

ISPA response to the DCMS Consultation on implementation of the European Electronic Communications Code

1. Introduction

- 1.1. ISPA welcomes the opportunity to respond to the consultation from the Department for Digital, Culture, Media and Sport (DCMS) regarding the implementation of the European Electronic Communications Code (EECC).
- 1.2. ISPA is the trade association for providers of internet services in the UK, we have over 150 members, 90% of which are SMEs. Our membership covers the whole spectrum of access provision, using FTTP, FTTC, wireless, satellite and hybrid solutions at a wholesale and retail level. All play a critical role in the delivery of broadband and internet services across the UK to consumers and businesses.
- 1.3. Given the span of ISPA's membership, many of the members will be submitting detailed responses to this consultation. As an association our response seeks to highlight some of the higher-level issues at play in the implementation of the EECC and set out the broader priorities of the sector.

2. Access and investment incentives

Articles 22 & 29 - Geographical surveys

- 2.1. Regarding the geographical surveys of network deployments (Article 22), further clarity is needed on the collection, sharing and use of this data, with the clear need for designation of areas to be based on accurate Ofcom data.
- 2.2. This data should aim to provide a full and accurate picture of current and projected broadband provision consistent with commercial confidentiality, particularly mindful that current Connected Nations data does not include large businesses which can distort the view of connectivity in an area. We note that Article 22 applies to ECNs capable of delivering broadband, and therefore provides a channel for such data to be collected. It is therefore clearly critical that this forecasting data must include all available technologies across consumer and business markets.
- 2.3. ISPA's members would like to note the need for a realistic approach to the implementation of Article 29 around penalties for "knowingly or grossly negligently provide misleading, erroneous or incomplete information." Incentives to provide accurate information must be balanced with any unintended consequences, including reducing ambition in the market and diverting resource from rollout programmes.
- 2.4. It is important that DCMS is aware that business cases for builds can change over time which may impact the accuracy of forecasted data. The timelines for the forecasts have a considerable impact on their accuracy, with shorter-term plans a lot firmer than those in the longer-term.
- 2.5. In Option 3 set out in the consultation, DCMS proposes that Ofcom would share the data collected on near- and medium-term forecasts with "national and local Government." There is concern over the extent to which this information would be shared within this network given the extreme sensitivity of this data. ISPA would encourage the DCMS to take account of operators' views in the

forthcoming consultation with Devolved Administrations and local government on the extent and nature of this data sharing and be particularly alert to the highly sensitive nature of forecast data.

- 2.6. The interaction between this data request process and the existing requirements on the industry, through the Connected Nations reports for example, should also be taken account of. The administrative burden on providers should be minimised, and the industry would encourage DCMS to be particularly mindful of the cost and time implications of this, and many other parts of the EECC. With potential need for new systems, processes and resource to meet these demands in addition to the existing and extensive requirements adhered to, there is a real risk to the acceleration of the pace of roll-out.

Article 61 - Powers and responsibilities of the national regulatory and other competent authorities with regard to access and interconnection

- 2.7. The EECC allows for the imposition of “symmetric obligations” under Article 61 (3). More specifically, National Regulatory Authorities (“NRAs”) may impose obligations upon reasonable requests to grant access to certain network elements where this is justified on the ground that replication is economically inefficient or physically impracticable. BEREC will publish guidelines on this specific topic by 21 December 2020.
- 2.8. We note that DCMS is not consulting on this Article at this time, and therefore we urge DCMS to ensure that it waits and follows the guidance from BEREC to ensure harmonisation across Europe, and to avoid allowing for national deviations.

Article 67 – Market analysis procedure

- 2.9. The industry welcomes the shift towards longer market reviews and the acknowledgement of the need for appropriate time to implement new regulations and allow them to bed in. This will certainly give the industry more clarity and the long-term stability needed to build strong business cases for investment for example.
- 2.10. Concerns remains around the timing of the first market review which would run from 2021-2026. This covers a key period of change within the industry with the transition to IP and WLR withdrawal scheduled for 2025. In this time of fundamental change there may be a need for more flexibility in the regulatory regime. In this context, it is proposed by ISPA’s membership that the option for a review within the five-year period is included. This can be provided for by a full transposition of Article 67 (5) which allows the regulator to decide on whether market changes in the intervening period require “a new analysis” (as foreseen in Recital 177).

3. End-user Rights

- 3.1. The third chapter of the EECC on ‘End-user rights’ defines these end-users as “consumers (i.e. domestic users), and not-for-profit organisations and small and medium enterprises (SMEs)”. The inconsistent application of, often consumer-focussed, regulation to the business market has been a consistent concern for the ISP industry, and one based largely in a failure of Government and regulators to fully understand the business market and use an appropriate and consistent definition of an SME. We see two separate issues: the definition of small businesses, and the inclusion of large enterprise businesses.

Small businesses

- 3.2. The first concern is raised in the implementation of the EECC, which ISPA's members feel dangerously conflates business and consumer needs. It further raises the threshold for a small business to 50 employees from the threshold of 10 employees regularly used by Ofcom.
- 3.3. There are considerable operational issues for ISPs in applying regulation using inconsistent small business definitions, particularly those based on employee numbers, which are often difficult to discern and instable.
- 3.4. Ofcom's implementation of Article 105(3) of the EECC on end-of-contract notifications for business customers¹ takes a more flexible and proportionate approach. This allows business providers to determine how best to comply by informing their larger business customers, and acknowledges that some smaller businesses share significant characteristics, behaviours and needs with a residential customer including the use of similar contracts.
- 3.5. The lack of understanding of the business market is further reflected in the shift to a 2-year contract waiver which sits in contradiction to the industry standard of a 3-year cycle under Article 105. While enterprise providers are carved out of some of this Article, the Code appears to be grouping all products together with mobile airtime maximum contract lengths without considering the impact on businesses and their providers.
- 3.6. ISPA would like to highlight the importance of consistency within the implementation of the Code, and wider Government and Ofcom policy. A full definition of business customers must be agreed, ultimately based on contract type (i.e. residential broadband or business connections) rather than shifting employee thresholds which providers have no insight into.
- 3.7. By introducing clear definitions for consumer and business customers based on their contract type, ISPs would be able to better identify customers and apply appropriate regulation. This would allow such regulation to be more appropriately targeted at the intended audience and take better account of different market dynamics and customer needs. DCMS must help industry gain clarity from Ofcom on these definitions, and assurances that they will be consistently applied across all current and future regulation.

Large enterprise businesses

- 3.8. Furthermore, the inconsistent use of "end-users" and "consumers" also brings large enterprise customers into regulation where there is no demonstrable harm or need for such consumer protection. Indeed, the intention in the Code is to differentiate the needs of different types of customers and establish that large businesses should not be subject to the same regulatory requirements as residential consumers given their stronger bargaining power.
- 3.9. We urge DCMS to carefully test the necessity and proportionality of applying certain consumer protection provisions to larger enterprises and carve out these enterprises where appropriate. Particular concerns around the application to large enterprises relate to Article 103 around comparison tools and Article 104 around quality of service given these contracts are commonly

¹ Ofcom, [Helping consumers get better deals](#): Statement on end-of-contract notifications and annual best tariff information, May 2019, Ch. 8

individually negotiated. The focus should remain on consumers who would benefit from regulatory intervention.

- 3.10. Where specifically carving out enterprise is not feasible, DCMS should make clear that Ofcom are able to use their discretion to focus on those categories that need protection the most. This was seen in Ofcom's approach to the implementation of Article 105(3) mentioned above and should be consistent across the code.

Article 99 – Non-discrimination

- 3.11. ISPA members agree that the impact of Article 99 would be limited given this relates to nationality and place of residence/establishment. This does, however, highlight a significant area of concern for ISPs around vulnerable customers.
- 3.12. There is, naturally, a clear need to engage with and provide support to vulnerable consumers and ISPA members are working hard to ensure that appropriate help is offered to those in need of it. However, with the update to the General Conditions in 2017 the guidance in this area has been insufficiently clear to work effectively. Given the importance of this issue, ISPA would like to encourage DCMS to convene a joint working group with Ofcom and industry to gain further clarity and guidance on the treatment of vulnerable consumers.

Article 107 – Bundled offers

- 3.13. ISPA's members have considerable concerns around the potential for regulatory clash in the regulation of bundled services that include non-communication elements. The position taken by the DCMS in this consultation, that the risk of such clash would be "limited", is potentially short-sighted and based on a limited assessment of the current market environment. Bundles and services are consistently evolving DCMS must ensure that its own definitions of what constitutes a bundle are clear and consistent with those of Ofcom, or there is a real risk that this innovation could lead to regulatory clash.
- 3.14. Further to this, the indication that these disputes, when they arise, would be resolved bilaterally between regulators is a further cause for concern. The uncertainty and potential inconsistency that this approach provokes would have a considerable impact on providers of such bundles.

4. Universal Service Obligation

Articles 85 & 87 – Provision of affordable universal service & status of existing universal service

- 4.1. The intention of DCMS to introduce an affordable mobile universal service, alongside the potential action on the affordability of the broadband USO, could have serious cost impact. It is particularly important to note that any cost of a mobile USO would likely fall on the industry as a whole, when it is clear these costs should fall on mobile operators. This should be taken into account when any further plans for a mobile USO are developed.
- 4.2. The industry would like to highlight the need for coordination in Ofcom's role under Article 85 to monitor and review retail pricing within the existing Broadband USO. The interaction between the USO and other state aid programmes under BDUK for example is considerable, and Ofcom must reflect on how their decisions on a pricing mechanism can best align with this.

- 4.3. ISPA would therefore encourage Ofcom to have an open dialogue with BDUK on pricing given the role of BDUK in assessing pricing and adequate market rates. Such a discrepancy between the USO and BDUK schemes could seriously undermine the functionality of these state aid programmes and must be mitigated where possible.

5. Other Articles

Article 31 – Right of Appeal

- 5.1. This Article provides for an appeals process and calls for it to be an "effective mechanism" in which "the merits of the case are duly taken into account", which clearly indicates a full merits process, not just a judicial review process.
- 5.2. In the UK, the appeals provisions were reduced in the Digital Economy Act 2017, removing the full merits standard from UK legislation, with the promise that the EU Directive would always be available as a back-up. On EU exit, such a possibility will fall away.
- 5.3. ISPA therefore urges DCMS to set out how it will ensure that Article 31 is fully implemented in UK law. Such a mechanism is critical to holding the regulator to account and ensuring the functioning of the UK telecoms market.

Articles 40 and 41 – Network security and resilience

- 5.4. It would be helpful for the Government to provide greater clarity to industry on whether the new Telecoms Security Requirements (TSRs) will be introduced under Articles 40 and 41 of the Code or under other domestic legislation, and if so on what timescales.
- 5.5. In any case, whatever legislation the Government proposes to introduce, it should be risk-based, flexible, robust, embrace collaboration and promote innovation-friendly and technology-neutral solutions.

6. Conclusion

- 6.1. The industry welcomes the new EECC and urges DCMS to take account of the many practical implications of the transpositions on ISPA members. A smart, risk-based approach to implementation would better future proof the transposition and lead to a successful and competitive UK communications industry.
- 6.2. A key area of concern is around the impact on the implementation of the UK leaving the EU without a deal. Given this, there is a real lack of certainty over the regulatory regime that ISPA members will have to follow in the years ahead.
- 6.3. We are keen to understand how the government believes our industry will be regulated post 31st October in the event that no withdrawal agreement is implemented by that date. ISPA's members are keen to stress the importance of a full consultation in this scenario and will seek to engage in discussions on this point, particularly as clarity appears to have eroded since publication of this consultation.

- 6.4. Throughout our response we have highlighted the many areas where further clarity is needed. This particularly relates to the consistency of definitions and implementation within the EEC and in broader Government policy and regulation. This includes the use of data, and definitions of businesses and vulnerable customers for example. There is a clear and pressing need for better coordination between Government and regulators to address these issues in a consistent and proportionate way, and the industry looks forward to continued dialogue on the transposition work over the coming months.