



The Conditions regulating Premium Rate Services

This document is a statement modifying the PRS
Condition to clarify its applicability to providers of premium
rate services provided over mobile phones and similar
communications devices

Statement

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Section 1

Summary

- 1.1 'Ofcom' (the Office of Communications) exists to further the interests of citizens and consumers through a regulatory regime which, where appropriate, encourages competition. Effective competition delivers choice and lower prices to consumers as well as opportunities for new services and providers. However, consumers may need protection from inappropriate behaviour by certain providers that may undermine confidence in the market as well as causing consumer detriment.
- 1.2 One example of such protection is the regulation of Premium Rate Services ('PRS'). PRS are defined in section 120 of the Communications Act 2003 ('the Act'). In broad terms, PRS offer consumers some form of content, product or service accessed via fixed or mobile telephones and charged to the user's telephone bill. While the majority of PRS providers promote and provide PRS responsibly, a minority do not. The activities of that minority can harm consumers; for example, by causing them to unknowingly incur charges or run up high phone bills, or by providing children with access to content that is inappropriate for them. Some PRS providers even use PRS to deliberately mislead or defraud. PRS regulation is designed to offer consumers a degree of protection from such harm.
- 1.3 The statutory provisions for the regulation of PRS are set out in sections 120 to 124 of the Act. These provisions provide Ofcom with the power to set conditions ('the PRS Condition') that bind the persons to whom they are applied, for the purpose of regulating the provision, content, promotion and marketing of PRS. Briefly, where Ofcom has approved a code for regulating the provision and contents of PRS, the PRS Condition can only require the persons to whom it applies to comply with directions given in accordance with that code by that code's enforcement authority.
- 1.4 PRS are currently regulated primarily by the Independent Committee for the Supervision of Standards in the Telephone Information Services ('ICSTIS') under a code which Ofcom has approved ('the Approved Code'). The currently applicable version of the Code was approved for the purposes of sections 120 and 121 of the Act on 29 December 2003, and approval was also given for an emergency code amendment on 4 August 2005.
- 1.5 The currently applicable version of the PRS Condition was published on 8 June 2006 and requires 'Communications Providers' (as defined in the PRS Condition) to comply with directions given by ICSTIS under the Approved Code. 'Communications Provider' is defined within the PRS Condition in such a way as to restrict that expression to persons involved in the provision of a subset of PRS known as 'Controlled Premium Rate Services' ('CPRS'). Of particular significance for the purposes of this Statement is that the definition of CPRS in the existing version of the PRS Condition contains an express exclusion for "a Mobile Service, a Personal Numbering Service or a Radiopaging Service".
- 1.6 A failure by a Communications Provider to comply with an ICSTIS direction will normally amount to a contravention of the PRS Condition and may lead to ICSTIS referring the matter to Ofcom. Ofcom may then take enforcement action under the relevant procedures set out in the Act.
- 1.7 In November 2005, Ofcom published a consultation document ('the First Consultation') on proposals to modify the wording of the PRS Condition. This was for

two reasons. First, there was growing evidence of consumer harm arising from 'rogue' internet dialler software which, once installed on a computer (typically without the user's knowledge), dialled '087' numbers whenever the user tried to access the internet. As calls to such numbers generally cost less than 10 pence per minute to call, the providers of such services were not subject to the PRS Condition. Ofcom therefore proposed an amendment to the PRS Condition by extending the definition of CPRS to include "internet dialler software", irrespective of the call cost or number.

- 1.8 Second, Ofcom had received representations that the wording of the definition of CPRS within the PRS Condition was ambiguous. In particular, it had been suggested that the definition of CPRS excluded PRS accessed from a mobile phone. Ofcom's legal view of the true meaning of the PRS Condition was that PRS accessed over mobile phones was not excluded. Nevertheless, Ofcom proposed to modify the PRS Condition in such a way as to remove any potential scope for confusion or doubt.
- 1.9 The form of modification which Ofcom proposed was the replacement of the "Mobile Services" exclusion with an exclusion for "calls to Mobile Services", thus removing any perceived uncertainty as to whether calls from mobile phones to PRS were or were not also excluded from the definition of CPRS. Any such uncertainty was not only unhelpful (since regulatory requirements should be set out as clearly and accessibly as reasonably possible) but could also contribute to consumer harm. Such harm could, for example, arise if ICSTIS' task of taking prompt and effective regulatory action was made more difficult by uncertainty on the part of some PRS providers as to whether the services they were providing were subject to Ofcom's 'backstop powers' under the PRS Condition in the event of failure by a Communications Provider to comply with an ICSTIS direction.
- 1.10 Having considered the responses received to the First Consultation, Ofcom was of the view that its proposed modification might be read as excluding services provided or paid for via reverse-billed SMS¹ (in respect of which the charge is made by sending an SMS message to a person's mobile phone). Accordingly, that modification had the potential to itself cause confusion, thereby substantially defeating the purpose of making the modification in the first place.
- 1.11 In a further document in June 2006 ('the Second Consultation') Ofcom confirmed the modification to the PRS Condition so as to include "internet dialler software" within the definition of CPRS irrespective of the cost of the call, but proposed, and invited comments on, an alternative form of modification to the PRS Condition to remove any perceived ambiguity in respect of the "Mobile Services" exclusion. The proposed modification was to remove the exclusion for "a Mobile Service, a Personal Numbering Service or a Radiopaging Service" entirely. As Ofcom stated in that consultation, its legal view was that the exclusion had been unnecessary and that removing it would make no difference to the true scope of CPRS. Such removal would, however, enable the clarification that Ofcom was seeking to provide to be delivered in a neat and simple way that did not have an apparent potential to itself give rise to confusion as to what the CPRS definition did and did not capture.

¹ Reverse-billed SMS is where a premium rate text message (typically costing from 25p to £1.50 per message) is sent to a mobile telephone, e.g. where a customer subscribes to a fixed number of SMS being sent to his phone per month (for example sport updates, mobile ring-tones etc.). ICSTIS has issued strict guidance for reverse-billed SMS, including obligations to ensure consumers are given clear information on charging at the point at which they sign up.

- 1.12 That view was fully in accordance with the original intention behind the exclusion, namely, to make clear that ordinary calls to mobile phones and other services which enabled the called party to be reached irrespective of his or her physical location were not within the scope of CPRS. That clarification appeared to have been thought desirable because of a perceived potential for confusion to arise as to whether callers to such services were being provided with a form of CPRS insofar as those callers were charged more than 10 pence per minute. In reality, however, callers to mobile phones, personal numbering services and radiopaging services were not being provided with a service which fell within section 120 of the Act (as properly interpreted) and were not, therefore, being provided with any form of PRS at all. If a service was not within the scope of PRS, it could not be within the scope of CPRS. The exclusion of “a Mobile Service, a Personal Numbering Service or a Radiopaging Service” was therefore unnecessary and of no practical effect. Accordingly, the removal of that exception would not have the effect of extending regulation in any way.
- 1.13 In addition, Ofcom confirmed in the Second Consultation the intention which it had expressed in the First Consultation to carry out a comprehensive review, commencing in 2006, of the scope, purpose and effectiveness of PRS regulation. This review would consider the scope of PRS regulation, and how it should be applied to, or removed from, emerging commercial services coming out of the mobile, fixed telephony, and broadcast sectors, as well as growth in broadband and Voice over Internet Protocol (‘VoIP’) billing as a possible new route to content. This review is now underway.

Conclusion

- 1.14 Having carefully considered the responses to the First and Second Consultations, Ofcom has now decided to proceed with the modification to the PRS Condition proposed in the Second Consultation. In that regard, Ofcom believes that it is plainly desirable that regulatory requirements should be set out as clearly, unequivocally and transparently as is possible (notwithstanding the inevitable complexity of the technology and markets with which Ofcom’s responsibilities are concerned), and that confusions or doubts which might make ICSTIS’ consumer protection work more difficult should be removed.
- 1.15 Ofcom is also satisfied that the statutory requirements for modifying the PRS Condition are met in respect of the amendment. In that regard, Ofcom does not see any incompatibility between the provision of clarity in respect of existing regulatory requirements, and the principles of transparency, proportionality or non-discrimination.
- 1.16 The modification, which is set out at Annex 2 will come into force one month from date of publication of the Notification and Statement.

Section 2

Background and Legal Framework

Premium Rate Services

- 2.1 PRS are defined in section 120 of the Act. In broad terms, PRS offer some form of content, product or service via fixed and mobile telecoms lines. These may be accessed by conventional voice services or using SMS text, line telephone, PC (e-mail, internet, bulletin board), mobile phone or interactive digital TV. Services typically include TV voting lines, competitions, scratchcards, adult entertainment, chat lines, business information services, technical helplines, mobile phone ringtones and game downloads, horoscopes and interactive TV games.
- 2.2 In the UK, PRS are typically accessed by calling numbers prefixed by '09', although similar, and in some cases identical, services may also be accessed from numbers on other numbering ranges, including those prefixed by '08' as well as access codes. Those accessed via SMS on mobile phones are often accessed via short codes starting with an '8' or a '6'. Directory enquiry services (118xxx numbers) also fall within the definition of PRS for the purposes of the Act.
- 2.3 PRS are defined in section 120(7) of the Act, which provides that a service is a PRS if:
- a) it is a service falling within subsection (8)²;
 - 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.

The regulatory framework and PRS

- 2.4 A new regulatory framework for electronic communications networks and services came into force on 25 July 2003. This new framework aims to reduce entry barriers and foster prospects for effective competition to the benefit of consumers.
- 2.5 Under the new regulatory framework, Ofcom must have regard to its principal duty set out in section 3 and, in particular 3(1) of the Act, which states that "*it shall be the principal duty of Ofcom, in carrying out their functions –*
- a) *to further the interests of citizens in relation to communications matters; and*

² A service falls within this section 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 users of the electronic communications service.

b) *to further the interests of consumers in relevant markets, where appropriate by promoting competition.*"

- 2.6 In addition, it is the duty of Ofcom to act in accordance with the six Community requirements (which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive.)³.
- 2.7 The relevant statutory provisions governing the regulation of PRS are set out under sections 120 to 124 of the Act. These provisions provide Ofcom with the power to set conditions ('the PRS Condition') that bind the persons to whom they are applied, for the purpose of regulating the provision, content, promotion and marketing of PRS. Where Ofcom has approved a code which has been made by any person for regulating the provision and contents of PRS and the facilities made available in the provision of such services, the PRS Condition can only require the persons to whom it applies to comply with directions given in accordance with the approved code by that code's enforcement authority. Any condition set under section 120 must comply with section 47 of the Act, i.e. it must be objectively justifiable, not unduly discriminatory, proportionate and transparent. It must also comply with the notification and consultation requirements in section 48 of the Act.

The role of ICSTIS and Ofcom in the regulation of PRS

- 2.8 The current regulatory arrangements for PRS follow a self- and co-regulatory approach. The primary role of consumer protection with regard to PRS falls to ICSTIS⁴, the industry-funded regulatory body for premium rate charge telecommunications services. ICSTIS regulates the content and promotion of PRS through a Code of Practice which imposes certain specified obligations on both 'service providers' and 'network operators' (as those parties are defined therein).
- 2.9 The current version of the Code of Practice was approved for the purposes of sections 120 and 121 of the Act on 29 December 2003 (the 'Approved Code') and approval was also given for an emergency code amendment on 4 August 2005
- 2.10 The current edition of the Code is available from the ICSTIS website⁵.
- 2.11 ICSTIS issued a consultation document on 28 July 2005 seeking comments on a draft new version of its Code of Practice. In conducting its review ICSTIS examined all areas of the current Approved Code (ICSTIS Code, 10th Edition, as amended) and also considered the recommendations put forward by Ofcom in its report to the Department of Trade and Industry ('DTI'), *the Regulation of Premium Rate Services*, published in December 2004 ('Ofcom's report').⁶ ICSTIS subsequently published a statement setting out a further version of its draft Code which had been amended in light of comments received.⁷ That draft was also submitted to Ofcom with a request that Ofcom approve it under sections 120 and 121 of the Act so that it would replace the current edition of the Approved Code.

³ Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.

⁴ Independent Committee for the Supervision of Standards of the Telephone Information Services.

⁵ http://www.icstis.org.uk/pdfs/Code_Practice_10_Amended.pdf

⁶ ICSTIS' consultation document is available on the ICSTIS website at: <http://www.icstis.org.uk/icstis2002/pdf/A%20Statement%20on%20the%20ECA%20Condoc%20-%20FINAL.pdf>.

⁷ ICSTIS' statement is available on the ICSTIS website at: http://www.icstis.org.uk/pdfs_code/11thCode_final_statement.pdf

- 2.12 Ofcom then published a consultation document on whether Ofcom should approve that new version of the Code (11th Edition).⁸ The consultation period closed on 10 July 2006 and Ofcom is currently in the process of considering the responses received.
- 2.13 Under the current version of the Approved Code, ICSTIS has a range of sanctions it can impose on 'service providers' in respect of breaches of the Approved Code. These include requiring the giving of assurances about future behaviour, the imposition of financial penalties, barring access to services and prohibiting a named individual from operating services for a set period.
- 2.14 The obligations imposed on 'network operators' are more limited. Broadly speaking, those obligations require network operators to assist ICSTIS, for example by complying with its directions to provide information about particular services or service providers, withholding revenues from particular service providers, or suspending the provision of particular services.
- 2.15 As noted above, Ofcom has the power under section 120 of the Act to set conditions for the purpose of regulating the provision, content, promotion and marketing of PRS that bind the persons to whom they are applied. The current PRS Condition, which was published on 8 June 2006, binds each and every person falling within the definition of 'Communications Provider' in the PRS Condition, to comply with:
- “(a) directions given in accordance with an Approved Code by the Enforcement Authority⁹ and for the purpose of enforcing the provisions of the Approved Code; and
- (b) if there is no such code, the provisions of the order for the time being in force under section 122.”
- 2.16 The definition of 'Communications Provider' in the PRS Condition is confined to persons involved in the provision of a subset of PRS nominated within the Condition as 'Controlled Premium Rate Services' ('CPRS'). CPRS are defined in the PRS Condition to include a PRS only where: (i) the charge or rate for the call is more than 10 pence per minute; (ii) the service is a Chatline Service; or (iii) Internet Dialler Software is operated. Unless a service falls within the definition of PRS in section 120 of the Act, however, it cannot constitute a CPRS, irrespective of the cost of calling it.
- 2.17 A failure by a Communications Provider to comply with an ICSTIS direction will normally amount to a contravention of the PRS Condition and may lead to ICSTIS referring the matter to Ofcom. Ofcom may then take enforcement action under the relevant procedures set out in the Act. The PRS Condition is sometimes referred to as Ofcom's 'backstop power' because that power performs the function of supporting ICSTIS' effectiveness in circumstances where a party falling within the definition of 'Communications Provider' in that condition is failing to comply with directions that ICSTIS has given to that party.

⁸ <http://www.ofcom.org.uk/consult/condocs/icstiscode/icstiscode.pdf>

⁹ Currently ICSTIS.

The definition of CPRS and Mobile Services

- 2.18 The history to the drafting and setting of the PRS Condition was discussed in the First and Second Consultations.
- 2.19 In 1999, Oftel and the DTI issued a joint consultation on the regulation of PRS.¹⁰ At that time, Oftel only had backstop powers in relation to live services. In the consultation, the key problem with PRS was identified as their expense and it was recognised that it was not only live conversation services that could result in telephone subscribers running up high bills. It was therefore proposed to extend the backstop powers to a wider category of PRS by modifying the (at the time) licence conditions on operators. This wider category of PRS was known as CPRS.
- 2.20 This consultation was followed by an Oftel statement in September 2000¹¹, in which Oftel said it would proceed with a licence modification to extend its PRS backstop powers. Oftel noted that whilst there was broad support for PRS calls over a certain price to be included in its backstop powers, there was some concern that this threshold could unintentionally capture services which were not normally considered to be PRS (such as services which may have had shared revenue such as so-called “find-me-anywhere services” on ‘07’ number ranges).
- 2.21 Oftel issued a draft licence modification on 24 July 2001¹² which included an express exclusion for “find-me-anywhere services” from the scope of CPRS. The basis for the exclusion was Oftel’s concern that defining CPRS by price alone might unintentionally capture calls to such services. The licence modifications were made on 8 February 2002 to all public telecommunications operator licences including those of the mobile network operators.
- 2.22 On 12 June 2003, Oftel consulted on the setting of the PRS Condition. In its document, *Conditions Regulating Premium Rate Services*, Ofcom stated that “*It remains the Director’s intention not to extend the definition of those persons or services that will be subject to statutory backstop powers beyond those that are the subject of current powers*”. It was proposed therefore to expressly exclude ‘Mobile Services’, ‘Personal Numbering Services’ and ‘Radiopaging Services’ from the definition of CPRS and this was in order to replicate the “Find-me-anywhere” exclusion from the previous regime.¹³
- 2.23 The PRS Condition then came into effect on 29 December 2003. The definition of CPRS within that Condition contained an express exclusion for ‘a Mobile Service, a Personal Numbering Service or a Radiopaging Service’.

Ofcom’s recent proposals to amend the PRS Condition

- 2.24 On 21 November 2005, Ofcom published a consultation document on proposals to modify the wording of the PRS Condition.¹⁴ This was for two reasons.
- 2.25 First, there was growing evidence of consumer harm arising from ‘rogue’ internet dialler software which, once installed on a computer (perhaps without the user’s

¹⁰ <http://www.ofcom.org.uk/static/archive/oftel/publications/1999/consumer/prem0899.htm>

¹¹ <http://ofcom.org.uk/static/archive/oftel/publications/numbering/prs0900.htm>

¹² <http://www.ofcom.org.uk/static/archive/oftel/publications/numbering/prslic0701.htm>

¹³ <http://www.ofcom.org.uk/static/archive/oftel/publications/numbering/2003/prs0603.htm>

¹⁴ <http://www.ofcom.org.uk/consult/condocs/prsconditions/>

knowledge), dialled '087' numbers whenever the user tried to access the internet. As calls to such numbers generally cost less than 10 pence per minute to call, the providers of such services were not subject to the PRS Condition. Ofcom therefore proposed an amendment to the PRS Condition by extending the definition of CPRS to include 'internet dialler software', irrespective of the call cost or number. This amendment was confirmed in June 2006 and the PRS Condition was modified by way of a Notification of 8 June 2006 and came into effect one month later.

- 2.26 Second, Ofcom had received representations that the wording of the definition of CPRS within the PRS Condition was ambiguous. In particular, it had been suggested that the definition of CPRS excluded PRS accessed from a mobile phone. Ofcom's legal view in respect of the true meaning of the PRS Condition was that PRS accessed over mobile phones was not excluded. Nevertheless, Ofcom proposed to modify the PRS Condition in such a way as to remove any potential scope for confusion or doubt.
- 2.27 The form of modification which Ofcom proposed was the replacement of the "Mobile Services" exclusion with an express exclusion for "*calls to Mobile Services*", thus removing any perceived uncertainty as to whether calls *from* mobile phones to PRS were or were not also excluded from the definition of CPRS. Any such uncertainty was not only unhelpful (since regulatory requirements should be set out as clearly and accessibly as reasonably possible), but also (as the First and Second Consultations noted) could contribute to consumer harm. Such harm could, for example, arise if ICSTIS' task of taking prompt and effective regulatory action was made more difficult by uncertainty on the part of some PRS providers as to whether they would be subject to Ofcom's 'backstop powers' under the PRS Condition in the event of a failure to comply with an ICSTIS direction. Indeed, Ofcom had at that stage already received informal expressions of concern from ICSTIS about the potential for this to be a significant problem if left unresolved.
- 2.28 As Ofcom noted within that Consultation, the UK premium rate sector was worth in the region of £1 billion per annum in 2004, and that rise in the popularity and usage of mobile phones had meant that a large proportion of calls to PRS were being made from mobile phones. Indeed, many of the complaints received by ICSTIS related to PRS accessed using 'short codes' which relate specifically to mobile, rather than fixed-line, phones. In those circumstances, it was plainly desirable that Ofcom should act promptly to clear up any inaccurate perceptions on the part of some industry players that PRS provided over mobile phones were not subject to Ofcom's backstop powers.
- 2.29 Ofcom received a number of responses from stakeholders to the First Consultation. Whilst there was broad support for a clarifying amendment to the PRS Condition, there was some concern that the proposed modification to the PRS Condition did not achieve the desired aim; in particular, Ofcom's proposal to exclude "*calls to Mobile Services*" from the PRS Condition might itself create the potential for confusion insofar as that exclusion might then be interpreted by some industry players as excluding data services. In addition, Ofcom was concerned that the modification proposed in the First Consultation might be thought or argued by some industry players to exclude from the scope of CPRS services (such as ringtone subscription services) charged for by the sending of reverse-billed SMS (i.e. text messages). Given that Ofcom neither wished to create any such confusion, nor to exclude services charged for by reverse-billed SMS from the scope of CPRS, Ofcom agreed to reconsider the wording of the proposed modification of the PRS Condition and to consult again.

- 2.30 On 8 June 2006, Ofcom published a subsequent consultation document with a revised proposed amendment to the PRS Condition.¹⁵ Ofcom proposed to remove the exclusion for “a Mobile Service, a Personal Numbering Service or a Radiopaging Service”. As had been set out in the First Consultation, the intention behind the exclusion had been to replicate the previous exclusion for “find-me-anywhere services” and thereby avoid any confusion arising as to whether providers of such services were subject to Ofcom’s backstop powers. As stated in that consultation, Ofcom’s legal view was that the exclusion had been unnecessary since such services were not PRS (as defined in section 120 of the Act) in any event. Removing the exclusion would therefore make no difference to the true scope of CPRS, but would enable the clarification that Ofcom was seeking to provide to be delivered in a neat and simple way that did not itself give rise to a potential for confusion.
- 2.31 That view was, as explained above, fully in accordance with the original intention behind the exclusion, namely, to make clear that ordinary calls to mobile phones and other services which merely enabled the called party to be reached irrespective of his or her physical location were not within the scope of CPRS. That clarification appeared to have been thought desirable because of a perceived potential for confusion to arise as to whether callers to such services were being provided with a form of CPRS insofar as they were being charged more than 10 pence per minute. In reality, however, callers to mobile phones, personal numbering services and radiopaging services were not being provided with a service which fell within section 120 of the Act (as properly interpreted) and were not, therefore, being provided with any form of PRS at all.
- 2.32 For a call to a mobile service to fall within section 120, its provision must consist in the provision of contents of a communications transmitted by means of an electronic communications network. Ofcom stated that it did not consider that the provision of an ordinary call to a mobile service would consist of the provision of contents of a communication – it is a service having its principal feature as the conveyance of signals. It would not therefore fall within section 120(8)(a) of the Act.
- 2.33 Ofcom stated that, alternatively, a call to a mobile service would be PRS if it fell within section 120(8)(b). Its provision would have to allow the user of an electronic communications service to make use of a “facility”. “A facility” is defined in section 120(14) as including a facility for making a payment for goods or services; a facility for entering a competition or claiming a prize; and a facility for registering a vote or recording a preference. Although the definition of “facility” at subsection 14 is not exhaustive, Ofcom said it did not consider than an ordinary call to a mobile could be said to be provided in order to allow a user to make use of a “facility”. An ordinary call to a mobile would not therefore fall within 120(8)(b).
- 2.34 Ofcom set out in the Second Consultation that the policy for excluding personal numbering services and radiopaging services from the definition of CPRS was the same as that for the mobile services exclusion; they were not genuine PRS but had some characteristics of PRS such as revenue share and call rates over 10ppm. They had all been previously described by Oftel as “find-me-anywhere services” and were carved out of the definition of CPRS in the licence conditions.¹⁶ Ofcom set out that it did not consider that personal numbering services and radiopaging services, as

¹⁵ <http://www.ofcom.org.uk/consult/condocs/prsconditions2/>

¹⁶ <http://www.ofcom.org.uk/static/archive/oftel/publications/numbering/prslic0701.htm>

defined, are PRS as defined in the Act in the same way as mobile services, as set out above.¹⁷

- 2.35 Ofcom's view was therefore that the exclusion of "a Mobile Service, a Personal Numbering Service or a Radiopaging Service" was unnecessary and of no practical effect. Accordingly, the removal of that exception would not have the effect of extending regulation in any way.
- 2.36 In addition, Ofcom confirmed in the Second Consultation the intention which it had expressed in the First Consultation to carry out a comprehensive review, commencing in 2006, of the scope, purpose and effectiveness of PRS regulation. That review would consider the scope of PRS regulation, and how it should be applied to, or removed from, emerging commercial services coming out of the mobile, fixed telephony, and broadcast sectors, as well as growth in broadband and Voice over Internet Protocol ('VoIP') billing as a possible new route to content.
- 2.37 Ofcom received a number of responses to the Second Consultation and these are considered, along with Ofcom's comments on these responses in section 3 below.

¹⁷ Paragraphs 5.50 to 5.57 of the Second Consultation.

Section 3

Responses to the consultation and Ofcom's comments

Responses to the Second Consultation and Ofcom's comments

General

- 3.1 Ofcom received five responses to the Second Consultation. Of those, two respondents (BT and the UK Competitive Telecommunications Association ('UKCTA')) supported Ofcom's proposal, two respondents Hutchison 3G UK ('H3G') and the Mobile Broadband Group ('MBG'), one of which was partly a confidential response, were opposed and one (the Network for Online Commerce ('NOC')) stated that it believed that the Approved Code should be the dominant code for all PRS, whether accessed via fixed line or mobile services.
- 3.2 A list of the respondents who submitted non-confidential responses is attached at Annex 3. The responses themselves are available for viewing at <http://www.ofcom.org.uk/consult/condocs/prsconditions2/responses/>.
- 3.3 Ofcom has carefully considered all responses received to the First and Second Consultations. Ofcom notes that the majority of the responses overall to the First and the Second Consultations were broadly supportive of the modification of the PRS Condition to remove any scope for confusion as to whether or not PRS accessed using mobile phones were within the scope of Ofcom's backstop powers.
- 3.4 Ofcom has given particularly careful consideration to the two responses which were opposed to the modification proposals. Ofcom understands these responses to be predicated on a belief that Ofcom was seeking to extend regulation. As set out in Section 2, however, Ofcom is satisfied that the actual and intended effect of the exclusion for "a Mobile Service, a Personal Numbering Service or a Radiopaging Service" from the definition of CPRS was to exclude ordinary calls to "find-me-anywhere services" – services which are not within the statutory definition of PRS and could not, therefore, be within the scope of CPRS in any event. Accordingly, the modification would not give rise to any change in the true scope of CPRS, or the extent of regulation under the PRS Condition, at all.

MBG

- 3.5 MBG repeated their concerns given in response to the First Consultation, stating that they still did not support making any changes to the definition of "Mobile Services" at this time. MBG believed that the promised PRS scope review was the proper place to address the issues which the proposed amendment sought to rectify. Furthermore, MBG argued that the mobile network operators had been co-operating closely with ICSTIS to try to eradicate complaints about third party premium rate services (particularly subscription services) and that such co-operation was working, with ICSTIS' half-year statement to March 2006 reporting a fall of 62% in complaints about mobile services. MBG stated that it considered any complaints arose only because the market was very dynamic and hence hard to regulate and not because of any doubts about the scope of existing regulation.

- 3.6 Ofcom stated in the consultation documents that a policy review of the scope of PRS regulation will commence in 2006. That review is now underway. Ofcom does not consider it necessary for this review to be completed before taking action to resolve any confusion about the scope of the current PRS Condition. As set out above, Ofcom's view is that the removal of the exclusion does not alter the regulatory regime in any way. Delay in clarifying the position could only serve to prolong the confusion and make ICSTIS' task of securing full compliance with the existing PRS regime more difficult than it ought to be. Ofcom believes that it is in the interests of consumers, good regulation and transparency for the removal to go ahead now and, in the absence of there being any change to the regulatory regime, it is difficult to identify any persuasive reasons for not doing so.
- 3.7 Whilst Ofcom agrees that evidence of co-operation between mobile network operators and ICSTIS is relevant to the policy review, Ofcom does not consider it to be relevant to the narrow question of whether it would be sensible to remove the scope of confusion as to the scope of current regulation. The true scope of existing regulation is, of course, independent of the policy project.

H3G

- 3.8 H3G was strongly opposed to Ofcom's proposal. It responded in writing to the Second Consultation on 12 July 2006 and 14 July 2006. Ofcom also met with H3G on 28 September 2006 and further written submissions were provided on 6 October and 12 October 2006. In coming to the decision set out in this Statement, Ofcom has also taken into account H3G's comments in respect of the First Consultation (along with those of other respondents).
- 3.9 H3G responded on four main areas; 1) Ofcom's assertion that the amendment to the PRS Condition is necessary to remove ambiguity and protect against consumer harm; 2) Ofcom's view that the PRS Condition amendment does not extend the scope of premium rate regulation; 3) Ofcom's statutory duties in conducting a consultation and amending the PRS Condition; and 4) policy considerations in applying premium rate regulation to mobile services. H3G also claimed that Ofcom had refused to engage with, or respond, to a number of its previous responses.

Ambiguity

- 3.10 H3G argued that Ofcom had not provided any evidence of consumer harm caused by the perceived ambiguity of the PRS Condition. It considered that the statistics given for complaints received by Ofcom and ICSTIS related mainly to fixed line services where there is no ambiguity. It stated that the mobile statistics failed to provide evidence that the underlying cause for the mobile services complaints was the supposed ambiguity.
- 3.11 H3G stated that it was puzzled why the statistics showed that the supposed ambiguity of the PRS Condition in relation to mobile services could lead to consumer harm where there is no ambiguity regarding the application of the condition to fixed line services. H3G continued by stating that the fact there were complaints about fixed line services showed the underlying cause of complaints was not dependent on the PRS Condition. H3G's position was that the risk of harm relates to the length of the supply chains and the lack of competition in the fixed market.
- 3.12 Ofcom's reference to the complaint statistics set out in the Second Consultation was not that the complaints about PRS accessed from mobile phones were the result of any ambiguity in the meaning of the PRS Condition, but that, given the number of

complaints about PRS accessed from mobile phones already, it was in the interests of consumer protection to provide clarity to all interested parties that such services were not outside the compulsory regulation under the Approved Code which the PRS Condition guaranteed.

- 3.13 Ofcom has noted what H3G has said in respect of the difference between traditional voice information services and mobile information services (such as those provided by H3G within its ‘walled garden content’ services) and will take these comments into account when conducting its review of scope. Ofcom does not consider, however, that such differences can in themselves affect either the true meaning of the existing PRS Condition or the benefits of ensuring that the PRS Condition is as clear as possible. The proper time for considering such differences is when considering what the regulatory regime should be (as Ofcom is in the process of doing), rather than considering how best to provide clarity as to what the regulatory regime is now.
- 3.14 H3G also criticised the complaint statistics referred to in the Second Consultation, in that they were categorised by reference to whether the customer accessed the service via a mobile or fixed line phone whereas the application of the regulatory requirements in respect of PRS depended, in H3G’s view, on whether a service was being provided via a mobile or fixed line service, with services provided by mobile terminating networks not being covered. Ofcom had therefore artificially inflated the supposed consumer harm relating to mobile services when it stated ‘09’ captured complaints from mobile telephones as well as fixed.
- 3.15 Ofcom agrees that the complaint statistics given in the Second Consultation drew a distinction between complaints on the basis of whether they were accessed over mobile or fixed line. Ofcom does not accept, however, that this was inappropriate. Some industry players have taken the position that all PRS accessed from mobile phones are excluded from CPRS irrespective of the identity of the person providing the service and his relationship with the end-user. Indeed, at least one industry player recently threatened ICSTIS with judicial review proceedings partly on that basis, but later decided not to pursue such proceedings. In those circumstances, it is reasonable for Ofcom to note the large proportion of complaints to ICSTIS which relate to PRS accessed from mobile phones. The fact that H3G may, perhaps, agree with Ofcom that some or all of those complaints relate to services which fall within the definition of CPRS does not alter the fact that other industry players may take a different view, and that it is desirable that Ofcom should take action to remove the scope for such alternative (and incorrect) interpretations of the PRS Condition’s scope.
- 3.16 H3G believed that ambiguity of the PRS condition had not led to any change in conduct by mobile operators or service providers, and pointed out that H3G managed its third party premium rate mobile services in compliance with the ICSTIS code and directions. It stated that it and other providers self-regulated their own portal mobile content services ensuring the objectives of the ICSTIS Code were met. Ofcom has noted these comments and will take them into account in its review of scope. Ofcom does not consider that this detracts from which services are covered by existing regulation.
- 3.17 H3G repeated its contention that, as the PRS Condition did not apply to mobile services, ICSTIS had no authority to impose levies on the mobile operators’ services. The express exclusion of mobile services from the PRS condition may have had a financial impact on ICSTIS, but revenue may not be raised without an express Act of Parliament. Any financial impact on ICSTIS’ revenue-raising was not an acceptable justification for a change to PRS regulation. H3G also argued that the wording of the

statute had the opposite effect; that it was not Parliament's intention that all mobile services should be covered by the PRS Condition.

- 3.18 Ofcom refutes the suggestion that it is modifying the PRS Condition in order to enable ICSTIS to raise revenue. As noted above, Ofcom does not accept that it is bringing about any change to the true meaning or scope of the PRS Condition by removing the exception for "a Mobile Service, a Personal Numbering Service or a Radiopaging Service". Accordingly, the removal of that exception will not result in any party being subject to the ICSTIS levy to any greater extent than is already the case. Additionally, Ofcom is unclear about the point which is being made in respect of the wording of the Act. If the services which H3G is claiming do not fall within section 120 of the Act do not in fact do so, then those services will not be PRS at all and therefore, by definition, cannot be CPRS. The proposed modification of the PRS Condition could make no difference to the position.

Extension of scope of premium rate regulation

- 3.19 H3G argued that Ofcom's view that the proposed amendment is not an extension of regulation has been asserted without any independent authority or policy review to show that premium rate regulation was intended to cover mobile services. H3G repeated its position that it is unsustainable for Ofcom to seek to amend the condition before carrying out a review of scope. H3G stated that without such a step H3G did not see how the section 47 tests had been met; that a proper impact assessment had not been carried out; that there had not been a meaningful consultation; and that reasons had not been given as required under section 48.
- 3.20 Ofcom restates that it does not consider it necessary to complete a policy review of the scope of PRS regulation prior to making the amendment to the PRS Condition. As Ofcom set out at paragraph 1.18 of the Second Consultation, Ofcom intended to commence a review in 2006 of the scope of PRS regulation in a quite separate exercise (and this is now underway). This latter exercise is intended to consider how PRS regulation should evolve in response to the emergence of new commercial services in the mobile, fixed telephony and broadcast sectors as well as possible new routes for content delivery, such as broadband and VoIP. Whilst this review of scope is intended to consider issues such as those raised by H3G (i.e. the extent to which an extension or relaxation of regulation is appropriate), it is not related to the present exercise of removing any scope for confusion regarding the requirements of the existing regulatory regime. Consequently Ofcom does not agree that a review of scope is required before making the proposed amendments.
- 3.21 **Deletion of express exclusion:** H3G said it was not credible for Ofcom to argue that the deletion of an unqualified express exclusion for "a Mobile Service" would not have a substantive effect. To argue that the deletion had no substantive effect would beg the question why it was included in the first place. H3G stated that Ofcom did previously believe that the exclusion had some meaning because in the first consultation it sought to qualify the exclusion so that it only applied to one service. H3G noted that Ofcom's additional justification was that the exclusion was never intended to cover non-PRS services and this emphasised the importance of Ofcom conducting a review of scope before amending the PRS Condition.
- 3.22 Ofcom's position is that the express exclusion of "a Mobile Service, a Personal Numbering Service or a Radiopaging Service" from the definition of CPRS in the PRS Condition is of no practical significance because the only services to which that 'exclusion' properly relates are not PRS anyway. That position is fully supported by the history of the setting of the PRS Condition. H3G does not appear to have

questioned the substance of the historic evidence in any of its responses and Ofcom is, in any event, satisfied that the evidence demonstrates the intent behind the exclusion as having been to replicate the previous exclusion for “find-me-anywhere services”. Ofcom also notes that the historical evidence provides a simple and credible explanation for the exclusion having been incorporated within the CPRS definition: to provide assurance that calls to “find-me-anywhere services” were not caught by the PRS Condition even if the cost of calling those services exceeded the 10 pence per minute threshold.¹⁸ Since such services are not in fact PRS, they cannot be caught by the PRS Condition in any event, and it makes sense to resolve the difficulties caused by confusion over the scope of the exception by removing that exception altogether.

- 3.23 **Objective of consultation:** H3G claimed that it was unclear as to the objective of the consultation if Ofcom held to the view that the existing PRS Condition covered what it termed ‘mobile services’: it would seem to be unnecessary if mobile services have always been within PRS regulation. It was nonsense, in H3G’s view, to consult merely on whether the proposed deletion would achieve Ofcom’s objective. H3G said it could only assume that Ofcom was issuing the consultation because it was aware that its interpretation of the PRS Condition remained controversial, that the proposed amendment might be regarded as an extension of premium rate regulation and that Ofcom would be unable to effect an amendment without further consultation. Again H3G stated that Ofcom ought to consider the policy before amending the PRS Condition.
- 3.24 Ofcom has not consulted only on the precise modification to the PRS Condition proposed in the Second Consultation. The First Consultation clearly set out Ofcom’s legal view as to the true meaning of the express exception contained within the definition of CPRS. Respondents to that consultation were able to comment, and did comment, on the totality of Ofcom’s reasons for wishing to modify the PRS Condition. Ofcom’s view remained, following that consultation process and in light of the consultation responses received, that the express exception to the definition of CPRS was of no practical effect and that it was appropriate to amend the PRS Condition to remove any room for doubts or confusion about the applicability of that Condition’s requirements to providers of PRS accessed using mobile phones. Such modification requires consultation under the Act.
- 3.25 Furthermore, Ofcom has reconsidered its legal view following the Second Consultation in the light of the responses received from, among others, H3G (which set out its position that Ofcom’s legal view was wrong). Following that reconsideration, Ofcom remains satisfied that its legal view is correct.
- 3.26 **Differing interpretations of the PRS Condition:** H3G submitted that if there is ambiguity then it follows that there are at least two alternative interpretations of the condition. Ofcom had not held any independent adjudication of the possible alternatives. It could not be both clear that the condition applied to mobile services as well as ambiguous that it did so.
- 3.27 Ofcom does not see it as inconsistent on the one hand to recognise that the exclusion has been interpreted by some as excluding PRS accessed using mobile phones, whilst at the same time maintaining its own legal view as to what the PRS Condition does, in fact, mean. Ofcom does not agree that an independent adjudication of its position would be appropriate. Even if such an independent

¹⁸ Paragraph 3.33 of the First Consultation and paragraph 3.32 of the Second Consultation.

adjudication were commissioned, its determination would not be conclusive as interested parties might still choose to seek to have the matter determined by a court.

- 3.28 **Historical interpretation:** H3G claim that Ofcom's attempt to justify its proposals based on historical intent is inherently flawed. Only a limited range of mobile services was available at the time the PRS Condition was written and there could not have been any specific intent for own portal content services to have been covered as that service was not contemplated or in existence at the time.¹⁹ Ofcom would need to show that future services were essentially the same as original services or that they raised the same policy justifications. Ofcom has failed, in H3G's view, to conduct a policy review and consider the potential for a different policy for such services. Without such policy consideration, Ofcom cannot assert it was Ofcom's intention that the condition covered own portal content services. H3G registered its concern that Ofcom could say that PRS accessible over mobile telephones including own portal content are currently captured by the PRS Condition. Additionally Ofcom has accepted that different policy considerations could apply to own portal mobile services. It cannot therefore be argued that it was the historical intent for the condition to cover own portal services.
- 3.29 Ofcom does not agree that its approach to interpreting the PRS Condition, which is to a substantial degree based on the historical background to the setting of that Condition, is flawed. Ofcom's historical analysis of the PRS regime encompassing the original Oftel consultations and licence conditions is necessary to understand the policy intent behind the drafting of the PRS Condition. Ofcom believes that it is appropriate to take account of that policy intent when interpreting a regulatory condition the plain language of which might be said to give rise to more than one possible meaning. The historical analysis, set out in detail in section 2 of this statement, demonstrates that the policy intent behind the exclusion provided for within the definition of CPRS was to make clear that regulation was not being extended to calls made to mobile phones or other forms of "find-me-anywhere" devices or services. H3G does not question this evidence in substance.
- 3.30 Having regard to that historical material, Ofcom is satisfied that the exclusion, properly interpreted, refers to services involving the making of ordinary calls to mobile phones or other forms of "find-me-anywhere" devices or services. The correct legal import of the PRS Condition cannot be considered to have changed simply because, subsequently to the setting of that Condition, H3G or other mobile network operators began providing new types of services which had not previously been available. Nor can the true meaning of the existing PRS Condition be affected by policy considerations concerning whether or how such services should be regulated. New services have to be provided within the existing regulatory regime. If a different regulatory approach would be more appropriate to those services, that different approach should be introduced following a proper policy review, rather than by purporting to change the meaning or interpretation of the existing regulatory requirements to achieve the desired outcome.
- 3.31 In any event, as set out above, Ofcom has noted H3G's concerns regarding the policy behind regulation of own portal content services and has clearly committed to

¹⁹ Ofcom understands that own portal content services are services sourced and supplied by a mobile network operator to its own customers via a secure browser. Ofcom's modification of the PRS Condition in this Statement does not decide or affect whether own portal content services fall within the definition of CPRS.

consideration of the appropriate extent of the regulation of those services going forward as part of its announced policy review of scope.

- 3.32 **Traditional PRS and own portal content:** H3G says that Ofcom has chosen not to contemplate own portal mobile services in its own definition of “a Mobile Service” as set out in the First and Second Consultations.
- 3.33 Ofcom has not sought to ‘define’ “a Mobile Service” by way of its First or Second Consultations. Rather, Ofcom has set out its legal view of the true meaning of the exclusion contained in the PRS Condition as well as its assessment, on the basis of that view, that it would, on balance, be beneficial and appropriate to resolve any confusion regarding the scope of the PRS Condition by modifying it. Further, Ofcom notes that the descriptions of PRS in the Second Consultation were merely examples and were not intended to be exhaustive. Ofcom is satisfied that H3G’s own portal services will not become CPRS as a result of the modification if they were not CPRS before that modification. Whether those services are in fact CPRS is not, therefore, a matter which Ofcom needs to decide before proceeding with that modification.

Statutory duties

- 3.34 H3G commented that Ofcom had failed to adequately address its previous submissions on whether Ofcom had met the tests in section 47 of the Act. H3G suggested it was not adequate for Ofcom to predicate its position on the basis that its proposals were not an extension of regulation.
- 3.35 **Objectively justifiable:** H3G made a number of points. It began by stating that Ofcom cannot fully consider the impact of its proposals to amend the Condition as it had not yet decided via the 11th edition of the ICSTIS Code or a policy review which services were appropriate for regulation. In this way Ofcom’s impact assessments were flawed. H3G said Ofcom’s response to this submission (that it was not extending regulation and the potential for consumer harm meant that its proposals were objectively justifiable) was not supported by evidence and did not answer H3G’s concerns. H3G stated again that Ofcom’s evidence on consumer harm was confused and overstated and repeated that it did not demonstrate that the complaints were proof of ambiguity.
- 3.36 Ofcom considers that it is reasonable for it to modify the PRS Condition in a way which does not alter the scope of regulation without first completing the policy review or approving the 11th edition of the ICSTIS Code.
- 3.37 Ofcom did not state that the complaints from consumers that it has quoted have arisen as a result of ambiguity within the PRS Condition (again see paragraph 3.12 above). It is the case, however, that unresolved confusion about the true scope of an important regulatory requirement is undesirable, particularly in circumstances where that confusion may make it more difficult for ICSTIS to carry out its task of protecting consumers from harm. It is reasonable for ICSTIS to expect Ofcom to provide clarity as to the services which are subject to compulsory ICSTIS regulation backed up by the PRS Condition.
- 3.38 Ofcom therefore considers its impact assessment is not flawed and it is reasonable for Ofcom to conclude that its modification of the PRS Condition is objectively justifiable.
- 3.39 H3G also stated there was no proof that the ambiguity had led to conduct by mobile operator to the detriment of consumers and, in fact, their conduct had been entirely

cooperative with ICSTIS. In H3G's view, Ofcom had also failed to address H3G's point that the consumer is afforded a high degree of protection by the networks from harm from the use of third party services.

- 3.40 Ofcom does not accept that there is no evidence that PRS providers have sought to exploit the ambiguity in the PRS Condition to undermine ICSTIS' regulatory effectiveness. The fact that mobile network operators may not have done so does not show that the continuation of the ambiguity would be unlikely to result in any consumer harm.
- 3.41 In any event, Ofcom's view is that as a responsible regulator, it is important for it to ensure that regulation is as clear and transparent as possible. If an ambiguity appears to exist and to be causing confusion as to the true scope of regulatory requirements, then the proper course of action will normally be for Ofcom to seek to resolve that ambiguity.
- 3.42 H3G was also concerned that Ofcom had failed to write to mobile stakeholders as it had implied to explain that PRS accessed via mobile handsets was covered by the PRS Condition, and that Ofcom had stated that consultation would only follow if ambiguity was revealed by way of that letter. Ofcom considered, however, that it would be preferable to consult on a wider basis with all stakeholders that might have an interest rather than pre-consult with a more narrowly defined group. Ofcom has responded confidentially to H3G on this point and is unclear why H3G claims it failed to respond to its point in that consultation.
- 3.43 H3G also suggested that Ofcom could not extend ICSTIS's remit by an amendment to the PRS Condition at the same time that it was consulting on whether or not to approve the 11th edition of the ICSTIS Code. H3G also noted its concern that Ofcom had failed to ensure that ICSTIS considered a reduction in regulation. This, coupled with comments made by the ICSTIS Director in March 2006 suggested that ICSTIS was seeking to extend its remit in the field of mobile services outside of the Act and this was inconsistent with Ofcom's duty to withdraw regulation, where appropriate. H3G also expressed concern with being expecting to respond to the consultation on the PRS Condition without knowing its conclusions on the 11th Code.
- 3.44 Ofcom does not accept that it is extending ICSTIS' remit by modifying the PRS Condition in this case. Since the modification is neither intended to effect, nor will effect, any substantive change in the regulatory regime, Ofcom does not consider the modification should be delayed until it has decided whether or not to approve the 11th edition of the ICSTIS Code. Ofcom will consider H3G's comments about that Code when making its decision on whether to approve it and H3G's concerns regarding the scope of regulation (and consequently about withdrawal from regulation) will be fully considered in the review of scope. In the meantime, it is appropriate that the existing regulatory regime should remain in place, and that Ofcom should maintain that regime in a clear and effective state.
- 3.45 H3G also said that Ofcom had stated that the PRS Condition applied to Mobile Services because these were PRS but it had not explained what mobile services it was concerned about and why such services, if any, are to be considered as PRS. Ofcom considers that in clarifying what does not fall within the PRS Condition, it does not need to exhaustively list every service that does; such a decision would need to be made on the facts of each situation on a case-by-case basis as the need arises. Ofcom's modification of the PRS Condition will not affect the correct answer in any such case.

- 3.46 It was also claimed by H3G that Ofcom had failed to consider whether a reduction in regulation was appropriate and this was contrary to its statutory duties. Ofcom disagrees: it is entirely for this reason that Ofcom is conducting its review of scope to ensure that regulation as currently exists remains appropriate.
- 3.47 **Unduly discriminatory:** H3G maintained it was inadequate for Ofcom to say that regulation was not being extended in response to H3G's concern that it would be unduly discriminated against by the proposals. Its view was that there was no evidence of harm in respect of own portal content and no impact assessment had ever been conducted. As the principal supplier of such services, H3G would be unduly penalised. H3G's competitors would not be subject to the same extension of regulation as their 3G portal offerings are not as well developed or advanced as those of H3G. Ofcom had stated in the Second Consultation that own portal content was captured by the PRS Condition and this unduly penalised H3G. Finally H3G noted that neither Ofcom nor ICSTIS had sought to apply PRS regulation to Vodafone's own portal content services. This approach was not transparent, was unduly discriminatory and prevented comments being made on issues within the scope of the consultation.
- 3.48 H3G also stated that the effect of the extension of regulation was to subject H3G's music downloads to greater regulation than its main competitors in the music download market such as web based services. Another example was H3G's subscription services to mobile television will be subject to requirements in the ICSTIS Code, whilst cable television providers can offer TV subscriptions without similar restrictions.
- 3.49 Ofcom does not accept that the proposed modification to the PRS Condition is capable of unduly discriminating against H3G or any other market participant. That is because the modification will make no difference to the true scope of the definition of CPRS. It might more realistically be considered to be unduly discriminatory as between PRS providers if those providing services accessed over one platform (e.g. mobile phones) were not fully subject to the same regulatory requirements which are in fact properly applicable under the Act irrespective of platform. To the extent that H3G considers there are other services that constitute PRS as defined in the Act that are not subject to the ICSTIS Code or the PRS Condition, Ofcom will consider such matters in its review of scope. This does not affect Ofcom's position as to the true meaning of the PRS Condition currently.
- 3.50 Ofcom believes that there is confusion here as regards four separate issues. The first is whether the legal question of whether the true meaning of the PRS Condition (and, in particular, the scope of the definition of CPRS contained therein) would be affected by the proposed modification; the second is whether the own portal services which H3G is providing fall within the definition of PRS in the Act; the third is whether those own portal services fall within the definition of CPRS in the PRS Condition; and the fourth is whether and how those own portal services should be regulated.
- 3.51 Ofcom's position, as set out in the First and Second Consultations, is that it was always both the intention behind, and the true effect of, the PRS Condition to capture PRS providers irrespective of whether the services they were providing were provided (whether wholly or partly) over mobile, as opposed to fixed line, equipment. The type of telephone equipment over which PRS content is accessed is therefore irrelevant to whether any particular service falls within the definition of CPRS in the PRS Condition, albeit that a service can only be CPRS if it also falls within the definition of PRS in section 120 of the Act. Accordingly, the fact that H3G's own portal services are accessed over mobile, as opposed to fixed line phones, is

irrelevant to whether those services fall within the definition of CPRS (whether as it is drafted at present, or after the making of the proposed modification), provided that those services fall within both the definition of PRS in section 120 of the Act and the other aspects of the definition of CPRS (e.g. exceeding the 10 pence per minute threshold). Insofar as H3G's services properly fall outside the statutory definition of PRS, they cannot be CPRS, and that will not change as a result of the proposed modification to the PRS Condition. Ofcom's modification of the PRS Condition does not decide, or even in any way affect, whether or not H3G's own portal services fall within the definition of CPRS; such a decision would need to be made on the facts of each situation, as has also to be done in respect of any service provided by Vodafone or any other person. Ofcom will therefore consider each situation on a case-by-case basis as the need arises, but the modification of the PRS Condition will not affect the correct answer in any such case.

- 3.52 If H3G's own portal services already fall within the definition of CPRS, then they will continue to do so after the modification of that Condition. If they do fall within the definition then that does not preclude H3G from arguing within Ofcom's review of scope that such services should be excluded from regulation or regulated differently because, as H3G alleges, there is a lack of evidence of consumer harm. The fact that H3G may succeed in those arguments does not detract from the fact that it is required, in the meantime, to comply with the existing regulatory requirements.
- 3.53 **Proportionate:** H3G questioned whether Ofcom's approach was proportionate given that consumer complaints in relation to mobile services fell by 62% between October 2005 and March 2006. H3G said Ofcom had failed to respond to H3G's previous consultation response that it was impossible rationally to measure the proportionality of the proposed amendment to the condition without first settling the policy goals it was designed to achieve. H3G also suggested that Ofcom had failed to address H3G's point that it had previously requested ICSTIS to provide it with details of complaints it had received about own portal content and had not been provided with such details. H3G therefore assumed no complaints had been made. Ofcom was therefore extending regulation. The only logical approach was therefore to determine the policy first and then clarify the application of the condition.
- 3.54 As noted above, the current undesirable confusion over the interpretation of the PRS Condition does not relate only to H3G's own portal services or even to own portal services generally, but relates to all forms of PRS which are or can be accessed over mobile phones or other mobile communications devices. Accordingly, Ofcom's view is that whether ICSTIS has received complaints specifically about H3G's own portal services is irrelevant to whether that confusion needs to be removed, though it may be relevant to the review of the scope of PRS regulation that Ofcom is currently in the process of undertaking.
- 3.55 Furthermore, a fall in the raw number of complaints to ICSTIS about PRS accessed over mobile phones does not detract from the fact that such complaints continue to represent a large proportion of the total number of complaints about PRS. Ofcom considers that proportionality is not simply about raw numbers, and a fall in the raw numbers of complaints about a particular form of service provision does not automatically lead to the conclusion that regulatory interest in that form of service provision is no longer proportionate. Proportionality requires a balance to be struck between competing interests. In the regulatory context, proportionality will normally require a weighing of the burden on business which might arise from an extension of regulation against the harm to competition and/or consumers which might arise, or be allowed to continue, if regulation is not so extended.

- 3.56 In this context, H3G also suggested that if Ofcom's proposal to extend the PRS Condition were implemented, it would be incumbent upon H3G to implement a more detailed compliance review and programme than already exists and this would cost, on a preliminary analysis, in excess of £300,000. H3G subsequently confirmed that the overall cost in the first year alone would amount to considerably more than £1 million. H3G said that whilst figures for later years had not been set it, these would only be more significant in terms of continued compliance with the ICSTIS Code.
- 3.57 H3G also suggested that because of these additional compliance costs, Ofcom should ensure that any amendment to the PRS Condition only take effect after a period of time, rather than on publication of the amendment. H3G noted Ofcom's approach to other changes in the PRS Condition, such as 0871 numbers and internet diallers which allowed transition periods for compliance.
- 3.58 H3G said that it would need until late February/March 2007 for compliance in this case, based on its extensive experience of compliance with the ICSTIS Code. H3G made the point that it would be discriminatory for it to have to comply with the Code by March 2007 only for the scope review to reverse the position later in the year. It would also be discriminatory if Ofcom had no transition period as compared to Ofcom's approach to other operators who have not invested to the same extent in own portal services as H3G.
- 3.59 In this case, Ofcom is proposing a modification to the PRS Condition which will not increase regulation. Ofcom is therefore not requiring any stakeholders to undertake any additional measures to comply over those which should currently and properly be in place. In fact, as noted at paragraph 3.16 above, H3G has suggested that it ensures its own portal content services meet with the underlying consumer protection objectives of the Code. Ofcom's proposed modification does, however, have the potential to reduce the costs and inconvenience caused to both ICSTIS and to industry by the present perceived uncertainty and confusion, by making the regulatory requirements more transparent, accessible and clear.
- 3.60 Ofcom has considered H3G's request as regards the time for implementation of its proposed amendment to the PRS condition. Unlike the proposed changes to include PRS on 0871 services and the amendment to include internet diallers within the scope of regulation, Ofcom does not consider that its modification to the PRS Condition in this case increases regulation at all.
- 3.61 Ofcom notes that in the First Consultation, it was proposed that the amendment to the PRS Condition should take effect one month from publication in order to provide a reasonable period of implementation "before new obligations took force". This was because the amendment proposed in that consultation included new requirements for internet diallers although it also included an amendment as regards mobile services (which Ofcom considered were clarification of existing regulation). Recognising that the First Consultation may have led some stakeholders to conclude that a period of month would be allowed for the mobile services amendment as well as the dialler amendment, but without prejudice to Ofcom's position that the modification as regards mobile services does not extend regulation in any way, Ofcom will allow a month before the amended condition takes effect. Ofcom does not consider that H3G has provided any persuasive reasons for requiring until February/March 2007 for compliance.
- 3.62 **Ofcom consultation principles:** H3G believed that Ofcom had failed to act with proper regard to its own consultation principles. It pointed out that in the Second Consultation Ofcom had said that the issues needed to be addressed sooner than a

review of scope could be completed in order to ensure that consumers were adequately protected from potential harm. H3G said this was not the reason given in the First Consultation where Ofcom had said the issues needed to be addressed urgently to ensure that consumers were adequately protected from any doubt that PRS over mobiles is regulated by Ofcom. There was no suggestion in the First Consultation that the short timescale was related to a review of scope and therefore there is no justification for failure to follow the consultation principles.

- 3.63 Ofcom does not accept that it has acted contrary to the letter or the spirit of its consultation principles. Both the First and Second Consultations concerned short proposals to modify the PRS Condition for the express purpose of clarifying it without changing its meaning or substance in any way. The nature and scope of the matters being consulted on were therefore quite different from those covered by many other Ofcom consultations (such as that which will be carried out as part of Ofcom's policy review of PRS regulation generally). Ofcom is satisfied that the consultation processes which it has followed in respect of its proposals to clarify the PRS Condition have been fair and appropriate. Ofcom notes, in that regard, that H3G has itself been able to put forward full submissions within those processes and that Ofcom has given detailed and careful consideration to those submissions.
- 3.64 Ofcom does not consider that there is any genuine distinction between the statements made by Ofcom in the First and Second Consultations regarding the benefits to consumers of clarifying the true scope of CPRS. The existence of doubts on the part of some persons over the scope of the definition of CPRS, and the potential for harm to consumers, are not alternative propositions but are related. ICSTIS often needs to give urgent directions to parties falling within the definition of a 'Communications Provider' in the PRS Condition. ICSTIS should be able to give such directions in circumstances of general acceptance in the industry that the parties to whom such directions are given are required to comply with them (as opposed to having a choice whether to voluntarily comply or not) otherwise the effectiveness of ICSTIS regulation is likely to be reduced with negative consequences for consumer protection.
- 3.65 Ofcom does not consider that the appropriateness of Ofcom now proceeding to make the proposed modification to the PRS Condition is dependent on any particular degree of current consumer harm. In Ofcom's view, it is to the advantage of consumers, industry and ICSTIS to ensure that the existing regulatory regime is set out in as transparent, accessible and clear a way as possible. Ofcom does not consider it appropriate to delay the provision of that advantage pending completion of Ofcom's policy review, which is concerned only with how PRS should be regulated in the future.
- 3.66 Whilst Ofcom is aware that a number of months has passed since the First Consultation, it is important to point out that the delay has been due to the very careful consideration it has given to the matter in light of the consultation responses. Ofcom has also wished to avoid modifying the PRS Condition in any way which might itself give rise to confusion (as may have been the case if the modification proposed in the First Consultation had been made). The length of the consultation and consideration process does not, in any event, detract from the net benefit of modifying the PRS Condition without any further delay.
- 3.67 H3G also commented that Ofcom had told H3G at the end of September 2006 that its decision would be made in a matter weeks rather than months and this could be on the basis that the amendment takes immediate effect. H3G said this approach was arbitrary and without justification and contrary to the one month for representations

allowed under the Act. Ofcom does not agree the approach was arbitrary: H3G have had since the Second Consultation was published to make comments on the transitional period. In any event, Ofcom has agreed to an implementation period of one month as set out above.

Policy considerations

- 3.68 H3G said that despite its three year attempt to seek a policy review and comments by Ofcom, Ofcom had failed to conduct a review or consultation on the scope of PRS regulation. H3G were concerned that amending the PRS condition prior to a review would curtail such a review and any consideration of the PRS condition must coincide with such a review.
- 3.69 Ofcom does not accept that it has failed to conduct a review or consultation on the scope of PRS regulation. Ofcom's First Consultation in November 2005 made clear that time and resources had been allocated to carrying out such a policy review in the following year. That commitment was repeated in the Second Consultation. The review is now underway, and it is not the case that no such review is being conducted.
- 3.70 The modification of the PRS Condition to remove any confusion as to its present scope will not in any way curtail the policy review, which is directed at what the future scope of PRS regulation should be. All policy options remain open and are unaffected by the PRS Condition modification.

Section 4

Conclusions following the second consultation

- 4.1 Having carefully considered the responses to the Second Consultation and having conducted its impact assessment as summarised at Annex 1, Ofcom has now concluded on the proposed modification of the PRS Condition to clarify that PRS accessed over mobile phones are not excluded from the definition of CPRS.
- 4.2 This modification, which is set out at Annex 2, deletes the express exclusion for “a Mobile Service, a Personal Numbering Service or a Radiopaging Service” because that express exclusion is not necessary, does not affect the true scope of CPRS, and has been shown to be more likely to confuse than to illuminate.

Tests set under the Communications Act 2003 for modifying conditions

- 4.3 When deciding to modify a condition set by Ofcom under Act, Ofcom is required to meet various tests set out in the Act. These tests and Ofcom’s assessment of how it has met them with regard to the proposed amendment to the PRS Condition are set out below.

Section 3 – Ofcom’s general duties

- 4.4 Section 3(1) of the Act sets out the principal duty of Ofcom. Ofcom is required by this section to carry out its functions in line with this duty. That duty is:
- a) to further the interests of citizens in relation to communications matters; and
 - b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.
- 4.5 Ofcom considers that the proposed clarification of the PRS Condition is in accordance with its section 3 duties. This is because, as explained in this document, it is not in the interests of consumers for there to continue to be confusion about the PRS which are ultimately subject to Ofcom’s backstop powers. Ofcom does not consider that such confusion is in the interests of consumers. Such confusion has demonstrated its potential to give rise to doubts on the part of some Communications Providers as to whether they are required to comply with ICSTIS directions. Such confusion is not only unhelpful and undesirable, but also not in the interests of consumers, who depend on the effectiveness of ICSTIS and its ability to secure immediate compliance with its directions, to protect against consumer harm.
- 4.6 Ofcom has also considered when carrying out its functions, amongst other things, the requirements in section 3 (2) of the Act to secure the availability throughout the UK of a wide range of electronic communications services, and section 3 (4) of the Act, namely that in performing its duties Ofcom must also have regard to such of the following as appears to be relevant in the circumstances, in particular:
- the desirability of promoting competition in relevant markets;
 - the desirability of encouraging investment and innovation in relevant markets;

- the needs of persons with disabilities, of the elderly and of those on low incomes; and
 - the opinions of consumers in relevant markets and of members of the public generally.
- 4.7 Ofcom considers that the proposed modification to the PRS Condition is compatible with the above duties and that, in particular, it would be beneficial to the PRS sector to clarify the scope of application of that condition. This proposed measure would build consumer confidence and satisfaction in the relevant sectors which, in turn, would have a beneficial effect to the long term success of the sector. Ofcom does not consider that clarifying the requirement for PRS providers to comply with directions given under their industry Code of Practice can reasonably be said to be incompatible with promoting the provision of PRS through a range of formats and business models, or with Ofcom's duties more generally.

Section 4 – European Community requirements for regulation

- 4.8 Section 4 of the Act requires Ofcom to act in accordance with the six Community requirements for regulation, including the requirement to promote the interests of all persons who are citizens of the European Union. These duties flow from Article 8 of the Framework Directive.
- 4.9 For the same reasons as those given in paragraph 5.5 above, Ofcom considers that the proposed modification of the PRS Condition promotes the interests of all persons who are citizens of the European Union.

Section 47 – Test for setting or modifying conditions

- 4.10 Section 47(1) of the Act states that Ofcom must be satisfied, when modifying a condition, that the test under section 47(2) has been met. That test is that the modification
- a) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
 - b) not unduly discriminatory against a particular persons or against a particular description of persons;
 - c) proportionate to what it is intended to achieve; and
 - d) transparent in relation to what it is intended to achieve.
- 4.11 As set out above, the policy for excluding mobile services, personal numbering services and radiopaging services from the CPRS definition was to make clear that “find-me-anywhere services” were not covered by the PRS Condition even though they frequently shared some of the characteristics of CPRS (such as costing more than 10 pence per minute to call). The exclusion was unnecessary, however, since such “find-me-anywhere services” were not within the statutory definition of PRS and could not, therefore, be CPRS in any event. The historical background to the exclusion is described at section 2 above.
- 4.12 Ofcom is satisfied that the proposed modification will not alter the scope of regulation in any way at all. Any suggestion that the modification is not objectively justifiable, or

is unduly discriminatory, disproportionate or non-transparent has to be considered against that background.

- 4.13 Ofcom considers the modification to be objectively justified in order to remove or reduce the scope for confusion over the true scope of CPRS and, as set out in section 3 above, does not consider the modification to be unduly discriminatory or disproportionate in any way. Ofcom also considers that the proportionality of the modification is rightly to be viewed alongside the fact that it is not being made as an alternative to the policy review. That policy review has already begun and will not be affected by the proposed modification.
- 4.14 Ofcom also considers that its proposals have been transparent. Ofcom has held two separate consultations to seek the views of interested parties and has taken account of all the comments made to it in response. Furthermore, Ofcom considers that the transparency of regulation is likely to be enhanced if the PRS Condition is modified in such a way as to make it clearer and more accessible, and to avoid unnecessary confusion.

Section 48 – Procedure for setting or modifying conditions

- 4.15 Section 48(2) requires Ofcom, before setting, modifying or revoking, to publish a notification setting out the proposed changes, the effect of those changes, the reasons for those changes and specifying a period within which representations may be made to Ofcom about the proposal. Section 48(3) states that the minimum period for receiving representations is no less than one month after the day the notification was published.
- 4.16 As explained above, Ofcom has held two separate consultations on the proposed modification to the PRS Condition. Each of these consultations invited representations to be made no later than at least one month after the date the consultation was published. In each case, the consultation included a draft of the proposed notification and an explanation of the effect of the proposed amendments. Ofcom considers that it has met the section 48 test with regard to the procedure it has followed in proposing a modification of the PRS Condition.

Ofcom's decision

- 4.17 Ofcom has decided to give effect to the modification of the PRS Condition proposed in the Second Consultation. Ofcom has published at Annex 2 a Notification of a modification to the PRS Condition as required by sections 48(1) and 120(5) of the Act.

Annex 1

Summary of Ofcom's Impact Assessment

Introduction

- A1.1 Impact assessments provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice policy-making. This is reflected in section 7 of the Act, which means that generally we have to carry out impact assessments where our proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom's activities. However, as a matter of policy Ofcom is committed to carrying out and publishing impact assessments in relation to the great majority of our policy decisions. For further information about our approach to impact assessments, see the guidelines, Better policy-making: Ofcom's approach to impact assessment, which are on our website: http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf (the "Guidelines").
- A1.2 Ofcom has said in the Guidelines that following consultation, Ofcom will generally publish a decision or policy statement that will contain a summary of analysis contained in earlier impact assessments; responses to the comments made about the impact assessments; show how the comments have affected assessment of the impact of the options considered; and set out the chosen option with reasons.
- A1.3 This Annex contains a summary of Ofcom's impact assessments as defined in section 7 of the Act together with Ofcom's chosen option. Section 3 of the Statement contains Ofcom's comments in response to any submissions made on its impact assessments. In this case after considering the responses made in respect of its impact assessment in the Second Consultation, Ofcom has chosen its preferred option as set out in the Second Consultation.

The citizen and/or consumer interest

- A1.4 Ofcom considers that the interests of citizens and/or consumers would be furthered through deleting the mobile services, personal numbering services and radiopaging services exclusions altogether from the PRS Condition. It is plainly desirable that regulatory requirements should be set out as clearly, unequivocally and transparently as is possible and that confusions or doubts which might make ICSTIS' consumer protection work more difficult should be removed.

Ofcom's policy objective

- A1.5 Ofcom's policy objective is to ensure that regulation of PRS is transparent and effective, and that consumers are able to use PRS with trust and confidence, irrespective of the platform the PRS is delivered over.

Analysis of the different options

Option 1 – do nothing

- A1.6 Ofcom could make no amendment to the PRS Condition.
- A1.7 Ofcom does not consider that this is an attractive option in light of the apparent confusion that surrounds the interpretation of CPRS. Ofcom considers that

regulation should be set out as clearly, unequivocally and transparently as is possible and, for that reason, Ofcom does not support this option.

Option 2 - the amendment as set out in the first consultation

A1.8 In the First Consultation, Ofcom proposed that the words “calls to” be inserted before a “Mobile Service”. The definition of CPRS would then read:

“a Premium Rate Service (other than calls to a Mobile Service, a Personal Numbering Service or a Radio Paging Service, or a service which is only accessed via an International Call) in respect of which....”

“(i) the charge for the call by means of which the service is obtained or the rate according to which such call is charged is a charge or rate which exceeds 10 pence per minute; or....”

A1.9 In response to the First Consultation the use of the word “call” was questioned by some respondents because it was unclear whether Ofcom intended this to include data services and thereby excluding these from the scope of PRS regulation. In addition, Ofcom was concerned that the modification proposed in the First Consultation could itself give rise to confusion in that it might be thought or argued that it excluded from the scope of CPRS services provided or paid for via reverse-billed SMS.

A1.10 Having considered the responses received to the First Consultation, Ofcom’s view was that the proposed modification in paragraph A1.8 above might be read by some as excluding such services provided or paid for via reverse-billed SMS which was not Ofcom’s intention. Accordingly, that modification had the potential to itself cause confusion, thereby substantially defeating the purpose of making the modification in the first place. Ofcom therefore does not support this option.

Option 3 – delete the words “a Mobile Service” from the definition of CPRS

A1.11 A further option is to delete the words “a Mobile Service” from the definition of CPRS. This would be on the basis that that an express exclusion for “mobile services” was unnecessary and was more liable to confuse than illuminate. That option would, however, leave the express exclusions for “a Personal Numbering Service or a Radiopaging Service” in place.

A1.12 As stated in the First and Second Consultations, Ofcom’s view is that the intention and true effect of the exclusion was to replicate the exclusion for “find-me-anywhere services” in order to avoid any confusion arising as to whether the providers of such services were subject to Ofcom’s backstop powers. As explained elsewhere in this Statement, that exclusion has been unnecessary and removing it would make no difference to the true scope of CPRS. Such removal would, however, enable the clarification that Ofcom was seeking to provide to be delivered in a neat and simple way that did not have an apparent potential to itself give rise to confusion as to what the CPRS definition did and did not capture

A1.13 Ofcom however, does not support this option as removing only the words “a Mobile Service” from the definition of CPRS would leave in place the words “a Personal Numbering Service or a Radiopaging Service”. Ofcom believes that the express exclusion of those services was also unnecessary since they are also not PRS, irrespective of whether they cost more or less than 10 pence a minute to call.

Accordingly, scope for confusion would be unnecessarily left to remain for those services.

Option 4: delete in full the exclusion for “a Mobile Service, a Personal Numbering Service or a Radiopaging Service”

- A1.14 A further option would be to delete in full the exclusion for “a Mobile Service, a Personal Numbering Service or a Radiopaging Service”.
- A1.15 In Ofcom’s legal view, that exclusion is unnecessary since such “find-me-anywhere services” (i.e. services which simply enable a person to be contacted irrespective of his physical location) are not within the scope of the statutory definition of PRS. Since the exclusion is unnecessary and recent experience suggests that it is more liable to confuse than to illuminate, Ofcom considers that the removal of the express exclusion, which would make no difference to the true scope of CPRS, represents the preferred option in order to reduce the possibility of confusion which might make more difficult ICSTIS’ practical ability to secure compliance with its directions.

The preferred option

- A1.16 Ofcom’s preferred option is Option 4; namely to delete in full the exclusion for “a Mobile Service, a Personal Numbering Service or a Radiopaging Service”.
- A1.17 Option 1 would do nothing to resolve the current scope for confusion as to the true scope of CPRS. Option 2 might itself give rise to such confusion. Option 3 would only reduce the scope for confusion to a limited extent or, by appearing to reaffirm the need for the exclusions for “a Personal Numbering Service or a Radiopaging Service” to remain, even promote such confusion. Option 4, on the other hand, reduces or removes the scope for confusion while, at the same time, having no effect on the true scope of existing regulation. Ofcom therefore regards Option 4 as representing the best option.
- A1.18 As set out elsewhere in this Statement, Ofcom does not consider that Option 4 is disproportionate or otherwise inappropriate. There is an obvious benefit, for the public, for ICSTIS, for industry, and for good regulation generally, in ensuring that regulatory requirements are as clear, transparent and accessible as possible. There will be no change in the existing regulatory burden on industry.

Annex 2

Notification of a modification under section 48(1) of the Act

Modification of a condition under section 120 of the Act which is set out in the Notification under Section 48(1) of the Act published by Ofcom on 8 June 2006 *Conditions Regulating Premium Rate Services*

WHEREAS:

- (A) OFCOM issued a notification pursuant to section 48(2) of the Act on 8 June 2006 setting out proposals for modification of the PRS Condition (the “Notification”);
- (B) In the Notification and accompanying explanatory statement, OFCOM invited representations on the proposals set out therein by 5pm on 10 July 2006;
- (C) By virtue of section 48(5) of the Act, OFCOM may give effect to any proposals to modify the PRS Condition as set out in the Notification, with or without modification only if-
 - (a) they have considered every representation about the proposal that is made to them within the period specified in the notification; and
 - (b) they have had regard to every international obligation of the United Kingdom (if any) which has been notified to them for the purposes of this paragraph by the Secretary of State;
- (D) OFCOM received responses to the Notification and have considered every such representation made to them in respect of the proposals set out in the First Notification and accompanying explanatory statement; and the Secretary of State has not notified OFCOM of any international obligation of the United Kingdom for this purpose.

Therefore OFCOM gives the following modification

1. OFCOM, in accordance with section 48(1) of the Act hereby makes the following modification of the PRS Condition as set out in the Schedule to this Notification.
2. OFCOM consider that the measures referred to in paragraph 1 above complies with the requirements of section 120(5) of the Act, as appropriate and relevant to each of the measures.
3. In taking the measures as set out in this Notification, OFCOM have considered and acted in accordance with their general duties in section 3 of the Act and the six Community requirements in section 4 of the Act.
4. The effect of and OFCOM's reasons for the modification as set out in the Schedule to this Notification are contained in the accompanying explanatory statement published with this Notification.

5. Copies of this Notification and the accompanying statement have been sent to the Secretary of State in accordance with section 50(1)(a) of the Act and to the European Commission in accordance with section 50(6) of the Act.
6. In this Notification:
 - (i) "the Act" means the Communications Act 2003;
 - (ii) "OFCOM" means the Office of Communications;
 - (iii) "the PRS Condition" means a condition under section 120 of the Act which is set out in the Notification under Section 48(1) and 120(5) of the Act published by the Director General on 23 December 2003.
7. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them in this Notification and otherwise any word or expression shall have the same meaning as it has in the Act.
8. For the purpose of interpreting this Notification:
 - (i) headings and titles shall be disregarded; and
 - (ii) the Interpretation Act 1978 shall apply as if this Notification were an Act of Parliament.
9. The Schedule to this Notification shall form part of this Notification
10. The modification set out in the Schedule to the Notification shall take effect one month from the date of the Notification.

Signed by

Claudio Pollack

A person authorised by Ofcom under paragraph 18 of the Schedule to the Office of Communications Act 2003

17 October 2006

Schedule

The modification to a condition under section 120 of the Act which is set out in the Notification under Section 48(1) published by Ofcom on 8 June 2006 ***Conditions Regulating Premium Rate Services***

The PRS Condition shall be modified as set out below (the deleted text has been struck through and the added text underlined, both highlighted in yellow for ease of reference).

1. The Communications Provider shall comply with:

- (a) directions given in accordance with an Approved Code by the Enforcement Authority and for the purposes of enforcing the provisions of the Approved Code; and
- (b) if there is no Approved Code, the provisions of the order for the time being in force under section 122 of the Act.

2. In this Condition,

(a) "Act" means the Communications Act 2003;

(b) "Approved Code" means a code approved for the time being under section 121 of the Act;

(c) "Communications Provider" means either:

(i) a person who:

(A) is the provider of an Electronic Communications Service or an Electronic Communications Network used for the provision of a Controlled Premium Rate Service; and

(B) is a Controlled Premium Rate Service Provider in respect of that Controlled Premium Rate Service;

(ii) a person who:

(A) is the provider of an Electronic Communications Service used for the provision of a Controlled Premium Rate Service; and

(B) under arrangements made with a Controlled Premium Rate Service Provider, is entitled to retain some or all of the charges received by him in respect of the provision of the Controlled Premium Rate Service or of the use of his Electronic Communications Service for the purposes of the Controlled Premium Rate Service;

or

(iii) a person who:

(A) is the provider of an Electronic Communications Network used for the provision of a Controlled Premium Rate Service; and

(B) has concluded an agreement relating to the use of the Electronic Communications Network for the provision of that Controlled Premium Rate

Service with a Controlled Premium Rate Service Provider;

(d) "Chatline Service" means a service which consists of or includes the enabling of more than two persons (the participants) to simultaneously conduct a telephone conversation with one another without either:

(i) each of them having agreed with each other; or

(ii) one or more of them having agreed with the person enabling such a telephone conversation to be conducted, in advance of making the call enabling them to engage in the conversation, the respective identities of the other intended participants or the telephone numbers on which they can be called. For the avoidance of any doubt, a service by which one or more additional persons who are known (by name or telephone number) to one or more of the parties conducting an established telephone conversation can be added to that conversation by means of being called by one or more of such parties is not on that account a Chatline Service, if it would not otherwise be regarded as such a service;

(e) "Controlled Premium Rate Service" means a Premium Rate Service (other than a Mobile Service, a Personal Numbering Service or a Radiopaging Service, or a service which is only accessed via an International Call) in respect of which:

(i) the charge for the call by means of which the service is obtained or the rate according to which such call is charged is a charge or rate which exceeds 10 pence per minute; or

(ii) the service is a Chatline Service; or

(iii) is Internet Dialler Software operated;

(f) "Controlled Premium Rate Service Provider" means a person who:

(i) provides the contents of a Controlled Premium Rate Service;

(ii) exercises editorial control over the contents of a Controlled Premium Rate Service;

(iii) packages together the contents of a Controlled Premium Rate Service for the purpose of facilitating its provision; or

(iv) makes available a facility comprised in a Controlled Premium Rate Service;

(g) "Dial-up Telephone Number" means the telephone number used by an end user's computer that connects it to the Internet

(h) "Enforcement Authority" means, in relation to an Approved Code, the person who under the code has the function of enforcing it;

(i) "Facility" includes reference to those things set out in section 120(14) of the Act;

(j) "International Call" means a call which terminates on an Electronic Communications Network outside the United Kingdom;

(k) "Internet Dialler Software" is software that replaces a Dial-up Telephone Number with a different Dial-up Telephone Number;

other than where it is used so that:

- a) an end-user's existing Internet Service Provider replaces the Dial-up Telephone Number;
- b) an end-user moves from his existing Internet Service Provider to another Internet Service Provider or is so moved with his consent.

(l) "Internet Service Provider" means a person who provides end-users, by means of a Dial-up Telephone Number, with connection to the Internet in the ordinary course of its business.

~~(m) "Mobile Service" shall have the meaning ascribed to it in the National Telephone Numbering Plan;~~

(m) "National Telephone Numbering Plan" means a document published by Ofcom from time to time pursuant to sections 56 and 60 of the Act;

~~(o) "Personal Numbering Service" shall have the meaning ascribed to it in the National Telephone Numbering Plan;~~

(n) "Premium Rate Service" shall have the meaning ascribed to it by section 120(7) of the Act;

~~(q) "Radiopaging Service" shall have the meaning ascribed to it in the National Telephone Numbering Plan;~~

3. For the purposes of interpreting this Condition, except in so far as the context otherwise requires, words or expressions shall have the same meaning as ascribed to them in paragraph 2 above and otherwise any word or expression shall have the same meaning as it has been ascribed in the Act.

Annex 3

List of respondents to the Second Consultation

BT

Hutchison 3G UK

Mobile Broadband Group

Network for Online Commerce

The UK Competitive Telecommunications Association