Consultation on the Draft 11th Edition of the ICSTIS Code of Practice

Response from mBlox Inc.
1 Oliver's Yard
55-71 City Road
London EC1Y 1HQ

Introduction

mBlox welcomes the issuing of the draft 11th Code, and sees many improvements. This response focuses on areas where mBlox considers the draft could and should be further improved.

1. Definition of Network Operator

We consider this to be the cornerstone issue of the 11th Code. It must be determined in the context of the rights and responsibilities attaching to the status of "network operator", as opposed to "service provider". If there is in fact no difference in consequence, then Occam's Razor must apply. However, the current draft code does make a clear distinction, in the following manner:

-clause 2.6.1 provides that the network operator shall be exposed to fine and refund liability only if it has not undertaken its obligations of due diligence on service providers. If it has undertaken due diligence, then it is not exposed to the behaviour of the service provider, and has no policing obligations.

-in the case of an investigation, the network operator is not the subject of the investigation and is not exposed to the severe reputational damage that ensues.

In framing the definition of a network operator, ICSTIS must therefore be clear as to why it wants any value-chain player to enjoy these protections; it must then extend these protections to the appropriate player in the value chain for all of the services regulated by ICSTIS, regardless of technology. At present, the draft code is ambiguous on this matter.

mBlox agrees that there is a valid case for giving these protections in the premium-rate value chain. In any payments network, an important role is played by the "Merchant Acquirer" (to borrow a phrase from the banking world). The Acquirer converges transactions from many merchants, and routes them to one of many "Issuers". Their role is to operate as a transactional switch, and to act as a gateway to the payments network for merchants. As such, established practice shows that it is appropriate for them to undertake due diligence on merchants as a condition of access to the network, and to deny network access to delinquent merchants. It is also essential that they underwrite the refunds and penalties of the merchants they acquire. However, such Acquirers must have scale in order to serve the value chain effectively, and this scale prevents them monitoring or pro-actively policing merchants in the systematic manner required by clause 3.1.1.

Examples of Acquirers carrying out exactly the above roles are today:

-Terminating Network Operators in the PRS value chain
-Merchant Acquiring Banks (eg Barclays Merchant Services) in the credit card value chain
-Mobile transaction networks (aka Aggregators) in the Premium SMS value chain
-Broadband transaction networks (eg WHA in France) in the broadband telecoms billing value chain

mBlox submits that it is essential that the Code is written in such a way as to recognise "terminating network" status to any such person involved in a value chain ending in a telephone bill, regardless of the technology.

The current version of the Code effectively recognises two types of party in the network: Condition 11 operators, and those with a "direct network connection" (clause 1.1.3) to them. mBlox supports the use of Condition 11 status as a means of identifying Originating Networks. It is objective, statutory and limited. We do believe that it will rapidly become obsolete, as players such as Vonage and Skype become prime suppliers of consumer telephony (including content service billing), but that is likely to need attention at the Ofcom level, rather than primarily in the ICSTIS code.

mBlox submits that "direct network connection" is ambiguous and potentially unhelpfully limited, and would be better replaced in clause 1.1.3 by "wholesale transactional relationship". This should further be a defined term, a relationship recognisable by virtue of the terms in the contractual relationship with the Condition 11 operator. In addition, we submit that an Acquirer is recognisable by the multi-operator transaction switching function they perform, and that to carry out this role it is essential to have direct transactional relationships with at least three Condition 11 operators for each type of originating network (circuit-switched fixed, IP fixed, mobile) acquired.

Such an arrangement would have several advantages.

-by requiring contracts with multiple Condition 11 operators, a TNO will have to submit to due diligence by several, independent ONOs, thus weeding out borderline organisations or those too closely tied to one or other ONO.

-by mandating contracts with multiple ONOs, it will raise the entry barrier for a network to the extent that only those committed to the Acquirer role, or those with so much scale that in-house acquiring is cost effective, can justify the time and expense involved to become a TNO.

-by requiring the inclusion of certain terms in the "wholesale transactional relationship", ICSTIS can determine that terminating networks are subject not just Ofcom authority (which has not proved to be especially forceful in the premium rate area) but also to the power of contract; ONOs will have a strong vested interest in taking action against delinquent TNOs if so required, and through the inclusion of third-party rights for ICSTIS this could dramatically increase the sanctions on delinquent TNOs beyond those currently provided in clause 9.5

-it would rectify what is universally seen as a gross distortion of the current market – the classification of PSMS aggregators as service providers – and ensure that the problem does not repeat itself when broadband billers such as BT "Click 'n Buy" become more prevalent. The current situation is unsustainable, since it forces roles and responsibilities onto aggregators that they have no business to fulfil.

mBlox cannot accept an alternative reading of "direct network connection" to mean only a circuit-switched PSTN interconnection contract. In a rapidly changing telecommunications market, moving fast towards transaction-based charging to the phone bill rather than just call-based charging, such a limited and arbitrary interpretation would consign ICSTIS to irrelevancy.

2. Scope

mBlox is deeply troubled that any stakeholder should argue that, by dint of their greater virtue, they should be exempt from the provisions of the Code. We reject this unequivocally. The rules must apply to all, equally. In particular, branded portal services have something of a history of code violation – T-Mobile's sports services for example. Whether consumer harm is caused may be debated, but there is no justification for an a priori presumption of innocence. Such a presumption would also give mobile portals a colossal competitive advantage compared to third parties, and would thereby work against the objective of creating an ethical, thriving and open industry. For these reasons, all content services billed to the telecommunications bill, whether by 090, 087x, PSMS shortcode – or even Skype Prepaid account – should be covered by the Code.

3. Terminology

mBlox submits that the time has come to purge the Code of its use of the words "Call" & "Caller". In an industry that is moving rapidly from PSTN session-based billing to event-based billing (PSMS, WAP Billing, BT Click'n Buy), a more descriptive term is required. We recognise that the definition of "Call" is highly inclusive, and covers all these event-based transactions; nevertheless, it is misleading, and makes the Code sound obsolete. We propose the use instead of the terms "Transaction" and "Customer", qualified or replaced as necessary with the terms "Session" and "Event". The definitions framework should also include the concepts of "Call"/"caller", as special terms for session-based transactions and session-based customers, used for greater clarity in dealing with specific applications.

4. Structure

It is our belief that the Code should provide a goal-based framework of durable guidelines, specialised for the sector but not too prescriptive. Prescription is best left to the Help Notes. It is desirable to sustain a penumbra of risk around the boundaries of good behaviour, to dissuade service providers from testing them too closely. Reputable service providers will always follow Help Notes, but the ultimate arbiter must be the Code, which must provide Adjudicators with the flexibility to punish wrong-doing when they see it, regardless of whether it adheres to the letter of a Help Note or not. Putting detailed prescription into the Code works against this, and creates a maintenance problem too.

For this reason, mBlox submits that all of section 7 should be removed to the status of Help Note, or at the very minimum redrafted into much more general terms. As currently constituted, the inclusion of section 7 will become a serious problem for maintenance. As an example, the terms of 7.10 may well come up for review and modification in the industry in the near future, in order to provide greater flexibility for the ethical use of minimum term contracts. On the other hand, more restrictive provisions may be introduced to ensure the ethical use of non-mobile sign-up mechanisms. These are just examples of how the industry is likely to move at a pace far outstripping the change processes for the Code. It would be a disaster if business models in the industry could not develop, due to the crystallisation in the Code of some ideas current in the industry in mid 2005.

5. Detailed Remarks

5.1 "Number" should be a defined term. We submit that it should include mobile shortcodes.

5.2 Clause 1.2.4 should be removed. The procedures of the Board should be in a separate document, referred to in the Code.

5.3 Clause 2.3 currently makes failure to ensure the credit-worthiness of a service provider a breach of the network operators obligations under the Code. This is highly undesirable. The Code must allow for the legitimate decision by network operators to contract with uncreditworthy service providers, on the clear understanding that they are thereby underwriting all and any fines and/or refunds imposed on such service provider. This provision of credit into the market is an essential function to be offered by some network operators, and must not be classed as a delinquency by the Code. The Code should therefore

be modified to include ICSTIS' right to require network operators to pay service provider fines and/or refunds both when a network is non-compliant, and also when the network has notified ICSTIS that it is underwriting a service provider and is therefore exempt from the credit due-diligence responsibility.

5.4 In clause 2.5.2(d), it is essential that in all cases the withholding can and must be done on ICSTIS instruction. The clause currently only says this in the first sub case.

5.5 Clause 5.3.2 is totally meaningless in the context of event-based billing, yet there is an important thought behind it that is applicable to eg PSMS as well. That thought needs to be made explicit and articulated correctly in this clause.

5.6 Clause 5.4 clearly refers to diallers. Yet the operators have just introduced Off-Handset Payment (OHP) by PSMS, and this sector will grow hugely in the next few years. The terms of this clause are inapplicable to these new means, and will cause confusion if left unmodified.

5.7 Clause 5.5.1 is overly limited, and does not recognise the full range of session- and event-based billing transactions that are now available. This should be redrafted to be more general in scope.

5.8 Clause 5.5.4 is unworkable in the mobile environment, since it unequivocally requires mobile phones to carry out functions they are incapable of performing.

5.9 Clause 5.5.7 is mis-phrased, since it is acceptable to include instructional messages as payload in premium billed messages that would have been sent anyway. A better construction would be "No additional charges may be levied for the reception of instructional messages".

5.10 Clause 5.9 is laudable in objective, but is drafted rather obscurely. Offers such as "First week free" or "Buy two, get one free" must be clearly legitimised.

5.11 In clause 8.1, we strongly advise that the Code make clear ICSTIS' policy on the confidentiality or public disclosure of investigations. At present, this is not clear, giving rise to suspicion and hostility from service providers when ICSTIS makes disclosures in an ad-hoc manner in response to press interest.

5.12 In clause 8.1.4, it is essential that ICSTIS deals with information provider and not the service provider under the conditions given, at the request of the information provider. This is important to activate the indemnity clauses many service providers put into their contracts with IPs, thereby ensuring that IPs cannot slip responsibility for fines back on the service provider by means of a legal loophole.