Mobile Data Association Response to the ICSTIS Consultation on Consumer Refunds – 3rd February 2006

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Introduction

The Mobile Data Association is the UK's principal trade body representing the mobile data industry. With over 100 members, it promotes the uses and benefits of mobile data through conferences, seminars, the media and two dedicated websites and maintains a dialogue with the appropriate government and regulatory bodies on industry issues.

This response is a result of consultation with the Wholesale Group members of the Association and does not take into account the views that might be expressed by the Network Operators.

Preamble – review of the Mobile Value Chain

The MDA is concerned that ICSTIS is once again seeking to implement OFCOM recommendations that have come about as a result of a review of the Fixed Line PRS industry.

The OFCOM recommendations are based on its understanding of the difficulties associated with the Fixed Line economic model of interconnect. It does not take into account the much simpler economic model of the mobile industry and therefore has as its focal point of redress the SP, as interconnect makes it very difficult to follow the money otherwise.

This is not the case in the Mobile Industry. Everything starts and stops with the Network Operator in the mobile community - therefore it makes sense that this should also be the case with consumer redress.

In the mobile industry it is relatively straightforward to follow the money back from the Network Operator and for money to flow the other way (a situation that OFCOM envisages as being difficult and costly to implement although ultimately would seem to be its preferred route of working).

The MDA believes that ICSTIS should take a lead and look to implement a different path for the mobile industry and educate OFCOM in the process.

The OFCOM approach that sees consumer redress as part of the punitive measures taken against the perpetrator of the breach of the Code of Practice has two consequences that are potentially damaging to all parties:

1. It confuses the issue of when proactive consumer redress is justified
2. It creates an environment where participants of the value chain can profit from the wrong doing, whether or not they were knowing accomplices. We are concerned that the burden of refund should not fall unduly on any one part of the value chain.

Under these proposals the proposition (a position reinforced in the proposals for the Icstis revised Code of Practice version 11) is that SPs should be the port of last resort. This effectively means that the issue of refund falls on the party that retains the least revenue from the delivery of a service.

As the billing agents, the Network Operators have a key role to play in consumer refunds, and irrespective of any customer relationship it is important that this remains

so. Much consumer disgruntlement over recent scams has been with the perception that the Operators are keen to wash their hands of a problem whilst profiteering from it (BT suffered many complaints of this nature over the rogue diallers issue).

If the Network Operators become the first port of call to issue consumer refunds then, by holding retained and future revenue share against the cost of refund, they naturally assure that all parts of the value chain pay their due share, and that the Network Operators are not seen to profit from the scam. Indeed in the instance of a major incident it should be possible for the Network Operators to demand direct reimbursement from the SPs for their share of the refunds if insufficient monies exist in retained revenues.

However, if one takes the stance that consumer redress should be part of the punitive action taken against the perpetrator of the problem, be it deliberate fraud or incompetence, the issue remains that, regardless of who created the problem, all parts of the value chain benefited from the revenues generated.

So how to effectively cleanse the system to ensure no one is the beneficiary (unwitting or otherwise) from wrongdoing?

The present situation leads to the conclusion that you cannot. Therefore, refunds should not be seen as a punitive measure, but as a tool to ensure that funds erroneously collected are returned to the consumer with each part of the value chain contributing their share. This can only be achieved by the Network Operators having primary responsibility. This has the added value that if a party absconds then the issue of retrieving money is placed on the preceding leg of the value chain which should lead to a strengthening of contractual relationships and due diligence on those using PRS.

Such punitive action should in essence be the remit of ICSTIS fines, which, if organisations are also deprived of the revenues from the breach, will have real bite. ICSTIS's use of compulsory refunds (and whether they should be proactive or reactive) should be kept as a separate issue from punitive fines and this power is best exercised through the billing party. It is then up to the value chain to retrieve the amounts being paid through the withholding of future revenues to the value of the refund if insufficient funds are otherwise available.

This general principle holds good whether looking at the fixed line or mobile industry. However whilst there can be consensus in the broad principles the devil is in the detail and when we get into the document we are hit once more by the fact that ICSTIS is being asked to impose OFCOM recommendations which were based on looking specifically at a fixed line issue with rogue diallers.

Detailed Response:

OFCOM Recommendation 7 & 8: Redress should continue as a possible ICSTIS sanction against SPs for breach of the CoP

As already discussed the approach to use consumer refunds as part of the sanctions against perpetrators of wrongdoing is flawed and this is exacerbated by the proposition that the party being sanctioned (Service Provider under the current definition of the code), is the party that will have profiteered the least from the breach. This would imply that the Service Provider is left with responsibility for instituting a full customer refund. Whilst clearly it is within the SPs domain to seek restitution from the

Information Provider through withholding funds or invoicing for the amounts refunded, the Service Provider has no contractual ability to make restitution from the Network Operator who in this instance may implement the refund but still retain their profit margin. This is clearly wrong and comes out of the view that refund is a sanction (punishment) as opposed to a tool to seek customer redress.

If one looks at a specific possible example: if ICSTIS, as a result of the Crazy Frog campaign, sought to impose on mBlox the sanction of full customer refunds, then this would put undue economic pressure on mBlox. Say mBlox retain 5% of the revenues, the Network Operators 20% and Jamster 75%. Even if mBlox got 100% restitution from Jamster for their share of the refunds, mBlox would still suffer a net loss of 15% representing the difference between their retained margin and the Network Operators margin. The Network Operators still retain their profit whilst from a consumer's point of view may be seen as the ones instigating consumer refunds.

If, however, Refund is seen as a tool for consumer redress, to be imposed by ICSTIS where there is evidence of significant consumer harm or undue level of profiteering resulting from a breach, then the emphasis is different. ICSTIS should, in such circumstances, order the billing party to make redress. It would then for that party (the Network Operator) to collect revenues from the value chain by withholding or demanding monies from their contracting partners, the SPs. The SPs then seek redress from their contracting partners, the IPs. In this way no party profiteers from wrongdoing and the customer would get redress earlier than would otherwise be the case. Clearly there would need to be co-operation between the various parties to identify harmed consumers and the amounts that need to be paid. There is also the issue of the value chain breaking down where one party absconds or goes under, but in such circumstances it is the preceding contracting party that picks up the burden. Again this should reinforce contractual relationships throughout the value chain and encourage a cautious approach to parties that a SP deals with.

Whilst the end game is the same for the consumer, in dealing with this as an issue of consumer redress as opposed to punitive action results in all parties paying their share of the restitution and no single party profiteering from the result.

OFCOM Recommendation 9: Setting up a body for instigating best practice for customer care

Whilst the principle of this is sound we would question whether this is a role for the regulator or one for the trade bodies to take up. We also believe that the emphasis should be on every service offered in the UK having a UK customer service number behind it. Who then supplies and supports that number should be up to the contracting parties. In essence it should be the IP who provides the service although they may seek to contract this out to the SP or some other third party. To impose that this has to be the role of the SP is an unnecessary distortion on the way the market operates.

To address ICSTIS specific 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?

It is clear that the consumer should be entitled to a full refund of the amount that they actually paid for a service that is in breach of the CoP. What is at issue is who pays the full value of the refund? ICSTIS states it starts at the Service Provider, even though the amounts will be more than they made from the service. They then make the analogy with the shop offering a full refund and not just for their margin. This analogy is false, however, for if one buys a tin of Heinz baked beans from Tesco and there is an issue with them, one takes them back to Tesco to get a full refund. One does not go to Heinz even though they manufactured and advertised the goods (one might separately seek redress from them for any harm caused but the cost of the can is obtained from Tesco). Tesco in this example is the party one paid for the goods and is the equivalent of the Network Operator. Why is ICSTIS seeking to jump the value chain rather than following the money? Tesco would seek restitution (if it were a major production fault) from Heinz who would then look to their suppliers. The same should operate in the Premium Rate Services industry. Start with the billing party then work your way back. That way no one profiteers from wrongdoing.

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?

We are in agreement that there should be no lower cost threshold and indeed managing these micro payments is possible where the Network Operators have responsibility for implementing such refunds. However given the overall costs of such an exercise ICSTIS should have a view to reasonableness and in certain circumstances where the cost of the exercise going through normal channels may exceed the value of refunds there should be flexibility to allow the contracting parties to come to alternative arrangements for ensuring consumers get full refunds.

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.

Wherever possible consumers should receive refunds through their telephone bill or airtime credits and for the reasons already stated these should be instigated by the Network Operator. However there may be circumstances where this is not possible or would be unreasonable. There is one instance known to us where a contract customer was erroneously billed £1,500 and it would not be plausible to use telephone credits here - as he complained it would tie him to an operator and would take well over a year for him to use up when he could have used the money for other things. Common sense should prevail here and ICSTIS's flexible approach to how restitution is made is welcome.

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?

Yes

Q5 - Q10

A lot of the issues raised here can be addressed through the Network Operators being the bodies that make the refund and for them to deduct the revenue share from their SPs accordingly. The SPs should themselves have a detailed log of the messages for which they are being asked to make refunds and can work with the Network Operators in this regard. Ultimately, however, the full record of a customer's history with a service may only be held by the IP as they may have used one provider to acquire a customer and another to deliver the service. This can be quite common where the customer authenticates a service via WAP through one provider but bills the service via SMS through an unrelated SP. In checking whether a customer has legitimately signed up for a service and been billed correctly, the onus is often on the IP to prove or disprove that the relationship was correct.

With this in mind:

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

In an ideal world the SP handles the customer throughout the life of the service and so has full records of when a customer signed up for a service, what messages the customer received during the life of the service and at what point the customer terminated the service. As such the SP would be in a position to check through any complaints a customer has in respect of the service as to whether they were genuine or not. In reality however there may be a number of reasons why the SP is not in this position for the reasons identified above or where the service during its lifetime has switched SPs. In such circumstances the SP puts the onus on the IP to check whether the complainant was genuine or otherwise. It is also common for the SP to have a small refund discretion (as the Network Operators have with the SPs) where the SP can settle a claim without recourse to the IP. This may be where there was a known glitch where the cost of investigating each individual complaint outweighs the benefit of making an immediate settlement, which may include a goodwill element. In these instances it is left to the SPs judgement as to whether a complainant is genuine or systematically trying to abuse the system.

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.

In the majority of cases the SP should have information from their own logs to be able to determine whether there are grounds for a complaint. i.e. has the complainant been sent any messages against which to make a refund? In certain circumstances

where for whatever reason the SP's own records are inconclusive then a copy of the bill in question is reasonable. The real concern is where there has been a highly publicised case where refunds are ordered that false claims are made against the company.

For example if an IP has an issue with its systems where it inadvertently signed on customers to a service that had not authorised this, but up until that point and after that point signed up customers legitimately but the scale of the error was sufficient for ICSTIS to impose a full refund policy on complainants so affected, then in this circumstance the SP could be faced with hundred of claims from parties who have legitimate claims as well as from customers who are trying it on but who had properly signed up for the service. The SP's systems would not necessarily be able to tell which were legitimate and which were not, but the IPs systems should be able to. In such a circumstance the ideal scenario would be for the IP to create a file of numbers for customers with a legitimate claim and the amounts involved and this to be passed on through the SP to the relevant Network Operators. A decision can then be made as to whether full restitution is made irrespective of complaints, or to refund only those who complain. Either way the data is available to flag up potentially fraudulent claims. One would anticipate in any event a message going out to all such parties to sign them up for the service, and to stop the service to those that do not sign up.

Clearly the above is a best scenario in terms of assuming the service is genuine and of value to consumers, but the same techniques and principles should be applicable even where the service in breach of the code was as a result of a deliberate act or non-observance of the Code. In these circumstances however a full refund may be due irrespective of whether they signed up for the service in which case the SPs own records to show that they have received messages from the service would be sufficient to instigate refund without reference to the IP.

In both examples however it should be the Network Operator from the data supplied by the SP that implements the refund then deducting the revenue share as the result of such refund from the SP. As such the order for refund should go to the Network Operator and for them to put the process in motion to collate the relevant data. This ensures that no one party in the value chain profiteers from any wrongdoing.

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?

See above. The process should be:

ICSTIS imposes the requirement for consumer refund in relation to Code breaches and advises the Network Operators accordingly. Depending on the severity of the breach this may be alongside an instruction to withhold funds to cover any potential fine and cost of consumer refunds.

The Network Operators advise the SP of the ICSTIS notification of refund and asks them to collate the necessary data.

The SP in association with the IP collates the data necessary for the Networks to process refunds

The Networks implement the refunds and deducts the relevant revenue share from either withheld funds or future revenue payments (or if insufficient bills the SP for the amount). The SP similarly deducts the relevant revenue share from their onward payment to the IP and so on down the value chain to the offending party or the point where contractual relations break down and the party before the breakdown is then effectively penalised.

In this example the consumer gets refund and no one profiteers from the Breach.

Q8. What evidence is it reasonable to ask of a consumer to evidence their disputed PRS transactions are not itemised?

If the SP has no record on their log file of premium rate messages or calls being made to a complainant's phone and this correlates with the Network Operators own logs, then the only recourse is for the consumer to prove that they have been charged under the service subject to ICSTIS breach, through the provision of an itemised bill. The only exception to this should be if the Network Operators logs show an unusual level of billing that cannot otherwise be accounted for in which case the consumer should be given the benefit of the doubt. However this assumes that the SP does keep a record of transactions going through their systems and this should be a minimum requirement of an SP. If the SP/IP have no records on the service in question for whatever reason then the onus of proof should switch to the SP and the consumer should be given the benefit of the doubt in respect of their claim.

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.

As above the SP/IP should have records of the transactions irrespective of whether the service is delivered to a prepaid or contract handset. This data should tie up with a network's own billing records. It is only therefore where for whatever reason this information is not available that the complainant should be given the benefit of the doubt on a pre-paid handset. Otherwise the SP/IP between them should be able to show why a complaint is not genuine and to share this data with the Network Operator to proceed or hold back on a refund. However there needs to be caution exercised here where the Network Operator decides to make a refund to the complainant irrespective of whether the service was at fault or not, for reasons outside of the service itself such as customer retention. In such circumstances it would be unreasonable for the SP/IP to pay assuming that all other aspects the service meets all relevant Codes of Practice of the day.

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

We believe all the issues here are addressed above.

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?

The issue here is whether or not ICSTIS should be given the power to instigate the equivalent of a class action against a provider. The most relevant comparable, looking at other industries, is the FSA's attempt to get consumer redress in the mis-selling of with-profit endowment policies. Here all providers of policies, irrespective of whether they had been shown to mis-sell, had to write to their customers to inform them that they might be entitled to redress if they had reason to believe they had been mis-sold a policy. There can be little doubt that the result, in addition to helping a lot of genuine claimants, also gave rise to a lot of bogus claims from people who fully understood the risks of what they were undertaking but nevertheless saw this as an opportunity to claw back some monies on their otherwise under-performing investments. The industry bore the brunt of this. (As probably did consumers where these claims have been factored into the future bonus payments of ongoing endowments!)

The question is do we want a similar situation to arise in the Premium Rate Industry? To date we have not faced the issue of a class action. The equivalent of the above would have been as a result of Jamster and other ring tone providers mis-selling subscription services that all providers of subscription services had to advise customers of their potential for a refund if they thought the subscription service had been mis-sold to them. Whilst the industry has already borne a cost in the way such services are now regulated and must be provided, we have not had any such generic action imposed on the industry.

This is how it should be. However, where there are specific examples of either deliberate breaches, or breaches that are significant in their ability to cause consumer harm, then we believe that ICSTIS should impose an obligation for all such affected customers to be notified of their right to claim a refund. The restriction on such a general broadcast has to be where it is reasonable to believe that a significant percentage of the customers for the service would be affected by the breach (in the case of fraud or mis-selling this would be 100%). However the onus then should still be for the consumer to make the claim, although in instances of intentional wrongdoing it should be the case that all customers should be refunded without recourse to registering a complaint where the monies raised from such fraud are available to make restitution, or through the establishment of a fund to meet obligations where a party defaults (similar to ABTA).

In such circumstances it should be for ICSTIS to make a ruling that all customers should be notified and then for the contracting parties behind the service to decide who should send the broadcast message but such message should be at cost and not include profit margins for any of the involved parties, including the Network

Operators (again to avoid any parties benefiting from wrong doing). In the absence of agreement it should be the SP that initiates and sends out the message and, as stated before, the Network Operators who handle and implement any resultant refunds.

However extreme caution needs to be exercised on this point and if ICSTIS are to introduce this capability then very clear rules need to be set down as to when 100% refunds would be imposed.

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?

We do not want to encourage ICSTIS along the lines of the FSA in effectively bringing a class action against the industry. Clearly there are circumstances where it would be appropriate for all consumers to be contacted where there has been a flagrant and deliberate breach of the code, or the scale of the breach is such to have caused serious financial harm to consumers or exceptional profit levels for the perpetrator, but such circumstances need to be clearly defined. Where this is the case, then the only effective way is to contact consumers via their mobiles, through an agreed form of text message, to advise them to contact a given number and/or visit the ICSTIS web site for further information.

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)?

In theory this sounds fine. However, in practice, the Network Operators' contact staff show considerable confusion towards Premium Rate Services and there is a very real danger that in such circumstances customers will be misinformed or misdirected to ICSTIS when their complaint has nothing to do with the adjudicated service. The call centres already struggle with pointing customers to the right SPs if there are problems with a given service, and often give out wrong information. We therefore propose that where the situation warrants there should be a direct message to all identified consumers of a service that is in breach and that they should be directed to a specific helpline to deal with their complaints, the provision of which will be agreed between the contracting parties behind the service (i.e. NO, SP and IP).

The use of Sanction Powers

As indicated above we do not believe consumer refunds should be used as part of ICSTIS punitive powers against wrongdoers. As such the use of the word sanction in this context (and in the OFCOM recommendation) is wrong. Instead ICSTIS should look to impose an obligation to issue consumer refunds in specific cases:

1. Fraud

2. Where evidence of the breach is widespread and threatening to the image of the industry
3. Where there is evidence that the breach has given rise to excessive profits and/or caused significant consumer harm.

(This goes beyond OFCOM's position that states that the circumstances where ICSTIS should impose redress should be codified to cover "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").

This measure is therefore simply to get the consumer back to the status quo and all parties in the value chain should contribute to this process orchestrated through the billing partner. If nothing else were to happen, and every consumer sought refund, the only financial loss at this stage to the participants should be time and money spent on setting up the service, running it and administrating refunds. Punitive action should only take the form of fines administered on the perpetrators of the breach and they should be scaled accordingly.

Section 3 – ICSTIS' proposals on the use of its sanctions powers to order a refund by a service provider

ICSTIS seek the involvement of Network Operators only where the SP fails to settle ICSTIS imposed refunds, and only up to the value of retained monies held back from the SP under the 30-day rule.

We believe this to be wrong and, in essence, reinforces the point that the Network Operators under this regime profit come what may. The Network Operators should be the first port of call for refunds and they should then seek restitution from their contracted SP up to the value of the SP's revenue share relating to the service. The SP should then seek restitution from their IP up to the value of the revenue share relating to the service etc. There should be no limit on this. If a fraud has been perpetuated over the course of 6 months before it was spotted then restitution should be over that six-month period as long as the victims of the fraud can be identified, and if that leaves a company in financial jeopardy then so be it. The Network Operators will only have to face the bill where the Service Provider has insufficient funds to pay their share of the refunds and where, in effect, the IP has refused to stump up their share. In this instance it could be that the SP in question would be forced out of business, and the Network Operators face a financial loss as a result.

We can see nothing wrong in this scenario as it should ensure greater scrutiny of the parties in the contractual relationship and tighten up procedures on taking on new business and give a greater responsibility on the type of new business that is taken on. All parties in the value chain should have financial responsibility for the service provided. There should be no artificial limits for one part of the value chain if such limits do not exist for any other part of the value chain. The idea that the Network Operators hold no responsibility in this area when they seek to impose regulations in other areas is a nonsense.

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

We think it is totally inappropriate to confuse sanctions against a SP for wrong doing of whatever nature resulting in a breach of the Code and the issue of consumer refunds. Refunds should be imposed where any of the 3 elements identified above exist, irrespective of the gravity of the Breach and/or steps taken by the SP/IP to mitigate the breach. Either there is a case for imposing consumer refunds or there is not, and it should not be subject to an additional caveat that a fine is insufficient. This may or may not lead to a tougher line by ICSTIS but will mean it is far clearer to the SP of what to expect and so they will govern their business accordingly.

Section 4 – Live Entertainment Services

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

We do not hold any specific views on the effectiveness or otherwise of the compensation scheme for Live Services. However we do think there is a case for the establishment of a Bond for the provision of any Premium Rate Services to act as a buffer against fraudulent behaviour and/or SP/IPs going out of business before delivery of service. However we also see that companies would only be prepared to contribute to a compensation scheme if they had the knowledge that some kind of licensing/approval regime was in place to weed out fraudsters and financially weak operators.

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?

The issuance of best practice principles on customer service seems a sensible step and to establish a working group to work towards this is welcome. However we would question whether this is the role of the regulator as opposed to the trade bodies, and would be concerned that this does not become de facto part of the Code which would further stifle innovation and competition within the industry.

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?

From a regulatory stance there should be a bare minimum requirement (e.g. services must have a UK helpline behind them, such a helpline must be able to deal with a complaint within x timeframe) however we would be nervous of extending this too far and therefore stifling competition between services and their providers. Companies like Orange and, later, Virgin, were able to break into the market because of their innovative stance on customer service (at that time) which forced other incumbent operators to respond by improving their own customer service regimes. It would be healthier for the PRS industry to develop in a similar way as opposed to being prescribed to by some central body.

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

We do not believe this initiative should be driven by the regulator but taken up by one or various of the trade bodies to come up with minimum standards appropriate to their part of the industry:

e.g. MEF - content, MDA - mobile, NOC - fixed line.