

**techUK written evidence to the Digital
Economy Bill Public Bill Committee**
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About techUK

techUK is the industry voice of the UK tech sector, representing more than 900 companies who collectively employ over 800,000 people, about half of all tech jobs in the UK. These companies range from innovative start-ups to leading FTSE 100 companies. The majority of our members are small and medium sized businesses.

Executive Summary

- techUK welcomes the desire to reform to the Electronic Communications Code, which is long overdue and is vital to increasing connectivity.
- We believe that a broadband USO should be implemented as a safety net to prevent social exclusion, facilitate access to online public services and encourage social and economic development. A broadband USO should ultimately be focussed on those premises which, because of the cost and complexity of reaching them, are unlikely to receive the designated minimum speed through either commercial or BDUK rollouts.
- techUK supports the general approach to age verification measures, however calls on Government and the age-verification regulator to work closely with industry to ensure the measures adopted would be proportionate and practical to implement. This should include a detailed examination of the relevant ancillary services that should be included in the scope of the Bill.
- The Committee should provide guarantees that ancillary service providers will not become the *de facto* enforcers of the new regulations should the regulator choose not to execute the enforcement powers as set out in the Bill (as the BBFC has suggested to the Committee).
- techUK has long called for the Government to harness its data to transform the delivery of public services. Securing citizens' trust will be vital if the Government is to harness the power of data and must be the top priority. As Dr Jerry Fishenden mentioned in his oral evidence to the Committee, transparency will be key for public trust and we agree that the Codes of Practice should be published alongside the Bill.
- techUK welcomes the intention of the Bill's proposals for automatic compensation for failure to meet performance standards, however many communications providers must run managed planned network outages for essential business and security reasons. They should not be penalised for these.

Universal service broadband obligation (USO)

- techUK welcomes the Government's efforts to ensure all UK premises have access to broadband. The introduction of a legal obligation, however, raises challenges and concerns among communication providers, particularly as deployment of superfast broadband (BDUK and commercial schemes) is underway.

The USO should only be used as a "safety net"

- techUK believes that a broadband USO should only be implemented as a safety net to prevent social exclusion, facilitate access to online public services and encourage social and economic development.
- We believe that a broadband USO should ultimately be focussed on those premises which, because of the cost and complexity of reaching them, are unlikely to receive the designated minimum speed through either commercial or BDUK rollouts.

Government should address the economic issues preventing full broadband roll out

- Failure of the market to deliver connectivity in all areas in the UK is primarily an economic issue (i.e. it is uneconomic for companies to deploy broadband infrastructure in the hardest to reach areas). Government intervention should therefore seek to address these. In approaching how best to achieve the goal of universally available good quality broadband access (accessible at competitive prices), we believe that Government must concentrate on removing barriers so that commercial investments become viable. It should also ensure that current BDUK schemes bring about the greatest expansion of superfast broadband coverage possible, which is why we strongly support the other measures such as the reforms to the Electronic Communications Code. Due consideration must be given to when it is appropriate for industry to fund the hardest to reach premises, and when some form of Government subsidy may be appropriate.
- Once all other avenues have been exhausted, then we believe there may be a case for a USO that acts as a safety net. This is consistent with the principle of the Universal Service Directive, which is designed to provide a minimum 'floor', rather than be a mechanism to deliver more advanced services that risk more significant market disruption. A USO in this instance would then serve to empower consumers who are in areas of explicit market failure.
- Satellite connectivity should be considered in scope for the most remote households. Satellite connectivity is already available to virtually all households and can be the most cost effective route to providing superfast broadband. DCMS' own evidence demonstrates that satellite broadband download speeds in excess of 24Mbps "are routinely possible", with upload speeds of >5 Mbps.

Reforms to the Electronic Communications Code

Operators must have genuine parity with utility companies for these reforms to work

- techUK welcomes the desire to reform the Electronic Communications Code, which is long overdue.
- The proposed reforms will give communications providers similar rights to utility companies with regards wayleaves and access. Communications providers will not be required to pay “consideration” to landowners on the basis of an arbitrary assessment of value to the provider. Instead it will be based on the land value.
- The reforms also establish formal specialist recourse via the Lands Tribunal if disputes between landowners and communications operators occur.
- There is substantial evidence underlining the value of these reforms. Research for DCMS carried out by Nordicity suggests giving communications operators equivalent wayleave rights to utility companies would reduce the cost of wayleaves by 40%, increase their ability to make infrastructure investments by up to 3.6%, generating net economic benefits of £500m p/a.¹
- It is important that the Government ensures communications operators to have genuine parity with utility companies in this regard if the UK is to see the benefit of these reforms.
- We welcome the Government's decision to maintain a clear distinction between renting land and using space on purpose-built and serviced mobile infrastructure sites. This is a vital distinction to ensure long-term investment in infrastructure and it recognises the economic and social value from investment in communications infrastructure.
- In particular the policy position underpinning the legislation ensures that the value from the competitive market for wireless communications infrastructure continues to be delivered. It recognises the importance of making long term investments in infrastructure and getting mobile services out to consumers in some of the most difficult parts of the UK.
- We believe that the reformed Electronic Communications Code strikes a fair balance between the interests of all parties covered by the rules. The additional Codes of Practice currently being drafted by Ofcom, with input from stakeholders, will help remove uncertainties about the relationship between landowners and Code operators. It is essential that we retain the support of the land sector in rolling out new coverage and we believe that the new Code and complementary self-regulatory rules will allow for a faster deployment and upgrade of digital infrastructure.

¹ Nordicity (2013) [Modelling the Economic Impacts of Alternative Wayleave Regimes](#)

Spectrum: roles of Government, Ofcom and industry

Brexit deepens the importance of partnership between Government, Ofcom and industry

- Spectrum is an essential ingredient for all forms of wireless communications services, satellite applications and an increasing array of wider applications including in healthcare, transport and navigation. Given the inevitable international dimension of allocations and regulations on spectrum, maintaining UK influence in these international processes is important too. As the UK prepares to leave the EU, our channels of influence via our ongoing direct membership of CEPT and ITU/WRC will need to be strengthened in order to compensate for the loss of influence in EU fora. Consideration should be given to increasing bi-lateral negotiations with key leading European Administrations, i.e. France, Germany.
- techUK supports Ofcom's role as an independent regulator. It is often seen internationally as a thought leader and exemplar on rigorous regulatory processes and this in turn lends wider UK benefits such as on inward investment.
- It is however important that Government takes an active interest in spectrum policy, particularly in relation to promoting UK's digital industry. Maximising UK value from spectrum requires a partnership between Government, Ofcom and industry. techUK looks forward to understanding the details of the proposed new arrangements for The Secretary of State to advise Ofcom on strategic priorities. Government should clarify the governance framework on spectrum policy between it and Ofcom, including mechanisms for high level industry inputs on strategic decisions.

Reforms to Ofcom appeals process add uncertainty to regulatory regime

- The Bill makes it more difficult to challenge Ofcom decisions (clause 74), moving from an "on the merits" approach to Judicial Review. These proposals make for an unpredictable regulatory regime through reducing the opportunities for appealing to the regulator, potentially meaning investment would be more difficult to generate. Industry is largely supportive of the existing regime, which is well-understood and has an excellent track record.
- Dilution of the standard of review, so that the assessment focuses primarily on whether the decision was made in the right way will put those incentives at risk. Over time we may be faced with decisions that have been taken with less rigour and less diligence. These decisions would likely lead to investment and technology jobs in the UK being put at risk.
- A merits based appeal system which allows the Tribunal to look at whether Ofcom made the right decision is important. The matters our members deal with are technologically and economically complex. Focusing appeals on the process by which a decision was taken (i.e. by adopting a judicial review based standard) does not mean that wrong decisions will always be corrected. It may result in the highly unsatisfactory situation where the regulator is required to retake its decision but may do so just by addressing a procedural flaw and thus still persist with the wrong decision.

- In addition, techUK has concerns that the proposed changes may restrict the ability of SMEs to appeal. In the technology world, it is often SMEs that can deliver the most innovative new offerings in the shortest possible timescales. Our calculations show that SMEs were instigators of 17% of appeals against Ofcom decisions in the last 5 years. This is a much higher percentage than their share of market might imply and suggests that the current appeal process works well for innovators and new entrants.
- Small companies have limited resources and while as technology pioneers, they may be able to explain why a decision is wrong from their perspective, they are not public law experts, and not versed in whether decisions were irrational or illegal, or taken by means that did not involve due process. The majority are highly likely to be disincentivised from challenging decisions that they consider to be wrong if they are faced with having to frame their appeal by reference to judicial review.

Provision of information to Ofcom: need to balance need for information for decision-making with avoiding excessive burdens on industry

- In relation to the broadening of Ofcom's information gathering powers, techUK very much recognises the importance of data to allow Ofcom to help consumers. However, these new powers should not result in excessively onerous requests on companies which could detract from the focus on service provision.

Regulation of Dynamic Spectrum Access

- Dynamic Spectrum access is an important part of the range of spectrum access mechanisms, one in which the UK is the European leader. techUK welcomes the proposals to facilitate the database services for DSA.

Switching communications provider

Competition is essential even when consumers are largely satisfied with their services

- Healthy completion is vital for a well-functioning broadband market and switching has a part to play in this. The UK currently has an extremely competitive market with a wide range of choice for consumers. The UK has the highest average download speeds of any EU member of the G7; and advertised prices for broadband are the lowest in the G7, on a Mbps basis.
- In addition, Ofcom research shows that consumers' overall level of satisfaction with communications services is around 90%².
- techUK believes the Government must work with industry when establishing the "requirements in relation to arrangements that enable an end-user to change communications provider on request". The nature of these requirements will be essential to ensuring a framework which is effective for consumers and communications providers alike.

² Ofcom [Consumer Complaints Report Q1 2016](#)

Automatic compensation for failure to meet performance standards

Compensation should not be required for planned or emergency network outages

- techUK welcomes the intention of the Bill's proposals for automatic compensation for failure to meet performance standards, however, it may have unintended consequences for users.
- Many communications providers must run managed planned network outages for essential business and security reasons. Anything which may prohibit businesses from undertaking such measures could seriously undermine network security, which would be to the detriment of users.
- Similarly, compensation should not be owed during necessary outages, for example for security reasons, and this should be guaranteed on the face of the Bill.

Age verification for pornography websites

Restricting inappropriate content is a top priority for industry

- The wellbeing of children online is a top priority for techUK members. Those who provide relevant products and services work to mitigate the risk of children encountering inappropriate content online.

Vague definitions unintentionally bring ancillary service providers into regulatory scope despite Government commitments

- The age verification section of the Digital Economy Bill is intended to give effect to the Conservative manifesto commitment to introduce age verification for commercial providers of adult content. However, techUK believes there are some important areas where amendments are required in order to clarify scope and the powers of the regulator.
- The Committee discussion has suggested that “making available” in clause 15 extends to platforms. The BBFC also suggested this in its oral evidence. In combination with clause 15(4), an amendment specifying (by definition) the type of organisation being targeted (providers of pornographic material) will make clear that ancillary service providers (e.g. social media, search engines, cloud and hosting services, and domain name registrars) are not the primary target of regulation. At a minimum, there should be a robust statement from the Minister.
- The term “on a commercial basis” in clause 15(2) is not defined on the face of the Bill. Government should take the opportunity to clarify, ideally through amendment to the Bill, that the regulatory framework is intended to apply to services which generate a revenue for the provider of the pornographic content service (e.g. from subscription, apps store download fees or advertising).
- The letter from Rt Hon Matt Hancock MP to the Committee (10 October 2016) provides helpful clarification on the intention not to include ISPs as part of the enforcement process, stating that “blocking of infringing sites would place the focus on access providers rather than content providers”. He adds, that such an approach “would not be consistent with how other harmful and/or illegal content is dealt with, where the UK has robust, highly effective non-statutory systems in place, to ensure that swift and decisive action is taken”.
- In addition to the restrictions on platform liability set out in clause 15(4), this is a welcome statement of intent. The Minister should publicly clarify that this extends to the range of ancillary service providers. This is necessary as the BBFC suggested in its evidence to the Committee that it would consider links to pornographic services posted on social media (giving Twitter as an example) within the regulator’s remit.
- techUK also notes that Labour’s proposed amendment 91 to the Bill (on the list of 13 October) is in direct opposition to the Minister’s helpful statement in his letter. It sets out a definition of ancillary service provider which includes a wide range of

technology organisations. For the reasons set out above, we urge the Government not to support this amendment.

- Similarly, proposed amendment 77 would specifically define ISPs as ancillary service providers with the aim to include them in the enforcement process. This contradicts the Minister's letter to the Committee.

BBFC's desire not to use enforce powers in the Bill risks making ancillary service providers the de facto enforcement levers

- In oral evidence to the Committee, the BBFC suggested that it does not plan to enforce the requirements of the Bill under clauses 20 and 21 and implied that it would primarily rely on co-opting ancillary service providers as a means of enforcement. Government should clarify that the BBFC will be expected to exhaust the powers in clauses 20 and 21 before providing notice of contravention to providers of ancillary services as set out in clause 22, and that clause 22 is considered a last resort.
- techUK notes that proposed amendment 76 would transform the regulator's discretionary power to notify ancillary service providers of a contravention of clause 15(1) into an obligatory power to notify. In light of the BBFC's desire not to execute any enforcement powers as regulator, this amendment would increase the likelihood of ancillary service providers becoming the *de facto* enforcers. This contradicts the Bill's original intention and the Minister's letter to the Committee.
- It is worth noting that the Bill is specifically intended to apply to all pornographic content services which are available to UK internet users and as such explicitly has extraterritorial effect. Given this broad scope, there will be limits to the effectiveness of the powers the Bill confers on the regulator.

Government should clarify that clause 22 does not give the regulator powers to direct ancillary service providers to take specific action

- As above, the BBFC suggested in oral evidence to the Committee that it considers ancillary service providers to be the main enforcement lever against non-complying persons and that it defines these services very broadly to include ISPs, search, social media and other services.
- Government should clarify that clause 22 is limited to providing notification to ancillary service providers of a non-complying person. Clause 22 does not confer a legal power to direct ancillary service providers to take specific action. Rather, notices are intended to be an input to existing self-regulatory or industry good practice schemes which could result in action by an ancillary service provider against the provider of a pornographic content service (e.g.: DTSG in the digital advertising space). Government should also clarify that clause 22 is not intended to overlap with such schemes or absorb them within the regulator's purview. These schemes are developed to address specific issues arising in the sector and such an outcome would have a range of unintended consequences.

- Government should clarify, ideally through amendment to clause 22, that the provision of notices of non-compliant persons under clause 22 is a last resort and should only be used where: the provider is deemed to be providing pornographic content (as defined in clause 16); the provider has not complied with the requirement to age verify users; and other remedies in clauses 20 and 21 have failed.
- Government should further clarify that clause 22 does not confer on the regulator powers to direct ancillary service providers to take specific action, for the reasons outlined above.

Other issues

Appeals

- The Bill does not provide for an appeals mechanism for providers of adult content services against decisions taken by the regulator. This seems an oversight given the novelty of this legislation. Government should provide for an appeals process on the face of the Bill.
- This is particularly important where ancillary service providers take action under self-regulatory or industry good practice schemes as a result of notices about non-complying persons provided by the regulator.

Information powers

- Information gathering powers are very widely drawn and, absent a proportionality and reasonableness test, could result in 'fishing expeditions' by the new regulator (e.g.: clause 19(1) refers to "any information"). Government should clarify that requests should be subject to such a test, ideally through amendment to clause 19(1), bringing it in line with other regulatory regimes.

Discretionary powers

- The regulator is given broad discretion in key areas including enforcement powers (clause 20(11)(c)), definition of ancillary services (clause 22(7)) and the exercise of its functions (clause 23(1)).
- It seems inappropriate to give a regulator such broad discretion in a wholly new area of law. Government should circumscribe these powers on the face of the Bill and provide greater direction as to how the regulator is expected to carry out its functions.

Back stop power

- Unlike other delegated regulators – such as ATVOD and ASA – the Bill contains no back stop powers in the event that the regulator fails to fulfil its statutory powers or otherwise falls short of the requirements set out in primary legislation. A back stop power should be placed on the face of the Bill to address this scenario.

Reforms to copyright

The UK's world leading IP regime must be maintained to foster innovation

- techUK supports the reforms in the Bill but strongly believes that the Government must tread lightly so as to avoid any unintended consequences that might stifle innovation.
- The UK has one of the best intellectual property regimes in the world and this must be protected, especially with potential economic headwinds in the short to medium term.

Disclosure of information to improve public service delivery

Government must work closely with industry to realise public service transformation

- techUK has long called for the Government to harness its data to transform the delivery of public services. We welcome the reforms at Clause 29. This Clause aims to allow improve public service delivery for the benefit of citizens by sharing data between public authorities or persons providing services to public authorities.
- This is an area where industry expertise can play a large role in helping the improve public services but ensuring the trust of citizens through robust data protection will be vital.
- techUK calls on the Government to work closely with industry to fully understand the range of public services that can be enhanced through these measures and realise their transformation.

Securing public trust is vital if the Government is to harness the power of data

- Sharing data does not need to be scary or dismissed for use in the public sector because the perceived risks are too high.
- In addition, the use of anonymised data to assist research carried out for public benefit must ensure that data is handled carefully. Content-level security technologies could form part of the specific safeguards developed in this area to help ensure that data is only seen by those authorised to see it, and to track how that data is accessed. This offers a new level of oversight for sensitive data, a prerequisite for gaining the trust of citizens, and improving operational efficiency.
- By using technology and appropriate safeguards these concerns can be addressed. When developing the processes for data sharing the following principles should be considered:
 - **The application of content-level security protocols.** Content-level security can help ensure that content is only accessed by those with the authority to do so.
 - **Reduction of error during original data collection.** Any provisions to enable access to collected data should be linked to eliminating errors in data collection at the original point of data capture. Specifically, antiquated forms workflows that require offline signature and the manual rekeying or scanning of data into a system which increases the risk of incorrect data.
 - **Use of privacy-friendly third party solutions to help detect multiple submissions.** Such solutions could help government departments identify links between devices to understand where multiple submissions may have been made by the same user, without revealing the identity of the user behind the device.
- techUK is fully supportive of a Code of Practice as noted in Clause 35 and welcomes calls from the recent oral evidence by Dr Jerry Fishenden that these should be published alongside the Bill. The Code of Practice must strike a balance between enabling data sharing and innovation, while ensuring security and trust. This is particularly important if Government is to achieve its goal of keeping pace with a fast moving tech sector, and

exploit the full operational insights and knowledge offered by the ability to conduct real time data analysis.

- The Code of Practice must also take account of future developments in the market, such as machine learning and automation, which have the potential to enable data to be collected, shared and analysed without human intervention. Ensuring the public understand how their data is being used by machine learning and automated technologies, and what their rights are in relation to providing or withholding consent, or questioning or challenging decisions taken by automated systems, will be essential to ensure transparency and trust.