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UK's Digital Economy Bill: effectiveness of age verification and copyright measures questioned

After its announcement in May 2016, the multi-faceted UK Digital Economy Bill ('Bill') has progressed through Parliament and has recently been considered by MPs at the Public Bill Committee stage, during which various organisations have weighed in on the Bill's proposals. Sue McLean, Of Counsel at Morrison & Foerster, discusses what we have learnt about two of the measures within the Bill that have drawn significant attention - those relating to online copyright infringement and age verification for access to pornographic material - following the conclusion of the Committee stage.

The Bill was announced in May 2016 and had its first reading in the House of Commons in July 2016. Timing-wise, this followed a slew of new digital single market ("DSM") proposals published by the EU Commission in June. And, of course, the Brexit referendum decision on 23 June 2016 called into question how those DSM proposals will affect the UK's digital economy going forward.

The Bill is intended to help ensure that the UK is a world leader in the digital economy. But, for such lauded aims, its content is rather more pedestrian. Indeed, the Bill has been described as a "Christmas Tree bill on which the Government are hanging various vaguely related issues." Although the Bill's primary focus is on improving the UK's digital infrastructure, in particular internet and broadband connectivity, it includes various other measures. For example, measures aimed at protecting children from harmful online content; increasing criminal penalties for online copyright infringement; amending Ofcom's regulatory responsibilities; and improving the delivery of public services, including in terms of data-sharing.

The Bill has been progressing through Parliament. Following first and second readings, MPs recently considered the Bill in a Public Bill Committee ('Committee'), which involved taking oral and written evidence from a variety of stakeholders. Two of the measures under the Bill that have drawn significant attention are those measures dealing with online copyright infringement and age verification for pornographic material.

Online copyright infringement

The Bill increases the maximum jail term for online copyright infringement from two to 10 years. This is intended to strengthen the UK copyright framework and bring criminal penalties for online and physical copyright infringement into line with one another.

The measure triggered a variety of concerns at the consultation stage, with respondents concerned that casual infringers may be criminalised. In evidence provided to the Committee, organisations such as the Open Rights Group ('ORG') reiterated its concerns that these criminal penalties could affect ordinary consumers. That's because the offence covers any person 'who knows or has reason to



Following conclusion of the Committee discussions, the Culture, Media and Sport Committee announced on 16 November 2016 that it intends to table a new amendment to the Bill to deal with the misuse of bots in the ticketing sector.

believe that he is infringing copyright and knows or has reason to believe that communicating the work will cause loss, or risk of a loss, to the copyright holder.' ORG argued that this reference to 'risk of loss' pulled in all file-sharing because even casual file-sharing could result in a licensed copy not being bought and therefore the risk of a loss of revenue to the copyright holder. ORG argued that in such circumstances criminal penalties would be manifestly disproportionate to the offence committed. The ORG is also concerned that the measure could fuel the activities of 'copyright trolls,' who specialise in extorting money from infringing users.

The Government rejected these concerns. It believes that the wording of the Bill is appropriate. Ultimately it will be for the courts to decide on criminal infringement on a case-by-case basis. However, it did not believe that a person who accidentally shares a single file without permission would be caught. On the subject of trolls, the Government did not perceive this as a significant concern, but will keep the topic under review.

Age verification

The Bill introduces age-verification measures for adult content, effectively prohibiting pornographic material from being made available online 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 for those in breach. It has been recently announced that the British Board of Film Classification ('BBFC') will take on this regulatory role.

Although relevant stakeholders agree that the aim of protecting children from harmful content is laudable, the measures have attracted a series of criticisms, both from stakeholders who think the proposals don't go far enough and from those that think the proposals go too far or won't work in practice. Key issues discussed at the Committee stage include:

- **Scope** - the Bill is aimed at website and app operators that provide online porn on a commercial basis (excluding on-demand services). 'Commercial basis' includes making the material

available free of charge on or via a site which is operated on a commercial basis (e.g. which uses advertising or another business model). The BBFC will publish guidance on which providers will be caught by the Bill in due course, but the Government confirmed during the Committee stage that the age verification measures are not intended to apply to ISPs.

- **'Ancillary service providers'** - where the regulator considers that an operator is in breach of the age verification measures it may inform any relevant payment services provider or ancillary service provider. An 'ancillary service provider' is a party that enables, facilitates or advertises the pornographic content. The BBFC made clear that it expects ISPs, search engines, and social media operators to be considered 'ancillary service providers' for these purposes and will be engaging with such parties over the coming months.
- **Privacy** - it's still not yet clear what the new age-verification measures will look like. What we do know is that they will be specified by the BBFC, and that the process is intended to be 'robust.' For example, entering a date of birth or checking a tick-box won't be sufficient. Privacy concerns have been raised over any age-verification process which requires proof of identity. The ORG highlighted that data collection of this nature creates inherent risks of data breaches and the lack of safeguards in the Bill creates opportunities for data leaks revealing sensitive information. In its oral evidence to the Committee the BBFC acknowledged that privacy is paramount and indicated that privacy would be taken into account when evaluating age verification measures.
- **Impact** - various parties have suggested that the cost of applying age verification measures may have an adverse impact on UK operators. In particular, there are fears that amateur and smaller commercial websites (including those sites catering for sexual minorities) may be unduly burdened. And some respondents such as the ORG are not convinced that the introduction of age verification measures will have a significant impact. In its view, although such measures might prevent young

children from inadvertently accessing adult content, they are unlikely to prevent determined teenagers.

- **Blocking** - the original Bill didn't include any powers to require an ISP to block any sites that fail to comply with age verification measures. At Committee stage, there was a general consensus that responsible sites would comply with the rules, but concern remained that many sites (in particular, overseas sites) would be less likely to comply. In their submissions to the Committee, organisations including ISPA, ORG and techUK resisted any suggestion of blocking. ORG suggested that the blocking of legal content would be disproportionate as "censorship should be reserved for illegal and harmful content." But a coalition of UK children's charities suggested that the Bill would not be effective if the regulator did not have the power to require ISPs to block non-compliant providers. Indeed the BBFC itself gave evidence that it thought that blocking ought to be part of the regulator's arsenal. And many opposition MPs pushed the Government to justify why blocking was not being considered. At Committee stage, the Government's view remained that it is not persuaded that blocking would be proportionate as it would not be consistent with how other harmful or illegal content is dealt with. It also believed that there is a question of practicality - porn companies would be able to circumvent blocking relatively quickly by changing URLs and there is a risk that legal content could be blocked. The Government said that it would need to be convinced that the benefits of blocking outweigh the risks. It now seems that it has been. On 20 November the DCMS announced that amendments to the Bill will be tabled to give the BBFC power to require ISPs to block websites that do not put tough age verification measures in place. Expect much more debate on this to come.

Secondary ticketing and bots

The Culture, Media and Sport Committee announced on 16 November that it intends to table a new amendment to the Bill to deal with the misuse of bots in the ticketing sector. Another bauble to hang on the Christmas tree.