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The Rt Hon. Baroness Taylor of Bolton
Chair of the Constitution Committee

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Dear Baroness Taylor of Bolton,

RESPONSE TO 5TH REPORT OF THE CONSTITUTION COMMITTEE - TELECOMMUNICATIONS (SECURITY) BILL

I am writing in response to the Constitution Committee's fifth report of this session which reviewed the Telecommunications (Security) Bill. As I said at the Bill's Second Reading, I recognise the importance of effective scrutiny and am therefore grateful for the Committee's prompt consideration of the Bill's provisions, and for highlighting areas that the House may wish to scrutinise further. I have reflected carefully on the report and on the views expressed by noble Lords during the Second Reading debate. This letter provides justification for the Bill's approach to the areas raised in the report.

Definition of a 'security compromise'

The Committee's report suggested that, given the potentially significant consequences of a security compromise, the Bill's definition of a security compromise is too broad. Whilst I acknowledge the Committee's concerns, I am confident that the Bill currently provides a sufficiently detailed definition of 'security compromise'.

The definition in the Bill is focused enough to address specific risks to telecoms networks - listing the key areas to protect, from network availability through to the confidentiality of signals and data. At the same time, it is broad enough to ensure the Bill is future-proof by providing the flexibility to enable us to address new and evolving threats. It is possible that some future security threats may not be captured by a narrower definition of 'security compromise'. That would significantly undermine the new security framework's effectiveness.

More specific security measures will be set out in secondary legislation. This is where detail will be provided on the precise measures public telecoms providers must take to protect networks and services and respond to specific risks, including current vulnerabilities. Accompanying technical guidance set out in codes of practice will also help providers understand the steps they could take to meet their obligations.

Competition and Appeals Tribunal

The Committee's report also questioned the rationale behind the standard of review applied to appeals against certain security decisions taken by Ofcom.

Clause 13 is designed to clarify that the Competition Appeal Tribunal must not apply the standard of appeal (duly taking into account the "merits of the case"), which was retained from European law, to relevant security decisions. Clause 13 establishes that the standard of appeal for relevant decisions¹, should instead be ordinary judicial review principles.

Having these appeals against relevant security decisions reviewed on ordinary judicial review principles, rather than taking account of the merits of the case, will ensure a smooth regulatory process that focuses on fair decision making. This should reduce the incentives for providers to litigate solely for the purpose of delaying the regulatory process.

It is particularly important, given these decisions relate to the security of a provider's network, that decisions can be addressed swiftly, and providers can get back to the important work of ensuring their networks are secure. The Competition Appeals Tribunal already applies judicial review principles in appeals against certain security decisions under the Network & Information Systems Regulations.

Judicial review principles are also the normal standard by which most decisions of government and public bodies are reviewed.

Oversight of the Bill's designated vendor direction powers

The Constitution Committee raised concerns regarding oversight of the Bill's powers and suggested these should be made to fall within the remit of the Investigatory Powers Commissioner.

The Secretary of State will only use the powers to issue designation notices and designated vendor directions when necessary to do so in the interests of national security, and where the requirements to be imposed are proportionate.

The Investigatory Powers Commissioner has responsibility for reviewing the use by public authorities - such as intelligence agencies, police and local authorities - of the powers in the Investigatory Powers Act. Oversight of the Investigatory Powers Act regime by the Investigatory Powers Commissioner is considered appropriate because of the potential intrusion into the private lives of individuals as a result of the use of covert powers. However, the Investigatory Powers Act regime is not directly comparable with the new powers and framework set out by this Bill.

¹ This does not include any enforcement decisions under sections 105S and 105T. For those cases, the Competition Appeal Tribunal should be reviewed by duly taking into account the merits of the case.

The national security powers in this Bill are very different to those in the Investigatory Powers Act. The powers in the Bill are focused on enabling the Government to impose, monitor and enforce controls on public communications providers' use of designated vendors' goods, services and facilities within UK telecoms networks. As such, there is not the same potential for intrusion into the private lives of individuals as a result of the use of these powers, when compared with those in the Investigatory Powers Act. Though I appreciate the sentiment behind the suggestion, for the reasons set out above I do not consider it appropriate to subject the use of the powers in this Bill to scrutiny by the Investigatory Powers Commissioner.

The Bill already contains effective mechanisms for oversight of the Secretary of State's use of the powers to give a designated vendor direction or designation notice. The Bill requires the Secretary of State to lay copies of designation notices and designated vendor directions before Parliament. This will provide Parliament with the opportunity to scrutinise the use of these powers.

On very rare occasions, the Secretary of State may choose not to lay a designation notice or direction before Parliament, because to do so would be contrary to the interests of national security. Where this is the case, the DCMS Select Committee will be able to view such directions and notices.

Once again, I would like to thank the Committee for their thorough and careful scrutiny of the powers in this Bill. I look forward to continuing to engage with you and noble Lords across the House during the passage of this Bill.

With best wishes

A handwritten signature in dark ink, appearing to read 'Diana Barran', written in a cursive style.

Baroness Barran
Minister for Civil Society