Virgin Media's submission to the Digital Economy Public Bill Committee

October 2016

Section 1: The Universal Service Obligation

Virgin Media does not have views on the powers contained within Clause 1 of the Digital Economy Bill, other than to agree that Government should enlist Ofcom to develop the technical specification of a USO and be responsible for its implementation.

However, we do have views on the principles and design of a USO.

Purpose of a USO

The purpose of a broadband Universal Service Obligation is to provide a safety net that ensures access to the online services that are required for economic and social participation in society. DCMS defined the public policy justification for a USO in its *A New Broadband Universal Service Obligation Consultation* (March 2016):

> *Many now see broadband as an essential service much like electricity and water. (page 2)*
>
> *We know that a lack of access to broadband can result in sections of society being excluded from the social and economic opportunities provided by broadband. For individuals, this can mean missing out on chances to find employment or saving money on household bills. It can also make it far harder to maintain contact with distant friends and relatives. In addition to this, broadband connectivity can increase the number of leisure and education opportunities whether through children using it for homework, or adults pursuing training opportunities whilst reducing social isolation and exclusion from government services which are increasingly becoming 'digital by default'. (page 9)*

The set of services that are compatible with the purpose of the USO include: email, web browsing/use and streamed video. Email access can help prevent social isolation. Web browsing brings fewer 'network effects' – one user's private browsing has little advantage to another - but unlocks considerable economic and social externalities: access to medical advice, filing taxes online, comparing prices, working from home and so on. To the extent that it provides access to news, educational or culturally significant content, a case could also be made that some forms of video streaming generate meaningful externalities.

By comparison, whilst rapid download of console games may require very high speeds, this would not in itself justify intervention to support, say, ultrafast broadband, since the benefits are private. If the consumer is not willing to pay the full cost of high speed broadband for this purpose, why should taxpayers, or the customers of existing broadband subscribers in particular, subsidise them?

Technical specification

10Mbps

10 Mbps download speed is more than adequate to supply the services required to ensure economic and social participation in society - this is unlikely to change in the foreseeable future.

Ofcom's analysis of the average bandwidth requirements for UK household reinforces the view that 10Mbps is adequate for the purpose of the USO. 10Mbps supports a household with four simultaneous users, where 6 Mbps are being used for film streaming in HD, 2Mbps for catch-up TV, 1.5Mbps for video calling and web browsing and 0.5Mbps reserved for web browsing[1].

Email, iPlayer streaming and all Gov.uk websites are accessible with speeds of 2Mbps. Bandwidth requirements for web surfing are imprecise. nbn co (the Australian government-owned broadband network) says that a "'click-bang' web viewing experience requires download speed of at least 3Mbps."[2]

Cloud storage is valuable, but its access does not prevent social or economic isolation, or enable participation in e-government or e-health. Streaming in HD or 4K does require higher speeds than SD (though in the case of HD still within the boundaries of 10Mbps). However, the incremental benefit of watching (even socially valuable) content in HD not SD is to the individual, not society as a whole.

Thus the applications most relevant to the purposes of a USO require only 10Mbps or fewer. Moreover, these applications generally have relatively low data consumption requirements and are not sensitive to stringent latency requirements.

DCMS acknowledges in its recent consultation that there are, appropriately, constraints on what level of speed can be required in a USO. It quotes the guidance of the Commission: *"The European Commission subsequently issued guidance which sets out that Member States could be asked to consider including broadband connections in the USO where the data rate in question is used at national level (i) by at least half of all households and (ii) by at least 80 per cent of all households with a broadband connection."*

Beyond 10Mbps

Government asserts that the USO will need to increase beyond 10Mbps over time. Ofcom has supported this view on the basis that: *"advanced applications that demand higher speeds are becoming more commonplace" and "[i]ncreasingly, there are several simultaneous uses of broadband in a home at any one time."*[3]

There are two important shortcomings in Ofcom's analysis:

First, whilst it is at least debatable whether there is any incremental societal value in enabling multiple users to undertake USO-type activities *simultaneously*, Ofcom's use case *already* allows for a high level of simultaneous usage, as noted above.

It is hard to envisage a dramatic increase in simultaneous usage. Household size has remained roughly static for decades – only 20% of UK households have four residents or more (Ofcom's use

1 Ofcom Connected Nations Report 2015

2 NBN, *How much speed do you need*, 13 February 2015

3 Ofcom Digital Communications Review 2016, page 27, para 3.35

case) and the number of devices used simultaneously and total hours spent online both have natural ceilings and are reaching saturation[4].

Second, Ofcom fails to recognise improvements in the performance of networks in managing 'advanced applications'.

Streaming video is a case in point. It now represents approximately 45% of European fixed traffic in peak periods[5]. Precisely because of this, there has been enormous attention to developing techniques for efficiently compressing video. This has resulted in substantial and ongoing improvements. The bandwidth required to deliver a given video quality has halved every seven years[6]. Codec developers are now demonstrating systems carrying 4K in 7-8 Mbps[7], or even as low as 2 Mbps[8]. Similar compression techniques are also being used for virtual reality with speeds as low as 2 Mbps (for 4K VR) are being demonstrated in the lab[9]. Clearly this represents substantial downward pressure on domestic bandwidth requirements.

If required bit rates decline by 50% every 7/10 years, this suggests that any revised USO is unlikely to need reviewing for many years to come.

SMEs

Virgin Media also notes that business connectivity requirements form part of the justification for the introduction, and technical specification of the USO, with an obvious focus on small businesses. Multiple studies have been undertaken on the long-term bandwidth requirements of SMEs. The most extensive study of UK SME requirements was undertaken by Communications Chambers on behalf of the Broadband Stakeholder Group and published in 2015[10]. The study finds that median downstream demand for small businesses in 2015 was 5Mbps and will increase to 8.1Mbps in 2025. The study identifies a number of factors that constrain the bandwidth demands of the average small business. More than 90% of small businesses have under four employees (almost 80% have only one employee). Small businesses tend to have less bandwidth intensive requirements than home users. HD video streaming – the biggest absorber of bandwidth in the home - is far less prevalent in the workplace. Cisco finds that home usage is roughly 3x that of business traffic per employee. According to Ofcom the most prevalent online activities amongst SMEs are: email, web access, purchasing, banking, HMRC services, operation of a website, payments, business advice and taking orders.

Other technical factors

A customer's broadband experience is determined by other technical factors than download speed alone. Some have suggested that satellite broadband could not play a part in a USO because it has

[4] http://www.broadbanduk.org/wp-content/uploads/2013/11/BSG-Domestic-demand-for-bandwidth.pdf

[5] Sandvine, *Global Internet Phenomena, Asia Pacific and Europe*, September 2015. 'Real Time Entertainment' is 45.57%. The vast majority of this will be video, though the category includes streaming audio

[6] ZetaCast, *Technical Evolution of the DTT Platform*, 2012

[7] BBC, *V-Nova streaming tech produces 4K compression 'worth watching'*, 1 April 2015

[8] The Online Reporter, *Tveon Claims 4K Streams at under 2 Mbps*, 19 October 2015

[9] Conduit, *Efficient Video Compression for Live VR Streaming* [as at 21 March 2016]

[10] http://www.broadbanduk.org/wp-content/uploads/2013/01/Small-Business-Connectivity-Requirements.pdf

comparatively high latency and usage is typically capped. Latency can cause frustration for consumers in a small number of scenarios – real time gaming principally – but Virgin Media would question the case for designing a USO to underpin those types of activities. High usage is driven by data hungry HD video streaming. Again the social value of subsidising a Netflix binge is questionable, but Government could set parameters for a USO data allowance for valuable activities, with recipients able to add additional data at their own expense for private use if they wish. An additional concern surrounding satellite – the comparatively high upfront costs of obtaining a dish – has been addressed under Government's new voucher subsidy.

Geographic application of a USO

The Universal Service Directive explicitly states that a USO must *"seek to minimise market distortion".*

Ofcom's Call for Inputs envisages that a USO could be applied to urban areas of the UK where 10Mbps broadband is currently not available from any fixed broadband supplier. This is rather short sighted. The scale of declared investment plans by multiple UK broadband suppliers and the evidence of increasing demand for broadband (take-up rose by 5% points in 2015) suggest that urban areas will be supplied by the market within the timescales envisioned for the implementation of a USO.

Virgin Media has made clear that its investment programme – *Project Lightning* – will prioritise economically viable opportunities; we anticipate a significant proportion will be urban in-fill opportunities close to our existing network. Since the launch of *Project Lightning,* BT has announced its intention to rollout G.Fast to 10 million premises by 2020, with an implied focus on urban areas, including areas that have not been part of the Infinity programme[11]. Hyperoptic and CityFibre are investing in their own urban networks – both have attracted funding in the past two years[12] and CityFibre has formed a joint venture with Sky and TalkTalk in York.

Virgin Media therefore believes that inclusion of urban areas in a USO would be misconceived and carry a high risk of market distortion.

To mitigate the risks of market distortion, the USO should instead be applied 'out to in'. The demand for higher speeds in the remotest of areas should be met first based on information from commercial suppliers about where they are most and least likely to be able to build to on commercial terms. In addition, USO designated areas should be rapidly 'de-scoped' when others announce an intention to build.

Funding mechanism

The Universal Service Directive (USD) places constraints on how a USO can be funded. The Directive requires that a USO can enable *"data rates that are sufficient to permit functional Internet access, as defined by the Member States, taking due account of… the prevailing bandwidth used by the majority*

[11] In multiple public statements BT has positioned the investment as an alternative to Ethernet for those that require ultrafast speeds, suggesting it will reach beyond the existing Infinity footprint.

[12] CityFibre raised £16.5m at its IPO in January 2014 and has raised in excess of £30m since according to press reports; Sky and TalkTalk has each invested £5m in its JV with CityFibre. Hyperoptic has received £50m in venture capital from Quantum Strategic Partners - http://www.theregister.co.uk/2013/05/23/hyperoptic_gets_multimillion_pound_investment_boost_to_expand_business/

of subscribers". If Member States wish to make additional provision beyond that level, the Directive[39] prohibits the establishment of an industry levy unless the regulator considers that the provision of universal services may represent an "unfair burden" to the provider.

The concept of 'unfair burden' has been considered in the Base case[53]. The court determined that a regulator must take into account the overall financial position of the universal service provider, not just the cost of roll out:

- an 'unfair burden' is a burden that "*is excessive in view of the undertaking's ability to bear it, account being taken of all the undertaking's own characteristics, in particular the quality of its equipment, its economic and financial situation and its market share*" (paragraph 42); and

- it is not sufficient to conclude that there is a "*loss-making situation*" from the provision of universal services (paragraph 46). There must be an individual assessment of the impact of bearing that cost on the relevant operator (Para 51).

The costs of a USO are unknown, but the most comprehensive analysis to date puts the total cost of delivering FTTC to the "final 5%" of households at roughly £700m"[13]. The same analysis estimates a 75% difference in the cost of delivering FTTC to the most commercially viable area (c£400 per premise) to the cost of delivering to the most remote (c£1,700 per premise). If one assumes an aid intensity - the proportion of total spend that is taxpayer money - of 75% to plug the gap, the total "burden" could be in realm of £525m.

A USO requires that the benefits associated with being the USO provider are subtracted from its total cost. If the estimated benefits of a revised USO remain the same, the net cost could therefore be in the order of £465m - £116m per annum if spread across a four year period.

Set against BT's – the assumed Universal Service Provider – financial position, this level of cost does not appear to constitute an "unfair burden". £116m is c.1.7% of BT and EE's combined annual profits. In the 2015/16 results, BT Group's annual revenue was £18.9bn; it had £3.09bn of free cash flow and profit (EBITDA) of £6.58bn.

Our analysis, though admittedly based on a number of assumptions, is broadly consistent with comments made by BT's CEO to the DCMS Select Committee on 'establishing world class connectivity throughout the UK' on 16 March when he said "*a mixture of this long-range VDSL idea that we have and have been testing and of fibre, and we went to 99%, that is in the hundreds of millions of pounds*." Having BT as the sole (unsubsidised) provider of the USO gives them an incentive to minimise cost and maximise take-up of the higher speed broadband.

[13] http://www.analysysmason.com/PageFiles/5766/Analysys-Mason-final-report-for-BSG-(Sept2008).pdf Figure 1.5

Section 2: Electronic Communications Code

Under the existing Electronic Communications Code, Communications Providers (CPs) face 'ransom rents' for access to land as landowners are able to set charges for access that are based on the economic value of the wayleave right to the *purchaser*. These payments therefore include 'consideration' i.e., they are in excess 'compensation' payments required only to make good any damage or disturbance to the land or economic loss to the landowner.

These arrangements put CPs in a worse position than utility companies such as water and electricity whose equivalent statutes (the Water Industry Act and Electricity Act) only require that they pay 'compensation' for access to land. As a result, Government's own economic analysis demonstrates that we pay significantly more than utility companies for wayleaves – 150% more than water companies; 66% more than electricity companies.

In addition, there are inequities amongst different CPs.

BT already has wayleave agreements with almost every home and businesses - a benefit of their history as the telco incumbent - covering the vast majority of its existing network infrastructure. BT's network upgrade plan is principally based on fibre upgrades to the cabinet, for which these historic wayleave agreements remain applicable. As a consequence, there are relatively few scenarios in which BT is required to negotiate a new wayleave agreement – only where it builds to a new development or deployments Fibre to the Premise. By contrast Virgin Media is required to enter into exhaustive negotiation to gain new wayleave agreements to expand our network to any new premise under Project Lightning (with the associated delays).

The proposed reforms within the Digital Economy Bill go some way to addressing the problems faced by Communications Providers:

- Changing the balance of negotiating power by limiting the basis of "consideration" to the 'underlying value of land' plus a small payment for the value of the right
- Implementing a more efficient and effective appeal process to the Lands Tribunal;
- Allowing early access to the land if the level of rents is the only issue not agreed; and
- An Ofcom governed voluntary Code of Conduct for landowners and providers to reduce the time taken to negotiate wayleaves. This will cover: standard documentation; timescales for negotiations; administrative charges.

However, this reform will not give CPs an equivalent status to electricity or water companies, despite Government's insistence that it considers broadband 'a modern utility'[14]. The Secretary of State said at Second Reading "digital connectivity is as important as a connection to water or electricity

[14] "Just as our forebears effectively brought gas, electricity and water to all, we're going to bring fast broadband to every home and business that wants it." *Former Prime Minister David Cameron, Speech to CBI, Nov 2015*

supplies". Nor will the reforms redress the imbalance between the UK's incumbent telco operator and challenge operators building out competing infrastructure to new premises.

The evidence commissioned by DCMS on the best wayleave regime to incentivise private investment in telecommunications infrastructure is compelling. According to Nordicity's economic impact assessment, giving fixed line communications providers equivalent wayleave rights to water companies would reduce the cost of wayleaves by 62%.

Recommendations

To grant CPs equivalent access rights to water companies; this will go some way to levelling the playing field with BT's for competing infrastructure providers.

Government should amend Schedule 1 of the Digital Economy Bill to ensure that CPs are granted equivalent rights as water companies:

a. **Not be required to pay consideration in addition to compensation** via an exemption for fixed broadband operators to Schedule 1, Paragraph 23;

b. **Able to offset any increase in value of the land or adjacent land from the compensation they are required to pay**[15] via either an amendment to addition to paragraph 80/81 or a new paragraph 24A (which reflects wording contained within Section 3(4) of Schedule 12 of the Water Industry Act 1991)

   Where, apart from this paragraph, any person entitled to an interest in any land would be entitled under paragraph 24 above to an amount of compensation in respect of the grant or exercise of code rights, there shall be deducted from that total amount an amount equal to the amount by which the exercise of the code rights enhances the value of any other land which—

   (a) is contiguous or adjacent to that land; and

   (b) is land to an interest in which that person is entitled in the same capacity.

c. **Limit the circumstances under which a land owner is able to reject an application** to install broadband infrastructure in ways equivalent to the water regime.

15 Water companies are able to offset any depreciation in the value of land against any enhancement in the value to it (or adjacent lands) that may come from improved water or sewerage service.

Section 3: Repeal of Section 73 of the Copyright, Designs and Patents Act

Government intends to repeal Section 73 of the Copyright Designs and Patents Act 1988.

Section 73 was originally created to help the availability of Public Service Broadcast channels in "analogue black spots" – areas where cable signal was available but the analogue signal was lacking.[16] As public broadcasting has evolved to digital transmission, Section 73 continues to support the universal availability of PSB broadcast to the c.250,000 premises where cable is available but the DTT signal is not.

The practical effect of Section 73 today is, however, to ensure that the Public Service Broadcast Channels are available free of charge to cable viewers.

Government has determined that it should repeal Section 73 on grounds that it has been abused by illegitimate online platforms, not cable companies. In doing so, Government has stated an unambiguous desire that the repeal of Section 73 should not give rise to so-called retransmission fee payments from the cable platform to the commercial PSBs.

> *"Government considers that the commercial PSBs are fairly compensated for their licensed PSB channels via the existing PSB 'compact' (EPG prominence and spectrum in return for PSB obligations), … and therefore expects that there will continue to be no net payments between all platform operators and the PSBs for carriage"*
>
> DCMS, Balance of Payments consultation response of 5 July 2016

Government's reasoning for its position is instructive; it believes that the PSBs are adequately compensated for their PSB programming by the current 'compact': EPG prominence and subsidised spectrum. A report commissioned by the Commercial Broadcasters Association in 2014 estimated that ITV enjoys a net benefit from its PSB status of £87m per annum[17].

It is therefore concerning that ITV views the repeal of Section 73 as an opportunity to seek retransmission fees from Virgin Media.

On an investor relations call in late July 2016, Adam Crozier said:

> *"when Section 73 goes…a negotiation will need to take place."*

Ultimately, Ofcom will be the one to adjudicate any dispute between a commercial PSB provider and Virgin Media. It is likely to do so through the lens of the "must offer" and/or "must carry" obligations under the 2003 Communications Act. This could put at risk Government's intention to see a "zero net balance of payments" between the two parties. However, it can be ensured by minimal changes to the 2003 Act outlined below.

If negotiations between Virgin Media and the commercial PSBs are to take place the former faces two significant risks:

[16] Whitford Committee on Copyright in 1977

[17] The costs and benefits of the C3 licences, Communications Chambers for COBA, December 2014

- A PSB channel could 'go dark' on the cable platform. The must offer obligation placed on PSBs under the 2003 Communications Act is not absolute: the requirement is "subject to agreeing terms". The experience of retransmission fees negotiations in the United States suggests broadcasters use withdrawal of their channel as a key bargaining tool in negotiations with the platforms. In 2013 there were 127 broadcast blackouts, some for as long as a month, and some designed to coincide with culturally significant TV 'moments' such as the Superbowl..

- Virgin Media is exposed to claims from both the PSBs and underlying copyright owners. Repeal of Section 73 will have the practical effect that the copyright in the broadcast and the underlying rights are no longer covered for cable broadcast. The PSBs currently clear the copyright with the underlying rights holders for all broadcasts in the UK (regardless of platform). However, immediately following repeal PSBs will be able to instruct underlying rights owners to pursue their copyright clearance with Virgin Media. Government has acknowledged this potential risk and stated its intention that the underlying rights should continue to be cleared by the PSBs for all platforms and to put in place transitional arrangements to prohibit Virgin Media's exposure to underlying copyright claims following repeal if this is not the case.

Recommendations

1. Government should guarantee that its policy intent of zero net fees is secured with two amendments to the 2003 Communications Act to clarify that PSBs are prohibited from seeking retransmission fees:.

    a. Amendment to "must offer" (s272 of 2003 Communications Act) to "prohibit the imposition <u>on any person</u> …, of any charge that is attributable (whether directly or indirectly) to the conferring of an entitlement to receive the channel"
    b. Amendment to PSB licenses – (in 2003 Communications Act and the operating licenses agreed with Ofcom) to prohibit "charges on persons in respect of their reception <u>(including reception for retransmission)"</u>

- Government should put in place transitional arrangements to a. prevent loss of access to PSB channels during a dispute (i.e., a period of two years); and b. ensure that Virgin Media is not exposed to claims from underlying copyright owners immediately following repeal. It should consult on amendments to the Copyright Designs and Patents Act to ensure that there is a long-term statutory guarantee that underlying copyright is cleared by the PSBs for all forms of UK broadcast.

Section 4: Threshold for Appeal of Ofcom decisions

The Bill envisages modifying the threshold for an appeal of an Ofcom decision from the current "merits-based" grounds for appeal to a Judicial Review standard. Virgin Media, and the vast majority of the UK Communications sector, opposes this change on the grounds that, over time, it will lead to a significant decline in the robustness and quality of regulatory decision making.

The current appeals process generates significant, quantifiable consumer benefits and underpins regulatory certainty. That certainty, in turn, is a significant advantage for the UK in attracting inward investment in telecommunications assets. A robust and effective appeals mechanism corrects regulatory mistakes and encourages the right level of rigour in regulators' decision-making processes. This means better outcomes for all stakeholders – including, most crucially, consumers.

These reforms will effectively dilute the grounds of appeal so that the regulator cannot be challenged on the quality of its evidence-base and likelihood efficacy of its decisions, but merely the process followed and the legality of the decision. It is clear that it is possible for decisions to be based on a robust process, but 'wrong' given the when the evidence. Sometimes regulators can and do make decisions which are not "unlawful" in a JR sense, but which are, nonetheless wrong (i.e. they are based on the wrong evidence or will not benefit consumers in the way the regulator believes). When these situations arise, they produce bad outcomes for stakeholders and consumers too.

Analysis undertaken for a group of CPs by Towerhouse LLP has quantified the consumer benefits that have arisen from overturning Ofcom decisions on price controls in recent years. The quantifiable financial impact of these appeals totalled a net benefit £376.3m. These are benefits which would be unlikely to have been realised under the proposed Judicial Review standard.

Moreover, a "Judicial Review" standard of appeal could lead to wildly varying interpretations and judgments by the courts, which would take years and many test cases to settle. The Judicial Review standard has three heads: illegality, irrationality and procedural impropriety. The first deals with errors by the decision-maker about the extent of their legal powers – Ofcom is quite unlikely to act illegally. The last concerns mistakes in the process (such as failing to comply with the procedural requirements to consult in the Communications Act), which again Ofcom is generally well able to avoid.

It is the second head - assessing whether a decision-maker has acted outside the very wide latitude allowed by the courts in relation to the substance of its decision – which has invited wildly divergent opinions from the Courts and which will generate significant uncertainty for Communications Operators.

Recommendations

Virgin Media makes three recommendations to mitigate what could be a hugely damaging adjustment to checks and balances applied to Ofcom decision making:

- Option 1: retain the existing standard of Appeal.

a) Option 2: mirror the language of Article 4 of the Framework Directive which ensures that merits based grounds for appeal are taken into consideration:

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 but taking due account of the merits of the case;

b) Option 3 mirror the grounds for appeal applied to other sectors including the electricity sector and civil aviation:

The Tribunal must decide an appeal, by reference to the grounds of appeal set out in the notice of appeal only to the extent that it is satisfied that the decision appealed against was wrong on one or more of the following grounds—
(a) that the decision was based, wholly or partly, on an error of fact;
(b) that the decision was wrong in law;
(c) that an error was made in the exercise of a discretion; or
(d) that the decision fails to achieve, in whole or in part, its intended effects.

Section 5: Internet pornography: requirement to prevent access by persons under the age of 18

As part of the Conservative Party's 2015 General Election Manifesto, the Government committed to age verification measures to limit children's and young people's exposure to "harmful sexualised content", i.e. online pornography. The Bill proposes:

1) Civil sanctions, including the ability to fine companies; and

2) 'Follow the money' through ancillary services

Virgin Media believes that the proposed approach constitutes a "gold standard" model for online content enforcement, elements of which have proven efficacious internationally – in Germany[18] – and domestically in relation to other forms of content. We believe this approach will encourage compliance with the law.

A similar, successful 'follow the money' model is administered by The City of London Police' IP Crime Unit (PIPCU) to disrupt copyright infringing websites where traditional law enforcement methods have been unsuccessful and could be replicated.

Case study: "The Follow the Money Approach and the efficacy of the PIPCU Model"

The Police IP Crime Unit (PIPCU) launched the Infringing Website List (IWL) in March 2013[19]. The establishment of the IWL followed collaboration between law enforcement, rights holders (represented by BPI, FACT, Publishers Associations, and IFPI), the advertising industry (represented by IAB UK, ISBA and IPA) and the payment card processors to prevent payments to sites that infringe UK copyright law. The solution combined self-regulation practices alongside traditional law enforcement tactics, and was named 'Operation Creative'.

The process:

Stage 1 Rights holder identifies infringement, and reports it to PIPCU.

Stage 2 PIPCU investigates the evidence package provided by the rights holder and either progresses the case or rejects it. At this stage it also instructs independent legal counsel to review the case.

Stage 3 PIPCU contacts the website owner to notify the owner of the investigation, and gives them the opportunity to respond and change behaviour.

Stage 4 If the site continues to infringe, it is added to the Infringing Website List (IWL). The IWL is made available to ancillary services providers that may be a source of revenue for the site – these are 1) payment card processors, and 2) advertisers, advertising agencies and advertising technology intermediaries involved in the placement of advertising to websites.

Stage 5 PIPCU continues to monitor the sites for infringement. Those that change their behaviour are removed from the IWL and therefore advertising and payment card processing can resume.

[18] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/541366/AV_ConsultationDCMS_20160216_Final__4_.pdf – Figure 8, p34

[19] https://www.iabuk.net/about/press/archive/city-of-london-police-call-on-advertising-and-brand-sectors-to-help-tackle-cyber

In August 2015, following a year long study of the effect of Operation Creative on advertising on IWL sites, PIPCU reported a 73% drop in household brand advertising. In 2016 the Gambling Commission reported that there was a 36% decrease in gambling ads appearing on IWL sites between March and June 2015.

The success of the IWL relies upon advertisers instructing their agencies and advertising trading partners to use the IWL list of inappropriate sites. Industry good practice also encourages the use of industry-approved content verification (CV) tools that employ the IWL. CV tools prevent an advertisement from appearing a content that is breaching copyright. In partnership with PIPCU some CV tools replace these advertisements with information promoting Operation Creative and legal sites.[20]

The IWL model was held up as an example of good practice, and hailed as a world-first solution to tackling IP crime by Ministers at the inaugural International IP Enforcement Summit in June 2014[21] organised by the European Commission and the IPO. Further, former Members of Parliament, and government appointed IP 'Tsar' Mike Weatherley[22], commended the self-regulatory approach in his report.

Additional sanctions

The four main Internet Service Providers have worked collaboratively with the UK government over the past four years to provide filters. Each ISP has made available free network level parental controls to all broadband customers and undertaken best efforts to ensure that all customers made an 'active choice' on whether to turn on parental controls. By 2015, 95% of Virgin Media's broadband customers had made a choice about whether to use filters which prevent access to pornography. These efforts directly support Government's policy objective of ensuring that under 18's are not able to access pornography content via the home broadband connection.

In a letter to members of the Public Bill Committee on 10 November 2016, the Minister made clear that the Government does not wish to pursue site blocking as an additional sanction for sites which do not comply with age verification measures:

"… our proposals represent a proportionate response to this issue especially given the level of interest that surrounds any proposal to regulate the internet. Blocking of infringing sites would place the focus on access providers rather that [sic] content providers."

Virgin Media agrees with the Minister's view. The age verification measures included in the Bill will ultimately affect how *all* UK consumers are able to view legal pornographic content. It seeks to limit young people under the age of 18 from being able view adult content on commercial pornography sites where the content is under the editorial control of the site owner. It is important to recognise

[20] For an overview of the market and good practice see:
https://www.iabuk.net/sites/default/files/The%20Programmatic%20Handbook.pdf
[21] https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/about_ohim/press_releases/IP_summit_report_en.pdf
[22] http://www.olswang.com/media/48204227/follow_the_money_financial_options_to_assist_in_the_battle_against_online_ip_piracy.pdf

that the Bill will not address the dissemination of user generated pornography via social media and/or photo sharing sites.

Government's Expert Advisory Committee summarised the drawbacks and potential unintended consequences of applying ISP blocking as a sanction against failure to comply with the age verification scheme. It expressed concerns that such measures would be disproportionate, risked driving young users to less secure "underground" sites, and presented technological challenges[23]. The report also concluded that whilst there is evidence of a strong correlation between rising exposure to online pornography amongst young people, the evidence of a causal link between exposure and sexualisation is less clear.

Wording of the legislation

In the Government's consultation on the Digital Economy Bill the term 'ancillary services' referred to "*those services which support and profit from the delivery of pornography on commercial sites. These include, but are not limited to, payment systems, advertising on pornography sites, web-hosting services, and other revenue-generating processes associated with these sites*". It is clear that the Government's intention is to reduce the monies paid to non-compliant sites – following the approach taken by PIPCU to IP crime. However it could be interpreted that an ancillary service is broader than a service that generates revenue for a site:

"(6) In this section an "ancillary service provider" means a person, other than a payment-services provider, who appears to the age-verification regulator to— (a) provide, in the course of a business, services which enable or facilitate the making available of pornographic material or prohibited material on the internet by the non-complying person; or (b) advertise, on or via any internet site operated by the non-complying person or via any other means of accessing the internet operated or provided by that person, any goods or services provided in the course of a business."

The following terms lack clarity of meaning in the above clause: 'ancillary services'; 'on a commercial basis'; and 'making available'. Unless there is clarity on the scope of these terms many different types of business – including ISPs – could be placed in an uncertain legal position.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/500701/Report_of_DCMS_Expert_Panel__Autumn_2015__FINAL_.pdf

Section 6: Automatic Compensation for failure to meet performance standards

The UK's broadband market is characterised by high levels of competition, consumer satisfaction and switching. 80% of consumers are happy with their communications service according to Ofcom.

The Bill seeks to update Ofcom's powers 'to require a communications provider to pay compensation to an end-user on failing to meet a specified standard or obligation'. Ofcom has issued a call for inputs and is currently considering responses before launching a larger consultation which is expected later this year.

As in other regulated sectors, Virgin Media already has in place robust compensation processes. In instances where customers contact us regarding an experience of an unplanned network fault, Virgin Media provides Loss of Service Credit. Consumers who are unhappy with our response are free to raise their complaint and an internal review process will begin. If they are still unhappy they are able to take their complaint to an Alternative Dispute Resolution Service. In the case of Virgin Media the ADR is CISAS[24] – which is administered independently, and all of their rulings are final. It should also be noted that to process is paid for by Virgin Media and therefore regardless of the outcome, the consumer does not bear any cost for escalating their complaint.

Virgin Media also self-regulates its performance to encourage improvement and incentivise performance. A clear example of this is how we use our customer feedback. Following interactions with Virgin Media, be that for an engineer call out or… a consumer will be asked to rate their experience against a series of statements. The scores of all of this feedback taken together provide an industry measurement called the Net Performance Score (NPS), which is in turn judged against an internal target. The NPS score ultimately impacts on all staff bonuses, focussing all on the importance of the customer and their experience of our service. It means that regardless of role, all individuals working at Virgin Media have in place objectives which focus them on delivering for consumers.

Virgin Media is therefore concerned to ensure that new regulatory powers do not have perverse consequences for the existing, broadly efficacious regime.

In designing a new standard Ofcom should be careful not to inhibit competition over quality of service – which is a key differentiator within the telecoms market and driver of consumer choice. There is a risk that Ofcom could inadvertently create perverse incentives on providers to weaken consumer contracts to potentially avoid automatic compensation payments. The intention of the Bill is that compensation will be 'automatic', there are questions to be asked about what automatic will mean in practice. There are a series of reasons why performance might be impacted where automatic compensation could be disproportionate. Finally, the regime should not be expensive and cumbersome to implement, as otherwise the cost could end up being reflected in consumer contracts.

[24] https://www.cedr.com/cisas/