

THE TELECOMMUNICATIONS INFRASTRUCTURE (LEASEHOLD PROPERTY) 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 (the “Department”) for the Delegated Powers and Regulatory Reform Committee, to assist with its scrutiny of the Telecommunications Infrastructure (Leasehold Property) Bill (“the Bill”). The Bill was introduced in the House of Commons on 8 January 2020. 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 Department has carefully considered the powers in the Bill and the Department’s view is that they are necessary and justified. It is our view that the Department 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 Bill amends the Electronic Communications Code (the “Code”) which regulates the relationship between digital infrastructure operators (“operators”) and landlords, landowners and managing agents (referred to in this memorandum collectively as “landlords”, unless specified differently). The Code is contained in Schedule 3A to the Communications

Act 2003 (c.21) (“the Act”)¹. The Bill inserts a new Part 4A of Schedule 3A to the Act (referred to interchangeably as “Part 4A” and “the Part”).

- 4) The purpose of the Bill is to provide a process pursuant to which operators can obtain rights under the Code in order to gain access to land connected with leased premises where an electronic communications service (a “service”) has been requested by a tenant and access to connected land is needed for the operator to provide the service. Crucially, the process is only available where the landlord has been repeatedly unresponsive to the operator’s requests for access.
- 5) The Bill enables operators to apply to the Upper Tribunal (Lands Chamber) in England and Wales, the Lands Tribunal for Scotland or the county court in Northern Ireland (all referred to in this memorandum as “the Tribunal”) where:
 - a) the operator has received a service request from a tenant; and
 - b) the operator has made multiple attempts - by way of at least one request, followed by three notices - to obtain Code rights from the occupier (the “required grantor”) of land connected to the tenant’s premises, but the required grantor has been repeatedly unresponsive.
- 6) On successfully applying to the Tribunal, the operator will be granted interim Code rights (“Part 4A Code rights”) which will be conferred for a period of no more than 18 months. This will allow the operator access to the common areas of the required grantor’s property in order to install electronic communications apparatus to enable the provision of the service. Ultimately, the tenant will not be obliged to take up a service, however the infrastructure to enable it will be in place.
- 7) The Part 4A Code rights will end after a period of no more than 18 months by virtue of the terms of the agreement imposed by the Part 4A order, unless the operator and required grantor reach a separate agreement on Code rights or the operator successfully applies to the Tribunal for full Code rights to be imposed under the existing provisions of the Code.

C. DELEGATED POWERS

¹ Schedule 3A was inserted by section 4 of, and Schedule 1 to, the Digital Economy Act 2017 (c.30).

- 8) Part 4A contains eight individual provisions conferring delegated powers, of which one is subject to the affirmative procedure.
- 9) The following clauses are considered in this memorandum:
- a) Clause 1 (Code rights in respect of land connected to leased premises), which inserts Part 4A, including the following paragraphs, into Schedule 3A to the Act:
 - i) Paragraph 27B(2)(b) of the Code gives the Secretary of State the power to make regulations to add further descriptions of premises to the scope of Part 4A.
 - ii) Paragraph 27C(8) of the Code gives the Secretary of State the power to make regulations to specify any other conditions that an operator must satisfy before giving a final notice.
 - iii) Paragraph 27D(1)(d) of the Code gives the Secretary of State the power to make regulations to specify additional conditions that an operator must satisfy before applying for a Part 4A order.
 - iv) Paragraph 27D(2) of the Code gives the Secretary of State the power to make regulations to set the period during which an application for a Part 4A order can be made following the service of a final notice.
 - v) Paragraph 27E(4) of the Code gives the Secretary of State the power to make regulations to specify the terms of the agreement to be imposed by the Tribunal pursuant to an order made under Part 4A. The regulations must make provision for the terms to deal with the matters mentioned in paragraph 27E(5)(a) – (j).
 - vi) Paragraph 27G(1)(c) of the Code gives the Secretary of State the power to make regulations to specify the period for which Part 4A Code rights will last, subject to a maximum of 18 months.
 - b) Clause 3 (Extent, commencement and short title):
 - i) Clause 3(4) gives the Secretary of State the power to appoint days on which those provisions not commenced on Royal Assent are to come into force.

- ii) Clause 3(6) gives the Secretary of State the power to make by regulations transitional provision in connection with the coming into force of any provision of the Bill.

Clause 1, Paragraph 27B(2)(b): Power to make regulations to include additional premises within the scope of the Part

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

Context and Purpose

- 10) The general purpose of Part 4A, as set out at paragraph 27A, is that the Tribunal may, by way of a Part 4A order, impose an agreement that confers Part 4A Code rights on an operator for the purpose of providing a service in respect of leased premises.
- 11) The circumstances in which an application for a Part 4A order can be made are set out at paragraph 27B. These are where the premises are occupied under a lease; the lessee requests a service to the premises; the operator requires Code rights over connected land in order to fulfil such a request; and the operator has given notice pursuant to the notice requirements (in relation to which, the required grantor has been unresponsive).
- 12) Paragraph 27B(2) sets out the premises that can be subject to the Part 4A procedure. Sub-paragraph (2)(a) provides that premises are within the scope of the Part if they form part of a multiple dwelling building (as defined by paragraph 27I(1)). Sub-paragraph (2)(b) gives the Secretary of State the power to make regulations prescribing further descriptions of premises which are to be within the scope of Part 4A. The purpose of this power is to give the Secretary of State the ability to make regulations to

include other types of premises, where changing circumstances are such that they consider other types should come within the Bill's scope.

Justification for taking the power

- 13) The definition of multiple dwelling building, the premises initially to be within the scope of Part 4A, covers premises such as blocks of residential flats or apartments. At present, this is the most common type of premises in relation to which tenants experience difficulty securing a service because of unresponsive landlords.
- 14) Limiting the application of the policy to this type of premises from the outset will allow the Department to assess the Bill's impact as it is implemented. Following this, it may be necessary to extend the application of Part 4A where there is evidence in the future that premises other than multiple dwelling buildings should come within the scope of Part 4A. This might include, for example, office blocks or business parks. This power therefore does not amend the policy itself but rather allows the application of the policy to respond to changing circumstances and keep pace with changing social and economic needs. It ensures that other classes of premises are not excluded from the benefits of the regime where there is evidence for their inclusion, meaning that Part 4A is implemented in an incremental and evidence-led way. It also ensures that another piece of primary legislation in near-identical terms will not be needed in the future to address types of premises other than multiple dwelling buildings.

Justification for the procedure

- 15) It is right that any regulations made pursuant to 27B(2)(b) should be placed before Parliament. It is considered that the negative resolution procedure provides a suitable level of scrutiny for regulations made pursuant to it.
- 16) The negative procedure is justified because the power is clearly limited. The Bill has been drafted to circumscribe carefully the limits of Part 4A of the Code. These are set out in more detail at paragraph 11 above and include that the target premises must be leased, the Code rights needed must be in relation to connected land and – significantly – that a case

ceases to be within the scope of Part 4A of the Code where the landlord responds in any way to the operator's request (see paragraphs 27B(1)(e) and (4), and 27D(1)(c) and (4)). These substantive provisions will have been scrutinised and approved by Parliament. Therefore any regulations made by the Secretary of State under this power will also be within those limits provided for by the Bill. In light of this, the negative procedure resolution procedure is considered appropriate for this delegated power.

Clause 1, Paragraph 27C(8) Power to make regulations to specify additional conditions to be met before giving 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

- 17) Paragraphs 27C and 27D sets out the requirements that must be satisfied before an operator can apply for a Part 4A order.
- 18) Following the giving by an operator of a request notice, paragraph 27C(1) provides that the operator must have given the required grantor two warning notices (in accordance with sub-paragraph (2)) and a final notice (in accordance with sub-paragraph (5)). Sub-paragraph (6) requires that a final notice may only be given within the permitted period (as provided for at sub-paragraph (7)).
- 19) Sub-paragraph (8) gives the Secretary of State the power to make regulations to specify additional conditions that must be satisfied before the operator may give a final notice. This might include, for example, a condition requiring that operators have properly identified the relevant occupier by undertaking a Land Registry search.

Justification for taking the power

- 20) 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.
- 21) The justification for taking this power is to allow additional conditions to be specified where there is evidence that it would be beneficial for operators to comply with these 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

- 22) It is right that any regulations made pursuant to paragraph 27C(8) should be placed before Parliament. It is considered that the negative resolution procedure provides a suitable level of scrutiny because the nature of the power concerns procedural requirements for the service of notices. As such – and in light of the fact that the main conditions that apply will have been scrutinised by Parliament - the negative procedure is deemed to be sufficient.

Clause 1, Paragraph 27D(1)(d) Power to make regulations to specify other conditions that an operator must satisfy before applying for a Part 4A order

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Context and Purpose

- 23) Paragraphs 27C and 27D set out the requirements that must be satisfied before an operator can apply for a Part 4A order. These have been set out in more detail above at paragraphs 17 and 18 of this Memorandum.
- 24) Paragraph 27D(1)(d) gives the Secretary of State the power to make regulations to specify other conditions that an operator must satisfy before applying for a Part 4A 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

- 25) The main conditions that operators must comply with before applying for an order are clearly set out on the face of the Bill (paragraph 27C). The Bill requires that multiple notices are given by operators in a prescribed manner and timeframe, and that any response from a required grantor (pursuant to paragraphs 27B(1)(e) and (4), and 27D(1)(c) and (4)) will stop the Part 4A process. These conditions offer protection to required grantors before Tribunal proceedings can be commenced against them. These requirements will be scrutinised and approved by Parliament.
- 26) The justification for taking the power is to allow additional conditions to be imposed where it becomes apparent that the Part 4A procedure would be better served by requiring that operators satisfy additional conditions prior to being able to commence the Tribunal process and apply for a Part 4A order. This might include conditions requiring that operators have particular forms of evidence of the steps that they have carried out pursuant to the requirements of paragraph 27D(1).

Justification for the procedure

- 27) It is right that any regulations made pursuant to paragraph 27D(1)(d) should be placed before Parliament. The negative resolution procedure is

considered to provide a suitable level of scrutiny for any such regulations. Firstly, the main conditions that operators must comply with appear on the face of the Bill. These will have been scrutinised and approved by Parliament. Secondly, 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 sufficient.

Clause 1, Paragraph 27D(2) Power to make regulations to specify the “period” in which an application for a Part 4A order may be made

Power conferred on: The Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution

Context and Purpose

28) Paragraphs 27C and 27D sets out the requirements that must be satisfied before an operator can apply for a Part 4A order. These have been set out in more detail at paragraph 18 above.

29) Paragraph 27D(2) gives the Secretary of State a power to make regulations to specify the cut off point for the time that an operator has to apply for a Part 4A order once the operator has served a final notice.

Justification for taking the power

30) The Department wishes to avoid a situation whereby operators do not apply for a Part 4A order in good time. Equally there is a balance to be struck and an application ought not to have to be commenced unduly quickly to enable proper preparation by operators. It is important to strike this balance, whilst also mitigating the possibility of changes in

circumstances between the operator having satisfied the requirements for applying for an order and actually applying for it.

- 31) It is the Department's initial view that the period to be specified by regulations should be 28 days from the point of issuing the final letter. This is considered to be an appropriate period of time to ensure that proceedings are commenced in an expedient manner while allowing operators sufficient time to undertake the preparatory and administrative tasks necessary.
- 32) This power is justified on the basis that it provides for a clear longstop on the time which an operator has to apply for a Part 4A order. It is particularly important that this longstop is amendable where, for example, there is evidence to suggest that the timeframes specified under the regulations are creating difficulties for landlords, operators or indeed the Tribunal.

Justification for the procedure

- 33) It is right that any regulations made pursuant to paragraph 27D(2) should be placed before Parliament. This power ensures that the timing can be specified and amended where the procedure requires it. It is considered that the negative resolution procedure provides a suitable level of scrutiny for regulations made.

Clause 1, paragraph 27E(4): Power to make regulations specifying the terms of the agreement imposed by a Part 4A order

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Affirmative, including a consultation requirement*

Context and Purpose

- 34) Paragraph 27E sets out the circumstances in which a Part 4A order can be made and its effect. Sub-paragraph (1) provides that the Tribunal may make an order where it is satisfied that those requirements set out at paragraph 27D have been met and the required grantor has not objected to the making of the order.
- 35) Sub-paragraph (2) provides that a Part 4A 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 27B(1)(d)).
- 36) Sub-paragraph (4) requires that the terms of the agreement imposed under a Part 4A order will be those specified in regulations made by the Secretary of State. Those regulations must in particular provide for an agreement to include terms (sub-paragraph (5)(a) – (j)):
- a) relating to details of the nature of the works to be carried out to be given to the required grantor;
 - b) relating to the obtaining by the operator of any consents etc. which is necessary in respect of the works;
 - c) relating to the giving of notice by the operator to the required grantor or other specified persons before entering the connected land in the exercise of the Part 4A code right or carrying out the works;
 - d) restricting the operator's right to enter the connected land to specified times (except in case of emergency);
 - e) as to the manner in which works are carried out by the operator;
 - f) relating to the restoration of the connected land at the end of the works;
 - g) relating to insurance cover or indemnification of the required grantor;
 - h) relating to maintenance or upgrading of apparatus installed on the connected land;
 - i) imposing requirements or restrictions on the grantor of Code rights in order to prevent damage and disruption to apparatus and facilitate access by the operator; and
 - j) relating to the assignment of the agreement.
- 37) Before making regulations pursuant to the power under sub-paragraph (4), the Secretary of State is required to consult operators, representatives

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

Justification for taking the power

38) 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 power is justified as the terms will form part of the contractual agreement between the operator and the required grantor. Such 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.

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

- a) The prescriptive list of terms that the regulations must provide for is set out sub-paragraph (5)(a) – (j). This list 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 upon which the regulations must deal. This list will be scrutinised and approved by Parliament.
- b) The statutory consultation requirement provided for at sub-paragraph (6) ensures that key stakeholders mentioned at sub-paragraph (6)(a) – (c) must be consulted with in respect of proposals to make regulations to add terms. The parties with which the Secretary of State is required to consult represent a mixture of interests and will ensure proper scrutiny of any proposals to use the power to add terms under sub-paragraph (4).

Justification for the procedure

40) As this power is necessarily broad, it is considered appropriate that the use of the power is debated and subject to more intensive scrutiny by Parliament through the affirmative procedure. Significant constraints on

the use of these powers – notably the requirement for statutory consultation – are also provided.

Clause 1, Paragraph 27G(1)(c) Power to make regulations to specify the period for which Part 4A Code rights will last, subject to a maximum of 18 months

Power conferred on: The Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution

Context and Purpose

41) Paragraph 27G deals with the expiry of Part 4A Code rights.

42) Paragraph 27G(1) provides that Part 4A 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 Tribunal 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 the purpose of this sub-paragraph, the Secretary of State has the power to make regulations to set the “specified period”, which is to be subject to a maximum 18 months (pursuant to 27G(3)).

Justification for taking the power

43) This power is necessary to ensure that Part 4A Code rights only apply for a period of time that is no longer than strictly necessary. This period of time can only properly be determined as the Part 4A procedure is implemented.

- 44) The power is no wider than necessary and is clearly constrained by the fact that regulations made pursuant to the power cannot provide for a period exceeding 18 months.

Justification for the procedure

- 45) As the regulations relate to the duration for which rights and obligations arising as a result of the making of a Part 4A order apply to operators and required grantors, it is important that they should be placed before Parliament. It is considered that the negative resolution procedure provides a suitable level of scrutiny, as the regulation-making power is clearly constrained by the maximum period for which those rights last, as set out on the face of the Bill.

Clause 3(4): Power to commence by regulations

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *None*

Context and Purpose

- 46) Clause 3(4) provides that those provisions of the Bill that do not come into force on Royal Assent by virtue of clause 3(3), will come into force on whatever day the Secretary of State appoints by regulations.
- 47) Clause 3(5) provides that regulations may provide that different days may be appointed for different purposes.

Justification for taking the power

48) The commencement power at clause 3(4) is required to enable the Secretary of State to commence at an appropriate time those provisions of the Bill not already commenced (i.e. those provisions set out at clause 3(3)).

Justification for the procedure

49) It is standard practice for commencement regulations not to be subject to any parliamentary procedure. The substance of the provisions will be considered during the passage of the Bill.

Clause 3(6): Power to make transitional provision in connection with the Bill

Power conferred on: *The Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *None*

Context and Purpose

50) Clause 3(6) provides the Secretary of State with the power to make transitional provision in connection with the coming into force of any provision of the Bill. The purpose of the power is to enable changes to be made to ensure that the Bill can be implemented in an orderly manner.

Justification for taking the power

51) The power for the Secretary of State to make transitional provision in regulations will help to facilitate the smooth commencement of the provisions of the Bill. If the coming into force of any provision of the Bill

needs transitional provision to be made in connection with it, this can be properly addressed.

Justification for the procedure

52) It is standard practice for regulations making transitional provision not to be subject to any parliamentary procedure. The substance of the provisions will be considered during the passage of the Bill.

Department for Digital, Culture, Media, and Sport