

TELECOMS INSIGHT

Welcome to the Telecoms Insight Newsletter

The convergence of advancing technologies in the sector makes it even more important for those in the industry to keep abreast of new developments, wherever and whenever they occur. But when time is at a premium, it can be a challenge to keep up with the breadth and pace of change.

To try and help, Shepherd and Wedderburn's TMT Regulatory team publish regular updates and briefings. In Telecoms Insight you will find articles covering key recent developments taking place in this sector, pulled together by our specialist lawyers.

We hope you enjoy this issue, which covers a wide variety of issues including our leading article on the Digital Economy Act, as well as coverage of the EU agreement on the WiFi4EU Initiative, the fate of BT as a result of the Digital Communication Review, and recent fines imposed on BT by Ofcom. We also consider the implications of the recent general election, and explore what the manifestos of the Conservative Party and DUP did and, critically, did not say as relates to telecommunications, giving us a glimpse of what to expect.

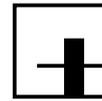
Digital Economy Act: Hidden surprises for telecoms operators

The Digital Economy Act received Royal Assent on 27 April. Whilst many aspects of the bill received considerable press coverage and will therefore come as no revelation to telecoms operators, other aspects have been less publicised and may therefore come as more of a surprise. In this leader, we will consider both the more and less surprising key points.

Need for Speed

The initial aspects of the Act aim to improve access to high speed broadband.

The first provides for an amendment to the Communications Act 2003 (the Act) which facilitates the introduction of a 'universal service order' (USO) to be made by the Secretary of State in respect of broadband speeds. The initial speed to be set out in the order must be at least 10Mbps. Additionally, if the speed stipulated under the USO is less than 30Mbps, then at the point where 75% of premises in the UK have a minimum download speed of 30Mbps, Ofcom must report again to the Secretary of State on whether it would be appropriate to raise the minimum download speed in the USO. Ofcom will remain responsible for designating the communications providers responsible for delivering the order, with the caveat that they must have regard to any guidance that is contained in the universal service order in making such a designation.



The ability to impose such a USO will be important in helping to deliver effective broadband services to the approximately 1 million premises which the Department for Culture Media and Sport (DCMS) expects will be unable to access 10Mbps services by 2017. How the USO will work in practice, however, is still the subject of uncertainty.

Of particular importance for many communications providers is the question of funding for this USO. Will funding only be drawn from communications providers? Given that the benefits of extending broadband services should accrue to society more broadly, there is a strong argument for suggesting that the USO should be funded from the public purse. However, the Government clearly favours an industry fund. Ofcom has, in its recent report on the USO, addressed what impact such an industry fund is likely to have on prices for consumers.

The second aspect is the long awaited revisions to the Electronic Communications Code (the Code). The Code is the key document regulating arrangements between network operators and site providers (typically the owners of the land on which telecommunications apparatus are installed). The Code, first developed in 1984, has long been acknowledged as being unfit for purpose in today's world. Indeed in 2010 a judge described the Code as "one of the least coherent and thought-through pieces of legislation on the statute book."¹ This was hardly surprising given that it had its antecedents in 19th century statutes concerned with telephone wayleaves.

On the back of this damning indictment, in 2011 the Law Commission examined the 2003 iteration of the Code on the request of DMCS, publishing its report in February 2013. In December 2014, DCMS under the then coalition



government announced that they would legislate to reform the Code as part of the deal with mobile operators relating to 'not spots' – areas with limited or no mobile network coverage. Under that deal, each mobile operator agreed to increase voice and text coverage to 90% of the UK by 2017, and to extend full coverage (i.e. including data) to 85% of the UK by 2017.

The mobile operators agreed to have their licence conditions amended to reflect these commitments, and in return the Government agreed to reform the Code (and to also ease access to government freehold buildings as sites for infrastructure).

Consequently, legislation to reform the Code was tabled as an amendment to the Infrastructure Bill, but this fell flat and was later withdrawn. Further consultation on draft legislation took place in early 2015 and the Government also received independent advice from Analysys Mason in April 2016. In May 2016 the Government published its final response setting out the key aspects of the reform of the Code, which are now encapsulated in the Digital Economy Act (amending the Communications Act). The revisions try to balance the competing interests of site owners and network operators and the interests of society as a whole in respect of access to high speed broadband. Whether this

is achieved will be seen over the coming years.

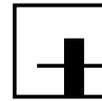
Itch to Switch

In addition to facilitating access to better quality broadband, the Digital Economy Act also provides Ofcom greater powers in relation to setting conditions around consumers' ability to switch providers, and also to require providers to pay automatic compensation on request. Both of these requirements had been trailed in Ofcom's Digital Communications Review, and will have been keenly anticipated by communications providers.

Red, White and Blue Telecoms policy

Provisions which had not been so reported in the public debate are those allowing the Secretary of State to set out the strategic priorities of the Government in respect of telecommunications and the management of the radio spectrum and postal services. They allow the Government to set out "particular outcomes with a view to achieving the strategic priorities."

Once such a statement is made, Ofcom is obliged to 'have regard' to it in carrying out its functions. In particular, within 40 days of the statement Ofcom must explain what it is that they are going to do as a result of the statement, and then publish a review of what they



have consequently done every 12 months. In light of the UK's imminent departure from the European Union, this provision appears to be setting the scene for the Government to have a much more hands-on roll in telecoms policy post-Brexit. Whilst currently the European directives require Ofcom's independence to be preserved and the strategic priorities of the telecommunications regime are currently very much set by the European Union, the insertion of these provisions *prima facie* appears to limit the independence of Ofcom, tying them more closely to Government policy. How these provisions bear out in practice, however, remains to be seen.

The sky is no longer the mobile bill limit

Another area of the Act that crept in without much fanfare was the provision dealing with billing limits on mobile phone contracts.

The billing limit provisions require that a mobile phone provider must give their customers an opportunity to specify a billing limit in the contract before it is concluded. The limit is specified in respect of each 'billing period', typically a month, and acts as a cap on the amount the customer may be charged for the service for that period. The provisions grant additional flexibility to customers, allowing them on reasonable notice to introduce, remove or amend billing limits for a given period. Providers will be obliged to give the customer notice if the limit is likely to be reached before the end of the period or if the limit is reached. This will likely require the mobile operators to keep an adequate record of communications with their customers to ensure they can prove compliance with the new obligations.

These provisions follow from the voluntary Code of Practice agreed on in 2015 by the five key mobile operators at the time, which deal with 'out of bundle' charges, roaming,

and stipulated a £100 liability cap in respect of lost or stolen mobile phones. The introduction of the provisions in the Digital Economy Act suggests that the Government did not consider the voluntary Code sufficient to deal with the issue of bill shock.

To predict that one or more mobile operators will fall foul of these new, potentially onerous obligations in the near future – and be aggressively fined for it – does not seem too outlandish given the recent fines Ofcom has doled on mobile operators for their failure to meet existing consumer protection obligations.

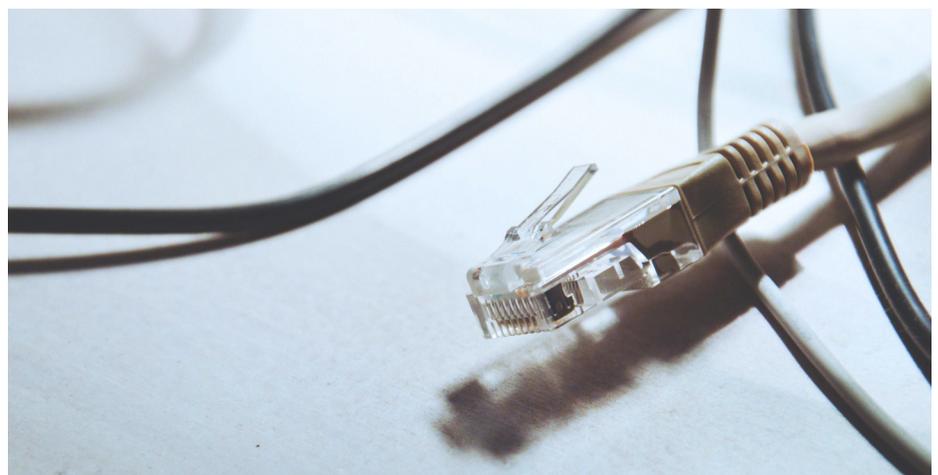
Judicial review standard, but is it judicious?

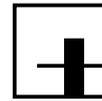
The Government and Ofcom's desire to change the standard of appeal in respect of appeals under the Communications Act was formerly a 'hot topic', with at least two public consultations chewing over it, but had largely left the public consciousness by the time the Digital Economy Act was passed. Stiff opposition to the proposals nevertheless remained from the bar council, the Competition Appeal Tribunal (CAT) and the majority of industry players. The Government has, however, persisted in its goals of removing what it considered to be a 'gold plating' of the European requirements and has seemingly won in this battle.

Under the amendments, the CAT will have to decide appeals under the Communications Act by applying the 'judicial review' standard, narrowing considerably the grounds of appeal by industry players against Ofcom decision. It is in stark contrast to the previous standard whereby the CAT considered appeals 'on the merits'. The Government and Ofcom have argued that this is in the interests of consumers, as it will make it harder for communications providers to challenge the (as proclaimed by Ofcom) pro-consumer decisions of the regulator.

There is therefore considerable debate on what the change will mean in practice, as the European Framework currently requires that Member States "shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism". The CAT should therefore remain obliged to take due account of the merits in its decision making, and this is something the telecommunications operators are likely to heavily rely on. Indeed, the Government in its explanatory notes on the original form bill stipulated that it was their view that 'judicial review' was flexible, and could allow for merits to be taken into account where appropriate – albeit no further explanation of when it would be appropriate is provided.

The lack of clarity suggests that the first case to be brought under the new





appeal standard is likely to include a hard-fought battle on this point. However, as this specific amendment will only be brought into force upon regulation made by Statutory Instrument, it is not yet known when this first battle will occur.

Crimeless Victims

Another controversial provision will enable courts to make a so called 'Drug Dealing Telecommunications Restriction Order'. The order will oblige the relevant telecommunications operator to take specified action, including disabling devices. Such an order may be imposed even where an end-user is even suspected of committing or facilitating a drug related offence – an unprecedented move heralded by some critics as draconian.

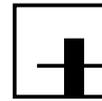
For your information

Of particular concern to many operators is the expansive new provision granting Ofcom the power to require a communications provider to publish any information held by that provider, or to provide such information to Ofcom to be published by it. This may include information that Ofcom has required the communications provider to “produce, generate or obtain” for provision or publication. It furthermore grants Ofcom the ability to oblige communications providers to collect or retain information they would not normally collect, amongst other actions. It is safe to say that this provision represents a considerable extension to Ofcom’s information gathering powers, given that the only limit is that the power must be

exercised “in such a way as to be proportionate to the use to which the information is to be put in the exercise of Ofcom’s functions.”

This is unlikely to give operators much comfort. Even under its present powers, Ofcom has not been shy in asking for operators for information they do not retain or collect (typically because there was no commercial reason for them to do so). Armed with these new powers to require providers to produce, generate or obtain information, Ofcom will no doubt be like a child in a candy store, wanting to sample and purchase everything. Juxtaposed with the new appeal standard, this provision is one in respect of which operators should be very wary. •





WiFi4EU, and you, and you

On the 29 May, after six months of negotiation, the EU has reached political agreement on the scope of the WiFi4EU initiative and the funding it is to receive.

The initiative is an important step in the fulfilment of the Commission's wider Digital Single Market Strategy. The purpose of WiFi4EU is to bring high quality WiFi connectivity to public spaces across the EU, aiming to provide "every European village and every city with free wireless internet access around the main centres of public life by 2020."

The EU has committed to designate €120 million for the initiative. This shall be used to roll-out the equipment and services needed to provide high quality WiFi hotspots in 6,000 to 8,000 municipalities across the EU.

Any local public authority, or other entities with a 'public mission', such as libraries or health centres, may apply for funding under WiFi4EU. If accepted, the funds will be provided in the form of vouchers, covering up to the full cost of the equipment and its installation. The public entities will remain responsible for the cost of connectivity and maintenance of equipment for at least three years, under the current proposals.

In the initial stages, a number of concerns regarding the scheme were raised, for example over the impact that the scheme would have on private competition for such services. The current agreement appears to quell this concern, with the EU committing to only support requests for funding in areas where no similar public or private offer is in place. Additionally, the agreement purports to ensure fairness across the member states, with the funds to be deployed in a geographically balanced manner,



on a first come, first served basis. A maximum of one voucher will be available per community.

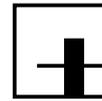
The WiFi4EU announcement will be warmly received by the public and public authorities alike, in particular those in 'hard to reach' areas where private players are unlikely to have rolled-out a public WiFi offering. The public will additionally be pleased to learn that the current agreement prevents funded public entities from imposing direct or indirect payment mechanisms in return for the connectivity. They may not, for example, make the viewing of commercial advertising or the provision of personal data for commercial purposes a condition for connecting to the service – a contrast to the typical 'free' WiFi services currently on offer.

Now political agreement has been reached, the detail as to where the funds will come from and the process for application for these funds must be hammered out. Once this has been settled, the intention

is for a pilot of the initiative to launch later this year, with an initial pot of €20,000 to cover up to 1,000 schemes. Pending any issues with this roll-out, the initiative will be fully launched in 2018.

The initiative may present a considerable opportunity for private players in the market to team up with the local authorities to provide the equipment and the connectivity necessary to make WiFi4EU a reality. Such providers should therefore watch this space for the official launch in the coming months.

Of course, for the UK agreement on the initiative is something of a bittersweet moment: with Brexit looming the UK's full participation in the initiative is not guaranteed. However, up the point of departure, local authorities and other eligible parties should not be prevented from applying for WiFi4EU Funding, and it may indeed be of considerable benefit for them to do so. •



Ofcom imposes record breaking fine: a more punitive approach?

On 26 March 2017, Ofcom (the UK telecommunications regulator) fined BT a record breaking £42 million for irregularities in compensation payments that should have been made to customers of its network arm, Openreach. BT is also required to compensate all the affected customers within 12 months, these compensation payments will amount to approximately £300 million.

The application of such material financial penalties is unprecedented in UK telecommunications regulation and is, arguably, indicative of a change in Ofcom's approach in this area. This fine is by some distance the largest ever levied by Ofcom. When it is combined with the scale of the Ofcom mandated compensation payments, the complete remedies package is one of significant punitive force. *The Financial Times* referred to

the scale of overall financial penalties levied by Ofcom in this case as "unprecedented in UK telecoms."

However, moves towards such an approach at Ofcom have, arguably, been developing over the past year to eighteen months at least, with the publication of Ofcom's new penalty guidelines and a number of high-profile fines. Moreover, this development arguably follows a broader trend among UK regulators towards regular, substantial and highly publicised applications of their enforcement powers. For example, such an approach has been prevalent at Ofgem, the energy market regulator for a number of years.

Whether such an approach will have the desired effect of improving compliance and deterring recidivism in respect of regulatory breaches is open to debate. Practically, however, it seems that those active in telecommunications markets will need to deal with the reality of a regulator willing to take a more adversarial and punitive approach to regulatory enforcement. •

Legal separation of Openreach: significant reforms announced by Ofcom

On 10 March 2017, the UK telecoms regulator, Ofcom, announced significant reforms to how BT's network arm, Openreach, will be governed.

Ofcom has stated that these changes represent the "biggest reform of Openreach in its history" and it seems certain that they will have a material effect on UK telecommunications markets.

Ofcom and BT have published a [NUMBER OF DOCUMENTS](#) which explain the new framework that BT and Openreach Limited will operate in. Broadly, the changes aim to provide Openreach Limited with (in Ofcom's words) "the greatest degree of independence from BT Group possible without incurring the delays and disruption – to industry, consumers and investment plans – associated with structural separation or the sell-off of Openreach to new shareholders."

Key changes include:

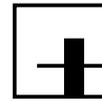
- **Legal separation/governance** Openreach will be incorporated as a separate company with a raft

of independence focussed corporate governance arrangements, seeking to ensure Openreach has scope to develop its own strategy and treats all customers equally.

- **Business separation** The new arrangements also include other operational business separation requirements (e.g. on staff, branding, premises, IT systems and information sharing).
- **Consultation with other market players** Openreach will also be required to formally consult confidentially with other market players such as Sky, TalkTalk and Vodafone on significant network investments.

Detailed arrangements on various important matters are yet to be confirmed; however, it is expected that these matters will be dealt with this year and that the new arrangements will fully come into force then. •





Communications and Politics: At a Glance

On the morning of Friday 9th June, the British public awoke to a result that could not have been anticipated just a month before, with the Conservative party losing their majority in Parliament.

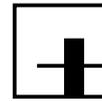
At the time of writing, the understanding is that Theresa

May, the current Prime Minister, will continue in her post and lead a minority Conservative Government, supported by the Democratic Unionist Party (DUP). For telecommunications operators, other than the wider political concerns over issues such as Brexit, of critical importance will be how the parties

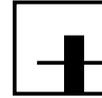
propose to deal with telecoms regulation going forward, and what investment they propose to put into the sector.

Below, we examine what the manifestos of the Conservatives and the DUP did and, critically, didn't say as relates to telecommunications.

Subject	Policy
Infrastructure Investment	<p>Conservative Party</p> <ul style="list-style-type: none">▪ Increase the National Productivity Investment Fund. £740 million has been earmarked for digital infrastructure investment.▪ Introduce a full fibre connection voucher for businesses by 2018.▪ To have major fibre spines in over 100 towns and cities and 10 million fibre connected premises by 2022.▪ Begin to roll out 5G network. <p>DUP</p> <ul style="list-style-type: none">▪ Develop a comprehensive broadband infrastructure plan to roll out high speed broadband across Northern Ireland.▪ Ensure Northern Ireland is at the forefront of 5G investment.
Speed and Coverage Goals	<p>Conservative Party</p> <ul style="list-style-type: none">▪ Ensure universal high speed broadband by 2020.▪ Ensure 'superfast' broadband coverage reaching 95% of premises by end of 2017.▪ Extend mobile coverage to 95% of country, and guaranteed WiFi on trains by 2022.▪ Ensure majority of population to covered by 5G signal by 2027.▪ Release spectrum from public sector to allow greater private access. <p>DUP</p> <ul style="list-style-type: none">▪ Press mobile telephony providers to invest in their 4G networks to ensure coverage across Northern Ireland.
Data Protection	<p>Conservative Party</p> <ul style="list-style-type: none">▪ Give individuals more rights over personal data.▪ Create a Data Use and Ethics Commission.▪ Draft and amend a new Data Protection Law. This may suggest the conservatives will forge a new path post-Brexit for data protection, foregoing the GDPR principles.



Subject	Policy
National Security and Technology	<p>Conservative Party</p> <ul style="list-style-type: none">Prevent terrorists from having a safe space to communicate online. This is strongly suggestive that they will fulfil the threat of attempting to weaken encryption. <p>DUP</p> <ul style="list-style-type: none">Make Northern Ireland a world leader in cybersecurity.
Commercial and Consumer Considerations	<p>Conservative Party</p> <ul style="list-style-type: none">Increase ministerial scrutiny and control of the company ownership within the telecoms sector. Although it does not stipulate how, this may require amendments to the Enterprise Act, or perhaps new licence conditions requiring % of telecommunications operators to be UK owned.Grant additional powers to the regulators and strengthen the power of the consumer enforcement bodies to order fines against companies breaking consumer law and delivering redress for wronged parties.Make broadband switching easier and more transparent.
The Missing Detail	<ul style="list-style-type: none">Brexit is, of course, discussed in the manifestos. However, with regard to telecommunications, no specific information is provided in respect of how the parties propose to change, or not to change, the regulation of telecoms post-Brexit. As discussed in our earlier article on the Digital Economy Act, there is now provision for the Government to play a larger role in the way Ofcom governs the telecommunications operators: going forward this may be utilised by which ever party wins.More generally, none of the manifestos mention the Digital Single Market Strategy the EU has tirelessly been pushing since its launch in 2015. Whether the UK will continue to play an active role in its development up to, and even post, Brexit is therefore unclear. For example, the manifestos are silent on a number of opportunities arising out of the Digital Single Market, for example the WiFi4EU initiative considered in our article above. These could be a potentially powerful mechanism to bring connectivity to all, but are not referred to by the main parties.In addition, the hot topic of ‘roam like at home’ has not made it into the manifestos of the Conservatives or the DUP. Only the Lib Dems in their unsuccessful manifesto pledged to fight to retain reduced roaming charges abroad. This is likely to come as a disappointment to the public, who will only from 15 June benefit from the end of roaming charges in the EU.Although the Conservative Party has made a USO pledge (with varying ambitions), it is again unclear what form this is going to take, and importantly, how it is to be funded. As discussed in our leader on the Digital Economy Act, it is probable that the future Government will utilise the USO Order mechanism to push through any binding commitments they wish to make. In respect of less certain ‘pledges’ however the mechanism used to drive these remains to be seen.Additionally, despite the focus on investment in telecommunications infrastructure, and in particular in fibre, the manifestos do not deal with one key concern of many communications providers. This is the much-discussed desire for the Government to reform the system ‘non-domestic rates’ charged to communications providers when they ‘light’ fibre networks to allow them to provide communications.



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