



# Conditions regulating Premium Rate Services

This document is a statement modifying the PRS Condition to capture Internet Dialler Software and a consultation document on proposals clarifying that PRS over Mobile Services are regulated by Ofcom

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## Section 1

# Summary

## Proposals

- 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 and mobile telecoms lines, and is charged to users' telephone bill. 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.
- 1.3 The statutory provisions for regulation of PRS are set out at sections 120 to 124 of the Communication Act 2003 ('the Act'). The regulatory arrangements for PRS follow a self- and co-regulatory approach with the primary role of consumer protection falling to ICSTIS. Ofcom's involvement in the PRS regulatory regime is to provide statutory 'backstop' support to the work of ICSTIS. Ofcom enforces directions issued by ICSTIS through Ofcom's condition regulating the provision, content, promotion and marketing of PRS ('the PRS Condition') under section 120 of the Act. The effect of the PRS Condition is to bind each and every person falling within the definition of 'Communications Provider' ('CP') therein, to comply with directions given in accordance with an Approved Code by the Enforcement Authority (i.e. ICSTIS) and if there is no Approved Code, the provisions of the order for the time being in force under section 122 of the Act.
- 1.4 In November 2005, Ofcom published a consultation document on proposals for modifications to the PRS Condition. This was for two reasons. First, there was growing evidence of consumer harm arising from 'rogue' diallers using '08' numbers and, in particular, '087' numbers. Ofcom was concerned that this may be the result of a possible migration of diallers from '09' numbers in an attempt to circumvent regulation of '09' PRS and, specifically, the requirement to seek permission from ICSTIS. Second, in discussions with stakeholders, Ofcom had received representations from the industry to the effect that Ofcom does not currently regulate PRS accessible over mobile telephones. Ofcom did not consider that PRS accessible via mobile telephones was outside of its backstop powers underpinning ICSTIS regulation and sought to clarify this by a proposed amendment to the PRS Condition.
- 1.5 Accordingly, Ofcom proposed to modify the PRS Condition in two ways.
- 1.6 First, Ofcom proposed to extend the definition of CPRS to include 'internet dialler software' ('diallers'), irrespective of the call cost or number. Diallers are a form of software that switch the modem setting of the computer that the dialler programme is running on from one particular internet connection to another.
- 1.7 In proposing to extend the definition of CPRS to capture diallers, Ofcom set out that it did not want to unintentionally capture pay-as-you-go dial up and unmetered dial up

internet services. These services provided by Internet Service Providers ('ISPs') provide narrowband access to the internet to end-users using a dial-up connection. Consequently, Ofcom proposed to exclude pay-as-you-go dial up and unmetered dial up internet services from the proposed definition of internet dialler software in the PRS Condition.

- 1.8 Second, Ofcom proposed to modify the definition of CPRS to avoid any doubt that PRS accessed over mobile telephones are regulated under Ofcom's back-stop powers.
- 1.9 Ofcom's consultation document is available on the Ofcom website at <http://www.ofcom.org.uk/consult/condocs/prsconditions/>
- 1.10 Ofcom received a total of 27 responses. A list of the respondents who submitted non-confidential responses is attached at Annex 6. The responses themselves are available for viewing on the Ofcom website at: <http://www.ofcom.org.uk/consult/condocs/prsconditions/responses/?a=87101>
- 1.11 In light of comments received to Ofcom's consultation document as well as comments received in relation to the Number Translation Service (NTS) framework consultation<sup>1</sup>, which set out various proposals relating to the NTS regime as it applies to '08' numbers, Ofcom has decided to give effect to the proposed modification to extend the definition of CPRS to include diallers, irrespective of the call cost or number, by publication of a Notification of a modification to the PRS Condition under section 48(1) and 120(5) of the Act. The notification is published at Annex 4 to this document.
- 1.12 In light of comments received on the proposal to remove any doubt that PRS over mobile telephones is regulated by Ofcom, Ofcom is today consulting further on a modification to the PRS Condition. Although there was broad support amongst the consultation responses for Ofcom to amend the PRS Condition to remove any doubt that PRS accessible over mobile telephones are regulated, there was some concern that the words that Ofcom proposed did not achieve the desired aim.
- 1.13 Ofcom had proposed that "calls to Mobile Services" be excluded from the PRS Condition. This was intended to ensure that calls to mobile services that were not genuine PRS but might have been caught by the price threshold in the PRS Condition were excluded from the scope of the PRS Condition. However, having carefully considered responses received, Ofcom is of the view that its proposed amendment might capture data services and that, consequently, reverse SMS services<sup>2</sup> could be excluded from the scope of the PRS Condition and therefore from regulation. Ofcom does not consider that reverse SMS are outside of its backstop powers which underpin ICSTIS regulation.
- 1.14 Accordingly, Ofcom is today proposing a new modification to the PRS Condition to remove any doubt that that PRS accessible over mobile telephones are regulated. It is proposing to remove the 'Mobile Services' exclusion in its entirety. As set out in the consultation document, the intention behind the carve-out was to capture calls to mobiles that were not genuine PRS but may have been caught by the price threshold

<sup>1</sup> [http://www.ofcom.org.uk/consult/condocs/nts\\_forward/](http://www.ofcom.org.uk/consult/condocs/nts_forward/)

<sup>2</sup> Reverse SMS is where a premium rate text messages (which typical costs ranging from 25p to £1.50 per message) are sent to a mobile telephone. Typically this works where a customer subscribes to a fixed number of SMS being sent to his phone per month, such as sport updates or ring tones. ICSTIS has issued strict guidelines for reverse-billed SMS, including obligations to ensure consumers are given clear information on charging at the point at which they sign up.

in the PRS Condition. However, a service must first fulfil the definition of PRS as defined in the Act to fall within the PRS Condition. Ofcom's view is that ordinary calls to mobile telephones (that is what was intended to be excluded by the "Mobile Services" definition) are not PRS as defined in the Act. Ofcom's view is that the exclusion is therefore unnecessary. Ofcom welcomes comments on this proposal.

- 1.15 Personal numbering services and radiopaging services are also currently excluded from the scope of the PRS Condition. The former are calls which allow an end-user to receive calls wherever he or she is; the latter involves the conveyances of signals from one piece of apparatus to another.
- 1.16 The rationale for the personal numbering services and radiopaging services exclusions was the same as for mobile services. In other words, there was a concern that the price threshold in the PRS Condition might capture these calls even though they were not genuine PRS. Accordingly, for the same reasons stated above, Ofcom considers that these exclusions are also unnecessary as they are not PRS as defined in the Act. Ofcom is therefore consulting today on their removal from the PRS Condition as well.
- 1.17 The proposed modifications to the PRS Condition are set out at Annex 5 to this document.
- 1.18 As set out in Ofcom's consultation document, Ofcom has not considered the scope, purpose and effectiveness of PRS regulation but intends to review PRS regulation in the context of new services, and the need to reflect technological advances in a policy review of PRS to commence shortly in 2006. This review will consider the scope of PRS regulation, and how it should be applied to, or removed from, emerging commercial services coming out of the mobile, fixed telephony and broadcast sectors, as well as growth in broadband and Voice over Internet Protocol ('VoIP') billing as a possible new route to content.
- 1.19 In the meantime, Ofcom has concluded on the internet diallers amendment to the PRS Condition and is proposing further amendments in respect of the mobile services, personal numbering and radiopaging exclusions. Ofcom considers that it is necessary to undertake these matters before the review of scope has completed, given the evidence of the potential for harm to consumers in respect of the mobile services exclusion as set out in this document. In addition, as regards the mobile services, personal numbering and radiopaging exclusions proposals, Ofcom does not consider that it is extending policy but rather clarifying existing regulation.
- 1.20 In reaching its proposals and its 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 120(5) of the Act which apply to the setting, modification and revocation of a condition.
- 1.21 The modification to extend the definition of CPRS to include diallers, irrespective of the call cost or number, as set out in the Notification at Annex 4, will take effect one month from the publication of this Notification. This is to provide a reasonable period of implementation before the new obligations take force

## Consultation

- 1.22 Ofcom is inviting written views and comments by **5pm on Monday 10 July 2006**, on the proposal to remove the mobile services, personal numbering services and

radiopaging services exclusions from the PRS Condition. The Notification and proposed modifications to the PRS Condition are set out at Annex 5 to this document

- 1.23 Details of how to respond on this issue can be found in Annex 1.
- 1.24 Ofcom will give careful consideration to all comments received during the consultation period, and in light of the comments received, may give effect to the proposals set out in this document, with or without modification, by publication of a Notification and explanatory statement. Ofcom expects to publish the Notification and Explanatory Statement later in the year.

## 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, fixed-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 PRS, 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 service providers ('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 ICSTIS 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)<sup>3</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.

<sup>3</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.

## The regulatory framework and PRS

- 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. The provisions provide Ofcom with the power 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. 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 consultation and notification requirements in section 48 of the Act.

## How PRS are currently regulated in the UK

- 2.9 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 its Code of Practice.

## The role of Ofcom

- 2.10 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.
- 2.11 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.”



- 2.12 Ofcom's powers, under the PRS Condition, only relate to those services which are defined as CPRS. CPRS are defined more narrowly than PRS, and currently means PRS where the charge or rate for the call is more than 10 pence per minute other than Chatline Services which are automatically included. This means that currently, calls that are charged at less than this price (other than Chatline Services) fall outside of the Condition (for example those on '0871'). Ofcom has concluded that this should be changed and will consult on subsequent changes to the PRS Condition to include services on '0871' once ICSTIS has developed, and consulted on, regulatory proposals for the '0871' range (see paragraphs 2.25 to 2.30 below)<sup>4</sup>.
- 2.13 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

- 2.14 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 into force and is available on the ICSTIS website. The Approved Code applies to all PRS which are accessed by a UK consumer or are provided by SPs in the UK.
- 2.15 The ICSTIS Code is 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 code.
- 2.16 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.
- 2.17 Although their responsibilities are more limited, the Approved Code also places a number of general requirements and specific obligations on TCPs 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 a TCP, 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.
- 2.18 ICSTIS issued a consultation document on 28 July 2005 seeking comments on a new version of its Code. In conducting its review ICSTIS examined all areas of the current ICSTIS Code (10<sup>th</sup> Edition, as amended) ('the Approved Code') and also considered the recommendations put forward by Ofcom in its report to the Department of Trade and Industry ('DTI'), *the Regulation of Premium Rate Services*, published in December 2004 ('Ofcom's report'). ICSTIS' consultation document is available on the ICSTIS website at:  
<http://www.icstis.org.uk/icstis2002/pdf/A%20Statement%20on%20the%20ECA%20C%20ondoc%20-%20FINAL.pdf>

<sup>4</sup> [http://www.ofcom.org.uk/consult/condocs/nts\\_forward/statement/statement.pdf](http://www.ofcom.org.uk/consult/condocs/nts_forward/statement/statement.pdf)

- 2.19 ICSTIS published a statement setting out its final Code in light of comments received. ICSTIS' 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)
- 2.20 Ofcom has today published a consultation document on whether Ofcom should approve under section 121 of the Act an amended ICSTIS Code (11<sup>th</sup> Edition), and is seeking comments on its approval. Ofcom's consultation document is available on the Ofcom website at: <http://www.ofcom.org.uk/consult/condocs/icstiscode/>

## The NTS Regime

- 2.21 Number Translation Service ('NTS') calls are calls to numbers identified in the National Telephone Numbering Plan (the 'Plan') as Special Service numbers (broadly, numbers that start with '08' or '09'). In addition, NTS includes calls to the legacy '0500' Freephone numbers, which, whilst still in use, are not listed in the Plan as they are no longer available for new allocations. Calls to '0844 04' numbers for Surftime internet access services and calls to '0808 99' numbers for FRIACO are not included.
- 2.22 NTS (and PRS) numbers are examples of non-geographic numbers in that the number dialled does not relate to a specific geographic location, but instead relates to a particular service. At a technical level, the NTS number dialled by a caller is 'translated' by the network to a geographic number to deliver the call to its destination.
- 2.23 Services offered using NTS numbers are similar to PRS except that prices range from free up to a maximum of 10ppm (from a BT landline). Types of services include information services, some technical helplines, access to telephone banking, sales and customer service lines and dial-up pay-as-you-go internet services.
- 2.24 Because of the lower prices charged for NTS calls generally the scope for consumer detriment from making long calls and from fraudulent activity is generally considered less of an issue. However, there is still potential for consumers to accrue high phone bills over a billing cycle where there may be frequent or long-duration use of lower priced services.

## The regulatory framework and NTS

- 2.25 Unlike PRS there are currently no additional regulatory controls on the use of NTS numbers, other than those which apply to all OCPs through the General Conditions.
- 2.26 Ofcom undertook a review of the regulatory framework for Number Translation Services ('NTS'), and published a statement, *NTS: A Way Forward*, on 19 April 2006. This set out Ofcom's conclusions on a number of policy issues associated with the NTS regime as it applies to '08' numbers raised in Ofcom's consultation document, *NTS: A Way Forward*, published on 28 September 2005. Ofcom's NTS statement is available on the Ofcom website at: [http://www.ofcom.org.uk/consult/condocs/nts\\_forward/statement/statement.pdf](http://www.ofcom.org.uk/consult/condocs/nts_forward/statement/statement.pdf)
- 2.27 As set out in its statement, Ofcom has decided to implement the measures proposed in the September 2005 consultation document with some modifications. The measures are as follows.
- 2.28 Ofcom intends to extend the regulatory framework for PRS to include '0871' numbers. Under the Plan, services on these numbers are charged at up to, and

including, 10p per minute or per call for BT customers. ICSTIS has agreed in principle to regulate '0871' numbers and Ofcom will modify the PRS Condition to extend the definition of CPRS to include services that are on this range so that Ofcom has backstop powers to support ICSTIS in this context. The '0871' range will not be subject to the same level of regulation by ICSTIS as the premium rate '09' number range. However, it will be subject to requirements designed to improve price transparency and to provide an appropriate level of consumer protection. Amongst other things, SPs using '0871' numbers will be required to include information about the price of calls in advertisements and on promotional material. Also, in order to minimise the risk that consumers will be deterred from making '0871' calls by the association with more expensive '09' services, Ofcom will ask ICSTIS to consider the possibility of a distinct branding for '0871' regulation. ICSTIS will take the lead in developing regulatory proposals for the '0871' range and will consult on its plans before they are introduced.

- 2.29 In addition, Ofcom intends to amend the Plan to clarify that adult services should only be provided on the '0908' and '0909' number ranges. As a result of this clarification, adult services currently provided on '08' numbers will have to move to the designated 09 ranges, where they may continue to be provided at prices of less than 10 pence per minute. ICSTIS has agreed in principle to regulate these additional services. Ofcom intends to amend the PRS Condition to extend the definition of controlled PRS to include all adult services, regardless of price. This will extend Ofcom's backstop powers to support ICSTIS. Ofcom will consult later this year on the changes to the Plan and the PRS Condition which are required to extend PRS regulation to cover adult services currently provided on '08' numbers.
- 2.30 In the meantime, this document sets out Ofcom's conclusion that all diallers will be covered by the PRS condition including those on '0871'.

## Section 3

# The issues and Ofcom's proposals

## Diallers and '08' numbers

### What are diallers?

- 3.1 Diallers are forms of software that can be transmitted through the internet. Diallers switch the modem setting of the computer that the dialler programme is running on from a particular internet connection to another. The switch has historically been from an '0845' telephone internet connection to a premium rate ('090' or equivalent) connection.
- 3.2 Diallers can be a legitimate and convenient way of paying for content on the internet – such as sports results, sites for charity contributions, music downloads and adult services – at premium rate rates rather than charging by credit card.
- 3.3 The way that diallers typically work is that upon accessing a website which contains a dialler, a consumer is normally shown a pop up or dialogue box which asks whether they wish to download a dialler programme. The key terms and conditions such as the cost should also be present. If the “yes” box is clicked, the dialler programme installs itself in the consumer's computer and is normally accompanied by an icon in the bottom tool bar. The switch to a premium rate internet connection allows for the charging of a consumer to view/access the website with a dialler feature and be charged for doing so.
- 3.4 In the normal course, the dialler programme should uninstall itself after the content or service has been provided and paid for, and return the customer's modem to its previous setting.

### The scale of the dialler problem during 2004

- 3.5 There exists a type of 'rogue' dialler using premium rate ('09'), international and satellite numbering that proved to be a serious virus type problem during 2004 and resulted in substantial levels of consumer harm. This resulted in ICSTIS receiving an unprecedented volume of complaints and enquiries from consumers about this activity. The majority of these cases involved websites simply installing diallers without permission and with stealth, resulting in consumers receiving high bills and subsequently disputing them on the grounds that they had no knowledge these calls were being made. The two most significant problems which emerged were as follows:
  - a failure of diallers to uninstall themselves when commanded to do so by the consumer (after legitimate use), resulting in continued use of the modem being charged at the higher rate; or
  - dialler programmes simply installing themselves surreptitiously where the consumer was simply surfing the web and had not clicked “yes” to any dialler programme being downloaded. This latter scenario typically occurred through the use of pop-ups that triggered the surreptitious installation of a dialler programme despite the consumer taking no action other than attempting to close the pop up box.

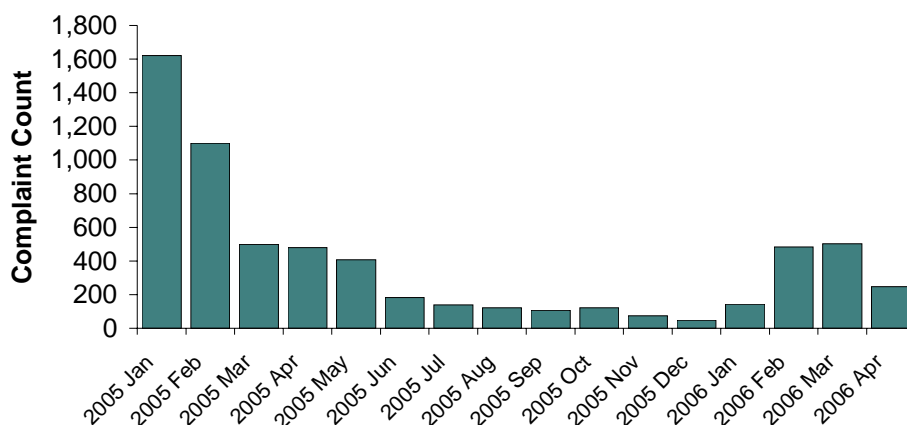
- 3.6 As a consequence, Ofcom was asked by DTI in August 2004 to undertake an urgent review of the regulatory framework for PRS in order to assess whether consumers were adequately protected from the potential for consumer detriment involving PRS.
- 3.7 In assessing the scale of the problem Ofcom received data relating to the volumes of consumer complaints received by ICSTIS (and OCPs), the number of breaches of the ICSTIS Code found and the amounts of money involved.
- 3.8 Ofcom's analysis of the problem showed that ICSTIS had received around 60,000 individual consumer complaints between August 2003 and July 2004 and, of those, approximately two-thirds related to diallers. Call records provided by ICSTIS' TCP confirmed that in April-May 2004, the ICSTIS Helpline received calls from over 5,000 individual callers per day. Over 50% of those were estimated to have related to diallers.
- 3.9 The Ofcom 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/loi/nwbnd/prsindex/ntsprsditi/prs\\_review.pdf](http://www.ofcom.org.uk/telecoms/loi/nwbnd/prsindex/ntsprsditi/prs_review.pdf)
- 3.10 Ofcom's report made a total of eighteen recommendations about how the range of problems surrounding the regulation of PRS could be addressed. Ofcom expects that the package of measures set out in the report will significantly reduce the potential for consumer detriment in the premium rate industry. Ofcom, together with DTI and ICSTIS, are now implementing the recommendations as swiftly as possible.
- 3.11 There has been significant progress on implementation of the recommendations from the report, including, amongst others:
- an emergency amendment to the ICSTIS Code imposing requirements upon all TCPs not to make payments to their SPs for at least 30 days after calls have been made by consumers;
  - the development of an Industry Memorandum of Understanding on traffic monitoring and information sharing;
  - an increased maximum fine which can be imposed by ICSTIS for a breach of its code; and
  - new rules requiring OCPs to establish, and comply with, codes of practice for handling customer enquiries and complaints about PRS.

### **Addressing the dialler problem**

- 3.12 In addition, ICSTIS instituted a 'prior permissions' regime for dialler software utilising premium rate numbers on 6 August 2004. This, in effect, means that no network should provide numbers for diallers on premium rate numbers unless the SP has a permission certificate from ICSTIS. The conditions which are attached to the certificate, which are in addition to the requirements of the ICSTIS Code, include, amongst others, that:
- terms and conditions of the service utilising the dialler must be clearly displayed on the users' screen, including costs per minute;
  - the user must confirm acceptance of the premium rate charge that will be incurred;

- an on-screen clock which displays how many minutes the user has been connected to the dialler and/or cumulative costs accrued; and
  - services to be terminated by forced release after a cumulative call spend of £20.
- 3.13 Ofcom supported this approach, and agreed that a robust permissions process would provide additional consumer safeguards by ensuring greater discipline at the network level. While this approach was unlikely by itself to completely eradicate the potential for similar types of problems arising in the future, Ofcom saw it as a valuable safeguard to be considered in the context of additional measures set out in the Ofcom review.
- 3.14 The evidence demonstrates that these measures have been largely effective in stamping out the abuse resulting from ‘rogue’ diallers using premium rate numbering. Figure 1 below shows a substantial decrease in the volume of complaints and enquiries received by ICSTIS about diallers using premium rate numbers during 2005 following the introduction of ICSTIS’ prior permissions regime towards the end of 2004. While there has been a slight upturn in complaints about diallers of late, this was primarily due to complaints about one SP which has now been resolved and where the SP was subsequently fined. ICSTIS have advised us that these complaints were closely monitored, and are now subsiding.

**Figure 1: Complaints received by ICSTIS on ‘09’ internet diallers – January 2005 to April 2006**

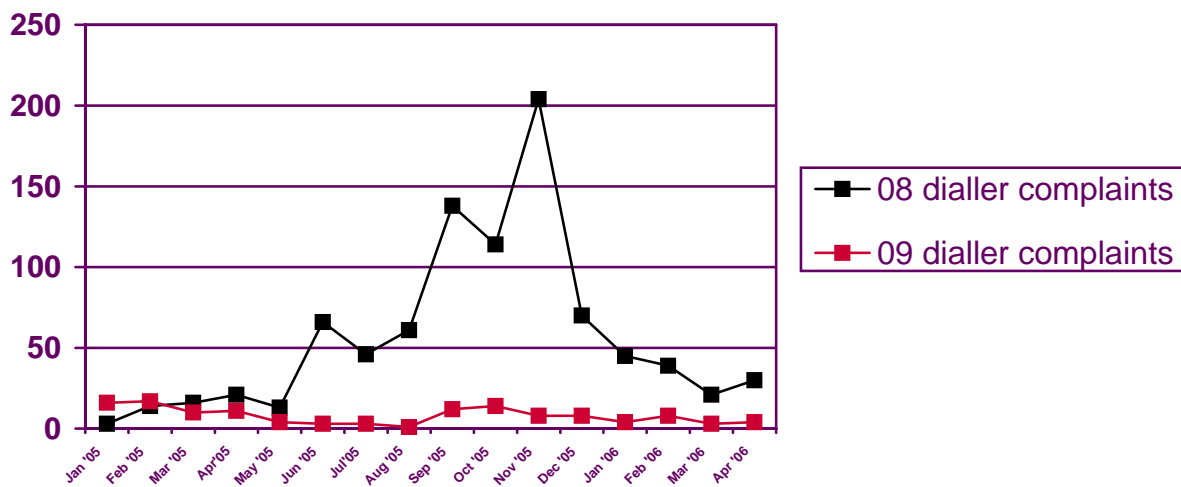


### Emergence of the dialler problem on ‘08’ numbers

- 3.15 ICSTIS’ prior permissions regime did not, however, encompass diallers on ‘08’ numbers given that ICSTIS does not currently regulate services on ‘08’. The current definition of CPRS means that even if ICSTIS chose to regulate ‘08’ it would be unable to take effective enforcement action without a change to the PRS Condition because the PRS Condition does not capture calls at less than 10 pence per minute and therefore services on ‘08’ numbers.

- 3.16 In its consultation document, Ofcom noted that there was growing evidence of consumer harm arising from ‘rogue’ diallers using ‘08’ numbers and, in particular, ‘087’ numbers (set out below). Ofcom was concerned that this may be the result of a possible migration of diallers from ‘09’ to ‘08’ in an attempt to circumvent regulation of ‘09’ PRS and, specifically, the requirement to seek prior permission from ICSTIS.
- 3.17 As part of its analysis, Ofcom had regard to the volume of complaints it had received relating to diallers on ‘08’ numbers. This analysis (as updated below) shows clearly that the volume of such complaints has substantially grown during 2005 while there has been a simultaneous reduction of complaints relating to ‘09’ diallers received by Ofcom. This would appear to support the notion of a migration of ‘rogue’ diallers from ‘09’ to ‘08’ to avoid regulation.

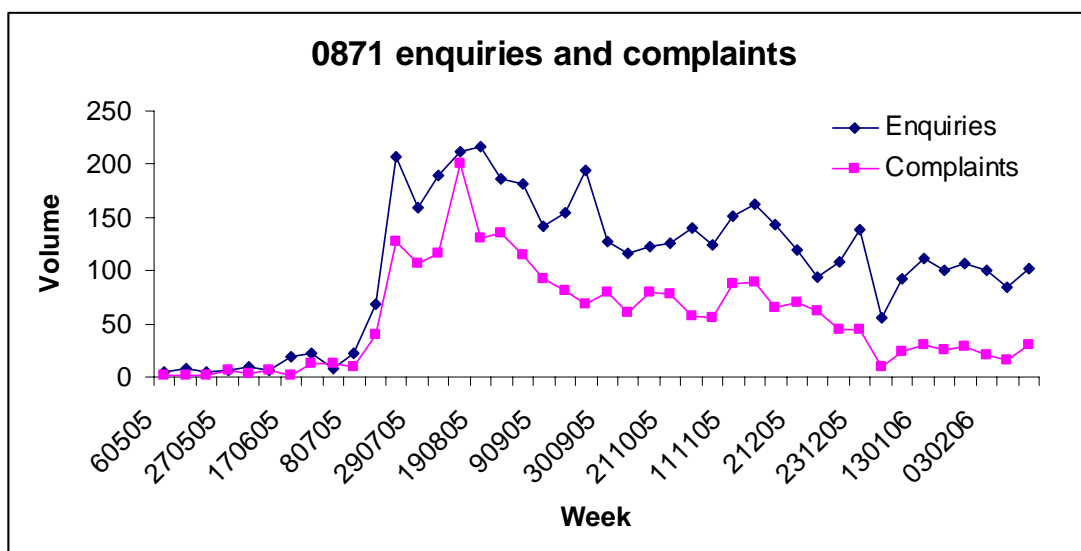
**Figure 2: Complaints received by Ofcom relating to internet diallers – January 2005 to April 2006.**



- 3.18 As part of its analysis of the ‘08’ dialler problem, Ofcom also requested data from BT, currently the largest fixed network operator. The data supplied also showed that there had been rapid growth in complaints and enquiries about ‘0871’ diallers by the operator’s customer contact handling team since May 2005. BT is now seeing an average of 158 complaints and enquiries per week. Volumes peaked in August and are now running at 55 complaints per week, and just over 100 enquiries.



**Figure 3: 0871 diallers complaints and enquiry volumes received by BT – May 2005 to February 2006**



- 3.19 As part of its analysis, BT also provided evidence into the size of the impact on the customer bill arising from the '0871' dialler complaints. It analysed current complaints awaiting investigation by its Complaints Review Team. In total, it analysed 95 customer issues, including the '0871' number recorded, the number of calls made to that number and the corresponding value noted. The analysis showed that the customer impact ranges from £1.07 to over £1,420 per customer. The average value of the 95 complaints analysed was £161 per customer.
- 3.20 BT also considered whether there had been any increase in the retentions made by them under the Artificial Inflation of Traffic ('AIT') process as a result of customer complaints on '087' issues. The AIT process was introduced by BT in 2001 at the request of the industry as a new Annex to its Standard Interconnect Agreement ('SIA'). The aim of the AIT provisions is for interconnecting Communications Providers to detect, identify and prevent AIT by notifying other Communications Providers in the revenue chain where they suspect AIT. In such an event, payments will be withheld while the matter is investigated.
- 3.21 This again highlighted a demonstrable increase by the Network Operator of the AIT process. The analysis showed that there had been over 70 retentions for the relevant period in 2005 and that, since April, the number of such retentions had accelerated, whereas in the previous two years there were only 48 retentions in total.
- 3.22 Ofcom believed that this evidence showed consumer harm from diallers using '08' numbers and, in particular, '087' numbers. This, together with experience of how the '09' dialler issue rapidly escalated, led Ofcom to believe that there was a strong case to extend the current regulatory regime for PRS to ensure that it captures all diallers, irrespective of the call cost or number. In particular Ofcom noted that:
- there is potential for consumers to accrue high phone bills over a billing cycle through the use of diallers where lower priced services are involved. This is because of the potential for frequent or high duration use. In this respect, Ofcom believed that diallers share many of the same characteristics and risks of Chatline Services, which are already CPRS irrespective of the call cost or number; and



- as already mentioned, Ofcom's data would appear to support the notion of a migration of 'rogue' diallers from '09' to '08' numbers in an attempt to circumvent the PRS regulatory regime and, specifically, the requirement to seek prior permission from ICSTIS. Ofcom was concerned that simply capturing diallers above a certain price threshold, such as 5 pence per minute or call, in order to only capture diallers on '087' numbers, which are typically priced at up to 10 pence per minute or call, may result in a further possible migration of 'rogue' diallers to other number ranges, such as '084', for example, which are typically priced at less than 5 pence per minute or call.
- 3.23 In proposing to extend the definition of CPRS to capture diallers, Ofcom also noted that it did not want to unintentionally capture pay-as-you-go dial up and unmetered dial up internet services. These services provided by ISPs provide narrowband access to the internet to end-users using a dial-up connection. Ofcom therefore proposed to exclude pay-as-you-go dial up and unmetered dial up internet services from the definition of internet dialler software.
- 3.24 Ofcom also noted that its proposal to capture diallers within the scope of the PRS Condition required ICSTIS' agreement to extend the scope of its regulation through its Code and, in particular, to agree to capture diallers, as defined above, within its prior permissions regime for diallers. ICSTIS has agreed to this in principle.
- 3.25 Ofcom set out in the consultation document that it believed that capturing "rogue" internet diallers would provide a greater level of consumer protection. First, it would bring these services within ICSTIS' regulation and therefore SPs who provide diallers, irrespective of the call cost or number, would be subject to ICSTIS requirements. Second, it would mean that Ofcom would have the power to enforce breaches of ICSTIS Directions where there was evidence of non-compliance with an ICSTIS Direction in this context.
- 3.26 While Ofcom notes that '08' dialler complaints to Ofcom, and to a lesser extent to BT, have subsided since publication of the consultation document in November, this is consistent with previous experience of 'scams' involving calls to premium rate numbers where such activity tend to come in waves, as set out Ofcom's report.

### **The definition of Controlled PRS and Mobile Services**

- 3.27 Ofcom's consultation document noted that it had received representations from stakeholders to the effect that the exclusion of 'Mobile Services' from the CPRS definition means that Ofcom does not currently regulate PRS accessible via mobile telephones.
- 3.28 Ofcom set out in its consultation document that it did not consider that PRS accessible via mobile telephones are outside its backstop powers which underpin ICSTIS regulation. Ofcom has the power under section 120 of the Act to set conditions for the purpose of regulating PRS and this has been implemented by means of the PRS Condition which took effect on 29 December 2003. PRS is defined widely at section 120(7) and 120(8) of the Act and includes the provision of content of communications transmitted by means of an electronic communications network.
- 3.29 As is described below, the policy behind the carve-out of 'Mobile Services' from the CPRS definition was to carve-out calls to mobile services that had the characteristics of PRS such as being over a certain price but were not normally considered to be PRS. Ofcom's view is that it has the power to regulate PRS accessible over mobile telephones and that this was caught by the definition of CPRS in the PRS Condition.

- 3.30 In 1999, Oftel and the DTI issued a Joint Consultation Paper on the Regulation of Premium Rate Services. At that time, Oftel only had backstop powers in relation to live services. In the consultation, the key problem with PRS was identified as their expense and it was recognised that not only live conversations resulted in high bills. It was therefore proposed to extend the backstop powers to a wider category of PRS by modifying the relevant licence conditions on operators. This document is available for viewing at:  
<http://www.ofcom.org.uk/static/archive/oftel/publications/1999/consumer/prem0899.htm>
- 3.31 In September 2000, Oftel issued a statement in response to the 1999 consultation saying that it would proceed with a licence modification extending its PRS backstop powers. It noted that whilst there was broad support for PRS calls over a certain price to be included in its backstop powers, there was some concern that this threshold could unintentionally capture services which were not PRS. This related to services which might have had shared revenue, such as 'find-me-anywhere services' on '07' (and on services on '08'). This document is available for viewing at:  
<http://www.ofcom.org.uk/static/archive/oftel/publications/numbering/prs0900.htm>
- 3.32 Oftel issued a draft licence modification on 24 July 2001. In doing so, it noted that its suggestion for capturing CPRS through reference to price still led to some types of service being captured unintentionally. As far as '07' was concerned, Oftel amended the draft licence condition to remove 'find-me-anywhere services' from the scope of CPRS. Given that a find-me-anywhere service was a service enabling a person to be contacted at any location rather than a service from any location, the policy was that CPRS should not capture calls to mobiles which might not be PRS. Without the carve-out for find-me-anywhere services, Ofcom was concerned that defining CPRS by price alone might unintentionally capture such calls. This document is available for viewing at:  
<http://www.ofcom.org.uk/static/archive/oftel/publications/numbering/prslic0701.htm>
- 3.33 On 12 June 2003, Oftel consulted on the setting of the PRS Condition. In its document, *Conditions Regulating Premium Rate Services*, Ofcom commented that "It remains the Director's intention not to extend the definition of those persons or services that will be subject to statutory backstop powers beyond those that are the subject of current powers". It was proposed therefore to carve out 'Mobile Services' from the definition of CPRS and this was in order to replicate the 'Find-me-anywhere' carve-out from the previous regime. In other words, the 'Mobile Services' carve out was merely to replicate the previous regime which was to ensure that calls to services that were not genuine PRS, but might have been caught by the price threshold, be excluded from the definition of CPRS. This document is available for viewing at:  
<http://www.ofcom.org.uk/static/archive/oftel/publications/numbering/2003/prs0603.htm>
- 3.34 However, in light of representations received from stakeholders, Ofcom proposed in the consultation document an amendment to the definition of CPRS to avoid any doubt that PRS accessible over mobile telephones are regulated under Ofcom's back-stop powers. As set out in the Impact Assessment in the consultation document, Ofcom was concerned that perceived uncertainty had the potential for increased consumer harm where PRS is accessible via mobile telephones.
- 3.35 Ofcom set out that the premium rate sector was in the region of £1 billion per annum in 2004. From an analysis of complaints received from both Ofcom and ICSTIS Ofcom noted that it was clear that complaints continue to be received relating to PRS

where accessible from mobile telephones. Between October 2004 and October 2005 Ofcom received some 706 complaints about PRS accessible from mobile telephones compared to 945 complaints about PRS from a fixed-line. In addition, since the beginning of 2005, ICSTIS received some 7,628 complaints about PRS short codes compared to 10,934 complaints about '09' numbers. Ofcom also noted that ICSTIS' complaints data relating to short codes, however, did not give a full picture of the scale of the complaints about PRS from mobile telephones as the '09' number complaints captures complaints from mobile telephones as well as fixed.

### **The Notification**

3.36 Ofcom therefore proposed to modify the PRS Condition by amending the definition of CPRS in order to:

- (i) include diallers where the purpose is to switch the modem setting of the computer that the dialler programme is running on from a particular internet connection to another, irrespective of the call cost or number. As already mentioned, however, Ofcom proposed to exclude pay-as-you-go dial up and unmetered dial up internet services; and
- (ii) amend the reference to 'Mobile Services' in order to avoid any doubt that the PRS accessible over mobile telephones are regulated under Ofcom's back-stop powers.

## Section 4

# Diallers: responses to the consultation and Ofcom's comments

## Responses to the consultation

- 4.1 Ofcom received 25 responses on the proposal to modify the PRS Condition to include diallers where the purpose is to switch the modem setting of the computer that the dialler programme is running on from a particular internet connection to another, irrespective of the call cost or number. Ofcom has also considered comments made in response to the NTS consultation on the issue of diallers being brought within the PRS regulatory regime.
- 4.2 A list of the respondents who submitted non-confidential responses is attached at Annex 6. The responses themselves are available for viewing on the Ofcom website at: <http://www.ofcom.org.uk/consult/condocs/prsconditions/responses/?a=87101>
- 4.3 In general, there was broad support for the proposed amendment, with 17 respondents expressing support to the proposal.
- 4.4 BT supported the proposal and agreed that the PRS regulatory regime should apply to all diallers, including geographic, non-geographic and international. BT provided a detailed analysis of customer complaints received on '0871' numbers which showed that volumes appear to have peaked in August 2005 and were currently "running at 65 complaints a week, and just over 100 enquiries".
- 4.5 BT also noted that Ofcom's proposed modification to the definition of CPRS would exclude PRS in which an Internet Dialler Software is operated in cases where the call is to a mobile service, a personal numbering service or a radiopaging service, or a service only accessed via an International Call. BT argued that this was inconsistent with Ofcom's intention to extend PRS regulation to all diallers, and therefore needs to be amended to avoid any ambiguities.
- 4.6 Citizens Advice ('CA') welcomed the measures which Ofcom and ICSTIS had taken to address the problem of rogue diallers using PRS, and considers that these measures have helped to reduce the incidence of such practices. CA, however, noted that it was now beginning to see evidence from bureaux which showed that these practices had now migrated to '0871' numbers. Accordingly, CA agreed that there was a strong case to urgently extend the current regulatory regime for PRS to ensure that it captures all diallers, irrespective of the call cost or the number dialled.
- 4.7 The Premium Rate Association ('PRA') and the Internet Service Providers Association ('ISPA') both supported the proposed amendment.
- 4.8 The Network for Online Commerce ('NOC') welcomed initiatives to control services using dialler technology but stated that it would be more "effective to regulate services rather than attempt to regulate technologies that may support those services". NOC maintained that existing regulation through the ICSTIS Code contains sufficient provision to resolve the problem.
- 4.9 The Telecommunications Ombudsman Service ('OTELO') stated that all the contacts and complaints that it had dealt with in relation to rogue diallers supported the

conclusions drawn by Ofcom. It noted that as complaints were now starting to arise on '087' numbers, extension of the PRS regulatory regime seemed justified. It also noted that the proposals made no reference to those diallers which divert calls to international numbers, and that its experience was that 'rogue' diallers were also using international numbers, and that the tighter the regulation of UK PRS the more likely that 'rogue' providers will increasingly look to migrate to international numbers.

- 4.10 The UK Competitive Telecommunications Association ('UKCTA') supported the proposal, and noted that consumer harm was occurring as a result of the migration of 'rogue' diallers from '09' to '0871' numbers. It did, however, argue that it was important to carefully define 'rogue' diallers. UKCTA welcomed the proposal not to inadvertently include standard internet dial-up services, and agreed that a distinction between dial-up internet services and other forms of diallers should remain. It noted that Ofcom's proposal focussed on extending regulation to those diallers where the primary purpose is to switch the dialler to another number and where the consumer has not provided consent for this switching. UKCTA agreed that this was in scope, but was concerned over the use of negative definitions as it considered that this approach carried with it the risk of over-regulation.
- 4.11 UKCTA noted that the definition also captures international direct-dialled ('IDD') numbers, and commented that it was unclear as to whether Ofcom and ICSTIS had the power to regulate services and service providers providing services on non-UK numbers. It therefore sought clarification on the extra-territoriality of the application of these regulations.
- 4.12 UKCTA also expressed concern about the proposed implementation timescales, and argued that TCPs would need time to introduce the necessary modifications. UKCTA also sought clarification in terms of how the extension of the ICSTIS regime to cover all diallers would work in terms of current levy arrangements. It noted that, in many cases, it was difficult to distinguish between a dialler on a '0871' number range that should be levied and other services on the same number range that are not levied by ICSTIS.
- 4.13 Eleven further respondents supported the proposal to include all diallers within the PRS regulatory regime, one of which queried whether IDD numbers would be captured. Two respondents disagreed, in principle, and stated that that PRS-type services should not be available on numbers other than '09'. Four respondents argued that the proposals were inadequate to deal with the problem, and that Ofcom should consider more effective controls to prevent the fraud in the first place. These ranged from compulsory call price announcements to more effective enforcement of the Numbering Plan. One respondent argued that there should be more obligations on providers relating to pricing information.

### Ofcom's comments

- 4.14 Ofcom has carefully considered all responses received. Ofcom notes that the majority of respondents were supportive of the proposed modification to extend the definition of CPRS to include diallers, irrespective of the call cost or number. This was largely on the basis of the evidence of consumer harm occurring as a result of the migration of 'rogue' diallers from '09' to '08' numbers and, in particular, '087' numbers.
- 4.15 Ofcom notes that a number of respondents sought clarification as to which diallers would be captured as a consequence of the proposed modification and, in particular,

whether it would capture diallers which utilise IDD numbers; in other words, numbers that terminate outside the UK.

- 4.16 Ofcom has no backstop powers in respect of those PRS which are terminated outside the UK. This is a specific carve-out from the PRS Condition. The modification does not therefore capture diallers where the number dialled terminates abroad. However, PRS that are supplied over numbers terminated outside the UK are currently regulated through voluntary arrangements between ICSTIS and UK network operators, whereby UK network operators commit to shutting down links with overseas operators where there are breaches of the ICSTIS Code. In addition, ICSTIS's prior permission regime for dialler software utilising premium rate numbers includes those diallers using IDD numbers. ICSTIS received no applications from providers for permission to provide dialler services on these numbers, and therefore, diallers using IDD numbers are currently not authorised. ICSTIS wrote to all OCPs to inform them of this during 2004, and to request that all such numbers which were found linked to diallers be cut off.
- 4.17 Ofcom notes that UKCTA expressed concern about the proposed implementation timescales, and argued that TCPs would need time to introduce the necessary modifications. Ofcom agrees the need for an appropriate timescale for implementation, but remains of the view that four weeks provides a sensible balance between the need to ensure that consumers are adequately protected and the need to provide a reasonable period of implementation for industry. Ofcom has also had regard to UKCTA's concern about the use of negative definitions, and the risk of over-regulation. Ofcom has considered alternative approaches to defining those dialler services it wishes to capture, and remains of the view that its proposed definition best captures those services which are most likely to result in consumer harm.
- 4.18 Ofcom also notes that UKCTA sought clarification as to how the levy arrangements would work given the difficulty in distinguishing between a dialler on a '0871' number range. Ofcom accepts that such clarity is necessary, and would expect that this would be addressed as part of discussions between ICSTIS and industry stakeholders on how the current 'prior permissions' regime for premium rate diallers will apply to diallers using '08' numbers.
- 4.19 Ofcom has considered NOC's concerns about the risks of regulating dialler technology rather than the relevant service, but remains of the view that the evidence of consumer harm from the use of diallers requires these services to be effectively regulated. This is the way in which diallers using '09' numbers are currently regulated, and Ofcom remains persuaded that this regulatory measure remains a proportionate and effective response to the dialler problem, as evidenced by the substantial decrease in the volume of complaints and enquiries received by ICSTIS about diallers using premium rate numbers during 2005 following the introduction of ICSTIS' prior permissions regime.
- 4.20 Ofcom notes that a number of responses questioned whether it was appropriate to allow revenue sharing services on '08' numbers on the basis that such services should be confined to the '09' range. The option of prohibiting revenue sharing on all '08' numbers was considered in the NTS Consultation Documents published in October 2004 and, subsequently, in September 2005. In the statement, the option was rejected on the grounds that it would be likely to lead to a significant reduction in service availability and usage, and would give rise to very significant forced migration costs for SPs who would need to move to the '09' range. Therefore, Ofcom remains of the view that the prospective benefits of this option, in terms of improved



transparency and consumer protection, are likely to be outweighed by the costs involved.

- 4.21 Ofcom has considered BT's comments that the definition of CPRS would exclude PRS where the dialler is operated in cases where the call is a mobile service, a personal numbering service or a radiopaging service, and this would mean not all diallers would be caught by the PRS Condition. Ofcom does not agree and it is of the view that diallers could not fall within these definitions. As set out in this document, these exclusions relate specifically to services which are not genuine PRS but have some of the characteristics of PRS, such as revenue share and calls over 10 pence per minute. For example, in the case of the mobile services exclusion, the evidence set out at paragraphs 3.27 to 3.35 illustrates that the intention of the exclusion was to make clear that ordinary calls to mobiles that may have fallen within the PRS Condition by virtue of their price were not subject to regulation. Ofcom does not consider therefore that a dialler service could be both a dialler service and fall within these very specific definitions at the same time.
- 4.22 In respect of the adequacy of the proposal, Ofcom, notes, as reflected in figures 1 and 2, that the introduction of similar measures for diallers using '09' numbers largely removed the problem from '09' numbers. Ofcom therefore remains of the view that this measure would provide both a proportionate and effective response to the dialler problem.
- 4.23 Accordingly, after careful consideration of responses received, Ofcom has decided to give effect to the proposed modification to extend the definition of CPRS to include diallers, irrespective of the call cost or number. The Notification of the modification to the PRS Condition under section 48(1) and 120(5) of the Act is published at Annex 4 to this document.
- 4.24 Ofcom is giving effect to the proposed amendment with modification in accordance with section 48(5) of the Act in as much as it is not confirming the proposal to modify the mobile services exclusion. Ofcom is instead today making new proposals for a modification to the PRS Condition in light of representations received on the mobile services issue which was consulted upon.

## **Notification of modifications to the PRS Condition**

### **Tests set out under the Communications Act 2003**

- 4.25 In modifying conditions, Ofcom is required to meet various tests set out in the Act. These tests, and Ofcom's assessment of how these are met in connection with the amended PRS Condition to include diallers, irrespective of the call cost or number, are set out below.

## **Section 3 – Ofcom's general duties**

- 4.26 Section 3(1) of the Act sets out the principal duty of Ofcom. Ofcom is required by this section to carry out its functions in line with this duty. That duty is:
- (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.

- 4.27 Ofcom considers that extending the PRS regulatory to include diallers is in accordance with its duties in section 3 of the Act. This is because, as explained in this document, there is evidence of consumer harm arising from 'rogue' diallers on '08' numbers and, in particular, '087' numbers, and the possibility of future migration to other number ranges to evade the regulatory regime.
- 4.28 Ofcom has also considered when carrying out its functions, amongst other things, 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 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.
- 4.29 Ofcom considers that extending the PRS regulatory regime to include diallers is in line with the above duties and that, in particular, and as set out above, this would be beneficial to the PRS and NTS sectors. As already stated, this would build consumer confidence and satisfaction in the relevant sectors which, in turn, would have a beneficial effect to the long term viability of the sector.

#### **Section 4 – European Community requirements for regulation**

- 4.30 Section 4 of the Act sets out the Community duties on Ofcom which flow from Article 8 of the Framework Directive. Ofcom considers that extending the PRS regulatory regime to include diallers promotes the interests of all persons who are citizens of the European Union by ensuring that consumers are adequately protected from the potential of consumer harm arising from 'rogue' diallers. In Ofcom's view, as already stated, this would build consumer confidence and satisfaction in the PRS and NTS sectors, which, in turn, would be beneficial to the sectors.

#### **Section 47 – Test for setting or modifying conditions**

- 4.31 As set out under section 47(1) of the Act, in modifying a condition, Ofcom must be satisfied that the test set out under section 47(2) has been met. The test is that the modification of the condition is:
- (a) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
  - (b) not unduly discriminatory against particular persons or against a particular description of persons;
  - (c) proportionate to what it is intended to achieve; and
  - (d) transparent in relation to what it is intended to achieve.



- 4.32 Ofcom considers that extending PRS regulation to diallers is objectively justifiable in light of evidence of consumer complaints about 'rogue' diallers on numbers outside the '09' number range, and the possibility of future migration to other number ranges to evade the regulatory regime.
- 4.33 Ofcom considers that extending PRS regulation to diallers is not unduly discriminatory because the proposed requirement does not benefit particular undertakings, and will be applied uniformly to all TCPs and SPs.
- 4.34 Ofcom considers that extending PRS regulation to diallers is proportionate on the grounds that this measure seeks to target regulation at those providers who seek to circumvent the PRS regulatory regime. There should be little additional burden on those responsible providers who already follow industry best practice in this area.
- 4.35 Ofcom considers that extending PRS regulation to diallers is transparent insofar as the nature and obligations are clearly set out in this document, as well as Ofcom's consultation document, published on 21 November 2005.
- 4.36 Accordingly Ofcom has decided to give effect to the proposed modification to extend the definition of CPRS to include diallers, irrespective of the call cost or number, by publication of a Notification of a modification to the PRS Condition under section 48(1) and 120(5) of the Act. The notification is published at Annex 4 to this document.

## Section 5

# Mobile services: responses to the consultation and Ofcom's comments

## Overview

- 5.1 As already explained, the definition of CPRS in the PRS Condition has a carve out for 'Mobile Services'. Ofcom set out in the consultation document that the idea of the carve-out was to make clear that calls to mobiles that were not generally considered to be PRS but might appear to be caught by virtue of their price were not subject to regulation. Accordingly, Ofcom proposed that in order to avoid any doubt that the PRS Condition does capture PRS over mobiles, it would amend the wording in the condition to make this clear.

## Responses to the consultation

- 5.2 Ofcom received 10 responses on the mobile services amendment. Of those, 7 respondents were supportive of the proposal, one welcomed the intent to clarify that all PRS are subject to regulation but questioned the need for a modification and two respondents, one of which was a confidential response, were opposed to the proposal.
- 5.3 A list of the respondents who submitted non-confidential responses is attached at Annex 6. The responses themselves are available for viewing on the Ofcom website at: <http://www.ofcom.org.uk/consult/condocs/prsconditions/responses/?a=87101>
- 5.4 CA, Otelo, PRA and the UKCTA responded in favour of the proposal to amend the definition. Otelo, in particular, noted that the risk of consumer harm as the use of premium rate SMS as a payment mechanism develops is considerable.
- 5.5 BT also supported the proposal but suggested an alternative text which it felt would clarify the issue further. In particular, BT believed that the definition should cover not only PRS accessed from a mobile telephone but all PRS mobile services, including ring tones charged at a premium rate. BT expressed concern that the proposed definition which excludes PRS involving "calls to a Mobile Service" confuses this point. BT therefore urged Ofcom to seek to clarify the issue.
- 5.6 Two individual respondents also expressed support to the proposal without further comment.
- 5.7 NOC welcomed Ofcom's intent to clarify that all PRS are subject to regulation but questioned the need for the proposed modification on the grounds that a public pronouncement by Ofcom would be sufficient.
- 5.8 MBG did not support making any changes to the mobile services definition at the current time. It argued that while Ofcom considers that this is intended only as a clarification, its view was that the text suggested did not make the situation any clearer. MBG also argued that it would be more appropriate to hold off any changes until Ofcom conducts its review of the scope of PRS regulation due to commence shortly in 2006. MBG argued that it did not see the benefit of making piecemeal changes and that, in particular, because of forthcoming developments in the mobile

market, MBG wanted much more detailed discussions with Ofcom and ICSTIS than is allowed through a short consultation.

- 5.9 MBG also disagreed that the supposed ambiguity is a cause of consumer harm and stated that the mobile operators are already working with ICSTIS to pursue SPs who are in breach of the Code. In addition, MBG argued that mobile operators have implemented measures beyond the ICSTIS Code through contractual means.

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- 5.10 This section has been removed as it relates to a confidential response.

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### **Ofcom's comments**

- 5.17 Ofcom has carefully considered all responses received on the mobile services amendment. Ofcom notes that the majority of respondents were broadly supportive of the proposal, agreeing that it is important that there should be no room for doubt that these services are regulated by Ofcom.

- 5.18 Ofcom has given careful consideration to the responses which were opposed to the proposal to amend the mobile services exclusion. Ofcom notes that these responses are largely based on the premise that Ofcom is seeking to extend regulation by its proposed amendment. Ofcom disagrees. Ofcom's view is that PRS accessible over mobile telephones is already caught by the PRS Condition and as such Ofcom has backstop powers in respect of these services. This is because, as set out in paragraphs 3.27 to 3.35, the mobile services carve-out was merely to ensure that calls to services that were not genuine PRS but which might have been caught by the price threshold were excluded from the scope of the PRS Condition. The proposed amendment was intended to avoid any doubt that PRS accessible over mobiles is regulated.

- 5.19 Ofcom notes the views of MBG and one confidential respondent which suggested that it would be more appropriate to consider changes to the PRS Condition in conjunction with the proposed review of scope. Ofcom's view is that this argument is based on the premise that we are extending regulation. Ofcom disagrees. Our view is that PRS accessible over mobile telephones, including own portal content services, are currently captured by the definition of CPRS in the PRS Condition. In addition, Ofcom considers it is necessary to amend the PRS Condition before the review of scope has been completed in order to avoid any doubt that PRS accessible over mobiles is regulated because of the potential for consumer harm which could arise from perceived ambiguity (as set out at paragraph 3.35). In a wider context, Ofcom will

consider the applicability of the PRS regime to a range of new services in its review of scope later in the year.

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5.20 This section has been removed as it relates to a confidential response.

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✂.....✂

5.31 Ofcom notes that MBG raised a number of further process points, including that a short consultation period was not justifiable. Ofcom recognised in its consultation document that the four week period was shorter than usual but that our view was that these issues needed to be addressed sooner than the timescales necessary for completion of a review of scope in order to ensure that consumers were adequately protected from potential harm as a result of any doubt that PRS over mobiles was regulated. In any event, Ofcom does not consider that its proposals were extending regulation as it currently stands. In deciding on a shortened timescale Ofcom was mindful that its consultation guidelines state that a consultation of one month is long enough for most consultations under the Act. Ofcom therefore believes that four weeks is reasonable in this case.<sup>5</sup>

5.32 Ofcom has also considered MBG's disagreement that the supposed ambiguity is a cause of consumer harm. MBG commented that mobile operators support ICSTIS' regulation of PRS, and have also introduced measures beyond the ICSTIS Code. While Ofcom welcomes any measures which operators put in place to protect consumers, Ofcom's view is that these must complement rather than replace the current PRS regulatory regime. In particular, as we set out in our consultation document, and described further at paragraph 3.35 above, Ofcom and ICSTIS continue to receive high volumes of complaints and enquiries from mobile customers about PRS issues. This evidence, in Ofcom's view, highlights the need for effective regulation.

5.33 On balance, therefore, having carefully considered all responses to the consultation document, and in light of the evidence on complaint levels relating to mobile PRS set

<sup>5</sup> [http://www.ofcom.org.uk/consult/consult\\_method/consult\\_guide.pdf](http://www.ofcom.org.uk/consult/consult_method/consult_guide.pdf), page 11.

out at paragraph 3.35 above, and in light of the fact that Ofcom considers that it has always been its policy to regulate PRS over mobiles, Ofcom confirms it is considering amending the condition to modify the definition of CPRS to avoid any doubt that PRS accessed over mobile telephones are captured by regulation.

### Ofcom's proposals for the wording of the modification

- 5.34 As described above, Ofcom had proposed that “calls to Mobile Services” be excluded from the PRS Condition to ensure that calls to mobile services that were not genuine PRS but might have been caught by the price threshold in the condition were excluded.
- 5.35 Having carefully considered responses received, Ofcom is of the view that its proposed amendment could capture data services and may therefore include reverse SMS services. Reverse SMS is where a premium rate text message (with typical costs ranging from 25p to £1.50 per message) are sent to a mobile telephone. For example, a customer may subscribe to having a fixed number of SMS being sent to his mobile phone every month, such as sports updates or ring tones. ICSTIS has issued guidelines for reverse billed SMS, including obligations to ensure consumers are given clear information in charging at the point at which they sign up. These are available on the ICSTIS website at:  
[http://www.icstis.org.uk/pdfs\\_guidelines/Guideline20version5.pdf](http://www.icstis.org.uk/pdfs_guidelines/Guideline20version5.pdf).
- 5.36 Ofcom considers that “calls” to a Mobile Service could be interpreted to include a data service such as reverse SMS. Ofcom does not consider that reverse SMS are outside of its backstop powers in the PRS Condition which underpin ICSTIS regulation. For example, in setting the PRS Condition in 2003, the Office of Telecommunications said that SMS was not excluded from the scope of the PRS Condition.<sup>6</sup> The consequence of Ofcom’s proposed amendment would therefore be to incorrectly exclude those services from the PRS Condition and therefore from regulation.
- 5.37 Ofcom therefore proposes to re-consult on the modification to the definition of CPRS to clarify that PRS accessed over mobile telephones are regulated under Ofcom's back-stop powers as explained below.

### Impact assessment

- 5.38 The analysis presented in this section, when read also with the rest of this document, represents an Impact Assessment (‘IA’), as defined by section 7 of the Act. You should send any comments on this IA to us by the closing date for this consultation. Ofcom will give careful consideration to all comments received during the consultation period before deciding whether to implement our proposals.
- 5.39 IAs provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice policy-making and are commonly used by other regulators. This is reflected in section 7 of the Act, which means generally we have to carry out IAs where our proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom’s activities. In accordance with section 7 of the Act, in producing the IA in this document, Ofcom has had regard to such general guidance as it considers appropriate, including related Cabinet Office guidance.

<sup>6</sup> [http://www.ofcom.org.uk/telecoms/ioi/nwbnd/prsindex/prs/prs\\_conditions.pdf](http://www.ofcom.org.uk/telecoms/ioi/nwbnd/prsindex/prs/prs_conditions.pdf)).

## Options for the amendment

### Option 1 - the amendment as set out in the consultation

- 5.40 In the consultation document, we proposed that the words “calls to” be inserted before a “Mobile Service”. The definition of CPRS would then read:

“a Premium Rate Service (other than calls to a Mobile Service, a Personal Numbering Service or a Radio Paging Service, or a service which is only accessed via an International Call) in respect of which....”

“(i) the charge for the call by means of which the service is obtained or the rate according to which such call is charged is a charge or rate which exceeds 10 pence per minute; or....”

- 5.41 In response to the consultation document the use of the word “call” was questioned by two respondents because it was unclear whether Ofcom intended this to include data services or not. BT said that “calls to Mobile Services” would still exclude PRS over mobiles such as ring tone PRS services.
- 5.42 Ofcom agrees. If we proceed with this amendment, there is a risk that we could potentially defeat the purpose of making the amendment in the first place, namely that of removing any doubt that PRS over mobile telephones are regulated and, in particular, the position with regards to reverse SMS. Indeed, from an analysis of Ofcom’s complaints data for the period 1 February 2005 to 31 January 2006, it is evident that the biggest issue affecting mobile customers was in relation to incoming SMS, with some 1,521 complaints being received about incoming SMS for the relevant period.
- 5.43 In light of this Ofcom does not support Option 1.

### Option 2 – delete the Mobile Services exclusion altogether

- 5.44 A further option is to delete the mobile services exclusion entirely. This would be on the basis that that a requirement to carve out “mobile services” by which is meant calls to mobile services that were not genuine PRS but might have been caught by the price threshold set out in the condition is actually not necessary.
- 5.45 This is because to fall within the definition of CPRS, what is provided has to be “Premium Rate Services”. These are defined under the PRS Condition as having the meaning set out in section 120(7) of the Act. This states:

“(7) A service is a premium rate service for the purposes of this Chapter 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.

(8) 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.”

5.46 Ofcom does not consider that an ordinary call to a mobile service that is caught only by virtue of its price would be PRS within section 120(7).

- for a call to a mobile service to fall within section 120(8)(a), its provision must consist in the provision of contents of a communications transmitted by means of an electronic communications network. Ofcom does not consider that the provision of a call to a mobile service would consist of the provision of contents of a communication – it is a service having its principal feature as the conveyance of signals. It would not therefore fall within 120(8)(a).
- alternatively, a call to a mobile service would be PRS if it fell within 120(8)(b). Its provision would have to allow the user of an electronic communications service to make use of a “facility”. “A facility” is defined in section 120(14) as including a facility for making a payment for goods or services; a facility for entering a competition or claiming a prize; and a facility for registering a vote or recording a preference. Although the definition of “facility” at subsection 14 is not exhaustive, Ofcom does not consider than an ordinary call to a mobile service could be said to be provided in order to allow a user to make use of a “facility”. A call to a mobile service would not therefore fall within 120(8)(b).

5.47 Therefore, it would be possible to delete the exclusion altogether as it refers to a service that is not caught by the PRS condition in any event.

5.48 However, removing the mobile services exclusion raises a question as to the two other carve-outs on the face of the PRS Condition, that of personal numbering services and radiopaging services.

5.49 The policy for excluding personal numbering services and radiopaging services from the CPRS definition was the same as that for the mobile services exclusion; they were not genuine PRS but had some characteristics of PRS such as revenue share and call rates over 10ppm. They were all previously defined by Oftel as ‘Find-me-anywhere Services’<sup>7</sup> and were carved out of the definition of CPRS in the licence conditions. For the reasons set out below, Ofcom does not consider that personal numbering services and radiopaging services as defined are PRS as defined in the Act in the same way as mobile services as set out above.

5.50 A personal numbering service is defined as having the meaning ascribed to it in the Numbering Plan. This is then defined as:

<sup>7</sup> <http://www.ofcom.org.uk/static/archive/oftel/publications/numbering/prslic0701.htm>

“a service based on number translation that enables End-Users **to be called or otherwise contacted**, using a single Personal Telephone Number and to receive those calls or other communications at almost any Telephone Number including Mobile Numbers” [Ofcom emphasis]

5.51 A ‘Personal Telephone Number’ is defined as:

“a Telephone Number from a range of numbers in Part A of this document, assigned by a Personal Numbering Service Provider which allows a Subscriber to receive calls or other communications at almost any Telephone Number including a Mobile Number”.

5.52 The range for Personal Telephone Numbers in Part A is ‘070’.

5.53 In Ofcom’s view, a personal numbering service is not a PRS as defined in section 120(7) in the same way that a call to a mobile service is not PRS. This is because:

- a personal numbering service would not fall within subsection (8)(a). It is not a service whose provision consists in the provision of the contents of a communication. It is a service having its principal feature as the conveyance of signals. It would not therefore fall within 120(8)(a).
- alternatively, a personal numbering service would be PRS if it fell within 120(8)(b). Its provision would have to allow the user of an electronic communications service to make use of a “facility”. “A facility” is defined in section 120(14) as including a facility for making a payment for goods or services; a facility for entering a competition or claiming a prize; and a facility for registering a vote or recording a preference. Although the definition of “facility” at subsection 14 is not exhaustive, Ofcom does not consider that a personal numbering service (in other words a call to a person on a personal number in the normal course of events) could be said to be provided in order to allow a user to make use of a “facility”. A personal numbering service would not therefore fall within 120(8)(b).

5.54 The same is true for a radiopaging service. Again, in the PRS Condition, this is defined as having the meaning ascribed to it in the Numbering Plan. This is defined there as:

“..Electronic Communications Services consisting in the conveyance of Signals by means of Wireless Telegraphy where every Signal, apart from simple acknowledgement, is ultimately transmitted from a station for Wireless Telegraphy comprised in the Communications Provider’s Electronic Communications Network to a station for Wireless Telegraphy or Wireless Telegraphy Apparatus that is not comprised in that network.”

5.55 Part A of the Plan allocated “076” for RadioPaging Services.

5.56 A radiopaging service is a conveyance of signals from one piece of apparatus “to” another.

5.57 Therefore, Ofcom is of the view that it would be inconsistent to remove the mobile services exclusion whilst retaining the personal numbering and radiopaging services exclusion which all had the same policy intent; to exclude from the PRS Condition services that were not genuine PRS but had some of the characteristics of PRS. This



may potentially therefore undermine the objective of greater clarity. For this reason, Ofcom does not support this option.

**Option 3: delete the mobile services, personal numbering services and radiopaging services exclusions altogether**

- 5.58 A further option would be to delete the mobile services exclusion and the personal numbering service and radiopaging service exclusions altogether.
- 5.59 Under this option, therefore, the personal numbering service and radiopaging services exclusions would be removed from the PRS Condition alongside the mobile services exclusions. This would be on the basis that they are not PRS as defined in the Act and therefore could not be caught by the PRS Condition in the same way as an ordinary call to a mobile handset.
- 5.60 It is important to note that in all these three cases, removal of exclusion would not mean that genuine PRS provided on the number ranges for these services would be outside of the PRS Condition. If a service is provided on these ranges and falls within section 120(7), then it will be PRS and it will be caught. Each case would need to be considered on its own merits.
- 5.61 For these reasons, Ofcom's preferred option is Option 3.

**Consultation on the notification of modifications to the PRS Condition**

- 5.62 The relevant procedures for setting, modifying or revoking the PRS Condition are set out in section 48 of the Act. Under section 48 of the Act, Ofcom is required to publish a notification of the proposed modification ('the 'Notification'), and to consult for a period of not less than one month after the day of publication of the Notification.
- 5.63 The Notification and proposed modification is attached at Annex 5.
- 5.64 Ofcom is inviting written views and comments by 5pm on 10 July 2006, on the Notification and proposed modifications to the PRS Condition.
- 5.65 Details of how to respond on each of these issues can be found at Annex 1.
- 5.66 Ofcom will give careful consideration to all comments received during the consultation period, and in light of the comments received may give effect to the proposals set out in this document, with or without modification, by publication of a Notification and explanatory statement. Ofcom expects to publish this document later in the year after the review of scope has started.

**Test set out under the Communications Act 2003**

- 5.67 In modifying conditions, Ofcom is required to meet various tests set out in the Act. These tests, and Ofcom's assessment of how these are met in connection with the proposed modification to the PRS Condition to remove the mobile services, personal numbering services and radiopaging services exclusions, are set out below.

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

- 5.68 Section 3(1) of the Act sets out the principal duty of Ofcom. Ofcom is required by this section to carry out its functions in line with this duty. That duty is:

- (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.

5.69 Ofcom considers that the proposal to remove any doubt that that PRS accessible over mobile telephones are regulated under the PRS Condition is in accordance with its duties under section 3 of the Act. This is because Ofcom is concerned that perceived uncertainty has a potential for increasing consumer harm where PRS is accessible via mobile telephones. This is set out in paragraph 3.35, highlighting that, between October 2004 and October 2005, Ofcom received some 706 complaints about PRS accessible from mobile telephones compared to 945 complaints about PRS from a fixed-line. In addition, Ofcom considers that the proposal to remove the personal numbering services and radiopaging services exclusions is in accordance with its duties under section 3 of the Act to assist in achieving clarity about what services are covered by regulation and therefore in the interests of citizens and consumers.

5.70 Ofcom has also considered when carrying out its functions, amongst other things, 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 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.

5.71 Ofcom considers that in light of potential for consumer harm in respect of perceived ambiguity with the definition of CPRS, amending the PRS Condition in the way proposed at paragraphs 5.58 to 5.61 is in line with the above duties and that, in particular, it would be beneficial to the PRS sector to clarify that only PRS, as defined in the Act, are captured by the PRS Condition. This proposed measure would build consumer confidence and satisfaction in the relevant sectors which, in turn, would have a beneficial effect to the long term viability of the sector.

#### **Section 4 – European Community requirements for regulation**

5.72 Section 4 of the Act sets out the Community duties on Ofcom which flow from Article 8 of the Framework Directive. Ofcom considers that the proposal to remove any doubt that that PRS accessible over mobile telephones are regulated under the PRS Condition promotes the interests of all persons who are citizens of the European Union by ensuring that consumers are adequately protected from the potential of consumer harm arising from PRS over mobile telephones. In Ofcom's view, as already stated, clarifying that only PRS as set out in the Act is captured by the PRS Condition would build consumer confidence and satisfaction in the PRS sector, which, in turn, would be beneficial to the sector. In addition, Ofcom considers that the proposal to remove the personal numbering services and radiopaging services

exclusions promotes the interests of all persons who are citizens of the European Union. As already explained, the rationale for the personal numbering services and the radiopaging services exclusions was the same as the mobile services exclusion. These exclusions are therefore unnecessary as these services are not PRS and therefore would not be captured by the PRS Condition in any event.

### **Section 47 – Test for setting or modifying conditions**

- 5.73 As set out under section 47(1) of the Act, in modifying a condition, Ofcom must be satisfied that the test set out under section 47(2) has been met. The test is that the modification of the condition is:
- (a) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
  - (b) not unduly discriminatory against particular persons or against a particular description of persons;
  - (c) proportionate to what it is intended to achieve; and
  - (d) transparent in relation to what it is intended to achieve.
- 5.74 Ofcom considers that the proposal to remove the mobile services, personal numbering services and radiopaging services from the PRS Condition is objectively justifiable on the basis that it is not extending regulation. The rationale for excluding mobile services, personal numbering services and radiopaging services from the CPRS definition was that, although they were not genuine PRS, they had some characteristics of PRS such as revenue share and call rates over 10ppm. They were all previously defined by Oftel as ‘Find-me-anywhere Services’<sup>8</sup> and were carved out of the definition of CPRS in the licence conditions. In addition, Ofcom is concerned that perceived uncertainty has a potential for increasing consumer harm where PRS is accessible via mobile telephones. This is set out in paragraph 3.35, highlighting that, between October 2004 and October 2005, Ofcom received some 706 complaints about PRS accessible from mobile telephones compared to 945 complaints about PRS from a fixed-line.
- 5.75 Ofcom considers that the proposal to remove the mobile services, personal numbering services and radiopaging services from the PRS Condition is not unduly discriminatory. This is because the proposed requirement does not benefit particular undertakings, and will be applied uniformly to all TCPs and SPs.
- 5.76 Ofcom also considers that the proposal to remove the personal numbering services and radiopaging services exclusions is proportionate on the grounds that there should be no additional burden on those responsible providers who already follow industry best practice in this area. As set out above, genuine mobile services, personal numbering services and radiopaging services would continue not to be captured under the PRS Condition, meaning that, in practice, there will be no change. Only if a service is provided on these ranges and falls within section 120(7), will it be PRS and therefore caught by regulation.
- 5.77 Ofcom considers that the proposal to remove the personal numbering services and radiopaging services exclusions is transparent insofar as the nature and obligations are set out clearly in this document, on which views are sought.

<sup>8</sup> <http://www.ofcom.org.uk/static/archive/oftel/publications/numbering/prslic0701.htm>

- 5.78 Accordingly, in light of comments received, Ofcom is today inviting written views and comments on the Notification and proposed modification to remove the mobile services, personal numbering services and radiopaging services exclusions under section 48(1) and 120(5) of the Act. The notification and proposed modifications are published at Annex 5 to this document.

## Annex 1

# Responding to this consultation

### How to respond

Ofcom invites written views and comments on the issues raised in this document, to be made by **5pm on 10 July 2006**. Ofcom is consulting over a shorter period of time because of the need to address these issues urgently so that consumers are adequately protected from the potential for consumer detriment arising from 'rogue' dialler services on numbers other than '09' and from any doubt that PRS accessible over mobile telephones is regulated by Ofcom.

Ofcom strongly prefers to receive responses as e-mail attachments, in Microsoft Word format, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 2), among other things to indicate whether or not there are confidentiality issues. The cover sheet can be downloaded from the 'Consultations' section of our website.

Please can you send your response to [gavin.daykin@ofcom.org.uk](mailto:gavin.daykin@ofcom.org.uk)

Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.

Gavin Daykin  
Floor 6  
Strategy & Market Development  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA

Note that we do not need a hard copy in addition to an electronic version. Also note that Ofcom will not routinely acknowledge receipt of responses.

It would be helpful if you can explain why you hold your views, and how Ofcom's proposals would impact on you.

### Further information

If you have any want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Gavin Daykin on 020 7981 3859.

### Confidentiality

Ofcom thinks it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), ideally on receipt (when respondents confirm on their response cover sheet that this is acceptable).

All comments will be treated as non-confidential unless respondents specify that part or all of the response is confidential and should not be disclosed. Please place any confidential parts of a response in a separate annex, so that non-confidential parts may be published along with the respondent's identity.

Ofcom reserves its power to disclose any information it receives where this is required to carry out its legal requirements. Ofcom will exercise due regard to the confidentiality of information supplied.

Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use, to meet its legal requirements. Ofcom's approach on intellectual property rights is explained further on its website, at [www.ofcom.org.uk/about\\_ofcom/gov\\_accountability/disclaimer](http://www.ofcom.org.uk/about_ofcom/gov_accountability/disclaimer).

### **Next steps**

Following the end of the consultation period, Ofcom intends to publish a Notification and explanatory statement later in the year.

Please note that you can register to get automatic notifications of when Ofcom documents are published, at [http://www.ofcom.org.uk/static/subscribe/select\\_list.htm](http://www.ofcom.org.uk/static/subscribe/select_list.htm).

### **Ofcom's consultation processes**

Ofcom is keen to make responding to consultations easy, and has published some consultation principles (see Annex 2) which it seeks to follow, including on the length of consultations.

If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at [consult@ofcom.org.uk](mailto:consult@ofcom.org.uk). We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, whose views are less likely to be obtained in a formal consultation.

If you would like to discuss these issues, or Ofcom's consultation processes more generally, you can alternatively contact Vicki Nash, Director, Scotland, who is Ofcom's consultation champion:

Vicki Nash  
Ofcom (Scotland)  
Sutherland House  
149 St. Vincent Street  
Glasgow G2 5NW  
Tel: 0141 229 7401  
Fax: 0141 229 7433  
E-mail: [vicki.nash@ofcom.org.uk](mailto:vicki.nash@ofcom.org.uk)

## Annex 2

# Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

### Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

### During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will normally allow ten weeks for responses to consultations on issues of general interest.

A2.6 There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

### After the consultation

A2.8 We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

## Annex 3

# Consultation response cover sheet

- A3.1 In the interests of transparency, we will publish all consultation responses in full on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), unless a respondent specifies that all or part of their response is confidential. We will also refer to the contents of a response when explaining our decision, without disclosing the specific information that you wish to remain confidential.
- A3.2 We have produced a cover sheet for responses (see below) and would be very grateful if you could send one with your response. This will speed up our processing of responses, and help to maintain confidentiality by allowing you to state very clearly what you don't want to be published. We will keep your completed cover sheets confidential.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their cover sheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses in the form of a Microsoft Word attachment to an email. Our website therefore includes an electronic copy of this cover sheet, which you can download from the 'Consultations' section of our website.
- A3.5 Please put any confidential parts of your response in a separate annex to your response, so that they are clearly identified. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only so that we don't have to edit your response.



**Cover sheet for response to an Ofcom consultation**

**BASIC DETAILS**

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

**CONFIDENTIALITY**

What do you want Ofcom to keep confidential?

Nothing	<input type="checkbox"/>	Name/contact details/job title	<input type="checkbox"/>
Whole response	<input type="checkbox"/>	Organisation	<input type="checkbox"/>
Part of the response	<input type="checkbox"/>	If there is no separate annex, which parts?	

If you want part of your response, your name or your organisation to be confidential, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

**DECLARATION**

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. It can be published in full on Ofcom’s website, unless otherwise specified on this cover sheet, and I authorise Ofcom to make use of the information in this response to meet its legal requirements. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

## Annex 4

# Notification of a modification under section 48(1) of the Act

**Modification of a condition under section 120 of the Act which is set out in the Notification under Section 48(1) and 120(5) of the Act published by the Director General on 23 December 2003, *Conditions Regulating Premium Rate Services*, dated 23 December 2003**

### WHEREAS:

- (A) OFCOM issued a notification pursuant to section 48(2) of the Act on 21 November 2005 setting out proposals for modification of the PRS Condition (the "First Notification");
- (B) The First Notification was sent to the Secretary of State in accordance with section 50(1)(a) of the Act and to the European Commission in accordance with section 50(6) of the Act;
- (C) In the First Notification and accompanying explanatory statement, OFCOM invited representations on the proposals set out therein by 5pm on 22 December 2005;
- (D) By virtue of section 48(5) of the Act, OFCOM may give effect to any proposals to modify the PRS Condition as set out in the First Notification, with or without modification only if-
  - (a) they have considered every representation about the proposal that is made to them within the period specified in the notification; and
  - (b) they have had regard to every international obligation of the United Kingdom (if any) which has been notified to them for the purposes of this paragraph by the Secretary of State;
- (E) OFCOM received responses to the First Notification and have considered every such representation made to them in respect of the proposals set out in the First Notification and accompanying explanatory statement; and the Secretary of State has not notified OFCOM of any international obligation of the United Kingdom for this purpose.

### Therefore OFCOM gives the following modification

1. OFCOM, in accordance with section 48(1) of the Act hereby makes the following modification of the PRS Condition as set out in the Schedule to this Notification.
2. OFCOM consider that the measures referred to in paragraph 1 above complies with the requirements of section 120(5) of the Act, as appropriate and relevant to each of the measures.
3. In taking the measures as set out in this Notification, OFCOM have considered and acted in accordance with their general duties in section 3 of the Act and the six Community requirements in section 4 of the Act.

4. The effect of and OFCOM's reasons for the modification as set out in the Schedule to this Notification are contained in the accompanying explanatory statement published with this Notification.
5. Copies of this Notification and the accompanying statement have been sent to the Secretary of State in accordance with section 50(1)(a) of the Act and to the European Commission in accordance with section 50(6) of the Act.
8. In this Notification:
  - (i) "the Act" means the Communications Act 2003;
  - (iii) "the Director General" means the Director General of Telecommunications;
  - (ii) "OFCOM" means the Office of Communications;
  - (iv) "the PRS Condition" means a condition under section 120 of the Act which is set out in the Notification under Section 48(1) and 120(5) of the Act published by the Director General on 23 December 2003.
9. 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.
10. For the purpose of interpreting this Notification:
  - (i) headings and titles shall be disregarded; and
  - (ii) the Interpretation Act 1978 shall apply as if this Notification were an Act of Parliament.
11. The Schedule to this Notification shall form part of this Notification

**Claudio Pollack**

**Director of Consumer Policy**

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

**8 June 2006**

## Schedule

**The modification to a condition under section 120 of the Act which is set out in the Notification under Section 48(1) and 120(5) of the Act published by the Director General on 23 December 2003 at Annex B of the Statement; Conditions Regulating Premium Rate Services dated 23 December 2003**

The PRS Condition shall be modified as set out below (the deleted text has been struck through and the added text underlined, both highlighted in yellow for ease of reference).

1. The Communications Provider shall comply with:

- (a) directions given in accordance with an Approved Code by the Enforcement Authority and for the purposes of enforcing the provisions of the Approved Code; and
- (b) if there is no Approved Code, the provisions of the order for the time being in force under section 122 of the Act.

2. In this Condition,

(a) "Act" means the Communications Act 2003;

(b) "Approved Code" means a code approved for the time being under section 121 of the Act;

(c) "Communications Provider" means either:

(i) a person who:

(A) is the provider of an Electronic Communications Service or an Electronic Communications Network used for the provision of a Controlled Premium Rate Service; and

(B) is a Controlled Premium Rate Service Provider in respect of that Controlled Premium Rate Service;

(ii) a person who:

(A) is the provider of an Electronic Communications Service used for the provision of a Controlled Premium Rate Service; and

(B) under arrangements made with a Controlled Premium Rate Service Provider, is entitled to retain some or all of the charges received by him in respect of the provision of the Controlled Premium Rate Service or of the use of his Electronic Communications Service for the purposes of the Controlled Premium Rate Service;  
or

(iii) a person who:

(A) is the provider of an Electronic Communications Network used for the provision of a Controlled Premium Rate Service; and

(B) has concluded an agreement relating to the use of the Electronic Communications Network for the provision of that Controlled Premium Rate Service with a Controlled Premium Rate Service Provider;

(d) "Chatline Service" means a service which consists of or includes the enabling of more than two persons (the participants) to simultaneously conduct a telephone conversation with one another without either:

(i) each of them having agreed with each other; or

(ii) one or more of them having agreed with the person enabling such a telephone conversation to be conducted, in advance of making the call enabling them to engage in the conversation, the respective identities of the other intended participants or the telephone numbers on which they can be called. For the avoidance of any doubt, a service by which one or more additional persons who are known (by name or telephone number) to one or more of the parties conducting an established telephone conversation can be added to that conversation by means of being called by one or more of such parties is not on that account a Chatline Service, if it would not otherwise be regarded as such a service;

(e) "Controlled Premium Rate Service" means a Premium Rate Service (other than a Mobile Service, a Personal Numbering Service or a Radiopaging Service, or a service which is only accessed via an International Call) in respect of which **either**:

(i) the charge for the call by means of which the service is obtained or the rate according to which such call is charged is a charge or rate which exceeds 10 pence per minute; or

(ii) the service is a Chatline Service; **or**

**(iii) is Internet Dialler Software operated;**

(f) "Controlled Premium Rate Service Provider" means a person who:

(i) provides the contents of a Controlled Premium Rate Service;

(ii) exercises editorial control over the contents of a Controlled Premium Rate Service;

(iii) packages together the contents of a Controlled Premium Rate Service for the purpose of facilitating its provision; or

(iv) makes available a facility comprised in a Controlled Premium Rate Service;

**(g) "Dial-up Telephone Number" means the telephone number used by an end-user's computer that connects it to the Internet**

**(g) (h)** "Enforcement Authority" means, in relation to an Approved Code, the person who under the code has the function of enforcing it;

**(h) (i)** "Facility" includes reference to those things set out in section 120(14) of the Act;

**(i) (i)** "International Call" means a call which terminates on an Electronic Communications Network outside the United Kingdom;

**(k) "Internet Dialler Software" is software that replaces a Dial-up Telephone Number with a different Dial-up Telephone Number;**

other than where it is used so that:

a) an end-user's existing Internet Service Provider replaces the Dial-up Telephone Number;

b) an end-user moves from his existing Internet Service Provider to another Internet Service Provider or is so moved with his consent.

(l) "Internet Service Provider" means a person who provides end-users, by means of a Dial-up Telephone Number, with connection to the Internet in the ordinary course of its business.

~~(j)~~ (m) "Mobile Service" shall have the meaning ascribed to it in the National Telephone Numbering Plan;

~~(k)~~ (n) "National Telephone Numbering Plan" means a document published by Ofcom from time to time pursuant to sections 56 and 60 of the Act;

~~(l)~~ (o) "Personal Numbering Service" shall have the meaning ascribed to it in the National Telephone Numbering Plan;

~~(m)~~ (p) "Premium Rate Service" shall have the meaning ascribed to it by section 120(7) of the Act;

~~(n)~~ (q) "Radiopaging Service" shall have the meaning ascribed to it in the National Telephone Numbering Plan;

3. For the purposes of interpreting this Condition, except in so far as the context otherwise requires, words or expressions shall have the same meaning as ascribed to them in paragraph 2 above and otherwise any word or expression shall have the same meaning as it has been ascribed in the Act.

## Annex 5

# Notification of a modification under section 48(2) of the Act

**Notification of a proposed modification under section 48(2) of the Act of a condition under section 120 of the Act which is set out in the Notification under Section 48(1) and 120(5) of the Act published by the Director General on 23 December 2003, *Conditions Regulating Premium Rate Services*, dated 23 December 2003**

### **Notification of a proposed modification under section 48(2) of the Act**

Proposal for modification of a condition under section 120 of the Act which is set out in the Notification under Section 48(1) and 120(5) of the Act published by the Director General on 23 December 2003 at Annex B of the Statement; Conditions Regulating Premium Rate Services dated 23 December 2003

1. OFCOM in accordance with section 48(2) of the Act hereby make the following proposal for the modification of the PRS Condition.
2. The draft modification is set out in the Schedule to this Notification.
3. The effect of, and OFCOM's reasons for making, the proposal referred to in paragraph 1 above is set out at sections 5 of the accompanying explanatory statement.
4. OFCOM consider that the proposed modification referred to in paragraph 1 above complies with the requirements of section 120(5) of the Act, as appropriate and relevant to each of the proposals.
5. In making the proposal set out in this Notification, OFCOM has considered and acted in accordance with their general duties in section 3 of the Act and the six Community requirements in section 4 of the Act.
6. Representations may be made to OFCOM about the proposal set out in this Notification and the accompanying statement by **10 July 2006**.
7. Copies of this Notification and the accompanying statement have been sent to the Secretary of State in accordance with section 50(1)(a) of the Act and to the European Commission in accordance with section 50(6) of the Act.
8. In this Notification:
  - (i) "the Act" means the Communications Act 2003;
  - (ii) "OFCOM" means the Office of Communications;
  - (iii) "the Director General" means the Director General of Telecommunications;
  - (iv) "the PRS Condition" means a condition under section 120 of the Act which is set out in the Notification under Section 48(1) and 120(5) of the Act published by the Director General on 23 December 2003"

9. 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.

10. For the purpose of interpreting this Notification:

(i) headings and titles shall be disregarded; and

(ii) the Interpretation Act 1978 shall apply as if this Notification were an Act of Parliament.

11. The Schedule to this Notification shall form part of this Notification

**Claudio Pollack**

**Director of Consumer Policy**

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

**8 June 2006**



## Schedule

**Proposal for modification to a condition under section 120 of the Act which is set out in the Notification under Section 48(1) and 120(5) of the Act published by the Director General on 23 December 2003 at Annex B of the Statement; Conditions Regulating Premium Rate Services dated 23 December 2003**

The PRS Condition shall be modified as set out below (the deleted text has been struck through and added text underlined, both highlighted in yellow for ease of reference):

1. The Communications Provider shall comply with:

- (a) directions given in accordance with an Approved Code by the Enforcement Authority and for the purposes of enforcing the provisions of the Approved Code; and
- (b) if there is no Approved Code, the provisions of the order for the time being in force under section 122 of the Act.

2. In this Condition,

(a) "Act" means the Communications Act 2003;

(b) "Approved Code" means a code approved for the time being under section 121 of the Act;

(c) "Communications Provider" means either:

(i) a person who:

(A) is the provider of an Electronic Communications Service or an Electronic Communications Network used for the provision of a Controlled Premium Rate Service; and

(B) is a Controlled Premium Rate Service Provider in respect of that Controlled Premium Rate Service;

(ii) a person who:

(A) is the provider of an Electronic Communications Service used for the provision of a Controlled Premium Rate Service; and

(B) under arrangements made with a Controlled Premium Rate Service Provider, is entitled to retain some or all of the charges received by him in respect of the provision of the Controlled Premium Rate Service or of the use of his Electronic Communications Service for the purposes of the Controlled Premium Rate Service;

or

(iii) a person who:

(A) is the provider of an Electronic Communications Network used for the provision of a Controlled Premium Rate Service; and

(B) has concluded an agreement relating to the use of the Electronic Communications Network for the provision of that Controlled Premium Rate Service with a Controlled Premium Rate Service Provider;

(d) "Chatline Service" means a service which consists of or includes the enabling of more than two persons (the participants) to simultaneously conduct a telephone conversation with one another without either:

(i) each of them having agreed with each other; or

(ii) one or more of them having agreed with the person enabling such a telephone conversation to be conducted, in advance of making the call enabling them to engage in the conversation, the respective identities of the other intended participants or the telephone numbers on which they can be called. For the avoidance of any doubt, a service by which one or more additional persons who are known (by name or telephone number) to one or more of the parties conducting an established telephone conversation can be added to that conversation by means of being called by one or more of such parties is not on that account a Chatline Service, if it would not otherwise be regarded as such a service;

(e) "Controlled Premium Rate Service" means a Premium Rate Service (other than a Mobile Service, a Personal Numbering Service or a Radiopaging Service, or a service which is only accessed via an International Call) in respect of which:

(i) the charge for the call by means of which the service is obtained or the rate according to which such call is charged is a charge or rate which exceeds 10 pence per minute; or

(ii) the service is a Chatline Service; or

(iii) is Internet Dialler Software operated;

(f) "Controlled Premium Rate Service Provider" means a person who:

(i) provides the contents of a Controlled Premium Rate Service;

(ii) exercises editorial control over the contents of a Controlled Premium Rate Service;

(iii) packages together the contents of a Controlled Premium Rate Service for the purpose of facilitating its provision; or

(iv) makes available a facility comprised in a Controlled Premium Rate Service;

(g) "Dial-up Telephone Number" means the telephone number used by an end user's computer that connects it to the Internet

(h) "Enforcement Authority" means, in relation to an Approved Code, the person who under the code has the function of enforcing it;

(i) "Facility" includes reference to those things set out in section 120(14) of the Act;

(j) "International Call" means a call which terminates on an Electronic Communications

Network outside the United Kingdom;

(k) "Internet Dialler Software" is software that replaces a Dial-up Telephone Number with a different Dial-up Telephone Number;

other than where it is used so that:

a) an end-user's existing Internet Service Provider replaces the Dial-up Telephone Number;

b) an end-user moves from his existing Internet Service Provider to another Internet Service Provider or is so moved with his consent.

(l) "Internet Service Provider" means a person who provides end-users, by means of a Dial-up Telephone Number, with connection to the Internet in the ordinary course of its business.

~~(m) "Mobile Service" shall have the meaning ascribed to it in the National Telephone Numbering Plan;~~

~~(n)~~ (m) "National Telephone Numbering Plan" means a document published by Ofcom from time to time pursuant to sections 56 and 60 of the Act;

~~(o) "Personal Numbering Service" shall have the meaning ascribed to it in the National Telephone Numbering Plan;~~

~~(p)~~ (n) "Premium Rate Service" shall have the meaning ascribed to it by section 120(7) of the Act;

~~(q) "Radiopaging Service" shall have the meaning ascribed to it in the National Telephone Numbering Plan;~~

3. For the purposes of interpreting this Condition, except in so far as the context otherwise requires, words or expressions shall have the same meaning as ascribed to them in paragraph 2 above and otherwise any word or expression shall have the same meaning as it has been ascribed in the Act.

## Annex 6

# List of respondents to the consultation

2connect@btconnect.com

Allely N

Arend J v d

BT

Cassells M

Citizens Advice

Dayneswood T

Feltham Dr R D

Fraser B

Internet Service Providers Association

Mayhew J

Miller R

Mobile Broadband Group

Murray D

Network for Online Commerce

Peak M

Premium Rate Association

Quick P

Rowland S

Scott N

Shersby Cllr J

The Telecommunications Ombudsman Service

UKCTA

Wadeshill J

Williams C