

ISPA Comments on draft SoS guidance on the Digital Economy Act

Introduction

ISPA welcomes the opportunity to comment on the draft Secretary of State Digital Economy Act Guidance to the Regulator. We have been working with our members on Internet safety for more than twenty years and have been in close contact with Government as the Digital Economy Bill has progressed through Parliament. Online safety is a priority for the Internet industry: from technical tools to help users control access to content online through to education and awareness campaigns and the creation of the Internet Watch Foundation to tackle child abuse images, the UK is rightly viewed as a leader in this area.

ISPA has approximately 150 full members, the overwhelming majority of whom are SMEs or microbusinesses, and there are hundreds of smaller ISPs in the market that form a long tail of providers who do not belong to the main industry associations. 92% of our membership can be defined as SMEs (less than £50m turnover), 89% have turnover of less than £20m, while 73% have turnover of less than £2m. The industry includes those that own and operate their own infrastructure primarily on a local or regional scale using a range of technologies, those that resell services from one or more wholesalers or a combination of both. Within this there are companies that may choose to provide their customers with different levels of technical tools or advice and guidance.

The main objective of the Act is to address the behaviour of commercial pornographic providers by enforcing an age verification obligation. This includes backstop measures aimed at services that underpin these sites, including, as a last resort, the blocking of non-complaint sites. The blocking of legal adult content represents a significant shift in the regulation of the Internet, one that was added late in the process by Parliament, with no cost impact assessment undertaken, and responsibility given to a regulator unfamiliar to online regulation. It therefore needs to be implemented proportionately and cautiously. If not, it could have a serious impact on our members and the vibrant and dynamic ISP sector that underpins our economy and society. It is therefore vital that the Secretary of State's guidance is implemented in a targeted, considered and proportionate way, taking account of our comments and recommendations.

ISP Blocking

The UK ISP market is large and diverse, ranging from national providers offering a range of services to local or specialised providers that focus on a specific aspect of the market. The market is rightly being challenged to invest more in the networks and services needed to deliver the next generation of infrastructure and technologies that the UK needs to maintain its status as a leading digital nation. As the measures move towards implementation, it is crucial that the regulator's approach to ISP blocking does not have a disproportionate impact on ISPs.

ISPA sets out below how we think a proportionate approach can best be approached, minimising the impact on investment and the market. First, however, we set out the four main categories of ISP:

Large consumer ISP: the consumer ISP market is served by four consumer ISPs that offer 'quad-play' communications services of TV, phone, broadband and mobile. They have subscriber numbers that range in the millions and have been at the forefront of protecting their customers, both through technical tools and education and awareness. There are various studies and estimates of the number of consumers served by the four ISPs. ISPA's own estimates suggests that 92% of consumers are covered by the 4 largest ISPs.

Medium sized consumer ISP: After the large four consumer ISPs, subscriber numbers drop substantially to the low hundreds of thousands. There are a small number of medium sized consumer ISPs that serve between 75,000-200,000 subscribers. These ISPs in the main choose to offer their customers access to safety features, such as network level parental controls or education and awareness guidance.

Small and niche consumer ISP: Beyond the middle tier there are hundreds of small, micro and niche ISPs that serve rural or regional areas, or more specialist customers to both consumers and small businesses. Smaller ISPs may resell wholesale services or own and operate their own small, often rural, networks where there is less market competition.

Business ISP: Outside of the consumer market, there is a rich market for dedicated business ISPs that provide connectivity and other internet services to business, from SMEs to large enterprises.

Taking the above market overview into account, we feel the guidance around ISP blocking could be strengthened in the following ways:

1. Business ISPs should be excluded from the blocking regime

Many ISPA members provide services to businesses rather than consumers and their customer base is substantially different to that of consumer services. The customers of business ISPs are neither consumers nor families and it is common practice of such customers to implement their own restrictions, which may include both technical measures and internal policies in relation to pornographic sites. It would therefore be highly disproportionate to extend a notice to such providers. We recommend that the guidance explicitly say that where an ISP is providing a service to a business it should not be subject to a notice.

2. A proportionate approach should take account of ISP market share

The most sensible way of ensuring a proportionate approach is to set a subscriber threshold and wherever this is set, ISPA will have members on either side. The 2010 Digital Economy Act set a threshold of 400,000 subscribers for fixed line ISPs to block access to copyright infringing websites and we feel this would be a helpful reference point.

As explained, there is a diverse and dynamic ISP market spread across the UK, often serving niche, hard-to-reach or rural areas using innovative technologies. Their customer base is small and while they may take certain steps – for example pointing to guidance or third party technical tools – they do not have systems in place for technical tools such as blocking and filtering. They would need to invest in new systems to meet any requirements placed on them to comply with notices. Complying with blocking notices would negatively impact on the time and resources available of smaller ISPs to innovate and invest in their networks. Discussions with our smaller members suggests there is a limited market for filtering services available to smaller ISPs.

ISPA is committed to working with its members to raise awareness of online safety and the role of filters and recently amended our code of practice to require members to review what safety measures they provide to their customers.

3. Expectations of blocking

In taking a proportionate approach to blocking that includes taking reasonable steps, the guidance must make clear that blocking is an imperfect solution that can be circumvented. This means that ISPs cannot guarantee that adult sites will be blocked and should not be held responsible or liable for any over or under blocking.

4. Proportionality

In conversations with officials and the regulator we have been assured that a proportionate approach will mean that only a relatively small number of sites will be blocked. The guidance states the regulator “should exercise its powers in a targeted manner”. We feel this should go further and make clear that only large commercial sites will be considered under the regime, with a cap on the numbers of sites that can be covered.

Status of the Guidance

The legislation states the regulator must have regard for the guidance and the regulator has the ability to issue its own guidance and an annual report. We recommend that the regulator takes a proactive stance in adhering to the guidance and providing industry with greater certainty. This must include issuing its own guidance around proportionality and scope and publishing an annual report.