



HOUSE OF LORDS

Select Committee on the Constitution

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7th Report of Session 2016–17

# Digital Economy Bill

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### *Committee staff*

The current staff of the committee are Antony Willott (Clerk) and Hadia Garwell (Committee Assistant). Professor Stephen Tierney and Professor Mark Elliott are the legal advisers to the Committee.

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# Digital Economy Bill

1. The Digital Economy Bill was introduced into the House of Commons on 5 July 2016. It received its first reading in the House of Lords on 29 November, and its second reading on 13 December. The dates for the committee stage are yet to be announced.
2. The Bill is wide-ranging. Among other things, it:
  - addresses the position of consumers in relation to access to broadband services and the quality of those services;
  - makes provision in respect of the building of digital infrastructure (e.g. by simplifying relevant planning rules);
  - seeks to support digital industries by improving the regime for the protection of relevant intellectual property rights;
  - makes provision in respect of Government digital services, including by authorising public authorities to share information;
  - introduces age-verification requirements for websites that publish pornography in order to make it more difficult for children to access such material;
  - makes Ofcom responsible for those aspects of regulating the BBC that are presently the responsibility of the BBC Trust.
3. We draw the House's attention to a number of matters with constitutional implications.

## Henry VIII powers

4. The Bill contains 46 provisions concerning delegated powers, of which 12 are Henry VIII powers. While we leave it to the Delegated Powers and Regulatory Reform Committee to judge the appropriateness of each of these powers, we draw the House's attention to the number—and in some cases, the scope—of the Henry VIII powers contained in the Bill.
5. We note in particular the Henry VIII power contained in Clause 6. This clause permits UK Government ministers to make provisions that are consequential upon the new Electronic Communications Code, including by amending or repealing not just legislation enacted by the UK Parliament, but also legislation enacted by the devolved legislatures. If the power in Clause 6 is used to amend, repeal or modify primary legislation, the affirmative procedure applies; otherwise, the negative procedure applies. However, while the Bill provides for the use of the affirmative procedure in the UK Parliament when Clause 6 is used in respect of primary legislation, the Bill does not provide for any involvement by the devolved legislatures or administrations when Clause 6 is used in respect of devolved primary legislation. There is, for instance, no requirement to secure the consent of or to consult relevant devolved legislatures.
6. The Delegated Powers and Regulatory Reform Committee has expressed concern about this matter in its report on Parts 1–4 of the Bill. We share that

concern, and indeed drew the House’s attention to a similar provision in the Wales Bill.<sup>1</sup>

7. **We draw the attention of the House to Clause 6, which permits primary legislation passed by the devolved legislatures, as well as secondary devolved legislation, to be amended by statutory instrument at the behest of a UK Government minister without the consent or involvement of the relevant devolved legislatures or governments. We would welcome an explanation from the Government as to why the Bill contains no procedural safeguards requiring the consent of, or at the very least consultation with, the relevant devolved legislature or government when the UK Government seeks to amend devolved legislation.**

### Level of detail on the face of the Bill

8. Part 3 of the Bill aims to make it more difficult for children to access online pornography. It does so by introducing a regime whereby access to online pornography will be subject to age-verification requirements.
9. Clause 15(1) provides that: “A person must not make pornographic material available on the internet on a commercial basis to persons in the United Kingdom except in a way that secures that, at any given time, the material is not normally accessible by persons under the age of 18.” Clause 16 goes on to define ‘pornographic material’ for the purpose of the age-verification regime.
10. However, the Bill does not spell out how the age-verification regime will actually work. Rather, it provides (in Clause 17) for the Secretary of State to designate a person (or persons jointly) as the ‘age-verification regulator’.<sup>2</sup> According to Clause 15(3), it is for the age-verification regulator to publish guidance about (and so by implication to determine) what sort of age-verification arrangements will be treated as sufficient for the purpose of compliance with Clause 15(1). Whether Clause 15(1) is being complied with—and hence what sort of arrangements will suffice for the purpose of compliance—is highly significant: non-compliance triggers (among other things) the possibility of financial penalties (Clauses 20 and 21) and permits the giving of directions to internet service providers to block access to ‘offending material’ (Clause 23).
11. Determining what will amount to adequate age-verification requirements for the purpose of compliance with Clause 15(1) is likely to involve the making of significant policy choices, as the Information Commissioner pointed out in her evidence to the Public Bill Committee in the House of Commons. She observed that there is an imperative need to “find a balance between verifying the age of individuals and minimising the collection and retention of personal data”—which would mean “only collecting and recording the minimum data required in the circumstances” and “ensuring that the purposes for which any data is used are carefully and restrictively defined, and that any activities keep to those restricted purposes”. The Commissioner went on to say that she would “have significant concerns about any method

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<sup>1</sup> Constitution Committee, *Wales Bill* (5th Report, Session 2016–17, HL Paper 59), paras 85–88.

<sup>2</sup> The Minister for Internet Safety and Security has indicated, in a published exchange of letters with the British Board of Film Classification, that the Board is likely to be allocated a role in relation to age verification, but that another body will carry out enforcement functions.

of age verification that requires the collection and retention of documents such as a copy of passports, driving licences or other documents (of those above the age threshold) which are vulnerable to misuse and/or attractive to disreputable third parties”.<sup>3</sup>

12. The Delegated Powers and Regulatory Reform Committee, in its report on Parts 1–4 of the Bill, expressed concern that the age-verification regulator is to be given power to define important terms used in Clauses 15 and 22, and to determine levels of financial penalties, by reference to “guidance” or “guidelines” the regulator itself prepared and published—and which would receive no form of Parliamentary scrutiny. Our concerns are related, but distinct. We question whether the House can effectively scrutinise the Bill when its scrutiny is impeded by the absence from the face of the Bill of any detail about the operation of the proposed age-verification regime. Nor is it the case that there will be subsequent opportunities for parliamentary scrutiny of delegated legislation on this matter, since the details of the regime will be set out in due course not by Ministers (or others) exercising regulation-making powers. Rather, the relevant arrangements will be set out by the yet-to-be-designated age-verification regulator in guidance that it will be required to publish. In its Delegated Powers Memorandum, the Government states that because “flexibility will be needed to reflect changes over time in technology and in commercial models”, it is “considered appropriate that these matters be dealt with in guidance issued by the age-verification regulator”. However, this inevitably forecloses upon the possibility of parliamentary scrutiny.
13. The matter of leaving key points to ‘guidance’ or ‘guidelines’ that are not subject to parliamentary scrutiny is not confined to Clause 15. For instance, under Clause 20, the age-verification regulator may impose financial penalties, including for contravention of Clause 15. The regulator is given broad discretion by the Bill as to the level of those penalties, but is required to publish the ‘guidelines’ it proposes to follow when deciding on the amount of any given penalty. As with guidance issued under Clause 15(3), there will be no opportunity for parliamentary scrutiny of guidelines published under Clause 21(9). Similarly, Clause 22(1) authorises the regulator to give notice to ‘payment-services providers’ and ‘ancillary service providers’; Clause 22(7) allows the regulator to publish ‘guidance’ about ‘the circumstances in which it will treat services provided in the course of a business as enabling or facilitating the making available of pornographic material or prohibited material’ (such matters being relevant to the exercisability of the Clause 22(1) power to give notice). The Bill, however, makes no provision for parliamentary scrutiny of guidance issued under Clause 22(7).
14. **We are concerned that the extent to which the Bill leaves the details of the age-verification regime to guidance and guidelines to be published by the as yet-to-be-designated regulator adversely affects the ability of the House effectively to scrutinise this legislation. Our concern is exacerbated by the fact that, as the Bill currently stands, the guidance and guidelines will come into effect without any parliamentary scrutiny at all. The House may wish to consider whether it would be appropriate for a greater degree of detail to be included on the face of the bill.**

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3 Written evidence from the UK Information Commissioner to the Public Bill Committee on the Digital Economy Bill ([DEB36](#))

### Appeals against decisions by Ofcom

15. Sections 192–196 of the Communications Act 2003 set out rights of appeal against certain of Ofcom’s decisions. Such appeals are heard by the Competition Appeal Tribunal. Appeal is ‘on the merits’, meaning that the Tribunal can overrule Ofcom if it considers that Ofcom’s decision is wrong or unlawful. Clause 75 of the Bill amends the 2003 Act such that in relevant cases the Tribunal will determine appeals not ‘on the merits’ but by reference to ‘the same principles as would be applied by a court on an application for judicial review’. This will narrow the grounds upon which Ofcom’s decisions can be overruled by the Tribunal. In evidence submitted to the Public Bill Committee in the House of Commons, the Internet Service Providers’ Association argued that Clause 75 would ‘limit ... access to justice’. In particular, it argued that smaller ISPs would be ‘highly likely to be disincentivised from challenging decisions if they are faced with having to frame their appeal by reference to judicial review yardsticks’.
16. **The suggestion that Clause 75 limits access to justice raises a question about its constitutional propriety. However, while it is the case that opportunities for challenging relevant Ofcom decisions will be narrowed by Clause 75, the absence of a right to challenge such decisions via an ‘on the merits’ appeal cannot be regarded as constitutionally improper. Provided that there is the possibility of challenging the lawfulness of Ofcom’s decisions before an independent tribunal—an opportunity that is safeguarded by the application of the judicial principles—basic constitutional requirements are met. Whether there should be broader opportunities for challenge is a significant policy question, but is not one that in our view goes to the constitutional propriety of the provision.**

### The BBC

17. Responsibility for the regulation of the BBC is currently shared by the BBC Trust and Ofcom. As such, the Communications Act 2003 already confers upon Ofcom such regulatory functions in respect of the BBC as are provided for in relevant legislation and in the BBC Charter and Agreement. As part of the Charter-renewal process, the Government has decided that the BBC Trust will be abolished and that full regulatory responsibility will pass to Ofcom. To that end, Clause 76 of the Bill amends section 198 of the Communications Act 2003. However, the details concerning Ofcom’s new roles in respect of the BBC are set out not in the Bill but in the new BBC Charter and Agreement. The new arrangements are expected to enter into force in April 2017.
18. **We would welcome an explanation from Government as to why it has chosen not to set out in statute the framework under which the BBC is to be regulated, as is the case with Channel 4, including such protections as may be considered necessary to protect the BBC’s independence.**