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Mobile Broadband Group – Response to ICSTIS consultation on 11th Edition of the ICSTIS Code of Practice

The Mobile Broadband Group ("MBG", whose members are O2, Orange, T-Mobile, Virgin Mobile, Vodafone and 3) welcomes the opportunity to respond to ICSTIS' consultation on the 11th Code of Practice.

Summary main points

- MBG supports the objective of the new Code – it must be much more difficult for customers to be misled and for rogue providers to benefit from their misdeeds.

- However, this is a badly missed opportunity to put into effect a much more root and branch reform, whereby the Code sets out the broad principles and is technology neutral. Detailed rules should appear in Guidelines. This would be a much more effective way to deal with changing circumstances.

- The PRS environment changes very quickly. The Code can only change very slowly. This has a number of implications:

    1. The Code should use less technology specific language, where possible (e.g. "SMS"). How will it deal with VoIP?
    2. Only that which must go in the Code for the sake of legal authority should be included. The rest should remain outside in 'guidance' or 'help' and be capable of being responsive to change.
    3. When new problems arise, ICSTIS and industry must co-operate much more speedily to plug gaps in the rules. Only then do we get the full benefit of co-regulation.

- The Code is still too fixed line centric. Much of the language does not fit properly into the mobile context and needs to be re-worked.

- ICSTIS is a co-regulatory model, derived from a consensus within industry that this is the best way to regulate PRS. The Code must refer to co-

regulation and emphasise industry's responsibility to participate fully in the formation of regulation. ICSTIS must also be more supportive of self-regulatory initiatives designed to improve the working of the PRS market.

- In addition to changes in the Code, ICSTIS needs to place much more emphasis on proactive monitoring of compliance, particularly in high risk areas. ICSTIS should be issuing warnings to SPs/IPs before the public has a chance to complain and thus reduce its overall workload.

- The scope should be refined, taking out services sold by network operators as part of a wider package. Evidence clearly shows that there is a very low risk of consumer harm arising.

- The issue of refunds and redress is potentially difficult and proposals need to be thought through more thoroughly. Network operators may need more information from SPs before claims for refunds can be validated.

- Network operators should assist ICSTIS with ensuring SPs comply with the Code but it is not right to fine them because of the misdeeds of service providers.

- 'Forced release' (e.g. 7.3.3.) is not a meaningful phrase for SMS/MMS based services, as it is for voice based services. The STOP command fulfils an equivalent function.

- ICSTIS must improve the quality of Directions sent to operators and service providers – too often there are errors or the instructions contained therein are unclear.

Overview

The consultation on the draft 11th Code comes at an important time in the development of the mobile content industry. In recent years the value of consumer spend on mobile premium rate content has grown dramatically and is now valued at approximately 500m per annum in the UK.

As the Fathom report recently commissioned by ICSTIS pointed out, this is expected to continue on a strong growth path as more value added services, such as audio-visual content and payment for goods, reach the mass market. It is absolutely imperative that the ICSTIS Code is capable of providing appropriate regulation in the developing environment.

The MBG is very supportive of the objectives that lie behind the changes to the Code. It must be much more difficult for ill-intentioned content providers to benefit from treating customers badly or fraudulently. It is sensible to slow down the payment flows and for ICSTIS to demand much more information about who is operating in the market.

However, the MBG is disappointed at the overall approach to the revision of the ICSTIS Code of Practice.

Reform of the Code

We feel that this is an excellent opportunity to undertake a major overhaul of the Code, whereby only the broad principles are written into the Code and the detailed, service by service rules are held in the Guidance notes. Only that which is absolutely necessary to give the Committee legal authority should be included in the Code itself.

There would be a number of benefits to this approach:

- The Code would become a much more streamlined and less daunting document for the PRS community, particularly new providers.
- The Code could be written in technology neutral language.
- Most importantly, the market could regulated in a much more adaptable way.

The PRS industry changes very rapidly. The Code does not and cannot, now that there is a lengthy process that involves both Ofcom and the European Commission. It is also fairly monolithic in structure, so that it is impossible to change even the smallest part of it without going through the whole rigmarole.

The Code should be the equivalent of primary legislation – overarching and enabling. The Guidance should be the equivalent of secondary legislation – covering the detail, having legal force and being easier to implement.

The Guidelines would spell out the detailed, service by service rules. And, having a more cellular structure than the Code, would much easier to amend in a piecemeal way, as and when the need arose. This is vital in the premium rate market, where circumstances change very quickly.

Code needs to accommodate mobile sector properly

There are still far too many areas of the Code which are clearly written with the fixed market in mind. For example the body of the code still contains such phrases as '*all calls must be terminated by forced release at £30 spend' (*6.7.5) and *'inform the caller of the price per minute of the call'. But* a 'call' is defined as '*any communication which passes through an electronic communications network',* which could encompass a traditional circuit based call, a text message or a multimedia message (MMS). This terminology is a carry over from traditional voice based PRS and does not fit comfortably with the mobile models. The mobile sector is left with the job of shoehorning ill fitting regulation onto our services. The Code should either distinguish

between time based and event based activity or make separate definitions for clarity.

In fact, ICSTIS should consider avoiding the use of specific technology terms such as 'SMS' and employ more neutral language. Otherwise how will it deal with emerging carriers such as VOIP, where terms such as pence per minute may be irrelevant.

More fundamentally, the regulatory processes do not really fit squarely onto the business models that obtain in the mobile market. For virtually all Premium SMS based on a short code, the mobile operator is both originating communications provider (OCP) and terminating communications provider (TCP). In many instances the information provider is connected to the mobile networks via an aggregator (an SP, in the Code). Although these SPs are not networks (they do not manage/route the short codes), they own or control some of the data that a network might need to fulfil its obligations under section 9 of the draft 11th Code (of which more detail later) and which ICSTIS may need in order to investigate complaints. We need this new version of the code to take account of the actual circumstances in the market today.

ICSTIS is a Co-regulatory model

Secondly, there is no mention in the code of **co-regulation.**

It is very important that all parties do not lose sight of the fact that the arrangements for PRS regulation are established through a settlement between industry and the independent Committee. This is the way we want the industry to be regulated. If there were no settlement, the task, in accordance with the Communications Act, would revert to formal regulation under Ofcom.

Those involved in the premium rate Industry have every incentive to ensure that PRS remains a method of payment that customers find convenient and can trust and thus to develop a code that protects customers. The potential benefits of co-regulation over formal regulation are:

a) Those with a major stake in developing regulation are much more inclined to take ownership of it and want to see it work properly.
b) That industry, with its detailed inside knowledge, are best placed to develop the rules that are fit for purpose, and
c) That regulation can be more adaptable to changing circumstances.

In the PRS market, the Committee's task is to assure the public that the Code is fit for purpose and independently enforced.

With the recent appointment of three industry members, there has been a conscious effort to place more emphasis on co-regulation. The MBG would like this to flow through to the Code and to see the Introduction spell out the co-regulatory arrangements fully and thus make it absolutely clear where industry's responsibility lies.

There should be a few further changes to the principles underpinning the code:

1. ICSTIS should be looking to deregulate where there is no evidence of consumer harm or likelihood of it occurring. It is a central tenet of good regulatory practice that interventions should be targeted and proportionate and be withdrawn when no longer required. The Code suffers from a complete absence of any aspiration to keep regulation at a minimum.
2. The vision for the Code should not only foster trust in consumers but also promote innovation in new services that will benefit consumers. The success of PRS should not just be an optional bi-product of good regulation – it is central to it.

We need to derive more benefits from the more flexible approach that co-regulation can achieve. Although the code is in its eleventh version in twenty years (which would suggest a reasonable degree of adaptability), in reality, the market changes even more quickly than that. We welcomed the emergency code change that brought in the 30 days retention rule but have been frustrated that other rules (for example on subscription services, STOP etc.), that would have been useful, have not been introduced more quickly.

The MBG would also like to discuss how industry can, through consensual means, react more quickly to services that are causing obvious consumer harm but are still managing to operate within the bounds of the Code. We must have a greater degree of partnership between the aggregators, mobile operators and ICSTIS to address problems quickly. Operators and aggregators can generally react on their commercial contracts more quickly than is feasible for ICSTIS. Nevertheless, when the mobile operators point out a problem to ICSTIS, it is absolutely essential that ICSTIS follows up as quickly as possible thereafter with their own guidelines and changes in procedures. We would like to put in place service level agreements between ICSTIS and industry that reinforces the point that ICSTIS needs to be much more fleet of foot with guidance.

MNOs (and aggregators) are also anxious to hear about emerging issues from ICSTIS and, subject to reasonable requests and where ICSTIS are unable to act quickly enough, will use their commercial contracts to protect customers' interests.

The 3rd party mobile content market (i.e. that which is not supplied through the mobile operators' branded portals) is structurally designed to maximise creativity and innovation and to provide consumers with an enormous range of choice. For the most part, this is hugely beneficial and is evidenced by the diversity and explosive growth in value added services. But if consumers are to be protected properly, regulation must adapt even more quickly than it has hitherto.

Use of monitoring and warning procedures

Thirdly, the MBG believes that there are ways of policing the PRS market better through consensual means and without always having to go through a full investigative procedure or, worse, the long cumbersome process that changing the code now involves.

We believe that there is a strong business case for devoting more resources to monitoring proactively compliance with the Code – concentrating on areas of high risk and to use a **warning** system, in addition to an informal procedure. A warning system would be used by the executive in conjunction with the compliance monitoring processes, whereby ICSTIS can offer SPs the opportunity to disconnect services prior to them causing any significant consumer harm. A warning system could potentially be used for minor and more serious problems (providing there has not been an obvious intention to defraud). Its overriding advantage is that it is quick and puts a halt to any customer risk there and then. The mobile operators have been operating an analogous yellow card/ red card system with great effect.

At present, it appears that the workload of case officers is driven far too much in response to complaints from the public. The MBG would like to see breaches stamped on *before* they generate complaints. This has two advantages - 1. potential problems are eradicated before customers are harmed, thus reducing case officer work load and 2. ICSTIS can fire a first warning shot without going into the lengthy process that dealing with a public complaint entails - thus being even more resource efficient and creating a much happier customer base.

In the mobile market, SPs are very motivated to co-operate with this. They are usually unaware that IPs are potentially breaching the Code and would be happy to have problems pointed out to them and be given the opportunity to disconnect one rogue service before a network operator is asked by ICSTIS to terminate a whole short code (which may have several legitimate services hanging off it).

Responses to detailed questions

Section 1: Question 1
What are your views on our proposed definition of NOs? Do you believe that our proposal is workable and will help ensure that only those companies that can fulfil the obligations of a network can be considered a network for the purposes of our Code?

Section 1: Question 2
We have stopped short of including a requirement for NOs to become signatories to Artificial Inflation of Traffic (AIT) arrangements. What are your views on ICSTIS requiring AIT arrangements in the Code?

Section 1: Question 3
What comments do you have on whether there are any other ways for ICSTIS to define NO for the purposes of the Code.

The MBG agrees with ICSTIS' policy intent – that it is important to find entities in the value chain that are of substance and can be properly identified as operating a network in the UK. We agree with the method chosen by ICSTIS but do have reservations about the use of the expression 'direct network connection' in part ii of the definition.

The meaning of this is not clear. We understand that ICSTIS is attempting to define a wholesale interconnect, whereby a network is identified as one that is genuinely

participating in the telecommunications value chain and passing consumer traffic over infrastructure.

In order to define more closely who would fall within the definition of a NO 'direct connection' to a NO with certified billing, we would suggest a few additions:

a) The definition should specify that a network operator should have control over the PRS number ranges (e.g. the mobile short codes) relevant to the service in question. In the mobile market, aggregators have a 'direct connection' but the mobile operators control and manage the short codes. We would not expect an aggregator to be defined as a network.
b) We would suggest adding Section 120 (12) to the definition so that it is clear that the definition of a network operator includes networks that are connected to an aggregator.

The MBG would not agree with making it a requirement to become signatories to the AIT arrangements as being one of the determining factors for being a network operator.

Definition of a service provider

Section 1: Question 4

What views do you hold on whether, through both the definition of a service provider and the new proposed definition of a network operator, we have managed to ensure that a company in the value chain can be easily identified.

Subject to the comments above on questions 1-3, the MBG is content with the definition of service provider.

Paragraph 1.3 – Scope of the Code

Section 1: Question 5
What comments do you have on the scope and application of the PRS regulatory regime?

Section 1: Question 6
Do you consider that PRS regulations should formally cease to apply in areas where the risk of consumer harm appears to be relatively low? If so, how could we identify and differentiate those areas within the context of broad definition of PRS?

Section 1: Question 7
Can you comment on whether existing PRS regulations are applied proportionately, with more intrusive measures sufficiently focused on higher risk activities or providers?

There is a very strong argument that regulating directly supplied services (i.e. those where the customer's rights are protected under the operator's terms and conditions) in the same way as third party services is disproportionate.

Premium rate regulation was not developed to regulate value added services that were marketed by telecommunications providers (rather than service providers) and

paid for through the telephone bill. Hence services such as alarm calls, ring back, voicemail and directory enquiries have operated **without** PRS specific regulation. (It was only when the DQ market was de-regulated and the link between CP and customer broken, that PRS regulation was mandated on SPs).

And value added services supplied by 'triple play' operators (cable, Home Choice etc) are still not regulated in this way (e.g. PPV television, video on demand.) Because of market developments, the regulation of the mobile platform and other multi-service platforms is becoming inconsistent.

There is a clear distinction between value added services provided directly by communications providers to their customers – their rights are covered in their terms and conditions of supply– and those provided by third parties who just use the communications provider (CP) as a mechanism for collecting revenue.

Furthermore, the CP, who is dealing directly with the customer is incentivised to treat the customer fairly – competitive forces demand it, whereas the SP, one step removed is not always so motivated. This statement is borne out very strongly by the evidence from premium rate regulation over the years. The proportion of cases brought against directly supplied services as against third party services is tiny.

There are also economic arguments. CPs should not be paying a levy on their own services because they handle practically all customer enquiries relating to them themselves and ICSTIS does not get burdened with them.

The MBG recognises that there are a large number of third party services that cause very few problems too and they might be disadvantaged if CPs were forgiven the levy on their own services. However, it should be borne in mind that, in addition to taking calls in relation to their own services, CPs take a very much larger number of calls relating to third party PRS. Only a small proportion of these calls need to be passed on to ICSTIS. Thus, to a certain extent, the CPs are also shouldering some of ICSTIS' workload by handling such calls. We do not say this is a bad thing. It is preferable that customers can deal with their CP directly rather than go to a regulator. But it does provide reasonable economic grounds on which CPs do not pay the levy on self-provided products.

In addition to the issue of the levy, there is the matter of the detailed regulations. With the developing technology and new ways of presenting content to customers, it will not always be relevant to talk in terms of 'calls' or SMS. Nor will it always be relevant to have detailed pricing provisions when value added services are included within an overall package of voice calls, messaging and information services.

In relation to scope, the MBG believes that using objective criteria and long term evidence from the market, ICSTIS can establish reasonable grounds for excluding communications providers' own services (i.e. those that are covered by their terms and conditions) from the levy and the intricate detail of the ICSTIS code. In fact, ICSTIS would not be following the principles of better regulation if they did not.

There is a further issue on scope in relation to a new range of mobile services, which might be characterised as 'off handset purchases'.

In the traditional model, PRS is used to pay for a ring tone or wallpaper for the mobile phone or register a vote and it is quite clear the that "*the charge is required to be paid*

to a person providing an electronic communications network by means of which the service in question is provided" (Section 120(7) (c). Thus the PRS criteria are fulfilled.

Where the good/service is not actually delivered through the electronic communications network itself but elsewhere (e.g. a can of coke dispensed from a machine), it is only the payment facility that could fall squarely within the definition of PRS. There should therefore be no levy payable on the outpayment for the whole service. However, as there is generally no charge for the use of the payment facility, it is uncertain how the levy could be calculated. The MBG would like to discuss this further with ICSTIS.

When used in this way for 'off handset' goods and services, PRS are set in more direct competition with other payment mechanisms such as credit cards and e-money and where the margins are likely to be tighter. It will set PRS at an unnecessary and excessive disadvantage if margins are further eroded by the Levy based on the full outpayment.

Section 2 - Administrative provisions (network operators)

Draft paragraph 2.1.2 – Supply of information by a network operator

Section 2: Question 1
Can you see any issues or problems with NOs being able to provide ICSTIS with the requisite information on whether they meet the criteria to be recognised as an NO for the purposes of the Code? Please specify any other information you feel should be required?

Paragraph 2.1.2 (b) (ii) states that operators would need to provide ICSTIS with the names and home addresses of each of the directors. If this is information is in the public domain (at Companies House, say) then fine. Otherwise it is not realistic. (Also applies to 2.3.1 (a)(ii).

Draft paragraph 2.3.1 – Provision of service provider details

Section 2: Question 2
Can you comment on whether or not we have successfully ensured that recommendation 2 of the Ofcom report (which states that NOs must provide ICSTIS with information on the identity of their SPs etc) has been transposed adequately in the draft provision?

Some of the provisions in this section are not reasonable.

- Part b) – it is not reasonable, useful or necessary to ask NOs to carry out a solvency test. First, a solvency test is difficult to do and only relevant on the day on which it is done. It becomes out of date very quickly and so, unless there were continued monitoring, would be of no practical use. Secondly, a service provider is very unlikely ever to owe a network operator any money. The payments flow in the other direction: from the customer to the network operator and then to the service provider.

- Part g) – The phrasing of the code needs slight amendment. Section 2.3.1 opens "*Before making its network available to a service provider, the network operator*

must…..: and then continues in part g) ……"*satisfy itself, by taking reasonable measures, that its electronic communications network and/or service are not being utilised for services not compliant with this Code".*

This should be amended to "*satisfy itself, by taking reasonable measures, that the service to be launched by the service provider and which utilises the network operator's electronic communications network and/or service is designed to be compliant with this Code"*

First of all, an operator cannot continuously monitor it SP's compliance with the code *"before making [its] network available."* This is putting the cart before the horse. Secondly, it is not proportionate to require network operators to do this. The underlying services running off a premium rate number can change very quickly and very often, usually without the network operator's knowledge. While mobile operators, through our own self-regulatory initiatives, do go to considerable lengths to encourage service providers to comply with the ICSTIS Code, it is quite another matter to accept a regulatory obligation (with all that it now entails) to do so. The levy is paid to ICSTIS so that ICSTIS can monitor compliance with the Code.

Draft Paragraph 2.4 – Number porting

Section 2: Question 4
Can you provide comments on whether, from an enforcement perspective, there is justification for going beyond Ofcom's recommendation 3 relating to number porting?

The MBG argues that the obligation to inform ICSTIS of number ports should fall on the importing network. This is so that the transaction is only recorded once it has been successfully completed and the new NO has the opportunity to supply up to date information.

Section 2: Question 5
Can you provide comments on whether there are any practical issues or hurdles you can see in relation to number porting that need to be specifically addressed?

There should be a specified and reasonable time period by which the notification is done following the port. It is not really practical or desirable to do it in advance of the port, because ports may fail or the customer may change his mind.

Draft Paragraph 2.5.4 – Network responsibility for shortfall in fines etc

Section 2: Question 6
Do you believe that the proposed provision on network responsibility for shortfalls in fines etc is clear in its application, effectiveness and proportionality? If not, why not?

Draft Paragraph 2.6 – Network operator non-compliance

Section 2: Question 7
Can you provide comments on ways in which we might amend or supplement the proposed text on network non-compliance to ensure that our approach meets the key principles of transparency, proportionality and consistency?

The MBG has a few concerns in sections 2.5 and 2.6

- The mobile model for premium SMS based on short codes works slightly differently to the model for traditional long dialled PRS. Aggregators (service providers in the context of the Code) can hang more than one service off a short code. When this occurs, the network operator does not possess all the information that is relevant to determining which text messages ("calls") have been made to which service. In order to find out this information, ICSTIS will have to bring the service provider into loop. The Code needs to recognise that a network operator may not be able to fulfil part c) of section 2.5.1, where such a request is made.

- 2.5.1 and 2.5.2 are very prescriptive, using such terms as 'within such time as it shall specify' and 'immediately'. These should be qualified by 'acting reasonably'. This is a general issue throughout the Code and occurs in a number of places e.g. 2.1.2 – requirement to provide details of any changes immediately, 2.1.4 – requirement to provide information within the time period specified by ICSTIS. This is a change from the previous Code and is not workable in practice. Both the provision of information and taking action in relation to actual services may take some time to implement.

- In section 2.5.4, the MBG accepts that network operators are liable for any money that it has failed to withhold from service providers and which, in the event that the service provider absconds, are then not available to pay fines and refunds. But we do not agree that the network operator should also be liable for additional amounts of money in the form of a fine under 2.6.1. The mobile operators are very anxious to assist ICSTIS in its role of regulating service providers and are happy to co-operate with carefully targeted requests to retain outpayments etc. However, this willingness to assist does not extend to opening ourselves up to this additional liability. It is not proportionate.

- In section d) of 2.6.1, we note that ICSTIS may issue an instruction to pay refunds. For the same reasons as noted in the first bullet above, mobile operators may not have the information needed to establish whether customer claims for refunds are valid. 2.6.1 should also clarify that refunds are only payable from the money retained (as in 2.5.4).

- Network operators may be in a position to refund customers directly. If this is the case, any refunds made out of funds withheld from a service provider must take precedence over passing the same funds to ICSTIS, unless ICSTIS can guarantee to provide refunds to customers.

- It should also be noted that in some circumstances, the AIT provisions are invoked and the terminating network operator will not have the money that a customer is claiming in refund. In this case, recourse has to be to the customers own communications provider.

Section 3 - Administrative provisions (service providers)
Help notes – Our Approach

Section 3: Question 1
What are your views on how useful you feel the format of 'help notes' will be and, in

particular, do you have any comments on how to make them more useful to you?

See below

Section 3: Question 2
What alternatives should we consider in providing the premium rate industry with regular guidance on how to operate premium rate services? For example, would more regular statements on how to comply with the Code provisions be useful?

See below

Section 3: Question 3
How might ICSTIS help industry groups develop their own notes on Code compliance?

The MBG understands that 'help notes' will not be compulsory but that observance/non-observance of help notes could be used as a factor in determining the outcome of a hearing or the level of a fine. If an SP were to ignore a help note and not able to offer any reasonable explanation for having done so, it would be more likely to weigh against them than if the help note had been followed.

This seems to be a reasonable approach, although we would be happier with the existing terminology of 'guidance'/guidelines.

Guidance notes should utilise and reflect ICSTIS adjudications by presenting them as case studies.

As regards industry help notes/guidance, the mobile operators have been adding conditions to their commercial contracts to combat potential (and actual) abuses of premium rate services that are not covered by the Code. Ideally this should not need to happen and we are looking to ICSTIS to respond to emerging instances of significant customer harm. Introducing the prior permission for subscription services was a welcome example of how this can be done. The mobile operators would like ICSTIS to respond more quickly to new threats and are keen to work in closer partnership in stamping out misuse of PRS.

Draft Paragraph 3.2.7 – Customer service arrangements

Section 3: Question 4
What are your views on the extent to which you believe the draft provision relating to the requirement for SPs to have in place customer service arrangements reflects the requirements set out in Recommendation 9 of the Ofcom Report?

The MBG has a question about section 3.2.6:

Why is it that the SP only has to "*bring the Code to the notice of any information providers with whom they contract…..*"*?*

By contrast, in section 2.3.2 a network operator must "*require the service provider complies with the Code".* This seems to be unnecessarily asymmetric and we believe that SPs should also require IPs to comply with the Code

Section 3: Question 5

How useful do you believe it would be to have a specific help note setting out examples of application in addition to the Code provision relating to customer service arrangements?

It would be useful, bearing in mind that under 2.3.1 a network operator is obliged to establish whether an SP has 'adequate' customer care arrangements.

Section 4 - Information providers

Section 4: Question 1
What comments do you have on whether having provisions requiring IPs to comply with the Code are useful, practical and workable?

In the mobile sector, the IP is very often the more relevant entity to be dealing with customer queries and complaints, rather than the service provider, who is the content aggregator. Without absolving the SP of its duties, the IP should be actively encouraged to play a greater part in assuming its responsibilities to customers. After all, it is generally the IP that is much more visible to the customer. The Code could do more to express this.

In this section ICSTIS should re-emphasise that it is their firm intention to foster good behaviour among all participants in the PRS value chain. It may be worth considering whether the Committee treat IPs that respond directly to ICSTIS procedures should be treated more favourably to those that leave their service provider to bear the full brunt of ICSTIS actions. Another option is to enable ICSTIS to take action directly against the IP, through the use of the Contracts (Rights of Third Parties) Act.

Section 5 - General provisions applicable to all PRS

Draft paragraphs 5.2 to 5.3 – Harm and Offence

Section 5: Question 1
Do you have views on whether the proposed amendments to the harm and offence provisions are appropriate and will allow services to be judged more easily against generally accepted standards in society? Alternatively, please let us have any alternative wording that you believe we should consider in regard to the harm and offence provisions.

No comments.

Draft paragraph 5.4 - Internet Services

Section 5: Question 2
Do you have any views as to whether you believe the additional protection of requiring the use of age verification for Internet services is necessary?

See below

Section 5: Question 3

Do you have any comments on its practicability and any effects its introduction may have on premium rate service providers?

See below

Section 5: Question 4

Can you offer any views on what you would consider constitute a 'robust' system of age verification for Internet services?

See below

Section 5: Question 5

Are other practical and proportionate measures ICSTIS could take specifically in relation to preventing inappropriate access by minors to adult internet services?

The MBG would not favour the ICSTIS Code introducing more requirements for age verification for Internet access or to be specific about what constitutes 'robust'. We recognise that minors accessing unsuitable content on the Internet is a matter of public concern. It is the main reason that mobile operators took the initiative of introducing age verification for audio-visual content supplied over mobiles. However, we feel that the Code is the wrong instrument through which to address this problem. The public concern is around what children are seeing on line, not that they would have to pay for it through a premium rate mechanism. The proposed measures would just result in the problem being displaced to other number ranges. The ICSTIS Code should remain aligned to the standard required for Chatline services (as set out in 6.71. of draft – confirmation of date of birth and permission of the bill payer).

The debate and policy development about what children can and cannot be allowed to see on-line should remain within the remit of Ofcom and the Home Office. Such solutions that are arrived at should be comprehensive and applicable to all means of access, not just PRS.

Draft paragraph 5.5.1 - Pricing Information

Section 5: Question 7

Can you comment on whether you believe that listing all the requirements for pricing in one place in the Code is logical and will make finding relevant information easier for service providers?

See below

Section 5: Question 8

Do you have any comments on whether the inclusion of a pricing proximity requirement in the Code would be practical, enforceable and future proof? Would you consider that a pricing proximity provision would be more effective as a series of prescriptive Code provisions or a generic Code provision supported by help notes?

See below

Section 5: Question 9

Do you have views on whether you believe that pricing information should be spoken as well as displayed for television advertising? Do you believe there are alternative ways to provide pricing information to consumers in television promotions which we should explore?

5.5.1 This clause is worded for time based telephony services and we would like to see rewording to encompass Premium SMS i.e. "…the likely charge for usage of the service…"

5.5.1.b strike from "SMS" and put "messaging services or other means of applying a charge to mobile users account must clearly state in promotional material the likely charge, including VAT for receiving each part of the service." Also substitute "text messaging" for "mobile messaging service" in the next sentence. The changes will future proof this clause for MMS and direct-to-bill capabilities.

5.5.2 After " horizontal" insert "static".

5.5.3 This clause is worded for time based telephony services and we would like to see rewording to encompass Premium SMS.

5.5.4.a This clause does not cater for handset browsing services that charge via Premium messaging or direct–to-bill functionality.

5.5.4.b This is not acceptable as there is no equivalent for voice services (such as a voice over) and would be impractical for screens on mobile phones. The risk to user is mitigated by £20 forced termination on time based services. Other visual services are charged by downloads, not by duration and so an on-screen clock would not be relevant.

5.5.7 Clarification is needed as to which party is free of charging.

Our concerns on pricing clarity have been both on the proximity of pricing information close to the consumer call to action and in the clarity of any operation of the service that would mean final pricing is greater than that seen in the promotion. This applies to subscription services, services that require one-off membership fees in addition to repeating charges and services that require multiple messages or minutes to complete the expected transaction.

The absence of pricing proximity requirements would leave ICSTIS without any powers of enforcement. The MBG strongly prefer ICSTIS' second suggestion that that there is a generic code provision supported by guidance notes.

Draft paragraph 5.6 – Address Information

Section 5: Question 10
Do you have any views on whether setting out the general principle of providing address information is better than being prescriptive as we currently are in the Code?

Draft paragraph 5.9 - Use of the word "Free"

Section 5: Question 11
Do you views on the inclusion of a 'buy one get one free' type provision in the Code and do you consider there to be any inherent risks in adopting such a provision which could lead to a greater degree of consumer harm?

The use of the word 'free' has caused and continues to cause considerable confusion with subscription services. It is very important to be clear about what is acceptable.

For example, if a customer can enter a subscription service, obtain free initial product and then be able to cancel the service in a reasonable (as opposed to an unreasonable) time without any charges, this would be an acceptable use of the word 'free'.

If a customer pays a flat rate for a subscription service and is then sent 'free' (i.e. at no marginal cost) messages, our understanding is that the ASA would deem this an incorrect use of the word free; the right term being 'inclusive'.

The Code should make this clarification and be consistent with general law and regulation in this area.

The MBG also accepts the principle of 'buy one, get one free.

With regard to Part b), the definition may be understood by custom and practice but the language is obscure and could be expressed in a more user friendly way.

Draft paragraph 5.13 - Services specifically targeted at children

Section 5: Question 12
Can you offer views on whether it is right and necessary to more carefully define what constitutes a children's service? How could this be done?

Section 5: Question 13
Do you have any views on whether the maximum call costs for children's services should remain at £3 or whether it should be varied?

Section 5: Question 14
What guiding principles do you believe might reasonably be applied if we were to consider an increase to the maximum tariff for children's services and what additional safeguards should be considered in protecting children?

Section 5.13.4 needs to be re-phrased to make a distinction between time based and transaction based 'calls'. It is only relevant that time base calls are terminated by forced release. This point is also covered in comments on section 7.3.3.

Section 6 - Provisions relating specifically to Live services

Draft paragraph 6.1 - Live services

Section 6: Question 1
Do you have any comments or views on our proposed approach in relation to regulating Live services?

Section 6.7.4. The MBG recommends that 60p per minute is increased to **75p** per minute, to accommodate the market potential for 3G video based chat services.

Section 6: Question 2
Are there alternative options that we could consider in reducing the level of regulatory burden in this area while maintaining adequate levels of consumer protection?

Draft paragraph 6.8.1 to 6.8.4 - Claims for compensation

Section 6: Question 3
Do you have any views on whether you consider the draft provisions more clearly set out the regulations governing claims for compensation?

Section 6: Question 4
Do you consider the use of a help note in relation to these provisions is better suited than detailed Code provisions in providing examples of how the claims for compensation work in practice? If not, what could you recommend that might better achieve this aim?

Section 7 - Additional provisions relating to specific categories of Service

Draft Paragraph 7.2 - Betting tipster services

Section 7: Question 1
Can you offer your opinion as to whether you are content with the inclusion of the betting tipster provisions in the draft Code?

The MBG's concern here is that the Gambling Commission are in the process of establishing themselves. They will be publishing rules about the advertising of gambling services, including betting.

We would like to avoid the risk of conflicting rules. The Gambling Commission must have primacy in their specialist field and so we would recommend that ICSTIS' thoughts on betting tipster services remain within guidelines or help notes. This will make them much easier to change, in the event that they are in conflict with Gambling Commission rules.

Draft paragraph 7.3 - Chat, Contact and Dating Services

Section 7: Question 2
What views do you hold on our proposals in relation to chat, contact and dating services?

7.3.1 should refer to virtual audio or audio/visual chat services, just for clarity.

Section 7: Question 3
What views do you hold on whether the proposed provisions are adequate to prevent use of adult chat services by younger children?

7.3.2(b), the Code should make clear that it is referring to people authorised by the bill payer.

7.3.2 (d). The Stop command should be described as the 'universal' stop command and the Code must specify that the positioning of the STOP command and be aligned with the policy that has now been agreed and issued by the network operators and adopted by the Mobile Data Association. This is the only way to prevent customer confusion over the use of the STOP command.

7.3.2 (e) – insert: ‘except where customers have had to provide proof of age (rather than self-verify) prior to entering the chat service’ (as would happen with chat services that fall within the remit of the mobile operators content code.

7.3.3. This section needs to reflect the reality that some chat services are conducted by SMS and some by voice. (a) should state either per minute or per text message. The forced termination only applies to the voice call, as the customer using text/ SMS is providing a positive indication that he/she wishes the conversation to continue each time a new message is written and sent. Forced termination is meaningless in the context of SMS, as each message is a discrete transaction and the transactions can take place over an extended time period. Where continuation of the SMS service is not initiated by the subscriber (as in a subscription service), the customer needs to be sent the option to invoke the STOP command after the £20 spend, or once per month, whichever is the sooner. See comments to 7.10.3 below.

Draft paragraph 7.3.5 and 7.3.6 – Reasonable and valid claims for Compensation

Section 7: Question 4
Do you have any views on the appropriateness of having specific provisions relating to service providers’ responsibility for paying reasonable and valid claims for refunds chat, contact and dating services given that there is a general duty on service providers to consider claims for compensation for all services?

No comments**.**

Draft paragraph 7.6 - Directory Enquiries (DQ) Services

Section 7: Question 5
Do you have any views on whether you believe that the proposed provisions clearly set out the regulations applicable to DQ services and are proportionate and appropriate?

No comments.

Draft paragraph 7.8 - Pay for product services

Section 7: Question 5
What are your views on our approach to pay for product services? Do you believe that the approach will increase clarity? If not, why not? Are there other alternative options you believe we should consider in clarifying the regulations in respect of pay for product services?

7.8.2 Exempting subscription services from this “Pay for Product” section can lead to issues including distance selling obligations, £20 prior permission, 7.8.4. provisions etc.

7.8.3 This clause is for audio services only and needs to be rewritten to cater for messaging and event based services. What, for example, does (c) mean ‘take one call only’ to enable delivery of the product? Does this mean only one mobile originating call to request the product or one mobile terminating call to charge for the product or deliver it? This section is not ‘mobile’ friendly.

7.8.5 This wording must also cater for non-address delivery including vending machines and electronic services. The dispatch address, for example, would not always be relevant.

Draft paragraph 7.9.6 – Maximum cost for non-live sexual entertainment services

Section 7: Question 6
Do you have views on whether you consider our approach in respect of the maximum cost for non-live sexual entertainment services fair, proportionate and necessary?

7.9.6 needs to reflect the fact that some SES are conducted by text message and some by a traditional voice call. Comments for 7.3.3 above also apply here.

7.9.7 Delete final sentence. The purpose behind this sentence is not explained and the proposals are not workable. ICRA is not widely used. Any measures of this type should remain within the domain of Ofcom and the Home Office and not be incorporated in the ICSTIS Code.

Draft paragraph 7.10 - Subscription services

Section 7: Question 7
What are your views whether you believe the draft provisions for subscription services will adequately safeguard consumers while, at the same time, allow service providers to continue providing a variety of subscription services?

See below.

Section 7: Question 8
Are there other alternative options you believe we should consider in clarifying the regulations in respect of subscription services?

7.10.1.a The words should also be static.

7.10.1.b Any “Minimum charge” should also be displayed.

7.10.1.c remove word Generic and include in this document reference to guidelines that need to be updated to contain the rules on the operation of STOP for both charging and marketing.

7.10.1.c The publication of the STOP command is mandatory for subscription services– remove “wherever stop instructions are displayed”.

7.10.2 Initial message does not have to be free and can be included with initial message containing the charging instructions.

7.10.2.e reword to “how to stop the service” and refer to guideline as mentioned previously.

7.10.3 and 7.10.4 can be combined into one clause through the following suggested changes:

7.10.3 Change to read “Once a month or on the spend of £20, whichever is the sooner, the following….”

7.10.3 Add f. “how to cease / stop the service” and refer to guideline as mentioned previously.

For services that have an update period greater than monthly or are charged less than 50p per message (and less than £20 per month), the service can contain the price per message and the stop reminder inside the service messages as an alternative to the monthly reminder.

7.10.5 This does not address the consumer concerns in that having stopped a service, they continue to get messages from the same shortcode (and therefore believe they have not successfully stopped the service). The 5 UK networks have stipulated that any subsequent messages should have the text “FreeMsg” preceding the normal text message content.

Section 8 - Procedures and sanctions

Draft paragraph 8.1.4 – Complaint investigation

Section 8: Question 1
Could you comment on whether you agree with the proposed model to deal with IPs? Do you consider that it is a workable alternative? We welcome comments on whether you can see any other ways in which we can deal with IPs directly.

See response to section 4.

The MBG reiterates here a point made elsewhere in the response. When investigating a complaint on a service that has been accessed on a mobile short code and where the complainant is unaware of the service he/she has been billed for, the first port of call is the service provider (‘aggregator’ in our terms). ICSTIS must collect the MSISDN from the complainant and pass it this piece of information on, so that the SP can establish which IP the complaint relates to.

Draft paragraph 8.4d – Emergency Procedure

Section 8: Question 2
What are your views on the Secretariat being able to invoke the Emergency procedure in cases that exhibit similar characteristics?

The MBG agrees with this proposal in principle. Nevertheless, we would welcome some amplification as to what is meant by ‘exhibit similar characteristics, perhaps with some examples and an element of reasonableness.

Section 8: Question 3
Do you have any views on the timescales required for service providers and the Secretariat to be increased?

Draft paragraph 8.6.6 – Refunds

Section 8: Question 4
What are your views on whether we have successfully incorporated the requirements of recommendation 8 relating to refunds in the Code?

The issue of redress is a potentially complex one. In reality, the MBG does not expect there to be a major problem, as the service providers with whom we deal are businesses of substance and do not abscond without paying fines etc.

Nevertheless, this is an important topic and, in case they do have to be put into effect the rules must be set down clearly.

Our comments particularly address section 8.6.6 (b) to (e), where obligations may fall on a network operator.

First of all, we would recommend the deletion of part (b). We recognise that the retention will make it more difficult for SPs to pay fines and refunds but section (b) makes it far too easy for SPs to pass the problem to the network operator.. Refunds via network credits should be allowed unless there is a very good reason not to. SPs should be discouraged from making refunds conditional on receiving the customer's bank details.

Secondly, in the event that the SP does not issue refunds and ICSTIS issues a direction to a networks to do so, ICSTIS must also order the SP to submit to the network operator such information as is required to establish the validity of the claim. The network operator does not always have it.

A further problem is that the retention may not be sufficient to meet all the claims of affected customers. ICSTIS needs to decide whether it would be better for a network to pay claims on a pro rata basis or on a first come first served basis.

Process point: ICSTIS need to have a process and resource for informing network operators about the progress of cases against SPs and IPs.

There is potential for a network operator to be retaining several pots of money in response to various directions issued by ICSTIS. These pots will be identifiable in the books of the network operator but it will be necessary to keep operators abreast of the status of each pot – whether a case has been heard, what the result was, whether the cash can be released to the SP or the case is subject to appeal; or whether ICSTIS procedures have been exhausted and the three month period is live, or whether the three month period has expired and no further claims are payable.

This can either be achieved through a spreadsheet that is regularly (weekly) circulated to relevant personnel within network operators or, preferably, is made available on-line to authorised persons.

Paragraph 8.7 – Reviews

Section 8: Question 5
Can you provider us with your view on whether you believe that the procedures as set out in the draft provisions in relation to Reviews are clear?

Paragraph 8.8 – Oral Hearings

Section 8: Question 6
What are your views on whether the Chairman of the Hearing should be able to convene a conference for the purpose of providing Directions?

Section 9 - Procedures concerning Nos

Draft paragraph 9.1 – Network operator non-compliance

Section 9: Question 1
What comments do you have on whether you believe the procedures as set out in the draft provisions relating to NO non-compliance are fair, clear, adequate and proportionate?

The MBG reiterates that mobile operators are happy to work in partnership with ICSTIS to ensure that PRS are properly regulated. We agree that the 30 day retention rule will be helpful, although mostly in the fixed market, where this rule will entail most change. We are also happy to hold back money under emergency procedures and, if we fail to, to be liable for any shortfall in customer refunds and fines.

We are not happy, though, to accept the additional liability of a fine for a network operator, when it is the service provider that has breached the Code.

Section 10 – Appeals

Section 10: Question 1
What are your views on whether the proposed amendment relating to the appeals procedures better reflects the purpose of the IAB and the modern public law of England and Wales?

The MBG's response to the proposed changes in the IAB procedure are as follows:

1. Extension of the right to appeal ICSTIS decisions to the IAB by network providers**.**

   This seems sensible in light of the new obligations being considered for the network operators under the 11th code.

   The current grounds of appeal to the IAB relate to error of fact, error of law, or an irrational exercise of discretion.

   The MBG would like to discuss with ICSTIS why the grounds for appeal are not being extended so that network operators can appeal on the merits of the case, as is required under the new EU framework for communications services.

2. Tribunal Chairman to have discretionary power, at ICSTIS's request, to require increased security deposits or to require a sum of money be lodged as security for costs.

This discretionary power is something that courts exercise. However, in a court case, normally one party will request security and the other can make representations as to why it is unnecessary etc. There is no mention of representations like this from the SP or NO concerned and no mention of parameters for the exercise of the discretion (eg. fair to do so in all the circumstances). The MBG considers that an application by ICSTIS should be public and perhaps the subject of a hearing at which the appellant's views should be taken into account in influencing the Tribunal Chairman's exercise of discretion.

3. Tribunal chairman can stay proceedings where the Appellant owes a substantial sum in fines and costs or where they haven't complied with sanctions imposed by ICSTIS**.**

No comments.

4. Increase in maximum award of costs from £10k to £25k and increase for the award from £5k to £10k.

No comments.