Online Infringement of copyright and the Digital Economy Act 2010

Draft Initial Obligations Code

Ofcom Consultation on

Interim Statement and Notice of a proposal to make an Order

BT response

27th July 2012

Executive Summary

BT is pleased to offer a response on this Consultation. This is a new and complex area of regulation and the Consultation on the Initial Obligations Code in May 2010 attracted a huge number of responses from a variety of stakeholders. In common with many other respondents, BT raised a large number of questions, many of which remain outstanding.

The expected Ofcom follow-up from May 2010 which may have addressed some of them – a consultation on "Enforcement of the code and the handling of industry disputes" and clarification of the remit, and operation of the appeals system more generally - has not materialised.

BT needs to be equipped with sufficient understanding of the obligations placed on it, its potential liabilities and exposure to risks, and that the regime will be workable and fair so that we can confidently proceed to develop the systems needed to implement and comply with the DEA regime in a timely and cost-effective way.

It is with this objective in mind that we seek answers to and clarifications for those outstanding issues, as well as for many issues raised by the proposed June 2012 draft Code and the explanations and interpretations provided by Ofcom in its Interim Statement.

We had expected that the revised Initial Obligations Code would contain more detail to fill-out the requirements of the Digital Economy Act (DEA). In fact, the reverse appears to have happened, notably on aspects such as some timelines, discretion of ISPs and subscribers and data protection.

On some aspects, interpretation and guidance of DEA and a preferred Ofcom approach outside of the DEA / Code has been indicated. As these are clearly not definitive, they introduce a further layer of complexity. BT will need to understand what its obligations are under the DEA / Code and how these would be appealed and enforced. In addition it will also need to understand the consequences of adopting practices which are suggested but are not imposed under the Code. Overall, then, it appears that BT faces an increased burden of risk in implementing the DEA under the revised proposals.

In the circumstances, the one month period to respond is inadequate to address the range of issues that the introduction of an entirely new regime for our industry raises. In this response, we have focused on issues that we have identified in the limited time available as clear concerns. There will no doubt be others which we identify beyond the response deadline.

We welcome continuing engagement with Ofcom to address these and other issues which are outstanding or may otherwise arise in the course of implementation so that we can obtain the clarity we need to fully understand what is required of BT.

Some of the changes and clarifications which Ofcom has made which we welcome include:

- the decision that providers of public Wi-Fi services are now to be treated in line with mobile internet providers, and are outside the scope of the Initial Obligations.
- the removal of Ofcom's general power to prescribe the content of ISPs' notification letters to customers.

- that ISPs notification obligations apply only to current subscribers, and for who they hold addresses.

The issues on which we have concerns and, or seek clarification include:

- Wi-fi – We want further clarity on exactly what Ofcom means when referring to "open" access. There are numerous types of wi-fi access provided by subscribers, for example Wi-Fi access by businesses in reception areas, and BT is concerned by the potential burdens, risks, viability and legality of adopting Ofcom's suggested treatment.
- Appeals - The appeals body proposed and associated appeals process requires a lot more detail from Ofcom to enable ISPs to understand the timing, process and cost implications. BT does not agree with Ofcom's proposal for the appeals body to decide if "open" Wi-Fi networks are in scope.
- Categorising customers - ISPs being responsible for, and the consequences of, determining if a customer is another "communications provider" and, or "ISP". The picture is not at all clear-cut in the case of either "public intermediaries" or of customers who run businesses and may provide internet access (free or otherwise).
- Non-payment of fees - ISPs receiving copyright infringement reports from copyright owners who have not paid notification fees. We believe we should not have to receive these in the first place where such fees are not paid in full.
- IP address matching - The Code provides that inaccuracy by ISPs will be treated as a material breach of the Code, and the ISP concerned would be subject to enforcement action. There is no mention of copyright owners being in material breach in respect of the accuracy or otherwise of their evidence gathering. There should be a consistent approach to such matters in respect of all stakeholders' obligations under the Code.

Costs

We will address the establishment of a specific framework for setting fees which allows for appropriate recovery of costs from rights holders in our response to the separate consultation. In this response we wish to flag:

- that there is also a need for mechanisms to be put in place to avoid ISPs incurring unnecessary additional costs by holding personal information in CIRs where there is no obligation to then process such reports;
- if there are no such mechanisms, it will simply add to the risks that ISPs will face of under-recovery of costs incurred for establishing systems and processing CIRs, and also for supporting the appeals process.

We comment in further detail on these and other points in the remainder of this response. The first set of comments are structured to make our points in the order that topics are raised in the bullet points in Ofcom's Executive Summary at paragraph 1.9 of the Interim Statement "Amendments to our previous proposals", with cross-references to some but not all relevant parts of the Statement. They are followed by our comments relating to changes and outstanding issues from May 2010 which are not picked-up in paragraph 1.9.

Comments on Ofcom's amendments to their previous proposals *(outlined in paragraph 1.9 of Ofcom's Interim statement)*

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1. ***"We have amended the definition of the internet access services and internet access providers that are within scope of the Code to clarify that only providers of fixed internet access supplying services over more than 400,000 broadband-enabled lines will be subject to the initial obligations. Internet access providers which do not meet these criteria (for example, mobile network operators and providers of Wi-Fi services) are outside the scope of the Code. This is on the basis that costs of participation would be disproportionately high compared to the expected low reduction in overall levels of online copyright infringement that participation would bring"***

BT welcomes Ofcom's decision to remove providers of public Wi-Fi access from scope however, Ofcom should clearly state the extent of this. For example, "open" Wi-Fi networks are referred to in para 7.46. Ofcom should define what constitutes "open" networks and how these are different from public Wi-Fi. For example is Wi-Fi provision in a reception area by a business public Wi-Fi or "open" access, and is this covered by the Code?

Para 7.46 - It should not be up to the appeals body to decide if "open" Wi-Fi networks are in scope when Ofcom has determined within the Code that public Wi-Fi has been excluded. It is, therefore, difficult to understand why a decision has not been made to also exclude these from the scope. On what basis would an appeals body determine such issues if Ofcom cannot make the decision at this stage?

Para A5.46 initially refers to CIRs which are rejected under para 18(d) of the Code and then later refers to para 8 (2) (b) of the Code which is about CIRs rejected under para 18(b) of the Code. Which of the two is the proposed change intended to apply to?

In any event, it appears to be a completely new obligation on qualifying ISPs to notify qualifying copyright owners of the identity of a downstream ISP in cases where a CIR has been provided by that copyright owner but the IP address relates to a downstream ISP. It requires qualifying ISPs to disclose what could be considered to be confidential and sometimes personal data to a third party, the copyright owner.

We do not believe that the DEA gives Ofcom the power to introduce this new obligation on ISPs and no justification of its aims, necessity and benefits or impact assessment including of the potential for breaches of confidentiality has been provided. Copyright owners themselves would be able to identify the downstream ISP from the range of IP addresses in some circumstances.

DEA interpretation-application of "ISP","subscriber","communications provider"

Determining who is and who is not an ISP is fraught with difficulty. Para 18 and A5.56 places the onus on the ISP to make a decision about a customer which could both be challenged in the appeals process and breach a customer's confidentiality if we get it wrong (see above) .

This puts a qualifying ISP in an invidious position - on the one hand, it would not want to upset a customer by insisting the customer is a "subscriber" (and not an

"ISP" or a "communications provider"), but on the other hand, it would not want to incur liability from breach of its obligations to send notifications to subscribers.

Paras 5.29, 5.30 and 5.36 - Ofcom expects BT to clarify the process on how we identify a customer is a "subscriber" and not an "ISP" or a "communications provider". We need clarification on how we are expected to do this especially for SMEs and other business customers where their use is not obvious to BT.

If BT gets a CIR with an IP address of another ISP, perhaps where BT provides wholesale products and services, then it may be clear that they will not be sent notifications as a subscriber but it may be very difficult to determine the status of other business customers.

Ofcom has advised that it does not believe it has powers to set any criteria but BT would expect more detailed guidance from Ofcom on this issue to enable it (and other ISPs) to comply with their obligations under the Code and the DEA.

2. ***"We have added in paragraph 2 of the Code a further qualification provision, that where all fixed ISPs within a Group (as defined in section 1261 of the Companies Act 2006) provide internet access services over more than 400,000 broadband-enabled lines in aggregate, they will each be qualifying ISPs. This removes ISPs' ability to avoid the application of the Code by making changes to their corporate structure;"***

Group extension

We are not convinced that the extension is warranted. If it is retained, further change is needed to make sure that an ISP in scope will have time to comply with the Code where it makes an acquisition that brings a subsidiary into the Group.

Time will be needed to address the considerable system development, interworking and integration issues that inevitably arise. There will be no "DEA evasion" motives attributable to qualifying ISPs in this situation and copyright owners will not have made any contribution relevant to the acquired ISP.

For niche businesses acquired to address a particular market segment, we have concerns that BT and the niche business will suffer competitive disadvantages if competitors of the niche business do not need to comply with the Code.

3. ***"In the May 2010 consultation we said that copyright owners must detail to Ofcom the processes that they have put in place to audit their evidence-gathering systems. We have now specified that copyright owners will be required to have their procedures approved by Ofcom before they can send any reports of apparent copyright infringement to ISPs. We expect that a copyright owner will be well placed to secure approval from Ofcom if it adopts evidence-gathering procedures that comply with a publicly-available specification which Ofcom is prepared to sponsor."***

"The Code now clarifies the standard for obtaining evidence of copyright infringement. It now specifies that a copyright owner may only send a CIR if it has gathered evidence in accordance with the approved procedures which gives reasonable grounds to believe that:

- ***a subscriber to an internet access service has infringed the owner's copyright by means of the service; or***
- ***has allowed another person to use that service and that person has infringed the owner's copyright by means of that service."***

Copyright owners' "evidence", effective scrutiny and enforcement

We welcome the greater degree of oversight that Ofcom is proposing to take on this issue. By providing greater understanding of what the copyright owners' detection techniques are capable of showing it should significantly improve the credibility and confidence of the DEA regime for everyone. BT does not intend to be involved in the process except in relation to any issue which would impact on its own capability to provide accurate address matching against the IP addresses submitted to it by copyright owners.

We consider that Ofcom should treat the parties consistently so that copyright owners' failure to comply with the Code standards on gathering evidence should also be treated as material breaches of the Code, with an indication that Ofcom would pursue enforcement action. The impact of these inaccuracies on an 'innocent' subscriber could be no less than and perhaps more detrimental than any inaccurate IP address matching by a Qualifying ISP.

If the techniques result in batches of inaccurate notices being sent to our subscribers, what does Ofcom intend should be the consequence? BT's customers should not be subjected to such notices and BT should not be at risk of enforcement action from either sending them out or deciding not to do so.

Extension beyond P2P and real-time detection?

We understand that the changes proposed in Para 4.16 to mean that BT may be asked to handle CIRs with IP addresses that relate to suspected online infringement activities in addition to detection and notifications of suspected P2P online infringement.

If they entail different detection techniques, then in addition to undergoing rigorous scrutiny for robustness and accuracy under the proposed Ofcom approval process, BT will need to be made aware of any aspect which may affect the accuracy of BT's IP address matching so it can manage the obligations placed on it for this activity.

Will there be some reports in which the time between the date of suspected infringement and time of detection will be longer than we previously assumed in the May 2010 consultation? If so it will have implications for the whole CIR processing timetable and may prejudice fairness to a subscriber (BT's response to the May 2010 consultation indicated that decoupling time of infringement from time of collection of evidence would result in problems).

4. ***"ISPs are not required to have their subscriber identification processes approved by Ofcom, though failure to comply with the requirement for accurate address matching is likely to be considered a material breach of the Code, triggering enforcement action and a fine where appropriate. We believe that ISPs have clear incentives to ensure their processes are robust in order to avoid reputational damage with their subscribers. However, Ofcom also***

proposes to sponsor a specification for matching IP addresses to individual subscribers which we would encourage ISPs to adopt on a voluntary basis."

ISPs' accuracy of IP address matching – expectations, practicalities

Ofcom states that failure to comply with the requirement for accurate address matching is likely to be considered a material breach of the Code, triggering enforcement action and a fine where appropriate. BT and other ISPs have already explained the problems of matching IP addresses and the fact that 100% accuracy is not going to be achievable. BT would welcome specific guidance from Ofcom (similar to that provided by the ICO in its manual for the Privacy and Electronic Communications Regulations) clarifying in what circumstances enforcement action would be brought.

We need to be clear that ISPs will not be expected to undertake activities to amend their networks to provide a greater level of "accurate matching" than currently exists and which suffices to meet their own business needs and the needs of law enforcement authorities.

That being the case, we are not clear what benefit a specification would bring and envisage that its creation will entail increases in costs and timetable for implementation. Security and confidentiality issues remain to be resolved.

5. ***"In the May 2010 consultation, we proposed that a copyright owner could only participate in the notification scheme if it had paid the fees due to ISPs and Ofcom under the cost-sharing arrangements made by the Secretary of State. The Code no longer makes advance payment of these fees a qualifying condition which a copyright owner must satisfy in order to be able to send CIRs to an ISP. In the interests of improving certainty as to the identity of copyright owners which are participating in the scheme, it now provides that until the copyright owner pays the fees due to the ISP in full, the ISP is not required to send notifications to its subscribers in relation to that copyright owner's CIRs. A failure to pay the fees due to Ofcom will not impede the processing of CIRs but is likely to lead to enforcement action by Ofcom against the copyright owner for recovery of the amount owed."***

Payment of fees by copyright owners

Page 4, last bullet: Until a copyright owner pays the fees due to an ISP in full the ISP is not required to send notifications to its subscribers in relation to that copyright owner's CIRs. Para 3.35 states "the qualifying ISP is under no obligation to process these until it receives payment of the relevant notification fees in full".

CIRs should not be sent to ISPs until notification fees are paid to ISPs in full as ISPs would not want any obligation to process them by matching IP addresses to subscribers, or even to simply retain the data until payment. What would be the purpose of providing CIRs to ISPs if there is no obligation to do anything with them until all fees are paid?

ISPs would not know what to do with CIRs provided with no obligation to process, yet in the hands of an ISP, these CIRs could be considered to be personal information. Simply storing them could amount to processing under the Data Protection Act even if the ISP had not actively matched the subscriber.

We, therefore, seek an explicit provision which prohibits copyright owners from sending CIRs for processing under the DEA until requisite payment has been made.

More generally, we will be separately responding to the consultation on fees and would like to discuss and clarify if the changes proposed in terms of fees paid to ISPs may impact on the risk of under recovery of an appropriate share of the costs of building and operating the system sized to respond to copyright owners estimated volumes.

6. ***"We initially proposed that CIRs must be sent within ten days of the evidence of infringement being gathered. To bring this into line with the DEA provisions, the Code now requires that CIRs must be sent within one month of the evidence being gathered. We also require that CIRs are submitted in an electronic format and using a standard form. We have also removed provisions in the May 2010 consultation draft requiring notifications to take account of guidance that Ofcom may issue in relation to the form and content of such notifications and to comply with any directions that Ofcom may make. This is on the grounds that it is doubtful that this is within the scope of the powers conferred on Ofcom by the DEA provisions;***

• Similarly, in the May 2010 consultation we proposed that ISPs should have ten days from receipt of a CIR to send a notification to the relevant subscriber. We have now altered this to one month to bring the Code into line with the DEA provisions; "

CIR - timing for sending to ISP and ISP to process

ISPs now have 30 days (or one month) from receiving a CIR to send out a notification (and the copyright owners have 30 days from the evidence being gathered to send in a CIR to an ISP). We welcome the 30 days as we have to do a considerable amount of work on receipt of a CIR to ensure it complies with the Code and we can subscriber match the IP address before determining whether a notification needs to be sent.

Whilst we recognise the constraint on Ofcom imposing a different period from that specified in the DEA, we would, nonetheless, welcome copyright owners promptly providing CIRs once evidence has been gathered. Any delay up to the thirty day limit could result in a notification being sent to a subscriber up to two months after the alleged infringement took place. This, in turn, could prejudice that subscriber's ability to deal appropriately with such a notification (including bringing an appeal). For example, the subscriber may not be able to remember who might have been using his broadband line at the time the alleged infringement occurred.

7. ***"In the light of responses to the May 2010 consultation we have removed ISPs' discretion under the Code to reject CIRs as invalid based upon their "reasonable opinion" on the basis that this provides an overly broad discretion;"***

CIR – invalidity/ rejection grounds, record-keeping requirements

Ofcom has removed specific wording which would allow for ISPs to reject CIRs as invalid based on "reasonable opinion" as being "overly broad". Para 18 (e) of the draft Code provides an exception if the ISP has not been able to identify the subscriber (and it is not reasonably practicable to do so).

Clarity is sought of the scenario where a possible match is made of two or more subscribers (e.g. where a CIR relates to a time close to re-allocation of an IP address) and whether this section would give the ISP an exemption to the notification requirements. The May 2010 draft Code wording, para 4.3, 3rd bullet:

" the Subscriber using the IP address at the time of the alleged infringement cannot reliably be identified "

provided more certainty and we suggest that this is re-introduced to cover this concern.

8. ***Paragraph 16 (1) (h) of the Code 'advice or information enabling the subscriber to obtain advice, about steps that the subscriber can take to protect an internet access service from unauthorised use' and paragraph 16 (2) which provides 'for the purposes of subparagraph (1) (h) a qualifying ISP must take into account the suitability of different protection for fixed subscribers in different circumstances'.***

Given the obligation 'must' used in sub para 16 (2), Ofcom is asked to provide more guidance as to exactly what they have in mind here. For example, is this designed to ensure that corporate subscribers are shown different solutions to residential subscribers? Given we are not talking about social telephony products here, what are the criteria we have to take account of?

Also, what are the implications for the appeals process which Ofcom refers to in para 7.44 in respect of the information we have provided to subscribers in the notifications we have made?

9. ***"We have added a further requirement that notifications must state the number of CIRs held by the qualifying ISP at the time of sending the notification which relate to IP addresses allocated to the subscriber. This is intended to provide more complete information to the subscriber about allegations of infringement that have been made to their ISP and help them assess whether to seek copies of these additional CIRs;"***

CIR – information to be kept by ISP, disclosure of details under Data Protection rules

A new requirement has been added for notifications to customers to state the number of CIRs held to "help them assess whether to seek copies of these additional CIRs". CIRs provided by copyright owners would need to go through a number of "gates" before being attributed to a particular subscriber. Once attributed, they will sit on that subscriber's record; some being notified; others not.

In any event the subscriber would have the ability under a DSAR "Data Subject Access Request" made under the Data Protection Act to ask for all the personal information BT holds which would include these CIR records. However the timing of the DSAR process (40 days to comply with a request) would not allow for the subscriber to bring an appeal within 20 days.

Therefore we anticipate that a separate database would need to be created to record this information and separate procedures from the DSAR process to provide

subscribers with this information. This will need to be included as part of the technical specification for the process and we will need to include the cost of this in the costs model. We would not anticipate a subscriber having to pay for this information.

10. ***"We have introduced a requirement that the gap between the date on which the previous notification was sent and the date on which the evidence was gathered in relation to a subsequent infringement which triggers the next notification must be at least 20 days. This is to give the subscriber an opportunity to modify their behaviour (or secure their connection) before a subsequent notification is sent;"***

Notifications to customer – 20 day gap

We agree with the introduction of a period in which the customer can react, deal with a notification and become "educated". However, attributing all the subsequent CIRs received from copyright owners in this period which relate to such a subscriber, and having them showing on any Copyright Infringement List (CIL), undermines the rationale for the gap and may well be a source of unfairness.

We seek clarity more generally on the proposed changes for ISPs to notify subscribers and copyright owners of numbers of CIRs (some may trigger notifications to subscribers and others may not) to understand their intent and their implications for our customers, inter-relation with CIL and the systems we may need to build, e.g. database and system partition requirements.

11. ***"Previously we proposed that copyright owners would only be able to request a copyright infringement list once within any three-month period, and that ISPs would have five days to provide the list. On the basis of submissions from copyright owners and ISPs we have now decided that copyright owners can request a list every month, and ISPs will have ten working days to provide it;"***

CIL – intended recipient and information to be provided and withheld

Paragraph 6.30 provides that copyright owners should not have CILs including CIRs that relate to other copyright owners.

In BT's response to the May 2010 consultation, we indicated that the system and design issues for CIL would be complex and we also anticipate that disclosure even of "anonymised" customer information will be a significant driver for customer enquiries and resulting costs for ISPs (as well as being the source of continuing consumer/ citizen debate).

In the circumstances, it is essential that Ofcom provides additional clarity and guidance on this issue so that everyone can proceed with a common understanding of the precise intention here. This will minimise from the outset the potential for delays in implementation or for appeals (subscriber and industry disputes) to arise. The nub of further clarification is the application of the definition of "copyright owner" for the purpose of receiving CILs, i.e. is a qualifying ISP obliged to treat a collective rights society or other agent on behalf of copyright owners as a "copyright owner" in its own right and entitled to see CIRs on a CIL which they have provided on behalf of their clients?

We want to ensure that we implement systems that comply both with the intended interpretation of this requirement to make relevant data available to copyright owners and that they are designed with the right measures in place to prevent inappropriate data sharing.

It is difficult to proceed with specifying, scaling and designing CIR and CIL systems in the confidence that they will be compliant with DEA/Code and data protection requirements if additional clarity is not forthcoming.

12. ***"In the May 2010 consultation we did not specify the period of time that a subscriber has to make an appeal to the appeals body. We have now decided that this period will be 20 working days from the date of receipt of a notification or, in the absence of a notification, the date on which the subscriber became aware of the appealable act or omission. This is to provide a balance between the desirability of allowing subscribers a reasonable time to appeal and the certainty that comes from applying a reasonable limit;***

We have amended the provision of the Code which specified that oral hearings should only be held in exceptional circumstances to reflect our view that this is a matter which is more appropriately dealt with in the appeals body's procedural rules;

• We have introduced a requirement that a CIR must specify the time at which the evidence suggests that an infringement took place. This is in addition to the previous requirement that the CIR specify the time at which the evidence was gathered. This addition is in support of the requirement in the DEA provisions that the appeals body must find in favour of the subscriber unless the copyright owner shows that the apparent infringement was an infringement of copyright and the report relates to the subscriber's IP address at the time of that infringement;

• On the instruction of Government we have removed the ability for subscribers to appeal on any other ground on which they choose to rely; and

• On the instruction of Government we have removed the requirement for ISPs and copyright owners to provide a statement showing how their processes and systems are compliant with the Data Protection Act."

Appeals – Process, timing, cost implications

ISPs will need clarity and guidance as the appeals system is developed to deal with the numerous complex system, database and record-keeping and data retention challenges which we anticipate.

For example, we would like clarity to be able to understand the requirements which may arise from various stakeholders such as, Ofcom, the Appeals Body, subscribers and potentially copyright owners requesting evidence to enable them to bring an appeal in the first place and to properly deal with such appeals. Clarity is needed so we can put appropriate systems in place to comply with and understand the approach which will be taken on enforcement.

These include issues relating to handling, retention and disclosure of:

a) CIR - how the process for appeals against CIRs which do not result in notification letters will work in practice; the impact of successful appeals (Para 7.42) and clarification that ISPs must continue to log CIRs against a

subscriber unless the appeals body orders removal as a remedy in a successful appeal.

b) CIL - Para 6.29 states thatif a subscriber is on a CIL they remain on it for 12 months after the last Notification is received. Therefore if no new Notification is sent to a subscriber is the data to be deleted? Does this give ISPs the time limit for holding the data? The provisions about this are very complex and could do with simplification and clarification.

The interaction of the Code and the subscriber fee structure means that there are incentives on them which pull in opposite directions. On the one hand, to appeal all relevant CIRs and CIL in one go and avoid multiple appeal fees for multiple notices, whereas Code clause 38 (2) pulls in the opposite direction.

Comments on other outstanding issues

The following provides our comments on the other issues which are not specifically referable to para 1.9 of the Statement.

1. Appeal system

Much more clarity is needed on what aspects ISPs will be expected to provide information on, liability for fees (to subscribers?), rationale and approach to compensation. In addition to the point raised under bullet 11 on page 4, more clarity about "reasonable steps" information provided in customer notifications and their implications in appeals.

Guidance is required on what "reasonable compensation" an ISP may be expected to pay. The most likely scenario that could arise is inaccurate address matching which leads to a double jeopardy as ISPs can be fined by Ofcom for inaccurate address matching.

2. Consistency with Ofcom's powers under Communications Act 2003

We wish to clarify consistency and interpretation issues with the approach proposed for DEA and that applicable under Comms Act on aspects such as S135 Information gathering and enforcement procedure. Is the departure from other Comms Act practice by removal of draft enforcement notice stage justified? Is there any precedent for broader Comms Act application? What will Ofcom's approach to exercise of its powers (including enforcement) be against copyright owners? We do not understand what the constraints, if any, are which may lead to differences compared to exercise of powers and discretion in relation to ISPs.

3. Indemnities – from Copyright Owner to ISP

Para 9.32: Ofcom should reconsider its position on indemnities. If the Code requires ISPs to fulfil CIR and CIL obligations even in cases where there are, e.g. problems with the accuracy of evidence gathered by copyright owners or data protection problems, BT may be exposed to claims and liabilities from processing data and sending out notifications. We seek clarity on how will BT be protected from such exposures under the Code. If there is no clear mechanism that BT can rely on in scenarios such as these, then it is fair and proportionate to provide for indemnities to ISPs in the Code.

4. Technical Measures

The intention to look at Technical Measures as a separate exercise from the Initial Obligations Code is clearly conveyed in the Statement and we would expect that it would entail new consultation(s) with no truncated periods for responses and a new Code.

It appears to us that the DEA requires that any threshold for a "relevant subscriber" fixed under the Code at a single CIR will have to be carried over to any "Technical Measures" regime, i.e. the Code and Technical Measures cannot be fully decoupled as conveyed by the Statement. Does Ofcom agree? If so, is Ofcom satisfied that its conclusions in para 6.33 are balanced and proportionate?

5. Changes to Code and DEA interpretation

We anticipate complexity and teething problems with implementing the DEA regime and the potential for legal challenge, e.g. on an issue such as classification of customers as "ISPs" rather than "subscriber". It is important, therefore, that we

understand if and how the Code can be revised to address such problems and the flexibility and speed with which changes can be made.

Ofcom has indicated in para 3.124 one specific area in which the Code may be revised – to address the outcome of its review of qualifying ISPs within scope. The revision process for that is formal and it would take time for a change to come into effect. In para 3.125, Ofcom indicates another area of review - the impacts of the "qualifying ISP" threshold but does not indicate if a change to the Code following such review would be made in the same way.

Elsewhere in the Interim Statement it is suggested that the appeals body has the power to review application of the Code and that it may determine the application of DEA provisions and in doing so depart from the understanding that Ofcom gives us, e.g. in Annex 5. Changes to the Code may be required as a result.

We seek more clarity and guidance from Ofcom on the process envisaged for making a change to the Code, e.g. triggers, who can make changes - Ofcom, appeals body, or both; if there is flexibility for Ofcom to make changes outside of the formal route set out in para 3.124) and also on the conduct and process for reviews.

6. CIRs to all qualifying ISPs

If qualifying copyright owners can selectively target the qualifying ISPs to who they send CIRs, then the potential for market distortion is significant, i.e. for the "targeted" qualifying ISP to be competitively disadvantaged in comparison to a "non-targeted" qualifying ISP.

Ofcom must ensure that the Code includes provisions that guarantee a fair, non-discriminatory, objective and transparent approach to the generation and sending of CIRs in order to eliminate the potential for such anti-competitive abuse of the DEA regime from arising.

7. Ofcom – ICO cooperation

A combination of Code and data protection requirements will determine how BT needs to design its systems and processes for DEA implementation. Once these are up-and-running, interventions such as data protection enforcement action, could curtail BT's ability to process data involved in the DEA regime. Could BT be exposed to enforcement from Ofcom for failure to comply with the Code obligations in such circumstances or not?
Since BT will have to comply with obligations under both regimes and it cannot treat one in isolation from the other, we are disappointed that the Interim Statement and proposed Code appears to adopt this approach.

We would welcome greater active coordination between Ofcom and theICO as a more joined-up,holistic approach to clarification and guidance would aid BT to implement and comply effectively.

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