

Digital Economy Act: ISPA Briefing

Introduction

The [Digital Economy Act](#) was passed before the dissolution of Parliament in March 2017 and is a wide-ranging act that includes a variety of obligations of relevance to members. This briefing paper provides ISPA members with a summary of the key measures of relevance to ISPs and next steps.

- Automatic compensation
- Age verification
- Broadband Universal Service Obligation
- Electronic Communications Code
- Ofcom appeals
- Ofcom Information gathering powers

1. Automatic compensation

The introduction of automatic compensation is a development to the Communications Act of 2003, and “will require a communications provider to pay compensation to an end-user on failing to meet a specified standard or obligation”.

What this means:

- The Act itself doesn’t specify the amount of compensation, or – as suggested – clarify what is meant by “end user”. However, an [Ofcom consultation](#) on this issue produced the guidelines for the following scenarios:
 - Should a service not work, after two working days have passed the ISP must pay £10 per working day that the service is not repaired.
 - A delay in the commencement of service beyond the date the provider has committed to - £6 for each calendar day of delay beyond the promised start date.
 - An appointment is missed, or cancelled with less than 24 hours’ notice - £30 per missed appointment.
 - Providers will be expected to tell customers that they are entitled to the compensation.
 - Providers must pay within 30 days.

ISPA action:

ISPA is responding to the Ofcom consultation that concludes on the 6th June, and working with members and Ofcom to improve the proposals. A range of issues have been identified with the current approach, including the impact on the reseller community and level of compensation.

2. Age Verification

The Bill delivers the commitment made in the 2015 Conservative Party Manifesto by requiring age verification on pornographic material available on the internet on a commercial basis.

What this means:

- “Commercial basis” includes free-to-use streaming sites. Sites that show “extreme pornography” and fail to implement age-checks will be subject to an “enforcement notice” or financial penalty from the regulator. The fine cannot exceed £250,000, or 5% of the company’s qualifying turnover. The regulator may also contact the website’s payment service provider if they do not comply with the enforcement notice or pay the fine.

- For ISPs this means the following:
 - If the website fails to comply, the regulator will initially go after ancillary services that help underpin or support the website, such as financial services like PayPal, or advertisers.
 - If this is unsuccessful, the regulator has the power to issue a notice to an ISP will be issued with a blocking notice setting out steps to block access to non-compliant sites.
 - The focus will be on dealing with the largest adult sites (<50)
 - We expect the number of ISPs served a notice to be proportionate, based on subscriber numbers
 - The regulator is expected to take a 'proportionate' approach, and will not mandate the choice of blocking technology
 - Draft guidance has been issued by the DCMS to the regulator, the BBFC.

ISPA action:

We have been working closely with Government, Parliament and members to address the issue for some time. We have written to the appropriate ministers, and the main thrust of our current efforts is to address the issue of scope and proportionality to minimise the impact on members.

3. Ofcom Increased Information Gathering Powers

The Bill amends and gives new powers to Ofcom to request communications providers produce, generate or obtain information about their services that they would otherwise not collect or retain. This includes any information related to electronic communications or in connection with Ofcom's functions, eg: for broadband performance.

What this means:

ISPs are now obliged to produce additional material and information pertaining to Ofcom's functions – this is to assist Ofcom with complaints or investigations they may be dealing with. Ofcom may also demand "analysis of" this information. Ofcom can demand the information "within a reasonable period" that they themselves will stipulate. Ofcom cannot, however, demand or publish information that relates specifically to a particular body or the private affairs of an individual.

ISPA action:

ISPA will be in contact with Ofcom seeking clarification on the extent to which ISPs will be obliged to create and keep such information.

4. Ofcom Judicial Review Powers

The Bill introduces a judicial review standard that aims to allow appellants to still challenge Ofcom's decisions, but prevents the appeal body from being able to examine Ofcom's decision making with the same level of scrutiny as previously. The Act moves away from a merits based system when appealing Ofcom's decisions and to a system of Judicial Review.

What this means:

This has effectively watered down powers to appeal against Ofcom's decision-making. In limiting the scope for scrutiny of Ofcom's decisions an imbalance has been created that will be weighted against ISPs, making it difficult to overturn decisions made by Ofcom.

ISPA action:

ISPA called for this amendment to be removed or weakened during the passing of the Bill.

5. Universal Service Obligation

The Bill updated the existing telephony USO to include an obligation to provide a minimum broadband service on request and amends the Communications Act to give Ofcom powers to determine the actual detail and specification in relation to a broadband USO. However, the actual detail of implementation will be left to secondary legislation.

What this means:

To address the ongoing challenge of rural broadband and providing broadband in areas where it is not commercially viable, anyone in the UK will be able to request a broadband connection that delivers a minimum speed of at least 10 megabits per second. Only designated Universal Service Providers are required to deliver the USO. Users will be subject to a cost threshold, a maximum cost per premise at which the USP would be expected to provide the service. There are also questions as to how this will be funded, with Government indicating an industry fund to cover the costs included in the threshold. Ofcom and Government have consulted on this. BT, the expected USP, are also set to consult.

ISPA action:

ISPA has been active in this area, meeting with peers, responding to consultations and looking for opportunities for providers to help deliver the USO. Our responses can be found [here](#) and [here](#). We will be responding to BT's forthcoming consultation and working closely with members.

6. Electronic Communications Code

The Bill will bring in reforms made to the Electronic Communications Code via changes to the Communications Act. This will also give the Secretary of State powers by regulations to make consequential provisions to the Code, including statutory instruments which can amend primary legislation if approved by a resolution of each House of Parliament.

What this means:

Whilst this allows for greater flexibility in practice there are concerns that this may convolute the process of USO roll-out unnecessarily.

ISPA action:

We are currently involved in an ongoing consultation into how broadband can be rolled out more efficiently without the need for legal red tape and confusion. This will remain a key priority for ISPA in the new Parliament

7. Parental control filters

The Act provides greater legal certainty to ISPs that offer a network level parental control filter, following the new EU net neutrality rules that had called the original arrangements into question. The key line is that the 'provider of internet access to an end-user may prevent or restrict access'.

What this means:

This ensures that ISPs that wish to provide a network level parental control filter are able to do so. There were concerns that Parliament would amend the 'may' prevent or restrict access to 'must'. However, successful lobbying by ISPA meant that this threat was removed and mandatory filtering was not included in the Bill.

ISPA action:

ISPA amended its code of practice to demonstrate its commitment to online safety with the following: *"members that serve consumers shall consider how best to help customers protect themselves online, including access to advice and educational material or technical tools"*.