

Client Alert

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UK Digital Economy Bill

By Alistair Maughan

The UK government has published its Digital Economy Bill, intended to lead to a new Digital Economy Act. Although this is not the first time that the UK has produced legislation on the Digital Economy, the timing of the latest bill – announced by the Queen in May 2016 but published post-Brexit vote – leads to questions about whether the UK will need more than a piecemeal Act of Parliament if it is to maintain whatever position it currently enjoys in the global digital economy.

Much has changed since the UK's last direct legislation on the digital economy, back in 2010. Technologies that seemed advanced then – such as cloud computing – now comprise mature markets, and have been replaced by Big Data, robotic process automation, the Internet of Things and blockchain/distributed ledger technology as industry favourites. Also, the EU has both announced and pushed forward its Digital Single Market initiative. And, of course, the UK has voted in favour of Brexit.

The UK government clearly believes that the UK sits at the top table in terms of the global digital economy. But how does the country retain its position? And, if and when Brexit happens, how will the UK seek to replicate the advantages of being within the world's largest free trade grouping in terms of the flow of digital goods and services?

Timing-wise, the new Digital Economy Bill (the "Bill") – which was announced in the Queen's speech to Parliament in May 2016 and had its first reading in Parliament in July 2016 – is unfortunate. The two key events in its short life so far straddled both the Brexit referendum decision and the EU's announcement of a slew of digital single market measures, both in June 2016.

In light of both those developments, the Bill risks being seen, at best, as merely a stop-gap series of piecemeal measures and, at worst, as an irrelevance. Not that the Bill's measures are unwelcome, of course – merely that, without a lot more government support and legislative initiative, the Bill is not going to close the gaps that risk opening up when Brexit takes the UK outside the EU digital single market.

Content-wise, the Bill's primary focus is infrastructural – especially targeting Internet and broadband connectivity. It includes a range of measures designed to:

- implement a new Electronic Communications Code;
- provide better, more consistent end-user access to broadband across the UK;
- protect children from pornography and harmful online content;
- amend Ofcom's regulatory responsibilities;

Client Alert

- improve the delivery of public services, including a new Data Sharing Code of Practice; and
- strengthen the Information Commissioner's enforcement powers and protect individuals' rights, including via a Direct Marketing Code of Practice intended to provide better protection against spam email and nuisance calls.

OBLIGATIONS ON COMMUNICATIONS PROVIDERS

The government plans that Internet service providers (ISPs) will have to comply with any request from a UK citizen to provide broadband services at a speed of at least 10Mbps (the so-called Universal Service Obligation), or pay out compensation.

But the Bill doesn't introduce a legal right to a 10Mbps broadband connection; it's merely the first step in that direction. The target 10Mbps threshold doesn't seem particularly onerous, given that the current average broadband speed is 18.6Mbps and the UK government's definition of superfast broadband is 24Mbps. However, the Universal Service Obligation will be reviewed over time, and the 10Mbps figure will rise as and when Ofcom deems higher speeds appropriate, to ensure that the broadband coverage remains "*sufficient for modern life*".

The Bill also proposes to amend the Communications Act 2003 to permit Ofcom to require communications providers to pay compensation to end-users in respect of a failure to meet published performance standards.

ELECTRONIC COMMUNICATIONS CODE

The Bill contains a new Electronic Communications Code (ECC) that provides rights for communications providers to install and maintain equipment on land. The changes ought to reduce the cost of infrastructure roll-out, incentivise investment and improve connectivity.

The existing ECC (originally set out in Schedule 2 to the Telecommunications Act 1984, as amended) governs the relationship between landowners and electronic communications providers who want access to land so that they can install and maintain equipment on that land. The government has been planning to update the ECC for some time in order to strike the right balance between the interests of landowners and communications providers – and to help satisfy the general public's insatiable desire for faster, more reliable broadband.

ISP SWITCHING

The Bill discusses customers switching between suppliers of communication services, how this will work and how much public take-up there might be, given that in some other areas (such as bank account switching), consumer take-up has been muted.

Currently, there is no consistency on how long it takes for consumers to switch from one communications service provider to another. The government wants to amend the Communications Act 2003 to add a power for Ofcom to specify requirements in relation to arrangements for end-users to switch their communications provider. The intention is for Ofcom to be able to help consumers make more informed decisions about which communications provider to use.

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It's not yet known how the new procedure will work. However, based on previous switching initiatives introduced by Ofcom, it's likely to be a short process (seven days or less). It's also likely to take the form of provider-led switching, so that consumers can arrange switching via their new provider and avoid the headache of having to contact their existing provider to exit the contract.

It's likely that public take-up will depend largely on how this right to switch is communicated to consumers, and how easy the switching process is in practice.

INTELLECTUAL PROPERTY

The UK government plans to increase the maximum jail term for online copyright infringement from two to 10 years – despite overwhelming opposition by respondents to its consultation on the change earlier in 2016.

The Bill also contains elements dealing with intellectual property (IP), including the creation of an “Internet link” for owners of registered design rights to reduce innocent infringements. Owners of registered design rights will be able to mark products with a website address at which the details of the registration would be published.

Currently, in registered design right infringement cases, defendants can plead that they didn't know that a design was registered – even if the product was physically marked “registered”. The only circumstances in which they can't claim innocent infringement is where the registered design number is identified on the product.

The Bill introduces a further scenario – *i.e.*, if the wording that identifies a registered design is accompanied by a link to a free website which lists the design number for the product, defendants can equally not claim innocent infringement.

This “webmarking” approach is expected to help reduce accidental IP infringement because, as the practice becomes widely adopted across industries, would-be accidental infringers will know what to check for.

ONLINE HARMFUL CONTENT

The Bill introduces age-verification measures for adult content, effectively prohibiting pornographic material from being made available on the Internet unless it is made available in a way not normally accessible by under-18s. The Bill includes a definition of pornography and provision for the designation of an age-verification regulator who can impose financial penalties on those in breach.

The Bill is aimed at website and app operators that provide online porn (excluding on-demand services). But it's not clear whether the Bill, as currently drafted, could cover ISPs. ISPs are not referenced expressly, and the explanatory notes to the Bill refer to “commercial providers of pornography”, but it's arguable that ISPs could be considered to fall within the definition of “persons who make pornographic material available on the internet on a commercial basis”. It would be preferable to have this clarified in the final legislation.

At one stage, it was thought that the Bill might include powers to require ISPs to block porn websites. However, although the regulator may inform ISPs of any sites that don't have the appropriate age-verification measures in place, the Bill doesn't include any powers to require an ISP to block any sites that fail to comply with those measures.

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It's not yet clear what the new age-verification measures will look like. What we do know is that they will be specified by a newly created age-verification regulator, and that the process is intended to be "robust". For example, it's unlikely that entering a date of birth or checking a tick-box will be sufficient. Privacy campaigners have raised concerns over any age-verification process which requires proof of identity – for example, the provision of credit card details.

Of course, another concern with any measure is how one can practically enforce age checks on overseas websites and apps. Concerns have been raised that any system will result in a two-tier system, to the disadvantage of UK operators.

DATA PRIVACY

The Bill contains a number of provisions to strengthen privacy enforcement actions.

The government intends to give statutory effect to the Information Commissioner's Office (ICO) Direct Marketing Guide. This will impose an obligation on companies that engage in direct marketing to comply with direct marketing rules, the Data Protection Act 1998 and the Privacy and Electronic Communications Regulations 2003. The government feels that this will reduce spam email and nuisance calls.

CONCLUSION

It's hard not to conclude that the Digital Economy Bill is inward-looking and relatively infrastructure-focussed. The UK government may argue that a solid, reliable Internet backbone is an essential element of a world-leading digital economy. And, while that may be true, the inevitable next step must be to move quickly on to more outward-facing digital policy issues designed to help the UK compete effectively in the global digital economy.

For example, the UK government will need to work out how to stem any loss of competitiveness when Brexit takes the UK outside the EU Digital Single Market and, perhaps more interestingly, what options Brexit presents the UK government to create a welcoming home for digital businesses freed from some of the regulatory constraints that the EU Digital Single Market may involve.

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Client Alert

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