was not clear to Ofcom whether H3G were commenting on the latest version of the definition. Ofcom notes that the providers of PRS are identified within the Act in section 120, and that the definitions of NO and SP in the draft Code are intended to capture only those parties. The providers of PRS identified in section 120 of the Act are not the same as those covered by the broad definitions which could be derived from section 32. Using the definitions in section 32 to define the NO in the Code would therefore be inappropriate, since one of the objectives of the definition is to identify particular sub-sets of the persons falling within section 120 who are subject to particular code obligations (either those of an NO or an SP).

- 3.48 Ofcom notes that ICSTIS has announced its intention to publish a helpline on determining whether parties are an NO for the purpose of the ICSTIS Code. Ofcom welcomes this, as it is likely to be of help to persons providing services within the PRS industry in determining which code obligations they are subject to.

### Due diligence

- 3.49 NOC, Thus, VR and UKCTA raised concerns relating to the proposed new due diligence requirements.
- 3.50 NOC supported the use of the terms 'reasonable' and 'satisfactory' as a movement away from an overly prescriptive code. However, it noted that it was essential that supporting guidelines, help notes or statements of expectation were in place to offer guidance on these provisions. This view was shared by Thus. Ofcom has discussed this issue further with ICSTIS and ICSTIS has confirmed its intention to develop help notes for NOs on complying with their due diligence requirements under the draft Code.
- 3.51 NOC also raised some concerns in relation to directors' information and, in particular, did not agree with the requirements listed under section 2.3.1, and argued that much of this information was available from Companies House. It also noted that this appeared under section 3.2.2(d) where SPs are required to provide personal information on company directors. A similar point was made by VR, who argued that the due diligence requirements were disproportionate, and also suggested that ICSTIS would be at risk of unlawfully delegating its regulatory powers to NOs.
- 3.52 Ofcom has noted the concerns expressed by some consultation respondents in relation to directors' information and other due diligence requirements. However, we continue to believe that the new due diligence requirements, which have their origins in Recommendation 2 of Ofcom's report to the DTI, are an appropriate and important consumer protection measure. As set out in that report, Ofcom was concerned that there were insufficient incentives for TCPs to carry out proper due diligence in respect of the SPs with whom they dealt. ICSTIS has experienced real problems in some cases as a result of NOs identifying SPs to ICSTIS which turned out to be non-existence companies, or entities trading under a false name or address, or who had 'hijacked' the identity of another company. This made it extremely difficult, and sometimes impossible, for ICSTIS to identify the true SP and hold that person to account.
- 3.53 Against that background, Ofcom believes that the due diligence requirements specified in the draft Code are absolutely essential both to protect consumers and to ensure the effectiveness of the regulatory regime. In particular, Ofcom believes that the retention of information about directors has an important role to play as a safeguard against dealing with persons trading under false or 'hijacked' business identities, as well as in enabling individuals who use PRS as a vehicle for criminal conduct to be subsequently identified to law enforcement authorities and/or barred by ICSTIS from involvement in the provision of PRS. Accordingly, Ofcom does not agree that those requirements are disproportionate in any way.
- 3.54 In relation to the concern specifically expressed by VR, Ofcom sees no basis for the suggestion that ICSTIS would be delegating its regulatory powers to NOs. In Ofcom's view, it is appropriate that NOs should be required to carry out due diligence checks on the persons to whom they provide services, particularly since those persons may use the services provided to cause serious harm to consumers

and evade proper regulatory control. If an SP is suspected of breaching its obligations under the draft Code, ICSTIS will seek information from the NO so as to identify the SP concerned and will then undertake its own investigation. Any regulatory sanction will be imposed on the NO by ICSTIS, and not by the NO. Accordingly, there is no delegation of ICSTIS' regulatory responsibilities.

- 3.55 The issue of retrospective application was raised by NOC, Thus and UKCTA. This issue concerned whether the due diligence requirements would apply to NOs in respect of SPs to whom the NO was already providing services at the time when the draft Code came into force.
- 3.56 Ofcom agrees that there is a need for clarity on this point. Ofcom has discussed the issue further with ICSTIS, and believes that the new provisions should apply to all contracts, including those signed prior to the new due diligence requirements coming into force. That said, Ofcom notes the concerns raised by various industry members about 'retro-fitting' the new diligence requirements into existing contracts which pre-date the new requirements. On balance, Ofcom accepts the need for a pragmatic approach, and the need for a longer transitional period in respect of contracts signed before the publication of this statement and Notification. Ofcom therefore proposed to ICSTIS that there should be an implementation period in respect of due diligence requirements in relation to pre-existing service provision arrangements, and that this period should run for ten months starting from the draft Code coming into force. ICSTIS supports this view. Ofcom believes that responsible networks will want to review their contracts in the normal course of their business, and that this provides a reasonable and appropriate period of time for them to be able to do so. For the avoidance of doubt the new due-diligence requirements will apply to all new contracts with SPs from the date of publication of this statement and Notification.
- 3.57 Accordingly, Ofcom, in discussion with ICSTIS, agrees that the draft Code should be amended to provide further clarity on this point (see new paragraph numbered 2.3.4).

### Implementation

- 3.58 NOC, Thus and UKCTA argued that the proposed implementation period of four weeks was inadequate in terms of the work required to ensure compliance with the new provisions. NOC argued for a period of 12 to 16 weeks, Thus argued for eight months and UKCTA argued for eight weeks.
- 3.59 Ofcom has carefully considered these concerns, and accepts that there may be a degree of systems development required. Ofcom has therefore accepted that it would be appropriate to allow a period of longer than four weeks for the coming into force of the draft Code. Ofcom has decided to extend the implementation period to eight weeks.

### Scope review

- 3.60 A number of respondents did not support approval in advance of the conclusion of Ofcom's review of the scope of PRS regulation. H3G stated that it opposed approval of the draft Code at this time as it did not believe that the application, impact and effectiveness of the draft Code could be reasonably assessed until Ofcom had clarified the scope of PRS regulation. MBG argued that it was unfortunate that approval was being sought ahead of the Ofcom scope review.

- 3.61 Ofcom has given careful consideration as to whether it would be appropriate to delay approval of the draft Code until after the review of scope had finished. On balance, Ofcom does not consider it necessary or desirable to await completion of the scope review prior to giving approval to the draft Code. This is because, as set out in Ofcom's consultation document, Ofcom believes that the new aspects of the regulatory regime that the draft Code would introduce are likely to ensure that ICSTIS regulation is more transparent and effective in protecting consumers; for example, by making it easier to identify the parties which are subject to the draft Code as NOs or SPs, and by reducing the potential for PRS to be used as a means to provide misleading and/or fraudulent services. These are changes which have been discussed over many months, from the time of Ofcom's report to the DTI onwards. In addition, the draft Code's specific provisions in respect of DQ services and subscription services, in particular, are necessary to ensure that the protections offered to consumers under the draft Code keep pace with changes in technology and the PRS industry. It would not be desirable for these changes to be delayed any further.
- 3.62 The review of scope which is now underway is a separate exercise to Ofcom's consideration of the draft Code submitted to it by ICSTIS. That review is intended to consider how PRS regulation should further evolve in response to the emergence of new commercial services in the mobile, fixed telephony and broadcast sectors as well as possible new routes for content delivery, such as broadband and VoIP. The draft Code has a number of important consumer protection advantages over the approved Code, and also has the advantage of containing provisions to address some new services and certain developments in the ways in which PRS are being provided. The scope review may well identify further changes which ought to be made. However, completion of the scope review will take some time, and a considerable amount of time and effort has already been invested, over many months, by ICSTIS and industry in the development of the draft Code. Since Ofcom regards the draft Code as having important advantages over the approved Code, Ofcom considers it appropriate to approve the draft Code now. That approval does not, of course, preclude the Code being modified or replaced to implement any changes in PRS regulation which the review of scope ultimately deems to be appropriate.
- 3.63 Ofcom notes that H3G's response was largely predicated on its belief that Ofcom was seeking to extend regulation by way of a proposed modification to the PRS Condition. That modification has now been made (see *The Conditions regulating Premium Rate Services*<sup>5</sup>, published on 17 October 2006). As set out in that document, however, Ofcom does not agree with H3G's contention that it is extending the scope of regulation by that modification. On the contrary, the modification did no more than reduce the scope for confusion as to the persons who were already subject to that Condition (Ofcom's full consideration on this matter is set out, in detail, in its October 2006 statement at paragraphs 3.28 to 3.70). Accordingly, Ofcom does not agree that the proposal to make that modification was a good reason for delaying the approval of the ICSTIS Code. That modification has, in any event, now already been made, and will not affect the breadth of the review of scope in any way.

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<sup>5</sup> <http://www.ofcom.org.uk/consult/condocs/prsconditions2/statement/prsconditions.pdf>

## Detailed comments about provisions contained in the draft Code

- 3.64 H3G and MBG made a number of comments in respect of provisions contained in the draft Code. In addition, VR made a number of specific points which Ofcom also considers it appropriate to respond to directly.

### **H3G**

- 3.65 Ofcom notes that H3G's comments were provided on the basis of the draft Code as consulted on by ICSTIS prior to being submitted to Ofcom, rather than on the basis of the modified version on which Ofcom consulted.

### Definitions

#### Paragraph 11.3.11

- 3.66 H3G criticised the ICSTIS definition of "call" on the basis that it encompasses messaging, communications and IP based browsing. It argued that there should be different terms used for time-based and event-based activity.
- 3.67 Ofcom understands the reasons why it may be felt that the word 'call' does not, as a matter of ordinary language, easily encompass certain ways in which PRS are accessed. However, there is a clear need (as a matter of practical drafting) for the draft Code to use a convenient shorthand to refer to communications through which PRS are accessed. In Ofcom's view, the definition of 'call' in paragraph 11.3.11 is sufficient to ensure that the meaning of that word, as used in the Code, is clear, and does not exclude access to PRS by methods other than a traditional voice call.

### Administrative Provisions/Service Providers

#### (Now paragraph 3.5)

- 3.68 H3G queried whether there was a publicly accessible list of individuals who have been prohibited from being involved in the provision of PRS. Ofcom understand that there is, and that this is available on the ICSTIS website, and updated as necessary. H3G argued that if there was such a list, it should then be referred to in the draft Code. Ofcom has discussed with ICSTIS. ICSTIS' position is that this is not necessary provided that the relevant list is published in a way that it can easily be accessed. Ofcom is content with this, but suggests that ICSTIS may wish to set out in any relevant help note the place(s) where the list is published and can be found.

### General Provisions applicable to all premium rate services

#### Paragraph 5.4.2

- 3.69 H3G said that "unreasonably prolonged or delayed" is open to various interpretations and needed greater clarity to be effective in terms of regulation. Ofcom has discussed with ICSTIS. ICSTIS' position is that this phrase has been in use since the Code started and is often used. It could not recall any decision which it had made on the application of this phrase which had been successfully challenged.
- 3.70 In any event, Ofcom does not consider that the use of the phrase (or a similar phrase) can be avoided in favour of something more specific. PRS are now provided

in many different ways and it would be impractical (and perhaps even impossible) to attempt to set out a comprehensive description of what could, in any particular situation, constitute “unreasonably prolonged or delayed”. Adjudicatory bodies are often required to deal with concepts (such as ‘reasonableness’) which require a degree of common sense assessment and take their colour from the background circumstances.

#### Paragraph 5.7.2

- 3.71 H3G wanted pricing information to be static as well as horizontal etc. Ofcom has discussed this with ICSTIS. ICSTIS did not feel that this would be appropriate. Scrolling text pricing information could be acceptable in some cases – such as on a TV screen where a considerable amount of information needs to be conveyed. Having considered the matter carefully, Ofcom does not consider that it should refuse to approve the draft Code unless it requires that pricing information be given in a static form. Nevertheless, Ofcom strongly agrees with the sentiment behind H3G’s suggestion: namely, that pricing information should be displayed clearly so that consumers know what they would be charged if they decide to access the PRS being offered to them in an advertisement or some other form of marketing. That is effectively what paragraph 5.7.2 of the draft Code requires. Ofcom would not regard it as acceptable for pricing information to be given by scrolling text unless this was sufficient to ensure that potential purchasers of the relevant PRS were made clearly aware of the costs of accessing the service.

#### Provisions relating to live services

##### Paragraph 6.3.1 (c)

- 3.72 H3G suggested that the operator of a live service should be defined to avoid confusion with “network operator”. Ofcom has discussed with ICSTIS. ICSTIS argued that this was unnecessary on the basis that network operators were never, throughout the Code, referred to simply as operators. Ofcom agrees, and sees little scope for confusion between the terms ‘network operator’ and ‘live operator’ to occur in practice.

##### Paragraph 6.4.2 (d)

- 3.73 H3G suggested that it should be the IP who must take action to cut off a caller who is under 18 rather than the SP. Ofcom disagrees that the Code should provide for this. There are two sets of obligations in the draft Code: one set for NOs and another for SPs, the latter set being concerned with the content, provision and marketing of PRS, while the former are directed at securing the effectiveness of the regulatory regime. Since the provision of inappropriate services to minors is clearly connected with the actual provision of the service, it is right that the relevant obligations should be placed on the SP. That would not preclude ICSTIS from, in any appropriate case, dealing directly with the relevant IP in relation to a suspected breach of that obligation. In that regard, Ofcom refers to paragraph 8.1.4 of the draft Code.

#### Additional provision relating to specific categories of service, chat, contact and dating

##### Paragraph 7.3.1

- 3.74 H3G sought clarification as to whether “virtual video chat” was excluded or covered. Ofcom has discussed this with ICSTIS. ICSTIS noted that the definition of ‘virtual chat services’ in the draft Code was straightforward in that it identified services which “enable two or more users to exchange separate messages, whether by recorded voice, text or pictures while engaged in the service.” If that is what ‘virtual video chat’ services do, then they will be covered by the definition of ‘virtual chat services’. Ofcom does not regard there as being any scope for genuine confusion with regard to that definition.

Paragraph 7.3.2 (a)

- 3.75 H3G suggested that the Code include a definition of “authorised user”. Ofcom has discussed this with ICSTIS and does not regard the meaning of this expression as unclear. It is clearly intended to refer to a person who is not authorised to access the service by the person who pays the phone bill.

Paragraph 7.3.2 (e)

- 3.76 H3G considered that services placed behind age verification and access controls should be exempt from this clause which required SPs to take reasonable steps to discourage sexually explicit chat on generally advertised services. Ofcom has raised this suggestion with ICSTIS. Having considered the matter, both ICSTIS and Ofcom are agreed that such an exclusion would not be appropriate. The question in each case is whether the SP has taken the required reasonable steps. Age verification and access controls are simply one way in which that requirement may be met.

Pay for Product services

Paragraph 7.10.2

- 3.77 H3G commented that there was a suggestion between paragraphs 7.10.1 and 7.10.2 (reading them together) that the Distance Selling Regulations 2000 did not apply to services where products were received as part of a subscription service (because they are defined as “pay for product”). Ofcom has raised this with ICSTIS, who stated that the reference to the Distance Selling Regulations was included to assist SPs and could be removed without affecting the provision in any substantive way. In any event, Ofcom notes that the draft Code is not capable of affecting the applicability of the Distance Selling Regulations in any way. All persons involved in the provision of PRS should ensure that they are complying with all relevant legal requirements, as well as with the provisions of the ICSTIS Code.

Sexual Entertainment Services

Paragraph 7.11.6

- 3.78 H3G queried how the £30 limit would apply to services provided over mobile phones where the charges were made on a ‘per message’ basis. Ofcom raised this with ICSTIS. ICSTIS noted that the phrasing of the provision was that all sexual entertainment services must “cost no more than £30”. Accordingly, the limit applies to the cost to the customer of receiving the sexual entertainment service, whether it is billed by time or per message. Ofcom notes that ICSTIS has a discretion to grant specific permission for a service provider to exceed the £30 limit.

#### Paragraph 7.11.7

- 3.79 H3G objected to ICSTIS' requirement for content rating as an inappropriate extension of ICSTIS' remit. Ofcom agrees with ICSTIS, however, that the requirement is important and necessary to assist parents in ensuring that their children do not access inappropriate content. Neither the Home Office Task Force nor Ofcom's media literacy programme constitute reasonable alternative avenues for requiring providers of PRS to protect children in this way.

#### Paragraph 7.11.7

- 3.80 H3G suggested that "sexual entertainment services" should also include gambling and stock trading, i.e. anything legally restricted to an adult audience. Ofcom has raised this with ICSTIS. However, Ofcom does not consider that gambling and stock trading can sensibly be regarded as 'sexual entertainment'. There are other code provisions that specifically deal with these other services.

#### Subscription Services

##### Paragraph 7.12

- 3.81 H3G made a number of suggestions for minor changes to the proposed provisions which were not thought to be necessary for consumer protection purposes. In relation to paragraph 7.12.6, for example, H3G requested a requirement for any follow up messages following use of the 'STOP' command to be accompanied by a "FreeMsg" text. Ofcom has raised this suggestion with ICSTIS. ICSTIS noted that the draft Code would ensure that users were charged nothing more once the STOP command has been sent. Whilst ICSTIS was pleased to note the actions of the five networks in responding to complaints from their customers about further messages, ICSTIS did not consider it appropriate to introduce a further requirement at this stage in the development of the draft Code. Ofcom is content with ICSTIS' response. Ofcom notes, however, that providers of text-based PRS must ensure that they respect the requirements of the Privacy and Electronic Communications Regulations (information about which is available from the Information Commissioner's Office).

#### **MBG**

- 3.82 As noted at paragraph 3.18 above, MBG raised concerns regarding the "STOP" command, suggesting that it was not always relevant, and giving the examples of subscription services delivered via i-mode and TV or magazine subscriptions in which the monthly payment buys the subscriber access into the service. ICSTIS feel that MBG may have misunderstood what is required here. The reference is to a requirement to allow customers to put an end to their subscription by using a 'Stop' command. Usually that will, in a subscription service, mean that the customer can stop the subscription by using the word 'Stop' (e.g. by sending an SMS message with the word 'Stop'). ICSTIS recognises, however, that the form in which the command is employed may differ between different services as a result of unavoidable technical constraints. In those situations, customers should be provided with an alternative method of using a 'Stop' command, i.e. giving a command that the subscription service ceases and no further charges are incurred. Where this method has been clearly communicated, and is made reasonably self-evident, to consumers, then the draft Code requirements in respect of the provision of a 'Stop' command facility can thereby be complied with.

- 3.83 In respect of paragraphs 9.1 and 9.3 of the draft Code, Ofcom agrees with ICSTIS' view that it is sometimes necessary for it to give an urgent direction that a service be suspended immediately and/or that revenues be withheld by the NO. That is because a great deal of consumer harm can sometimes be caused within a very short space of time. Furthermore, it would not be appropriate for a recipient of a direction to be able to exempt himself from having to comply with it simply by the device of lodging an appeal (which appeal might take some time to determine, particularly if the appellant were slow in prosecuting it). Ofcom is satisfied that, having regard to the potential for consumer harm and the need for effective measures to be taken to prevent such harm, paragraphs 9.1 and 9.3 of the draft Code are proportionate and appropriate.

## VR

- 3.84 VR submitted a long and detailed response to the consultation document. Ofcom is grateful to VR for taking the time to do so, and has given careful consideration to all of the points which VR has made.
- 3.85 At the heart of those points was VR's submission that the provisions of the draft Code were contrary to the principles (a) that regulation should be proportionate, (b) that there should be a bias against regulatory intervention, and (c) that regulation should not be unnecessarily intrusive. Ofcom has considered it appropriate to view that submission against the background of recent events affecting consumer confidence in the PRS industry. There have been a number of instances over recent years of large numbers of consumers and other users of electronic communications services being harmed by the irresponsible, unethical, misleading, and sometimes even fraudulent, provision of PRS. In some cases, ICSTIS has been provided by NOs with details of SPs which turned out to be false (for example, because the SP was using a false business name and address). In other cases, ICSTIS fines have gone unpaid by SPs as a result of failures of NOs to promptly comply with ICSTIS directions to immediately suspend services and/or withhold revenues. In the light of these events, Ofcom believes that the consumer protections provided by the ICSTIS Code required strengthening.
- 3.86 Further, the proportionality or otherwise of regulatory requirements can be properly evaluated only by taking account of the seriousness of the harm which those requirements are intended to protect against, as well as any alternatives which have been proposed to those requirements. Ofcom notes, however, that although VR argued that the measures which would be introduced by the draft Code to reduce the potential for such consumer harm were disproportionate, VR did not suggest alternative means by which the consumer protections afforded by the approved Code could nevertheless be enhanced. Given the recent serious episodes of consumer harm in connection with PRS provision, however, the 'bottom line' for Ofcom is that the regulatory regime must be sufficiently robust to counter such harm, ensuring that there are effective deterrents from such harm and that, where such harm occurs, effective measures can be taken to promptly bring that harm to an end, identify the parties responsible for causing that harm, impose and enforce any penalty that may be appropriate, and ensure that consumers are compensated for the harm caused to them. This, too, is a principle of good regulation. In ensuring that regulation is fit for the purpose of meeting that objective, it is also appropriate to ensure that the means used to reach that objective are proportionate and do not impose unnecessary burdens on industry. However, industry concerns cannot be allowed to predominate to the extent that the regulatory regime is rendered ineffective.

- 3.87 Many of VR's complaints about an alleged lack of proportionality appear to arise from VR's views that 'ICSTIS is not a proper statutory body subject to all safeguards relating to public bodies' activities. It was for that reason, for example, that VR opposed paragraph 2.1.2(a) of the draft Code, stating that "for a Code to allow ICSTIS to ask for what[ever information] it likes without limitation, however unreasonable, would appear to be very disproportionate". Ofcom does not, however, accept that ICSTIS is free to act unreasonably. On the contrary, ICSTIS is, like other public bodies, required to act reasonably and is subject to the supervision of the Administrative Court. In addition, ICSTIS' formal decisions and adjudications can be appealed to an Independent Appeals Body ('IAB'), which is chaired by a judge. Further, Ofcom considers that administrative law would not permit ICSTIS to use its information gathering powers for improper purposes, including any purposes unconnected with the proper discharge of ICSTIS' duties under the Code.
- 3.88 In addition, Ofcom does not agree with VR that it is an unjustified interference with freedom of contract to require NOs to include provisions in their contracts with SPs to require those SPs to comply with their Code obligations. Indeed, Ofcom sees no good reason why NOs and SPs should have any legitimate reasons for wishing to avoid such requirements.
- 3.89 VR also criticised as disproportionate the provisions which enabled ICSTIS to require NOs to withhold all revenues from an SP. VR argued that ICSTIS should only be able to direct an NO to withhold monies if a service is being investigated *and* a financial sanction has been imposed *and* an administrative charge has been incurred. Ofcom does not agree. Unless ICSTIS is able to ensure that monies are withheld at the start of an investigation, scams may be perpetrated using PRS and the monies generated by such scams removed before ICSTIS is able to complete its investigation. This would seriously weaken the effectiveness of the regulatory regime and the protection which it affords to consumers. Ofcom notes that at the start of an investigation ICSTIS may not know the extent of financial harm which appears to have been caused and no penalty will yet have been imposed. Accordingly, it is entirely appropriate that ICSTIS should be able to direct the withholding of all monies in the first instance. ICSTIS will be required by administrative law to exercise that power reasonably and proportionately, in accordance with principles of good administration.
- 3.90 Ofcom also disagrees with VR's comment that it is inappropriate that ICSTIS be empowered to sanction NOs. NOs are subject to obligations under the ICSTIS Code, and Ofcom sees no good reason why they should not be subject to sanctions under that Code if they contravene those obligations. That is particularly so in view of the procedural protections afforded to both NOs and SPs under the draft Code, including the possibility of appeal to the IAB. It will remain the case that any communications provider who is required by Ofcom's PRS Condition to comply with ICSTIS directions, but who breaches that requirement, may be subject to action by Ofcom under sections 94-96 and 123-124 of the Act in respect of that breach. Ofcom does not, however, consider that the existence of its backstop powers under the PRS Condition, which exists to underwrite the effectiveness of ICSTIS regulation, make it unnecessary for ICSTIS to itself have power to deal with breaches of its Code. Indeed, Ofcom considers that for ICSTIS to have such power is entirely consistent with a self and co-regulatory approach in which regulation is primarily carried out by the relevant industry regulatory under an industry code of practice, with Ofcom seldom having to intervene.

- 3.91 Further, with regard to VR's comments concerning the 30-day withholding requirement, Ofcom believes that this requirement is necessary to ensure that monies are not paid over to SPs more quickly than instances of suspected serious harm can be identified by ICSTIS (usually as a result of complaints from consumers faced with unexpected high charges on their phone bills) and any appropriate directions issued. Ofcom does not consider that it would be appropriate for the draft Code to provide for the payment of interest on the withheld funds. This is a matter for commercial negotiation between NOs and SPs.
- 3.92 Ofcom also considers VR's criticism of the lack of a 'proper benefit analysis and impact assessment review' to be overstated and not to cast doubt on the appropriateness of approving the draft Code. In that regard, Ofcom notes that the draft Code is the result of many months of discussion and consultation between ICSTIS and a great many members of the PRS industry in a variety of fora. ICSTIS has clearly given a great deal of thought to the interests of the PRS industry, as well as the need to afford effective protection to consumers, and has sought to draw a fair balance between these various concerns. Further, Ofcom sees no realistic basis for VR's suggestions that the draft Code may lead to NOs contravening the Human Rights Act 1998 or competition law.
- 3.93 Ofcom also sees no basis for VR's criticism that the draft Code would allow ICSTIS to pick and choose (between the NO, SP and IP) the party it will hold responsible for contraventions of the Code. Although a party which was itself both an SP and an NO would be subject to the obligations of both an NO and an SP under the draft Code, the Code provides for particular sets of obligations in respect of each of those parties. Those parties are defined in Chapter 11 of the draft Code. An NO which contracts with an SP will be required to discharge certain due diligence requirements in respect of that SP; however, NOs will not be held responsible for breaches committed by SPs, provided that the NO complies with its own obligations under the Code. The SP is responsible for discharging the Code obligations of an SP, and it is both appropriate and, as a practical matter, necessary, for the SP to be held responsible for discharging those obligations. It is for the SP to choose whether to discharge those obligations itself or rely on one or more commercial partners to do so. As a concession to the administrative convenience of SPs, ICSTIS may agree to deal directly with an IP in respect of suspected breaches of the draft Code by a particular service which that IP is involved in providing. That does not detract, however, from the fact that it is ultimately the SP which is responsible for discharging the obligations of an SP under the draft Code. Paragraph 11.3.6 of the draft Code has been drafted in such a way as to give ICSTIS no discretion as to who the SP is. Further, Ofcom notes that the draft Code seeks to impose obligations only on a subset of the persons who are identified in sections 120 (9)-(12) as providers of PRS.
- 3.94 Having considered all of the various criticisms of the draft Code which VR has made, Ofcom remains satisfied that the provisions of that Code, while imposing a number of new obligations on industry participants (particularly NOs), are necessary in order to secure the effectiveness of the PRS regulatory regime and to offer an appropriate degree of protection to consumers.
- 3.95 Further, while Ofcom notes VR's criticisms of ICSTIS' style of regulation under the existing Code, Ofcom notes that VR has not suggested that Ofcom revoke its approval for the existing Code and instead regulate the PRS industry under an order made pursuant to section 122 of the Act. Ofcom is currently aware of only one body which has made a code of practice which could potentially be approved by Ofcom under section 121, and that body is ICSTIS. While any effective body which is

involved in regulation is bound to incur criticism from some quarters, Ofcom is not aware of any criticisms which have been levelled at ICSTIS and which are sufficiently substantiated, serious or widespread to warrant Ofcom withdrawing its support from that body. Indeed the contrary is the case: Ofcom believes self and co-regulation by ICSTIS to enjoy widespread support both within and outside the PRS industry.

- 3.96 In those circumstances, Ofcom does not accept that criticisms of ICSTIS' style of regulation make it inappropriate for Ofcom to approve the draft Code, particularly given the advantages of that Code over the approved Code in terms of its greater flexibility, the taking account of new models of service provision, and enhanced protections for consumers. Ofcom notes that industry players with suggestions regarding the way that ICSTIS polices compliance with its Code should make those suggestions to ICSTIS directly. In addition, Ofcom reiterates that ICSTIS is already required to act in a reasonable and proportionate manner, that its decisions and adjudications can be appealed to an IAB, and that it is ultimately subject to the supervision of the Administrative Court.

## Section 4

# Reasons for approving the draft Code under section 121 of the Act

4.1 Having given consideration to the provisions of the draft Code, and having carefully considered all responses received, Ofcom has decided to approve it under section 121. This section sets out the legal tests and principles that are relevant to Ofcom's decision whether or not to approve the draft Code and the reasons why Ofcom is of the view that it is consistent with those tests and principles now to approve it.

### The relevant legal tests and principles

4.2 In order to approve the draft Code, Ofcom must be satisfied that:

- a) a code has been made by any person for regulating the provision and contents of PRS, and the facilities made available in the provision of such services [the test in section 121(1)(a) of the Act];
- b) the Code contains provisions for regulating, to such extent as Ofcom think fit, the arrangements made by the providers of PRS for promoting and marketing those services [the test in section 121(1)(b) of the Act, discussed further below];
- c) all of the requirements in section 121(2) are met [these requirements are also set out and discussed further below]; and
- d) having regard inter alia to the provisions of the Code, it is appropriate for Ofcom to approve it [the test in section 121(1)(c), with Ofcom exercising its discretion in accordance with its duties under sections 3 and 4 of that Act]<sup>6</sup>.

4.3 Each of these four matters is discussed further below.

4.4 In considering those matters, including in the light of the responses to Ofcom's consultation document, Ofcom has considered it to bear in mind that section 121 allows Ofcom to approve a code which another person (in this case ICSTIS) has made. Although Ofcom has made various suggestions to ICSTIS in the course of ICSTIS' development of the draft Code which has ultimately been submitted to Ofcom for approval, the draft Code has been drafted by ICSTIS. Further, Ofcom has also kept in mind the extensive industry input which ICSTIS has sought and received in the course of developing that Code. Accordingly, while Ofcom is concerned to ensure that all of the provisions of the draft Code are effective, proportionate and appropriate, Ofcom has also kept in mind that it is ICSTIS' Code, and that its provisions have been presented to Ofcom as a package. Ofcom has therefore applied the statutory tests to the draft Code as a whole.

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<sup>6</sup> This reflects the fact that, even if (a) and (b) are met, Ofcom has a discretion whether to approve the draft Code and must exercise that discretion having regard to all relevant matters and against the background of its general duties under section 3 of the Act.

**a) Ofcom is minded to decide that the draft Code is a code which has been made by a person for regulating the provision and contents of premium rate services, and the facilities made available in the provision of such services**

4.5 Ofcom is satisfied that the draft Code, drafted by ICSTIS, the regulatory body for premium rate charged telecommunications services, has been made by a person for regulating the provision and contents of PRS, and the facilities made available in the provision of such services.

**(b) Ofcom is minded to decide that the draft Code contains provisions for regulating, to such extent as Ofcom think fit, the arrangements made by the providers of premium rate services for promoting and marketing those services**

4.6 Ofcom is satisfied that the draft Code provides for regulating the arrangements made by the providers of PRS (as those parties are defined in section 120 of the Act) for promoting and marketing those services. The appropriateness of the extent to which the provisions of the draft Code regulate those activities is considered below (under heading (c)) as part of Ofcom's overall assessment of the appropriateness of approving the draft Code.

**(c) Ofcom is minded to decide that the draft Code meets all of the requirements in section 121(2)**

**that there is a person who, under the code, has the function of administering and enforcing it**

4.7 Ofcom is satisfied that ICSTIS would continue to have responsibility for administering and enforcing the draft Code should it be approved under section 121.

**that that person is sufficiently independent of the providers of PRS**

4.8 ICSTIS is independent of both Ofcom and the PRS industry. ICSTIS consists of up to twelve members ("the Committee"), served by a full-time secretariat. All Committee members are appointed in their individual capacities. With the exception of three members who are appointed on the basis of their contemporary industry knowledge, no member may have any commercial interest in the PRS industry. Any member with such commercial interests will, in any event, take no part in any adjudication process.

4.9 The draft Code makes provision for those who are at risk of having adjudications made against them to receive an oral hearing. In addition, any SP or NO who is subject to an adverse adjudication following such a hearing may appeal that decision to ICSTIS' IAB. The IAB comprises a Chairman (currently His Honour Judge Derek Holden) and four lay members. All five are completely independent of ICSTIS. As well as hearing appeals against adjudications following an oral hearing, the IAB hears, and under the draft Code would continue to hear, appeals against refusals of applications for permission to provide services in cases where the draft Code requires that prior permission from ICSTIS be obtained, and appeals against the imposition of conditions as part of the permission granted to a SP to operate a service.

4.10 Having regard to the matters set out above, Ofcom believes that ICSTIS is sufficiently independent of providers of PRS.

**that adequate arrangements are in force for funding the activities of that person in relation to the draft Code**

- 4.11 ICSTIS is a non-profit making organisation and is funded primarily by a levy on SPs. NOs are responsible for paying the levy on behalf of the SPs whom they serve. This would continue to be the case under the draft Code should it be approved.
- 4.12 In addition, ICSTIS receives some of its income from fines and administrative charges imposed on regulated persons who are found to have breached the Code. The rationale for the use of such fines and charges to fund ICSTIS' activities is that those who place an additional cost burden on ICSTIS, in terms of a need to carry out investigative and enforcement activities, should pay an increased share of ICSTIS' expenditure rather than imposing higher costs on the majority of participants in the PRS industry who act responsibly and are complying with the Code.
- 4.13 ICSTIS consults on its budget plans each year, following which the plans (and the level of the levy necessary to meet that budget) are submitted to Ofcom for approval. The approved budget for 2005/6 has been set at £3,989,700.
- 4.14 Similar arrangements have proved capable of providing ICSTIS with adequate funding for its activities in the past, and Ofcom believes that this will continue to be so should the draft Code be approved.

**that the provisions of the draft Code are objectively justifiable in relation to the services to which it relates**

- 4.15 Ofcom is satisfied that the provisions of the draft Code are objectively justifiable in relation to the services to which it relates, primarily because those provisions are necessary to provide an adequate degree of protection for consumers.
- 4.16 In particular, Ofcom notes that the growth of the PRS market and advances in communications technology means that there continues to be significant potential for PRS to result in consumer harm. This includes, among others, the following:
- failure to take sufficient steps to ensure that consumers who call premium rate numbers, or access PRS in other ways, are aware of the likely charges for the call;
  - the risk of unauthorised use whereby the bill payer may find themselves responsible for calls which they did not make (such as where someone else has made calls from the consumer's phone line without permission);
  - inappropriate content, and the risk that minors may be exposed to content which is offensive, unlawful or otherwise inappropriate; and
  - misleading and fraudulent services where consumers may be deceived into calling numbers which carry premium rate charges.
- 4.17 Both Ofcom and ICSTIS have been concerned at a number of high profile recent examples of PRS which have caused serious and widespread consumer harm. These include, among others, the following:
- 'prize' competitions and claim lines involving lengthy calls to numbers charged at premium rates for low value or non-existent prizes;

- fake parcel non-delivery notifications which provide householders with a premium rate number to call to arrange re-delivery of a parcel; and
- TV advertisements which encourage consumers (many of whom were children) to send an SMS (text message) to a shortcode in order to receive a mobile phone ringtone, but which did not make adequately clear that they were in fact signing up to a subscription service.

4.18 Consequently, Ofcom and ICSTIS continue to believe that an effective PRS regulatory regime is vital in order to protect consumers and the reputations of legitimate PRS operators, as well as to keep pace with changes in technology and the PRS industry. For this reason, Ofcom believes that the draft Code is justifiable to the services to which it relates.

**that those provisions are not such as to discriminate unduly against particular persons or against a particular descriptions of persons**

4.19 Ofcom is satisfied that the provisions of the draft Code are not such as to discriminate unduly against particular persons or against a particular descriptions of persons as they do not benefit particular undertakings and will be applied uniformly to all relevant undertakings engaged in the premium rate sector, as defined under section 120 of the Act.

4.20 The draft Code continues to focus regulation on those entities defined in the Code as NOs and SPs, albeit that there have been changes to the definition of those parties from those currently used in the approved Code. This may lead to some parties being subjected to obligations under the draft Code as NOs and SPs who are not subject to those obligations at present. Ofcom does not believe, however, that it follows that the draft Code discriminates unduly.

4.21 The role of the NO is fundamental to PRS regulation. SPs are responsible for their services but depend on NOs for connectivity and on the supporting payment mechanisms. It remains crucial that ICSTIS can quickly and readily identify the NO. Moreover, ICSTIS are dependent on NOs supporting ICSTIS by carrying out due diligence, providing information about SPs, barring access to services where necessary and withholding revenue payments to SPs when requested.

4.22 The new definition of an NO in the draft Code has been developed in response to serious difficulties which ICSTIS has experienced in attempting to effectively regulate value chains in which the company claiming to be the NO has appeared to have little 'physical' responsibility for providing the electronic communications networks and/or services used to provide the PRS. Regulated parties in any sector need to be provided with certainty from the regulator as to their status and responsibilities. It is for this reason that ICSTIS is seeking to introduce a more stringent test to be applied to the NO definition by focusing regulation on parties in the value chain who not only fall within section 120 (10) or (11) but are also obliged to obtain approval for the billing systems under Ofcom's General Condition 11 or who have a direct network connection with a company that does have to obtain such approval. This is likely to result in the NO obligations being more squarely focused on true TCPs (i.e. the parties physically providing the networks on which the calls are terminated).

4.23 The draft Code identifies the SP definition as the person who contracts with the NO. As under the approved Code, the SP will be responsible for complying with the draft code obligations concerning the content and promotion of PRS. The direct link between the NO and the SP remains crucially important given the complex and

varied nature of the 'value chains' by which PRS may be provided, and the need for ICSTIS, in all value chains, to be able to quickly identify the persons (i.e. the SP and NO) who are responsible for discharging the obligations under the Code in relation to the provision of any particular service. The provisions of the draft Code are designed to achieve this end.

- 4.24 In recognition of the fact that SPs will not always themselves be the direct providers of the content of services, the draft Code enables ICSTIS to deal directly with content providers who are not defined under the draft Code as SPs (defined as 'IPs') where the SP, the IP and ICSTIS are agreeable to this. However, even in those circumstances, the SP would remain liable if the IP were to default on its obligations.

**that those provisions are proportionate to what they are intended to achieve**

- 4.25 Ofcom is satisfied that the provisions of the draft Code are proportionate to what they are intended to achieve.
- 4.26 Ofcom notes, in that regard, that those provisions have been developed by ICSTIS as a result of extensive consultation with the PRS industry and in the light of ICSTIS' experiences of regulating that industry (including the difficulties that ICSTIS has sometimes faced in being able to respond speedily and effectively to breaches of the approved Code which were causing serious financial loss and/or inconvenience to large numbers of consumers).
- 4.27 Ofcom also believes that the provisions of the draft Code are appropriately targeted at those services which seem likely to carry the greatest potential risk of causing significant harm to consumers. In addition, Ofcom believes that the additional burdens on the industry (e.g. the due diligence requirements placed on NOs in relation to the SPs with whom they deal) are proportionate methods of addressing the significant problems caused by 'rogue' providers who seek to either mislead or defraud consumers.

**that, in relation to what those provisions are intended to achieve, they are transparent**

- 4.28 Ofcom is satisfied that, in relation to what those provisions are intended to achieve, they are transparent. In that regard, Ofcom notes that the provisions of the draft Code have been drafted with a view to ensuring a sensible balance between making them as clear and unequivocal as possible with the need to reflect the fast-moving and dynamic PRS industry which delivers PRS across various different platforms.
- 4.29 In addition, Ofcom notes that the draft Code is the product of a considerable amount of open discussion and public consultation. A number of the provisions of the draft Code which would represent changes to the existing ICSTIS regime flow from Ofcom's report to DTI, which was published in December 2004. In addition, ICSTIS has already consulted on the draft Code and taken account of stakeholders' comments in producing the version which it has now submitted to Ofcom. The ICSTIS consultation document was widely circulated, and was posted on the ICSTIS website; all registered users were sent an email notification informing them of the consultation. In addition, ICSTIS held various workshops to discuss with industry and consumer stakeholders.

**(d) Having regard inter alia to the provisions of the draft Code, Ofcom is minded to decide that it is appropriate for Ofcom to approve it**

4.30 In deciding whether Ofcom is satisfied of those matters, Ofcom must act consistently with its general duties under section 3 of the Act, as well as with the six Community requirements set out in section 4 of the Act.

**Section 3: Ofcom's general duties**

4.31 Section 3(1) of the Act sets out the principal duties of Ofcom in carrying out its functions:

- a) to further the interests of citizens in relation to communications matters; and
- b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

4.32 Section 3(2)(b) is also relevant: the requirement that Ofcom secure the availability throughout the UK of a wide range of electronic communications services.

4.33 Section 3(3) provides that, in performing their duties under subsection (1), Ofcom must have regard, in all cases, to—

- a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
- b) any other principles appearing to Ofcom to represent the best regulatory practice.

4.34 In addition, section 3(4) provides that, in performing its duties, Ofcom must have regard to “such of the following as appear to them to be relevant in the circumstances”, including:

- the desirability of promoting competition in relevant markets;
- the desirability of promoting and facilitating the development and use of effective forms of self-regulation;
- the desirability of encouraging investment and innovation in relevant markets;
- the vulnerability of children and of others whose circumstances appear to Ofcom to put them in need of special protection;
- the needs of persons with disabilities, of the elderly and of those on low incomes;
- the desirability of preventing crime and disorder;
- the opinions of consumers in relevant markets and of members of the public generally; and
- the extent to which, in the circumstances of the case, the furthering or securing of the matters mentioned in subsections (1) and (2) is reasonably practicable.

- 4.35 Section 3(5) provides that Ofcom, in performing its duty of furthering the interests of consumers, must have regard, in particular, to the interests of those consumers in respect of choice, price, quality of service and value for money.

#### **Section 4: The six Community requirements**

- 4.36 Section 4 of the Act sets out the six Community requirements (which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive) which Ofcom, in carrying out its functions under inter alia Chapter 1 of Part 2 of the Act, must act in accordance with.
- 4.37 In broad terms, the six requirements are as follows:
- i) to promote competition, including in relation (a) to the provision of electronic communications networks and services, and (b) to the provision and making available of services and facilities that are provided or made available in association with the provision of electronic communications networks or services to secure that Ofcom's activities contribute to the development of the European internal market;
  - ii) to secure that Ofcom's activities contribute to the development of the European internal market;
  - iii) to promote the interests of all persons who are citizens of the European Union (within the meaning of Article 17 of the EC Treaty);
  - iv) to take account of the desirability of Ofcom's carrying out its functions in a manner which, so far as practicable, does not favour (a) one form of electronic communications network, service or associated facility, or (b) one means of providing or making available such a network, service or facility, over another;
  - v) to encourage (to such extent as Ofcom consider appropriate for certain purposes which are specified in section 4(8) of the Act) the provision of network access and service interoperability; and
  - vi) to encourage such compliance with the standards specified in section 4(10) of the Act as is necessary for facilitating service interoperability and securing freedom of choice for customers of communications providers.

#### **Ofcom's overall assessment of the appropriateness of approving the draft Code**

- 4.38 In deciding to give approval to the draft Code, Ofcom has carefully considered the most significant amendments to the draft Code which would be different from those under the approved Code. These include the following:

#### **Incorporating the relevant recommendations from Ofcom's review of the regulation of PRS**

- 4.39 The draft Code includes provisions which would implement the following recommendations from Ofcom's report to the DTI:
- TCPs to provide ICSTIS with more detailed information on SPs and to take all reasonable steps to ensure that the information so provided is accurate;

- TCPs to provide ICSTIS with information, when directed to do so, about other networks to which any PRS numbers allocated to that TCPs have been ported;
  - TCPs to be required, in certain circumstances, to pay refunds to consumers out of monies withheld by such TCPs from their SP customers pursuant to an ICSTIS direction;
  - SPs to be required to have adequate customer service and redress mechanisms, including a UK customer service telephone number; and
  - ICSTIS to be able to use directions to impose sanctions, including fines, directly on TCPs where they fail to meet their obligations under the Code.
- 4.40 Ofcom considers it appropriate, for the reasons given in its report to the DTI, to support these changes to the ICSTIS regulatory regime. In particular, Ofcom anticipates that the recommendations will significantly reduce the scope for consumer detriment through the introduction of additional safeguards and help restore consumer confidence in the PRS industry. Ofcom also believes that the increased regulatory burden which these changes would bring are a proportionate measure in light of the potential scope for consumer harm from PRS.

#### an amended definition of NO for the purposes of the draft Code

- 4.41 Ofcom's reasons for supporting the new definition of NO that the draft Code would introduce are discussed at paragraphs 3.33 to 3.48 above.
- 4.42 In summary, Ofcom believes that the new definition would focus regulation more clearly on the parties in the value chain who are best able to secure compliance with the obligations in the draft Code (whether by carrying out those obligations themselves or requiring other parties with whom they contract to carry out those obligations). Ofcom also believes that the new definition would lead to greater clarity, certainty and transparency in relation to the identities of the NO and SP in the value chain, enabling both ICSTIS and the regulated parties to understand much more easily the identities of the parties who are subject to NO and SP obligations under the draft Code.

#### provisions which allow, in specific circumstances, an 'Information Provider' ('IP') in a particular 'value chain' to take responsibility for breaches raised against the 'SP'

- 4.43 As already described, there are a number of businesses involved in the provision of PRS, and who therefore may fall within sections 120 (9), (10) or (11) of the Act and are therefore, in principle, be subject to regulation under the approved Code.
- 4.44 Similarly with the approved Code, the draft Code would continue to identify particular parties as NOs and SPs by way of the activities which they perform. As discussed previously, this is essential in order to provide certainty and transparency as to the identities of the parties who are responsible for discharging the NO and SP obligations under the Code in respect of any particular PRS.
- 4.45 This does, however, mean in practice that there will be circumstances where parties will be responsible for discharging certain obligations as SPs in relation to aspects of the provision of PRS which are, in fact, within the direct control of another person. This may be the case, for example, where the SP in respect of a particular PRS acts as a reseller, aggregator or bureau which is providing a link between an NO and the person actually providing the content of the service in question.

- 4.46 Ofcom does not believe that this is disproportionate or unfair. As has already been discussed above, Ofcom believes that the effectiveness of the Code is dependent on ICSTIS being able to quickly identify certain parties as responsible for discharging particular obligations under the Code.
- 4.47 Nevertheless, Ofcom accepts that there may be circumstances where it may be more convenient for ICSTIS to deal with a person who is involved in providing the PRS being investigated but who is not the SP. Where, for example, the possible breach relates to the content of the service and the SP does not himself provide the content of that service, it may be more convenient for ICSTIS to deal directly with the person who does.
- 4.48 In order to facilitate this scenario, the draft Code contains provisions which would, in certain circumstances, allow ICSTIS to deal directly with an IP who would typically be the provider of the content of a PRS, in relation to possible breaches of the draft Code. One of the conditions for this to occur would be that the IP was willing to accept full responsibility for the service in question, as well as for complying with any sanctions that ICSTIS might ultimately impose. If the IP was not willing to take responsibility for the service, or failed to comply with sanctions, then ICSTIS would still be able to revert to the default position of holding the SP fully responsible for its obligations as such under the Code.
- 4.49 Ofcom believes that these provisions are appropriate, and would introduce a practical convenience (thus helping to ensure that the regulatory regime was not unnecessarily burdensome) without weakening the effectiveness and enforceability provided by the clear NO and SP definitions.

#### making some live services exempt from having to apply for prior permission

- 4.50 Similarly to the approved Code, the draft Code sets out that a live service (i.e. a PRS which involved two-way or multi-way live voice conversation) may only be provided where ICSTIS has granted prior permission. This provision is designed to provide an additional safeguard for consumers in relation to services (including live sexual entertainment and Chatline Services) which present a particular risk to consumers, both in terms of the content of the service<sup>7</sup> and of the possibility of individual consumers running up very high phone bills<sup>8</sup>.
- 4.51 The draft Code, however, allows ICSTIS to exempt certain categories of live services from the prior permission requirement. The exemption will have regard to the risks associated with such services for consumer complaints and other concerns to arise.
- 4.52 Ofcom believes that it is appropriate to include provision in the draft Code to allow such exemptions as published by ICSTIS. While certain live services (such as Sexual Entertainment Services) may present a particular high risk in terms of potential for consumer harm, other live services (such as Directory Enquiry services) are the

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<sup>7</sup> Services which enable live conversation to take place between strangers may, for example, present risks to users' personal safety. Measures may also need to be taken to prevent children from accessing the service or, if ICSTIS has granted permission for the service to be provided to children, measures may need to be taken to protect children while they are accessing the service.

<sup>8</sup> The current approved Code also enables ICSTIS to require that certain categories of PRS (including non-live services) obtain 'prior approval' before being provided, and this will continue to be the case under the new Code. These provisions allow ICSTIS a degree of flexibility in identifying categories of PRS which, at the relevant point in time, present a particularly high risk of causing harm to consumers, and to target regulatory activity at those services by subjecting them to a prior permission requirement.

cause of very few complaints to ICSTIS. Ofcom believes that it is appropriate for ICSTIS to provide a degree of flexibility in managing its prior permissions exemptions for live services in order to target ICSTIS' regulatory effort at services where the potential for consumer harm is likely to be greatest. This is consistent with Ofcom's duty under section 3(3) of the Act to have regard to the principles under which regulatory activities should be proportionate and targeted only at cases in which action is needed.

- 4.53 Where ICSTIS considers that a particular exemption is no longer appropriate, such as where ICSTIS has reason to believe that live services falling within an exempt category are causing significant consumer harm, it will be possible for ICSTIS to act quickly to withdraw or modify the relevant exemption, provided reasonable notice is given of the change.

#### specific provisions for Directory Enquiries services and subscription services

- 4.54 Since Ofcom's approval of the ICSTIS Code (10th Edition) back in 2003, the PRS sector has developed significantly and, as a consequence, there have been changes in the provision of PRS. The draft Code includes specific provision to deal with two of these, in particular: Directory Enquiry ("DQ") services and subscription services.

- 4.55 *DQ services:* In 2001 Oftel decided to liberalise the DQ market. The 192 national and 153 international DQ service numbers on which each network operator generally chose to provide DQ services to its own customers were phased out, replaced with multiple DQ services provided by different competing providers on the 118 XXX number range. The change-over process was completed on 24 August 2003 when the 192 and 153 numbers were 'switched off'.

- 4.56 The risk of consumer harm being caused through DQ services is relatively low in comparison to many other forms of PRS. The cost of making a call to a 118 service in order to find a particular person's telephone number will usually fall between 27 and 65 pence, though the cost of the service may be considerably higher where the DQ provider also provides the caller with call completion (i.e. where the DQ provider connects the caller to the telephone number for which he or she was searching).

- 4.57 Nevertheless, Ofcom considers it appropriate that the draft Code should provide certain specific protections for consumers who use DQ services. A caller to such a service will almost always expect, for example, that the provider of the service will, in searching for a particular UK telephone number, use a comprehensive database of UK end-users' directory information. Accordingly, consumers need to be protected from DQ services which might be promoted in such a way that they appear no different from other national DQ services, but which in fact search only a more limited database (e.g. a database which includes only customers of particular communications providers or end-users in one part of the UK).

- 4.58 In addition, the draft Code also includes provisions to prevent consumers who, having already paid for accessing the DQ service, are then pressurised into agreeing to be connected to that number by the SP with the result that they are continuing to pay higher rates while speaking to the person they ultimately wants to call. Ofcom considers that these provisions are necessary to protect consumers. These provisions would not prevent call completion being successfully offered so long as the caller is given the alternative of being provided with the number in order to dial themselves.

- 4.59 Ofcom believes that the DQ service-specific provisions in the draft Code would provide an appropriate degree of protection for consumers in relation to such services, and would do so without unnecessarily constraining innovation and competition.
- 4.60 The draft Code includes, for example, a provision that would require DQ services which hold themselves out as 'UK' or 'national' DQ services to provide those services with the benefit of access to up-to-date information about all end-users in relation to whom directory information can be obtained under General Condition 19.1 of the General Conditions of Entitlement (as amended by Ofcom from time to time)<sup>9</sup>. The draft Code would likewise require DQ service providers who hold themselves out as providing an 'international' DQ service to do so with the benefit of access to up-to-date information which is equivalent in comprehensiveness to the national directory or DQ service available in the country or countries which the DQ service professes to cover.
- 4.61 *Subscription services:* The development of charging by 'reverse-billed SMS' has enabled the provision of subscription services. These are services that result in the consumer being repeatedly charged, via his or her phone bill, without positive consent required on each occasion.
- 4.62 Subscription services pose a particularly high risk of consumer harm because of the potential for consumers to be repeatedly subjected to charges to which they may not have agreed.
- 4.63 The draft Code imposes specific standards in relation to the provision of such services, including that the material by which such services are promoted must clearly indicate that the service is a subscription service. In addition, the draft Code also requires providers of subscription services to send a free message to new subscribers informing them of the costs of the service and the frequency at which the charges will be made. The free message would also have to be sent once a month or every time the user had spent £20 on accessing the service (whichever is the earlier) and include details of the way that the subscriber can unsubscribe to the service. The draft Code also contains provisions about how subscribers should be able to unsubscribe from subscription services at any time by texting the word "STOP" to the provider of the service.
- 4.64 Ofcom considers such provisions are necessary in order to ensure that consumers are properly protected from the potential for consumer harm caused by subscription services.

#### new provisions relating to price warnings for PRS advertised on television

- 4.65 The draft Code contains new provisions which require pricing information to be included in promotional material transmitted on television or in another audio-visual format in both spoken and visually-displayed form if the cost of the call generally exceeds £2. This would ensure that all PRS promotion on television are subject to the same rules, regardless of whether such promotion took place during 'programme time' or 'advertising time'. This is a change from the approved Code which imposes a requirement that the price of the call be communication in spoken form only in relation to PRS promotion during 'programme time'.

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<sup>9</sup> General Condition 19.1 requires communications providers to meet all reasonable requests from any person to make available the directory information of end-users who have been assigned telephone numbers which were originally allocated to it.

- 4.66 Ofcom believes that this change is appropriate, and would provide consumers with protection from the risk of incurring significant call charges without their knowledge. The change would also be in line with Ofcom's duty to have regard to the needs of elderly and disabled persons, some of whom might have difficulty in reading price information communicated only by way of on-screen text but not by voice (or vice versa).

## Conclusions

- 4.67 Ofcom considers that the interests of citizens and consumers would be furthered were Ofcom to approve the draft Code.
- 4.68 In that regard, Ofcom believes that the new aspects of the regulatory regime that the draft Code would introduce are likely to ensure that that ICSTIS regulation is more transparent and effective; for example, by making it easier to identify the parties which are subject to the Code as NOs or SPs, and by reducing the potential for PRS to be used as a means to provide misleading and/or fraudulent services. The draft Code's specific provisions in respect of DQ services and subscription services, in particular, are also necessary to ensure that the protections offered to consumers under the Code keep pace with changes in technology and the PRS industry.
- 4.69 These changes would complement and build on some of the fundamental aspects of the regulatory regime for PRS encompassed in the approved Code. Those aspects, which the draft Code would retain, include:
- basic requirements which are applicable to all types of regulated PRS;
  - provisions relating to pricing information, including a basic requirement that prospective users of PRS be informed clearly and straightforwardly of the cost of using the service;
  - a prior permissions regime for particular services which are judged to have the potential to cause particular consumer harm – a regime that proved effective in combating the 'rogue' dialler problem of 2004;
  - additional provisions relating to specific categories of service, including contact and dating services, children services, competition and games with prizes services, sexual entertainment services and subscription services; and
  - procedures relating to complaint investigations, adjudications, sanctions, oral hearings and appeals.
- 4.70 In approving the draft Code, Ofcom has had regard to its duties under section 3 of the Act. Ofcom believes that the approval of the draft Code would be compatible with those duties, not only because the draft Code would be in line with Ofcom's primary duty to citizens and consumers, but also because it would promote legitimate competition in the provision of PRS and the networks and services by which PRS are provided.
- 4.71 Effective competition is best promoted by means of effective regulation which does not unnecessarily constrain new market entry, innovation or new models of provision, but which allows consumers to feel confident that, from whoever they purchase a service, they will be protected by certain basic standards and rights. Effective competition can only exist where consumers are not misled but are given reliable

information about the cost of the services so that they are able to make informed choices.

- 4.72 The draft Code has been developed having regard to the opinions of consumers and the public generally, and both Ofcom and ICSTIS have received many comments from consumers and bodies representing consumers expressing concern about the potential for misleading and fraudulent forms of PRS. It also includes provisions specifically directed at protecting children, both from certain types of services (such as sexual entertainment services) which it may not be appropriate for them to receive, and in relation to PRS which are targeted at them.
- 4.73 Ofcom considers that its approval of the draft Code would also be compatible with the six Community requirements in section 4 of the Act (so far as they are relevant). More effective regulation of PRS being provided in the UK would serve the interests of all persons who are citizens of the European Union. In addition, as explained above, approval of the draft Code would also promote competition. The draft Code would not unnecessarily favour one form of provision of PRS over another since most of the requirements in the draft Code are applicable across all platforms. Specific requirements are only imposed in relation to specific platforms where that platform poses a particular risk which other platforms not subject to the requirement do not impose.
- 4.74 Accordingly, Ofcom is today giving notification of its approval of the ICSTIS Code (11<sup>th</sup> edition) (the notification of which is formally set out at Annex 2) under section 121 of the Act.

## **Annex 1**

# List of respondents to the consultation

BT

Coulomb

Hutchison 3G UK

Mobile Broadband Group

Network for Online Commerce

Thus

The UK Competitive Telecommunications Association

Victoria Russell, Emanuela Lecchi and Juliette Levy

## Annex 2

# Notification of approval of a Code for Premium Rate Services under section 121 of the Communications Act 2003

## The approval of a Code for premium rate services for the purpose of sections 120 and 121 of the Communications Act 2003

### WHEREAS:

- (A) section 121 of the Communications Act 2003 (c. 21) (“the Act”) empowers the Office of Communications (“Ofcom”), subject to being satisfied of certain matters specified in that section, to approve a code which has been made by any person for regulating the provision and contents of premium rate services, and the facilities made available in the provision of such services;
- (B) on 18 May 2006 the Independent Committee for the Supervision of Standards of the Telephone Information Services (“ICSTIS”) formally submitted to Ofcom a draft Code of Practice (“the 11<sup>th</sup> ICSTIS Code”) with a request that Ofcom approve it pursuant to section 121 of the Act;
- (C) on 8 June 2006 Ofcom published a consultation document, to which the version of the 11<sup>th</sup> ICSTIS Code submitted by ICSTIS was attached, stating that Ofcom was minded to approve that Code under section 121 and inviting comments on that proposal by 10 July 2006;

Ofcom has now considered the responses which it received to the consultation document and, for the reasons set out in the Statement which accompanies this Notification, Ofcom considers that the requirements for the purposes of approving a code set out in section 121 of the Act have been satisfied and that it would be appropriate and in accordance with Ofcom’s statutory duties now to approve the 11<sup>th</sup> ICSTIS Code;

### NOW, therefore:

1. Ofcom hereby gives its approval of the code for premium rate services set out in the Schedule hereto for the purposes of sections 120 and 121 of the Act, to take effect from, and including, 4 January 2007.
2. Except as otherwise defined in this Notification, words or expressions used shall have the same meaning as they have been ascribed in the Act.

**Signed by**

**Claudio Pollack**

**A person authorised by Ofcom under paragraph 18 of the Schedule to the  
Office of Communications Act 2003**

**9 November 2006**

**Schedule**

# The ICSTIS Code (11<sup>th</sup> edition)

This follows on the next page.

# CODE OF PRACTICE

Eleventh edition

November 2006



Code for Premium Rate Services  
Approved under  
Section 121 of  
the Communications Act 2003

Code of Practice  
(Eleventh Edition)

CODE OF PRACTICE  
2006  
ICSTIS

PART ONE

as approved by the Office of Communications for the purposes of  
Sections 120 and 121 of the Communications Act 2003  
on 9th November 2006

## Introduction to ICSTIS

ICSTIS is the regulatory body for premium rate services. The Board consists of up to 12 members, all appointed in their individual capacities<sup>1</sup>. Up to three members of the Board have contemporary industry knowledge. ICSTIS is committed to a co-regulatory approach to regulation and works closely with the premium rate industry and with Ofcom to ensure that its regulation meets the principles of good regulation and, wherever possible, draws on the support of industry in ensuring that compliance with this Code, along with our vision and mission, is achieved. ICSTIS is a non-profit making limited company. The Board is supported by a permanent Executive.

## Mission Statement

### Our vision

As the regulator for premium rate services, our vision is that anyone can use these services with absolute confidence.

### Our mission

In pursuit of our vision, we create a Code of Practice which sets appropriate standards for the promotion, content and overall operation of premium rate services, taking account of people, particularly children, who may be especially vulnerable. We promote compliance by giving advice on our Code to providers of premium rate services. If there are breaches of the Code, we promptly enforce its provisions in order to minimise consumer harm and encourage compliance in the future.

So that we can continue to protect and inform consumers faced with constantly changing technology, we regularly review our standards, consulting widely to obtain a cross-section of opinion.

### Our values

In carrying out our mission, we are committed to the following:

- staying aware of, and responsive to, the ways in which consumers, or particular sets of consumers, may be vulnerable to harm when using premium rate services and striving to ensure that they receive the necessary protection,

<sup>1</sup> Board members are recruited following an open recruitment and selection process. For full details of the recruitment process and information on current Board members, please see [www.icstis.org.uk](http://www.icstis.org.uk).

- openness, fairness, even-handedness and impartiality when dealing with any individual or company involved in the provision of premium rate services,
- consistency when making decisions and imposing sanctions relating to breaches of our Code and having in place mechanisms to ensure that consistency,
- co-operative engagement with the constantly developing premium rate industry to secure its support for our work,
- working with legislators and other regulators to ensure that those who influence the operation of premium rate services fully understand and support our work,
- maintaining our understanding of relevant technological developments so that our regulation remains targeted and proportionate, and allows innovation and investment,
- being accessible to consumers and helping them understand how premium rate services work so that they can better protect themselves,
- acknowledging the important contribution made by all members of the organisation.

## Independence

ICSTIS operates in an entirely independent manner. Apart from up to three members who are appointed on the basis of their contemporary industry knowledge, no member of the Board may have any commercial interest in the premium rate sector. Any Board member with such commercial interests will take no part in any adjudication process.

## Remit

ICSTIS is responsible for regulating premium rate services in the UK. Through this Code, ICSTIS regulates services in their entirety – their content, promotion and overall operation. Premium rate services offer some form of content, product or service that is charged to users' phone bills.

Premium rate services typically offer information and entertainment services via fixed or mobile phone, fax, PC (e-mail, Internet, bulletin board), or interactive digital TV. There are many sorts of services, examples of which are:

- ringtones
- sports alerts
- TV voting
- competitions
- directory enquiries
- chat and business information.

They currently vary in cost from approximately 10 pence to £1.50 per call or minute (typically from a landline). Premium rate mobile services use short access codes - typically four or five-digit numbers, and will usually be shown on phone bills as 'premium rate call' or 'high premium rate service'. Premium rate charging for mobile content is generally on a per text message or per transaction basis, and includes services such as ringtones, logos, goal alerts and video clips.

UK-based landline premium rate services are normally carried on '09' dialling codes and directory enquiry (DQ) services on 118XXX codes.

ICSTIS regulates through the imposition and enforcement of responsibilities on defined parties who are collectively termed providers of premium rate services. These are those who provide the networks which carry the services (network operators), those who provide the services which the networks then carry (service providers) and those who provide the content of the service if the service provider does not do that itself (information providers).

ICSTIS provides Help Notes which, although not part of the Code, do provide detailed advice on certain areas. These notes, together with a copy of the relevant legislation and other relevant material, are available on the ICSTIS website ([www.icstis.org.uk](http://www.icstis.org.uk)) and on request from ICSTIS.

## Sanctions

ICSTIS investigates complaints and has the power to fine companies, bar access to services and order refunds. ICSTIS can also bar the individual person behind a company from running any premium rate services under any company name on any telephone network for a set period.

### Funding

ICSTIS is funded by a levy on the industry and is committed to ensuring wherever possible that funding is supplemented by other sources of income from those who from time to time breach this Code, thus reducing the financial burden on the vast majority of legitimate providers of premium rate services. For further details, see our website ([www.icstis.org.uk](http://www.icstis.org.uk)).

### This Code

In order to make this Code as accessible as possible, it consists of two parts.

Part 1. This contains information about the scope of the Code and how it can be changed. It goes on to set out the rules which apply directly to network operators and to service providers in setting up and operating their services. It then sets out the rules which apply to the content and promotion of services generally, and the rules which relate to certain specific kinds of service.

Part 2. Premium rate services exist in a complex world of statutes and regulations which apply to the fast-moving, technologically-advanced world of communications. It is necessary to have careful and formal definitions and procedures to ensure that the Code is legally comprehensible and enforceable. This part of the Code contains the definitions, the formal terms of reference of ICSTIS and the various procedures, including those which relate to Code breaches and the imposition of sanctions, appeal processes and the collection of money for funding ICSTIS.

### Copy advice and general enquiries

<b>Telephone</b>	<b>020 7940 7474</b>
<b>Press Office</b>	<b>020 7940 7408</b>
<b>Fax</b>	<b>020 7940 7456</b>
<b>E-mail</b>	<b><a href="mailto:executive@icstis.org.uk">executive@icstis.org.uk</a></b>
<b>Web</b>	<b><a href="http://www.icstis.org.uk">www.icstis.org.uk</a></b>

## PART ONE

<b>1</b>	<b>INTRODUCTION</b>	
1.1	Principles of good regulation	10
1.2	The scope of this Code	10
1.3	Geographic reach of the Code	11
1.4	Amendments and advice	11
1.5	Confidentiality	12
1.6	European Commission	12
<b>2</b>	<b>NETWORK OPERATORS</b>	<b>13</b>
2.1	General responsibilities (including funding)	13
2.2	Data protection	14
2.3	Network operators' due diligence requirements	14
2.4	Number exportation and control	16
2.5	Specific obligations	16
2.6	Network operator non-compliance	17
<b>3</b>	<b>SERVICE PROVIDERS</b>	<b>19</b>
3.1	General responsibilities (including funding)	19
3.2	Provision of information	19
3.3	General duties of service providers	20
3.4	Data protection	21
3.5	Engagement of associated individuals	21
<b>4</b>	<b>INFORMATION PROVIDERS</b>	<b>23</b>
<b>5</b>	<b>GENERAL PROVISIONS APPLICABLE TO ALL PREMIUM RATE SERVICES</b>	<b>24</b>
5.1	Prior permission	24
5.2	Legality	25
5.3	Harm and offence	25
5.4	Fairness	26
5.5	Service replacement	26
5.6	Internet dialler services	26
5.7	Pricing information	27
5.8	Contact information	28
5.9	Service identification	28
5.10	Promotions with long shelf-lives	28
5.11	Use of the word 'free'	29
5.12	Inappropriate promotion	29
5.13	Promotion by non-premium rate services	29
5.14	'STOP' command	29

6	<b>PROVISIONS RELATING SPECIFICALLY TO LIVE SERVICES</b>	30
6.1	Permission requirements	30
6.2	Promotional material	30
6.3	The conduct of live services	30
6.4	Chatline services (multi-party)	31
6.5	Claims for compensation	31
7	<b>ADDITIONAL PROVISIONS RELATING TO SPECIFIC CATEGORIES OF SERVICE</b>	33
7.1	Advice services	33
7.2	Betting tipster services	33
7.3	Virtual chat services (including text chat)	34
7.4	Contact and dating services	35
7.5	Children's services	35
7.6	Competitions and other games with prizes	36
7.7	Consumer credit services	38
7.8	Directory enquiry ('DQ') services	38
7.9	Fundraising and charitable promotions	41
7.10	Pay-for-product services	41
7.11	Sexual entertainment services	42
7.12	Subscription services	43

## PART TWO 45

8	<b>PROCEDURES AND SANCTIONS</b>	46
8.1	Complaint investigation	46
8.2	Informal procedure	47
8.3	Standard procedure	47
8.4	Emergency procedure	48
8.5	Information provider cases	50
8.6	Adjudication	51
8.7	Sanctions	51
8.8	Reviews	53
8.9	Oral hearings	54
8.10	Administrative charge	57
9	<b>ADDITIONAL PROCEDURES CONCERNING NETWORK OPERATORS</b>	58
10	<b>APPEALS</b>	61
11	<b>Framework</b>	62
11.1	Terms of reference	62
11.2	Delegation of powers	63
11.3	Definitions	63

## ANNEX 1

FUNDING ARRANGEMENTS	68
----------------------	----

## ANNEX 2

PROCEDURES OF THE INDEPENDENT APPEALS BODY	74
--	----

## 1 Principles of good regulation

- 1.1 In carrying out its activities, ICSTIS undertakes to have regard to five principles of good regulation, namely:
- transparency
  - accountability
  - proportionality
  - consistency
  - targeting

## 1.2 The scope of this Code

1.2.1 The Communications Act 2003 ('the Act') sets out in Section 120 the definition of premium rate services and who may be regulated in respect of them. The Act provides Ofcom with the power to approve a Code for the purposes of that regulation and Ofcom has approved this Code under Section 121 of the Act<sup>2</sup>.

1.2.2 Providers of premium rate services are obliged, pursuant to the condition set by Ofcom under the Act and Section 120(3)(a) of the Act, to comply with directions given by ICSTIS in accordance with this Code for the purpose of enforcing its provisions.

1.2.3 The condition set by Ofcom applies to controlled premium rate services ('CPRS'), the definition of which is contained within Part 2 of this Code. The definition of CPRS is slightly narrower than the definition of premium rate services contained in the Act. Insofar as a particular premium rate service is not within the definition of CPRS, this Code applies to it but compliance is voluntary.

1.2.4 Nothing in this Code shall be construed as requiring any person, or as enabling ICSTIS to require any person, to provide any information in circumstances where:

- a the requiring of that person to provide information would be, or
- b the making of provision in this Code for ICSTIS to be able to require that person to provide that information would have been,

contrary to Directive 2000/31/EC including Article 15 thereof.

<sup>2</sup> The Memorandum of Understanding (MoU) between Ofcom and ICSTIS can be found at: [www.icstis.org.uk/pdfs/OfcomICSTISMoUAug2005.pdf](http://www.icstis.org.uk/pdfs/OfcomICSTISMoUAug2005.pdf). The MoU establishes the framework and the shared principles to ensure efficient and effective regulation by ICSTIS based on providing value for money and operating in accordance with the principles of good governance.

## 1.3 Geographic reach of the Code

1.3.1 Save as is provided below, this Code applies to all premium rate services which are accessed by a user in the United Kingdom or provided by a service provider which is situated in the United Kingdom.

1.3.2 Some premium rate services may also be 'information society services' (as defined in Article 1.2 of Directive 98/34/EC as amended by Directive 98/40/EC). Information society services are required to be regulated in accordance with Directive 2000/31/EC on Electronic Commerce ('the E-Commerce Directive'). This Code will apply to such services when the service provider responsible for the provision of those services under this Code is:

- a established in the United Kingdom, or
- b established in the European Economic Area ('EEA') but only where the services are being accessed or may be accessed from within the United Kingdom, or
- c established in another EEA member state, but only where:
  - i the services are being accessed or may be accessed from within the United Kingdom, and
  - ii the conditions set out in Article 3.4 (read, as appropriate, in accordance with Article 3.5) of the E-Commerce Directive are satisfied.

## 1.4 Amendments and advice

1.4.1 This Code may be amended or otherwise modified from time to time by way of a process consistent with Section 121(6) of the Communications Act 2003.

1.4.2 ICSTIS may issue and/or amend advice concerning provisions of this Code from time to time. This may be in the form of Help Notes or statements which set out what ICSTIS' expectations are. These will include advice on the way it is anticipated that certain types or categories of service are likely to be dealt with under the Code and/or the way in which specific provisions are likely to be applied in relation to such services. Help Notes are intended to assist those involved in the provision of premium rate services to comply with the Code but do not bind ICSTIS and do not form part of this Code.

## 1.5 Confidentiality

Confidential information (such confidentiality being judged on an objective basis) received by ICSTIS will be kept in confidence by ICSTIS and will not be divulged to any third party other than ICSTIS employees, officers, professional advisors and Ofcom or other proper authority without consent (such consent not being unreasonably withheld or delayed). ICSTIS may divulge such information if it is necessary for it to do so in order to discharge its responsibilities under this Code or for the purpose of prevention of fraud or because disclosure is required by law.

## 1.6 European Commission

This Code was notified in draft to the European Commission in accordance with Directive 98/34/EC, as amended by Directive 98/48/EC.

## 2.1 General responsibilities (including funding)

- 2.1.1 Network operators must ensure that ICSTIS regulation is satisfactorily maintained by:
- a carrying out their own obligations under this Code promptly and effectively,
  - b taking all reasonable steps to prevent the evasion or undermining of the regulation of premium rate services.

- 2.1.2 Network operators, prior to or without any delay following commencement of any premium rate service, must supply ICSTIS with such information as it may require:
- a to show that they meet the criteria necessary to be recognised as a network operator for the purposes of this Code,
  - b to ensure effective identification of and communication with them and their responsible officers, which will include:
    - i a fully functioning active address within the UK,
    - ii the name of the person responsible for the day-to-day operation of the network operator's premium rate business,
    - iii phone and fax numbers and e-mail addresses for the network operator enabling contact at all necessary times.

Where any of the information provided to ICSTIS under this paragraph changes, network operators must provide ICSTIS with the changed information without any delay.

- 2.1.3 Network operators must have regard to and comply with the funding provisions which are set out in Annex 2 to Part 2 of this Code.
- 2.1.4 Network operators must respond without any delay to ICSTIS communications. If ICSTIS specifies a time period for response, they must adhere to it.
- 2.1.5 Any direction given by ICSTIS shall be effective if sent in writing to the postal address, fax number or the e-mail address provided by the network operator. Directions will state clearly the action required by the network operator and the time within which such action must be taken. In the case of post, delivery is presumed to have taken place on the first working day following posting.
- 2.1.6 Network operators who also operate as service providers are responsible for the application to themselves (or the relevant part of themselves) of the provisions in this Code relating to service providers as though those provisions were being applied to third party service providers.

## 2.2 Data protection

- 2.2.1 Network operators must make a notification to the Office of the Information Commissioner under the Data Protection Act 1998 and must, in their notification:
- a disclose ICSTIS as a potential recipient of personal data,
  - b state that data collected from service users may be used by ICSTIS for regulatory purposes.
- 2.2.2 Network operators must not give any undertaking to service users, suppliers, service providers, information providers or others which could preclude any information being given to ICSTIS in confidence.

## 2.3 Network operators' due diligence requirements

- 2.3.1 Before making their network and/or services available to service providers for premium rate services, network operators must (unless ICSTIS waives any such requirement in writing):
- a collect and maintain such information as ICSTIS may require them to hold in respect of their service providers in order to ensure effective identification of and communication with service providers, and in every case must collect and maintain the following information:
    - i the full address where their service providers are located and (if different) the address within the UK where they may be contacted,
    - ii in the case of a limited company, its registered number and the name and home address of each of the directors,
    - iii the name of the director with primary responsibility for premium rate services,
    - iv the name of the person responsible for the day-to-day operation of each service provider's premium rate services,
    - v phone and fax numbers and e-mail addresses for their service providers and the individuals named under *iii* and *iv* above, enabling contact to be made with any of them at all necessary times.
  - b obtain satisfactory evidence that their service providers have sufficient financial and other resources necessary to discharge their obligations under this Code in the light of their intended premium rate activities,
  - c make sufficient inquiry so as to satisfy themselves fully that the information supplied to them by service providers is accurate. In undertaking these inquiries, network operators must obtain

clear evidence, in particular in respect of the identity of the people named in accordance with paragraph 2.3.1a *iii* and *iv* above,

- d retain the information collected and the records of the inquiries made and responses to those inquiries and a copy of all evidence obtained, and make those records and copies available to ICSTIS upon being directed by ICSTIS to do so,
- e bring this Code to the attention of their service providers and retain a copy of the registration form lodged by each service provider with ICSTIS and the acknowledgement of receipt by ICSTIS (see paragraph 3.2.1),
- f satisfy themselves, by taking reasonable measures, that their service providers have in place adequate customer service and refund mechanisms including a non-premium rate UK customer service phone number in order to enable service providers to discharge their obligations under the Code.

2.3.2 In the contract with any service provider under which network operators make their network and/or services available to a service provider, network operators must:

- a require that the service provider complies with this Code (or such successor versions as may from time to time be issued) and any directions that are made by ICSTIS in accordance with it,
- b include provision(s), pursuant to Section 1 of the Contracts (Rights of Third Parties) Act 1999, so that ICSTIS may directly enforce the relevant term(s) of that contract.

2.3.3 Network operators shall not make, and shall withhold, payments to service providers for a period of at least 30 days after the use of the premium rate service to which the payments relate.

2.3.4 For a period of 10 months after the coming into force of this Code, paragraph 2.3.1 above shall not apply so as to require network operators to do the things set out in paragraph 2.3.1 in relation to any service provider to whom the network has made its network and/or services available not less than 8 weeks prior to this Code coming into force.

## 2.4 Number exportation and control

- 2.4.1 Network operators must maintain a record of numbers which, having been allocated or exported to them, are exported by them to another network operator or over which they cease to have control for any reason.

- 2.4.2 Network operators must supply to ICSTIS on request without any delay in relation to any number to which paragraph 2.4.1 applies, the name of the network operator to whom the number has been exported or who has control over it and, if known, the name of the service provider.

## 2.5 Specific obligations

- 2.5.1 When directed to do so by ICSTIS, network operators shall provide to ICSTIS within such time as it shall specify such information (including copy documents) as it requires in relation to any complaint received or investigation being carried out by it. Such information may include, but is not limited to:
- a service provider details and copies of contracts with service providers and/or any agents or other parties concerned in the process of providing the network operator's network facilities or other communications services to service providers,
  - b the number and length of calls to or from any number,
  - c information concerning historic traffic levels to services of the relevant service providers,
  - d the times when calls were made,
  - e all details of outpayments including amounts, bank details and dates of payment to service providers (which may include such proof of payment as ICSTIS shall specify),
  - f details of other numbers held by relevant service providers.
- 2.5.2 When directed to do so by ICSTIS, network operators shall immediately:
- a terminate access to such premium rate services and/or numbers as ICSTIS may specify,
  - b terminate access to all numbers that are allocated to any specified service provider,
  - c terminate access to some or all numbers over which a specified premium rate service or type of service may be operated,
  - d withhold such an amount of money as ICSTIS may require out of monies payable by the network operator to a specified service provider until permitted by ICSTIS to do otherwise, or withhold some or all money payable to a specified service provider in respect of certain numbers or premium rate services (as may be specified) until permitted by ICSTIS to do otherwise, or withhold all money payable to a specified service provider until informed by ICSTIS that it may do otherwise,

- e pay over to ICSTIS such an amount of any money withheld pursuant to paragraph 2.3.3 or to sub-paragraph 2.5.2d above as ICSTIS may require in order to satisfy outstanding fines and/or administrative charges, such payment to be made within 30 days of such direction,
- f pay refunds on behalf of service providers when so required by ICSTIS in accordance with paragraph 8.7.6.

- 2.5.3 Network operators must not contract to provide services to any service provider and/or associated individual in respect of whom a sanction, which has been published, has been imposed under paragraphs 8.7.2f or 8.7.2g so as to enable the service provider and/or associated individual to operate in breach of that sanction.

- 2.5.4 Network operators that pay money to a service provider contrary to paragraph 2.3.3 or after receipt of a direction by ICSTIS to withhold money from that service provider may be directed by ICSTIS to pay to it an amount no more than the amount of the fines, administrative charges or refunds that have not been paid by or on behalf of the service provider when due, provided that the amount payable by the network operator to ICSTIS is no more than the amount that should have been withheld by the network operator in accordance with the Code or as directed under the Code.

## 2.6 Network operator non-compliance

- 2.6.1 Non-compliance by a network operator with any of its obligations set out in this Code shall be dealt with in accordance with Section 9. If ICSTIS determines that a network operator is in breach of any of its obligations then, having taken all relevant circumstances into account, it may make a direction imposing a sanction on the network operator in the form of any or all of the following depending upon the degree of seriousness with which it regards the breach:
- a a reprimand and/or a requirement that the network operator must comply and remedy the consequences of the breach,
  - b an instruction to pay an appropriate fine,
  - c an instruction to cease to provide its network and/or services for the carriage of any particular type or category of premium rate services for a certain period,
  - d an instruction to pay reasonable and valid claims for refunds.

### 3.1 General responsibilities (including funding)

- 3.1.1** Service providers are responsible for ensuring that the content and promotion of all of their premium rate services (whether produced by themselves, information providers or others) comply with all relevant provisions of this Code.
- 3.1.2** Service providers are responsible for funding ICSTIS in accordance with the funding provisions in Annex 1.
- 3.1.3** Any direction or notice required to be given in accordance with any of the rules or procedures in this Code shall be effective if sent in writing to the postal address, fax number or e-mail address provided. In the case of post, delivery is presumed to have taken place on the first working day following posting.

### 3.2 Provision of information

- 3.2.1** Before providing any premium rate services, service providers must register with ICSTIS by completing online or lodging with ICSTIS a registration form (available for completion on the ICSTIS website or from ICSTIS) and receive an acknowledgement (which may be electronically generated) from ICSTIS.
- 3.2.2** Service providers must provide to ICSTIS without delay such information as it may require for any purpose relating to this Code which may include but is not limited to:
- a** any number ranges (including dialling codes) or other connection arrangements allocated to it by Ofcom or any network operator,
  - b** if the service requires or involves access to any website, the URL of the site,
  - c** the name, address, e-mail address, phone and fax number of the person representing the service provider who is nominated to receive all communications in connection with the application of the Code, enabling contact to be made with that person at all necessary times, and, if that person is not a director of the service provider, the name of the director with primary responsibility for premium rate services,
  - d** the name and home address of each of the directors and their phone and fax numbers and e-mail addresses.

- 3.2.3** Changes or additions to information provided to ICSTIS in the registration form or otherwise in accordance with this Code must be notified to ICSTIS and to the relevant network operator without delay.

### 3.3. General duties of service providers

- 3.3.1** Where certain codes or number ranges have been designated by either Ofcom or a network operator for use only for particular purposes or for the provision of particular categories of service, or where Ofcom or a network operator has restricted certain codes or number ranges from being used for particular purposes or for the provision of particular categories of service, those codes or number ranges must not be used in contravention of these restrictions. Ofcom's designations will have precedence over any issued by a network operator.
- 3.3.2** Before promoting or providing services, service providers must have readily available all documentary and other evidence necessary to substantiate any factual claims made. This material, together with a statement outlining its relevance to the factual claim in question, must be provided without delay if requested by ICSTIS.
- 3.3.3** Service providers must use all reasonable endeavours to ensure that all of their services are of an adequate technical quality.
- 3.3.4** Service providers must bring the Code to the notice of any information providers with whom they contract in respect of the provision of premium rate services and must, in that contract, require that information providers comply with the Code.
- 3.3.5** Service providers must ensure that there are in place customer service arrangements which must include a non-premium rate UK customer service phone number and an effective mechanism for the consideration of claims for refunds and their payment where justified.

### 3.4 Data protection

- 3.4.1** Service providers must make a notification to the Office of the Information Commissioner under the Data Protection Act 1998 and must, in their notification:

- a disclose ICSTIS as a potential recipient of personal data,
- b state that data collected from service users may be used by ICSTIS for regulatory purposes.

3.4.2 Service providers must not give any undertaking to service users, suppliers, network operators, information providers or others which could preclude any information being given to ICSTIS in confidence. Service providers must warn consumers that any data collected may be passed to ICSTIS.

3.4.3 Services which involve the collection of personal information, such as names, addresses and phone numbers (which includes the collection of Calling Line Identification (CLI) or caller display information), must make clear to service users the purpose for which the information is required. The service must also identify the data controller (if different from the service provider or information provider) and any different use to which the personal information might be put, and give the service user an opportunity to prevent such usage.

### 3.5 Engagement of associated individuals

Service providers must not engage or permit the involvement in the provision of premium rate services of any service provider and/or associated individual in respect of whom a sanction, which has been published, has been imposed under paragraphs 8.7.2f or 8.7.2g so as to enable the service provider and/or associated individual to operate in breach of that sanction.

## 4 Information Providers

4.1 Information providers must comply with the provisions of this Code where applicable to them or to the service and/or promotion with which they are concerned.

4.2 ICSTIS operates this Code through processes which primarily involve network operators and service providers. ICSTIS deals with information providers in its procedures and imposes sanctions directly on them only in limited circumstances as set out in paragraph 8.1.4 or where an individual is subject to the process set out in paragraphs 8.7.4 and 8.7.5 which may lead to the imposition of a sanction under paragraph 8.7.2f or 8.7.2g.

## 5.1 Prior permission

- 5.1.1** ICSTIS may require that particular categories of service must not be provided without its prior written permission for any service within that category. ICSTIS will give reasonable notice of such a requirement and the category of service to which it applies, and will publish a full list of such service categories from time to time. Prior permission may be granted subject to the imposition of additional conditions. Such permission may be withdrawn or varied upon reasonable grounds and with notice in writing.
- 5.1.2**
- a** Where a service provider can demonstrate to the satisfaction of ICSTIS in relation to a particular service that any objective of the Code can be adequately satisfied by means other than strict adherence to the Code provisions, ICSTIS may give prior written permission (which may be given subject to conditions) for the service to be provided by such alternative means. Such permission may be withdrawn or varied by ICSTIS subject to the giving of reasonable notice.
  - b** Whenever ICSTIS grants permission under 5.1.2a above, it will publish on its website, in relation to that permission before the permission is to take effect, the following information:
    - i** the paragraph numbers of the Code provisions to which the permission relates,
    - ii** details of the terms and scope of the permission, including any conditions attached to it,
    - iii** a brief statement identifying the objective of the Code which ICSTIS has decided is capable of being satisfied by means other than strict adherence to the Code provisions in question, and stating ICSTIS' reasons for being so satisfied, and
    - iv** the date from which the permission is to take effect.
  - c** Nothing in 5.1.2b above requires the publication of "commercially confidential information" (information which is not already in the public domain and the publication of which would be likely to damage the commercial interests of a service provider or any other person). Where some of the information described in 5.1.2b is commercially confidential, ICSTIS shall publish as much of that information as is not commercially confidential at the time of first publication and may publish the remainder of the information if and when it ceases to be commercially confidential.

- 5.1.3** A breach of any condition imposed in connection with a permission granted by ICSTIS in accordance with this Code shall be a breach of the Code.
- 5.1.4** ICSTIS may require the payment of reasonable charges by applicants for prior permission in order to defray administrative costs.

## 5.2 Legality

Services and promotional material must comply with the law. They must not contain anything which is in breach of the law, nor omit anything which the law requires. Services and promotional material must not facilitate or encourage anything which is in any way unlawful.

## 5.3 Harm and offence

- 5.3.1** Services and promotional material must not, or must not be likely to:
- a** result in any unreasonable invasion of privacy,
  - b** induce an unacceptable sense of fear, anxiety or distress,
  - c** encourage or incite any person to engage in unreasonably dangerous practices or to use harmful substances,
  - d** induce or promote racial disharmony,
  - e** cause grave or widespread offence,
  - f** debase, degrade or demean,
  - g** promote or facilitate prostitution.
- 5.3.2** Services and promotional material must not, in circumstances where it is not reasonable for a consumer to expect such content or material (and subject to 5.3.1 above):
- a** contain material indicating violence, sadism or cruelty, or be of a repulsive or horrible nature,
  - b** involve the use of foul language.

## 5.4 Fairness

- 5.4.1** Services and promotional material must not:
- a** mislead, or be likely to mislead in any way,
  - b** take unfair advantage of any characteristic or circumstance which may make consumers vulnerable.

- 5.4.2 Services must not be unreasonably prolonged or delayed.
- 5.4.3 Services must not be of a nature which encourages unauthorised use.

### 5.5 Service replacement

A service must not be replaced by another service which might give offence to, or might be inappropriate for, service users reasonably expecting the original service.

### 5.6 Internet dialler services

- 5.6.1 No premium rate service which requires that Internet dialler software is delivered to the user's equipment in order to access the service or any part of it ('Internet dialler services') may be provided without prior written permission from ICSTIS.
- 5.6.2 In respect of Internet dialler services, prior to connection to the premium rate service, prominent pricing information and the premium rate number being used must be displayed on the user's screen.
- 5.6.3 An on-screen clock must be displayed throughout the duration of any Internet dialler service showing the cumulative cost.
- 5.6.4 Unless permission to do otherwise is specifically granted by ICSTIS, Internet dialler services which provide access to a website must not allow any further access via the service to the worldwide web until the user has disconnected from the premium rate service.

## PROMOTIONS

### 5.7 Pricing information

- 5.7.1 Service providers must ensure that all users of premium rate services are fully informed, clearly and straightforwardly, of the cost of using a service prior to incurring any charge.
- 5.7.2 Written pricing information must be easily legible, prominent, horizontal and presented in a way that does not require close examination. Spoken pricing information must be easily audible and discernible.
- 5.7.3 In cases where it is unlikely that a consumer will have seen or heard any promotional material containing pricing information, the service provider must place a short, distinct pricing message at the beginning of the service.
- 5.7.4 Unless ICSTIS has given written permission to the contrary, the pricing information in promotional material transmitted on television or in another audio-visual format must be spoken as well as being visually displayed if the cost of the service generally exceeds £2.
- 5.7.5 Premium rate services which do not generally cost more than 50 pence are exempt from all ICSTIS requirements on pricing information, unless the services are:
  - a children's services (see paragraph 7.5), or
  - b accessed by automated equipment (such as a burglar alarm or a modem operating in conjunction with software that causes a number to be dialled automatically when the user wishes to access the Internet), or
  - c subscription services (see paragraph 7.12).
- 5.7.6 All operational or instructional messages necessary to obtain access to a service and provided separately to the service must be available free of charge to a user.

## 5.8 Contact information

For any promotion, the identity and contact details in the UK of either the service provider or information provider, where not otherwise obvious, must be clearly stated. The customer service phone number required in paragraph 3.3.5 must also be clearly stated unless reasonable steps have previously been taken to bring it to the attention of the user or it is otherwise obvious and easily available to the user.

## 5.9 Service identification

5.9.1 In all promotional material, any code, prefix, short access number or similar provision must be presented in such a way that it can be readily identified as a premium rate code or, as appropriate, an international prefix.

5.9.2 If the premium rate service operates on an international number, it must be made clear in the promotional material that an international call is required.

## 5.10 Promotions with long shelf-lives

In the case of premium rate services which are promoted in publications or other media which are likely to have a shelf-life of three months or more, the promotion must include a statement to the effect that the information given is correct as at the time of publication and that time must also be stated. If the charges for the service increase during the life of the promotion, such services must be prefaced with a short message informing users of the new charge levels.

## 5.11 Use of the word 'free'

No premium rate service or product obtained through it may be promoted as being free unless:

- a a product or service has been purchased by the consumer using a premium rate service and a second product or service of an equal or greater value is provided at no extra charge, or
- b a product is provided through the premium rate service and the cost to the user does not exceed the delivery costs of the product and the promotional material states the maximum cost of the call.

## 5.12 Inappropriate promotion

Service providers must use all reasonable endeavours to ensure that promotional material does not reach those for whom it, or the service which it promotes, is likely to be regarded by them as being offensive or harmful. Service providers must use all reasonable endeavours to ensure that their services are not promoted in an inappropriate way.

## 5.13 Promotion by non-premium rate services

Wherever a premium rate service promotes, or is promoted by, a non-premium rate electronic communications service, both services will be considered as one where, in the opinion of ICSTIS, it is reasonable to do so.

## 5.14 'STOP' command

Where a 'STOP' command is used in a service, clear instructions on its use must be given, including any necessary information on the placing of 'STOP' within any message to be sent by the user. When a 'STOP' command has been sent, the service provider must make no further charge to the user for the service.

## 6.1 Permission requirements

- 6.1.1 No live services may be provided without prior permission from ICSTIS, save that ICSTIS may identify categories of live services which are exempt from the prior permission requirement. Such exemptions may be withdrawn or modified by ICSTIS at any time on reasonable notice and a list of exempt categories will be published by ICSTIS from time to time.
- 6.1.2 ICSTIS may set such conditions as it sees fit in the granting of permission under paragraph 6.1.1.

## 6.2 Promotional material

- a Unless the live service is available 24 hours a day or permission not to provide such information has been granted by ICSTIS, hours of operation must be stated on the promotional material.
- b Unless ICSTIS has granted permission for it to do so, no promotion may be directed primarily at persons under 18 years of age or encourage such persons to call the service.

## 6.3 The conduct of live services

- 6.3.1 Unless ICSTIS grants permission to do otherwise:
  - a all providers of live services must ensure that on connection each service user receives a brief introductory message giving details of the call costs and the name of the service provider providing the live service,
  - b service providers must actively discourage service users from seeking or giving out surnames, places of work, addresses or geographic phone numbers, or arranging or attempting to arrange any meeting while connected to a live service,
  - c service providers must ensure that operators use reasonable endeavours to prevent persons under 18 years of age from taking part in any live service,
  - d if an operator has reasonable grounds, upon questioning a service user, to suspect that the user is under 18, the service provider must immediately end the service for that user.

- 6.3.2 The service provider shall take reasonable steps to identify and cut off calls made without the permission of the bill-payer.

## 6.4 Chatline services (multi-party)

- 6.4.1 Chatline services must not be promoted or operate as sexual entertainment services and operators must use all reasonable endeavours to prevent conversation which is primarily of such a nature.
- 6.4.2 Before a service user may participate in a chatline service, the service provider must obtain the user's date of birth and confirmation that he has the permission of the bill-payer to use the service.

## 6.5 Claims for compensation

- 6.5.1 Where it considers it appropriate, ICSTIS will not grant permission under paragraph 6.1.1 unless it is satisfied that compensation arrangements exist for the prompt and effective provision of compensation. Compensation must be available to any person whose connection to the electronic communications network has been the subject of unauthorised use of the relevant live service(s) and in respect of which the Adjudicator has made an award in accordance with paragraph 6.5.4 of the Code.
- 6.5.2 At the time of publication of this Code, neither live entertainment services nor chatlines may be provided unless a compensation scheme approved by ICSTIS is in place and the relevant service provider has complied with the terms of the relevant compensation scheme.
- 6.5.3 Claims for compensation may be made by any person whose connection to the electronic communications network has been the subject of unauthorised use. When claims are received by ICSTIS, the relevant service provider(s) will be given an opportunity to settle them to the satisfaction of the claimant.

## 6.5.4

If the service provider does not settle the matter to the satisfaction of the claimant within a reasonable time, the matter will be referred to the Adjudicator, who will determine the matter in accordance with his procedures and who may require that the service provider pays the claim or part of it, together with an administrative charge and appropriate provision for the claimant's costs.

**SECTION 7 SUPPLEMENTS, BUT DOES NOT REPLACE, THE GENERAL PROVISIONS IN SECTION 5.**

## 7.1 Advice services

## 7.1.1

All advice services must:

- a be conveyed in a responsible manner,
- b indicate clearly in the promotional material or at the beginning of the service, the identity, current status and any relevant professional qualifications and experience of the person(s) or organisation supplying the information or advice. If the advice is given by a person with no relevant qualifications, the service must explain the source of the information.
- c be prefaced with a statement that the service user should not act upon advice which needs individual interpretation without first consulting a suitably qualified practitioner.

## 7.2 Betting tipster services

## 7.2.1

Service providers must ensure that services and promotional material do not:

- a make claims about future selections being certain winners or about the certainty of profits,
- b quote odds for future selections unless the availability of these odds can be substantiated.

## 7.2.2

Service providers must make clear that opinions on particular selections given in services or promotional material are opinions and not statements of fact.

## 7.2.3

Service providers must ensure that any claims made, including previous selections and general statements about tipsters' records of success, are capable of being substantiated.

### 7.3 Virtual chat services (including text chat)

- 7.3.1** **Definition of virtual chat services**  
Virtual chat services are not live conversation services but enable two or more users to exchange separate messages whether by recorded voice, text or pictures while engaged in the service.
- 7.3.2**
- a** Service providers must take all reasonable steps to ensure that the participant in any virtual chat service is an authorised user and that nobody under the age of 18 uses virtual chat services.
  - b** The only exceptions to this rule are non-adult (non-sexual entertainment) text and picture-based virtual chat services offered to the 16-17 age group, provided that the advertising of such services occurs in media where the target readership or audience is not below 16 years of age.
  - c** In the case of group text virtual chat services, consumers must be informed of any conditions before they enter the service and, in particular, of the minimum number of messages they will receive and the price per message.
  - d** In the case of text virtual chat services, the 'STOP' command must be available and consumers must be so informed before entering the service.
  - e** Service providers must take all reasonable steps to discourage sexually explicit chat on services which are advertised in generally available media.
- 7.3.3** All virtual chat services must, as soon as is reasonably possible after the user has spent £10, and after each £10 of spend thereafter:
- a** inform the user of the price per minute of the call,
  - b** require users to provide a positive response to confirm that they wish to continue. If no such confirmation is given, the service must be terminated.
- 7.3.4** Service provider employees who are to be involved in operating virtual chat services (whether or not for the purposes of monitoring) must be given adequate training in the relevant requirements of this Code before commencing operation. No such employee shall be under the age of 18.

### 7.4 Contact and dating services

- 7.4.1** **Definition of contact and dating services**  
Contact and dating services are services which enable persons who were previously unacquainted with each other to make initial contact and arrange to meet in person or otherwise continue to have contact with one another outside the service if they wish to do so.
- Service providers who operate services which enable contact details to be exchanged, either in the course of exchanging messages in virtual chat services or otherwise, must:
- a** warn users and advertisers of the risks involved when contact details are given out and give clear advice on sensible precautions to take when meeting people through such services,
  - b** ensure that publicly-available elements of the service do not contain contact details, addresses or any other means of direct contact,
  - c** when requested by the advertiser, ensure that their details are removed from the service at the earliest opportunity and in all cases within 24 hours,
  - d** make clear in the promotional material any restrictions on the location, sex and age range of users and of advertisers to the service,
  - e** bar access to a voicemail box where the advertiser has not collected responses for more than four weeks. If the service provider is unable to tell when responses are collected, no advertisement may be published for more than four weeks.

### 7.5 Children's services

- 7.5.1** **Definition of children's services**  
Children's services are services which, either wholly or in part, are aimed at or should have been expected to be particularly attractive to children, who are defined for the purposes of this Code as people under 16 years of age.
- 7.5.2** Promotional material for children's services must clearly state:
- a** the usual cost of the service,
  - b** that the service should only be used with the agreement of the person responsible for paying the phone bill.

- 7.5.3** Children's services, and any associated promotional material, must not:
- a** contain anything which is likely to result in harm to children or others or which exploits their credulity, lack of experience or sense of loyalty,
  - b** include anything which a reasonable parent would not wish their child to hear or learn about in this way,
  - c** make direct appeals to children to buy or donate, unless the product, service or donation is one which they could reasonably be expected to afford for themselves,
  - d** encourage children to use other premium rate services or the same service again.
- 7.5.4** Children's services must not:
- a** generally cost more than £3, or in the case of subscription services (see paragraph 7.12), more than £3 per month,
  - b** involve competitions that offer cash prizes or prizes readily converted to cash.

## 7.6 Competitions and other games with prizes

- 7.6.1** Competition services typically fall into five basic categories:
- lotteries,
  - competitions,
  - other games with prizes,
  - an entry mechanism into a draw,
  - information about prizes and how to claim them.
- Most of these are subject to legal restrictions. Before setting up such services, service providers are strongly advised to seek advice on legal and excise duty implications.
- 7.6.2** Promotional material for competition services which generally cost more than £1 must clearly display:
- a** the cost per minute and likely playing time, or the full cost of participation,
  - b** details of how the competition operates and an indication of any tie-breakers.

- 7.6.3** Promotional material must clearly state any information which is likely to affect a decision to participate, in particular:
- a** any key terms and conditions, including any restriction on the number of entries or prizes which may be won,
  - b** an adequate description of prizes and other items offered to all or a substantial majority of participants, including the number of major prizes and details of any restriction on their availability or use,
  - c** where a prize consists wholly or in part of vouchers, the promotional material must specifically and prominently state the value of a single voucher as well as any total value.
- 7.6.4** The following additional information must also be made readily available on request, if not contained in the original promotional material:
- a** how and when winners will be informed,
  - b** how winner information may be obtained,
  - c** any criteria for judging entries,
  - d** any alternative prize that is available,
  - e** the details of any intended post-event publicity,
  - f** any supplementary rules which may apply.

**7.6.5** Except where there are only instant prize-winners, promotional material for competition services must state when the competition closes. An insufficient number of entries or entries of inadequate quality are not acceptable reasons for changing the closing date of a competition or withholding prizes.

- 7.6.6** Competition services and promotional material must not:
- a** use words such as 'win' or 'prize' to describe items offered to all or a substantial majority of participants,
  - b** exaggerate the chance of winning,
  - c** suggest that winning is a certainty,
  - d** suggest that consumers must use a premium rate service in order to participate if an alternative postal entry route is available.

- 7.6.7 Service providers must ensure that:
- a prizes are awarded within 28 days of the closing date, unless a longer period is clearly stated in the promotional material,
  - b all correct entries have the same chances of winning,
  - c if there is any subjective assessment in the selection of the winning entries (e.g. tie-breakers) in a competition open to the general public, then judging is by a person or persons independent of the service provider and any intermediaries involved, or by a judging panel including at least one independent member.

## 7.7 Consumer credit services

Prior permission must be obtained from ICSTIS for the provision of any service which provides, or provides advice relating to, consumer credit, regardless of the level of credit to which such a service relates.

## 7.8 Directory enquiry services ('DQ')

- 7.8.1 **Definition of a directory enquiry service**  
 A directory enquiry ('DQ') service is a service one of the main or advertised purposes of which is to provide callers with the telephone numbers of subscribers and/or other end-users of electronic communications services ('end-users') by searching one or more sources of information ('sources') (whether held in paper or electronic form, and whether held or maintained by the service provider or by any other person) using information provided by callers as to particular end-users' names and/or addresses.

- 7.8.2
- a In respect of a DQ service which is held out as providing numbers for the generality of end-users in the United Kingdom (or a part of the United Kingdom), that service must be provided using sources which include up-to-date information about all end-users in the United Kingdom (or that part of the United Kingdom) in relation to whom directory information can be obtained under General Condition 19.1 of the General Conditions of Entitlement (as amended by Ofcom from time to time).
  - b In respect of a DQ service which is held out as providing information about end-users outside the United Kingdom, that service must be provided using sources which include up-to-date information about all end-users whose telephone numbers can be obtained from the current edition of the published national directories or national DQ service available in respect of the country or countries which the DQ service is held out as covering.

- 7.8.3 Any promotion for a DQ service which provides numbers for less than the generality of end-users in the United Kingdom must expressly and clearly indicate the group of end-users in relation to whom the service is able to provide information.

- 7.8.4
- a A DQ service provider must, immediately upon a caller providing sufficient information to enable the telephone number he is searching for ('the number') to be identified, provide, or offer to provide, the caller with that number (unless legal or regulatory obligations prevent the number from being provided). If the caller then indicates that he wishes the number to be so provided, the service provider must immediately provide that number without the caller having to redial or incur any additional charge (save for the cost of continuing the call for a sufficient duration to receive the number).
  - b The number can be provided, in accordance with subparagraph a above, by way of speech, e-mail, text message or other communication format. In the case, however, of a caller who has accessed the service by way of a voice call, the service provider must provide the caller with the option of being provided with the number by way of speech (whether that speech is spoken by a live operator or generated electronically).

- c Where a DQ service offers callers the service of call completion (connecting the caller to the number without his having to dial it), the service provider must, before making the onward connection, first inform the caller of the cost of that service and allow him to choose whether or not to agree to the connection being made. The caller must be provided with a clear opportunity to decline call completion and to instead be provided with the number (in accordance with sub-paragraph a above) unless legal or regulatory obligations prevent the number from being so provided.
- d DQ services must not offer call completion or connection to:
  - i any premium rate service which is a chatline service,
  - ii any premium rate service which is a sexual entertainment service, or
  - iii any individual, business or organisation with whom the DQ service provider has an agreement to share call revenue.
- e ICSTIS may exempt a particular DQ service, or a category or species of DQ services, from any of the obligations or requirements of this paragraph (paragraph 7.8.4) where ICSTIS considers it appropriate to do so in order to permit the provision of DQ services in a form, or using a business model, that would not otherwise be reasonably possible and the provision of which would be of net benefit to both competition and consumers. The terms and extent of any such exemption shall be published on ICSTIS' website.

**7.8.5** DQ services provided on '118' prefixed telephone numbers are exempt from the restrictions imposed by the following provisions of the Code in respect of the provision of live services:

- a paragraph 6.3.1a – the provision of pricing information on connection; and
- b paragraph 6.3.1c and d – concerning the prevention of persons under the age of 18 from calling the service.

**7.8.6** A caller to a DQ service who:

- a in the course of calling that service, provided adequate relevant information to enable identification of the number (assuming that the DQ service provider was complying with paragraphs 7.8.2 and 7.8.3 above), but
- b was not provided with that number, and
- c makes a complaint to the provider of the DQ service in relation to those circumstances,

must be offered a refund in respect of the full cost of the call to the DQ service and any subsequent call by which the complaint was made. This is in addition to any obligation that may arise by reason of paragraph 3.3.5.

## 7.9 Fundraising and charitable promotions

Service providers should be aware that the scope of such services is limited by legislation relating to charities.

The promotional material for fundraising (whether or not for charitable purposes) and charitable promotions must make clear:

- a either the total sum per call or the amount per minute which will be paid to the beneficiary,
- b the identity of the beneficiary,
- c any restrictions or conditions attached to the contribution to be made to the beneficiary.

## 7.10 Pay-for-product services

### 7.10.1 Definition of pay-for-product services

Pay-for-product services are those, costing more than £1 in total, in which the benefit to the user is either the delivery during or consequent to the use of the service of a product or service (not itself being premium rate content) paid for wholly or in part by the user through a network operator, or the provision during the service of electronic data which the user is able to receive and store and which is not primarily intended for use on the device used for access to the service. Such services are required to conform to the requirements of the Distance Selling Regulations 2000<sup>3</sup>.

**7.10.2** Pay-for-product services do not include products received as part of a subscription service (in respect of which see paragraph 7.12).

**7.10.3** Unless permission to do otherwise is specifically granted by ICSTIS, service providers must ensure that pay-for-product services:

- a do not cost more than £30,
- b include an introductory message giving the likely total cost of the service and adequate information about how the service works,
- c require access to the service to take place only once to enable delivery of the product,
- d terminate automatically once the £30 limit has been reached.

<sup>3</sup> Details of the Distance Selling Regulations can be found at [www.dti.gov.uk/ccp/topics1/ecomm.htm](http://www.dti.gov.uk/ccp/topics1/ecomm.htm).

- 7.10.4** The promotional material for pay-for-product services must clearly state:
- a** any costs additional to the cost of the service relating to delivery charges (where applicable),
  - b** any necessary information about the arrangements for delivery of any product or service and/or performance of any service.
- 7.10.5** If a pay-for-product service generally costs more than £5:
- a** the service provider must keep records of the contact details of the service user and the names and dispatch addresses to which any physical product has been sent for a minimum of six months,
  - b** the service must require an active confirmation from users that they accept that their personal details and delivery address will be retained and made available in the case of a claim for unauthorised use.
- 7.10.6** In addition to fulfilling the requirements of paragraph 3.3.5, providers of pay-for-product services must meet all reasonable and valid claims for refunds where the user who ordered the goods or services was not the bill-payer or did not have the bill payer's permission to use the service.
- 7.10.7** Pay-for-product services where the product is of a clearly sexual nature are sexual entertainment services. Such services must operate on the designated code(s) for sexual entertainment services.

## 7.11 Sexual entertainment services

- 7.11.1** **Definition of sexual entertainment services**  
Sexual entertainment services are services of a clearly sexual nature or any services for which the associated promotional material indicates, or implies, that the service is of a sexual nature.
- 7.11.2** Sexual entertainment services, and promotions for them, must not contain references which suggest or imply the involvement of persons under 18 years of age.
- 7.11.3** Promotions for sexual entertainment services must not appear in media targeted at persons under the age of 18.

- 7.11.4** Promotions for sexual entertainment services must be in context with the publication or other media in which they appear. Services should be in context with the advertising material promoting them. The content of a service should not be contrary to the reasonable expectations of those responding to the promotion.
- 7.11.5** Save where the relevant network operator has provided an alternative solution acceptable to ICSTIS, all sexual entertainment services must provide a message at the beginning of the service stating that:
- a** the user must be over the age of 18,
  - b** the user should be either the bill-payer or have the bill-payer's permission to call the service,
  - c** service details may appear on the phone bill.
- 7.11.6** In addition, all sexual entertainment services which are not live services must:
- a** cost no more than £30 (unless ICSTIS grants specific permission to a service provider to allow a higher maximum charge),
  - b** terminate the call automatically once the £30 (or other agreed) limit is reached.
- 7.11.7** Service providers must ensure that promotions for sexual entertainment services, and the services themselves, are compatible with access control and rating arrangements available for and appropriate to the medium through which they are accessible. Providers of sexual entertainment services which can be accessed by any means at premium rate must ensure that all websites which can be accessed are content-rated with the Internet Content Rating Association (ICRA) or any other rating system that is generally accepted.

## 7.12 Subscription services

- 7.12.1** **Definition of subscription services**  
Subscription services are those which incur a recurring premium rate charge.
- 7.12.2** It must always be possible for a user to leave a subscription service by using the 'STOP' command.

- 7.12.3 Promotional material must:
- a clearly indicate that the service is subscription-based. This information should be prominent and plainly visible and/or audible to consumers,
  - b ensure that the terms of use of the subscription service (e.g. whole cost pricing, opt-out information) are clearly visible and/or audible,
  - c advertise the availability of the 'STOP' command.
- 7.12.4 **Subscription initiation**  
Users must be sent a free initial subscription message containing the following information before receiving the premium rate service:
- a name of service,
  - b confirmation that the service is subscription-based,
  - c what the billing period is (e.g. per day, per week or per month) or, if there is no applicable billing period, the frequency of messages being sent,
  - d the charges for the service and how they will or can arise,
  - e how to leave the service,
  - f service provider contact details.
- 7.12.5 **Subscription reminders**  
Once a month, or every time a user has spent £20 if that occurs in less than a month, the information required under paragraph 7.12.4 above must be sent free to subscribers.
- 7.12.6 **Subscription termination**
- a After a user has sent a 'STOP' command to a service, the service provider must make no further charge for messages.
  - b Users must be free to leave a service at any time and service providers must do nothing to indicate that this is not the case, unless specific permission to do so has been granted by ICSTIS.

Code for Premium Rate Services  
Approved under  
Section 121 of  
the Communications Act 2003

Code of Practice  
(Eleventh Edition)

CODE OF PRACTICE  
2006  
ICSTIS

PART TWO

as approved by the Office of Communications for the purposes of  
Sections 120 and 121 of the Communications Act 2003  
on 9th November 2006

## 8.1 Complaint investigation

- 8.1.1 ICSTIS will consider and, where appropriate, investigate all complaints which it receives, provided that the complaint is made within a reasonable period from the time when it arose.
- 8.1.2 ICSTIS, through its Executive, monitors premium rate services. The Executive can itself initiate an investigation where there appears to be a breach of the Code.
- 8.1.3 During investigations, or as part of the adjudication process, ICSTIS may direct any service provider or network operator concerned to disclose to the Executive, subject to the confidentiality provision set out in paragraph 1.5 and within a reasonable time period, any relevant information or copies of documents. This may include, for example, information concerning:
- call volumes, patterns and revenues,
  - details of the numbers allocated to a service provider,
  - details of services operating on particular premium rate numbers,
  - customer care records,
  - arrangements between networks and service providers,
  - arrangements between service providers and information providers.
- 8.1.4 Throughout these procedures, ICSTIS will deal directly with service providers and network operators. ICSTIS may also deal with information providers in any case in circumstances where the service provider requests that ICSTIS deals directly with the information provider and:
- a the information provider:
    - accepts full responsibility for the service and/or its promotion,
    - undertakes that, in the event that a breach is established and a sanction and/or administrative charge is imposed, it will be responsible for compliance and/or payment, and
  - b the relevant service provider undertakes that, in the event that the information provider fails to comply with any sanction and/or make any payment due, the service provider will retain responsibility for compliance and/or payment in respect of any sanction and/or administrative charge that has been imposed, and will comply on demand from ICSTIS without any entitlement to further process, and

- c ICSTIS accepts that the case is one in which it is appropriate for it to deal with the information provider.

The procedure in respect of cases in which ICSTIS is asked to deal directly with information providers is set out at paragraph 8.5.

## 8.2 Informal procedure

In appropriate cases where an apparent breach of the Code has caused little consumer harm, the Executive may use the 'informal procedure'. Factors including the seriousness of the breach and the service provider's case history will be taken into account when deciding whether the informal procedure should be applied. In such cases:

- a The service provider will be contacted and informed of the apparent breach.
- b If the service provider agrees that a breach of the Code has taken place, the service provider will be required to remedy the breach and accept any condition that the Executive may require. No other sanction will be imposed nor any administrative charge levied.
- c The service provider will be sent a letter confirming what has been agreed.
- d If the service provider disputes the breach, the standard procedure may be invoked.
- e A record will be maintained in respect of breaches of the Code dealt with through the informal procedure.

## 8.3 Standard procedure

When the Executive receives or initiates a complaint, the 'standard procedure' will usually be used:

- a The Executive will provide the service provider with all the necessary information about the complaint, including details of the service or promotional material which gives rise to the apparent breach of the Code, and will be referred to the relevant provisions of the Code.

- b The service provider will be given a reasonable time in which to respond and to provide any information requested. This response will normally be required within five working days. In exceptional circumstances, a shorter time limit may be set but this will not be less than 24 hours.
- c If the service provider fails to respond within the required period, the Executive will proceed on the assumption that the service provider does not wish to respond.
- d The Executive will prepare a report, together with relevant supporting evidence, which will be placed before a sub-committee of ICSTIS delegated to adjudicate upon the matter (an 'adjudication panel').
- e The adjudication panel may invite the service provider to make informal representations to it in person in order to clarify any matter or the service provider may request the opportunity to make such informal representations to the adjudication panel.
- f At any point in the course of a standard procedure, ICSTIS may inform the relevant network operator(s) of the apparent breach of the Code and direct that it withholds from the service provider any payments (relating to the relevant services) outstanding under the contract between it and the service provider.

## 8.4 Emergency procedure

- 8.4.1 Where it appears to the Executive that a breach of the Code has taken place which is serious and requires urgent remedy, the 'emergency procedure' will be used:
- a The Executive will undertake an immediate investigation of the complaint.
  - b On completion, the Executive will notify its findings to three members of the Board.
  - c If all three members agree that there appears to be a serious breach of the Code requiring urgent remedy, the Executive will:
    - i use reasonable endeavours to notify the service provider (by phone, fax or e-mail) that the service appears to be in breach of the Code, that the emergency procedure has been invoked and that the service must be removed immediately,
    - ii advise the relevant network operator(s) of the breach and direct that it withholds from the service provider any payments outstanding under the contract between it and the service provider,

- iii if the service provider cannot be contacted, or, having been contacted does not remove the service immediately, direct that the network operator(s) bar access to the relevant service(s) or number(s) forthwith.
- d Once the service has been removed, the service provider will be provided with all the necessary information relating to the complaint and will be referred to the relevant provisions of the Code. The service provider will then be required to respond in writing within five working days.
- e All relevant information including any response from the service provider will, in the absence of special circumstances, be laid before an adjudication panel within 10 working days from the provision of the service provider's response or as soon thereafter as is practicable.
- f The adjudication panel may invite the service provider to make informal representations to it in person in order to clarify any matter or the service provider may request the opportunity to make such informal representations to the adjudication panel.
- g The time limits set out in this Section may be extended at ICSTIS' discretion if it considers that their strict application might cause injustice.

8.4.2 If, within 10 working days following the confirmation of use of the emergency procedure by three members of the Board in a particular case, another case comes to the notice of the Executive which exhibits substantially the same characteristics, the Executive may, subject to the approval of one member of the Board, proceed with the emergency procedure in that other case. The Executive will promptly inform the Board of such action.

- 8.4.3
- a Within two working days following the making of a direction under paragraph 8.4.1, service providers may apply to ICSTIS for an urgent review of the use of the emergency procedure in the particular case.
  - b The application must be made in writing together with any supporting evidence setting out:
    - i the grounds on which the service provider considers that the emergency procedure should not have been used in respect of the services and/or;
    - ii the grounds on which the service provider considers that access to the services or numbers should no longer be prevented.

- c Subject to any requirement for further information, three members of the Board ('the review panel') will consider the matter within two working days of receipt of an application for review and shall decide, through whatever process they think fit, whether the prevention of access to the services or numbers should continue pending completion of the normal process under paragraph 8.4.1, or whether access should be permitted to some or all of the services or numbers concerned, and if so upon what, if any, conditions.

## 8.5 Information provider cases

- 8.5.1** In any case in which a service provider and information provider wish ICSTIS to deal directly with the information provider, the service provider must provide to ICSTIS:
- a the service provider response to the case required under 8.3 or 8.4, together with a request in writing for ICSTIS to deal directly with the information provider in respect of the case, and
  - b the acceptance and undertakings of the service provider and information provider required in accordance with paragraph 8.1.4, in such form as ICSTIS may prescribe.
- 8.5.2** ICSTIS will (subject to any requirement for further information) determine within five working days thereafter whether it is willing to exercise its discretion to deal directly with the information provider in the relevant case.
- 8.5.3** If ICSTIS determines that it is willing to deal directly with the information provider, the case will be processed for the purposes of these rules as if the information provider was the service provider so that the information provider shall (together with any other rights or obligations) be entitled to require an oral hearing and to appeal to the Independent Appeals Body (IAB) in respect of the case, and shall be subject to any sanction duly imposed.
- 8.5.4** For the avoidance of doubt, ICSTIS may, in determining any sanction against an information provider, take into account to the extent appropriate any breach history of the information provider, including any involvement of the information provider in services where a breach was upheld against a service provider. Once a determination has been made under this paragraph, the service provider will have no further right to take part in the process as a party.

- 8.5.5** ICSTIS may, for good cause, determine at any time in the course of the process of a case that the case is not suitable to be dealt with other than directly with the service provider. If ICSTIS so determines, the case shall recommence as a case in which ICSTIS deals directly with the service provider and, in so far as practicable, no Board member previously involved in the matter shall take further part in the process.

## 8.6 Adjudication

On the basis of the evidence presented, the adjudication panel will decide whether there has been a breach of the Code. Each case will be considered and decided on its own merits. Service providers will be notified of the adjudication in writing. Where the adjudication has been made on the papers alone, or following informal representations in person, the notification will include reference to the service provider's right to an oral hearing.

## 8.7 Sanctions

- 8.7.1** Once the adjudication panel has determined that there has been a breach of the Code, the Executive will put before it the service provider's details. These will include a list of any relevant breaches previously upheld, sanctions imposed on the service provider and any other relevant information.
- 8.7.2** ICSTIS has a range of sanctions which it may apply according to the degree of seriousness with which it regards any breaches. Having taken all relevant circumstances into account, ICSTIS may singularly or in any combination in relation to each breach:
- a require the service provider to remedy the breach,
  - b issue a formal reprimand,
  - c require the service provider to submit certain or all categories of service and/or promotional material to ICSTIS for copy advice and/or for prior permission for a defined period,
  - d impose an appropriate fine on the service provider to be collected by ICSTIS,
  - e require that access to some or all of the service provider's services and/or numbers be barred for a defined period and direct the relevant network operator(s) accordingly,

- f prohibit a service provider, information provider and/or any associated individual found to have been knowingly involved in a serious breach or series of breaches of the Code from involvement in or contracting for the provision of a particular type or category of service for a defined period,
  - g prohibit a service provider, information provider and/or any associated individual found to have been knowingly involved in a serious breach or series of breaches of the Code from involvement in or contracting for the provision of any premium rate services for a defined period,
  - h require, in circumstances where there has been a serious breach of the Code and/or where an intent to mislead or defraud has been demonstrated, that the service provider pays all claims (or any specified category of claims) made by users for refunds of the full amount spent by them for the relevant service, save where there is good cause to believe that such claims are not valid.
- 8.7.3** The failure of any service provider to comply with any sanction within any reasonable time period imposed on it by ICSTIS will result in:
- a ICSTIS issuing a direction to all relevant network operators requiring suspension of access to some or all of the numbers allocated to the service provider until full compliance with ICSTIS sanctions has been achieved,
  - b a further breach of the Code by the service provider, which may result in additional sanctions being imposed.
- 8.7.4** If an adjudication panel considers that it may wish to make a recommendation under paragraph 8.7.2f or 8.7.2g in respect of any named individual, it shall first make all reasonable attempts to so inform the individual concerned and the service provider or information provider in writing. It shall inform each of them that any of them may request an opportunity to make informal representations to the adjudication panel in person and of the right of any of them (or of ICSTIS itself) to require an oral hearing.
- 8.7.5** Where an individual (or ICSTIS) requires an oral hearing pursuant to the right set out in paragraph 8.7.4 but the associated individual fails, without good cause, to appear (either himself or through his representative) at an oral hearing which is properly established, then that oral hearing panel may make such a finding as it considers fit.

**8.7.6****Refunds**

- a Where payment of refunds has been imposed as a sanction in accordance with 8.7.2h, it is the responsibility of the service provider to pay all claims for refunds as required by ICSTIS, except those where there is good cause to believe that any such claim is not valid.
- b If money that would otherwise have been paid to the service provider has been retained by a network operator in accordance with a direction from ICSTIS or other obligation under the Code ('a retention'), and if the service provider satisfies ICSTIS that it is unable to comply with the sanction without recourse to the money so retained, it may pass details of payable claims to the network operator which shall make the refund payments due from the retention.
- c If the service provider fails to deal promptly with claims made for refunds, ICSTIS (without prejudice to taking action against the service provider under paragraph 8.7.3) may direct any network operator which has a retention to deal with claims for refunds and pay the refunds from the retention.
- d If ICSTIS has not issued directions under paragraph 8.7.6c, the obligation of the network operator shall cease three months after completion of the ICSTIS adjudication process and any time period for appeal to the IAB or the conclusion of such appeal or, if sooner, when the retention has been fully expended.
- e If there is a retention remaining following payment of all claims for refunds or at the end of the three-month period, it must be used to discharge in whole or in part ICSTIS fines and/or administrative charges outstanding and payable by the service provider. If any retention remains thereafter, the network operator shall be entitled to deduct from the retention its costs and expenses arising from dealing with refunds.

**8.8** **Reviews**

- 8.8.1** On reasonable grounds, ICSTIS may, at its discretion, review determinations made in respect of applications for prior permission and adjudications and/or sanctions.
- 8.8.2** A service provider or applicant for prior permission may request a review by setting out in writing the case for such a review.

**8.8.3** **Review procedure**  
Having received a written request setting out the reason why a determination made in respect of an application for prior permission or an adjudication and/or sanction should be reviewed, ICSTIS will decide whether the review is merited and may proceed with the review forthwith or set a later date for such a review.

**8.8.4** Following such written request, one or more nominated Board members may suspend any sanction imposed pending a review.

## 8.9 Oral hearings

**8.9.1** Any service provider, applicant for permission or associated individual ('the applicant') may, by notice in writing to the Executive, require that an oral hearing be held:

- a** in the event of a refusal by ICSTIS to grant prior permission to provide a service, or only to grant it upon condition,
- b** following receipt of any communication from the Executive alleging a breach or breaches of the Code,
- c** in respect of any adjudication made by ICSTIS without an oral hearing,
- d** in the circumstances of an intention to make an order under 8.7.2f or 8.7.2g.

**8.9.2** The applicant must, within such written notice, provide details of the allegation or decision in respect of which the oral hearing is required and set out clearly the applicant's case in respect of the relevant allegation or decision.

**8.9.3** Such written notice may be provided to the Executive at any time up to 10 working days after receipt by the applicant of written notification of a decision by ICSTIS or at any time prior to the adjudication being made where the oral hearing is required following an allegation of a breach of the Code.

**8.9.4** ICSTIS may require at any stage of its processes that an oral hearing be held.

**8.9.5** Oral hearings shall take place before no fewer than two members of the ICSTIS Board ('the hearing panel').

**8.9.6** The applicant is entitled to appear at the oral hearing in person or to be represented. The Executive will attend the oral hearing in order to put the case against the applicant and may instruct a representative to act on its behalf.

**8.9.7** The enforcement of sanctions imposed pursuant to an adjudication is not automatically suspended by written notice requiring an oral hearing. The applicant may apply in writing to the Chairman of the hearing panel ('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 a significant risk of public harm. If an applicant has not been granted a suspension of sanction but has not complied with the sanction, the Chairman may stay the oral hearing.

### 8.9.8 Procedures for hearing

#### 8.9.8.1 Pre-hearing process

**a** The Chairman will give such directions as he considers necessary for the fair and speedy hearing of the oral hearing.

Such directions may include, for example, directions for:

- the exchange of statements of case,
- the admission of facts before the hearing,
- the disclosure of documents,
- the provision of expert reports,
- the exchange of witness statements,
- the preparation of agreed bundles of documents,
- the submission and exchange of outline arguments,
- the provision of security for the administrative charges of ICSTIS.

Directions may be given as to the date by which such actions shall be taken. Where it appears reasonable in all the circumstances, the Chairman may strike out a case or take such other steps as he sees fit where any direction is not followed.

- b** The Chairman may convene a conference for the purpose of providing directions or may deal with directions by correspondence or phone, as he sees fit.
- c** Not less than 10 working days before the date of the oral hearing, the applicant shall be notified in writing (at the address of the applicant last made known to ICSTIS) of the day, time and place of the oral hearing.
- d** Within five working days of receipt of the notice specifying the date of the hearing, the applicant shall inform the Executive in writing of whether he intends to appear in person at the hearing and the name of any person who will be representing him at the hearing.

- e The Chairman may vary any of the time limits set out in these procedures.

**8.9.8.2** If the applicant is neither present nor represented at the hearing, and the hearing panel has no cause to believe there is a good reason for the applicant's absence, the matter shall be determined by the hearing panel as it sees fit in the absence of the applicant.

**8.9.8.3** **The hearing**

In respect of alleged breaches of the Code of Practice:

- a The Executive shall outline the grounds of the case, and call such witnesses and refer to such documents as it is entitled to do.
- b The applicant shall then be entitled to respond to the case put by the Executive and to call such witnesses or present any written statements or other documents as he is entitled to do.
- c The Executive shall then be entitled to address the hearing panel.
- d The applicant shall be entitled to reply.
- e A witness in person may be cross-examined. A witness who has been cross-examined may be re-examined.
- f The Chairman of the hearing panel may question any witness at any time.

In respect of a case concerning an application for permission, the Chairman shall adopt such procedures as he shall deem to be most convenient.

The Chairman of the hearing panel shall have the power to vary any of these procedures at any time and to adjourn the hearing if satisfied that it is in the interests of justice to do so.

**8.9.8.4** **Confidential information**

The hearing panel shall be entitled to consider and act upon confidential information without directly or indirectly disclosing to the applicant (or the Executive as the case may be) the source of that information, provided that the other party is given a reasonable opportunity to rebut its substance.

**8.9.8.5** **Recording**

A sound recording shall be made of the oral hearing. Recordings will be made available to the Executive and the applicant.

**8.9.9** **Public hearing**

An oral hearing shall be conducted in private, unless the applicant or the Executive otherwise requires. If an oral hearing is in public,

either party may request that any part of the hearing be conducted in private and any such application shall itself be heard in private.

**8.9.10** **Powers of the hearing panel**

The hearing panel shall decide the matter entirely afresh. For the avoidance of doubt, the hearing panel:

- a may impose a greater or lesser sanction than that previously imposed by an adjudication panel,
- b may reverse a decision to issue or refuse a permission,
- c may set such conditions on a permission as it sees fit,
- d must agree to impose such sanctions, permissions and/or conditions, and administrative charges or otherwise dispose of the matter as may be jointly agreed by the Executive and the applicant and which has been agreed by the Chairman of ICSTIS ('adjudication by consent').

**8.9.11** **Decision and publication**

The hearing panel shall, as soon as is practicable after the hearing, provide a reasoned written decision. All decisions, whether reached through written or oral process, shall be published by ICSTIS and may identify any network operator, service provider and information provider concerned. Publication will be effected by placing the written decision on the ICSTIS website and in any other way that ICSTIS shall determine.

## 8.10 Administrative charge

All service providers found to be in breach of the Code may be invoiced for the administrative and legal costs of the work undertaken by ICSTIS. Non-payment within the period laid down by ICSTIS will also be a breach of the Code and may result in further sanctions being imposed. ICSTIS may direct that the relevant network operator withholds and passes to ICSTIS the sum(s) due from the payments outstanding under the contract between the network operator and the service provider.

9 Additional procedures concerning network operators

- 9.1 If it appears to ICSTIS that a network operator has failed to comply with its obligations under this Code (whether the subject of a direction or not):
- a ICSTIS will set out in writing the details of the apparent failure to comply.
  - b The network operator will be given a reasonable time to respond. This response will normally be required within five working days.
  - c Upon receipt of the network operator's response or if the network operator does not respond within the time required, the Executive will prepare a report, together with supporting evidence, which will be placed before a sub-committee of ICSTIS appointed to adjudicate upon the matter (a 'network operator adjudication panel') ('the panel'). The adjudication will be provided promptly in writing to the network operator.
  - d The panel may invite the network operator to make informal representations to it in person in order to clarify any matter or the network operator may request the opportunity to make such informal representations to the panel.
  - e The network operator or the Executive may require at any point in the procedure that the matter be dealt with by means of an oral hearing provided that no requirement for an oral hearing may be made more than 10 working days after the provision of any adjudication made under paragraph 9.1c.
- 9.2 Oral hearings taking place under this Section shall be heard by a panel of no less than two Board members, one of whom shall be appointed as the Chairman.
- 9.2.1 The procedures for hearings and related matters shall be as set out in paragraphs 8.9 and 8.10 as though 'network operator' had been substituted for 'applicant' throughout.
- 9.2.2 The hearing shall be conducted in private unless the network operator or the Executive otherwise requires. If a hearing is in public, either party may request that any part of the hearing be conducted in private and any such application shall itself be heard in private.
- 9.2.3 The panel shall, as soon as practicable after the hearing, provide a reasoned written decision. This written decision shall be published by ICSTIS.

- 9.2.4 If the panel determines that the network operator has failed to comply with its obligations under the Code, then the Executive will place before it the network operator's details. These will include a list of any previous determinations of failure to comply, sanctions directed and any other relevant information.
- 9.2.5 The panel may impose, by means of a direction to the network operator imposing a sanction upon it, one or more of the sanctions set out in paragraph 2.6.1, which are:
- "2.6.1 Non-compliance by a network operator with any of its obligations set out in this Code shall be dealt with in accordance with Section 9. If ICSTIS determines that a network operator is in breach of any of its obligations, then, having taken all relevant circumstances into account, it may make a direction imposing a sanction on the network operator in the form of any or all of the following depending upon the degree of seriousness with which it regards the breach;
- a a reprimand and/or a requirement that the network operator must comply and remedy the consequences of the breach,
  - b an instruction to pay an appropriate fine,
  - c an instruction to cease to provide its network and/or services for the carriage of any particular type or category of premium rate services for a certain period,
  - d an instruction to pay reasonable and valid claims for refunds."
- 9.2.6 All network operators on whom a sanction is imposed may be invoiced for the administrative and legal costs of the work undertaken by ICSTIS. Non-payment within the period laid down by ICSTIS will be a failure by the network operator to comply with its obligations under the Code and may result in the imposition of a further sanction direction.
- 9.3 A direction or the obligation to comply with any other obligation under this Code is not automatically suspended by the initiation or utilisation of any of the procedures set out in paragraph 9.1. The network operator may apply in writing to the Chairman of ICSTIS setting out the grounds on which a direction or obligation 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 a significant risk of public harm. If the network operator has not been granted a suspension of the direction or obligation and has not complied with the direction or obligation, the Chairman of any oral hearing panel may stay the oral hearing pending compliance.

- 9.4 A network operator may appeal to the IAB against any panel decision which directs that a sanction be imposed.
- 9.5 If a network operator fails to comply with a sanction direction issued following the process set out in [Section 9](#) (including any appeal to the IAB), ICSTIS may (without prejudice to any enforcement action which it may take) refer the matter to Ofcom in accordance with Section 120 of the Act for it to take such action as it shall see fit.

## 10 Appeals

- 10.1 Service providers, applicants for permission, information providers, associated individuals and network operators ('appellants') may, after an oral hearing at which the appellant or his representative has appeared, appeal to the Independent Appeals Body ('IAB') against ICSTIS decisions and adjudications (other than any adjudication by consent).
- Appeals may be made on the following grounds:
- the disputed decision was based on error of fact,
  - the disputed decision was wrong in law, or
  - ICSTIS exercised its discretion incorrectly in reaching its decision.
- 10.2 In order to institute an appeal, the appellant must provide a written notice of appeal setting out the grounds upon which the appeal is made and the facts and matters upon which it is based, to be received by the clerk to the IAB ('the Clerk') within 20 working days of the issue of the ICSTIS adjudication or determination which is the subject of the appeal.
- 10.3 The notice of appeal must be accompanied by:
- the written adjudication,
  - the case bundle used at the ICSTIS oral hearing,
  - a security deposit of £5,000 or an application (to be determined by the Chairman of the IAB) to waive or reduce such a security deposit setting out the grounds for such waiver or reduction,
  - a description of any new evidence upon which the appellant intends to rely and which, for good reason, was previously unavailable,
  - if the notice of appeal and/or any necessary accompanying documents are being provided to the Clerk more than 20 working days after the issue of the ICSTIS adjudication, the appellant must also provide an application (to be determined by the Chairman of the IAB) for the appeal to proceed, setting out the reasons for the delay and the grounds for such application.
- 10.4 If an appellant or his representative failed to appear in person at an oral hearing for good reason, but the oral hearing proceeded in his absence and ICSTIS has refused to permit a further oral hearing, the appellant may apply to the Chairman of the IAB to request him to require that ICSTIS holds a further oral hearing.

## 11.1 Terms of reference

- 11.1.1 The powers of ICSTIS in relation to this Code of Practice enable it to supervise the provision and content of promotional material for premium rate services and, with the support of Ofcom, to enforce this Code. In the performance of this role, ICSTIS may:
- a set and maintain standards and, as appropriate, requirements for the content, promotion, marketing and provision of premium rate services and for the payment of refunds in appropriate cases, and keep these standards and requirements under review,
  - b monitor premium rate services to ensure compliance with these standards,
  - c consult widely with interested parties before changing these standards,
  - d make arrangements and determine procedures for the proper support (including funding) of ICSTIS, and the efficient and effective operation of its regulation of premium rate services,
  - e determine any categories of premium rate service which may be provided only on the basis of prior written permission from ICSTIS, identify conditions which should be attached to the grant of such prior permission, keep such categories and conditions under review, and receive, consider and determine applications for prior written permission,
  - f administer a system for the payment of claims for compensation for unauthorised use of live services, and provide a system for adjudications where such claims are disputed,
  - g investigate and adjudicate upon complaints relating to the content, promotion and marketing of premium rate services, and issue directions designed to achieve compliance with the Code, which may include the imposition of sanctions,
  - h issue directions either generally or to individual providers of premium rate services (as defined in Section 120(9) of the Act) to procure compliance with the Code and/or to secure enforcement of its provisions,
  - i publish its decisions promptly and publish reports on its work at regular intervals, and generally publicise its role and take steps to inform consumers about premium rate services and regulation of them by ICSTIS,
  - j report to Ofcom as and when required concerning the regulation of premium rate services,
  - k do all such things as it reasonably considers to be conducive to or to facilitate the achievement of these terms of reference or effective premium rate regulation generally.

## 11.2 Delegation of powers

The Board may delegate its powers to sub-committees which will be formed of no fewer than two Board members.

## 11.3 Definitions

- Framework**
- 11.3.1 Premium rate services are defined in Section 120 of the Communications Act 2003 ('the Act') as follows:
- Subsection (7) provides:
- "A service is a premium rate service if:
- a it is a service falling within subsection (8);
  - b there is a charge for the provision of the service;
  - c the charge is required to be paid to a person providing an electronic communications service by means of which the service in question is provided; and
  - d that charge is imposed in the form of a charge made by that person for the use of the electronic communications service."

Subsection (8) provides:

"A service falls within this subsection if its provision consists in:

    - a the provision of the contents of communications transmitted by means of an electronic communications network; or
    - b allowing the user of an electronic communications service to make use, by the making of a transmission by means of that service, of a facility made available to the users of the electronic communications service."

Subsection (14) provides:

"References in this section to a facility include, in particular, references to:

      - a a facility for making a payment for goods or services;
      - b a facility for entering a competition or claiming a prize; and
      - c a facility for registering a vote or recording a preference."

11.3.2 'General conditions of entitlement' means the general conditions set by Ofcom pursuant to Section 45 of the Act which are applicable at the material time.

'Total metering and billing system' has, for the purposes of this Code, the same meaning as in Condition 11 of the general conditions of entitlement.

- 'A lead network' means an electronic communications network provider who is obliged to obtain approval for its total metering and billing system in accordance with Condition 11 of the general conditions of entitlement.
- 11.3.3** Subject to paragraphs **11.3.4** and **11.3.5** below, 'network operator' means, for the purposes of this Code in respect of any premium rate service, a person who falls within Section 120(10) or Section 120(11) of the Act and:
- i who is a lead network; or
  - ii has a direct network connection and has direct billing arrangements in respect of that connection with the lead network; or
  - iii through arrangements made with a lead network, provides electronic communication services to the public and bills the public directly, and can perform or can require the performance of all the obligations that are set out in Section 2 of the Code; or
  - iv if no-one falls within i, ii or iii above, the network operator shall be the person who falls within Section 120(10) or (11) and, in respect of the premium rate service or services in question, provides or has, in the reasonable opinion of ICSTIS, the closest or most substantial connection with the provision of the communications network used for the provision of the premium rate service.
- A direct network connection exists when a person provides switching equipment (to currently accepted industry standards), which by inter-connection arrangements made between that person and the lead network, enables the conveyance of signals between the lead network and that person.
- 11.3.4** If a premium rate service is provided which is accessible only through the use of VoIP technology and, in respect of that service, there is no network operator identifiable under paragraph **11.3.3** above, then the network operator, for the purposes of this Code, is the person who provided the facility through which the user gained access to the service.
- 11.3.5** If the primary function of a person is to aggregate or collate content of services for third parties and/or to acquire network access through wholesale arrangements which it then provides to third parties on a retail basis, that person is a service provider for the purposes of this Code and is not a network operator, unless there is no other network operator identifiable who is involved in the provision of the relevant premium rate service.

- 11.3.6** 'Service provider' is the first person who falls within Section 120(9)(a)-(d) or Section 120(10) of the Act who, not being a network operator himself, contracts with or enters into arrangements with a network operator for use of the network operator's facilities in the provision of the relevant premium rate service<sup>4</sup>.

Where a network operator itself provides premium rate services in any given case in which he falls within Section 120(9)(a)-(d) as well as being the network operator in respect of the relevant service then that network operator or such part of its organisation as is responsible for the provision of the same will be a service provider for the purposes of this Code.

- 11.3.7** 'Information provider' is any person falling within section 120(9) (a)-(d) of the Act, not himself being a service provider for the purpose of this Code.

- 11.3.8** 'Controlled Premium Rate Service' has the meaning set out in the Condition issued by Ofcom under Section 120 of the Act effective from time to time.

#### General

- 11.3.9** 'Adjudicator' is the person, independent of ICSTIS, network operators, service providers or information providers, who adjudicates upon claims for compensation in respect of unauthorised calls to live services.
- 11.3.10** 'Associated individual' is any sole trader; partner in or director or manager of a service provider or information provider, anyone having day-to-day responsibility for the conduct of its relevant business and any individual in accordance with whose directions or instructions such persons are accustomed to act, or any member of a class of individuals designated by ICSTIS.
- 11.3.11** 'Call', for the purposes of this Code, means any communication which passes through an electronic communications network, whether initiated by a user or initiated by or facilitated by a service provider, and 'caller' shall be construed accordingly.

<sup>4</sup> In order to ensure clear and effective regulation, responsibility for the promotion and content of premium rate services rests with service providers. We recognise that, as set out in the Communications Act 2003, service providers can organise their businesses in numerous ways. Many provide their own content, while others package content that may be developed or marketed by others. Some service providers focus on providing connections to the phone networks and have limited involvement in the content or promotion of a service. If service providers choose to adopt a model under which immediate control of matters for which they are answerable under this Code is passed to others, they should take appropriate steps to protect their interests because they remain directly responsible for sanctions imposed by ICSTIS for Code breaches.

- 11.3.12** ‘Chairman of the Independent Appeals Body’ is the person, being a qualified solicitor or barrister of not less than 10 years’ standing, appointed to be Chairman of the Independent Appeals Body.
- 11.3.13** ‘Chatline service’ has the meaning set out in the Condition issued by Ofcom under Section 120 of the Act effective from time to time.
- 11.3.14** ‘Children’ means people under 16 years of age.
- 11.3.15** ‘Children’s services’ are services which, wholly or in part, are aimed at or should have been expected to be particularly attractive to children.
- 11.3.16** ‘Communications provider’ is defined in Section 405 of the Act as a person who, within the meaning of Section 32(4) of the Act, provides an electronic communications network or an electronic communications service.
- 11.3.17** ‘Contact and dating services’ are services which enable persons who were previously unacquainted with each other to make initial contact and arrange to meet in person or otherwise continue to have contact with one another outside the service if they wish to do so.
- 11.3.18** ‘Directory enquiry’ (‘DQ’) service is a premium rate service, one of the main or advertised purposes of which is to provide callers with the telephone numbers of subscribers and/or other end-users of electronic communications services (‘end-users’) by searching one or more sources of information (‘sources’) (whether held in paper or electronic form, and whether held or maintained by the service provider or by any other person) using information provided by callers as to particular end-users’ names and/or addresses.
- 11.3.19** ‘Electronic communications network’ has the meaning given to it in Section 32(1) of the Act.
- 11.3.20** ‘Electronic communications service’ has the meaning given to it in Section 32(2) of the Act.
- 11.3.21** ‘Independent Appeals Body’ (‘IAB’) is a body of persons, independent of ICSTIS, appointed to provide tribunals to hear appeals in respect of service providers and following oral hearings:
- against adjudications made by ICSTIS,
  - against refusals by ICSTIS of applications for permission to provide services,
  - against conditions imposed by ICSTIS upon such permission,
  - in respect of network operators, against adjudications made by ICSTIS which direct that a sanction be imposed.

- 11.3.22** ‘Internet dialler software’ is software that replaces the telephone number used by an end-user’s computer that connects it to the Internet (dial-up telephone number) with a different dial-up telephone number.
- 11.3.23** ‘Live services’ are premium rate services which involve two-way or multi-way live voice conversation.
- 11.3.24** ‘Ofcom’ is the Office of Communications. References to Ofcom and to any statutory authority or other regulatory body include any replacement successor bodies.
- 11.3.25** ‘Pay-for-product services’ are those, costing more than £1 in total, in which the benefit to the user is either the delivery during or consequent to the use of the service of a product or service (not itself being premium rate content) paid for wholly or in part by the user through a network operator, or the provision during the service of electronic data which the user is able to receive and store and which is not primarily intended for use on the device used for access to the service.
- 11.3.26** ‘Person’ means any natural or legal person.
- 11.3.27** ‘Promotion’ means anything where the intent or effect is, either directly or indirectly, to encourage the use of premium rate services, and the term promotional material shall be construed accordingly.
- 11.3.28** ‘Sexual entertainment services’ are services of a clearly sexual nature or any services for which the associated promotional material indicates or implies that the service is of a sexual nature.
- 11.3.29** ‘Subscription services’ are those which incur a recurring premium rate charge.
- 11.3.30** ‘Virtual chat services’ are not live conversation services but enable two or more users to exchange separate messages, whether by recorded voice, text or pictures, while engaged in the service.

## 1 General provisions

- 1.1 Information obtained by ICSTIS under these provisions shall be confidential, save that ICSTIS may share it with Ofcom to the extent that is reasonable for the proper regulation of premium rate services.
- 1.2 For the purposes of these funding provisions, the following definitions shall apply:
- 'Outpayments' are sums payable by network operators to service providers in respect of revenue generated by premium rate services.
  - 'Revenue' is the sum received by a network operator in respect of or attributable to the provision of a premium rate service, gross of any sum that may be due to third parties arising out of the provision of the said service.

## 2 Timetable

- 2.1 ICSTIS will publish a timetable for its annual budgetary and forecasting procedures as set out below. It will specify the dates by which various activities should be carried out by network operators and/or ICSTIS.
- 2.2 ICSTIS may, upon giving reasonable notice to interested parties, vary some or all of the dates set out in the timetable.

## 3 Budget and activity plan

- 3.1 As far as is practicable, by 31 December each year, ICSTIS will publish a proposed budget and activity plan for wide consultation and scrutiny.
- 3.2 Having considered the comments received under paragraph 3.1, ICSTIS will review and then present its proposed budget and activity plan to Ofcom for comment within such a period of time as ICSTIS may specify.
- 3.3 After receiving comments from Ofcom, ICSTIS will make such amendments to the proposed budget and activity plan as are necessary to secure Ofcom approval.

- 3.4 ICSTIS will then announce its budget for the forthcoming financial year, specifying the amount it intends to collect ('the Budgeted Figure').

## 4 Forecasting

- 4.1 Subject to paragraph 4.3 below, network operators must, in accordance with the timetable, provide ICSTIS with a forecast of the value of outpayments (gross of the levy – see Section 5 below) that each of them anticipates making in or for the forthcoming financial year.
- 4.2 If a network operator fails to provide a forecast in accordance with paragraph 4.1 above, ICSTIS may issue a direction to the network operator requiring the provision of a forecast and/or may make its own forecast of the outpayments likely to be made by the relevant network operator during the forthcoming financial year. This will be based on such information as ICSTIS may have concerning the network operator's outpayments in previous years, information received from other network operators and ICSTIS' own knowledge of the industry.
- 4.3 Where a network operator intends to provide premium rate services over its electronic communications network and has not previously done so, the network operator is not obliged to provide forecasts pursuant to paragraph 4.1 above.

## 5 Levy

- 5.1 ICSTIS will determine the proportion of every outpayment that needs to be retained and paid to ICSTIS ('the levy'). ICSTIS may from time to time vary the rate at which the levy is set to ensure that it continues to receive adequate funding to carry out its activities.
- 5.2 ICSTIS will advise network operators (in writing) and other interested parties (by publication on its website) of the levy to be applied to outpayments from time to time and issue directions accordingly. The levy will be expressed as the proportion of each outpayment that must be retained (e.g. 0.XX pence per £1).

5.3 Following receipt of notification under paragraph 5.2 above, network operators must inform everyone to whom they make outpayments of the level at which the levy has been set and that they (the network operator) will deduct the levy at source from every outpayment that is made and pay the deducted amount to ICSTIS.

5.4 Network operators are responsible for deducting the levy notified under paragraph 5.2 from every outpayment that they make. Where a network operator fails to deduct the levy, the network operator will remain liable to ICSTIS as though it had in fact deducted the levy.

## 6 Payments

6.1 In accordance with the timetable, ICSTIS will advise each network operator whose outpayments for the forthcoming year have been forecast under Section 4 of this Annex of the total amount that the network operator is expected to collect in the forthcoming financial year by the application of the levy notified for the time being under paragraph 5.2 ("its Contribution").

6.2 Each network operator's contribution will be calculated by multiplying its forecasted outpayments for the forthcoming year by the applicable levy for the time being (e.g. £1,000,000 x 0.XX).

6.3 Upon being advised of its contribution by ICSTIS pursuant to paragraph 6.1 above, a network operator must pay its contribution to ICSTIS by 12 equal monthly instalments payable by the last day of each month commencing on the following 31st March. Wherever possible, network operators should arrange to make payments by electronic transfer.

6.4 Where a network operator falls within paragraph 4.3 above, the network operator will make payments to ICSTIS calculated by multiplying its actual outpayments by the applicable levy each month during the balance of the first year of service provision.

6.5 All invoices provided by ICSTIS to network operators will add a charge for VAT.

6.6 All network operators must provide ICSTIS with quarterly reports upon the actual levels of outpayments that they are making as soon as is reasonably practicable following 30th June, 30th September, 31st December and 31st March.

6.7 Network operators may, in exceptional circumstances, seek ICSTIS' agreement to a recalculation of their forecasts and the consequential payments required of them under paragraph 6.3 above.

## 7 Late payment

7.1 If a network operator fails to pay to ICSTIS monies due in accordance with the timescales set out in this Code and/or in accordance with directions issued by ICSTIS, the network operator will be liable to pay interest in respect of such monies at the rate of 3% above the prevailing base rate for the time being of HSBC plc from the date on which the relevant payment became due.

## 8 Adjustments

8.1 At the end of each year and in any event by no later than 30th April, network operators must provide ICSTIS with a statement of the actual aggregate outpayments that they have made, and the revenue that they have received in their capacity as a network operator during the preceding year. The statement must identify all cases in which the network operator has provided premium rate services in respect of which there is no identifiable outpayment (see Section 10 of this Annex). Where it has supplied no such services, the network operator must state this in the statement.

8.2 Following receipt of the statement referred to in paragraph 8.1 above or an auditors' report pursuant to paragraph 9.1 below, ICSTIS will determine in respect of each network operator the aggregate amount that ought to have been collected pursuant to paragraph 5.4 above and the aggregate amount that has been paid pursuant to Section 6 of this Annex by that network operator.

8.3 Where a network operator's payment to ICSTIS based on forecast outpayments exceeds actual outpayment levels, the network operator will be entitled to have the excess amount repaid. ICSTIS will recalculate this sum based on information provided under paragraph 8.2 above.

8.4 Where ICSTIS concludes, pursuant to paragraph 8.2, that a network operator ought to have collected an amount in excess of that actually paid to ICSTIS, the network operator will be liable to ICSTIS for the difference which will be payable forthwith.

8.5 ICSTIS will not make a calculation pursuant to paragraph 8.2 in respect of a network operator which has not provided a declaration of its actual outpayments for the entire year pursuant to paragraph 8.1 above.

## 9 Auditors

9.1 The ICSTIS auditor for the time being ('the Auditors') shall have the power to request from a network operator direct confirmation by audited statement of the actual level of outpayments it made and the actual revenue it retained in respect of premium rate services supplied by it as a network operator during any relevant period. A network operator's auditors must provide such a statement within such reasonable time as the Auditors may request and/or ICSTIS may direct.

9.2 Network operators will not be subject to a request under paragraph 9.1 above more than once in every four years, save where previous audited statements have revealed significant inconsistencies or where information provided to or obtained by ICSTIS or the Auditors may give the Auditors cause for concern.

9.3 A network operator or a network operator's auditors shall, at the request of the Auditors, supply such further information and/or explanation of such matters as the Auditors may consider necessary to satisfy themselves as to the accuracy of the network operator's figures in such a format as may be prescribed (including by further statement).

9.4 If an auditors' report obtained under paragraph 9.1 above indicates that the actual outpayments made by a network operator during the relevant year were different from those declared under paragraph 8.1 above, the Auditors will make such adjustments as are necessary pursuant to Section 8.

9.5 If the Auditors advise it to be necessary for the proper administration of this part of the Code, ICSTIS may direct that a network operator subjects itself to assessment by an agreed independent auditor for the purpose of establishing whether the network operator has fully complied with its obligations under this part of the Code. The costs of any such assessment shall be borne by ICSTIS unless the independent auditor concludes that the network operator was not in all material respects complying with its obligations under this part of the Code or where the independent auditor was unable to reach any conclusion because of non-co-operation by the network operator, in which case the costs will be borne by the network operator.

9.6 Where an audit conducted under paragraphs 9.1 or 9.5 above has revealed material inconsistencies in the information previously supplied to ICSTIS by a network operator, ICSTIS may take enforcement action under Section 9 of the Code.

## 10 No identifiable outpayment

10.1 Where ICSTIS has received notification under paragraph 8.1 above that a network operator has supplied service(s) for which there is no identifiable outpayment, it may direct the relevant network operator to explain the reasons for the lack of any identifiable outpayment(s) and/or to supply details of the level of revenue it has generated in respect of those services.

10.2 If ICSTIS considers it appropriate to do so, it will direct the network operator to treat the revenue it has generated in respect of such service(s) or such a portion of that revenue as ICSTIS may determine as though it were in fact an outpayment.

Appeals against ICSTIS adjudications

The Independent Appeals Body ('IAB') is a body of persons independent of ICSTIS appointed to provide tribunals to hear appeals.

The ICSTIS Code of Practice (Eleventh Edition) provides a right of appeal for service providers, applicants for permission, information providers, associated individuals or network operators who are aggrieved by an ICSTIS decision or determination. The relevant provisions in the ICSTIS Code of Practice (Eleventh Edition) are as follows:

1 Appeals

1.1 "Service providers, applicants for permission, information providers, associated individuals and network operators ('appellants') may, after an oral hearing at which the appellant or his representative has appeared, appeal to the Independent Appeals Body ('IAB') against ICSTIS decisions and adjudications (other than any adjudication by consent).

Appeals may be made on the following grounds:

- the disputed decision was based on error of fact,
- the disputed decision was wrong in law, or
- ICSTIS exercised its discretion incorrectly in reaching its decision.

1.2 In order to institute an appeal, the appellant must provide a written notice of appeal setting out the grounds upon which the appeal is made and the facts and matters upon which it is based, to be received by the clerk to the IAB ('the Clerk') within 20 working days of the issue of the ICSTIS adjudication or determination which is the subject of the appeal.

1.3 The notice of appeal must be accompanied by:

- the written adjudication,
- the case bundle used at the ICSTIS oral hearing,
- a security deposit of £5,000 or an application (to be determined by the Chairman of the IAB) to waive or reduce such a security deposit setting out the grounds for such waiver or reduction,
- a description of any new evidence upon which the appellant intends to rely and which, for good reason, was previously unavailable,

- if the notice of appeal and/or any necessary accompanying documents are being provided to the Clerk more than 20 working days after the issue of the ICSTIS adjudication, the appellant must also provide an application (to be determined by the Chairman of the IAB) for the appeal to proceed, setting out the reasons for the delay and the grounds for such application.

1.4 If an appellant or his representative failed to appear in person at an oral hearing for good reason, but the oral hearing proceeded in his absence and ICSTIS has refused to permit a further oral hearing, the appellant may apply to the Chairman of the IAB to request him to require that ICSTIS holds a further oral hearing."

The procedures which follow are those laid down by the IAB and are under its control.

2 The procedures of the Independent Appeals Body

The IAB is able to hear any appeal lodged with the Clerk to the IAB ('the Clerk') in accordance with the provisions of [Section 10](#) of the ICSTIS Code of Practice (Eleventh Edition).

The Clerk shall forthwith, upon receipt of the notice of appeal, provide a copy of it and of the accompanying documents to the Chairman of the IAB ('the Chairman') and to ICSTIS.

In the event that an appellant was, for good reason, unable to attend an oral hearing but the oral hearing proceeded in his absence, then the appellant may apply to the Chairman of the IAB. The Chairman shall obtain the views of the Chairman of the hearing panel in writing, or in a hearing at which the appellant may also attend. The Chairman may require that ICSTIS provides a further oral hearing. The Chairman shall have the discretion to award the costs of the application.

3 The Appeal Tribunal

Upon receipt of a notice of appeal, the Chairman shall appoint an Appeal Tribunal, consisting of three members, to deal with the appeal. The Chairman or Deputy Chairman (if any) shall be the Chairman of the Tribunal ('the Tribunal Chairman').

If the appellant has applied for a waiver or reduction in respect of the provision of the required security deposit and for the appeal to proceed despite the notice of appeal having been lodged out of time, then as soon as reasonably practicable, the Tribunal Chairman shall convene a hearing at which any such application shall be considered and at which ICSTIS may be heard.

In respect of an application for a waiver of the requirement to provide the security deposit, the Tribunal Chairman shall waive the deposit (or reduce the required level of security) if he determines that there appears to be plain merit in the grounds of appeal and that exceptional hardship will result from the requirement that the security be provided.

ICSTIS shall be entitled to apply to the Tribunal Chairman for a determination that the appeal should not be permitted to proceed unless the security deposit is increased to a higher level and/or that a sum is lodged as security for costs. The Tribunal Chairman may make such a determination entirely at his discretion.

In respect of an application for an appeal to proceed despite having been made late, the Tribunal Chairman shall grant such application if he is satisfied that, in all the circumstances, it is fair to do so and he may impose such conditions as he sees fit as to the further conduct of the appeal or as to lodgment of security for costs.

#### 4 Suspension of sanctions

The enforcement of sanctions imposed by ICSTIS is not automatically suspended by the provision of a notice of appeal. An appellant may apply to the Tribunal Chairman, by written application to the Clerk, setting out the grounds upon which the sanction should be suspended. The Clerk will forthwith provide a copy to the Tribunal Chairman. Unless the Tribunal Chairman considers that there are exceptional reasons in the particular case to grant the application, he will do so only 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 a significant risk of public harm. He shall seek the views of ICSTIS on those matters prior to making a decision and may convene a hearing to deal with such applications.

If an appellant has not been granted a suspension of sanction, and has not complied with the sanction imposed, the Tribunal Chairman may stay the appeal on the application of ICSTIS or on his own volition. Appeals stayed for more than six months shall be automatically struck out and may not be recommenced.

#### 5 Representation

The appellant shall be entitled to appear before the Appeal Tribunal in person and be represented.

ICSTIS shall attend as respondent to any appeal before the Appeal Tribunal and may instruct a representative to act on its behalf.

#### 6 Pre-hearing process

The Tribunal Chairman may, at his own discretion, or upon the application of either party to the appeal, convene a conference of the parties at which he may give such directions as he considers necessary for the fair and speedy hearing of the appeal. Such directions may include, for example, directions for:

- the admission of facts before the hearing,
- the disclosure of documents,
- the provision of expert reports,
- the exchange of written statements,
- the preparation of agreed bundles of documents,
- the submission and exchange of outline arguments.

Directions may be given as to the date by which such actions shall be taken.

For the avoidance of doubt, the Chairman shall have the power to make directions for disclosure of documents and any other directions relating to evidence as though the appeal was a first hearing of the matter which is the subject of the appeal.

Not less than 10 working days before the date of the hearing of the appeal, the Clerk shall send written notice of the day, time and place of the hearing of the appeal to the last known address of the appellant and to ICSTIS.

7 The hearing

Within five working days of receipt of the notice specifying the date of the hearing, both the appellant and ICSTIS shall each inform the Clerk in writing of whether they intend to appear at the hearing and the name of any person who will be representing them at the hearing.

The appellant shall outline the grounds of his appeal and call such witnesses and refer to such documents as he is entitled to do.

ICSTIS shall then be entitled to respond to the case put by the appellant and to call such witnesses or present any written statements or other documents.

The appellant shall then be entitled to address the Appeal Tribunal.

A witness in person may be cross-examined by the other party in the appeal.

A witness who has been cross-examined may be re-examined.

The Tribunal Chairman may question any witness at any time.

The Tribunal Chairman shall have the power to vary any of these procedures at any time and to adjourn the hearing if satisfied that it is in the interests of justice to do so.

If the appellant is neither present nor represented at the hearing and the Appeal Tribunal has no cause to believe there is a good reason for the appellant's absence, the appeal may be dismissed.

8 Confidential information

The Appeal Tribunal shall be entitled to consider and act upon confidential information without directly or indirectly disclosing to the appellant (or ICSTIS as the case may be) the source of that information provided that the appellant (or ICSTIS) is given a reasonable opportunity to rebut its substance.

9 Recording

A sound recording shall be made of the proceedings before the Appeal Tribunal. Recordings will be made available to ICSTIS and the appellant.

10 Public hearing

An appeal hearing shall be conducted in private, unless the appellant or ICSTIS otherwise requires. If an appeal hearing is in public, either party may request that any part of the hearing be conducted in private and any such application shall itself be heard in private.

11 Costs of hearing

The Appeal Tribunal shall make such award for costs of the parties as it shall see fit, subject to a maximum of £25,000 (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 £10,000 (inclusive of VAT).

12 Powers of the Appeal Tribunal

The Appeal Tribunal shall consider all documentation and evidence produced at the ICSTIS oral hearing and may, at its discretion, rehear any witness called before the ICSTIS oral hearing and hear new evidence which for good reason was not available at the ICSTIS oral hearing.

The Appeal Tribunal may:

- confirm, vary or rescind an adjudication or determination or any part of it made by ICSTIS and substitute such other finding as it considers appropriate,

- confirm, vary or rescind any sanction imposed by ICSTIS pursuant to its adjudication. For the avoidance of doubt, the Appeal Tribunal may impose a greater sanction (or sanction direction) than that imposed by ICSTIS, provided that such a sanction could have been imposed by ICSTIS.
- confirm, vary or rescind the imposition of an administrative charge made by ICSTIS.

### 13 Decision and publication

The Appeal Tribunal shall, as soon as is practicable after the hearing, provide a reasoned written decision. This written decision shall be published by ICSTIS.

### 14 Further appeal

There is no further appeal through ICSTIS' procedures or those of the IAB.





ICSTIS | Clove Building, 4 Maguire Street, London SE1 2NQ  
Telephone | 020 7940 7474 Fax | 020 7940 7456  
Press Office | 020 7940 7408  
Web | [www.icstis.org.uk](http://www.icstis.org.uk)

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