

THE PRODUCT SECURITY AND TELECOMMUNICATIONS INFRASTRUCTURE BILL

Memorandum from the Department for Digital, Culture, Media and Sport to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

- 1) This memorandum has been prepared by the Department for Digital, Culture, Media and Sport for the Delegated Powers and Regulatory Reform Committee, to assist with its scrutiny of the Product Security and Telecommunications Infrastructure Bill (“the Bill”). The Bill was introduced to the House of Commons on 24 November 2021. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken, as well as the nature of and the reason for the procedure selected.
- 2) The Government has carefully considered the powers in the Bill and considers that they are necessary and justified. It is the Government’s view that it has struck the right balance between the need for Parliamentary scrutiny and the need to be able to react quickly to make what are often technical amendments by secondary legislation.

B. PURPOSE AND EFFECT OF THE BILL

- 3) The purpose of the Bill is to optimise the use and facilitate the rollout of future-proof, gigabit-capable broadband and 5G networks, and to better protect citizens, networks and infrastructure from risks enabled by greater connectivity, namely harm from compromised consumer connectable products.

- 4) The Product Security Part (Part 1) of the Bill will set out obligations for manufacturers, importers and distributors relating to compliance with security requirements (to be set out in regulations) to prevent the sale, distribution and use of insecure consumer connectable products and to take action in respect of products made available to consumers where there has been a compliance failure. It also places obligations on manufacturers, importers and distributors to ensure that products that will be made available to UK customers are accompanied by important information relevant to the security of these products and empowers the Secretary of State to specify more detail about this information. This Part of the Bill provides the Secretary of State, and any person the Secretary of State authorises to perform enforcement functions, with proportionate enforcement powers to oversee compliance. The Secretary of State or delegated enforcer will monitor, investigate and, where necessary, take action in relation to non-compliant products and those responsible for them.
- 5) The Telecommunications Infrastructure Part (Part 2) of the Bill implements changes to support faster and more collaborative negotiations between landowners and telecom providers. It includes changes to support greater upgrading and sharing of telecommunications infrastructure, which optimises the use of existing networks and reduces the need for new deployment. This Part also includes changes relating to agreements that come to an end. These changes are intended to facilitate prompt and collaborative negotiations for renewal agreements where required and to ensure that both new and renewal agreements that are completed after the Bill comes into effect reflect the legislative framework in a consistent way. Appropriate measures will remain available for cases where an agreement cannot be reached.
- 6) Growth in digital connectivity will be matched by an increase in the number and types of consumer connectable products owned by UK households. Without product security measures, consumers will not be able to make easy, informed choices when purchasing connectable products, making them vulnerable to cyber attacks by bringing insecure or harmful connectable products into their home.

- 7) The existing legislative framework requires amendment to support the delivery of the Government's target of a minimum of 85% gigabit-capable broadband coverage (and to get as close to 100% as possible) and geographic coverage of 4G reaching 95% of the UK by 2025, and for the majority of the population to have 5G coverage by 2027.

C. DELEGATED POWERS

Part 1 - Product security

a) Clause 1 ('Power to specify security requirements')

- i) Subsection (1) - power to specify security requirements for the purpose of protecting or enhancing the security of connectable products made available to consumers and of users of those products.

b) Clause 3 ('Power to deem compliance with security requirements')

- i) Subsection (1) - power to deem that relevant persons have complied with security requirements if specific conditions are met.

c) Clause 6 ('Excepted products')

- i) Subsection (1) - power to specify products that are excepted from the product security regime.

d) Clause 9 ('Statements of compliance')

- i) Subsection (2)(b) - power to specify the form of, and the information to be contained in, a summary statement of compliance.
- ii) Subsection (3)(b) - power to specify the form of, and the information to be contained in, a statement of compliance.
- iii) Subsection (6) - power to make further provision about statements of compliance.
- iv) Subsection (7) - power to provide that a manufacturer is deemed to have complied with the duty in subsection (2) if specified conditions are met.

e) Clause 11 ('Duties to take action in relation to compliance failure')

- i) Subsection (5) - power to specify the conditions that must be met for a manufacturer to be subject to the duty to notify its customers of a compliance failure of a manufacturer.

- f) **Clause 15 ('Statements of compliance')**
 - i) Subsection (3) - power to specify the length of time a statement of compliance must be retained by an importer.
 - ii) Subsection (4) - power to require an importer to make available a statement of compliance.

- g) **Clause 18 ('Duties to take action in relation to importer's compliance failure')**
 - i) Subsection (5) - power to specify the conditions that must be met for an importer to be subject to the duty to notify its customers of a compliance failure of the importer.

- h) **Clause 19 ('Duties to take action in relation to manufacturer's compliance failure')**
 - i) Subsection (7) - power to specify the conditions that must be met for an importer to be subject to the duty to notify its customers of a compliance failure of a manufacturer.

- i) **Clause 24 ('Duties to take remedial action in relation to distributor's compliance failure')**
 - i) Subsection (5) - power to specify the conditions that must be met for a distributor to be subject to the duty to notify its customers of a compliance failure of the distributor.

- j) **Clause 25 ('Duty to take remedial action in relation to manufacturer's compliance failure')**
 - i) Subsection (8) - power to specify the conditions that must be met for a distributor to be subject to the duty to notify its customers of a compliance failure of the manufacturer.

- k) **Clause 34 ('Compensation for notices wrongly given')**
 - i) Subsection (6)(a) - power to direct the form and manner in which compensation claims for notices wrongly given should be made

- l) **Clause 38 ('The relevant maximum')**
 - i) Subsection (6) - power to set out classes of entities within groups which will be relevant for the calculation of the maximum relevant monetary penalty.
 - ii) Subsection (7) - power to provide in regulations how qualifying worldwide revenue can be determined for the purposes of calculating the maximum possible penalty.

- m) **Clause 53 ('Guidance')**
 - i) Subsection (1) - power to make guidance on any provision within Part 1 of the Bill.
 - ii) Subsection (2) - power for the enforcement authority to make guidance about the exercise of any of its enforcement functions.

- n) **Clause 54 ('Meaning of "UK consumer connectable product"')**
 - i) Subsection (10) - power to repeal subsections (2)(b) or (3)(b) and make consequential amendments to this clause.

Part 2 - Telecommunications infrastructure

- o) **Clause 65 ('Jurisdiction of court in relation to tenancies in England and Wales')**
 - i) Subsection (2A) - power to provide for the jurisdiction to be exercised by the First-tier Tribunal or Upper Tribunal.

- p) **Clause 66 ('Unresponsive occupiers')**
 - i) Paragraph 27ZB(3)(b) - power to modify the definition of 'relevant land' under Part 4ZA.
 - ii) Paragraph 27ZC(2)(d) - power to specify any other information which is required to be provided by the operator in a warning notice.

- iii) Paragraph 27ZC(5)(d) - power to specify any other information which is required to be provided by the operator in a final notice.
 - iv) Paragraph 27ZC(8) - power to specify any other conditions that an operator must satisfy before giving the required grantor a final notice.
 - v) Paragraph 27ZC(5)(b) - power to set the time period under which the required grantor must respond to the final notice.
 - vi) Paragraph 27ZD(1)(e) - power to make regulations to specify additional conditions that an operator must satisfy before applying for a Part 4ZA order.
 - vii) Paragraph 27ZD(2) - power to specify evidence which the operator is required to provide with its application under Part 4ZA.
 - viii) Paragraph 27ZD(3) - power to set the time period during which an application under Part 4ZA order can be made following the service of a final notice.
 - ix) Paragraph 27ZE(4) - power to specify the terms of an agreement imposed by a Part 4ZA order.
 - x) Paragraph 27ZF(3) - power to make regulations to specify the period for which Part 4ZA Code rights will last.
- q) **Clause 70 ('Jurisdiction of First-tier Tribunal in relation to code proceedings in Wales')**
- i) Amendment to the existing power in paragraph 95(1) of the Code so as to enable a function conferred by the code on the court to be exercisable by the First-tier tribunal in relation to Wales.
- r) **Clause 71 ('Power to impose time limits on the determination of code proceedings')**
- i) i) Subsection (1) - power to provide for certain proceedings to be determined within a specified time period (including a power enabling the Secretary of State to make limited amendments to primary legislation).
- s) **Clause 72 ('Rights of network providers in relation to infrastructure')**

i) New section 148A(1) of the Communications Act 2003 - power to make regulations concerning the rights of operators in respect of infrastructure required for the purpose of their networks.

t) **Clause 73 ('Power to make consequential amendments')**

i) Subsection (1) - power to make provision that is consequential on any provision made by or under Part 2.

Part 3 - Final provisions

u) **Clause 75 ('Power to make transitional or saving provision')**

i) Subsection (1) - power to make such transitional or saving provisions.

v) **Clause 78 ('Commencement')**

i) Commencement power.

Part 1 - Product security

Clause 1, subsection (1): Power to specify security requirements

<i>Power conferred on:</i>	<i>The Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative or affirmative resolution</i>

Context and Purpose

- 8) Subsection (1) allows the Secretary of State to specify the security requirements that will be imposed by the product security part of the Bill. This power is exercisable for the purpose of protecting or enhancing the security of relevant connectable products and the users of those products.
- 9) Subsection (2) sets out that a security requirement is a requirement that relates to relevant connectable products or relevant products of a specified description and applies to relevant persons or relevant persons of a specified description.
- 10) Clause 2 makes further provision about regulations made under clause 1(1) and sets out that significant changes including the addition of new requirements, the removal of requirements and the persons to whom those security requirements apply are subject to an affirmative resolution process to allow parliamentary scrutiny. Minor amendments varying the description of products or software or of other terms used in describing a security requirement (where varying means a change that does not affect the extent or effect of the requirement) will be conducted via the negative resolution process.
- 11) The government published a policy paper in April 2021, confirming its intent in respect of security requirements that would be given effect using the power in clause 1(1) of the Bill¹. Three security requirements will be made: a ban on universal default passwords, a mandatory means to manage reports of

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<https://www.gov.uk/government/publications/regulating-consumer-smart-product-cyber-security-government-response>

vulnerabilities, and an obligation to provide transparency on for how long, at a minimum, the product will receive security software updates. The power will also be used to set point of sale security requirements for all relevant persons directly supplying products to customers. These *point of sale* security requirements will require provision of information to customers about the minimum length of time for which the manufacturer of the product will provide security updates. Additionally, the government has stated that in the alternate, products will be capable of meeting security requirements if they meet international standards, to be specified. The power to describe which international standards are to be recognised is found in clause 3 and described further below.

Justification for taking the power

- 12) For this Bill to function effectively it must remain responsive to technological changes. The government therefore requires the flexibility to specify, as well as vary and revoke, security requirements to adapt to such changes.
- 13) The Bill operates by placing various duties on economic actors to comply with security requirements in relation to in-scope products that are made available in the UK and to take action where there has been non-compliance with the security requirements. The security requirements are therefore a key element to the effective operation of this legislation. They will be technical in nature (e.g. setting out details such as products and software relevant to each individual security requirement, mandating specific conformity assessment procedures in respect of certain products and setting out technical detail and language in terms of what is required for each security requirement). The requirements must reflect the capabilities of contemporary technology. The requirements will be required to change as industry standards for how products are configured change and what was once considered advanced technology becomes routine. Otherwise the legislation will not achieve its intended effect.
- 14) Due to the speed of technological advancement and change, these requirements are likely to require amending and updating and may be added to. For example, the leading international standard for product security of consumer connectable products is ETSI Standard (EN) 303 645 which contains 13 requirements. The

government currently intends to make regulations under clause 1(1) of the Bill that mandates the three most important of these 13 requirements, but in future, depending on regular threat assessments, it may be necessary to adopt additional requirements. Further, ETSI Standard (EN) 303 645 is curated by a working group, of which the UK is a member, that will adapt and refresh the standard in the future where appropriate and necessary. Other international standards bodies are also considering this matter and it will be necessary for the government to monitor these developments and keep the product security requirements up to date.

Justification for the procedure

15) By virtue of clause 2(6), regulations made under clause 1(1) are subject to affirmative procedure, except those described under clause 2(5), which are subject to negative resolution procedure.

16) The affirmative resolution procedure for substantive changes which change the nature or burden of the product security framework ensures Parliament has the opportunity to debate material changes to the security requirements.

17) However, given how fast technology is evolving, it is likely that new product types and software will be created in the future and it is therefore important that minor changes to descriptions of products, software and the technicalities of a security requirement can be made to keep the legislation up to date and fit for purpose. It is considered that the negative resolution procedure provides a suitable level of scrutiny for regulations made pursuant to this.

Clause 3, subsection (1): Power to deem compliance with security requirements

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

Context and Purpose

18) Subsection (1) provides the Secretary of State with the power to provide by regulations that a person is deemed to have complied with the security requirements where specified conditions are met.

19) Subsection (2) provides that the conditions mentioned in subsection (1) may include (a) that the product conforms to specified standard and (b) that a person has otherwise met their security requirements imposed by a specified standard. The standards may be specified by a person or a body outside the United Kingdom. An example condition could be that a product conforms to a specified standard, or that the person meets requirements imposed by a specified standard in relation to a product.

Justification for taking power

20) Improving the baseline cyber security of consumer connectable products is a critical global issue. As the number of these products in domestic circulation grows, ensuring that they are secure by design will continue to become a growing concern for other national and international regimes, international standards bodies and conformity assessment bodies. It is likely that these actors will introduce guidelines, recommendations or standards that are similar to or align with the security requirements in this Bill.

21) For instance, an economic actor may already be compliant with a regulatory regime which specifies that they must comply with existing international standards such as the ETSI (EN) 303 645 or ISO/IEC 29147. In recognition of this, the Bill provides the Secretary of State with the power to specify alternative routes by which relevant persons can demonstrate compliance with relevant security requirements. Where standards achieve equivalent security outcomes to the regulations and do not weaken the regime then the burden to businesses can be reduced without impacting on the application of the law.

22) This power will facilitate mutual recognition agreements and help the UK to avoid placing undue burden on industry by restricting the free flow of international trade.

Justification for the procedure

23) It is considered that the negative resolution procedure provides a suitable level of scrutiny for this power, as it does not enable the Secretary of State to create additional security requirements, or reduce the effect of the legal framework.

Clause 6, subsection (1): Excepted products

Power conferred on: *The Secretary of State*
Power exercisable by: *Regulations made by statutory instrument*
Parliamentary procedure: *Negative or affirmative resolution*

Context and Purpose

24) The provisions empower the Secretary of State to make regulations excepting particular products from the provisions of this regime.

Justification for taking the power

25) The government is committed to ensuring that businesses are not subject to an unnecessarily duplicative regulatory regime. This power will enable the government to specify products already subject to robust regulation as out of scope that would otherwise fall within the ambit of the Bill under the definition of “relevant connectable products”. Products that will be covered by future regulation relevant to that product, or products that it would not otherwise be appropriate to include, will also be excepted from scope using this power. The government stated its intent in respect of which products will be initially excepted in its April 2021 policy paper².

26) This power will allow the Secretary of State to except a product from the scope of the bill where it is already regulated to the same or a higher standard in other

² *ibid*

acts or regulations. For example, the government has stated that it will except smart metering devices that are already regulated from a cyber security perspective through Relevant Technical Specifications which must be met when subject to a Relevant Energy License Conditions as set out in The Gas Act 1986 and The Electricity Act 1989.

27) Similarly, this power would also allow the Secretary of State to except products from the scope of the Bill where it would be disproportionate or otherwise inappropriate for them to be in scope, as identified through consultation with industry and/or by advice from the National Cyber Security Centre (NCSC).

28) Desktop computers and laptops are in the first instance to be excepted from the scope of this Bill due to their complex supply chains relative to other products. The government held a Call for Views on this point and it is possible that these products will be brought into scope at a later date if the proportionality balance changes when considering risk of cyber threat against cost of implementation.

29) Additionally, this power will also allow the Secretary of State to except products when that product is incorporated into, attached to, or otherwise forms part of, another product, either of these products is to be regarded as an excepted product.

Justification for the procedure

30) By virtue of subsection (3), regulations made under this clause which are limited to varying the description of a product specified in regulations or to specifying any description of products that are subject to requirements that are considered by the Secretary of State to be equivalent to those already specified are subject to the negative resolution procedure.

31) By virtue of subsection (4), all other regulations made under this clause are subject to affirmative procedure.

32) The affirmative resolution procedure is the appropriate vehicle for this power as it is important that Parliament has the opportunity to debate any major changes,

including the removal of a product from the exceptions list, or the addition of a product class to the list, as such changes will impact how the legislative regime functions, the impact on business, and the protection customers of consumer connectable products are afforded.

33) However, it is considered that the negative resolution procedure provides a suitable level of scrutiny for regulations made pursuant to subsection (3), as the government does not expect that such regulations would impact the security protections afforded by this regime.

Clause 9, subsection (2)(b): Power for Secretary of State to specify the form of, and the information to be contained in, a summary statement of compliance

Power conferred on: *The Secretary of State*
Power exercisable by: *Regulations made by statutory instrument*
Parliamentary procedure: *Negative resolution*

Context and Purpose

34) This provision enables the Secretary of State to specify in regulations what information must be included in a summary statement of compliance under subsection (2)(b), and in what form the summary statement of compliance must take for the manufacturer to discharge the duty under subsection (2).

Justification for taking the power

35) In order for this Bill to function effectively, consumers, manufacturers, and everyone in the supply chain, need to understand how compliance with product security requirements is demonstrated. The government needs to provide clear instructions on the form that statements of compliance are presented in, and the information they must include to allow for consistency across the process and a minimum level of transparency.

36) An effective statement of compliance will likely contain information that enables relevant persons such as importers and distributors to identify a product, and to easily ascertain that the manufacturer or manufacturers of a product have

complied with all applicable security requirements in relation to the product. In situations where a summary version of the statement of compliance is applicable it will need to contain information, and in the form specified by, regulations set out under the power in this section, this would reduce the burden to industry as it will be sufficient for a product to be accompanied by a summary statement in lieu of the full statement of compliance.

37) To facilitate compliance with the legislation, the government is committed to, as far as possible, aligning with the administrative requirements of product safety legislation, since products subject to the PSTI Bill will often also be subject to other product safety legislation. Where appropriate, this power will be used to allow manufacturers to produce summary versions of the statement of compliance that include all necessary information in the same form as declarations of conformity required by product safety legislation. The intention is for manufacturers to be able to produce a single document to discharge their duties under different legislation.

38) The level of administrative detail concerning the form and information that needs to be present in a summary version of a statement of compliance is not considered appropriate for primary legislation. Since the security requirements will be specified in regulations made under the power in clause 1 and the statement of compliance (and any summary version of it) will need to contain specific information related to these security requirements, it is not possible for the contents of the summary statement of compliance to be described on the face of the Bill. It is also considered necessary for the legal framework to apply as intended long term for the contents and the form of summary versions of the statement of compliance to be easily amendable so the regulations continue to reflect changes to the declaration of conformity requirements, and changes or additions to the security requirements to be reflected.

Justification for the procedure

39) By virtue of subsection (9), regulations made under this clause are subject to negative procedure. The negative procedure is considered the appropriate level of parliamentary scrutiny for regulations made under this power in respect to

providing summary statements of compliance instructions as these are merely augmentations of the obligation to draw up a statement of compliance.

Clause 9, subsection (3)(b): Power for Secretary of State to specify the form of, and the information to be contained in, a statement of compliance

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

Context and Purpose

40) This provision enables the Secretary of State to specify in regulations what information must be included in a statement of compliance under subsection (2)(a), and in what form the statement of compliance accompanying the product must take for the manufacturer to discharge the duty under subsection (2).

Justification for taking the power

41) In order for this Bill to function effectively, consumers, manufacturers, and everyone in the supply chain, need to have a shared understanding of how compliance with product security requirements is demonstrated. The government needs to provide clear instructions on the form that statements of compliance are presented in, and the information they must include.

42) The level of administrative detail that will be included in regulations made under this power is not considered appropriate for the Bill. Since the security requirements will be specified in regulations made under the power in section 1 and the statement of compliance will need to contain specific information related to these security requirements, it is not possible for the contents of the summary statement of compliance to be described on the face of the Bill. It is also considered necessary that the requirements related to statements of compliance are easily amendable to accommodate any changes to the security requirements (e.g. the addition of a new security requirement).

Justification for the procedure

43)By virtue of subsection (9), regulations made under this clause are subject to negative procedure. The negative procedure is considered the appropriate level of parliamentary scrutiny for regulations made under this power in respect to providing statements of compliance instructions as these are merely augmentations of the obligation to draw up a statement of compliance.

Clause 9, subsection (6): Power to make provisions about statements of compliance

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

Context and Purpose

44)Under clause 9(2) of the Bill, consumer connectable products sold in the UK must be accompanied by a statement of compliance or a summary of the statement of compliance, that is in such form and contains such information as is specified in regulations, in which the manufacturer confirms that they have met relevant security requirements relating to the product. Manufacturers, importers and distributors are prohibited from making consumer connectable products available to UK customers if the product is not accompanied by a statement of compliance, even if the security requirements have been complied with in relation to a product.

45)Amongst other things, the statement of compliance must state that, in the opinion of the manufacturer, the manufacturer has complied with any security requirements relating to the product.

46)Subsection (6) provides a power for the Secretary of State to set out further provision around statements of compliance, including specific steps to take to determine compliance and the retention, publication and making available of the statement of compliance.

Justification for taking the power

47) In order for this Bill to function effectively, consumers, manufacturers, and everyone in the supply chain, need to have a shared understanding of what is required in respect of statements of compliance. The government needs to be able to provide clear instructions on steps to take to determine compliance where appropriate, the minimum amount of time statements of compliance must be kept, how they should be published and provisions around making copies available.

48) Where changes to the wider technological or threat landscapes render it appropriate, the government may introduce regulations under subsection (6)(a) mandating that products of a particular description undergo a particular assurance process. This would be done in instances where the provisions of that assurance process are equivalent to all or some of the relevant security requirements the manufacturer is subject to under this regime in relation to that product.

Justification for the procedure

49) By virtue of subsection (9), regulations made under this clause are subject to negative procedure. The negative procedure is considered the appropriate level of parliamentary scrutiny for regulations made under this power in respect of providing statements of compliance instructions as these are merely augmentations of the obligation to draw up a statement of compliance. The negative resolution procedure is also deemed appropriate in respect of mandating assurance processes because any assurance process mandated by this power would not go beyond the security requirements to which a product would already be subject.

Clause 9, subsection (7): Power to provide that a manufacturer has complied with the statement of compliance duty when certain conditions are met

Power conferred on: The Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution

Context and Purpose

50) This power provides the Secretary of State with the power to establish that a manufacturer has complied with the statement of compliance duty when specified conditions are met.

51) Subsection (7) will be used to set out regulations specifying conditions that, if met by a manufacturer, precludes it from being subject to the duty to only make products available where that product is accompanied by a statement of compliance (or summary statement). This is related to use of the power in clause 3 to facilitate mutual recognition agreements by providing a means of recognising the standards used in other regulatory regimes.

Justification for taking the power

52) Where the government has recognised another standard as being equivalent to compliance with a security requirement using the provisions of clause 3(1), it may be appropriate under certain conditions, for instance where the government has entered into a mutual recognition arrangement with another regime, for the duty to ensure that a product is accompanied by a statement of compliance to be waived for relevant persons in relation to products that meet that standard.

Justification for the procedure

53) By virtue of subsection (9) regulations made under clause 9(7) are subject to the negative procedure. The negative procedure is considered the appropriate level of parliamentary scrutiny for regulations made under this power. A negative procedure allows quicker implementation of mutual recognition agreements. More broadly, exercising this power does not create an additional obligation on manufacturers to demonstrate compliance or reduce the effect of the existing obligation, but merely creates alternative routes for manufacturers to meet their obligation related to the statement of compliance.

Clause 11, subsection (5): Power for the Secretary of State to specify the conditions that must be met for a manufacturer to be subject to the duty to notify customers of a compliance failure of a manufacturer

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

Context and Purpose

54) Under the Bill, a manufacturer is required to take action, including notifying certain persons such as the Secretary of State, an enforcer to whom the Secretary of State has delegated enforcement functions if applicable, and other economic actors, where the manufacturer becomes aware of (or ought to be aware of) a compliance failure by a manufacturer in relation to a product. This provision allows the Secretary of State to specify in regulations certain conditions which, when met, will also require the manufacturer in the same circumstances to notify customers in the United Kingdom to whom the manufacturer has supplied the product.

Justification for taking the power

55) Where the nature of a compliance failure in relation to consumer connectable products supplied to customers exposes those customers to risk, it is important that they are informed and can respond accordingly. The Government will use this power to set out practical conditions, the effect of which will be that customers will need to be notified of compliance failures where that failure has exposed the customer to significant risk. These conditions will be defined in regulations, and will be based on an assessment of the additional risk of cyber-attack presented by different kinds of compliance failure, for instance, in relation to specific security requirements.

Justification for the procedure

56) The negative procedure is considered to provide an appropriate level of parliamentary scrutiny for the exercise of this power. The negative procedure will

allow the government to respond quickly to ensure that customers continue to be informed of compliance failures that expose them to significant risk amidst changes to the broader threat and technology landscapes.

Clause 15, subsection (3): Power to specify the length of time a statement of compliance must be retained by an importer

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

Context and Purpose

57) Subsection (3) provides a power for the Secretary of State to set out that importers must retain a copy of statements of compliance for a specified period of time.

58) It is expected that the security requirements may change or be amended in the future and that the UK's product safety regulatory regime will also be updated and it is therefore important that compliance can be evidenced for the duration of a product's lifecycle.

Justification for taking the power

59) Consumer connectable product supply chains are complex. Many manufacturers of these products are not based in the UK and it is therefore vital that statements of compliance, that detail whether security requirements in relation to a product have been complied with, are kept by importers, as they will often be the economic operator that first makes the product available in the UK.

60) The time period technical documentation is required to be retained may vary depending on what security requirements are made under the power in clause 1(1). For example, security requirements that require a manufacturer to state how long a product will be supported with security updates, would need to be

supported by a requirement to retain technical documentation for the duration of that support period.

61)The Secretary of State or a delegated enforcer will likely require access to statements of compliance as part of carrying out enforcement functions. Access to technical documentation for products is vital during investigations into potential non-compliance.

Justification for the procedure

62)By virtue of subsection (6) regulations made under subsection (3) are subject to negative procedure. The negative procedure is considered the appropriate level of parliamentary scrutiny for regulations made under this power as this is simply specifying the time period required for the retention of the to the statement of compliance by the importer.

Clause 15, subsection (4): Power to require an importer to make the statement of compliance available in accordance with regulations

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

Context and Purpose

63)Subsection (4) provides a power for the Secretary of State to set out that importers must make available the statement of compliance, or the summary of the statement of compliance, in accordance with provision made by the regulations. This power may be used to ensure that a copy of the statement of compliance is readily accessible to the Secretary of State or a delegated enforcer, allowing them to conduct investigations where compliance breaches have been identified even when the manufacturer of a product is based overseas.

Justification for taking the power

64) It is vital that the Secretary of State has the power to require importers to make statements of compliance available in addition to requiring them to keep it for a specific period. Ensuring that compliance can be evidenced is important but effective enforcement requires that the Secretary of State or a delegated enforcer can review evidence which helps determine if there has been compliance as part of its investigations.

65) Future regulations may specify how this information is to be made available to ensure transparency, for example, making provisions equivalent to regulation 28 of the Radio Equipment Regulations 2017, such that the importer makes the statement of compliance available to any person carrying out enforcement functions that requires access to it.

Justification for the procedure

66) By virtue of subsection (6) regulations made under this clause are subject to negative procedure. The negative procedure is considered the appropriate level of parliamentary scrutiny for regulations made under this power as such provisions would simply specify the conditions under which a statement of compliance relating to a product is made available.

Clause 18, subsection (5): Power for the Secretary of State to specify the conditions that must be met for an importer to be subject to the duty to notify customers of a compliance failure (of the importer)

Power conferred on: The Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution

Context and Purpose

67) Under the Bill, an importer is required to take action, including notifying certain persons such as the Secretary of State, or an enforcer to whom the Secretary of State has delegated enforcement functions if applicable, where the importer

becomes aware of, or ought to be aware of, a compliance failure by the importer in relation to a product. This provision allows the Secretary of State to specify in regulations certain conditions which, when met, will also require the importer in the same circumstances to notify customers in the United Kingdom to whom the importer has supplied the product.

Justification for taking the power

68) Where the nature of a compliance failure in relation to consumer connectable products supplied to customers exposes those customers to risk, it is important that they are informed and can respond accordingly. The Government will use this power to set out practical conditions, the effect of which will be that customers will need to be notified of compliance failures where that failure has exposed the customer to significant risk. These conditions will be defined in regulations, and will be based on an assessment of the additional risk of cyber-attack presented by different kinds of compliance failure, for instance, in relation to specific security requirements.

Justification for the procedure

69) The negative procedure is considered to provide an appropriate level of parliamentary scrutiny for the exercise of this power. The negative procedure will allow the government to respond quickly to ensure that customers continue to be informed of compliance failures that expose them to significant risk amidst changes to the broader threat and technology landscapes.

Clause 19, subsection (7): Power for the Secretary of State to specify the conditions that must be met for an importer to be subject to the duty to notify customers of a compliance failure (of the manufacturer)

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

Context and Purpose

70) Under the Bill, an importer is required to take action, including notifying certain persons such as the Secretary of State, an enforcer to whom the Secretary of State has delegated enforcement functions if applicable, and other economic actors, where an importer becomes aware of or ought to be aware of a compliance failure by a manufacturer in relation to a product. This provision allows the Secretary of State to specify in regulations certain conditions which, when met, will also require an importer in the same circumstances to notify customers in the United Kingdom to whom the importer has supplied the product.

Justification for taking the power

71) Where the nature of a compliance failure in relation to consumer connectable products supplied to customers exposes those customers to risk, it is important that they are informed and can respond accordingly. The Government will use this power to set out practical conditions, the effect of which will be that customers will need to be notified of compliance failures where that failure has exposed the customer to significant risk. These conditions will be defined in regulations, and will be based on an assessment of the additional risk of cyber-attack presented by different kinds of compliance failure, for instance, in relation to specific security requirements.

Justification for the procedure

72) The negative procedure is considered to provide an appropriate level of parliamentary scrutiny for the exercise of this power. The negative procedure will allow the government to respond quickly to ensure that customers continue to be informed of compliance failures that expose them to significant risk amidst changes to the broader threat and technology landscapes.

Clause 24, subsection (5): Power for the Secretary of State to specify the conditions that must be met for a distributor to be subject to the duty to notify customers of a compliance failure (of the distributor)

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Context and Purpose

73) Under the Bill, a distributor is required to take action, including notifying certain persons such as the Secretary of State or an enforcer to whom the Secretary of State has delegated enforcement functions if applicable, where the distributor becomes aware of or ought to be aware of a compliance failure by the distributor in relation to a product. This provision allows the Secretary of State to specify in regulations certain conditions which, when met, will also require the distributor in the same circumstances to notify customers in the United Kingdom to whom the distributor has supplied the product.

Justification for taking the power

74) Where the nature of a compliance failure in relation to consumer connectable products supplied to customers exposes those customers to risk, it is important that they are informed and can respond accordingly. The Government will use this power to set out practical conditions, the effect of which will be that customers will need to be notified of compliance failures where that failure has exposed the customer to significant risk. These conditions will be defined in regulations, and will be based on an assessment of the additional risk of cyber-attack presented by different kinds of compliance failure, for instance, in relation to specific security requirements.

Justification for the procedure

75) The negative procedure is considered to provide an appropriate level of parliamentary scrutiny for the exercise of this power. The negative procedure will allow the government to respond quickly to ensure that customers continue to be informed of compliance failures that expose them to significant risk amidst changes to the broader threat and technology landscapes.

Clause 25, subsection (8): Power for the Secretary of State to specify the conditions that must be met for a distributor to be subject to the duty to notify customers of a compliance failure (of a manufacturer)

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

Context and Purpose

76) Under the Bill, a distributor is required to take action, including notifying certain persons such as the Secretary of State, an enforcer to whom the Secretary of State has delegated enforcement functions if applicable, and other economic actors, where the distributor becomes aware of (or ought to be aware of) a compliance failure by a manufacturer in relation to a product. This provision allows the Secretary of State to specify in regulations certain conditions which, when met, will also require the distributor in the same circumstances to notify customers in the United Kingdom to whom the distributor has supplied the product.

Justification for taking the power

77) Where the nature of a compliance failure in relation to consumer connectable products supplied to customers exposes those customers to risk, it is important that they are informed and can respond accordingly. The Government will use this power to set out practical conditions, the effect of which will be that customers will need to be notified of compliance failures where that failure has exposed the customer to significant risk. These conditions will be defined in regulations, and will be based on an assessment of the additional risk of cyber-attack presented by different kinds of compliance failure, for instance, in relation to specific security requirements.

Justification for the procedure

78) The negative procedure is considered to provide an appropriate level of parliamentary scrutiny for the exercise of this power. The negative procedure will allow the government to respond quickly to ensure that customers continue to be

informed of compliance failures that expose them to significant risk amidst changes to the broader threat and technology landscapes.

Clause 34, subsection (6)(a): Power for the Secretary of State to direct the form and manner in which compensation claims for notices wrongly given should be made

Power conferred on: *The Secretary of State*

Power exercisable by: *Guidance*

Parliamentary procedure: *None*

Context and Purpose

79) Subsection (6)(a) enables the Secretary of State to direct the form and manner in which relevant persons can make compensation claims to the Secretary of State for wrongly given stop or recall notices.

Justification for taking the power

80) The government is committed to establishing a fair process to allow relevant persons to claim compensation in the event that the most financially burdensome measures available to the Secretary of State are incorrectly employed. Under clause 34, a person who was wrongly given a stop or a recall notice may claim compensation for any loss or damage suffered as a result of the giving of the notice.

81) Subsection (5) provides that a person seeking compensation must first make a claim to the Secretary of State.

82) Subsection (6)(b) and (c) provide that a claim made under subsection (5) must include evidence of the loss or damage in respect of which compensation is sought and must specify the amount of compensation sought.

83) The power in subsection (6)(a) will be used to set out the form and the manner in which the claim must be made. For example, the guidance may specify that the method by which evidence may be submitted, or that the claim should contain a certain type of evidence to show that had it not been for the wrongly issued stop

notice, the claimant would have made a certain amount of profit from sales of the product.

84) Guidance published under this power may also include details of administrative procedures that are considered not to be appropriate for the Bill in order for the process to be fair and transparent. The power will ensure that technical changes to the process can be made promptly without amending primary legislation. For example, the guidance may be updated to allow claims to be sent to the address or email address of an appointed enforcer under clause 27(1).

Justification for the procedure

85) Any guidance produced under this power will help relevant persons claiming compensation by creating an effective and straightforward claims process. The guidance cannot create any new security requirements or duties and cannot affect the scope of the regulatory regime. Due to these limitations, no Parliamentary procedure for its approval has been included.

Clause 38, subsection (6): Power to make Regulations to set out classes of entities within groups which will be relevant for the calculation of the maximum relevant monetary penalty

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Affirmative resolution*

Context and Purpose

86) Subsection (6) provides the Secretary of State a power to set out in Regulations which members of groups (e.g. subsidiaries and parent companies in a group of companies) may have their total qualifying worldwide revenue taken into account for the purposes of working out the relevant maximum monetary penalty if the non-compliant relevant person is a member of one or more groups.

Justification for taking the power

87) Clause 38(1) provides that a penalty will be calculated as the higher of £10 million or 4 per cent of a person's qualifying worldwide revenue for the person's most recent complete accounting period. Subsection (6) allows the Secretary of State to provide that where that person is a member of one or more groups, the qualifying worldwide revenue will be calculated as a specified percentage of the whole group's revenue, or of the revenue of some members of the group of a specified description.

88) This power is necessary to ensure that penalties imposed on large groups will be proportionate and effective. For example, a large manufacturer may have a UK subsidiary that breaches their duties and is penalised. If the penalty is calculated as a percentage of the revenue of the subsidiary only, it may not be sufficient to deter the parent company (the manufacturer) or to incentivise it to comply. However, a group may include entities that are not responsible for the breach and were not involved in the actions of the UK subsidiary. For example, a group member may operate entirely in a different industry. The power in subsection (6) would allow the Secretary of State to provide by Regulations that the revenues of other members of the group will be considered for the purpose of calculating the penalty. The regulations may also provide that the revenues of group members of a specified description (e.g. group members who only produce food) will not be considered for the purpose of calculating the penalty.

89) Section 159(1) of the Data Protection Act 2018 empowers the Secretary of State by regulation to provide that a person is not an undertaking. In effect, regulations made under this power allow the Secretary of State to provide that the revenues of group members of a specified description will not be considered for the purpose of calculating a penalty because those persons are not 'undertakings'. In substance, this is very similar to the power in clause 38(6). Given the nature of this power, we have chosen to highlight that there is a precedent set in data protection legislation.

Justification for the procedure

90)The affirmative procedure is considered appropriate because regulations made under the power in clause 38(6) would substantially change the amount of any penalty imposed under clause 36. As any such increase would impact the potential burden this regime could place on businesses, a higher degree of parliamentary scrutiny is considered appropriate.

91)As referenced above the Data Protection Act 2018 contains a similar power to make regulations which is also subject to the affirmative procedure.

Clause 38, subsection (7): Power to make Regulations setting out how the relevant maximum penalty is to be calculated for a period

Power conferred on: The Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution

Context and Purpose

92)Subsection (7) of clause 37 provides a power for the Secretary of State to bring additional regulations about how worldwide revenue is determined for a specified period, for the purpose of calculating the relevant maximum penalty

Justification for taking the power

93)This power is necessary to provide clarity to relevant persons about the manner in which the relevant maximum penalty will be calculated. The power will allow the Secretary of State to, for example, provide that the revenue or turnover figures as stated in an entity's financial statements will be used to determine what the qualifying worldwide revenue of that company is. It was deemed inappropriate to include this on the face of the Bill as the regulations will likely need to provide substantial technical detail including how income from other activities (e.g. sale of assets outside the company's regular business) will be treated and how the qualifying worldwide revenue of groups will be calculated where individual members within the group have accounting periods of different lengths, or accounting periods that end on different dates.

94) Similar powers exist in other legislation. Section 36(8) of the Competition Act 1998 provides that the Secretary of State may, by regulations, set out how the turnover of an undertaking will be determined. Section 159(1)(b) of the Data Protection Act 2018 allows the Secretary of State to make provisions in regulations about how the turnover of an undertaking is to be determined. These provisions are consistent with clause 38(7).

Justification for the procedure

95) The affirmative procedure is considered to provide appropriate parliamentary scrutiny for any regulations made under subsection (7) as it is important that parliamentarians have the opportunity to debate changes to how worldwide revenue and the maximum potential penalties are calculated given the financial burden that may be placed on businesses.

Clause 53, subsection (1): Power to make guidance on any provision within Part 1 of the Bill

Power conferred on: *The Secretary of State*

Power exercisable by: *Guidance*

Parliamentary procedure: *None*

Context and Purpose

96) Clause 53(1) enables the Secretary of State to make guidance about the effects of any provision made by or under Part 1.

Justification for taking the power

97) Guidance issued under this power may, for example, set out best practice for complying with the duties imposed by Chapter 2 or explain that certain “supplies” will not be enforced against as a result of clause 55.

98) This power is necessary to enable the Secretary of State to quickly react to questions from businesses and consumers and to provide clarity about the functioning of the legislation arising from the operation of the provisions of Part 1.

Justification for the procedure

99) Any guidance produced will help economic actors to comply with the regulatory scheme and steer them through any necessary processes and procedures. The guidance cannot create any new security requirements or duties. Nor is there a duty for any person to have due regard to the guidance. Due to these limitations, no Parliamentary procedure for its approval has been included.

Clause 53, subsection (2): Power to make guidance about the exercise of enforcement functions (within the meaning of section 27)

Power conferred on: *The enforcement authority*

Power exercisable by: *Guidance*

Parliamentary procedure: *None*

Context and Purpose

100) Subsection (2) enables the enforcement authority (defined by clause 56 as the Secretary of State or any person authorised to exercise a function of the Secretary of State by an agreement under clause 27 to publish guidance about the exercise of its enforcement functions. The guidance will aim to help relevant persons navigate through the enforcement process. For example, the guidance issued under this power may include information that could help relevant persons prevent the use of enforcement measures by complying with their duties and cooperating with the enforcement authority. The guidance may also explain how representations made under clauses 28(5), 29(5) or 30(6) will be reviewed.

Justification for taking the power

101) This power will enable the enforcement authority to provide clear instructions about its enforcement procedures. It is necessary to produce such guidance to

ensure transparency in enforcing the legislation and to help relevant persons to navigate through the enforcement process.

Justification for the procedure

102) Any guidance produced will help relevant persons to comply with the enforcement measures. The guidance aims to provide transparency. The guidance cannot create any new security requirements or duties. Nor is there a duty for any person to have due regard to the guidance. Due to these limitations, no Parliamentary procedure for its approval has been included.

Clause 54, subsection (10): Power to repeal subsections (2)(b) or (3)(b) and make consequential amendments to Part 1

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Affirmative resolution*

Context and Purpose

103) Clause 54 defines the term “UK consumer connectable products” which is used throughout Part 1 of the Bill for the purposes of identifying products in relation to which the security requirements apply.

104) One of the effects of the definition is to exclude relevant persons with respect to “used” products from needing to comply with any security requirements made under Part 1 of the Bill relating to these products. Specifically:

- a) products that are made available to UK consumers that are not “used” at the point at which they are made available to consumers, are defined as “UK consumer connectable products”
- b) consumer connectable products that are made available to business customers are defined as “UK consumer connectable products”, where they are not “used” at the point at which they are made available to that business.

c) duties cease to apply if the consumer connectable product is made available to UK customers again, but in a 'used' condition. Returned or reconditioned (when reconditioned by or on behalf of the manufacturer) products do not count as 'used'.

105) The Secretary of State is empowered to make regulations which repeal the provisions of this clause that currently exclude "used" products from the scope of this regime. The power also allows the Secretary of State to make any changes to Part 1 of the Bill necessary and appropriate to effect the repeal of subsections (2)(b) and (3)(b).

106) The repeal of subsections (2)(b) and (3)(b) would require broader changes to specific elements of the Bill such as the duties in Chapter 2 or the definition of "supply" in clause 55. Whilst the duties currently achieve the intended objectives of the legislation, there are certain elements of the duties, which would need to be amended to accommodate the incorporation of used products into the scope. For example, the duties to not make a product available unless it is accompanied by a statement of compliance in clauses 15 and 22 would be disproportionately burdensome in relation to used products. An importer or a distributor making a used product available may have no means to obtain the original statement of compliance produced by the manufacturer in relation to the product when it was new.

107) Likewise some changes will be necessary in the definition of 'supply' to ensure that the treatment of rental products does not require compliance with excessively burdensome duties but users of such products are protected by the provisions of the Bill.

Justification for taking the power

108) Feedback from industry to the 2020 call for views on regulating consumer connectable product cyber security highlighted that the inclusion of "used" products would impose impractical obligations on businesses. The government announced in the 2021 response to this call for views that "used" products would be excepted from the scope of this regime at commencement.

109) Millions of consumer connectable products have been sold in the UK and minimum security requirements may not be met in relation to these older products. The continued operation of legacy equipment may have security risks for users and the wider economy if they continue to use default passwords and are not receiving security updates when needed. Depending on how this risk profile develops it may be necessary to start applying security requirements in relation to these products when they are resold so that “used” consumer connectable products need to also meet security requirements.

110) The government will continue to monitor the impact of this exception on the users of consumer connectable products, and has taken this power to enable “used” products to be brought into scope of the Bill at a later date, should it be deemed proportionate and appropriate by Government and Parliament, for the purposes of protecting and enhancing the security of those who use these products.

111) Although this is a Henry VIII power in that it allows ministers to repeal a provision and to make consequential amendments to the Bill, the scope of the power is limited to removing the exclusion of “used” products from the regulatory scheme and to only making changes to other provisions of the Bill when they are necessary or appropriate to realise the inclusion of used products in the scope of the legislation.

Justification for the procedure

112) The affirmative resolution procedure is the appropriate vehicle for this power, as the repeal of subsections (2)(b) and (3)(b) would directly affect the scope of products captured by this regulatory framework, the impact of the framework on businesses, and consumer protection. The affirmative resolution procedure is also appropriate to enable Parliament to appropriately scrutinise any further changes made to Part 1 to realise the repeal of subsections (2)(b) and (3)(b).

Part 2 - Telecommunications infrastructure

Clause 65: power to provide for the jurisdiction of the court to be exercised by the First-tier Tribunal or Upper Tribunal

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative Resolution*

Context and Purpose

113) This clause inserts a new subsection (2A) into section 63 of the Landlord and Tenant Act 1954 (“the 1954 Act”) which confers a power on the Secretary of State to make regulations for the jurisdiction of the court to be exercised by the First-tier Tribunal and the Upper Tribunal in relation to disputes about the renewal of agreements protected by Part 2 of the 1954 Act whose primary purpose is to confer Code rights. conferring Code rights under Part 2 of the 1954 Act.

114) Schedule 2 of the Digital Economy Act required that disputes relating to the renewal of these agreements must be dealt with under the provisions of the 1954 Act rather than the renewal procedures contained in Part 5 of the Code. Amongst other things, this means that disputes relating to the renewal of agreements protected by the 1954 Act must be dealt with by the county court, rather than the Upper Tribunal (Lands Chamber), which deals with most other disputes relating to code rights.

Justification for taking the power

115) As outlined above, disputes which concern the renewal of an agreement whose primary purpose is to confer code rights that are protected by the 1954 Act must be dealt with by the county court. All other disputes relating to code rights fall within the jurisdiction of either the Upper Tribunal or the First-tier Tribunal in England and Wales, the Lands Tribunal for Scotland in Scotland and either the Lands Tribunal or the county court in Northern Ireland. The jurisdiction for cases relating to code rights was transferred to the Upper Tribunal (Lands Chamber) as

part of the 2017 reforms to the Code. The intention was not only to allow cases to be heard by the courts recognised as having the appropriate expertise to deal with matters relating to what are essentially rights relating to land, but also to enable disputes to be dealt with more quickly and cheaply.

116) The overall impact of the position outlined above is that disputes involving the renewal of agreements protected by the 1954 Act do not benefit from the improved disputes procedures that the 2017 reforms aimed to deliver for disputes relating to code rights. Transferring the jurisdiction for 1954 Act disputes to the Lands Tribunals will address this and provide greater consistency in the way that all disputes relating to code rights are dealt with.

117) We have engaged with the judiciary who are in favour of this jurisdictional change and agree that the Tribunals have the proper expertise to deal with these cases. Introducing this change through regulations will have the added benefit of ensuring the Secretary of State retains flexibility to transfer functions between the different courts should this become appropriate, with powers analogous to those contained in paragraph 95(1) of the Code. It will also provide greater flexibility in managing the timing for any such changes (including the initial transfer from the county courts to the Lands Tribunals) to take effect, so we can ensure the relevant courts have adequate time to prepare for increases in caseload and to introduce any new guidance or administrative procedures that may be needed.

Justification for the procedure

118) By virtue of new subsection (2E) inserted by this Bill into section 63 of the 1954 Act, the negative procedure will apply to regulations made using this power. The Government considers that the negative procedure affords an appropriate level of parliamentary scrutiny since the power is narrowly drawn and simply enables the transfer of jurisdiction of a specific class of cases from one court to another; indeed, as set out above, the transfer is to the Tribunal with particular expertise in dealing with such cases and would bring parity across the legal system so that cases in which similar issues arise are considered in the same forum. Such a change, given effect through the exercise of this power, does not detrimentally impact on access to, or the application of, justice.

Clause 66, new paragraph 27ZB(3)(b) to be inserted into Schedule 3A to the Communications Act 2003: power to modify the definition of ‘relevant land’ under Part 4ZA

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Affirmative Resolution*

Context and Purpose

119) Under the new Part 4ZA inserted by this Bill into Schedule 3A to the Communications Act 2003, the Tribunal may, by way of an order pursuant to paragraph 27ZE, impose an agreement that confers Part 4ZA Code rights on an operator for the purpose of installing apparatus under or over the “relevant land”, in circumstances where the operator does not need to install apparatus actually on that land. Paragraph 27ZB(3)(b) contained in the new Part 4ZA, provides a power for the Secretary of State to modify the definition of “relevant land” contained in paragraph 27ZB(3)(a). Paragraph 27ZB(4) provides that regulations in exercise of this power can only be made following consultation with operators, persons representing the interests of landowners likely to be affected by any such regulations, as well as any other persons that the Secretary of State thinks appropriate.

Justification for taking the power

120) Paragraph 27ZB(3)(a) provides a definition of ‘relevant land’ as ‘land that is not covered by buildings or used as a garden, park or other recreational area’. However, it is anticipated that there may be other types of land, which fall within the exclusions above (that is, types of land which *are* covered by buildings or used as a garden, park or other recreational area) where it could be appropriate in the future to permit operators to acquire Part 4ZA Code rights. The power provided for by paragraph 27ZB(3)(b), exercisable only following consultation as required by paragraph 27ZB(4), provides this flexibility; the Government 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. As such, the power will enable the definition of “relevant land” included on the face of the Bill to be modified, so as to alter the scope of land to which the new Part 4ZA process can apply. The power is, in effect, a “Henry VIII” power; it is a delegated power which enables a Minister, by delegated legislation, to make a change to the definition of “relevant land” as initially provided for on the face of the Bill.

121) In addition, further consultation may also assist in identifying any additional types of land to which it would be appropriate to apply the Part 4ZA process. However, the Government considers that this power is necessary in order to ensure that legislation keeps pace with the practicalities of infrastructure deployment.

Justification for the procedure

122) By virtue of the new paragraph (za) inserted into section 402(2A) of the Communications Act 2003 by paragraph 2 of the Schedule to the Bill, the affirmative resolution procedure will apply to regulations made under this power. The Government considers the affirmative procedure to be appropriate given the potential effect of the power, enabling changes to the definition of “relevant land” already included on the face of the Bill and that will already have been scrutinised and approved by Parliament. As such, it is considered appropriate that any regulations made using this power are debated and subject to more intensive scrutiny by Parliament through the affirmative procedure.

Clause 66, new paragraph 27ZC(2)(d) to be inserted into Schedule 3A to the Communications Act 2003: power to specify any other information which is required to be provided by the operator in a warning notice

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative Resolution*

Context and Purpose

123) Before an operator is able to apply to the court for a Part 4ZA order, they must send two warning notices, and a final notice, to the ‘required grantor’, who is likely to be the owner or occupier of the land over which the Code rights are sought. Paragraph 27ZC(2) sets out the information which must be included in a warning notice. This power enables the Secretary of State to specify, in regulations, other information to be included in a warning notice.

Justification for taking the power

124) Part 4ZA provides a new process through which an agreement can be imposed by a court. Paragraph 27ZC(2) sets out, on the face of the Bill, a number of requirements as to what a “warning notice” for these purposes must include. However the Government anticipates that, when Ofcom consults on the form of notice, and as this new process is implemented over time, it might become apparent that additions to these requirements are needed. This power will provide flexibility for the future, allowing provision to be made requiring such additional information to be provided by operators without the need for additional primary legislation.

Justification for the procedure

125) By virtue of section 402(2) of the 2003 Act, the negative resolution procedure will apply to regulations made under this power. The Government considers this procedure to afford an appropriate level of parliamentary scrutiny since Ofcom will have carried out a consultation inviting stakeholders from both telecoms operators and landowner representatives on the form of the notices. We anticipate that such a consultation - although focused on the form of the notice - may also identify further information that it would be appropriate to include as the *contents* of the notice; this power will enable the Government to take the necessary action to address this.

126) However we anticipate that any changes required are likely to be technical and limited in nature and will not broaden or otherwise change the nature of the overall framework provided for by the Bill. Such regulations can only be used to

add to the list of required information in a warning notice, as set out in paragraph 27ZC(2); they cannot amend the list already provided for on the face of the Bill.

Clause 66, new paragraph 27ZC(5)(d) to be inserted into Schedule 3A to the Communications Act 2003: power to specify any other information which is required to be provided by the operator in a final notice

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative Resolution*

Context and Purpose

127) Before it is able to apply to the court for a Part 4ZA order, an operator must send two warning notices, and a final notice, to the required grantor. Paragraph 27ZC(5) sets out the information which must be included in a final notice. This power, provided for in paragraph 27C(5)(d), enables the Secretary of State to specify, in regulations, other information to be included in a final notice.

Justification for taking the power

128) Having a power to specify additional information to be included in a final notice under the Part 4ZA process provides flexibility for the future in dealing with these points, and any other concerns that may arise. As with the power to specify additional information to be included in a warning notice (see above), such a power enables the Secretary of State to take into account any practical issues, or other considerations, that arise as this new Part 4ZA process is implemented over time. This could include specifying additional information to be included in *all* final notices so as to ensure consistency across the sector, with (for example) site providers benefitting from the same core information being provided to them irrespective of the specific operator concerned. Such regulations may also support how Paragraph 27ZC(5) is understood and compliance with the requirements is achieved, should this become necessary based on experience of implementing the new Part 4ZA process.

129) Finally, by virtue of paragraph 90 of the Code, OFCOM is required to prescribe the *form* of a notice to be given under this Code and, before doing so, must consult operators and such other persons as OFCOM think appropriate. As with the power at 27ZC(5)(d), we anticipate that such a consultation - although focused on the form of the notice - may also identify further information that it would be appropriate to include as the *contents* of the notice; this power will enable the Government to take the necessary action to address this.

Justification for the procedure

130) By virtue of section 402(2) of the 2003 Act, the negative resolution procedure will apply to regulations made under this power. The Government considers this procedure to afford an appropriate level of parliamentary scrutiny since such regulations, making provision for additional information to be included in final notices, are likely to be technical and limited in nature and will not broaden or otherwise change the nature of the overall framework provided for by the Bill. Further, such regulations can only be used to add to the list of required information in a final notice, as set out in paragraph 27ZC(5) they cannot amend the list already provided for on the face of the Bill.

Clause 66, new paragraph 27ZC(8) to be inserted into Schedule 3A to the Communications Act 2003: power to specify any other conditions that an operator must satisfy before giving the required grantor a final notice

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative Resolution*

Context and Purpose

131) Paragraphs 27ZC and 27ZD set out the requirements that must be satisfied before an operator can apply for a Part 4ZA order. In particular, paragraph 27ZC sets out the notice requirements that must be complied with.

132) Paragraph 27ZC(1) provides that the operator must have sent two warning notices beyond the initial paragraph 20(2) request notice (in accordance with sub-paragraph (2)), and a final notice (in accordance with sub-paragraph (5)), before applying to the Tribunal for an order under Part 4ZA. Sub-paragraph (6) requires that a final notice may only be given within the permitted period (as defined at sub-paragraph (7)).

133) Sub-paragraph (8) gives the Secretary of State the power to make regulations to specify additional conditions that the operator must satisfy before giving the required grantor a final notice.

Justification for taking the power

134) The main conditions that will apply before an operator can give a final notice are clearly set out on the face of the Bill. These include that the operator must have given various warning notices in the prescribed manner and timeframes. These conditions are the main protections for required grantors and, as such, will be scrutinised and approved by Parliament.

135) The justification for taking this power is to allow additional conditions to be specified where there is evidence, arising in the future from implementation of the new Part 4ZA process, that it would be beneficial for operators to comply with such additional conditions before being able to give a final notice. Such conditions might include those requiring operators to carry out additional searches or checks, or provide further information or documentation before issuing the final notice. Any such conditions would add additional protections for required grantors before the formal Tribunal process can be commenced.

Justification for the procedure

136) By virtue of section 402(2) of the 2003 Act, the negative resolution procedure will apply to regulations made under this power. This procedure is considered to provide an appropriate level of parliamentary scrutiny as any such regulations will likely concern procedural requirements, of the type identified above, to be complied with by the operator before the formal stage of the Part 4ZA process can be commenced. Further, the power cannot be used to remove or amend any

of the core conditions as provided for on the face of the Bill (and as scrutinised by Parliament); it only provides a means of adding to these conditions.

Clause 66, new paragraph 27ZC(5)(b) to be inserted into Schedule 3A to the Communications Act 2003: power to specify the time period within which the required grantor must respond to the final notice

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative Resolution*

Context and Purpose

137) Paragraphs 27ZC and 27ZD sets out the requirements that must be satisfied before an operator can apply for a Part 4ZA order. One such requirement is that the specified period, within which the required grantor must respond to the final notice, has ended.

138) As provided for by paragraph 27ZC(5)(b), this “specified period” is to be set out in regulations made by the Secretary of State. This provision therefore confers on the Secretary of State a power to make regulations to specify the amount of time within which the required grantor must respond after being served a final notice. If they fail to respond within that time period, and the other applicable conditions have been satisfied, the operator may apply to the court for a Part 4ZA order.

Justification for taking the power

139) The power for the Secretary of State to specify, in regulations, the applicable time period provides flexibility for the future, including for any appropriate changes to be made in light of practical experience gained as this new Part 4ZA process is implemented. Being able to specify a time period helps ensure that proceedings under Part 4ZA can be commenced in an expedient manner, whilst also ensuring required grantors are allowed time to respond. Ensuring that the time period can be amended is particularly important where, for example, there is

evidence to suggest that any specific period is creating difficulties for the parties involved in this process.

140) The new Part 4A, inserted into the Electronic Communications Code in Schedule 3A to the Communications Act 2003, inserted by the Telecommunications Infrastructure (Leasehold Property) Act 2021, seeks to achieve a similar balance, and the Government intends to commence these provisions soon. As such, a time period is not given on the face of this Bill in order that the practical experience of Part 4A provisions may, if appropriate, inform the time period specified in regulations for Part 4ZA.

Justification for the procedure

141) By virtue of section 402(2) of the 2003 Act, regulations made under this power will be subject to the negative resolution procedure. The Government considers this procedure to afford an appropriate level of parliamentary scrutiny of such regulations since the power is narrowly drawn and any regulations made in exercise of it are likely to be technical and limited in nature, simply setting out a minimum time period between a final notice being served and an operator being able to make an application to the court.

Clause 66, new paragraph 27ZD(1)(e) to be inserted into Schedule 3A to the Communications Act 2003: power to make regulations to specify additional conditions that an operator must satisfy before applying for a Part 4ZA order

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative Resolution*

Context and Purpose

142) Paragraphs 27ZC and 27ZD set out the requirements that must be satisfied before an operator can apply for a Part 4ZA order.

143) As provided for in paragraph 27ZD(1)(e) and (6), a power is conferred on the Secretary of State to specify, in regulations, other conditions that an operator must satisfy before applying for a Part 4ZA order. These are likely to be inherently procedural or administrative in nature as they will relate to conditions that operators are to comply with before the Tribunal process can be commenced.

Justification for taking the power

144) The main conditions that operators must comply with before applying for an order are clearly set out on the face of the Bill (paragraphs 27ZC and 27ZD). For example, an operator will be required to give multiple notices to required grantors and provision is made so that a response in writing from a required grantor will stop the Part 4ZA process. These conditions offer protection to required grantors before Tribunal proceedings can be commenced against them. These requirements, set out on the face of the Bill, will be scrutinised and approved by Parliament.

145) Part 4ZA provides a new process through which an agreement can be imposed by a court. As this new process is implemented over time, it might become apparent that adding to conditions with which operators must comply before applying for an order would be an appropriate step, helping to ensure that the process operates as effectively as possible and providing further safeguards for required grantors.

Justification for the procedure

146) By virtue of section 402(2) of the 2003 Act, regulations made under this power will be subject to the negative resolution procedure. The Government considers this procedure to afford an appropriate level of parliamentary scrutiny of such regulations since the power can only be used to specify additional conditions; the main conditions with which operators must comply appear on the face of the Bill and will have been scrutinised by Parliament; these cannot be amended using this power. In addition, this power is concerned with matters that are inherently procedural in nature, setting additional conditions (and therefore safeguards for the required grantor) that must be complied with before the Tribunal process can

be commenced. Accordingly, the negative procedure is considered to be appropriate in these circumstances.

Clause 66, new paragraph 27ZD(2) to be inserted into Schedule 3A to the Communications Act 2003: power to specify evidence which the operator is required to provide with its application under Part 4ZA

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative Resolution*

Context and Purpose

147) Paragraphs 27ZC and 27ZD sets out the requirements that must be satisfied before an operator can apply for a Part 4ZA order. This power, provided for by paragraph 27ZD(2), confers a discretionary power on the Secretary of State to specify what evidence must accompany an application for a Part 4ZA order.

Justification for taking the power

148) Part 4ZA provides a new process through which an agreement can be imposed by a court. As this new process is implemented, and as such cases start to be heard by the court, we anticipate that it could be appropriate to specify what evidence must accompany an application for a Part 4ZA order. This could provide consistency of approach, whilst also assisting the judiciary with the efficient and fair determination of such applications by ensuring that key material is available to the court, such as that which demonstrates operators have satisfied the relevant conditions with which they must comply before applying for a Part 4ZA order. This power provides flexibility for the future in respect of these matters, and enables the Government to act in response to issues and considerations that arise once this Bill has come into force and the new Part 4ZA process is being implemented.

Justification for the procedure

149) By virtue of section 402(2) of the 2003 Act, regulations made under this power will be subject to the negative resolution procedure. The Government considers this procedure to afford an appropriate level of parliamentary scrutiny of such regulations since the provision they will make is likely to be limited in effect, simply specifying evidential requirements and not having any wider impact on the effect of the overall framework.

Clause 66, new paragraph 27ZD(3) to be inserted into Schedule 3A to the Communications Act 2003: power to set the time period during which an application under Part 4ZA order can be made following the service of a final notice

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative Resolution*

Context and Purpose

150) Paragraphs 27ZC and 27ZD sets out the requirements that must be satisfied before an operator can apply for a Part 4ZA order.

151) Paragraph 27ZD(3) confers a power on the Secretary of State to make regulations specifying the time period within which an operator must apply for a Part 4ZA order, after the final notice has been given to the required grantor (and, as per paragraph 27D(1)(c), after the specified period within which the required grantor must respond to the final notice has ended).

Justification for taking the power

152) As set out above in respect of paragraph 27ZD(1)(c) (see paragraph 142), the Government considers that required grantors should benefit from a minimum, specified period of time within which they can respond to an operator, before an operator can make an application for a Part 4ZA order. Likewise, the Government considers that operators, having given a final notice to a required grantor, should be required to make an application for a Part 4ZA order in good time; such an

application should be made by the operators out of necessity, whilst a time-limited period also reduces the risk of a change in circumstances between the operator having satisfied the requirements for applying for an order and then actually making the application itself.

153) The power for the Secretary of State to specify, in regulations, the applicable time period provides flexibility for the future, including for any appropriate changes to be made in light of practical experience gained as this new Part 4ZA process is implemented.

154) The Government believes, for the reasons set out above, that provision ought to be made for a clear longstop on the time which an operator has to apply for a Part 4ZA order. Further, it is particularly important that there is flexibility to amend this longstop in the future where, for example, there is evidence to suggest that the timeframes specified under the regulations are creating difficulties for any of the parties concerned, or otherwise creating difficulties for the effective operation of the new Part 4ZA process. The effect of this power, setting, extending or reducing a time period, is such that making the necessary provision by regulations is considered to be appropriate, rather than requiring further primary legislation.

Justification for the procedure

155) By virtue of section 402(2) of the 2003 Act, regulations made under this power will be subject to the negative resolution procedure. The Government considers this procedure to afford an appropriate level of parliamentary scrutiny since the power is limited in effect, relating only to specifying, and amending as may be appropriate, a specific procedural time limit that must be complied with by operators seeking to make a Part 4ZA order.

Clause 66, new paragraph 27ZE(4) to be inserted into Schedule 3A to the Communications Act 2003: power to specify the terms of an agreement imposed by a Part 4ZA order

Power conferred on: *The Secretary of State*

Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution, including a consultation requirement

Context and Purpose

- 156) Paragraph 27ZE sets out the circumstances in which a Part 4ZA order can be made and its effect. Sub-paragraph (1) provides that the court may make an order where it is satisfied that those requirements set out at paragraphs 27ZC and 27ZD have been met and the required grantor has not objected to the making of the order.
- 157) Sub-paragraph (2) provides that a Part 4ZA order is one which imposes an agreement on the operator and required grantor. Such an agreement confers on the operator the Code rights requested in the request notice (issued pursuant to paragraph 27ZB(1)(d)).
- 158) Sub-paragraph (4) requires that the terms of the agreement imposed under a Part 4ZA order will be those specified in regulations made by the Secretary of State. Those regulations must in particular provide for an agreement to include specific terms, as set out in detail in sub-paragraph (5). Amongst other things, this includes terms relating to the provision, by the operator to the required grantor, of details of the works to be carried out in the exercise of the Part 4ZA code rights; terms relating to the giving of notice by the operator before entering on relevant land; terms relating to the restoration by the operator of the relevant land at the end of the works and terms imposing requirements or restrictions on the required grantor for the purposes of preventing damage to the apparatus, facilitating the operator's access to the apparatus, or otherwise preventing or minimising disruption to the operation of the apparatus.
- 159) Before making regulations pursuant to the power under sub-paragraph (4), the Secretary of State is required to consult operators, persons appearing to the Secretary of State to represent owners of interests in land likely to be affected by

the regulations, and any other persons the Secretary of State thinks appropriate (see sub-paragraph (6)).

Justification for taking the power

160) The power provided at sub-paragraph (4) enables the Secretary of State to specify the terms of an agreement to be imposed on parties. The Government considers such a power is justified as the terms will form part of the contractual agreement between the operator and the required grantor and those terms will inevitably involve a level of detail not suited to primary legislation. Furthermore, these will benefit from the input of the key stakeholders affected by those regulations, as recognised in the consultation requirements with which the Secretary of State must comply before making such regulations. An ability to update such terms over time, with the benefit of experience of the new Part 4ZA process being implemented, is also considered necessary and appropriate.

161) There are various constraints on the use of the power, as follows:

- a) The prescriptive list of minimum terms that the regulations must provide for is set out sub-paragraph (5)(a) – (l). This list, which will be scrutinised and approved by Parliament, ensures that the regulations provide, at a minimum, terms ensuring a balance between the rights and obligations of the operator and required grantor. This in turn ensures that there is a measure of certainty as to the matters which the regulations must deal with as a minimum .
- b) The statutory consultation requirement as provided for at sub-paragraph (6). This ensures that key stakeholders mentioned at sub-paragraph (6)(a) – (c) must be consulted in respect of proposals to make regulations under this power. The parties with which the Secretary of State is required to consult represent a balanced mix of interests and will ensure relevant views can be voiced by stakeholders and taken into account by the Secretary of State.

Justification for the procedure

162) By virtue of the new paragraph (zb) inserted into section 402(2A) of the Communications Act 2003 by paragraph 2 of the Schedule to the Bill, regulations

made under this power will be subject to the affirmative resolution procedure. Notwithstanding the significant constraints on the use of this power as set out above (namely the need for the regulations to include specific terms as a minimum, and the requirement for the Secretary of State to consult), the Government recognises that this power is necessarily broad and will make provision for an important part of the new Part 4ZA process. As such, it is considered appropriate that any regulations made using this power are debated and subject to more intensive scrutiny by Parliament through the affirmative procedure.

Clause 66, new paragraph 27ZF(3) to be inserted into Schedule 3A to the Communications Act 2003: power to make regulations to specify the period for which Part 4ZA code rights will last

Power conferred on: *The Secretary of State*
Power exercisable by: *Regulations made by statutory instrument*
Parliamentary procedure: *Negative Resolution*

Context and Purpose

163) Paragraph 27ZF makes provision relating to the expiry of Part 4ZA Code rights.

164) Paragraph 27ZF(1) provides that Part 4ZA Code rights cease to be conferred on the operator by, or otherwise bind, the required grantor where (a) a replacement agreement comes into effect; (b) the court refuses an application by the operator to impose a replacement agreement; or - where (a) or (b) has not occurred before the end of the specified period - at the end of that period. For these purposes, the Secretary of State has the power to make regulations to set the “specified period”, which can be no longer than six years (pursuant to paragraph 27ZF(3)).

Justification for taking the power

165) The Government considers that Part 4ZA Code rights should only apply for a period of time that is no longer than necessary, striking a balance between the rights of the required grantor and the need for operators to have some degree of operational certainty. Further, as Part 4ZA provides for a new process, it is important to have flexibility in the future as to the length of that period of time, so that any issues, concerns or other matters arising from the implementation of this new process can be taken into account and acted on, without the need for further primary legislation.

166) The power is no wider than necessary for these purposes and is clearly constrained by the fact that regulations made pursuant to the power cannot provide for a period exceeding six years. The Government considers that this is the maximum period of time that it is appropriate for a Part 4ZA order to apply in order to ensure these rights are not enduring. It is also a reasonable length of time for a person with a relevant interest in the land to become aware of the Part 4ZA order and enter into negotiations with the relevant operator. The Government also considers that the six year (maximum) period is suitably short to ensure that operators continue to make representations and attempts to contact the landowner and begin negotiations in pursuance of a negotiated agreement. However, as noted above, it will be important for the Government to be able to act flexibly, through an ability to make regulations and not requiring further primary legislation, should this assessment of the most appropriate period change over time.

167) Following this (maximum) six year period, in the event that a landowner had failed to engage with an operator, the operator would not be entitled to make a repeat application under the Part 4ZA route (by virtue of new paragraph 27ZD(1)(a)), and would need to seek full rights via the Upper Tribunal if the landowner remains unresponsive, or if they have otherwise failed to reach an agreement.

Justification for the procedure

168) By virtue of section 402(2) of the 2003 Act, regulations made under this power will be subject to the negative resolution procedure. The Government considers

this procedure to afford an appropriate level of parliamentary scrutiny; as the regulations relate to the duration for which rights and obligations arising as a result of the making of a Part 4ZA order apply to operators and required grantors, it is important that a route is provided through which Parliament can potentially consider such regulations. The Government considers that the negative resolution procedure strikes an appropriate balance, ensuring such a route is provided, whilst recognising that the relevant power is itself constrained, relating to a single, specific time period within the wider framework provided by the Bill, and exercisable only to specify a period of no more than six years.

Clause 70 - Amendment to the existing power in paragraph 95(1) of the Code so as to enable a function conferred by the Code on the court to be exercisable by the First-tier tribunal in relation to Wales.

Power conferred on: *The Secretary of State*
Power exercisable by: *Regulations made by statutory instrument*
Parliamentary procedure: *Affirmative resolution insofar as amendment, repeal or modification is to primary legislation, otherwise negative resolution.*

Context and Purpose

169) Paragraph 95 of the Code already confers powers on the Secretary of State to make regulations which change the forum in which disputes under the Code are heard in England and Wales, Scotland and Northern Ireland³. In exercise of this power the Secretary of State has previously made the Electronic Communications Code (Jurisdiction) Regulations 2017⁴.

170) The power at paragraph 95(1) of the Code currently enables jurisdiction for disputes under the Code to be conferred on the First-tier Tribunal in relation to

³ Paragraphs 30 to 35 of the Department's memorandum dated 28 November 2016, concerning delegated powers in the Digital Economy Bill, provide further information as to paragraph 95 of the Code and the delegated powers therein; available at <https://publications.parliament.uk/pa/bills/lbill/2016-2017/0080/17080-delegated-powers-memorandum.pdf>

⁴ S.I. 2017/1284. These Regulations have a number of amendments pending, as a result of provision made by paragraphs 5 to 10 of the Schedule to the Telecommunications Infrastructure (Leasehold Property) Act 2021, although these have not yet been brought into force.

England, and on the Upper Tribunal in relation to England and Wales. By way of an amendment to paragraph 95(1), which is currently due to be made when paragraph 4(11) of the Schedule to the Telecommunications Infrastructure (Leasehold Property) Act 2021 is brought into force, the power can also be used to confer jurisdiction on the First-Tier Tribunal in relation to Wales but only in connection with proceedings under Part 4A of the Code. This Bill, as introduced, makes similar provision in relation to proceedings under Part 4ZA of the Code.

171) Paragraph 95(4) of the Code, together with the power in section 402(3)(c) of the Communications Act 2003, already confers a Henry VIII power on the Secretary of State when making regulations under paragraph 95(1) of the Code; such regulations may make consequential provision that amends, repeals, revokes or otherwise modifies the application of any enactment.

172) Clause 70 will confer a power on the Secretary of State through which jurisdiction for *all* disputes under the Code can potentially be conferred on the First-tier Tribunal in relation to Wales. It is the Government's intention to introduce new regulations in due course which will enable disputes under the Code to be commenced and heard by either the First-tier Tribunal or the Upper Tribunal in England; the amendment made by clause 70 will enable the existing powers in paragraph 95 of the Code to be exercised so as to provide for a consistent approach across both England and Wales.

Justification for taking the power

173) In passing the Digital Economy Act 2017, Parliament has already signified its approval for the approach taken by paragraph 95(1) of the Code, whereby jurisdiction can be conferred on different tribunals through the making of regulations. As set out above, clause 70 does not disturb that existing approach, but instead expands the regulation-making power so that jurisdiction can be conferred on the First-tier Tribunal in relation to Wales, as can already be done in relation to England.

174) Before making such a change in relation to Wales, as with England, we will need to liaise with the Ministry of Justice and the judiciary to ensure that any

administrative or procedural issues are resolved. Amending the existing regulation-making power at paragraph 95(1) of the Code, rather than making express provision on the face of the Bill, will enable any jurisdictional change in relation to Wales to be made at an appropriate time, whilst also providing flexibility should, in due course, practical experience necessitate any further changes in approach in the future.

Justification for the procedure

175) Clause 70 amends paragraph 95(1) of the Code but does not change the current approach that already applies to regulations made using the power that paragraph confers on the Secretary of State. In general, the negative procedure would apply⁵ to such regulations and we consider that remains appropriate notwithstanding the change made by clause 70; the amendment results in an amended power that is narrowly drawn and simply enables the transfer of jurisdiction of disputes under the code from one Tribunal to another. Such a change, given effect through the exercise of this power, does not detrimentally impact on access to, or the application of, justice.

176) However, as noted above, it is already the case that regulations made under paragraph 95(1) may make consequential provision which amends, repeals, revokes or otherwise modifies the application of primary legislation. Where such regulations have this effect, then the affirmative procedure will apply⁶. Such an approach is also considered appropriate, and therefore maintained, in relation to regulations made using the power in paragraph 95(1) as amended by clause 70.

Clause 71, subsection (1) - power to provide for the determination of court proceedings relating to the Code within specified periods

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative Resolution*

⁵ See section 402(2) of the Communications Act 2003 (“the 2003 Act”); the Code itself can be found at Schedule 3A to that Act.

⁶ See section 402((2A) of the Communications Act 2003.

Context and Purpose

177) Clause 71 of the Bill inserts a new section 119A into Chapter 1 of Part 2 of the Communications Act 2003. This new section 119A confers a power on the Secretary of State to make regulations for any proceedings issued in connection with a dispute concerning the Code to be determined within a specified time period. Any such regulations must specify the type of proceedings with which any time limits apply.

178) This new power includes a limited Henry VIII power, permitting the Secretary of State to amend a specified list of provisions in primary legislation that cross-refer to an existing provision that may be amended or repealed in exercise of the power conferred by the new s.119A.

Justification for taking the power

179) Currently, proceedings issued pursuant to paragraph 20 of the Code in respect of disputes concerning new agreements have to be determined within six months from the date of issue; such provision is made by regulation 3 of the Electronic Communications and Wireless Telegraphy Regulations 2011 (“the WTA 2011 Regulations”), as referred to by paragraph 97 of the Code. There is no corresponding provision relating to disputes on other Code matters, such as disputes concerning the renewal of expired agreements.

180) The proposed changes to the Code are intended to support the faster resolution of all Code disputes, including where proceedings have been issued pursuant to paragraph 20. If this proves to be the case, there may be no need for the current time limit to remain in place and this power could be used by the Secretary of State to remove it by way of amendment to regulation 3 of the 2011 Regulations. Conversely, if it appears that there should be time limits in place for the resolution of Code disputes, the Secretary of State would be able to use this power to alter the time limit in regulation 3 and/or extend that time limit to other types of disputes under the Code, such as disputes concerning renewals. The power could also be used to provide different time limits for different types of

proceedings if appropriate. By taking this power, it will enable the Secretary of State to take appropriate action in the future, taking into account the effect of the proposed changes to the Code on the time taken to resolve disputes.

181) As identified above, a future exercise of the power conferred by the new section 119A could necessitate the amendment or revocation of the regulation 3 of the WTA 2011 Regulations. However, the WTA 2011 Regulations also inserted “signposts” to that regulation in a number of other pieces of legislation. These signposts, set out in the Schedule to the WTA 2011 Regulations, are not operative legal provisions; they simply flag the existence of the regulation 3 time limit to the reader in other legislative provisions where that time limit could be relevant.

182) The WTA 2011 Regulations were able to insert such signposts into other legislation, including primary legislation, because they were made in exercise of the power conferred by section 2(2) of the European Communities Act 1972 which, subject to Schedule 2 of that Act, permitted provision to be made as might be made by Act of Parliament.

183) The Government considers it would be appropriate for the Secretary of State to have flexibility to address this issue should it arise in the future. Doing so necessitates the taking of a Henry VIII power, as we would directly need to amend the legislative provisions which cross-refer to regulation 3 and the power under which the 2011 Regulations were originally made is no longer available. However, as per the drafting of the proposed amendment, this would be an extremely limited Henry VIII power, specifying the provisions in respect of which it can be exercised. This provides an appropriate route through which the issue identified above can be addressed, if it arises. The “amendable” provisions as specified in the drafting for the new provision are, as above, merely signposts without substantive legal effect. They were themselves inserted by secondary legislation.

184) In the Government’s view, it would not be appropriate to confer a power to amend the WTA 2011 Regulations and then risk a number of confusing and

unhelpful signposts remaining in legislation. At the same time, it would be a disproportionate use of Parliamentary time to require separate primary legislation in order to deal with those signposts. A very limited power such as that set out in the proposed amendment is an effective way of addressing this issue and an appropriate instance of Parliament delegating legislative powers to a Minister of the Crown.

185) It would not be feasible to include provision in the Bill itself to directly revoke or amend the signposts identified above since, at this stage, it is not known what approach may be taken to regulation 3 of the 2011 Regulations in the future. It may be that the regulation is retained, or is otherwise amended in such a way that the signposts continue to operate effectively and so the need to amend the signposts does not arise. Alternatively, as explained above, amendment or revocation to the signposts may be required to avoid confusing cross-references appearing in the statute book. Taking this limited Henry VIII power provides the flexibility to respond to whatever approach is taken in the future.

Justification for the procedure

186) By virtue of section 402(2) of the 2003 Act, regulations made under this power will be subject to the negative resolution procedure. The Government considers this procedure to afford an appropriate level of parliamentary scrutiny since the power is limited to making technical changes to the time period within which relevant cases are heard. It does not change the access to, or application of, justice, nor are any more substantive changes made as to establish legal precedents or the broader operation of justice. Instead, regulations made under this power will have a limited effect, ensuring - if considered appropriate - consistency of relevant time periods can be provided for cases giving rise to similar issues.

187) The Government recognises that, as per paragraph 7 of the latest version of the Committee's guidance⁷, there is a presumption that the affirmative procedure will apply in respect of a Henry VIII power. However, as that guidance also

⁷ [“Guidance for Departments on the role and requirements of the Committee”](#) (November 2021)

recognises, the appropriate level of parliamentary scrutiny for such powers will not be the affirmative procedure in all cases. In light of the limited nature of the Henry VIII power and the minor and technical effect it would have if exercised, the Government considers that applying the usual presumption in this particular case would result in a disproportionate approach; it would not be a good use of Parliamentary time for two separate debates to be held simply as a result of the Secretary of State making regulations to amend or revoke otiose signposts. Indeed, the Committee will note that the WTA 2011 Regulations, which inserted these signposts in the first place, were themselves subject to the negative resolution procedure. Further, and in any event, the negative procedure would still provide an opportunity for Parliamentary scrutiny of any regulations made using this power.

Clause 72, New section 148A(1) to be inserted into the Communications Act 2003: power to make provision relating to rights of network providers in relation to infrastructure.

Power conferred on: *The Secretary of State*
Power exercisable by: *Regulations made by statutory instrument*
Parliamentary procedure: *Affirmative Resolution*

Context and Purpose

188) The Communications (Access to Infrastructure) Regulations 2016 (“the 2016 Regulations”) were made pursuant to section 2(2) of the European Communities Act 1972 in order to implement an EU Directive. The intention of the Directive was to facilitate and incentivise the roll-out of high-speed electronic communications networks. The Regulations encourage the sharing of existing telecoms and non-telecoms infrastructure which may be suitable for deploying broadband networks (e.g. sewers, electricity lines) and the coordination of civil works across a wide range of infrastructure sectors.

189) Reusing existing infrastructure can significantly reduce the time and cost of rolling out new broadband networks, and can be a huge asset in reaching the government's connectivity ambitions.

190) This new power would allow the Secretary of State to make provision, through regulations, conferring rights on network providers in relation to infrastructure, for the purpose of facilitating the development of electronic communications networks. Such regulations may, in particular, amend, vary or revoke the 2016 Regulations.

Justification for taking the power

191) At present, the 2016 Regulations can only be amended via primary legislation, which is likely to be a disproportionate vehicle for the level of technical amendments the Government anticipates it would want to make.

192) We consider that any amendments to the Regulations would therefore be more appropriate to make through secondary rather than primary legislation. However, as the Regulations were made under section 2(2) of the European Communities Act 1972 which has now been repealed, the Secretary of State has no power to make amendments to the regulations.

193) The Regulations are currently little-used due to a lack of clarity. The intention of this power is to allow the government to make regulations, including amending the 2016 Regulations as may be appropriate, so as to better tailor the existing legislative framework to the UK telecoms market so that infrastructure can be used more efficiently.

194) DCMS ran a call for evidence from 12 June 2020 to 4 September 2020 that looked into whether and how the 2016 Regulations could be updated to encourage better use. The government response to that call for evidence was published in November 2021⁸. It set out the government's intentions to consider

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<https://www.gov.uk/government/publications/review-of-the-access-to-infrastructure-regulations-call-for-evidence>

changes to certain elements of the 2016 Regulations to improve their clarity and ease of use, subject to further consultation and scrutiny by Parliament.

195) By including provision in this Bill for the Government to make regulations in respect of the rights of network providers in relation to infrastructure, it provides the opportunity for these and any other relevant matters to be addressed, and offers a means of amending and updating the 2016 Regulations. This could be achieved without having to bring forward additional primary legislation, which, in the Government's view, would be a disproportionate use of parliamentary time.

196) In addition, before making regulations in exercise of this power, the Secretary of state must consult OFCOM and such other persons the Secretary of State considers appropriate.

Justification for the procedure

197) By virtue of the new section 148A to be inserted into the Communications Act 2003, regulations made under this the new section 148A(1) would be subject to the affirmative resolution procedure. The Government considers this procedure to be appropriate, notwithstanding the consultation requirement identified above, since the nature of the power is such as to warrant regulations made under it being debated and subject to more intensive scrutiny by Parliament.

Clause 73, subsection (1): Power to make consequential amendments

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative or affirmative resolution*

Context and Purpose

198) This provision confers a power on the Secretary of State to make provision, by way of regulations, that is consequential on any provision made by or under Part 2 of the Bill. For these purposes, such regulations may, in particular, amend,

repeal, revoke or otherwise modify any Act made before, or during the same session of Parliament as, this Bill.

Justification for taking the power

199) This power will enable amendments to be made to legislation so as to ensure the provisions of this Bill fit within the existing statutory framework in a way that is clear, coherent and operates effectively. The power is necessarily wide, but is limited by the fact that any legislative amendments pursuant to it must be genuinely consequential on provision made by or under Part 2 of the Bill.

Justification for the procedure

200) The relevant parliamentary procedure applicable to any regulations made under this power will be determined by the effect of such regulations.

201) By virtue of clause 73(4), regulations that amend or repeal any primary legislation will be subject to the affirmative resolution procedure; the Government considers it appropriate that such regulations, potentially including the exercise of a Henry VIII power, should be debated and subject to the more intensive scrutiny by Parliament provided by this procedure.

202) By virtue of clause 73(5), any other regulations made in exercise of this power will be subject to the negative resolution procedure; the Government considers this procedure to afford an appropriate level of parliamentary scrutiny in light of the limited purpose for which such regulations can be made.

Part 3 - Final provisions

Clause 75, subsection (1): Power to make transitional or saving provision

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *No procedure*

Context and Purpose

203) This provision enables the Secretary of State to make appropriate transitional provision, or savings provision, in connection with the coming into force of any provision of the Bill. A transitional provision manages the transition from one regime to another, whilst a saving provision “saves” the operation of an existing piece of legislation or rule of law, so that it continues to have effect for particular purposes when the new legal framework provided for by a new piece of legislation is introduced.

204) Amongst other things, the government may use this power to specify that the provisions of the regime provided for by Part 1 of the Bill do not apply to any products supplied to UK consumers before the coming into force of this Bill.

205) Further, in respect of the new regime introduced by Part 1 of the Bill, the government may also use this power to specify transition periods before which certain categories of person are not required to comply with duties to which they would otherwise be subject. Whilst these transition or “grace periods” will be refined based on industry feedback on detailed versions of our initial security requirements, the government is likely to provide staggered grace periods for different categories of economic actor (e.g. requiring manufacturers to comply with their duties before importers and distributors to minimise e-waste).

206) This power will also enable appropriate provision to be made in relation to Part 2 of the Bill, to ensure that any necessary measures are put in place to provide for when and how any changes relating to the Code will take effect for, among other things, Code agreements, negotiations and disputes that may already be underway when the Bill comes into force.

Justification for taking the power

207) The Government considers that it will be necessary to make further transitional or saving provision, not yet identified, arising from the coming into force of this Bill. For example, it is important that economic actors have sufficient time to implement changes necessary for them to fulfil the requirements and

adhere to the obligations of the regime and particular provision may be needed in respect of this.

Justification for the procedure

208) As identified above, this somewhat standard power is considered necessary to include in this Bill, enabling the Secretary of State to provide for a smooth introduction of the new legal framework. The Government considers that regulations made under this power do not need to be subject to any parliamentary procedure on the basis that Parliament has already approved the principle of the provisions set out in the Bill by enacting them, and the power can only be exercised to make provision in connection with the coming into force of those provisions.

Clause 78, subsection (3): Commencement

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *No procedure*

Context and Purpose

209) Clause 78 makes provision for the coming into force of the Bill's provisions. A number of provisions come into force upon Royal Assent. Subsections (2) and (3) confer a power on the Secretary of State to make provision in regulations for the remaining provisions of the Bill to come into force, with such regulations able to make different provision for different purposes.

Justification for taking the power

210) Whilst, as set out above, a number of provisions in the Bill will commence upon Royal Assent, others will come into force in accordance with provisions made by the Secretary of State in regulations. The government has committed to providing industry with an appropriate grace period to adjust their business practices before fully bringing the measures in Part 1 of the Bill into force, and will commence them by regulations at a later date following the development of key

pieces of secondary legislation required for the regime to function, such as regulations setting out the initial baseline manufacturer security requirements and point of sale security requirements. Similarly, this power will enable the measures in Part 2 of the Bill to be brought into force at an appropriate time, following any preparatory or legislative steps that are required to take place.

Justification for the procedure

211) As identified above, this somewhat standard power is considered necessary to include in this Bill, as it will enable the Secretary of State to bring into force relevant provisions of the Bill at an appropriate time. The Government considers that regulations made under this power do not need to be subject to any parliamentary procedure in light of the extremely limited effect of the power; it can only be exercised to bring into force provisions of the Bill which have already been scrutinised and approved by Parliament.