



A Review of the procedures of the Independent Appeals Body (IAB)

A public consultation by ICSTIS on behalf of the IAB

The deadline for comment is Friday 23 September 2005

Contents page

Section	Page
1. Introduction to the IAB	3
2. This consultation	3
3. The Procedures of the IAB	5

Introduction to the Independent Appeals Body

The IAB hears appeals against ICSTIS' decisions and adjudications (other than any adjudication by consent) on the following grounds:

- the disputed decision was based on error of fact,
- the disputed decision was wrong in law, or
- ICSTIS exercised its discretion incorrectly in reaching its decision.

While the ICSTIS Code of Practice makes reference to the procedures of the IAB for ease of reference, the IAB is wholly independent of ICSTIS.

This consultation

The Procedures of the IAB are currently set out in Annex 2 of the 10th Edition of the ICSTIS Code of Practice. The purpose of this consultation is to seek your views on the proposed changes to the IAB Procedures. The IAB wants to have the views of those affected by the requirements of the Procedures before they are finalised.

The proposed amendments to the Procedures are shown in [Appendix 1](#). The main proposed changes are the following:

- The Procedures now make reference to network operators as, under the draft Eleventh Edition of the ICSTIS Code of Practice, ICSTIS will have the power to issue sanctions against network operators. The grounds for a network operator to appeal are the same as those set out in the ICSTIS Code of Practice that relate to service providers, applicants for permission and named parties. It is obviously convenient that appeals by network operators should be made to the IAB as well as appeals by the service providers, and the IAB has consented to such an extension of its activity.
- There has been included in Section 3 of the Procedures of the IAB a discretionary power to the Tribunal Chairman, on application from ICSTIS, to decide whether to increase the security deposit required from an Appellant or to require a sum of money to be lodged as security against costs. The addition of this discretion is proposed as recent cases have proven to be highly expensive exercises and that has highlighted the real possibility that following an appeal in which ICSTIS is successful it may be virtually impossible for it to recover its costs. In addition, some appeals may be based on entirely unmeritorious grounds and the IAB would welcome the opportunity to have this power available in appropriate cases.
- The proposed amendment to Section 4 of the Procedures of the IAB state that the Tribunal Chairman can stay proceedings in certain circumstances. In particular, where the appellants owe a substantial sum in fines and costs and have not been granted a suspension of sanctions and where the service provider has not complied with the sanctions imposed by ICSTIS.
- The proposed amendment to Section 11 of the Procedures of the IAB increase the maximum award for costs and the award for provision of the Tribunal to £25,000 (from £10,000) and to £10,000 (from £5,000) respectively to make them more realistic given recent cases examined by the IAB.

Questions for respondents

Do you agree with the proposed amendments as set out above? If not, why not?

Do you believe that the IAB should consider any other amendments to the Procedures?

How to submit your responses

Responses should be submitted no later than **23 September 2005** to:

Paul Whiteing
Clerk to the IAB
ICSTIS
Clove Building
4 Maguire Street
London
SE1 2NQ
Tel: 020 7940 74105 Fax: 020 7940 7456
Email: pwhiteing@icstis.org.uk
Web: www.icstis.org.uk

Further copies of this consultation paper are available from:

Further copies of this consultation paper are available from:

Christine Musumeci
External Affairs and Policy Administrator
Tel: 020 7940 7415 Fax: 020 7940 7456
E-mail: cmusumeci@icstis.org.uk

Publication of responses

All responses are treated as public documents by the IAB unless respondents specifically state that their response is private. Please indicate on your response if you would like all or part of it to be treated as confidential. All public responses will be published on the ICSTIS website.

Timescales and Next Steps

Respondents are given 8 weeks to respond to this consultation document. After this time, the IAB will examine all responses received and determine how the Procedures should be amended. Once amended, the Procedures of the IAB will be sent, along with the draft ICSTIS Code of Practice, in accordance with the Technical Standards Directive, to the European Commission for comment by other Member States on the Information Society provisions of the draft Code. In parallel, Ofcom will consult on its recognition of the 11th Edition of the ICSTIS Code before it comes into force. The procedures of the IAB will come into effect at the same time as the 11th Edition of the Code and is likely to take effect in the early part of 2006.

Appendix 1

The procedures of the Independent appeals body

Appeals against ICSTIS adjudications

The Independent appeals body ('IAB') is a body of persons independent of ICSTIS appointed to provide tribunals to hear appeals.

The ICSTIS Code of Practice (Eleventh Edition) provides a right of appeal for Service providers, Applicants for permission or Associated individuals (as defined in the Code) or for Network operators who are aggrieved by an ICSTIS decision or determination. The relevant provisions in the ICSTIS Code of Practice (Eleventh Edition) are as follows:

“10.Appeals

- 10.1 Applicants may, after an oral hearing at which the Applicant or his representative has appeared, appeal to the Independent appeals body ('IAB') against ICSTIS' decisions and adjudications (other than any adjudication by consent).

Network operators may appeal to the IAB against ICSTIS adjudications whether or not an oral hearing has taken place. Appeals by an Applicant or Network operator ('Appellant') may be made on the following grounds:

- the disputed decision was based on error of fact,
- the disputed decision was wrong in law, or
- ICSTIS exercised its discretion irrationally in reaching its decision.

- 10.2 In order to institute an appeal, the Appellant must provide a written notice of appeal setting out the grounds upon which the appeal is made and the facts and matters upon which it is based, to be received by the clerk to the IAB ('the Clerk') within 20 working days of the issue of the ICSTIS adjudication or determination which is the subject of the appeal.

- 10.3 The notice of appeal must be accompanied by:

- the written adjudication,
- the case bundle used at the ICSTIS oral hearing,
- a security deposit of £5,000 or an application (to be determined by the Chairman of the IAB) to waive or reduce such a security deposit setting out the grounds for such waiver or reduction,
- a description of any new evidence upon which the Appellant intends to rely and which, for good reason, was previously unavailable,
- if the notice of appeal and/or any necessary accompanying documents are being provided to the Clerk more than 20 working days after the issue of the ICSTIS adjudication, then the Appellant must also provide an application (to be determined by the Chairman of the IAB) for the appeal to proceed, setting out the reasons for the delay and the grounds for such application.

- 10.4 If an Appellant or his representative failed to appear in person at an oral hearing for good reason, but the oral hearing proceeded in his absence and ICSTIS has refused to permit a further oral hearing, the Appellant may apply to the Chairman of the IAB to request him to require that ICSTIS holds a further oral hearing."

The procedures which follow are those laid down by the Independent appeals body ("IAB") and are under its control.

2 The procedures of the Independent appeals body

The IAB is able to hear any appeal lodged with the Clerk to the IAB ('the Clerk') in accordance with the provisions of paragraph 10 of the ICSTIS Code of Practice (Eleventh Edition).

The Clerk shall forthwith, upon receipt of the notice of appeal, provide a copy of it and of the accompanying documents to the Chairman of the IAB ('the Chairman') and to ICSTIS.

In the event that an Appellant was, for good reason, unable to attend an oral hearing but the oral hearing proceeded in his absence, then the Appellant may apply to the Chairman of the IAB. The Chairman shall obtain the views of the Chairman of the hearing panel in writing, or in a hearing at which the Appellant may also attend. The Chairman may require that ICSTIS provides a further oral hearing. The Chairman shall have the discretion to award the costs of the application.

3 The appeal tribunal

Upon receipt of a notice of appeal, the Chairman shall appoint an Appeal Tribunal, consisting of three members, to deal with the appeal. The Chairman or Deputy Chairman (if any) shall be the Chairman of the Tribunal ('The Tribunal Chairman').

If the Appellant has applied for a waiver or reduction in respect of the provision of the required security deposit and/or for the appeal to proceed despite the notice of appeal having been lodged out of time, then as soon as reasonably practicable, the Tribunal Chairman shall convene a hearing at which any such application shall be considered and at which ICSTIS may be heard.

In respect of an application for a waiver of the requirement to provide the security deposit, the Tribunal Chairman shall waive the deposit (or reduce the required level of security) if he determines that there appears to be plain merit in the grounds of appeal and that exceptional hardship will result from the requirement that the security be provided.

ICSTIS shall be entitled to apply to the Tribunal Chairman for a determination that the appeal should not be permitted to proceed unless the security deposit is increased to a higher level and/or that a sum is lodged as security for costs. The Tribunal Chairman may make such a determination entirely in his discretion.

In respect of an application for an appeal to proceed despite having been made late, the Tribunal Chairman shall grant such application if he is satisfied that in all the circumstances it is fair to do so and he may impose such conditions as he sees fit as to the further conduct of the appeal or as to lodgment of security for costs.

4 Suspension of sanctions

The enforcement of sanctions imposed by ICSTIS is not automatically suspended by the provision of a notice of appeal. An Appellant may apply to the Tribunal Chairman, by written application to the Clerk, setting out the grounds upon which the sanction

should be suspended. The Clerk will forthwith provide a copy to the Tribunal Chairman. The Tribunal Chairman will grant the application only if he is satisfied that not to do so would give rise to undue hardship, and that to do so would not give rise to a significant risk of public harm. He shall seek the views of ICSTIS on those matters prior to making a decision and may convene a hearing to deal with such applications.

If an Appellant has not been granted a suspension of sanction, and has not complied with the sanction imposed, the Tribunal Chairman may stay the appeal on the application of ICSTIS or on his own volition. Appeals stayed for more than 6 months shall be automatically struck out and may not be recommenced.

5 Representation

The Appellant shall be entitled to appear before the Appeal Tribunal in person and be represented.

ICSTIS shall attend as respondent to any appeal before the Appeal Tribunal and may instruct a representative to act on its behalf.

6 Pre-hearing process

The Tribunal Chairman may, at his own discretion, or upon the application of either party to the appeal, convene a conference of the parties at which he may give such directions as he considers necessary for the fair and speedy hearing of the appeal. Such directions may include, for example, directions for:

- the admission of facts before the hearing,
- the disclosure of documents,
- the provision of expert reports,
- the exchange of written statements,
- the preparation of agreed bundles of documents,
- the submission and exchange of outline arguments.

Directions may be given as to the date by which such actions shall be taken.

For the avoidance of doubt, the Chairman shall have the power to make directions for disclosure of documents and any other directions relating to evidence as though the appeal was a first hearing of the matter which is the subject of the appeal.

Not less than 10 working days before the date of the hearing of the appeal, the Clerk shall send written notice of the day, time and place of the hearing of the appeal to the last known address of the Appellant and to ICSTIS.

Within 5 working days of receipt of the notice specifying the date of the hearing, both the Appellant and ICSTIS shall each inform the Clerk in writing of whether they intend to appear at the hearing and the name of any person who will be representing them at the hearing.

7 The hearing

The Appellant shall outline the grounds of his appeal and call such witnesses and refer to such documents as he is entitled to do.

ICSTIS shall then be entitled to respond to the case put by the Appellant and to call

such witnesses or present any written statements or other documents.

The Appellant shall then be entitled to address the Appeal Tribunal.
A witness in person may be cross-examined by the other party in the appeal.

A witness who has been cross-examined may be re-examined.

The Tribunal Chairman may question any witness at any time.

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

If the Appellant is neither present nor represented at the hearing and the Appeal Tribunal has no cause to believe there is a good reason for the Appellant's absence, the appeal may be dismissed.

8 Confidential information

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

9 Recording

A sound recording shall be made of the proceedings before the Appeal Tribunal. Recordings will be made available to ICSTIS and the Appellant.

10 Public Hearing

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

11 Costs of hearing

The Appeal Tribunal shall make such award for costs of the parties as it shall see fit, subject to a maximum of £25,000 (inclusive of disbursements and VAT). In addition, the Appeal Tribunal shall award the costs of the provision of the Tribunal as it sees fit, subject to a maximum of £10,000 (inclusive of VAT).

12 Powers of the Appeal Tribunal

The Appeal Tribunal shall consider all documentation and evidence produced at the ICSTIS oral hearing and may, at its discretion, rehear any witness called before the ICSTIS oral hearing and hear new evidence which for good reason was not available at the ICSTIS oral hearing.

The Appeal Tribunal may:

- confirm, vary or rescind an adjudication or determination or any part of it made by ICSTIS and substitute such other finding as it considers appropriate,
- confirm, vary or rescind any sanction imposed by ICSTIS pursuant to its

adjudication. For the avoidance of doubt, the Appeal Tribunal may impose a greater sanction (or sanction direction) than that imposed by ICSTIS provided that such a sanction could have been imposed by ICSTIS.

- confirm, vary or rescind the imposition of an administrative charge made by ICSTIS.

13 Decision and publication

The Appeal Tribunal shall, as soon as is practicable after the hearing, provide a reasoned written decision. This written decision shall be published by ICSTIS.

14 Further appeal

There is no further appeal through ICSTIS' procedures or those of the IAB.