

## **Consultation on the draft 11<sup>th</sup> edition of the ICSTIS Code of Practice. Response from Bristol City Council Trading Standards Service.**

We welcome the opportunity to comment on the draft 11<sup>th</sup> edition of the ICSTIS CoP. It is recognised that it is serious attempt to address the recommendations of the Ofcom Review, which followed serious public concern about widespread abuse of PRS leading to significant consumer detriment in a number of specific areas. We recognise that the revised Code will sit alongside a number of measures already taken to tackle and prevent these abuses. Our response to the specific questions posed in the Consultation Document follow. However we would first wish to make the following broad points on the effectiveness and shortcomings of the proposed Code:

We welcome:

- a more flexible format that should allow a more reactive approach to new problem areas;
- bringing NOs into the regulatory framework;
- greater accountability and need for due diligence placed upon NOs and SPs for the content they carry;
- recognition that there are particular problems for children accessing inappropriate service or products that it is illegal to supply to them.

We are concerned that the draft Code does not sufficiently address the following issues and we set out the arguments for this in the responses:

- inadequate measures to ensure consumer redress and dilution of the Ofcom recommendation from 'redress' to 'refunds';
- the need to find adequate measures to prevent children from accessing inappropriate service or products that it is illegal to supply to them;
- the need to recognise and draw attention to existing legal requirements and to align the Code with these;
- continued confusion between the legal status and effect of competitions and lotteries or prize draws.

### **Section 1**

1. The clarification of definition of NOs and the alignment with Ofcom general conditions of entitlement will make it easier to identify with whom the new responsibilities of NOs rest and the also to identify the parties falling under the other classifications defined in the supply chain (SP and IP).
2. Placing greater accountability on NOs to prevent abuse of the market taking place would suggest that AIT arrangements should be included in the code.
3. No comment.
4. The definitions of NO and SP are clear enough, but the answer to the question entirely depends on the clarity and level of due diligence placed upon and exercised by the NO and the degree to which ICSTIS

can enforce it. If this is not effective it will remain too easy for the true SP to hide behind false names, accommodation addresses etc.

5. Rapid changes in technology and the wider ranging and novel applications for which PRS are being used suggest that the statutory definition of PRS is being stretched. We strongly suggest that before new platforms that employ PRS as a payment mechanism are permitted they should initially fall within a prior permission regime in order to allow a thorough assessment of the potential for consumer harm to be evaluated and addressed in order to avoid the serious consumer detriment that has been shown to develop rapidly and exponentially from recent innovations, such as rogue diallers, ACE diallers, call-backs, SMS subscription services.  
In view of the current evidence of the potential abuse and artificial revenue generation at the expense of the consumer calling customer service call centres on 087 prefix numbers and the confusion for consumers in the descriptor 'national rate' given the actual cost that most consumers now pay for using geographic numbers, it may be time to bring such numbers within the PRS regime. We are aware that Ofcom is considering this matter.
6. No, we agree with the consultation document that regulation is necessary and must apply to all businesses. New developments in the application of PRS even by otherwise compliant companies may have unintended or insufficiently calculated consequences for consumer harm which must be capable of being addressed and rectified through the Code and its enforcement. Variations in risk of particular sectors should be addressed by modifications of the code and special conditions for problematic and high risk areas. Similarly the enforcement regime should be targeted and based on risk assessment, identifying those businesses and sectors where compliance is the norm and focussing on those areas and businesses which set out to abuse the system
7. The Ofcom review has recognised that the NOs have a key role to play in developing an effective regulatory regime. ICSTIS has in the last year recognised that there are sectors and businesses seeking to perpetrate mass consumer fraud through the abuse of PRS and demonstrated necessity of taking urgent and serious enforcement action against them; the focus of the revised code and the way it is applied should be on proactive measures to prevent such abuses entering the market, including a prior permission regime for known problem areas such as prize draws as distinct from competitions (see statutory definitions in Lotteries and Amusements Act 1971 and Gambling Act 2005).

## **Section 2**

1. Network status of NOs should be confirmed by Ofcom as meeting Condition 11 of the General Conditions and information required by

ICSTIS should be checked through Companies House and by testing contact details provided. ICSTIS should also require, for publication if need be, details of effective means by which consumers can contact the NO for assistance with resolving problems and ICSTIS should test these. NOs should specify the procedures they will adopt to ensure that ICSTIS will be informed promptly of any changes to the information provided.

2. It will be necessary for ICSTIS to issue guidance on what it considers 'satisfactory' (2.3.1 b), 'sufficient' (c) and 'reasonable' (f and g) and how NOs will provide evidence of compliance with (e) if requested by ICSTIS.
3. There is no question 3
4. The argument in the Consultation Document to go beyond Ofcom's recommendation is incontrovertible not only from an enforcement perspective, but also from the perspective of consumer protection and level playing field for other operators. However the draft Code does not enact ICSTIS' wish 'to be notified of any intention....before it happens' as the suggested wording implies that this takes place promptly after the change has taken place. Furthermore 'promptly' is not defined and could result in legal argument and dilution of effect. A clear time limit is needed. It is also important that a consumer's ability to check a PRS number to find out which NO holds it is maintained and that the information is accurate.
5. No, provided the requirements of 2.3 have been complied with and the issues raised in the comments on 2.3 and 2.4 addressed.
6. This is appropriate and provides a significant incentive for NOs to conduct proper due diligence and actively cooperate with ICSTIS' enforcement activity. It is not clear however whether this will work effectively when a number has been ported and particularly when breaches are detected within 30 days. It is assumed that the original NO will remain responsible for assisting ICSTIS and accountable for any shortfalls if in breach but this should be clarified for the avoidance of doubt. We have concerns over the use of the term 'refunds' which will be addressed in commenting at Section 8 Question 4.
7. We have concerns over the use of the term 'refunds' which will be addressed at Section 8 Question 4. Although we note that the text of the Consultation Document uses the preferred term 'compensation'.

### **Section 3**

1. Whilst it the rationale for changing from issuing 'Guidelines' to 'help notes' in order not to be seen to extend the Code outside of the revision procedure, it is not certain whether it will have significant

impact on the effective status of interpretative guidance, whatever the title used or the caveats attached. It is important and a reasonable expectation that regulators offer advice and reasonable assistance to those (the majority) that they regulate who wish to comply with regulations. It is imperative the 'help notes' reflect the current legislative requirements. So 'help notes' are to be welcomed. However in the example provided on Pricing there is a degree of vagueness and omissions which are not helpful. For example, it should be drawn to readers attention that there is specific legislation covering how prices of services (and goods, which might be part of the offer) are communicated to consumers, which covers issues such as comparative pricing, inclusion of VAT, misleading pricing and use of the term 'free', which are not addressed in the 'help note'. Section 5.1 of the Code states that 'services and promotional material must comply with the law'. It would be helpful to make those businesses governed by the Code aware of the other statutory enforcement regimes that impinge upon their activity and direct them to where they can obtain assistance, such as their local authority trading standards service, (which will offer a LACoRS Home Authority relationship to businesses based in their area), to avoid confusion and ensure consistency and a more co-ordinated approach to regulatory enforcement.

2. In addition to what is stated above, the production of prompt guidance or clear unambiguous statements that certain practices are in direct contravention of the Code (and of the law, if appropriate) when there is evidence of widespread misapplication or abuse of the Code.
3. No comment.
4. Customer service arrangements should also include the legal name of the business, company registration number if applicable and an address of business to allow for communication by letter and appropriate for service of legal documents. What steps will ICSTIS take to ensure that mechanisms for the consideration of claims are 'effective' and will they be proactive or reactive? What measure will they use to establish whether claims for payment are 'justified' and will it act under the Code if justified claims are not being met? Again we have concerns over the use of the term 'refunds' which will be addressed at Section 8 Question 4.
5. This question seems a little opaque but, presuming it means guidance on what a business has to do to meet the requirements of para 3.2.7, this would clearly be helpful, provided such advice is consistent with and draws attention to the civil and criminal legislation that governs consumers' rights, including rights of redress, when responding to marketing and in relation to contracts for goods and services.

## **Section 4**

1. The Code should apply to all persons and legal entities in the PRS supply chain in so far as it is applicable to their activities, and this will obviously include IPs.

## **Section 5**

1. This seems to be a reasonable effort to update the broad principles, in addition to legality, that the Code expects PRS to meet. We would ask how the word 'unreasonably' is applied in 5.3.2 and why the word 'unduly' is necessary in 5.3.3 – should services encourage unauthorised use at all?
2. It is absolutely necessary to have in place adequate procedures for age verification when selling products which are legally age-restricted, such as video recordings and games software, credit, betting and gaming, and should also apply to services that the Code deems should not be provided to under18s or under16s such as Chat, Contact and Dating services. Such procedures should be in place not only for internet services, but also for services accessed by telephone, including mobile SMS and MMS services.
3. An effective system is necessary to demonstrate legal compliance and due diligence where appropriate.
4. Some of the possible methods of ensuring a robust system are set out in the Consultation document. We would be happy through the offices of LACoRS or the Trading Standards Institute (TSI) to offer advice on age-verification schemes, which does raise additional challenges when products are sold at a distance and there is no face-to-face element in the transaction.
5. See response to Section 5 Question 4 above.
6. There is no Question 6.
7. Yes, but refer to the references to statutory requirements for pricing in response to Section 3 Question 1.
8. As it is a principle of the Code (5.1.1) that all promotional material must state clearly the likely charge for calls to each service, the intention surely is that pricing information is communicated in such a way that consumers are perfectly clear about the cost of using any PRS before they choose to do so. Proximity may well play an important role in achieving this, provided it is accompanied by prominence and clarity. The ultimate test is whether consumers towards whom the promotional material is directed, or those likely to respond to it, understand what the offer is, including the price. We believe that such objectives can best be achieved by statement of broad principles and supporting notes, which can evolve to keep pace with fast moving technology and market practices.

9. Yes, pricing information should be spoken as well as displayed for television advertising, assuming that the PR number and details of the product being promoted are also communicated by voice as well as visually. What is most important is that pricing information is not gabbled at the end or scrolled across too fast and too small to be taken in and understood.
10. We do not believe that the proposals for Address information at 5.6 provide effective means to ensure that a consumer will be able to locate and communicate with the SP or IP – the proposals do not even require an address to be provided as a non-PRS phone number would appear to fit the requirement. It is important, particularly when dealing with a remote or distant supplier, to know the name of the legal entity one is dealing with and the physical address (location) for correspondence and legal service if need be. Simple trading names or trading styles do not necessarily identify the legal entity and may easily mislead as to the identity of the SP or IP. Similarly PO Box numbers, Accommodation addresses and phone numbers are not an adequate method of ensuring that a consumer can identify and communicate with an SP or IP. Given that the Code requires (3.2.7) SPs to have in place customer service arrangements with specified means of contact (see also comment at Section 3 Question 4), at what point in the marketing and transactional process does ICSTIS intend that the consumer discovers the means of contacting the customer service? Reference should be made to the requirements to the Distance Selling Regulations and associated legislation to ensure that the Code is consistent with these, including pre-contractual information requirements and consumers' specific rights in contracts concluded at a distance. See <http://www.dti.gov.uk/ccp/topics1/facts/distancesell.htm>
11. Statements that services or goods are being provided 'free' are claims as to the cost at which products are supplied to consumers and should therefore be addressed under 5.5 Pricing information. The comments made in response to Section 3 Question 1 and Section 5 Questions 7 and 8 are relevant here. Provisions of the Code addressing the use of the term 'free' should be consistent with legislative requirements, such as in Part III of the Consumer Protection Act 1987 and the Code of Practice for Traders on Price Indications issued by the DTI (under review) specifically addresses this issue.  
See <http://www.dti.gov.uk/ccp/topics1/facts/misleading.htm>  
See <http://www.dti.gov.uk/ccp/consultpdf/priceann.pdf>  
'BOGOF' promotions are covered by these requirements as is what constitutes a 'free offer' (Section 1.10 of CoP). There is a danger in being over-prescriptive in the Code and the same approach proposed elsewhere in the draft Code of applying broad principles supported by more detailed help notes, which can be updated quickly to respond to new issues/ problems, may be more effective.

12. The inappropriate marketing of certain PRS either targeted at children or indiscriminately including them in unsolicited mass-marketing exercises has been a major cause for concern and complaint. Issues concern suitability of content, impressionability, vulnerability and failure to understand the cost implications of responding to certain PRS offers. It must be recognised that children have wide access to telecommunications technology and high degrees of skill in using it, which may often exceed those of their parents. They are therefore an attractive mass market commercially but they must be recognised as sector in need of particular protection as is the case in many other areas. Although the law recognises that the majority of contracts made with minors are not enforceable, the fact that transactions using PRS almost invariably require payment before or as the services or products are being delivered make that protection somewhat ineffective. In addition it is important that children are not even exposed to types of marketing that are inappropriate or for products covered by age-restricted sales legislation – see responses to Section 5 questions 2 – 5 above. It is vital therefore that children’s services are robustly and inclusively defined addressing the realities of the types of products that are likely to appeal particularly to children.
13. We agree that the maximum call cost for children’s services should not be increased, but believe that if the need for a cap is recognised it should not be allowed to be artificially inflated by breaking products down into components sold at maximum price but which are not capable of being used on their own and also that greater care should be exercised before children are allowed to enter subscription services which provide new product without it being specifically requested by the child. The code should address these particular issues.
14. See last response in relation to additional safeguards. The guiding principles for any services that are directed towards or particularly appealing to children are:
- exclusion of inappropriate material and products
  - clarity on product description and cost prior to purchase in terms appropriate to children
  - adequate and effective mechanisms for refund and redress

## **Section 6**

1. We agree that option 3 is the preferred option. Regulatory controls should be targeted and proportionate in relation to risk. This proposal would retain additional control for those services that may present a particular risk of harm. We would however express concern at the use of PRS as a route to access technical support in circumstances where the consumer is in fact reporting a potential fault with a product they have purchased. PRS are not appropriate access Customer Service, as indeed concerns are being acknowledged about the use of 087 numbers for this purpose also. This relates to Recommendation 9 of

the Ofcom Report and to Code proposals at 3.2.7 and responses to Section 3 Questions 4 and 5.

2. The use of the Prior Permission regime should be applied on a risk-based approach in relation to recognised problematic or sensitive areas and be capable of bringing in new PRS or marketing methods that give rise to consumer harm or detriment - prize draws promotions has been an example of this.
3. The proposals appear plain in their requirements.
4. Yes, provided that there is no dilution of the ability of consumers can obtain proper compensation in appropriate cases. We trust that ICSTIS will actively monitor this and use its powers, including 30 day funds held back by NOs, should this be the case.

## **Section 7**

1. We agree; this is an expanding area of PRS, and one could cause significant detriment to consumers by fuelling addiction.
2. The availability of these types of services to young people under 18 is a serious cause for concern and is attracting much public discussion. They should not be available to children. The incorporation of requirements into the Code is supported provided that active monitoring does not indicate higher levels of non-compliance.
3. It is doubtful whether the proposed provisions are adequate to prevent the use of adult chat services by children. As elsewhere in the draft Code there is a serious need to address how to ensure that both products that are age-restricted by law and products deemed unsuitable for children in the Code cannot be supplied to children. This has already been raised in the responses to Section 5 Questions 2 – 5. This challenge must be embraced by ICSTIS and the industry and it may that there are solutions that are technology based. We understand that there already exists technology that locks new mobiles from receiving adult content and that they can only be unlocked in circumstances where the owner is required to demonstrate their age. Such developments might form part of the solution.
4. To consider special provisions for these services on the basis that they have 'greater potential for consumer harm' is fine if the intention is to compensate for any harm done. However this is unlikely and, as all services are capable of causing consumer detriment and to avoid confusion between types of services and ensure consistency with the rights that consumers are entitled to under the law of contract and other civil law obligations, it would be sensible to have a uniform right of redress under the Code in relation to all services and products.

5. The liberalisation of DQ services has caused significant public confusion and concern over reliability. We make the same caveat here as elsewhere over the move from prior permission into the Code – it will need active monitoring to ensure that levels of non-compliance decline rather than increase.
- 5(a) (there are two questions 5) Pay for Product Services. Reference to the Distance Selling Regulations has been made specifically in the Code at 7.8.1. The last few months has seen a rapid increase on the availability of these services. This has consequently led to a significant increase in complaints received by Trading Standards Services. Many relate to the appropriateness of these services being targeted at children and the lack of clear information that many are in fact subscription services. In the absence clear and prominent pricing information, offences under the Consumer Protection Act 1987 may be committed. We would advocate the inclusion of the price and frequency of payments for subscription type services. See comments on price indications and information to be included in responses at Section 5 Questions 7 – 11.
6. There is ample evidence that persons under the age of 18 can and do access this type of service and is the cause of concern in the media. We would question assertions that persons under the age of 18 cannot view the content and would not recommend increasing the maximum cost. We are interested in the IMCB classification system and whether it will be coupled with effective mechanisms to prevent supply to those under age as with the regime under the BBFC and the Video Recordings Act.
7. The new Code provisions are found at 7.10 rather than 6.10 as stated in the consultation document. Subscription services are discussed at Section 7 Question 5(a) above. We agree with the consultation document that these services have the potential to cause serious consumer harm particularly to children – and have shown to do so. The draft proposals are to be welcomed but given the number of children who have complained that they believed that were buying one ring-tone and ended up with a subscription service, there is clearly still a significant problem. Given ICSTIS position on what is a reasonable maximum for children to spend, it is appropriate to ask whether subscription services are appropriate for children. Why should not children be able to buy the latest must-have ring-tone by itself rather than as part of a bundle of other products? We would also suggest that a statement that a service is ‘subscription based’ may not be sufficient to alert some children that they are signing up to receive a number of products and that this should be spelled out more clearly.
8. See previous response.

## Section 8

1. It is unfortunate that ICSTIS is by and large unable to regulate directly IPs and other businesses beyond the SP. It is important that a culpable person is identified and open to direct sanction. ICSTIS recognises that many mass consumer frauds related to PRS have rapidly re-emerged in another guise once action has been taken. The current focus is to address this by imposing greater accountability and requirement for due diligence on SPs and now NOs. Whilst we support this move to increase responsibility and assistance to prevent breaches from higher up the chain, we suggest also that, given the greater onus on providing information from the latter, ICSTIS should not hesitate in holding accountable and subject to sanction any IP or others in the value chain that it can demonstrate to be culpable of any significant breach of the Code, regardless of whether or not it accepts liability.
2. This seems a sensible proposal. There have been many examples of scams persisting that are simply variations on a theme or the same scam under a new name. However it is not clear why the ability to invoke the Emergency Procedure on similar facts without reference to the Board should expire after 10 days from the original Board decision (8.4.d). This could encourage tactical action by would-be scammers.
3. Provided this does not compromise the ability to take prompt action under the Emergency Procedure and the offending activity is halted, the time taken to deal with the follow-up formalities is less important.
4. We are disappointed to see Recommendation 8 of the Ofcom Report diluted from 'redress' to 'refunds', especially as the term refunds seems to be being narrowly construed in the Consultation Document. It is important to recognise that consumer loss arising from deceptive or misleading marketing practices will often extend beyond the cost of the PR call. In particular most prize draw scams are linked to secondary marketing opportunities and these may themselves be misleading. The law recognises the right to claim consequential loss arising out breach of contract. We believe that insufficient attention has been paid to finding effective ways of recompensing consumers who have been victims of mass consumer frauds linked to PRS and that active steps to resolving this issue would do much to restore confidence in PRS and discourage similar abuses in the future. It is unreasonable to expect consumers to be aware of adverse judgements and pursue claims independently. Such procedures favour the more articulate consumer against the vulnerable and disadvantaged. It should be possible to recompense consumers through their billing account with their NO using with-held funds under the 30 day rule, supplemented by any fines levied by ICSTIS if need be. As with the procedure in the criminal courts any claims for compensation should be met first, before prosecution costs and fines. As a first step it should be possible for NOs to be required to automatically credit accounts for any calls made to PR numbers against which a significant adverse finding has been made using with-held funds.

5. Agreed, provided that it does not lead to procedural tactics to prolong the life of services that cause consumer harm or detriment.
6. No comment.

### **Section 9**

1. Agree.

### **Section 10**

1. Agree.

### **Further specific comment on the draft Code**

The Consultation Document does not ask any questions about the specific requirements relating to **7.4 Competitions and other games with prizes**. We believe that this categorisation perpetuates a confusion that has hampered the ability of ICSTIS to respond rapidly and effectively to abuses of PRS that have perpetrated mass consumer fraud and detriment in relation to prize draw scams. These typically inform consumers that they are a 'winner' having been entered into a draw without their knowledge. They are encouraged to ring a PR number to discover their prize but, after a lengthy expensive call, are told they have won a prize which is in fact a secondary marketing opportunity and which may be misleading in order to encourage consumers to proceed.

The draft Code still shows lotteries as a subset of 'Competition services' whereas lotteries and competitions are defined quite distinctly in law, both in the Lotteries and Amusements Act 1974 and in the Gambling Act 2005. A competition requires the exercise of judgement or skill, whereas a lottery is simply the opportunity to enter into a draw. Competitions linked to PRS have not caused the widespread consumer harm over the last few years that prize draws have and it would assist consumer protection in the future if the Code recognised both the legal distinction and the practical distinction. The Office of Fair Trading has been successful in seeking undertakings from businesses engaged in promoting prize draw scams linked to PRS that they will desist from operating illegal lotteries as defined under the Lotteries and Amusements Act. The new Gambling Commission will assume enforcement responsibilities for these areas under the Gambling Act 2005 in due course. We would like to see ICSTIS distinguish this sector from competitions and games with prizes in order to recognise and eliminate this particular abuse.

Stephen Meale  
Trading Standards Manger  
Bristol City Council