Internet Telephony Services Providers' Association

ITSPA Response to DCMS Consultation on Implementing the European Electronic Communications Code

About

The Internet Telephony Services Providers' Association ("**ITSPA**") represents over 100 UK businesses involved with the supply of next generation communication services over data networks to industry and residential customers within the UK. Our traditional core members are IP networks and service providers. ITSPA pays close attention to both market and regulatory framework developments on a worldwide basis in order to ensure that the UK internet telephony industry is as competitive as it can be within both national and international markets.

Please note that certain aspects of the ITSPA response may not necessarily be supported by all ITSPA members. Individual members may respond separately to this consultation where a position differs. However, the ITSPA Council is confident that this response reflects the views of the overwhelming majority of ITSPA members.

A full list of ITSPA members can be found at http://www.itspa.org.uk/.

Response

Introduction

Parliamentary Time

As a preface to our response to this Consultation, we would like to raise the fact that several recent major legislative changes related to the telecommunications sector have not undergone much parliamentary scrutiny.

Of course, we do not say what happened was illegitimate, merely that the actions of successive Governments have acted to disenfranchise an industry that contributes £33.8bn to UK GDP and provides the infrastructure upon which most of the rest of the economy operates.[1]

For example:

- The Digital Economy Act 2010 was entered into the statute book through a wash-up process before the 2010 general election.
- The Value Added Tax (Section 55A) (Specified Services and Excepted Supplies) Order 2016 introduced, upon a mere 20 days' notice, a radical change to all telecommunications wholesale billing by way of Statutory Instrument.

[1] Ofcom Communications Market Report 2019

- The Digital Economy Act 2017 ("**DE2017**") was also entered into the statute book through a wash-up process before the 2017 general election. Indeed, we cite issues that have arisen from light-touch scrutiny here which we say requires the repealing of elements of the DE2017.

The last time that we believe that Parliament has had an opportunity to properly scrutinise the legislative apparatus that underpins this industry was the Communications Act 2003 ("**CA2003**"). Fittingly, that was also the result of a major European directive, or set of directives, being the predecessor instruments to the EECC.

As will be clear from our response, and we believe from the responses of others, there are significant issues with the EECC. In the context of previous legislation, and the issues that are apparent with the EECC, we do not consider it to be unreasonable to ask that sufficient Parliamentary time be given; this is why we do not agree with DCMS that it is appropriate to use secondary legislation, nor to bury the provisions in amongst EU Withdrawal legislation.

In suggesting this, we are mindful of the manifesto commitments of the major parties with respect to telecommunications and respectfully submit that delivery of those commitments is somewhat contingent upon a successful transposition exercise.

Brexit

The transposition deadline is in December 2020. Even considering the desired UK Common Commencement Dates and anticipating a 1st October 2020[2] coming into force, there remains sufficient time to be in the possession of the full facts of the UK's future relationship with the European Union. We would not want to see public money wasted on a potential transposition that may not come to fruition, especially given the problems with the Directive we discuss herein.

We respectfully submit that a "wait and see" approach be taken following this Consultation prior to expending more effort, especially given that the Office of Communications ("**Ofcom**") has already started to implement the provisions[3] where it considers it has the domestic power to do so, despite the impact on our sector.

Specific Issues with the EECC

Caveat Emptor

The UK business to business sector has operated on the common law principle of *caveat emptor*. The onus is largely on the buyer to ensure that the goods or services being procured are fit for purpose and that the sale agreement is fair.

[2] §2.31 HM Government's Transposition Guidance: How to implement European Directives effectively (February 2018)

[3] Ofcom Statement: Helping consumers get better deals – end-of-contract notifications and annual best tariff information

The industry has rarely, if ever, argued that a sole trader (e.g. a window cleaner) doesn't look, feel or act like a residential consumer in their purchasing of telecommunications services. To that end, there has rarely been a dispute on the extension of the same protections residential consumers are afforded to Small Office/Home Office (SOHO) users.

However, the CA2003 went beyond the provisions of the relevant Directives at the time and, for most intents and purposes, introduced the so-called 10 employee threshold; for example Section 52 CA2003

> *(6) In this section "domestic and small business customer", in relation to a public communications provider, means a customer of that provider who is neither—*
>
> *(a) himself a communications provider; nor*
>
> *(b) a person who is such a customer in respect of an undertaking carried on by him for which more than ten individuals work (whether as employees or volunteers or otherwise).*

The CA2003 does not specify whether this threshold is triggered at the point of sale, at the point a dispute arises, whether it applies from each accounting reference date, or anything else that assists either the industry or those the provision is designed to protect.

We have the absurd situation where an animal shelter with 10 volunteers may lose statutory protection if a volunteer brings a friend to help walk the dogs one afternoon; a landlord who runs a public house with a large roster of student or seasonal staff has less protection than a boutique law firm of 9 telecommunications solicitors.

The UK has no statutory register of the number of employees, or volunteers, or otherwise. There is no jurisprudence or other guidance as to how this provision is to be interpreted, yet we are facing the prospect of having to transpose a second tier; a 50-employee threshold[4].

This turns the long-established principle of *caveat emptor* into *caveat venditor* at an arbitrary point on the spectrum of business customers.

Do the provisions change mid-contract if they hire a 51st employee? What if the 11th and 12th employees are made redundant? Can a business avoid its contractual obligations by TUPEing almost all of its staff into a newly formed subsidiary?

If the existing CA2003 definition is merely amended, then the existing confusion is merely magnified. Not only that, the cost and detrimental impacts are magnified too.

A Communications Provider is then faced with a choice; do they

[4] Article 102(2) of the EECC refers to micro-enterprises and small businesses, which in turn are defined in Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises.

a) Incur the costs and risks associated with attempting to differentiate between micro-enterprise, small business and other; or
b) Treat all customers, regardless of size, the same, to the lowest common statutory denominator, and deny larger enterprises innovation that would otherwise have arisen? Essentially, we tend towards a self-fulfilling prophecy where all telecommunications products and services are residential.

We very much welcome the EU position that not-for-profits[5] constitute a separate sector for the purposes of regulation as this, in one fell swoop, deals with the number of volunteers issue.

Thereafter, the transposition requires care and guidance so that it is demonstrably clear, with reference to the public record, to the selling party, what their obligations are in relation to that prospective customer at the point of sale. We say that the point a contract (or renewal or amendment) is entered into is the point at which the conditions should bite and remain to provide certainty for all involved.

As a wider point, the EECC (and the general European Union shift towards *caveat venditor)* is at odds with the long established, and successful, UK common law position. We do not consider this shift to be UK Government policy (far from it – it is a long established principle of this Government to cut red tape) and suggest that as much as possible, within the confines of the law, is done to minimise its impact.

Contract Length

Article 105 essentially means that the starting point for selling to a business of up to 50 employees is a 2-year contract.

An office of 50 employees is likely to need >50 IP handsets (noting that meeting rooms often have their own too), an Ethernet circuit which also requires a specialised router, and potentially other equipment. These are not the sort of hardware that can be purchased at Argos and can run into thousands, or tens of thousands of pounds for this size of business.

The useful economic life of this specialised equipment is 3 to 5 years; that is what an accountant would use for the preparation of statutory accounts, supported by their auditors and likely accepted by HMRC. It is also common that the upfront cost of this equipment is included in a monthly rental for the contract duration, i.e. amortised over a 3-5-year term.

This provision is essentially forcing communications providers to adapt their business models to large upfront payments to small businesses, or to separate out hardware into substantially lesser regulated lease agreements, potentially commanding a premium relative to today.

We would instead propose that the provision be transposed so that:

[5] Article 102(2) of the EECC

- Communications Providers are free to offer any contract duration they see fit to business users and conclude such a relationship based on a free market negotiation;
- Communications Providers be required to offer a 2-year contract variant of any of their products and services;
- It be made clear, in statute, that the Communications Provider must make the prospective customer aware that there is an option for a 2-year contract.

This interpretation of Article 105(1) is not incompatible with the letter or spirit of the Directive, however, it implements it in a light touch way that doesn't risk running roughshod over the industry, or the working capital position of its customers.

Legacy Networks

The importance of Article 81 (and, for that matter, Article 61(2)(b) and 61(2)(c)) in relation to the forthcoming switch off, by BT, of the PSTN, cannot be understated. There is a specific drive, from Government, and Parliamentarians, to deliver high headline download speeds to voters and constituents. We do not disagree with this objective, indeed, ubiquitous fit for purpose connectivity will be a mainstay of major global economies for decades to come.

However, we must be mindful of the needs to the vulnerable in society; we note that the NHS still has 9,000 fax machines in operation.[6] This is just one example of a technology that uses Voice Band Data ("**VBD**"). VBD is the encoding of data signals over a voice connection; basically how old-fashioned modems worked before broadband was available. This protocol is used for telemetry in a number of applications, from PDQ machines (including the paypoint machines used by the poorest in society to pay for their heating) to alarm systems and the "red cord" systems in the homes of the vulnerable and disabled.

The process of switching off and replacing the PSTN very much puts VBD applications at risk.

ITSPA does not advocate gold-plating in transposition lightly; far from it. However, in areas such as this, where there is the potential for serious harm for the most vulnerable arising, or detrimental impacts to rural economies where alternatives to VBD for payment processing are not always available, then we consider there to be a significant case for intervention.

We would suggest that DCMS may wish to engage with its counterparts across Government on the issue of VBD prior to laying any instrument before Parliament, to assess whether there is a case to leverage the transposition of Article 81 to procure the best outcome for the vulnerable.

Interconnection

Competition is currently stifled by an inability for new entrants readily able to interconnect with established operators; this leads to new entrants paying over the odds for the conveyance of calls to and

[6] 'NHS told to ditch absurd fax machines' – BBC News, 9 December

from incumbent operators in the market by forcing them to be beholden to transit operators which are free from any form of regulation on their pricing today.

Indeed, these transit operators are often vertically integrated operators with a vested interest to protect their upstream or downstream operations from new entrants.

Presently, Ofcom have encapsulated access and interconnection in General Condition of Entitlement A1; however, this only places an obligation to negotiate, not conclude, and is therefore a weak and ineffective provision and one that is certainly biased in favour of the incumbent operators.

It is clear to ITSPA that Article 61 of the EECC is intended to be stronger than Ofcom has made GC A1 – and indeed, goes further than Section 51(1)(b) of the Communications Act 2003. The language use shifts from being discretionary to being far more absolute.

Whilst we have no doubt that Ofcom will eventually consult upon and amend GC A1 to be more in keeping with the EECC, we respectfully submit that the domestic legislation will need refinement to give it full effect by removing Ofcom's discretion and hence the ability for Ofcom to have to balance the vested interests of the incumbent.

We suggest that Section 51(1)(b) of the CA2003 be amended to read:

> *(b) conditions making such provision as required for securing service interoperability and for securing, or otherwise relating to, network access.*

Independence of the Regulator and the Right of Appeal

The Digital Economy Act 2017 was passed, as noted above, in a wash-up process. As such, it had insufficient scrutiny and has led to two issues "bubbling under" which have yet to be fully tested.

Both of these issues were problematic under the old European legislative regime for telecommunications, but, with a stricter view on the subject matter in the EECC, they become more acute.

Right of Appeal

Article 31(1) of the EECC clearly refers to a right of appeal to a decision of Ofcom on the merits. Section 87 of the DE2017 inserted Section 194A CA2003:

> *"The Tribunal must decide the appeal, by reference to the grounds of appeal set out in the notice of appeal, by applying the same principles as would be applied by a court on an application for judicial review"*

Without labouring the point, a judicial review and an appeal on the merits are two different standards. Contrary to what some may attempt to have DCMS believe, the frequency of redress sought by the industry at the Competition Appeal Tribunal is not born of petulance or self interest, but more often than not, but there being fundamental flaws in the decisions of the regulator that a specialist tribunal has set aside.

We suggest that the original wording in the CA2003, prior to the DE2017, be restored, to be compatible with the EECC.

Independence of the Regulator

Articles 6 and 8 of the EECC go to the point about political independence. For example, Article 8(1) says'

> *"[Ofcom] shall not seek or take instructions from any other body in relation to the exercise of the tasks assigned to them under national law implementing Union law".*

This is clearly at odds with Section 98 DE2017, which inserted Section 2B into the CA2003;

> *OFCOM must have regard to the [Statement of Strategic Priorities] when carrying out—*
> *(a)their functions relating to telecommunications,*
> *(b)their functions under the enactments relating to the management of the radio spectrum, and*
> *(c)their functions relating to postal services.*

Whilst we welcome much of the thinking and content of the recent Statement of Strategic Priorities ("**SSP**"), the clear conflict between EU and domestic legislation on this point at best presents a risk to regulatory certainty and at worst hands those with vested interests a ready-made appeal (on a matter of law) to have any decision based on an SSP easily set aside.

There is nothing wrong with the Government responding to Ofcom consultations nor engaging with the regulator as any stakeholder would. We would fully expect the CEO of Ofcom (and indeed, provision is clear in the EECC for accountability) to appear before and be held accountable to a parliamentary select committee. We would also expect that Ofcom would pay attention to parliamentary proceedings and manifestos such as to gain an understanding of the will of the people; what we have a significant issue with is the mandatory fettering of Ofcom's discretion which we say is incompatible with EU law.

Fraud

DCMS will be aware of ITSPA's long standing campaign to reduce the impact of fraud on the telecommunications sector. Indeed, in his tenure as Foreign Secretary, the current Prime Minster, the Rt Hon Boris Johnson MP, noted[7] "*with interest, the problems [ITSPA] outline*".

In May 2011, when Article 28 of the current Universal Service Directive came into effect and Ofcom modified (then GC20), we welcomed the potential for the monetisation of crime in telecoms to be dealt a significant blow by regulators around the European Union co-operating to prevent wholesale interconnection payments being made in these circumstances.

[7] Letter to Peter Farmer, then Deputy Chair of ITSPA, dated 16th December 2016.

Eight and a half years on, we are unaware of this power being used in any meaningful way, and certainly not at any scale. This is despite some analyses suggesting that 2% of a phone bill represents the equivalent of retail shrinkage, i.e. the monetisation of cyber crime.

Article 97(2) of the EECC repeats the concept, in words we say are stronger, clearly signalling that it was intended by the European Parliament, Commission and Council to be utilised.

This is an opportunity to be leveraged and is justification for DCMS to modify Ofcom's statutory remit to specifically include defending citizen-consumers (this would, with the statutory definition of consumer in the CA2003 extend to business users) from being the victims of financial crime.

Termination Rates

ITSPA's members will generally submit their own responses on the subject of termination rates; however, with respect to Article 75, they agree that care must be taken. The last intervention in termination rates (coming into effect in the 2013 narrowband market review as a result of Ofcom implementing a 2009 EU Recommendation) was a significant upheaval for the whole industry; the magnitude of this cannot be overstated.

It should be noted that the generally unlimited bundles to fixed and mobile numbers enjoyed by consumers these days are as a result of the decreases seen at the time; equally, it should also be noted that for some industry members with specific business models, it caused a negative impact on their users commercial agreements and/or that member's ability to innovate.

The implementation of the contents of Article 75 are to be done by way of a market review by the sectorial regulator; this will require consultation, and will only happen after BEREC (to which Ofcom will engage) has done what was asked of it under the same statute. We would be surprised, if, given the nature of Article 75, it required transposition, however, the stability of the industry players is a prerequisite for the delivery of the SSP and the Government's manifesto promises, therefore, DCMS should be alert to the history of the subject matter at hand and the potential for issues arising.