EXPLANATORY MEMORANDUM TO

THE TELECOMMUNICATIONS INFRASTRUCTURE (LEASEHOLD PROPERTY) (TERMS OF AGREEMENT) REGULATIONS 2022

2022 No. 1323

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Digital, Culture, Media and Sport and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 The purpose of this instrument is to implement elements of the Telecommunications Infrastructure (Leasehold Property) Act 2021 ('the 2021 Act'), which creates a fast-track route by which a telecommunications operator may apply to a court for an order (a 'Part 4A order') granting rights to access to a 'multiple-dwelling unit' (for example a block of flats) in order to provide an electronic communications service where it has been requested by a lessee in occupation. The 2021 Act provides the Secretary of State with a power to make regulations to specify the terms of an agreement to be imposed by a Part 4A order. This instrument sets out those terms of the agreement.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales and Scotland.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales and Scotland.

5. European Convention on Human Rights

5.1 The Parliamentary Under Secretary of State at Digital, Culture, Media & Sport Stuart Andrew has made the following statement regarding Human Rights:

"In my view the provisions of the Telecommunications Infrastructure (Leasehold Property) (Terms of Agreement) Regulations 2022 are compatible with the Convention rights."

6. Legislative Context

6.1 The 2021 Act amends the Electronic Communications Code (the "Code") which regulates the relationship between telecommunications operators ("operators") and landlords, landowners and managing agents. The Code is contained in Schedule 3A to the Communications Act 2003 (c.21). The 2021 Act inserts a new Part 4A into Schedule 3A to the Communications Act 2003.

6.2 These regulations are made in exercise of powers conferred on the Secretary of State under section 402(3) of, and paragraphs 27E(4) and (5) of Schedule 3A to, the Communications Act 2003.

6.3 This instrument is one of two statutory instruments which implement the 2021 Act. The other statutory instrument is the Telecommunications Infrastructure (Leasehold Property) (Conditions and Time Limits) Regulations 2022 (the "Conditions and Time Limits Regulations"). The Conditions and Time Limits Regulations will specify conditions to be satisfied before an operator can give a final notice to the required grantor[1] and before applying for a court order, and the expiry periods for code rights and for applying for a court order.

6.4 This instrument uses powers conferred on the Secretary of State which are subject to consultation, as required by paragraph 27E(6) of Schedule 3A to the Communications Act 2003. This consultation was run from 9 June 2021 to 4 August 2021, under the title 'Regulations to implement the Telecommunications Infrastructure (Leasehold Property) Act Consultation'. The Government response to this consultation was published 24 June 2022.[2]

7. Policy background

What is being done and why?

7.1 The Government is committed to addressing the barriers preventing people from accessing the fast, reliable connections they need to thrive. Gigabit-capable connections will be the enabling infrastructure of the 21st century. They will be the backbone of our future economy, allowing the development of innovative consumer products, the delivery of personalised public and health services, and support for our businesses to compete globally. But this can only be achieved if fast, reliable and secure digital infrastructure extends to every home.

7.2 It is for this reason that the 2021 Act was passed. It will support those living in blocks of flats and apartments (also known as multi-dwelling buildings) to access broadband services.

7.3 Data suggests that 40% of industry requests to required grantors go without any response. The 2021 Act aims to encourage required grantors to respond to operators' requests for access. Access rights are essential for the delivery of connectivity as operators are unable to deploy their services without first obtaining permission to install their equipment through connected land.

7.4 The 2021 Act creates a new route through the courts that operators can use to access blocks of flats and apartments if a required grantor is repeatedly unresponsive to requests for access.

7.5 The 2021 Act creates a process pursuant to which it will be possible for infrastructure to be installed on private property without explicit consent of the required grantor. The 2021 Act provides the Secretary of State with a power to make regulations to specify the terms which must be included in an agreement imposed by a Part 4A

[1] 'Required grantor' is defined under paragraph 27B(1)(c) of the Code as a person who, in order for the operator to fulfil the request from the lessee in occupation, must agree to confer on the operator a code right in respect of connected land or otherwise to be bound by such a code right exercisable by the operator.

[2] https://www.gov.uk/government/consultations/consultation-on-regulations-to-implement-the-telecommunications-infrastructure-leasehold-property-act/outcome/regulations-to-implement-the-telecommunications-infrastructure-leasehold-property-act-government-response

order. The 2021 Act required that these should include certain terms related to particular issues, in order to ensure that the rights obtained through this process are used appropriately. This instrument sets out those terms, which include:

7.6 Requirement to give notice before entry onto relevant land. This instrument requires that a notice containing all details of the relevant works should be sent to the required grantor (via registered post or recorded delivery and a notice affixed to a conspicuous object on the relevant land), all residents of the multiple-dwelling unit (via a notice affixed to a conspicuous object on the relevant land), and, if relevant, each managing agent, at least five working days before entering the relevant land. This notice must also state when the work is planned to start, how long it is anticipated to continue for, and must include the contact details of the operator.

7.7 Requirement for the operator to obtain consents, permits, licences, permissions, authorisations or approvals which is necessary for the works to be carried out. This instrument requires that operators obtain any necessary consents, permits, licences, permissions, authorisations or approvals for the works before they commence. The instrument requires that operators obtain Listed Building Consent (pursuant to section 8 of the Planning (Listed Buildings and Conservation Areas) Act 1990 where required to pursuant to section 7 of that Act.

7.8 Limiting the operator's right of entry to specified times, except in cases of emergency. This instrument requires that operators may only enter the relevant land between 08:30-18:00, Monday-Friday, unless otherwise agreed by way of written consent of a managing agent or recognised tenants' association, or to carry out emergency works.

7.9 The manner of carrying out work. This instrument sets out specific standards which operators must comply with when carrying out their work. This includes taking all reasonable and proper precautions to avoid unnecessary damage, and carrying out work in a workmanlike manner with adequate and proper materials. It also requires work to be signed off by the most senior individual carrying out the work, affirming that the work has been carried out according to these standards.

7.10 The restoration of land at the end of works. This instrument requires that the operator restores the relevant land at the end of the relevant works to the reasonable satisfaction of the required grantor.

7.11 Indemnification and insurance requirements. This instrument requires that operators must indemnify the required grantor for up to £5,000,000, and also maintain public liability insurance to cover the exercise of their Part 4A code rights.

7.12 Requirement for maintenance or upgrading. This instrument requires that the operator maintains and upgrades the apparatus so far as is reasonably practicable.

7.13 Restrictions on the required grantor. This instrument stipulates that the required grantor is prohibited from damaging or disrupting the apparatus, and from unreasonably obstructing the operator from accessing the apparatus.

7.14 Requirement to attach notice on apparatus. The instrument requires that the operator must attach a notice to at least one piece of the apparatus installed in exercise of the agreement imposed by a Part 4A order and prescribes what this notice must include.

7.15 Assignment of rights. This instrument provides that the agreement to be imposed by a Part 4A order may only be assigned by the operator to a third-party operator. A condition of the assignment must be that the assignee keeps evidence detailing the assignment in question.

7.16 Prevention of actions inhibiting other operators. This instrument requires that the operator must not prevent or inhibit other operators from providing a service to other premises in the multiple dwelling building of which the target premises are a part (e.g. other premises within the block of flats in which the lessee in occupation who has requested the service lives), unless this is necessary for the operator to exercise its rights under the Part 4A agreement.

7.17 This instrument gives rise to the need for bespoke court rules in the relevant courts and tribunals across the UK. The Government is working with HM Courts & Tribunal Service for England and Wales, and the Scottish Civil Justice Council and Scottish Courts and Tribunal Service to make provision for such rules. These will be in place by the time this instrument comes into force, which will be in relation to England and Wales on 26 December 2022, and in relation to Scotland on 1 July 2023.

7.18 The different timelines for Scotland are due to differing requirements in Scottish courts concerning how courts handle 'intimation of action', combined with different processes for issuing of guidance ahead of the introduction of new court processes.

7.19 The 2021 Act extends to the United Kingdom. Accordingly, the Government will work with the Northern Ireland Executive and the Northern Ireland Judiciary to ensure that appropriate court rules are in place in Northern Ireland. Once this is done, the Government intends to introduce an equivalent instrument to this one for Northern Ireland (NI) at a later date.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal).

9. Consolidation

9.1 This instrument does not amend another instrument, as such consolidation shall not occur.

10. Consultation outcome

10.1 The Department for Digital, Culture, Media & Sport issued a policy consultation on 9 June 2021 which closed on 4 August 2021. The Department published its policy position in the response on 24 June 2022 which is available on gov.uk.

10.2 The 24 June 2022 response included proposals on all of the provisions included in this instrument.[3] There were 12 responses to the consultation, including organisations representing landowners, operators, professional bodies and government administrations.

10.3 The responses were largely supportive of the proposals.

10.4 In some cases, the consultation responses allowed the detail of the regulations to be developed further, beyond what was initially proposed. These are as follows:

10.5 Regarding the details and process for providing notice of planned works. The instrument requires that notices must contain as much detail about the work as

[3] The full government response to the consultation can be found at the following link: https://www.gov.uk/government/consultations/consultation-on-regulations-to-implement-the-telecommunications-infrastructure-leasehold-property-act/outcome/regulations-to-implement-the-telecommunications-infrastructure-leasehold-property-act-government-response

reasonably possible. This addition was made in light of consultation responses which emphasised the importance of as much detail being provided to interested parties as possible.

10.6 Regarding the obtaining by the operator of any consent, permit, licence, permission, authorisation or approval which is necessary for the works to be carried out. One consultation response proposed specifically requiring operators to obtain Listed Building Consent when works are planned for listed buildings. Whilst this would strictly speaking be covered by the general requirement for operators to obtain 'all necessary consents, permits, licences, permissions, authorisations or approvals', given the relatively scarcity of multiple dwelling units which are listed, and their particular architectural importance, it was felt appropriate to take up this proposal, and so highlight Listed Building Consent in these regulations.

10.7 Regarding the details and process for giving notice of operators accessing the property. In light of consultation responses which emphasised the value of using multiple means of contact, the instrument includes a requirement that the required grantor should be contacted both via recorded delivery, and by affixing a notice to the property.

10.8 Regarding the details of the necessary standard to which work must be completed. It was suggested that terms such as 'reasonable professional standard' were ambiguous and could lead to disagreements between parties. In light of this, the instrument contains more specific requirements, comparable to language found in wayleaves in this sector and in building regulations, and would not be seen as out of place or excessive.

10.9 The following details were changed as a result of consultation responses:

10.10 Regarding limiting operator rights of access to specified times, except in cases of emergency. In light of consultation responses, a slight adjustment has been made to the timings from what was originally proposed (Weekdays 09:30 - 18:30), to Monday to Friday, 08:30 - 18:00. This change was made as a compromise between the variety of timings proposed in the responses, to strike a balance between facilitating access for the operator to complete work, and respecting neighbours.

11. Guidance

11.1 Guidance will be prepared to aid parties' understanding of the agreement to be imposed by a Part 4A order. This will be hosted on gov.uk.

12. Impact

12.1 The impact on business, charities or voluntary bodies of this instrument is as follows. The direct costs to business resulting from this policy are the costs associated with the mandated steps to contact the required grantor in order to use the new court process and familiarisation costs of implementing the policy. Indirect costs include the marginal cost of connecting a premise once access has been granted and the cost of the new court process itself.

12.2 The indirect benefits to business include increased revenue from more connections and cost savings from avoiding the current court process. However, these benefits are not quantified. Other indirect benefits to business, which are quantified, relate to upgraded infrastructure, including improvements in productivity and labour force participation.

12.3 Overall, the business net present value is estimated as £50.0m. The business benefit-cost-ratio (BCR) is estimated as 3.49, over a 15 year appraisal period. The equivalent annual net direct cost to business (EANDCB) is estimated as £0.0m, in 2019 prices, below the £5m de minimis threshold.

12.4 The impact on the public sector of these regulations is an increased number of cases passing through the judicial system of approximately 3000 cases per year across the UK. The process is intended to be expedient and engagement with the judiciary to date has indicated that a decision should take no more than 30 minutes.

12.5 A full Impact Assessment has not been prepared for this instrument because equivalent annual net direct cost to business (EANDCB) is estimated as £0.0m, in 2019 prices, below the £5m de minimis threshold.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific action is proposed to minimise regulatory burdens on small businesses.

13.3 The basis for the final decision to take no specific action to assist small businesses is as follows:

13.4 Private Landlords: These regulations concern access to property owned by private landlords. It is possible that small businesses, for example a property management company may get affected. However, following two consultation processes on this topic which received responses from stakeholders in the landowner and landlord community - one preceding the 2021 Act, and one preceding this instrument - and a Small and Micro Business Assessment, the impact is considered to be low - i.e. under £5m - and as such no mitigation is needed. This low impact is due in part to the safeguards inbuilt under the 2021 Act, and the regulations themselves. These include numerous notice requirements (which are time limited) before rights which would impact landlords can be applied for, conditions on the exercise of those rights if granted, and the time limit for the rights themselves.

13.5 Network Operators: From the perspective of network operators, the regulatory burden on network operators created by this instrument is not significant, and so does not warrant mitigation action. Indeed, whilst the majority of network operators have over 50 employees, the policy is likely to provide a significant benefit for small operators, by mitigating use of historic wayleaves by larger operators where required grantors are non-responsive. While all operators currently have the option to go to court to gain access to premises, only large operators have the means to do so (even if most do not).

13.6 Wider small and micro-business community: The policy is expected to provide significant benefit to the wider small and micro-business community by providing increased speeds, higher capacity and greater reliability. These benefits allow small and micro-businesses to use cloud-based applications and services that can lower operational costs and increase efficiency.

13.7 Overall, there are no disproportionate direct costs on small businesses. The result of the regulation change will be greater market access for small and micro operators and significant wider impacts to the small and micro business community.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is that a review provision is not required.

14.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015 Stuart Andrew has made the following statement:

"I would not be appropriate to make provision in this regulation for a review under sections 28 to 32 of the Small Business, Enterprise and Employment Act 2015, in reliance on section 31(2)(a) of that Act. This is because the expected annualised net impact on business or on voluntary or community bodies as a result of this legislation would be ±£0, and as such a review would be disproportionate, taking into account the economic impact of the regulatory provision on "qualifying activity" (that is, activity, by a business for the purposes of the business, or by a voluntary or community body for the purposes of the body)."

15. Contact

15.1 James Moore at the Department for Digital, Culture, Media & Sport, Telephone: 07442 995039 or email: james.moore@dcms.gov.uk can be contacted with any queries regarding the instrument.

15.2 Mark Hitchen, Deputy Director for Broadband Regulation and Investment Team, at the Department for Digital, Culture, Media & Sport can confirm that this Explanatory Memorandum meets the required standard.

15.3 Stuart Andrew, Parliamentary Under Secretary of State at the Department for Digital, Culture, Media & Sport can confirm that this Explanatory Memorandum meets the required standard.