



Suhail Bhat
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22nd September 2005

Dear Suhail,

RE: ICSTIS Code (11th Edition) consultation.

Further to our recent useful meeting, please find below the comments of WIN plc in respect of the draft Code of Practice (11th Edition). I hope that you will find these opinions helpful. Please do not hesitate to contact me if you wish to discuss any detail or need clarity on points raised.

Yours sincerely,

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ICSTIS Draft Code of Practice (11th Edition)

SECTION ONE - Definitions

Question 1 *What are your views on our proposed definition of NO's? Do you believe that our proposal is workable and will help ensure that only those companies that can fulfil the obligations of a network can be considered a network for the purposes of the Code?*

WIN welcomes ICSTIS' desire to provide clarity in the industry as to the roles of its participants and the responsibilities that stem from those roles.

It is important that ICSTIS is able both to identify culpable parties and take action accordingly but also to identify such parties to the public, accurately and in an appropriate time scale. We believe that the new definition of Network Operator will be helpful in achieving these aims although there is some scope for ambiguity surrounding the phrase 'direct network connection' in clause 1.1.3 (ii) and WIN support the view that ICSTIS need to review this terminology to ensure that the definition is sufficiently tight to provide absolute clarity.

Question 4 *What views do you hold on whether, through both the definition of a service provider and the new proposed definition of a network operator, we have managed to ensure that a company in the value chain can be easily identified?*

WIN welcomes the attempt to define more clearly the scope of Network Operator and Service Provider and indeed to recognise that there is increasingly a significant overlap in these roles as Network Operators launch and enhance their own Service Provider function.

The outline value chain is evident following ICSTIS' definitions but it is unbalanced and incomplete. In addition the current ICSTIS practice, focused around the definition of Service Provider, does not provide sufficient transparency or consumer protection.

ICSTIS are aware that the industry is made up a variety of layers, some of which overlap. The ICSTIS model and its public presentation of that model does not deal with the detail within the industry. This detail is material in terms of liability and should be clearer. In particular the ICSTIS model does not reflect the 'common carrier' or 'mere conduit'¹ status of the aggregator within the value chain. Aggregators provide a vital link between Service Providers and Information Providers and the Networks facilitating much of the application of the regulatory framework. Responsible aggregators provide a contractual link (and therefore a regulatory enforcement channel) to a large majority of all Service Providers/Information Providers thus providing ICSTIS with effective access to culpable parties in respect of their enforcement action. Aggregators provide (amongst other value

¹ The Electronic Commerce (EC Directive) Regulations 2002

adds) a vital link for ICSTIS which makes its enforcement processes scaleable and possible.

Whilst aggregators act as a vital link and facilitate enforcement the reality is of course that due to the scale of the services they operate and the volumes of content that pass through the infrastructure the aggregator is both practically and technically unable to actively monitor the content of the network. Like all mere conduits however the reasonable endeavours process operates firstly by conducting a sensible degree of commercial due diligence in respect of a customer then establishing robust, enforceable contracts incorporating law, regulatory and industry Codes. Thereafter the process is reactionary - once put on actual notice of an alleged infringement (however such notice comes about) the conduit acts in the appropriate and prescribed way. WIN believe that with regards to most aggregators this model works effectively. The culpable content provider is readily identified, the damage halted and recompensed and the penalty administered and upheld.

It is inappropriate therefore that aggregators are considered equally culpable as the Service Providers (or Information Providers) who have actual editorial and management control of its own content and service and worse still that aggregators are publicly stated as being found liable.

The definition of Service Providers as currently drafted is too vague and too wide to adequately set out the industry value chain. The result is a significant distortion in the market perception and does little to aid consumer protection.

Given this inadequacy WIN welcomes the introduction of the definition Information Provider but this definition only contributes in part to clarifying the market place and the responsibilities of parties in it.

WIN expressly seek transparency in the application of the new definitions when enforcement of the regulations is required. It must be clear to a member of the public;

- (a) who is providing the content of the service to the consumer; and
- (b) who has infringed regulations in respect of the provision of that content.

It is wrong that an aggregator should be published by ICSTIS as the primary party liable for a breach of a Code unless the cause of action has arisen from the aggregators service interconnection service per se. We note that ICSTIS has been publicly criticised in the Daily Telegraph article dated 21st September 2005 by allowing Jamster to hide behind M-Blox in this manner. Moreover a practice is developing in which Information Providers who are ejected by one aggregator for persistent and deliberate breaches are simply moving to another aggregator which is unable to detect transgressions on the ICSTIS website. ICSTIS should not facilitate this tactic.

By bundling the aggregators with Service Providers the consumer is not adequately put on notice regarding unscrupulous services. There is no merit in the ICSTIS search tool attributing adjudications against WIN for example. The consumer needs to know and be

able to search against the infringing Information Providers details in order to make informed decisions or to be afforded any protection.

There are a number of significant consequences that stem from the current situation:

1. The public are not made sufficiently aware of the actual infringing party and are unable to form a reliable opinion as to an Information Providers credibility – ICSTIS' value statement in respect of protecting consumers is therefore undermined.
2. By publishing the aggregators details as the principal party in default the true situation is misrepresented and the consequences are that -:
 - a. The aggregator, who has aided ICSTIS in bringing about an adjudication, collected the fine from the Information Provider and paid it over to ICSTIS and co-operated in all respects, suffers the detrimental publicity as being the perceived owner of the infringing service when in fact they can be merely a conduit of that service. This is damaging to the future business of that aggregator.
 - b. The aggregator, acting as a conduit for multiple information Providers accrues a fine history which in turn results in progressively higher fines being imposed on that aggregator. As a consequence the fines are becoming disproportionate to the activity complained of. This is detrimental to new Information Providers entering the market.

The current structure and lack of transparency as to the real perpetrator undermines ICSTIS' values in respect of openness, fairness, even-handedness and impartiality. It does not result in consistency when making decisions. In the longer term it will not foster co-operative engagement with the industry. It cannot be ICSTIS' intentions to undermine its own values in such a way.

WIN recommends therefore that:

1. the proprietary owner (whether a Service Provider or Information Provider) of the infringing service is the principal party published as having breached the Code;
2. the search engine is geared to pick up adjudications against the proprietary owner;
3. the fines are increased based on the infringement history of that culpable party;
4. an aggregator is identified as the principal infringer only;
 - a. where the aggregator and Service Provider/Information Provider amount to the same entity; or
 - b. where the aggregator element of the service is primarily responsible for the breach of the Code; or
 - c. the conduct of the aggregator during the enforcement process is such that it is acting in breach of the Code; and
5. where the aggregator, in acting as a conduit of that infringing service, is culpable under the terms of the Code, such liability is published in a manner so as to make it clear to the public that the aggregator was not acting as the Information Provider.

In this way the consumers would have transparency as to where the fault lies and would understand better the relationship between the various entities – the value chain.

It concerns WIN that whilst ICSTIS has introduced a new definition of Information Provider and proposes dealing directly with the Information Provider where the conditions of clause 8.1.4 are met there is no statement clarifying how ICSTIS will clearly identify the Information Providers role and culpability or its responsibility to the consumer. In any event even where the conditions of clause 8.1.4 are not met points 1-5 above should apply.

Question 5 *What comments do you have on the scope and application of the PRS regulatory regime?*

Question 6 *Do you consider that PRS regulations should formally cease to apply in areas where the risk of consumer harm appears to be relatively low? If so, how could we identify and differentiate those areas within the context of broad definition of PRS?*

Question 7 *Can you comment on whether existing PRS regulations are applied proportionately, with more intrusive measures sufficiently focused on higher risk activities or providers?*

WIN do not believe that it would be appropriate to differential the PRS regulatory regime by price. WIN believe that to take such approach would result in many anomalies that would only add to the current confusion in the regulatory regime. In addition such differentiated regulation would lead to accusations of anti-competitive practices and the establishment of disproportionate barriers to entry.

High priced premium rate services are not universally the source of all complaints nor is it true to say that low priced premium rate services cause no harm.

We note with interest the view that branded portal services should fall outside the regime. WIN strongly oppose such view. WIN agree that branded portals have little or no interest in abusing or confusing customers but nor do smaller independent Information Providers. Given the commercial ability of such organisations in any event (both to achieve compliance and gain market share) and the fact that these services are increasingly originating from the network operators, such a move must be anti-competitive and a barrier to entry for new service providers. We do not consider that it is ICSTIS role to facilitate such a climate.

WIN support ICSTIS' vigorous approach in dealing with rogue Information Providers. That said there is a distortion in the proportionality of fines being imposed as the culpable Information Provider is not being judge according to its own infringement record but that of its Service Provider. WINS objections to this are clearly stated under question 4 above.

SECTION THREE – SERVICE PROVIDERS

Question 1: What are your views on how useful you feel the format of 'help notes' will be and, in particular, do you have any comments on how to make them more useful to you?

Question 2: What alternatives should we consider in providing the premium rate industry with regular guidance on how to operate premium rate services?

Question 3: How might ICSTIS help industry groups develop their own notes on Code compliance?

The format of the 'help notes' produced by ICSTIS is an improvement to the current Guidelines issued from time to time.

- There must be a consistency in format and where relevant a consistency in the content that each help note addresses.
- Phrases and terminology used throughout the notes must be consistent so that they become meaningful and differences may therefore be identified as significant.
- Unique service specific requirements should be identified as such (e.g. prior permissioning requirements or moderation of services)
- Acknowledgement (at least tacitly) should be given to other Codes, regulation or legislation that may impact the service or topic referenced in the note.

It would be particularly helpful to provide 'How to set up a service' for the benefit of Information Providers.

Increasingly Service Providers/ Network Operators are being asked to advise Information Providers as to the compliance of their service. Whilst guidance can be given the lack of specific detail in the Code means that definitive instruction is difficult to issue. In addition the Service Provider/Network Operator is potentially faced with a conflict of interest when asked to assess the application of the Code against a service for compliance purposes and then again if the service in fact infringes the Code. Much of this definition or clarity in the application of the Code is gained through industry practice and ICSTIS enforcement experience. ICSTIS is best placed to consolidate this practice and experience and provide guidance through the help notes.

Question 4: What are your views on the extent to which you believe the draft provision relating to the requirement for SP's to have in place customer service arrangements reflects the requirements set out in recommendation.

WIN supports the requirement for Service Providers to have in place customer service arrangements and this obligation should be expressly conferred on Information Providers also.

The detailed requirements could be presented by ICSTIS in a help note.

SECTION FOUR – Information providers

What comments do you have on whether having provisions requiring IP's to comply with the Code are useful, practical and workable?

WIN consider the role of Information Providers as critical to fulfilling ICSTIS' values of consumer protection, openness and fairness in enforcement, consistency in decision making whilst encouraging innovation and achieving proportionality. Only through imposing sanctions on the culpable party will ICSTIS foster co-operation within the industry and protect the public interest appropriately.

This subject was addressed in Section One above.

SECTION 5 – General Provisions Applicable to all Premium Rate Services (Service Providers)

Question 1: Do you have any views on whether the proposed amendments to the harm and offence provisions are appropriate and will allow services to be judged more easily against generally accepted standards in society?

WIN supports the amendments to section 5.2 and 5.3 and believe that the new wording does introduce more readily recognisable standards as to what should be expected from premium rate services.

Question 2 – 5 – age verification proposals for Internet Services.

WIN does not believe that it is ICSTIS's role to set age verification procedures in respect of Internet Services. WIN believes that controls requiring age verification are excessive and prevent genuine users from gaining access to these services.

Question 7: Can you comment on whether you believe that listing all the requirements for pricing in one place in the Code is logical and will make finding relevant information easier for service providers?

Question 8: Do you have any comments on whether the inclusion of a pricing proximity requirement in the Code would be practical, enforceable and future proof? Would you consider that a pricing proximity provision would be more effective as a series of prescriptive Code provisions or a generic Code provision supported by help notes?

It is logical to put pricing requirements under the Code for Premium Rate Services in one place. It is however necessary to make clear the distinction between PRS per se and PR subscription services which have additional pricing requirements and set those out clearly.

With regard to the pricing proximity issue, there is real risk that overly prescriptive regulation will be detrimental to the PRS market, inhibit consumer choice and stifle competition in the communications market more generally.

The recent introduction of the Mobile Operator Premium Text Code Extension ² is a clear example of how prescriptive regulation, introduced without full consultation, can have a damaging effect on PRS industry. The prescriptive measures undermine the capabilities

² Issued in July 05 and then reissued on 9th August.

of current technology and also fail to provide the flexibility for the introduction of new technology or services. The result is that the consumer experience is unnecessarily cumbersome (which in itself instils lack of certainty in the consumer) and fails to cover new mechanisms for communication. For example the Code Extension sets out in detail relating to SMS WAP services but omits to include Flash capability.

In addition WIN believe that consumer perceptions as to acceptable procedure and information change rapidly. If the qualitative research that ICSTIS conducted in February 2004 regarding consumer awareness of premium rate services and pricing was conducted again then the results would be significantly different.

It is therefore necessary to ensure that pricing requirements are:

1. clear and unambiguous;
2. sufficiently generic to allow for the evolution of new technology;
3. enhance the consumer experience and ease of use of the service;
4. appropriate taking into account consumer levels of adoption;
5. facilitate the introduction of new services and allow for innovation; and
6. reflect the basic principles of contract law.

WIN therefore support the view that the Code should remain generic in its pricing statements but that the help notes can be issued from time to time to address specific formats, technologies or services as required.

Question 9: Do you have views on whether you believe that pricing information should be spoken as well as displayed for television advertising? Do you believe there are alternative ways to provide pricing information to consumers in television promotions which we should explore?

WIN consider that pricing information should be spoken in respect of television advertising. An analogy may be made with the financial services industry where television advertising was regularly accompanied by a voiceover warning. In time this voiceover has been dropped as the consumer has become more savvy with regards to financial products. The same is true in respect of PR services although we would anticipate that the consumer awareness and understanding of PR services will come about more quickly.

Question 10: Do you have any views on whether setting out the general principle of providing address information is better than being prescriptive as we currently are in the Code?

This new provision accompanied with the requirement to provide helpline details is sufficient. A future exposure may be with regard to International service providers who do not have a tangible address or operational facility within the UK.

Do you have views on the inclusion of a 'buy one get one free' type provision in the Code and do you consider there to be any inherent risks in adopting such provision which could lead to a greater degree of consumer harm?

WIN do not consider that the inclusion of such provision would expose the consumer to any greater degree of harm than is already apparent in the traditional market place and regulations which apply to that traditional market place should be and are equally applicable to the markets within premium rate services. This would support the basic principle of technological neutrality.

SECTION SIX - Provisions Relating Specifically To Live Services.

Question 1: Do you have any comments or views on our proposed approach in relation to regulating live services?

Question 2: Are there alternative options that we would consider in reducing the level of regulatory burden in this area whilst maintaining adequate levels of consumer protection?

WIN support ICSTIS's proposal to reduce the prior permissioning process to live services save for those identified on a specific exceptions list provided that the service definitions on the list are tightly defined and highly specific. This mechanism allows the most flexibility whilst reducing the compliance burden on all parties but would give the consumer the requisite level of protection.

Question 3: Do you have any views on whether you consider the draft provisions more clearly set out in the regulations governing claims for compensation?

WIN's experience to date in respect of this matter suggests that providers of chat services act responsibly with regard to complaints and compensation claims. There are thorough procedures as between WIN and its chat clients to address and settle consumer concerns. The drafting in the Code is adequate.

Question 4: Do you consider the use of a help note in relation to these provisions is better suited than detailed Code provisions in providing examples of how the claims for compensation work in practice? If not, what could you recommend that might better achieve this aim?

WIN has its own adequate procedures with its clients in respect of compensation claims and does not see the requirement for additional help notes or Code provision to deal with this matter.

SECTION SEVEN – Additional Provisions Relating to Specific Categories of Service (Service Providers)

Question 2: What views do you hold on our proposals in relation to chat, contact and dating services?

Question 3: What views do you hold on whether the proposed provisions are adequate to prevent use of adult chat services by younger children?

WIN supports the specific reference in the Code to SMS chat services. ICSTIS need to ensure that there is consistency in the wording used in respect of live chat services and SMS chat services so as to avoid a generic use of 'chat service'. There has been some confusion under the existing regime as what regulations apply to each service, for example, moderation is an express requirement and quite prescriptive for live chat services but is only a reference on the prior permissioning application in respect of SMS chat services and is non-prescriptive.

Age verification is a concern to consumers, Service Providers and Information Providers. As with Internet and TV based services there are no mechanisms implemented that can guarantee users are over the age of 18 years. It is however a recognised principle upheld internationally that Service Providers and Information Providers can only be expected to use all reasonable endeavours to prevent use of their services by persons under the age of 18. What is reasonable is a test that evolves with market practice, technical innovation and legislative change³. ICSTIS should not attempt to increase the Service Provider or Information Provider burden in this respect unless it has identified a specific mechanism that will effectively enable such providers to fulfil that obligation.

Question 4: Do you have any views on the appropriateness of having specific provisions relating to service providers' responsibility for paying reasonable and valid claims for refunds for chat, contact and dating services given that there is a general duty on service providers to consider compensation for all services?

WIN consider that these additional provisions are unnecessary as the general duty together with the prescriptive helpline requirement (whether under the ICSTIS Code or Networks Code) adequately cover this obligation.

Question 5: What are your views on our approach to pay for product services? Do you believe that the approach will increase clarity? If not, why not? Are there other alternative options you believe we should consider in clarifying the regulations in respect of pay for product services?

There has been considerable confusion in the market regarding Premium Rate Services ("PRS") that are one-off transactions and PR Subscription Services. This confusion has arisen both from the application of the ICSTIS Code and the Network Operator Premium Text Codes (and extensions thereto). There is merit in regulating PRS and PRSS distinctly albeit that there is significant overlap in compliance requirements (e.g. customer services requirements, pricing information etc). Again the terminology must be consistent so that the similarities and differences may be clearly identified between the

³ For example the introduction into the UK of identity cards may bring with a unique identifier that will assist in the age verification although it will not be definitive.

service types and appreciated. In practice it is likely that Help Notes may be used by ICSTIS to provide practical clarity in this area.

ICSTIS need to ensure that its regulation is sufficiently flexible to accommodate new payment mechanisms that are likely to be introduced into the mobile market such as Pay-Pal where a combination of premium rate access and pre-paid accounts may be used simultaneously to browse and purchase goods.

Question 7: What are your views on whether you believe the draft provisions for subscription services will adequately safeguard consumers while, at the same time, allow service providers to continue providing a variety of subscription services?

The draft provisions for subscription services largely reflect the regulations introduced in August by the Network Operator Premium Text Code Extension and are welcomed in that they clarify some aspects which were less clear in such Code extension.

With regards to the promotional material requirement WIN recognises there is a need to gain consumer confidence in respect of subscription service and the implementation of s7.10.1 is supported.

WIN notes that ICSTIS does not go as far as the Network Operator Text Code in terms of the subscription initiation and WIN supports ICSTIS view on this. The Network Operators have created a highly prescriptive environment (requiring a MO in response to the subscription message) that fails to enhance the user experience and is entirely cumbersome. This requirement will inevitably curb innovation and does not foster technological neutrality.

The service termination requirements (clause 7.10.4) are a cause for significant concern. There is an anomaly here in that in no other media format is there a requirement that once a subscriber has spent a certain amount of money that subscriber is obliged to be reminded of his right to terminate the subscription. WIN understands why this requirement has been introduced but feels that it is unnecessary, a 'cost' reminder, as distinct from a termination reminder would be entirely adequate.

In the event that ICSTIS retain this termination reminder WIN ask that ICSTIIS keep this provision under review. When consumer awareness and confidence has increased this requirement should be removed.

In any event, the monthly termination reminder will have a significant impact on the subscription services market and will act as a barrier to entry, curtail investment in innovative services and reduce investment in the mobile services industry. Again no other subscription service media has this requirement and the provision should be deleted from the Code as being disproportionate and unnecessary.

WIN's substantive concern with the provisions of clause 7.10.4 rests in the fact that as currently worded there is much ambiguity.

- (1) Is the £20 threshold applicable to each individual short code service or each service operated as a sub-set of that short code?
- (2) Is the £20 threshold in respect of each Service Provider or individual services offered by that Service Provider?
- (3) How will it work when goods are purchased through a subscription service – (a) will it be just the subscription cost that needs to reach £20 or (b) the total value of goods plus the subscription cost that is relevant?
- (4) As payment mechanisms from the handset evolve, the applicability of this regulation will cause confusion and uncertainty.

Given that the mobile phone is increasingly becoming a tool for browsing, research and purchasing it seems inappropriate to impose overly restrictive regulation that it has not been necessary to impose in other technology environments.

SECTION EIGHT – Procedures and Sanctions

Question 1: Could you comment on whether you agree with the proposed model to deal with IP's? Do you consider that it is a workable alternative? We welcome comments on whether you can see any other ways in which we can deal with IP's directly?

WIN welcomes ICSTIS model to deal with Information Providers as set out in the draft Code and refers ICSTIS to section One question 4 above.

Question 2: What are your views on the Secretariat being able to invoke the Emergency Procedure in cases that exhibit similar circumstances?

Whilst WIN can, at one level, see the need for ICSTIS to have powers under its emergency procedures to automatically review (under the emergency procedure) other services displaying apparently the same service characteristics as the alleged infringing service WIN has significant concerns that this power may be used to restrict, suspend or terminate services operated by that Service Provider where in fact those other similar services are compliant, or do not warrant the use of the emergency procedure.

Essentially the provisions of clause 8.4.d empower ICSTIS to act against third party services based upon as yet unsubstantiated claims made in respect of a single service within a sector of services, or exhibiting similar characteristics. WIN consider that the use of such powers could be disproportional, oppressive and prejudicial to the legitimate services operating within that sector.

SECTION NINE - Procedures Concerning Network Operators

Question 1: What comments do you have on whether you believe the procedures as set out in the draft provisions relating to NO non-compliance as fair, clear, adequate and proportionate.

The principal Network Operators occupy every position within the value chain and indeed even act as its regulators. This presents a number of issues and gives rise to conflicts of interest and scope for anti-competitive behaviour. WIN welcome therefore the new Code provisions that clearly set out the Network Operators responsibility in the value chain.
