

TELEFÓNICA O2 UK LIMITED RESPONSE TO:

**ONLINE INFRINGEMENT OF COPYRIGHT AND THE DIGITAL ECONOMY ACT
2010 – DRAFT INITIAL OBLIGATIONS CODE**

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INTRODUCTION

1. Telefónica O2 UK Limited (O2)¹ welcomes the opportunity to respond to Ofcom’s “Online Infringement of Copyright and the Digital Economy Act 2010 - Draft Initial Obligations Code” (the Consultation).
2. O2 is a leading communications company for consumers and businesses in the UK, with 21.355 million mobile customers and over 500,000 fixed broadband² customers as at 31 March 2010.
3. Throughout the debate over the last few years on tackling the issue of illegal P2P, we have made clear that we believe the best way for the creative industries to solve the problem of copyright breaches is to embrace new internet business models that enable customers to legally consume the content they want, when they want it and in a format they want, for a fair price³.
4. We remain of this view. However, whilst, we do not agree with the underlying principle of the Digital Economy Act (DEA) - that ISPs be obliged to act on reports from Copyright Owners⁴ - we nevertheless recognise that the DEA gave Ofcom duties to draw up and enforce a code of practice (“the Code”) and that is what Ofcom is consulting upon.

¹ Telefónica O2 UK Limited (O2) is part of Telefónica Europe plc which is a business division of Telefónica S.A. and which owns O2 in the UK, Ireland, Slovakia, Germany and the Czech Republic, and has 53.9 million customers (at March 2010). Telefónica is the world’s largest integrated telecommunications operator, and the largest in Europe in terms of market capitalisation. Its activities are centred mainly on fixed and mobile telephony, with broadband as the key tool for the development of both.

² Excluding that of the separate ISP, Be Un limited.

³ Our response to the Consultation “Legislation to Address Illicit P2P File-Sharing”, published by the Department for Business Innovation and Skills (BIS), June 2009, sets out our views in greater detail. <http://www.bis.gov.uk/files/file53679.ZIP>

⁴ To send notifications to their subscribers following receipt of reports [CIRs] of copyright infringement from Copyright Owners. ISPs must also record the number of reports made against their subscribers and provide Copyright Owners on request with an anonymised list which enables the Copyright Owner to see which of the reports it has made are linked to the same subscriber – also known as the ‘copyright infringement list.’ [§1.2 of the Consultation]

5. Accordingly, in this response, we generally restrict our comments to remarks on Ofcom's proposals in the Consultation to give effect to the relevant measures (aimed at reducing online copyright infringement) introduced in the DEA along with responding to the questions raised in the Consultation. We do not make a more wide ranging critique of the underlying rationale for the measures in the first place (which were debated in Parliament to some degree and in respect of which we have made previous submissions to government [ibid]) or to the separate Government Consultation on Cost Sharing⁵.
6. However, for the avoidance of doubt, we wish to make clear that our response to the Consultation does not mean that we accept that placing obligations on ISPs under the DEA is the right way to proceed, nor that the overall scheme of measures has received the necessary scrutiny, nor that it is in accordance with other relevant regulatory or legislative frameworks⁶.

GENERAL REMARKS

7. Before we respond to the questions raised in the Consultation, we have some general overall observations.

The need for joined-up thinking, planning and arrangements

8. As Ofcom will no doubt acknowledge, the implementation of the DEA in respect of P2P is being executed in a number of work streams, by a number of different entities. For example,
 - i) Ofcom is charged with establishing the Code, the Appeals process, the CIR tariffs and a number of other activities under the DEA;
 - ii) The Government (via BIS) is charged with setting the cost sharing arrangements;
 - iii) An independent Appeals body (yet to be established) will be charged with the operation of the Appeals process;

⁵ BIS Consultation "Online Infringement of Copyright (Initial Obligations) Cost Sharing", <http://www.bis.gov.uk/assets/biscore/business-sectors/docs/10-915-consultation-online-infringement-of-copyright.pdf>

⁶ For example, we note that BT and TalkTalk have announced a legal challenge. Consistency with relevant legislation, such as the Data Protection Act, the Privacy and Electronic Communications Regulations and the Copyright, Designs and Patents Act, must be confirmed.

- iv) There are further consultations to come in relation to the Code (enforcement of the Code and the handling of industry disputes (July), and tariff setting (September)); and
- v) Qualifying ISPs and Copyright Owners have to implement the necessary processes and systems.

This response

- 9. There remain numerous pieces of this jigsaw which have yet to be determined⁷, and furthermore, as Ofcom emphasises, the “...*the draft Code attached to this consultation does not contain detailed provisions in relation to the sharing of costs at this time. We will issue a further consultation on these issues once the statutory instrument has been made.*” [§2.18]. And furthermore, “... *it is very important stakeholders consider the potential need to digest and respond, if relevant, to a number or the full set of consultations on online copyright infringement.*” [§9.5]
- 10. Accordingly, O2’s response is made in general terms and on a without prejudice basis. We reserve our right to comment further.

Drawing it all together

- 11. In addition, some details of arrangements are being “left” to Copyright Owners to agree with ISPs (for example, in the Consultation, Ofcom remarks that there is merit in agreeing standard format CIRs and other aspects etc [§4.9]). As an ISP which Ofcom proposals should be subject to the Code from day 1, O2 is not aware of any formal forum being established within which ISPs and Copyright Owners can reach such agreements. We would support Ofcom facilitating such discussions.
- 12. Indeed, given the multiple workstreams and their interrelationships, we would draw an analogy with the management of arrangements for Number Portability,

⁷ Indeed, Ofcom notes that “...*further consultations will be pivotal in allowing the further development of appropriate safeguards for consumers, securing appropriate resourcing for the requirements following from the code and ensuring these requirements are fulfilled.*” [§9.3] and “*We recognise there are linkages between consultations which are relevant to stakeholder response.*” [§9.4].

under which Ofcom proposed a formal set of working groups and structure.⁸ Whilst, we recognise that Ofcom's remit in relation to P2P under the DEA is limited to certain activities, and, for the avoidance of doubt, we are not proposing that a "Copyright Code Co." structure be established per se, we nevertheless believe that there are similarities of activity (multiple parties, planning, interfaces and processes to be established, customer experience to be considered and technical aspects to be determined, procurement/ system build etc) such that Ofcom should give consideration to a more structured and joined up forum for developing the Code and the associated activities and industry standardisation. Indeed, given that Ofcom emphasised the challenging timescales for both porting arrangements and the DEA, the absence of a central co-ordinated management and governance forum for ISPs, Copyright Owners and Ofcom to progress the DEA scheme is striking.

The timescales needed to scope, plan, build, and test and launch the scheme measures

13. We recognise Ofcom is working to timescales established under the Act.
14. O2 was not a participant of the previous trial of measures under the Memorandum of Understanding [§2.13] and so we do not have the benefit of that trial experience⁹. We would anticipate that (by way of illustration on timelines), as a rule of thumb for a project of this nature, a minimum timescale of 6-9 months to plan, specify, build, test and launch these types of processes should be anticipated. To this we would add a minimum 3 months should a procurement exercise be required. And we would also add further time at the start to reach agreement between the various parties as to the specification of what is to be built. Ofcom also needs to recognise that such projects need to be planned, resourced and integrated into business roadmaps (and that there is an opportunity cost therein).
15. Ofcom notes that "*We are required to have made a code by January 8th unless the Secretary fo State extends this timetable*" [§1.7] and in order to do so, Ofcom

⁸ See UKPorting.

⁹ It would be helpful (as we have separately requested) for Ofcom to share as much information about the learning from the MoU as it is able.

anticipates putting the Code before the EC and Parliament this year¹⁰. We believe that in the Code, Ofcom must provide sufficient time is allowed to implement the arrangements and to test them¹¹. Indeed, we believe Ofcom is duty bound to do so. To not provide sufficient time would be obtuse given the 6.5M plus consumers and citizens reported to be engaged in illicit P2P¹², the cited £400M benefit to the Copyright Owners of tackling P2P¹³ and the cost of the scheme's measures themselves. It is essential that the measures are implemented in a sound way such that the risk of alienating a digital generation is minimised¹⁴.

16. As Ofcom notes, “...the DEA is very clear on how Ofcom should implement many elements of the measures, but where there is discretion the interests of citizens and consumers are central to Ofcom’s approach.” [§1.3]. Whilst Ofcom has specific duties under the DEA, clearly, it also has its more general duties under the Communications Act 2003¹⁵. These duties cannot be prejudiced and Ofcom must explain how its proposals remain consistent with its wider duties.

Concluding remarks

17. We are aware that BT and Talk Talk have appealed the DEA on certain legal grounds¹⁶. In this response we have not sought to duplicate ground which we understand (from press reports) they cover in their appeal as it relates to the Code.

18. We would welcome the opportunity to discuss our response in greater detail with Ofcom.

¹⁰ See Figure 1: Online Copyright Infringement – indicative process for consultation, the Consultation.

¹¹ And as we observe herein, the timing obligations in respect of establishing a code must not be conflated/ confused with timescales for launching the relevant measures which the DEA does not dictate and in respect of which Ofcom has discretion. Indeed, in determining any timescales for launch Ofcom must act in accordance with its general duties.

¹² “right-holders estimate there are some 6.5 million people in the UK who are active unlawful file sharers”, *ibid*.

¹³ “If no action is taken, we estimate costs for the creative content industries to be in the region of £400 million per annum in displaced sales”, *ibid*.

¹⁴ The very generation which Copyright Owners want to convert to legal consumption of their goods.

¹⁵ <http://www.ofcom.org.uk/about/what-is-ofcom/statutory-duties-and-regulatory-principles/>

¹⁶ <http://news.bbc.co.uk/1/hi/technology/10542400.stm>

RESPONSE TO CONSULTATION QUESTIONS

Question 3.1: Do you agree that Copyright Owners should only be able to take advantage of the online copyright infringement procedures set out in the DEA and the Code where they have met their obligations under the Secretary of State's Order under section 124 of the 2003 Act? Please provide supporting arguments.

19. Yes, we agree that Copyright Owners must meet their obligations. However, as Ofcom will appreciate, the final form and content of the Secretary of State's Order has yet to be made (and of course it only deals with one piece of the jigsaw, principally the proposals for the cost sharing arrangements – but not, the equally important arrangements for setting the relevant tariff to recover those costs – which Ofcom has yet to do). So we can only answer in general terms, on the presumption that the Order will include obligations and pre-conditions on Copyright Owners that are acceptable to us¹⁷ and, furthermore, that Copyright Owners meet their other obligations both under the Code and in respect of the other pieces of the jigsaw, which, as Ofcom notes, are intended to complement the obligations placed on ISPs:

“Whilst this document focuses on the Code of practice, we note that its measures were always expected to be complemented by a wider set of activity on online copyright infringement including consumer education, the promotion of lawful alternative services and targeted legal action against serious infringers. We therefore intend to monitor how these develop and, in accordance with additional obligations placed on Ofcom in the DEA, we will report regularly to Government on both the effectiveness of the code of practice and also on these broader measures.” [§1.9]

20. We look forward to hearing how Ofcom will monitor these other activities. As Ofcom will appreciate, many believe (O2 included) that these wider set of activities, in particular the promotion of lawful alternative services by Copyright Owners, are likely to be the most effective approach to reducing Copyright Infringement.

¹⁷ For example, that a Copyright Owner makes the relevant forecast and payment for the CIRs that it intends to issue, is a signatory to Ofcom's code and has agreed to any reasonable pre-conditions which might generally be required of it.

21. In the meantime, we believe there are also some fundamental aspects to clarify in respect of participation under the Code, for example:

- i) What is the situation if a Copyright Owner wished to take swift legal action against an alleged offender via the courts process and serve a Norwich Pharmacal Order (i.e. not to issue a CIR and trigger notification letters). In these circumstances, would an ISP, in meeting any such court order, be permitted to use the systems (i.e. IP address/subscriber matching) established under the Code to meet such a court order? Elsewhere, it has been suggested that ISPs should not be able to recoup the costs associated with meeting court orders under the Code arrangements.¹⁸
- ii) What is the situation if a Copyright Owner and ISP wished to make commercial arrangements outside of the Code. Can they make use of the systems established under the Code? For example, commercial arrangements have been reported in the case of Virgin Media/Universal¹⁹?
- iii) We also believe that it needs to be clarified how the principle will be enforced over the lifetime of the measures. And in this respect there is some link with both the draft Order (setting the cost sharing arrangements) and Ofcom's setting of the CIR tariff scheme which is designed to enable ISPs to recover the costs of their obligations under the Code. For example, Ofcom clearly recognises the risk of "free riders" (Copyright Owners joining in subsequent Notification Periods in order to seek to avoid contributing to set up/ capital costs). Accordingly, in relation to the question posed, clarity is needed as to whether the Code requires Copyright Owners to meet their

¹⁸ See section 5.3 of the BIS Consultation "Online Infringement of Copyright (Initial Obligations) Cost Sharing", which also indicates ISPs are meant to exclude the costs of meeting RIPA requests or Data Retention Regulations.. However, if the Government wishes to make use of the systems in relation to those requirements, what will be the position?

<http://www.bis.gov.uk/assets/biscore/business-sectors/docs/10-915-consultation-online-infringement-of-copyright.pdf>

¹⁹<http://news.bbc.co.uk/1/hi/8100394.stm>

obligations “from day 1” of the Code, or whether a more complex arrangement is to be established to allow Copyright Owners to join over time. For example, through a cost sharing arrangement between Copyright Owners wherein those that are in at the start are able to recover a proportion of their upfront costs (paid to ISPs) from Copyright Owners who join the scheme in subsequent Notification Periods. Of course, a mechanism will be needed to ensure that there is at least critical mass of sufficient numbers of Copyright Owners participating from the outset to meet ISPs costs.

22. It is clearly important for these issues (and other matters of detail) to be resolved satisfactorily.

23. Ofcom’s question also asks for justification of our views. We think the justification for requiring Copyright Owners to meet their obligations has generally been well debated, both in previous BIS consultations as well as within Parliament. As the beneficiaries of the DEA measures, Copyright Owners must take responsibility to meet their obligations. The principle of beneficiary pays is a widely recognised fair and equitable principle.

Question 3.2: Is two months an appropriate lead time for the purposes of planning ISP and Copyright Owner activity in a given notification period? If a notification period is significantly more or less than a year, how should the lead time be varied? Please provide supporting evidence of the benefits of an alternative lead time.

24. Ofcom currently proposes that a Copyright Owner must provide estimates of the CIRs it intends to submit (to a Qualifying ISP) two months from the beginning of the notification period [§3.5].

25. The appropriateness of the two month timescale needs to be considered in respect of two main scenarios:

- i) Where the ISP is first brought “in scope”. For example, is two months sufficient for the initial Notification Period (in respect of which Ofcom

proposes the “main” 7 ISPs should be Qualifying ISPs) and also, is it sufficient for ISPs brought into scope for the first time in subsequent years; and

- ii) Is it sufficient for subsequent years in respect of those ISPs already subject to the Code (i.e. for which systems and processes are already established under the Code).

26. In respect of the first scenario, we believe that two months is likely to be wholly inadequate in two broad respects:

- i) the number of CIRs that an ISP is going to be required to handle in any one Notification Period is a fundamental “input assumption” into the planning, build and operational assumptions for meeting its obligations under the Code (it will also flow through to all other elements of the jigsaw: for example, the likely size of the Appeals Body); and
- ii) the number of CIRs is also a fundamental element of the tariff structure and cost recovery piece, which is of itself interlinked with the planning and build timescales because Copyright Owners are rightly required to meet costs in advance²⁰.

27. Whilst assumptions about volumes can be made to achieve some degree of system sizing and data retention planning assumptions, it is unreasonable and impractical that any planning, development, build activity and expenditure should commence without firm volume commitments and associated payment of relevant costs by Copyright Owners²¹. From what we know of the obligations to date (and Ofcom must recognise that we have not had the experience of the Memorandum of Understanding initiative²²) we do not believe two months would be sufficient to

²⁰ Although, of course, ISPs are already incurring costs in relation to the measures by virtue of the planning and management activity etc in response to the DEA and Ofcom Code programme.

²¹ Whilst to some extent systems can be planned and built to capacity ranges and capacity can be added reduced, we do not see why O2 should bear any of this risk.

²² O2 was not a participant in the trial. However, we understand all the other ISPs (with the exception of the Post Office?) which Ofcom currently proposes to include under the Code were. O2 has not had

undertake a project of this nature (we have shared our generic project plan with Ofcom). Generally, we would anticipate that a project of this nature would require at a minimum 6 to 9 months to design specify, build, test and deliver (and these are themselves challenging timescales – see our response to questions 14 and 17 in the earlier BIS Consultation²³). The (untested) assumption here is that there is no significant procurement activity. Should this not be the case then that itself would likely add a minimum of 3 month tender process and be subject to the delivery timescales of the supplier. We would stress these timescales are illustrative and generic only.

28. We understand that Copyright Owners are reticent to forecast numbers in advance of the cost Order being made and an understanding of the likely CIR fee. However, in reality, Copyright Owners have made very firm (and public) assessments of the losses they believe Copyright Infringement is causing the content industry, along with estimates of the number of people engaged in the activity. Furthermore, since Copyright Owners have called for the measures, they must have modelled the “conversion” rate to legal consumption. Accordingly, Copyright Owners must have business models which forecast the investment range for which the measures pay back. Accordingly, we see no reason why Copyright Owners cannot come forward with volumes at this stage (even if that makes some assessment as to the cost per CIR). Since Ofcom is tasked with setting the tariff for an efficient operator, ISPs cannot take an “open chequebook” approach to building systems since Ofcom will be establishing what the costs are of an efficient operation.

29. Whilst, at this early scoping stage it may be that an iterative assessment may at least allow some progress²⁴, clearly, such volumes will need to be turned into firm commitments before any significant work and expenditure is required.

the benefit of the experience of the Code and as such is starting from scratch in this process. This is in stark contrast to the other ISPs. Accordingly, O2 is at a disadvantage compared to all other ISPs who have had the benefit of the trial, for example, experience of customer reaction, experience of process, metrics, etc.

²³ “Legislation to Address Illicit P2P File Sharing”, BIS, June 2009 (ibid).

²⁴ Indeed, given the harm claimed for their industry, one might expect Copyright Owners to be keen to be willing to have at least some dialogue on volumes etc.

30. The DEA requires that a code must be in place six months after the provisions of the Act comes into force (January 2011). However, this is not the same as requiring that the whole infrastructure and mechanisms envisaged in the Code are launched in the same timescale. In this latter area, we believe further dialogue is required.

Question 3.3: Do you agree with Ofcom's approach to the application of the Code to ISPs? If not, what alternative approach would you propose? Can you provide evidence in support of any alternative you propose?

31. Ofcom explains that the touchstones for its approach (to implement the government's intent – which Ofcom notes in very clear [§1.6]²⁵), are to ensure an approach which meets the requirements of objective justification, non-discrimination, proportionality and transparency. We agree that these are important touchstones.

32. We also note that Ofcom highlights the difficulty in using the principle of the CIR “threshold” laid out in the DEA for triggering the inclusion of an ISPs under the Code – since CIRs are not yet being issued and Ofcom concludes that “*We are therefore unable to set a CIR based threshold for Qualifying ISPs, which is objectively justifiable, non-discriminatory, proportionate and proportionate*” [§3.8].²⁶

²⁵ “As regards those ISPs to whom the Code should apply, the guidance from Government on how we should implement the measures is very clear. The intent is that small and medium sized ISPs should not initially fall within the scope of the Code. However, should evidence be presented that infringement was a significant issue on those ISPs then we will consider bringing them within the scope of the Code. Our proposal is that fixed ISPs with more than 400,000 subscribers should initially be subject to the Code. We believe this approach to be appropriate because it focuses the obligations on the major ISPs who provide internet access to more than 96% of the UK market, it is consistent with the Government's intentions and, based on evidence received from copyright owners, the vast majority of alleged infringement is amongst subscribers of those ISPs. Mobile operators are initially excluded, due in part to current mobile technologies being less conducive than fixed for copyright infringement. However, we will review, on a regular basis, whether to extend coverage of the code.” [§1.6]

²⁶ Although, Ofcom does not appear to consider if Copyright Owners could begin issuing CIRs – unless Ofcom takes the view that CIRs are solely a creature of the Code and hence a CIR can only exist in relation to an ISP within the Code - thus creating a somewhat circular prohibition on ever being able to use CIRs as a threshold - or is Ofcom's point that the Copyright Owners have not built the systems and processes to create CIRs in the first place?

33. In the absence of CIRs, Ofcom proposes to use an alternative threshold of “subscriber numbers” as a proxy for the level of copyright infringement on networks: *“According to information we have obtained from Copyright Owners on the distribution of alleged online copyright infringement activity by ISP, we consider there is a broad correlation between the number of subscribers an ISP has and the level of alleged copyright infringement activity on their service [§3.15.3]. Ofcom concludes that such a proxy nevertheless meets the requirements of objective justification, non-discrimination, proportionality and transparency.*
34. We comment further on this proxy below. However, as Ofcom recognises, subscriber numbers are not a universal proxy, since Ofcom concludes that on evidence provided by Copyright Owners *“95% of alleged copyright infringement incidents identified occurred on fixed networks”*. In addition, there are other factors which Ofcom discusses [§3.11] and [§3.12] why mobile should not be included. For the avoidance of doubt, we agree with Ofcom’s proposal that the Code should not initially apply to mobile.
35. As to the use of subscriber numbers as a proxy for the “level of alleged copyright infringement” in respect of fixed ISPs. We note that Ofcom does not provide any substantiating evidence for this assertion other than to refer to evidence provided by the Copyright Owners.
36. Ofcom has not provided O2 with this evidence and therefore we are not in a position to comment in any detail on the validity of the hypothesis (or indeed the evidence itself) upon which Ofcom basis its approach. Whilst we not suggesting that Ofcom publish a breakdown of evidence on an ISP per ISP basis under the Consultation, we believe that Ofcom should seek to provide as much of the evidence as possible (Ofcom must act transparently to the extent it can). Furthermore, Ofcom could provide relevant data (in relation to that ISP) to each Qualifying ISP which it proposes to include such that they are provided with the “evidence with which they are accused”. We would welcome Ofcom’s comments here.

Question 3.4: Do you agree with the proposed qualification criteria for the first notification period under the Code, and the consequences for coverage of the ISP market, appropriate? If not, what alternative approaches would you propose? Can you provide evidence in support of any alternative you propose?

37. Ofcom proposes that the qualification criteria for the first period should be based on those fixed ISPs with more than 400,000 subscribers (presumably as at the start of the Notification Period – Ofcom must make clear the basis and source of the subscriber figures used).
38. Whilst Ofcom notes that it believes this threshold delivers a “proportionate” approach (for a number of specified reasons – which we comment on below) [§3.15], Ofcom does not explain how this 400,000 subscriber threshold delivers, in Ofcom’s view, an objectively justified, non-discriminatory and transparent approach. We believe Ofcom must explain these aspects.
39. We also note that, as Ofcom points out the government gives a clear steer as to its intent in the explanatory notes to the DEA: “*The government’s intention is for the obligation to fall on all ISPs except those who are demonstrated to have a very low level of online infringement. This is on the basis that it would be disproportionate (in cost terms) to require an ISP to incur significant costs to counter a problem that does not exist to any significant degree on its network*” [§3.6]
40. However, whilst Ofcom proceeds on the basis of its summary hypothesis that “*we consider there is a broad correlation between the number of subscribers an ISP has and the level of alleged copyright infringement activity on their service*”, this is not the same approach as the government’s intent would require, which is for obligations to fall on all ISPs except those “*who are demonstrated to have a very low level of online infringement*”. As far as we are aware, Ofcom’s focus appears to have been on the basis of the reverse process, to determine which ISPs to include, rather than to start with all ISPs and then exclude those who are demonstrated to have a very low level of online infringement (the only case where Ofcom has proceeded on this basis is in respect of mobile). Furthermore,

Ofcom has provided no indication as to what is considered “a very low level of online infringement” or what “to any significant degree” (other than in respect of mobile). Furthermore, there is no discussion – or clarity – as to whether Ofcom in assessing “absolute” levels of online infringement or “proportionate” levels of online infringement.

41. Accordingly, it is difficult to respond in full to the question. However, in addition to the above remarks we also make some observations on other elements of the rationale Ofcom sets out [§3.15.1 to §3.15.5] for Ofcom’s proposal that the Code should initially apply to BT, O2 (taking into account its fixed internet access subscribers only), Orange (taking into account its fixed internet access subscribers only), Post Office, Sky, TalkTalk Group and Virgin Media:

- i) *The seven ISPs with more than 400,000 subscribers together account for 96.5% of the residential and SME business broadband market [§3.15.2]- Ofcom refers to the residential and SME business broadband market. Ofcom should make clear (whether and, if so, why) corporate is excluded. Furthermore, if Ofcom is suggesting that by bringing into scope 96.5% of subscribers, it is capturing a similar percentage of the copyright infringers, we see no reason why Ofcom cannot make that hypothesis explicit (and as we say above, provide the evidence substantiating that hypothesis).*
- ii) *There is a natural breakpoint in that the smallest of the seven ISPs is more than twice the size of the next smallest [§3.15.2] - There is also quite clearly a natural breakpoint between the top 4 ISPs and the next 3 ISPs, with the smallest of the top 4 being between 4 and 5 times the size of O2’s base²⁷. If the ratio of “twice” is sufficient to draw the line, then what is Ofcom’s logic to not draw the line under the top 4 where the differential ratio is far higher (and hence, if Ofcom is arguing that there is a relative proportionality argument, then by the maths, such argument is even more robust at the breakpoint higher up between the top largest 4 ISPs and the rest).*

²⁷ BskyB 2.53M subscribers vs O2’s subscriber base. Source Enders Analysis.

- iii) *According to information we have obtained from Copyright Owners on the distribution of alleged online copyright infringement activity by ISP, we consider there is a broad correlation between the number of subscribers an ISP has and the level of alleged copyright infringement activity on their service [§3.15.3] - We have commented on this earlier. Ofcom has not provided O2 with any evidence to substantiate the assertion that: “based on evidence received from copyright owners, the vast majority of alleged infringement is amongst subscribers of those ISPs”. That O2 should be included without first being provided with sight of the “evidence against it” and the opportunity to respond to such evidence is contrary to all principles of natural justice and better regulation.*

Question 3.5: Do you agree with Ofcom’s approach to the application of the 2003 Act to ISPs outside the initial definition of Qualifying ISP? If you favour an alternative approach, can you provide detail and supporting evidence for that approach?

42. We also note Ofcom remarks that “As appropriate, we will alter the qualification criteria in the Code, so as to require the participation in the Code on any ISP where the scale of infringement is sufficient to objectively and proportionately justify its inclusion in the Code” and that “In making such an assessment we would review evidence of alleged infringement across those ISPs outside the scope of the Code and consider both the costs and feasibility of requiring those ISPs to comply with the obligations” [§3.18]
43. We agree that Ofcom must be an evidence based regulator and act objectively and proportionately. Indeed, Ofcom’s proposals to include the “main” 7 ISPs must also be made on a robust evidence base and with regard to objectivity and proportionality. Is Ofcom suggesting otherwise? The suggestion that it should alter qualification criteria at some future date suggests so. Regulators cannot simply change the rules as they go along – they must act consistently and coherently. Accordingly, we believe Ofcom must ensure that the qualification criteria adopted from the start are the right qualification criteria. If not, they cannot be used. Indeed, Ofcom appears to be picking and choosing assessment criteria. For example, in respect of Wi-Fi [§3.24] Ofcom considers the effect on

consumers, the level of infringement and the costs of inclusion. No such assessment (other than the “proxy” of subscriber numbers for level of infringement) is made for the initial inclusion of the “main” 7.

44. We also note that Ofcom remarks “*our approach will in practice be guided by evidence gathered once the Code has been implemented*”. It is not clear what evidence Ofcom will use. Ofcom concludes in respect of the initial phase that CIRs cannot be used – because none are being generated. However, even in subsequent phases, will CIRs be generated in respect of ISPs not in scope, so as to provide evidence? Even if they were, what guarantee is there that such a process will provide robust evidence? We go back to the point we make earlier, ISPs have been given no opportunity to scrutinise the evidence that Rights Owners have produced. This is unacceptable.

Question 3.6: Do you agree with Ofcom’s approach to the application of the Act to subscribers and communications providers? If you favour alternative approaches, can you provide detail and supporting evidence for those approaches?

45. The definitions of subscriber and communications provider are of course set out in the DEA²⁸. Nevertheless, we welcome Ofcom’s general discussion about the practical application and implications of such definitions in respect of, for example, Wi-Fi networks. As Ofcom notes that there are a broad range of business models in the internet access market from BT to Starbucks²⁹, via community Wi-Fi³⁰ (not to mention the mobile market³¹). For the avoidance of

²⁸ “...in relation to an internet access service...a person who – (a) receives the service under an agreement between the person and the provider of the service; and (b) does not receive it as a communications provider” (Section 124N)” [§3.19]

²⁹ Where a Wi-Fi network is provided in conjunction with other goods or services to a customer, such as a coffee shop or a hotel, our presumption is that the provider is within the definition of internet service provider.[§3.23] However, Ofcom then goes onto explain that “Ofcom’s proposal for the threshold for determining a Qualifying ISP would initially exclude those operators since the number of subscribers would not meet the required threshold.” [§3.23]

³⁰ “In principle, operators of Wi-Fi networks would fall within the definition of internet service provider where the service is provided by means of an agreement with the subscriber, even where this is oral or implicit.” But that “[the definition of internet service provider] may not apply to open access Wi-Fi networks where there is no payment from, and no agreement with, those making use of them. In those circumstances, the person making open access Wi-Fi available would themselves be a subscriber [and hence liable to receive CIR triggered notices and be recorded on the CIL]”³⁰

doubt, we recommend that Ofcom makes it explicit which Wi Fi providers (e.g. BT Openzone?) are in scope under the initial Code.

Question 4.1: Do you agree with the proposed content of CIRs? If not, what do you think should be included or excluded, providing supporting evidence in each case?

46. As Ofcom points out, the DEA specifies what information must be included in a CIR [§4.1]. Nevertheless, we believe it would be useful and transparent for Ofcom to explain why each item of information is to be included on CIRs within the Code [§4.3] (such that there is common understanding of the purpose of each item of information on CIRs).

47. On a point of detail, for the avoidance of doubt, can Ofcom clarify that “port number used to conduct apparent infringement” is the “source port number” rather than the destination port number.

48. We believe that, at a minimum, the level of information on the CIR must be no less than that required by the courts. We note that Ofcom observes that it “believes” this test is met (but does not explain on what basis that judgement is made).

49. We would suggest that Ofcom drafts the Code in such a fashion such that amendments to the list (including additions or deletions) can be made through a process that is acceptable to Code participants. In this way, there will be capability to ensure that the list can respond to the “experience” of running the scheme and any information which is found to be in practice unnecessary, is removed (or vice versa) subject to suitable change control.

³¹ And, of course, were mobile to be included subsequently, then mobile business models would also need to be considered, for example, in MVNO models where the MVNO was the ISP rather than the host network.

Question 4.2: Do you agree with our proposal to use a quality assurance approach to address the accuracy and robustness of evidence gathering? If you believe that an alternative approach would be more appropriate please explain, providing supporting evidence.

50. We believe that a formal accreditation process should be established rather than the self declaration process Ofcom proposes. We discuss our reasons for this in our response to Question 7.1.

Question 4.3: Do you agree that it is appropriate for Copyright Owners to be required to send CIRs within 10 working days of evidence being gathered? If not, what time period do you believe to be appropriate and why?

51. We agree with Ofcom that it is important that CIRs are issued to Qualifying ISPs in a timely fashion – such that notifications can be sent “whilst the iron is hot”. We support Ofcom’s proposal that CIRs must be sent within 10 working days – although, Ofcom uses the expression “[from] *evidence having been gathered*”. It is not clear whether this counts from the time of the alleged infringement or, for example, from the time the Copyright Owner receives the report from their sub contractors of such alleged infringement (for example, if the latter measure were used, and Copyright Owners only get reports in weekly batches, then it is possible that the CIR may reach an ISP some weeks after the date of the alleged infringement).

52. We note that Ofcom observes that “*We believe that there are cost benefits for both ISPs and Copyright Owners in having a standard format for CIRs and propose, in the first instance, that industry pursue agreement on such a format.*” [§4.9] We agree (and moreover, similar benefits may flow from common formats of CILs and other reporting elements, not just CIRs). However, it is not clear that there is a natural forum at which such a common format can be agreed. We would welcome Ofcom convening such a forum.

Question 5.1: Do you agree with our proposals for the treatment of invalid CIRs? If you favour an alternative approach, please provide supporting arguments.

53. We agree that there are likely to be circumstances in which ISPs will not be able to identify a subscriber or process a CIR. And we agree that the Code should make provision for such situations³².

54. And indeed, in this respect, we note that Ofcom suggests that mobile providers (if brought into scope) should be under an obligation to obtain pre-pay subscriber details. This is a significant change of Ofcom and indeed Government Policy. Indeed, Government and Ofcom have previously recognised the significant benefits which pre-pay have brought to consumers (and the UK more generally) and it is generally recognised that the option for anonymity is an attraction for many. Furthermore, the availability of anonymous pre-pay enables the UK to meet the relevant requirements of the Privacy and Electronic Communications Regulations in respect of facilities for anonymity (see ICO assessment on the regulations). We recommend Ofcom makes clear that pre-pay registration (indeed any subscriber registration, including for Wi-Fi) is not a requirement of the Code.

55. We agree that in these circumstances an ISP should notify the relevant Copyright Owner within a certain period (whether it needs to be 10 working days as Ofcom proposals is not clear). Nonetheless we agree a set of “rejection codes” should be agreed. Again, as above, we are not clear that a natural forum exists for agreeing such codes.

³² However, there can be no obligation on an ISP to obtain data that it does not possess in the first instance. Accordingly, a specific exemption to this effect should be included to such effect, i.e. without the “reasonably practicable” qualification – which suggests that ISPs are under a duty to actively seek subscriber registration and Copyright Owners are obliged to pay for such activity. If Ofcom interprets the DEA as requiring a “subscriber registration” scheme to be implemented, then this is a significant issue and something which will require greater discussion and scrutiny.

Question 5.2: Do you agree with our proposal to use a quality assurance approach to address the accuracy and robustness of subscriber identification? If not, please give reasons. If you believe that an alternative approach would be more appropriate please explain, providing supporting evidence.

56. We believe that a formal accreditation process should be established rather than the self declaration process Ofcom proposes. We discuss our reasons for this in our response to Question 7.1.

Question 5.3: Do you agree with our proposals for the notification process? If not, please give reasons. If you favour an alternative approach, please provide supporting arguments.

57. On balance, we support the “time-based” approach Ofcom proposes³³ [§5.11]. We recommend that the practical aspects for the retention period for CIRs is given careful consideration – i.e. does the CIR count carry over from “notification period to notification period” or is the clock reset every year if a 3rd and final notice has not been sent?

58. In addition, how quickly should a subscriber be added to the CIL after the third and final notification is sent?

³³ We [Ofcom] propose a time-based process. We would see the notification process as working as follows:

- the first CIR would trigger the first notification;
- the second notification would be triggered by the first CIR received on or after one month from the date of the first notification. This notification would provide details of the “trigger” CIR and also refer to any accumulated CIRs; and
- the third and final notification would be triggered by the first CIR received on or after one month from the date of the second notification. This notification would provide details of the “trigger” CIR and also refer to any accumulated CIRs. The subscriber would be added to the copyright infringement list at this point. 5.12 We also propose that those on a copyright infringement list should be sent, in the event that further CIRs are issued against their account, update notifications no more than once every three calendar months. We believe that this would give effect to the right of subscribers to appeal against CIRs.

Question 5.4: Do you believe we should add any additional requirements into the draft code for the content of the notifications? If so, can you provide evidence as to the benefits of adding those proposed additional requirements? Do you have any comments on the draft illustrative notification (cover letters and information sheet) in Annex 6?

59. We note the illustrative notifications annexed and that the text includes: “[We have also received *x* further CIRs against your account. If you would like information on these additional CIRs (including details of the copyright owner making them), then please contact us on #####.]” We recommend a list of other CIRs be appended to notifications rather than invite customers to contact their ISP.

Question 6.1: Do you agree with the threshold we are proposing? Do you agree with the frequency with which Copyright Owners may make requests? If not, please provide reasons. If you favour an alternative approach, please provide supporting evidence for that approach.

60. We note that Ofcom proposes the threshold for inclusion on a Copyright Infringement List (CIL) and for the Copyright Owner making a request for such a list is that the ISP has sent the subscriber a Third Notification within the previous 12 months and that the Copyright Owner requesting the list has sent at least one CIR relating to that subscriber within the previous 12 months [§6.4].

61. We welcome that Ofcom seeks to be clear as to what should be reported on the CIL³⁴. As with CIRs, we believe that it would be beneficial for there to be agreement on the format of CILs. However, currently we are not aware of any forum in which this can be agreed. Accordingly, we suggest Ofcom give some thought to facilitate this (see earlier comments) or provide some proposals.

62. In principle, we agree that it is generally appropriate to limit the frequency at which a CIL can be requested by Copyright Owners and we note Ofcom’s

³⁴ “Therefore, although a number of CIRs may have been submitted by differing Copyright Owners in relation to a subscriber, the list (in anonymised form) that is disclosed to one Copyright Owner will only contain details of the CIRs submitted by that Copyright Owner.” [§6.5]

proposal that the frequency should be once within any period of 3 months. Since the CIL is meant to help Copyright Owners target litigation against those Subscribers who appear to be the most persistent offenders, if Copyright Owners wished to pursue an offender without delay, they could use the alternative route of a Court Order. It would of course be perverse if the Code actually slowed down Copyright Owners' ability to pursue individuals through the courts if speed were of essence.

63. We also note that the intent is that the CIL passed to a Copyright Owner be in "anonymised form" in respect of subscribers [§6.3]. As we explain elsewhere, an ISP cannot be responsible should the Copyright Owner hold additional data from which it is possible to identify the Subscriber on the CIL.

64. We believe that it is essential the Information Commissioner confirms that he is satisfied with the DEA measures in good time before the processes are finalised and costs incurred. We would welcome Ofcom's confirmation that this is being addressed.

Question 7.1: Do you agree with Ofcom's approach to subscriber appeals in the Code? If not, please provide reasons. If you would like to propose an alternative approach, please provide supporting evidence on the benefits of that approach.

65. We believe there must be a fair, robust and independent subscriber appeals mechanism established under the Code. We note the arrangements Ofcom proposes. Whilst, the detailed Appeal Procedures are for the Appeals body to establish, the procedures are subject to Ofcom approval and accordingly Ofcom can set some parameters. Accordingly, we believe time spent now by Ofcom considering the parameters is time well spent. We have a number of general observations.

66. It is unclear as yet as to the reaction of Subscribers to the DEA approach to tackling Copyright Infringement. As such the demands made on the Appeals process are uncertain, but it cannot be discounted that there will be a significant volume of Appeals made (not least perhaps as protest against the DEA

measures). Accordingly, we believe that the Appeals procedure must in so far as is possible afford a simple and straightforward Appeals process. Grounds for appeal (and determinations) must be on objective grounds and not subjective grounds.

67. The Appeals Body must be satisfied with the Quality Assurance process. We believe that it will not serve anyone well for there to be room for the Appeals Body and Ofcom to have differing views about the quality of Copyright Owner and ISP processes generating CIRs, identifying subscribers and making notifications etc under the Code. At the moment, there is this possibility, since it is Ofcom which receives the Quality Assurance reports from Copyright Owners and ISPs and it is Ofcom which retains the power to direct a Copyright Owner or ISP to take action in respect of its evidence gathering procedures. Accordingly, we believe that the option of a formal accreditation process for Copyright Owners and ISPs has some advantages in that it would mean that the Appeals Body would simply establish objectively that an “*act or omission*” was outside of such accreditation parameters. Under the current arrangements, the Appeals Body may determine, notwithstanding that an ISPs processes were established in good faith under its Quality Assurance arrangements, that changes should be made or that compensation should be awarded [§7.27.2]. Indeed, it is also possible that a Subscriber might seek to pursue an ISP under the Data Protection Act (unless the Copyright Owner is determined to be the Controller of the relevant processing whereupon it will be responsible to the Subscriber). This is another reason why we consider an accreditation standard would be advantageous since it would provide the Information Commissioner the opportunity to provide guidance as to whether such a standard met fair processing requirements^{35 36}.

68. Remedies – we note that it is proposed that the Appeals Body has powers to award compensation [§7.27.2] along with Ofcom’s own powers of the same under

³⁵ And indeed any other relevant guidance, for example, in respect of CILs, whilst in layman’s terms the data may be described as “anonymous”, we believe it is important that the Information Commissioner confirms whether, in reality, the information is likely to be considered sufficiently anonymised so as to cease to be “personal data”. This will be important since it will determine whether or not the information is subject to the Data Protection Act.

³⁶ For example, how will the Appeals Body deal with a Subscriber who points to the Information Commissioner’s Guidance which explains that in cases where there are shared users of an IP address (in one household for example), this may make it impossible to determine to whom the data relates?

[§9.11 (c)] of the draft Code (as well as facing exposure under the Data Protection Act as mentioned above). Furthermore, since ISPs are being obliged by the DEA to implement measures, rather than at their own free will, we see no reason why the Appeals Body should determine compensation against an ISP that has acted in good faith, particularly, since, if an ISP has an aggrieved Subscriber on its hands it is incentivised to deal fairly with that Subscriber in any event. If there is any compensation to be paid, it must be met by Copyright Owners. We would also point out that any costs to be re-imbursed under §7.27.3 should be met by the party at fault (the draft does not make this clear) and that as the draft Code makes clear, such costs must be limited to reasonable costs capped to a reasonable level.

69. Transparency of Appeals – will the Appeals Body be under a duty to publish appeals decisions, whilst of course, preserving Subscriber anonymity. Or in aggregated form?
70. Appeals on documentation - We believe that the procedures should, in so far as is possible, provide for Appeals to be decided on the papers presented and hence that an Oral hearing should only be called in exceptional circumstances.
71. Anonymity – we support the intent of section §7.7 of the draft Code to preserve subscriber anonymity. We note that the Code requires ISPs (and the Appeals Body) to ensure “*to the greatest extent possible*” that the identity of the Subscriber making the appeal is not disclosed directly or indirectly to the relevant Copyright Owner without the written consent of the Subscriber. Clearly, there must be a test of reasonableness here. For example, an ISP cannot be held responsible if the Copyright Owner is able to deduce the identity of the Subscriber from associating other data with that provided by the ISP (publicised examples of a [journalist] legitimately managing to establish the identity of an ISP customer from published anonymous surfing logs demonstrate that information provided in anonymised form can still lead to an individual’s identity being determined). Does “*to the greatest extent possible*” mean that an ISP needs to make specific arrangements on a case by case basis with the Appeals Body to preserve the identity of the Subscriber (such as, for example, encryption of correspondence etc?). We use these illustrations merely to seek to establish the test Ofcom is

seeking to establish here. Is Ofcom seeking to establish something more than “reasonableness”?

72. Grounds for Appeal – We note that the draft Code provides that grounds for appeal include “*that an act or omission by a Qualifying ISP or Qualifying Copyright Owner amounts to a contravention of the Code or of an obligation regulated by the Code; or any other ground on which a Subscriber chooses to rely as to why the act or omission should not have occurred.*” [§7.12.4] and [7§.12.5]. The meaning of these grounds could usefully be clarified by Ofcom. For example, that any act or omission must be directly related to the case in question.

73. Since §7.12 does not apparently provide for an exhaustive list of grounds for appeal, then §7.24 should not be restricted to the list set out in §7.12 (i.e. §7.24 must presumably be available for all grounds, not just those listed in §7.12). Indeed, given that enforcement of the Code is clearly provided for under section 9 of the draft Code and is the responsibility of Ofcom, we are unclear why the above aspects are included as grounds for a Subscriber Appeal.

Question 8.1: Do you agree with Ofcom’s approach to administration, enforcement, dispute resolution and information gathering in the Code? If not, please provide reasons. If you favour an alternative approach, please provide supporting evidence on the benefits of that approach.

74. We note the arrangements Ofcom proposes. In dealing with enforcements (and disputes), we believe that Ofcom should explain where its proposals differ from those embedded in the Communications Act for dealing with Enforcement of General Conditions (section 94 and 95) and for setting of Penalties (section 96) (and the relevant provisions for disputes). For example:

- i) At [§9.6 (e)] of the draft Code, Ofcom states that a Notice of Enforcement will include a “*summary of the basis*” for the alleged infringement. We are unclear why only a “summary” is proposed (the word is not included in the relevant section of the Communications Act) – a party will wish to be provided with the full basis of the allegation

against it such that it can make informed representations - and hence we suggest that “summary” is deleted.

- ii) The draft Code refers to a “Notice of Enforcement”, “Draft Enforcement Notification” and “Final Enforcement Notification”. We would suggest that for clarity, the first of these “Notice of Enforcement” is called “Notice of Code Contravention”.
- iii) We would suggest that §9.22 of the Draft Code is amended to reflect that any penalty must be (a) appropriate; and (b) proportionate to the contravention in respect of which it is imposed – as per section 97 (1) of the Communications Act.
- iv) The Communications Act provides for the party in breach to remedy the consequences of the notified contravention. No such option appears available under the draft Code.

75. We would also suggest that Ofcom clarifies how §9.23 of the Draft Code applies where, for example, multiple CIRs are involved.

76. Furthermore, Ofcom should make clear the route by which Ofcom enforcement/ dispute directions can be appealed.

Telefónica O2 UK Limited

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