

# TO REGULATE OR TO OVER-REGULATE? INTERNET SERVICE PROVIDER LIABILITY: THE INDUSTRY REPRESENTATIVE BODY IN TERMS OF THE ECT ACT AND REGULATIONS

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"This new phenomenon [the Internet] has brought with it new challenges and dangers to previously existing legal rules and mechanisms. For instance, the delictual and criminal rules for defamation or the infringement of copyright had been fairly settled before the advent of the Internet. Suddenly the application of the rules relating to publishers such as newspapers, journals and even radio and television, did not quite seem fit in respect of parties such as Internet Service Providers who technically were publishing information, but had very little control over the content which they published on behalf of others. This problem is not a uniquely South African problem, but exists wherever the Internet exists."<sup>1</sup>

## SUMMARY

The Electronic Communications and Transactions Act 25 of 2002 provides for the limitation of liability of Internet service providers against actions based on unlawful content placed on their websites. The legislature's approach is to emphasize self-regulation of the Internet by providing in section 72 of the Act that only those service providers which belong to an Industry Representative Body (IRB), recognized by the Minister of Communications, will qualify for the protection accorded by the ECT Act. Such an IRB must then, through its Code of Conduct, regulate service providers belonging to it. This article evaluates the prerequisite of an IRB and investigates the guidelines for recognition of IRBs by the minister.<sup>2</sup> The South African position is then compared with that in the European Union. The need for the existence of IRBs is questioned and the guidelines are criticized. It is argued that both the threshold requirements and IRB recognition requirements are unnecessary in the context of

<sup>1</sup> S 1.1 *The Guidelines for Recognition of Industry Representative Bodies of Information Service Providers* GN 1283 in GG 2974 of 2006-12-14.

<sup>2</sup> *The Guidelines for Recognition of Industry Representative Bodies of Information Service Providers* GN 1283 in GG 2974 of 2006-12-14.

limited liability. It is submitted that these barriers to limited liability are needless and can possibly hamper the industry as a whole.

## 1 INTRODUCTION

Internet service providers (ISP's) are important role-players in the provision and availability of Internet services to the public. However, it became clear that existing rules relating to criminal and civil liability for publishers exposed ISPs to an unreasonable risk of liability which could jeopardize the free flow of information and the effective functioning of the Internet.<sup>3</sup> As a result many countries, including the United States of America (USA) and member states of the European Union (EU), enacted legislation to protect ISPs under certain circumstances from liability for content published on their websites.<sup>4</sup> The South African legislature recognized that an unreasonable risk of criminal and civil liability for ISPs exists within the provisions of South African common and statutory law.<sup>5</sup> The legislature addressed this issue in Chapter XI of the Electronic Communications and Transaction Act 25 of 2002 (ECT Act).

The legislation which was promulgated provided ISPs with safe harbours from liability. There are at least two forms of this type of legislation.<sup>6</sup> One form provides ISPs with broad immunity from liability for unlawful content hosted by third parties. An example of this can be found in section 230 of the USA's Communications Decency Act of 1996 (CDA).<sup>7</sup> The second approach provides ISPs, which perform certain functions in a particular manner, with limited immunity from liability for unlawful content posted by third parties. Three examples of this form of legislation are: In the USA, the Digital Millennium Copyright Act (DMCA),<sup>8</sup> in the EU, the Electronic Commerce Directive 2000/31/EC (EU Directive),<sup>9</sup> and in South Africa, the ECT Act.

<sup>3</sup> *Zeran v America Online Inc* 129 F 3d 327 (4<sup>th</sup> Cir 1997) 331; Recital 40 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of the information society services, in particular electronic commerce, in the Internal Market (OJ L178 of 17 July 2000); and s1.1 of GN 1283.

<sup>4</sup> Roos "Freedom of Expression" in Van der Merwe, Roos, Pistorius, Eiselen *Information and Communications Technology Law* (2009) 399 416-429; Recital 40 of Directive 2000/31/EC; *Zeran v America Online Inc supra* 330-331; and s 1.1 of GN 1283.

<sup>5</sup> S 1.1 of GN 1283.

<sup>6</sup> Edwards "The Fall and Rise of Intermediary Liability Online" in Edwards and Waelde (eds) *Law and the Internet 3ed* (2009) 47 49.

<sup>7</sup> This is Title V of the *Telecommunications Act* of 1996, Pub L No 104-104 110 Stat 56. The current position in the USA appears to be that ISPs receive special protection compared to analogous offline entities. Nel "The Liability of Internet Service Providers for Defamation: A Comparison Between American, English and South African Law" 2008 *Responsa Meridiana* 101 112; Frits "Internet Libel and the Communications Decency Act: How the Courts Erroneously Interpreted Congressional Intent with Regard to Liability of Internet Service Providers" 2004-2005 93 *Kentucky LJ* 765 784; and Akdeniz *Internet Child Pornography: National and International Responses* (2008) 241.

<sup>8</sup> 17 USC § 512 ff 105 Pub L No 304 112 Stat 2660.

<sup>9</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of the information society services, in particular electronic commerce, in the Internal Market (OJ L178 of 17 July 2000).

Section 72 of the ECT Act provides for the limitation of liability of providers of information system services against actions based on unlawful content placed on their websites. The legislature's approach was to emphasize self-regulation<sup>10</sup> of the Internet by the Internet industry by providing that only those service providers which belong to an Industry Representative Body (IRB), recognized by the Minister of Communications (the Minister), would qualify for the protection.<sup>11</sup> Such an IRB must then, through its Code of Conduct, regulate service providers belonging to it.

The safe harbours created by Chapter XI are only available to providers that meet certain requirements. These are related to membership of an IRB recognized by the Minister.<sup>12</sup> An IRB must comply with specific requirements to obtain recognition. The purpose of this article is to evaluate the prerequisite of an IRB and to investigate the requirements for recognition by the Minister.

## 2 CONDITIONS FOR ELIGIBILITY

The limitation of liability of ISPs provided for in Chapter XI of the ECT Act is available to persons who provide "information system services",<sup>13</sup> which ISPs do. However, to obtain the protection of Chapter XI, ISPs must comply with two threshold requirements. The ISP must:

- be a member of an IRB that has been recognized by the Minister;<sup>14</sup> and
- has adopted the IRB's Code of Conduct and implemented its provisions.<sup>15</sup>

Once an ISP has complied with these requirements, it may make use of the safe harbours if it:

- performs certain functions in a particular manner in relation to the unlawful material;<sup>16</sup> and
- has responded in a reasonable time to a legitimate take-down notice.<sup>17</sup>

The prerequisite that an ISP must be a member of an IRB in order to make use of the limitation of liability section of the Act makes the IRB an integral element of the limitation of an ISP's liability. The Act places a duty on the Department of Communications (the Department) to ensure that IRBs establish acceptable minimum levels of professional conduct for their members to qualify for limited liability.<sup>18</sup> This is done by providing that an IRB

<sup>10</sup> This is specifically spelled out in s 1.2 of GN 1283.

<sup>11</sup> S 1.2 of GN 1283.

<sup>12</sup> S 72 of the Electronic Communications and Transactions Act 25 of 2002; Roos 429-434; Nel "Freedom of Expression and the Internet" in Buys (ed) *Cyberlaw @ SA II: The Law of the Internet in South Africa 2ed* (2004) 197 205-207.

<sup>13</sup> S 70 of Act 25 of 2002.

<sup>14</sup> S 72(a).

<sup>15</sup> S 72(b).

<sup>16</sup> See s 73-76. These are the mere conduit, cache, host or information location tool functions.

<sup>17</sup> S 77. This requirement does not apply to mere conduits. S 73.

<sup>18</sup> This is the interpretation provided by the Department in s 2.7 of GN 1283.

will only be recognized for purposes of this Chapter under very specific conditions.

The requirements for recognition of an IRB by the Minister are broadly outlined in section 71 of the ECT Act. The Minister must be satisfied that: the IRB's members are subject to a Code of Conduct;<sup>19</sup> membership is subject to adequate criteria;<sup>20</sup> the Code of Conduct requires continued adherence to adequate standards of conduct;<sup>21</sup> and the IRB is capable of monitoring and enforcing its Code of Conduct adequately.<sup>22</sup> The ECT Act does not provide the necessary guidelines as to the requirements to which an IRB must comply, for a successful application for recognition by the Minister.<sup>23</sup> This is provided by the regulations to the ECT Act, entitled *Guidelines for Recognition of Industry Representative Bodies of Information System Service Providers* (Guidelines).<sup>24</sup>

### 3 THE GUIDELINES FOR RECOGNITION OF INDUSTRY REPRESENTATIVE BODIES<sup>25</sup>

The Guidelines were published on 14 December 2006, four years after the commencement of the ECT Act. The Guidelines include the following: a description of the ECT Act's background;<sup>26</sup> the Guidelines' founding principles;<sup>27</sup> its objective and scope;<sup>28</sup> a Best Practice Code of Conduct that contains minimum and preferred standards of conduct by an IRB's members;<sup>29</sup> a checklist of the adequate criteria necessary for membership,<sup>30</sup> and the considerations the Minister is to take into account when determining whether an IRB is capable of adequately monitoring and enforcing its own Code of Conduct and therefore eligible for recognition in terms of the Act.<sup>31</sup> The Guidelines provide the necessary detail of the minimum standards required by an IRB for recognition by the Minister. They further provide standards of conduct that an IRB's members should strive for.<sup>32</sup>

<sup>19</sup> S 71(2)(a).

<sup>20</sup> S 71(2)(b).

<sup>21</sup> S 71(2)(c).

<sup>22</sup> S 71(2)(d).

<sup>23</sup> The Internet Service Provider Association of South Africa (ISPA) was unable to apply successfully for recognition due to this. Brooks "Question 2" in *Re: Questions for the Committee in Relation to Recognition of an IRB* (2009-10-26) E-mail to ND O'Brien (copy on file with author), subsequently Brooks *Re: Questions for the Committee*. Brooks is ISPA's General Manager.

<sup>24</sup> GN 1283 in GG 29474 of 2006-12-14.

<sup>25</sup> *Ibid.*

<sup>26</sup> S 1 of GN 1283.

<sup>27</sup> S 2.

<sup>28</sup> S 3.

<sup>29</sup> S 4-6. The Guidelines assist IRBs in complying with s 71(2)(a) and s 71(2)(c) of the ECT Act as the Best Practice Code of Conduct indicates what the Minister considers adequate compliance.

<sup>30</sup> Therefore assisting IRBs in complying with s 71(2)(b) of the ECT Act.

<sup>31</sup> Therefore assisting IRBs in complying with s 71(2)(d) of the ECT Act.

<sup>32</sup> S 1.2 of GN 1283.

### 3 1 Principles upon which the Guidelines are based

The Guidelines are based on a variety of principles<sup>33</sup> and stress the legislature's intention that, ideally, the regulation of content and conduct on the Internet should be carried out by the industry rather than the State.<sup>34</sup> There should be voluntary acceptance of this policy by the industry.<sup>35</sup> This self-regulation must be effective, using practical and realistic methods that respect and promote South Africa's constitutional values.<sup>36</sup> It is not the intention of the legislature for ISP's to assume the role of the law enforcement authorities and they therefore do not have a general obligation to monitor for illegal conduct or content. However, ISP's cannot ignore illegal activities and are obliged to report such activities to the law enforcement authorities.<sup>37</sup> Further, the requirements for recognition should be fair on ISPs and not affect their economic viability. The requirements should promote equality and technological neutrality so that other entities can benefit from the ECT Act,<sup>38</sup> such as wireless access providers. The Guidelines contain a Best Practice Code of Conduct which reflects one of the aims of Chapter XI, that is to provide users with remedies against unlawful content.<sup>39</sup>

### 3 2 Objective and scope

The Guidelines are applicable to all information system service providers, but were prepared for a specific category, namely ISPs.<sup>40</sup> If other categories of providers are unable to comply fully with the Guidelines due to technological differences, the IRB for that category of information system service providers must indicate to the Minister how it will comply in a different manner.<sup>41</sup>

One of the key aims of the Guidelines is to ensure that IRBs and their members comply with the provisions of the ECT Act before receiving the protection of Chapter XI.<sup>42</sup> The Guidelines aim to assist in developing a safe,

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<sup>33</sup> S 2.

<sup>34</sup> S 2.1.

<sup>35</sup> *Ibid.*

<sup>36</sup> S 2.2-2.3.

<sup>37</sup> S 2.8-2.9.

<sup>38</sup> S 2.10-2.11.

<sup>39</sup> S 2.7.

<sup>40</sup> The ECT Act does not provide a specific definition for the term "Internet Service Provider". Chapter XI of the ECT Act, entitled "Limitation of Liability of Service Providers", provides in s 70 that for the purposes of that chapter "service providers" means any person providing "information system services", which are defined in s 1 as including: "the provision of connections, the operation of facilities for information systems, the provision of access to information systems, the transmission or routing of data messages between or among points specified by a user and the processing and storage of data, at the individual request of the recipient of the service".

<sup>41</sup> S 3 of GN 1283. The Guidelines provide the following example: a wireless application service provider (which appears not to be considered the same as an ISP) may not have a website to comply with the Guidelines informational requirements to provide a link to the IRB's Code of Conduct. That provider can propose to comply by ending all its SMS messages with Code of Conduct at [www.nameofirb.co.za](http://www.nameofirb.co.za).

<sup>42</sup> S 3.1 of GN 1283.

secure and efficient Internet for users and promote confidence in its use by: specifying and ensuring compliance with minimum standards of acceptable content and conduct; containing the preferred standards ISPs should ultimately strive for based on the ECT Act and international best practice; increasing the Internet's legality, integrity and safety; preventing its unlawful or offensive use; and ensuring affordable, quick, effective, fair, unbiased and transparent complaint and disciplinary procedures for the public.<sup>43</sup>

### 3 3 Best practice Code of Conduct

Section 71(2)(a) of the ECT Act provides that the Minister may only recognize an IRB if he is satisfied that its members are subject to a Code of Conduct. The Guidelines provide a Best Practice Code of Conduct that contains both minimum and preferred requirements based on international best practice.<sup>44</sup> The minimum requirements are mandatory for IRBs to comply with in order to be recognized by the Minister. The preferred requirements are optional and indicate the standards that the industry should strive to achieve.<sup>45</sup> The requirements set the standards by which an ISP must interact with the public, recipients of its services, other ISPs, its IRB and the relevant law enforcement authorities. The Guidelines cover sixteen minimum requirements which will be discussed below:

- Professional conduct

An IRB member is required to conduct itself in a professional and lawful manner at all times.<sup>46</sup> It must comply with all legal requirements and cooperate with authorities when obliged to do so.<sup>47</sup>

- Standard terms of agreement

Members of the IRB must have Standard Terms of Agreement accessible on their websites containing all the terms relevant to the relationship with the recipients of its services.<sup>48</sup> The terms must include certain commitments and undertakings such as: a commitment not to knowingly create, store or disseminate illegal content; not to knowingly create, publish or display material that infringes copyright; and to desist from infringing intellectual property rights of others; and an undertaking not to send or promote the sending of spam.<sup>49</sup> There must further be a standard term that the member has the right to remove content that it considers illegal or upon receipt of a take-down notice.<sup>50</sup> The member must have the right to suspend or

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<sup>43</sup> S 3.

<sup>44</sup> S 1.2.

<sup>45</sup> S 2.7.

<sup>46</sup> It must conduct itself in this manner with the recipients of its services, the public, other ISPs and its IRB. S 5.1.1 of GN 1283.

<sup>47</sup> S 5.1.2.

<sup>48</sup> The terms must be accessible by potential users prior to the conclusion of a service agreement. S 5.2.1 of GN 1283.

<sup>49</sup> S 5.2.2.

<sup>50</sup> S 5.2.3.

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terminate a recipient's services in the event of non-compliance with these or other contractual obligations.<sup>51</sup>

- **Service levels**

IRB members may only offer service levels that are feasible taking into account all practical considerations.<sup>52</sup> Members are required to act professionally, fairly and reasonably in all dealings with consumers, businesses and other members.<sup>53</sup>

- **Content control**

Where a member becomes aware of unlawful online activities by a recipient of its services, it is obliged to act by terminating the offending recipient's services and reporting its activities to the relevant authorities within a reasonable time. Members may not engage in unlawful conduct or knowingly host or link unlawful content. Further, they must adhere to their IRB's Code of Conduct, disciplinary procedure and decisions. Members have to keep copies or records of all take-down notices, and the material removed as result thereof, for a period of three years.<sup>54</sup>

- **Consumer protection**

The minimum requirements require members to commit to honest and fair dealing. They must also comply with all applicable advertising standards and regulations.<sup>55</sup>

- **Privacy and confidentiality protection**

The minimum requirements oblige members to respect the recipients of their services' constitutional right to privacy of their personal information and communications.<sup>56</sup>

- **Copyright and intellectual property protection**

The minimum requirements contain an obligation by members to respect and not to knowingly infringe the intellectual property rights of others.<sup>57</sup>

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<sup>51</sup> S 5.2.4.

<sup>52</sup> Such as the members technical capabilities and knowledge. S 5.3.1 of GN 1283.

<sup>53</sup> S 5.3.2.

<sup>54</sup> However, if it is an offence to possess such material it must be delivered to the authorities. S 5.4 of GN 1283.

<sup>55</sup> S 5.5.

<sup>56</sup> The requirements state that members may not deal in the recipients of their services' personal information unless it is for that members' own needs or they have the recipients' prior written permission; members must respect the confidentiality of the recipient's electronic communications; and shall not disclose a recipient's confidential information unless required to do so by law or without the recipient's prior written permission. S 5.6 of GN 1283.

<sup>57</sup> S 5.7.

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- Spam protection

Members shall not send or promote the sending of spam. They should further ensure that their networks are not utilized for this purpose. Members should provide a complaint facility for the public in relation to any spam originating on the members network. They should react in a reasonable time to complaints received.<sup>58</sup>

- Protection of minors

Members are required not to offer subscription services to minors without their legal guardians' assistance and to take reasonable steps to ensure that unassisted minors cannot receive such services. Members must provide recipients of their services with information as to methods of regulating and monitoring minors' Internet access; for instance through content labelling systems and filtering software. Members who provide services to corporate recipients do not have to take the above steps.<sup>59</sup>

- Cyber crime

Members must take all reasonable steps to prevent unauthorized access, interception or interference with data residing on its network or otherwise under its control.<sup>60</sup>

- Complaints procedure

The IRB must establish a complaints procedure for the use of the public. It must be published on the IRB's website and all its members shall provide a link to it. All IRB members must commit to receiving, investigating and resolving complaints that were made in good faith and in terms of the procedure. Members must comply with the IRB's decisions.<sup>61</sup>

- Disciplinary procedure

The IRB should establish a disciplinary procedure for members who contravene the Code of Conduct. The IRB shall have the right to investigate any contravention, and members shall be obliged to co-operate with the IRB in the performance of its rights and duties in terms of the disciplinary procedure. Should the IRB find that the member has transgressed the IRB's Code of Conduct, the IRB may take a variety of actions against that

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<sup>58</sup> S 5.8.

<sup>59</sup> S 5.9.

<sup>60</sup> S 5.10.

<sup>61</sup> The procedure must provide for a reasonable time to deal with complaints. If a complaint is not resolved timeously, the complaint should be directed to the IRB for resolution. The procedure should also allow for the direct referral to the IRB of complaints involving a member's contravention of the IRB's Code of Conduct. The IRB may then elect to refer it to the member in question. S 5.11 of GN 1283.

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member. The IRB must store the records of all proceedings for a period of three years.<sup>62</sup>

- **Monitoring and compliance**

Members must provide the IRB with a full report, within a reasonable time, of all steps taken as a result of receipt of a take-down notice. Members must further provide the IRB with an annual statement confirming their compliance with the IRB's Code of Conduct. The IRB can investigate a member's compliance with the Code of Conduct and institute disciplinary hearings where necessary.<sup>63</sup>

- **Informational requirements**

The IRB must publish its Code of Conduct on its website and all its members must provide a link to it on their websites. Members are required to display the IRB membership logo prominently and provide full contact details to enable adequate identification on their websites.<sup>64</sup>

- **Take-down procedure**

The IRB must establish a take-down procedure that is applicable to all its members and complies with the relevant provisions of the ECT Act. The IRB must publish the procedure on its website and all its members must provide a link to it. The procedure must allow for a reasonable time for dealing with a take-down notice.<sup>65</sup>

- **Review and amendment**

The IRB is entitled to review and amend its Code of Conduct at any time. Amendments must be reported to the Minister. The amendments must be binding on all members.<sup>66</sup>

Besides the abovementioned minimum requirements, the Guidelines contain preferred requirements which are optional and indicate the standards that the industry should strive to achieve.<sup>67</sup> The Guidelines provide that these preferred requirements are based on international best

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<sup>62</sup> The actions that the IRB may take are to order a take-down of material in accordance with a take-down notice; reprimand the member; temporarily suspend the member; expel the member; publish details of the transgressing member, the transgression and the action taken; and report illegal content to the relevant authorities. S 5.12 of GN 1283.

<sup>63</sup> S 5.13.

<sup>64</sup> The details listed, are not limited to registered name and are electronic contact details, physical address and telephone and fax numbers. S 5.14 of GN 1283.

<sup>65</sup> S 5.15.

<sup>66</sup> S 5.16.

<sup>67</sup> S 2.

practice.<sup>68</sup> They expand on the sixteen minimum requirements discussed above.<sup>69</sup>

### 3 4 Adequate criteria for membership

The Guidelines assist IRBs in complying with section 71(2)(b) of the ECT Act, by providing a checklist of the substantial criteria for membership.<sup>70</sup> The checklist requires all potential members of the IRB to comply with it within 30 days from date of application for membership.<sup>71</sup> The minimum criteria appear to be largely based on the minimum requirements outlined above. However, the checklist does differ in some respects to the minimum requirements.<sup>72</sup>

### 3 5 Monitoring and enforcement of the IRB's Code of Conduct

Section 71(2)(d) of the ECT Act requires IRBs to be able to monitor and enforce its Code of Conduct. When determining whether an IRB has complied with this section the Minister must consider the following:<sup>73</sup>

- Nature and independence

The Minister must consider whether the IRB is appropriately structured and constituted. The Minister must therefore consider: how representative the IRB is of the industry; its independence, whether it is unbiased; and whether it has a proper constitution-making provision for a variety of aspects.<sup>74</sup>

<sup>68</sup> S 1.2 of GN 1283. In some instances the preferred requirements do not expand further on the minimum requirements, such as Professional Conduct. S 6.1 of GN 1283. In other instances they expand on the minimum requirements quite extensively, such as in Service Levels. S 6.3 of GN 1283.

<sup>69</sup> S 6 of GN 1283.

<sup>70</sup> S 72(2)(b) provides that membership to an IRB should be subject to adequate criteria.

<sup>71</sup> Part 2 of GN 1283.

<sup>72</sup> There are inconsistencies between the Best Practice Code of Conduct and the checklist. The checklist does not contain the heading of one of the areas covered under the Code of Conduct, namely "Take down Procedure". However, the checklist creates a new heading, "Commitment to the Code of Conduct". Under this new heading a requirement from another area is repeated, involving a member providing a link to the IRB's complaints procedure (mentioned at 11.3 and 12.1 of Part 2 of GN 1283 under separate headings in the checklist). The new heading contains requirements listed underneath at least five different headings in the minimum requirements section. The adequate criteria further leave out the obligation by the members to comply with the IRB decisions (s 5.11.6 of GN 1283) as well as the obligation to provide their co-operation to the IRB in accordance with the disciplinary procedure (s 5.12.3 of GN 1283).

<sup>73</sup> Part 3 of GN 1283.

<sup>74</sup> These aspects are: regular elections of a board that can act independently; sufficient staff to perform the IRB's functions; a properly constituted and effective complaints committee; and an adequate membership application procedure that screens potential members to ensure they comply with the necessary requirements for membership. Part 3 A of GN 1283.

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- Complaints, disciplinary and take-down procedures

The IRB's complaints, disciplinary and take-down procedures will only be considered effective where there is widespread knowledge of the Code of Conduct and the aforementioned procedures amongst the IRB's members and the public.<sup>75</sup> The procedures must be effective and binding.<sup>76</sup>

- Monitoring procedures

The Minister should consider whether there is an effective monitoring and enforcement policy in place. The policy should include procedures for: regular compliance spot checks; initiating investigations or following up complaints; and checking compliance of conditions set down as result of complaints or disciplinary proceedings. It should also include annual compliance statements from members and compulsory reporting by members of take-down notices.<sup>77</sup>

- Reporting duties

To receive continued recognition, an IRB must report any changes to the IRB's Constitution, Article of Association and Code of Conduct to the Minister. The Minister must then evaluate whether the IRB is still eligible for recognition. The IRB must also provide an annual report by 28 February each year on the following: membership of the IRB; statistics on take-down notices and complaints received; disciplinary proceedings against members; and any other information the Minister may require.<sup>78</sup>

From the discussion of the IRB's recognition requirements above, it is obvious that the Guidelines set minimum standards for recognition of an IRB. It is further obvious that the guidelines are indeed not only guidelines but that they are requirements which must be complied with by an IRB who hopes to be recognized for the purposes of section 72 of the Act.

#### **4 THE INTERNET SERVICE PROVIDER'S ASSOCIATION AS AN IRB TO BE RECOGNIZED BY THE MINISTER**

ISPA is a non-profit industry representative body established in 1996 with a current membership of approximately 150 ISPs.<sup>79</sup> ISPA participated in the

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<sup>75</sup> This will rely on sufficient notice of the above information on members' websites. The IRB should require its members to display this information prominently and for this to be checked regularly by the IRB. Part 3 B of GN 1283.

<sup>76</sup> A proper record of the full process from complaint stage right through to appeal stage must be kept. The IRB should be able to instigate investigations by itself. Decisions should be binding with adequately severe punishments for transgressors. Part 3 B of GN 1283.

<sup>77</sup> Part 3 D of GN 1283.

<sup>78</sup> Part 3 E of GN 1283.

<sup>79</sup> ISPA "What is the ISPA?" <http://www.ispa.org.za/about/index.shtml> (accessed 2009-07-18). The membership covers a wide spectrum of ISPs, consisting of non-profit providers, educational networks and commercial providers. Some of the members are: MTN, NeoTel,

formulation of the ECT Act and applied for recognition as an IRB shortly after the Act was promulgated. Its application was rejected as the Department did not yet have sufficient guidelines for an application for recognition.<sup>80</sup> Owing to pressure exerted by ISPA, a draft of the Guidelines was published by the Department approximately two years after the promulgation of the ECT Act.<sup>81</sup> ISPA made extensive submissions regarding the draft Guidelines,<sup>82</sup> holding that they were too wide and unworkable in the form in which they then were.<sup>83</sup> The Department was receptive to ISPA's submissions in relation to the Guidelines, but appears to have largely ignored the submissions made in relation to the preferred requirements. ISPA's second application, made after the Guidelines became a schedule to the Act, took approximately two years to complete.<sup>84</sup> ISPA states that it has incurred great expense in complying with the Guidelines. One of its greatest expenses incurred was as a result of the development of a Code of Conduct Compliance Wizard to assist ISPA members in compliance with its Code of Conduct and enable ISPA to monitor compliance easily.<sup>85</sup> ISPA was formally recognized by the Minister on 22 May 2009.<sup>86</sup> It is the first, and currently only, IRB to be recognized by the Minister.<sup>87</sup>

## 5 COMPARISON OF THE SOUTH AFRICAN APPROACH TO THE EUROPEAN UNION

The USA and the EU are both global leaders in technological development and can provide examples of Internet regulation for developing nations who want to establish their own regulatory framework.<sup>88</sup> Both the USA and the EU emphasize self-regulation of the Internet,<sup>89</sup> which is an international

MWEB, Polka, Axxess Africa and AeroSat. ISPA "ISPA Members" <http://www.ispa.org.za/about/memberslist.shtml> (accessed 2009-07-18).

<sup>80</sup> Brooks "Question 2" in *Re: Questions for the Committee*.

<sup>81</sup> ISPA "Key milestones and victories for ISPA" <http://www.ispa.org.za/apply/milestones.html> (accessed on 2009-07-28).

<sup>82</sup> *Notice inviting comment on proposed Guidelines for recognition of Industry Representative Bodies in terms of Chapter XI of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002)* GN 1954 in GG 26768 of 2004-09-08.

<sup>83</sup> ISPA *ISPA submission on proposed Guidelines for recognition of an Industry Representative Body* (2004-10-13) <http://www.ispa.org.za/regcom/submissions/ispa-sub-proposed-irb-guidelines.doc> (accessed 2009-08-15) and subsequently *ISPA submission on proposed Guidelines*.

<sup>84</sup> Brooks "Question 4" and "Question 5" in *Re: Questions for the committee*.

<sup>85</sup> Brooks "Question 6" in *Re: Questions for the Committee*.

<sup>86</sup> *Recognition of the Internet Service Provider's Association as an industry representative body for internet service provider* GN 588 in GG 32252 of 2009-05-22.

<sup>87</sup> "ISPA gets Minister's recognition" *IT Online* (2009-05-21) <http://www.it-online.co.za/content/view/945534/129/> (accessed on 2009-07-28).

<sup>88</sup> May, Chen and Wen "The Differences of Regulatory Models and Internet Regulation in the European Union and the United States" 2004 13 *Information and Communications Technology Law* 259 259; and Roos 429.

<sup>89</sup> Bonnici *Information Technology & Law Series 16: Self-regulation in Cyberspace* (2008) 14; Koops, Lips, Nouwt, Prins and Schellekens "Should Self-regulation be the Starting Point" in Koops, Lips, Prins and Schellekens (eds) *Information Technology & Law Series 9: Starting points for ICT regulation* (2006) 109 111, 118; Tambini, Leonardi and Marsden *Codifying Cyberspace* (2008) 3-4; *Zeran v America Online Inc supra* 331; and Roos 418. However, the meaning attached to the word differs between these jurisdictions; and Bonnici 23.

trend.<sup>90</sup> As is clear from the above, South Africa is following this trend.<sup>91</sup> Since it appears that South Africa has adopted similar liability-limiting legislation as the EU,<sup>92</sup> the Guidelines emphasize international standards and best practice,<sup>93</sup> it is submitted that it is relevant to examine the EU position for purposes of comparison briefly.

There are a number of regulatory models that can be utilized by governments, for example: command and control, or self-regulation.<sup>94</sup> Each model has its strengths and weaknesses in general and in the context of the Internet.<sup>95</sup> The argument is that no one method of regulation can be entirely effective for the Internet, necessitating a blend of regulatory methods.<sup>96</sup> The EU emphasizes co-regulation which is a compromise between self-regulation on the one hand and command and control on the other, as being a more suitable form of regulation for the Internet.<sup>97</sup> The EU considers the co-regulation approach to be more flexible, adaptable and effective than traditional government regulation and legislation. Further, it involves multiple stake holders, namely public authorities, the Internet industry and other interested parties.<sup>98</sup> An EU commissioned report on self-regulation of the

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<sup>90</sup> Prins and Schellekens "Fighting Untrustworthy Internet Content: In Search of Regulatory Scenarios" 2005 10 *Information Polity* 129 132; Bonnici 14; and Price and Verhulst *Self-regulation and the Internet* (2005) 1. However, see Engel "The Role of the Law in the Governance of the Internet" 2006 *International Review of Law, Comp & Tech* 201 for a discussion on the role that law can still play in Internet regulation.

<sup>91</sup> S 1 of GN 1283.

<sup>92</sup> Roos 429.

<sup>93</sup> *Ibid.*

<sup>94</sup> Some methods are: 1) command and control or top-down governance, which is government regulation (May *et al* 2004 *Information and Communications Technology Law* 261; Engel 2006 *International Review* 203; Bonnici 24; Price and Verhulst 1); 2) co-regulation, which involves the public authorities, industry and other interested parties in developing a regulatory framework (*Self-regulation of Digital Media Converging on the Internet: Industry Codes of Conduct in Sectoral Analysis* (2004) 9); 3) self-regulation, also termed soft law or bottom-up governance, refers to norms that are voluntarily developed, accepted and regulated by a particular community (Prins and Schellekens 2005 *Information Polity* 132; and Cannataci and Bonnici "Can Self Regulation Satisfy the Transnational Requisite of Successful Internet Regulation?" 2003 17 *International Review of Law, Comp & Tech* 51 54).

<sup>95</sup> An example of a criticism of command and control regulation in the context of the Internet is that it takes too long to develop and therefore cannot keep pace with the rapid development of the Internet (Engel 2006 *International Review* 206). An example of a criticism of self-regulation is that it is biased in favour of the industry by which the regime is created (Bonnici and De Vey Mestdagh "Right Vision, Wrong Expectations: The European Union and Self-regulation of Harmful Internet Content" 2005 14 *Information and Communications Technology Law* 133 144).

<sup>96</sup> Cannataci and Bonnici 2003 *International Review* 52; and Bonnici 15.

<sup>97</sup> Council Recommendation 98/560/EC on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity (*Official Journal* L270 of 7 October 1998); *Self-regulation of Digital Media* 9; Tambini *et al* 4; Bonnici 14; Walden "Directive 2000/31/EC-Directive on Electronic Commerce" in Büllesbach, Poullet and Prins (eds) *Concise European IT Law* (2006) 205 255.

<sup>98</sup> European Commission *Second Evaluation Report from the Commission to the Council and the European Parliament on the application of Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity* (2003) 5; *Self Regulation of Digital Media* 9; and Tambini *et al* 42-43.

Internet-identified co-regulation as a finely balanced concept as opposed to direct government involvement which may result in the benefits of self-regulation being lost.<sup>99</sup>

Co-regulation is emphasized in the EU Directive.<sup>100</sup> Member states are required to encourage the drafting of codes of conduct by trade, professional and consumer associations so as to facilitate the proper implementation of the Directives' provisions.<sup>101</sup> The adoption of these codes should, however, be voluntary.<sup>102</sup> Adhering to a particular code of conduct or membership of an IRB is therefore not required by an EU ISP in order to obtain limited liability. EU member states cannot add additional requirements that ISPs must comply with in order to benefit from the protection.<sup>103</sup> However, it was not the EU E-Commerce Directive that resulted in extensive drafting and implementation of codes of conduct, but rather an earlier EU Council Recommendation<sup>104</sup> followed by the EU's Safer Internet Plan<sup>105</sup> which both focused on the development of a safer environment for Internet users with a particular focus on the protection of minors and human dignity.<sup>106</sup> The plan differentiates between illegal content, which must be dealt with by the laws of a state, and harmful content, which is not illegal but its circulation is restricted.<sup>107</sup> The Plan identified four courses of action, the first being the establishment of a safe environment through a network of EU-wide hotlines,

<sup>99</sup> *Self Regulation of Digital Media* 9.

<sup>100</sup> Art 16 of Directive 2000/31/EC; and Tambini *et al* 121.

<sup>101</sup> *Ibid.*

<sup>102</sup> Recital 49 and art 16 of Directive 2000/31/EC.

<sup>103</sup> European Commission Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee-First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (2003) 13.

<sup>104</sup> 98/560/EC. Recommendations have no binding force, but can be utilized for interpreting national or community legal measures. Mathijssen *A Guide to European Law* (2004) 29. Recommendation 98/560/EC was a direct result of the EU's Commission of European Communities *Green Paper on Protection of Minors and Human Dignity in Audiovisual and Information Services* (COM (1996) 483 final).

<sup>105</sup> EU Parliament and Council Decision 276/1999/EC "Adopting a multiannual Community Action Plan on promoting safer use of the Internet by combating illegal and harmful content on global networks" (25 January 1999 *Official Journal* L33 of 6 February 1999. An action plan is a non-binding legal instrument utilized by the EU to further its aims. Roos 455; and Bonnici 35-36. The Safer Internet Action Plan was extended by EU Parliament and Council Decision No 1151/2003/EC "Amending Decision No 276/1999/EC adopting a multiannual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks" (16 June 2003) *Official Journal* L162 1 July 2003. It was later replaced by the Safer Internet Plus Plan which had a particular focus on mobile Internet technologies. EU Parliament and Council Decision 854/2005/EC "Establishing a multiannual Community Programme on promoting safer use of the Internet and new online technologies" (11 May 2005) *Official Journal* L149 11 June 2005.

<sup>106</sup> *First Report on the application of Directive 2000/31/EC* 15; Swiss Institute of Comparative Law *Legal Instruments for Combating Racism on the Internet* (2009) 143; Akdeniz 249; and Tambini *et al* 42-43.

<sup>107</sup> Such as legal pornography. Roos 455; and Bonnici 35-36.

which enable users to report illegal content, and the adoption of Codes of Conduct.<sup>108</sup>

The Guidelines emphasize the principle of self-regulation of the Internet by the Internet industry. However, the approach cannot be deemed to be pure self-regulation as the Guidelines drafted by the Department dictate the Code of Conduct to be used by the industry in regulating itself. It therefore appears that the South African approach is a form of co-regulation, as the ECT Act and Guidelines provide for the regulation of the South African Internet industry by a separate entity staffed by members of a non-government organization. However, the legislature has effectively created additional requirements that ISPs must comply with to obtain limited liability. This is in sharp contrast to the EU approach where issues of ISP liability and ISP regulation are dealt with separately.<sup>109</sup> The ECT Act has combined these issues by making ISP regulation an element for limited liability.

## 6 CRITICISM OF THE SOUTH AFRICAN MINIMUM REQUIREMENTS

It is submitted that a number of criticisms can be leveled at the minimum for IRB recognition as they appear in Chapter XI of the ECT Act and the Guidelines:

- Both sets of requirements are unnecessary in the context of limited liability

The Department has a duty to ensure that only responsible ISPs benefit from the protection of the ECT Act. It is submitted that the necessity of such a duty is misguided and contrary to the logic of the safe harbour provisions. The purpose of sections 73-76 is to protect ISPs from liability for performing their technical functions.<sup>110</sup> An ISP will lose the protection of the ECT Act where it does not perform its functions in a technical, passive and automatic manner, thus making the question of whether it is a responsible ISP redundant. The American approach, as contained in the CDA, has been criticized as a number of negative side effects have arisen from the granting of broad immunity to ISPs without imposing any real duties or safeguards.<sup>111</sup> Had the South African legislature granted broad immunity to ISPs, the

<sup>108</sup> The other courses of action were: developing filtering and rating systems; encouraging awareness campaigns on ways to protect minors from illegal and harmful content; and, co-ordinating similar international initiatives and assessing the impact of measures taken. Roos 455.

<sup>109</sup> In both the USA and the EU, ISPs are granted immunity without having to be responsible ISPs. See 47 USC § 230 (CDA), 17 USC § 512 (DMCA) and Directive 2000/31/EC.

<sup>110</sup> S 1 of GN 1283.

<sup>111</sup> *Eg*, ISPs have received immunity even when they perform the role of a primary publisher, have a beneficial relationship with the third party or where they are aware of the defamatory statements and fail to act. Siegel *Communications Law in America* (2002) 494; Nel 2008 *Responsa Meridiana* 104. The CDA has been further criticized for granting ISPs broad immunity to monitor for unlawful content, but not creating an incentive to do so. Rustad and Koenig "Rebooting Cybertort Law" 2005 80 *Washington LR* 335 341; Nel 2008 *Responsa Meridiana* 104.

Guidelines would possibly be more suitable as the question of whether the ISP is a responsible member of the industry would become very relevant. However, with the South African legislation as it is, the effect of the creation of these extra requirements has been to expose ISPs unnecessarily to liability for four years during the drafting and recognition processes; and the waste of time, money and man-power of ISPs, IRBs and the Department.

- The Guidelines do not promote self-regulation

Unlike the EU, the Department has failed to find the fine balance required for a co-regulatory framework as it was established in the form of legislation. This results in a loss of the benefits of co-regulation and self-regulation, in particular flexibility and speedy adaptability to change,<sup>112</sup> as legislation is more cumbersome and expensive to change.<sup>113</sup> Further, the Department is granted the power to consider nearly every aspect of an IRB from its formation and regulation to even its future aims. This would appear to be contrary to the principle of self-regulation. It is submitted that, with the extent of government control granted by the Guidelines, the industry is funding an entity that can potentially become an extension of the Department, therefore the public authority. Despite the principle of self-regulation contained in the ECT Act and the Guidelines, the South African approach may not promote self-regulation in practice. Finally, the acceptance of the Guidelines by ISPs cannot be considered to be entirely voluntary due to its being a requirement for obtaining limited liability. Therefore, it appears that the South African position is not in keeping with international standards and is therefore not ideal.

- Lack of equality and technological neutrality

The definition for information service providers is wide and an unwanted side effect may be that limited liability being granted to entities that the legislature did not intend. The requirement of membership to an IRB is a way to limit that effect. This may, however, be to the detriment of non-commercial entities and other categories of information service system providers.

Non-commercial entities do not necessarily have the funds to defend legal actions or create IRBs, whereas large commercial entities, which may have access to such funds, are more likely to form IRBs and receive protection.<sup>114</sup> The current approach would appear to limit the access to the safe harbours to largely commercial enterprises, to the potential detriment of non-commercial entities such as education institutions or possibly non-profit

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<sup>112</sup> Engel 2006 *International Review* 206; *Self Regulation of Digital Media* 9.

<sup>113</sup> Cannataci and Bonnici 2003 *International Review* 57; Bonnici and De Vey Mestdagh 2005 *Information and Communications Technology Law* 145-146.

<sup>114</sup> It is positive to note that the ISPA management committee does bestow honorary ISPA membership on educational or non-profit entities. These members do not have to pay any fees. They, however, do not have any voting rights. Therefore, their interests will not necessarily be promoted. ISPA "ISPA Membership Basics" <http://www.ispa.org.za/apply/index.shtml> (accessed 2009-07-18).

organizations.<sup>115</sup> Should an IRB, established for commercial entities, be burdened with non-commercial entities, it may not represent non-commercial entities' interests effectively as the IRB would be orientated to promoting commercial interests.

The Guidelines do not necessarily promote technological neutrality, which is one of the objectives of the ECT Act.<sup>116</sup> The Guidelines were prepared specifically for ISPs, which are only one category of Information System Service Providers.<sup>117</sup> It is submitted that this places an extra barrier to the recognition of an IRB for another category of information system service providers and as a result unfairly prejudices them. It took approximately two years for an IRB, for which the Guidelines were specifically drafted, to be recognized by the Minister. The authors are of the opinion that it is possible that the recognition process for an IRB of another type of provider will take longer. It will have to spend more time and resources to determine how to comply with the Guidelines. Further, it will have to convince the Minister that it is necessary to recognize another IRB and that it has complied with all the requirements. During this time, its members will not benefit from the same protection afforded to ISPs. It is submitted that the current position favours a potential monopoly by one IRB which could ultimately have negative effects for the industry.<sup>118</sup>

It is therefore submitted that the threshold requirements unfairly prejudice non-commercial entities and other categories of information service system providers by effectively creating a barrier to the protection afforded by the ECT Act. The effect of this is a lack of equality and technological neutrality.

- Not in keeping with international best practice

It is apparent from the criticisms raised above, that there are certain aspects of the threshold requirements that are not in keeping with international best practice: Membership of an IRB as a requirement for limited liability; the adoption of the policy and standards contained in the Guidelines by ISPs is not truly voluntary; the Guidelines do not appear to promote self-regulation; lack of equality and technological neutrality. Therefore, despite the Department's insistence on international best practice and standards, it appears that they have failed to meet them.

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<sup>115</sup> Such as university networks. This would be worrying due to the fact that the Internet developed due to the pioneering work of universities. See Engel 2006 *International Review* 205 for a brief description of the relevance of the universities in Internet development.

<sup>116</sup> S 2(1)(f).

<sup>117</sup> S 3 of GN 1283.

<sup>118</sup> A worst case scenario would be that there would only be one recognized IRB as it would be difficult for another IRB to be recognized either because it has smaller membership than the recognized IRB or because its members deal with different technologies that make it difficult to comply with the Guidelines. This does not assist in promoting new technologies. It could also result in the industry being dominated by one group and technology.

- The content of the Guidelines is in conflict with its principles

As the contents of the Guidelines appear not to promote self-regulation, equality and technological neutrality, it appears that the content of the Guidelines conflicts with its own principles and aims.

- Guidelines are too broad

In its submissions on the proposed Guidelines, ISPA noted that the purpose of Chapter XI is to provide ISPs immunity from third-party content and not to regulate ISPs business practices. It therefore contended that the Guidelines should deal with an ISPs ability to implement and process take-down notice procedures.<sup>119</sup> However, the Guidelines deal with issues that are not connected to ISP liability for third party content.<sup>120</sup> The Guidelines are therefore considered to be unnecessarily extensive to give effect to a five-line section of the ECT Act.<sup>121</sup> In fact, it came to the attention of the authors that ISPA nearly did not complete the recognition process as the Guidelines were too broad and difficult to comply with.<sup>122</sup> The effect of the Guidelines in practice was that an IRB nearly considered obtaining limited liability for its members not to be worth the effort of compliance. This is despite the threat that civil and criminal liability posed to ISPs,<sup>123</sup> a threat which the ECT Act was attempting to remove.<sup>124</sup> However, ISPA changed its approach and focused only on the minimum requirements, providing extensive explanations to the Department on areas that ISPA did not agree with.<sup>125</sup>

- Poor drafting

Despite the lengthy period that the Department took to produce the Guidelines there are a number of issues that indicate poor drafting such as: Certain compulsory provisions of the ECT Act are listed under the non-mandatory preferred requirements;<sup>126</sup> lack of certain definitions and consistency in terms used;<sup>127</sup> lack of consistency in layout between the

<sup>119</sup> ISPA *ISPA submission on proposed Guidelines* 1-2. The Electronic Communication and Transaction Bill B8-2002 had a Memorandum on the Objects of the Electronic Communications and Transaction Bill annexed thereto. S 75-76 of the bill are ostensibly the same as s 71-72 of the ECT Act, yet it is interesting to note that the memorandum does not raise the duty that the Department has identified in the Guidelines.

<sup>120</sup> Such as: professional conduct; standard terms and conditions; service levels; consumer protection; privacy and confidentiality protection; spam protection; and regulation of minors' access to subscription services.

<sup>121</sup> Brooks "Question 1" in *Re: Questions for the committee*.

<sup>122</sup> Brooks "Question 9" in *Re: Questions for the committee*.

<sup>123</sup> *Zeran v America Online Inc supra* 330; Recital 40 of Directive 2000/31/EC; S 1 of GN 1283.

<sup>124</sup> S 1 of GN 1283.

<sup>125</sup> Brooks "Question 9" in *Re: Questions for the committee*.

<sup>126</sup> Such as Chapter VII (Consumer Protection Provisions) and Chapter VIII (Privacy Provisions). S 6.2 of GN 1283.

<sup>127</sup> Under the minimum requirements Privacy and Confidentiality Protection section, the term "personal information" is defined. However, the section also refers to "confidential information", which is not defined. S 5.6 of GN 1283. Further, the minimum requirements specifically refer to "recipients of services", however, the preferred requirements refer to the

minimum requirements and the adequate membership criteria,<sup>128</sup> and repetition of certain requirements.<sup>129</sup>

Even though some of the above points may be minor, when the length of time of the development of the Guidelines is considered and the importance of the industry, these errors should not have been made. These errors would further add to frustration in compliance.

- Disregard to the objectives of the ECT Act

It is submitted that these requirements do not assist in promoting certain objectives of the ECT Act. The criticisms above reveal that: the current position demonstrates a failure by the South African government to recognize the importance of the information economy,<sup>130</sup> that the requirements do not place South Africa in a favourable position to compete internationally,<sup>131</sup> and that it appears from the length of time it took to develop, promulgate and apply the Guidelines that the Department did not have a clear idea of how to apply sections 71-72 effectively.<sup>132</sup> The effect of the Guidelines in practice was for an IRB to consider not completing the recognition process. The Guidelines therefore appear to be in conflict with the primary purpose of Chapter XI of the ECT Act, which is the provision of limited liability to ISPs. It is possible that other objectives of the ECT Act are not promoted, such as not promoting investments nor innovation in the Internet and therefore creating barriers to the use of the Internet.<sup>133</sup>

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undefined terms of "user" and "client". These terms are used with "recipients of services", even underneath the same section. See "Standard Terms of Agreement" and "Service Levels" contained in s 6.2-6.3 of GN 1283 respectively; "Copyright and Intellectual Property Protection" sections under minimum requirements and preferred requirements s 5.7 and 6.7 of GN 1283 respectively.

<sup>128</sup> For a discussion, see par 3 4 above. It is also noted that the requirement of an ISP's commitment to co-operate with law enforcement is contained underneath the "Professional Conduct" section of the minimum requirements. However, it is found underneath "Content Control" in the adequate criteria for membership section. S 5.1 and Part 2 s 4 of GN 1283 respectively.

<sup>129</sup> *Eg*, under the minimum requirements, acting in a professional manner in dealings with all parties and entities is repeated under "Professional Conduct" and "Service Levels". S 5.1 and 5.3 of GN 1283. A further example: under the adequate criteria for membership, the requirement to publish a complaints procedure is repeated under "Commitment to the Code of Conduct" and "Complaints Procedure". Part 2 of GN 1283.

<sup>130</sup> This is a reasonable inference to make when one considers the the length of time it took for the Department to develop, draft (poorly) and promulgate largely unnecessary Guidelines and recognize an IRB, thus exposing ISPs to liability for a lengthy period; the Guidelines appearing to favour one technology and only commercial entities; and that both sets of requirements create an extra barrier to ISP immunity that does not exist in other jurisdictions.

<sup>131</sup> As they appear not to be in accordance to international practice.

<sup>132</sup> This is further evidenced by the exceptions ISPA raised to the draft Guidelines.

<sup>133</sup> The threshold requirements do not promote large investment nor innovation in the Internet as jurisdictions with a more favourable immunity regime would be seen as a better option. Therefore the regime potentially does not promote s 2(1)(i) of the ECT Act. Failing to encourage investment or innovation, results in a failure to promote the development of services that are responsive to the needs of users. Therefore the regime also potentially does not promote S 2(1)(k). A lack of investment, innovation and development of services that are responsive to the needs of users can result in a lack in the growth of the amount of

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## 7 RECOMMENDATIONS

The need for EU member states to encourage the drafting of voluntary codes of conduct appears to be based on human rights issues and on ensuring the protection of minors.<sup>134</sup> In comparison, it appears that the focus of the Guidelines is consumer protection. It is therefore recommended that the Guidelines should be incorporated into consumer protection legislation, and that the requirements for IRB membership should not be required for access to the limited liability. Alternatively the requirements need to be rethought to be less of an unnecessary barrier to obtaining limited liability.

## 8 CONCLUSION

The South African legislature and the Department have adopted a similar approach to ISP liability as exists in the EU, but have added extra requirements for ISPs to meet in order to access the safe harbours created in Chapter XI of the ECT Act. Of these extra requirements, membership of an IRB which has been recognized by the Minister is an integral element. It can be gleaned from ISPA's recognition process that recognition by the Minister is not easy to obtain and is potentially costly in terms of time and money. It has been argued that both the threshold requirements and IRB recognition requirements are unnecessary in the context of limited liability. The Department has created needless barriers to limited liability that could possibly have a serious affect on the industry as a whole. As a result, the Department has failed to meet the objectives of the ECT Act and the Guidelines. The overall effect is to indicate a failure on the part of government to recognize the importance of the Internet industry; potentially stifle investment and development in the Internet; and place South Africa in an unfavourable position to compete internationally.

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electronic transactions in South Africa. Therefore the regime furthermore potentially does not promote S 2(1)(c). The regime does not promote the development of SMME's. Such entities are forced to bear various costs that would not be necessary in other jurisdictions with a more favourable regime. Some of these costs they are forced to incur are: the cost of ensuring that they comply with adequate membership criteria to an IRB; continued cost of compliance; and the IRB membership cost. It is thus clear that the regime potentially does not promote s 2(1)(p). Should the regime in fact result in the above, the consequence would be a failure to promote universal access, especially to primarily underserved areas. Therefore in addition, the regime potentially does not promote s 2(1)(b).

<sup>134</sup> As illustrated in par 5 above.