

THE PRODUCT SECURITY AND TELECOMMUNICATIONS INFRASTRUCTURE BILL

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

INTRODUCTION

1. This supplementary 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.
2. This memorandum identifies an amendment proposed to an existing provision in Clause 70 of the Bill as introduced to the House of Commons. That provision confers a power to make delegated legislation. The proposed amendment will have the effect of making that power a limited “Henry VIII” power, enabling the Secretary of State to make limited amendments to primary legislation.
3. This memorandum explains why this change is being proposed, together with further information in support of the Government’s view that this change is necessary and justified.

PART 2: TELECOMMUNICATIONS INFRASTRUCTURE

Clause 70 - Power to provide for the determination of court proceedings relating to the Code within specific periods

Power conferred on: The Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution

Context and Purpose of the power

4. As set out in the Department's original memorandum relating to the Bill¹ ("the original memorandum"), clause 70 inserts a new section 119A into the Communications Act 2003. This new section confers a power on the Secretary of State to make regulations requiring 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 to which any time limits apply.
5. The new section 119A(3) expressly provides that regulations made under this power may in particular amend or revoke provision made by the Electronic Communications and Wireless Telegraphy Regulations 2011² ("the 2011 Regulations"). Those Regulations already require that certain types of dispute arising under the Electronic Communications Code ("the Code") must be determined by a court within a six month period.
6. As set out in the original memorandum, such provision is necessary to provide flexibility for the future; it may be that there is no need for the current time limit to be retained at all, in which case the power conferred by the new section 119A could be used by the Secretary of State to remove it by way of amendment to the 2011 Regulations. Alternatively, if the Secretary of State considered that new or different time limits should be put in place, this power could be used to achieve this, amending the 2011 Regulations as might be necessary.

Justification for the amendment to the power

7. As identified above, a future exercise of the power conferred by the new section 119A could necessitate the amendment or revocation of the 2011 Regulations. More specifically, this could involve amendment or revocation of regulation 3, which provides for the existing six month time period within which certain types of dispute must currently be resolved.

¹ See page 58 of the original memorandum as published on 24 November 2021 and available at <https://bills.parliament.uk/publications/43918/documents/1027>.

² S.I. 2011/1210.

8. However, we have identified that the 2011 Regulations not only made substantive provision to this effect at regulation 3, but also inserted “signposts” to that regulation in a number of other pieces of legislation, namely:
 - a. paragraph 2A of Schedule 3 to the New Roads and Street Works Act 1991;
 - b. section 107(1A) of the Communications Act 2003;
 - c. paragraph 97 of Schedule 3A to the Communications Act 2003;
 - d. section 69(5A) of the Marine and Coastal Access Act 2009;
 - e. section 27(6A) of the Marine (Scotland) Act 2010;
9. These signposts, set out in the Schedule to the 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.
10. By way of an example of the sort of provision made by these signposts, paragraph 2A of Schedule 3 to the New Roads and Street Works Act 1991 states:

Regulation 3 of the Electronic Communications and Wireless Telegraphy Regulations 2011 makes provision about the time within which certain applications for the granting of rights to install facilities must be determined.
11. The 2011 Regulations implemented the Citizen’s Rights³ and Better Regulation⁴ Directives, which amended the European Framework on Electronic Communications⁵. As such, the 2011 Regulations were able to insert such signposts into other legislation, including primary legislation, because they were made in exercise of the

³ Directive 2009/136/EC of the European Parliament and of the Council of 9 November 2009 amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

⁴ Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services.

⁵ The European Framework was made up of the Framework Directive, the Authorisation Directive, the Access Directive, the Universal Service Directive and the “E-Privacy” Directive.

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.

12. However those signposts could become problematic in the future if regulation 3 of the 2011 Regulations were to be amended or revoked by the Secretary of State in exercising the power conferred by the new section 119A. The signposts could become otiose and result in confusion for the reader if, for example, they pointed to a regulation that has in fact been revoked.
13. The Government considers it would be appropriate for the Secretary of State to have flexibility, in the future, to address this issue should it arise. Doing so necessitates the taking of a Henry VIII power, as we would directly need to amend the legislative provisions listed at paragraph 8 above 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.
14. 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. In the Government’s view, it would not be appropriate to confer a power (as provided for in the new section 119A, as per clause 70 of the Bill) to amend the 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.
15. 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 selected

16. As set out at paragraph 172 of the original memorandum to the Committee, regulations made under clause 70 will be subject to the negative resolution procedure. This amendment makes no change to that approach.
17. Notwithstanding the proposed amendment, and the conferring of a limited Henry VIII power on the Secretary of State, the Government considers the negative resolution procedure to afford an appropriate level of Parliamentary scrutiny of regulations made under the new section 119A as inserted into the Communications Act 2003 by clause 70.
18. The Government recognises that, as per paragraph 7 of the latest version of the Committee's guidance⁶, there is a presumption that the affirmative procedure will apply in respect of a Henry VIII power. However, as that guidance also 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 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 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.

⁶ ["Guidance for Departments on the role and requirements of the Committee"](#) (November 2021)

Department for Digital, Culture, Media and Sport

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