



**Statement on the provision of
refunds to consumers and the
development of industry best
practice for customer service: A
consultation paper**

Issued by ICSTIS on: 11 November 2005

Closing date for comments: Monday 6 February 2006

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Appendix

"The Regulation of Premium Rate Services: An Ofcom Report for DTI", Chapter 7 Redress. Published by Ofcom, December 2004

Executive summary

The Regulation of Premium Rate Services: An Ofcom Report for DTI (the Ofcom Review), published on 9th December 2004, undertook a review of the regulation of the premium rate sector, especially in light of the significant increase in public complaints about premium rate services (PRS) earlier in 2004. These complaints arose primarily from the growing problems with so called “rogue” Internet diallers.

As a result of the Review, Ofcom made a number of recommendations for improvements to the regulation of the sector.

One part of the Ofcom Review was dedicated to the issues of consumer redress and refunds and what improvements could be made in this area by industry and ICSTIS to improve the arrangements for redress, so restoring, or helping to restore, trust and confidence in PRS. Redress, in the form of an order to pay reasonable and valid claims for compensation, has been a sanction available, and used, by ICSTIS since the inception of the 10th Code of Practice in January 2004. Ofcom, in its Review, recognised that redress is a consumer issue generally across many sectors and that the way in which the PRS value chain is constructed does present some unique difficulties about how best redress can be arranged to maximise consumer protection and ease the burden for how it is best secured and administered.

Like Ofcom, we have taken the view that the most appropriate course of action in the context of our regulatory remit is to focus on “refunds”, that is the actual amount the consumer was charged and not some additional compensation to deal with other related issues such as general distress, loss of time negotiating a rebate for that loss and associated costs tangible or otherwise. To go beyond the actual financial detriment which relates to the telephone charge would effectively turn ICSTIS into an ombudsman rather than an industry regulator. Therefore this consultation paper focuses on refunds, and especially the amount paid over by consumers for services that have caused detriment as a result of breaches of ICSTIS’ Code of Practice.

This paper also deals with an associated issue, again related to an Ofcom recommendation. That is that we should work with industry to develop best practice guidance on customer service. Section Five of this paper deals with that specific issue.

We seek the views of all stakeholders by **Monday 6 February 2006**.

Where possible, comments should be submitted in writing by Word and sent by e-mail to pwhiteing@icstis.org.uk. Copies may also be sent by mail or fax to:

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Section One: Introduction

The Regulation of Premium Rate Services: An Ofcom Report for DTI (the Ofcom Review), published on 9th December 2004, undertook a review of the regulation of the premium rate sector, especially in light of the significant increase in public complaints about premium rate services (PRS) earlier in 2004. These complaints arose primarily from the growing problems with so called “rogue” Internet diallers. Some two thirds of the 62,000 complaints we received between August 2003 and July 2004 related to diallers. In most cases the breaches were associated with a direct financial loss suffered by consumers. This data appears to be consistent with data published by BT in October 2004 which said they had dealt with 45,000 complaints about diallers with a further 9,500 cases at that point pending resolution on the same matter.

As a result of the Review, Ofcom made a number of recommendations for improvements to the regulation of the sector. Most of these recommendations related to the rules set down by ICSTIS in our Code of Practice, on which an extensive revision on the 11th Code of Practice, incorporating these recommendations, is now underway, in the light of consultation responses.

One part of the Ofcom Review was dedicated to the issues of consumer redress and refunds and what improvements could be made in this area by industry and ICSTIS to improve the arrangements for redress, so restoring, or helping to restore, trust and confidence in PRS. Redress, in the form of an order to pay reasonable and valid claims for compensation, has been a sanction available, and used, by ICSTIS since the inception of the 10th Code of Practice in January 2004. Ofcom, in its Review, recognised that redress is a consumer issue generally across many sectors and that the way in which the PRS value chain is constructed does present some unique difficulties about how best redress can be arranged to maximise consumer protection and ease the burden for how it is best secured and administered.

Ofcom, in their Review, also addressed the question of what redress means. It is worth quoting directly here from the Ofcom Review (the full text of Section 7 being attached at the end of this paper):

7.3 Ofcom has considered whether redress in the context of this report means a refund only or a refund with additional compensation, for example for the time and effort expended by the consumer in complaining. Calculating such additional compensation is inevitably somewhat more subjective in nature than simply refunding the cost of the call and requires a more sophisticated process (e.g. the use of an adjudicator) to establish what level of additional compensation may be appropriate. For the purposes of this report Ofcom has focussed on how full refunds can be more effectively provided, rather than considering the issue of additional compensation in any detail.

7.4 Ofcom acknowledges that requiring additional compensation to consumers over and above a simple refund may have a deterrent effect, but Ofcom considers that this deterrent effect can be created more directly by appropriate use of fines, as discussed elsewhere in this report.

Like Ofcom, we have taken the view that the most appropriate course of action in the context of our regulatory remit is to focus on “refunds”, that is the actual amount the consumer was charged and not some additional compensation to deal with other

related issues such as general distress, loss of time negotiating a rebate for that loss and associated costs tangible or otherwise. To go beyond the actual financial detriment which relates to the telephone charge would effectively turn ICSTIS into an ombudsman rather than an industry regulator. Therefore this consultation paper focuses on refunds, and especially the amount paid over by consumers for services that have caused detriment as a result of breaches of ICSTIS' Code of Practice. This does not prevent consumers, however, from pursuing other forms of compensation that go beyond refunds of telephone charges incurred. Alternative dispute resolution remedies exist in the telecoms market notably through schemes such as Otelo¹ or CISAS² and consumers can pursue these avenues too.

Specifically Ofcom made three recommendations in relation to refunds:

- *Recommendation 7: Redress should continue as a possible ICSTIS sanction against SPs for breach of the CoP. ICSTIS should codify and publish the circumstances in which it will use this sanction, essentially where there has been a serious breach of the CoP leading to significant harm to consumers and/or where an intent to mislead or defraud has been demonstrated.*
- *Recommendation 8: Where redress is ordered as a sanction against the SP and when directed to do so by ICSTIS, TCPs should make funds withheld by them available for consumers to claim redress for three months after an adjudication under the CoP.*
- *Recommendation 9: SPs should be required in the CoP to have adequate customer service and redress mechanisms, including a UK customer service telephone number. ICSTIS should monitor compliance with these obligations, including a programme of 'mystery shopping', and work with the industry to develop best practice guidance on customer service.*

In respect of Recommendation 7, refunds are to continue as a possible ICSTIS sanction and this consultation document aims to explore and set out ICSTIS' views on the circumstances in which we believe refunds should be used as a sanction.

Recommendation 8 is currently being taken forward as part of the consultation on the 11th Edition of the ICSTIS Code of Practice – paragraphs 8.6.6 (c), (d) and (e) of that consultation refer.

In respect of Recommendation 9, the 11th draft Code contains a new provision (at paragraph 3.2.7) obliging service providers to have adequate customer service and refund mechanisms, including a non - premium rate UK telephone number. We do intend to monitor compliance, in particular through mystery shopping, with this requirement once it takes effect in 2006 and we propose to use this consultation also to explore and develop with industry best practice guidance on customer service.

In Section Four of this paper we deal separately with the area of certain forms of live (voice) service where ICSTIS does have extensive involvement with a compensation scheme. Such a scheme was not judged during the Ofcom Review process to be

¹ Office of the Telecommunications Ombudsman

² Communications & Internet Services Adjudication Scheme

suitable to the wider needs of the PRS sector focused as it is on particular types of service which do pose higher risks of, in particular, unauthorised use.

Section Two: Dealing with refunds

Introduction

The delivery of PRS to consumers, as well as being governed by the ICSTIS Code of Practice, is like many other consumer services in that it is subject to consumer law. There is much consumer law which deals with faulty goods and services or with consumer rights when those goods, when purchased, are not fit for purpose. The Sale of Goods Act 1979 (as amended), the Supply of Goods and Services Act 1982 and the Consumer Protection (Distant Selling) Regulations 2000 are just some examples.

At the heart of much of this legislation (and our Code of Practice) are requirements that the product should be of a satisfactory quality, be as described by the promotion or advertisement and it must be fit for purpose. Consumers have civil remedies available to them to enforce these rights. The provision of a dedicated industry funded co-regulatory body (ICSTIS) and a Code of Practice should, for the most part, have the affect of providing a speedy consumer-friendly means of enacting those civil remedies without the need to go through a legalistic process which can be costly for all parties. Action by ICSTIS also ensures that marketing and services in breach of the Code of Practice are dealt with at the aggregate level, providing protection for all consumers, not just individual complainants.

What do we mean by a refund?

Consumers have expectations that if they secure a refund for faulty goods or services then that refund should equate to their financial outlay on those goods and services. We agree and believe that to be meaningful and have credibility a refund must be the total charge (including VAT where applicable) for the relevant service which has been passed to the consumer. We recognise that this will usually be more than the service provider made from the service through their revenue share. But the consequences of revenue share arrangements that exist in the market should not be laid at the feet of the consumer who has little if any awareness of the business arrangements that drive PRS. By extension we also believe that a refund should therefore cover what the Originating Communications Provider (OCP) actually charged the consumer for the relevant service as featured on the consumers' telephone bill. That refund should also take full account of the fact that charges for the same service may vary, for example where tariffs can be higher from a Mobile Operator.

We believe that these proposals are in line with consumer law generally. If a consumer is entitled to a refund then it must be the full cost paid or charged, not a lesser amount related to one party's profit from providing the service. If a consumer is entitled to a refund from a shop for faulty goods, the shopkeeper has to refund the full cost borne by the consumer, not just their profit although the retailer may of course make a claim against the supplier or wholesaler.

Q1. Do you agree that a refund should equate to the full cost of the service that the consumer actually paid for the service? If not, why not and what alternative would you suggest?

Is there an amount below which refunds can be denied?

We do not believe there is a threshold limit below which legitimate refund orders can or should be ignored. In our view it is a consequence of operating in a micro-payment

business that the costs associated with dealing with a refund can sometimes be high compared with the revenues obtained. This cost should feature in a provider's charging model. That said, when adjudicating it will be within ICSTIS' power to determine, where appropriate, to only award refunds in cases where the financial detriment has exceeded a particular threshold. Such cases are likely to be rare but could arise where to not do so could create unreasonable administrative hardship on the service provider involved in processing a great many very small refunds and where the content or service was generally otherwise delivered to consumers.

Q2. Do you agree that a refunds arrangement should have no formal lower cost threshold and that ICSTIS may vary from this in case specific situations where to not do so would be disproportionate?

In what form should refunds be provided?

In an ideal world consumers should be able to secure their refund direct to the telephone bill in the form of an itemised credit. We recognise the practical limitations of this as a consequence of the fact that the telephone bill in this context is a mere billing tool being used by parties to supply content or other services to consumers and that the billing telephone company usually has no direct contractual relationship with the service or content provider. It is our view that consumers must be offered a refund in the form of money or money equivalent such as through a cheque or postal order or other direct money where a direct credit cannot be made to the consumer's phone account. We equally appreciate that processing refunds via cheques or postal orders can prove to be a disproportionately costly exercise to businesses and that their value to their customers, including the effort of banking them, maybe low where the actual amount of the refund is a small sum. It is also a barrier to those without a bank account. We therefore very much endorse other arrangements that service providers may choose to make with consumers from which they derives benefit. We are aware of examples of alternatives offered to consumers such as books of stamps or vouchers for high street stores that can be a more convenient means of refunding the consumer in a practical way that can be equally beneficial to them. We see no problem with this as long as the consumers are in agreement.

Q3. We would welcome feedback and examples of how customer service refunds can be made in ways that meet the needs of both the consumer and the service provider who has to facilitate and administer the refund.

Q4. Do you agree that refunds may be made in a number of ways as long as the customers are in general agreement to accept an alternative to a monetary refund being offered by the service provider or other party involved in the provision of the service?

What evidence is reasonable in order to ensure refund applications are genuine and not fraudulent?

In the absence of an ability to make a direct refund onto a telephone bill, as a consequence of the complex value chain that exists in PRS, one issue which service providers face is how they can best authenticate that the customer complaint is genuine and not fraudulent. We believe that unnecessary barriers should not be placed in the way of consumers obtaining what is in effect their legal right to a refund as a consequence of a service not being fit for purpose. We equally accept that service providers have a right to protect themselves against fraud or abuse. Accordingly the principles that we would expect to be adhered to are:

- ❑ In cases where ICSTIS has ordered a refund as part of a sanction following a breach of the Code of Practice, that requests for the necessary refund from the relevant complainants should not unreasonably be resisted;
- ❑ We expect service providers to act in good faith when handling such requests and in particular in requiring evidence that the payment has been made or is requested by the consumers telephone company;
- ❑ Where there is doubt or disagreement, the burden of proof in such cases should be with the service provider to demonstrate that the charges were not made or that the consumer's case is not covered by the relevant ruling from ICSTIS.

We accept that service providers have a right to satisfy themselves, in what is a remote transaction environment, as to the validity of the refund request and to protect themselves against fraud or abuse. To that end we think it is reasonable, if seen as necessary, to request a copy of the relevant phone bill from the consumer with the itemised charge appearing as a mean of validation. As a consequence any refund can be directed to the bill payer and their address.

Where a bill is not present then it is not unreasonable, where necessary to ask that the consumer obtain such a copy of a bill from their phone company by way of evidence. We would emphasise however, that this should only be necessary where there is doubt about the authenticity of the claim and that all reasonable attempts, through calling line identification (CLI) record checking for example, should be made to handle the refund without the need for a copy of a bill.

We also recognise that a good many consumers, especially those of Mobile Operators who may have pre-pay arrangements and therefore have no telephone bill to evidence the transaction, albeit copies of bills may be made available by the Mobile Operator. We recognise that this is a particular area of difficulty in practice for consumers and Mobile Operators alike and would welcome views on how these matters can best be resolved in a way that meets the overall refund objective without imposing unreasonable practical obstacles.

Q5. We would welcome information about how service providers manage these issues today in order to benchmark various practices.

Q6. We would welcome views on what is a reasonable degree of evidence in such situations for a service provider to demand given the risks of fraud.

Q7. What suggestions do you have for how best to manage the authentication of consumer requests whilst minimising the barriers to consumers when seeking refunds? How can this be kept under review?

Q8. What evidence is it reasonable to ask of a consumer to evidence their disputed PRS transaction where their network provider does not provide bills or where they are not itemised?

Q9. We would welcome views about how matters of refund authentication can best operate in an environment where consumers do not ordinarily receive a telephone bill such as the majority of mobile phone users who have pre-pay arrangements.

Q10. We would welcome any other views on customer authentication and fraud management which might aid the development of an appropriate refunds framework.

How to communicate refund availability?

The Ofcom Review recognised the limits of the redress/refund sanction applied by ICSTIS as it requires service providers found in breach, and where sanctioned by ICSTIS, to reimburse consumers who have complained to ICSTIS. The Review further recognised that requiring more proactive redress – that is notifying **all** affected consumers that they are entitled to a refund - would require the co-operation of a number of parties in the PRS value chain, notably the service provider, and Terminating and Originating Communications Providers.

Ofcom's Review limited itself to considering refunds for consumers who complain and left open for ICSTIS and the industry to consider how the issue of a wider proactive policy of notification to all affected consumers could best operate. There are further steps we propose to take to inform consumers better in general about those particular cases we investigate where we do impose a sanction of a refund on the service provider, such as through a revamped consumer section of the ICSTIS website. However, we nevertheless believe there are practical and other resource constraints on how far ICSTIS can reasonably be expected to inform all affected consumers of their rights without there being the willing support of commercial parties in the value chain. At the same time, Ofcom are currently consulting on proposals to strengthen codes of practice and Dispute Resolution arrangements as they apply to OCPs about the provision of information about PRS. This includes a requirement for OCPs to provide basic information to their customers on obtaining refunds in cases of PRS disputes.³ Ofcom's proposals interlink with this issue.

Q11. Do you think that industry or ICSTIS has a responsibility to notify all affected consumers of their rights to claim a refund when this has been made the subject of a sanction by ICSTIS? If you do, where does responsibility lie and why?

Q12. What views do you have on how affected consumers, whether they complained or not, can be advised of their rights to a refund where that has been demanded by ICSTIS as a sanction?

Q13. What further potential is there in the ICSTIS adjudication information being shared with the customer contact staff of the OCPs who may be able to alert future complainants about services to their right to a refund (where sanctioned by ICSTIS)?

³ Providing citizens and consumers with improved information about Number Translation services and Premium rate Services was issued by Ofcom on 28 September 2005. A copy is available for download at www.ofcom.org.uk

Section Three: ICSTIS' proposals on the use of its sanctions powers to order a refund by a service provider

Introduction

It has been a recent provision of ICSTIS' Codes of Practice that refunds can be ordered as a sanction where a service provider has breached the Code. The current 10th Edition Code (as amended) and draft new 11th Code both allow for ICSTIS to order refunds as part of a package of sanctions against a service provider found to be in breach of the Code of Practice by ICSTIS. Following an Ofcom Review Recommendation, in the 11th Code we propose to support this principle with provisions that ensure that where the sanction is issued to order a refund and is not met by the service provider, that the Terminating Network Operator (TCP) then becomes responsible to meet the obligation up to the limit of the total revenues retained from the service provider for the service in question. We recognise that this places a new burden on TCPs but hopefully with improved due diligence combined with the 30 day rule, the number of occasions on which this provision needs to be used will be minimal.

In setting out our views on when it would be appropriate to use the power to award a refund as a sanction against a service provider it is necessary for ICSTIS to outline the process by which we determine Code breaches and sanctions. This will be the subject of a separate policy statement in due course in which we will set out ICSTIS' approach to sanctions in more detail. This will take account of a new upper limit for fines (currently £100,000) which DTI have recently been consulting should the new limit take effect.

Investigations and Code of Practice breaches - Summary

The initial investigation is made by the Secretariat which will write to the service provider outlining the nature of the alleged contraventions of the Code, inviting the service provider to respond with its comments on the alleged breaches.

Thereafter a report is placed before an adjudicatory panel of the Committee (the panel) which sets out the outcome of the Secretariat's investigation presenting details of the investigations made, including any representations made by the service provider. The panel will then determine whether the Code has been breached. Once the panel have determined whether breaches are to be upheld then, and only then, do they give considerations to the nature of the severity of the breaches and an appropriate sanction to apply.

Sanctions - Summary

Breaches where the service and/or its related promotional material had serious shortcomings will be treated more severely in terms of a sanction to be applied than those where the breach was more technical or minor and led to little consumer harm or detriment. The panel, in determining a sanction will also have regard to any aggravating or mitigating factors which could either raise or lower the normal sanction in such a case. Examples of aggravating factors would be the service provider refusing to co-operate with ICSTIS throughout the investigation or the unusually high volume of complaints. Examples of mitigating factors would be the extent to which the service provider attempted to remedy the consequences of the

breach at the earliest opportunity, the genuine nature of the error, the level of co-operation with the Secretariat or a low level of complaints.

All of these factors will then be considered by the panel, along with the service provider's breach record, and on this basis a sanction will be applied usually in the form of a fine and/or other sanctions. Cases of a more serious nature will usually attract a higher fine or combination of other sanctions available to ICSTIS. Such cases will be ones generally where there is evidence of one or more of the following:

- ❑ An (and possibly excessive) identifiable financial detriment to individual consumers arising directly from a Code breach or breaches, and a consequential gain to the service provider;
- ❑ a wilful intent by the service provider to deceive the consumer or engage in other forms of unconscionable conduct;
- ❑ the product or service not being supplied or being of a manifestly unsatisfactory quality;
- ❑ the marketing or promotional material was in some way fundamentally misleading and as consequence consumers were misled into purchasing a service that they would not otherwise have wanted to purchase;
- ❑ the product being inappropriately priced in such a way to disguise the true cost to the consumer which had they been aware of prior to purchase would have significantly impacted on their decision to purchase. One example here is to describe the PRS as "free" when it clearly is not and/or

We have taken the decision that cases which contain a combination of the above characteristics will be ones that will usually also attract the sanction of requiring refunds be paid to complainants. For cases of a lower seriousness rating, and where the above factors are not present, we propose to use our discretion, based upon the facts of each case, the nature of the breaches along with the nature of the aggravating and mitigating factors to determine whether a refund obligation should also follow.

Whilst concluding that in such cases, where the above characteristics are generally not present, that the refund sanctions will not automatically apply it would nevertheless be good practice for a service provider to consider all reasonable requests from affected consumers and the offer of it could be a mitigating factor when determining any sanction.

Q14. Do you have any views on this approach to considering how refund sanctions will be determined by ICSTIS?

Section Four: The Live Entertainment Services compensation arrangements

The ICSTIS Compensation Scheme for Live Services (voice only) was set up in 1989. It exists to provide compensation to those whose telephone has been used without authorisation to call certain types of premium rate services – normally Live Entertainment Services such as certain adult services or psychic reading services. The Scheme is largely administered by the service providers in question but, where necessary, the Adjudicator, who is independent of ICSTIS, considers claims for compensation and makes directions as appropriate. A separate Scheme exists for multi-party chat services.

If required by ICSTIS to join the Scheme, service providers must, before operating Live Services, fulfil the requirements of Section 5 of the Code of Practice (10th Ed as amended). They must:

- contribute to the Live Conversation Service Providers' Compensation Fund as required by the Trustees,
- enter into a contract with the Trustees of the Compensation Fund in a form agreed by ICSTIS,
- lodge a bond with ICSTIS as security against meeting compensation claims (a 'Compensation Scheme Bond').

The Adjudicator has powers to award compensation having regard to the reasonable care the applicant made to protect themselves from unreasonable unauthorised use. This compensation will relate directly to the financial loss incurred arising from the cost of the premium rate calls in dispute and subject to the claim. The Adjudicator may also make an award for compensation of an additional amount which relates to the legitimate and necessary costs that the consumer incurred in making and bringing the claim.

These compensation arrangements for Live Entertainment Services and multi-party chatline services have worked well from both an industry and consumer perspective over many years and we have no intention, as a result of this consultation and proposals, in any way to interfere with these arrangements.

Q15. Do you agree that the arrangements for the ICSTIS Compensation Schemes for Live Services and multi-party chatlines should remain as they are and should not be affected by proposals in this consultation paper? If not, why not?

Section Five: Developing Industry best practices for customer service

As is stated in the introduction to this paper, Ofcom made a recommendation in their Review of PRS regulation that ICSTIS should work with industry to develop best practice guidance on customer service. We are entirely content to take forward this proposal with industry and believe that any such emerging guidance would not be binding on service providers or others, and would not form part of ICSTIS' Code of Practice, albeit the Code does contain certain obligations with regards to customer service. If taken forward by many providers in the value chain, especially those with a consumer interface for the delivery of the specific services – namely service providers and content/information providers – we believe it will contribute to our vision of ensuring that anyone can use PRS with absolute confidence. And greater consumer confidence in PRS should also contribute to a healthy and growing market for all forms of value-added content whether that is voice or data services including those that are now emerging on new platforms such as 3G mobile handsets. We see such guidance being directed at the content and service provider members of the industry; not at Originating Communication Providers who already have customer service obligations as a result of General Conditions imposed by Ofcom. These extend to the management of enquiries and complaints about PRS and which are the subject of other recommendations in the Ofcom Review. We believe that evidence of good consumer practice would also be something that ICSTIS could have regard to as a mitigating factor in situations where complaint investigations are launched by ICSTIS.

We believe that the best starting point to take forward this recommendation would be to establish a Working Group comprising ICSTIS and practitioners primarily from the service and content provider communities who have a significant contribution to make towards developing best practice. This, we believe, would enhance credibility of the outputs with the great majority of those other content or service providers who are in the PRS market for the long term.

Such a group could be chaired by an ICSTIS Committee member, by an industry representative or by someone independent of industry and ICSTIS altogether. We suggest it be made up of about 10 members drawn from industry practitioners primarily focused in the service provider parts of the value chain. It would be for that group to determine its terms of reference and work programme. We suspect that it will want to identify best practice in delivering total customer satisfaction taking account of the many dimensions a business needs to plan for in order to deliver satisfaction such as:

- Quality products or service including fulfilment
- Accuracy of service
- Promptness of response
- Staff attitudes and training with respect to dealing with customers
- Complaints, disputes and refunds handling

Q16. Do you agree that ICSTIS should take forward the development of best practice guidance for customer service in the way outlined above? Can you identify any organisations from which a representative should join this working group?

Q17. Are there other aspects of customer satisfaction that you believe a Working Group ought to consider when developing best practice guidance for customer service?

Q18. Do you have any views about the make-up and structure of a Working Group, including who should chair it?

Section Six: Summary of consultation questions

Q1. Do you agree that a refund should equate to the full cost of the service that the consumer actually paid for the service? If not, why not and what alternative would you suggest?

Q2. Do you agree that a refunds arrangement should have no formal lower cost threshold and that ICSTIS may vary from this in case specific situations where to not do so would be disproportionate?

Q3. We would welcome feedback and examples of how customer service refunds can be made in ways that meet the needs of both the consumer and the service provider who has to facilitate and administer the refund.

Q4. Do you agree that refunds may be made in a number of ways as long as the customers are in general agreement to accept an alternative to a monetary refund being offered by the service provider or other party involved in the provision of the service?

Q5. We would welcome information about how service providers manage these issues today in order to benchmark various practices.

Q6. We would welcome views on what is a reasonable degree of evidence in such situations for a service provider to demand given the risks of fraud.

Q7. What suggestions do you have for how best to manage the authentication of consumer requests whilst minimising the barriers to consumers when seeking refunds? How can this be kept under review?

Q8. What evidence is it reasonable to ask of a consumer to evidence their disputed PRS transaction where their network provider does not provide bills or where they are not itemised?

Q9. We would welcome views about how matters of refund authentication can best operate in an environment where consumers do not ordinarily receive a telephone bill such as the majority of mobile phone users who have pre-pay arrangements.

Q10. We would welcome any other views on customer authentication and fraud management which might aid the development of an appropriate refunds framework.

Q11. Do you think that industry or ICSTIS has a responsibility to notify all affected consumers of their rights to claim a refund when this has been made the subject of a sanction by ICSTIS? If you do, where does responsibility lie and why?

Q12. What views do you have on how affected consumers, whether they complained or not, can be advised of their rights to a refund where that has been demanded by ICSTIS as a sanction?

Q13. What further potential is there in the ICSTIS adjudication information being shared with the customer contact staff of the OCPs who may be able to alert future complainants about services to their right to a refund (where sanctioned by ICSTIS)?

Q14. Do you have any views on this approach to considering how refund sanctions will be determined by ICSTIS?

Q15. Do you agree that the arrangements for the ICSTIS Compensation Schemes for Live Services and multi-party chatlines should remain as they are and should not be affected by proposals in this consultation paper? If not, why not?

Q16. Do you agree that ICSTIS should take forward the development of best practice guidance for customer service in the way outlined above? Can you identify any organisations from which a representative should join this working group?

Q17. Are there other aspects of customer satisfaction that you believe a Working Group ought to consider when developing best practice guidance for customer service?

Q18. Do you have any views about the make-up and structure of a Working Group, including who should chair it?

Section Seven: How to respond to this consultation

We seek the views of all stakeholders on the proposals in this paper by **Monday 6 February 2006**.

Where possible, comments should be submitted in writing using Word and sent by e-mail to pwhiteing@icstis.org.uk. Copies may also be sent by mail or fax to:

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If you have any queries about this document please telephone or e-mail Paul Whiteing, using the above contact details.

Confidentiality

We plan to publish the outcome of this paper and to make available all responses received. If you want all or part of your submission to remain confidential then you must make a specific request for this along with your reasons for making it.

Appendix – The Ofcom Review

Section 7

Redress

Introduction

- 7.1 Ofcom has considered whether there are improvements that can be made to the existing mechanisms by which redress is provided to consumers who have been financially harmed as a result of calls made to PRS numbers, and whether any new mechanisms are required.
- 7.2 Redress is a consumer protection issue across many sectors (see for example the DTI/National Consumer Council report *Seeking Resolution* published in January 2004). However, there are particular difficulties in providing redress to consumers for calls to PRS numbers:
- the consumer is paying the OCP for a service provided by the SP, with whom the OCP may have no direct contractual relationship, and who may be several contractual steps ‘removed’ even from the TCP. This is another manifestation of the wider value chain problem described in Section 5 above; and
 - although SPs can make substantial amounts of money from offering these services, this is often made up of a relatively small amount paid by a large number of individual consumers to their OCPs. The relatively small sums paid by individual consumers may mean that consumers may not always be bothered to seek redress.

What does ‘redress’ mean?

- 7.3 Ofcom has considered whether redress in the context of this report means a refund only or a refund with additional compensation, for example for the time and effort expended by the consumer in complaining. Calculating such additional compensation is inevitably somewhat more subjective in nature than simply refunding the cost of the call and requires a more sophisticated process (e.g. the use of an adjudicator) to establish what level of additional compensation may be appropriate. For the purposes of this report Ofcom has focussed on how full refunds can be more effectively provided, rather than considering the issue of additional compensation in any detail.
- 7.4 Ofcom acknowledges that requiring additional compensation to consumers over and above a simple refund may have a deterrent effect, but Ofcom considers that this deterrent effect can be created more directly by appropriate use of fines, as discussed elsewhere in this report.

Scope of redress

- 7.5 Redress is a sanction available to be imposed today by ICSTIS for breach of the CoP where ICSTIS has established that there was a serious breach of the

CoP. The key issue in Ofcom's view is how to make this sanction more effective for consumers.

- 7.6 Redress can be reactive (i.e., in response to complaints) or proactive (i.e., trying to find all consumers harmed by a scam, whether or not they have complained, and provide them with redress). The redress sanctions imposed by ICSTIS are reactive, requiring SPs found to be in serious breach of the CoP to reimburse the costs of calls made to the relevant services to all consumers who have complained. Requiring proactive redress would clearly be significantly more onerous on the SP concerned, and might well require co-operation between the SP, the TCP and the OCP to track down and attempt to reimburse all consumers affected. Ofcom has limited its analysis in this report to reactive redress, but would encourage ICSTIS and the PRS industry to consider whether and how a proactive redress sanction could be implemented for cases of major consumer detriment.
- 7.7 Ofcom has also noted that redress for 'unauthorised use' (i.e., use without the knowledge and/or permission of the bill payer) is already required by ICSTIS under its CoP for certain live services (e.g. one-to-one chat, tarot and other psychic services) that can be argued to be 'high risk' services. ICSTIS Guideline No. 5 deals with the workings of the Chatline Services Compensation Fund and ICSTIS Guideline No.6 deals with the workings of the Live Conversation Service Providers' Compensation Fund.
- 7.8 Clearly the challenge in relation to redress for unauthorised use is trying to establish if a service user is not authorised by the bill payer to use the service. Guideline Number 6 recognises that partial payment of claims rather than full payment may sometimes be appropriate e.g. if the bill payer did not know about the call, but there was some contributory negligence on the bill payer's part. Under the terms of Guideline Number 6, if the SP does not settle a claim for compensation to the satisfaction of the claimant, then the claim will be passed to the Adjudicator⁴ for adjudication. If a claim is upheld, the Adjudicator may stipulate the appropriate level of compensation that should be paid, which may include, at the Adjudicator's discretion, legal and other costs and expenses of the claimant.

Options

- 7.9 Ofcom has considered options for consumer redress based on combinations of:
- (a) who pays redress to the consumer; and
 - (b) how that redress is funded.
- 7.10 The parties which could pay the redress to the consumer are:
- the OCP – ideally this would be an 'on the bill' refund but could also be via a cheque in the post or a similar mechanism;
 - the TCP – via a cheque in the post or similar;
 - the SP – via a cheque in the post or similar; or

⁴ The Adjudicator is a person appointed by ICSTIS as defined at paragraph 1.1.14 of the CoP.

- ICSTIS – again via a cheque in the post or similar.

7.11 The payout could be funded as follows:

- withheld interconnection payments collected by OCPs (either using AIT provisions or 'claw back' from next month's outpayments to the particular TCP concerned);
- withheld revenue share payments to the SP collected by TCPs (following an ICSTIS Direction);
- TCP or SP bonds held by ICSTIS;
- TCP or SP fines imposed by ICSTIS; or
- out of TCPs' or SPs' pockets.

Assessment of options

OCP makes redress payment to consumer

- 7.12 This option does not involve consumers being permitted to refuse to pay a disputed PRS charge on their bills. When such a measure was introduced in the United States, this led to OCPs managing the risk of bad debt simply by declining to provide their customers with access to PRS services, thereby dramatically limiting the availability and innovation of PRS services. Rather, this option envisages consumers paying for any disputed PRS charges on their bills, and subsequently having these charges refunded by the OCP following an ICSTIS investigation and the imposition of a redress sanction.
- 7.13 The advantage of the OCP making redress payments to consumers is that it opens up the possibility that such payments could be made on the consumer's telephone bill, since the OCP will already have an established billing relationship with the consumer. Ofcom considers that 'on bill' refunds are likely to be, from the consumer's point of view, the most efficient and convenient way to receive redress.
- 7.14 However, it is not clear to Ofcom how an obligation could be created on OCPs to pay redress, whether on the bill or not. As discussed above, the two ADR schemes have generally ruled that OCPs are not responsible for PRS redress in the case where the calls have actually been made from the consumer's premises.
- 7.15 In addition, there is no existing mechanism to allow money to flow backwards up the value chain from SPs via TCPs to OCPs to fund redress (not even notionally, via a claw back from the next month's interconnection payments from the OCP to the TCP concerned). Ofcom considers that such mechanisms could be developed via modified contractual terms and interconnection arrangements between the various parties in the value chain, as well as changes in OCPs' billing systems to introduce such refund functionality. It would take significant industry investment and time to put such arrangements in

place. Such investments would need to be proportionate to the magnitude of the consumer detriment involved. In the longer term Ofcom encourages all OCPs and other Communications Providers involved in PRS to explore the possibilities for providing redress in this way. However, it is clear that some shorter term and more easily implemented mechanism for adequate consumer redress is required.

ICSTIS makes redress payment to consumer

- 7.16 Many consumers complaining about PRS calls today have the false expectation that ICSTIS can obtain redress for them on an individual basis. Some OCPs may incorrectly imply this when they refer PRS complainants to ICSTIS. In fact, making ICSTIS responsible for the payment of individual consumer claims for redress would be a substantial widening of ICSTIS' remit, with associated increases its running costs. The additional costs for ICSTIS would be both in handling and fulfilling individual consumer requests for redress, and in dealing with the additional bureaucracy of money flows from OCPs, TCPs or SPs (depending on the agreed mechanism for funding the redress).
- 7.17 Ofcom has particular concerns about the idea that ICSTIS could use income from fines for breaches of its CoP to fund redress. Ofcom considers that this could call into question the independence and fairness of the ICSTIS adjudication process which is one of ICSTIS' areas of strength and is particularly valued by the industry. Alternatively, if there were an ICSTIS-administered 'pool' of funds to cover redress raised from all members of the industry, responsible SPs would be contributing towards the cost of rectifying the damage done by unscrupulous SPs.

SP makes redress payment to consumer

- 7.18 Many SPs to whom Ofcom has spoken during this review already have mechanisms for providing redress, usually by means of cheques posted out to complainants. Such redress is often unrelated to any breach of the CoP, and is simply considered by the SP to be a gesture of goodwill and part of good customer service.
- 7.19 ICSTIS has suggested to Ofcom during this review process that it could become a requirement in the CoP (and part of any SP registration scheme) that SPs have (and certify that they have) adequate mechanisms for handling customer complaints and dealing with requests for redress from members of the public, including access to a UK customer service telephone number. ICSTIS has noted that it would be willing to support the development of industry best practice in this area. Whilst Ofcom is not recommending a SP registration scheme in this report, Ofcom does see the value in a CoP obligation on SPs to have adequate customer service (including a UK customer service telephone number) and redress mechanisms. Ofcom considers that this measure could be backed up by mystery shopping by ICSTIS to monitor compliance with the obligation.
- 7.20 ICSTIS can and does currently impose redress requirements on SPs in some ICSTIS adjudications alongside other sanctions such as fines. This is usually

for particular types of breach of the CoP such as where there is clearly fraudulent intent, for example no service provided on the line, a recording of an engaged tone etc. As part of Ofcom's discussions with ICSTIS during this review, ICSTIS has proposed that redress continues as one possible ICSTIS sanction, and that ICSTIS should codify and make public the circumstances in which it is likely to impose this sanction (essentially where there has been a serious breach of the CoP leading to significant harm to consumers and/or where an intent to mislead or defraud has been demonstrated).

7.21 However, a redress sanction against a SP may not always be effective, for instance if the SP disappears. Clearly this would affect the payment of fines as well as redress and is part of the wider issue of how to ensure appropriate compliance by SPs (see Section 6 on enforcement).

7.22 Ofcom has noted the success of the existing ICSTIS Live Conversation Message and Chatline Service Compensation Schemes ('the Schemes') for higher risk PRS services such as one-to-one chat and psychic services. Under the Schemes, providers of the relevant types of PRS service must:

- contribute to the relevant Compensation Funds;
- enter into a contract with the Trustees of the relevant Fund; and
- lodge a bond with ICSTIS as security against meeting valid compensation claims even after a SP has ceased trading.

7.23 The Schemes make provision for full refunds to be paid to consumers in the event of unauthorised use (i.e., use without the knowledge or permission of the bill payer). The Schemes recognise that partial payment of claims rather than full payment may sometimes be appropriate, for example if the bill payer did not know about the call, but there was some contributory negligence on the bill payer's part. If the SP does not settle a claim for compensation to the satisfaction of the claimant, then the claim will be passed to the Adjudicator for adjudication. Evidence of unauthorised use will usually be obtainable from the recordings made of live entertainment services required under the CoP. Such evidence will not be available in respect of other classes of service, for example those provided over the internet.

7.24 Ofcom has considered the desirability of extending such compensation schemes to other types of PRS services more generally. There could be several variations on this idea, for example:

- requiring all SPs to be in such a scheme;
- requiring all new SPs without an established track record to be in such a scheme for a probationary period. After a period of satisfactory performance, they would no longer need to be in the scheme;
- requiring the providers of particular service types (e.g. those involving internet diallers) to be in such a scheme; and

- membership of the scheme could be imposed as a sanction following breaches of the CoP.

7.25 Ofcom considers that the existing Schemes impose heavy but appropriate obligations on SPs, given the proven higher risks associated with the types of services covered by the schemes. Ofcom acknowledges that complying with the requirements of such schemes can represent additional hurdles for new SPs, reducing the scope for market entry. However, Ofcom would support ICSTIS extending such compensation schemes or equivalent measures to other classes of PRS, e.g., internet diallers or services offered at or above a particular price, provided this was practical and based on evidence that this would be a proportionate and effective response to the consumer harm arising from such services.

TCP makes redress payment to consumer

7.26 Section 104 of the Act creates scope for third parties, including consumers, to take action through the courts against Communications Providers for breach of an enforcement notification relating to the PRS Condition. The Act itself therefore clearly envisages TCP liability to third parties in relation to PRS in certain circumstances.⁵

7.27 Ofcom has considered whether or not TCPs could be made liable in the CoP for any redress sanction imposed on one of the TCP's SP partners where the SP itself does not honour the sanction. However, Ofcom's legal advice is that there would be a risk of inconsistency with Human Rights legislation if Party A (the TCP) were made liable for the misdemeanours of Party B (the SP) in circumstances where other measures are available which are likely to achieve the same purpose.

7.28 However, where a TCP has been directed to withhold any funds from an SP under ICSTIS' Emergency Procedure and following an adjudication by ICSTIS which provides for redress to be paid by the SP Ofcom considers that such monies could be made available to consumers by way of redress in appropriate circumstances, for example where the SP has disappeared.

7.29 In such circumstances, Ofcom considers that ICSTIS should be able to direct the TCP holding the money to make it available to consumers for a period of three months for example. TCPs would also continue to be responsible for making payments to ICSTIS from withheld funds in respect of any fines and admin charges levied by ICSTIS.

7.30 Ofcom acknowledges that this will increase the regulatory burden on TCPs in administering consumer applications for redress, but considers that the additional burden will be proportionate to the problems that rogue PRS services cause UK consumers, and will be targeted appropriately at those TCPs who

⁵ Section 104 makes breach of a General Condition set under section 45, as well as breach of requirements imposed by an enforcement notification under section 95, actionable through the courts by third parties. However, because the PRS Condition is set under section 120 civil liability to third parties for breach of PRS regulation will only arise following breach of requirements imposed under a section 95 notification.

wish to do business with less established SPs. TCPs control access to the UK telephone network for SPs, and, as such, are closer to and have more knowledge of the SP community on which to base a judgement of risk than a regulator such as ICSTIS or Ofcom.

7.31 Attempting to fund redress centrally from fines or bonds payable by SPs would in Ofcom's view be more interventionist, creating a significant bureaucratic overhead for the body that administers these arrangements due to the large number of individual SPs active in the market. However, each TCP already has contracts (either directly or indirectly) with all SPs who access the UK telephone network via that particular TCP's network.

Recommendations

7.32 Ofcom recommends that:

- Recommendation 7: Redress should continue as a possible ICSTIS sanction against SPs for breach of the CoP. ICSTIS should codify and publish the circumstances in which it will use this sanction, essentially where there has been a serious breach of the CoP leading to significant harm to consumers and/or where an intent to mislead or defraud has been demonstrated.
- Recommendation 8: Where redress is ordered as a sanction against the SP and when directed to do so by ICSTIS, TCPs should make funds withheld by them available for consumers to claim redress for three months after an adjudication under the CoP.
- Recommendation 9: SPs should be required in the CoP to have adequate customer service and redress mechanisms, including a UK customer service telephone number. ICSTIS should monitor compliance with these obligations including a programme of 'mystery shopping', and work with the industry to develop best practice guidance on customer service;

7.33 In addition, Ofcom will support ICSTIS if in the future it decides to extend current Compensation Schemes for unauthorised use to other types of PRS call in a proportionate manner, based on adequate evidence of consumer detriment and an analysis indicating that expanding these schemes is likely to be of net benefit to UK consumers.