

## **Consultation By The Department Of Trade & Industry On A Draft Order Raising The Maximum Penalty For Those That Misuse Premium Rate Services, and on Disclosure of Information.**

### **GOVERNMENT RESPONSE (WITH IMPLEMENTING ORDER ATTACHED AT ANNEX A)**

#### **Background**

1. One of the recommendations in Ofcom's review of PRS regulation in 2004 was for the DTI to consider raising the maximum penalty which can be levied by the PRS regulator, ICSTIS, on those that breach its Code of Practice for PRS. The current maximum is £100k and ICSTIS gave us detailed arguments in favour of raising the penalty to £250,000 following the considerable harm to consumers caused by PRS scams. The DTI consultation set out the background and how the Communications Act 2003 stipulates a maximum amount and includes an order-making power for changing it.
2. The Consultation also proposed adding the PRS regulator to the list of persons Ofcom can provide information to without the consent of the affected party. Again, the consultation set out the background to this.

#### **Analysis of Responses – Raising the Maximum Penalty**

3. The consultation closed on 20 September. We received 12 responses from PRS service providers, network operators and consumer bodies. There was overwhelming support for raising the maximum penalty, with several respondents keen to see the maximum penalty raised even higher than £250,000. We are satisfied with the evidence that ICSTIS has provided that raising the maximum penalty to £250,000 is proportionate to the revenues "rogue" providers can make from services which breach the Code. Moreover, the raising of the maximum penalty to £250,000 is only one of a package of measures which should strengthen the regulatory regime against those who intend to defraud consumers by breaching the ICSTIS Code. Of these, a key recommendation requiring Terminating Communications Providers to withhold payments to Service Providers for 30 days after a PRS call is made was implemented on 15 September, and these monies withheld could be used to refund consumers and pay fines.
4. ICSTIS has also considered the responses to this consultation and has confirmed that it remains content to have the limit raised to £250,000.
5. Some respondents mentioned that collection rates for fines are too low, which reduces the deterrent effect of having a higher maximum penalty.

ICSTIS has recognised that its collection rates have been less than what it might wish for, but is confident that the processes and personnel that ICSTIS has put in place will ensure that the underlying trend of the 2005/06 collection rates will exceed those of 2004/5. This is because cooperation with the networks has improved generally as other recommendations from the report are being implemented. In spite of past issues with collection rates there is still a pressing need to increase the maximum penalty to make it more proportionate to the larger revenues being generated by today's Premium Rate Services.

6. Two responses raised the issue of how ICSTIS applies fines [following a recent Independent Appeal Body ruling] and suggested that ICSTIS could apply the maximum fine several times over if a service committed a number of breaches, and one suggested this obviates the need to raise the maximum fine. However, ICSTIS have noted that this is not the approach they have followed and that the maximum level needs to be increased in any event to allow for significant single breaches to be proportionately penalised. In light of this, we believe that the maximum penalty should be raised.

7. BT asked what the fines are used for and suggested they could be used to refund customers. ICSTIS currently uses penalty amounts to reduce the next year's costs of regulating as charged by ICSTIS, and if ICSTIS were to stop this, the burden of regulation on companies would increase. In any case the Ofcom report recommends that ICSTIS should codify and publish the circumstances in which it will use consumer redress as a sanction against Service Providers. Ofcom also recommends requiring Terminating Communications Providers to make funds withheld by them available for consumers to claim refunds for three months after an adjudication by ICSTIS. ICSTIS is also currently consulting on implementing the Ofcom recommendations on consumer refunds.

### **Analysis of Responses - Disclosure of Information**

8. The Order raising the maximum penalty will also specify the Premium Rate Services regulator as a person to whom Ofcom can disclose information about telecoms companies without their consent. Under the current provisions of the Act, Ofcom cannot pass information to ICSTIS about who has been allocated PRS numbers without the applicant's consent. The Act contains an order making power, which can be used to specify ICSTIS as a body that Ofcom can disclose applicants' numbering information to without the applicant's consent. This would give ICSTIS the information they need to take swift action.

9. Nearly all respondents were clearly in favour of this, although one or two respondents said that more specific reference should be made in the Order to a Code for the purposes of regulating Premium Rate Services, or to

ICSTIS itself. The concern was that any organisation with a Code approved by Ofcom might demand sensitive numbering information from Ofcom. The Order itself was worded by reference to a person with the function of administering and enforcing a code approved by Ofcom under section 121 of the Act. This limited the person specified to one enforcing not just any Code, but a Code approved by Ofcom under section 121, which specifies the Code as that for regulating Premium Rate Services. However, we have now specified ICSTIS itself in the Order[, and have also clarified that the higher maximum penalty only applies to breaches which occur after the Order comes into force].

## **Conclusion**

10. The overall support for both proposals has led us to conclude that we should now proceed with the Order to implement the increase in the maximum penalty to £250,000 and to include ICSTIS in the list of persons with whom Ofcom can share data.

## **Guidance for Business.**

### **Maximum Fines:**

The increase in the maximum fine from £100,000 to £250,000 will not in itself alter the way ICSTIS levies fines.

It should be noted that ICSTIS will continue to apply proportionality to its fining policy, so that penalties will vary according to the seriousness of the case. The maximum fine will be applied only in those cases where a service deviates significantly from the ICSTIS Code. The new maximum fine should act, alongside other recommendations in the Ofcom report, as a more effective deterrent to behaviour which would breach the ICSTIS Code. Only those service providers who break the rules will be affected by the fines increase.

### **Disclosure of Information:**

Ofcom will now be able to provide ICSTIS with numbering information without the consent of network operators. Network operators may therefore be associated with problem Premium Rate services at an earlier stage, so they should be aware of this. No new procedures will need to be introduced in order to comply with ICSTIS directions, and the PRS condition which underpins ICSTIS' regulation of PRS remains unchanged. The types of sanction ICSTIS can impose on Service Providers (fines, disconnection) remain the same. Network Operators are already party to the Memorandum of Understanding on traffic monitoring and information sharing, and the disclosure of information amendment is in the same spirit. Network Operators may notice ICSTIS approaching them about problem Service Providers at an earlier stage than in the past, but this can only benefit the reputations of Network Operators and the Premium Rate sector generally.

### **Annex A overleaf: Implementing Order**

**Please see attached at Annex A the Order implementing these changes.**

## Annex A

*Draft Order laid before Parliament under sections 123(5) and 393(11) of the Communications Act 2003, for approval by resolution of each House of Parliament.*

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### DRAFT STATUTORY INSTRUMENTS

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**2005 No.**

## **ELECTRONIC COMMUNICATIONS**

### **The Communications Act 2003 (Maximum Penalty and Disclosure of Information) Order 2005**

*Made* - - - - - *2005*

*Coming into force* - - - - - *30 December 2005*

The Secretary of State makes the following Order in exercise of the powers conferred by sections 123(4), 393(3)(i) and 393(4)(c) of the Communications Act 2003<sup>(1)</sup>;

In accordance with sections 123(5) and 393(11) of that Act, a draft of this Order was laid before Parliament and approved by a resolution of each House of Parliament.

#### **Citation, commencement and interpretation**

**1.**—(1) This Order may be cited as the Communications Act 2003 (Maximum Penalty and Disclosure of Information) Order 2005 and shall come into force on 30 December 2005.

(2) In this Order “the Act” means the Communications Act 2003.

#### **Amendment of maximum penalty**

**2.**—(1) In section 123(2) of the Act (enforcement of conditions regulating premium rate services) for “£100,000” substitute “£250,000”.

(2) Paragraph (1) does not apply to contraventions of conditions set under section 120 of the Act which occurred before the coming into force of this Order.

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(1) 2003 c. 21.

**Specification as a relevant person**

3. The Independent Committee for the Supervision of Standards of Telephone Information Services is specified as a relevant person for the purposes of section 393(3) of the Act (general restriction on disclosure of information).

**Specification as a relevant function**

4. The function of administering and enforcing a code approved by OFCOM under section 121 of the Act is specified as a relevant function for the purposes of section 393(4) of the Act.

## **EXPLANATORY NOTE**

*(This note is not part of the Order)*

This Order makes provision connected with the regulation of premium rate services pursuant to the Communications Act 2003 (“the Act”).

Article 2 amends section 123(2) of the Act so as to raise the maximum penalty that the Office of Communications (“OFCOM”) can impose under section 96 of the Act (as applied by section 123 of the Act), in respect of breaches of the code regulating the provision and content of premium rate services, from £100,000 to £250,000.

Articles 3 and 4 extend the circumstances in which information, which is subject to restrictions on its disclosure imposed by section 393(1) of the Act, may be disclosed. Section 393(2)(b) provides that such restrictions do not apply to any disclosure of information which is made for the purpose of facilitating the carrying out by any relevant person of any relevant function. Article 3 specifies the Independent Committee for the Supervision of Standards of Telephone Information Services (“ICSTIS”) as a relevant person for the purposes of section 393. ICSTIS is a company limited by guarantee with registered number 2398515, whose function it is to administer and enforce a code approved by OFCOM under section 121 of the Act (which regulates the provision and content of premium rate services). Article 4 specifies the function as a relevant function for the purposes of section 393.

A partial regulatory impact assessment has been prepared for this instrument and a copy is available from the Department of Trade and Industry, Bay 207, 151 Buckingham Palace Road, London SW1W 9SS and can also be found at [www.dti.gov.uk/consultations](http://www.dti.gov.uk/consultations).