

DIGITAL ECONOMY BILL

Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee by the Department for Culture, Media and Sport

Introduction

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee by the Department for Culture, Media and Sport, with input from the Cabinet Office, the Department for Business, Energy and Industrial Strategy, the Department for Education, HMRC, HM Treasury and the Home Office. It identifies the provisions of the Digital Economy Bill (“the Bill”) which confer powers to make delegated legislation and explains in each case why the power has been taken and the nature of, and reason for, the procedure selected.
2. The descriptions of the powers are arranged in the order that they appear in the Bill. (Schedules are addressed in order of the clauses giving effect to them.)

Overview of the Bill

3. The Bill contains 7 Parts and 4 Schedules.
4. The Bill has four main themes. First, the Bill will enable access to fast digital services. It will support the creation of a new legal right for everyone to request an affordable connection to broadband of a minimum specified speed, from a designated provider, which will then be obliged to fulfil that request provided that it is reasonable. Consumers and businesses will be able to access better information about digital services, switch provider more easily and be automatically compensated when things go wrong. As well as enhancing Ofcom’s powers to deliver these improvements, Ofcom will become fully industry-funded, allowing greater flexibility and independence. The Bill will ensure that its board reflects the whole of Great Britain and Northern Ireland. The Bill will also amend the standard of appeal applied by the Competition Appeal Tribunal when hearing appeals against Ofcom’s decisions in order to enable faster and more effective regulation.

5. Second, the Bill will enable investment in better digital infrastructure. Communication providers will be able to acquire land for less cost with reforms to the electronic communications code (“the Code”), which will accelerate the pace of rollout of new infrastructure resulting in better coverage and speed in digital services. The Bill will also remove the sunset provision which applies to regulations imposing conditions and restrictions on Code operators, which will enable the relaxations for overhead lines, poles and cabinets introduced in 2013 for 5 years to become permanent. Radio spectrum, a finite resource, will be used more efficiently with measures to manage better the use of “white space” and enhanced powers for Ofcom to deliver better spectrum management and enforcement.
6. Third, the Bill will create new protections for children, consumers and businesses in the emerging digital world. Persons making pornographic material available on the internet on a commercial basis must ensure that such content is behind adequate age-verification controls. The age-verification regulator will have the power to impose a financial penalty on those in breach, and to give notice of a contravention to payment service providers (which could result in payment service providers declining to facilitate transactions to which the person in contravention is party) and to ancillary service providers (such as advertisers). The regulator will also have the power to require internet service providers to prevent persons in the United Kingdom from being able to access material on the internet where it is being made available in contravention of the age-verification requirement or is “prohibited material” (as defined in clause 22). There will be a new statutory code of practice for direct marketing, which will enable the Information Commissioner to take more effective action against nuisance callers. Designers will be given a new way of giving the public notice of their intellectual property rights with a web address. Those who breach online copyright will now face the same sanction as those who breach offline copyright. Websites will also no longer be able to profit from reusing the content from our public service broadcasters without establishing proper contractual arrangements with rights holders.
7. Fourth, the Bill contains a suite of measures that support the digital transformation of government, enabling the delivery of better public services, world-leading

research and better statistics. Measures will enable public authorities to deliver timely and effective interventions to citizens and make the best use of taxpayers' money. They will provide new powers for public authorities to share information to combat fraud against the public sector. Public authorities will be empowered to cut the billions of overdue debts owed to government by allowing early identification of and help for people with debts spread over a number of public agencies. The UK Statistics Authority (UKSA) will be given easier secure access to data to produce more timely and accurate national and official statistics. Researchers will be provided with a more complete and accurate evidence base to inform analysis and enable better policy design and delivery. There are a number of safeguards set out on the face of the Bill to ensure personal data is protected including the introduction of new offences for unlawful disclosure and a requirement for codes of practice to be issued and followed in the use and disclosure of information under these powers.

8. In addition to these four key areas, the Bill will amend Ofcom's powers to regulate the BBC following the decision to remove the regulatory function of the BBC Trust as provided for in the Royal Charter which has been approved by Her Majesty and the Framework Agreement. The Bill will also transfer to the BBC responsibility for the full cost of the 'over-75s' television licence concession as well as responsibility for setting the 'over-75s' concession policy from 2020.

Delegated powers

9. The Bill contains 46 individual provisions concerning delegated powers. 12 of these, indicated by asterisks in this memorandum, are "Henry VIII" powers, all of which are subject to the affirmative resolution procedure insofar as their use affects primary legislation. An index of delegated powers is provided for the Committee's ease of reference.
10. Six of the "Henry VIII" powers are powers to make consequential amendments to pre-existing primary legislation, and one is to make further transitional provision, in addition to the transitional provision already provided on the face of the Bill.
11. The remaining five powers are:

- Two powers that relate to the disclosure of information in relation to fuel poverty. Fuel poverty schemes under the relevant legislation can be varied (for example to operate through different operators in the energy market) and the information sharing scheme in the Bill needs to be capable of being adjusted to fit varied schemes to ensure that the benefits can be delivered automatically to vulnerable persons.
 - One power that relates to civil registration, to add, modify or remove public authorities from the list of bodies with whom civil registration data may be shared. This list is set out in primary legislation to ensure transparency and effective scrutiny, but it is important that it can be amended to reflect any name or function changes in the relevant public authorities as well as to allow for public authorities to be added or removed as appropriate.
 - Two powers to amend or repeal the information sharing powers in relation to debt owed to the public sector and fraud against the public sector following a review of the operation of the relevant Chapters (three years after they come into force). These powers are limited by the framework of the Chapters which will already have been approved by Parliament and include strong safeguards such as the need for a statutory consultation before the power can be used.
12. The relevant departments have considered the use of powers in the Bill as set out below and are satisfied that they are necessary and justified.

PART 1: ACCESS TO DIGITAL SERVICES

Clause 1(4): Power to provide for broadband connections and services within the universal service order

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument (under section 65 of the Communications Act 2003)

Parliamentary procedure: Negative resolution

Context and purpose

13. Section 65 of the Communications Act 2003 enables the Secretary of State to make a universal service order implementing the requirements of the Universal Service Directive (2002/22/EC). The Directive requires provision of a connection capable of supporting voice, facsimile and data at rates that are sufficient to provide functional internet access. Functional internet access is not defined in the Directive. The purpose of clause 1(4) is to make clear that the power to make a universal service order under section 65 of the Communications Act 2003 applies to broadband connections and services, should these be required to provide functional internet access.

Justification

14. Digital inclusion is a priority for the Government, which wishes to ensure that everyone has the opportunity for reliable internet access in order to participate fully in modern society and promote economic development. Specifically referring to broadband connections and services will provide certainty as to the extent of the order-making power in section 65.
15. This matter is not appropriate to place on the face of the Bill because the legislation needs to keep pace with fast-changing technology and the emerging needs of citizens and businesses. The Government's ambition is to set the obligation at 10 Mbps but this is likely to need regular review to stay relevant.

Justification for procedure selected

16. Section 65 is subject to the negative resolution procedure. Before making any order under section 65, the Secretary of State must consult with Ofcom and such other persons as she considers appropriate. This provides the opportunity for relevant matters to be brought to the Secretary of State's attention before any order is made. The Bill provision clarifies the extent of the existing power. Any regulation under the Bill provision will be of the same nature as provision made under section 65 as currently constituted, but of narrower scope. Accordingly it is appropriate that the procedure adopted is the same as the procedure that applies to the existing power.

Clause 1(7): Power to direct review (in relation to broadband connections or services) of universal service order

Power conferred on: Secretary of State

Power exercisable by: Direction

Parliamentary procedure: None

Context and purpose

17. Clause 1(7) inserts a new section 72A into the Communications Act 2003. Section 72A will enable the Secretary of State to direct Ofcom to review and report to her on any provision made, or that may be made, by the universal service order in relation to broadband connections or services.

Justification

18. The power enables the Secretary of State to ensure that the obligations in place continue to meet the needs of the UK at a time when electronic communications technology is constantly developing.

Justification for procedure selected

19. A power of direction is considered the appropriate procedure for requiring a review of the universal service obligation as the requirement will apply only to Ofcom. Prior to making a direction, the Secretary of State must consult with Ofcom,

providing them with the opportunity to make representations regarding the nature and extent of the review. Once the review is complete, the Secretary of State would need to follow the Parliamentary procedure set out above should it be decided to vary the universal service order.

PART 2: DIGITAL INFRASTRUCTURE

The electronic communications code

20. Clause 4 repeals the electronic communications code contained in Schedule 2 to the Telecommunications Act 1984 and inserts a substantially revised code (“the Code”) in new Schedule 3A to the Communications Act 2003. The new Code is contained in Schedule 1, transitional provision in Schedule 2 and consequential amendments to existing legislation in Schedule 3.
21. The Code regulates the relationship between electronic communications operators (regulated by Ofcom pursuant to sections 106 - 119 of the Communications Act 2003) and landowners. It is based on the principle of there being consensual agreement between operators and landowners for the installation, operation and maintenance of electronic communications apparatus, but allows operators to apply to the court for compulsory access to land when agreement cannot be reached.
22. The Code is being reformed to bring it up to date with the requirements of modern technology demands and to make it clearer. The reforms follow many of the recommendations of the Law Commission which consulted on the necessary reform of the existing code and made recommendations in its report no. 336 published on 27 February 2013.¹

Clause 4 and Schedule 1 (paragraph 17(6)-(7)): Power to designate a provider of an electronic communications service

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution

Context and purpose

23. This power re-enacts, in paragraph 17(6) and (7) of the Code, the like power in paragraph 29(6) and (7) of the current Code. While no regulations have been made under the power in paragraph 29 of the current Code, it is to be re-enacted

¹ http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc336_electronic_communications_code.pdf

to ensure compliance with requirements of EU law encouraging the sharing of apparatus between code operators and other providers of electronic communications networks. This is consistent with the recommendations of the Law Commission in paragraph 3.54 of its report.

24. Paragraph 17 seeks to facilitate sharing between electronic communications code operators, by providing that the Code is not to be taken as limiting the sharing of apparatus installed by a code operator pursuant to an agreement with another operator. Paragraph 17 is therefore a technical, legal interpretative provision whose sole purpose is to ensure that the Code will not be interpreted in a way which would undermine the policy objective of encouraging the sharing of apparatus.
25. The scheme of paragraph 17 sets out those persons who are intended to have the benefit of such sharing arrangements. Every such sharing agreement must have at least one party which is an electronic communications operator to whom the Code has been applied by Ofcom. Such operators may have sharing agreements with operators which have not had the Code applied to them (see paragraph 17(6)(a)), or a designated provider of a programme service (see paragraphs 17(6)(b) and 17(7)).
26. The power enables the Secretary of State to designate for the purposes of paragraph 17:
 - a provider of an electronic communications service
 - which consists in the distribution of a programme service²
 - by means of an electronic communications network.

The effect of the power is that once designated such a person would be a qualifying person for the purposes of paragraph 17. The effect of the designation is that an agreement to share apparatus made between a *designated* provider and a code operator (to whom the Code has been applied under section 106 of the Communications Act 2003) benefits from the interpretive provisions of paragraph

² As defined in section 201 of the Broadcasting Act 1990 (in practical terms, a television or radio broadcaster).

17 of the Code. The benefit is that the Code is not to be interpreted as limiting in any way the agreement to share.

27. It is important to note that paragraph 17 is concerned only with the sharing agreement. The underlying agreement for code rights between the code operator and the landowner is not affected. So if the landowner has required that sharing take place only with the landowner's consent, or on specified terms, the landowner's rights are not prejudiced by paragraph 17 (see paragraphs 17(3) and (4)).

Justification

28. As noted above, paragraph 17 of the new Code replicates paragraph 29 of the existing Code which includes the same power. Paragraph 29 was inserted into the existing Code by Schedule 3 to the Communications Act 2003. The existing power is subject to the negative procedure (see section 402 of the Communications Act 2003). The existing power has in fact never been exercised, which suggests that sharing has been able to take place in the context of the Code without the need for such designation. The power should however remain available to the Secretary of State given its potential importance in the context of encouraging sharing. If the power were to be exercised it could only work to the benefit of the person so designated in ensuring that the agreement would enjoy the protection afforded by paragraph 17. The question of whether to enter into such an agreement in the first place would be for the person so designated and the code operator: there is no coercive quality to the power. For these reasons the Government considers that it is appropriate for the decision on whether to make regulations designating a provider of such a service for the purposes of paragraph 17 of the Code to continue to be delegated to the Secretary of State.

Justification for procedure selected

29. This power is identical to the power in the existing Code which is subject to the negative procedure in accordance with section 402(2) of the Communications Act 2003. Given its enabling and non-coercive quality, it is appropriate for the power to continue to be subject to the negative procedure.

*** Clause 4 and Schedule 1 (paragraph 95): Power to confer jurisdiction on other tribunals**

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution insofar as amendment, repeal or modification is to primary legislation, otherwise negative

Context and purpose

30. This power, in paragraph 95(1) and (2), and 95(3) of the Code, enables the Secretary of State to change the forum in which disputes under the Code are heard in England and Wales, Scotland and Northern Ireland.
31. Most disputes under the current code concerning the conferral and the termination of code rights, and the price to be paid for those rights, are brought before the County Court in England and Wales, the County Court in Northern Ireland and the Sheriff Court in Scotland. The Law Commission recommended that, in England and Wales, the Upper Tribunal (Lands Chamber) should be the principal forum for such disputes, but also that the First-tier Tribunal (Property Chamber) and the County Court should have jurisdiction for such disputes in a reformed Code. Changing the forum for disputes jurisdiction is not controversial: the proposal that disputes be dealt with by a specialist tribunal received the support of the majority of stakeholders who responded to the Law Commission's consultation and does not itself affect substantive rights, only the forum in which those rights are determined. Subsequent discussions with the Scottish Government and Northern Ireland Administration reached the same conclusion that Code disputes should be dealt with by the respective specialist Lands Tribunal in those jurisdictions.

Justification

32. Before it can be introduced, however, the change of forum in England and Wales will require implementation discussions with the Ministry of Justice and the President of Tribunals, and possibly some minor changes to the relevant Tribunals' procedural rules so that they are able to deal appropriately with disputes under the Code. We are liaising in England and Wales with the Ministry of Justice about implementing this policy including initiating the process for changes to the

Tribunals' procedural rules. We have similar discussions ongoing in Scotland with the Scottish Ministers and in Northern Ireland with the Department of Justice. These matters are of a technical and administrative nature, and potentially time consuming and complex. Reform of the Code itself is a priority and should not be made subject to the timetable for such administrative issues. The courts will accordingly continue to have jurisdiction for the new Code, until the new administrative and technical changes are in place. In the main, any affected legislation will be subordinate (dealing with procedural rules), but as consequential amendments might be required to primary legislation, the power must be capable of this.

33. The same issues arise in relation to the change of forum in Scotland and Northern Ireland. Accordingly the power needs to have effect also in relation to Scotland and Northern Ireland. The provisions include a requirement in paragraph 95(5) that the Secretary of State will consult the Scottish Ministers and the Department of Justice in Northern Ireland where the exercise of the powers relate respectively to Scotland and to Northern Ireland.

Justification for procedure selected

34. Code disputes are currently dealt with by the Courts under the Courts' established rules of procedure. When transferred they will be dealt with by relevant tribunals under those tribunals' established rules of procedure, with any minor or consequential changes that might need to be made to those procedures that are specific to code disputes. The matters relevant to the power will be the readiness of each tribunal to take responsibility for its new jurisdiction, and minor or consequential rule changes that might be needed.
35. Those are administrative and technical matters for which the negative procedure is considered appropriate. However insofar as (even minor) consequential amendments related to the transfer of jurisdiction might be required to primary legislation we consider the affirmative procedure would then be appropriate. An amendment is therefore made (see paragraph 47 of Schedule 3 to the Bill) to section 402 of the Communications Act 2003 to ensure that the affirmative

procedure is required where primary legislation (including enactments of the devolved legislatures) is amended, repealed or its application modified.

Clause 4 and Schedule 1 (paragraph 103): Duties for OFCOM to prepare codes of practice

Power conferred on: Ofcom

Power exercisable by: Codes of practice

Parliamentary procedure: None

Context and purpose

36. Paragraph 103 of Schedule 1 provides a duty for Ofcom to prepare and publish codes of practice dealing with:
- a. the provision of information for the purposes of the Code by operators to persons who occupy or have an interest in land;
 - b. the conduct of negotiations for the purposes of the Code between operators and such persons;
 - c. the conduct of operators in relation to persons who occupy or have an interest in land adjoining land on, under or over which electronic communications apparatus is installed; and
 - d. such other matters relating to the operation of the Code as Ofcom think appropriate.
37. The Government considers that the codes of practice are likely to have a positive effect on relations between landowners and operators. It should be noted however that there are no specified legal consequences arising from a failure to adhere to the codes of practice, and accordingly the Government does not consider that this power is a delegated power of a legislative nature. It is included here only to assist the Committee's scrutiny of the Bill.³

³ This entry is accordingly not included within the number of provisions concerning delegated powers set out at paragraph 7.

Justification

38. The Government's view is that codes of practice would be beneficial in encouraging cooperative behaviour between parties affected by the Code. The Code of Practice will help to provide practical guidance on the operation of best practice under the new Code. The Code has not been updated for nearly 30 years and will introduce new powers and responsibilities for all parties and reassessment of past behaviours and expectations in day-to-day operations is necessary in order for a smooth transition. The Law Commission, in their 2013 report on the electronic communications code, also recommended that there should be codes of practice.

Justification for procedure selected

39. The Government does not consider that any Parliamentary procedure is necessary. This is a duty to issue a code of practice, but it is not a statutory code of practice to be enforced by the regulator or other party. The Government agrees with the Law Commission that a statutory code of practice policed by Ofcom would not be proportionate or desirable. Ofcom already have significant powers under the Communications Act 2003 to regulate the electronic communications sector.
40. As such the provisions at paragraph 103 do not increase OFCOM's regulatory powers or delegate to OFCOM any legislative competence. Rather the provisions seek to ensure that OFCOM will develop codes of practice in consultation with parties affected by the Code to create a standard for best practice and greater transparency in relation to what parties can expect of one another in day to day engagement.
41. The provisions at paragraph 103 do not require the Courts to consider compliance with such codes of practice when assessing whether parties to a dispute under the Code have acted reasonably. The Courts will consider all the circumstances of the case. The extent to which there is compliance with a code of practice may be a relevant consideration for the Court to take into account, depending on the relevance of the code of practice and the other circumstances of the individual case.

*** Clause 5 and Schedule 2: Power to make transitional provision in connection with the code**

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution insofar as amendment or repeal is to Schedule 2, otherwise negative

Context and purpose

42. Schedule 2 makes detailed transitional provision for the Code.
43. Clause 5(1) confers a power on the Secretary of State by regulations to make further transitional or transitory provision in connection with the coming into force of the new Code. Clause 5(2) provides that such regulations can amend the transitional provisions in Schedule 2.

Justification

44. This power ensures that, if a requirement for supplemental transitional provision is identified after Royal Assent, it can be addressed. The power extends to amendment of the transitional provisions in Schedule 2, because if supplemental transitional provision is required, it may also be necessary to amend the existing transitional provision.

Justification for procedure selected

45. It is envisaged that (if use of this power is necessary) it is likely to involve some amendment of Schedule 2, in which case the Government considers that it is appropriate that the power is subject to Parliamentary approval through the affirmative procedure. There may however be cases where further transitional provision is required which does not amend Schedule 2, for which the negative procedure is considered appropriate.

*** Clause 6(1): Power to make consequential provision etc in connection with the code**

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution insofar as amendment, repeal or modification is to primary legislation, otherwise negative

Context and purpose

46. Clause 6(1) confers a power on the Secretary of State by regulations to make consequential provision in connection with the repeal of the existing code, the enactment of the new Code and the consequential amendments associated therewith. As set out in Clause 6(2), this power may be exercised to amend, repeal, revoke or otherwise modify the application of any enactment (other than primary legislation not passed before the end of the Session in which the Bill is passed). Clause 6(3) provides that such regulations may include incidental, supplementary, consequential, transitional, transitory or saving provision.
47. In accordance with clause 6(4), where the power is used to amend, repeal or modify the application of primary legislation (including enactments of the devolved legislatures) the affirmative procedure is required. Otherwise the negative procedure is required, in accordance with clause 6(5).

Justification

48. The consequential amendments in Schedule 3 include the main operative amendments which need to be made to primary legislation, in particular Public General Acts, as a result of the making of the new Code. Further consequential amendments will be required to some further primary legislation such as private Acts and to some secondary legislation to reflect, for example, the redrafting of the Code and its moving from Schedule 2 to the Telecommunications Act 1984 to Schedule 3A to the Communications Act 2003. There are a considerable number of such instruments and there are likely to be changes to some of them between now and Royal Assent. To that extent they are something of a “moving target” and not suitable for amendment by Schedule 3. The Government considers

accordingly that the efficient way to deal with those further consequential amendments is by regulations made after Royal Assent.

Justification for procedure selected

49. The Government considers that it is appropriate for the power to be subject to Parliamentary approval through the affirmative procedure where amendments to primary legislation are made, and the negative procedure where the amendments are to secondary legislation.

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

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution

Context and purpose

50. Clause 7 removes the sunset provision that applies to certain types of restrictions and conditions imposed in regulations made under section 109 of the Communications Act 2003 and which have been used to help facilitate the roll out of communications infrastructure, in particular broadband.
51. Section 109 enables the Secretary of State to make regulations placing conditions and restrictions on code operators. Before making regulations, the Secretary of State must have regard to the matters set out in subsection (2). Section 109 was amended by the Growth and Infrastructure Act 2013 (c. 27) to insert subsections (2A) and (2B).
52. Section 109(2B) provides that the Secretary of State is to be treated as having complied with any duty imposed by the legislation set out in subsection (2B) when complying with paragraph (2)(b), the need to protect the environment and, in particular, to conserve the natural beauty and amenity of the countryside. Subsection (2B) is subject to the sunset provision set out in subsection (2A) where any exercise of the power on reliance of subsection (2B) must take place

before 6 April 2018 and any regulations made must cease to have effect before 6 April 2018.

53. These provisions enabled amendments to be made to the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 (S.I. 2003/2552) in 2013 relating to the installation of broadband infrastructure, helping to facilitate the roll out of such infrastructure. These amendments complement amendments made to the Town and Country Planning (General Permitted Development) Order 1995 (S.I. 1995/418) relating to broadband infrastructure.

Justification

54. Prior to making the changes to regulations in 2013, the Government consulted on the proposed planning changes. In response to concerns expressed in the consultation that the changes might lead to the insensitive siting of broadband 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.
55. 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. The working group jointly agreed that overall the code of practice appeared to be working well. A further review of the code of practice has recently been conducted and as before, there is evidence of high levels of compliance and awareness. A call for evidence was also issued in March asking communications providers, planning authorities and environmental bodies for evidence about the impact of the planning changes since they were introduced in 2013. No significant adverse impacts were identified and there was clear evidence from all parties about the increasing demand for digital connectivity which depends on expanding the broadband infrastructure network. Communications network providers reported that the changes are important in supporting their future investment plans as they have reduced administrative costs, sped up the rollout process, and have provided greater planning certainty. The changes also support the Government's public broadband rollout and its

target of providing superfast broadband to 95% of UK homes and businesses by the end of 2017.

56. In light of the outcome of the working group, there is no longer a need for the sunset provision in section 109 and this is to be removed to allow continued rollout of communications infrastructure and ensure future technologies are made available.

Justification for procedure selected

57. Regulations made under section 109 are subject to the negative resolution procedure. Operators with rights under the Electronic Communications Code have had conditions and restrictions placed on the exercise of those rights since the Electronic Communications Code was first introduced in 1984. Between 1984 and 2003 the conditions and restrictions formed part of the operators' individual licences. In 2003 the licensing regime came to an end when the new EU regulatory framework was implemented via the Communications Act 2003, and the Code-related conditions and restrictions in licences were transposed into the Code regulations. Given the length of time that the Code-related conditions and restrictions have been in place either in licences or in regulations, the negative resolution procedure is considered to afford sufficient scrutiny. It should also be noted that, before any changes are made to the Code regulations, there is a requirement in the Communications Act 2003 for there to be public consultation on the proposed changes. There is therefore already a degree of transparency and scrutiny.

Regulation of dynamic spectrum access services

58. Clause 8 inserts new sections 53A – 53M into the Wireless Telegraphy Act 2006 (WTA) to facilitate the use of unused parts of allocated spectrum known as white spaces. 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.
59. 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.

Clause 8: New section 53A(3) and (4) WTA – duty to publish criteria and information

Power conferred on: Ofcom

Power exercisable by: Criteria and information

Parliamentary procedure: None

Context and purpose

60. New section 53A permits dynamic spectrum access services to be registered by Ofcom on an application made to Ofcom. Section 53A(3) provides that Ofcom must, from time to time as they think fit, publish:
- a. the criteria for determining applications under section 53A, and
 - b. information relating to the restrictions and conditions to which registration under new section 53A may be subject.

Justification

61. This duty to publish criteria and information is intended to help ensure transparency and consistency in Ofcom's decisions on registration. It is not thought appropriate to fix in legislation the matters covered by section 53A(3). For example, Ofcom may need to update the criteria for determining applications from time to time, or make different provision for different cases, perhaps depending on the particular frequency band in which dynamic spectrum access services are being introduced.

Justification for procedure selected

62. It is not thought necessary that Parliament scrutinise the criteria or information that is covered, and so it is considered appropriate that no Parliamentary procedure apply.
63. Ofcom's overarching duties will apply in the usual way, for example its duty to review regulatory burdens and its duty to carry out impact assessments (sections 6 and 7 of the Communications Act 2003).
64. Ofcom is also under an existing duty to send to the Secretary of State a report of the carrying out of their functions (paragraph 12 of the Schedule to the Office of Communications Act 2002); the Secretary of State is required to lay a copy of this report before each House of Parliament.

Clause 8: New section 53A(7)(a) WTA – power to specify frequency bands

Power conferred on: Ofcom

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: None

Context and purpose

65. New section 53A(7) provides that a “dynamic spectrum access service” is a service that provides information about:
 - a. 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
 - b. the places in which, the power at which, the times when and any conditions subject to which such stations and apparatus may use such frequencies.
66. If Ofcom consider that dynamic spectrum access services should be introduced in a particular frequency band, it will be able to use the power in section 53A(7)(a) to specify frequency bands. A service will only be a “dynamic spectrum access service” (and thus will only be able to register with Ofcom) if it is providing (or intending to provide) information about frequencies that fall within the specified band. Given that it is likely to be difficult for a service provider to get access to the

information it needs other than from Ofcom (which will be a result of registration), the effect of Ofcom making regulations specifying a frequency band for the purposes of section 53A(7) is that persons wishing to provide a dynamic spectrum access service in relation to the specified frequency band will be able to apply to Ofcom to do so (and thereby get access to the information that they need to offer the service).

Justification

67. Not all bands will be suitable for spectrum-sharing on a dynamic spectrum access basis. Which bands can be used may change over time. It is therefore not appropriate to set out in the Bill in what frequency bands dynamic spectrum access services can operate. However, it is important that it is clear to stakeholders the bands in which dynamic spectrum access services may operate. As such, it is considered appropriate that this information be set out in regulations made by Ofcom.

Justification for procedure selected

68. It is not proposed that the regulations made by Ofcom under new section 53A(7)(a) should be subject to Parliamentary procedure. This approach is in keeping with other powers that Ofcom has to make regulations, for example under sections 8(3), 12 and 14 of the Wireless Telegraphy Act 2006.
69. This is appropriate because regulations under new section 53A(7) are likely to be made to accompany regulations made by Ofcom under its existing powers in section 8(3) of the Wireless Telegraphy Act 2006. Put simply, the regulations made under section 8(3) could provide that the use of certain wireless telegraphy stations or apparatus is exempt from the requirement to be licensed, on the condition that the spectrum that the station/apparatus uses is in a particular band and is based on information obtained from a dynamic spectrum access service registered with Ofcom. At the same time, Ofcom could make regulations under section 53A(7) to specify the frequency band for the purposes of the meaning of “dynamic spectrum access service”.

70. As already mentioned, Ofcom's overarching duties will apply in the usual way, for example its duty to carry out impact assessments (section 7 of the Communications Act 2003). Ofcom is also under an existing duty to send to the Secretary of State a report of the carrying out of their functions (paragraph 12 of the Schedule to the Office of Communications Act 2002); the Secretary of State is required to lay a copy of this report before each House of Parliament. There are of course two Parliamentary committees with a particular interest in Ofcom's activities (the House of Lords Select Committee on Communications and the Commons Culture, Media and Sport Select Committee), so Ofcom's exercise of their powers are not without scrutiny.

Clause 8: New section 53C WTA – duty to establish and maintain register

Power conferred on: Ofcom

Power exercisable by: Register

Parliamentary procedure: None

Context and purpose

71. New section 53C requires Ofcom to establish and maintain a register for the purposes of Part 2A of the Wireless Telegraphy Act 2006 (Regulation of dynamic spectrum access services).
72. The register must contain the names of the persons registered under section 53A and such other information relating to the registration of those persons as Ofcom considers appropriate.
73. Ofcom may make available to users or prospective users of dynamic spectrum access services such information contained in the register as they consider appropriate.

Justification

74. The register will need to be updated, for example each time a new service provider is registered by Ofcom, or a registration expires or is revoked. As such, it is considered that this information should be included in a register established and

maintained by Ofcom, rather than being set out in legislation that would need to be amended each time it needed updating.

Justification for procedure selected

75. The information may be needed by users or prospective users of dynamic spectrum access services, for example for them to check whether a particular service provider is registered with Ofcom. Section 53C(3) allows Ofcom to make available to users or prospective users of dynamic spectrum access services such information contained in the register as they consider appropriate.

Clause 8: New section 53D WTA – power to charge fees for registration etc.

Power conferred on: Ofcom

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: None

Context and purpose

76. New section 53D allows Ofcom to make regulations to provide for Ofcom to charge fees for: registering a person under section 53A; for the continuation in force of such a registration; for the variation or revocation of such a registration; and for anything done by Ofcom in connection with facilitating the service provided by a person registered under section 53A (but excluding anything for which Ofcom may charge under any other enactment).

Justification

77. This provision enables Ofcom to set fees to recover its costs in administering a registration scheme. It is not considered appropriate for fees to be set out in primary legislation. For example, the amount of the fees will need to change over time so that they are in line with Ofcom's costs. Setting up and running a registration scheme, and providing dynamic spectrum access service providers with the information they need to provide that service, will require some work by Ofcom; this provision is intended to ensure that Ofcom is able to recover those costs.

Justification for procedure selected

78. The power allows Ofcom to recover its costs for the activities listed, and it is not thought that Parliament will need to consider the amounts at which the fees are set. Therefore, no Parliamentary procedure will apply. This is in keeping with other powers that Ofcom has to make regulations e.g. section 12 of the Wireless Telegraphy Act 2006 (charges for grant of licence).
79. As already mentioned, Ofcom is under an existing duty to send to the Secretary of State a report of the carrying out of their functions (paragraph 12 of the Schedule to the Office of Communications Act 2002). The Secretary of State is required to lay a copy of the report before each House of Parliament, and there are two Parliamentary committees with a particular interest in Ofcom's activities (the House of Lords Select Committee on Communications and the Commons Culture, Media and Sport Select Committee).

Clause 8: New section 53H WTA – power to make statement of principles

Power conferred on: Ofcom

Power exercisable by: Statement

Parliamentary procedure: Before making or revising a statement Ofcom must consult the Secretary of State and the Treasury. Ofcom must publish the statement and every revision of it, and send a copy of the statement and of every revision to the Secretary of State. The Secretary of State must lay copies of the statement and of every revision before each House of Parliament.

Context and purpose

80. New section 53H makes provision about the amount of a penalty that Ofcom can impose under section 53E. Ofcom may impose a penalty of such amount as it thinks appropriate and proportionate to the contravention, as long as that does not exceed 10% of the “relevant amount of gross revenue”. The “relevant amount of gross revenue” is defined in section 53H(2). For example, where the last

accounting period of that person which falls before the contravention was a period of 12 months, the relevant amount of gross revenue is the relevant part of the person's gross revenue for that period. The reference to "relevant part" is a reference to so much of the person's gross revenue as is attributable to the provision of the dynamic spectrum access service to which the contravention relates (section 53H(4)).

81. Section 53H(5) allows Ofcom to set out the principles which it will apply in ascertaining the gross revenue of a person for a period and the extent to which a part of a person's gross revenue is attributable to the provision of any dynamic spectrum access service.

Justification

82. This power allows Ofcom to set out the principles it will apply in ascertaining the gross revenue of a person for a period and the extent to which a part of a person's gross revenue is attributable to the provision of any dynamic spectrum access service. This follows the approach in section 44 of the Wireless Telegraphy Act 2006. These principles may need to be updated from time to time, for example to reflect changes in best practice. As such, it is not thought appropriate to fix in primary legislation what these principles should be.

Justification for procedure selected

83. The procedure used mirrors the procedure applied to a similar power in section 44 of the Wireless Telegraphy Act 2006.
84. Before making or revising such a statement, Ofcom must consult the Secretary of State and the Treasury. If it makes such a statement, Ofcom must publish the statement and every revision of it, and send a copy of the statement and of every revision to the Secretary of State. The Secretary of State must lay copies of the statement and of every revision before each House of Parliament. Parliament will therefore be able to examine any statement or revision to it.
85. In addition, as previously mentioned Ofcom is under an existing duty to send to the Secretary of State a report of the carrying out of their functions (paragraph 12 of

the Schedule to the Office of Communications Act 2002). The Secretary of State is required to lay a copy of the report before each House of Parliament, and there are two Parliamentary committees with a particular interest in Ofcom's activities (the House of Lords Select Committee on Communications and the Commons Culture, Media and Sport Select Committee).

Clause 9: Power to designate a statement of strategic priorities

Power conferred on: Secretary of State

Power exercised by: Statement

Parliamentary procedure: *The Secretary of State must lay the statement in draft before Parliament. If either House of Parliament resolves not to approve it within 40 days of laying, the Secretary of State may not designate the statement.*

Context and purpose

86. Clause 9 inserts new sections 7A-C into the Wireless Telegraphy Act 2006. Under new section 7A the Secretary of State may designate a statement for the purposes of section 7A, provided the requirements as to Parliamentary procedure in section 7C are satisfied. The statement is a statement setting out strategic priorities of the Government relating to the management of the radio spectrum in the United Kingdom. This statement may also include particular outcomes identified with a view to achieving the strategic priorities, and the roles and responsibilities of persons who have functions to which the strategic priorities relate.
87. Ofcom's duties in relation to the statement of strategic priorities are set out in in new section 7B. The statement must be published in such a manner as the Secretary of State considers appropriate and the Secretary of State must take such other steps as she considers appropriate for the purpose of bringing the statement to the attention of Ofcom. Ofcom must have regard to the statement of strategic priorities when carrying out their radio spectrum functions. However, this duty does not affect the obligation of Ofcom to comply with any other duty or requirement. The Secretary of State can 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, which the Secretary of State must lay before Parliament.

Justification

88. The power is intended to allow the Government to set out in a statement strategic priorities relating to the management of the radio spectrum, including particular outcomes, that Ofcom must have regard to when carrying out their radio spectrum functions, and to amend such a statement. It is not appropriate to set out such strategic priorities in primary legislation; by their nature they will change over time.
89. The use of a designated statement to set out strategic priorities and policy outcomes does occur elsewhere. For example, Part 5 of the Energy Act 2013 makes provision for the Secretary of State to designate a statement as the strategy and policy statement.

Justification for procedure selected

90. The statement will set out strategic priorities of the Government relating to the management of radio spectrum. Ofcom must have regard to these, but this does not affect the obligation of Ofcom to comply with any other duty or requirement.
91. Under the Energy Act 2013, before a statement can be designated as the strategy and policy statement it must be laid before Parliament and approved by both Houses (section 135). However, section 132 requires that (in addition to the Authority having regard to the strategic priorities set out in the strategy and policy statement when carrying out regulatory functions), the Secretary of State and the Authority must carry out their respective regulatory functions in the manner which the Secretary of State or the Authority (as the case may be) considers is best calculated to further the delivery of the policy outcomes.
92. Clause 9 does not go so far as to require Ofcom to carry out its functions in the manner it considers is best calculated to further the delivery of the policy outcomes; it only requires Ofcom to have regard to the statement.
93. As such, it is not thought necessary that Parliamentary approval of the statement is needed (as is provided for in the Energy Act 2013). However, the Secretary of

State is required to lay a draft of the statement before Parliament and cannot designate the statement if either House resolves, within the 40-day period, not to approve it.

PART 3: ONLINE PORNOGRAPHY

Clause 15(3): Duty to publish guidance in relation to the requirements in clause 15(1)

Power conferred on: The age-verification regulator

Power exercisable by: Guidance

Parliamentary procedure: None

Context and purpose

94. Clause 15(1) prohibits a person from making pornographic material available on the internet on a commercial basis to persons in the United Kingdom unless the material is made available in a manner which secures that it is not normally accessible by persons under the age of 18.
95. Clause 15(2) provides that for the purposes of Part 3, making pornographic material available on the internet on a commercial basis include making it available on the internet free of charge on or via an internet site which is operated on a commercial basis, or via any other means of accessing the internet which is operated or provided on a commercial basis.
96. Clause 15(3) provides that the age-verification regulator must publish guidance about:
- types of arrangements for making pornographic material available that the regulator will treat as complying with clause 15(1);
 - circumstances in which an internet site or other means of accessing the internet will be treated by the regulator as operated or provided on a commercial basis; and
 - other circumstances in which the regulator will treat making pornographic material available on the internet as done on a commercial basis.

Justification

97. The guidance will assist persons who are making pornographic material available on the internet on a commercial basis to understand what arrangements for age-

verification the age-verification regulator will consider sufficient for the purposes of complying with clause 15(1).

98. Guidance on what the regulator will treat as being done on a “commercial basis” will assist persons who make pornographic material available on the internet in understanding the approach the regulator will take when considering whether the prohibition in subsection (1) applies to a given case.
99. In relation to both matters, flexibility will be needed to reflect changes over time in technology and in commercial models. As such, it is considered appropriate that these matters be dealt with in guidance issued by the age-verification regulator.

Justification for procedure selected

100. The guidance is intended to assist stakeholders in understanding the circumstances in which the regulator will treat something as being done on a “commercial basis” and what is considered to be a sufficient age access control. For example, a person is not required to only use the arrangements that are set out in the guidance (under clause 15(3)(a)). As such, it is considered appropriate that no Parliamentary procedure apply.

Clauses 17-18: Power to designate the age-verification regulator

Power conferred on: Secretary of State

Power exercisable by: Notice

Parliamentary procedure: *The Secretary of State must lay particulars of any proposed designation before both Houses of Parliament and may not make the proposed designation for 40 days, beginning with the day on which particulars of it were laid. If either House resolves within that 40 days that the Secretary of State should not make the proposed designation, the Secretary of State must not make it.*

Context and purpose

101. Clause 17 contains provision relating to the designation and funding of the age-verification regulator. Clause 17(1) allows the Secretary of State to designate, by notice, any person or persons as the age-verification regulator. Clause 17(4) provides that the Secretary of State must not make such a designation unless satisfied that arrangements will be maintained by the age-verification regulator for appeals against the matters outlined in clause 17(4).

102. A notice under subsection (1) or (2) must be published in the London, Edinburgh and Belfast Gazettes.

103. The age-verification regulator will have powers to:

- require information from (a) internet service providers or (b) persons who the regulator believes to be involved, or to have been involved, in making pornographic material available on the internet on a commercial basis to persons in the United Kingdom (with associated enforcement powers for non-compliance) (clause 19);
- take enforcement action (including imposing financial penalties) against those who are contravening or have contravened clause 15(1) or who have failed to comply with a requirement to provide information under clause 19 (clauses 20-21);
- give notice to payment-services providers and ancillary service providers of a person whom the age-verification regulator considers is contravening clause 15(1), or is making prohibited material available on the internet to persons in the United Kingdom (clause 22);
- require internet service providers to prevent persons in the United Kingdom from being able to access material on the internet where it is being made available in contravention of clause 15(1) or is "prohibited material" as defined in clause 22 (clause 23);
- choose, if it thinks fit, to exercise its powers under clauses 20 (enforcement of sections 15 and 19), 22 (power to give notice of

contravention to payment-services providers and ancillary service providers) and 23 (power to direct internet service providers to block access to material) principally in relation to persons who, in the age-verification regulator's opinion, make pornographic material or prohibited material available on the internet on a commercial basis to a large number of persons, or a large number of persons under the age of 18, in the United Kingdom; or generate a large amount of turnover by doing so (clause 24(1));

- consult for the purposes of exercising, or considering whether to exercise, any function under Part 3 (clause 24(2)(a)); and
- carry out, commission or support any research which it considers appropriate for the purposes of exercising, or considering whether to exercise, any function under Part 3, and publish the results of that research (clause 24(2)(b) and (c)).

Justification

104. Clause 17 gives the Secretary of State the power to appoint any person or persons as the age-verification regulator. It is considered necessary to retain this flexibility, first in order to ensure that the right person or persons are appointed as regulator. For example it is possible that the functions of the regulator could be shared or divided as between 'front-end' activity, by which we mean the work of issuing guidance and giving notice of contraventions, and enforcement. The role is also relatively narrow in scope compared to many regulatory roles and it may therefore be suitable to be carried out by an existing regulator or regulators in addition to their current responsibilities. The flexibility in retaining a power to designate means that it is possible to make changes should the demands of the role or the fit with other regulatory duties need to change over time. This approach is consistent with some other regulatory roles. For example the British Board of Film Classification, which creates the classification system relied on in this legislation, is designated under section 4 of the Video Recordings Act 1984 and the Claims Management Regulator is designated under section 5 of the Compensation Act 2006. As such,

the Government considers that the right approach is that the Bill contain provision to designate a person, or persons, as the regulator.

105. On 10 October 2016 the government published letters of intent exchanged between the Department of Culture, Media and Sport and the British Board of Film Classification, who are expected to take on a regulatory role in relation to age-verification.

Justification for procedure selected

106. The powers of the regulator are set out in the clauses. Clause 17 is limited to a power to designate who the regulator is. It is not considered that the identity of the regulator is something that would require debate in Parliament. As such, it is appropriate that the designation of the regulator is subject to annulment by Parliament.

Clause 21(9): Power to publish guidelines about financial penalties

Power conferred on: The age-verification regulator

Power exercisable by: Guidelines

Parliamentary procedure: None

Context and purpose

107. Clause 21 concerns the power of the age-verification regulator to impose a financial penalty on a person under clause 20. Clause 21(9) provides that the age-verification regulator must publish the guidelines it proposes to follow in determining the amount of a financial penalty. Clause 21(5) provides that, in deciding the amount of a financial penalty, the age-verification regulator must have regard to the guidelines or revised guidelines in force.

108. The age-verification regulator may revise the guidelines from time to time. The guidelines, and any revised guidelines, must be published in whatever way the age-verification regulator considers appropriate for bringing them to the attention of the persons who, in its opinion, are likely to be affected by them. Before publishing the guidelines, or any revised guidelines, the age-verification regulator

must consult the Secretary of State and such other persons as it considers appropriate. Before deciding how to publish the guidelines or any revised guidelines, the age-verification regulator must consult the Secretary of State. It is expected that in practice the regulator will play close attention to the approach taken by Ofcom under the provisions in the Communications Act 2003 on which this provision is closely modelled.

Justification

109. The preparation and publication of such guidelines, and making it the duty of the age-verification regulator to have regard to the guidelines, are intended to help ensure transparency and consistency in the setting of penalties. The maximum financial penalty and method for calculating it are set out in the clause, so the guidelines here relate to how the regulator will determine the fine in a particular case and flexibility to respond to circumstances will be needed here. This element of detail is considered appropriate for guidelines. This approach is entirely consistent with the elements of the Ofcom regulatory regime on which this part of the provisions is modelled (under section 392 of the Communications Act 2002 Ofcom before determining the amount of penalties imposed by them under the Communications Act 2003 or any other enactment apart from the Competition Act 1998 are obliged to issue guidance in similar terms).

Justification for procedure selected

110. It is not appropriate to make the guidelines subject to a Parliamentary procedure. The guidelines do not define the key criteria of maximum fines, but rather the proposed approach in individual cases. They are guidelines the regulator must follow itself, not guidelines imposed on the regulator by another body, and are designed to ensure that it is consistent in its approach. Furthermore, the aim is for a proportionate and flexible regulatory regime given the subject matter and manner in which it is provided and accordingly it is important that this guidance can be updated to keep pace with and respond to changes in the way that pornography is made available. The approach is also consistent with the approach taken to the publication of similar guidelines with more wide-ranging effect as to penalties that it

is the duty of Ofcom to publish under section 392 of the Communications Act 2003.

Clause 22(7): Power to publish guidance about “ancillary service providers”

Power conferred on: The age-verification regulator

Power exercisable by: Guidance

Parliamentary procedure: None

Context and purpose

111. Clause 22(1) provides that where the age-verification regulator considers that a person (“the non-complying person”) is contravening clause 15(1) or is making prohibited material available on the internet to persons in the United Kingdom, it may give notice of that fact to any payment-services provider or ancillary service provider.
112. Clause 22(6) sets out a definition of “ancillary service provider”. This includes a person, other than a payment-services provider, who appears to the age-verification regulator to provide, in the course of a business, services which enable or facilitate the making available of pornographic material or prohibited material on the internet by the non-complying person.
113. Clause 22(7) provides that the age-verification regulator may publish guidance for the purposes of clause 22(1) and (6) about the circumstances in which it will treat services provided in the course of a business as enabling or facilitating the making available of pornographic material or prohibited material.

Justification

114. Clause 22(6) sets out the definition of “ancillary service provider”. Guidance about the circumstances in which the age-verification regulator will treat services provided in the course of a business as enabling or facilitating the making available of pornographic material or prohibited material on the internet will assist stakeholders in understanding the approach taken by the age-verification regulator as to who is an ancillary service provider. It will also assist them in understanding

the status of notices they receive in accordance with that guidance. It is hoped that the regulator will take a proportionate and flexible approach, and accordingly, the guidance may need to be updated from time to time to reflect, for example, changes in commercial practice. The guidance is guidance about the approach the regulator itself will take. It relates only to descriptions of the types of person (who are not themselves subject to any further regulatory outcome) it may inform about regulatory conclusions it has reached.

Justification for procedure selected

115. The guidance will assist stakeholders in understanding the approach that the regulator is taking in applying this definition. It is guidance the regulator may issue to indicate the approach it will take itself in deciding to whom it might issue notices indicating that it has found a person is breaching the requirement in clause 15. The recipients of those notices can decide whether or not to take action. Accordingly it is considered that no Parliamentary procedure is necessary.

PART 4: INTELLECTUAL PROPERTY

Clause 29(3): Power to make transitional, transitory and saving provision

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution

Context and purpose

116. Clause 29 repeals section 73 of the Copyright, Designs and Patents Act 1988, 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. Section 73 amounts to an exemption for cable providers from paying copyright fees to retransmit the core public service broadcaster channels such as BBC1, ITV1 and Channel 4. This clause contains a standard power enabling the Secretary of State to make transitional, transitory or saving provision in connection with the coming into force of this section.

Justification

117. This is a standard power to enable the changes made by this clause to be implemented in an orderly manner.

Justification for procedure selected

118. The negative resolution procedure is appropriate for such regulations as Parliament will have already approved the principle of this provision by enacting it.

PART 5: DIGITAL GOVERNMENT

This Part contains 20 delegated powers. Many of these are similar delegated powers repeated across several Chapters. These powers have not been consolidated on the face of the Bill so that readers can understand how the provisions will work in each Chapter. Each power has been set out separately in the memorandum but where the justification is similar relevant cross-references have been included. In summary:

- 5 of the delegated powers are to make regulations specifying public authorities to disclose information or permitted recipients to receive information (public service delivery, debt, fraud and civil registration);
- 5 of the delegated powers are to make consequential provisions (public service delivery, debt, fraud and civil registration);
- 6 of the delegated powers are for issuing a code of practice (public service delivery, civil registration, debt, fraud, research and statistics purposes);
- 2 of the delegated powers are a duty to review the operation of a Chapter (debt and fraud);
- 1 of the delegated powers is to make regulations specifying objectives for which information may be disclosed (public service delivery);
- 1 of the delegated powers is to make regulations to provide for fees to be payable to a civil registration official in respect of the disclosure of official information; and
- 1 of the delegated powers is to make regulations amending the condition that must be met for disclosure of information for fuel poverty purposes (public service delivery).

Chapter 1: Public service delivery

Clause 30(2): Power to make regulations specifying persons who may disclose information

Power conferred on: The appropriate national authority

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution

Context and purpose

119. Clause 30 provides a gateway for specified public authorities to share information with other specified public authorities. The information may only be shared for specific purposes related to improving the well-being of individuals or households, including the improvement and targeting of public services and benefits.
120. The specified public authorities are described in the Bill as specified persons. Those specified persons are to be set out in regulations under clause 30(2). Specified persons must be either a public authority or a person providing services to a public authority (clause 30(3)). Persons not included on the list of specified persons in regulations will not be permitted to use the power.
121. The specific purposes for which information may be shared under this power are described in the Bill as specified objectives. The specified objectives are also to be set out in regulations (see clause 30(6) below).
122. This is a permissive gateway, which means it is at the discretion of the specified persons whether or not they choose to disclose information under the power.
123. The use of the information sharing power will be supported by a code of practice (provided for under clause 36) which will contain guidance setting out best practice and the procedures and practices to be followed by specified persons.
124. Draft regulations have been published at:
<https://www.gov.uk/government/publications/digital-economy-bill-part-5-digital-government>

Justification

125. The specified persons are to be set out in secondary legislation rather than primary legislation as the list will need to be regularly updated, for example to reflect the transfer of functions and responsibilities between public authorities. The list may also need to be updated to remove specified persons in accordance with clause 30(5)(b) which provides a sanction for non-compliance with the code of practice (see explanation below). It is not considered appropriate to go back to Parliament to change primary legislation every time such an adjustment is required.
126. Given the relative breadth of the power to share information under clause 30, it is considered important that there be tightly controlled limits on the delegated power to specify persons, in particular it was recognised that there must be limits around the nature of the bodies that could be included in these lists. Therefore there are a number of constraints on this delegated power.
127. To be a specified person the person must be a public authority or a person providing services to a public authority (clause 30(3)).
128. In making regulations under clause 30(2) the appropriate national authority must have regard to the systems and procedures the person has in place to ensure the secure handling of information by that person (clause 30(5)). This is to ensure as far as possible that the integrity of the information shared is maintained.
129. Clause 30(5)(b) provides that the appropriate national authority, in making such regulations listing the persons permitted to exercise the power, also has the power to remove specified persons from the list. This is an additional safeguard to ensure that only appropriate persons are permitted to make use of the powers. Specified persons must continue to demonstrate their suitability for using the public service delivery power. If concerns arise about continued suitability clause 30(5)(b) allows for action to be taken. Before removing a specified person, the appropriate national authority must have regard to whether the specified person has complied with the code of practice for the disclosure and use of information under these clauses. This provides a sanction for non-compliance with the code of practice.

130. Before making or amending the list of specified persons, the appropriate national authority must consult the Information Commissioner, other appropriate national authorities, the Commissioners for Her Majesty's Revenue and Customs and such other persons as the appropriate national authority thinks appropriate. This provides an additional level of safeguarding in that a wider range of viewpoints will be taken into consideration, therefore providing assurance that the implications of the addition or removal of specified persons would be more fully considered.

Justification for procedure selected

131. As this provides the appropriate national authority with a delegated power to specify who may share information under this clause, it is considered appropriate that the use of the power is debated and subject to more intensive scrutiny by Parliament via the affirmative procedure.

132. Clause 37(12) provides that regulations made under clause 30(2) will not be subject to the hybrid instrument procedure. This is necessary because if regulations made under clause 30(2) were used to, for example, add or remove a specific local authority from the list of specified persons the regulations would be likely to be hybrid as it would be treating that local authority differently than others in the same class (other local authorities). The Government is satisfied that the private interests of, for example, local authorities will be sufficiently protected because of the safeguards provided for in the power including that before making regulations there is a requirement for statutory consultation.

Clause 30(6): Power to make regulations to specify objectives for which information may be disclosed

Power conferred on: The appropriate national authority

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution

Context and purpose

133. Under clause 30 information may only be shared for specific purposes related to improving the well-being of individuals or households, including the improvement

and targeting of public services and benefits. The specific purposes for which information may be shared under this power are described in the Bill as specified objectives. Clause 30(6) provides the power for the appropriate national authority to specify the objectives in regulations.

134. The specified objectives must meet conditions set out at clause 30(8) and (9) which include a requirement that all information sharing under this power must have as its purpose improving the well-being of individuals or households.

135. Clause 30(10) sets out a definition of well-being for the purpose of these provisions.

136. Draft regulations have been published at:

<https://www.gov.uk/government/publications/digital-economy-bill-part-5-digital-government>

Justification

137. The specified objectives are to be set out in secondary legislation as the objectives for which information may be disclosed will need to be added to and amended to allow the power to keep pace with emerging social and economic needs, as well as the use of new streams of information to address them. This will make the most effective use of this information sharing power. The use of a delegated power for this purpose is intended to strike a suitable balance between having a sufficiently controlled and limited list of objectives, and ensuring that new objectives can be added where it is considered appropriate to do so.

138. This delegated power is constrained by a number of conditions set out on the face of the legislation.

139. An objective may only be specified in regulations under this power if the objective meets two conditions set out in clause 30(8) and (9).

140. The first condition is that the objective must have as its purpose the improvement or targeting of a public service provided to individuals or households, or the facilitation of the provision of a benefit to individuals or households.

141. The second condition is that the objective must have as its purpose the improvement of the well-being of individuals or households. Subsection (10) provides a definition of well-being for these purposes. Examples can be seen in the draft regulations and include identifying and providing support to individuals or households who face multiple disadvantages and assisting those living in fuel poverty by reducing their energy costs, improving efficiency in their use of energy or improving their health or financial well-being.
142. The power is also subject to a statutory consultation requirement. Before making regulations the appropriate national authority must consult the Information Commissioner, the other appropriate national authorities, the Commissioner for Her Majesty's Revenue and Customs and such other persons as the appropriate national authority sees fit. This provides an additional level of safeguarding in that a wider range of viewpoints will be taken into consideration, therefore providing assurance that the implications of the addition of new objectives would be more fully considered.

Justification for procedure selected

143. As this provision provides the appropriate national authority with the power to specify the purposes for which information may be shared it is considered appropriate that the use of the power is debated and subject to more intensive scrutiny via the affirmative procedure.

*** Clause 31(4)(a): Power to make regulations to amend the list of permitted recipients of information from specified persons for use in connection with fuel poverty support schemes**

Power conferred on: The appropriate national authority

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution

Context and purpose

144. Clause 31 enables persons specified in regulations made under the preceding clause to disclose information to licensed gas and electricity suppliers for the

purpose of providing assistance to people living in fuel poverty. The disclosure must be for use by the recipient in connection with support schemes made under various provisions of the Energy Act 2010, Gas Act 1986 or Electricity Act 1989 or grant schemes made by Scottish or Welsh Ministers under the Social Security Act 1990. Support schemes made under those provisions currently include the Warm Home Discount (WHD) and the Energy Company Obligation (ECO). These particular schemes impose obligations on licensed gas and electricity suppliers.

145. The power would enable all or some licensed gas and electricity suppliers to be removed from the list of permitted recipients of information. It would also enable new persons to be added to the list of permitted recipients.
146. A person on the list of permitted recipients is also authorised by the next clause to disclose information to a specified person for the purpose of providing assistance to people living in fuel poverty. Data matching and other uses of data to identify, target and deliver fuel poverty support can require the sharing of data both from and to the energy supplier or other person delivering the support or administering the scheme.

Justification

147. Previous statutory schemes have imposed obligations on licensed generators and the primary legislation for the ECO scheme would allow obligations to be imposed on licensed electricity distributors and gas transporters. The current ECO and WHD schemes are administered and enforced by the Gas and Electricity Markets Authority, but the primary legislation for the ECO scheme would allow another person to be appointed as the administrator in the future. The power to amend the list of permitted recipients will enable the list to be kept up to date with the range of persons that are required to deliver fuel poverty support or to administer, monitor and enforce the support schemes.
148. The ability to share data is expected to improve the accuracy, efficiency and effectiveness of the targeting and delivery of support under the schemes. If the list of permitted recipients could not be amended, this could constrain the design of future support schemes and the range of persons who could be involved in them.

149. Before adding a permitted recipient, the appropriate national authority must have regard to their systems and procedures for the secure handling of information. Before removing a permitted recipient, the appropriate national authority must have regard to their compliance with the code of practice for the disclosure and use of information under these clauses. The threat of removal is a potential sanction for breach of the code of practice. The power to amend the list of permitted recipients can be used to exclude particular persons, such as a particular gas or electricity supplier.
150. Before amending the list of permitted recipients, the appropriate national authority must consult the Information Commissioner and various other persons.

Justification for procedure selected

151. As this provision provides a power to amend primary legislation it is considered appropriate that the power is subject to Parliamentary approval through the affirmative procedure.
152. Clause 37(12) provides that regulations made under clause 31(4) will not be subject to the hybrid instrument procedure (if it would otherwise apply to the instrument). This is necessary because if, for example, a specific electricity or gas licenceholder was being added or removed from the list of permitted recipients, the regulations would be likely to be hybrid as it would be treating that licenceholder differently than others in the same class. The Government is satisfied that the private interests of, for example, licenceholders will be sufficiently protected because of the safeguards provided for in the power including the requirement for consultation.

*** Clause 31(4)(b): Power to make regulations to amend the second condition that must be met for the disclosure of information to gas and electricity suppliers for fuel poverty purposes**

Power conferred on: The appropriate national authority

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution

Context and purpose

153. Clause 31 enables specified persons to disclose information to permitted recipients (such as licensed gas and electricity suppliers) for the purpose of providing assistance to people living in fuel poverty. There is a second condition that also must be met, which is that the disclosure must be for use by the permitted recipient in connection with support schemes made under various provisions of the Energy Act 2010, Gas Act 1986 or Electricity Act 1989 or grant schemes made by the Scottish or Welsh Ministers under s15 of the Social Security Act 1990.

154. The power would enable the appropriate national authority to amend the second condition.

Justification

155. The power to amend the second condition would enable the fuel poverty support schemes listed under that second condition to be updated should the statutory framework for the existing schemes change, or new frameworks for support schemes be created. Obligations to provide support may be imposed on gas and electricity licence holders in a range of ways, including through primary or secondary legislation or through licence conditions.

156. The purpose of any disclosure under the clause must continue to be for the purpose of assisting people living in fuel poverty by reducing their energy costs, improving efficiency in their use of energy, or improving their health or financial well-being, and this requirement cannot be amended. Nor can the power be used to entirely remove the second condition.

157. Before exercising the power, the appropriate national authority must consult the Information Commissioner and various other persons.

158. Where the regulations could affect the disclosure of HMRC information, they may only be made with the consent of the Treasury.

Justification for procedure selected

159. As this provision provides a power to amend primary legislation it is considered appropriate that the power is subject to Parliamentary approval through the affirmative procedure.

Clause 36: Duty to issue code of practice

Power conferred on: The relevant Minister (i.e. the Secretary of State or the Minister for the Cabinet Office)

Power exercisable by: Code of practice

Parliamentary procedure: As soon as is reasonably practicable after issuing or reissuing the code of practice the relevant Minister must lay, or arrange for the laying of, a copy of it before (a) Parliament, (b) the Scottish Parliament, (c) the National Assembly for Wales, and (d) the Northern Ireland Assembly.

Context and purpose

160. Clause 36 provides that the relevant Minister must issue a code of practice about the disclosure of information and the use of information disclosed under clauses 30, 31 and 32.

161. This is considered to be a new power because it requires the relevant Minister to issue guidance to persons to whom the code applies to which they must have regard. It is considered to be possibly legislative in nature as the requirement to have regard is set out on the face of the Bill.

Justification

162. The code will include too much detail to be suitable for primary legislation. The code will contain detailed guidance setting out best practice and details of the recommended procedures and practices to be followed in exercising the powers under clauses 30, 31 and 32.
163. The use of a code for this purpose rather than primary legislation also ensures the flexibility to review and update the content to reflect developments in what is regarded as best practice in information sharing.
164. The code provides an additional safeguard in that failure to comply with the code of practice may result in removal of the person from the regulations (those persons who have the power to disclose or receive information under clauses 30, 31 and 32). This is provided for at clauses 30(5) and 31(5)(b) which set out that in determining whether to make regulations which amend or revoke previous regulations so that the person ceases to be a specified person, the appropriate national authority must have regard to whether that persons has had regard to the code of practice. Non-compliance by a person providing services to a public authority can also be taken into account as the code also applies to such persons.

Justification for procedure selected

165. It is not considered necessary for the code to be subject to specific Parliamentary scrutiny because it contains guidance that will support those using the power, rather than binding legal obligations. There will also be expert external scrutiny as the code is subject to statutory consultation requirements (with the Information Commissioner, other appropriate national authorities, the Commissioners for Her Majesty's Revenue and Customs and such other persons as the relevant Minister thinks appropriate) when issued or reissued. Further, there is a requirement set out on the face of the Bill ensuring that the code of practice (and any reissue) must be consistent with the ICO's code of practice on data sharing.
166. In addition to the external scrutiny provided by consultation, the code will be made transparent to Parliament. Clause 36(7) provides that as soon as is reasonably practicable after issuing or reissuing the code of practice the relevant Minister

must lay, or arrange for the laying of, a copy of it before (a) Parliament, (b) the Scottish Parliament, (c) the National Assembly for Wales, and (d) the Northern Ireland Assembly.

167. A draft of the code of practice was made available online before the Bill reached Committee stage in the House of Commons.

*** Clause 37: Power to make consequential provision**

Power conferred on: The appropriate national authority

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution

Context and purpose

168. Clause 37(2) and (3) confer a power on the appropriate national authority to make regulations that may contain consequential, supplementary, transitional or transitory provision or savings. This power may be exercised to amend, repeal or revoke any provision of the Chapter or any enactment passed or made before or in the same session as the Bill.

169. In the case of regulations specifying persons (clause 30(2)), this power may be used to make provision in relation to information disclosed by those persons which is similar to that made by clause 35 in relation to information disclosed by Her Majesty's Revenue and Customs.

Justification

170. If further amendments are needed to primary legislation as a consequence of this Chapter it is considered appropriate to make those in secondary legislation given that the power can only be used to give effect to the provisions on the face of this Bill, which will have been approved by Parliament.

171. Every effort has been made to identify any necessary amendments to or repeal of other enactments needed as a result of these clauses. However, because the specific persons who may disclose information under the power and the specific

objectives for which the power will be used are to be defined in secondary legislation, it is possible that further minor consequential, supplementary, transitional or transitory amendments may be required to give effect to those provisions in regulations. This delegated power is included to ensure that steps can still be taken should anything unexpected arise or if it becomes necessary to make changes to primary legislation to facilitate implementation of the provisions.

172. In recognition of the particularly sensitive nature of the taxpayer and benefit recipient information held by Her Majesty's Revenue and Customs, the Bill provides that the Commissioner for Her Majesty's Revenue and Customs must consent to any onward disclosure of HMRC information or for the use of any HMRC information other than for the purpose for which it was provided under clause 30.

173. The power to make provision similar to this for other specified persons has been included so that if legislation places restrictions on a public authority's ability to share information in a similar way to how HM Revenue and Customs has been constrained by the Commissioner for Revenue and Customs Act 2005, the regulations may provide for this. An example of when this power might be used is when the Welsh Revenue Authority becomes operational.

Justification for procedure selected

174. As this provision provides the relevant Minister with the power to amend primary legislation it is considered appropriate that the power is subject to Parliamentary approval through the affirmative procedure.

Chapter 2: Civil registration

*** Clause 39: Power to amend the list of specified public authorities to whom civil registration officials may disclose information**

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution

Context and purpose

175. Clause 39 inserts new provisions into the Registration Service Act 1953 which establish a data sharing gateway by which civil registration officials may share information which they hold in connection with their functions with public authorities. The data can only be shared if the public authority requires the information to enable it to carry out its functions.
176. The new provisions include a list of specified public authorities that may receive data under this power (section 19AB). There is also a power to add, modify or remove an entry from that list. That power is to be exercised by regulations which are subject to the affirmative procedure. Those regulations may also contain consequential, incidental, supplemental, transitional or transitory provision or savings, including provision to amend, repeal or revoke any enactment.
177. The use of the information sharing power will be supported by a code of practice (provided for under new section 19AC) which will contain guidance about the disclosure of information under new section 19AA to which civil registration officials must have regard.

Justification

178. The sharing of civil registration data with public authorities will bring benefits to the public accessing public services and will improve the efficiency of those services. The gateway provides a wide power and safeguards have been added to provide reassurance regarding its use. One of these is the inclusion of a list of those public authorities who can receive data on the face of the legislation, narrowing the reach of the power. Inclusion of the list enables Parliament to approve the

categories of public authority who may receive this data (providing oversight) and ensures the list is readily accessible to the general public (providing transparency).

179. It is important that the list can be amended so that it can reflect any name or function changes in the relevant public authorities as well as allow for public authorities to be added or removed as appropriate. It is expected that the use and benefits of this gateway will be increasingly appreciated over time leading to requests for new authorities to be added. For example, public authorities in the devolved administrations may wish to be included on the list once use of the power has become established. Also, at present there are specific data sharing gateways that allow registration data to be passed to the police (such as section 13 of the Police and Justice Act 2006 ('the 2006 Act')) who are not currently included on the list of public authorities. If it is decided that data which civil registration officials share with the police should in future be shared under the power in this Bill then they could be added and the power to modify the list has been taken to enable this type of amendment to occur. Equally if circumstances arose where it was no longer considered appropriate to share with a category of public authority under this power then that entry could be removed. The data sharing power cannot be widened beyond public authorities.
180. Should an amendment to the list create an unintended consequence to an enactment (for example to an enactment containing another data sharing gateway which will be overlapped) the power to make consequential amendments has been taken to resolve this. For example, were the police to be added to the list, section 13 of the Police and Justice Act 2006 may need to be amended to remove the Registrar General for England and Wales to ensure there was not a duplication of the power.
181. It is likely that amendments made to primary legislation will need consequential, incidental, supplemental, transitional or transitory provision or savings. Examples of this would be the removal of overlapping disclosure powers as discussed above or savings for complementary disclosure powers.

Justification for procedure selected

182. The regulations are subject to the affirmative procedure. This approach is considered to be an appropriate balance between achieving flexibility and providing transparency, reassurance and oversight of the use of the power. The ability to amend the list of public authorities with whom data may be shared by way of secondary legislation is crucial to the flexibility of this data sharing power which is intended to ensure greater efficiency across government and in the provision of services to the public in an environment of rapid technological change. The affirmative procedure is considered to provide the appropriate level of Parliamentary scrutiny for such an amendment. Where primary legislation is being amended it is appropriate that Parliament debates and approves any changes being made to that legislation.

Clause 39: Duty to issue code of practice

Power conferred on: The Registrar General

Power exercisable by: Code of practice

Parliamentary procedure: As soon as reasonably practicable after issuing or reissuing the code of practice the Registrar General must arrange for a copy of it to be laid before Parliament

Context and purpose

183. Clause 39 includes a new section 19AC which provides that the Registrar General must issue a code of practice about the disclosure of information under new section 19AA.

184. This is considered to be a separate power because it requires the Registrar General to issue guidance to persons to whom the code applies to which they must have regard. It is arguably legislative in nature as the requirement to have regard is set out on the face of the Bill.

Justification

185. The code is to be issued to provide a further safeguard for the use of the data sharing power in new section 19AA by assisting registration officials to make consistent and appropriate decisions regarding the use of this power. The code will contain detailed guidance about practices and procedures which are recommended to be followed when making disclosure under new section 19AA, which would be too detailed to include in primary legislation. The use of a code of practice for this safeguarding purpose also ensures the necessary flexibility to review and update the content to reflect developments in best practice for information sharing.

186. The code will also direct the individual to, and highlight key parts of, the appropriate data protection legislation and guidance (both within government and from the Information Commissioner). In doing so it is intended that it will help to ensure that appropriate steps are followed when considering whether to make a disclosure – but it will not impose any legal obligations on the individual considering disclosure.

Justification for procedure selected

187. It is not considered necessary for the code to be subject to specific Parliamentary scrutiny because it contains guidance that will support those using the power, rather than binding legal obligations. There will also be expert external scrutiny as the code is subject to statutory consultation requirements (with the Information Commissioner, the Secretary of State and such other persons as the Registrar General thinks appropriate) when issued or reissued. Further, there is a requirement set out on the face of the Bill ensuring that the code of practice (and any reissue) must be consistent with the ICO's code of practice on data sharing.

188. In addition to the external scrutiny provided by consultation, the code will be made transparent to Parliament. As soon as is reasonably practicable after issuing or reissuing the code of practice the Registrar General must arrange for a copy of it to be laid before Parliament.

189. A draft of the code of practice was made available online before the Bill reached the Committee stage in the House of Commons

Clause 39(3): Power to provide for fees for disclosure of information

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution

Context and purpose

190. Clause 39 also amends section 19B of the Registration Service Act 1953. In addition to the existing power to make regulations to provide for fees to be payable to the Registrar General in respect of the provision of copies or other records of information held by the Registrar General in section 19B, the clause creates a new power to provide for fees to be payable in respect of the disclosure by a civil registration official of information under new section 19AA. The power is to be exercised by regulations subject to the negative procedure.

Justification

191. This provision enables fees to be set for the provision of information under new section 19AA so that a civil registration official is able to recover the costs of carrying out this function. The provision of information under this provision will inevitably require work to be done and costs incurred by civil registration officials which will need to be charged for under normal cost recovery principles. All fees will be set in accordance with HM Treasury rules as set out in Managing Public Money. It is not considered appropriate for fees to be set in primary legislation since they will need to be amended regularly to keep pace with changes in the cost of providing the service.

Justification for procedure selected

192. Existing powers to set fees for civil registration functions are subject to the negative resolution procedure. This power is narrowly drawn and enables fees to be set only for the provision of information pursuant to new section 19AA. The

level of any fees charged under this provision will be in accordance with HM Treasury rules and will be agreed with them in advance. In these circumstances it is considered appropriate that these regulations be subject to the negative procedure.

*** Clause 40: Power to make consequential provision**

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution insofar as amendment or repeal is to an Act of Parliament, otherwise negative

Context and purpose

193. Clause 40 enables the Secretary of State to make regulations amending, repealing or revoking any enactment passed or made before or in the same Session as the Bill in consequence of any provision made by clause 39. This power includes the power to make transitional or transitory provision or savings. It is not foreseen that there will be a need to make consequential, incidental or supplementary provisions arising from such an amendment and to ensure that this power is no wider than necessary, such powers have not been provided for. Regulations made under this clause may be subject to the affirmative or negative procedure, depending on content. Regulations amending or repealing an Act of Parliament will be subject to the affirmative procedure.

Justification

194. Every effort has been made to identify any necessary amendments or repeals arising as a consequence of clause 39. This power is taken to ensure that appropriate steps can still be taken should anything unexpected arise. For example, if there is overlap between data sharing arrangements made under the new power and a data sharing power which already exists we would want to be able to remove the unnecessary duplication by amendment or repeal of the original power.

Justification for procedure selected

195. Where amendments are to be made to an Act of Parliament they will be subject to the affirmative resolution procedure to ensure that there is a high level of oversight of such amendments in the form of debate and vote in Parliament. The negative procedure is considered appropriate for amendments to secondary legislation.

Chapter 3: Debt owed to the public sector

Clause 41(4): Power to make regulations specifying persons who may disclose information

Power conferred on: *The appropriate national authority*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Affirmative resolution*

Context and purpose

196. Clause 41 provides a gateway for specified public authorities to share information with other specified public authorities. The information may only be shared for the purpose of taking action in connection with debt owed to a specified public authority or to the Crown.

197. The specified public authorities who would be allowed to share information with each other are described in the Bill as specified persons. The specified persons are to be set out in regulations under clause 41(4). Specified persons must be either a public authority or a person providing services to a public authority (clause 41(5)). Persons not included on the list of specified persons in regulations will not be permitted to use the power.

198. This is a permissive power, which means it is at the discretion of the specified persons whether or not they choose to disclose information under the power.

199. The use of the information sharing power will be supported by a code of practice (provided for under clause 45) which will contain guidance setting out best practice and the procedures and practices to be followed by specified persons.

200. Draft regulations have been published at:

<https://www.gov.uk/government/publications/digital-economy-bill-part-5-digital-government>

Justification

201. The specified persons are to be set out in secondary legislation rather than primary legislation as the list will need to be regularly updated, for example to reflect the transfer of functions and responsibilities between public authorities. The list may also need to be updated to remove specified persons in accordance with clause 41(7)(b) which provides a sanction for non-compliance with the code of practice (see explanation below). It is not considered appropriate to go back to Parliament to change primary legislation every time such an adjustment is required.

202. See further justification under the provision of a similar power in clause 30(2) above.

Justification for procedure selected

203. As this provides the appropriate national authority with a delegated power to specify who may share information under this clause, it is considered appropriate that the use of the power is debated and subject to more intensive scrutiny by Parliament via the affirmative procedure.

204. Clause 47(9) provides that regulations made under clause 41(4) will not be subject to the hybrid instrument procedure. This is necessary because if regulations made under clause 41(4) were used to, for example, add or remove a specific local authority from the list of specified persons the regulations would be likely to be hybrid as it would be treating that local authority differently than others in the same class (other local authorities). The Government is satisfied that the private interests of, for example, local authorities will be sufficiently protected because of the safeguards provided for in the power including that before making regulations there is a requirement for statutory consultation.

Clause 45: Duty to issue code of practice

Power conferred on: The relevant Minister (i.e. the Secretary of State or the Minister for the Cabinet Office)

Power exercisable by: Code of practice

Parliamentary procedure: As soon as is reasonably practicable after issuing or reissuing the code of practice the relevant Minister must lay, or arrange for the laying of, a copy of it before (a) Parliament, (b) the Scottish Parliament, (c) the National Assembly for Wales, and (d) the Northern Ireland Assembly.

Context and purpose

205. Clause 45 provides that the relevant Minister must issue a code of practice about the disclosure of information and the use of information disclosed under clause 41.

206. This is considered to be a new power because it requires the relevant Minister to issue guidance to which a person to whom the code applies must have regard. It is arguably legislative in nature as the requirement to have regard is set out on the face of the Bill.

Justification

207. The code will include too much detail to be suitable for primary legislation. The code will contain detailed guidance to specified persons setting out best practice and details of the recommended procedures and practices to be followed in exercising the power under clause 41.

208. See further justification under the provision of a similar power in clause 36 above.

Justification for procedure selected

209. It is not considered necessary for the code to be subject to specific Parliamentary scrutiny because it contains guidance that will support those using the power, rather than binding legal obligations. The code is also subject to statutory consultation requirements (with the Information Commissioner, other appropriate national authorities, the Commissioners for Her Majesty's Revenue and Customs and such other persons as the relevant Minister thinks appropriate) when issued or reissued. Further, there is a requirement set out on the face of the Bill ensuring

that the code of practice (and any reissue) must be consistent with the ICO's code of practice on data sharing.

210. In addition to the external scrutiny provided by consultation the code will be made transparent to Parliament. Clause 45(7) provides that as soon as is reasonably practicable after issuing or reissuing the code of practice the relevant Minister must lay, or arrange for the laying of, a copy of it before (a) Parliament, (b) the Scottish Parliament, (c) the National Assembly for Wales, and (d) the Northern Ireland Assembly.

211. A draft of the code of practice was made available before the Bill reached the Committee stage in the House of Commons.

*** Clause 46: Duty to review operation of Chapter**

Power conferred on: The relevant Minister (i.e. the Secretary of State or the Minister for the Cabinet Office)

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution

Context and purpose

212. Clause 46 provides that the relevant Minister must review the operation of the Chapter as soon as practicable three years after commencement. If, as a result of the review, the relevant Minister decides that these powers should be amended or repealed, the relevant Minister has the power to do so by regulations. This is to ensure that such a review is effective.

Justification

213. The delegated power to repeal the Chapter is considered appropriate for secondary legislation given that it is a power to remove the permissive information sharing power following the review.

214. If the outcome of the review is that the powers should be repealed then this should be capable of happening quickly, rather than the powers continuing to be in place

until a suitable legislative vehicle is found to make the necessary amendments to the primary legislation.

215. It was considered whether this should be a sunset provision. However, if the powers prove to be effective in reducing overdue debts owed to the Crown this power to repeal the legislation would avoid the need to reintroduce the powers in primary legislation. To re-introduce the powers would require finding another legislative vehicle which could result in significant delays, given it would depend on whether there were any bills with appropriate scope, the stage they were at in their parliamentary passage and the parliamentary timetable. This would mean an unknown period of time where powers which were already proven to be effective could not be relied on.
216. The delegated power to amend the Chapter is considered appropriate for secondary legislation given that it could not be used to extend the powers. Any such amendments to the Chapter would be limited by the framework of the Chapter which will have already been approved by Parliament.
217. This power allows the relevant Minister the power to amend the Chapter if it is considered to be working well but in need of slight modifications to improve its effectiveness. Such modifications would be as a result of any gaps identified in the use of the power during the review process. The intention of the power to amend is not to broaden the powers in the Chapter but rather to improve on its operation in light of the use of the power during the three years since commencement.
218. The power to repeal or amend the Chapter is subject to constraints. Before carrying out the review the relevant Minister must publish the criteria by reference to which the decision whether to amend or repeal the Chapter will be made (clause 46(2)). This provides transparency and accountability for the way the review is conducted. No criteria are currently included on the face of the legislation as the criteria would be formulated at the time of the review so that the criteria can benefit from the experience of the use of the power. However, consideration is currently being given to what the criteria should include.
219. The delegated power is subject to statutory consultation requirements. In carrying out the review the relevant Minister must consult the Information Commissioner,

the devolved administrations and such other persons the relevant Minister thinks appropriate (clause 46(3)). The relevant Minister must seek consent on the regulations from the relevant devolved administration if, and to the extent that, they affect information sharing between devolved bodies under the relevant chapter or the relevant functions of the devolved bodies.

220. Once the review is completed the relevant Minister must publish a report on its outcome and lay a copy of the report before (a) Parliament, (b) the Scottish Parliament, (c) the National Assembly for Wales, and (d) the Northern Ireland Assembly (clause 46(4)). Again, this provides accountability for the use of the power.

Justification for procedure selected

221. As this provision provides the relevant Minister with the power to amend or repeal primary legislation it is considered appropriate that the use of the power is debated and subject to more intensive scrutiny via the affirmative procedure.

222. No draft regulations will be published for this delegated power given that the power may not be used until three years after commencement and that the content of the regulations will be dependent on the outcome of the review at the time.

*** Clause 47: Power to make consequential provision**

Power conferred on: *The appropriate national authority*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Affirmative resolution*

Context and purpose

223. Clause 47(2) and (3) confer a power on the appropriate national authority to make regulations that may contain consequential, supplementary, transitional or transitory provision or savings. This power may be exercised to amend, repeal or revoke any provision of the Chapter or any enactment passed or made before or in the same session.

224. In the case of regulations specifying persons (clause 41(4)) this power may be used to make provision in relation to information disclosed by that person which is similar to that made by clause 44 in relation to information disclosed by Her Majesty's Revenue and Customs.

Justification

225. If further amendments are needed to primary legislation as a consequence of this Chapter it is appropriate to make those in secondary legislation given that the power can only be used to give effect to the provisions on the face of this Bill, which will have been approved by Parliament.

226. See justification under the provision of a similar power in clause 37 above.

Justification for procedure selected

227. As this provision provides the relevant Minister with the power to amend primary legislation it is considered appropriate that the power is subject to Parliamentary approval through the affirmative procedure.

Chapter 4: Fraud against the public sector

Clause 49(5): Power to make regulations specifying persons who may disclose information

Power conferred on: *The appropriate national authority*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Affirmative resolution*

Context and purpose

228. Clause 49 provides a gateway for specified public authorities to share information with other specified public authorities. The information may only be shared for the purpose of the taking of action in connection with fraud against a public authority.

229. The specified persons are to be set out in regulations under clause 49(5). Specified persons must be either a public authority or a person providing services

to a public authority (clause 49(6)). Persons not included on the list of specified persons in regulations will not be permitted to use the power.

230. This is a permissive power, which means it is at the discretion of the specified persons whether or not they choose to disclose information under the power.

231. The use of the information sharing power will be supported by a code of practice (provided for under clause 53) which will contain guidance setting out best practice and details of the recommended procedures and practices to be followed by specified persons.

232. Draft regulations have been published at:

<https://www.gov.uk/government/publications/digital-economy-bill-part-5-digital-government>

Justification

233. The specified persons are to be set out in secondary legislation rather than primary legislation as the list will need to be regularly updated, for example to reflect the transfer of functions and responsibilities between public authorities and future developments.. The list may also need to be updated to remove specified persons in accordance with clause 49(8)(b) which provides a sanction for non-compliance with the code of practice (see explanation below). It is not considered appropriate to go back to Parliament to change primary legislation every time such an adjustment is required.

234. See further justification under the provision of a similar power in clause 30(2) above.

Justification for procedure selected

235. As this provides the appropriate national authority with a delegated power to specify who may share information under this clause, it is considered appropriate that the use of the power is debated and subject to more intensive scrutiny by Parliament via the affirmative procedure.

236. Clause 55(9) provides that regulations made under clause 49(5) will not be subject to the hybrid instrument procedure. This is necessary because if regulations made under clause 49(5) were used to, for example, add or remove a specific local authority from the list of specified persons the regulations would be likely to be hybrid as it would be treating that local authority differently than others in the same class (other local authorities). The Government is satisfied that the private interests of, for example, local authorities will be sufficiently protected because of the safeguards provided for in the power including that before making regulations there is a requirement for statutory consultation.

Clause 53: Duty to issue code of practice

Power conferred on: The relevant Minister (i.e. the Secretary of State or the Minister for the Cabinet Office)

Power exercisable by: Code of practice

Parliamentary procedure: As soon as is reasonably practicable after issuing or reissuing the code of practice the relevant Minister must lay, or arrange for the laying of, a copy of it before (a) Parliament, (b) the Scottish Parliament, (c) the National Assembly for Wales, and (d) the Northern Ireland Assembly.

Context and purpose

237. Clause 53 provides that the relevant Minister must issue a code of practice about the disclosure of information and the use of information disclosed under clause 49.

238. This is considered to be a new power because it requires the relevant Minister to issue guidance to which a person to whom the code applies must have regard. It is arguably legislative in nature as the requirement to have regard is set out on the face of the bill.

Justification

239. The code will include too much detail to be suitable for primary legislation. The code will contain detailed guidance to specified persons setting out best practice

and details of the recommended procedures and practices to be followed in exercising the power under clause 49.

240. See further justification under the provision of the same power in clause 36 above.

Justification for procedure selected

241. It is not considered necessary for the code to be subject to specific Parliamentary scrutiny because it contains guidance that will support those using the power, rather than binding legal obligations. There will also be expert external scrutiny as the code is subject to statutory consultation requirements (with the Information Commissioner, other appropriate national authorities, the Commissioners for Her Majesty's Revenue and Customs and such other persons as the relevant Minister thinks appropriate) when issued or reissued. Further, there is a requirement set out on the face of the Bill ensuring that the code of practice (and any reissue) must be consistent with the ICO's code of practice on data sharing.

242. In addition to the external scrutiny provided by consultation, the code will be made transparent to Parliament. Clause 53(7) provides that as soon as is reasonably practicable after issuing or reissuing the code of practice the relevant Minister must lay, or arrange for the laying of, a copy of it before (a) Parliament, (b) the Scottish Parliament, (c) the National Assembly for Wales, and (d) the Northern Ireland Assembly.

243. A draft of the code of practice was made available before the Bill reached the Committee stage in the House of Commons.

*** Clause 54: Duty to review operation of Chapter**

Power conferred on: The relevant Minister (i.e. the Secretary of State or the Minister for the Cabinet Office)

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution

Context and purpose

244. Clause 54 provides that the relevant Minister must review the operation of the Chapter as soon as practicable three years after commencement. If, as a result of the review, the relevant Minister decides that these powers should be amended or repealed, the relevant Minister has the power to do so by regulations. This is to ensure that such a review is effective.

Justification

245. See justification under the provision of a similar power in clause 46 above.

Justification for procedure selected

246. As this provision provides the relevant Minister with the power to amend or repeal primary legislation it is considered appropriate that the use of the power is debated and subject to more intensive scrutiny via the affirmative procedure.

247. No draft regulations will be published for this delegated power given that the power may not be used until three years after commencement and that the content of the regulations will be dependent on the outcome of the review at the time.

*** Clause 55: Power to make consequential provision**

Power conferred on: The appropriate national authority

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution

Context and purpose

248. Clause 55(2) and (3) confer a power on the appropriate national authority to make regulations that may contain consequential, supplementary, transitional or

transitory provision or savings. This power may be exercised to amend, repeal or revoke any provision of the Chapter or any enactment passed or made before or in the same session.

249. In the case of regulations under clause 49(5) specifying persons, this power may be used to make provision in relation to information disclosed by that person which is similar to that made by clause 52 in relation to information disclosed by Her Majesty's Revenue and Customs (clause 55(4)).

Justification

250. If further minor amendments are needed to legislation as a consequence of this Chapter it is appropriate to make those in secondary legislation given the power can only be used to give effect to the provisions on the face of this Bill, which will have been approved by Parliament.

251. See justification under the provision of the same power in clause 37 above.

Justification for procedure selected

252. As this provision provides the relevant Minister with the power to amend primary legislation it is considered appropriate that the power is subject to Parliamentary approval through the affirmative procedure.

Chapter 5: Sharing for research purposes

Clause 61: Duty to issue code of practice

Power conferred on: The UK Statistics Authority (“UKSA”)

Power exercisable by: Code of practice

Parliamentary procedure: As soon as is reasonably practicable after issuing or reissuing the code of practice the relevant Minister must lay, or arrange for the laying of, a copy of it before (a) Parliament, (b) the Scottish Parliament, (c) the National Assembly for Wales, and (d) the Northern Ireland Assembly.

Context and purpose

253. Clause 61 provides that the Statistics Board must issue a code of practice about the disclosure, processing, holding and use of information disclosed under clause 57. UKSA is referred to as the Statistics Board in the Bill.

254. This is considered to be a new power because it requires the Statistics Board to issue guidance to which a person to whom the code applies (public authorities and persons accredited under the power) must have regard. It is arguably legislative in nature as the requirement to have regard is set out on the face of the Bill.

Justification

255. The code will include too much detail to be suitable for primary legislation. The code will contain detailed guidance to specified persons setting out best practice and details of recommended procedures and practices to be followed in exercising the power under clause 57.

256. Public authorities and persons accredited under the power are required to have regard to the code of practice in disclosing, processing, holding or using information under clause 57.

257. The use of a code for this purpose ensures the necessary flexibility to review and update the content to reflect developments in best practice for information sharing.

258. The code provides an additional safeguard to the use of the power in that failure to comply with the code of practice may result in withdrawal of accreditation. This is provided for at clause 62(5) which sets out that the grounds for the withdrawal of accreditation must include the ground that the person has failed to have regard to the code of practice under clause 61.

Justification for procedure selected

259. It is not considered necessary for the code to be subject to specific Parliamentary scrutiny because it contains guidance that will support those using the power, rather than binding legal obligations. There will also be expert external scrutiny as the code is subject to statutory consultation requirements (with the Minister for the Cabinet Office, the Information Commissioner, other appropriate national authorities, the Commissioners for Her Majesty's Revenue and Customs and such other persons as the Statistics Board thinks appropriate) when issued or reissued. Further, there is a requirement set out on the face of the Bill ensuring that the code of practice (and any reissue) must be consistent with the ICO's code of practice on data sharing.

260. In addition to the external scrutiny provided by consultation, the code will be made transparent to Parliament. Clause 61(9) provides that as soon as is reasonably practicable after issuing or reissuing the code of practice the Statistics Board must lay, or arrange for the laying of, a copy of it before (a) Parliament, (b) the Scottish Parliament, (c) the National Assembly for Wales, and (d) the Northern Ireland Assembly.

261. A draft of the code of practice was made available before the Bill reached the Committee stage in the House of Commons.

Chapter 7: Statistics

Clause 68: Duty to issue a statement of principles and procedures and a code of practice

Power conferred on: The UK Statistics Authority (“UKSA”)

Power exercisable by: Statement or code of practice

Parliamentary procedure: After issuing or reissuing the statement or code of practice UKSA must lay a copy of it before (a) Parliament, (b) the Scottish Parliament (c) the National Assembly for Wales, and (d) the Northern Ireland Assembly.

Context and purpose

262. Clause 68 inserts new sections 45B – 45G into the Statistics and Registration Service Act 2007 (“SRSA”). UKSA is referred to as the Statistics Board in the SRSA. These sections provide for the disclosure of information to the Statistics Board by different types of public and private bodies and make further provision related to those disclosures. Sections 45E(5) and 45G provide that the Statistics Board must prepare and publish:

- i) a statement about the principles to which it will have regard in exercising its functions for accessing data under sections 45B to 45D of the SRSA and the procedures it will adopt in exercising those functions; and
- ii) a code of practice containing guidance on the matters to be taken into account by a public authority where that public authority is making changes to its processes for collecting, organising, storing or retrieving information or to its processes for supplying information to the Statistics Board.

263. This is considered to be a new power because it requires the Statistics Board to issue guidance to which a person to whom the access provisions in sections 45B to 45D SRSA or code applies must have regard. It is arguably legislative in nature as the requirement to have regard is set out on the face of the Bill.

Justification

264. The statement or code will provide a level of detail that would be inappropriate to set out on the face of the Bill. They are intended to provide guidance to specified persons setting out detail of practices and procedures to be followed which will provide an additional safeguard on the use of the powers provided to the Statistics Board by sections 45B-45D of the SRSA.
265. The use of a statement or code for this purpose ensures the necessary flexibility to review and update the content to reflect developments in data sharing.

Justification for procedure selected

266. It is not considered necessary for the statement or code to be subject to specific parliamentary scrutiny because they contain guidance that will support those using or affected by the power rather than binding legal obligations. Both statement and code are also subject to statutory consultation requirements (with the Minister for the Cabinet Office, the Information Commissioner, Scottish Ministers, Welsh Ministers, the Department of Finance in Northern Ireland and such other persons as UKSA thinks fit) when issued or reissued.
267. In addition the statement and code will be made transparent to Parliament. Sections 45E(10) and 45G(6) provide that, after issuing or reissuing the statement or code of practice, UKSA must lay it before (a) Parliament, (b) the Scottish Parliament, (c) the National Assembly for Wales, and (d) the Northern Ireland Assembly.

PART 6: MISCELLANEOUS

Clause 76: Functions of Ofcom in relation to the BBC

Power conferred on: Ofcom

Power exercisable by: Directions or codes

Parliamentary procedure: None

Context and purpose

268. The BBC is established and governed by Royal Charter and a Framework Agreement between the BBC and the Secretary of State (made under the Charter). These documents cover all aspects of the BBC including its constitution and its powers and duties. Her Majesty the Queen has approved a new Royal Charter, which it is anticipated will become effective from 3 April 2017, together with the new Framework Agreement between the BBC and the Secretary of State.
269. Ofcom currently has a limited role in regulating a small amount of the BBC's activities: section 198 of the Communications Act 2003 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". However, in the existing provision, the "BBC's services" is defined so as not to cover all of the activities of the BBC.
270. Clause 76 amends section 198 to give Ofcom full regulatory powers in relation to all of the BBC's activities, in line with Government policy that Ofcom should replace the BBC Trust as the sole regulator of the BBC. In turn the Charter and Framework Agreement will specify how Ofcom will exercise its statutory powers in relation to the BBC, including in relation to the BBC's commercial services.
271. Clause 76 also confers a power for Ofcom to fine a person who does not provide information in connection with Ofcom's regulatory functions in relation to the BBC. The substantive requirements for Ofcom to fulfil before it can issue a fine are provided for in the clause. The clause also requires Ofcom to publish guidance in order to provide clarity as to how it will approach issuing penalties. However, the guidance has no specific legal effect and accordingly the Government does not consider this to be a delegated power of a legislative nature. It is mentioned here only to assist the Committee's scrutiny of the Bill.

Justification

272. The extension to Ofcom's statutory powers will enable it to fulfil its new role as the BBC's sole regulator.

Justification for procedure selected

273. The substantive effect of this measure is to widen the scope of Ofcom's existing regulatory powers, rather than to give Ofcom stronger new regulatory or legislative powers or competence. The Charter, periodically granted to the BBC by the Crown under the royal prerogative, and the Framework Agreement, between the BBC and the Secretary of State, determine how Ofcom exercises its statutory regulatory powers over the BBC. Both are drawn up in consultation with the BBC and Ofcom.

Clause 77(6): Power to determine TV licence fee concessions by reference to age

Power conferred on: BBC

Power exercisable by: Determination

Parliamentary procedure: None

Context and purpose

274. The current legislative framework requires that the installation and use of a television receiver are authorised by a television licence. The BBC is responsible for collecting the licence fee. Section 365 of the Communications Act 2003 enables the Secretary of State to make provision, by regulations, for concessions in relation to the payment of the licence fee. One such concession relates to age and currently takes the form of the so-called 'over-75s' exemption from payment of the licence fee. Clause 77 transfers the policy responsibility for and the function of conferring age-related concessions (for those aged 65 and over) from the Secretary of State to the BBC.

Justification

275. As part of the funding agreement between the Government and the BBC, reached in summer 2015, the BBC agreed to cover the full costs of the age related concessions alongside taking on the policy responsibility for setting the age related

concession. This measure gives effect to that agreement and secures greater autonomy for the BBC in administering the concession.

Justification for procedure selected

276. The power to set and administer the age-related concession is being transferred from the Secretary of State to the BBC with appropriate safeguards. This concession will no longer be set out in regulations, however the measure requires that the BBC must consult those it considers appropriate before making, varying or revoking a determination. There is also a requirement that determinations under this power are in writing and are published. The measure also makes it clear that the BBC's determinations are to be in relation to any person aged 65 or higher and may not be in relation to a lower age.

Clause 81: Duty to prepare a code of practice on direct marketing

Power conferred on: The Information Commissioner

Power exercised by: Statutory code of practice

Parliamentary procedure: Negative resolution

Context and purpose

277. Clause 81 inserts a new section 52AA into the Data Protection Act 1998 ("the 1998 Act"). Under new section 52AA, the Information Commissioner must issue a code of practice containing practical guidance in relation to the carrying out of direct marketing in accordance with the requirements of the 1998 Act and the Privacy and Electronic Communications (EC Directive) Regulations 2003, and promoting good practice.
278. Failure to comply with the code will not of itself expose a person to legal proceedings. However, clause 81(8) amends section 52E(3) of the 1998 Act so that a court, tribunal or the Information Commissioner must take account of the code if it appears relevant to a question being considered by it or her.
279. Amendments to section 52B of the 1998 Act, as provided for by clause 81(5), provide for consultation with the Secretary of State and submission of the final version to the Secretary of State. The Secretary of State must lay the code before

Parliament. After laying, unless either House of Parliament resolves not to approve the code, the Information Commissioner is obliged to issue the code 40 days after it has been laid before Parliament. The code comes into force 21 days after it has been issued.

Justification

280. Currently, the Information Commissioner publishes guidance on direct marketing under section 51 (general duties of Commissioner) but this guidance has no legal effect. Clause 81 will enable the code to be relied on in enforcement proceedings.

281. The provisions rely on the use of a code of practice because a statutory code, unlike primary legislation, can be updated from time to time and provides a flexible means of ensuring that those carrying out direct marketing have access to up-to-date guidance on direct marketing that accurately reflects the current law. A code can also provide a level of detail and explanation that is not possible in legislation.

Justification for procedure selected

282. However, it is considered appropriate to subject the code to a degree of Parliamentary scrutiny in order to provide some oversight of how guidance in the area of direct marketing is developing. The negative resolution procedure has been selected because it is considered that whilst Parliament should have sight of the code and the opportunity to consider its content, it does not warrant a more rigorous procedure.

Clause 85: Power to apply settlement finality regime to payment institutions

Power conferred on: HM Treasury

Power exercised by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution

Context and purpose

283. Clause 85 inserts new section 379A into the Financial Services and Markets Act 2000, conferring a power on the Treasury to bring payment institutions within the settlement finality regime in the UK.

284. The settlement finality regime derives from the Settlement Finality Directive (98/26/EC). It enables transfer orders by certain categories of participant in payment and clearing systems designated by national authorities to be settled before domestic insolvency law applies. This regime is implemented in the UK by the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (“the 1999 Regulations”).
285. However, the 1999 Regulations do not presently encompass payment institutions (meaning “authorised payment institutions” and “small payment institutions” under the Payment Services Regulations 2009 (which implement the Payment Services Directive (2007/64/EC)), and equivalent overseas firms).
286. This power will enable the Treasury by regulations made by statutory instrument to provide for the application of the settlement finality regime to payment institutions. The regulations may make consequential, supplemental or transitional provision, and amend subordinate legislation. In essence, this would enable non-bank firms which provide payment services (including firms which provide payment services in new ways, such as platforms which facilitate peer-to-peer payments) to benefit from the preferential treatment afforded to banks concerning settlement finality – i.e. ensuring that transactions are settled without being unwound by creditors, in the event of a payment institution becoming insolvent while it has unsettled transactions in its system. The intention is that this will help to level the playing field between bank and non-bank payment service providers, and will promote competition in the UK’s £75 trillion payments market.

Justification

287. The Treasury considers that taking a power is the most effective way of implementing this change. The primary legislation sets out the principle that non-bank firms classified as authorised payment institutions may have the benefit of the settlement finality regime. However, the precise effects on the settlement finality regime will require detailed technical consideration with the Bank of England and these matters of detail are more appropriately set out in secondary legislation. Furthermore, the existing regime that applies to banks is in secondary legislation so there will be equivalence in the procedure that applies to both types

of institutions. In addition, a power leaves open the possibility of making further amendments to the regime in future.

Justification for procedure selected

288. It is considered appropriate for the regulations to be subject to negative resolution, since the principle will have been approved in primary legislation and the power itself is necessarily narrow: it may only be exercised in the application of a clearly defined regime, which already applies to other types of institution; and in relation to a narrowly defined category of institution.

Clause 86 and Schedule 4: Power to recognise payment systems that the Bank of England may supervise for the purpose of ensuring financial stability

Power conferred on: HM Treasury

Power exercised by: Recognition order made under section 184 of the Banking Act 2009

Parliamentary procedure: None

Context and purpose

289. Clause 86 gives effect to Schedule 4, which amends Part 5 of the Banking Act 2009 (“the 2009 Act”) to broaden the existing power to recognise payment systems that the Bank of England may supervise for the purpose of ensuring financial stability, and also makes necessary consequential amendments to the 2009 Act and other primary legislation.
290. The existing power only applies to payment systems involving banks and building societies. The broadened power will allow the Treasury to recognise non-bank payment systems, so as to ensure that any payment system may be covered by the regulatory framework in Part 5 of the 2009 Act.
291. The purpose is to ensure that the Treasury and the Bank of England can respond in a timely manner to potential risks to financial stability that could be created by a systemically important non-bank payment system. There is no such system at present, but this provides the necessary safeguard in the event that such a system

develops in future. In turn, it complements the potential expansion of access to the Bank's central settlement system to non-bank payment providers.

292. The power to recognise payment systems is exercisable by recognition order (under s.184 of the Banking Act 2009) made by the Treasury after consultation with the Bank of England. This may only be made if the Treasury is satisfied that any deficiencies in the design of a system, or any disruption of its operation, would be likely either to threaten the stability of the UK financial system, or to have serious consequences for business in the UK. In considering whether to recognise a system, the Treasury must have regard to a range of factors, including, but not limited to: the number, value and nature of the transactions processed, the relationship between the system and other systems, and whether the system is used by the Bank of England.
293. As a corollary of these amendments, powers conferred on the Bank of England and the Treasury, found elsewhere in Part 5 of the 2009 Act, are also necessarily broadened so as to be applicable to non-bank payment systems. These powers include powers concerning the publication of principles and codes of practice by the Bank of England (sections 188 and 189 of the 2009 Act), the making of regulations by the Treasury concerning the scale of fees, and the sharing and publication of information (sections 203 and 204 of the 2009 Act). We also highlight the power under section 206A for the Treasury to apply the provisions of Part 5 to service providers in respect of payment systems, by order made by statutory instrument subject to the affirmative resolution procedure.

Justification

294. The existing power exercisable by recognition order under section 184 of the 2009 Act remains appropriate in respect of non-bank payment systems, as this concerns technical considerations and assessments regarding stability and confidence in the financial system which are more appropriately carried out by the Treasury in consultation with the Bank of England rather than in legislation. It also ensures that the payment systems that are supervised by the Bank of England can be amended from time to time to reflect current conditions. The legislative framework

tightly constrains the matters that HMT must have regard to in exercising the power.

295. In respect of powers found elsewhere in Part 5 of the 2009 Act which are necessarily broadened as a corollary of these amendments, these powers continue to be justified in respect of non-bank payment systems in order to ensure that the Part applies in the same way to, and is effective for, all payment systems. For example, the broadening of the power in section 206A is justified as service providers will continue to play a part in the operation of all payment systems.

Justification for procedure selected

296. The existing power is exercisable by recognition order under section 184 of the 2009 Act. This is an administrative procedure which is not subject to Parliamentary control. This remains appropriate given the nature of the decision to bring a payment system within the Bank of England's oversight. This decision will include consideration of commercial matters relating to individual businesses, as well as potentially sensitive and technical questions of financial stability, in discussion with the Bank of England.
297. Insofar as other powers conferred on the Bank of England and on the Treasury are broadened in consequence of the broadening of the power to recognise payment systems that the Bank of England may supervise, it is intended that the existing procedures should continue to apply. The existing level of parliamentary control for each power is considered to work well and allows the Bank to act quickly and use its expertise to make decisions based on technical and sensitive commercial factors. The Treasury's power to extend the application of provisions of Part 5 to service providers in respect of payment systems remains subject to the affirmative resolution procedure.

Clause 87(4): Power to specify the qualifications or description of qualifications for which the Secretary of State is required to pay tuition-fees (paragraph 3(1) of Schedule 5 to ASCAL 2009)

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution

Context and purpose

298. Clause 87 amends section 88 of and Schedule 5 to the Apprenticeships, Skills, Children and Learning Act 2009 (“ASCAL 2009”) to impose an obligation on the Secretary of State to provide tuition fee-free training for persons who are 19 years of age or over for a specified qualification in making use of information technology.
299. The clause confers a power on the Secretary of State to specify in secondary legislation the qualifications, or a description of the qualifications, by reference to an assessment made by the Secretary of State of the level of attainment demonstrated by a qualification. The power permits the Secretary of State to confer a function on herself to make discretionary decisions about qualifications for which training is to be provided free of charge.
300. There is an existing equivalent power for numeracy and literacy qualifications. The clause, in effect, expands that power to include qualifications in making use of information technology.
301. The Government intends to mirror the approach taken in the Adult Skills (Specified Qualifications) Regulations 2010 (SI 2010/733) which are made under the existing, equivalent, power for numeracy and literacy qualifications. The regulations are therefore expected to provide that a specified qualification in making use of information technology is a qualification which is assessed by the Secretary of State to be at the level of attainment specified in new paragraph 5A of Schedule 5 to ASCAL 2009 (i.e. the level which in the opinion of the Secretary of State is the minimum required in that respect by persons aged 19 or over in order to be able to operate effectively in day-to-day life). As is the case for qualifications in literacy and numeracy, the regulations are expected to require the Secretary of State to make available to the public lists of the specified qualifications.

302. Section 88 of ASCAL 2009 places a duty on the Secretary of State to secure that a course of study for a specified qualification in literacy or numeracy is free in certain circumstances and this is to be amended to include specified qualifications in making use of information technology. As a corollary, the scope of other connected secondary legislation-making powers in sections 87 and 88 of ASCAL 2009 are also affected. These ancillary powers enable the operation of the duty in section 88 and the effect on the scope of these powers is a consequence of the amendment to Schedule 5. All these powers are subject to the negative resolution procedure. There will therefore be Parliamentary scrutiny should any of these powers be used in connection with the amendment to section 88 and Schedule 5. The powers are listed below.

- Section 87(3)(c) ASCAL 2009 – power to specify the conditions as to persons for whom the Secretary of State has a duty to secure appropriate facilities for education and training;
- Section 88(2)(c) ASCAL 2009 – power to specify conditions a person must meet to be eligible for fee-free tuition;
- Section 88(5)(a) ASCAL 2009 – power to amend the age at which fee-free education must be provided;
- Section 88(6) ASCAL 2009 – power to specify a body to pay tuition fees; and
- Section 88(7)(b) ASCAL 2009 – power to specify the sorts of fees relating to a course which are to fall within the meaning of the term “tuition fees” (and therefore paid by the Secretary of State).

Justification

303. Paragraph 3 of Schedule 5 to ASCAL 2009 allows the Secretary of State flexibility to change the qualifications or types of qualification which can be provided tuition fee-free. This is particularly important in relation to information technology, in circumstances where a key policy aim is to ensure that the underlying qualification is up-to-date in a subject area which is fast-changing. Having a power to specify the qualifications or types of qualification allows changes to the qualification or types of qualification as and when necessary. Further, having a power for this

purpose mirrors the existing structure for determining which training in literacy and numeracy under section 88 of and Schedule 5 to ASCAL 2009 is to be tuition fee-free.

Justification for procedure selected

304. The principle of the provision of tuition fee-free training for making use of information technology is set out in primary legislation. The specific qualifications or descriptions of qualification which are to be tuition fee-free are matters of detail and secondary legislation, subject to the negative resolution procedure, provides the appropriate level of scrutiny by Parliament. In addition, under section 262(5) of ASCAL 2009 the negative procedure is applicable for all regulations made under paragraph 3 of Schedule 5 to ASCAL 2009 and applying the same procedure ensures consistency of approach.

PART 7: GENERAL

Clause 89: Commencement

Power conferred on: Secretary of State, Minister for the Cabinet Office

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: None

Context and purpose

305. Clause 89(1) lists the provisions which come into force on Royal Assent and clause 89(2) those which come into force two months after Royal Assent. Clause 89(3) provides for section 77 (TV licence fee concessions by reference to age) to come into force on 1 June 2020. Clause 89(4) provides that Part 5, except sections 39 and 40, comes into force on whatever day the Secretary of State or the Minister for the Cabinet Office appoints by regulations. Clause 89(5) provides that all the other provisions come into force on whatever day the Secretary of State appoints by regulations. Clause 89(6) provides that regulations under clause 89 may appoint different days for different purposes.

Justification

306. The commencement power at subsections (4) and (5) will enable the Secretary of State (or the Minister for the Cabinet Office, in respect of the relevant provisions in Part 5) to commence the provisions of the Bill not covered by subsections (1) to (3) at an appropriate time.

Justification for procedure selected

307. The Government considers that the power to make commencement regulations need not be subject to any Parliamentary procedure as the power only sets the date of when the new provisions will come into force. The substance of the provisions will be considered during the passage of the Bill.

Clause 90(4)-(9): Power to extend Bill to Crown Dependencies

Power conferred on: Her Majesty

Power exercisable by: Order in Council

Parliamentary procedure: None

Context and purpose

308. Clause 90(9) provides that Her Majesty may by Order in Council direct that sections 15 to 26 of the Bill are to extend, with whatever modifications appear to Her Majesty to be appropriate, to any of the Channel Islands or the Isle of Man.
309. Subsections (6)-(8) refer to similar mechanisms for extending the extent of the Copyright, Designs and Patents Act 1988, the Broadcasting Act 1990, the Broadcasting Act 1996, the Communications Act 2003 and the Wireless Telegraphy Act 2006, and provide that those mechanisms can be used in relation to any amendments made by the Bill to those Acts.
310. In relation to section 28 of the Bill, which amends the Registered Designs Act 1949, clause 89(5) provides that section 47 of the 1949 Act applies as it does to that Act. Section 47 provides that the Act extends to the Isle of Man, subject to any modifications contained in an Order made by Her Majesty in Council.

Justification

311. In respect of subsections (5)-(9), the powers to extend are conferred where the Bill adds to provision in other Acts that Parliament has already decided should be subject to those powers. The powers were considered appropriate, since the extension of the provisions to the Crown Dependencies occurs only with the agreement of those jurisdictions' authorities and thus provides a means by which provision can be extended without those jurisdictions being required to legislate for themselves.
312. It is likewise considered appropriate that the same means applies to any amendments made by this Bill to those enactments, and thus that primary legislation is not required to extend these provisions.

313. Sections 15 to 26 of the Bill (online pornography) concern an area related to matters within the Communications Act 2003. It is therefore likewise considered appropriate to provide for a means by which these clauses could be extended to the Crown Dependencies with the agreement of those jurisdictions' authorities.

Justification for procedure selected

314. The extension of the Bill to the Crown Dependencies does not warrant Parliamentary scrutiny since the Bill itself will have already been scrutinised during its Parliamentary passage.

Department for Culture, Media and Sport

28 November 2016

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