

26<sup>th</sup> April 2002

Guy Russell  
Cii Division  
Department of Trade and Industry  
151 Buckingham Palace Road  
London SW1W 9SS

Dear Guy,

## **ICSTIS response to the DTI consultation on the Electronic Commerce (EC Directive) Regulations 2002**

### **Executive Summary**

ICSTIS welcomes the decision of the Department to consult on the Regulations before implementing them. This letter contains a number of key points:

- ICSTIS remains of the view that the draft Regulations could seriously undermine consumer protection in the field of premium rate services and that UK consumers will not enjoy the same level of consumer protection as they do at present.
- ICSTIS remains of the view that it is an enforcement authority for the purposes of the Directive and Regulations.
- ICSTIS will have no remit over complaints made to it about Information Society premium rate services where the service provider is based in another Member State.
- Clarification is sought on the co-ordination of enforcement issues.
- Clarification is sought on the relationship between paragraph 7 (8) of the draft Regulations and the Stop Now Power regime guidance issued by the OFT.
- ICSTIS seeks further clarification on the guidance pertaining to the definition pertaining to "Mere Conduits".

### **Background**

ICSTIS welcomes the Department's initiative in undertaking a further consultation on the Regulations before laying them before Parliament. We accept that there is a fine balance between needing to implement the Directive as soon as possible and needing to

consult as widely as possible with all interested parties about the implications of the Directive and consequential Regulations.

Given ICSTIS' previous response which was a comprehensive digest of the potential implications for us arising from the Directive and its implementation, we do not on this occasion intend to repeat what was said earlier but would mark our disappointment that the Department have not been able to find it possible to take forward to the draft Regulations those suggestions which we previously submitted. We remain concerned that the Directive as implemented through these Regulations could undermine consumer protection in the field of premium rate telephony insofar as UK consumers who suffer harm and who complain to ICSTIS may not enjoy the level of protection from us in the future to the extent that they do at present. That said, we have sought legal advice on how best we may deal with these Regulations once implemented on the assumption that there will be little that changes between the draft as issued and the final version that will be approved by Parliament.

In terms of specific comments on the Regulations or accompanying guidance, we submit the following:

### **Interpretation**

ICSTIS takes the view that it is an enforcement authority for the purposes of the Regulations. Whilst ICSTIS is not an emanation of the State, its Code of Practice is recognised by the Director General of Telecommunications and is binding on all network operators who provide "Controlled Premium Rate Services" as a term of their licence issued by DTI. ICSTIS is able to enforce its Codes and is authorised to do so. If the Department disagrees with this interpretation we would like to be so informed with an explanation.

### **Internal Market**

#### **1. Scope issues**

Section 7 (1) of the Regulation imposes obligations upon the enforcement authority (ICSTIS) in relation to service providers based in the UK providing premium rate "Information Society Services". This means that a French premium rate service provider operating in the UK but only accessible by French consumers will be regulated by the UK enforcement authority – according to the Regulations and consistent with the Directive. This appears to involve ICSTIS' Code having a general application to all providers of premium rate information society services, whose country of origin is the UK, regardless of the contractual arrangements with the network. This gives rise to practical enforcement and funding issues as ICSTIS is not funded, as an independent body, to undertake such regulation and its Code of Practice makes it clear that its Code has no application over services terminating outside of the UK.

In these circumstances, ICSTIS would welcome a formal dialogue with the Department about how it proposes to deal with any such complaints that it receives and to provide us with appropriate contact points for referral should we receive complaints about such services.

## **2. Enforcement issues**

Paragraph 7 (5) states:

*(5) Paragraph (4) shall only apply where the information society service prejudices or presents a serious and grave risk or prejudice to an objective at (a) to (d) of that paragraph.*

It would be helpful if the Regulations or Guidance could clarify what constitutes a “serious and grave risk of prejudice...” ICSTIS has tests that it applies when using its Emergency Procedure to stop a service with immediate effect pending a full investigation by ICSTIS. The Code says:

*“Where it appears to the Secretariat that a breach of the Code has taken place which is serious and requires urgent remedy the emergency procedure will be used...”*

The Emergency Procedure is used in situations akin to actual harm being serious and grave. This is a different test to that set out in paragraph 7 (5) where what is needed is a serious and grave risk of prejudice. Presumably the prejudice to the objective itself may be moderate, provided that there is a serious and grave risk of that prejudice occurring.

If the Department has views on our interpretation then we would be glad to hear them.

In respect of Paragraph 7 (4) or (8), where ICSTIS, as an enforcement authority decides to take action, does this need to be co-ordinated or registered with the Department of Trade & Industry or any other Government Body? On the assumption that it does we would be grateful if the Department would provide us with the appropriate points of contact within Government.

Also, in respect of urgent remedies as outlined in paragraph 7 (8) of the draft Regulations, it is essential that ICSTIS is clear about the relationship between this derogation under the Regulations and the Stop Now Powers and procedures managed by OFT and being expanded under proposals in the Enterprise Bill. The existing Stop Now Guidelines issued by OFT in April 2002 relating to international proceedings and service providers based in other Member States do not appear to reflect the derogations under paragraph 7 (8) of the draft Regulations. The latter allows Member States to act on a unilateral basis in matters of urgency. By contrast, the former suggest that the OFT will in normal circumstances ask the relevant Qualified Entity in the Member State where the business is based to take enforcement action on behalf of the OFT for the protection of UK consumers. Additional clarification of the relationship between the derogation in the draft Regulations and the Stop Now Orders would be beneficial.

At a practical level, in terms of how ICSTIS is preparing for the implementation of the Regulations in the UK, we have written to all our counterparts across the EU in the International Audiotex Regulatory Network (IARN) seeking advice on whether we can look to deal direct with them in the event of an investigation into complaints about a service which originates in their countries. We have not received replies to date, and recognising the non-statutory nature of many of these bodies, we are not very hopeful that these cross-border disputes will be easily managed through this network. If this is

the case we will have to have from DTI clear points of contact in each Member State as we deal on a regular basis with complaints about cross-border “Information Society Services”. If such arrangements are not in place across all Member States then we will have to consider with you whether we will need to make greater use, going forward, of our Emergency Powers, combined with the derogation under paragraph 7 (8).

### **Section 17 Mere Conduit**

The interim business guidance (6.13) gives other examples of intermediary service provider such as content aggregation services but is not clear as to whether these are, or are not, mere conduits for the purpose of the Regulations. Additional guidance on this category of service provider and whether the added value aspects of the service they provide beyond the provision of transmission services, may preclude them from the mere conduit provisions would assist.

We have no other comments at this time.

Paul Whiteing

**Paul Whiteing**  
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