

DIGITAL ECONOMY BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Digital Economy Bill as introduced in the House of Commons on 5 July 2016 (Bill 45).

- These Explanatory Notes have been prepared by the Department for Culture, Media and Sport in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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Overview of the Bill

- 1 This Bill implements a number of policies outlined in the Conservative Party Manifesto. The Bill contains measures on providing a broadband universal service for the United Kingdom, additional powers for Ofcom in respect of information provision, consumer switching and automatic compensation in relation to communication matters, a new Electronic Communications Code and other communications infrastructure matters, measures to introduce better controls on online pornography and to protect citizens from nuisance calls, measures related to digital intellectual property, powers to share data between public authorities and some measures relating to the BBC.
- 2 The purpose of the Bill is to enable access to fast digital communication services for citizens and businesses, to enable investment in digital communications infrastructure, to shape the emerging digital world to the benefit of children, consumers and businesses, and to support the digital transformation of government, enabling the delivery of better public services, world leading research and better statistics.

Policy background

Access to digital services

- 3 The Conservative Party Manifesto committed to roll out universal broadband to ensure everyone is part of the digital economy. Improved connectivity is essential for any ambitious nation, driving economic growth, quality of life, education, and engagement with public services. The January 2014 [UK Broadband Impact Study](#) further sets out the benefits of fast broadband.
- 4 “Superfast” broadband is a term used to describe broadband capable of delivering download speeds of at least 24 Mbps, which cannot be delivered through previous generation broadband technology. A range of technologies can deliver superfast broadband. The United Kingdom’s superfast broadband networks are largely provided through Virgin Media’s cable network and through BT Openreach’s “Fibre to the Cabinet” (“FTTC”) solutions. FTTC is currently the main technology being used to extend superfast broadband coverage through publicly-funded projects but other technologies including “Fibre to the Premises” (“FTTP”), wireless, and satellite also have roles to play. In 2013 the government set an ambition that, by the end of 2017, 95 per cent of premises would be able to connect to superfast broadband. To ensure that coverage extends to areas where it would not be commercially viable for the private sector, the government, Local Authorities and devolved administrations are investing nearly £1.7 billion in improving broadband. There are also a number of projects trialling technologies to extend coverage to the final five per cent and in May 2016 it was announced that BT had confirmed more than £200 million would be available for reinvestment, because its contracts with government require it to return money to local authorities once certain take-up thresholds have been reached.
- 5 As the world goes increasingly online, those left behind risk social and economic exclusion. The government is therefore concerned to ensure that, where superfast broadband remains unavailable, a good quality broadband service is nonetheless available. In December 2015 the government launched a scheme offering a subsidised satellite broadband connection (including the option of superfast speeds) to homes and businesses unable to obtain an affordable broadband service of at least 2 Mbps. This scheme formed part of the government’s commitment to make sure every home and business in the United Kingdom could access speeds of at least 2 Mbps by the end of 2015. This commitment is termed the “Universal Service Commitment” and currently acts as a non-statutory safety net.
- 6 In November 2015 the Prime Minister announced that government was planning to create a

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broadband Universal Service Obligation (“USO”) with the ambition to give people the legal right to request a broadband connection with speeds of 10 Mbps by the end of the Parliament. Unlike the non-statutory Universal Service Commitment, a broadband USO would be a legal right to request a connection, similar to the way the existing USO operates to request a telephone line or equivalent arrangements for utilities. On 23 March 2016 the government published [A new broadband Universal Service Obligation](#), consulting on the proposal. On 17 May 2016 the government published its response to the consultation confirming plans to legislate.

- 7 The government expects the broadband USO to work in a similar way to the telephony USO that is enabled by section 65 of the Communications Act 2003 (“the 2003 Act”) and implemented through the Electronic Communications (Universal Service) Order 2003 (SI 2003/1904). A provider or providers are designated to provide the service. In the case of BT, who is a designated provider under the telephony USO, a telephone connection is provided on request unless the cost of installing the connection exceeds £3,400 in which case the customer has the option of paying any additional costs. The government has commissioned Ofcom to provide technical analysis and recommendations on the design of the broadband USO and on 7 April 2016 Ofcom published [Designing the broadband universal service obligation](#), inviting views from industry and others on how the detailed operation of the broadband USO will work. Ofcom will complete its report by the end of 2016. The broadband USO will be implemented under the power in section 65 of the 2003 Act and the Bill amends section 65 to provide adequate vires. The government will consult on a draft order once Ofcom completes its analysis.
- 8 In addition to ensuring the availability of broadband connectivity, the government believes that consumers need to be well informed about services available to them, be able to easily switch provider and be compensated if things go wrong. Ofcom also shares this belief and set out a similar position in their recent strategic review of digital communications, [Making communications work for everyone](#), published on 25 February 2016.
- 9 The government believes that consumers should be able to more easily switch communications provider. In 2014 just 6 per cent of consumers switched their broadband or fixed line telephone provider, half the rate of switching of gas or electricity providers. For pay-TV the switching rate was just 2%. Since June 2015 Ofcom has successfully implemented gaining provider-led switching across the Openreach network. This means that customers wishing to change their fixed voice and/or broadband service provider only need to contact their new provider. No longer do customers also have to contact their existing provider to obtain an authorisation code that they must then give their new provider. The government supports this model and on 25 May 2016 published [Switching Principles Action Plan](#) setting out how the government wishes to ensure switching continues to be made simpler.
- 10 Ofcom has powers to require communications providers to adopt rules on switching under section 51 of the 2003 Act. The government is keen to see an extension of the 2015 switching reforms to the Openreach network extended to other electronic communication services, especially as many consumers now buy services in a bundle including mobile services and pay-TV. To ensure that Ofcom is able to achieve these reforms in a timely manner, the Bill will clarify that section 51 may be used to require communication providers to comply with switching conditions.
- 11 Electronic communications, and in particular broadband, are increasingly essential services like utilities, without which it is difficult to operate. Delays in connection and re-connection can be inconvenient and unless the consumer actively complains there is little incentive for the provider to improve quality of service. Consumers who suffer a power cut are protected by [Ofgem’s Quality of Service Guaranteed Standards](#), which are service levels that should be met by each distribution company. If they fail to meet the level of service required, then customers may be entitled to a payment. The government wishes to see a similar scheme set up for those who have

their communication services disrupted. The Bill will make clear that Ofcom is equipped with powers to achieve this.

Digital infrastructure

- 12 The electronic communications code (“the code”) enables electronic communication network providers to install and maintain electronic communication networks by giving network operators certain rights. Under the code, operators are permitted to construct infrastructure on public land and have rights to install equipment on private land. With regards to private land, the code requires that operators contact the land owner before installing equipment but also provides that when permission is not given by the land owner an operator can apply to the County Court or Sheriff Court in Scotland to allow them to undertake the work. The code is found in the Telecommunications Act 1984, pre-dating the introduction of mobile networks in the United Kingdom and is widely considered to be out of date and in need of reform.
- 13 The government asked the Law Commission to review the code in 2012. The Law Commission published a detailed [report](#) on 28 February 2013, including detailed recommendations for reform of the code, but also advised government to carry out further consultation and research in some areas before proceeding. In early 2015, the previous government introduced amendments to the Infrastructure Bill, which would have reformed the code along the lines of the Law Commission’s recommendations. However, the measure was subsequently removed from the Bill, to allow further consultation and research to take place.
- 14 Following formal consultation in February 2015 and further analysis work, on 17 May 2016 the government published [A New Electronic Communications Code](#), setting out plans to legislate. The Bill will reform the underpinning rights that communications providers have to acquire land - moving to a “no scheme” regime that ensures property owners will be fairly compensated for use of their land, but restricts their ability to profit from the public need for communications infrastructure. In this respect, it will put the telecommunications sector on a similar footing to utilities like electricity and water, and significantly reduce the cost of providing infrastructure.
- 15 The revised code will also provide new rights to upgrade and share infrastructure. The government intends infrastructure sharing to assist future deployment of technology such as 5G. Administrative changes to court processes are intended to allow for faster dispute resolution, making sure that disputes do not delay construction and maintenance of communications infrastructure.
- 16 The Bill will also enable an existing temporary relaxation of the rules for installing communications apparatus to be made permanent in order to further facilitate broadband infrastructure rollout. Communications network providers with rights under the electronic communications code (“code operators”) are permitted to construct infrastructure on public land and take rights over private land. In addition to these rights, code operators are subject to conditions and restrictions relating to the installation, retention and use of electronic communications apparatus as set out in the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 (SI 2003/2553) made under section 109 of the 2003 Act. Section 109 was amended by the Growth and Infrastructure Act 2013 that enabled changes to be made to these regulations relating to the installation of broadband cabinets and poles, relaxing the notification requirements placed on code operators, as well as the general requirement placed on them to bury new overhead lines underground. Complementary changes were made to planning legislation that enabled the installation of the infrastructure. In 2018 this easing of 2003 regulations will be reversed because the Growth and Infrastructure Act 2013 contains a sunset provision. The Bill will remove the sunset provision.
- 17 In 2013 the government consulted on the proposed planning changes. In response to concerns expressed in the consultation that the removal of prior approval requirements might lead to the

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insensitive siting of cabinets and poles, it was agreed that communications providers and planning authorities would develop and commit to a [code of practice](#) on the siting and appearance of apparatus to safeguard against this. On 5 March 2015 the Minister for the Digital Economy made a written statement announcing the outcome of a review of the operation of the code of practice. The review was conducted by a working group comprising representatives from a range of industry and sector organisations including the Planning Officers Society, English Heritage, the National Parks Authorities, Openreach, Virgin Media and the UK Competitive Trade Association (UKCTA). The working group jointly agreed that overall the code appeared to be working well. The government believes that the planning changes have been proven to work well and that the sunset provision should be removed to allow continued rollout of superfast broadband and future technologies.

- 18 The Bill also contains a number of measures relating to spectrum. Spectrum is the term generally given to the electromagnetic frequency range from 3kHz to 300GHz, considered the part of the electromagnetic spectrum that can be used for wireless communication. The government considers that making better use of spectrum is essential to facilitate the development of the United Kingdom's digital communications infrastructure. Spectrum is national asset owned by the government, which is then licensed by Ofcom to a wide range of civil uses. In addition and separate from its role as the independent telecommunications regulator, Parliament has tasked Ofcom with managing and granting rights of use in relation to spectrum through duties and obligations under the 2003 Act and the Wireless Telegraphy Act 2006 ("the 2006 Act"). The Bill implements a number of measures that were first announced in the 2013 strategy paper, [Connectivity, content and consumers: Britain's digital platform for growth](#).
- 19 White spaces are unused parts of allocated spectrum. These frequencies are not always used at a specific time or in a specific location. They are a technical consequence of the way spectrum bands are allocated, but they are also wasted space. The government is keen that better use is made of white space, and new technologies known as white space devices will share spectrum bands with existing users. This process is known as dynamic spectrum access and it enables white space devices, operating in frequency bands authorised by Ofcom, to connect to geolocation databases which identify when and where spectrum may be available for use. These databases are not regulated under existing legislation. The Bill will allow Ofcom to register and then regulate such database providers so that it is better placed to undertake its spectrum management duties and prevent interference and to help facilitate dynamic spectrum access.
- 20 In most regulated sectors it is normal to require the regulator to have regard to government priorities. For example, Part 5 of the Energy Act 2013 provides for the Secretary of State to set out the strategic priorities, and other main considerations, of the government in formulating its energy policy for Great Britain, and the particular outcomes to be achieved as a result of the implementation of that policy. Ofgem must have regard to the strategic priorities when carrying out regulatory functions; further, the Secretary of State and Ofgem must carry out their respective regulatory functions in the manner each consider is best calculated to further the delivery of the policy outcome. Section 2A of the Water Industry Act 1991 (as amended by section 24 of the Water Act 2014) allows the Secretary of State to publish a statement setting out strategic priorities and objectives for Ofwat in carrying out relevant functions relating wholly or mainly to England (section 2B makes equivalent provision for Wales). Ofwat must carry out those functions in accordance with any such statement. Radio spectrum is a limited resource that needs careful management with increasing demands from technologies dependent on mobile connectivity and it is the government's view that a strategic approach is needed. The Bill makes provision for Ofcom to have regard, when carrying out its radio spectrum functions, to a statement setting out the strategic priorities of the government relating to the management of the radio spectrum.
- 21 Currently, where there is a contravention of a provision, term or limitation of a spectrum licence,

Ofcom can revoke (or vary) the licence or prosecute. In limited circumstances, Ofcom may impose a financial penalty. The government's view is that the current enforcement powers available to Ofcom in relation to such a contravention are not necessarily proportionate or sufficiently flexible in all cases. For example, spectrum licences granted to mobile network operators contain requirements to achieve certain rates of coverage, such as the term in the 900 MHz and 1800 MHz licences requiring 90% coverage of the United Kingdom's landmass by the end of 2017. If these requirements are not met Ofcom's only available sanction is to revoke the licence. The Bill will provide Ofcom with powers to issue financial penalties if matters such as coverage requirements are not satisfied.

Online pornography

- 22 The Conservative Party Manifesto committed the government to measures to restrict access to harmful sexualised content online, by requiring age verification for access to all sites containing pornographic material. In February 2016 the government published [Child Safety Online: Age Verification for Pornography](#), consulting on how to implement the commitment. The government believes that commercial providers of pornography (material designed primarily to cause sexual arousal and stimulation), should have age verification controls in place where it is accessed online in the United Kingdom. The Bill provides for a legal requirement backed by regulation underpinned by civil sanctions. The regulator will be able to maintain a list of non-compliant sites and to provide that list to organisations through whom pornographers may receive payment including payment providers such as credit card companies to enable them to consider whether to withdraw services. Similarly the list can be provided to internet service providers.
- 23 The Bill does not provide for the blocking of non-compliant websites by internet service providers ("ISPs") on the basis that this would not be consistent with the treatment of other harmful or illegal content such as online terrorist material. Rather this approach will sit alongside the existing regimes. Firstly, the systems in place in relation to harmful content on line, for example the multi-stakeholder, voluntary approach underpinned by the Internet Watch Foundation, which provides a 'notice and takedown' service to advise ISPs, in partnership with the police, to remove this criminal content relating to children. Secondly, the major ISPs, covering 90% of the market, provide optional family friendly filters that are free to customers, and filter out a variety of potentially harmful or unsuitable content. Account holders (who must be over 18) are able to customise the settings of these filters, or indeed turn them off.

Intellectual property

- 24 The Conservative Party Manifesto committed to protect intellectual property and to make Britain the best place in Europe to innovate, patent new ideas and set up and expand a business. The Bill contains a number of intellectual property measures to support creative industries.
- 25 The main 'physical' criminal copyright offences in the Copyright, Designs and Patents Act 1988 ("the 1988 Act") carry a ten-year maximum custodial sentence but the provisions governing online infringement, introduced using secondary legislation in 2003 in the course of implementing the Information Society Directive 2001/29/EC, provide for a maximum two-year sentence. In March 2015 the government published [Penalty Fair?](#), a study of criminal sanctions for copyright infringement available under the 1988 Act. This recommended that the offence for online copyrights infringement was increased to achieve parity with physical copyright infringement. In July 2015 the government published a [consultation on changes to the penalties for online copyright infringement](#). On 21 April 2016 the government published a response to the consultation announcing its intention to legislate to increase the maximum sentence for online copyright infringement to ten years, achieving parity with the physical offence, and also to re-draft the offence to address wider concerns about the offence provisions themselves. The Bill will implement the necessary changes.

- 26 Currently, registered design owners can stamp or label their products with the word ‘registered’ and the relevant registered design numbers in order to ensure that anyone who infringes the design cannot later claim they were unaware of the registration, and so be excused from paying damages to the owner. The optional marking of a product in this way to make others aware of the intellectual property protection afforded to the product is sometimes called providing “constructive notice”. Multiple rights may subsist in a single product, which may lapse or be revoked at different points in time. It is an offence to represent falsely that a design in any product is a registered design. Re-marking products when the details change in one right is very costly, both in terms of time and money. In July 2015 the government published a [Call for Evidence](#) on a proposal to introduce an option for design owners to mark their products with a relevant website address as a way of providing public notice of their intellectual property rights. The Bill will amend the Registered Designs Act 1949 to provide design owners with the option of marking a product with the address of a website which links the product with the relevant registered design numbers as an alternative way of providing constructive notice.
- 27 Section 73 of the 1988 Act exempts cable platforms, such as Virgin Media, from paying copyright licence fees to retransmit the core public service broadcaster channels, such as ITV1. The provision exists to support the specific policy objective of supporting the development of cable television infrastructure in the 1980s and 1990s. In March 2015 the government published: [The balance of payments between television platforms and public service broadcasters: Options for deregulation](#), consulting on, amongst other things, repealing section 73. It was proposed that the measure was no longer relevant with the development of multi-channel and digital TV on satellite, terrestrial and increasingly internet based platforms. The Bill repeals section 73. In the government’s view, with over 4.5 million cable subscribers across the country, many of whom use the service for far more than just television, the objective of developing cable infrastructure is now met through other legislative measures such as reform of the electronic communications code – as above. Additionally under section 272 of the 2003 Act public service broadcasters must offer channels without charge so the legislation is no longer necessary. The repeal also removes a loophole that is relied upon by internet based live-streaming services who profit by retransmitting public service broadcaster content over the internet, substituting their own advertisements. See *ITV Broadcasting Limited and others v TV Catchup Limited and others* [2015] EWCA Civ 204, which has now been referred to the Court of Justice of the European Union for a second time.

Digital Government

- 28 In November 2012 the previous government published the [Government Digital Strategy](#) setting out the objective of delivering government services as “digital by default”. The government’s view was that the public increasingly expects to access services quickly and conveniently, at times and in ways that suit them, often online. The strategy identified that up to that point, government had been hindered in delivering better services because of a reliance on digitised versions of pre-digital business processes, layered on top of legacy IT systems, some of which are over 30 years old. It was stated that out-dated back-end systems prevented effective data sharing.
- 29 In 2013 government started on a two year programme of open policy making to find a way of overcoming the legal barriers to the better delivery of public services, better research and better statistics (www.datasharing.org.uk). In February 2016 this process culminated in the government’s publication of [Better Use of Data in Government](#), consulting on proposed reforms. The Bill provides the necessary legal framework to enable data sharing for a public benefit and will be a key enabler for the government transformation plan, that sets out in more detail how the government intends to deliver transformed public services over the lifetime of this Parliament.

Public Service Delivery

- 30 For a public authority to access information held in another part of the public sector it requires

appropriate legal powers, which are often provided by express legal gateways to disclose information. The government believes that the current legal landscape of data sharing for public service delivery is unduly complex and inconsistent across public services and organisations. This may hinder the ability of public authorities to offer citizens timely and appropriate interventions and to respond quickly to a changing social and policy environment.

- 31 The Bill provides a single gateway to enable public authorities, specified by regulation, to share personal information for tightly constrained reasons agreed by Parliament, where its purpose is to improve the welfare of the individual in question. To use the gateway, the proposed sharing of information must be for the purpose of one of the specified objectives, which will be set out in regulations.
- 32 The government is publishing draft regulations to demonstrate examples of the type of information sharing objectives that are envisaged and these are summarised in Annex B of these notes. The Annex also lists the public authorities who are likely to be specified in regulations, permitting them to use the power.

Civil registration

- 33 The Bill also provides a data gateway for civil registration information in England and Wales. Most transactions to prove eligibility for public services still rely on individuals providing paper birth, marriage, civil partnership and death certificates as evidence. The Bill will allow for electronic verification between public authorities and the General Registry Office, removing reliance on paper certificates. The government's view is that this will also reduce the risk of fraud in relation to forged or altered certificates. Further, the Bill will enable access to civil registration data like births, deaths and marriages so that public authorities do not send letters to people who are deceased.

Debt and Fraud

- 34 The government is seeking to help individuals manage their debt to the public sector more effectively. The Bill will allow public authorities to pilot projects enabling information to be shared between specified persons to help improve efficiency, and create a more informed view of a customer's individual circumstances, and their ability to pay.
- 35 Government agencies work to detect and prevent losses to the public sector from fraudulent activity. The Bill will provide the ability for public authorities to pilot arrangements to enable the sharing of information between specified persons to spot conflicting information across different public services that could suggest patterns of fraud for further investigation by officials.

Research and Statistics

- 36 Official statistics produced by the Office for National Statistics ("ONS") are intended to support the development of economic and public policy and inform public and commercial decision-makers. The Bill provides ONS with access to administrative data from across government and businesses. The government's view is that this will provide more accurate, frequent and timely statistics, instead of relying on surveys.
- 37 The Bill will also provide for the use of de-identified (de-personalised) data to support accredited researchers to access and link data in secure facilities to carry out research for public benefit.

Data Protection

- 38 The digital government measures in the Bill are aligned to the "Data Protection Principles" set out in Schedule 1 to the Data Protection Act 1998, in particular that the sharing or linking of data should be proportionate, (i.e. that the minimum amount and type of data necessary is used), and purposive - that the powers are constrained so that there are specific purposes for which data can be disclosed. The Bill provides that information cannot be disclosed under the powers if it

contravenes the Data Protection Act or is prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000. The Bill provides a new criminal offence for unlawful disclosure, and to further protect HMRC tax data once it has left the department, HMRC has continuing controls over their data shared under these powers.

- 39 Powers to create new information sharing objectives for public service delivery are limited by the Bill in that they must demonstrate that information is needed to improve a public service provided to individuals, or facilitate provision of a benefit to an individual. The objective must have as its purpose the improvement of the well-being of citizens. There is also a statutory duty to consult with the Information Commissioner, HMRC and others.

Ofcom and other regulation

Ofcom reports and information

- 40 Ofcom already has several powers to require communication providers to provide information for various purposes, in particular the power in section 135 of the 2003 Act that allows it to collect information for the purpose of fulfilling its regulatory function in respect of electronic communication services. The powers are limited and in particular Ofcom can only require communications providers to make data publicly available themselves for specific purposes such as consumer protection, but not to promote competition. Ofcom can publish information on its own website but it is limited in its ability to release information directly to third parties, such as price comparison websites. Further, a provider is not obliged to give Ofcom information that it does not presently have, either because it has not collected the information, or having collected it, has not retained it. The Bill will provide Ofcom with a broader information collection power that the government envisages could be used to obtain address-level data on broadband line speeds, in formats suitable for third party intermediaries to use to present comparisons; and for Ofcom to use for monitoring speed prediction accuracy. This could address one of the key problems consumers face: that providers only advertise estimated broadband speeds within wide ranges, often only at postcode level and the speed can vary significantly where premises are further down the road from the nearest curbside cabinet
- 41 In addition to this new information gathering power, the Bill will also amend some of Ofcom's existing powers to collect information. Ofcom's general information gathering power in section 135 of the 2003 Act will be widened to enable them to access customer experience data held by communications providers to ensure visibility of metrics such as the number of complaints received and the time taken to be resolved. Ofcom's power to publish reports on the state of the country's communications infrastructure every three years under section 134A, as inserted by the Digital Economy Act 2010, will be added to so that Ofcom can report more frequently where necessary in fast developing areas such as 4G coverage where the government has a target of achieving 90% coverage by the end of 2017. The Bill will also give Ofcom the power to publish comparative data that it already collected under section 136, and which the government believes could aid the consumer in determining which provider is offering a higher quality product.

Ofcom appeals

- 42 Sections 192 to 196 of the 2003 Act set out the rights of appeal against the majority of Ofcom's decisions regarding the regulation of electronic communications networks, services and spectrum. These provisions also apply to appeals against Ofcom's decisions in respect of radio and television regulation that are made under powers in the Broadcasting Act 1990, the Broadcasting Act 1996 and Part 3 of the 2003 Act for a competition purpose. These appeals are heard by the Competition Appeal Tribunal ("the CAT"), which the 2003 Act requires to carry out a review of Ofcom's decisions "on the merits". In the case of appeals against price control decisions, the CAT must refer the case to the Competition and Markets Authority ("the CMA") and then decide the matter in accordance with the determination of the CMA.

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- 43 The government believes that the existing “on the merits” standard of review is overly burdensome. A 2013 analysis by the Department for Business, Innovation & Skills found that the average length of an appeal to the CAT reviewed “on the merits” was 11 months. The high costs of continuing litigation and subsequent delays in the regulatory regime can hinder effective regulation that must be able to keep pace with technological advances in the sector. The CAT itself has stressed “an appeal before the Tribunal is not a *de novo* hearing” (BT v Ofcom [2015] CAT 6). The government therefore wishes to ensure that this is clearer in legislation. A judicial review standard will ensure that appellants can still challenge Ofcom’s decisions, but litigants will no longer be able to seek complete reappraisals of Ofcom’s fair decision making.
- 44 Regulation of the telecommunications sector in the United Kingdom must comply with the Framework Directive (2002/21/EC) for electronic communications. Article 4 of the Framework Directive requires Member States to provide a right of appeal for any user or network or service provider that is affected by a decision of the national regulatory authority to an appeal body. Member States must ensure that “*the merits of the case are duly taken into account and that there is an effective appeal mechanism*”. The government’s view is that the requirement for the CAT to decide appeals “on the merits” goes further than is required by Article 4, and that a judicial review standard of appeal would be more appropriate. The intensity of judicial review is flexible, dependent on the circumstances, and can therefore duly take into account the merits of the case as required by the Framework Directive.
- 45 There is precedent for regulatory appeals to be decided on a judicial review standard. Section 120 of the Enterprise Act 2002 provides a right of review to the CAT of certain decisions of Ofcom, the Secretary of State or the Competition and Markets Authority in relation to mergers. The CAT is required to determine the application by applying the same principles as would be applied by a court on an application for judicial review. Similarly section 57 of the Postal Services Act 2011 provides for an appeal against Ofcom decisions on a judicial review standard.
- 46 There have been three consultations on this issue since 2010. Most recently, in June 2013 the Department for Business, Innovation & Skills published a consultation entitled [Streamlining Regulatory and Competition Appeals](#), consulting on a range of reforms to the regulatory system, including the option of changing the basis of appeals under the 2003 Act to a judicial review standard. The Bill will now implement this reform.

Regulation and functions of the BBC

- 47 On 12 May 2016 the government published the white paper: [A BBC for the future: a broadcaster of distinction](#), in which it was announced that Ofcom would be appointed as the external independent regulator of the BBC, as recommended by the independent review by Sir David Clementi. Section 198 of the 2003 Act provides that it will be a function of Ofcom, to the extent set out in the BBC’s Royal Charter and Framework Agreement between the BBC and the Secretary of State, to regulate the BBC’s services. The ‘BBC’s services’, as set out by the Act, do not cover all of the activities of the BBC, in particular, the BBC’s commercial services, online activities and the World Service. The Bill amends section 198 so that Ofcom can regulate all of the BBC’s activities. This is an enabling measure and the detail of what functions Ofcom will be required to carry out will be set out in the Charter and Framework Agreement.
- 48 As part the summer 2015 [agreement](#) between the government and the BBC, the BBC agreed to cover the full costs of the so-called ‘over-75s TV licence concession’ and to take on responsibility for the concession from 2020. The concession provides for free television licences (currently funded by the government) for those who have reached a qualifying age, currently set at 75 years. Section 365 of the 2003 Act enables the Secretary of State to make provision for concessions in relation to the payment of the licence fee, which may take the form of exemptions from payment or of reduced rate payments. The Secretary of State exercises the function of conferring

concessions by making regulations. The Bill transfers to the BBC the function of making provision for a concession by reference to age (for persons who are aged 65 or over) to the BBC. The Secretary of State will retain the power to make provision for all other concessions as set out in the 2003 Act.

Direct marketing code

- 49 The Bill contains measures that the government believes will contribute to reducing the number of unwanted direct marketing telephone calls. The Information Commissioner's [direct marketing guidance](#) sets out best practice to ensure that the law is complied with. The Bill will put this guidance on a statutory footing by requiring the Information Commissioner to issue a statutory code of practice on direct marketing. It is the government's view that this will make it easier for the Information Commissioner to take enforcement action against those organisations in breach of the direct marketing rules under the Data Protection Act 1998 and the Privacy and Electronic Communications Regulations 2003 (SI 2003/2426) ("PECR").
- 50 Direct marketing without consent from targeted consumers is an offence under PECR. Consent for direct marketing does not last indefinitely and in PECR consent is referred to as only being given 'for the time being'. The Information Commissioner's direct marketing guidance is that if an organisation is making contact by telephone, text or email for the first time it should not, in most circumstances, rely on any indirect (third party) consent given more than six months ago, even if the consent did clearly cover that organisation. The Commissioner frequently sees situations where third party consent is taken to last indefinitely and to apply to any number of different companies and products. Fines imposed may be challenged and where the quality of consent is a core issue, enforcement has proven difficult to sustain. The Bill will aid enforcement of the regulations.

Ofcom miscellaneous

- 51 The government believes that economic regulators should be independent from government and funded by industry. Ofcom is largely funded through fees from industry for regulating broadcasting, postal services and communications networks. Additionally Ofcom is funded by government to perform statutory duties that do not permit the raising of fees or charges from industry, such as its duty to tackle silent and abandoned calls. Ofcom is prohibited from charging fees to cover these costs. As referred to above, Ofcom is also tasked with managing and granting rights of use in relation to spectrum and levies fees and charges on those who use the radio spectrum under the 2006 Act. In 2014/15 there were 79,910 2006 Act licences in issue, covering a wide range of frequencies, technologies and methods of use. Ofcom collects the money raised from these licences and pays it to into the Consolidated Fund. The government returns approximately £50m of these receipts as grant in aid to Ofcom to fund its spectrum management and other activities. The Bill will allow Ofcom to cover all its non-fee raising activities from spectrum management receipts and then only return the net proceeds to government. This will not increase costs or fees (other than for satellite filings – see below) but will create an accounting mechanism that allows Ofcom to be fully independent
- 52 The Bill will enable Ofcom to recover fees from satellite operators for the satellite filings made to the International Telecommunications Union, the United Nations agency for information and communication technologies. Satellite filings facilitate equitable access to and rational use of the natural resources of the radio-frequency spectrum and the geostationary-satellite orbit. The International Telecommunications Union manage this through the maintenance of a Master International Frequency Register so that frequency assignments and any associated orbits obtain international recognition and there is less chance of interference. Ofcom's existing powers to charge fees do not currently cover satellite filings so they provide this service free of charge, with the cost of filings being covered by public money. The Bill will correct this anomaly, allowing Ofcom to charge, as is already the case for regulators in many other countries who charge for

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providing this type of service.

- 53 The Scotland Act 2016 implemented the [Smith Commission Agreement](#), which was published in November 2014 having gained all-party agreement in Scotland. The Smith Commission Agreement provided that Scottish Ministers should have the power to appoint a member to the Ofcom Board, Ofcom should lay its annual report and accounts before the Scottish Parliament and Ofcom to submit reports to, and appear before, committees of the Scottish Parliament. Sections 65 and 66 of the Scotland Act 2016 have implemented this. The government has agreed with the Welsh Government and the Northern Ireland Executive to make equivalent provision for those jurisdictions. This Bill makes provision for Northern Ireland. Clause 50 of the Wales Bill as introduced to the House of Commons on 7 June 2016 makes equivalent for provision for Wales.

Legal background

- 54 In February 2002 the European Parliament and the Council of Ministers adopted four Directives, which set out a package of measures for a common regulatory framework for electronic communications networks and services. The Framework Directive (2002/21/EC) is the overarching Directive dealing with electronic communications. It sets out principles that apply across all the specific Directives. The Access Directive (2002/19/EC) regulates access to, and interconnection of, electronic communications networks and associated facilities. The Authorisation Directive (2002/20/EC) deals with requirements electronic communication networks and services must satisfy to operate legally in a Member State. The Universal Service Directive (2002/22/EC) sets out the universal service obligations Member States are required to ensure are available and specifies particular roles/functions for the Member State and the national regulator. These Directives were given effect in the United Kingdom through the 2003 Act.
- 55 Ofcom is the communications regulator in the United Kingdom. Ofcom is established under the Office of Communications Act 2002. Ofcom's powers are found in the 2003 Act and the 2006 Act as well as the Broadcasting Act 1990 and the Broadcasting Act 1996.
- 56 The Bill amends Ofcom's powers to set general conditions on communication providers, to report and collect information and to regulate the BBC. All of these powers relate to the 2003 Act. The Bill also amends Ofcom's powers to manage electromagnetic spectrum and these powers relate to the 2006 Act.
- 57 The existing electronic communications code is found in the Telecommunications Act 1984. The Bill replaces it with a new code that is to be inserted into the 2003 Act.
- 58 Presently online pornography that amounts to R18 certificated material and is accessible to children is potentially captured by the Obscene Publications Act 1959 regime, although whether a prosecution is required will fall to be considered on a case-by-case basis. The regime for the classification of films is set out in the Video Recordings Act 1984. On-demand programme services are regulated under Part 4A of the 2003 Act; for example, an on-demand programme service must not contain any R18 material, material that would have received such a certificate, or any material that might seriously impair the physical, mental or moral development of persons under the age of 18, unless there are effective age-verification controls to ensure the person seeing or hearing it is 18 or over.
- 59 Currently the legal framework around data sharing is found across a disparate range of statutory provisions, conferring specific powers to share information in particular circumstances. The Bill contains a new statutory framework enabling data to be shared for particular purposes, introducing new offences for misuse of information shared under these powers.
- 60 The new powers to disclose information to gas and electricity suppliers relate to fuel poverty. The

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Warm Homes and Energy Conservation Act 2000 sets out the legislative framework for addressing fuel poverty in England and Wales. For the purposes of that Act, a person is to be regarded as "living in fuel poverty" if they are a member of a household living on a lower income in a home which cannot be kept warm at reasonable cost.

- 61 The Bill inserts a new data sharing power, enabling disclosure of civil registration data to public authorities, into the Registration Services Act 1953 and amends that Act to provide that a charge for disclosure of information under the new power may be made. The Registration Services Act 1953 sets out the structure of the registration service, establishes the office of the Registrar General and provides for functions relating to all registration areas. Responsibility for delivery of civil registration services in England and Wales is split between central and local government. The other principal Acts governing registration are the Marriage Act 1949, Births and Deaths Registration Act 1953, Civil Partnership Act 2004 and Marriage (Same Sex Couples) Act 2013 which contain detailed provision in relation to each of the relevant areas.
- 62 The new powers to disclose information to the Statistics Board amend the Statistics and Registration Services Act 2007 that established the Board.
- 63 The Data Protection Act 1998 regulates the processing of personal data, including data used by direct marketing businesses. It was enacted principally for the purpose of transposing the Data Protection Directive (95/46/EC). The PECR implement the E-privacy Directive (2002/58/EC). The PECR provide detailed privacy rules in relation to the developing area of electronic communications.

Territorial extent and application

- 64 Schedule 1 of the Bill concerns the electronic communications code and extends to the whole of the United Kingdom. Telecommunications is a reserved matter. The code will provide for disputes to be settled by the Sheriff Court in Scotland and the County Court in Northern Ireland but also provides powers for the Secretary of State to in future transfer these matters to the Lands Tribunal for Scotland and the Lands Tribunal in Northern Ireland respectively. Powers to make fees and rules for land tribunals is generally within the devolved competence of Scottish ministers and Northern Ireland ministers. The Bill provides Scottish ministers with additional powers to set tribunal fees and rules in relation to the code and since this will alter the executive competence of the Scottish ministers, legislative consent will be required for this measure from the Scottish Parliament. The Bill does not provide equivalent powers for Northern Ireland because adequate powers already exist on the statute book.
- 65 Clauses 30 and 31 provide powers for the disclosure of information to and from gas suppliers licensed under the Gas Act 1986 and electricity suppliers licensed under the Electricity Act 1989. The licensing regime under those Acts does not extend to Northern Ireland. Legislative competence in respect of gas and electricity, with some exceptions, has been transferred to the Northern Ireland Assembly. Clauses 30 and 31 only extend to England, Wales and Scotland. These provisions relate to matters concerning energy and fuel poverty, some of which is devolved to the Scottish Parliament and the National Assembly for Wales so they will require legislative consent to be obtained from those devolved legislatures.
- 66 Clause 38 provides powers for civil registration officials to disclose certain information to other public authorities. Legislative competence in respect of civil registration has been devolved to the Scottish Parliament and the Northern Ireland Assembly, but not under the Government of Wales Act 2006. The new powers only extend to England and Wales with the exception of provisions enabling consequential amendments that extend to the whole of the United Kingdom but do not make any change to the law in Scotland or Northern Ireland. The powers might be used by a registration official in England and Wales to share registration data with a department or public authority performing reserved functions in Scotland, and there may also be good reason for a devolved body in Scotland or Northern Ireland to receive such information. The Bill does not, however, provide for sharing with devolved public authorities in Scotland and Northern Ireland but there is the power to add such bodies by regulation in future.
- 67 Other than clauses 30, 31 and 38, the remainder of Part 5 applies to the whole of the United Kingdom. Public authorities that may be authorised by regulation to share information may include public authorities with devolved functions. Many of these provisions relate to matters devolved to the Scottish Parliament, the Northern Ireland Assembly and the National Assembly for Wales so they will require legislative consent to be obtained from those devolved legislatures.
- 68 Clause 78 provides the Northern Ireland Executive with the power to appoint a member of the Ofcom board and a requirement for Ofcom to lay its annual report and accounts before Northern Ireland ministers, who shall then lay them before the Northern Ireland Assembly. This provision will require legislative consent from the Northern Ireland Assembly.
- 69 All of the remaining provisions in the Bill extend and apply to the whole of the United Kingdom. In the view of the UK Government, all the remaining provisions of the Bill are not within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly.
- 70 If there are amendments relating to matters within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly, the consent of the relevant devolved legislature(s) will be sought for the amendments.

71 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom. The table also summarises the position regarding legislative consent motions and matters relevant to Standing Orders Nos. 83J to 83X of the Standing Orders of the House of Commons relating to Public Business.

Commentary on provisions of Bill

Part 1: Access to Digital Services

Clause 1: Universal service broadband obligations

- 72 Section 65 of the 2003 Act provides powers to make an order specifying the services that fall within the scope of the Universal Service Obligation. This clause inserts new subsections into section 65 of the 2003 Act clarifying the government's powers to include broadband within the scope of universal service.
- 73 This clause also inserts a new section 72A into the 2003 Act which gives the Secretary of State the power to require Ofcom to review the broadband USO, as appropriate, to ensure that in future it continues to reflect connectivity needs, including whether the minimum speed needs to be updated.

Clause 2: General conditions: switching communications provider

- 74 Section 51 of the 2003 Act provides Ofcom with powers to set general conditions that apply to communications providers. In particular, section 51(1)(a) enables Ofcom to set conditions for protecting the interests of end-users of public electronic communications services and subsection (2) provides examples of the purposes for which conditions protecting the interests of end-users may be made. This clause amends section 51 by inserting new subsection (2)(i) which makes it explicit that the scope of Ofcom's powers to set general conditions includes the power to require communications providers to adhere to arrangements and processes to facilitate an end-user changing communications provider on request, including but not limited to gaining-provider led processes.

Clause 3: Automatic compensation for failure to meet performance standards

- 75 Section 51 of the 2003 Act provides Ofcom with powers to set general conditions that apply to communication providers. In particular, section 51(1)(a) enables Ofcom to set conditions for protecting the interests of end-users of public electronic communications services and subsection (2) provides examples of the purposes for which conditions protecting the interests of end-users may be made. This clause amends section 51 of the 2003 Act by inserting new subsection 2(da) making explicit the scope of Ofcom's power to set a condition requiring the payment of compensation by communications providers to end-users – communications providers may be required to pay compensation to an end-user where they fail to meet a specified standard or obligation.

Part 2: Digital infrastructure

Clause 4: The electronic communications code

- 76 This clause repeals the Telecommunications Code in schedule 2 to the Telecommunications Act 1984 and inserts a new Schedule 3A to the 2003 Act, containing the electronic communications code.
- 77 *Subsections (4) to (9)*, make consequential amendments to section 106 of the 2003 Act, substituting the term "conduit system", which is not used in the new code, with "system of infrastructure".
- 78 *Subsection (10)* introduces Schedule 2 to the Bill, which contains transitional provision, and Schedule 3 to the Bill, which contains consequential amendments.

Clause 5: Power to make transitional provision in connection with the code

- 79 *Subsection (1)* confers a regulation-making power on the Secretary of State to make amendments

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related to any transitional provisions in connection with the code coming into force. *Subsection (2)* provides that the power can be used to amend any legislation, including primary legislation, passed until the end of the Parliamentary Session in which the Act is passed. Where the power is used to amend primary legislation, *subsection (3)(a)* provides that the affirmative procedure will be required. Otherwise the negative procedure is applied, as provided for by *subsection (3)(b)*.

Clause 6: Power to make consequential provision etc in connection with the code

80 Schedule 3 to the Bill provides for consequential amendments that stem from the new code in Schedule 1. This clause confers a regulation-making power on the Secretary of State to make further consequential amendments connected to the new electronic communications code, should they be needed. Under *subsection (2)*, this power can be used to amend any legislation, including primary legislation, passed until the end of the Parliamentary Session in which the Act is passed. Where the power is used to amend primary legislation, *subsection (5)* provides that the affirmative procedure will be required. Otherwise the negative procedure is applied, as provided for by *subsection (6)*.

Clause 7: Application of the code: protection of the environment

81 This clause amends section 109 of the 2003 Act so that regulations made where the Secretary of State has had regard to section 109(2)(b) (the need to protect the environment), the Secretary of State will be treated as having complied with any duty imposed in connection with that exercise of that power by the legislation set out in section 109(2B).

Clause 8: Regulation of dynamic spectrum access services

82 This clause inserts new Part 2A into the 2006 Act, to allow Ofcom to regulate spectrum that is used through new technologies that enable “dynamic spectrum access”. Dynamic spectrum access services are provided by means of a database that allows the identification of frequencies available for use by radio equipment known as white space devices in spectrum bands authorised by Ofcom.

83 New section 53A provides that a person who provides, or proposes to provide, a dynamic spectrum access service may be registered by Ofcom. It requires Ofcom to publish criteria by which they will determine if an application for registration should be accepted and also to publish information relating to the restrictions and conditions to which registration may be subject. *Subsection (5)* enables Ofcom to set the time period for which a registration will be valid, and apply any restrictions and conditions as Ofcom see fit. *Subsection (6)* provides that any restrictions and conditions in *subsection (5)* must be set out in a written notice given to the person registered. *Subsection (7)* provides a definition of ‘dynamic spectrum access service’, which is a service providing information about the availability for use by wireless telegraphy stations and wireless telegraphy apparatus of frequencies that fall within a frequency band specified in regulations made by Ofcom, and the places in which, power at which, times when and any conditions subject to which such stations and apparatus may use such frequencies.

84 New section 53B gives Ofcom power to revoke or vary a registration. *Subsections (1) and (2)* identify the procedure by which Ofcom may revoke or vary a registration. *Subsection (2)* does not apply if the proposal to vary or revoke is made at the request of or with the consent of the registered person in section 53A. *Subsection (4)* confirms that nothing in section 53B applies in relation to a notification given under section 53E (Notification of a contravention of registration restrictions or conditions) or a decision given under section 53G (Enforcement of notification under section 53E).

85 New section 53C requires Ofcom to establish and maintain a register for the purposes of Part 2A. This should contain the names of the persons registered under section 53A and such other information relating to the registration as Ofcom consider appropriate. *Subsection (3)* provides

that Ofcom may make available such information contained in the register to users or prospective users of dynamic spectrum access services as they consider appropriate.

- 86 New section 53D allows Ofcom to make regulations to provide for Ofcom to charge fees. This will allow Ofcom to recover its costs for registering providers of dynamic spectrum services under section 53A and for activities undertaken on their behalf to facilitate the service they provide, for example, the processing of spectrum availability information etc. Subsection (2) ensures that Ofcom may only charge fees to recover costs where the activities to which a charge is applied are not covered or met by other charging requirements. Subsection (3) requires any sum payable to Ofcom to be paid in accordance with the regulations, and recovered by them as necessary.
- 87 New sections 53E-53I concern enforcement where a person contravenes the restrictions or conditions subject to which that person is registered. New section 53E enables Ofcom to give a person a notification where they have reasonable grounds for believing that such a person is contravening or has contravened the restrictions and conditions of a registration made under new section 53A. Subsection (2) details the content of such a notification, including that Ofcom must specify a period during which the person notified has the opportunity to make representations on the notification and the steps that Ofcom considers should be taken to comply with the relevant restriction or condition and remedy the consequences of the contravention. Such a notification must also state if Ofcom is minded to impose a penalty or to suspend or revoke that person's registration.
- 88 New section 53F concerns penalties under section 53E, including making provision as to the penalty that may be specified in relation to a continuing contravention.
- 89 New section 53G details Ofcom's powers in relation to enforcing a notification issued under section 53E. Subsections (1) and (2) provide that where Ofcom has issued a notification under section 53E and the period allowed for the making of representations has expired, it may issue a 'confirmation' decision or inform the person that they are satisfied with their representations and that no further action will be taken. Subsections (3) to (5) describe the procedure for the issuance of a 'confirmation decision' as defined in subsection (2)(a). It is the duty of the person to comply with any requirement imposed by a confirmation decision. Subsection (6) describes how the duty identified in subsection (5) is enforceable by Ofcom. Subsection (7) provides that a penalty imposed by a confirmation decision must be paid to Ofcom and if not paid within the period specified by Ofcom is to be recoverable by them accordingly.
- 90 New section 53H makes provision about the amount of any penalty issued under section 53E. Subsection (1) provides a maximum penalty. Subsections (2) to (4) further describe how the amount in subsection (1) should be calculated. Subsections (5) to (10) allows Ofcom to set out in a statement how the calculations of the penalty in subsection (1) should be made by them, and how such a statement should be published. Subsection (11) provides definitions of 'accounting period' and 'gross revenue'.
- 91 New section 53I allows Ofcom to require a recipient of a notification under section 53E to provide them with information for the purposes of ascertaining their gross revenue.
- 92 New section 53J allows Ofcom to require certain persons, as detailed in subsection (2), to provide information to a person registered under section 53A for the purpose of enabling the registered person to avoid undue interference with wireless telegraphy. Subsections (3) to (4) describe how any such demand for information should be made.
- 93 New section 53K allows Ofcom to issue a notification for contravention of a requirement imposed under 53J. Subsections (2) to (4) describes what such notification should contain; that it can be issued in relation to one, more than one, or for a continuing contravention; and when Ofcom may give a further notification.

- 94 New section 53L makes provision as to penalties under section 53K.
- 95 New section 53M details Ofcom’s powers in relation to enforcing a notification under section 53K. Subsections (1) and (2) provide that where Ofcom has issued a notification under section 53K and the period allowed for the making of representations has expired, it may issue a ‘confirmation decision’ or inform the person that they are satisfied with their representations and that no further action will be taken. Subsections (3) to (5) describe the procedure for the issuance of a ‘confirmation decision’ as defined in subsection (2)(a). It is the duty of the person to comply with any requirement imposed by a confirmation decision. Subsection (6) describes how the duty identified in subsection (5) is enforceable by Ofcom. Subsection (7) requires any penalty payable to Ofcom imposed by a ‘confirmation decision’ to be paid to Ofcom and recovered by them as necessary.
- 96 *Subsection (2)* of this clause amends section 111 of the 2006 Act. Section 111 concerns restrictions on the disclosure of information. Section 111(3) sets out disclosures of information to which the restriction in section 111(1) does not apply. This clause amends section 111(3) to add to the list of exceptions information disclosed by Ofcom to a person registered under section 53A for the purpose of providing the dynamic spectrum access service in respect of which the person is registered. This will allow Ofcom to share such information with registered providers, without needing the consent of the person from whom the information was obtained.

Clause 9: Statement of strategic priorities

- 97 This clause inserts new sections 7A, 7B and 7C into Part 1 of the 2006 Act, enabling the Secretary of State to publish a statement setting out strategic priorities in relation to the management of radio spectrum to which Ofcom must have regard.
- 98 New section 7A gives the Secretary of State a power to designate a statement that sets out the government’s strategic priorities relating to the management of the radio spectrum in the United Kingdom, provided the requirements in section 7C are satisfied. It sets out what else may be set out in the statement. Subsection (4) notes that this section does not restrict the Secretary of State’s direction making powers under Section 5 of this Act, or the 2003 Act. Subsection (5) provides for the amendment or replacement of the strategy and policy statement.
- 99 New section 7B outlines the duties of Ofcom in relation to the statement. Subsection (2) requires the Secretary of State to publish the statement in such manner as the Secretary of State considers appropriate, and to take such steps as the Secretary of State considers appropriate for the purpose of bringing it to Ofcom’s attention. Subsection (3) requires that Ofcom must “have regard” to the statement when carrying out their radio spectrum functions. Subsection (4) confirms that this duty does not affect the obligation of Ofcom to comply with any other duty or requirement. Subsection (5) allows the Secretary of State to require Ofcom to explain how they propose to comply with their duty to “have regard” to the statement and to publish a copy of that explanation. Subsection (6) requires the Secretary of State to lay a copy of Ofcom’s explanation before Parliament.
- 100 New section 7C details the parliamentary procedure that applies to a statement that the Secretary of State may wish to designate as a strategy and policy statement under section 7A.

Clause 10: Penalties for contravention of wireless telegraphy licences

- 101 This clause widens the circumstances in which Ofcom may impose a penalty for contravention of a wireless telegraphy licence. Currently Ofcom has powers to issue penalties in relation to contraventions of a wireless telegraphy licence where (i) the procedure for contraventions by multiplex licence holders in sections 42 and 43 of the 2006 Act apply; or (ii) the procedure in section 43A has been applied as a result of a direction by the Secretary of State.

102 *Subsections (2)-(4)* amend section 42 of the 2006 Act and the heading to that section. *Subsection (2)* amends section 42 so that Ofcom's power to impose a penalty under section 42 applies where a person is or has been in contravention in any respect of the terms, provisions or limitations of a wireless telegraphy licence. *Subsection (3)* inserts a definition of "relevant multiplex contravention".

103 *Subsections (5) to (7)* amend section 43. *Subsection (6)* inserts new subsection (2A) into section 43. This specifies the amount of a penalty imposed under section 42 for a contravention that is not a relevant multiplex contravention. The amount of a penalty for a relevant multiplex contravention is dealt with in section 43(1) and (2).

104 *Subsection (8)* repeals section 43A. *Subsection (11)* repeals section 39 of the Digital Economy Act 2010 (which inserted section 43A into the 2006 Act).

Clause 11: Fixed penalties under Wireless Telegraphy Act 2006

105 Paragraph 4 of Schedule 4 to the 2006 Act sets out the content of a fixed penalty notice.

Subparagraph (2)(a) defines the period of time in which enforcement action is suspended to allow the alleged offender an opportunity to pay the fixed penalty. This clause amends the period of time from 'one month' to '28 days'.

Clause 12: Search warrants under Wireless Telegraphy Act 2006

106 Section 97 of the 2006 Act makes provision for Ofcom's powers of entry, search and seizure. Subsection 97(3) defines the 'relevant period' for which a search warrant may be used.

107 This clause amends the definition of 'relevant period' under subsection 97(3) so that a search warrant is valid from when it is granted, and ends three months after the end of the day on which the warrant is granted. It will enable Ofcom to enter and search a property from the time that the warrant is issued or at any time until the end of a three-month period running from the end of that day.

Clause 13: Disposal of seized property under Wireless Telegraphy Act 2006

108 Section 101 of the 2006 Act makes provision for the detention and disposal of property that has been seized by Ofcom, or by a person authorised by Ofcom. Subsection 101(5) sets out the period of time, following the end of the detention period authorised by subsection 101(2), after which Ofcom may dispose of property that remains in their possession.

109 This clause replaces current subsection 101(5), providing for a shorter time period than is currently required. Under the new subsection (5) the time period that Ofcom is required to retain the property is reduced from one year to 6 months following the end of the detention period authorised by section 101(2)(a), or, if section 101(2)(b) applies, the end of the day on which the proceedings referred to in section 101(2)(b) were concluded.

Clause 14: Time limits for prosecutions under Wireless Telegraphy Act 2006

110 This clause inserts new subsections (3A), (3B) and (3C) into section 107 of the 2006 Act and extends the time limits for bringing proceedings for those summary offences listed in subsection (3B) (for which the current time limit is six months). The 2006 Act will be amended so that the time limit for bringing proceedings for those summary offences listed in new subsection (3B) will be one year from the end of the day on which the prosecutor becomes aware of evidence which he or she considered sufficient to justify a prosecution for the offence, or, if earlier, three years from the end of the day on which the offence was committed.

Part 3: Online pornography

Clause 15: Internet pornography: requirement to prevent access by persons under the age of 18

111 This clause provides that a person must not make pornographic material available online to users in the United Kingdom on a commercial basis without sufficient age verification controls in place. The clause provides for guidance to be issued by the age verification regulator (established by clause 17) on acceptable age verification arrangements and on when the manner in which pornography is provided is commercial.

Clause 16: Meaning of “pornographic material”

112 This clause defines ‘pornographic material’.

Clause 17: The age-verification regulator: designation and funding

113 This clause establishes a power for the Secretary of State to designate a person (or persons) as the age verification regulator, and sets out that the Secretary of State may revoke such a designation, and designate an alternative person.

114 *Subsection (4)* provides that the Secretary of State must satisfy himself that a satisfactory appeals regime is in place, and *subsection (6)* states that the Secretary of State may make such grants or loans, as he deems appropriate to the regulator to fund its activities.

Clause 18: Parliamentary procedure for designation of age-verification regulator

115 This clause provides that the Secretary of State must lay the particulars of any designation before both Houses of Parliament, and having done so, must not make the proposed designation until 40 days have elapsed.

Clause 19: Age-verification regulator’s power to require information

116 This clause establishes a power for the regulator to request information from a relevant person (i.e. a person operating a regulated internet service) to enable the regulator to carry out its functions.

Clause 20: Enforcement of sections 15 and 19

117 This clause sets out the enforcement steps available to the age verification regulator if a person has breached the requirement to have age verification controls in place or has not complied with an information requirement.

Clause 21: Financial penalties

118 This clause makes further provision about the financial penalties introduced in clause 20.

119 *Subsection (3)* clarifies how ‘qualifying turnover’ should be determined, and *subsection (8)* requires that penalties received must be paid into the Consolidated Fund.

120 *Subsections (9) to (13)* provide for a requirement for the age verification regulator to publish guidelines about the amounts of financial penalties under clause 20(1) and (10).

Clause 22: Age-verification regulator’s power to give notice of contravention to payment service providers and ancillary service providers

121 This clause enables the regulator to notify payment service providers and ancillary services of those who are in breach of clause 15 or who are making prohibited material available on the internet.

Clause 23: Exercise of functions by the age-verification regulator

122 This clause provides discretion for the regulator to, acting consistently with its guidance, exercise its functions in a targeted way, to those providers of pornography who reach the most people or have large turnovers.

Clause 24: Requirements for notices given by regulator under this Part

123 This clause sets the criteria by which the age verification regulator may give notice to an infringing provider.

Clause 25: Interpretation of this Part

124 This clause explains how (and where) the various terms used in the chapter are defined.

Part 4: Intellectual property

Clause 26: Offences: infringing copyright online and making available right

125 Sections 107 (2A) and 198 (1A) of the 1988 Act currently provide a maximum two-year sentence for online copyright infringement and infringement of a performer's making available right. This clause amends the maximum sentence for both offences to ten years. The offence provisions are also amended to introduce an additional mens rea so that a person must either intend to make a monetary gain for himself or another, or know or have reason to believe that his actions will cause loss to the owner of the right or expose the owner to a risk of loss. The clause also replaces the pre-existing concept of 'prejudicial effect' with more precise notions of "gain" and "loss" in money.

Clause 27: Registered designs: infringement: marking product with Internet link

126 This clause amends the 1949 Act to provide registered design owners with an alternative way of providing notice of their rights. Registered design proprietors would have the ability to mark their products with either the specific registered design number(s) or the web address of a webpage, which clearly associates the product with the relevant registration number(s).

127 *Subsection (3)* makes provision to ensure that the registered design numbers can be looked up on a website free of charge.

Clause 28: Copyright etc. where broadcast retransmitted by cable

128 This clause repeals section 73 of the 1988 Act, which provides that the copyright in the broadcast of public service broadcaster channels (and the copyright in any work included in the broadcast) is not infringed where the broadcast is retransmitted by cable. This amounts to an exemption for cable providers from paying copyright fees to retransmit the core public service broadcaster channels e.g. the BBC, ITV1, Channel 4, Channel 5 and S4C.

Part 5: Digital Government

Chapter 1: Public Service Delivery

Clause 29: Disclosure of information to improve public service delivery

129 This clause provides a permissive gateway that enables specified persons to share information with other specified persons for the purposes of a specified objective. The clause sets out that the definition of specified persons means a person specified, or of a description specified, which will be set out in regulations made by the appropriate national authority. A specified person must be a public authority or a person providing services to a public authority. Where a specified person is a person providing services to a public authority its ability to disclose information is limited to the

functions it exercises for that public authority. In deciding whether to make regulations under *subsection (2)*, the appropriate national authority must consider the provision the person(s) in question have in place to ensure secure handling of information shared. In deciding whether to make regulations which remove a specified person from the list of persons permitted to exercise the power, the appropriate national authority must consider whether the person in question has had regard to the code of practice, which will set out practice to be observed in exercising this power. The clause sets out that a specified objective means an objective specified in regulations made by the appropriate national authority. An objective may be specified by regulations only if it meets the criteria at *subsection (8) and (9)*. The intended interpretation of 'benefit' under *subsection (8)(b)* is the offer or delivery of a service or type of financial assistance that is for the good or advantage of the individual. The 'provision of a benefit' should not result in the loss or withdrawal of a service or type of financial assistance.

Clause 30: Disclosure of information to gas and electricity suppliers

130 This clause allows the persons specified in regulations made under the previous clause to disclose information to licensed gas or electricity suppliers. The disclosure must be for the purpose of reducing the energy costs, or improving energy efficiency or the health or financial well-being of people living in fuel poverty and it must be disclosed for use in connection with an energy supplier obligation scheme. These schemes are the Warm Home Discount (which is made under Part 2 of the Energy Act 2010) and the Energy Company Obligation (which is made under various provisions of the Gas Act 1986 and the Electricity Act 1989). These schemes do not extend to Northern Ireland. Section 142 of the Pensions Act 2008 already enables the disclosure of social security information about persons in receipt of state pension credit in connection with the Warm Home Discount scheme. This has been used to enable electricity suppliers to automatically provide rebates to customers on state pension credit under the Warm Home Discount scheme, without the need for the customers to identify themselves by applying for support. This clause will enable other datasets to be used for the purpose of providing support under the Warm Home Discount and Energy Company Obligation schemes to people living in fuel poverty.

131 Amendments can be made by affirmative regulations to the list of support schemes for which the information may be disclosed and to the list of permitted recipients of the information. The purpose of the disclosure must always be to assist people living in fuel poverty.

Clause 31: Disclosure of information by gas and electricity suppliers

132 This clause allows gas and electricity suppliers (and any other permitted recipient of information under the previous clause) to share information with specified persons, for the purpose of reducing the energy costs of, or improving energy efficiency or the health and financial well-being of people living in fuel poverty. This clause will enable energy suppliers to share details of their customers with the public authority, or with the person providing services to the public authority, who will then be able to 'flag' which of the supplier's customers should be eligible for assistance under the fuel poverty support scheme.

Clause 32: Further provisions about disclosures under section 29, 30 or 31

133 This clause provides that the person receiving the information can only use it for the purpose for which it was disclosed. Unless it meets one of the exceptions set out in *subsection (2)*. The first two exceptions are consistent with conditions for the processing of sensitive personal data set out in the Data Protection Act 1998 that information can be shared if that information is already lawfully in the public domain or if the data subject has given consent to the information being shared. Paragraphs (c) and (d) provide an exemption so that data can be used for the purposes of criminal investigations or civil or criminal legal proceedings. Paragraph (e) sets out the additional exemptions where information can be used to prevent serious physical harm to a person, preventing loss of life, protecting vulnerable adults or children, responding to emergencies or

protecting national security where further action by a public body is necessary in response to the risks identified.

134 This clause also provides a definition of personal information and sets out further conditions on the disclosure and use of personal information. Information cannot be disclosed or used in ways which contravene the Data Protection Act 1998 or if it is prohibited in Part 1 of the Regulation of Investigatory Powers Act.

135 The exceptions do not apply to information disclosed by HM Revenue and Customs unless the Commissioners for HM Revenue and Customs have provided consent. This clause also sets out that information disclosed does not constitute a breach of any obligation of confidence or any other restriction on data disclosure made to the data provider.

136 This clause provides that clauses 29, 30 or 31 do not limit any power to disclose that exists apart from this clause.

Clause 33: Confidentiality of personal information

137 This clause provides safeguards to ensure personal information is only disclosed to appropriate persons and used for appropriate purposes. *Subsection (1)* provides that a person (P) receiving the information under clause 29, 30 or 31 or any other person who receives that information either directly or indirectly from that person (P) cannot disclose that personal information. The limited circumstances when information can be disclosed are set out in *subsection (2)*. Any person who contravenes this prohibition on further disclosure is guilty of an offence under *subsection (3)*. The clause introduces a criminal offence for unlawful disclosure of personal information, which carries a penalty of imprisonment, a fine, or both. *Subsection (4)* sets out that a reasonable belief that the disclosure was lawful is a defence to the offence set out at *subsection (3)*. The new offence is consistent with existing sanctions in the Commissioners for Revenue and Customs Act 2005 and the Statistics and Registration Act 2007. This clause does not apply to personal information disclosed by HM Revenue and Customs under the power at clause 29 or 30. Specific conditions that relate to information disclosed by HM Revenue and Customs are set out in the following clause.

Clause 34: Information disclosed by Her Majesty's Revenue and Customs

138 This clause sets out that a person (P) receiving personal information under clauses 29 or 30 from HM Revenue and Customs, or any other person that receives that information either directly or indirectly from that person (P), cannot disclose that personal information. This restriction on onward disclosure of personal information provided by HM Revenue and Customs does not apply if the Commissioners for HM Revenue and Customs have given general or specific consent to do so. *Subsection (3)* sets out that anyone who breaches this prohibition is guilty of an offence. *Subsection (4)* sets out the defences to the offence under *subsection (3)*. Criminal sanctions set out in section 19 of the Commissioners for Revenue and Customs Act 2005 will apply to an offence under *subsection (3)*.

Clause 35: Code of practice

139 This clause sets out that a code of practice must be issued by the Minister (Secretary of State or the Minister for the Cabinet Office) about the disclosure and use of information under the power. All specified persons disclosing or using information under the power must have regard to the code of practice. Before issuing or reissuing the code of practice, the Minister must consult the Information Commissioner, relevant Ministers in the devolved administrations, the Commissioners for HM Revenue and Customs and other appropriate bodies and persons as the Minister sees fit. *Subsection (3)* permits the relevant Minister to revise and re-issue the code of practice. The code of practice must be laid before Parliament and the relevant bodies in the devolved territories, when it is issued and every time it is reissued.

Clause 36: Regulations under this Chapter

140 This clause sets out that regulations under this Chapter are to be made by statutory instrument, or, in the case of regulations made by the Department of Finance in Northern Ireland, by statutory rule. Before making regulations under this Chapter the appropriate national authority must consult the Information Commissioner, each other person who is an appropriate national authority in relation to regulations under this Chapter, the Commissioners for HM Revenue and Customs and any other persons the appropriate national authority thinks appropriate. The regulations may contain consequential, supplementary, transitional or transitory provisions or savings, and such provision may amend, repeal or revoke any provision of this Chapter or any enactment passed or made before or in the same session as this Act. Regulations made under this Chapter will be subject to the affirmative resolution procedure, which requires the regulations to be approved by both Houses of Parliament. The clause also sets out the procedure for Ministers in the devolved administrations to make regulations under this Chapter.

Clause 37: Interpretation of this Chapter

141 This clause sets out definitions for interpreting this Chapter of the legislation.

Chapter 2: Civil Registration

Clause 38: Disclosure of information by civil registration officials

142 This clause inserts new sections 19AA, 19AB and 19AC, concerning the disclosure of information by civil registration officials, into the Registration Service Act 1953.

143 New section 19AA allows civil registration officials to disclose any information they hold to another registration official or to a specified public authority. Before disclosing any information a civil registration official must ensure that the information is required by a recipient to fulfil one or more of their functions. If there were restrictions in other legislation that prevents disclosure of certain data then the civil registration official would not be able to share that data in those circumstances.

144 New section 19AB specifies the public authorities to which a registration official is able to share data. Subsections (2) – (7) enable the Secretary of State to make regulations to add, modify or remove public authorities from the list and to make different provisions for different purposes. It also sets out the parliamentary procedure for regulations made under this clause. Regulations made under this clause will be subject to the affirmative resolution procedure, which requires the regulations to be approved by both Houses of Parliament.

145 New section 19AC requires the Registrar General to issue a code of practice for civil registration officials to have regard to when considering the disclosure of information under section 19AA. Subsections (3) – (5) enable the Registrar General to revise and re-issue the code of practice having consulted with those listed at sub-paragraph (4). The Registrar General must arrange for the code of practice to be laid before parliament at the point of issue and at any time the code is revised and reissued.

Clause 39: Consequential provision

146 This clause enables the Secretary of State to make regulations to amend, repeal or revoke any provision in any Act, which was passed before or in the same session as this Act as a consequence of the provisions set out in clause 38.

147 Regulations made under this clause, which amend or repeal an Act, will be subject to the affirmative resolution procedure that requires the regulations to be approved by both Houses of Parliament. Any other regulations under this section will be subject to the negative resolution procedure.

Chapter 3: Debt

Clause 40: Disclosure of information to reduce debt owed to the public sector

148 This clause provides a permissive gateway that enables specified persons to share information with other specified persons for the purposes of taking action in connection with debt owed to a specified person or the Crown. The clause provides a definition of a debt for the purposes of this power, and explains what ‘taking action in connection with debt owed a specified person or the Crown’ is, namely identifying and collecting debt, bringing civil proceedings, and taking administrative action as a result of that debt. *Subsection (4)* explains that the ‘specified persons’ permitted to make use of the power provided in the clause will be set out in regulations. A specified person must be a public authority or a person providing services to a public authority. The power to make regulations is conferred on the appropriate national authority. Where a specified person is a person providing services to a public authority its ability to disclose information is limited to the functions it exercises for that public authority. In deciding whether to make regulations under subsection (4), the appropriate national authority must consider the provision the person(s) in question have in place to ensure secure handling of information shared. In deciding whether to make regulations which remove a specified person from the list of persons permitted to exercise the power, the appropriate national authority must consider whether the person in question has had regard to the code of practice, which will set out practice to be observed in exercising this power. *Subsection (8)* sets out consultation requirements in making such regulations.

Clause 41: Further provisions about power in section 40

149 This clause provides that the person receiving the information can only use it for the purpose for which it was disclosed, unless one of the exceptions set out in *subsection (2)* is engaged. The first two exceptions are consistent with conditions for the processing of sensitive personal data set out in the Data Protection Act 1998 that information can be shared if that information is already lawfully in the public domain or if the data subject has given consent to the information being shared. Paragraphs (c) and (d) provide an exemption so that data can be used for the purposes of criminal investigations or civil or criminal legal proceedings. Paragraphs (e) and (f) set out the additional exceptions to the general rule in *subsection (1)*, enabling information to be used for the purposes of protecting vulnerable adults or children, or protecting national security where further action by a public body is necessary in response to information uncovered through use of the data sharing power. The exceptions do not apply to information disclosed by HM Revenue and Customs unless the Commissioners for HM Revenue and Customs have provided consent.

150 This clause also provides a definition of personal information and sets out further conditions on the disclosure and use of personal information. Information cannot be disclosed or used in ways which contravene the Data Protection Act 1998 or if it is prohibited in Part 1 of the Regulation of Investigatory Powers Act. This clause also sets out that information disclosed does not constitute a breach of any obligation of confidence or any other restriction on data disclosure made to the data provider.

151 This clause provides that it does not limit any power to disclose information under clause 40 that exists apart from this clause.

Clause 42: Confidentiality of personal information

152 This clause provides safeguards to ensure personal information is only disclosed to appropriate persons and used for appropriate purposes. *Subsection (1)* provides that a person (P) receiving personal information under the power at clause 40 or any other person who receives that information either directly or indirectly from that person (P) cannot further disclose that personal information. The limited circumstances when information can be disclosed are set out in *subsection*

(2). Any person who contravenes this prohibition on further disclosure is guilty of an offence under *subsection (3)*.

153 This clause introduces a criminal offence for unlawful disclosure, which carries a penalty of imprisonment, a fine or both, consistent with existing sanctions in the Commissioners for Revenue and Customs Act 2005 and the Statistics and Registration Act 2007. *Subsection (4)* sets out that a reasonable belief that the disclosure was lawful is a defence to the offence set out at *subsection (3)*. This clause does not apply to personal information disclosed by HM Revenue and Customs under the power at clause 40. Specific conditions that relate to information disclosed by HM Revenue and Customs are set out in the following clause.

Clause 43: Information disclosed by Her Majesty's Revenue and Customs

154 This clause sets out that a person (P) receiving personal information under clause 40 from HM Revenue and Customs or any other person that receives that information either directly or indirectly from that person (P) cannot disclose that personal information. This restriction on onward disclosure of personal information provided by HM Revenue and Customs does not apply if the Commissioners for HM Revenue and Customs have given general or specific consent to do so. *Subsection (3)* sets out that anyone who breaches this prohibition is guilty of an offence. Criminal sanctions set out in section 19 of the Commissioners for Revenue and Customs Act 2005 will apply for any such unlawful disclosure. *Subsection (4)* sets out the defences to the offence under *subsection (3)*.

Clause 44: Code of practice

155 This clause sets out that a code of practice must be issued by the Minister (Secretary of State or the Minister for the Cabinet Office) about the disclosure and use of information under the power. All specified persons disclosing or using information under the power must have regard to the code of practice. Before issuing or reissuing the code of practice, the Minister must consult the Information Commissioner, relevant Ministers in the devolved administrations, the Commissioners for HM Revenue and Customs and other appropriate bodies and people as the Minister sees fit. *Subsection (3)* permits the relevant Minister to revise and re-issue the code of practice. The code of practice must be laid before Parliament, and the relevant bodies in the devolved territories, when it is issued and every time it is reissued.

Clause 45: Duty to review operation of Chapter

156 This clause sets out that three years after this Chapter comes into force, the relevant Minister must, as soon as is reasonably practicable, carry out a review of the operation of the power to determine whether it should be amended or repealed. Before carrying out the review the Minister must publish criteria against which the determination will be made. In carrying out the review, the Minister is required to consult the Information Commissioner, relevant Ministers from the devolved administrations and other persons as the Minister consider appropriate. Under *subsection (4)*, upon completion of the review, the Minister must publish a report setting out its findings, and have a copy of the report laid before Parliament, and the relevant bodies in the devolved administrations. The clause provides an order-making power for the Minister to amend or repeal the Chapter as a result of the review. The Minister must seek the consent of the HM Treasury before any regulations are made in relation to amending or repealing the Chapter, where the regulations could affect the disclosure of information by Her Majesty's Revenue and Customs.

Clause 46: Regulations under this Chapter

157 This clause sets out that regulations under this Chapter are to be made by statutory instrument, or, in the case of regulations made by the Department of Finance in Northern Ireland, by statutory rule. Before making regulations under this Chapter the appropriate national authority must consult the Information Commissioner, each other person who is an appropriate national

authority in relation to regulations under this Chapter, the Commissioners for HM Revenue and Customs and any other persons the appropriate national authority thinks appropriate. The regulations may contain consequential, supplementary, transitional or transitory provisions or savings, and such provision may amend, repeal or revoke any provision of this Act or any enactment passed or made before or in the same session as this Act. Regulations made under this Chapter will be subject to the affirmative resolution procedure, which requires the regulations to be approved by both Houses of Parliament. The clause also sets out the procedures for Ministers in the devolved administrations to make regulations under this Chapter.

Clause 47: Interpretation of Chapter

158 This clause sets out definitions for interpreting this Chapter of the legislation.

Chapter 4: Fraud against the public sector

Clause 48: Disclosure of information to combat fraud against the public sector

159 This clause provides a permissive gateway, which enables specified persons to share information with other specified persons for the purposes of taking action in connection with fraud against a public authority. The clause provides a definition of ‘fraud against a public authority’ for the purposes of this power, and explains what ‘taking action in connection with fraud against a public authority’ is, namely preventing, detecting, investigating, and prosecuting fraud as defined in this clause, and bringing civil proceedings and taking administrative action as a result of that fraud. *Subsection (4)* explains that the ‘specified persons’ permitted to make use of the power provided in the clause will be set out in regulations. A specified person must be a public authority or a person providing services to a public authority. The power to make regulations is conferred on the appropriate national authority. Where a specified person is a person providing services to a public authority its ability to disclose information is limited to the functions it exercises for that public authority. In deciding whether to make regulations under *subsection (5)*, the appropriate national authority must consider the provision the person(s) in question have in place to ensure secure handling of information shared. In deciding whether to make regulations which remove a specified person from the list of persons permitted to exercise the power, the appropriate national authority must consider whether the person in question has had regard to the code of practice, which will set out practice to be observed in exercising this power. *Subsection (9)* sets out consultation requirements in making such regulations.

Clause 49: Further provisions about power in section 48

160 This clause provides that the public authority or person receiving the information can only use it for the purpose for which it was disclosed, unless one of the exceptions set out in subsection (2) is engaged. The first two exceptions are consistent with conditions for the processing of sensitive personal data set out in the Data Protection Act 1998 that information can be shared if that information is already lawfully in the public domain or if the data subject has given consent to the information being shared. Paragraphs (c) and (d) provide an exemption so that data can be used for the purposes of criminal investigations or civil or criminal legal proceedings. Paragraph (e) set out additional exceptions to the general rule in *subsection (1)*, designed to cover circumstances where it is envisaged that a public authority in receipt of information under the power at clause 48 might need to use information shared for a pressing matter in the public interest or in the interests of an individual’s wellbeing, namely preventing serious physical harm to a person, preventing loss of human life, safeguarding vulnerable adults or children, responding to an emergency, or protecting national security, where further action by a public body is necessary in response to information uncovered through use of the power.

161 The exceptions do not apply to information disclosed by HM Revenue and Customs unless the Commissioners for HM Revenue and Customs have provided consent. *Subsections (4)* and *(5)* also

provide a definition of personal information for the purposes of these provisions. *Subsection (7)* and sets out further conditions on the disclosure and use of personal information, specifically that information cannot be disclosed or used in ways which contravene the Data Protection Act 1998 or if disclosure is prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000. *Subsection (6)* also explains that information disclosed under the permissive power in clause 48 does not constitute a breach of any obligation of confidence or any other restriction on the disclosure of data disclosure.

162 This clause provides that it does not limit any power to disclose information under clause 48 that exists apart from this clause.

Clause 50: Confidentiality of personal information

163 This clause provides safeguards to ensure personal information is only disclosed to appropriate persons and for appropriate purposes. *Subsection (1)* provides that a person (P) receiving personal information under the power at clause 48, or any other person who receives that information either directly or indirectly from that person (P) cannot further disclose that personal information. The limited circumstances when information can be disclosed are set out in *subsection (2)*. Any person who contravenes this prohibition on further disclosure is guilty of an offence under *subsection (3)*.

164 This clause introduces a criminal offence for unlawful disclosure of personal information, which carries a penalty of imprisonment, a fine, or both. *Subsection (4)* sets out that a reasonable belief that the disclosure was lawful is a defence to the offence set out at *subsection (3)*. The new offence is consistent with existing sanctions in the Commissioners for Revenue and Customs Act 2005 and the Statistics and Registration Act 2007. This clause does not apply to personal information disclosed by HM Revenue and Customs under the power at clause 48. Specific conditions that relate to information disclosed by HM Revenue and Customs are set out in the following clause.

Clause 51: Information disclosed by Her Majesty's Revenue and Customs

165 This clause sets out that a person (P) receiving personal information from HM Revenue and Customs under the power at clause 48, or any other person that receives that information either directly or indirectly from that body cannot disclose personal information disclosed under the power. This restriction on onward disclosure of personal information provided by HM Revenue and Customs does not apply if the Commissioners for HM Revenue and Customs have given general or specific consent to do so. *Subsection (3)* sets out that anyone who breaches this prohibition is guilty of an offence. Criminal sanctions set out in section 19 of the Commissioners for Revenue and Customs Act 2005 will apply for any unlawful disclosure *Subsection (4)* sets out the defences to the offence under *subsection (3)*.

Clause 52: Code of practice

166 This clause sets out that a code of practice must be issued by the relevant Minister (Secretary of State or the Minister for the Cabinet Office) setting out principles and guidelines on the disclosure and use of information under the power at clause 48. All specified persons disclosing or using information under the power must have regard to the code of practice. Before issuing or reissuing the code of practice, the Minister must consult the Information Commissioner, relevant Ministers in the devolved administrations, the Commissioners for HM Revenue and Customs and any other appropriate bodies and persons as the Minister sees fit. *Subsection (3)* permits the relevant Minister to revise and re-issue the code of practice. The code of practice must be laid before Parliament, and the relevant bodies in the devolved territories, when it is issued and every time it is reissued.

Clause 53: Duty to review operation of Chapter

167 This clause sets out that three years after this Chapter comes into force, the relevant Minister (Secretary of State or the Minister for the Cabinet Office) must, as soon as is reasonably

practicable, carry out a review of the operation of the power to determine whether it should be amended or repealed. Before carrying out the review the Minister must publish criteria against which the determination will be made. In carrying out the review, the Minister is required to consult the Information Commissioner, relevant Ministers from the devolved administrations and any other persons as the Minister considers appropriate. Following the review, under *subsection (4)*, the Minister must publish a report with its findings, and lay a copy before Parliament, and the relevant bodies in the devolved administrations. The clause provides an order-making power for the Minister to amend or repeal the Chapter. The Minister must seek the consent of the HM Treasury before any regulations are made in relation to amending or repealing this Chapter where such regulations could affect the disclosure of information by Her Majesty's Revenue and Customs.

Clause 54: Regulations under this Chapter

168 This clause sets out that regulations under this Chapter are to be made by statutory instrument or, in the case of regulations made by the Department of Finance in Northern Ireland, by statutory rule. Before making regulations under this Chapter the appropriate national authority must consult the Information Commissioner, each other person who is an appropriate national authority in relation to regulations under this Chapter, the Commissioners for HM Revenue and Customs and any other persons the appropriate national authority thinks appropriate. The regulations may contain consequential, supplementary, transitional or transitory provisions or savings, and such provision may amend, repeal or revoke any provision of this Act or any enactment passed or made before or in the same session as this Act. Regulations made under this Chapter will be subject to the affirmative resolution procedure, which requires the regulations to be approved by both Houses of Parliament. The clause also sets out the procedures for Ministers in the devolved administrations to make regulations under this Chapter.

Clause 55: Interpretation of Chapter

169 This clause sets out definitions for interpreting this Chapter of the legislation.

Chapter 5: Sharing for research purposes

Clause 56: Disclosure of information for research purposes

170 This clause allows public authorities to share any information that they hold, including personal information, for the purpose of research in the public interest. Data sharing arrangements under these provisions allow for two or more public authorities to share and link information in secure conditions. They also permit the use of information that may not be classed as "personal information," such as data from surveys or from existing findings or studies. This would also include Unique Property Reference Numbers where views differ on whether it would fall into the scope of personal information.

171 In order for public authorities to provide personal information, (which is defined for these purposes by *subsections (10) and (11)*) for interrogation by researchers, certain conditions must be met in order to protect personal privacy before the information can be shared with researchers for interrogation.

172 The conditions referred to above are set out at *subsections (3) to (8)* as follows:

173 Information provided must be de-identified, that is modified by removing any information (such as name or address) that could lead to direct identification of an individual or legal entity. This must be done in way which minimises the risk of an individual or organisation being identified, even when, for example, information from one public authority is combined with another.

174 Information provided for interrogation by researchers must be done so either by the public authority that holds the information or by a person who processes the data on its behalf for this

purpose. Such “persons” may include, for example, those who are involved in removing information that may identify individuals or organisations, or those who provide facilities to allow access to the de-identified data in secure conditions. Reasonable steps (including best practice such as that recommended by the Information Commissioner) should be taken to prevent the accidental or deliberate disclosure of information that identifies individuals or organisations.

- 175 All research carried out under these provisions should be in the public interest. Criteria for determining whether research is in the public interest will be set out in a Code of Practice (established at Clause 60) and accredited (as set out at Clause 61).
- 176 All those who are involved in processing information for this purpose, including those who are involved in de-identifying information, those who provide secure facilities, and researchers who examine the information provided, must be accredited as set out at Clause 61.
- 177 Each person who discloses the information or processes it for disclosure under this clause has regard to the code of practice.
- 178 *Subsections (10) and (11)* define personal information and information that identifies a particular person

Clause 57: Provisions supplementary to section 56

- 179 This clause sets out the parameters of this power, and how it interacts with existing statute or common law.
- 180 *Subsection (1)* provides that disclosure of information under this power does not breach the common law duty of confidentiality or any other restrictions on disclosing the information.
- 181 *Subsection (2)* provides that information cannot be disclosed under this power if to do so would breach the Data Protection Act 1998 or Part 1 of the Regulation of Investigatory Powers Act 2000.
- 182 *Subsection (3)* provides that clause 59 does not limit any power to disclose that exists apart from this clause.
- 183 *Subsections (4) – (6)* allow for public authorities to charge fees for providing information to researchers. Fees must be charged on a costs recovery basis.

Clause 58: Bar on further disclosure of personal information

- 184 This clause provides safeguards to ensure personal information is only disclosed to appropriate persons and used for appropriate purposes. The person (P) receiving the information or any other person who receives that information either directly or indirectly from that person (P) cannot disclose personal information disclosed under the power. The limited circumstances when information can be disclosed are set out in *subsection (3)*. Any person who contravenes is guilty of an offence under *subsection (5)*. The clause introduces a criminal offence for unlawful disclosure, which is consistent with existing sanctions in the Commissioners for Revenue and Customs Act 2005 and the Statistics and Registration Act 2007. This clause does not apply to personal information disclosed by HM Revenue and Customs. Specific conditions that relate to information disclosed by HM Revenue and Customs are set out in the following clause.

Clause 59: Information disclosed by Her Majesty’s Revenue and Customs

- 185 This clause sets out that a person (P) receiving personal information from HM Revenue and Customs or any other person that receives that information either directly or indirectly from that person cannot disclose personal information disclosed under the power. This restriction on onward disclosure of personal information provided by HM Revenue and Customs does not apply if the Commissioners for HM Revenue and Customs have given general or specific consent to do so. Criminal sanctions set out in section 19 of the Commissioners for Revenue and Customs

Act 2005 will apply for any unlawful disclosure. *Subsection (5)* sets out the defences to the offence.

Clause 60: Code of practice

186 This clause provides that a code of practice must be issued by the Statistics Board about the disclosure, use and processing of information under the power. The Board must prepare, consult on, and publish a code of practice setting out guidance that public authorities and accredited persons must have regard to. *Subsection (8)* requires that the code must be laid before Parliament and the devolved legislatures when it is issued and any time it is reissued.

Clause 61: Accreditation for the purposes of this Chapter

187 This clause sets out the requirements by which the Statistics Board as the oversight body for the conditions set out in clause 56, accredits persons and research under this power.

188 *Subsection (1)* gives the Statistics Board the power to accredit, and withdraw accreditation for persons who may process information and persons to whom information may be disclosed, researchers and research under the power.

189 *Subsections (2) to (5)* set out the Statistics Board duties to create and publish conditions for accrediting the persons or research as set out in subsection (1), as well as for withdrawing accreditation. The conditions for accreditation must include that persons must be fit and proper persons to carry out the function for which they are seeking accreditation, and that the proposed research is in the public interest. The conditions for withdrawal of accreditation must include the ground that the person failed to have regard to the code of practice under clause 60.

190 *Subsection (6)* requires the Statistics Board to consult the Minister for the Cabinet Office, the Information Commissioner, the Commissioners for Her Majesty's Revenue and Customs, the Scottish Ministers, the Welsh Ministers, the Department of Finance in Northern Ireland and such other persons as the Statistics Board thinks appropriate.

191 *Subsections (7) to (8)* set out requirements by which the Statistics Board must maintain and publish a register of accredited persons.

Clause 62: Delegation of functions of Statistics Board

192 This clause provides the Statistics Board with the power to delegate any of its functions under clause 61 to another person providing certain conditions are met.

Clause 63: Interpretation of this Chapter

193 This clause sets out definitions for interpreting this Chapter of the legislation.

Chapter 6: Her Majesty's Revenue and Customs

Clause 64: Disclosure of non-identifying information by HMRC

194 This clause relaxes the current legal constraints on disclosing non-identifying information, allowing HMRC to share information more widely, for purposes in the public interest.

195 *Subsection (1)(b)* gives HMRC officials the authority to decide whether disclosure is in the public interest. Non-identifying information is general and aggregate information and is defined in *subsection (2)*, as information that does not specify the identity of an individual. *Subsection (3)*, for clarity, sets out the definition of identifying information as information where a person's identity is either specified or can be deduced.

Chapter 7: Statistics

Clause 65: Disclosure of information by HMRC to the Statistics Board

196 This clause amends section 45 of the Statistics and Registration Service Act 2007 (“the 2007 Act”) which makes provision for the disclosure of information held by HMRC to the Statistics Board. This clause amends section 45 of the 2007 Act to lift the restriction that prevents HMRC from disclosing information to the Statistics Board for the Board's functions under section 22 of the 2007 Act (statistical services), by permitting HMRC to do so with the consent of the Commissioners for Revenue and Customs. This clause also omits subsection (5) of section 45 of the 2007 Act which restricts the disclosure of personal information held by HMRC to personal information relating only to imports and exports.

Clause 66: Disclosure of information by public authorities to the Statistics Board.

197 This clause inserts new section 45A after section 45 of the 2007 Act to make provision for the disclosure of information held by public authorities to the Statistics Board where the public authority is satisfied that the Board requires that information for the purposes of any one or more of the Board's functions. Such information may not be used by the Statistics Board for the purposes of its functions under section 22 of the 2007 Act (statistical services), or disclosed by the Board to an approved researcher under section 39(4)(i) of the 2007 Act, without the consent of the public authority providing that information.

198 This clause provides that any such disclosure does not breach any obligation of confidence or other restriction on disclosure, however imposed. The clause does not authorise a disclosure that would contravene the Data Protection Act 1998, would be prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000 or would contravene EU legislation. This clause omits sections 47 to 49 of the 2007 Act which make provision for regulations to authorise disclosure to the Statistics Board.

Clause 67: Access to information by Statistics Board

199 This clause inserts new sections 45B to 45G after section 45 and new section 45A of the 2007 Act to give the Statistics Board access to information held by a range of different bodies.

200 The clause includes in section 45B a right of access by the Statistics Board to information held by Crown Bodies and other named bodies. This allows the Statistics Board to make a formal written request for information from those bodies. The body in question must respond in writing to the request, either indicating it is willing to provide the information (and the date it will provide it) or that it is not willing to provide the information (and give reasons for not providing it). In certain circumstances, the Statistics Board may choose to lay the correspondence with the body before the relevant legislature. The clause provides that a disclosure in response to a request does not breach any obligation of confidence or any other restriction on disclosure. The clause specifies that section 45B does not authorise a disclosure that is prejudicial to national security, contravenes the Data Protection Act 1998, is prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000 or contravenes EU legislation.

201 The clause also includes at sections 45C and 45D the power for the Statistics Board, by notice, to require the disclosure of information held by other public authorities and some undertakings. The information required will be specified in the notice. The notice may also specify times and dates to which the information relates, the date by which, and the form and manner in which, the information must be disclosed. The clause provides that a disclosure in compliance with a notice does not breach any obligation of confidence or any other restriction on disclosure. The clause specifies that sections 45C and 45D do not authorise a disclosure that is prejudicial to national security, contravenes the Data Protection Act 1998, is prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000 or, expressly in the case of section 45C, contravenes EU legislation.

- 202 The Statistics Board must obtain the consent of Ministers in the devolved administrations before giving a notice to a public authority that exercises devolved functions and exercises those functions only as regards the particular territory. The clause also provides a definition of undertaking for the purposes of this section.
- 203 This clause makes provision that the Statistics Board may only issue a request or a notice if the information to be disclosed is required by the Board for any one or more of the Board's functions. Information disclosed in response to a request or a notice may not be used by the Statistics Board for the purposes of its functions under section 22 of the 2007 Act (statistical services), or disclosed by the Board to an approved researcher under section 39(4)(i) of the 2007 Act, without the consent of the public authority or undertaking providing that information.
- 204 The Statistics Board must prepare, consult on, and publish a Statement of principles and procedures by which it will exercise its functions under this clause, and the Statement must be laid before Parliament and the devolved legislatures. This clause also makes provision for it to be an offence for failure to comply with a notice without reasonable excuse, or if in purporting to comply with a notice a person knowingly or recklessly provides false information.
- 205 This clause also makes provision that the Statistics Board may include in a notice a requirement for a public authority or undertaking to consult the Board before making changes to its processes for collecting, organising, storing or retrieving information to which the notice relates, or to processes for supplying such information to the Board. The Statistics Board must prepare, consult on, and publish a code of practice setting out guidance that public authorities need to take into account when making those changes, and the code must be laid before Parliament and the devolved legislatures.

Clause 68: Disclosure by the Statistics Board to devolved administrations

- 206 This clause inserts a new section 53A after section 53 of the 2007 Act. Section 53A will allow the Statistics Board to disclose information it holds in relation to the exercise of any of its functions to a devolved administration (which will be defined in section 53A). Information may only be disclosed under section 53A for the purpose of any or all of the statistical functions of the devolved administration. Section 53A does not authorise a disclosure which would breach any obligation of confidence owed by the Statistics Board, contravene the Data Protection Act 1998, be prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000 or breach any other restriction on disclosure. Section 53A sets out the procedure by which the devolved administration must request the information. Section 53A only permits disclosure in specific circumstances, including in the case of information received from public authorities that the public authority consents to its disclosure. Section 53A also permits the Statistics Board to set conditions the devolved administration must meet before the information will be disclosed. Section 53A also limits use of the information disclosed to the purposes for which it was disclosed.

Part 6: Ofcom and other regulation

Clause 69: OFCOM reports on infrastructure etc

- 207 Section 134A of the 2003 Act requires Ofcom to report to the Secretary of State triennially on various matters relating to electronic communications networks and electronic communications services listed in section 134B(1) and (2). This clause inserts new sections 134AA and 134AB. New section 134AA sets out that Ofcom has the power to prepare and publish a report on any of those matters at times or at intervals it considers appropriate. Ofcom is not required to report on all matters listed in section 134B(1) and (2). It is for Ofcom to consider which matters to report on. New section 134AB allows Ofcom to publish information obtained under section 135 for the purpose of preparing a report under 134A or 134AA, and also allows Ofcom to publish information derived from such information.

208 New sections 134AA and 134AB places a duty on Ofcom to consider whether they could refuse to disclose under the Freedom of Information Act 2000 information to be contained in a report and, if so, whether that information should be excluded from the report or be published, respectively.

209 This clause does not affect Ofcom's duty to prepare a report on a triennial basis to the Secretary of State, as set out in section 134A.

Clause 70: Comparative overviews of quality and prices

210 Section 136(1) of the 2003 Act gives Ofcom the power to require a communications provider or a person who makes available associated facilities to provide Ofcom with information for the purpose specified in section 136(2). That purpose is the carrying out, with a view to publication and in the interests of the end-users of public electronic communications services, of comparative overviews of the quality and prices of such services.

211 This clause repeals section 136(2) and replaces it with a new section 134D, which will give Ofcom an express power to carry out and publish such comparative overviews. It also amends section 393(6) of the 2003 Act to provide that nothing in section 393 (general restrictions on the disclosure of information) limits the matters that may be published as part of such a comparative overview.

Clause 71: Conditions about allocation of telephone numbers

212 Section 58 of the 2003 Act provides that general conditions (which may be set by Ofcom under section 45 of the 2003 Act) may include conditions about the allocation and adoption of telephone numbers. This clause amends section 58 by inserting new subsection (2A) which provides that general conditions may also require communications providers that have been allocated telephone numbers to inform Ofcom of certain circumstances or events. These are further specified in subsections (2A)(a) to (d).

213 New subsection (2A)(a) covers information which a communication provider was not required to provide at the time of applying for an allocation of numbers, but which has since been made a requirement on application. New subsection (2A)(b) covers any changes to the information provided at the time of applying for an allocation of telephone numbers. New subsection (2A)(c) covers any proposal by the provider to cease providing an electronic communications service or network. New subsection (2A)(d) covers any other circumstances or events that Ofcom may specify in the general condition itself. These might include (but are not limited to) events such as the commencement of proceedings for liquidation, bankruptcy, administration or receivership in relation to the communications provider.

Clause 72: Provision of information to OFCOM

214 Section 135 of the 2003 Act provides Ofcom with powers to obtain information necessary for the purpose of carrying out its functions under Part 2 Chapter 1. This clause amends section 135 by substituting a new subsection (1). This new subsection sets out that Ofcom may also use its information gathering powers under Section 135 to obtain information necessary for the purpose of carrying out two of its functions that are outside of Part 2 Chapter 1.

215 New subsection (1)(a) will enable Ofcom to use its information gathering powers under Section 135 to carry out its functions under section 14(1) of the 2003 Act. Section 14(1) requires Ofcom to make arrangements for ascertaining the state of public opinion and the interests and experiences of consumers in relation to various specified matters.

216 New subsection (1)(b) will enable Ofcom to use its information gathering powers under Section 135 of the 2003 Act to carry out its functions under section 26 of the 2003 Act, insofar as they relate to matters in relation to which Ofcom have functions under Part 2 Chapter 1. Section 26 requires Ofcom to arrange for the publication of information and advice about matters in relation to which they have functions as it appears to them to be appropriate to make available to various specified

persons.

Clause 73: Information required from communications providers

- 217 This clause amends the 2003 Act by inserting new sections 137A and 137B, which set out the scope of Ofcom's powers to require communications providers to collect, generate or retain information for the purpose of publication, either by the communications provider, or by Ofcom.
- 218 Subsection (1)(a) of new section 137A gives Ofcom power to require communications providers to publish any information held by the provider. Subsection (1)(b) provides powers to require communications providers to provide any such information to Ofcom, for the purposes of Ofcom publishing such material.
- 219 Subsection (2) of new section 137A allows the requirements imposed under subsection (1) to include requirements to produce, generate or obtain information. Subsection (3)(a) to (c) of new section 137A contains a non-exhaustive list of some of the things that the communications provider might be required to do, including collect information, retain information or generate new information through analysis of data or information. The power also encompasses a requirement for communications providers to answer any questions that Ofcom might ask under this subsection.
- 220 Subsection (4) of new section 137A sets out the limitations on Ofcom's powers under subsections (1) to (3). Ofcom may use the powers conferred by subsections (1) to (3) only in connection with the carrying out its functions under chapter 1 of part 2 of the 2003 Act (provisions relating to electronic communications networks and services), or related functions under Part 1. Subsection (4)(b) requires that the exercise of the powers conferred by subsection (1) to (3) is proportionate to the use to which the material will be put in connection with the carrying out of those functions.
- 221 Subsection (5) of new section 137A provides that the power conferred is to be exercised by a demand contained in a notice served on the communications provider, which describes the information or analysis required, or sets out the questions to be answered. The notice must also set out Ofcom's reasons for imposing the requirement.
- 222 Subsection (6)(a) requires that Ofcom serve a draft of any forthcoming demand to the recipient in advance of issuing it, and informs the provider of the period in which they may make representations. Subsection (6)(b) requires that Ofcom have regard to representations made by a communications provider within that period which identify restrictions to complying with the demand, due to restrictions on the disclosure or publication of information, as set out in subsection 6(b)(i) or due to the practicability of complying with the demand, as set out in subsection 6(b)(ii).
- 223 Subsection (7) of new section 137A gives Ofcom power to prescribe the format, form and manner in which information, analysis or answers are to be published or provided under subsection (1)(a) or (b), and the timeframe within which they must be published or provided (subject to it being a reasonable period). Subsection (8) provides that, when Ofcom publishes information, analysis or answers, it must do so in a manner, form or format that it considers appropriate.
- 224 New section 137B(1) requires that in exercising the powers conferred on it under new section 137A, Ofcom must have regard to the need to exclude from publication matters which are confidential, as defined in subsections (2) and (3). This mirrors the qualification on Ofcom's duty to arrange for the publication of information and advice under section 26.

Clause 74: Appeals from decisions of OFCOM and others: standard of review

- 225 Section 195 of the 2003 Act requires that appeals to the CAT against regulatory decisions under section 192 of the 2003 Act, or that are subject to the provisions set out in section 195, must be decided "on the merits".

These Explanatory Notes relate to the Digital Economy Bill as introduced in the House of Commons on 5 July 2016 (Bill 45)

- 226 *Subsection (2)* of this clause amends section 193 of the 2003 Act, relating to price control matters referred to the Competition and Markets Authority (“CMA”), so that when considering a price control matter the CMA must have regard to the principles to be applied by the CAT under section 194A.
- 227 *Subsection (4)* inserts a new section 194A that requires specified appeals to be decided by applying the same principles as would be applied by a court on an application for judicial review and that where the CAT dismiss or quash the whole or part of the decision appealed, the CAT must remit the decision back to the decision-maker with a direction to reconsider and make a new decision in accordance with the CAT’s ruling.
- 228 *Subsection (11)* makes amendments and substitutions to section 317 of the 2003 Act to ensure that the provisions of the new section 194A also apply to appeals against decisions of the regulator when exercising a Broadcasting Act power for a competition purpose under section 317 of the 2003 Act.
- 229 Those appeals that are not specified and are subject to the existing provisions set out in section 195 of the 2003 Act will continue to be heard “on the merits” as set out in section 195 of the 2003 Act.
- 230 *Subsection (12)* of this clause sets out that the changes introduced in this clause will not apply retrospectively to appeals made to the tribunal before the clause comes into force.

Clause 75: Functions of OFCOM in relation to the BBC

- 231 Ofcom’s current power to regulate the BBC derives from section 198 of the 2003 Act. This provides that it will be a function of Ofcom, to the extent set out in the Charter and Framework Agreement, to regulate the BBC’s services, including the power for Ofcom to impose financial penalties on the BBC.
- 232 Under section 198(1) of the 2003 Act, the ability to confer functions on Ofcom through the BBC Charter and Framework Agreement is limited to functions “to regulate the provision of the BBC’s services and the carrying on by the BBC of other activities for purposes connected with the provision of those services.” The Act defines ‘the BBC’s services’ as its television, radio and on-demand services and does not cover all of the activities of the BBC, in particular, the BBC’s commercial services, online activities and the World Service.
- 233 This clause amends section 198 to broaden the ability of Ofcom to regulate the activities of the BBC. *Subsection (3)* allows provision to be made in the BBC Charter and Framework Agreement so that Ofcom can regulate all of the BBC’s activities, in its new role as the external regulator of the BBC.

Clause 76: TV licence fee concessions by reference to age

- 234 Section 365 of the 2003 Act enables the Secretary of State to make provision for concessions in relation to the payment of the television licence fee, which may take the form of exemptions from payment or of reduced rate payments. This includes a concession for a free television licence for those who have reached a qualifying age, currently set at 75 years. The Secretary of State exercises the function of conferring concessions by making regulations.
- 235 This clause inserts new section 365A into the 2003 Act to confer on the BBC the function of making provision for a TV licence fee concession by reference to age, limited by subsection (2) of the new section to persons who are aged 65 or over. This concession will no longer be determined by regulations but will be determined independently by the BBC following consultation. The BBC will have the power to make changes to the concession, including changing the eligibility criteria, level of concession and qualifying age (although this may not be lower than 65) or to end the concession.

236 The Secretary of State retains the power to make provision for all other concessions.

Clause 77: Direct marketing code

237 This clause inserts new sections 52AA into the Data Protection Act 1998("the 1998 Act") and makes amendments to sections 51 and 52B to 52E.

238 New section 52AA places the Information Commissioner under a duty to publish and keep under review a direct marketing code of practice.

239 New section 52AA(1) and (2) provide that the code will contain practical guidance and any other guidance that promotes good practice in direct marketing activities. Good practice is defined as practice that appears to the Information Commissioner to be desirable including, but not limited to, compliance with the requirements of the 1998 Act and the PECR. When deciding what constitutes good practice, the Information Commissioner must have regard to the interests of data subjects and others.

240 New section 52AA(3) requires that in preparing the code the Information Commissioner must consult, as he or she considers appropriate, with trade associations, data subjects and persons who represent the interests of data subjects.

241 New section 52AA(4) applies the definition of direct marketing in section 11(3) of the 1998 Act, which defines direct marketing as the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals.

242 *Subsections (3) to (8)* amend sections 51(5A) and 52B to 52E of the 1998 Act so that these provisions apply to the direct marketing code of practice as well as to the data-sharing code of practice, established under section 52A. These provisions set out the procedure to be adopted when preparing the code, require the code to be kept under review and altered or replaced as necessary, provide for the publishing of the code and set out the legal effect of the code.

Clause 78: OFCOM and Northern Ireland

243 Ofcom is the UK-wide independent communications regulator overseeing television, radio, telecommunications, mobiles, postal services and the airwaves. It was established by the Office of Communications Act 2002 ("the 2002 Act").

244 Section 1 of the 2002 Act provides that the Secretary of State appoints the chair and other members of Ofcom and that the Scottish Ministers appoint a member. *Subsections (1) to (4)* of this clause amend section 1 of the 2002 Act to provide that the Minister for the Economy in Northern Ireland shall appoint one member of Ofcom and that, before doing so, they must consult the Secretary of State. *Subsection (4)* ensures that the member appointed by the Northern Ireland Ministers has the same functions as other non-executive members of Ofcom in the appointment of any executive members of Ofcom.

245 The Schedule to the 2002 Act makes further provision about Ofcom including: qualification for membership, tenure of office, accounts and audit and annual reports. *Subsection (5)* of this clause amends the application of the Schedule in relation to the member of Ofcom appointed by the Minister for the Economy of Northern Ireland. The functions relating to ensuring that a person being appointed to Ofcom does not have any conflict of interest and the functions relating to the member's resignation or removal from office are conferred on the Northern Ireland Ministers. The member may only be removed from office by the Minister for the Economy in Northern Ireland following consultation with the Secretary of State.

246 *Subsection (7)* of this clause amends the Schedule to the 2002 Act to require the Comptroller and Auditor General to send a copy of Ofcom's statement of accounts and the Comptroller and Auditor General's report to the Minister for the Economy in Northern Ireland and for the Minister

to lay those documents before the Northern Ireland Assembly. Similarly, *subsection (8)* amends the Schedule to the 2002 Act to require Ofcom to send its annual report to the Minister for the Economy in Northern Ireland and for the Minister to lay the report before the Northern Ireland Assembly.

247 Section 44 of the Northern Ireland Act 1998 (power of Assembly to call for witnesses and documents: limitation by reference to transferred matters etc) gives the Northern Ireland Assembly the power to require persons and UK Ministers to appear before it to give evidence or produce documents in relation to any subject for which the Northern Ireland Assembly has general responsibility. Subsection (9) of this clause gives the Northern Ireland Assembly the power to compel witnesses and documents from Ofcom in relation to the functions exercised by Ofcom in relation to Northern Ireland.

Clause 79: Retention by OFCOM of amounts paid under Wireless Telegraphy Act 2006

248 Section 400(1)(c) of the 2003 Act (Destination of fees and penalties) requires that that all charges imposed by Ofcom by or under its powers to manage the radio spectrum contained in Chapters 1 and 2 of Part 2 of the 2006 Act and the ordinary charging provisions in the new Part 2A (regulation of dynamic spectrum access services as inserted by clause 8 of this Bill) be paid into the Consolidated Fund. Section 401 of the 2003 Act (Power of Ofcom to retain costs of carrying out spectrum functions) - once that section is brought into force - enables Ofcom to publish a statement of principles (referred to in this clause as “the statement”) setting out the basis on which it can retain money that would otherwise be payable into the Consolidated Fund.

249 This clause provides that the statement no longer requires that the amounts retained by Ofcom in accordance with section 401 need be spent on or match only Ofcom’s own costs in performing spectrum management functions. *Subsection (3)* allows Ofcom’s statement to set out that it will use amounts retained by it under section 401 for such purposes as it specifies.

250 *Subsection (5)* substitutes existing subsections (3) to (5) of section 401 with a new subsection (3) which requires that the amounts retained by Ofcom are objectively justifiable and proportionate to the costs in respect of which they are retained. Other limitations on how amounts are used are repealed.

251 *Subsection (7)* of this clause adds the requirement for the Secretary of State (in addition to the Treasury) to consent to the making, revision or withdrawal of a statement made in accordance with this section.

252 *Subsections (2), (4), (6) and (8)* of this clause make minor consequential amendments to section 400 and 401 of the 2003 Act.

Clause 80: International recognition of satellite frequency assignments: power of OFCOM to charge fees

253 This clause sets out the provisions that will be inserted into the 2003 Act that will give Ofcom the power to prescribe or agree fees to be charged for the administrative services they provide to satellite operators to obtain international recognition for their satellite frequency assignments in line with the relevant provisions of the International Telecommunications Union’s Radio Regulations.

254 New *section 28A* sets the general provisions that will give Ofcom the power to prescribe or agree fees to be charged for their satellite filing work.

255 *Subsection (5)* sets out the actions that Ofcom must undertake before they are able to request payment of the fees for their satellite filing work.

These Explanatory Notes relate to the Digital Economy Bill as introduced in the House of Commons on 5 July 2016 (Bill 45)

256 *Subsection (6) and subsection (7)* provide for the procedure under which the amount of the fees is to be set by Ofcom under *Subsection (2)*.

Part 7: General

Clause 81: Financial provisions

257 This clause is self-explanatory.

Clause 82: Commencement

258 The amendments to Ofcom's powers in relation to the BBC come into force on Royal Assent. The government intends that the new Royal Charter for the continuance of the BBC will have the effect of transferring additional regulatory responsibility to Ofcom from 1 January 2017. While Ofcom will already have some powers to perform this role, the government wants to ensure that any gap in those powers is closed as soon as is possible.

259 A number of provisions will be brought into force two months after Royal Assent. These include the provision relating to universal service broadband obligations, powers for Ofcom to set general conditions on communication providers in respect of switching and automatic compensation as well as Ofcom's powers to collect and report information. A number of technical matters in respect of spectrum and the provision relating to the direct marketing code will also be brought into force at the same time.

260 A commencement date of 1 June 2020 will apply to the measure concerning the TV licence concession. The government has committed to maintain free TV licences for those aged 75 and over for the whole of this Parliament, with responsibility for the policy passing to the BBC in the next Parliament. The timing of the implementation of this measure was agreed with the BBC in July 2015.

261 The remaining measures in the Bill will be brought into force by regulations.

Clause 83: Extent

262 Detailed analysis of the extent of the Bill can be found at Annex A. Otherwise this clause is self-explanatory.

Clause 84: Short title

263 This clause is self-explanatory.

Schedule 1: The electronic communications code

Part 1: Key Concepts

264 Part 1 defines some important terms that are used throughout the code and points to the location of the definition of other terms used in the code.

265 *Paragraph 2* defines "operators" as firstly, those who have been designated by Ofcom under section 106 of the 2003 Act as being persons to whom the code applies and secondly (in certain circumstances) the Secretary of State or a Northern Ireland department. The amendments made to section 106 of that Act by this schedule mean that operators may be providers of electronic communications networks or of infrastructure systems.

266 Paragraph 3 lists the code rights, a specified list of rights relevant to the installation and maintenance of apparatus on, over or under land. The definitions of the rights here have been expanded to ensure they are comprehensive enough to cover all relevant situations. The right to lop trees and cut back vegetation has been added to the list.

These Explanatory Notes relate to the Digital Economy Bill as introduced in the House of Commons on 5 July 2016 (Bill 45)

- 267 Rights can only be code rights if they are conferred for “the statutory purposes”. *Paragraph 4* defines the statutory purposes as the purposes of the operation of the operator’s “network” or the provision of an “infrastructure system” (both of which terms are further defined in paragraphs 6 and 7).
- 268 Most of the code rights relate to “electronic communications apparatus”. *Paragraph 5* defines this term in broad terms. The definition includes buildings whose only function is to contain other apparatus.

Part 2: Conferral of code rights and their exercise

- 269 As summarised in *paragraph 8*, Part 2 makes provision about how code rights may be conferred and exercised, and who is bound by code rights.
- 270 *Paragraph 9* provides that only the occupier may confer a code right on an operator. This reflects the position in paragraph 2(1) of the existing code.
- 271 *Paragraph 10* makes provision for who is bound by code rights. The code rights bind not only the occupier but also any other person with an interest in the land who has agreed to be bound by the code rights; persons who are the successors in title to any person who is bound; and any person whose interest is created after the right is conferred and is derived from an interest that is bound.
- 272 *Paragraph 11* makes provision about the formal requirements for an agreement.
- 273 *Paragraph 12(1)* provides that code rights may be exercised only according to the terms of the agreement. *Paragraph 12(2)* replicates the general effect of paragraph 4(1) of the existing code. Its effect is that, where the operator exercises the rights agreed, in accordance with the agreement, that operator does so with the statutory protection of the code and is as a result not vulnerable to common law claims in nuisance or trespass. *Paragraph 12(3)* provides that if a person with a freehold or leasehold interest in the land is not bound by the agreement under which the code rights are granted, the operator does not have statutory protection against that person. This encourages operators to obtain agreement from each person with an interest in the land (where it is necessary for the operator to have agreement from that person). *Paragraph 12(4)* provides that the benefit of a statutory covenant is preserved in relation to the exercise of code rights.
- 274 *Paragraph 13* provides that an operator who installs electronic communications apparatus with the agreement of the occupier of “land A”, may not obstruct or interfere with access (including emergency access) to or from “land B” without obtaining a code right to do so from the occupier of “land B” (and from such other persons with an interest in land B as the operator may require). *Paragraphs 13(4) and (5)* provide that where “land B” is a street, road or tidal land (where special code rights apply and which by their nature are generally accessible), the agreement of the occupier of “land B” is not required if access to “land B” from “land A” is obstructed by electronic apparatus on “land A”. *Paragraph 13* replicates the effect of paragraph 3 of the existing code.

Part 3: Assignment of code rights, and upgrading and sharing of apparatus

- 275 Part 3 of the new code makes provision about the assignment of code rights, and the upgrading and sharing of apparatus.
- 276 *Paragraph 15* provides that an operator may assign an agreement under which code rights are conferred to another operator, enabling the second operator to ‘stand in the shoes’ of the first. An operator may assign only the entirety of the agreement and the code rights it contains and may not separately assign the individual code rights it confers. The other party to the agreement (the site provider) is not permitted to prevent or make subject to conditions such an assignment. After the date of the assignment the operator who assigned the agreement (“first operator”) is not liable

for a breach of the agreement by the operator whom the agreement is assigned to (“second operator”), provided that notice of the assignment is given to the other party. If, however, the first operator had agreed to guarantee the performance of the second operator, the guarantee will still apply.

277 *Paragraph 16* provides a new power for an operator to upgrade or share apparatus, in certain circumstances, without the operator needing the agreement of the other party to the agreement, or having to pay in order to do so. Specific conditions must be met for this right to apply. If the conditions are not or cannot be met, the operator must seek agreement for the right in the normal way under Part 2. To give effect to these rights paragraph 16(5) prevents the parties contracting out of the right or making it subject to conditions.

278 *Paragraph 17* has the same effect as paragraph 29 of the existing code. Its purpose is to facilitate sharing of apparatus between: (i) one or more operators to whom the code has been applied by Ofcom under section 106 of the 2003 Act; (ii) other providers of electronic communications networks to whom the code has not been applied by Ofcom; and (iii) qualifying persons whom the Secretary of State may designate by regulations.

279 At least one of the parties to such an agreement must be an operator to whom Ofcom has applied the code. The effect of paragraph 17 is that the provisions of the code may not be interpreted so as to restrict the operators’ agreement to share apparatus with each other. Paragraph 17 does not affect the interpretation of an agreement between an operator and a site provider.

Part 4: Power of court to impose agreement

280 Part 4 makes provision for the imposition by the court of an agreement conferring code rights where such an agreement cannot be reached consensually under Part 2. The power of the court to impose agreements and the granting of compulsory access to land is an essential part of the existing code (see paragraph 5 of the existing code). The meaning of “the court” is set out in Part 16.

281 *Paragraph 19* sets out the circumstances in which the court can impose an agreement. It replicates much of paragraphs 5(1), 5(2) and 5(7) of the existing code.

282 *Paragraph 20* sets out the test that the court must apply and the conditions that must be met for imposing an agreement. It replaces the test in paragraph 5(3) of the existing code. The court must have regard to any prejudice to the site provider and whether it can be compensated, as well as the public benefit likely to arise from any order imposing code rights. *Paragraph 21* like paragraph 5(7) of the existing code, it provides that the court’s order takes effect as an agreement.

283 *Paragraph 22* sets out key terms that the court must include, or consider including, in the court-imposed agreement. It contains provisions corresponding to paragraphs 5(4) and 5(5) of the existing code.

284 *Paragraph 23* makes provision for how consideration is assessed for the rights that the court has ordered and provides for this to be the market value. Market value must not take into account the use the operator intends to make of the land. This means valuation is on a “no scheme” basis. Valuation must be based on two assumptions. The first is that there is more than one site available to the operator, to ensure that a market valuation is applied even if in fact the land has unique features. The second is that the rights in paragraphs 15 and 16 (assignment of code rights and the upgrading and sharing of apparatus) are not included in the value of the code right.

285 *Paragraph 24* provides for the court to order an operator to pay compensation to a person who will suffer loss or damage as a result of the imposition of the code right on usual compensatory principles.

286 *Paragraph 25* provides that an operator may apply for interim code rights. This is a new right not provided for in the existing code. It enables code rights to be granted on an interim basis pending agreement or the court determining a final agreement. Rights may be granted on an interim basis either (a) where the parties agree to the making of the order and the terms of the interim agreement (which may be the case, for example where the only issue not agreed between them is the consideration to be paid); or (b) when the court considers that there is a good arguable case that the interim code right will be made permanent at a final hearing. If the right is not made permanent at a final hearing, the interim right ends and the operator must remove the apparatus in accordance with Part 6.

287 *Paragraph 26* provides for the court to be able to grant temporary code rights on application by the operator. It corresponds to, the provision in paragraph 6 of the existing code. This right is different from an interim code right in that it arises where there is existing apparatus already on the land, the operator has no right to keep it installed and the operator requires temporary code rights in order to maintain the apparatus and the network service while the operator seeks permanent rights. The temporary code rights will continue until either the operator has secured permanent code rights or the person with interest in the land has secured the rights to enforce removal of the apparatus. When assessing whether new permanent code rights should be granted, the court must disregard the fact that the apparatus is already on the land.

Part 5: Termination and modification of agreements

288 Part 5 makes provision about the termination and modification of agreements.

289 *Paragraphs 28 and 29* provide for code rights to continue as a matter of statute notwithstanding that they may have come to an end in accordance with their terms. In England and Wales the Landlord and Tenant Act 1954 contains similar provisions. Accordingly *paragraph 28* clarifies whether the continuity provisions of the code, or of the 1954 Act are applicable, to avoid ambiguity.

290 *Paragraph 28(5)* defines an agreement to which the provisions of Part 5 apply as a “code agreement”, to distinguish it from an agreement which is subject to the termination and continuity provisions of Part 2 of the Landlord and Tenant Act 1954. Most agreements to which Part 2 of the code applies will be “code agreements” within *paragraph 28(5)* of the code. A lease that grants code rights but whose primary purpose is not to grant code rights (see *paragraph 28(2)*) will be (so far as it relates to code rights) an agreement within Part 2 of the code, but Part 5 of the code will not apply to it.

291 *Paragraph 29* provides that code agreements continue in effect after the date of termination. This ensures that there is continuity of rights, and of network provision, pending determination of an application by the operator for new permanent rights or of an application by a “site provider” for the right to remove the apparatus. *Paragraph 29(1)* defines a site provider. The continuity provisions of *paragraph 29* do not apply where the relevant code right is an interim or temporary right arising from orders under *paragraph 25* or *26*.

292 *Paragraphs 30 and 31* make provision for how a site provider who is party to a code agreement may bring the code agreement to an end. The site provider must provide a notice to the operator. The notice must set out a proposed date, no earlier than 18 months away, on which the terms of the code agreement are to end. The notice must also set out one of the required grounds for termination. Those grounds are that the operator has substantially breached its obligations; that the operator has persistently delayed payments; that the site provider intends to redevelop the land and could not reasonably do that without ending the code agreement; or that the test in *paragraph 20* (for conferral of new code rights) is not met. *Paragraph 87* makes further provision about the form of the notice. The effect of the notice is to end the code agreement unless the parties agree otherwise; or the operator gives, within 3 months, a counter-notice proposing that

the old agreement continue or proposing new terms, and then applies to the court for an order within a further 3 months. If the court considers any of the required grounds to have been made out by the site provider, it must order the agreement to come to an end; if not it must make an order pursuant to paragraph 33.

293 *Paragraph 32* makes provision so that where a code agreement comes to an end; an operator may by notice seek new or modified terms of agreement. It gives effect to the recommendation in paragraphs 6.116 and 6.117 of the Law Commission report on the code. The notice must set out the proposed, modified or new terms of the agreement, the change in code rights to be conferred and the proposed date on which the changes should take effect. The proposed date must be at least 6 months after the date of the notice and must be after the date on which the existing code agreement ends. If operator and site provider have not reached agreement within 6 months of the notice, either party may apply to the court, which may then make any of the orders in paragraph 34.

294 *Paragraphs 33 and 34* set out the orders the court may make on an application made by the operator or site provider under paragraphs 31 or 32. The court can order that the right or rights may (or may not) continue to be exercised, the period for which rights may be exercised and whether any of the other terms of the agreement, including terms as to consideration, should remain the same or be modified. The court may order that a new code right or rights be exercised, that a new agreement be entered into and, if agreement on terms of the new agreement is not reached, it can specify the terms. When specifying the terms, the court must include terms as to payment, which should be determined on the basis set out in paragraph 22, terms designed to minimise loss and damage, the period of the agreement and any compensation for loss and damage (which can include expenses, diminution in value and reinstatement costs as set out in paragraph 80). Under sub paragraphs (14) and (15), the court can also order payment of the difference between the new rate of consideration and the consideration actually paid for the period between the old agreement ending and the new agreement being imposed. In deciding all of these terms, the court must also have regard to all the circumstances and the other matters set out in sub-paragraph (13). Under paragraph 34 the parties can agree (or apply to the court to determine) the level of interim payment to be made pending final determination of the applications in accordance with paragraph 33. Any payment under paragraph 34 will therefore be a factor to take into account under paragraph 33(13) and (14).

Part 6: Rights to require removal of electronic communications apparatus

295 *Paragraph 35* introduces Part 6 of the code, which makes provision to enable a person with an interest in land (a "landowner") to require removal of apparatus. Paragraphs 21 and 22 of the existing code contain provisions that correspond to some extent to this part, but the provisions in Part 6 of the code are much more detailed.

296 In order to have the right to remove apparatus a landowner must meet one or more of the five conditions set out in paragraph 36. The first is that the landowner has never been bound by a code right relating to the apparatus; the second is that the code right has ended. These two conditions, are not met, however, if the land remains occupied legally by another person who has conferred code rights (and not done so in breach of any covenant to the landowner). The third condition is that the apparatus is not being used and is not likely to be used for the operator's network; the fourth is that: (a) the operator has ceased to be an Ofcom designated code operator; (b) Ofcom has not authorised the retention of the apparatus on the land; and (c) no other person has a code right to keep the apparatus there. The fifth condition is that a transport or street work right under which the apparatus was installed no longer applies and there is no other person with a code right to keep the apparatus there.

- 297 *Paragraph 37* makes provision enabling landowners to establish whether operators have apparatus on their land pursuant to a code right by serving a notice. If the operator does not disclose the information within 3 months the operator may seek a court order to remove the apparatus. If it is later established that there is in fact a code right that relates to the apparatus, then the operator must bear the costs of the landowner in seeking to enforce removal.
- 298 *Paragraph 38*, which largely corresponds to paragraphs 4(2), 21(1) and 21(2) of the existing code, makes provision for enforcing the removal of apparatus. A landowner may give a notice requiring removal and restoration of the land to its original condition. If agreement is not reached with the operator within 28 days concerning such removal and restoration, the landowner may seek a court order requiring removal of the apparatus by the operator or permitting removal or sale by the landowner.
- 299 *Paragraph 39* sets out the orders a court may then make to effect removal, including the power to order the operator to pay compensation for the period during which the apparatus was on the land after the right to remove arose (paragraph 39(3)). If the operator does not comply with an order to remove, the court may permit the landowner to remove the apparatus. Paragraph 39 has provisions corresponding to paragraphs 21(7) and 21(8) of the existing code.

Part 7: Conferral of transport land rights and their exercise

- 300 Part 7 of the code applies to transport land and gives the operator certain rights in relation to such land, which may be exercised without agreement or a court order. Part 7 replaces paragraphs 12 to 14 of the existing code concerning linear obstacles. The existing code has been largely replicated in Part 7 of the code, with changes to make provisions in relation to land that ceases to be transport land and to apply the new public interest test.
- 301 *Paragraph 40* sets out the scope of Part 7. Paragraph 41 defines the transport land to which Part 7 applies as land used wholly or mainly by, or in connection with, a railway, canal or tramway and defines transport undertaker as the person carrying on the railway, canal or tramway.
- 302 *Paragraph 42* provides that the operator can exercise the transport land rights for the statutory purposes, allowing the operator to exercise the rights without agreement or a court order, subject to the remaining provisions of Part 7.
- 303 *Paragraph 43* sets out the transport land rights that can be exercised under Part 7. The rights allow the operator to cross transport land with a line and to install and keep other apparatus in connection with that line. There are associated rights to enter land, inspect, maintain, adjust, alter, repair, upgrade and operate the apparatus and to carry out associated works. Sub-paragraphs (2)-(3) provide that the line must not cross the transport land by a route exceeding the shortest route by 400 metres on a horizontal plane. Subparagraph (4) provides that none of the transport land rights allow the operator to install a line or other apparatus that interferes with the traffic on the railway, canal or tramway.
- 304 *Paragraphs 44 and 45* set out the requirements that must be complied with in order for the operator to carry out non-emergency works in the exercise of the transport land rights. Under paragraph 45, the operator may only carry out the proposed works after the transport undertaker has been given 28 days' notice; subject to the objection procedure under paragraph 45, where, within that 28 day notice period, the transport undertaker may give notice objecting to the works. If an objection notice is given, either the operator or the transport undertaker has 28 days to give notice that the matter be referred to arbitration. Where the transport undertaker has objected, the operator may only carry out the proposed works if 28 days passes without an arbitration notice having been given. If an arbitration notice is given, the works may only be carried out in accordance with an award given on arbitration.
- 305 *Paragraph 46* sets out the requirements that must be complied with in order for the operator to

carry out emergency works (defined in sub-paragraph (9)) in the exercise the transport land rights. The operator must give notice of the emergency works as soon as reasonably practicable after starting the works. The transport undertaker may give notice requiring the operator to pay compensation for loss or damage it has suffered as a result of the emergency works. The parties have 28 days to agree the amount to be paid; failing which either party may give notice to refer the dispute to arbitration.

306 *Paragraph 47* sets out the process for dealing with the arbitration of a dispute relating to an objection to proposed non-emergency works or about the compensation payable as a result of emergency works. The arbitrator has various powers to require information from and impose other requirements on the parties. In relation to proposed non-emergency works, the arbitrator has power to make an award requiring modifications to the works or to specify terms on which such works may be carried out, as well as to award compensation and consideration. In relation to emergency works, the arbitrator has power to award compensation. In determining the award, the arbitrator must have regard to the public interest in there being access to a choice of high quality electronic communications services.

307 *Paragraph 48* allows a transport undertaker to give notice requiring an operator to alter the line or other apparatus installed by the exercise of a transport land right, on the grounds that it will interfere with the carrying on of the railway, canal or tramway or things done for connected purposes. The operator must comply with this notice, unless it gives counter notice, in which case the transport undertaker may apply to the court for an order requiring the operator to alter the apparatus. The court must not make an order unless it is satisfied that the grounds on which the notice is issued are met. In line with the Law Commission recommendation at paragraph 7.71 of the report, in determining whether to make an order, the court must have regard to the public interest in there being access to a choice of high quality electronic communications services.

308 *Paragraph 49* is an addition to the code it provides that where land ceases to be transport land, the operator may continue to exercise the transport land rights in accordance with Part 7 in relation to apparatus already on the land and in relation to substantially similar replacements. This is subject to the ability of the occupier of the land to give 12 months' notice to terminate such rights.

309 *Paragraph 50* provides that an operator will be guilty of an offence by commencing works in contravention of the provisions of Part 7. An operator who is guilty of an offence will be liable on conviction to a fine not exceeding level 3 on the standard scale (currently £1,000).

Part 8: Conferral of street work rights and their exercise

310 Part 8 of the code applies to streets in England and Wales and roads in Northern Ireland and Scotland, and gives the operator certain rights in relation to such streets and roads, which may be exercised without agreement or a court order. Part 8 largely replicates paragraph 9 of the existing code, with changes to make provision in relation to land that ceases to be a street or road.

311 *Paragraph 51* sets out the scope of Part 8. *Paragraph 52* defines the streets in England and Wales and the roads in Scotland and Northern Ireland to which Part 8 applies.

312 *Paragraph 53* provides that the operator can exercise the street work rights for the statutory purposes, allowing the operator to exercise the rights without agreement or a court order, subject to the remaining provisions of Part 8.

313 *Paragraph 54* sets out the rights that can be exercised under Part 8. The street work rights allow the operator to install and keep apparatus in, on, under or along or across a street or road. There are associated rights to enter land, inspect, maintain, adjust, alter, repair, upgrade and operate the apparatus and to carry out associated works.

314 *Paragraph 55*, as for transport land, is an addition to the code it provides that, where land ceases to

be a street or road, the operator may continue to exercise the street work rights in accordance with Part 8 in relation to apparatus already on the land and in relation to substantially similar replacements. This is subject to the ability of the occupier of the land to give 12 months' notice to terminate such rights.

Part 9: Conferral of tidal water rights and their exercise

315 Part 9 of the code applies to tidal water and lands and gives the operator certain rights in relation to tidal water and lands (“tidal water rights”) that may be exercised without agreement (in most cases) or a court order. Part 9 largely replicates paragraph 11 of the existing code, with changes to make provision in relation to agreements over Crown tidal water and land.

316 *Paragraph 56* sets out the scope of Part 9. *Paragraph 57* sets out what is to be included in the meaning of tidal water and land.

317 *Paragraph 58* provides that the operator can exercise the tidal water rights for the statutory purposes, allowing the operator to exercise the rights without (in most cases) agreement or a court order, subject to the remaining provisions of Part 9.

318 *Paragraph 59* sets out what rights can be exercised under Part 9. The tidal water rights allow the operator to install and keep other apparatus on, under or over tidal water or lands, and there are associated rights to enter land, inspect, maintain, adjust, alter, repair, upgrade and operate the apparatus and to carry out associated works.

319 *Paragraph 60* requires the agreement of the Crown under paragraph 100 before the tidal water rights can be exercised on Crown tidal water or lands. Any consideration payable for the right under such an agreement will only be enforceable so as to require the payment of the market value.

Part 10: Undertaker’s works affecting electronic communications apparatus

320 Part 10 of the code deals with undertaker’s works affecting apparatus and replicates paragraph 23 of the existing code.

321 *Paragraph 61* sets out the scope of Part 10.

322 *Paragraph 62* sets out the key definitions of “undertaker” and “undertaker’s works” for Part 10. The Part will apply to other code operators, as well those who, under statute, carry on a railway, canal, tramway, road transport, water transport, inland navigation, dock, harbour, pier or lighthouse undertaking.

323 *Paragraphs 63 and 64* set out the requirements that must be complied with for the undertaker to carry out non-emergency undertaker’s works that interfere with a network. Under paragraph 63, the undertaker may only carry out the proposed works after the operator has been given 10 days’ notice, subject to any counter-notice given by the operator under paragraph 65.

324 Under paragraph 64, within that 10 day notice period, the operator may give counter-notice stating that the undertaker is required to alter apparatus (as a result of the proposed works) under the supervision and to the satisfaction of the operator, or that the operator intends to make such an alteration. Where counter-notice is given, the undertaker may go ahead with the works in accordance with the notice, or may go ahead independently where the operator unreasonably fails to provide supervision or where the operator fails to carry out the works within a reasonable time.

325 *Paragraph 65* requires the undertaker who carries out non-emergency works to pay the operator for any loss or damage sustained as a result of such works and for expenses incurred by the operator in supervising the works. This amount is recoverable in any court of competent

jurisdiction.

326 *Paragraph 66* provides that an operator can alter apparatus in connection with non-emergency undertaker's works where it has given counter-notice that it intends to do so. In such a case, the undertaker must pay the operator any expenses associated with the alteration and the amount of any loss or damage incurred as a result of the alteration. This amount is recoverable in any court of competent jurisdiction.

327 *Paragraph 67* sets out the requirements that must be complied with for the undertaker to alter apparatus in carrying out emergency undertaker's works (defined in sub-paragraph (7)). The undertaker must give notice of the emergency works as soon as is practicable after beginning the works. The undertaker must complete the works to the satisfaction of the operator and must pay the operator any expenses incurred in supervising the work and the amount of any loss or damages sustained as a result of the alteration. These amounts are recoverable in any court of competent jurisdiction.

328 *Paragraph 68* provides that an undertaker, or an agent of an undertaker, will be guilty of an offence by commencing works in contravention of the provisions of Part 10. An undertaker or agent who is guilty of an offence will be liable on conviction to a fine not exceeding level 3 on the standard scale (currently £1,000), or level 4 (currently £2,500) if the service provided by the operator's network is interrupted.

Part 11: Overhead apparatus

329 Part 11 of the code deals with overhead apparatus and replicates paragraphs 10 and 18 of the existing code.

330 *Paragraph 70* provides that an operator may install overhead lines that pass above third party land (on which no apparatus is installed) without the need for the agreement (under Part 2) of the person whose land is overflown, provided the apparatus to which the lines are attached is on land in relation to which the operator does have a right to install such apparatus. The lines must be at least three metres above the ground, must not pass within two metres of any building and may not interfere with the carrying on of any business carried out on that land. This replicates the power in paragraph 10 of the existing code.

331 *Paragraph 71* provides that operators must attach notices to any apparatus, the whole or part of which is three metres or more above the ground. This includes lines and other apparatus. The operator must attach a notice (within three days, beginning with the day after installation) to every major item of apparatus, or the nearest existing major item of apparatus to which the new apparatus is connected, if no new major apparatus has been installed. This notice must be legible, secure and provide the name and address of the operator to which an objector can send notice of objection under Part 12. It is a criminal offence for an operator to breach these requirements, punishable on summary conviction by a fine not exceeding level 2 on the standard scale (currently £500). This paragraph replicates paragraph 18 of the existing code.

Part 12: Rights to object to certain apparatus

332 Part 12 of the code details the rights that particular persons have to object to certain types of apparatus and the time periods within which those objections may be made. The rights do not apply to persons whose agreement is required under Part 2, since those persons' rights can be considered in the context of negotiating the code agreement. The rights in this Part apply to persons who may be affected by the installation of apparatus but whose agreement is not required for the installation of such apparatus. The nature of the right to object depends on how soon the objection is made after installation of the apparatus.

333 *Paragraph 73* sets out which people are eligible to object, which apparatus they are able to object to,

and the process of objecting.

- 334 Paragraph 73(1) provides that a person may object if they are an occupier of or have an interest in tidal water or lands and are not a person who is bound by a code right enabling the operator to keep the apparatus installed on, under or over the tidal water or land. The right to object does not apply to a person with the benefit of a Crown interest (see paragraph 60 of the code as to the exercise of a tidal water right in relation to Crown land).
- 335 Paragraph 73(3) and (4) concern the right to object where an operator keeps a line installed over land pursuant to the right in paragraph 70. In that case a person has the right to object if they are an occupier of or have an interest in land over which such a line has been installed and they are not a person who is bound by a code right enabling the operator to keep the apparatus installed over the land.
- 336 Paragraph 73(5) and (6) concerns the right to object where apparatus is kept on or over land for the purpose of an operator's network and that apparatus is at a height of three metres or more above the ground. In that case a person who is the occupier of, or has an interest in, neighbouring land has a right to object if the nearness of that neighbouring land to the land on or over which the apparatus is kept is capable of prejudicing either the enjoyment of the neighbouring land or any interest in that land.
- 337 Paragraph 73(7) provides that there is no right to object if the new apparatus installed is not substantially different from apparatus that it is replacing and is not in a significantly different position.
- 338 *Paragraph 74* provides that the right to object is exercised by giving notice to the operator. The content of the right and the procedure for exercising it depend on whether notice of objection is given within 12 months of installation, or after that period.
- 339 *Paragraph 75* provides for the procedure that applies if objection is made within 12 months of installation. Within two to four months of having given such a notice the objector may apply to the court to have the objection upheld. The court must uphold the objection if both of two conditions are met. The first condition is that the apparatus materially prejudices the person's enjoyment of, or interest in, the land. The second is that the court must be satisfied that there are possible alterations to the apparatus which (a) will not substantially increase the cost of or diminish the quality of the service provided to users of the network, (b) will not give another person a right to object just as good as the first objector's, and (c) will not involve the operator in substantial "additional expenditure". It is not the cost of altering the apparatus that is taken into account in assessing additional expenditure, but rather the difference in cost between the original installation and the additional cost of the proposed altered installation if the latter had been installed from the outset. Similarly if the court considers that the apparatus has been unnecessarily installed, expenditure incurred in removing it is not to be taken into account. If these conditions are met, the court can require the apparatus to be changed or moved, and (in either case) can prevent further objections being made against an installation authorised by the court.
- 340 *Paragraph 76* provides for the procedure that applies if the notice is given later than 12 months after installation. Within two to four months of having given such a notice, the objector may apply to the court to have the objection upheld. The court may uphold the objection only if it is satisfied that the alteration is necessary to enable the objector to carry to an improvement to the land and the alteration will not substantially interfere with the operator's network service. Sub-paragraph (7) provides that the objector must, unless the court orders otherwise, pay the operator's costs of the alteration.
- 341 *Paragraph 77* sets out limitations on the court's powers where the court is considering making an

order under paragraph 75 (directing the alteration of any apparatus or authorising the installation of any apparatus) or under paragraph 76 (directing the alteration of any apparatus). The court must not make an order unless the operator has the necessary code rights to effect the alteration or unless the court imposes such code rights as are necessary to effect the alteration. The court also has the power under this paragraph to require the objector to bring matters to the notice of other interested persons.

Part 13: Rights to lop trees

342 Part 13 of the code allows operators in applicable circumstances to lop trees or other vegetation that overhangs a street in England and Wales or Northern Ireland or a road in Scotland. Part 13 replicates paragraph 19 of the existing code, but extends provision to include the lopping or cutting back of vegetation other than trees.

343 Under *paragraph 78*, the operator may require the tree to be lopped or vegetation to be cut back where it overhangs the street. If no objection is made by the site provider within 28 days of the operator giving notice of that requirement, the operator may itself have tree lopped or the vegetation cut back. If the owner of the tree or of other vegetation objects the court decides the matter. The operator must reimburse that person for any expenses associated with the lopping or cutting back, or for any loss or damage caused. This right applies to trees that are protected by a tree preservation order and trees in conservation areas but, by virtue of paragraph 94(1), is subject to the provisions of any relevant tree preservation legislation. Such legislation provides certain exceptions for statutory undertakers including operators.

Part 14: Compensation under the code

344 Part 14 contains general provision about compensation.

345 *Paragraph 80* makes provision about compensation for the purposes of the powers of the court to order compensation; in relation to agreements imposed under Part 4 and in relation to the removal of apparatus under Part 6. Paragraph 80(2) enables the court to order compensation for reasonable legal and valuation costs incurred by a landowner. Paragraphs 80(3) to 80(6) make provision for the inclusion of statutory principles for assessing compensation for diminution in value of land. Paragraph 80(7) provides that there cannot be double compensation for the same loss.

346 *Paragraph 81* makes general provision for the continued application of established statutory rules for the assessment of rights to compensation for injurious affection to neighbouring land where rights under Parts 2 to 9 are exercised.

347 *Paragraph 82* provides that no other rights to compensation arise in relation to the lawful exercise of code rights.

Part 15: Notices under the code

348 Part 15 makes provision about requirements for the form of notices given under the code and about procedures for giving notices. Part 15 broadly retains the effect of paragraph 24 of the existing code, but is updated to provide for Ofcom to produce model notices and forms for use under the code.

349 *Paragraph 84* makes requirements for the form of notices given by operators under the code. An example of where an operator might give a notice can be found at paragraph 19(2).

350 *Paragraph 85* makes requirements for the form of notices given by a person other than an operator.

351 *Paragraph 86* requires Ofcom to prescribe the form of a notice to be given under each provision of the code that requires a notice to be given.

352 *Paragraph 87* makes requirements about the procedures for giving notice.

Part 16: Enforcement and dispute resolution

353 Part 16 concerns the forum in which code disputes are to be adjudicated (in England and Wales) the Lands Chamber of the Upper Tribunal should adjudicate code disputes. So that the necessary technical and administrative arrangements for changing the forum of disputes can be considered in more detail, Part 16 gives the Secretary of State the power to make regulations to confer jurisdiction on the First-tier Tribunal and Upper Tribunal (in England and Wales), the Lands Tribunal for Scotland, and the Lands Tribunal for Northern Ireland. In relation to England and Wales, the First-tier Tribunal and the Upper Tribunal are unified tribunals; therefore Part 16 refers to the tribunals rather than specific chambers within the tribunals. It is for the Lord Chancellor or the Senior President of Tribunals, with the concurrence of the other, to make provision for the allocation of the functions between the various chambers of the First-tier Tribunal and Upper Tribunal (see Section 7(9) of the Tribunals, Courts and Enforcement Act 2007).

354 *Paragraph 89* makes provision as to which court or tribunal can enforce an agreement under the code or a right conferred by the code. A court or tribunal that has imposed an agreement will be able to enforce it. In addition, a court or tribunal with the power to impose an agreement under the code will be able to enforce any agreement or right under or conferred by the code (not just an agreement that the court or tribunal has imposed). This paragraph also provides that any court of competent jurisdiction will be able to enforce an agreement or right under the code. So, for example, the High Court of England and Wales may be able to enforce (for example, by way of injunction in applicable circumstances) a code right as part of its jurisdiction to deal with actions relating to contract. The question as to whether a particular court is the right one in which to bring such a claim will be determined under applicable court rules (see for example Part 7 of the Civil Procedure Rules in England and Wales).

355 *Paragraph 90* means that, in the absence of regulations made under paragraph 91, references in the code to “the court” means the county court (in relation to England and Wales and Northern Ireland) or the sheriff (in Scotland).

356 *Paragraph 91* gives the Secretary of State the power to make regulations to confer jurisdiction on the First-tier Tribunal and Upper Tribunal (in England and Wales), the Lands Tribunal for Scotland, and the Lands Tribunal for Northern Ireland.

357 Paragraph 91(2) means that jurisdiction can be conferred on the tribunals as well as or instead of the court. Where jurisdiction is conferred on more than one body, paragraph 91(3) permits the Secretary of State to make regulations setting out in which court or tribunal proceedings are to be commenced and enabling that court or tribunal to transfer proceedings to another court or tribunal. For example, in relation to England and Wales it will be possible for jurisdiction to adjudicate code disputes to be conferred on the First-Tier Tribunal, the Upper Tribunal and the county court. Paragraph 91(3) gives the Secretary of State the power to make regulations to provide, for example, that proceedings relating to code disputes must be commenced in the Upper Tribunal but that the Upper Tribunal may transfer proceedings to the First-tier Tribunal or the county court (see Chapter 9 of the Law Commission report).

358 *Paragraph 93* refers to regulation 3 of the Electronic Communications and Wireless Telegraphy Regulations 2011. Regulation 3 applies to certain applications to install facilities. Where regulation 3 applies to an application under the code, there is a six-month time limit for determining the application. This replicates paragraph 24A of the existing code.

359 *Paragraph 94* makes provision in relation to appeals in Northern Ireland, and replicates paragraph 25 of the existing code.

Part 17: Supplementary provisions

360 Part 17 contains a number of supplementary provisions, including definitions of terms used elsewhere in the code.

361 *Paragraph 95* provides that the new code does not authorise the contravention of any enactment passed or made before the new code comes into force unless such an enactment makes provision to the contrary. So for example, nothing in the code authorises anything that would be in breach of existing planning legislation.

362 Paragraph 96(1) provides that the code does not restrict the terms of any agreement (i.e. an agreement under Part 2) to which the operator is a party. In other words the parties are free to agree what they wish. This is subject to paragraph 95(2), the “no-contracting out” provision. Its effect is that any agreement to which the operator is a party cannot disapply the minimum obligations and rights set out in Parts 3 to 6 of the code, in paragraph 60(2) to (5) and in paragraph 95. Without such provision an operator might otherwise be required by a site provider to forgo its rights under the code as a condition of being granted the code right.

363 Under general land law, a movable object that is attached to the land may become part of the land (and consequently become the property of the owner of the land) if it has become a fixture. *Paragraph 97* prevents this from happening by providing that property rights in apparatus are unaffected by that apparatus becoming attached to land. This provision was contained in the existing code but clearer wording has been used.

364 *Paragraph 98* replicates paragraph 15 of the existing code. Its effect is that an operator must have the agreement of the authority with control of a relevant conduit to install apparatus in that conduit (i.e. such rights cannot be ordered by the court under Part 4).

365 Paragraph 99 obliges Ofcom to publish a code of practice on the operation of the code and suggested (but not mandatory) standard terms for use in code agreements. These may be updated from time to time. Ofcom is required to consult with operators and anyone else it thinks appropriate before it first publishes the code of practice and suggested standard terms.

366 *Paragraph 100* provides that Crown land (meaning, primarily, land owned or leased by the government) is subject to the code in the same way as any other land. It also sets out who has the authority to enter into agreements or grant code rights over various different categories of Crown land.

367 *Paragraph 101* sets out the meaning of “occupier” for the purposes of the code.

368 *Paragraph 102* makes provisions for Scottish Ministers to make rules for the Lands Tribunal for Scotland in relation to code.

369 *Paragraph 103* makes provision in relation to arbitration in Scotland.

370 *Paragraph 104* defines other terms used within the code including but not limited to a definition of land under the code, which excludes apparatus, thereby ensuring that code rights cannot bind digital communications apparatus.

Schedule 2: The electronic communications code: transitional provision

371 This Schedule sets out transitional provisions connected with the new electronic communications code coming into force. This Schedule provides for agreements made under the electronic communications code set out in Schedule 2 to the Telecommunications Act 1984, and for other rights and matters affected by that code, to transition to the new code in Schedule 1.

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- 372 *Paragraph 1* sets out how key terms should be interpreted under Schedule 2, most notably that an existing agreement is an agreement made under paragraph 2(1) of the existing code (Schedule 2 to the Telecommunications Act 1984) or an agreement imposed by the Courts under paragraph 5 of the existing code. Any agreements made before the commencement of the new code can be considered existing agreements.
- 373 *Paragraph 2* provides that on commencement of the new code, existing agreements that are still in force will come under the governance of the new code. This is with the exception of certain modifications, which are set out in transitional arrangements to ensure there is no retrospective application of the new code.
- 374 *Paragraph 3* provides that under existing agreements which transition to the governance of the new code are code rights listed at paragraph 2(1)(a) to (c) of the existing code.
- 375 *Paragraph 4* provides that the operator in a subsisting agreement under the existing code will remain the operator under the new code. Paragraph 4(2) provides that a person who is bound by a code right under the existing code will continue to be bound by that code right with access to the same provisions set out under paragraph 2(3) of the existing code. Paragraph 5(2) provides that a person bound by a code right under paragraph 4(4) to 4(12) of the existing code will still be bound by that right, with the exception of provisions at paragraph 21 (Restrictions on rights to require removal of apparatus), which should be replaced with the provisions at part 5 of the new code (Termination and Modification of Agreements).
- 376 *Paragraph 5* excludes the assignment of code rights, upgrading and sharing provisions from subsisting agreements.
- 377 *Paragraph 6* makes provision for subsisting agreements, when they eventually terminate, to take advantage of Part 5 of the new code which in particular enables the subsisting agreement to continue until terminated in accordance with Part 5.
- 378 *Paragraph 7* concerns rights in relation to street works, flying lines, tidal waters and linear obstacles. Paragraph 7(1) provides that paragraphs 9 to 12 of the existing code dealing with these rights will continue to apply to any works already in process when the new code comes into force. Paragraph 7(2) provides that any apparatus lawfully installed under paragraph 9 to 12 should come under the corresponding new provision in the revised code as long as the provisions under the new code provide for the same or equal rights as those under the existing code. Paragraph 7(3) sets out the corresponding provision in the new code.
- 379 *Paragraph 8* provides that an agreement for the purposes of paragraph 11(2) of the existing code in relation to tidal water or lands in which there is a Crown interest has effect as an agreement for the purposes of paragraph 60 of the new code.
- 380 *Paragraph 9* provides that agreements under paragraph 15 of the existing code (which relate to certain specified conduits) are treated as having the same effect as if made under the like provision in the new code.
- 381 *Paragraphs 10 and 11* make provision in relation to applications for code rights under the existing code that were made but not completed before the coming into force of the new code. Such applications may be continued, either as proceedings under the provisions of the existing code or the new code, but with the common result that if successful they create code rights in an agreement that has effect under the new code. If the operator requires proceedings that would have continued under the existing code to be dealt with as proceedings under the new code, the operator must bear any additional costs that result.
- 382 *Paragraph 12* provides that any order for temporary rights made by the Court before the new code comes into force continues in force under the new code and that any application for temporary

rights under the existing code continues as the like application under the new code.

383 *Paragraph 13* provides that the repeal of the existing code does not affect rights to compensation that arise in relation to matters that occurred before repeal.

384 *Paragraph 14* preserves existing rights and obligations under paragraph 17 (Objections to overhead apparatus) and paragraph 18 (Obligation to affix notices to overhead apparatus) of the existing code.

385 *Paragraph 15* provides that the repeal of the existing code will not affect rights under paragraph 20 of the existing code (Power to require alteration of apparatus) for apparatus installed before the new code comes into force. Parties with existing agreements related to apparatus that was installed before the code comes into force will continue to have rights under paragraph 20 of the existing code against that apparatus. Those rights will cease at such time as the apparatus is subject to an agreements under the new code. The new code makes provision for different rights to object to certain apparatus in Part 12.

386 *Paragraph 16* provides that Part 12 of the new code (Rights to Object to Certain Apparatus) accordingly applies only to apparatus installed before the new code comes into force.

387 *Paragraphs 17 and 18* make provision in relation to the right to cut back trees that overhang the street and make clear the circumstances in which a contested right to cut back trees is dealt with under the provisions of the existing code.

388 Paragraph 21 of the existing code makes provision for the removal of apparatus when code rights have ceased and makes provision for the operator to be able to contest removal by applying for new rights. *Paragraphs 19 to 22* of this Schedule make provision for applications by site providers to remove apparatus (and applications by operators seeking new rights to keep apparatus installed) to continue under the equivalent provisions of the new code.

389 Under the existing code there are provisions dealing with the rights of operators and the works of other statutory undertakers. *Paragraph 23* clarifies when the provisions of the existing code will apply to such works.

390 *Paragraphs 24 to 27* make additional transitional provision dealing with the giving of notices, avoiding double compensation and other minor technical matters.

Schedule 3: The electronic communications code: consequential amendments

391 This Schedule makes amendments that are consequential on the introduction of the new electronic communications code in Schedule 1.

Commencement

392 The provisions of the Bill will come into force as provided for by clause 82 of the Bill. The notes on that clause above provide full details. Subject to parliamentary approval of the Bill and any necessary secondary legislation, it is intended to start commencement of the provisions of the Bill from Spring 2017.

Financial implications of the Bill

393 The financial costs and benefits of the Bill have been set out in accompanying impact assessments. The following assessments have been made:

- a. An overarching impact assessment;
- b. Part 2: Access to Digital Services:
 - i. An impact assessment of the new electronic communications code;
 - ii. An impact assessment of Dynamic Spectrum Access;
 - iii. An impact assessment of Financial penalties for Breaches of Wireless Telegraphy Act Licence Conditions;
 - iv. An impact assessment of Wireless Telegraphy Act enforcement;
- c. Part 3: Online pornography:
 - i. An impact assessment of Age verification for online pornography;
- d. Part 4: Intellectual Property:
 - i. An impact assessment of Webmarking: Constructive notice - products protected by registered designs;
 - ii. An impact assessment of The balance of payments between TV platforms and Public Service Broadcasters;
- e. Part 5: Digital Government:
 - i. An impact assessment of Digital Government: public services;
 - ii. An impact assessment of Digital Government: civil registration;
 - iii. An impact assessment of Digital Government: disclose identified data for the purpose of taking action in connection with debt owed to a specified public authority;
 - iv. An impact assessment of Digital Government: new powers for bodies to disclose identified data for the purpose of combating fraud against the public sector;
 - v. An impact assessment of Digital Government: power to allow public authorities to disclose de-identified data in controlled conditions for research in the public interest;
 - vi. An impact assessment of Digital Government: new powers for access to identified data for the purposes of producing national and other official statistics and research;

- f. Part 6: Ofcom and other regulation
 - i. An impact assessment of Ofcom data transparency powers;
 - ii. An impact assessment of Ofcom appeals;
 - iii. An impact assessment of Direct Marketing Code of Practice;
 - iv. An impact assessment of Ofcom satellite filings.

Parliamentary approval for financial costs or for charges imposed

394 The additional expenditure arising from the Bill is subject to a Money Resolution. On introduction Parliament will be asked to agree that any expenditure arising from this Bill (should it become an Act) incurred by a member of government will be taken out of money supplied by Parliament.

Compatibility with the European Convention on Human Rights

395 Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before Second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act). The Secretary of State for Culture, Media and Sport, the Rt Hon John Whittingdale MP, has made the following statement:

"In my view the provisions of the Digital Economy Bill are compatible with the Convention rights."

396 The Bill engages Article 6 (right to a fair trial), Article 7 (no punishment without law), Article 8 (right to respect for private and family life), Article 10 (freedom of expression), and Article 1 of the First Protocol to the European Convention of Human Rights ("ECHR") but is compatible with the rights set out in these Articles.

Electronic communications code

397 The new electronic communications code, like the current code, provides for electronic communications operators to obtain access to land by compulsion where it cannot be agreed, subject to judicial supervision. The code engages the right to property in Article 1 of Protocol 1. The public interest in creating, improving and maintaining such networks is well established and justifies the interference. The new code will also change the valuation basis of land for code rights to "no scheme" (which is the usual rule for compulsory purchase arrangements in other utilities and public projects). It is the government's view that this should result in a reduction in the price paid for access to land by telecoms operators. The government considers that the measure is clearly within the United Kingdom's margin of discretion and there is no breach of Protocol 1 Article 1. The provisions will not be retrospective.

Online pornography

398 Clauses 15 to 25 concerning online pornography engage Article 10. The government's view is that there are good arguments as to why the approach in the Bill is justified and proportionate, given

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the overall aim of protecting children from accessing material that is age inappropriate and may be harmful to them. The requirement to have age access controls in place will be required by law. The requirement to ensure that persons must prove that they are aged 18 or over in order to access this material reflects requirements that apply elsewhere.

Intellectual property

399 The provisions in Part 4 concerning the infringement of copyright amend the existing offence provisions in sections 107 and 198 of the 1988 Act respectively. The amended offence provisions make it an offence where a person infringes copyright in a work by communicating the work to the public; or infringes a performer's making available right and the person knows or has reason to believe that he is infringing the right, and the person either intends to make a gain for himself or another, or knows or has reason to believe that the act of infringement will cause loss to the owner of the right or expose the owner of the right to a risk of loss.

400 The amendments will have the effect of providing more clarity on the meaning of the existing offence provisions and considered compatible with Article 7.

Digital government

401 The digital government provisions cover a number of different areas but the broad purpose of the provisions is to provide for more effective data sharing between particular bodies in government in specified circumstances. The collection, storage and disclosure of identifying personal information by government about an individual in these circumstances will engage with that person's Article 8 rights. Any interference with an Article 8 right can be justified on the basis that it is in accordance with the law and is for a legitimate aim.

402 The digital government provisions are subject to detailed legislative frameworks and safeguards to ensure data is disclosed in specific circumstances by and to specified bodies for specified purposes. The safeguards also require the bodies to handle data in compliance with the Data Protection Act 1998 and the Regulation of Investigatory Powers Act 2000. The benefit of more effective data sharing between particular bodies provided for by Part 5 and safeguards set out in each provision are considered to provide sufficient protection to persons whose Article 8 rights may be affected and Part 5 is considered to be compatible with the article.

403 Clause 65, in Part 5, relates to the disclosure of information by HMRC to the Statistics Board and may engage Article 1 to the First Protocol as the UK statistics authority is able to obtain data that it would otherwise be required to purchase. To the extent that there is an interference, such interference is considered proportionate and therefore compatible with the ECHR as it is necessary in a democratic society to have the legitimate aim of producing statistics that assist the economic well-being of the country.

Appeals from decisions of OFCOM and others: standard of appeal

404 Clause 74 will amend section 192, 195 and 317 of the 2003 Act to change the standard of appeal applied by the Competition Appeal Tribunal ("CAT") when considering appeals against certain decisions of OFCOM. At present, the CAT consider such appeals "on the merits". This clause amends this standard of appeal so that the CAT will be required to apply the same principles as would be applied by a court on an appeal for judicial review.

405 Clause 74 engages Article 6 (right to a fair trial) and is considered to be compatible with Article 6. The change in the standard of appeal will be amended but the right to appeal by a person aggrieved by a decision of OFCOM under section 192 of the 2003 Act to the CAT remains in place. The CAT is an independent tribunal that will still have jurisdiction to hear the appeal and review the decision of OFCOM.

Related documents

406 The government has published online a number of related documents:

www.gov.uk/government/collections/digital-economy-bill-2016

407 The following documents are relevant to the Bill and can be read at the stated locations:

- A new broadband Universal Service Obligation, Department for Culture, Media and Sport, March 2016,
www.gov.uk/government/consultations/broadband-universal-service-obligation
- Making communications work for everyone, Ofcom, February 2016,
media.ofcom.org.uk/news/2016/digital-comms-review-feb16/
- Switching Principles Action Plan, Department for Business, Innovation and Skills, May 2016,
www.gov.uk/government/publications/switching-suppliers-action-plan
- Electronic Communications Code, Law Commission, February 2013,
www.lawcom.gov.uk/project/electronic-communications-code/
- A New Electronic Communications Code, Department for Culture, Media and Sport, May 2016,
www.gov.uk/government/publications/government-publishes-proposals-for-a-new-electronic-communications-code
- Connectivity, content and consumers: Britain's digital platform for growth, Department for Culture, Media and Sport, July 2013,
www.gov.uk/government/publications/connectivity-content-and-consumers-britains-digital-platform-for-growth
- Child Safety Online: Age Verification for Pornography, Department for Culture, Media and Sport, February 2016,
www.gov.uk/government/consultations/child-safety-online-age-verification-for-pornography
- Changes to penalties for online copyright infringement, Intellectual Property Office, July 2015,
www.gov.uk/government/consultations/changes-to-penalties-for-online-copyright-infringement
- Webmarking for registered design rights, Intellectual Property Office, July 2015,
www.gov.uk/government/consultations/webmarking-for-registered-design-rights-call-for-evidence
- Better use of data in government, Cabinet Office, February 2016,
www.gov.uk/government/consultations/better-use-of-data-in-government
- Sharing and publishing data for public benefit, HM Revenue and Customs, July 2013,
www.gov.uk/government/consultations/sharing-and-publishing-data-for-public

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benefit

- Direct Marketing Guidance, Information Commissioner’s Office, May 2016, ico.org.uk/for-organisations/guide-to-pecr/electronic-and-telephone-marketing/
- Public Administration Committee - Tenth Report 2013-14: Statistics and Open Data: Harvesting unused knowledge, empowering citizens and improving public services, House of Commons, 11 March 2014
<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubadm/564/564.pdf>
- Environment, Food and Rural Affairs Committee - Seventh Report 2014-15: Rural broadband and digital-only services, House of Commons, 28 January 2015
<http://www.publications.parliament.uk/pa/cm201415/cmselect/cmenvfru/834/834.pdf>
- Culture, Media and Sport Committee – First Report 2016-17: Cyber Security: Protection of Personal Data Online, House of Commons, 15 June 2016
<http://www.publications.parliament.uk/pa/cm201617/cmselect/cmcmums/148/148.pdf>

Annex A - Territorial extent and application in the United Kingdom

1. Subject to two exceptions, the provisions of the Bill extend and apply to England and Wales, Scotland and Northern Ireland.¹
2. Clauses 30 and 31 concern the disclosure of information to and from gas and electricity suppliers under the Gas Act 1986 and the Electricity Act 1989, and only extend to England and Wales and Scotland.
3. Clause 38 amends the Registration Service Act 1953, which only extends and applies to England and Wales.

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
Part 1: Access to Digital Services								
Clauses 1 to 3	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Part 2: Digital Infrastructure								
Clause 4 to 6	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Schedule 1	Yes	Yes	Yes	Yes	N/A	N/A	N/A	Yes
Schedule 2	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Schedule 3	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Clauses 7 to 14	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Part 3: Online Pornography								
Clauses 15 to 25	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Part 4: Intellectual Property								
Clauses 26 to 28	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Part 5: Digital Government								
Chapter 1: Public Service Delivery								
Clause 29	Yes	Yes	Yes	Yes	N/A	N/A	N/A	Yes

¹ References in this Annex to a provision being within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly are to the provision being within the legislative competence of the relevant devolved legislature for the purposes of Standing Order No. 83J of the Standing Orders of the House of Commons relating to Public Business.

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
Clauses 30 to 31	Yes	Yes	Yes	No	N/A	N/A	Yes	Yes
Clauses 32 to 33	Yes	Yes	Yes	Yes	N/A	N/A	N/A	Yes
Clause 34 (HMRC)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Clauses 35 to 37	Yes	Yes	Yes	Yes	N/A	N/A	N/A	Yes
Chapter 2: Civil Registration								
Clause 38	Yes	Yes	No	No	N/A	Yes	Yes	No
Clause 39	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Chapter 3: Debt owed to the public sector								
Clauses 40 to 42	Yes	Yes	Yes	Yes	N/A	N/A	N/A	Yes
Clause 43 (HMRC)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Clauses 44 to 47	Yes	Yes	Yes	Yes	N/A	N/A	N/A	Yes
Chapter 4: Fraud against the public sector								
Clauses 48 to 50	Yes	Yes	Yes	Yes	N/A	N/A	N/A	Yes
Clauses 51 (HMRC)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Clauses 52 to 55	Yes	Yes	Yes	Yes	N/A	N/A	N/A	Yes
Chapter 5: Sharing for research purposes								
Clauses 56 to 58	Yes	Yes	Yes	Yes	N/A	N/A	N/A	Yes
Clause 59 (HMRC)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Clauses 60 to 63	Yes	Yes	Yes	Yes	N/A	N/A	N/A	Yes
Chapter 6: Her Majesty's Revenue and Customs								
Clause 64	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Chapter 7: Statistics								
Clause 65 (HMRC)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Clause 66 to 68	Yes	Yes	Yes	Yes	N/A	N/A	N/A	Yes
Part 6: Ofcom and other regulation								
Clauses 69 to 80	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No

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Minor or consequential effects²

The following provisions that apply to England and Wales have effects outside England and Wales, all of which are, in the view of the Government of the United Kingdom, minor or consequential:

Clause 38: Disclosure of information by civil registration officials

The substance of the amendments and repeals made to the Registration Service Act 1953 extend and apply to England and Wales only. Subsections (4) and (5) of the new section 19AB inserted into that Act extend to England and Wales, Scotland and Northern Ireland. These subsections enable the Secretary of State to include in regulations amending the list of public authorities with whom data can be shared under this power, consequential amendments to other enactments. It is only such consequential amendment that may extend to the whole of the United Kingdom. The provisions which extend to the whole of the United Kingdom are provisions to make consequential amendments arising from the primary policy, which only applies to England and Wales. There are no other provisions that extend to the whole of the United Kingdom and so the clause is considered to apply only to England and Wales. This is to ensure that all necessary enactments may be amended to avoid unintended consequences arising. The substance of these new provisions is not effected.

The powers inserted into the Registration Services Act that extend to England and Wales only enable a registration official in England and Wales to share registration data with a devolved body in Scotland or Northern Ireland. There are no legislative obligations or duties imposed upon the recipient of registration data and requesting and receiving such the disclosure does not interfere with the executive competence of Scottish and Northern Ireland Ministers.

Subject matter and legislative competence of devolved legislatures

Clause 38 of the Bill relates to civil registration. The legal framework for civil registration in England and Wales is framed by the Registration Service Act 1953, as well as related legislation: the Births and Deaths Act 1953; the Marriage Act 1949; the Civil Partnership Act 2004; the Marriage (Same Sex Couples) Act 2013. All of this legislation relates to England and Wales only. In Scotland, the legal framework for civil registration is separate, with its origins in the Registration of Births, Deaths and Marriages (Scotland) Act 1854. The framework for civil registration in Northern Ireland is also separate, found in the Civil Registration Act (Northern Ireland) 2011, which recently replaced the Births and Deaths Registration (Northern Ireland) Order 1976 and the Marriage (Northern Ireland) Order 2003. Civil registration is not a reserved or excepted matter under the Scotland Act 1998 or the Northern Ireland Act 1998. The Scottish Parliament and the Northern Ireland Assembly have legislative competence in respect of civil registration.

² References in this Annex to an effect of a provision being minor or consequential are to its being minor or consequential for the purposes of Standing Order No. 83J of the Standing Orders of the House of Commons relating to Public Business.

Annex B - Digital Government: Regulations

- 1 Part 5 of the Bill contains a number of powers to make regulations to specify the objectives of information sharing and with whom information may be shared. This Annex provides further detail on how the government intends to use these powers.

Objectives of disclosure of information to improve public service delivery

- 2 Clause 29 of the Bill provides a power to specify by regulation the objectives under which information may be disclosed. The government intends to make regulations, initially, for the following objectives:

Troubled Families Programme

- 3 This programme, which operates in England only and is administered by the Department for Communities and Local Government (“DCLG”), aims to address the lack of child attendance in school, assist adults in employment or on a path back to work and reduce youth crime and anti-social behaviour. Identifying families in need of help requires DCLG to see information from other authorities. Disclosure of information would be for the objective of identifying and providing support to individuals or households who face multiple disadvantages. While the objective was originally developed to support the goals of the Troubled Families Programme, it is designed not to be limited to supporting any specific programme. It should assist the numerous national and local interventions that require multiple public services to work together to support families and individuals with multiple, complex problems. The regulations will describe the objective as:
 - a. identifying individuals or households who face multiple disadvantages, and
 - b. enabling the public services to be provided to such individuals and households to be tailored to their needs.

Assistance with re-tuning television equipment

- 4 Ofcom is currently working to clear the 700MHz radio spectrum band to be used for mobile broadband having published a [statement](#) in November 2014. Currently the main use of the 700MHz band is to transmit digital television, so many viewers will have to re-tune televisions over the next five years and a limited number may need alterations to their TV aerials. Identifying vulnerable persons who might need help in dealing with these changes requires access to existing information from public authorities. The regulations will describe the objective as:
 - a. identifying individuals or households who may be eligible for assistance,
 - b. making contact with such individuals or households with a view to the provision of assistance, and
 - c. establishing any such individual’s or household’s entitlement to assistance.

- 5 Given that a previous clearance of TV transmission from the 800MHz radio spectrum band benefited from a help scheme for vulnerable viewers, and that future changes to TV frequencies cannot be ruled out, the regulations will allow for assistance to viewers in the event of any changes in the spectrum currently used by digital terrestrial TV (470-790 MHz).

Fuel Poverty

- 6 Schemes for providing assistance to persons living in fuel poverty may be run by public authorities, such as local authority or government run grant schemes, or they may take the form of

supplier obligations, like the Energy Company Obligation and the Warm Home Discount, where the assistance is delivered or promoted by energy suppliers. The government's view is that the best way to guarantee that this assistance reaches those who need it is to provide it automatically, although automatic rebates can only happen if the state can inform energy companies which of their customers should receive it. Pensioner households already receive rebates in this way, because a specific data sharing gateway has been created in the section 142 of the Pensions Act 2008 to enable it to happen. The government intends the data sharing gateway provides by this Bill to be used for other vulnerable persons. A number of different public authorities hold data about incomes and dwelling characteristics, which would enable better targeting of fuel poverty support schemes at those in greatest need and more efficient delivery of the assistance to people living in fuel poverty. The regulations will describe the objective as:

- a. assisting people living in fuel poverty by reducing their energy costs,
- b. assisting people living in fuel poverty by improving efficiency in their use of energy, or
- c. assisting people living in fuel poverty by improving their health or financial well being.

Persons who may disclose or receive information under public service deliver information sharing powers

7 Clause 29 of the Bill provides a power to specify by regulation persons who may disclose or receive information using the data sharing gateway provided in Chapter 1 of Part 5 of the Bill. The government intends to make regulations, initially, for the following persons:

- The Treasury.
- The Secretary of State for the Home Department.
- The Secretary of State for Foreign and Commonwealth Affairs.
- The Lord Chancellor.
- The Secretary of State for Justice.
- The Secretary of State for Defence.
- The Secretary of State for Business, Innovation and Skills.
- The Secretary of State for Work and Pensions.
- The Secretary of State for Communities and Local Government.
- The Secretary of State for Education.
- The Secretary of State for International Development.
- The Secretary of State for Energy and Climate Change.
- The Secretary of State for Transport.
- The Secretary of State for Culture, Media and Sport.
- The Secretary of State for the Environment, Food and Rural Affairs.
- The Chancellor of the Duchy of Lancaster.
- Her Majesty's Revenue and Customs.

- A county council in England.
- A district council in England.
- A London borough council.
- The Common Council of the City of London in its capacity as a local authority.
- The Council of the Isles of Scilly.
- The Greater London Authority.
- A chief officer of police for a police area in England and Wales.
- A person providing services to a specified person.

Persons who may disclose information to reduce debt owed to the public sector and to combat fraud against the public sector

8 Clause 40 of the Bill provides a power to specify by regulation persons who may disclose or receive information using the data sharing gateway provided in Chapter 3 of Part 5 of the Bill. Clause 48 of the Bill provides a power to specify by regulation persons who may disclose or receive information using the data sharing gateway provided in Chapter 4 of Part 5 of the Bill. The government intends to make regulations under both these powers, initially, for the following persons:

- The Secretary of State for the Home Department.
- The Lord Chancellor.
- The Secretary of State for Justice.
- The Secretary of State for Business, Innovation and Skills.
- The Secretary of State for Work and Pensions.
- The Secretary of State for Transport.
- Her Majesty's Revenue and Customs.
- A county council in England.
- A district council in England.
- A London borough council.
- The Common Council of the City of London in its capacity as a local authority.
- The Council of the Isles of Scilly.
- The Greater London Authority.
- The Student Loans Company
- A person providing services to a specified person.

Annex C - Glossary

Term	Reference
CAT	Competition Appeal Tribunal
CMA	Competition and Markets Authority
PECR	Privacy and Electronic Communications Regulations 2003
Superfast broadband	Broadband capable of delivering download speeds of at least 24 Mbps
the 1988 Act	Copyright, Designs and Patents Act 1988
the 1998 Act	Data Protection Act 1998
the 2002 Act	The Office of Communications Act 2002
the 2003 Act	Communications Act 2003
the 2006 Act	Wireless Telegraphy Act 2006
the 2007 Act	Statistics and Registration Service Act 2007
USO	Universal Service Obligation
the code	The electronic communications code
code rights	Rights conferred on a communications network provider concerning the installation and maintenance of apparatus on, over or under land
code operators	Communications network providers with rights under the electronic communications code

DIGITAL ECONOMY BILL

EXPLANATORY NOTES

These Explanatory Notes relate to the Digital Economy Bill as introduced in the House of Commons on 5 July 2016 (Bill 45).

Ordered by the House of Commons to be printed, 5 July 2016

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LONDON - THE STATIONERY OFFICE LIMITED

Printed In the United Kingdom by The Stationery Office Limited

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