



Department
for Culture
Media & Sport

Lord Ashton of Hyde
Parliamentary Under Secretary of State
4th Floor
100 Parliament Street
London SW1A 2BQ

020 7211 6000

www.gov.uk/dcms

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Dear Lords,

DIGITAL ECONOMY BILL – GOVERNMENT REPORT STAGE AMENDMENTS TO PARTS 3, 5 AND 6

I am writing to provide further detail about amendments I tabled yesterday. In addition to amendments on online pornography and government data-sharing I have tabled new measures to address concerns raised by colleagues, including amendments to support the ongoing process of separating Openreach from BT, on listed events, secondary ticketing and on regulatory priorities in electronic communications. I would also like to update you on where the government is on the question of Ofcom appeals and the Electronic Programme Guide, both matters on which we believe amendments are unnecessary. All these matters will be debated on the final days of Report stage next week on 20 and 22 March.

Online pornography

The age verification regulator is to be given powers in this Bill to give notice to payment service providers, ancillary service providers and to ISPs, of websites that have inadequate age verification as well as prohibited material. When we debated this at Committee stage on 2 February I noted that many colleagues have raised concerns with me about the scope of what amounts to “prohibited material” and I agreed to consider this further. Our priority, as set out in the manifesto is to protect children, not to operate online censorship but equally we must guard against our age verification policy legitimising the criminal content that unfortunately exists on the internet. Following careful thought we have decided that the Criminal Justice and Immigration Act 2008 provides an appropriate definition of unacceptable “extreme pornography”. This ensures depictions of violent, non-consensual and other harmful acts can be taken down, but of other non-harmful acts are not wrongly prohibited. Amendments tabled yesterday adopt the approach taken in this definition in place of “prohibited material”.

This is a controversial area and I know that there are calls for both wider and narrower definitions of what could potentially be blocked online. The work of the new regulator supplements, not substitutes, the work of the Internet Watch Foundation to take down material depicting child abuse and other unacceptable material.



Digital government

A large number of government amendments have already been tabled to amend the data-sharing powers. We are seeking to tighten the scope of the powers, to ensure that data is only shared absolutely when necessary with the right Parliamentary oversight. The amendments already tabled would modify powers in line with the recommendations of the Delegated Powers and Regulatory Reform Committee. Yesterday we tabled further safeguards as well as minor adjustments to the research chapter to ensure the anti-disclosure offences will be effective and to allow the definitions of small and micro businesses in the statistics chapter to be set on a transitional basis.

We have been working closely with the Information Commissioner to address her concerns to ensure privacy is at the heart of how the data-sharing powers operate. I have tabled amendments to make it a specific requirement that those making disclosures of personal data under the Bill have regard to the relevant Information Commissioner's Office (ICO) codes on privacy. These amendments strengthen transparency and ensure that privacy impacts are considered in line with the ICO's guidance.

The government has begun the process of implementing the GDPR which will take effect in May 2018. At that point, the legislative scheme used by the Information Commissioner to collect fees for its data protection work will fall away. I have tabled an amendment to begin the process to enable the creation of an alternative funding model to be in place for April 2018 ready for the start of the financial year in which the new Regulation will take effect.

Crown guarantee for the BT pension scheme

On 10 March Ofcom announced a voluntary deal with BT to legally separate Openreach from BT Group. This means that Openreach, currently an operating division of BT, will become a wholly-owned subsidiary, with the aim that a more independent Openreach will help drive investment in infrastructure, improve competition and ultimately bring benefits to consumers.

When BT was privatised in 1984, a guarantee was given that the Crown would take on BT plc's liabilities to the BT Pension Scheme in the event of BT plc entering insolvent winding-up. The legislation from 1984 did not specify what would happen in the event that BT were split up. As such, the existing Crown Guarantee would not cover the liabilities of the new Openreach company to the pension scheme. Although such insolvency is extremely unlikely and is not foreseen, the government's view is that members of the Scheme who transfer to the new company should not lose the protection of the Crown Guarantee. Therefore, a legislative change is necessary to the Guarantee to allow the liabilities of the new Openreach to the BT Pension Scheme to be covered. The Scheme was closed to new members in 2001, and currently has c.40,000 contributing members of c.300,000 total members. Around 17,000 contributing members will transfer to new Openreach. My amendment ensures that the government has the necessary powers to deal with this appropriately.

Ofcom appeals

We have carefully considered the debate on the Bill measure reforming appeal rights against Ofcom decisions. We continue to believe that it is in everyone's interests that we have a strong regulator, whose decision-making processes, as well as decisions once made, are not frustrated by litigation. We will not table amendments but I wanted to explain further our thinking.

A "merits" appeal has a particular meaning in the UK, and appellants argue it implies a bottom-up review of a decision akin to a retaking of the whole decision rather than a review aimed at identifying an error by Ofcom. By comparison, Article 4 of the Framework Directive requires an appeal which is capable of considering the substance of a case to the extent the body hearing the case considers this necessary in the circumstances. The two are quite different. The Bill replaces appeals "on the merits" with appeals on judicial review principles, thereby removing unnecessary gold plating.

We do not believe it necessary to include the language of the Directive on the face of the Bill as the Court of Appeal has determined that judicial review is perfectly able to meet the current EU law requirement that "the merits of the case are duly taken into account" in appeals in the electronic communications sector as required by Article 4. The High Court has recently heard a judicial review of a decision by Ofcom – the Annual Licence Fees case - which did exactly this.

Listed events

Throughout the passage of the Bill we have heard concerns that the listed events regime might be under threat. Listed events are key sporting events, including the FA Cup Final, the Grand National and the Olympic Games, the television rights to which must be offered to "qualifying" channels before they can be offered to the rest of the market. Qualifying channels are those which can be received without payment by at least 95% of the UK population. The current qualifying channels are the Public Service Broadcasters' main terrestrial channels as they are received by at least 95% of homes via the various free to view television platforms (excluding the licence fee and basic tier cable subscriptions). Nonetheless, we have listened to the debate and to ensure that the listed events regime is future proof, I have tabled an amendment to provide the Secretary of State with the power to amend the qualifying criteria should that be necessary.

Electronic programme guide

We have heard a great deal during the passage of the Bill that the legislation underpinning the electronic programme guide is out of date. The government fully supports public service broadcasters but we have simply not seen any credible evidence of a problem. Indeed, to the contrary we believe the evidence suggests that there is a significant downside in making further amendment. Enclosed is a note looking at this in more detail and I hope that we will all agree that while we must keep legislation up to date, as we are doing with listed events, the case is not made to meddle with the programme guide.

Strategic priorities for telecommunications, spectrum management and postal services

To enhance the accountability of Ofcom to Parliament, I have tabled an amendment to create a new power to produce a Strategy and Policy Statement (“SPS”) covering telecommunications, the management of spectrum and postal services (while not covering media and broadcasting). This power will give the government greater ability to deliver its commitments to better broadband and mobile coverage. It will give clarity to the respective roles and responsibilities of regulator and government. Policy decisions are taken by government – accountable to Parliament. The detailed application of regulation is the role of Ofcom, independent of government. The SPS will be laid before Parliament to improve scrutiny. This amendment brings Ofcom into line with other regulators (such as Ofwat and Ofgem), acting on the government’s commitments to improve economic regulation as laid out in the ‘Principles for Economic Regulation’, 2011.

To improve information sharing between Ofcom and government the amendment also requires Ofcom to provide some information to government 24 hours in advance of publication, where that would be appropriate, and improve Ofcom’s general information sharing powers to enable Ofcom to share data and information with government - when they consider that to be supportive of policy development. This will aid the government's development of policy, and introduce greater transparency in the working relationship between Ofcom and government.

Ticket Bots

Yesterday we published the government's response to the Waterson report. I enclose a copy, which accepts Professor Waterson’s recommendations in full.

During passage of the Bill the government held two roundtables to explore the issue of ticketing bots. Professor Waterson attended one of the meetings and discussions showed that thinking on this has moved on since publication of his report.

It is hugely frustrating for fans who miss out on tickets in the primary market, only to see them appear on the secondary market in large numbers at dramatically increased prices and there is clearly a strength of feeling in both Houses on this. I have tabled an amendment providing a power to create a specific offence of using a ticketing bot to purchase more tickets than the maximum permitted, with a view to strengthening the law.

This will be similar to legislation recently introduced in the USA and would apply to any event that takes place in the UK, for which bots are used to obtain tickets, including by individuals based overseas.

The offence itself will not be on the face of the Bill, but will be a power to regulate. This is in order to ensure we are able to meet the requirements of the Technical Standards Directive, and to give us the flexibility to keep up with changes in technology and avoid any offence on the face of the Bill becoming obsolete. We have today also published a draft of the regulation.

Northern Ireland

The Northern Ireland Assembly was not able to pass the legislative consent motion on the Bill before its recent dissolution. I have tabled an amendment to allow separate commencement in Northern Ireland by regulations, if needed, once it has been possible to secure necessary consents. My officials have discussed this possibility with officials in the Northern Ireland Department of Finance, Department for the Economy and Department for Communities who all agree that this is a sensible way to proceed. We are therefore amending the commencement provisions in the Bill to allow the measures in the Bill to be brought into force separately for different areas. As is normal, the commencement regulations will not be subject to Parliamentary procedure, but UK Ministers would undertake to only exercise the power once consent is obtained.

I will place a copy of this letter and the documents listed below in the House library.



Lord Ashton of Hyde

Parliamentary Under Secretary of State

Enclosed:

- Table of government amendments to the Digital Economy Bill tabled on 13th March
- Note on electronic programme guides
- Government's response to the Waterson review of consumer protection measures applying to ticket resale
- Draft regulation on Ticket Bots