

DIGITAL ECONOMY BILL

Supplementary memorandum concerning the delegated powers in the Bill for the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This further supplementary memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee by the Department for Culture, Media and Sport.
2. It addresses amendments to the Digital Economy Bill tabled for Report stage in the House of Lords, identifying those which confer powers of a legislative nature and explaining in each case why the power has been taken and the nature of, and the reason for, the procedure selected.
3. The government's response to the Committee's recommendations on the Bill (as given in its 11th, 13th and 16th reports of session 2016-17 published on 22 December 2016, 19 January 2017 and 2 February 2017 respectively) included an explanation of the amendments tabled or to be tabled in response to those recommendations.¹ Those amendments are therefore not included within this memorandum.
4. It may, however, be helpful for the government to draw the Committee's attention here to two matters referred to in the government's response.
5. First, a new clause has been tabled in relation to Part 3 of the Bill which provides that the Secretary of State may issue guidance to the age-verification regulator in relation to the regulator's functions. The government's response to the Committee's recommendations explained that it intended to table such an amendment as part of its response to the Committee's concerns about the regulator's powers.

¹ <https://www.publications.parliament.uk/pa/ld201617/ldselect/lddelreg/118/11807.htm>

6. Second, three delegated powers have been tabled in relation to clause 34 (disclosure of information to water and sewerage undertakers). The government explained in its response to the Committee's recommendations that since the Committee had reported on the relevant part of the Bill, the government had amended the Bill to insert similar data sharing provision to address the take-up of water poverty schemes as was already included in relation to fuel poverty schemes. It further explained that it would table amendments so as to make identical provision as to powers in respect of water poverty, as for the powers in clause 32(5) for fuel poverty, once those powers had been amended in response to the Committee's recommendations. Amendments to both clauses have now been tabled.

B. ANALYSIS OF DELEGATED POWERS BY CLAUSE

New clause: Power to make regulations creating a criminal offence of breaching limits on internet and other ticket sales

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution

Context and purpose

7. This clause confers a power on the Secretary of State by regulations to create a criminal offence of breaching limits on internet and other ticket sales.
8. The Government considers that the creation of a new offence is necessary to deal with the issue of ticketing bots being used in relation to recreational, sporting and cultural events that take place in the United Kingdom. Bots are software that automate the ticketing purchase process to circumvent limits on the maximum number of tickets that can be purchased. They are used to purchase tickets for sale on primary sites, in excess of the maximum number permitted by the conditions of sale, which can then be sold on the secondary market at inflated prices.

9. In 2015 Professor Waterson commenced a review of consumer rights provisions in relation to online ticket sales pursuant to section 94(1) of the Consumer Rights Act 2015.² Professor Waterson did not recommend banning the secondary ticketing market, or capping resale prices. His view was that ticket sellers should adopt strategies to prevent automated ticket purchasing by bots. However, he also concluded that there was a lack of reporting of their use and uncertainty concerning the legal position.
10. In light of this, the Government considers that the creation of a new offence is the most effective way of dealing with the situation where people are unable to buy tickets on the primary market, only to see them immediately reappear on the secondary market at inflated prices. Clarification of the law in this area means that there can be no doubt as to the illegality of this practice, or the need to report it.
11. The clause sets out as parameters the circumstances in which the offence may be committed. These are: that tickets for a recreational, sporting or cultural event in the UK are offered for sale, through a process that the purchaser completes using an electronic communications network or service, and subject to conditions that limit the number that may be purchased. The offence consists of using anything that enables or facilitates completion of any part of such a process with intent to obtain tickets in excess of the maximum permitted. The offence may be committed whether the offer is made, or anything is done to obtain tickets, in or outside the United Kingdom since by their nature the acts that comprise the offence are not limited in terms of territoriality.

Justification

12. The principle of creating the offence will be approved by Parliament during passage of the Bill. However, the Government considers that it is appropriate for detailed provision to be made by regulations rather than on the face of the Bill. This is because the offence by its nature is intricately bound up with behaviour driven by technology. The way in which the ticketing market

² *Independent Review of Consumer Protection Measures concerning Online Secondary Ticketing Facilities* (May 2016), available online at <http://www2.warwick.ac.uk/fac/soc/economics/staff/mjwaterson/ind-16-7-independent-review-online-secondary-ticketing-facilities.pdf>

operates is constantly changing and as technology evolves it may be necessary to revisit the details of the offence in terms of how it can be committed and what it comprises.

13. In particular, operators in this area have proved adept at circumventing controls on their activities. It is also very possible that measures may be found to circumvent the commission of the offence in a way that can be detected. It is difficult to predict how this might be done in the future and it is therefore important to retain as much flexibility as possible so that this can be addressed, if necessary, once the offence has been on the statute book for a period of time.
14. By including detailed provision in regulations rather than on the face of the Bill, the Government will be well placed to amend that provision to keep pace with technological developments and thus ensure that the behaviour at which the measure is directed continues to be targeted most effectively. The vires for the proposed offence therefore include powers for an offence to be limited to particular circumstances or acts within those set out in the parameters of the clause, and for it to be subject to an exception or defence. This will provide appropriate flexibility for the future.
15. Importantly, however, key aspects of the power are set out on the face of the Bill. These include not only the circumstances within which the offence may be permitted, which act as parameters, but also the method of trial and restrictions on any penalty. Subsection (6) provides that the offence must be triable only summarily in England and Wales and Scotland; and subsection (7) provides (inter alia) that the offence may not be punishable with imprisonment.

Justification for procedure selected

16. The Government considers that it is appropriate for the power to be subject to Parliamentary approval through the affirmative procedure, given that it provides for the creation of a new criminal offence, so as to ensure more intensive scrutiny through debate and approval in both Houses.

17. It is likewise considered appropriate that the affirmative procedure apply to subsequent regulations, in light of the Government's anticipation that the regulations may need revision to remain effective in response to technological developments.

New clause: Power to amend qualifying conditions for television programme services to which listed events are made available

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution

Context and purpose

18. This clause confers a power on the Secretary of State by regulations to amend the qualifying conditions for television programme services to which rights to broadcast listed events are made available.
19. Part IV of the Broadcasting Act 1996 ("the 1996 Act") makes provision to ensure that events of national interest are made available to widely received free-to-air television services. These events are set out in a list published by the Secretary of State and thus referred to as "listed events".
20. It does not provide that such listed events must be broadcast live. Rights holders are not required to sell live rights and broadcasters are not obliged to purchase them or to show the events. Instead, it ensures that where live rights are made available, they must be made available to free-to-air channels, by restricting the acquisition by television programme providers of exclusive rights to the whole or any part of television coverage of listed events and the broadcasting on an exclusive basis of such coverage unless the contracts comply with the requirements of the 1996 Act and Ofcom has given consent.
21. In particular, rights to broadcast listed events on an exclusive live basis must be offered to a service that meets the qualifying conditions in section 98(2) of

the 1996 Act, as well as to a service which does not. The qualifying conditions are:

(a) that the service is received for free (with the exception of the BBC Licence Fee and basic tier cable subscription fees); and

(b) that the service is received by at least 95% of the population of the United Kingdom.

22. Ofcom is required to publish a list of channels that meet the qualifying conditions. At present, it links reception of a channel to viewing figures for channels provided by the Broadcasters' Audience Research Board (BARB). Concern that been expressed in Parliament and elsewhere that, if this metric continues to be used without factoring in other methods of viewing broadcast television (such as streaming via the internet by phones or tablet devices), then in future one or all of the channels currently on the list may no longer meet the qualifying conditions.
23. In order to guard against this, the clause inserts a new subsection (5A) which confers power on the Secretary of State to amend the percentage of the population by which a service must be received in order to qualify. This would enable the Secretary of State to lower the relevant percentage so as to ensure that there continues to be a list of channels which meet the qualifying conditions.
24. New subsection (5B) provides that any amendment to the percentage does not affect the validity of any existing contract to broadcast a listed event. This follows the approach in section 97(5) of the 1996 Act which is concerned with changes to the list of events itself. Any amendment is not intended to invalidate existing agreements to broadcast listed events, which can last for a number of years.
25. New subsection (5C) provides that regulations made under subsection (5A) may make transitional, transitory or saving provision. This is to enable other potential effects to existing contracts to be dealt with; for example, if a rights agreement that is currently void because it only grants the exclusive right to

televising a listed event to a non-qualifying service, or vice versa, would cease to be void because a change in the percentage renders the television programme service a qualifying service (or vice versa). There may also be a need for saving or transitional provisions to address negotiations for rights agreements which are under way but not concluded at the time regulations are made.

Justification

26. The Listed Events regime is not under immediate threat. However, developments in how the public views listed events are difficult to predict. It is therefore considered appropriate to take a power to ensure that, as media consumption habits change, the Government's policy objective to ensure that listed events are widely available on free-to-view services continues to be met.
27. The power has been drawn narrowly so as to relate only to the percentage figure specified in section 98(2)(b). It does not relate to the listed events themselves or to wider aspects of the regime. The Government does not therefore consider it necessary to specify a list of objectives or considerations to which the Secretary of State must have regard in exercising the power.
28. In drafting the clause, consideration was given as to whether the power should contain a range within which the percentage could be amended. However, given the unpredictability of developments in how people view audio-visual media, the power needs to retain sufficient flexibility. In this regard, it should be recognised that if the percentage were set too low it would not meet the policy objective of ensuring that listed events remain widely available to the public for free, and that this therefore acts in practice as a restraint on the power.
29. Furthermore, exercise of the power would need to comply with EU law. The EU Audio Visual Media Services Directive (Directive 2010/13/EU) enables Member States, at Article 14, to take measures to ensure that a "substantial proportion" of the population are not deprived of the possibility of following listed events on free-to-view services. Although this is not defined, this

constrains how far the power could be used to lower the percentage in section 98(2)(b).

Justification for procedure selected

30. As this provision provides a power to amend primary legislation it is considered appropriate that the power is subject to Parliamentary approval through the affirmative procedure.

New clause: Power to make strategic policy statement for Ofcom

Power conferred on: Secretary of State

Power exercisable by: Statement

Parliamentary procedure: The Secretary of State must lay the statement in draft before Parliament. If either House of Parliament resolves not to approve it within 40 days of laying, the Secretary of State may not designate the statement.

Context and purpose

31. This clause inserts new sections 2A, 2B and 2C into the Communications Act 2003.
32. New section 2A confers a power on the Secretary of State to make a statement setting out the strategic priorities of the Government relating to telecommunications, management of the radio spectrum and postal services. This does not include media. Section 2B provides that Ofcom must have regard to the statement when carrying out its related functions. The purpose is to enable the Secretary of State to set strategic priorities and for Ofcom to have regard to them, in common with other regulators such as Ofwat and Ofgem.
33. Section 2C requires the Secretary of State to consult Ofcom and other persons on the draft statement. Thereafter, the Secretary of State must make any further changes and lay the statement before both Houses of Parliament. The Secretary of State must not designate the statement if, within 40 days, either House of Parliament resolves not to approve it.

Justification

34. The power is intended to allow the Secretary of State to set out in a statement strategic priorities relating to particular sectors. It is not appropriate to set out such strategic priorities in primary legislation; by their nature they will change over time.
35. The use of a designated statement to set out strategic priorities is used elsewhere. For example, Part 5 of the Energy Act 2013 makes provision for the Secretary of State to designate a statement as the strategy and policy statement.

Justification for procedure selected

36. The statement will set out the strategic priorities of the Government relating to telecommunications, management of the radio spectrum and postal services. Ofcom must have regard to these, but this does not affect the obligation of Ofcom to comply with any other duty or requirement.
37. Under the Energy Act 2013, before a statement can be designated as the strategy and policy statement it must be laid before Parliament and approved by both Houses (section 135). However, section 132 requires that (in addition to the Authority having regard to the strategic priorities set out in the strategy and policy statement when carrying out regulatory functions), the Secretary of State and the Authority must carry out their respective regulatory functions in the manner which the Secretary of State or the Authority (as the case may be) considers is best calculated to further the delivery of the policy outcomes.
38. The clause does not go so far as to require Ofcom to carry out its functions in the manner it considers best calculated to further the delivery of the policy outcomes; it only requires Ofcom to have regard to the statement.
39. As such, it is not thought necessary that Parliamentary approval of the statement is needed (as provided for in the Energy Act 2013). However, the Secretary of State is required to lay a draft of the statement before Parliament and cannot designate the statement if either House resolves, within the 40-day period, not to approve it.

New clause: Power to exempt information from advance provision to the Secretary of State before publication

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution

Context and purpose

40. This clause inserts new section 24A into the Communications Act 2003, conferring a duty on Ofcom to provide to the Secretary of State, at least 24 hours in advance of publication unless exceptional circumstances apply or otherwise agreed, the information which it proposes to publish. The Secretary of State may not disclose the information to anyone other than another Minister of the Crown or make representations to Ofcom, requesting a change to the proposed publication. This restriction ceases when the first of the following occurs: publication or Ofcom informs the Secretary of State that the restrictions need no longer apply.
41. The clause confers a power on the Secretary of State by regulations to exempt certain specified information from automatic disclosure in advance of publication. New section 24B provides that this duty of disclosure only applies once the regulations have been made and have come into force.
42. The purpose is to enable the Secretary of State to have a fuller understanding of the activities of Ofcom so as to help with the Secretary of State's policy development but also ensure that any publications which are unsuitable for automatic disclosure are not required to be disclosed.

Justification

43. Given the range of information which Ofcom publishes or proposes to publish and the fact the scope may change over time, it is not practical to list on the face of the Bill the names of every publication which is not suitable for automatic advance disclosure. At the same time, the Secretary of State does not wish to see the contents of each and every publication and some

publications may not be suitable for advance disclosure, for example publications relating to sensitive ongoing investigations. Accordingly, provision is made for the Secretary of State to make regulations using the negative procedure which sets out which publications are exempt. It requires the Secretary of State to consult with Ofcom before making these regulations, so as to ensure that the exemptions are appropriate.

Justification for procedure selected

44. As this is a technical provision, concerning information sharing obligations of a regulator to Government, the affirmative procedure is not considered necessary. By way of comparison, Schedule 8 of the Consumer Rights Act 2015 includes a regulation making power for the Secretary of State in respect of how another regulator, the Competition and Markets Authority, should approve redress schemes – this includes a provision as to what information should be provided. That power is subject to the negative procedure.

New clause: Power to make regulations about charges payable to the Information Commissioner

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: None

Context and purpose

45. This clause confers a power on the Secretary of State by regulations to require data controllers to pay charges of an amount specified in the regulations to the Information Commissioner.
46. At present, the costs of carrying out the Information Commissioner's statutory duties in relation to data protection are funded from the annual notification fees collected from data controllers pursuant to fees regulations made under Part 3 of the Data Protection Act 1998 ("the DPA"). Data controllers are obliged to notify the Information Commissioner of certain types of data processing (from which the Information Commissioner collates a register of

data controllers), a requirement which derives from Article 18 of the Data Protection Directive 95/46/EC. Section 18(5) DPA requires each data controller to pay a fee with the notification, of an amount prescribed in regulations made by the Secretary of State.

47. EU Regulation 2016/679³ (the General Data Protection Regulation, or “GDPR”) is to replace the Data Protection Directive with a data protection regime applicable throughout the EU. It does not include a requirement for national data protection authorities to maintain a register of data controllers, and the relevant provisions in Part 3 of the DPA therefore need to be repealed as part of the UK’s implementation of the GDPR. This means that the fee payable by data controllers can no longer be linked to an obligation to register.
48. The clause confers a power on the Secretary of State to make regulations about charges payable to the Information Commissioner to replace the existing funding mechanism. This will enable fees regulations to be made ahead of the GDPR taking legal effect on 25 May 2018 and thus to give data controllers’ sufficient notice of the changes.
49. The fees regulations may include provision for a free-standing charge – that is, where the charge does not relate to any service provided by the Information Commission to the data controller. They may also make provision about the times or periods within which a charge must be paid; and may make provision for different charges to be payable in different cases (including no charge or a discounted charge).
50. The clause also confers a related power for the Secretary of State by regulations to require a data controller to provide information to the Information Commissioner, or to enable the Commissioner to require a data controller to provide information, for the purposes of determining whether a charge is payable and the amount of any such charge.

³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC.

Justification

51. It is considered appropriate for fees to be set out in regulations rather than on the face of the Bill, enabling them to be amended from time to time as necessary. This replicates the position for fees required pursuant to section 18(5) DPA.
52. The power is subject to a number of procedural safeguards. The Secretary of State is required to consult the Information Commissioner before making regulations, replicating the position in section 25(4)(b) DPA. She must also have regard to the desirability of securing that the charges payable are sufficient to offset certain specified expenses related to the Information Commissioner's role as statutory regulator for data protection and the costs arising from section 1 of the Superannuation Act 1972. This provision is similar to section 26(2) DPA, but includes reference to the obligations imposed on the Information Commissioner as a result of the GDPR and Directive (EU) 2016/680 (the Criminal Data Directive), as well as any implementing regulations.

Justification for procedure selected

53. The regulations are not subject to any Parliamentary procedure but must be laid in Parliament after being made. This follows the approach taken in section 67(6) DPA in relation to the existing regulation making power.

New clause: Power to modify or supplement provision as to the Secretary of State's liability in respect of British Telecommunications plc's liabilities as successor for payment of pensions

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution

Context and purpose

54. This clause confers a power on the Secretary of State by regulations to modify or supplement provision in section 68 of the Telecommunications Act 1984 (“the 1984 Act”) as to the Secretary of State’s liability in respect of British Telecommunications plc (“BT”)’s liabilities to the BT Pension Scheme.
55. At present, BT’s liabilities to the scheme are guaranteed by the government as a result of legislation enacted on its privatisation in 1984. Section 68 of the 1984 Act provides that in the event that the successor company to the former British Telecommunications Corporation enters insolvent winding up, the Secretary of State shall become liable for any outstanding liability of the successor company for the payment of pensions (“the Crown Guarantee”).
56. Openreach is the division of BT that develops and maintains the UK’s main telecoms network used by providers such as Sky, TalkTalk, Vodafone and BT’s retail business. In response to Ofcom’s concern that BT has the ability and incentive to favour its own retail business when making strategic decisions about new investments in the Openreach network, it was announced on 10 March 2017 that BT had agreed to the legal separation of Openreach. This means that Openreach will become a legally separate company within BT Group, with its own ‘Articles of Association’. Openreach, and its directors, will be legally required to make decisions in the interests of all Openreach’s customers, and to promote the success of the company.
57. This legal separation affects the operation of the Crown Guarantee insofar as it applies to staff transferred across from BT to the new Openreach. Without any government intervention, the transferred staff will lose the benefit of the Crown Guarantee. This power will enable the Secretary of State to ensure that the Crown Guarantee continues to apply to the pensions of some or all of the staff who benefited from it before separation and to provide for the circumstances in which the Crown Guarantee will apply and the circumstances in which it will not.

Justification

58. On 10 March 2017 BT notified Ofcom pursuant to section 89C of the Communications Act 2003 of its revised proposals for the legal separation of

Openreach. It also published the commitments⁴ made to Ofcom, which include commitments to Openreach employees' continued participation in the BT Pension Scheme, subject to a condition set out in the notification being met:

“the adaptation of the Crown Guarantee or the provision of a new guarantee in respect of Openreach Limited’s pension liabilities (insofar as they relate to pension benefits of employees who are currently covered by the Crown Guarantee) which is equivalent in operation and scope to the guarantee provided in respect of BT plc’s pension liabilities under the Crown Guarantee, in terms acceptable to BT plc and the trustee of the BTPS from time to time ...”

59. The adaptation of the Crown Guarantee cannot be settled until the full detail is known of the nature of the new legal entity comprising the separate Openreach business, the terms of transfer of employee contracts, any transitional arrangements and the associated timetable. It is not therefore not possible to make detailed provision for this matter on the face of the Bill. Additionally, decisions need to be taken about limits to the application of the Crown Guarantee, in relation to the duration of the Crown Guarantee and the circumstances in which it applies, including provision for coverage where the business of Openreach changes or if Openreach itself goes through further legal changes.
60. The government understands that there are no more than 20,000 Openreach employees who may be affected by the use of the power. They can only benefit through the use of the power, as without it the Crown Guarantee will cease to apply to their pension arrangements.
61. The power is exercisable with the consent of the Treasury and provides for consultation of a range of interested bodies before it is exercised, as follows:
 - (a) the Pensions Regulator;
 - (b) BT;

⁴ <http://www.btplc.com/UKDigitalFuture/Agreed/index.htm>

- (c) the trustees of the BT Pensions Scheme;
- (d) any transferee or successor to which the regulations apply;
- (e) any other persons the Secretary of State considers it appropriate to consult.

Justification for procedure selected

62. The Government considers that it is appropriate for the power to be subject to Parliamentary approval through the affirmative procedure, given that it enables the modification or supplementation of section 68 of the 1984 Act.

Clause 97: Commencement – power to appoint different days for different areas and to make transitional provision in connection with commencement

Power conferred on: Secretary of State, Minister for the Cabinet Office and Welsh Ministers

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: None

Context and purpose

63. This clause amends clause 97 (Commencement) of the Bill to enable the Secretary of State and Minister for the Cabinet Office and Welsh Ministers, in relation to provisions in Part 5 of the Bill, to appoint different days for different areas for commencement of provisions of the Bill and to make transitional, transitory and saving provision in connection with commencement
64. The Bill contains a number of provisions where a legislative consent motion is needed from the Northern Ireland Assembly. The Northern Ireland Assembly was not able to pass the legislative consent motion on the Bill before its recent dissolution and it may now not be possible to obtain a Legislative Consent Motion from the Assembly before the Bill completes its passage at Westminster.

65. This clause enables the provisions of the Bill, where consent is required, to be commenced separately by regulations, potentially at a later date, once it has been possible to secure consent.
66. Particular provisions of the Bill affected are:
- a. Part 5 – Digital Government, where a legislative consent motion is required for all of the data sharing measures with the exception of data sharing with HMRC.
 - b. Clause 82 – Ofcom and Northern Ireland, where a legislative consent motion is required for the provision that gives powers to Northern Ireland ministers to nominate a board member to Ofcom and to require reports to be laid before the Assembly.
 - c. E-books amendment (tabled at Lords report), where the public lending right is a transferred matter and so requires a legislative consent motion.
 - d. Breaching limits on internet and other ticket sales (ticket bots) amendment (to be tabled for Lords report), where consumer rights law is transferred matter and so requires a legislative consent motion.
67. The clause also enables transitional, transitory and saving provision to be made in connection with commencement. Where different days are appointed for commencement, or different days for different purposes or different areas, such provision may be necessary to ensure effective transition.

Justification

68. The amendment to the commencement power is required as the Northern Ireland Assembly was unable to pass the legislative consent motion on the Bill before its recent dissolution and it may now not be possible to obtain consent before the Bill completes its passage at Westminster. The power will enable implementation in England and Wales and Scotland whilst consent is sought.

69. The transitional powers are required to ensure effective transition, such as where commencement for different areas on different days has taken place.
70. The transitional powers are also expected to be used to define small and micro businesses for the purposes of the statistics provisions in Chapter 7 of Part 5 on a temporary basis until the powers to do that in the Small Business, Enterprise and Employment Act 2015 are commenced.

Justification for procedure selected

71. Commencement regulations are not subject to Parliamentary procedure, but UK Ministers will undertake to only exercise the commencement power in relation to Northern Ireland once consent is obtained.

Department for Culture, Media and Sport

13 March 2017