

PRODUCT SECURITY AND TELECOMMUNICATIONS INFRASTRUCTURE BILL

EXPLANATORY NOTES ON LORDS AMENDMENTS

What these notes do

1. These Explanatory Notes relate to the Lords Amendments to the Product Security and Telecommunications Infrastructure Bill as brought from the House of Lords on 20 October 2022 (Bill 167).
2. These Explanatory Notes have been prepared by the Department for Digital, Culture, Media and Sport in order to assist the reader of the Bill and the Lords Amendments. They do not form part of the Bill and have not been endorsed by Parliament.
3. These Explanatory Notes, like the Lords Amendments themselves, refer to HL Bill 16, the Bill as first printed in the Lords.
4. These Explanatory Notes need to be read in conjunction with the Lords Amendments and the text of the Bill. They are not, and are not intended to be, a comprehensive description of the Lords Amendments.
5. Lords Amendments 1 to 16 were tabled in the name of the Minister.
6. Lords Amendment 17 was tabled by Baroness Merron, Lord Bassam of Brighton and Lord Fox, and was opposed by the Government.
7. In the following Commentary, an asterisk(*) appears in the heading of any paragraph that deals with a non-Government amendment.

Commentary on Lords Amendments

Lords Amendments to Part 1: Product Security

Clauses 3 and 9

Lords Amendments 1, 2 and 3

- 1 Lords Amendment 1 would amend clause 3 and Lords Amendment 2 would amend clause 9 to change the resolution procedure from negative to draft affirmative for regulations made under clause 3 and clause 9(7) respectively.
- 2 Lords Amendment 3 is a minor and technical consequential amendment to clause 9. It would ensure that regulations made using other powers in clause 9 unrelated to amendments above should continue to be subject to the negative resolution procedure.

Clause 27: Delegation of enforcement functions

Lords Amendment 4

- 3 Lords Amendment 4 would amend clause 27 to provide that the Secretary of State's power to delegate enforcement functions is to be exercised by regulations, rather than by written agreement. This amendment would ensure that, where the Secretary of State deems it appropriate to delegate enforcement functions to a person, this is subject to parliamentary scrutiny.

Lords Amendments 5 to 9

- 4 Lords Amendment 5 to 9 are minor and technical consequential amendments on Lords Amendment 4, the first Government amendment to clause 27.

Lords Amendment 10

- 5 Lords Amendment 10 would amend clause 27 to ensure that the regulations in this section are subject to the affirmative resolution procedure. It follows on from Lords Amendment 4.

Clause 56: Meaning of other expressions used in Part 1

Lords Amendment 11

- 6 Lords Amendment 11 is a consequential amendment on Lords Amendment 4. This amendment would replace references to 'agreement' with 'regulations' in the definition of "the enforcement authority".

Lords Amendments to Part 2: Telecommunications Infrastructure

Clause 57: Person able to confer code rights on operators in exclusive occupation

Lords Amendments 12 to 14

- 7 Lords Amendment 12 would remove clause 57 from the Bill. Clause 57 was included in the Bill to deal with two situations which had proved problematic for operators. These situations arose due to the wording of paragraph 9 of the Electronic Communications Code, which states that code rights can only be conferred by an agreement between the operator and the “occupier” of the land. The courts had interpreted “occupier” in this context to include an operator who was already in occupation of the land. Since an operator could not enter into an agreement with itself, this meant that an operator in occupation of land was prevented from obtaining new code rights in respect of that land either a) when the original term of their agreement had expired and they did not have any statutory route through which they could renew that agreement or b) where they required additional Code rights during the term of an existing agreement.
- 8 Clause 57, as amended at Report stage in the House of Commons, amended paragraph 9 of the Code, so that an operator in exclusive occupation of land had other persons to whom they could turn in order to obtain code rights. On 22 June 2022, after the Bill had been introduced in the House of Lords, the UK Supreme Court handed down a judgment which took a different approach to the meaning of “occupier” in paragraph 9 of the Code (“the Judgment”)¹. The effect of the Judgment is that, where an operator is seeking code rights in respect of land, that same operator’s occupation of the land (if any) is to be disregarded for the purposes of paragraph 9 of the Code.
- 9 The Judgment therefore addresses both of the problematic situations which Clause 57 (as amended) was also seeking to resolve, albeit through a different approach. In light of the Judgment, Clause 57 is no longer needed.
- 10 Lords Amendments 13 and 14 are consequential on Lords Amendment 12.

New Clause (after Clause 60): Power to fly lines from apparatus kept by another operator

Lords Amendment 15

- 11 Lords Amendment 15 would amend paragraph 74 of the Code to facilitate upgrading and sharing of relevant electronic communications apparatus kept by the main operator.

¹ Cornerstone Telecommunications Infrastructure Limited -v- Compton Beauchamp Estates Limited, Cornerstone Telecommunications Infrastructure Limited -v- (1) Ashloch Limited (2) AP Wireless II (UK) Limited and On Tower UK Limited (formerly known as Arqiva Services Limited) -v- AP Wireless II (UK) Limited [2022] UKSC 18

- 12 Paragraph 74 of the Code confers a right on operators who keep electronic communications apparatus on or over land (“main land”) for the purposes of their network to install and keep lines connected to such apparatus over land (“neighbouring land”) adjacent to, or in the vicinity of, the land on or over which such apparatus is kept. Such lines must be connected to the apparatus on the main land and be kept at a height of three metres or more above the ground and at a distance of more than two metres from any building over which they pass. The typical apparatus to which paragraph 74 applies and to which this amendment would apply is telegraph poles.
- 13 Subsections (2) and (3) of the amendment would define the operator referred to in paragraph 74(1) who keeps the electronic communications apparatus on or over land as the “main operator”. This would be to distinguish between the main operator and other operators, so that new rights could be conferred on those other operators.
- 14 Subsection (4) would confer a right on operators other than the main operator to install and keep lines that are connected to the apparatus on the main land and that pass over neighbouring land. This would be subject to certain conditions, including the same conditions applicable to the current paragraph 74 right.
- 15 Other operators would be required to secure the consent of the main operator before exercising the right. The formal requirements for agreements set out in paragraph 11 of the Code would not apply to such consent. Subsection (4) would therefore effectively enable other operators to benefit from the sharing of apparatus (typically telegraph poles) kept by the main operator.
- 16 In addition to the new rights for other operators to fly lines from apparatus, subsection (6) would confer new rights on both the main operator (pursuant to paragraph 74(3A)) and other operators (pursuant to paragraph 74(3B)) to upgrade, or carry out works to, apparatus (typically telegraph poles) for the purposes of, or in connection with, the exercise of the right to fly lines. The rights in sub-paragraphs 74(3A) and (3B) could be used, for example, to install a box at the top of the telegraph pole connected to a line to complete a connection to a premises.
- 17 Other operators would be required to secure the consent of the main operator before exercising the rights in sub-paragraph 74(3B). Similarly, both the main operator and any other operator would be required (pursuant to sub-paragraph 74(3D)) to obtain the consent of the occupier of the main land before accessing it to exercise these rights. The formal requirements for agreements set out in paragraph 11 of the Code would not apply to such consent. The consent of the occupier of neighbouring land would not be a requirement for the exercise of the rights nor would an operator be prevented from seeking such consent; whether to do so would be for operators to consider on a case by case basis.
- 18 Additionally, the relevant upgrading of or other works to the apparatus would not be permitted if such activities failed to satisfy three tests. First, such activities would need to have no more than a minimal adverse impact on the appearance of the apparatus. Second, such activities would need to have no more than a minimal adverse impact on the land on or

over which the apparatus is kept. Third, such activities would need to cause no loss, damage or expense to any person with an interest in the land on or over which the apparatus is kept.

New Clause (after Clause 65): National Security Certification Process

Lords Amendment 16

- 19 Lords Amendment 16 would insert a new clause into the Bill, which provides a new intervention power for the Secretary of State. This power will enable the Secretary of State to prevent a court from making an order imposing an agreement that confers code rights on an operator in circumstances where the granting of such rights is likely to prejudice national security, defence or law enforcement.
- 20 In deciding whether the order sought by the operator would be likely to prejudice national security, defence or law enforcement, the Secretary of State would be required to consider whether any terms proposed by the operator will sufficiently mitigate any risks.
- 21 The new clause inserted by Lords Amendment 16 would also make amendments to paragraphs 21, 26 and 27 of the Code that are consequential on the introduction of this new intervention power.

New clause (after Clause 74): Independent review of the Electronic Communications Code*

Lords Amendment 17

- 22 Amendment 17 would require the Secretary of State to appoint an independent person, within 3 months from when this Bill is passed, to conduct a review of the effect of specific pieces of legislation on the deployment of telecommunications infrastructure. This review must consider, amongst other things, the extent to which revisions to the electronic communications code have secured progress towards the Government's telecommunications infrastructure targets. The Secretary of State would be required to publish the independent person's report and to respond to it, laying a copy of both the report and the response before Parliament.

Financial Effects of Lords Amendments

- 1 The Department does not consider that any of the Lords Amendments give rise to any significant expenditure. Lords Amendment 17 would require a new head of public expenditure to meet the costs of the independent reviewer.

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