ICSTIS' response to Ofcom's consultation on Promoting effective self regulation – Criteria for transferring functions to co-regulatory bodies

Executive Summary

We welcome and support the action being taken by Ofcom to establish clear criteria when considering delegation to self-regulatory bodies. Any model will need to contain a degree of flexibility and interpretation if it is to deal with a potentially wide range of issues and market conditions related, for example, to technical co-operation, dispute resolution, content rating and direct consumer protection.

Background - From self to independent regulation

The Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS) was formed in September 1986. ICSTIS began its life as an institution of self-regulation. It was originally set up by BT and the Association of Telephone Information and Entertainment Providers (ATIEP) – now a defunct service provider trade body. Originally two of ICSTIS' Committee members were nominated by the Premium Rate Services (PRS) sector itself but this was changed in 1990 in order to increase the Committee's independence and also because ICSTIS experienced numerous conflict issues with these members and they were unable to represent the sector adequately. Since that time ICSTIS' Committee membership has therefore been made up of independent members only and it is currently a condition of appointment that they can have no direct interest in the provision of PRS whilst serving as Committee members.

It is important to note that ICSTIS does not so much regulate a £1Bn "industry" as a payment mechanism which is used by a multitude of companies as a revenue stream either as a core business activity or, increasingly, as a peripheral one to other revenue stream activities. PRS providers can be blue chip companies – broadcasters such as the BBC, ITV and Sky, media groups such as tabloid newspapers and many magazine groups that invariably own their own service provider companies. Equally they may be Governments – many embassies now operate their information lines on PRS, charities – for fund raising or cost recovery purposes, as well as traditional providers for whom premium rate is a core activity in the provision of a range of entertainment services, whether competitions, chat or adult services. Network operators, as the carriers of this telephony traffic, and with revenue-share arrangements for it, also have a stake and again for some this is a core activity and for others it is peripheral to a range of other services they supply. Regardless of whether the range of commercial stakeholders that ICSTIS regulates is unique or not, this factor has also influenced how the governance arrangements for ICSTIS have historically been shaped. Given the fluidity in this market, the governance and funding changes already brought about by the Communications Act 2003 along with the other work underway in the field of developing best practice in governance, we plan to conduct our own governance review in 2004 looking specifically at the case for changes in the composition of the Committee and at building on our existing advisory and consultative structures.

Market conditions under which self and co-regulation can work best: An analysis which has supported the ICSTIS model of regulation to date

Before turning to the criteria themselves, it is useful to consider the market conditions in which self and co-regulation can work best. An international conference hosted by DTI and OFT in 2001[1] reached the conclusion that there are certain conditions where self-regulatory codes can work best. These are: (i) there is an active industry association, (ii) that the industry is relatively mature and (iii) that there is some kind of external stimulus (e.g., a threat of statutory regulation).

This model is useful in contextualising why ICSTIS' current form of independent regulation has, in the eyes of many, been so successful:

[1] DTI/OFT international seminar on self and co-regulation, Middle Aston, 19-20 March 2001

- ICSTIS does not have one active industry association from which it can draw direct support. We commit significant resources in engaging with those trade bodies with an interest in PRS (e.g., Direct Marketing Association, Mobile Data Association, Mobile Entertainment Forum, UKCTA, Premium Rate Association and the Network for Online Commerce). However, they do not alone or in combination, represent anywhere near the totality of the numerous and diverse parties that have a business interest in the Code of Practice we develop and enforce. Some of these bodies represent the wireless sector which has been a relatively new adopter of PRS through Premium SMS and the like. None can claim to represent the broadcasters, that are increasingly significant drivers of PRS through the great variety of TV programmes that build in interactivity or participation through votes and the like.

- It is less than clear that the payment mechanism we regulate is "mature". Premium rate, as a payment mechanism for the delivery of content to communications devices has gone through a series of abrupt changes over the last 17 years with the move from fixed line telephony to mobile payment mechanisms (Premium SMS), the development of web-based premium diallers for Internet content charging and interactive TV return paths. And we are again on the cusp of further, and potentially revolutionary, change over the next one-two years with the advent of new forms of micro-billing on mobile for rich pictorial content some of which may prove to be very problematic and may raise child protection issues also. That said, we recognise that there has been a sea change since the founding days of ICSTIS where the only industry stakeholders that could be engaged with were either small businesses whose core activity was PRS entertainment or a small number of large network operators.

- There clearly was an external stimulus for telephone companies originally to develop a regulatory solution for this new payment mechanism just as there was a further incentive in the late-1990s to move to update this arrangement with new backstop powers through the telecoms licensing regime for enforcing the Code of Practice. In part this followed the rapid expansion on the network side of companies engaged in facilitating the provision of PRS a minority of which appeared to have little interest in ensuring that this was done in a way that had regard to ensuring that public confidence and trust in this payment mechanism was maintained.

It is this combination of market conditions which has led to the evolution of an independent regulatory model for PRS and the success of which has been judged by many to have significantly contributed to the use of this payment mechanism now being the greatest anywhere in the world by a considerable margin. That said, and as stated above, we believe that it is now right again to review ICSTIS' governance arrangements to ensure they remain fit for purpose as we move forward.

Criteria for delegating Ofcom's functions to a co-regulatory body
This section offers ICSTIS' views on the detailed criteria set down in section 3 of the consultation paper.

Beneficial to consumers: We agree that a co-regulatory mechanism must secure additional benefits for consumers above those that would be provided by a statutory regime. Other benefits may include preventative action, speed of action, flexibility and better-informed decision-making. All of this should lead to greater trust and confidence in the product offering, so encouraging innovation, investment and an increase in commercial activity. Any regulatory body needs to do this in a way that avoids any suggestion that it is subject to "regulatory capture". If its governance arrangements include distinct industry input then it must be careful to ensure that there are mechanisms for managing this in order to maintain consumer integrity and trust.

Clear division of responsibilities: We agree that it is essential that there is a clear division of responsibilities between the co-regulatory body and Ofcom. We equally believe that it is important that there be a close dialogue between both parties where views and advice can be shared, albeit with the clear understanding that at the end of the day the different bodies may well have different responsibilities.

Accessible to members of the public: The regulatory scheme needs to be accessible to the public in an easy to use way that is generally free or if not has a de minimis cost attached to it. We also agree that there needs to be effective arrangements for wider public consultation on material policy changes such as to Codes of Practice and guidelines and that such consultations should generally follow the standards set by the Better Regulation Task Force and by Ofcom for its own consultation arrangements. Such consultation arrangements should involve all stakeholders in question.

Independence from interference by interested parties: We accept that there is a tension between the desirability of achieving independence and the need for industry expertise. This is a tension that exists in all co and self-regulatory regimes and needs careful management over time and in the context of the market conditions in which it is situated. We are of the view that this context has not been fully considered by Ofcom when suggesting "a mix of lay people and industry people will often be appropriate…". ICSTIS has found ways over the years to resolve this tension and avoid charges of "regulatory capture" by for example having an independent Committee but then closely aligned to it advisory bodies drawn largely from the commercial sector from which it can draw advice, information and expertise. It is also important that the term "industry" is broadly perceived to include all stakeholders with commercial interests in the industry as a whole because their brand names are affected by industry performance.

We note that Ofcom are silent on the role that industry members might take on the Board of a self-regulatory body. Are they there to serve in the best interests of the self-regulatory body or principally as representatives of the commercial entity who employs them full time? We are of the firm view that it must be the former and we would agree with recommendation made by Derek Higgs[2] that all Directors take decisions objectively in the interests of the Company on which they sit – in this case the self-regulatory body's Board. This we believe is consistent with the Committee on Standards in Public Life's Seven Principles of Public Life, which insofar as they apply to Ofcom as a body discharging a public function, would need to be adopted by any body to whom powers were delegated.

Adequate funding and staff: We agree with this but would go further and suggest that Ofcom should be satisfied that (i) the funding is structured and sustainable to the extent that commercial stakeholders are satisfied as to the equity of the arrangements over the longer term and (ii) the co-regulatory body publish its audited accounts.

Near universal participation: We are of the view that Ofcom's starting point is that there should be universal participation and only waiver from this if the participation that is lacking is de minimis and will have no material impact on the derived benefits to consumer. It would seem critical to Ofcom' credibility, public trust in non-statutory solutions generally and the credibility of individual regimes recognised by Ofcom that Ofcom should avoid committing to support arrangements which do not have broad industry involvement and which, consequentially, risk failure.

Effective and credible sanctions: We agree that any co-regulatory body will need to have available a range of sanctions that act as a deterrent and which must be applied in a proportionate manner. Sanctions that do not have this effect will lead to the perception, if not the

[2] Review of the role and effectiveness of non-executive directors - January 2003

reality, that the body is "toothless" and as such this will then "blow back" onto Ofcom with criticism being levied by MP's, Select Committees, consumer bodies and the media.

Auditing and review by Ofcom: We agree that Ofcom should be satisfied that the body can handle the likely workload and that a consequence of co-regulatory status is that this will mean that the body should be open to reviews by Ofcom. We also agree that where there are demonstrable deficiencies – by which we would interpret a clear failure against any of the criteria for co-regulation set by Ofcom, not expressions of general dissatisfaction from a small minority of stakeholders – then Ofcom should suggest remedies which would then need agreeing by that body in order to overcome the issue.

Public accountability – We agree with the sentiment of this proposal entirely.

Consistency with similar regulation: We agree that it is desirable to be consistent in the level and type of regulation for delivery of the same types of content over different platforms. For this reason we founded the Content Regulators Forum in 2000 and maintain good and effective relations with the ASA and other bodies that develop content Codes of Practice. We have Memorandums of Understanding with Otelo and the OFT. The latter regard ICSTIS as the "established means" for regulating PRS and refer such matters to us in all instances. We will also engage fully with the work of the Content Board of Ofcom precisely so that we can work towards ensuring, as far as is possible, a consistent approach in this area going forward.

Independent appeals mechanism – Insofar as a co-regulatory body may be deemed to be a public body we believe that it is incumbent upon them to ensure that any appeals mechanisms also comply with Human Rights Act 2000 requirements in terms of the right to a fair and impartial hearing. It is not clear to us that Ofcom has turned its mind to this issue and the commentary at 2.18 makes no reference to who will appoint any appellate bodies – an issue on which we received considerable legal advice when the ICSTIS Independent Appeals Body was created. Paragraph 2.18 also makes reference to the "dissatisfaction of either party", without making it clear which parties are being referred to – industry, consumers or the regulator. Clarification is required from Ofcom here as depending on the parties in question it could have considerable ramifications for how self regulatory bodies arrange and then need to resource their appeals mechanisms.

This is another area where Ofcom should avoid being over-prescriptive as there are material differences between regimes based on regulatory enforcement designed to protect consumers at large and dispute resolution regimes (such as Otelo) where the focus is on individual consumers and where the Ombudsman scheme has a unique structure in terms of the respective rights of appeal by consumers and scheme members.

Divergence from the criteria: We agree that circumstances may arise where it is not appropriate to apply the criteria in full and that where this happens Ofcom should explain publicly and fully the rationale for any variation of approach.

Consultation questions

Q1 In which specific areas might co-regulation have a role to play?
It is difficult to point to areas where future developments would make self-regulation likely. If the existence of dominant market power is a consideration it is possible that the self-regulatory possibilities will arise more in the field value-added content and less in relation to carriage where competition policy issues may remain a consideration. We should be looking, perhaps, at areas where evolutionary developments in technology may result in the delivery of services which are Internet-based but, in future, broadly equivalent in content terms to broadcast services regulated by Ofcom. In the absence of non-statutory solutions consumer issues could arise over the nature of this content and/or the ways in which communications providers charge it.

Q2 Do respondents agree with the criteria set out for assessing whether a co-regulatory organisation is likely to be effective?
In broad terms we do agree with the criteria proposed albeit as has been seen we do have a number of comments. The only specific area that might be developed, in light of recommendations by Higgs, is in having criteria to ensure that members of the governing body have suitable arrangements in place for induction and professional development.

Q3 What other criteria should be considered?
We have no immediate thoughts on other criteria.

Q4 How should self and co-regulation be developed by Ofcom in the future?
We are of the view that Ofcom should certainly develop co-regulation as new best practice from bodies like the Better Regulation Task Force emerges. Ofcom should also be mindful of the work done by other Government offices, e.g., OFT's work on developing Consumer Codes of Practice. Insofar as issues touch upon general governance matters then Ofcom should look across industry at emerging developments in governance as supported by the Dti/Treasury through Higgs, Downing Street's consultation on the legal and regulatory framework for charities[3] and the like. Finally, Ofcom should engage all co-regulatory bodies at an early stage as they develop their thinking – change that is built by consensus will be better than that which is "forced".

[3] Private Action, Public Benefit – Downing Street Strategy Unit, September 2002