

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

This consultation document seeks your comments on
a proposed emergency code amendment to the ICSTIS
Code of Practice (Tenth Edition)

Consultation

Publication date: **11 July 2005**

Closing Date for Responses: **27 June 2005**

Contents

Section		Page
1	Summary	1
2	Background	3
3	Ofcom's review of the regulation of premium rate services	7
4	Approval of an Emergency Code Amendment to the ICSTIS Code of Practice (Tenth Edition)	9
Annex		Page
1	Responding to this consultation	16
2	Ofcom's consultation principles	18
3	Consultation response cover sheet	19

Section 1

Summary

- 1.1 'Ofcom' (the Office of Communications) exists to further the interests of citizens and consumers through a regulatory regime which, where appropriate, encourages competition. Effective competition delivers choice and lower prices to consumers as well as opportunities for new services and providers. However, consumers may need protection from inappropriate behaviour by certain providers that may undermine confidence in the market as well as causing consumer detriment.
- 1.2 This document invites comments on a Notification under section 121(7) of the Communications Act 2003 ('the Act') on Ofcom's approval to a proposed emergency code amendment ('the ECA') to the Independent Committee for the Supervision of Standards of Telephone Information Services ('ICSTIS') Code of Practice (Tenth Edition) ('the approved Code').
- 1.3 The effect of the proposed amendment would be to impose requirements upon all Network Operators ('NOs')¹, as defined in the approved Code, not to make payments to Service Providers ('SPs'), also as defined in the approved Code, for at least 30 days after calls have been made by consumers. The modification to the approved Code is set out in the Annex to the Schedule to the Notification, published at Annex 3 to this document.
- 1.4 The requirement to slow down the flow of money to SPs comes from Ofcom's report to the Department of Trade and Industry ('DTI'), *The Regulation of Premium Rate Services*, published in December 2004 ('Ofcom's report'). The review was triggered by growing concern over the problem of 'rogue' internet diallers and other such problem services, and the extent to which the current regulatory regime was able to deal effectively with problems of this kind. Ofcom's report is available on the Ofcom website at: http://www.ofcom.org.uk/telecoms/ioi/nwbnd/prsindex/ntsprsditi/prs_review.pdf
- 1.5 During the course of the review, Ofcom identified a number of problems with the current regulation of premium rate services ('PRS'), and our report made a number of detailed and incremental recommendations which, it was anticipated, would significantly reduce the scope for consumer detriment and restore consumer confidence in the PRS industry.
- 1.6 One such recommendation concerned the speed and frequency of out-payments from Terminating Communications Providers ('TCPs')² to SPs, and the report noted concern about current commercial practices where monies were paid out quickly (typically weekly or twice-weekly), which merely facilitated the flow of monies to unscrupulous SPs. These arrangements make it very difficult for ICSTIS to identify a breach and take action against an SP before the money is paid out by the TCP to the SP.
- 1.7 ICSTIS issued a consultation document on 15 April 2004 seeking comments on the ECA to include a specific obligation on NOs not to make payments to their SPs for at least 30 days after calls have been made. ICSTIS received 20 responses to its consultation document and, in light of comments received, concluded that the

¹ Ofcom's report referred to those Providers that facilitated the provision of PRS through the provision of network facilities and who terminate calls on behalf of SPs as TCPs. This document refers to those Providers instead as 'Network Operators' in line with the ICSTIS Code of Practice (Tenth Edition)

² TCPs facilitate the provision of PRS through the provision of network facilities and who terminate the call on behalf of the SP. The TCP is the party that contracts with the SP.

proposed ECA, as set out in its consultation document, should be endorsed in its entirety. ICSTIS published a statement on 13 June 2005 setting out its conclusions. It submitted the statement to Ofcom on the same day in order for Ofcom to give approval to the ECA in accordance with section 121(6) and 121(7) of the Act. ICSTIS' statement is available on the ICSTIS website at:

<http://www.icstis.org.uk/icstis2002/pdf/A%20Statement%20on%20the%20ECA%20Condoc%20-%20FINAL.pdf>

- 1.8 Ofcom is now proposing to approve the ECA. In reaching its proposed conclusions set out in this document, Ofcom has considered, and acted in accordance with its principal duty in section 3, as well as the community requirements in section 4 of the Act. Ofcom has also considered the tests set out in sections 121(1) and 121(2) of the Act.

Consultation

- 1.9 Ofcom is inviting written views and comments by **5pm on Friday 11 July 2005** on the amendment to the approved Code, as amended, which is set out in the Annex to the Schedule to the Notification, published at Annex 3 to this document.

- 1.10 Details of how to respond can be found in section 5.

Effective date

- 1.11 Ofcom is proposing to endorse ICSTIS' proposal that the ECA should take effect six weeks from the date of publication of Ofcom's final Notification, should we issue such a notification approving the ECA following this consultation and due consideration of responses received.

Section 2

Background

What are premium rate services?

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

³ A service falls within this section if its provision consists in:

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

The regulatory framework and premium rate services

- 2.5 A new regulatory framework for electronic communications networks and services entered into force on 25 July 2003. The framework is designed to create harmonised regulation across Europe, and is aimed at reducing entry barriers and fostering prospects for effective competition to the benefit of consumers.
- 2.6 Under the new regulatory framework, Ofcom must have regard to its principal duty set out in section 3 and, in particular, section 3(1) of the the Act which states that *“it shall be the principal duty of Ofcom, in carrying out their functions –*
- (a) to further the interests of citizens in relation to communications matters; and*
- (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.”*
- 2.7 Ofcom must also have regard to the community requirements set out in section 4 of the Act.
- 2.8 The relevant statutory provisions governing the regulation of PRS are set out under sections 120 to 124 of the Act.
- 2.9 The provisions specifically relating to approval of a code for PRS are set out in section 120 of the Act. Under section 121(2) of the Act, Ofcom are not to approve a code for the purposes of section 120 unless they are satisfied that a number of criteria have been met. These include that the provisions of the code must be objectively justifiable, not unduly discriminatory, proportionate and transparent.
- 2.10 Section 121(3) places restrictions on Ofcom’s powers to approve a code in respect of persons who are PRS providers by virtue only of section 120(12).
- 2.11 Section 121(4) provides that the provision that may be contained in a code, and approved under section 121 includes, in particular, provision about the pricing of PRS and provision for the enforcement of the code.
- 2.12 Section 121(5) provides-

“The provision for the enforcement of a code that may be approved under this section includes-

- (a) provision for the payment, to a person specified in the code, of a penalty not exceeding the maximum penalty for the time being specified in section 123(2) [currently £100,000];*
- (b) provision requiring a provider of a premium rate service to secure that the provision of the service is suspended or otherwise ceases or is restricted in any respect;*
- (c) provision for the imposition on a person, in respect of a contravention of the code, of a temporary or permanent prohibition or restriction on his working in connection with the provision of premium rate services or, in the case of a body corporate, on its providing such services or on its carrying on other activities in connection with their provision.”*

How are premium rate services currently regulated in the UK?

- 2.13 The regulatory arrangements for PRS follows a self- and co-regulatory approach, with the primary role of consumer protection falling to ICSTIS. ICSTIS is the industry-funded regulatory body for all premium rate-charged telecommunications services, and

has responsibility for regulating the content and promotion of services through its Code of Practice.

The role of Ofcom

- 2.14 Ofcom's role in the premium rate regulatory regime is to provide statutory support to the work of ICSTIS. Ofcom has the power under section 120 of the Act to set conditions for the purpose of regulating the provision, content, promotion and marketing of PRS that bind the persons to whom they are applied.
- 2.15 The PRS Condition which regulates the provision, content, promotion and marketing of PRS took effect from 29 December 2003. The effect of the PRS Condition is to bind each and every person falling within the definition of 'Communications Provider' as defined in the PRS Condition, to comply with:
- (a) *directions given in accordance with an Approved Code by the Enforcement Authority and for the purpose of enforcing the provisions of the Approved Code; and;*
 - (b) *if there is no such code, the provisions of the order for the time being in force under section 122."*
- 2.16 In the event of an apparent failure to comply with an ICSTIS Direction amounting to a breach of the PRS Condition, Ofcom's general powers of enforcement under its powers in sections 94 – 96 of the Act will apply.

The role of ICSTIS

- 2.17 ICSTIS is responsible for the preparation and enforcement of the approved Code. The current version was approved for the purposes of sections 120 and 121 of the Act on the same date as the PRS Condition came in to force and is available on the ICSTIS website⁴.
- 2.18 The approved Code applies to all PRS which are accessed by a UK consumer or are provided by SPs in the UK. The ICSTIS terms of reference, set out in the approved Code, include the following:
- (a) *set and maintain standards and, as appropriate, requirements for the content, promotion, marketing and provision of PRS, and keep these standards under review,*
 - (b) *monitor PRS to ensure compliance with these standards,*
 - (c) *consult widely with interested parties before changing these standards,*
 - (d) *make arrangements and determine procedures for the proper support (including funding) of ICSTIS and the efficient and effective operation of its regulation of PRS,*
 - (e) *determine any categories of PRS which may only be provided on the basis of prior written permission from ICSTIS, identify conditions which should be attached to the grant of such prior permission, keep such categories and conditions under review, and receive, consider and determine applications for prior written permission,*
 - (f) *administer a system for the payment of claims for compensation for unauthorised use of Live Services, and provide a system for adjudications where such claims are disputed,*

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

- (g) investigate and adjudicate upon complaints relating to the content, promotion and marketing of PRS, and issue directions designed to achieve compliance with the CoP which may include the imposition of sanctions,*
- (h) issue directions either generally or to individual providers of PRS to procure compliance with the CoP and/or to secure enforcement of its provisions,*
- (i) publish reports on its work at regular intervals and generally publicise its role. This includes reports to Ofcom, as and when required, relating to the regulation of the premium rate industry and the adequacy and appropriateness of regulatory arrangements.*

- 2.19 The provisions set out in the approved Code are primarily targeted at the actions of SPs, and it is their responsibility to ensure that the content and promotion of all their PRS (whether produced by themselves or by their content and information providers) comply with all relevant provisions of the approved Code.
- 2.20 ICSTIS has a range of sanctions that it can impose on SPs that breach the approved Code according to the seriousness with which it regards the breach. These range from obtaining assurances about future behaviour and instructing refunds to be offered to imposing fines, barring access to services and prohibiting certain 'named' individuals from operating services for a set period.
- 2.21 Although their responsibilities are more limited, the approved Code also places a number of general requirements and specific obligations on NOs to assist in the enforcement of ICSTIS' decisions by carrying out directions given by ICSTIS. These may include directions to cease dealing with particular businesses or individuals, to block access to certain numbers or services and to withhold payments to SPs in respect of particular services. Where there is evidence of non-compliance with an ICSTIS direction by an NO, this will represent a potential breach of the PRS Condition, and ICSTIS will notify Ofcom that it considers that the relevant provider has contravened the terms of the condition.

Section 3

Ofcom's review of the regulation of premium rate services

- 3.1 In August 2004 Ofcom was asked by DTI to undertake an urgent review of the regulatory framework for PRS in order to assess whether consumers are adequately protected from the potential for consumer detriment involving PRS.
- 3.2 The review was prompted in part by recent problems that have arisen in the premium rate sector caused by internet diallers and, more generally, by broader concerns relating to the PRS regulatory regime as a whole. In particular there was concern, shared by Ofcom, that the recent problems caused by internet diallers were only the latest in a series of examples of irresponsible and unethical behaviour that have caused considerable consumer detriment and damaged consumer confidence in the PRS sector.
- 3.3 Ofcom's review was carried out between August and November 2004. During the course of the review, Ofcom identified a number of problems with the current regulation of PRS, and our report made a number of detailed and incremental recommendations which, it is anticipated, will significantly reduce the scope for consumer detriment and restore consumer confidence in the PRS industry.
- 3.4 Ofcom's report, *The Regulation of Premium Rate Services*, was published on 9 December 2004. It is available on the Ofcom website at: http://www.ofcom.org.uk/telecoms/ioi/nwbnd/prsindex/ntsprsditi/prs_review.pdf
- 3.5 One of the key contributory factors to the problems of effective regulation of PRS concerned the speed and frequency with which payments were made from TCPs to SPs, with out-payments often being paid weekly or twice-weekly on the basis of call traffic information. From discussions with stakeholders, Ofcom found that frequent payment terms had become more common, and were increasingly being used by some TCPs as a means of competing with each other for SP business. The practical effect of this, in some cases, was that some SPs were receiving payments in respect of a particular call as much as two months before the TCP receives the respective interconnect payment and as much as three months before the consumer receives their bill from the OCP.
- 3.6 These arrangements therefore give ICSTIS a limited window within which to identify that a breach of the approved Code has occurred, and to take steps to stop the flow of funds to the SP concerned. This has created a situation where ICSTIS is reliant on the imposition, and collection, of fines on SPs in order to enforce the provisions of the approved Code. In practice, it has proved extremely difficult to enforce. It is relatively easy for rogue SPs to set up a service and disappear quickly in the event of breaches of the approved Code. In such cases, it is difficult for ICSTIS to track down the relevant SP. Even where the SP has been tracked down, it will often be the case that the SP will have no assets with which to pay fines or provide redress to customers.
- 3.7 In light of this, and following discussions with ICSTIS in respect of appropriate withhold periods, Ofcom concluded in its report that delaying payments to SPs for a minimum period of 30 days was likely to be an effective and proportionate way of improving the effectiveness of the regulatory regime. This requirement would give ICSTIS more time to identify breaches of the approved Code and, where appropriate, direct NOs to

withhold funds pending the outcome of investigations. Accordingly, Ofcom recommended that the approved Code should be amended to include an obligation on TCPs not to make payments to their SPs for at least 30 days after calls have been made.

- 3.8 Ofcom, together with DTI and ICSTIS, are now looking to implement the recommendations as swiftly as possible. This process, however, is far from straightforward, and will take a number of months to complete, particularly as a number of recommendations will require changes to the approved Code – a process which typically takes 8 -10 months to effect. The length of time is a result of the various statutory consultation and notification requirements involved, including consultation exercises by both ICSTIS and Ofcom and notification to the European Commission which requires a standstill period of three months.
- 3.9 ICSTIS is currently working on revisions to the approved Code, and expects to issue a draft version (11th Edition) for consultation in the next few weeks. However, given the timescales involved, and evidence that the current payment structure continues to result in networks releasing monies to SPs rapidly, and represents a significant risk to the effective regulation of PRS, Ofcom, ICSTIS and DTI have agreed the need to introduce the requirement to withhold funds on an emergency basis in advance of the more general consultation on the approved Code.

ICSTIS' consultation on an Emergency Code Amendment to the approved Code

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

Section 4

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

The proposed Emergency Code Amendment provision

4.1 ICSTIS have proposed to include the following additional clause (2.3.9) to the current version of the approved Code (Tenth Edition) for the purpose of the ECA:

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

b) *Where:*

I. there has been an adjudication, pursuant to paragraph 7.6, in respect of a breach of the Code by a service provider; and,

II. a fine and/or administrative charge has been imposed on that service provider which has not been paid in accordance with the terms of that fine and/or administrative charge:

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

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

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

What this means in practice?

4.2 The proposed ‘30 day rule’ obligation means that in order to be compliant with their obligations under the approved Code, NOs will be required not to make payments to their SPs for at least 30 days after the call has been made for the relevant service.

4.3 ICSTIS has informed Ofcom that it intends to put in place a programme of compliance monitoring, and where it finds that NOs have failed to comply, or has reason to believe that NOs may not be complying, ICSTIS will issue a Direction to the relevant NO requiring compliance. Failure to comply with a Direction from ICSTIS would then be a matter for referral to Ofcom for a potential breach of the PRS Condition. Ofcom treats all breaches of conditions extremely seriously, and where Ofcom is notified by ICSTIS

of non-compliance with ICSTIS Directions, Ofcom will investigate to assess whether there has been a breach of the PRS Condition. In the event of failure to comply with an ICSTIS Direction which amounts to a breach of the PRS Condition, Ofcom's powers of enforcement under the sections 94 to 96 of the Act will apply.

- 4.4 In addition, and as set out in ICSTIS' statement, where NOs have not withheld money in accordance with 2.3.9(a) and where an adjudication levies a fine and/or administrative charge which is not paid by the SP, then ICSTIS may direct the NO for the relevant service, under paragraph 2.3.9(b) to pay to ICSTIS an amount equal to what it should have withheld under 2.3.9(a). A failure by the NO to comply with a Direction issued under 2.3.9(b) will result in ICSTIS directly referring the NO to Ofcom for non-compliance with ICSTIS Directions.

Options

- 4.5 Ofcom considers that there are two options, and would welcome comments and views from stakeholders. The two options are as follows:
- No change;
 - NOs not to make payments to their SPs for at least 30 days after calls have been made.

Impact Assessment

- 4.6 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.
- 4.7 As 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.

Option 1: No change

- 4.8 Under section 6 of the Act, Ofcom has a duty to ensure that it does not impose or maintain unnecessary regulatory burdens. Ofcom would consider that the 'no change' option would be the most appropriate course of action to take in the event that there was no clear evidence that the speed and frequency with which payments were made from TCPs to SPs were not a significant contributory factor to the problems of effective regulation of PRS.
- 4.9 The option of 'no change' would have the benefit of avoiding the additional costs involved in making changes to existing payment terms, including the fact that there may well be an impact in terms of cash flow for Service Providers. However, while Ofcom appreciates that there may well be affects to cash flow in the short term, Ofcom does not believe that they should be material, and that any costs need to be placed in context with the level of consumer detriment experienced over the last year. As already explained, because of the scale of the problem, Ofcom was asked by DTI to

undertake an urgent review of the regulatory framework for PRS. The purpose of the review was to assess whether consumers are adequately protected from the potential for consumer detriment involving PRS. In our report, Ofcom identified a number of problems with the current regulation of PRS, and therefore made recommendations to reduce the scope for consumer detriment and restore consumer confidence in the PRS industry.

- 4.10 One of the key problems identified, as already explained, was the speed with which monies were paid out by TCPs to SPs, with out-payments often being paid weekly or twice-weekly. These arrangements gave ICSTIS a limited window within which to identify that a breach of the approved Code had occurred, and to take steps to stop the flow of funds to the SP concerned. Consequently, ICSTIS were reliant on the imposition, and collection, of fines on SPs in order to enforce sanctions. This has proved extremely difficult in practice.
- 4.11 In light of this, Ofcom considers that the risk of not doing anything, including increased negative publicity about the UK PRS sector and continued problems with rogue dialers and other such problem services, would result in a loss of consumer confidence which in turn would adversely impact on the PRS sector. Accordingly, Ofcom does not support the option of 'no change'.

Option 2: NOs not to make payments to their SPs for at least 30 days after calls have been made

- 4.12 Ofcom believes that this option would be the most appropriate course of action in the event that there is clear evidence that the speed and frequency with which payments were made from TCPs to SPs were a significant contributory factor to the problems of effective regulation of PRS.
- 4.13 As explained above, during the course of our review, Ofcom was persuaded that the existence of early payment terms was a significant contributory factor to the problems. This was because such payment arrangements enabled SPs that may have been in serious breach of the approved Code to receive most, if not all, of their revenue for the services. Where this happened, the relevant SPs were able to disappear quickly before ICSTIS was able to apply the key deterrent of holding monies gained, pending completion of its investigation and the imposition of sanctions.
- 4.14 In light of this, Option 2 is Ofcom's preferred option as it appears to Ofcom to be a proportionate way of improving the effectiveness of the regulatory regime. Under this option, ICSTIS would have more time to identify breaches of the approved Code and, where appropriate, direct NOs to withhold funds pending the outcome of its investigations. This should ensure that those companies running PRS in breach of ICSTIS rules will not be receiving monies rapidly, and will therefore not be able to profit from such services.

Question 1:

Which of the regulatory options listed in this section do you support, and why?

Tests set out under the Communications Act 2003

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

Section 3 – Ofcom’s general duties

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

Section 4 – European Community requirements for regulation

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

Section 121 – Approval of a code for premium rate services

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

Section 121(1)

4.23 Ofcom considers, that in respect of the proposed modification to the approved Code,

- a. that a code has been made by any person for regulating the provision and contents of PRS, and the facilities made available in the provision of such services;
- b. that the code contains provisions for regulating, to such extent (if any) as they think fit, the arrangements made by the providers of PRS for promoting and marketing those services; and
- c. that it would be appropriate to approve the code (i.e. the modification) for the purposes of section 120.

Section 121(2)

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

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

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

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

4.26 ICSTIS operates in an entirely independent manner. The Board consists of up to twelve members, all appointed in their individual capacities. With the exception of three members who are appointed on the basis of their contemporary industry knowledge, no member of the Board may have any commercial interests in the premium rate sector. Any Board member with such commercial interests will take no part in any adjudication process.

4.27 Ofcom is therefore satisfied that ICSTIS is sufficiently independent of providers of PRS.

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

4.28 ICSTIS is a non-profit making organisation and is funded by a levy on service providers and collected by NOs. The budget is consulted on with all stakeholders each year and is approved by Ofcom.

4.29 Under current funding arrangements, ICSTIS calculates a budget and estimates the levy necessary to meet that budget. The levy rate is published widely, and is collected through NOs withholding that levy rate from out-payments to SPs. The final ICSTIS budget for 2005/6 has been set at £4,106,450 and the levy at 0.46% (assuming market growth of 7.5%).

4.30 Ofcom is satisfied that adequate arrangements are in force for funding the activities of that person in relation to the code.

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

4.31 As already explained, in the event that Ofcom were to approve the ECA, NOs will be obliged not to make payments to their SPs for at least 30 days after the call has been made. Ofcom notes that NOs will be required to comply with this requirement in order to meet their obligations under the approved Code.

4.32 Ofcom is satisfied that the proposed requirement is objectively justifiable given that the speed and frequency with which payments are made from TCPs to SPs continues to be a major contributory factor to the problems of effective regulation.

4.33 In addition, from discussions with stakeholders, Ofcom found that frequent payment terms were increasingly being used by some TCPs as a means of competing with each other for SP business. It is for this reason that Ofcom considers that the requirement should be binding and apply uniformly to all NOs, and be monitored proactively. While Ofcom is aware that some stakeholders have argued that the obligation should be applied flexibly insofar as there should be freedom to adopt payment models of less than 30 days, Ofcom has not been persuaded that applying the regulation in this way would provide similar effectiveness. Ofcom remains concerned that this may encourage NOs to continue to agree early payment terms given the likely different approaches to risk management.

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

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

4.35 The effectiveness of the PRS regulatory regime has always been dependent on ensuring that there are sufficient incentives on those persons who are facilitating the provision of PRS through the provision of network facilities and who terminate the call on behalf of the SP. It is those persons who contract with the SP.

4.36 Ofcom does not consider that similar provisions requiring OCPs to withhold funds from TCPs would be as effective as it would be administratively complex to apply. This is because a breach of the approved Code would require Directions to be issued to all OCPs, of which there are now around 200, rather than to a single TCP with whom the SP has entered into commercial arrangements with. ICSTIS' task in keeping track of withheld funds and ensuring their proper use would be far more challenging and resource intensive than under a system where funds were withheld at the TCP level.

4.37 Moreover, Ofcom does not consider that applying similar provisions can be applied to SPs given, as already explained, the commercial and regulatory barriers to market entry are very low, and therefore any regulatory measures which are directed at making SPs more accountable are likely to be unsuccessful. There may be as many as 3,000 to 4,000 SPs responsible for providing as many as 30,000 to 40,000 PRS in the UK at any one time. It is for this reason that Ofcom believes that effective regulation requires responsibility to lie further up the value chain.

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

- 4.38 Ofcom is satisfied that the proposed requirement to delay payments to SPs for a minimum period of 30 days would be a proportionate way of improving the effectiveness of the regulatory regime.
- 4.39 Ofcom accepts that there are different views regarding the likely scale of the costs involved resulting from withholding monies for a period of at least 30 days. This is borne out through our discussions with stakeholders, and whereas some have argued that 30 day payment terms are standard in most businesses, and therefore would have only a minimal effect on legitimate SPs, others have argued that smaller SPs may be more heavily dependent on rapid payment terms.
- 4.40 On balance, Ofcom remains of the view that delaying payments to SPs for a minimum period of 30 days would provide the most appropriate withhold period. Ofcom accepts that the proposed requirement may well affect the cashflows of some SPs, and that the vast majority of these are likely not to have committed any breaches of the approved Code. However, Ofcom believes that any such costs need to be placed in the context of the scale of the problems relating to consumer harm experienced last year.

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

- 4.41 Ofcom is satisfied that the proposed requirement is transparent. First, the proposed requirement flows from Ofcom's report to DTI, which was published in December 2004. This has therefore been public for a number of months in advance of this consultation. Second, ICSTIS has already consulted on the proposed requirement. The ICSTIS consultation document was widely circulated, and was posted on the ICSTIS website; all registered users were sent an email notification informing them of the consultation. In addition, ICSTIS held a workshop to discuss with industry stakeholders.
- 4.42 Accordingly Ofcom is today proposing to give notification of approval of the ECA as set out in the Schedule to the Notification in Annex 3 for the purposes of sections 120 and 121 of the Act.

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 Monday 11 July**.

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 at 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
Competition & Markets
4th Floor
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA

Fax: 020 7981 3333

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 your response could include direct answers to the questions asked in this document, which are listed together at Annex 3. It would also help 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 Bill Fell on .

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, ideally on receipt (when respondents confirm on their response cover sheer 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.

Next steps

Following the end of the consultation period, Ofcom intends to publish a statement around the end of **Date**.

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.

Ofcom's consultation processes

Ofcom is keen to make responding to consultations easy, and has published some consultation principles ([see Annex 1](#)) 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. 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 Tony Stoller, Director, External Relations, who is Ofcom's consultation champion:

Tony Stoller
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
Tel: 020 7981 3550
Fax: 020 7981 3333
E-mail: tony.stoller@ofcom.org.uk

Annex 2

Ofcom's consultation principles

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

Before the consultation

- A2.1 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

- A2.2 We will be clear about who we are consulting, why, on what questions and for how long.
- A2.3 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.
- A2.4 We will normally allow ten weeks for responses to consultations on issues of general interest.
- A2.5 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.
- A2.6 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

- A2.7 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, 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

Name/contact details/job title

Whole response

Organisation

Part of the response

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

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

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

WHEREAS:

- A section 120 of the Act empowers OFCOM to set conditions that bind persons to whom they are applied for the purpose of regulating the provision, content, promotion and marketing of premium rate services;
- B such conditions may require the persons to whom they apply to comply, to the extent required by the condition, with directions given in accordance with an approved code by an enforcement authority and for the purpose of enforcing its provisions or, if there is no such code, the provisions of the order for the time being in force under section 122;
- C OFCOM set a condition under section 120 of the Act by way of publication of a notification under sections 48(1) and 120(5) of the Act on 23 December 2003 which took effect from 29 December 2003;
- D OFCOM also published a notification of approval of a code for premium rate services for the purposes of sections 120 and 121 of the Act on 23 December 2003 which took effect from 29 December 2003;
- E on 9 December 2004, OFCOM published its report to DTI, The Regulation of Premium Rate Services, in which it made a number of detailed recommendations aimed at significantly reducing the scope for consumer detriment from premium rate services;
- F recommendation 4 of OFCOM's report recommended that the Approved Code should be amended to include an obligation on Terminating Communications Providers not to make contractual payments to Service Providers for at least 30 days after calls are made;
- G on 15 April 2005, ICSTIS issued a consultation document seeking comments on an emergency amendment to the Approved Code in order to implement recommendation 4;
- H ICSTIS considered every such representation duly made in response to its consultation document, and finalised its modification taking such representations into account on 13 June 2005;
- I The modification is set out in the Schedule to this Notification;
- J for the reasons set out in the explanatory statement accompanying this Notification, OFCOM proposes that the requirements for the purposes of approving a code set out in section 121 of the Act have been satisfied;
- K In making the proposal set out in this Notification, OFCOM has considered and has acted in accordance with its general duties set out in section 3 and the six Community requirements in section 4 of the Act;

- L Representations may be made to OFCOM about the proposal for approval of a modification to the Approved Code as set out in this Notification and the accompanying explanatory statement by 5pm on 11 July 2005.

NOW, therefore:

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

[Name]
Director, Competition & Markets

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

[date]

Schedule

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

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

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

(b) Where:

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

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

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

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