**PRODUCT SECURITY AND TELECOMMUNICATIONS INFRASTRUCTURE BILL**

**MEMORANDUM FOR THE JOINT COMMITTEE ON HUMAN RIGHTS**

## Introduction

1. This Memorandum addresses issues arising under the European Convention on Human Rights ("ECHR") in relation to the Product Security and Telecommunications Infrastructure Bill ("the Bill").

2. The Secretary of State for the Department for Digital, Culture, Media and Sport ("DCMS") has made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in their view, the provisions of the Bill are compatible with the Convention rights.

## Summary of the Bill

3. Part 1 of the Bill sets out the Product Security measures and Part 2 of the Bill sets out the Telecommunications Infrastructure measures.

## Part 1: Product Security

4. This Part:
    a. in Chapter 1, provides for the Secretary of State to make regulations specifying security requirements relating to products and to make regulations deeming compliance with security requirements where certain conditions are met. It also defines the products to which security requirements may relate and sets out persons to whom security requirements may apply;
    b. in Chapter 2, sets out the duties of economic actors: manufacturers, authorised representatives, importers and distributors under the Bill;
    c. in Chapter 3, provides that the Secretary of State is responsible for enforcing the provisions of Part 1 of the Bill. It sets out enforcement provisions empowering the Secretary of State (or an enforcer to whom the power to enforce Part 1 has been delegated) to investigate non-compliance and take action in the form of enforcement notices and variable monetary penalties imposed on economic actors, applications

for forfeiture and the bringing of criminal proceedings under summary only criminal offences; and

d. in Chapter 4, outlines supplementary provisions. It provides that the Secretary of State may issue guidance about the effect of any provision made by or under Part 1 of the Bill and that the Secretary of State or delegated enforcer may issue guidance about the exercise of any of their enforcement functions. It also sets out the interpretation under Part 1.

**Part 2: Telecommunications Infrastructure**

5. This Part makes amendments to the Communications Act 2003, including reforms to the Electronic Communications Code located in Schedule 3A to the Communications Act 2003 as inserted by the Digital Economy Act 2017 (“the Code”). It also makes amendments to the Landlord and Tenant Act 1954 (“the 1954 Act”). More specifically:

    a. clauses 68 to 69 introduce a new duty on operators to consider methods of alternative dispute resolution (ADR), an explicit duty on Tribunals to consider any unreasonable refusal to engage with ADR when awarding costs, and a requirement on OFCOM to prepare a code of practice on handling complaints;
    b. clause 66 inserts a new Part 4ZA in the Code dealing with occupiers, landowners and managing agents, who have not responded to an access request by the operators despite repeated notices;
    c. Clause 71 inserts a new section 148A into the Communications Act 2003 which provides the Secretary of State with a power to make regulations concerning the rights of network operators in respect of ‘relevant infrastructure’ required for the purposes of facilitating the development of public electronic communications networks. Amongst other things, such regulations may be used to amend, vary or revoke any provision made by the Communications (Access to Infrastructure) Regulations 2016 ("the ATI Regulations"), which regulate the sharing of infrastructure between telecommunication providers. The ATI

Regulations are intended to facilitate and incentivise the roll-out of high-speed electronic communications networks;

d. clauses 61 and 65 introduce new provisions to Part 2 of the 1954 Act which will apply to subsisting agreements (as defined at paragraph 1(4) of Schedule 2 to the Digital Economy Act 2017), which are unable to be renewed pursuant to Part 5 of the Code. These will enable rent to be calculated based on market rent while applying the "no network" disregard. In addition, jurisdiction for dealing with these disputes will be transferred to the First-tier Tribunal ("the Tribunal") and Upper Tribunal of the Lands Chamber ("the Upper Tribunal") from the County Court;

e. clauses 58 to 60 introduce a new automatic right for network operators to upgrade and share apparatus (currently set out in Part 3 of the Code), and applies this retrospectively, subject to a notification requirement, and adds a reference to “sharing” apparatus to the “menu of rights” at paragraph 3 of the Code, to put “sharing” on an equal statutory footing to “upgrading”.

**Part 3: Final Provisions**

6. This part provides that the following powers will commence on Royal Assent:

    a. Regulation making powers.
    b. Powers to make consequential amendments, powers to make transitional and saving provisions, provisions around regulations made under the Bill, financial provisions, extent, commencement and the short title.
    c. Delegation of the enforcement functions by the Secretary of State to another person.

**ECHR issues raised by the Bill**

7. The Bill engages Article 6 (Right to a fair trial), Article 8 (Right to respect for private and family life, home life and correspondence), Article 10 (Freedom of expression) and Article 1 of the First Protocol (“A1P1”) (Right to peaceful

enjoyment of possessions) of the ECHR and is compatible with the rights set out in those Articles.

8. DCMS has set out the ECHR issues raised by the Bill, arranged by reference to each relevant part of the Bill. This memorandum deals only with those provisions of the Bill which may raise issues arising under the ECHR. DCMS will undertake further analysis on compliance with the ECHR when making secondary legislation under these powers.

## Part 1: Product Security

### Investigatory powers

Article 8

9. DCMS has chosen to adopt the suite of investigatory powers from Schedule 5 to the Consumer Rights Act 2015 ("CRA"), the exercise of which can engage Article 8.

10. The Bill sets out clearly what is required of economic actors to comply with its provisions and further detail will be set out in secondary legislation. The Bill, together with the adopted provisions of Schedule 5 to the CRA, also sets out clearly when the powers may be used. The Bill further allows the Secretary of State to issue guidance, which will assist economic actors in understanding what is required of them.

11. The powers are necessary for an enforcer to be able to investigate potential non-compliance with the Bill and to ensure that the Bill can be effectively enforced. They pursue the legitimate aims of public safety and the prevention of disorder and crime.

12. The powers are designed to be proportionate and are circumscribed by important safeguards including:

    a. The power to require the production of information does not permit interference with an economic actor's right to remain silent and privilege against self-incrimination. No evidence relating to the information produced may be adduced and no question relating to the

information may be asked by or on behalf of the prosecution in any criminal proceedings against the person except in limited circumstances.

b. An economic actor cannot be required to provide any information which carries legal privilege and documents subject to legal privilege cannot be seized.

c. There are limitations on applying for a warrant to enter the premises and the Court can only grant a warrant if certain conditions are met. The power to enter premises (either with or without a warrant) only permits entry at a reasonable time. There are safeguards on entry without a warrant such as the provision of reasons for the entry to the occupier and indicating the nature of the offence.

d. An officer may only seize and detain products which they reasonably suspect may disclose a breach of the Bill, be liable to forfeiture, or be required as evidence in proceedings for a breach of the Bill. The powers of seizure are also subject to safeguards, including the requirement for an officer to take reasonable steps to inform the person from whom the products or documents are seized and provide them with a written record of what was seized.

e. Compensation will be payable in relation to lost or damaged documents which have been seized, subject to certain conditions.

f. There is a right to appeal the detention of the products by making an application to the Magistrates' Court (in England, Wales and Northern Ireland) and making a summary application to the Sheriff (in Scotland) for its release.

g. Where the products have been submitted to a test, an enforcer must inform the relevant person of the results of the test and the enforcer must allow the economic actor to have the products tested if it is reasonably practicable to do so.

Article 10

13. It is arguable that the powers to require the production and inspection of documents may engage Article 10, which captures information of a commercial nature. As set out above, these powers are necessary and proportionate to further the legitimate aim of the prevention of disorder and crime and any interference is justified.

A1P1:

14. Some of the investigatory powers adopted from Schedule 5 to the CRA may also engage A1P1, particularly those which relate to products and documents, which would be defined as "possessions" within the meaning of A1P1.

15. To the extent that any of these powers interfere with A1P1, this is justified. DCMS considers that the Bill serves the public interest by ensuring that products in relation to which security requirements to be set out in secondary legislation have not been complied with, are not made available to customers in the UK. DCMS considers that the powers are proportionate to that public interest and contain a number of safeguards, including those outlined above.

**Civil sanctions**

16. Chapter 3 of Part 1 includes civil sanctions of enforcement notices, variable monetary penalties and forfeiture which DCMS considers to engage the civil limb of Article 6. In addition, enforcement notices and forfeiture engage Article 8 and A1P1. DCMS considers that these provisions are compatible with the provisions of the ECHR.

**Enforcement notices:**

17. The enforcement authority may issue enforcement notices comprising compliance notices, stop notices and recall notices to economic actors where there has been non-compliance with the Bill (clauses 28 to 30).

Article 6:

18. DCMS considers enforcement notices to be compliant with Article 6. Enforcement notices can only be served if there are reasonable grounds to

believe there has been non-compliance. Economic actors will have 10 days to make representations before an enforcement notice is imposed, except where the Secretary of State considers there is an urgent need to impose a stop or a recall notice.

19. There will be a statutory right of appeal against the enforcement notice or any provision of it including any variation of the notice by the Secretary of State made after it was issued. Appeals will be heard in the First-tier Tribunal (General Regulatory Chamber) on the following grounds only: that the decision to give the notice or to include any provision in the notice was based wholly or partly on an error of fact, that the decision to give the notice or to include any provision in the notice was wrong in law or that the notice or any provision of it was unfair or unreasonable for any other reason.

20. DCMS is of the view that these appeal grounds will provide "sufficiency of review" for the purposes of Article 6(1)[1].

Article 8:

21. To the extent that Article 8 could be engaged by the imposition of enforcement notices, DCMS considers that any interference would be justified and proportionate for the reasons set out above.

A1P1:

22. Enforcement notices may engage A1P1. For example, an enforcement notice could amount to an interference with an economic actor's peaceful enjoyment of their possessions, a stop notice may amount to control of use under A1P1 and recall notices could interfere with a consumer's right to the peaceful enjoyment of their possessions. DCMS considers that the enforcement notices are proportionate to the public interest and subject to safeguards. The Secretary of State can only give a stop notice where it reasonably believes that an economic actor is carrying on, or likely to carry on, an activity in breach of its duties and a recall notice when the security requirements have been breached in relation to a product supplied to customers.

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[1] *Bryan v United Kingdom* (1996) 21 EHRR 342

23. Appropriate compensation is also available where an economic actor has wrongly suffered loss or damage as a result of an incorrect decision by the Secretary of State to impose stop or recall notices. A compensation claim must be made to the Secretary of State, and a decision on such a claim must be made within 45 days of the Secretary of State receiving it. A decision not to award compensation, or a decision to award a certain amount of compensation, may be appealed to the First-tier Tribunal if felt unsatisfactory by the economic actor. A failure to make a decision, or to notify of such a decision, within the 45-day period mentioned above may be subject to challenge by way of judicial review for a breach of statutory duty.

**Forfeiture**

24. The Secretary of State may apply to the Courts for an order for forfeiture of products where they have reasonable grounds to believe that the security requirements have not been complied with, as set out in the Bill under Clause 42(2). If the powers under this clause are exercised, they may engage Article 6, Article 8 and A1P1. DCMS considers that the clause is compatible with the provisions of the ECHR.

Article 6:

25. The Court can only grant an application for an order for forfeiture where they are satisfied on the balance of probabilities that the products are or will be made available to customers in the UK, that one or more of the security requirements have not been complied with in relation to a product, that it is unlikely that the relevant security requirement(s) will be complied with and it is proportionate to make a forfeiture order. The Bill further provides that the Court cannot order forfeiture unless the Secretary of State has given notice of the application and date and location of the proceedings for forfeiture to every identifiable person with an interest in the products (unless it was not reasonable to do so). Any person with an interest in the forfeited products is also entitled to appear in proceedings, even in cases where notice was not given to them by the Secretary of State.

26. Applications for forfeiture orders will be considered within the Magistrates Court (in England and Wales), the Sheriff Court in Scotland and a court of summary jurisdiction in Northern Ireland, which is compatible with Article 6(1).

Article 8:

27. To the extent that Article 8 could be engaged by these provisions, DCMS considers that any interference would be justified and proportionate for the reasons set out above.

A1P1

28. Forfeiture is generally regarded as control of use of possessions under A1P1.[2] The provisions relating to forfeiture are proportionate for the reasons set out above and compatible with A1P1.

**Variable monetary penalties**

29. The Secretary of State will have the power to issue variable monetary penalties to economic actors where satisfied on the balance of probabilities that an economic actor has failed to comply with their duties under the Bill (Clause 36(1)).

Article 6

30. DCMS considers that variable monetary penalties engage the civil limb of Article 6 and are compatible with the ECHR.

31. The power to issue variable monetary penalties is considered necessary for the Secretary of State to adequately take action where there has been serious or repeated non-compliance. It is envisaged that variable monetary penalties would likely be used after enforcement notices have been imposed and failed to achieve compliance. The penalties are subject to the following safeguards:
    a. The Secretary of State must notify a person of the intention to impose a penalty notice and allow them to make representations about the giving

[2] *AGOSI v. the United Kingdom,* 1986] Series A no. 108

of the notice. A penalty notice may not be imposed for a period of 28 days following the notification of the intention to impose the notice.

b. The Secretary of State may not require the penalty to be paid less than 28 days after the penalty notice is given.
c. Economic actors will have a statutory right of appeal.
d. A penalty notice must be provided to the relevant economic actor and contain the following: reasons for giving the penalty notice, the amount of the penalty, how payment is to be made, the period within which the payment must be made, how the person may appeal and the consequences of failing to pay the penalty.

32. As with the enforcement notices, economic actors will have a statutory right to appeal against the imposition of the penalty, the amount of the penalty or the period in which the penalty or any part of it is required to be paid. Any subsequent variation of a penalty notice by the Secretary of State may also be appealed against. Appeals will be heard in the First-tier Tribunal on similar grounds to appeals in relation to enforcement notices: that the decision appealed against was based wholly or partly on an error of fact, was wrong in law or was unfair or unreasonable for another reason. DCMS considers that these grounds will provide sufficiency of review for the purpose of Article 6.

**Criminal offences**

Article 6

33. Chapter 3 of Part 1 of the Bill contains the following criminal offences which engage the criminal limb of Article 6:

a. The offence of failing to comply with an enforcement notice: A person guilty of this offence will be liable on summary conviction to a fine not exceeding level five on the standard scale (unlimited fine in England and Wales and up to £5,000 in Scotland and Northern Ireland).

b. The offence of obstruction (from paragraph 36 of Schedule 5 to the CRA): A person who is guilty of this offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

c. Purporting to act as an officer of an enforcer (from paragraph 37 of Schedule 5 to the CRA). Also included within the Bill is an offence of purporting to act as authorised to exercise enforcement functions to ensure coverage of other enforcement functions not in Schedule 5 to the CRA. A person guilty of these offences will be liable on summary conviction to a fine not exceeding level five on the standard scale (unlimited fine in England and Wales and up to £5,000 in Scotland and Northern Ireland).

34. The provisions are compliant with Article 6 in respect of the above criminal offences because all will be summary offences tried in the Magistrates' Court (in England and Wales), the Sheriff Court in Scotland and a court of summary jurisdiction in Northern Ireland. These courts are "independent and impartial tribunals established by law" in-line with the essential principle in Article 6(1). The presumption of innocence is established within the UK criminal justice system in line with the requirement in Article 6(2) and proceedings within these courts will provide the minimum rights of the fair trial specified in Article 6(3).

35. The Secretary of State in England, Wales and Northern Ireland, and the Lord Advocate, or The Crown Office and Procurator Fiscal Service on behalf of the Lord Advocate, in Scotland, will be able to bring proceedings for criminal offences to allow them to enforce the Bill effectively and tackle non-compliance, with criminal offences being an additional deterrent to civil sanctions. The offence of failing to comply with an enforcement notice is similar to that contained in existing domestic product safety legislation and is subject to the defence of due diligence - taking all reasonable steps to comply with the notice. The Secretary of State also has the option to issue variable monetary penalties for the breach of a duty that led to the imposition of an enforcement notice prior to bringing proceedings for the offence of not complying with an enforcement notice. The offence of purporting to act as an officer of an enforcer (applicable for the purpose of enforcing Part 1 of the Bill) is set out in Schedule 5 to the CRA and the additional provision in the Bill of the offence of purporting to act as authorised to exercise enforcement functions to ensure the enforcement functions in the Bill are captured aligns

with Schedule 5. With respect to the offence of obstruction, paragraph 36 of Schedule 5 to the CRA applies and contains a safeguard to ensure that a person charged with the offence will not incriminate themselves, which is considered to be an essential feature of Article 6.

## Part 2: Telecommunications Infrastructure

### Renewal of expired agreements

36. Clause 61 inserts new provisions into the Landlord and Tenant Act 1954 Act for the Tribunal to impose terms in relation to leases currently protected under the 1954 Act (if the parties are unable to agree terms).

A1P1

37. Clause 61 engages A1P1 ECHR as it relates to the landlord's property rights. The changes effected by the Bill are likely to impact the rents received by landlords on the renewal of an agreement. Statutory limitations on rent are capable of interfering with a landlord's A1P1 rights and can amount to control of use[3]. Any interference is subject to conditions provided for by law, serves the public interest, passes the fair balance test and is compliant with A1P1.

38. The Bill's renewal measures serve a legitimate public interest. The proposed new provisions are required in order to bring consistency and certainty to the renewals procedure by bringing the procedure and terms for Code agreements - where the primary purpose is to grant Code rights that are renewed pursuant to the 1954 Act - closer to those applicable to new agreements entered into under Part 4 of the Code and to agreements renewed under Part 5.

39. Subsisting agreements protected by the 1954 Act are still "Code agreements" in the sense that they confer Code rights. Therefore it is appropriate that there is as much consistency as possible between the terms and procedures that apply on renewal.

[3] *Lindheim and others v Norway 13221/08* paragraphs 75 to 78

40. Any potential interference with A1P1 would further a legitimate aim, namely improving digital connectivity across the whole of the UK, in response to a pressing social need and maintaining the economic wellbeing of the country. As a result of the coronavirus pandemic, more people are working or studying remotely, meaning that access to high quality broadband and/or mobile signal is increasingly important.

41. A large proportion of litigation commenced since the 2017 reforms took effect has been concerned with the issue of renewals and whether agreements protected by the 1954 Act can be renewed under that legislation or under Part 5 of the Code. This has become a key issue due to the different tests at section 34 of the 1954 Act and paragraph 24 of the Code.

42. While DCMS agree that the 1954 Act should continue to apply to the circumstances in which the parties can seek to renew or terminate leases protected by that Act, DCMS believes that the remuneration for Code rights should be based on the statutory valuation framework contained in the Code to ensure as much consistency as possible.

43. Determinations affecting site providers and operators are set by clear provisions in the Bill. In accordance with the law, foreseeability and proportionality are necessarily subject to adjudication of the Court.

44. The same provisions could arguably be said to have retrospective effect, due to their impact on the renewal of concluded leases. There is no absolute prohibition on interference with existing leases with retrospective effect, and any interference with landlords' rights to renew at market rent and on substantially similar terms can be justified as serving a legitimate public interest and striking a fair balance between the public interest and landlords' A1P1 rights. Nonetheless, a "special justification" is required for such interference[4].

[4] *Bäck v Finland, 37598/97, paragraph 68*

45. This "special justification" lies in the need for as much consistency as possible, as outlined above.

46. Furthermore, the proposed change only has limited retrospective effect: it is not applied to the amount of rent received for the remainder of the term of the agreement; it is only applied when the existing agreement is renewed. On renewal of an agreement, it would be reasonably contemplated by the parties that the market may have changed since the date on which the agreement was entered into. Therefore there was a probability that the amount of rent on renewal would be lower, if the market had deteriorated and the calculation at paragraph 24 of the Code is of the market rent for such agreements applying the “no network” disregard contained in that paragraph and the amendment to section 34 of the 1954 Act is merely clarifying the position in such circumstances.

47. To the extent that any provisions arguably have retrospective effect, this is justified by the need for as much consistency as possible. These provisions are subject to conditions provided for by law, serve the public interest, pass the fair balance test and are compliant with A1P1.

Article 6

48. It could be argued that the renewals provisions engage the civil limb of Article 6. Any alleged interference would relate to the fact that the changes will transfer jurisdiction for considering such disputes from the County Court to the Tribunal. The effect is to create a single regime for dispute resolution and although it will change the forum within which disputes will be heard, it will not undermine the right to a fair trial. Instead, DCMS considers that the changes will benefit those parties to a dispute.

49. DCMS considers this regime complies with the essential principle in Article 6(1): the Tribunal is independent and impartial and established by law. Whilst the right to apply to the County Court under the 1954 Act will no longer be available, the parties can apply to the Tribunal. DCMS has discussed this

matter with the Deputy President of the Upper Tribunal (Lands Chamber) and is confident that this measure will facilitate access to and the administration of justice by reducing delay and expense for both parties. Parties are also expected to benefit from more specific expertise within the Tribunal. There is also a right to appeal against the Tribunal's decision to the Upper Tribunal (Lands Chamber).

**Unresponsive occupiers**

50. Clause 66 of the Bill proposes that where an operator has repeatedly attempted to contact an occupier or another person with an interest in the relevant land ("the occupier/ landowner") to seek Code rights in order to install telecommunications infrastructure to provide an electronic communications service[5] and the landowner has not responded, the operator will be able to apply to the Tribunal for rights under the Code. The rights will be those which had been sought originally by the operator from the occupier/ landowner.

*A1P1*

51. DCMS considers that this provision engages A1P1 as it relates to the control of use of land. In particular, the occupier/ landowner's property will be capable of being entered into by an operator bringing communications infrastructure into it.

52. As such, any interference with A1P1 will principally be in relation to the landowners and their property as an operator will be able to enter onto the relevant land and exercise the Code rights sought, pursuant to an agreement the terms of which will be specified in regulations. Those regulations must cover key areas, which are listed in paragraph 27ZE(5) of the Bill.

53. Any potential interference with A1P1 is justified as the access to the land will allow operators to provide electronic communications services. This access is only available in the event that the occupier/landowner has persistently failed to respond to the operator's request for Code rights. Such access - along with

[5] Defined in section 32(2) of the Communications Act 2003

any other rights conferred on an operator pursuant to an agreement imposed under Part 4ZA - will last for a period of no more than six years (with the actual period to be specified by the Secretary of State in Regulations)

54. The powers conferred on the Secretary of State to modify the definition of relevant land, through regulations, to which Part 4ZA will apply, ensure flexibility for the future. DCMS considers it important to enable further provision to be made, should the need arise, based on practical experience as the new Part 4ZA process is implemented. It allows DCMS to assess Part 4ZA's impact to guard against unforeseen consequences.

55. Part 4ZA of the Code contains various safeguards for the occupier/ landowners and places the evidential burdens on the operators:
    a. the operator will have to demonstrate that access to the relevant land is required to provide electronic communication services to the relevant property;
    b. operators can only obtain Code rights in respect of relevant land, which excludes land covered by building or used as a garden, park or other recreational area (although the Secretary of State can modify the definition through regulations);
    c. the agreement by which Code rights are granted must prohibit an operator from installing apparatus on the relevant land. It may only be installed over or under the relevant land. This is designed to reduce the burden on occupier/ landowners as much as possible.
    d. the operator will have had to make three unsuccessful attempts to contact the occupier/ landowners requesting Code Rights. In total, the occupier/ landowner will have at least 56 days to respond to the operator before they are able to apply to the Tribunal, which DCMS considers is sufficient time for an occupier/ landowner to issue some response to the operator. Any response received by the operator (within the 56 days) will remove the landowners from the scope of this mechanism;
    e. If an application has been lodged before the Tribunal, the occupier/ landowner would have additional time up until the day before the

determination to object and be removed from the scope of the mechanism.

56. The Tribunal will consider the evidence and if satisfied that the requirements have been met, may make a Part 4ZA order on paper. The terms on which these Part 4ZA Code rights will be exercised will be set out in regulations, which will contain key safeguards. For example, the terms must cover provisions: restricting the operator's right to enter the relevant land to specified times except in cases of emergency; requiring the operator to give notice before entering and to provide details of the work to be carried out; relating to insurance cover and indemnification relating to the maintenance or upgrading by the operator of the apparatus installed. The terms specified in those regulations can also cover other subject areas but that sub-paragraph reflects that DCMS has seriously and carefully considered the balance between the operators and occupier/ landowners. The regulations will be subject to the more intensive form of Parliamentary scrutiny provided for by the affirmative procedure.

57. The test which the Tribunal will be applying is straightforward as set out in the Bill[6]. It is hoped that this will be a speedier process than the present Code adjudication.

58. The rights available to an operator will last for no longer than 6 years. If the occupier/ landlord remains unresponsive or the parties have failed to reach an agreement after this period, the operator would not be entitled to make a repeat application under an unresponsive occupier route and would need to obtain full rights via the Upper Tribunal.

59. If the occupier/ landowner engages with the operator at any point in the process leading up to - and including - the application to the Tribunal for a Part 4ZA order, this will have the effect of (a) stopping the clock altogether,

[6] See Clause 66, paragraph 27ZE(1) as inserted by the Bill

and (b) taking the matter completely out of the Part 4ZA process.

60. This part of the Bill is intended to incentivise occupiers/ landowners and operators to reach agreements to confer Code rights voluntarily. Placing such a low burden on the occupier/ landowner to extricate themselves from the scope of the policy, coupled with the requirements on operators to demonstrate the application meets the criteria and is therefore in scope, creates a balanced and proportionate approach.

61. As set out above, any interference with A1P1 is justified as the proposal allows operators to pursue the public interest of providing an electronic communication service and the Bill contains extensive safeguards outlined above.

Article 6:

62. It could be argued that these provisions engage Article 6. The provisions relating to unresponsive occupiers inserted by clause 66 will enable the Tribunal to give an operator the right to enter land to undertake certain work over and under the land, where the occupier/ landowner has not responded to the notices from the operator and has not been represented before the Tribunal. In order to make a successful application to the Tribunal, the operator must meet the criteria for making an application, and the criteria is provided under paragraph 27ZB - 27ZD of the Bill. These provisions set out various safeguards for the occupier/landowner and places evidentiary burden on the operator (as outlined above in paragraphs 55 and 56).

63. DCMS understands that in the event an application is made to the Tribunal, the Tribunal would serve notice of such proceedings on the occupier/ landowner. If the occupier/ landowner provides a response to that notice that would be the end of the process under Part 4ZA.

64. The occupier/ landowner will also have a right to appeal as per the Tribunal procedure rules. The occupier/ landowner can also seek compensation, where the Tribunal can order the operator to pay compensation to the occupier/ landowner for any loss or damage sustained by the occupier/ landowner as a result of a Part 4ZA Code right.

Article 8:

65. DCMS considers that Article 8 is most likely not engaged by this Part of the Bill, but the analysis below is included for completeness.

66. Part 4ZA relates to 'relevant land'. It is arguable that Article 8 would be engaged if the vacant land could be interpreted within the concept of 'home' and could be linked to the right to respect for his home. For example, in respect of farmland, a farmer's freehold might include both "pure" farmland (i.e. land not covered by buildings but used for farming activities such as grazing cattle) and his home. It is possible therefore that land to which the operator is attempting to seek access) may be interpreted as an extension of a home. In this scenario it is arguable that Article 8 is engaged.

67. On balance, DCMS considers that such scenarios are likely to be sparse and hence it is unlikely that Part 4ZA Code rights engage with Article 8. However in cases where there is potential engagement with Article 8, this can be justified as the interference (if any) would be in accordance with the law and necessary in the interests of the economic well-being of the country. It is critical to the effective rollout of digital infrastructure that operators are not hampered in connecting properties to their networks because of non-responsive landowners.

68. It is also proportionate because of the clear procedural and evidential safeguards that are contained on the face of this Part of the Bill as set out at paragraphs 55 to 56 above.

**Upgrading and sharing**

69. Clauses 59 and 60 of the Bill make provision to introduce a new automatic right, for an operator to upgrade and share any apparatus installed under land, subject to conditions. This right is only exerciseable in relation to agreements entered into prior to 28 December 2017, or apparatus installed prior to 29 December 2003,[7] whereas the current paragraph 17 rights apply only to agreements entered into on or after 28 December 2017.[8]

A1P1:

70. These provisions engage A1P1 as they will provide for operators to share and upgrade apparatus under private land, without needing the site provider's consent or requiring the operator to pay for the right to upgrade and share.

71. The automatic upgrading and sharing right is exercisable in relation to apparatus under the land where the following conditions are met:
    a. There is no adverse impact on the land,
    b. The upgrading or sharing imposes no burden on the other party to the agreement, which includes anything that has an adverse effect on the enjoyment of the land or causes loss, damage or expense, and
    c. The upgrading or sharing takes place without entry onto the land, except where the operator has an existing right to enter the land.[9]

72. There has always been a clear public interest in the provision of electronic communications, and in such networks being upgraded to facilitate the deployment of better technologies. Apparatus sharing also has a wide range of benefits. Sharing means more operators providing coverage in a given area, offering consumers greater choice. It reduces the number of sites needed to achieve multi-operator coverage, which can minimise the disruption caused when cables and ducts are installed underground. It is cheaper and more efficient for operators, and has environmental benefits (for example,

[7] The date on which Schedule 3 to the Communications Act 2003 came fully into force. Schedule 3 made amendments to the telecommunications code in Schedule 2 to the Telecommunications Act 1984 for the purpose of translating the telecommunications code into a code applicable in the context of the new regulatory regime established by the Communications Act 2003.
[8] The date on which Schedule 1 to the Digital Economy Act 2017 came into force (and inserted the Code into the 2003 Act).
[9] See clauses 59(4) and 60(3) of the Bill.

fewer street works are required to lay fibre). Digital demand and the need for maximum geographical coverage has increased, which in turn increases the benefits of operators being able to upgrade and share their apparatus efficiently. This has developed further since the coronavirus pandemic, due to a greater reliance on network capability for things like working remotely.

73. The provision has a legitimate aim (the public interest of network connection) and the conditions imposed mean the exercise of the right can only be carried out in very specific circumstances, where the impacts are minimal (if any). The right is also subject to a notice requirement on the operator 21 days prior to the upgrading or sharing, which is a further procedural safeguard.[10]

74. The notice requirement requires operators to affix a notice to a conspicuous object on the relevant land in a secure and durable manner containing prescribed information, 21 days before the upgrading or sharing is carried out. Relevant land is the land under which the apparatus installed, where the main operator has a right to enter the land, or in any other case, any land on which works will be carried out to enable the upgrading or sharing to take place.

75. This is different to the usual notice procedure under the Code.[11] DCMS consider that engaging in the full notice procedure would be a very onerous administrative burden for operators, when the apparatus subject to the upgrading and sharing may be installed under numerous pieces of land stretching over long distances. This could have a chilling effect on the ability of operators to avail themselves of the new automatic right, and therefore the public interest in the carrying out of upgrading and sharing of telecommunications apparatus.[12]

76. DCMS' view is that as the conditions for the exercise of the right (as set out above) are so narrowly drawn, such that they will not be used in a way that

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[10] See clauses 59(4) and 60(3) of the Bill.
[11] Paragraph 91 of the Code requires an operator to take steps to identify the site provider to give them a notice, and if that, amongst other things, is not practicable, eventually allow the notice to be attached to a conspicuous notice on the land.
[12] There is precedent for a less onerous notice requirement, see paragraph 75 of the Code.

affects the value of the land, and the public interest benefit is so compelling, the measure is proportionate.

77. DCMS acknowledges that the right may be exercisable even when the operator is unable to produce evidence of the right to keep the apparatus under the land in the first place (this will usually be the case when the apparatus has been installed for many years). In these circumstances, paragraph 37 of the Code acts as a safeguard. Paragraph 37 gives a landowner the right to to require the removal of electronic communications apparatus on, under or over the land if prescribed conditions are met, one of which is that the landowner has never been bound by a code right entitling an operator to keep the apparatus on, under or over the land (see paragraph 37(2)).

78. There is an argument that this provision introduces an element of retrospectivity, to the extent that it applies to apparatus installed prior to 29 December 2003 and agreements concluded prior to 28 December 2017. However, this is justified as the impact on the site provider relative to the public interest benefit is low. Further, it does not have “formal” retrospective effect, in the sense that it will only apply to upgrading and sharing undertaken by an operator after the provision comes into force. The measure strikes a fair balance between the public interest in upgrading and sharing networks and the protection of the individual’s property rights, given the limited impact it will have on site providers. The conditions and the notice requirement provide important safeguards for the purposes of A1P1.

79. The provision is therefore proportionate to the aim and strikes a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.

80. The legal consequences for the affected parties of the change are not significant given the conditions attached to exercising the right. In addition,any consideration and/or compensation a site provider would have received for

upgrading and sharing prior to the introduction of the right is minimal.[13]

81. Further, there is an enhanced public interest argument to allow operators to upgrade and share apparatus installed pre-29 December 2003 as much of the Openreach network infrastructure was installed then. The measure is proportionate: in many of these situations, a site provider may be unaware that apparatus is installed under or over their property, until an attempt to upgrade or share the equipment brings it to their attention.

82. The notice requirement acts as a procedural safeguard for the notification of works being carried out under the land, and an opportunity for site providers to challenge the exercise of the right[14] with the use of common law remedies if they disagree that the conditions are satisfied for the exercise of the new automatic right when a network operator undertakes the upgrading and/or sharing.

83. This provides a balanced notice requirement which allows site providers to protect their interests whilst not being administratively cumbersome for operators. This obviates the risk of operators not availing themselves of the new automatic right to upgrade and share, which could result in the strong public interest in the right not being realised. Our view is that, in light of the narrowly drawn conditions, a fair balance is struck between the public interest and the protection of the individual's fundamental rights[15].

84. The proposals arguably affect the site provider's ability to charge for or be compensated by the courts under Part 4 of the Code for the upgrading and sharing of apparatus on land. However, the proposed conditions outlined above for the exercise of the right mean that the interference (if any) with the right is justified, in the context of the strong public interest in network

[13] The amount of consideration payable for laying fibre cables is often nominal or nil, and the "no-scheme basis" for compensation introduced by the Digital Economy Act 2017 means that any compensation payable to the landowner for interference with the land is calculated on the market rate of the land, without accounting for its use by telecommunications apparatus.
[14] AGOSI v. the United Kingdom, [1986] Series A no. 108.
[15] *Sporrong and Lönnroth v Sweden* [1983] 5 EHRR 35

connection. In addition, the financial impact on the provider is minimal.

85. Clause 58 of the Bill updates the "menu of rights"[16] so that a reference to the "sharing" of apparatus is added to the current reference to "upgrading" in paragraphs 3(c), (e) and (f) of the Code.

86. The principles involved in both upgrading and sharing are broadly similar and the same reasoning should be adopted by the Tribunal when considering both upgrading and sharing, whereas it currently is not.[17] Adding sharing to the menu of Code rights will address this.

87. The general public interest arguments set out above at paragraphs 72, 73 and 81 in relation to network connection apply, as do the specific public interest benefits of network sharing set out at paragraph 72.

88. Further, this provision will help to avoid litigation in this area, speed up negotiations between operators and site providers and make the test for sharing applied by the Tribunal consistent with the test for upgrading. DCMS considers these provisions to be compatible with A1P1.

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[16] The menu of rights to be amended is found at paragraph 3(c), (e), and (f) of the Code
[17] See *On Tower v J H & F W Green Ltd* [2020] UKUT 348 (LC), paragraph 60.