Everything Everywhere Limited

Response to the Ofcom consultation on online infringement of copyright and the Digital Economy Act 2010 – Draft Initial Obligations Code

30 July 2010

About Everything Everywhere Limited

Everything Everywhere Limited is the recently formed company running two of the UK's most famous brands: T-Mobile (UK) and Orange (UK). Owned jointly by Deutsche Telekom AG and France Telecom SA, Everything Everywhere Limited is the UK's biggest communications company, with a combined customer base of over 30 million people and 700 retail stores across the country.

Together, the two brands provide mobile, broadband, fixed, business and entertainment services in the UK. Everything Everywhere provides high quality GSM coverage to 99% of the UK population. At the end of March 2010, Everything Everywhere had over 30.2 million customers in the UK – 29.44 million active mobile customers and over 0.86 million fixed broadband customers.

Further information about Everything Everywhere can be found on the Everything Everywhere website at www.everythingeverywhere.com.

Introduction and general comments

Everything Everywhere welcomes the opportunity to respond to the Ofcom consultation on online infringement of copyright and the Digital Economy Act 2010 – Draft Initial Obligations Code.

Orange (UK) and T-Mobile (UK), the companies that operated the two telecoms brands in the UK prior to the formation of Everything Everywhere, have always maintained that the Digital Economy Act (the 'Act') was heavily weighted in favour of copyright owners who stand to gain most from its implementation. This remains the view of Everything Everywhere. We are concerned that the Initial Obligations Code (the 'Code') does not adopt a similar bias.

Everything Everywhere fully supports Ofcom's approach to leave mobile Internet Service Providers ('ISPs') out of scope. The operational, technical and legal reasons for this have been explained in detail in Orange's and T-Mobile's submissions to previous consultations concerning the Act. In these submissions it is made very clear why applying the Act to mobile ISPs would be disproportionate due to the low level of illegal file sharing and the huge costs of compliance.

Everything Everywhere supports the views set out in the Mobile Broadband Group's ("MBG") response to this consultation.

This submission relates primarily to Everything Everywhere's fixed ISP business. The key issues raised in this submission on the draft Code, include the following:

- several provisions of the Code go above and beyond what is required by the Act. An example of this is that whilst the Act requires Ofcom to have a Code in place by January 2011, there is no requirement for the notification process to also start from that date.
- we recognise that the Code cannot cover every detail. However, several procedural and operational aspects are unclear and we would expect guidance from Ofcom before we build our systems to meet the requirements of the Code;
- the Code must be more clear on the details of the threshold of Copyright Infringement Reports ('CIRs') that would bring additional ISPs in scope. The threshold should be based on the percentage of infringements that are attributed to an ISP, based on the total number of all CIRs issued by all COs to all ISPs in a qualifying period. This percentage should not be insignificant given the costs of compliance. The threshold should be based on actual not forecasted CIRs;
- there should continue to be a de minimis threshold based on subscriber numbers as this would ensure that smaller ISPs are not disproportionately impacted by the obligations in the Act given that the definition of an ISP is so wide that it could capture companies offering internet access to their employees and WiFi hotspot providers such as cafes, libraries and educational institutions;
- ISPs must not be required to commit to incurring the costs of building systems or re-engineering processes until COs commit to recovery of such costs in accordance with the Cost Sharing Order;
- there should be no requirement to send Update Notifications to customers after they have received 3 letters and are placed on the Copyright Infringement List ('CIL'). This undermines the process of sending warning letters and is not the basis of the proposals that framed the

debate in Parliament. After the third letter it is up to the copyright owner to apply for a court order and to take action against the most serious infringers;

- Ofcom should consult with the Home Office to ensure consistency of applicable data retention standards. Recording, retaining, processing and mapping IP addresses to an individual constitutes a complex and intrusive personal data processing operation. Any communications data retained for the purposes of the Code will also be made available to public authorities in accordance with the provisions of the Regulation of Investigatory Powers Act 2000; and

- due to the complexity and intrusiveness of the personal data processing operations envisaged by the Code, for the lawfulness of which the ISP is responsible under data protection legislation, Ofcom should also consult with the Information Commissioner's Office ('ICO') to ensure that the processes set out in the Code are compliant with the Data Protection Act 1998 and the Privacy and Electronic Communications Regulations 2003. If additional safeguards are required to ensure compliance with data protection legislation, the ICO should be asked to publish guidance and any recommendations should be reflected in the Code.

Everything Everywhere believes that in attempting to regulate an issue between COs and end users, too much regulatory and operational burden is placed on the shoulders of ISPs. As an ISP, Everything Everywhere is an intermediary that passes packets of information over its network (a mere conduit). Everything Everywhere neither benefits from, nor encourages, end users to infringe copyright online and, as such, should not bear the burden (technical, operational or financial) of enforcing the law against apparently infringing end users.

The internet offers excellent opportunities for COs to supply end users with content without the significant costs associated with production, distribution and marketing that exist in a non-digital environment. Imposing significant burdens on ISPs in order to protect the outdated business models of COs risks introducing a chilling effect on the vital continued investment in infrastructure and innovation that is required to ensure that the UK remains competitive in the digital economy.

Furthermore, COs should be explicitly required to inform and educate the public, including regarding the adverse consequences of illegal file-sharing, how to protect equipment from unauthorised use and the legitimate channels through which end users can access digital content. The Code does not currently impose any information provision obligations on COs and indeed there is an expectation that this will be done by ISPs' customer services who are ill-equipped to deal with issues of copyright infringement.

Finally, it is difficult to provide complete and informed answers to all the questions posed in the consultation document. This is because the Code is aimed at introducing significant changes to the way ISPs run their business and it is virtually impossible to analyse and understand the implications of the proposed changes within the proposed timeframe. The fact that many important areas of the Act remain unknown as they are still subject to ongoing or forthcoming consultations (including consultations on appeals and tariff settings) and that the Act itself is currently subject to judicial review by the High Court compound the problem.

In the remainder of this document, Everything Everywhere answers, where possible and relevant, the questions of the Ofcom consultation document.

Responses to Ofcom's questions

A. Application of the Code

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.

Only a draft of the Order is currently available and, therefore, it is difficult to provide a definitive answer. We nevertheless answer the question in principle below.

In principle, COs should only be able to make use of the processes of the Code if they have met their obligations under the Order. This is envisaged by Section 124C(4) of the Act which clearly states that the Code may specify that COs should only be able to send Copyright Infringement Reports ('CIRs') once they have made arrangements with an ISP concerning payment in advance of a contribution towards meeting the costs incurred by the ISP.

COs should only be able to take advantage of the Code once they have met their financial contribution obligations under the Order. More specifically, a CO should only be able to rely on the Code once it has made the relevant forecast and the corresponding payment by reference to the forecasted number of CIRs it plans to send. It is unreasonable to oblige ISPs to commit resource and incur costs (e.g. diverting investment from other projects, allocating personnel, initiating projects for technical solutions, process development and capital expenditure or negotiating/re-negotiating arrangements with outsourced service providers) before there is a firm commitment from COs to ensure that ISPs will be able to recover these costs under the Order.

In addition, to enable ISPs to have certainty that their investment will be recovered, Everything Everywhere believes that the CIR forecast and corresponding payments from COs should relate to a period of two years or the COs should commit to sending a minimum number of CIRs to cover ISPs capital expenditure.

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.

Two months is not an appropriate or sufficient lead time for the purpose of planning a fixed ISP activity in the initial notification period (i.e. the notification period for which the ISP will be required for the first time to have in place the systems and operations required by the Code). Two months also appears to be too short for subsequent notification periods. For the initial notification period we would expect nine months from when the Code comes into force and we have received forecasts from COs. For subsequent notification periods we believe that six months is a more reasonable lead time. We explain the reasons below. Should mobile ISPs come into scope, we would require much longer lead times due to the complexity of implementation.

For the initial notification period, ISPs are for the first time required to comply with the new obligations imposed by the Act and the Code. ISPs will need to implement new (or adapt existing) systems, solutions and processes. This requires the allocation of management time and human resource, allocation of financial resource including possibly diversion of investment from other parts of the business, technical and operational project work and review of existing arrangements with suppliers or new arrangements with suppliers (for instance, where the ISP has outsourced or intends to outsource

the relevant systems or processes). In order to be able to implement a project with such far reaching consequences, it is imperative that ISPs have certainty that there is a legal requirement to implement these solutions and be in a position to gauge the capacity required from these solutions. In other words, before any project work can be undertaken, the Code must have come into force and the ISP must have an understanding of the expected volume of CIRs, which can only be achieved after receipt of CIR forecasts from COs.

In addition, as a result of the recent joint venture between Orange (UK) and T-Mobile (UK), Everything Everywhere is undergoing a process of operational and technological integration which means that business critical projects must take priority. Everything Everywhere is therefore not in a position to commence work on putting the necessary systems and processes in place before it is actually required to do so (i.e. once the Code has come into force) and it has received forecasts from COs enabling it to gauge the required capacity of these systems and processes.

It should also be noted that the Act requires that the Code is in place within six months after the relevant provisions of the Act come into force. This means that, in the absence of a notice of the Secretary of State extending this period, the Code should be in place by January 2011. However, the Act does not require that CIRs can be sent and received by then. In other words, the Act does not require Ofcom to ensure that ISPs and COs have the relevant systems and processes in place to enable the start of the first notification by January 2011. In this regard we share ISPA's view that Ofcom should accordingly extend the time for implementation with a transition period to push back the date notices can be sent, as this will help ISPs, COs and, indeed, Ofcom itself to produce a more effective system thereby better serving the purposes of the Act.

Finally, after the initial notification period, in-scope ISPs will obviously have the relevant systems and processes in place. However, it may be the case that there are significant fluctuations in the forecasted CIRs from notification period to notification period, which may require corresponding adaptations to the systems and processes in place at the ISP. Two months is again too short a lead time to enable adequate planning or upscaling of solutions. We believe that six months is a reasonable period.

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?

Everything Everywhere strongly supports Ofcom's proposal to exclude mobile ISPs from the application of the Act and the Code, at least for the initial phase of the application of the Code. We support the reasons given in the MBG's response. To summarise:

- there is no proof that file sharing is a problem on mobile networks. Mobile broadband is a nascent market and with realistically achievable speeds of around 2 Mbps mobile broadband is not suited to large amounts of file sharing;
- measures are being taken to optimise network performance for all customers including enforcement of fair use policies and other measures which prevent file sharing growing.
- Operators are actively negotiating with rights holders and there has been considerable growth in legitimate content such as music, games and video clips which compete successfully against piracy based alternatives. Ofcom's Communications Market Report 2009 states that the mobile platform continues to play an important role in stimulating digital music sales with a **third** of all digital music purchases being made over a mobile devices due to services such as T-Mobile's Jukebox which offers over one million tracks live from all major labels and indies,

Nokia Comes with Music and applications on the G1 and iPhone which link to legitimate content.

- unlimited data packages on mobile will not be commonplace in future, as already announced by O2. The propensity of a subscriber to download music illegally for free will decrease when they have to pay for the data. Thus, mobile will become even less attractive to copyright infringers.
- huge and entirely disproportionate network costs would be incurred if mobile operators had to implement the proposed obligations and match individuals to public IP addresses. Recording, retaining and mapping this level of information is a complex and intrusive personal data processing operation which would give rise to additional privacy and data protection challenges; and

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?

Everything Everywhere supports the current threshold. However, this does not mean that we do not have concerns about the way in which Ofcom reached its decision.

Ofcom suggests (on the basis of information supplied by COs) that there is a broad correlation between the size of an ISP and the levels of alleged copyright infringement, but without providing any supporting evidence. Everything Everywhere appreciates that Ofcom has to take a pragmatic view and that given the unreasonable timescales for the implementation of the Code and the consequent lack of better information, it was virtually impossible for Ofcom to carry out a thorough assessment.

Going forward the Code must be clear on the details of the threshold of CIRs that would bring additional ISPs in scope. The threshold should apply to each platform and be based on the percentage of CIRs that are attributed to an ISP based on the total number of all CIRs issued by all COs to all ISPs in a qualifying period. This percentage should not be insignificant given the costs of compliance. Furthermore the threshold should be based on actual infringements not forecasted CIRs which are then validated by Ofcom. The ISP should also have access to the number of claimed infringements as it will be able to validate this by checking against the level of traffic on file sharing protocols on their network in a given period (although this will include legitimate file sharing sites).

We agree that there also needs to be a de minimis threshold based on subscriber numbers in order to ensure smaller ISPs are not disproportionately impacted by the obligations in the Act. This is important given that the definition of an ISP is so wide and could capture companies offering internet access to their employees and WiFi hotspot providers such as cafes, libraries and educational institutions.

We also support Ofcom's view that it must keep the application of the Code to ISPs under review, taking into account new developments and fresh evidence concerning the scale of infringement and the cost and feasibility of requiring out-of-scope ISPs to comply with the Code.

B. Definitions under the Act

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?

Where there are multiple parties in the value chain Ofcom should provide guidance as to which party is responsible for complying with the requirements in the Act. In May 2010, we submitted to Ofcom a detailed paper on the various wholesale relationships that exist within our businesses. Ofcom should provide clarifications for each of the scenarios given in that paper, particularly where the value chain extends outside the UK.

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?

Everything Everywhere broadly agrees with Ofcom's approach subject to futher clarification as set out in our answer to question 3.5 above.

C. Copyright Infringement Reports ('CIRs')

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?

Everything Everywhere broadly agrees with the proposed content of CIRs. We believe that the following additions or amendments should be made:

- the file format of the copied work, the file size of the copied work and the file sharing application or protocol should also be included as this will facilitate the identification of the apparently illegally copied file;
- both the IP addresses and port numbers in the communication of the apparent infringement and the CO's agent IP address/port number, i.e. both the source and destination IP addresses and port numbers, should be included;
- the CO should also state that the process used for obtaining the evidence was the accredited process in accordance with section 3.5 of the Code; and
- the statement that no consent has been given by the owner of the UK copyright should be amended by deleting the words ', to the best of the Qualifying Copyright Owner's knowledge,'. It is unreasonable to expect ISPs to shoulder the burden of compliance with the Code for acts concerning copyright works where the CO is not certain that this use is not licensed.

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.

We fully support the approach proposed by the MBG in its submission to this consultation, whereby the evidence gathering process of the CO as well as the subscriber identification process of the ISP (please see 5.2 below) is accredited either by Ofcom itself or a qualified independent third party before any CIRs are issued. If the processes of all qualifying ISPs and COs are tested for robustness before 'go-live', both Ofcom and the Appeals Body will have the opportunity to object to the process being followed by each participating CO and ISP and require them to take specific steps to improve their processes. A CO or ISP which passes the quality assurance would be deemed to have a robust process in place. In our view, this process is likely to reduce the risk of systemic mistakes and the

scope for disputes between ISPs and COs, will increase the confidence of all stakeholders in the process and will reduce the likelihood of frivolous appeals, thereby increasing the overall effectiveness of the system.

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?

Everything Everywhere believes that COs should be able to send CIRs to ISPs in a far shorter time period than 10 days. This is because COs will generate huge volumes of automatic records through automated systems in order to process CIRs. This will ensure subscribers receive reports in a timely manner. This would also limit data storage requirements.

D. Identifying subscribers and making notifications

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.

Everything Everywhere agrees with Ofcom's proposed approach subject to the following comments:

- the Code should clarify that ISPs should be paid for processing invalid CIRs which clearly count towards allocation of CIRs to a CO as they will automatically generate the process on the ISP's systems;
- the Code should clarify the action required of ISPs where there is a subscriber appeal pending before the Appeals Tribunal. ISPs should not be required to action further CIRs for that individual. In its decision, the Appeals Tribunal should also issue directions to the ISP as to how the ISP should manage the relevant records it holds for that subscriber (for instance that the relevant CIRs should be deleted);
- the Code should clarify the circumstances in which pending a dispute between a CO and an ISP, the ISP is entitled to stop processing CIRs from that CO;
- the Code should clarify whether duplicate CIRs should count, e.g. where two CIRs apply to one copyright work and resolve to one subscriber who is allocated different IP addresses within a short space of time. While this may seem academic to the CO, the subscriber may feel more inclined to appeal if s/he believes s/he is being accused of the same infringement twice.
- the ISP needs to be able to refuse a CIR if there is some ambiguity with the subscriber traceability. For example if the time on the CIR is within an agreed period of the IP address being reallocated to a new subscriber then the ISP cannot be certain that the particular subscriber is the one identified by the CIR. These parameters must be agreed as part of the quality standard process.

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.

We set out our approach to quality assurance in 4.2 above, i.e. that the evidence gathering process of the CO as well as the subscriber identification process of the ISP is accredited either by Ofcom itself or a qualified independent third party before any CIRs are issued.

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.

In relation to CIRs, we agree with Ofcom that the notification letters should be sent at intervals based on time rather than volume of CIRs, provided, however that no less than 30 days have elapsed between letters. However, as every CIR will be recorded against the subscriber on the CIL, potentially each CIR could be used by the CO against the subscriber in a court action based on the CIL. Subscribers should be given the opportunity under the Code to appeal each CIR recorded against them and not just those CIRs that triggered a Notification Letter. To enable this, subscribers should be sent details of all CIRs that have been received by the ISP since the previous Notification Letter.

Everything Everywhere believes that there should be no update notifications following the third notification letter after the subscriber is included on the CIL. This would undermine the warning process. COs should be encouraged to follow up with court action. It is this understanding that has formed the basis of the Government's proposals on illegal file-sharing and has framed the debate in Parliament.

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?

Everything Everywhere broadly agrees with Ofcom's approach to the content of notifications.

However, we believe that in its current form the Code imposes all the information provision obligations on ISPs as opposed to COs who are best placed and have greater interest in informing and educating subscribers about illegal file-sharing. Accordingly, we believe that the Code should set out the following obligations for COs:

- COs should set up a portal and hotline in order to comply with the information requirements set out in sections 124A(6) (f) to (i) and 124A (8) (a) to (d) of the Act, which provide the public and the recipients of notifications with further information on the online copyright infringement process, the appeals process and information on where to get independent legal advice. This should also include definitive guidance on what steps a subscriber can take in order to take "reasonable steps" to prevent unauthorised use of their internet service by a third party; and

- COs should set up and bear the cost of a free telephone support line for the recipients of notifications, which should be advertised in all communications to apparent infringers. The service should enable the public to access independent information anonymously to avoid any deterrent effect. COs are best placed to explain their concerns with breaching copyright law. ISPs' customer services employees are trained on how to respond to customer queries on use

of their services and their accounts and are not able to explain about copyright beyond directing subscribers to further information. Furthermore ISP's customer service advisors will not have access to the systems which contain details of alleged infringements so they are limited in how they can help the customer.

E. Copyright Infringement Lists ('CILs')

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.

We agree in principle with limiting the frequency with which COs may request CILs and that three months is an appropriate interval. However, we also believe that the five day period proposed by Ofcom for the ISP to send the CIL to the CO is too rigid and that this should be extended to 14 days.

One aspect of the CILs which is not covered by Ofcom's question and which we believe is important concerns the privacy and data protection implications of the compilation, maintenance and sharing of CILs between ISPs, COs and persons authorised by COs. For instance, under section 6.4 of the Code, CILs may only contain information directly related to CIRs made by the requesting CO. However, because the definition of COs includes persons authorised to act on behalf of the CO, such authorised persons may receive information concerning multiple COs. Furthermore, it should be clarified that once an ISP has disclosed, on the basis of a court order, the name of a subscriber to a CO, the ISP should then allocate a new anonymised identifier to that subscriber.

Everything Everywhere believes that due to the complexity and intrusiveness of the personal data processing operations envisaged by the Code, for the lawfulness of which the ISPs are in most instances responsible under data protection legislation, Ofcom should consult with the Information Commissioner's Office ('ICO') to ensure that the processes set out in the Code are compliant with the Data Protection Act 1998 and the Privacy and Electronic Communications Regulations 2003. If additional safeguards are required to ensure compliance with data protection legislation, the ICO should be asked to publish guidance and, if required, those recommendations should be reflected in the Code.

Similarly, we believe that Ofcom should also consult with the Home Office to ensure consistency of applicable data retention standards. Recording, retaining, processing and mapping IP addresses to an individual constitutes a complex and intrusive personal data processing operation. Any communications data retained specifically for the purposes of the Code will also be made available to public authorities in accordance with the provisions of the Regulation of Investigatory Powers Act 2000.

F. Subscriber appeals

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.

In our responses to Ofcom questions 4.2 and 5.2 above we set out our views on the need for an accredited quality assurance process.

Everything Everywhere believes that if pursuant to a comprehensive quality assurance process Ofcom and the Appeals Body are satisfied that the ISP's systems and processes comply with the Code, there cannot be many grounds for appeals against IP matching by an ISP. The role of an ISP in the Code is to pass on information from COs that an IP address identified with one of their subscribers has allegedly been involved in copyright infringement. Matching subscriber details through an IP address should not be considered as robust evidence. ISPs cannot make a statement stronger than that their records show that an IP address was allocated to a particular subscriber at a particular point in time. This means that ultimately an overwhelming number of appeals will be due to mistakes made by COs rather than ISPs.

However, during the notification process, the subscriber in receipt of a Notification Letter has a relationship with their ISP. It follows that from the subscriber's point of view the ISP is the most obvious target for an appeal (e.g. for sending the Notification Letter) as opposed to the CO who actually made the accusation. This could have significant implications for ISPs in terms of their relationship with their subscribers and when the Appeals Tribunal awards costs in an appeal against an ISP. The Appeal Tribunal should be alert to this possibility and well equipped to address it. There are several uncertainties surrounding the Appeals process envisaged by the Code and we expect that the Appeals process will be subject to separate consultation by Ofcom.

We agree with the MBG that Ofcom should specify that:

- an appeal has to be lodged within 25 working days from receipt of the Notification Letter. This is an important time limit, as it may have a substantial impact on the length of time that ISPs have to store evidence therefore potentially increasing the ISP's costs; and

- the Appeals Body can only award reasonably incurred costs to a subscriber, capped at £5,000. It should not be able to award compensation for any other aspect (e.g. consequential losses, distress etc.). The costs should only be awarded against the party or parties at fault, which in our view in the majority of case will ultimately be the CO.

We also agree with Ofcom that only in exceptional circumstances there should be appeal hearings and that in the vast majority of cases an appeal should be decided on a documents only basis.

G. Admin, enforcement, disputes and information gathering

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.

Everything Everywhere broadly agrees with Ofcom's approach.

We believe that there should be an initial moratorium in the imposition of fines to enable ISPs and COs to familiarise themselves with the new regulatory environment. Everything Everywhere would also welcome detailed guidance from Ofcom on enforcement and dispute resolution.

As mentioned in our response to Ofcom question 5.1 above, it is possible that in the context of a dispute between an ISP and a CO (for instance concerning a serious breach of the Code by the CO), the ISP may feel entitled to suspend the processing of the CIRs received from that CO. In such instances, Ofcom must have a process in place to swiftly look at a request to that effect from the ISP to enable a realistic solution to a situation where an ISP complains about a systematic problem with the CO. This could put the ISP in the difficult position of having to chose between knowingly processing non-compliant CIRs to the detriment of its subscribers or knowingly breaching the Code.

Queries

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