



**Changes to Governance and the ICSTIS Code of Practice
(11th Edition): an ICSTIS Consultation**

A Public Consultation on Enhancing Governance and Adjudications

The closing date for comment is 26 April 2007

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Section 1

Executive Summary

This Consultation seeks stakeholders' views on proposed changes to ICSTIS Governance arrangements, particularly in relation to our adjudicatory functions, and also views on the consequential proposed amendments to the Code.

ICSTIS always aims to provide a high standard of regulation that meets public and industry expectations. Premium rate activity has increased considerably over recent years. This has involved ICSTIS in a series of policy, operational and governance changes. The need generally is to ensure that our Code, enforcement and other work stays best suited to the needs of a dynamic, growing, commercially significant and increasingly complex market.

At present the ICSTIS Board has three core roles:

- to establish the strategic direction of the organisation and its regulatory policy
- to hold the Executive to account
- to carry out adjudicatory functions in relation to compliance and applications for prior permission for certain categories of service

We remain committed to maintaining a high standard of regulation that meets industry and public expectations. We believe changed circumstances mean there is now a strong case for change to ensure we continue to meet these high standards. We propose greater separation of the roles described:

- by creating a smaller Board focused strongly on setting strategic direction, policy-making and supervising the work of the Executive
- by establishing a Code Compliance Panel (consisting of people with professional and other relevant skills and resources necessary to assure the quality and timeliness of adjudicatory work) from which to draw people to sit on Tribunals, thereby resulting in a lesser degree of continuing Board involvement in adjudicatory work
- by ensuring that Tribunals sitting to make determinations on code compliance issues are always chaired by a legally qualified Code Compliance Panel member

The change is designed to build on and retain the benefits of the present structure and ensure that our arrangements will be as flexible and future-proof as possible.

Section 2

Background

ICSTIS: our status and role

ICSTIS is the independent regulator of premium rate services in the United Kingdom. Premium rate payment charge to a communications account is used for a wide variety of services and goods. Widely recognised and popular services include participation TV voting, ringtones and logos for mobile devices, competitions, dating and chat services and business, weather or sports updates. Premium rate payment underpins the new generation of niche participation television channels. It can be used on the Internet, for charitable donations and for the purchase of goods as well as services.

We believe the UK market for premium rate services is the largest of its kind in the world with consumer expenditure of around £1.2 - £1.4 billion. Detailed information on the work of ICSTIS is in our annual Activity Report available at www.icstis.org.uk. The website provides other information on the organisation including our Code of Practice, details of past adjudications, consumer support services and consultations and publications.

ICSTIS is a co-regulatory body recognised and underpinned by Ofcom. Provisions setting out the framework of regulation of premium rate services in the United Kingdom were made in Sections 120-124 of the Communications Act 2003.

These provisions are at Appendix 1. We would draw consultees' attention to Section 121 of the Act where there is a list of the criteria to be applied by Ofcom when recognising a Code for regulation of premium rate services. Of note are the requirements that there be a person responsible for administration and enforcement, that this person is sufficiently independent of providers of services and that provisions are proportionate and transparent.

The ICSTIS Code of Practice 11th Edition was formally approved by Ofcom in a Notification issued on the 9th November 2006.

Section 3

Reasons for reviewing Governance arrangements

Premium rate services are much changed from those of ten years ago. ICSTIS has developed and matured to match industry and public needs. We aim to do all possible to prevent problems and harm arising but are committed to dealing with problems where action is needed. The integrity of adjudications has remained critical to stakeholder confidence in our work.

In reviewing our governance arrangements we set a series of objectives. These are set out below with brief commentaries.

We want to ensure the Board has the capacity and focus to develop strategy, policy and relationships in a market that has grown in size and complexity.

Convergence in the communications sector has spurred widespread use of premium rate charging as a way of buying content. Adjudicatory work accounts for over 30% of the time members currently spend on ICSTIS work.

Reforms would allow the Board to focus on its core responsibilities: setting strategic direction, translating its preventative agenda into a rolling Three Year Plan, engaging with Ofcom, industry and others on work to secure agreement on the purpose and scope of regulation, and addressing new challenges coming out of convergence and market innovation. The Board also has a broad duty of accountability to Ofcom and other stakeholders, including obligations related to the conduct of enforcement work.

We want arrangements that will still work if the scope of regulation changes or the volume of adjudicatory activity increases within existing or reduced scope.

ICSTIS has challenging key performance indicators relating to its adjudicatory work. The industry and public have the right to expect that cases will be heard quickly and professionally and that the decisions reached will be clear, consistent and proportionate.

The activity regulated by ICSTIS has grown nearly five-fold in five years. Ten years ago fewer than 4,000 complaints related to around 50 services resulted in fines totalling £68,000. Five years ago in 2002 we saw complaint and fine levels exceed 10,000 and £1million for the first time. In each of the last five years we have seen between 175 and 230 cases go to adjudication with annual fine totals ranging between £1.2million and £5.5million. In 2004/5 we registered over 75,000 complaints. The figure fell in 2005/6 to approximately 20,000.

We were pleased to achieve a further reduction in individual consumer complaints and harm in 2006 as compared with 2005. We are working strategically to continue this trend. We must, however, look at the structure of our adjudicatory processes in terms of the powers available to ICSTIS and the significance of our decisions. The level of complaints in 2005 reflected a particular spike caused by very significant problems particularly in relation to dialler services. We must recognise that spikes and fluctuations in complaints have always occurred and it is important that we are equipped to deal promptly and effectively with complaints in the future.

Ofcom recently asked ICSTIS to regulate revenue-share services on the 0871 number range from January 2008. We are doing scoping work on the market and the likely regulatory issues. We must assume this will involve us in some investigations and adjudications. Under

our 11th Code ICSTIS has assumed from Ofcom general responsibility for adjudication work in relation to network operators when acting in the premium rate market. This, too, has potential implications for casework.

Finally, and over an as yet uncertain timeframe, there could be changes in ICSTIS' scope of regulation as a result of a review currently being conducted by Ofcom.

We want arrangements that clearly demonstrate our understanding of and belief in the principles of good regulation.

We believe a change in structure would help us to continue to meet the Better Regulation Task Force principles to which Ofcom and ICSTIS are committed. These are that regulation, where needed, should be:

- Targeted
- Proportionate
- Consistent
- Transparent
- Accountable

Much of the focus and application of these principles relates to the need for regulation. We believe it is equally important that these tests and principles apply to enforcement action. We have taken action to increase transparency of individual decisions and the framework in which they are taken. We believe further improvements in terms of consistency and proportionality are most likely to be achieved if the organisation is structured to ensure focus on this activity.

We want arrangements that ensure that adjudication and enforcement processes are dealt with in a way that will ensure that decisions are reached in a professional and efficient way.

We are operating in an increasingly complex, commercially significant and sometimes litigious area. This was acknowledged in 2005 when Parliament made an Order under the Communications Act 2003 to increase ICSTIS' powers to impose financial sanctions to £250,000.

Our stakeholders have increased expectations of the quality of our adjudicatory processes due to the level of fines and other sanctions that we are able to impose.

Given the financial and reputational issues for companies faced with an ICSTIS adjudication, it is vital that those involved have the necessary skills and professional expertise.

It is certainly the case that high-profile cases have become increasingly litigious affairs. In the last 18 months Oral Hearing Panels have taken cases that each involved up to 5-6 legal representatives including barristers acting on behalf of service providers, information providers and ICSTIS. Hearings have run to 2-3 days and reasoned adjudications can exceed 50 pages. It is important that those who sit on the Tribunal and the ICSTIS Executive have the skills and authority to ensure increasingly complex and commercially sensitive issues are managed appropriately.

We want arrangements that reflect established practice in corporate governance

The duties of a Board are widely understood. These are set out in the Revised Combined Code of Corporate Governance which incorporates the earlier work in the reports on corporate governance issues by Cadbury, Greenbury, Hampel and Higgs.

Boards are seen to have four key responsibilities:

- Establishing the organisations vision, mission and values
- Setting strategy and structure
- Delegating to management – and supervising performance
- Exercising accountability, consistency and proportionality of decisions to shareholders/stakeholders

The Revised Combined Code refers to the importance of clarity regarding the roles of Chairman and Chief Executive and argues that Boards should include a balance of executive and non-executive directors.

All of these principles and propositions apply in equal or large part in the regulatory world.

Section 4

The case for enhancing the adjudicatory structure

We believe that structural reform is necessary to ensure that ICSTIS can continue to deliver adjudications that are:

- Timely
- Well informed
- Consistent in their application
- Clear: transparent as to reasoning
- Clearly communicated to the parties involved and the public at large
- Proportionate, and therefore effective in securing future compliance and ending any misconduct

Sustaining a unitary structure

In 2000 in the light of the Human Rights Act and following consultation, we brought the Independent Appeals Body into being. A major issue at that time was whether there should be a complete separation of the function of reaching adjudications on the one hand and other Board functions on the other. It was decided that it was preferable to retain the adjudication responsibilities entirely in the hands of the Board. This was primarily because of the level of knowledge brought by Board members to their adjudication work and the understanding they gained from that work which they were able to apply in discharging their Board responsibilities. Following the passage of the Communications Act 2003, the unitary structure was deliberately maintained.

We believe the changes now proposed balance the benefits of a unitary model and Board involvement with adjudications with the need to secure the benefits to the Board and ensure the quality of adjudicatory work in the future.

Continuous improvement

A number of changes to improve adjudicatory procedures have been delivered within our existing structure. We have, for example, published guidance on our sanctions and how they are applied. We have introduced a new format for reporting adjudications and have provided our reasoning in greater detail. We have introduced, and codified, arrangements that allow Information/Content Providers to answer direct for breaches, rather than always calling on the Service Provider to account for problems. We and the industry are making more frequent use of informal representation to ensure adjudications are as fully informed as possible.

We believe that structural change is now necessary to take these improvements to the next level and ensure that we have an adjudicatory structure which is robust for the future.

Addressing the capacity constraint

At present the ICSTIS Board of twelve non-executive members operates as one body. With the exception of those members with an active involvement in the industry all Board members have considerable responsibilities as adjudicators dealing with breaches of the Code and applications for specific permissions to operate. This is in addition to their wider responsibilities as members of the Board. Setting aside whether or not this arrangement conforms with best practice there are practical issues over the capacity of a single group of individuals to deliver on a widening agenda.

Section 5

Our proposal

We are proposing a smaller Board and to create a structure in which the Board will be supported by a Code Compliance Panel.

Our intention, while recognising the inter-dependencies and relationships between policy and adjudicatory work, is to establish Tribunals which will always be professionally chaired by a legally qualified person who is not a member of the Board. This should ensure the future quality of adjudications and efficiency of process while also allowing the Board to focus on the strategic governance and accountability matters that must be addressed at this level. Our detailed proposals are as follows:

The Board

We propose moving to a Board of ten members. The Code will continue to allow for up to twelve but we believe ten is the optimum size at this point.

We propose to appoint the Chief Executive as a member of the Board. The Chief Executive would be excluded from Code Compliance Panel work.

We propose to continue to have three members with an active involvement in the sector. We are not proposing any change in the status and roles of these members.

The Code Compliance Panel

It is intended that the Code Compliance Panel will consist of a senior barrister or solicitor (the Chairman of the Code Compliance Panel) and two other lawyers also duly experienced and capable of chairing Tribunals. In addition, it is intended that three lay members be appointed to the Code Compliance Panel.

We intend that Tribunals will continue to comprise three members. These Tribunals will continue to make determinations in respect of Code breaches and will decide all requests for prior permission under the Code. The Tribunal will always be chaired by one of the legally qualified Code Compliance Panel members, who will normally be supported by one lay member and one Board member. However, it is intended that the precise make-up of Tribunals will be left flexible so that the most appropriate Tribunal to a particular case can be formed with a view to ensuring, as best as possible, a fair and proper determination. This could mean Tribunals sitting at times with two lay members and at times with two Board members.

We do not propose to be more prescriptive at this time about the composition of Tribunals. We want to make best use of the adjudicatory knowledge and experience of existing non-industry Board members and to ensure a level of continuity. We intend to review the effectiveness of the arrangement if it is introduced as proposed. Any review would include an assessment of the benefits and costs of continued involvement of Board members at the levels proposed.

Responsibilities of the Chair of the Code Compliance Panel

It is intended that the Chair of the Code Compliance Panel will be appointed by the Board. The Chair of the Code Compliance Panel will then be consulted by the Board in respect of the appointments of the other two lawyer Panel members and of the lay Panel members.

It is expected that the Chair of the Code Compliance Panel will be a very experienced barrister or solicitor with a minimum of fifteen years' relevant experience.

The Chair of the Code Compliance Panel will oversee the conduct of the Panel and supervise the performance of its members. The Chair of the Code Compliance Panel will be responsible for co-ordinating meetings with all members of the Panel and relevant members of the Executive to review decisions and to ensure calibrations of outcomes.

The Chair of the Code Compliance Panel will be the conduit to the Board but will not be a Board member. He/she will attend Board meetings, where invited, for items relevant to the operation of the Code Compliance Panel and to update the Board on any developing issues or trends that may require policy decisions.

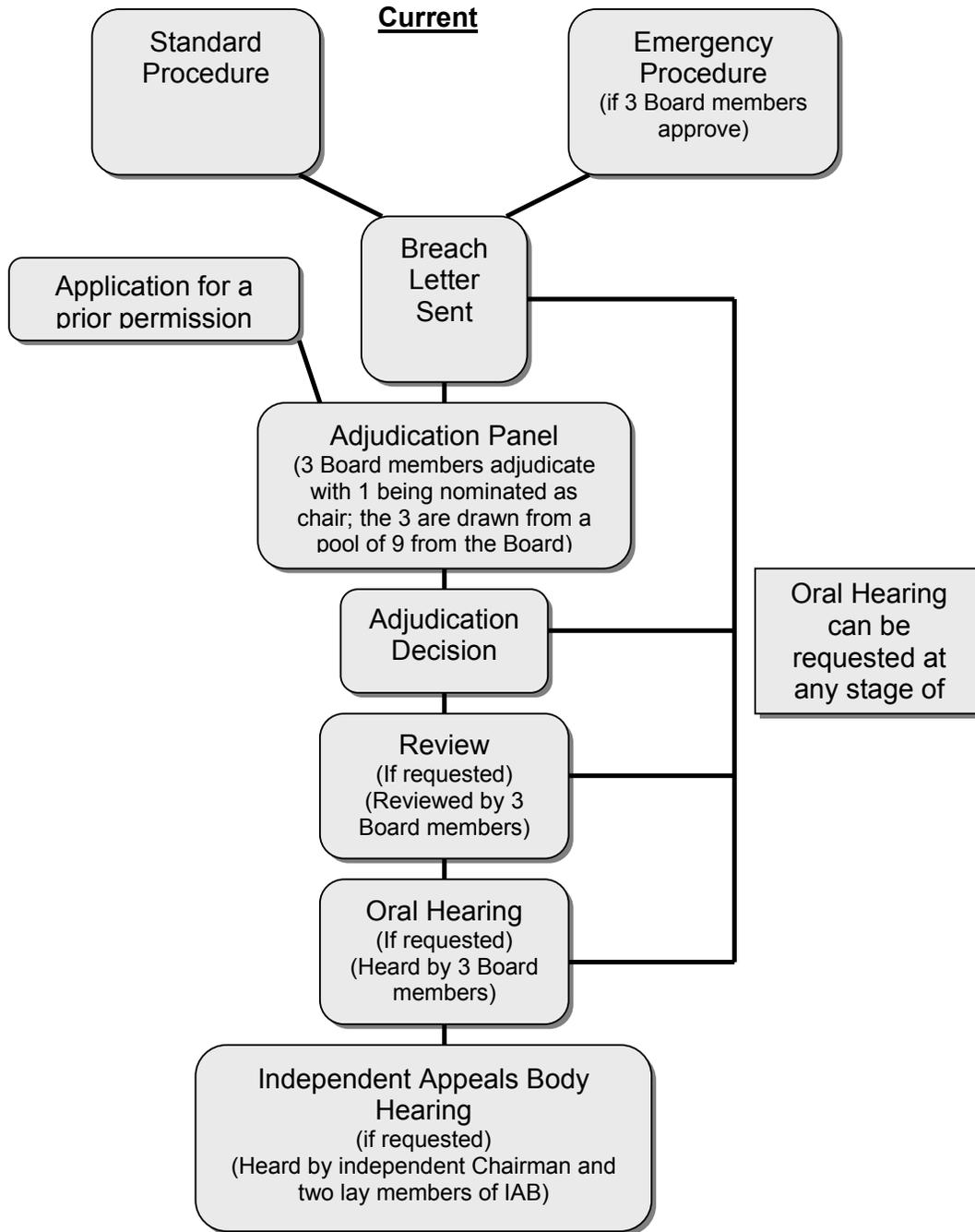
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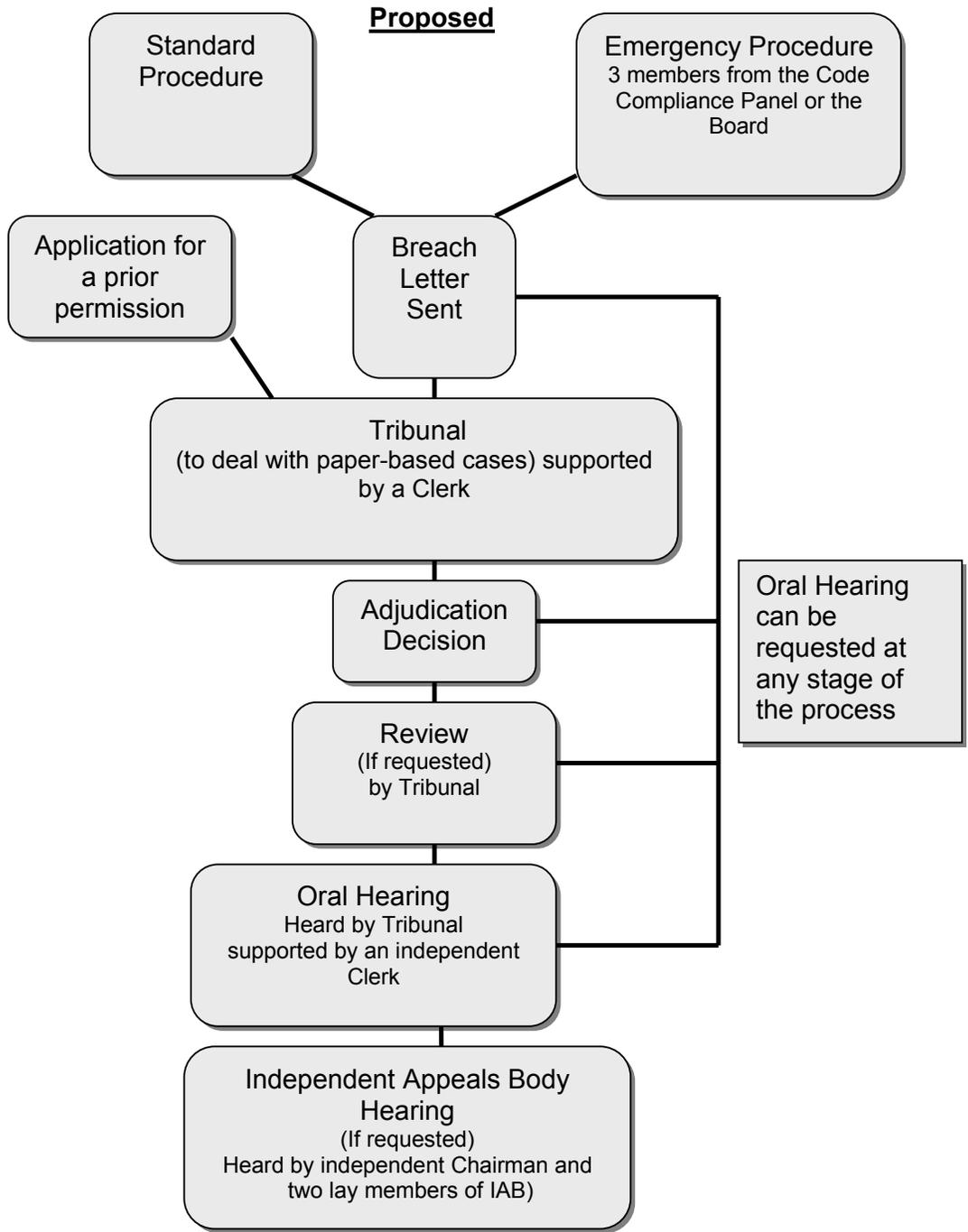
The Code Compliance Panel will be supported in its work by the ICSTIS Executive. The Executive will, in particular, provide a suitably experienced and legally qualified Clerk to support each Tribunal as required.

The Executive will make separate arrangements for external support from an independent qualified lawyer when a Tribunal Chairman of an Oral Hearing convened under the terms of the Code of Practice decides that a Clerk is required.

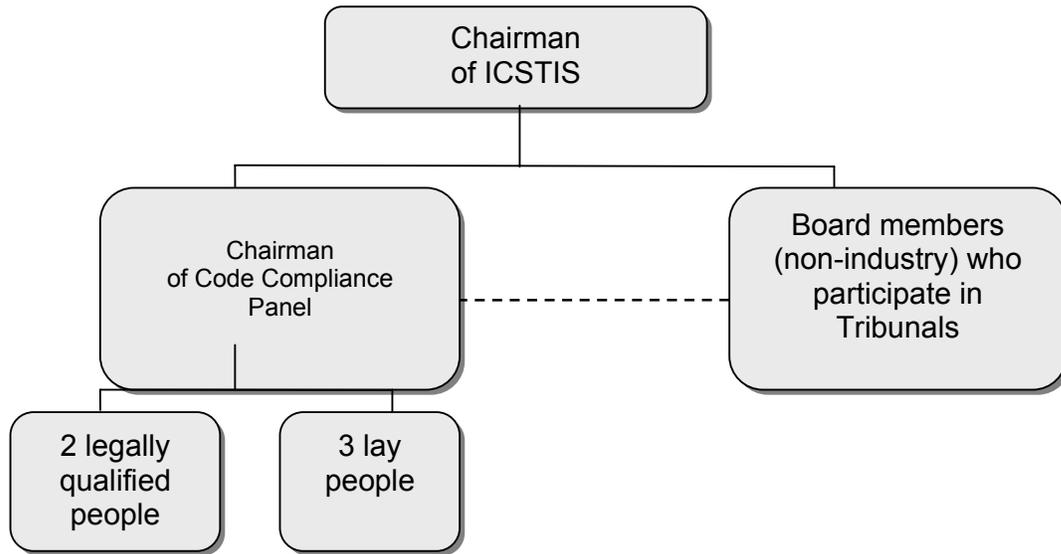
The Chair of the Code Compliance Panel will be expected to work closely with the relevant Director of the ICSTIS Executive on process and other matters relating to the effective operation of the Panel.

In the flow chart below we set out the degree of continuity intended and the process points at which decisions would in future be for members of the new Code Compliance Panel. This includes decisions to apply the Emergency Procedures, all decisions related to informal representations and Oral Hearings and decisions on whether to engage with an Information Provider in respect of a case as provided for in Section 8.5 of our Code of Practice.





Proposed Reporting Structure



Section 6

Managing the roles and relationships between the proposed Code Compliance Panel and the Board

The Code of Practice will continue to be set by the Board and in doing this it will, as now, consult with all relevant parties and have regard to the principles of regulation outlined earlier.

In drawing up the Code, the Board will want to be informed by the Code Compliance Panel of relevant enforcement issues, areas of ambiguity or other concerns that have arisen with the application of the existing Code. The Board would have a duty to keep the sanctions guidance under review and ensure that the Code Compliance Panel has the opportunity to contribute to this work.

In addition to receiving copies of Tribunal adjudication reports from the Executive immediately they are available, it is intended that the Board would receive a report from the Chair of the Code Compliance Panel on all Tribunal decisions on a quarterly basis, highlighting any trends and policy issues. It would be for the Board to act as necessary to communicate any changes in policy through Statements of Expectation or other appropriate means. Statements could, on occasion, be in response to an individual decision. The Board would not, however, have the power to appeal against decisions of the Tribunals. It is not intended to change arrangements relating to the Independent Appeals Body in any way.

When a policy decision is made by the Board, the Code Compliance Panel will be provided with the Board paper, the minutes of the meeting and the formal expression of the final policy to understand the reasoning for the decision. This is to ensure policies are clearly understood by those who are considering cases.

Section 7

Code changes/timing

To move to this model the 11th Code of Practice will require amending. As Ofcom needs to approve the changes they will need to consult as well.

A draft copy of the proposed changes to Sections 1, 2, 3, 8 and 9 of the 11th Code is attached at Appendix 2. The proposed changes are highlighted in **bold, underlined italics**.

Subject to responses we would be able to enter into transitional arrangements in the summer of 2007 and move in full to the proposed structure in the autumn.

Section 8

The cost benefit assessment

The changes proposed are governance ones. They do not affect the responsibilities and rights set out in the Code. They do not, for example require Oral Hearings where these are not required now or impose any obligations to attend informal representation sessions ahead of adjudications. There are no additional required costs for parties who are the subject to a case and prospective adjudication. Equally those wishing to make representations or seek Oral Hearings remain able to do so. The associated costs appear generally unchanged.

We are not proposing changes in the provisions relating to payment of deposits or liabilities for administrative charges and other costs.

We make no assumptions over the future trend in financial sanctions thought necessary by Tribunals. As elsewhere in the regulatory world we do not recognise sanctions for non-compliance as a regulatory cost.

It might be argued that the proposed arrangements would by virtue of focus, resource and consistency of practice result in a reduction in the number of cases that become the subject of a review, Oral Hearing or Appeal. The last two processes are important rights within our overall arrangements. Accordingly it seems inappropriate to anticipate any reduction in cases under procedures that are core rights.

Analysis of the costs of the proposed structure indicates that it will be cost neutral.

Section 9

Consultation questions

We are seeking the views of all stakeholders on the proposals and questions contained in this paper by no later than **Thursday 26 April 2007**.

We are aware that this deadline amounts to a period of 8 weeks consultation. However, as we believe these proposals do not substantively change the overall structure and operation of ICSTIS and the Code of Practice, the normal 12 weeks consultation period is unnecessary.

We are inviting views on:

1. The principle of a degree of separation of Board and Code Compliance work
2. The proposal of a smaller Board (generally of ten) with the revised composition indicated
3. The creation of a Code Compliance Panel which will always provide a legally qualified Chairman of Tribunals
4. The idea of an initial element of common citizenship between the Board and the Code Compliance Panel but with the option to revise this based on experience
5. The amendments made to the Code (as attached) to give effect to the proposals stated
6. Any other ways in which this framework or ICSTIS processes might be revised to achieve maximum public and industry trust within the parameters set out

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

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If you have any queries about this consultation please telephone or e-mail Ayo Omideyi using the above contact details.

Confidentiality

We plan to publish the outcome of this consultation 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 the request.

APPENDIX 1

Communications Act 2003 Sections 120 – 124

Reproduced from text available at: www.opsi.gov.uk/acts/acts2003/30021--c.htm#120

Regulation of premium rate services

120 Conditions regulating premium rate services

(1) OFCOM shall have the power, for the purpose of regulating the provision, content, promotion and marketing of premium rate services, to set conditions under this section that bind the persons to whom they are applied.

(2) Conditions under this section may be applied either-

- (a) generally to every person who provides a premium rate service; or
- (b) to every person who is of a specified description of such persons, or who provides a specified description of such services.

(3) The only provision that may be made by conditions under this section is provision requiring the person to whom the condition applies to comply, to the extent required by the condition, with-

- (a) directions given in accordance with an approved code by the enforcement authority and for the purpose of enforcing its provisions; and
- (b) if there is no such code, the provisions of the order for the time being in force under section 122.

(4) The power to set a condition under this section includes power to modify or revoke the conditions for the time being in force under this section.

(5) Sections 47 and 48 apply to the setting, modification and revocation of a condition under this section as they apply to the setting, modification and revocation of a condition under section 45.

(6) OFCOM must send a copy of every notification published under section 48(1) with respect to a condition under this section to the Secretary of State.

(7) A service is a premium rate service for the purposes of this Chapter if-

- (a) it is a service falling within subsection (8);

- (b) there is a charge for the provision of the service;
- (c) the charge is required to be paid to a person providing an electronic communications service by means of which the service in question is provided; and
- (d) that charge is imposed in the form of a charge made by that person for the use of the electronic communications service.

(8) A service falls within this subsection if its provision consists in-

- (a) the provision of the contents of communications transmitted by means of an electronic communications network; or
- (b) allowing the user of an electronic communications service to make use, by the making of a transmission by means of that service, of a facility made available to the users of the electronic communications service.

(9) For the purposes of this Chapter a person provides a premium rate service ("the relevant service") if-

- (a) he provides the contents of the relevant service;
- (b) he exercises editorial control over the contents of the relevant service;
- (c) he is a person who packages together the contents of the relevant service for the purpose of facilitating its provision;
- (d) he makes available a facility comprised in the relevant service; or
- (e) he falls within subsection (10), (11) or (12).

(10) A person falls within this subsection if-

- (a) he is the provider of an electronic communications service used for the provision of the relevant service; and
- (b) under arrangements made with a person who is a provider of the relevant service falling within subsection (9)(a) to (d), he is entitled to retain some or all of the charges received by him in respect of the provision of the relevant service or of the use of his electronic communications service for the purposes of the relevant service.

(11) A person falls within this subsection if-

- (a) he is the provider of an electronic communications network used for the provision of the relevant service; and
- (b) an agreement relating to the use of the network for the provision of that service subsists between the provider of the network and a person who is a provider of the relevant service falling within subsection (9)(a) to (d).

(12) A person falls within this subsection if-

- (a) he is the provider of an electronic communications network used for the provision of the relevant service; and

(b) the use of that network for the provision of premium rate services, or of services that include or may include premium rate services, is authorised by an agreement subsisting between that person and either an intermediary service provider or a person who is a provider of the relevant service by virtue of subsection (10) or (11).

(13) Where one or more persons are employed or engaged under the direction of another to do any of the things mentioned in subsection (9)(a) to (d), only that other person shall be a provider of the relevant service for the purposes of this Chapter.

(14) References in this section to a facility include, in particular, references to-

- (a) a facility for making a payment for goods or services;
- (b) a facility for entering a competition or claiming a prize; and
- (c) a facility for registering a vote or recording a preference.

(15) In this section-

"approved code" means a code for the time being approved under section 121;

"enforcement authority", in relation to such a code, means the person who under the code has the function of enforcing it; and

"intermediary service provider" means a person who-

(a) provides an electronic communications service used for the provision of the relevant service or an electronic communications network so used; and

(b) is a party to an agreement with-

(i) a provider of the relevant service falling within subsection (9)(a) to (d), or

(ii) another intermediary service provider,

which relates to the use of that electronic communications service or network for the provision of premium rate services, or of services that include or may include premium rate services.

121 Approval of code for premium rate services

(1) If it appears to OFCOM-

(a) that a code has been made by any person for regulating the provision and contents of premium rate services, and the facilities made available in the provision of such services;

(b) that the code contains provision for regulating, to such extent (if any) as they think fit, the arrangements made by the providers of premium rate services for promoting and marketing those services; and

(c) that it would be appropriate for them to approve that code for the purposes of section 120,

they may approve that code for those purposes.

(2) OFCOM are not to approve a code for those purposes unless they are satisfied-

- (a) that there is a person who, under the code, has the function of administering and enforcing it; and
- (b) that that person is sufficiently independent of the providers of premium rate services;
- (c) that adequate arrangements are in force for funding the activities of that person in relation to the code;
- (d) that the provisions of the code are objectively justifiable in relation to the services to which it relates;
- (e) that those provisions are not such as to discriminate unduly against particular persons or against a particular description of persons;
- (f) that those provisions are proportionate to what they are intended to achieve; and
- (g) that, in relation to what those provisions are intended to achieve, they are transparent.

(3) OFCOM are not for those purposes to approve so much of a code as imposes an obligation as respects a premium rate service on a person who is a provider of the service by virtue only of section 120(12) ("the relevant provider") unless they are satisfied that the obligation-

- (a) arises only if there is no one who is a provider of the service otherwise than by virtue of section 120(12) against whom it is practicable to take action;
- (b) arises only after a notice identifying the service and setting out respects in which requirements of the code have been contravened in relation to it has been given to the relevant provider by the person responsible for enforcing the code; and
- (c) is confined to an obligation to secure that electronic communications networks provided by the relevant provider are not used for making the service available to persons who are in the United Kingdom.

(4) The provision that may be contained in a code and approved under this section includes, in particular, provision about the pricing of premium rate services and provision for the enforcement of the code.

(5) The provision for the enforcement of a code that may be approved under this section includes-

- (a) provision for the payment, to a person specified in the code, of a penalty not exceeding the maximum penalty for the time being specified in section 123(2);
- (b) provision requiring a provider of a premium rate service to secure that the provision of the service is suspended or otherwise ceases or is restricted

in any respect;

(c) provision for the imposition on a person, in respect of a contravention of the code, of a temporary or permanent prohibition or restriction on his working in connection with the provision of premium rate services or, in the case of a body corporate, on its providing such services or on its carrying on other activities in connection with their provision.

(6) OFCOM may, at any time, for the purposes of section 120-

(a) approve modifications that have been made to an approved code; or

(b) withdraw their approval from an approved code.

(7) Where OFCOM give or withdraw an approval for the purposes of section 120, they must give notification of their approval or of its withdrawal.

(8) The notification must be published in such manner as OFCOM consider appropriate for bringing it to the attention of the persons who, in OFCOM's opinion, are likely to be affected by the approval or withdrawal.

122 Orders by OFCOM in the absence of a code under s. 121

(1) OFCOM may make an order under this section if, at any time, they consider that there is no code in force to which they think it would be appropriate to give, or to continue to give, their approval under section 121.

(2) An order under this section may make such of the following provisions as OFCOM think fit-

(a) provision imposing requirements with respect to the provision and contents of premium rate services, and with respect to the facilities made available in the provision of such services (including provision about pricing);

(b) provision imposing requirements with respect to the arrangements made by the providers of premium rate services for the promotion and marketing of those services;

(c) provision for the enforcement of requirements imposed by virtue of paragraph (a) or (b);

(d) provision making other arrangements for the purposes of those requirements.

(3) The power to make provision by an order under this section includes, in particular-

(a) power to establish a body corporate with the capacity to make its own rules and to establish its own procedures;

(b) power to determine the jurisdiction of a body established by such an order or, for the purposes of the order, of any other person;

- (c) power to confer jurisdiction with respect to any matter on OFCOM themselves;
- (d) power to provide for a person on whom jurisdiction is conferred by the arrangements to make awards of compensation, to direct the reimbursement of costs or expenses, or to do both;
- (e) power to provide for such a person to enforce, or to participate in the enforcement of, any awards or directions made under such an order;
- (f) power to make provision falling within section 121(5)(c) for the enforcement of the provisions of the order; and
- (g) power to make such other provision as OFCOM think fit for the enforcement of such awards and directions.

(4) An order under this section may require such providers of premium rate services as may be determined by or under the order to make payments to OFCOM in respect of expenditure incurred by OFCOM in connection with-

- (a) the establishment and maintenance, in accordance with such an order, of any body corporate or procedure; or
- (b) the making of other arrangements for the purposes of the requirements of such an order.

(5) An order under this section is not to impose an obligation as respects a premium rate service on a person who is a provider of the service by virtue only of section 120(12) ("the relevant provider") unless the obligation-

- (a) arises only if there is no one who is a provider of the service otherwise than by virtue of section 120(12) against whom it is practicable to take action;
- (b) arises only after a notice identifying the service and setting out respects in which requirements of the order have been contravened in relation to it has been given to the relevant provider by OFCOM; and
- (c) is confined to an obligation to secure that electronic communications networks provided by the relevant provider are not used for making the service available to persons who are in the United Kingdom.

(6) The consent of the Secretary of State is required for the making by OFCOM of an order under this section.

(7) Section 403 applies to the power of OFCOM to make an order under this section.

(8) A statutory instrument containing an order made by OFCOM under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

123 Enforcement of s. 120 conditions

(1) Sections 94 to 96 apply in relation to a contravention of conditions set under section 120 as they apply in relation to a contravention of a condition set under section 45.

(2) The amount of the penalty imposed under section 96 as applied by this section is to be such amount not exceeding £100,000 as OFCOM determine to be-

(a) appropriate; and

(b) proportionate to the contravention in respect of which it is imposed.

(3) In making that determination OFCOM must have regard to-

(a) any representations made to them by the notified provider;

(b) any steps taken by him towards complying with the conditions contraventions of which have been notified to him under section 94 (as applied); and

(c) any steps taken by him for remedying the consequences of those contraventions.

(4) The Secretary of State may by order amend this section so as to substitute a different maximum penalty for the maximum penalty for the time being specified in subsection (2).

(5) No order is to be made containing provision authorised by subsection (4) unless a draft of the order has been laid before Parliament and approved by a resolution of each House.

124 Suspending service provision for contraventions of s. 120 conditions

(1) OFCOM may give a direction under this section to a person who is a communications provider ("the contravening provider") if they are satisfied-

(a) that he is or has been in serious and repeated contravention of conditions set under section 120;

(b) that an attempt, by the imposition of penalties or the giving of enforcement notifications under section 95 (as applied by section 123) or both, to secure compliance with the contravened conditions has failed;

(c) that the giving of the direction is appropriate and proportionate to the seriousness (when repeated as they have been) of the contraventions; and

(d) that the giving of the direction is required for reasons of public policy.

(2) OFCOM may also give a direction under this section to a person who is a communications provider ("the contravening provider") if they are satisfied-

(a) that he is, or has been, in contravention of conditions set under section

120 in respect of a premium rate service;

(b) that the circumstances of the contravention make it appropriate for OFCOM to suspend or restrict the provision of premium rate services provided by the contravening provider without the conditions set out in subsection (1) being satisfied; and

(c) that in those circumstances the giving of the direction is urgently required for reasons of public policy.

(3) A direction under this section is-

(a) a direction to the contravening provider to secure the suspension of the provision of premium rate services provided by him; or

(b) a direction requiring him to secure compliance with restrictions, set out in the direction, on the provision of such services.

(4) A direction under this section-

(a) must specify the services to which it relates; and

(b) except so far as it otherwise provides, takes effect for an indefinite period beginning with the time at which it is notified to the person to whom it is given.

(5) A direction under this section-

(a) in providing for the effect of a suspension or restriction to be postponed, may provide for it to take effect only at a time determined by or in accordance with the terms of the direction; and

(b) in connection with the suspension or restriction contained in the direction or with the postponement of its effect, may impose such conditions on the contravening provider as appear to OFCOM to be appropriate for the purpose of protecting that provider's customers.

(6) Those conditions may include a condition requiring the making of payments-

(a) by way of compensation for loss or damage suffered by the contravening provider's customers as a result of the direction; or

(b) in respect of annoyance, inconvenience or anxiety to which they have been put in consequence of the direction.

(7) If OFCOM consider it appropriate to do so (whether or not in consequence of representations or proposals made to them), they may revoke a direction under this section or modify its conditions-

(a) with effect from such time as they may direct;

(b) subject to compliance with such requirements as they may specify; and

(c) to such extent and in relation to such services as they may determine.

(8) Sections 102 and 103 apply in the case of a direction under this section as they apply in the case of a direction under section 100, but as if references in section 103(1) to an electronic communications network or electronic communications

service were references to a premium rate service.

(9) For the purposes of this section there are repeated contraventions by a person of conditions set under section 120 to the extent that-

(a) in the case of a previous notification given to that person under section 94 (as applied by section 123), OFCOM have determined for the purposes of section 95(2) or 96(2) (as so applied) that such a contravention did occur; and

(b) in the period of twelve months following the day of the making of that determination, one or more further notifications have been given to that person in respect of contraventions of a condition set under section 120.

(10) For the purposes of this section the seriousness of repeated contraventions of conditions set under section 120 has to be determined by reference to the seriousness of the contraventions of the approved code or order by reference to which the conditions have effect.

APPENDIX 2

ICSTIS Code of Practice (Eleventh Edition) November 2006

ABOUT ICSTIS

Introduction to ICSTIS

ICSTIS is the regulatory body for premium rate services. The Board consists of up to 12 members, all appointed in their individual capacities¹. Up to three members of the Board have contemporary industry knowledge. ICSTIS is committed to a co-regulatory approach to regulation and works closely with the premium rate industry and with Ofcom to ensure that its regulation meets the principles of good regulation and, wherever possible, draws on the support of industry in ensuring that compliance with this Code, along with our vision and mission, is achieved. ICSTIS is a non-profit making limited company. The Board is supported by a permanent Executive.

Mission Statement

Our vision

As the regulator for premium rate services, our vision is that anyone can use these services with absolute confidence.

Our mission

In pursuit of our vision, we create a Code of Practice which sets appropriate standards for the promotion, content and overall operation of premium rate services, taking account of people, particularly children, who may be especially vulnerable. We promote compliance by giving advice on our Code to providers of premium rate services. If there are breaches of the Code, we promptly enforce its provisions in order to minimise consumer harm and encourage compliance in the future.

So that we can continue to protect and inform consumers faced with constantly changing technology, we regularly review our standards, consulting widely to obtain a cross-section of opinion.

Our values

In carrying out our mission, we are committed to the following:

- staying aware of, and responsive to, the ways in which consumers, or particular sets of consumers, may be vulnerable to harm when using premium rate services and striving to ensure that they receive the necessary protection,
- openness, fairness, even-handedness and impartiality when dealing with any individual or company involved in the provision of premium rate services,
- consistency when making decisions and imposing sanctions relating to breaches of our Code and having in place mechanisms to ensure that consistency,
- co-operative engagement with the constantly developing premium rate industry to secure its support for our work,

¹ Board members are recruited following an open recruitment and selection process. For full details of the recruitment process and information on current Board members, please see www.icstis.org.uk.

- working with legislators and other regulators to ensure that those who influence the operation of premium rate services fully understand and support our work,
- maintaining our understanding of relevant technological developments so that our regulation remains targeted and proportionate, and allows innovation and investment,
- being accessible to consumers and helping them understand how premium rate services work so that they can better protect themselves,
- acknowledging the important contribution made by all members of the organisation.

Independence

ICSTIS operates in an entirely independent manner. Apart from up to three members who are appointed on the basis of their contemporary industry knowledge, no member of the Board may have any commercial interest in the premium rate sector. Any Board member with such commercial interests will take no part in any adjudication process.

Remit

ICSTIS is responsible for regulating premium rate services in the UK. Through this Code, ICSTIS regulates services in their entirety – their content, promotion and overall operation. Premium rate services offer some form of content, product or service that is charged to users' phone bills.

Premium rate services typically offer information and entertainment services via fixed or mobile phone, fax, PC (e-mail, Internet, bulletin board), or interactive digital TV. There are many sorts of services, examples of which are:

- ringtones
- sports alerts
- TV voting
- competitions
- directory enquiries
- chat and business information.

They currently vary in cost from approximately 10 pence to £1.50 per call or minute (typically from a landline). Premium rate mobile services use short access codes - typically four or five-digit numbers, and will usually be shown on phone bills as 'premium rate call' or 'high premium rate service'. Premium rate charging for mobile content is generally on a per text message or per transaction basis, and includes services such as ringtones, logos, goal alerts and video clips.

UK-based landline premium rate services are normally carried on '09' dialling codes and directory enquiry (DQ) services on 118XXX codes.

ICSTIS regulates through the imposition and enforcement of responsibilities on defined parties who are collectively termed providers of premium rate services. These are those who provide the networks which carry the services (network operators), those who provide the services which the networks then carry (service providers) and those who provide the content of the service if the service provider does not do that itself (information providers).

ICSTIS provides Help Notes which, although not part of the Code, do provide detailed advice on certain areas. These notes, together with a copy of the relevant legislation and other relevant material, are available on the ICSTIS website (www.icstis.org.uk) and on request from ICSTIS.

Sanctions

ICSTIS investigates complaints and has the power to fine companies, bar access to services and order refunds. ICSTIS can also bar the individual person behind a company from running any premium rate services under any company name on any telephone network for a set period.

Funding

ICSTIS is funded by a levy on the industry and is committed to ensuring wherever possible that funding is supplemented by other sources of income from those who from time to time breach this Code, thus reducing the financial burden on the vast majority of legitimate providers of premium rate services. For further details, see our website (www.icstis.org.uk).

This Code

In order to make this Code as accessible as possible, it consists of two parts.

Part 1. This contains information about the scope of the Code and how it can be changed. It goes on to set out the rules which apply directly to network operators and to service providers in setting up and operating their services. It then sets out the rules which apply to the content and promotion of services generally, and the rules which relate to certain specific kinds of service.

Part 2. Premium rate services exist in a complex world of statutes and regulations which apply to the fast-moving, technologically-advanced world of communications. It is necessary to have careful and formal definitions and procedures to ensure that the Code is legally comprehensible and enforceable. This part of the Code contains the definitions, the formal terms of reference of ICSTIS and the various procedures, including those which relate to Code breaches and the imposition of sanctions, appeal processes and the collection of money for funding ICSTIS.

Copy advice and general enquiries

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1 INTRODUCTION

1. Principles of good regulation

1.1 In carrying out its activities, ICSTIS undertakes to have regard to five principles of good regulation, namely:

- transparency
- accountability
- proportionality
- consistency
- targeting

1.2 The scope of this Code

1.2.1 The Communications Act 2003 ('the Act') sets out in Section 120 the definition of premium rate services and who may be regulated in respect of them. The Act provides Ofcom with the power to approve a Code for the purposes of that regulation and Ofcom has approved this Code under Section 121 of the Act².

1.2.2 Providers of premium rate services are obliged, pursuant to the condition set by Ofcom under the Act and Section 120(3)(a) of the Act, to comply with directions given by ICSTIS in accordance with this Code for the purpose of enforcing its provisions.

1.2.3 The condition set by Ofcom applies to controlled premium rate services ('CPRS'), the definition of which is contained within Part 2 of this Code. The definition of CPRS is slightly narrower than the definition of premium rate services contained in the Act. Insofar as a particular premium rate service is not within the definition of CPRS, this Code applies to it but compliance is voluntary.

1.2.4 Nothing in this Code shall be construed as requiring any person, or as enabling ICSTIS to require any person, to provide any information in circumstances where:

- a the requiring of that person to provide information would be, or
- b the making of provision in this Code for ICSTIS to be able to require that person to provide that information would have been, contrary to Directive 2000/31/EC including Article 15 thereof.

1.3 Geographic reach of the Code

1.3.1 Save as is provided below, this Code applies to all premium rate services which are accessed by a user in the United Kingdom or provided by a service provider which is situated in the United Kingdom.

1.3.2 Some premium rate services may also be 'information society services' (as defined in Article 1.2 of Directive 98/34/EC as amended by Directive 98/40/EC). Information society services are required to be regulated in accordance with Directive 2000/31/EC on Electronic Commerce ('the E-Commerce Directive'). This Code will apply to such services when the service provider responsible for the provision of those services under this Code is:

- a established in the United Kingdom, or

² The Memorandum of Understanding (MoU) between Ofcom and ICSTIS can be found at: www.icstis.org.uk/pdfs/OfcomICSTISMouAug2005.pdf.

The MoU establishes the framework and the shared principles to ensure efficient and effective regulation by ICSTIS based on providing value for money and operating in accordance with the principles of good governance

- b established in the European Economic Area ('EEA') but only where the services are being accessed or may be accessed from within the United Kingdom, or
- c established in another EEA member state, but only where:
 - i the services are being accessed or may be accessed from within the United Kingdom, and
 - ii the conditions set out in Article 3.4 (read, as appropriate, in accordance with Article 3.5) of the E-Commerce Directive are satisfied.

1.4 Amendments and advice

- 1.4.1 This Code may be amended or otherwise modified from time to time by way of a process consistent with Section 121(6) of the Communications Act 2003.
- 1.4.2 ICSTIS may issue and/or amend advice concerning provisions of this Code from time to time. This may be in the form of Help Notes or statements which set out what ICSTIS' expectations are. These will include advice on the way it is anticipated that certain types or categories of service are likely to be dealt with under the Code and/or the way in which specific provisions are likely to be applied in relation to such services. Help Notes are intended to assist those involved in the provision of premium rate services to comply with the Code but do not bind ICSTIS and do not form part of this Code.

1.5 Confidentiality

Confidential information (such confidentiality being judged on an objective basis) received by ICSTIS will be kept in confidence by ICSTIS and will not be divulged to any third party other than ICSTIS employees, officers, professional advisors and Ofcom or other proper authority without consent (such consent not being unreasonably withheld or delayed). ICSTIS may divulge such information if it is necessary for it to do so in order to discharge its responsibilities under this Code or for the purpose of prevention of fraud or because disclosure is required by law.

1.6 European Commission

This Code was notified in draft to the European Commission in accordance with Directive 98/34/EC, as amended by Directive 98/48/EC.

2 CONSTITUTION

2 Constitution

2.1 ICSTIS is constituted as a not for profit company limited by guarantee. The members of ICSTIS Ltd are also its directors, of which there may be up to 12 at any time, and who together form the Board of Directors ("the Board") which is responsible for the discharge of all duties which fall upon ICSTIS under this Code.

2.2 Board members are appointed in their individual capacities. Up to three Board members are appointed in the light of their personal contemporary industry knowledge and may have commercial interests in the premium rate sector. They can take no part in any adjudicatory function or process.

2.3 The Board has determined that the function of undertaking adjudications or reviews of adjudications in respect of alleged breaches of the Code and in respect of the grant or refusal of permissions and the imposition of conditions in permissions granted under the Code ("the adjudicatory function") will be delegated to Tribunals which will include one or more persons who are not Board members but are members of the Code Compliance Panel ("the Panel") and may include non-industry members of the Board. The relevant processes are set out in Part 8 of this Code.

2.4 The Board is supported by a permanent Executive body, the Chief Executive of which may be appointed to be a Board member but will take no part in any adjudicatory function or process.

3 THE CODE COMPLIANCE PANEL

3 The Code Compliance Panel

3.1 The Panel consists of:

- **The Chairman of the Panel who shall be a qualified barrister or solicitor who has not less than 15 years' relevant experience.**
- **Two legally qualified members who shall be qualified barristers or solicitors who have not less than 10 years relevant experience.**
- **Three lay members.**

3.1.2 The Chairman of the Panel shall be appointed by the Board.

3.1.3 The legally qualified members and lay members shall be appointed by the Board in consultation with the Chairman of the Panel.

3.2 The Chairman of the Panel shall attend all relevant parts of all meetings of the Board as determined by the Chairman of ICSTIS.

8 PROCEDURES AND SANCTIONS

8.1 Tribunals

Whenever the rules of this Part or Part 9 of the Code require the constitution of a Tribunal, then it shall consist of three members who shall be:

- **The Chairman of the Code Compliance Panel or such of the two legally qualified Panel members as he shall nominate (who shall sit as Chairman of that Tribunal).**
- **Two persons who shall be drawn from the lay members of the Panel and/or the Board members entitled to undertake adjudicatory functions. The selection of the Tribunal members other than the Chairman shall be carried out as the Board may from time to time decide.**

8.2 Permissions

All applications for permission required under this Code will be considered by a Tribunal which may grant or refuse any application for permission and in granting a permission may impose any condition which it considers to be appropriate.

8.3 Complaint investigation

8.3.1 ICSTIS will consider and, where appropriate, investigate all complaints which it receives, provided that the complaint is made within a reasonable period from the time when it arose.

8.3.2 ICSTIS, through its Executive, monitors premium rate services. The Executive can itself initiate an investigation where there appears to be a breach of the Code.

8.3.3 During investigations, or as part of the adjudication process, ICSTIS may direct any service provider or network operator concerned to disclose to the Executive, subject to the confidentiality provision set out in paragraph 1.5 and within a reasonable time period, any relevant information or copies of documents. This may include, for example, information concerning:

- call volumes, patterns and revenues,
- details of the numbers allocated to a service provider
- details of services operating on particular premium rate numbers,
- customer care records,
- arrangements between networks and service providers,

8.3.4 Throughout these procedures, ICSTIS will deal directly with service providers and network operators. ICSTIS may also deal with information providers in any case in circumstances where the service provider requests that ICSTIS deals directly with the information provider and:

- a the information provider
 - accepts full responsibility for the service and/or its promotion,
 - undertakes that, in the event that a breach is established and a sanction and/or administrative charge is imposed, it will be responsible for compliance and/or payment, and
- b the relevant service provider undertakes that, in the event that the information provider fails to comply with any sanction and/or make any payment due, the

service provider will retain responsibility for compliance and/or payment in respect of any sanction and/or administrative charge that has been imposed, and will comply on demand from ICSTIS without any entitlement to further process, and

- c ICSTIS accepts that the case is one in which it is appropriate for it to deal with the information provider. The procedure in respect of cases in which ICSTIS is asked to deal directly with information providers is set out at paragraph 8.7.

8.4 Informal procedure

In appropriate cases where an apparent breach of the Code has caused little consumer harm, the Executive may use the 'informal procedure'. Factors including the seriousness of the breach and the service provider's case history will be taken into account when deciding whether the informal procedure should be applied. In such cases:

- a The service provider will be contacted and informed of the apparent breach.
- b If the service provider agrees that a breach of the Code has taken place, the service provider will be required to remedy the breach and accept any condition that the Executive may require. No other sanction will be imposed nor any administrative charge levied.
- c The service provider will be sent a letter confirming what has been agreed.
- d If the service provider disputes the breach, the standard procedure may be invoked.
- e A record will be maintained in respect of breaches of the Code dealt with through the informal procedure.

8.5 Standard procedure

When the Executive receives or initiates a complaint, the 'standard procedure' will usually be used:

- a The Executive will provide the service provider with all the necessary information about the complaint, including details of the service or promotional material which gives rise to the apparent breach of the Code, and will be referred to the relevant provisions of the Code.
- b The service provider will be given a reasonable time in which to respond and to provide any information requested. This response will normally be required within five working days. In exceptional circumstances, a shorter time limit may be set but this will not be less than 24 hours.
- c If the service provider fails to respond within the required period, the Executive will proceed on the assumption that the service provider does not wish to respond.
- d The Executive will prepare a report, together with relevant supporting evidence, which will be placed before a ***Tribunal which shall adjudicate on the matter***.
- e The ***Tribunal*** may invite the service provider to make informal representations to it in person in order to clarify any matter or the service provider may request the opportunity to make such informal representations to the ***Tribunal***.
- f At any point in the course of a standard procedure, ICSTIS may inform the relevant network operator(s) of the apparent breach of the Code and direct that it withholds from the service provider any payments (relating to the relevant services) outstanding under the contract between it and the service provider.

8.6 Emergency procedure

8.6.1 Where it appears to the Executive that a breach of the Code has taken place which is serious and requires urgent remedy, the 'emergency procedure' will be used:

- a The Executive will undertake an immediate investigation of the complaint.

- b On completion, the Executive will notify its findings to **any three people each of whom is either a member of the Code Compliance Panel or of the Board and entitled to undertake adjudicatory functions.**
 - c If all three **people so notified** agree that there appears to be a serious breach of the Code requiring urgent remedy, the Executive will:
 - i use reasonable endeavours to notify the service provider (by phone, fax or e-mail) that the service appears to be in breach of the Code, that the emergency procedure has been invoked and that the service must be removed immediately,
 - ii advise the relevant network operator(s) of the breach and direct that it withholds from the service provider any payments outstanding under the contract between it and the service provider,
 - iii if the service provider cannot be contacted, or, having been contacted does not remove the service immediately, direct that the network operator(s) bar access to the relevant service(s) or number(s) forthwith.
 - d Once the service has been removed, the service provider will be provided with all the necessary information relating to the complaint and will be referred to the relevant provisions of the Code. The service provider will then be required to respond in writing within five working days.
 - e All relevant information including any response from the service provider will, in the absence of special circumstances, be laid before a **Tribunal** within 10 working days from the provision of the service provider's response or as soon thereafter as is practicable.
 - f The **Tribunal** may invite the service provider to make informal representations to it in person in order to clarify any matter or the service provider may request the opportunity to make such informal representations to the **Tribunal**.
 - g The time limits set out in this Section may be extended at the discretion **of the Chairman of the Tribunal** if **he** considers that their strict application might cause injustice.
- 8.6.2 If, within 10 working days following the use of the emergency procedure in a particular case, another case comes to the notice of the Executive which exhibits substantially the same characteristics, the Executive may, subject to the approval of one member of the **Code of Compliance Panel or of the Board and entitled to undertake adjudicatory functions**, proceed with the emergency procedure in that other case. The Executive will promptly inform the **Chairman of the Code Compliance Panel** of such action.
- 8.6.3
- a Within two working days following the making of a direction under paragraph 8.6.1, service providers may apply to ICSTIS for an urgent review of the use of the emergency procedure in the particular case.
 - b The application must be made in writing together with any supporting evidence setting out:
 - i the grounds on which the service provider considers that the emergency procedure should not have been used in respect of the services and/or;
 - ii the grounds on which the service provider considers that access to the services or numbers should no longer be prevented.
 - c Subject to any requirement for further information, **a Tribunal** will consider the matter within two working days of receipt of an application for review and shall decide, through whatever process **it decides**, whether the prevention of access to the services or numbers should continue pending completion of the normal process under paragraph 8.6.1, or whether access should be permitted to some or all of the services or numbers concerned, and if so upon what, if any, conditions.

8.7 Information provider cases

- 8.7.1 In any case in which a service provider and information provider wish ICSTIS to deal directly with the information provider, the service provider must provide to ICSTIS:
- a the service provider response to the case required under 8.5 or 8.6, together with a request in writing for ICSTIS to deal directly with the information provider in respect of the case, and
 - b the acceptance and undertakings of the service provider and information provider required in accordance with paragraph 8.3, in such form as ICSTIS may prescribe.
- 8.7.2 ICSTIS will (subject to any requirement for further information) determine within five working days thereafter whether it is willing to exercise its discretion to deal directly with the information provider in the relevant case.
- 8.7.3 If ICSTIS determines that it is willing to deal directly with the information provider, the case will be processed for the purposes of these rules as if the information provider was the service provider so that the information provider shall (together with any other rights or obligations) be entitled to require an oral hearing and to appeal to the Independent Appeals Body (IAB) in respect of the case, and shall be subject to any sanction duly imposed.
- 8.7.4 For the avoidance of doubt, ***the Tribunal*** may, in determining any sanction against an information provider, take into account to the extent appropriate any breach history of the information provider, including any involvement of the information provider in services where a breach was upheld against a service provider. Once a determination has been made under this paragraph, the service provider will have no further right to take part in the process as a party.
- 8.7.5 ***The Tribunal*** may, for good cause, determine at any time in the course of the process of a case that the case is not suitable to be dealt with other than directly with the service provider. If ***the Tribunal*** so determines, the case shall recommence as a case in which ICSTIS deals directly with the service provider and, in so far as practicable, no ***Tribunal*** member previously involved in the matter shall take further part in the process.

8.8 Adjudication

On the basis of the evidence presented, the ***Tribunal*** will decide whether there has been a breach of the Code. Each case will be considered and decided on its own merits. Service providers will be notified of the adjudication in writing. Where the adjudication has been made on the papers alone, or following informal representations in person, the notification will include reference to the service provider's right to an oral hearing.

8.9 Sanctions

- 8.9.1 Once ***a Tribunal*** has determined that there has been a breach of the Code, the Executive will put before it the service provider's details. These will include a list of any relevant breaches previously upheld, sanctions imposed on the service provider and any other relevant information.
- 8.9.2 ***The Tribunal*** has a range of sanctions which it may apply according to the degree of seriousness with which it regards any breaches. Having taken all relevant

circumstances into account, **it** may singularly or in any combination in relation to each breach:

- a** require the service provider to remedy the breach,
- b** issue a formal reprimand,
- c** require the service provider to submit certain or all categories of service and/or promotional material to ICSTIS for copy advice and/or for prior permission for a defined period,
- d** impose an appropriate fine on the service provider to be collected by ICSTIS,
- e** require that access to some or all of the service provider's services and/or numbers be barred for a defined period and direct the relevant network operator(s) accordingly,
- f** prohibit a service provider, information provider and/or any associated individual found to have been knowingly involved in a serious breach or series of breaches of the Code from involvement in or contracting for the provision of a particular type or category of service for a defined period,
- g** prohibit a service provider, information provider and/or any associated individual found to have been knowingly involved in a serious breach or series of breaches of the Code from involvement in or contracting for the provision of any premium rate services for a defined period,
- h** require, in circumstances where there has been a serious breach of the Code and/or where an intent to mislead or defraud has been demonstrated, that the service provider pays all claims (or any specified category of claims) made by users for refunds of the full amount spent by them for the relevant service, save where there is good cause to believe that such claims are not valid.

8.9.3 The failure of any service provider to comply with any sanction within any reasonable time period imposed on it by ICSTIS will result in:

- a** ICSTIS issuing a direction to all relevant network operators requiring suspension of access to some or all of the numbers allocated to the service provider until full compliance with ICSTIS sanctions has been achieved,
- b** a further breach of the Code by the service provider, which may result in additional sanctions being imposed

8.9.4 If a ***Tribunal*** considers that it may wish to make a recommendation under paragraph 8.9.2f or 8.9.2g in respect of any named individual, ***ICSTIS*** shall first make all reasonable attempts to so inform the individual concerned and the service provider or information provider in writing. It shall inform each of them that any of them may request an opportunity to make informal representations to the ***Tribunal*** in person and of the right of any of them (or of ICSTIS itself) to require an oral hearing.

8.9.5 Where an individual (or ICSTIS) requires an oral hearing ***before a Tribunal*** pursuant to the right set out in paragraph 8.9.4 but the associated individual fails, without good cause, to appear (either himself or through his representative) at an oral hearing which is properly established, then that ***Tribunal*** may make such a finding as it considers fit.

8.9.6 Refunds

- a** Where payment of refunds has been imposed as a sanction in accordance with 8.9.2h, it is the responsibility of the service provider to pay all claims for refunds as required by ICSTIS, except those where there is good cause to believe that any such claim is not valid.
- b** If money that would otherwise have been paid to the service provider has been retained by a network operator in accordance with a direction from ICSTIS or other obligation under the Code ('a retention'), and if the service provider

satisfies ICSTIS that it is unable to comply with the sanction without recourse to the money so retained, it may pass details of payable claims to the network operator which shall make the refund payments due from the retention.

- c If the service provider fails to deal promptly with claims made for refunds, ICSTIS (without prejudice to taking action against the service provider under paragraph 8.9.3) may direct any network operator which has a retention to deal with claims for refunds and pay the refunds from the retention.
- d If ICSTIS has not issued directions under paragraph 8.9.6c, the obligation of the network operator shall cease three months after completion of the ICSTIS adjudication process and any time period for appeal to the IAB or the conclusion of such appeal or, if sooner, when the retention has been fully expended.
- e If there is a retention remaining following payment of all claims for refunds or at the end of the three-month period, it must be used to discharge in whole or in part ICSTIS fines and/or administrative charges outstanding and payable by the service provider. If any retention remains thereafter, the network operator shall be entitled to deduct from the retention its costs and expenses arising from dealing with refunds.

8.10 Reviews

8.10.1 On reasonable grounds, **a Tribunal** may, at its discretion, review determinations made in respect of applications for prior permission and adjudications and/or sanctions.

8.10.2 A service provider or applicant for prior permission may request a review by setting out in writing the case for such a review.

8.10.3 *Review procedure*

Having received a written request setting out the reason why a determination made in respect of an application for prior permission or an adjudication and/or sanction should be reviewed, **the Chairman of the Code Compliance Panel** will decide whether the review is merited **in which event a Tribunal will carry out the review**.

8.10.4 Following such written request, **the Chairman of the Compliance Panel** may suspend any sanction imposed pending a review.

8.11 Oral hearings

8.11.1 Any service provider, applicant for permission or associated individual ('the applicant') may, by notice in writing to the Executive, require that an oral hearing be held:

- a in the event of a refusal by **a Tribunal** to grant prior permission to provide a service, or only to grant it upon condition,
- b following receipt of any communication from the Executive alleging a breach or breaches of the Code,
- c in respect of any adjudication made by **a Tribunal** without an oral hearing,
- d in the circumstances of an intention to make an order under 8.9.2f or 8.9.2g.

8.11.2 The applicant must, within such written notice, provide details of the allegation or decision in respect of which the oral hearing is required and set out clearly the applicant's case in respect of the relevant allegation or decision.

- 8.11.3 Such written notice may be provided to the Executive at any time up to 10 working days after receipt by the applicant of written notification of a decision by ICSTIS or at any time prior to the adjudication being made where the oral hearing is required following an allegation of a breach of the Code.
- 8.11.4 ICSTIS may require at any stage of its processes that an oral hearing be held.
- 8.11.5 Oral hearings shall take place before **a Tribunal appointed for the purpose.**
- 8.11.6 The applicant is entitled to appear at the oral hearing in person or to be represented. The Executive will attend the oral hearing in order to put the case against the applicant and may instruct a representative to act on its behalf.
- 8.11.7 The enforcement of sanctions imposed pursuant to an adjudication is not automatically suspended by written notice requiring an oral hearing. The applicant may apply in writing to the Chairman of the ***Tribunal*** ('the Chairman') setting out the grounds on which the sanction should be suspended. Unless the Chairman considers that there are exceptional reasons in the particular case to grant the application, he will only do so if he is satisfied that not to do so would give rise to undue hardship, and that to do so would not give rise to a significant risk of public harm. If an applicant has not been granted a suspension of sanction but has not complied with the sanction, the Chairman may stay the oral hearing.
- 8.11.8 *Procedures for hearing*
- 8.11.8.1 Pre-hearing process
- a** The Chairman will give such directions as he considers necessary for the fair and speedy hearing of the oral hearing.
- Such directions may include, for example, directions for:
- the exchange of statements of case,
 - the admission of facts before the hearing,
 - the disclosure of documents,
 - the provision of expert reports,
 - the exchange of witness statements,
 - the preparation of agreed bundles of documents,
 - the submission and exchange of outline arguments,
 - the provision of security for the administrative charges of ICSTIS.
- Directions may be given as to the date by which such actions shall be taken. Where it appears reasonable in all the circumstances, the Chairman may strike out a case or take such other steps as he sees fit where any direction is not followed.
- b** The Chairman may convene a conference for the purpose of providing directions or may deal with directions by correspondence or phone, as he sees fit.
- c** Not less than 10 working days before the date of the oral hearing, the applicant shall be notified in writing (at the address of the applicant last made known to ICSTIS) of the day, time and place of the oral hearing.
- d** Within five working days of receipt of the notice specifying the date of the hearing, the applicant shall inform the Executive in writing of whether he intends to appear in person at the hearing and the name of any person who will be representing him at the hearing.
- e** The Chairman may vary any of the time limits set out in these procedures.

8.11.8.2 If the applicant is neither present nor represented at the hearing, and the **Tribunal** has no cause to believe there is a good reason for the applicant's absence, the matter shall be determined by the **Tribunal** as it sees fit in the absence of the applicant.

8.11.8.3 The hearing

In respect of alleged breaches of the Code of Practice:

- a The Executive shall outline the grounds of the case, and call such witnesses and refer to such documents as it is entitled to do.
- b The applicant shall then be entitled to respond to the case put by the Executive and to call such witnesses or present any written statements or other documents as he is entitled to do.
- c The Executive shall then be entitled to address the hearing panel.
- d The applicant shall be entitled to reply.
- e A witness in person may be cross-examined. A witness who has been cross-examined may be re-examined.
- f The Chairman of the **Tribunal** may question any witness at any time.

In respect of a case concerning an application for permission, the Chairman shall adopt such procedures as he shall deem to be most convenient.

The Chairman of the **Tribunal** shall have the power to vary any of these procedures at any time and to adjourn the hearing if satisfied that it is in the interests of justice to do so.

8.11.8.4 Confidential information

The **Tribunal** shall be entitled to consider and act upon confidential information without directly or indirectly disclosing to the applicant (or the Executive as the case may be) the source of that information, provided that the other party is given a reasonable opportunity to rebut its substance.

8.11.8.5 Recording

A sound recording shall be made of the oral hearing. Recordings will be made available to the Executive and the applicant.

8.11.9 Public hearing

An oral hearing shall be conducted in private, unless the applicant or the Executive otherwise requires. If an oral hearing is in public, either party may request that any part of the hearing be conducted in private and any such application shall itself be heard in private.

8.11.10 Powers of the **Tribunal**

The **Tribunal** shall decide the matter **dealt with in the oral hearing** entirely afresh. For the avoidance of doubt, the **Tribunal**:

- a may impose a greater or lesser sanction than that imposed by **the Tribunal which dealt with the matter previously**,
- b may reverse a decision to issue or refuse a permission,
- c may set such conditions on a permission as it sees fit,
- d must agree to impose such sanctions, permissions and/or conditions, and administrative charges or otherwise dispose of the matter as may be jointly agreed by the Executive and the applicant and which has been agreed by the **Chairman of the Code Compliance Panel, or if he is unavailable by one of the legally qualified Panel members** ('adjudication by consent').

8.11.11 Decision and publication

The ***Tribunal*** shall, as soon as is practicable after the hearing, provide a reasoned written decision. All decisions, whether reached through written or oral process, shall be published by ICSTIS and may identify any network operator, service provider and information provider concerned. Publication will be effected by placing the written decision on the ICSTIS website and in any other way that ICSTIS shall determine.

8.12 Administrative charge

All service providers found to be in breach of the Code may be invoiced for the administrative and legal costs of the work undertaken by ICSTIS. Non-payment within the period laid down by ICSTIS will also be a breach of the Code and may result in further sanctions being imposed. ICSTIS may direct that the relevant network operator withholds and passes to ICSTIS the sum(s) due from the payments outstanding under the contract between the network operator and the service provider.

9 ADDITIONAL PROCEDURES CONCERNING NETWORK OPERATORS

- 9.1 If it appears to ICSTIS that a network operator has failed to comply with its obligations under this Code (whether the subject of a direction or not):
- a ICSTIS will set out in writing the details of the apparent failure to comply.
 - b The network operator will be given a reasonable time to respond. This response will normally be required within five working days.
 - c Upon receipt of the network operator's response or if the network operator does not respond within the time required, the Executive will prepare a report, together with supporting evidence, which will be placed before a **Tribunal appointed to adjudicate upon the matter. The adjudication** will be provided promptly in writing to the network operator.
 - d The **Tribunal** may invite the network operator to make informal representations to it in person in order to clarify any matter or the network operator may request the opportunity to make such informal representations to the **Tribunal**.
 - e The network operator or the Executive may require at any point in the procedure that the matter be dealt with by means of an oral hearing provided that no requirement for an oral hearing may be made more than 10 working days after the provision of any adjudication made under paragraph 9.1c.
- 9.2.1 The procedures for hearings and related matters shall be as set out in paragraphs 8.11 and 8.12 as though 'network operator' had been substituted for 'applicant' throughout.
- 9.2.2 The hearing shall be conducted in private unless the network operator or the Executive otherwise requires. If a hearing is in public, either party may request that any part of the hearing be conducted in private and any such application shall itself be heard in private.
- 9.2.3 The **Tribunal** shall, as soon as practicable after the hearing, provide a reasoned written decision. This written decision shall be published by ICSTIS.
- 9.2.4 If the **Tribunal** determines that the network operator has failed to comply with its obligations under the Code, then the Executive will place before it the network operator's details. These will include a list of any previous determinations of failure to comply, sanctions directed and any other relevant information.
- 9.2.5 The **Tribunal** may impose, by means of a direction to the network operator imposing a sanction upon it, one or more of the sanctions set out in paragraph 2.6.1, which are:
- "2.6.1 Non-compliance by a network operator with any of its obligations set out in this Code shall be dealt with in accordance with Section 9. If ICSTIS determines that a network operator is in breach of any of its obligations, then, having taken all relevant circumstances into account, it may make a direction imposing a sanction on the network operator in the form of any or all of the following depending upon the degree of seriousness with which it regards the breach:
- a a reprimand and/or a requirement that the network operator must comply and remedy the consequences of the breach,
 - b an instruction to pay an appropriate fine,

- c an instruction to cease to provide its network and/or services for the carriage of any particular type or category of premium rate services for a certain period,
 - d an instruction to pay reasonable and valid claims for refunds.”
- 9.2.6 All network operators on whom a sanction is imposed may be invoiced for the administrative and legal costs of the work undertaken by ICSTIS. Non-payment within the period laid down by ICSTIS will be a failure by the network operator to comply with its obligations under the Code and may result in the imposition of a further sanction direction.
- 9.3 A direction or the obligation to comply with any other obligation under this Code is not automatically suspended by the initiation or utilisation of any of the procedures set out *above*. The network operator may apply in writing to the ***Chairman of the Code Compliance Panel*** setting out the grounds on which a direction or obligation should be suspended. Unless the ***Chairman of the Code Compliance Panel*** considers that there are exceptional reasons in the particular case to grant the application, he will only do so if he is satisfied that not to do so would give rise to undue hardship, and that to do so would not give rise to a significant risk of public harm. If the network operator has not been granted a suspension of the direction or obligation and has not complied with the direction or obligation, the Chairman of any ***Tribunal*** may stay ***an*** oral hearing pending compliance.
- 9.4 A network operator may appeal to the IAB against any ***Tribunal*** decision which directs that a sanction be imposed.
- 9.5 If a network operator fails to comply with a sanction direction issued following the process set out in Section 9 (including any appeal to the IAB), ICSTIS may (without prejudice to any enforcement action which it may take) refer the matter to Ofcom in accordance with Section 120 of the Act for it to take such action as it shall see fit.