

## TELECOMMUNICATIONS (SECURITY) BILL

### Memorandum concerning the Delegated Powers in the Telecommunications (Security) Bill for the Delegated Powers and Regulatory Reform Committee

- A. Introduction
- B. Purpose and effect of the Bill
- C. General commentary on the delegated powers in the Bill
- D. Summary of delegated powers in the Bill
- E. Analysis of delegated powers in the Bill

#### I. Powers relating to security of public electronic communications networks and services

Clause 1(2): power to make regulations imposing duty to take specified security measures

Clause 2: power to make regulations imposing duty to take specified measures in response to security compromises

Clause 3: power to issue codes of practice about security measures etc.

Clause 7(2): power to substitute different maximum penalties for contravention of security duties

#### II. Powers relating to designated vendor directions

Clause 15(2): power to give designated vendor directions

Clause 19(2): power to substitute different maximum penalties for contravention of a duty imposed by an inspection notice etc.

Clause 20: power to substitute different maximum penalties for contraventions of requirements imposed by designated vendor directions etc.

Clause 22: power to substitute different maximum penalties for contravention of a requirement not to disclose

Clause 23: power to substitute different maximum penalties for contravention of an information requirement under section 105Z27

Clause 24: power to substitute different maximum penalties for contravention of information requirements related to Ofcom's security functions

#### III. Powers relating to final provisions

Clause 28: commencement (including power to make transitional, transitory or saving provision)

## DELEGATED POWERS MEMORANDUM

### 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 Telecommunications (Security) Bill ('the Bill'). The memorandum reflects the Bill as introduced in the House of Commons on 24 November 2020.
2. This memorandum identifies the provisions of the Bill that confer delegated legislative powers. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

### B. Purpose and effect of the Bill

3. The Bill amends the Communications Act 2003 ('the 2003 Act') to reform and strengthen the regulatory framework that applies to the security of UK public telecommunications networks and services. (References in this memorandum to 'new sections' are to sections inserted into the 2003 Act by the Bill.)
4. The **first part** of the Bill (clauses 1 to 14) creates new duties applying to providers of public electronic communications networks and public electronic communications services to protect those networks and services against security compromises. It confers powers on the Secretary of State to make further provision about the measures to be taken, and to issue codes of practice giving guidance about those measures.
5. It also makes provision about informing others of security compromises. This includes imposing duties on providers to inform users of significant risks of security compromises (and the measures users can take to protect themselves), and to inform Ofcom (as the regulator for the telecommunications sector) of the occurrence of a security compromise that has a significant effect on the network or service, or of 'pre-positioning' attacks that would put a person in a position to be able to bring about such a security compromise.
6. It also creates stronger supervisory and enforcement powers for Ofcom. These include powers for Ofcom to assess providers' compliance with their security duties, using strengthened powers to require information or through testing or other requirements imposed by

'assessment notices'. Ofcom's strengthened enforcement powers include a new power to give a provider a direction to take interim action in sufficiently serious cases, and the power to impose a financial penalty of such amount as Ofcom determine to be appropriate and proportionate, subject to higher maximum amounts of up to 10% of a provider's 'relevant turnover', or (in the case of a continuing contravention) £100,000 per day.

7. The **second part** of the Bill (clauses 15 to 23) creates new national security powers which are intended to be used to control the risks posed from the use in connection with UK networks and services of goods, services or facilities from 'high risk vendors'. It confers powers on the Secretary of State to give directions to public communications providers, imposing requirements on their use of goods, services or facilities supplied, provided or made available by designated persons. The directions could require (among other things) that the use of particular goods etc. be prohibited or restricted, or that goods etc. be removed from a network or disabled.
8. A direction can only be given where the Secretary of State considers that the direction is necessary in the interests of national security, and the requirements it imposes are proportionate to what sought to be achieved by the direction. The Secretary of State must also issue a 'designation notice' in respect of any person that supplies the goods etc. that are subject to requirements in a direction.
9. The Secretary of State can require a provider given a direction to prepare a plan for compliance with a direction, and can give Ofcom a 'monitoring direction' requiring Ofcom to gather information relevant to determining a provider's compliance with a direction and to provide that information in the form of a report to the Secretary of State. The Bill provides Ofcom with the necessary powers to carry out such investigations as they consider appropriate for the purpose of gathering information for a report, including giving an 'inspection notice' to the provider. In addition, the Bill gives the Secretary of State a power to require information relevant to the exercise of his functions.
10. The Bill creates enforcement powers for the Secretary of State in respect of any contravention of a requirement imposed by a direction, including power to impose a financial penalty of such amount as he determines to be appropriate and proportionate, up to 10% of a provider's 'relevant turnover', or (in the case of a continuing contravention) £100,000 per day. In urgent

cases, the Secretary of State can give a provider an urgent enforcement direction which is enforceable in civil proceedings forthwith.

11. The Secretary of State can also impose requirements not to disclose particular information (such as the contents of a designated vendor direction), where disclosure would be contrary to the interests of national security.

**C. General commentary on the delegated powers in the Bill**

12. The first part of the Bill contains three delegated legislative powers. In addition, this memorandum addresses one power that the department considers to be administrative in character.
13. The second part of the Bill contains five delegated legislative powers. In addition, this memorandum addresses one power that the department considers to be administrative in character.
14. The final provisions in the Bill contain a delegated legislative power relating to commencement.
15. Of these nine delegated legislative powers, six are powers to amend the maximum penalties specified in the Bill (and accordingly are Henry VIII powers). These powers are subject to draft affirmative resolution procedure. Taking these powers is consistent with the existing approach to the amendment of penalties in Chapter 1 of Part 2 of the 2003 Act: see sections 35A(7), 110A(7), 116(8), 123(4), 124L(4), 130(9), and 139(9).
16. The Committee should note that, unless otherwise provided, powers exercisable by the Secretary of State to make orders or regulations under the 2003 Act are subject to negative resolution procedure, by virtue of section 402 of that Act (as amended by clause 25(3) of the Bill).

#### D. Summary of delegated powers in the Bill

	Clause	Power conferred	Purpose	Parliamentary procedure
I. Powers relating to security of public electronic communications networks and services				
1	Clause 1(2)	Power to make regulations imposing duty to take specified security measures	To enable more detailed requirements to be imposed on providers, further to new section 105A(1).	Negative resolution
2	Clause 2	Power to make regulations imposing duty to take specified measures in response to security compromises	To enable more detailed requirements to be imposed on providers, further to new section 105C(2) and (3).	Negative resolution
3	Clause 3	Power to issue codes of practice about security measures etc.	To enable statutory guidance to be given to providers as to the measures to be taken under sections 105A to 105D.	No procedure (but issued codes are laid before Parliament)
4	Clause 7(2)	Power to substitute different maximum penalties for contravention of security duties (Henry VIII power)	To ensure that, where appropriate, the maximum penalties can be amended without further primary legislation.	Draft affirmative resolution
II. Powers relating to designated vendor directions				
5	Clause 15(2)	Power to give designated vendor directions	To enable requirements to be imposed with respect to the use of goods, services and facilities supplied, provided and made available by designated persons, in connection with the provision of a network etc., where necessary in the interests of national security.	No procedure (but directions are laid before Parliament in accordance with new section 105Z11).
6	Clause 19(2)	Power to substitute different maximum penalties for contravention of a duty imposed by an inspection notice etc. (Henry VIII power)	To ensure that, where appropriate, the maximum penalties can be amended without further primary legislation.	Draft affirmative resolution

7	Clause 20	Power to substitute different maximum penalties for contraventions of requirements imposed by designated vendor directions etc. (Henry VIII power)	To ensure that, where appropriate, the maximum penalties can be amended without further primary legislation.	Draft affirmative resolution
8	Clause 22	Power to substitute different maximum penalties for contravention of a requirement not to disclose (Henry VIII power)	To ensure that, where appropriate, the maximum penalties can be amended without further primary legislation.	Draft affirmative resolution
9	Clause 23	Power to substitute different maximum penalties for contravention of an information requirement under section 105Z27 (Henry VIII power)	To ensure that, where appropriate, the maximum penalties can be amended without further primary legislation.	Draft affirmative resolution
10	Clause 24	Power to substitute different maximum penalties for contravention of information requirements related to Ofcom's security functions (Henry VIII power)	To ensure that, where appropriate, the maximum penalties can be amended without further primary legislation.	Draft affirmative resolution
III. Powers relating to final provisions				
11	Clause 28	Commencement (including power to make transitional, transitory or saving provision)	To commence relevant provisions at an appropriate time, and make any provision necessary in consequence of commencement, to ensure a smooth transition between the old and the new law.	No procedure

## **E. Analysis of delegated powers in the Bill**

### *I. Powers relating to security of public electronic communications networks and services*

#### **1. Clause 1(2): new section 105B (power to make regulations imposing duty to take specified security measures)**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Negative resolution*

### **Context and purpose**

17. New section 105B confers power on the Secretary of State to make regulations requiring a provider of a public electronic communications network or a public electronic communications service to take specified security measures, or security measures of a specified description.
18. The power therefore enables more detailed requirements to be imposed on providers, further to their duty under new section 105A(1) to take such measures as are appropriate and proportionate for the purposes of identifying and reducing the risks of security compromises occurring, and preparing for the occurrence of security compromises.

### **Justification for taking the power**

19. The power enables the Secretary of State to specify measures (or description of measures) that providers must take further to their duty under new section 105A(1). This power can be used to ensure greater clarity as to the measures that providers must take, giving greater assurance that the measures implemented will address the risks posed to the security of the telecommunications sector. This approach will also improve the effectiveness of Ofcom's supervision and enforcement of providers' compliance with their security duties.
20. Where appropriate, different provision could be made in relation to providers of different descriptions. (See subsection (3) of section 402 of the 2003 Act.) This would allow the more detailed requirements to be shaped to different cases, whether that is in terms of fundamental technological differences between different networks and services (for instance, wireless or

fixed line networks) or in terms of the scale and use of a network (and therefore the consequent risks to its security).

21. These requirements are liable to be detailed and contain significant technical detail, making them inappropriate to be set out in primary legislation.
22. Furthermore, those more detailed requirements will be subject to periodic review and, where appropriate, revision. Those reviews are required as a result of the rapid evolution of technologies used to provide public electronic communications networks and services (for instance, the ongoing transition to 5G wireless networks), and updated analysis of the risks to the security of networks and services (in particular, the use of new 'attack vectors' by persons seeking to target UK networks and services).
23. A measure (or description of measure) may only be specified in regulations if the Secretary of State considers that taking that measure would be appropriate and proportionate for a purpose mentioned in section 105A(1). The power therefore only enables more detailed requirements to be imposed within the parameters set in the primary legislation. Further, new section 105B(4) provides that nothing in regulations under section 105B affects the duty imposed by section 105A.

#### **Justification for the procedure**

24. New section 105B(2) provides that a measure may only be specified in regulations where the Secretary of State considers that taking that measure (or a measure of that description) would be appropriate and proportionate for a purpose mentioned in new section 105A(1). It is considered appropriate for the power to be subject to negative resolution procedure as Parliament will have approved the purposes in new section 105A(1) which define the scope of the power. Furthermore, the measures specified in the regulations are liable to be technical, and are likely to require revision from time to time to respond to changes in technology and evolving security threats.

**2. Clause 2: new section 105D (power to make regulations imposing duty to take specified measures in response to security compromises)**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Negative resolution*

**Context and purpose**

25. New section 105D confers power on the Secretary of State to make regulations requiring a provider of a public electronic communications network or a public electronic communications service to take specified measures, or measures of a specified description, in response to a security compromise of a specified description.
26. The power therefore enables more detailed requirements to be imposed on providers, further to their duties under new section 105C(2) and (3) to take such measures as are appropriate and proportionate for the purpose of preventing adverse effects (on the network or service or otherwise) arising from a security compromise that has occurred, or for the purpose of remedying or mitigating any adverse effect that has arisen.

**Justification for taking the power**

27. The power enables the Secretary of State to specify measures (or descriptions of measures) that providers must take further to their duty under new section 105C(2) and 105C(3). As with the power conferred under new section 105B, the power can be used to ensure greater clarity as to the measures that providers must take.
28. The duty to take measures specified in regulations made under new section 105D would arise where a security compromise of a description specified in the regulations occurs. As with regulations made under section 105B, different provision could be made in relation to providers of different descriptions. The power would therefore potentially enable provision to be made to address very specific kinds of security compromise. It is appropriate to take a power to do this, as flexibility is required. It is not possible to anticipate all the cases in which it might be appropriate to use the power, as this will depend on an evolving analysis of the risks to UK networks and services, and the measures that can be taken in response to the

occurrence of those risks (notwithstanding the measures providers implement to mitigate them).

29. As with regulations made under section 105B, any requirements are liable to be detailed and contain significant technical detail, making them inappropriate to be set out in primary legislation.

### **Justification for the procedure**

30. New section 105D(2) and (4) provide that a measure may only be specified in regulations where the Secretary of State considers that taking that measure (or a measure of that description) would be appropriate and proportionate for the purposes mentioned in section 105C(2) and (3). It is considered appropriate for the power to be subject to negative resolution procedure as Parliament will have approved the purposes in section 105C(2) and (3) which define the scope of the power. (In this regard, section 105D(6) provides that nothing in regulations made under section 105D affects the duty imposed by section 105C.) Furthermore, the measures specified in the regulations are liable to be technical, and may require revision from time to time to respond to changes in technology.

### **3. Clause 3: new section 105E (power to issue codes of practice about security measures etc.)**

*Power conferred on: Secretary of State*

*Power exercised by: Code of practice*

*Parliamentary procedure: No procedure (but issued codes are laid before Parliament)*

### **Context and purpose**

31. New section 105E confers power on the Secretary of State to issue, revise and withdraw codes of practice giving guidance as to the measures to be taken under sections 105A to 105D by providers.
32. New sections 105F and 105G make procedural provision in connection with codes of practice. This includes a statutory consultation requirement in relation to a draft code of practice (or, as

the case may be, revisions of an existing code). The published code must be laid before Parliament.

33. Section 105H makes provision about the effect of codes of practice. A court or tribunal must take into account a provision of a code of practice in determining any question arising in legal proceedings, and Ofcom must also take into account a provision of a code in determining any question arising in connection with the carrying out of one of their relevant (security-related) functions, if (in either case) that provision appears to be relevant to the question.
34. Where Ofcom have reasonable grounds for suspecting that a provider is failing, or has failed, to act in accordance with a provision of a code of practice, new section 105I enables Ofcom to require the provider to give a statement to Ofcom confirming whether or not it is acting, or has acted, in accordance with the code, including an explanation of the reasons for any failure. This will support Ofcom's regulatory work by building an understanding of the reasons why providers decide to implement measures other than those set out in a code of practice. In cases where Ofcom has concerns that a provider is not complying with its duties under sections 105A to 105D, Ofcom's exercise of its power under new section 105I might be used in determining whether to open an investigation.

### **Justification for taking the power**

35. The department considers the power under new section 105E to be an administrative power. It is included in this memorandum because it is a power to make general provision. As set out in section 105E, a code of practice is to give guidance about the measures to be taken by providers under sections 105A to 105D. The contents of a code of practice are therefore not legislative in character, notwithstanding that new section 105H gives effects to the code by ensuring that, where relevant, that guidance is something which Ofcom, or a court of tribunal, must take into account.
36. The security measures implemented by providers will necessarily be highly technical. In this context, it is appropriate for power to be conferred on the Secretary of State to set out guidance about the measures that are expected to be taken. That guidance will draw on the particular expertise of the National Cyber Security Centre, including its awareness of the particular threats posed to UK networks and services from states and other actors.

37. A statutory code of practice is considered to be the appropriate form for this guidance. It is critically important that a high level of security of UK networks and services is attained, especially given the ever-increasing importance of telecommunications to the economy and society. However, it is recognised that UK networks and services differ in technically complex ways, and thus that different security measures might be appropriate in different circumstances.
38. It would therefore be difficult to legislate for the detail of the measures that providers should take. At the same time, however, there is a strong case for clear expectations to be set out about those measures. For this reason, it is considered appropriate for the codes of practice to have the statutory effects provided for in new section 105H (which are well-precedented).

#### **Justification for the procedure**

39. Codes of practice are expected to take the form of highly technical guidance. In view of that, section 105F requires the Secretary of State to carry out a statutory consultation on a draft of the code (or revisions of an existing code) with any provider to whom the draft would apply, as well as Ofcom. This will contribute to ensuring codes are drafted to a high standard and therefore are appropriate to have the statutory effects outlined above.
40. Section 105F further provides for codes of practice to be published and laid before Parliament, to ensure transparency given the effects of the code and to support Parliament's consideration of policy in this area. However, it is not considered appropriate for the codes to be subject to other Parliamentary procedure given (a) their status as guidance, (b) their highly technical nature, and (c) the anticipated need to revise any codes relatively frequently to respond to changes in technology and evolving security threats.

#### **4. Clause 7(2): new section 105T(4) (power to substitute different maximum penalties for contravention of security duties)**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Draft affirmative resolution*

## **Context and purpose**

41. New section 105S applies Ofcom's enforcement procedure in relation to contraventions of regulatory conditions to the security duties imposed on providers. Ofcom has power to impose on providers financial penalties of such amount as it determines to be appropriate and proportionate to the contravention.
42. Section 105T makes provision for the maximum amount of penalties applicable to contraventions of the security duties. These generally provide for a maximum penalty in the case of a continuing contravention of £100,000 per day. In the case of a contravention of a duty imposed by section 105I, the maximum penalty is £10 million or, in the case of a continuing contravention, £50,000 per day. Subsection (4) confers a power on the Secretary of State to substitute a different amount for the amounts for the time being specified in section 105T. (Section 105T does not specify a maximum penalty for contraventions that are not continuing contraventions (other than in respect of a duty imposed by section 105I). Section 97 of the 2003 Act applies and so such contraventions are subject to a maximum penalty of 10% of a provider's 'relevant turnover', which is the same as applies to contraventions of regulatory conditions set by Ofcom.)

## **Justification for taking the power**

43. This power ensures that the maximum amount of penalties specified in section 105T can be amended without a need for further primary legislation. The power could be used to keep pace with inflation, or to alter the maximum penalty to ensure it remains an effective deterrent and otherwise appropriate as a matter of policy.
44. As explained in section C of this memorandum, taking this power is consistent with the existing approach in Chapter 1 of Part 2 of the 2003 Act, where delegated powers are conferred on the Secretary of State to substitute different amounts for maximum penalties specified in the Act.

## **Justification for the procedure**

45. It is considered appropriate for the power to be subject to draft affirmative procedure, given the importance of the maximum amount of penalties and the fact that it operates by amending

primary legislation. As explained in section C of this memorandum, this approach is consistent with similar delegated powers in Chapter 1 of Part 2 of the 2003 Act.

## *II. Powers relating to designated vendor directions*

### **5. Clause 15(2): new section 105Z1 (power to give designated vendor directions)**

*Power conferred on: Secretary of State*

*Power exercised by: Direction*

*Parliamentary procedure: No procedure (but directions are laid before Parliament in accordance with new section 105Z11)*

#### **Context and purpose**

46. New section 105Z1 creates a power for the Secretary of State to give directions to public communications providers ('providers') that impose requirements regarding the use of goods, services or facilities which are supplied, provided or made available by a designated vendor specified in the direction ('designated vendor directions'). The Secretary of State must also issue a 'designation notice' in respect of any person who supplies the goods etc. that are subject to requirements in a direction. The power for the Secretary of State to issue a designation notice is set out in new section 105Z8.
47. As explained in section B of this memorandum, the purpose of this power is to enable requirements to be imposed to control the risks from the use in connection with UK networks and services of goods, services or facilities from 'high risk vendors'. Further policy background can be found in the department's UK Telecoms Supply Chain Review Report published in July 2019.
48. The Secretary of State may give a designated vendor direction only if he considers that the direction is necessary in the interests of national security, and the requirements imposed by the direction are proportionate to what is sought to be achieved by the direction.

### **Justification for taking the power**

49. The department considers the power to give designated vendor directions to be administrative in nature, because directions can only be given to particular providers and are not of general application. It is included in this memorandum on the basis of its significance.
50. It is appropriate to take a power, rather than impose requirements on the face of the bill for several reasons. First, the power will need to address specific cases where the use of goods etc. in connection with networks or services gives rise to national security concerns. Second, the power must be exercisable to deal with national security concerns that arise in future, as opposed to those identified at the time of the passage of the Bill. Third, designated vendor directions are to be given where the Secretary of State considers the direction necessary in the interests of national security, and thus are liable to relate to highly sensitive issues which are inappropriate to be dealt with in primary legislation.
51. The power to give designated vendor directions is subject to the limits set out in new sections 105Z1 to 105Z6. These include requirements to, insofar as it is reasonably practicable and not contrary to national security interests, consult with the providers subject to the direction and the designated vendor specified in the direction when giving or varying a direction (sections 105Z3 to 105Z5).

### **Justification for the procedure**

52. It would be inappropriate for the exercise of this power to be subject to Parliamentary control given that it is exercisable in the interest of national security and is liable to relate to highly sensitive issues. It should also be noted that the requirements to be imposed by designated vendor directions are likely to be technically complex, and may need to be varied to respond to evolving security concerns and technological developments.
53. New section 105Z11 provides that designated vendor directions are to be laid before Parliament, to ensure transparency and support Parliament's consideration of policy in this area. However, this requirement does not apply if the Secretary of State considers that doing so would be contrary to the interests of national security. The Secretary of State may also exclude from publication aspects of a designated vendor direction that would be contrary to the interests of national security or would, or would be likely to, prejudice to an unreasonable

degree the commercial interests of any person. This is a necessary restriction given that directions may relate to highly sensitive issues.

**6. Clause 19(2): new section 105Z17(5) (power to substitute different maximum penalties for contravention of a duty imposed by an inspection notice etc.)**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Draft affirmative resolution*

**Context and purpose**

54. New section 105Z17 applies Ofcom's enforcement procedure in relation to contraventions of regulatory conditions to contraventions of a duty imposed by an inspection notice, or a duty imposed by new section 105Z15(3) (which requires a provider not to act in such a way as to defeat the purpose of an inspection notice). Ofcom has power to impose on providers financial penalties of such amount as it determines to be appropriate and proportionate to the contravention.

55. Section 105Z17 makes provision for the maximum amount of penalties applicable to contraventions of a duty imposed by an inspection notice, or contraventions of a duty imposed by section 105Z15(3). These provide for a maximum amount of £10 million or, in the case of a continuing contravention, £50,000 per day. Section 105Z17(5) confers a power on the Secretary of State to substitute a different amount for the amounts for the time being specified in section 105Z17.

**Justification for taking the power**

56. This power ensures that the maximum amount of the penalties can be amended without a need for further primary legislation. The power could be used to keep pace with inflation, or to alter the maximum penalty to ensure it remains an effective deterrent and otherwise appropriate as a matter of policy.

57. As explained in section C of this memorandum, taking this power is consistent with the existing approach in Chapter 1 of Part 2 of the 2003 Act, where delegated powers are conferred on the Secretary of State to substitute different amounts for maximum penalties specified in the Act.

### **Justification for the procedure**

58. It is considered appropriate for the power to be subject to draft affirmative procedure, given the importance of the maximum amount of penalties and the fact that it operates by amending primary legislation. As explained in section C of this memorandum, this approach is consistent with similar delegated powers in Chapter 1 of Part 2 of the 2003 Act.

### **7. Clause 20: new section 105Z19(5) (power to substitute different maximum penalties for contraventions of requirements imposed by designated vendor directions etc.)**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Draft affirmative resolution*

### **Context and purpose**

59. The Secretary of State's enforcement powers in respect of designated vendor directions include a power to impose a financial penalty on a provider who is contravening, or has contravened, a requirement imposed by a designated vendor direction, or who is contravening, or has contravened, a requirement under new section 105Z7 to provide the Secretary of State with a plan for compliance. The Secretary of State has power to impose a financial penalty of such amount as he determines to be appropriate and proportionate to the contravention in respect of which it is imposed.

60. New sections 105Z19(2) and (3) make provision for the maximum amount of penalties applicable to contraventions of requirement imposed by a designated vendor direction. Subsection (2) provides for a maximum penalty of 10% of a provider's 'relevant turnover', while subsection (3) provides for a maximum penalty for continuing contraventions of £100,000 per day. Section 105Z19(4) makes provision for the maximum amount of penalties applicable to contraventions of a requirement imposed under section 105Z7; the maximum penalty being

£10 million or (in the case of a continuing contravention) £50,000 per day. Section 105Z19(5) confers a power on the Secretary of State to substitute a different amount for the amounts expressed in cash terms for the time being specified in subsections (3) and (4).

### **Justification for taking the power**

61. This power ensures that the maximum amount of penalties expressed in cash terms can be amended without a need for further primary legislation. The power could be used to keep pace with inflation, or to alter the maximum penalty to ensure it remains an effective deterrent and otherwise appropriate as a matter of policy.
62. As explained in section C of this memorandum, taking this power is consistent with the existing approach in Chapter 1 of Part 2 of the 2003 Act, where delegated powers are conferred on the Secretary of State to substitute different amounts for maximum penalties specified in the Act.

### **Justification for the procedure**

63. It is considered appropriate for the power to be subject to draft affirmative procedure, given the importance of the maximum amount of penalties and the fact that it operates by amending primary legislation. As explained in section C of this memorandum, this approach is consistent with similar delegated powers in Chapter 1 of Part 2 of the 2003 Act.

## **8. Clause 22: new section 105Z26(4) (power to substitute different maximum penalties for contravention of a requirement not to disclose)**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Draft affirmative resolution*

### **Context and purpose**

64. New section 105Z25 makes provision for requirements not to disclose. The Secretary of State may require a provider or designated vendor not to disclose the contents of a designated vendor direction or a designation notice (or parts thereof) without the Secretary of State's

permission, where disclosure would be contrary to the interests of national security. The Secretary of State may also require a provider not to disclose the existence or contents of a notification of contravention, a confirmation decision or an urgent enforcement direction, or a notice of confirmation of an urgent enforcement direction (or parts thereof) without the Secretary of State's permission, where disclosure would be contrary to the interests of national security. Further, the Secretary of State may also require a person consulted in relation to a designated vendor direction, a designation notice, or a variation of a direction or notice not to disclose the existence of the consultation (or part thereof) and any information disclosed to the person in the consultation (or part of the consultation), without the permission of the Secretary of State, where disclosure would be contrary to the interests of national security.

65. The Secretary of State's enforcement powers in respect of requirements not to disclose include a power to impose a financial penalty for contraventions. The Secretary of State has power to impose a penalty of such amount as he determines to be appropriate and proportionate to the contravention in respect of which it is imposed. New section 105Z26 makes provision for the maximum amount of penalties applicable to contraventions of a requirement not to disclose. These provide for a maximum amount of £10 million or, in the case of a continuing contravention, £50,000 per day. Section 105Z26(4) confers a power on the Secretary of State to substitute a different amount for the amounts for the time being specified in section 105Z26.

### **Justification for taking the power**

66. This power ensures that the maximum amount of penalties can be amended without a need for further primary legislation. The power could be used to keep pace with inflation, or to alter the maximum penalty to ensure it remains an effective deterrent and otherwise appropriate as a matter of policy.
67. As explained in section C of this memorandum, taking this power is consistent with the existing approach in Chapter 1 of Part 2 of the 2003 Act, where delegated powers are conferred on the Secretary of State to substitute different amounts for maximum penalties specified in the Act.

### **Justification for the procedure**

68. It is considered appropriate for the power to be subject to draft affirmative procedure, given the importance of the maximum amount of penalties and the fact that it operates by amending

primary legislation. As explained in section C of this memorandum, this approach is consistent with similar delegated powers in Chapter 1 of Part 2 of the 2003 Act.

**9. Clause 23: new section 105Z29(3) (power to substitute different maximum penalties for contravention of an information requirement under section 105Z27)**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Draft affirmative resolution*

**Context and purpose**

69. New section 105Z27 confers power to require a provider or a person who appears to have information relevant to the exercise of the Secretary of State's functions under sections 105Z1 to 105Z26 to provide the Secretary of State with such information as he may reasonably require for the purpose of exercising his functions under sections 105Z1 to 105Z26. Further provision as to this power is set out in section 105Z27 and restrictions on the power are set out in section 105Z28.

70. The Secretary of State's enforcement powers in respect of information requirements include a power to impose a financial penalty for contraventions of an information requirement. The Secretary of State has power to impose a penalty of such amount as he determines to be appropriate and proportionate to the contravention in respect of which it is imposed. New section 105Z29 makes provision for the maximum amount of penalties applicable to contraventions of an information requirement (being £10 million or, in the case of a continuing contravention, £50,000 per day). Section 105Z29(3) confers a power on the Secretary of State to substitute a different amount for the amounts for the time being specified in section 105Z29.

**Justification for taking the power**

71. This power ensures that the maximum amount of the penalties can be amended without a need for further primary legislation. The power could be used to keep pace with inflation, or to alter the maximum penalty to ensure it remains an effective deterrent and otherwise appropriate as a matter of policy.

72. As explained in section C of this memorandum, taking this power is consistent with the existing approach in Chapter 1 of Part 2 of the 2003 Act, where delegated powers are conferred on the Secretary of State to substitute different amounts for maximum penalties specified in the Act.

### **Justification for the procedure**

73. It is considered appropriate for the power to be subject to draft affirmative procedure, given the importance of the maximum amount of penalties and the fact that it operates by amending primary legislation. As explained in section C of this memorandum, this approach is consistent with similar delegated powers in Chapter 1 of Part 2 of the 2003 Act.

### **10. Clause 24: new section 139ZA(5) (power to substitute different maximum penalties for contravention of information requirements related to Ofcom's security functions)**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Draft affirmative resolution*

### **Context and purpose**

74. New section 139ZA relates to Ofcom's enforcement powers in relation to information requirements imposed by Ofcom in order to enable it to carry out its functions in relation to supervision and enforcement of providers' security duties, or to prepare a report under section 105Z12 (relating to designated vendor directions).

75. Section 139ZA makes provision for the maximum amount of penalties applicable to contraventions of information requirements related to Ofcom's security functions or to the preparation of a report under section 105Z12 (being £10 million or, in the case of a continuing contravention, £50,000 per day). Section 139ZA(5) confers a power on the Secretary of State amend section 139ZA so as to make different provision as to the maximum penalties that may be applied.

### **Justification for taking the power**

76. This power ensures that the maximum amount of the penalties can be amended without a need for further primary legislation. The power could be used to keep pace with inflation, or to alter the maximum penalty to ensure it remains an effective deterrent and otherwise appropriate as a matter of policy.
77. As explained in section C of this memorandum, taking this power is consistent with the existing approach in Chapter 1 of Part 2 of the 2003 Act, where delegated powers are conferred on the Secretary of State to substitute different amounts for maximum penalties specified in the Act.

### **Justification for the procedure**

78. It is considered appropriate for the power to be subject to draft affirmative procedure, given the importance of the maximum amount of penalties and the fact that it operates by amending primary legislation. As explained in section C of this memorandum, this approach is consistent with similar delegated powers in Chapter 1 of Part 2 of the 2003 Act.

### ***III. Powers relating to final provisions***

#### **11. Clause 28: Commencement (including power to make transitional, transitory or saving provision)**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: No procedure*

### **Context and purpose**

79. Clause 28(3) confers power on the Secretary of State to bring into force those provisions of the Bill that relate to the security of public electronic communications networks or services. Other provisions (including those relating to designated vendor directions) come into force either on Royal Assent or two months thereafter.

80. Subsection (5) provides that the Secretary of State may make transitional, transitory or saving provision in connection to the coming into force of any provision of the Bill.

#### **Justification for taking the power**

81. Commencement by regulations enables the provisions to be brought into force at an appropriate time, allowing the Secretary of State to ensure that affected stakeholders and Ofcom are prepared for changes to the law.

82. The power to make transitional, transitory or saving provision in regulations ensures that, if necessary, provision can be made to ensure a smooth transition between the old and the new law. It is appropriate to take the power to ensure that any legal uncertainties or gaps can be addressed.

#### **Justification for the procedure**

83. Consistent with common practice, commencement regulations, and regulations making transitional, transitory or saving provision in connection with commencement, are not subject to Parliamentary procedure. Parliament will have approved the principle of the provisions in the Bill by enacting them: it is not necessary for their commencement, and any provision in consequence of their commencement, to be subject to further Parliamentary scrutiny.

**Department for Digital, Culture, Media and Sport**

**24 November 2020**