



Notification of approval of an
emergency code amendment to
the ICSTIS Code of Practice
(Tenth Edition)

Consultation

Publication date: 4 August 2005

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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 In August 2004 Ofcom was asked by the Department of Trade & Industry ('DTI ') to undertake an urgent review of the regulatory framework for Premium Rate Services ('PRS') in order to assess whether consumers are adequately protected from the potential for consumer detriment involving PRS.
- 1.3 The review was prompted in part by problems that had arisen in the premium rate sector caused by internet diallers and, more generally, by broader concerns relating to the PRS regulatory regime as a whole.
- 1.4 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, and our report made a number of detailed and incremental recommendations which, it was anticipated, would significantly reduce the scope for consumer detriment and restore consumer confidence in the PRS industry. Ofcom's report is available on the Ofcom website at:
http://www.ofcom.org.uk/telecoms/ioi/nwbnd/prsindex/ntsprsditi/prs_review.pdf
- 1.5 One such recommendation concerned the speed and frequency of out-payments from Terminating Communications Providers ('TCPs')¹ to Service Providers ('SPs'), and the report noted concern about current commercial practices where monies were paid out quickly (typically weekly or twice-weekly), which merely facilitated the flow of monies to unscrupulous SPs. These arrangements make it very difficult for the Independent Committee for the Supervision of Standards of Telephone Information Services ('ICSTIS') to identify a breach and take action against an SP before the money is paid out by the TCP to the SP.
- 1.6 On 15 April 2005 ICSTIS published a consultation document on a proposed emergency code amendment ('the ECA') to the ICSTIS Code of Practice (Tenth Edition) ('the approved Code') seeking comments on the proposal to include a specific obligation on Network Operators ('NOs')², as defined in the approved Code, not to make payments to their SPs, also as defined in the approved Code, for at least 30 calendar days after calls have been made.

¹ TCPs facilitate the provision of PRS through the provision of network facilities and who terminate the call on behalf of the SP. The TCP is the party that contracts with the SP.

² Ofcom's report referred to those Providers that facilitated the provision of PRS through the provision of network facilities and who terminate calls on behalf of SPs as TCPs. This document refers to those Providers instead as 'Network Operators' in line with the ICSTIS Code of Practice (Tenth Edition)

- 1.7 ICSTIS received 20 responses to its consultation document and, in light of comments received, concluded that the proposed ECA, as set out in its consultation document, should be endorsed in its entirety. ICSTIS published a statement on 13 June 2005 setting out its conclusions. It submitted the statement to Ofcom on the same day in order for Ofcom to give approval to the ECA in accordance with section 121(6) and 121(7) of the Act. ICSTIS' statement is available on the ICSTIS website at: <http://www.icstis.org.uk/icstis2002/pdf/A%20Statement%20on%20the%20ECA%20Condoc%20-%20FINAL.pdf>
- 1.8 On 27 June 2005 Ofcom published a draft Notification under section 121(7) of the Communications Act 2003 ('the Act') inviting comments on Ofcom's approval of the proposed ECA. The document is available on the Ofcom website at: <http://www.ofcom.org.uk/consult/condocs/icstis/>
- 1.9 In light of comments received in response to Ofcom's consultation document, Ofcom has decided to give effect to the proposed ECA set out in its consultation document by publication of a Notification under section 121(7) of the Act.

The effect of the amendment will be to impose requirements upon all NOs not to make payments to SPs for at least 30 calendar days after calls have been made by consumers. The amendment to the approved Code is set out in the Annex to the Schedule to the Notification, published at Annex 1 to this statement.

- 1.10 In reaching its final conclusions set out in this document, Ofcom has considered, and acted in accordance with its principal duty in section 3, as well as the community requirements in section 4 of the Act. Ofcom has also considered the tests set out in sections 121(1) and 121(2) of the Act.

Effective date

- 1.11 In light of comments received, Ofcom is endorsing its proposal that the ECA should take effect six weeks from the date of publication of this Notification.

Section 2

Background

What are premium rate services?

- 2.1 PRS offer some form of content, product or service via fixed and mobile telecoms lines. These may be accessed as conventional voice services or using SMS text, line telephone, PC (e-mail, internet, bulletin board), mobile phone or interactive digital TV. Services 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 UK-based PRS are typically prefixed by '09' although similar, and in some cases identical, services are increasingly being offered on numbering ranges outside this range, including numbers starting '08' as well as access codes and, in case of mobile services, short codes (usually starting with an '8' or '6'). Directory enquiry services (on 118xxx) also fall within the definition of premium rate services for the purposes of the Act.
- 2.3 These services vary in cost, typically between 10 pence per minute or per call up to £1.50 per minute or per call (for BT customers). In most cases the bulk of the revenue from calls to such services goes to the SPs who are responsible for the content, product or services provided or who act as resellers or aggregators on behalf of a number of such providers. The SPs are responsible for compliance with the bulk of the obligations imposed by the approved Code. The remainder of the revenue is shared by the consumer's 'originating' telephone company (the Originating Communications Provider ('the OCP')), which receives a small fee for 'origination' of the phone call) and the telephone company that contracts with the SP and 'terminates' the call on behalf of the SP through the provision of network facilities ('the TCP').
- 2.4 PRS are defined in section 120(7) of the Act which provides that a service is a premium rate service, if:
- (a) it is a service falling within subsection (8)³;
 - (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.

³ 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.

The regulatory framework and premium rate services

- 2.5 A new regulatory framework for electronic communications networks and services entered into force on 25 July 2003. The framework is designed to create harmonised regulation across Europe, and is aimed at reducing entry barriers and fostering prospects for effective competition to the benefit of consumers.
- 2.6 Under the new regulatory framework, Ofcom must have regard to its principal duty set out in section 3 and, in particular, section 3(1) of the 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*
- (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.”*
- 2.7 Ofcom must also have regard to the community requirements set out in section 4 of the Act.
- 2.8 The relevant statutory provisions governing the regulation of PRS are set out under sections 120 to 124 of the Act.
- 2.9 The provisions specifically relating to approval of a code for PRS are set out in section 120 of the Act. Under section 121(2) of the Act, Ofcom are not to approve a code for the purposes of section 120 unless they are satisfied that a number of criteria have been met. These include that the provisions of the code must be objectively justifiable, not unduly discriminatory, proportionate and transparent.
- 2.10 Section 121(3) places restrictions on Ofcom’s powers to approve a code in respect of persons who are PRS providers by virtue only of section 120(12).
- 2.11 Section 121(4) provides that the provision that may be contained in a code, and approved under section 121 includes, in particular, provision about the pricing of PRS and provision for the enforcement of the code.
- 2.12 Section 121(5) provides-
- “The provision for the enforcement of a code that may be approved under this section includes-
- (a) provision for the payment, to a person specified in the code, of a penalty not exceeding the maximum penalty for the time being specified in section 123(2) [currently £100,000];*
- (b) provision requiring a provider of a premium rate service to secure that the provision of the service is suspended or otherwise ceases or is restricted in any respect;*
- (c) provision for the imposition on a person, in respect of a contravention of the code, of a temporary or permanent prohibition or restriction on his working in connection with the provision of premium rate services or, in the case of a body corporate, on its providing such services or on its carrying on other activities in connection with their provision.”*

How are premium rate services currently regulated in the UK?

- 2.13 The regulatory arrangements for PRS follows 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 its Code of Practice.

The role of Ofcom

- 2.14 Ofcom's role in the premium rate regulatory regime is to provide statutory support to the work of ICSTIS. 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 that bind the persons to whom they are applied.
- 2.15 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' as defined in the PRS Condition, to comply 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.”

- 2.16 In the event of an apparent failure to comply with an ICSTIS Direction amounting to a breach of the PRS Condition, Ofcom's general powers of enforcement under its powers in sections 94 – 96 of the Act will apply.

The role of ICSTIS

- 2.17 ICSTIS is responsible for the preparation and enforcement of the approved Code. The current version was approved for the purposes of sections 120 and 121 of the Act on the same date as the PRS Condition came in to force and is available on the ICSTIS website⁴.
- 2.18 The approved Code applies to all PRS which are accessed by a UK consumer or are provided by SPs in the UK. The ICSTIS terms of reference, set out in the approved Code, include the following:
- (a) set and maintain standards and, as appropriate, requirements for the content, promotion, marketing and provision of PRS, and keep these standards under review,*
 - (b) monitor PRS 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 PRS,*

⁴ http://www.icstis.org.uk/icstis2002/pdf/code_tenth_edition_january_2004.pdf

- (e) determine any categories of PRS which may only be provided 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 PRS, and issue directions designed to achieve compliance with the CoP which may include the imposition of sanctions,*
 - (h) issue directions either generally or to individual providers of PRS to procure compliance with the CoP and/or to secure enforcement of its provisions,*
 - (i) publish reports on its work at regular intervals and generally publicise its role. This includes reports to Ofcom, as and when required, relating to the regulation of the premium rate industry and the adequacy and appropriateness of regulatory arrangements.*
- 2.19 The provisions set out in the approved Code are primarily targeted at the actions of SPs, and it is their responsibility to ensure that the content and promotion of all their PRS (whether produced by themselves or by their content and information providers) comply with all relevant provisions of the approved Code.
- 2.20 ICSTIS has a range of sanctions that it can impose on SPs that breach the approved Code according to the seriousness with which it regards the breach. These range from obtaining assurances about future behaviour and instructing refunds to be offered to imposing fines, barring access to services and prohibiting certain 'named' individuals from operating services for a set period.
- 2.21 Although their responsibilities are more limited, the approved Code also places a number of general requirements and specific obligations on NOs to assist in the enforcement of ICSTIS' decisions by carrying out directions given by ICSTIS. These may include directions to cease dealing with particular businesses or individuals, to block access to certain numbers or services and to withhold payments to SPs in respect of particular services. Where there is evidence of non-compliance with an ICSTIS direction by an NO, this will represent a potential breach of the PRS Condition, and ICSTIS will notify Ofcom that it considers that the relevant provider has contravened the terms of the condition.

Section 3

Ofcom's review of the regulation of premium rate services

- 3.1 In August 2004 Ofcom was asked by DTI to undertake an urgent review of the regulatory framework for PRS in order to assess whether consumers are adequately protected from the potential for consumer detriment involving PRS.
- 3.2 The review was prompted in part by recent problems that have arisen in the premium rate sector caused by internet diallers and, more generally, by broader concerns relating to the PRS regulatory regime as a whole. In particular there was concern, shared by Ofcom, that the recent problems caused by internet diallers were only the latest in a series of examples of irresponsible and unethical behaviour that have caused considerable consumer detriment and damaged consumer confidence in the PRS sector.
- 3.3 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, and our report made a number of detailed and incremental recommendations which, it is anticipated, will significantly reduce the scope for consumer detriment and restore consumer confidence in the PRS industry.
- 3.4 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
- 3.5 One of the key contributory factors to the problems of effective regulation of PRS concerned the speed and frequency with which payments were made from TCPs to SPs, with out-payments often being paid weekly or twice-weekly on the basis of call traffic information. From discussions with stakeholders, Ofcom found that frequent payment terms had become more common, and were increasingly being used by some TCPs as a means of competing with each other for SP business. The practical effect of this, in some cases, was that some SPs were receiving payments in respect of a particular call as much as two months before the TCP receives the respective interconnect payment and as much as three months before the consumer receives their bill from the OCP.
- 3.6 These arrangements therefore give ICSTIS a limited window within which to identify that a breach of the approved Code has occurred, and to take steps to stop the flow of funds to the SP concerned. This has created a situation where ICSTIS is reliant on the imposition, and collection, of fines on SPs in order to enforce the provisions of the approved Code. In practice, it has proved extremely difficult to enforce. It is relatively easy for rogue SPs to set up a service and disappear quickly in the event of breaches of the approved Code. In such cases, it is difficult for ICSTIS to track down the relevant SP. Even where the SP has been tracked down, it will often be the case that the SP will have no assets with which to pay fines or provide redress to customers.
- 3.7 In light of this, and following discussions with ICSTIS in respect of appropriate withhold periods, Ofcom concluded in its report that delaying payments to SPs for a minimum period of 30 calendar days was likely to be an effective and proportionate way of improving the effectiveness of the regulatory regime. This requirement would

give ICSTIS more time to identify breaches of the approved Code and, where appropriate, direct NOs to withhold funds pending the outcome of investigations. Accordingly, Ofcom recommended that the approved Code should be amended to include an obligation on TCPs not to make payments to their SPs for at least 30 calendar days after calls have been made.

- 3.8 Ofcom, together with DTI and ICSTIS, are now looking to implement the recommendations as swiftly as possible. This process, however, is far from straightforward, and will take a number of months to complete, particularly as a number of recommendations will require changes to the approved Code – a process which typically takes 8 -10 months to effect. The length of time is a result of the various statutory consultation and notification requirements involved, including consultation exercises by both ICSTIS and Ofcom and notification to the European Commission which requires a standstill period of three months.
- 3.9 On 28 July 2005 ICSTIS published a consultation document seeking comments on a revised Code (11th Edition). ICSTIS' consultation document is available on the ICSTIS website at:
<http://www.icstis.org.uk/icstis2002/pdf/Draft11thCode280705.pdf>
- 3.10 However, given the timescales involved, and evidence that the current payment structure continues to result in networks releasing monies to SPs rapidly, and represents a significant risk to the effective regulation of PRS, Ofcom, ICSTIS and DTI have agreed the need to introduce the requirement to withhold funds on an emergency basis in advance of the more general consultation on the approved Code.

ICSTIS' consultation on an emergency amendment to the approved Code

- 3.11 On 15 April 2005, ICSTIS issued a consultation document seeking comments on the ECA to the approved Code to include a specific obligation on NOs not to make payments to their SPs for at least 30 calendar days after calls have been made.
- 3.12 ICSTIS received 20 responses to its consultation document and, in light of comments received, concluded that the proposed ECA, set out in its consultation document, should be endorsed. ICSTIS published a statement on 13 June 2005 setting out its conclusions. ICSTIS submitted the statement to Ofcom on the same day in order for Ofcom to give approval to the ECA in accordance with section 121(6) and 121(7) of the Act.
- 3.13 ICSTIS' statement is available on the ICSTIS website at:
<http://www.icstis.org.uk/icstis2002/pdf/A%20Statement%20on%20the%20ECA%20Condoc%20-%20FINAL.pdf>

Ofcom's consultation on a Notification of approval of an emergency amendment to the approved Code

- 3.14 On 27 June 2005, Ofcom published a consultation document seeking comments on a draft Notification under section 121(7) of the Act on Ofcom's approval to the proposed ECA. A list of the respondents who submitted responses is attached at Annex 2. The responses themselves are available for viewing on the Ofcom website at:
<http://www.ofcom.org.uk/consult/condocs/icstis/responses/?a=87101>

ICSTIS' consultation on the draft 11th edition of the ICSTIS Code of Practice

- 3.15 ICSTIS issued an updated version of its Code of Practice for consultation on 28 July 2005. Full details of the ICSTIS consultation, which runs until 23 September 2005, are available on the ICSTIS website at:
<http://www.icstis.org.uk/icstis2002/pdf/Draft11thCode280705.pdf>
- 3.16 It is important to note that the provisions in the attached Notification appear differently in the draft 11th edition of the ICSTIS Code on which ICSTIS is currently consulting. This is because ICSTIS have restructured the provision in order that it fits presentationally alongside other provisions within the draft Code, as amended. Any comments on the draft 11th edition of the Code should be made to ICSTIS as part of its consultation exercise.

Section 4

Responses to the consultation and Ofcom's comments

Overview

- 4.1 The Explanatory Statement and Notification, published today, gives effect, without modification, to the proposals set out in Ofcom's consultation document, *Notification of an emergency code amendment to the ICSTIS Code of Practice (Tenth Edition)*, published on 27 June 2005.
- 4.2 The effect of the amendment, as set out in the Notification, will be to impose requirements upon all NOs not to make payments to SPs for at least 30 calendar days after calls have been made by consumers. The amendment to the approved Code is set out in the Annex to the Schedule to the Notification, published at Annex 1 to this statement.
- 4.3 In reaching its final conclusions set out in this document, Ofcom has considered, and acted in accordance with its principal duty in section 3, as well as the community requirements in section 4 of the Act. Ofcom has also considered the tests set out in sections 121(1) and 121(2) of the Act.

Analysis of responses

- 4.4 Ofcom received a total of eight responses. A list of the respondents who submitted responses is attached at Annex 2. The responses themselves are available for viewing on the Ofcom website at:
<http://www.ofcom.org.uk/consult/condocs/icstis/responses/?a=87101>

Respondents comments

- 4.5 Of the responses received, Gamma Telecom and Redstone offered unqualified support to the proposed ECA. In particular, they agreed that slowing down the flow of money, whilst ensuring that all NOs are working to the same rules, was the most effective way of controlling inappropriate behaviour by SPs.
- 4.6 BT noted that a 30-day minimum payment period may restrict legitimate commercial transactions, but accepted that the proposed requirement would reduce the negative impact of unscrupulous SPs.
- 4.7 Eckoh agreed that short payment cycles, in the case of unscrupulous SPs, represented a danger to the effective regulation of PRS. However, Eckoh argued that the proposed ECA should be considered alongside Ofcom's recommendation relating to the need for greater due diligence on the part of TCPs. Eckoh noted that some TCPs currently had arrangements with SPs that provided for outpayment terms of less than 30 days, and that, in most cases, these were legitimate arrangements, often with "blue chip" companies, with little risk of consumer detriment or harm. In light of this, and the greater due diligence requirements by TCPs, payment terms of less than 30 days should not be a breach of the ICSTIS Code. Eckoh therefore proposed that that a breach of the Code should arise only in those circumstances where TCPs made outpayments in less than 30 days and there is an ICSTIS ruling and the fines and/or administration charges are not paid.

- 4.8 Network for Online Commerce ('NOC') also supported the principle of managing the flow of funds to non-compliant SPs, but was disappointed that Ofcom listed two options only in the form of "no change" or "NOs not to make payments to their SPs for at least 30 days". NOC considered that a non-discretionary approach would penalise the entire premium rate industry in a totally disproportionate manner. NOC believed that NOs should retain the freedom and flexibility to adopt payment models of less than 30 days on the proviso that they accept full financial responsibility, via due diligence obligations.
- 4.9 NOC also proposed that outpayments should be arranged on a calendar month basis rather than an arbitrary 30 day period as this would significantly ease the administrative burden and provide for better transparency. NOC also argued that any ruling for 30 or 35 days payments would not be able to be applied until the BT Annex E (Artificial Inflation of Traffic ('AIT')) provisions were amended.
- 4.10 Orange was supportive of the intention to slow down the money flow, and noted that the proposed policy had been standard business practice for Orange for a number of years. Orange did, however, argue that while it was generally satisfied with the 30 day proposal, it may be prudent to reduce the timeframe to 28 days in order to enable TCPs to continue to make monthly payments in arrears, even where that month is short. Orange also queried the position with regard to charitable donations made via PRS in response to crisis situations, and whether it was appropriate to make exceptions to the broad rule.
- 4.11 UKCTA supported Option 2 and agreed that "no change" was not an option. However, UKCTA was unable to provide wholehearted support without further clarification of the additional proposed clause 2.3.9, as set out in the draft Notification. In particular, UKCTA sought clarification in respect of how the proposed requirement to withhold funds to SPs would work in practice
- 4.12 UKCTA also noted that the proposed ECA would have a major impact, on occasion, when ICSTIS issues Directions under the approved Code, which in turn could have serious consequences for the financial viability of SPs. Accordingly, UKCTA argued that ICSTIS should review its procedures for the issue of Directions to TCPs before the proposed ECA comes into force.
- 4.13 Vodafone supported the proposed ECA albeit expressed a preference that the earliest payment due for a particular transaction should be either 30 days or at the end of the month following the month in which the charge was incurred. Vodafone believed that this would ease the implementation of the proposed requirement without compromising its effectiveness. Vodafone also expressed concern in respect of the proposed six week implementation period, and argued that three months would provide a more appropriate period.
- 4.14 Vodafone also expressed concern that under the proposed ECA, following an ICSTIS adjudication in respect of a breach of the Code, ICSTIS could direct the NO to pay ICSTIS a fine and/or an administrative charge. Vodafone argued that these monies, particularly where collected as part of a service in breach of the Code, should be returned to consumers. Vodafone also questioned how the proposed ECA would fit in terms of the proposed Payments Directive where "payment service providers" are required to settle with merchants within three days.

Ofcom's comments

- 4.15 Ofcom notes that all respondents were generally supportive of the principle to slow down the flow of monies from NOs to SPs and that, while three of the respondents either supported the proposed ECA in full or saw no reason why it should not be implemented, the other respondents proposed variations on it.
- 4.16 Two respondents argued that the proposed ECA should be considered in the context of Ofcom's recommendation relating to the need for greater due diligence on the part of TCP's, and that therefore NOs should retain a degree of freedom and flexibility to adopt payment models of less than 30 days on the proviso that they accept full financial responsibility.
- 4.17 Ofcom does not, however, support such an approach and, as explained in its draft Notification, believes that the requirement to slow down the flow of monies to SPs will only be effective if it is uniformly binding. Ofcom considers that the danger of applying regulation in a way which provides flexibility is that it is unlikely to result in significant changes in payment models, particularly given that there are such different approaches to risk management across the industry.
- 4.18 Ofcom has also considered Orange's point relating to whether there should be exceptions to the rule in respect of charitable donations made via PRS in response to crisis situations. Ofcom is sympathetic with this argument but, as set out in the paragraph above, does not believe that there should be any exceptions where premium rate is used as a payment mechanism. However, Ofcom would expect that ICSTIS would continue to monitor the effectiveness of the requirement in order to ensure that it remains appropriate and proportionate in all cases.
- 4.19 Three respondents proposed variations on the withhold period, with NOC proposing that it should be arranged on a calendar month basis, Orange proposing that it should be reduced to 28 days and Vodafone proposing that the period should be 30 days or at the end of the month following the month in which the charge was incurred. NOC also made the point that any ruling for 30 or 35 days payment terms would not be able to be applied until the BT Annex E (Artificial Inflation of Traffic ('AIT')) provisions were amended.
- 4.20 Ofcom has considered the proposals in respect of the most appropriate withhold period, but has not been persuaded that other proposals would have greater merit. As stated in Ofcom's consultation document, while we recognise that there are differing views regarding the appropriate withhold period, and the likely scale of the costs involved, our view is that 30 days provides a sensible balance between ensuring effective consumer protection with the need to minimise likely costs. Ofcom also notes that the proposed ECA would provide NOs with the ability to make payments to their SPs on a calendar month basis, if they so choose, so long as they make sure that no payment is paid to SPs less than 30 calendar days after the call has been made. Accordingly, it is open to NOs to slow payments down by more than 30 calendar days, in certain circumstances, in order that payments take place only once a month or to align with the AIT provisions, so long as no payment is paid to SPs less than 30 calendar days after the call.
- 4.21 Ofcom notes that UKCTA sought clarification in respect of how the proposed requirement to withhold funds to SPs would work in practice. The specific issues raised by UKCTA are addressed below:

- in the event that an SP does not pay a fine following an adjudication by ICSTIS, the NO can only be held liable for the amount that the NO should be withholding in accordance with the Code or as directed under the Code;
 - the NO cannot be held liable in circumstances where an issue arises that relates to payments that have subsequently been legitimately paid out in previous 30-day cycles;
 - if the amount legitimately withheld by the NO is less than the fine, then there is no further liability on the TCP. If the amount being withheld is in excess of the fine, then the balance can be passed to the SP.
- 4.22 UKCTA also raised the issue of the liability of the NO in those circumstances where monies have not been collected due to interconnection retention notices. Ofcom agrees that it would be inappropriate for NOs to be held liable for fines where they have withheld in accordance with the ECA but they have not received payment from the OCP relating to the relevant service in the 30 day cycle because of an interconnection retention notice. The objective behind the ECA is to provide ICSTIS with important additional time to investigate complaints and detect misleading and/or potentially fraudulent activity and, where necessary, to freeze call revenues during any additional ICSTIS investigation. The objective has never been to shift the liability to the NO. Accordingly, NOs should only be held liable for monies received. Ofcom will work with ICSTIS in order to ensure that there is sufficient clarity in respect of the issue of NO liability.
- 4.23 UKCTA also argued that ICSTIS should review its procedures for the issue of Directions to NOs before the proposed ECA comes into force. Ofcom agrees the need for clarity in this area, but does not agree that the proposed ECA should be delayed in light of current concerns relating to current payment structures which, in our view, continue to represent a significant risk to the effective regulation of PRS. Ofcom notes that the current procedures, are set out in section 8 of the current ICSTIS Code, which has been approved by Ofcom. Ofcom also notes that these procedures are, in any event, currently being reviewed as part of the current consultation on the draft 11th Edition of the ICSTIS Code.
- 4.24 Vodafone expressed concern in respect of the proposed six week implementation period, and argued that three months was an appropriate time period for implementation. Ofcom does not agree that six weeks is an insufficient period and, in particular, notes that the proposed ECA stems from Ofcom's report to DTI, which was published in December 2004, and that ICSTIS has also consulted on this requirement. Ofcom therefore believes that six weeks remains an appropriate implementation period.
- 4.25 Vodafone also commented that there is a risk that a proposed Payments Directive requires "payment service providers" to settle with merchants within three days. Vodafone expressed concern that the proposed directive may apply to PRS. ICSTIS and Ofcom will continue to monitor any developments from Europe that affects PRS and will keep the Code under review to ensure consistency.
- 4.26 Vodafone also expressed concern that under the proposed ECA, following an ICSTIS adjudication in respect of a breach of the approved Code, ICSTIS could direct the NO to pay ICSTIS the fine or an administrative charge. Vodafone argued that these monies, particularly where collected as part of a service in breach of the Code, should be returned to consumers. Ofcom agrees that under the proposed ECA, this is a likely scenario, but that the issue is a matter for ICSTIS to determine,

in accordance with its own sanctions provisions set out in the ICSTIS Code, under which ICSTIS may direct NOs to pay over monies.

Section 5

Approval of an Emergency Code Amendment to the ICSTIS Code of Practice (Tenth Edition)

Tests set out under the Communications Act 2003

- 5.1 In approving a code for PRS Ofcom is required to meet the various tests set out in the Act. These tests, and Ofcom's assessment of how these are met, are set out below.

Section 3 – Ofcom's general duties

- 5.2 Section 3(1) of the Act sets out the principal duty of Ofcom in carrying out its functions to further the interests of citizens in relation to communications matters and further the interests of consumers in relevant markets where appropriate by promoting competition.
- 5.3 Ofcom considers that the interests of citizens are furthered by the proposed requirement to require NOs not to make payments to SPs for at least after 30 calendar days after calls have been made.
- 5.4 This is because, as explained in this document, Ofcom considers that the current payment structure results in NOs releasing monies to SPs rapidly, and that this represents a significant risk to the effective regulation of PRS. The proposed requirement would give ICSTIS time to identify breaches of the approved Code and, where appropriate, direct NOs to withhold funds pending the outcome of its investigations. This will mean that companies running premium rate services in breach of ICSTIS' rules will no longer be able to profit from operating such services. Consequently, there would be reduced incentives upon SPs to act irresponsibly, and consumers would be better protected as a result.
- 5.5 Ofcom has also considered the requirements in section 3(2) of the Act to secure the availability throughout the UK of a wide range of electronic communications services, and section 3 (4) of the Act, namely that in performing its duties Ofcom must also have regard to such of the following as appears to be relevant in the circumstances, in particular:
- 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 needs of persons with disabilities, of the elderly and of those on low incomes; and
 - the opinions of consumers in relevant markets and of members of the public generally.

- 5.6 Ofcom considers that the proposed requirement set out in this document meets the above criteria and that, in particular, will be beneficial to the premium rate sector for the reasons set out above. It would build consumer confidence and satisfaction in the premium rate sector which, in turn, would have a beneficial effect on the long term viability of the sector.

Section 4 – European Community requirements for regulation

- 5.7 Section 4 of the Act sets out the Community duties on Ofcom which flow from Article 8 of the Framework Directive. Ofcom considers that its proposals outlined above promote the interests of all persons who are citizens of the European Union, in line with the third Community requirement, because the introduction of a requirement which slowed down the flow of money to companies running PRS in breach of ICSTIS rules would ensure that consumers were better protected from the potential for consumer detriment arising from PRS. Also, as already stated, this would build consumer confidence and satisfaction in the premium rate sector which, in turn, would be beneficial to the premium rate sector.

Section 121 – Approval of a code for premium rate services

- 5.8 The procedure for approval of a code for premium rate services is set out in section 121 of the Act.

Section 121(1)

- 5.9 Ofcom considers, that in respect of the proposed modification to the approved Code,
- a) that 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;
 - b) that the code contains provisions for regulating, to such extent (if any) as they think fit, the arrangements made by the providers of PRS for promoting and marketing those services; and
 - c) that it would be appropriate to approve the code (i.e. the modification) for the purposes of section 120.

Section 121(2)

- 5.10 Section 121(2) of the Act states that Ofcom is not to approve a code for those purposes unless it is satisfied that the tests listed in that section are met. The tests are as follows:

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

- 5.11 Ofcom is satisfied that ICSTIS would be the body responsible for administering and enforcing the approved Code.

that that person is sufficiently independent of the providers of premium rate services

- 5.12 ICSTIS operates in an entirely independent manner. The Board consists of up to twelve members, all appointed in their individual capacities. With the exception of three members who are appointed on the basis of their contemporary industry

knowledge, no member of the Board may have any commercial interests in the premium rate sector. Any Board member with such commercial interests will take no part in any adjudication process.

- 5.13 Ofcom is therefore satisfied 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 Code

- 5.14 ICSTIS is a non-profit making organisation and is funded by a levy on service providers and collected by NOs. The budget is consulted on with all stakeholders each year and is approved by Ofcom.
- 5.15 Under current funding arrangements, ICSTIS calculates a budget and estimates the levy necessary to meet that budget. The levy rate is published widely, and is collected through NOs withholding that levy rate from out-payments to SPs. The final ICSTIS budget for 2005/6 has been set at £4,106,450 and the levy at 0.46% (assuming market growth of 7.5%).
- 5.16 Ofcom is therefore satisfied that adequate arrangements are in force for funding the activities of that person in relation to the code.

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

- 5.17 As already explained, in the event that Ofcom were to approve the ECA, NOs will be obliged not to make payments to their SPs for at least 30 calendar days after the call has been made. Ofcom notes that NOs will be required to comply with this requirement in order to meet their obligations under the ECA.
- 5.18 Ofcom is satisfied that the proposed requirement is objectively justifiable given that the speed and frequency with which payments are made from TCPs to SPs continues to be a major contributory factor to the problems of effective regulation of PRS.
- 5.19 In particular, from discussions with stakeholders, Ofcom found that frequent payment terms were increasingly being used by some TCPs as a means of competing with each other for SP business. It is for this reason that Ofcom considers that the requirement should be binding and apply uniformly to all NOs, and be monitored proactively. While Ofcom is aware that some stakeholders have argued that the obligation should be applied flexibly insofar as there should be freedom to adopt payment models of less than 30 days, Ofcom has not been persuaded that applying the regulation in this way would provide similar effectiveness. Ofcom remains concerned that this may encourage NOs to continue to agree early payment terms given the likely different approaches to risk management.

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

- 5.20 Ofcom is satisfied that the proposed requirement is non-discriminatory insofar as it does not benefit particular undertakings and, as set out in the paragraph above, will be applied uniformly to all NOs engaged in the premium rate sector.

- 5.21 The effectiveness of the PRS regulatory regime has always been dependent on ensuring that there are sufficient incentives on those persons who are facilitating the provision of PRS through the provision of network facilities and who terminate the call on behalf of the SP. It is those persons who contract with the SP.
- 5.22 Ofcom does not consider that similar provisions requiring OCPs to withhold funds from TCPs would be as effective as it would be administratively complex to apply. This is because a breach of the approved Code would require Directions to be issued to all OCPs, of which there are now around 200, rather than to a single TCP with whom the SP has entered into commercial arrangements with. ICSTIS' task in keeping track of withheld funds and ensuring their proper use would be far more challenging and resource intensive than under a system where funds were withheld at the TCP level.
- 5.23 Moreover, Ofcom does not consider that applying similar provisions can be applied to SPs given, as already explained, the commercial and regulatory barriers to market entry are very low, and therefore any regulatory measures which are directed at making SPs more accountable are likely to be unsuccessful. There may be as many as 3,000 to 4,000 SPs responsible for providing as many as 30,000 to 40,000 PRS in the UK at any one time. It is for this reason that Ofcom believes that effective regulation requires responsibility to lie further up the value chain.

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

- 5.24 Ofcom is satisfied that the proposed requirement to delay payments to SPs for a minimum period of 30 calendar days would be a proportionate way of improving the effectiveness of the regulatory regime because, in Ofcom's view, 30 days provides a sensible balance between ensuring effective consumer protection with the need to minimise likely costs.
- 5.25 Ofcom accepts that there are different views regarding the most appropriate withhold period and the likely scale of the costs involved resulting from withholding monies. However, on balance, Ofcom remains of the view that delaying payments to SPs for a minimum period of 30 calendar days would provide the most appropriate withhold period, and that this is therefore proportionate to what it is intended to achieve. Ofcom accepts that the proposed requirement may well affect the cashflows of some SPs, and that the vast majority of these are likely not to have committed any breaches of the approved Code. However, Ofcom believes that any such costs need to be placed in the context of the scale of the problems relating to consumer harm experienced last year.
- 5.26 Ofcom also notes that there were differing views in terms of how the rule should be applied, with some respondents arguing that the proposed ECA should be applied in such a way as to provide a degree of discretion to Providers. However, Ofcom does not support such an approach, and believes that the requirement to slow down the flow of monies to SPs will only be effective if it is uniformly binding. Ofcom considers that the danger of applying regulation in a way which provides for flexibility is that it is unlikely to result in significant changes in payment models.
- 5.27 Also, of relevance, and as addressed in paragraph 4.22, Ofcom agrees that there is some uncertainty in respect of NO liability in those circumstances where monies have not been collected due to interconnection retention notices. Ofcom agrees that it would be inappropriate for NOs to be held liable for fines where they have withheld in accordance with the ECA but they have not received payment from the OCP relating to relevant service in the 30 day cycle because of an interconnection

retention notice. Accordingly, NOs should only be held liable for monies received. Ofcom will work with ICSTIS in order to ensure that there is sufficient clarity in respect of the issue of NO liability.

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

- 5.28 Ofcom is satisfied that the proposed requirement is transparent. First, it flows from Ofcom's report to DTI, which was published in December 2004. This has therefore been public for a number of months. In addition, both ICSTIS and Ofcom have subsequently formally consulted on the proposed requirement.
- 5.29 Accordingly Ofcom is today proposing to give notification of approval of the ECA as set out in the Schedule to the Notification in Annex 1 for the purposes of sections 120 and 121 of the Act.

Annex 1

Notification

NOTIFICATION UNDER SECTION 121(7) OF THE COMMUNICATIONS ACT 2003

Proposal for approval of a modification to an approved code for premium rate services for the purpose of sections 120 and 121 of the Communications Act 2003 ('the Act')

WHEREAS:

- A section 120 of the Act empowers OFCOM to set conditions that bind persons to whom they are applied for the purpose of regulating the provision, content, promotion and marketing of premium rate services;
- B such conditions may require the persons to whom they apply to comply, to the extent required by the condition, with directions given in accordance with an approved code by an enforcement authority and for the purpose of enforcing its provisions or, if there is no such code, the provisions of the order for the time being in force under section 122;
- C OFCOM set a condition under section 120 of the Act by way of publication of a notification under sections 48(1) and 120(5) of the Act on 23 December 2003 which took effect from 29 December 2003;
- D OFCOM also published a notification of approval of a code for premium rate services for the purposes of sections 120 and 121 of the Act on 23 December which took effect from 29 December 2003;
- E on 9 December 2004, OFCOM published its report to DTI, The Regulation of Premium Rate Services, in which it made a number of detailed recommendations aimed at significantly reducing the scope for consumer detriment from premium rate services;
- F recommendation 4 of OFCOM's report recommended that the Approved Code should be amended to include an obligation on Terminating Communications Providers not to make contractual payments to Service Providers for at least 30 days after calls are made;
- G on 15 April 2005, ICSTIS issued a consultation document seeking comments on an emergency amendment to the Approved Code in order to implement recommendation 4;
- H ICSTIS considered every such representation duly made in response to its consultation document, and finalised its modification taking such representations into account on 13 June 2005;
- I The modification is set out in the Schedule to this Notification;
- J for the reasons set out in the explanatory statement accompanying this Notification, OFCOM proposes that the requirements for the purposes of approving a code set out in section 121 of the Act have been satisfied;

- K In making the proposal set out in this Notification, OFCOM has considered and has acted in accordance with its general duties set out in section 3 and the six Community requirements in section 4 of the Act;

NOW, therefore:

1. OFCOM hereby gives, in accordance with section 120 and 121 of the Act, its approval of the modification to the Approved Code as set out in the Schedule to this Notification for the purposes of section 120 and 121 of the Act, to take effect from and including 15 September 2005.
2. In this Notification:
 - i. **“Act”** means the Communications Act 2003;
 - ii. **“Approved Code”** means the ICSTIS Code of practice (Tenth Edition) approved on 23 December which took effect from 29 December 2003;
 - iii. **“DTI”** means the Department of Trade and Industry
 - iv. **“ICSTIS”** means the Independent Committee for the Supervision of Standards of Telephone Information Services
 - v. **“OFCOM”** means the Office of Communications and includes reference to the Director General of Telecommunications where it relates to the period before 29 December 2003;
 - vi. **“Service Providers”** has the same meaning as in the Approved Code; and
 - vii. **“Terminating Communications Provider”** means the party who facilitates the provision of network facilities and who terminates the call on behalf of the Service Provider.
3. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them in this Notification and otherwise any word or expression shall have the same meaning as it has in the Act.
4. For the purpose of interpreting this Notification:
 - i. headings and titles shall be disregarded; and
 - ii. (ii) the Interpretation Act 1978 shall apply as if this Notification were an Act of Parliament.
5. The Schedule to this Notification shall form part of this Notification

Claudio Pollack - Director of Competition Policy

A person authorised by Ofcom under paragraph 18 of the Schedule to the Office of Communications Act 2002

4 August 2005

Schedule

Proposal for approval of a modification to an approved code for premium rate services for the purpose of sections 120 and 121 of the Communications Act 2003

The Approved Code shall be modified as set out below by the addition of the following clause:

“2.3.9 (a) Network operators shall not make, and shall withhold, payments to service providers for a period of at least 30 days after the making of the calls to which the payments relate:

(b) Where:

- (i) there has been an adjudication, pursuant to paragraph 7.6, in respect of a breach of the Code by a service provider; and,*
- (ii) a fine and/or administrative charge has been imposed on that service provider which has not been paid in accordance with the terms of that fine and/or administrative charge:*

ICSTIS may direct the network operator who has contracted with the service provider in respect of the premium rate service(s) to which the fine and/or administrative charge relates, to pay to ICSTIS an amount no more than the amount of the fine and/or administrative charge that has not been so paid provided that the amount 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

(c) For the avoidance of doubt, where a network operator fails to pay to ICSTIS the amount that it is directed to pay by ICSTIS pursuant to paragraph 2.3.9(b) because that network operator has failed to withhold monies pursuant to paragraph 2.3.9(a) or for any other reason, that network operator shall remain liable to pay over the entire amount directed.

(d) This sub-paragraph is without prejudice to the Code generally and, in particular, paragraphs 2.3.5, 7.5(c)(ii) and 7.7.2(d).”How to respond

Annex 2

Responses to the consultation document

BT

Ekcoh Technologies (UK) Limited

Gamma Telecom

Network for Online Commerce

Orange

Redstone

UKCTA

Vodafone