ICSTIS Brief on raising Maximum Fine Levels Under the Communications Act 2003

Introduction

1. An Order has been proposed by the DTI to increase the maximum fine level that ICSTIS may impose under the Communications Act 2003 (the Act) from £100,000 per contravention of the section 120 condition to £250,000 per contravention.

2. We have been asked to provide a brief on this proposal. In particular, we have been asked to deal with a judgment of the Independent Appeal Body (the IAB) in the *PRS Communications case* which was reported in July 2005.

The judgment of the IAB in the *PRS Communications case*

3. In *PRS Communications* the IAB ruled that each breach of the ICSTIS Code of Practice (the Code) represented a breach of the section 120 condition. Therefore each breach of the Code could merit a fine of £100,000. As in many cases that ICSTIS prosecutes there is more than one breach raised, this could result in multiple of fines in any one case, some of which could be £100,000.

ICSTIS' position

The judgment of the IAB in the PRS Communications case *and legitimate expectation*

4. ICSTIS is clear that the IAB's interpretation of the Act is a permissible one.

5. ICSTIS notes that this is the first time since discussions surrounding the Act began that this interpretation has been promulgated. During ICSTIS' discussions with Ofcom and DTI, both before and after the coming into force of the Act, the Act was always interpreted so that one contravention of the section 120 condition would occur when a particular set of breaches was raised in any one case against one service provider. The result of this interpretation was that fines of a maximum of £100,000 were imposed in any one case against one service provider. This was accepted by Ofcom as part of their Review of PRS Regulation in December 2004.

6. Given that this has always been the practice of ICSTIS, with the full support of Ofcom, there is a very real issue of a legitimate expectation on the part of service providers that a set of breaches in a particular case will not lead to fines of multiples of £100,000.

7. It is as a matter of practicality, rather as a matter of law, that the rulings of the IAB are binding upon ICSTIS. It is not provided for in the Code that the IAB's rulings are binding but, clearly, ICSTIS would not wish to be before the IAB on the same points repeatedly. However, this lack of legal direction upon ICSTIS to have regard to the IAB's rulings leaves it open to service providers to argue that its legitimate expectation not to be fined in excess of £100,000 per case is not defeated by the IAB's ruling in *PRS Communications*. This is particularly so as, due to the punitive nature of these very large fines, the administrative court is likely to take a narrow approach.

8. There is also a matter of legal preference. ICSTIS' approach, to date, has been to fine "in the round" rather than break down fines by breach. This is because it is the entirety of a service provider's behaviour in a particular case that has defined the approach to its fine (and the proportionality of that fine), rather a breach by breach breakdown. In fining "in the round", the Committee has regard to the nature and range of breaches of the Code as well as to many other factors. This is the same approach as the courts take when determining criminal sanctions.

Problems with a "per breach" approach

9. Even if ICSTIS was to take the risk of defeating service providers' legitimate expectations, or acting to change the expectations, regarding the £100,000 fine level, this still raises two distinct but interrelated problems.

10. Firstly, there is the quite stark problem that some cases of the utmost seriousness are only addressed by one breach of the Code.

11. This is quite possible. The Code contains some central propositions in its Section 4 (General Provisions). These cover the basic consumer protection provisions relating to honesty, pricing information, inappropriate promotion (for example to children or vulnerable adults) and of delay in services (in order to rack up call costs). An egregious breach of the Code may only transgress one of these provisions.

12. For example, consider a promotion that tells consumers that they may enter a draw for a free car by calling a certain number, where that number is a premium rate number and it is not declared as such in the promotion. Potentially the only breach of the Code is of paragraph 4.4 (regarding the provision of pricing information) despite the fact that the service is close to a fraud. To place any more breaches on the charge sheet, simply in order to increase the potential fine level, would be illegitimate.

13. When it is considered that services that omit or obfuscate pricing information in this manner abound and that such services can, in periods of mere weeks or

months, build up revenue of a million pounds or more, it becomes clear that a £100,000 fine limit per breach is wholly inadequate and why we regard a new limit of £250,000 to be proportionate, along with most respondents to the DTI's consultation on this matter.

14. Secondly, there is an issue of proportionality.

15. It could be that in the example above, a subsidiary breach of paragraph 4.5 (provision of identity and contact details in promotional material) can be raised. In that case, such a breach would be ancillary to the main breach of paragraph 4.4 of the Code, which covered the main mischief and it would be wholly improper and disproportionate (and therefore unlawful) of ICSTIS to fine £100,000 for the main breach of paragraph 4.4 and then to breach the same amount for the ancillary breach of paragraph 4.5.

16. Even if ICSTIS were to reduce the fine level for the ancillary breach, there is legal exposure as to what level the 'ancillary fine' ought to be at as a percentage reduction of the 'main fine'. For example, if the main breach of paragraph 4.4 attracted a fine of £100,000, should the ancillary breach of paragraph 4.5 attract a fine of £50,000 or £5,000?

Revenues currently being made in the premium rate industry

17. As mentioned above, the premium rate industry sees revenues of in excess of £1 million pounds being made by a single service in very short periods of time (sometimes weeks). Additionally, with the promulgation of the 11th Code of Practice, ICSTIS will be taking over a substantial part of the regulation of network operators and will have the power to fine them. Cases involving networks may involve more than one service provider.

18. ICSTIS is currently facing cases where service providers are in repeated breach of the same paragraph of the Code on separate occasions and with similar (high) revenue levels. ICSTIS is unable to accumulate fines beyond the £100,000 level after "three strikes". This means that the fine becomes an operational cost for the service provider in a tried and tested breach.

19. Due to the high revenues earned, the £250,000 figure has been the subject of wide support and interest from industry stakeholders as an effective deterrent against wrongdoing.

Conclusion

20. If ICSTIS is to provide effective consumer protection it must be able to fine in a proportionate and legal manner at a level that disincentivises individuals and undertakings from engaging in abusive behaviour using premium rate services.

21. Where revenues of the type outlined above are being made, and where fines from ICSTIS are seen as a mere business cost this must be robustly challenged. Large fines that substantially eat in to revenues and profits made must be allowed for clearly and unambiguously in the legislation.

22. The proposed Order is an opportunity to make such an allowance and to give the message clearly and unambiguously that such high levels are not only allowed but intended.

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