

COMMUNICATIONS ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Networks, Services and the Radio Spectrum

Chapter 1: Electronic Communications Networks and Services

84. **Chapter 1** of Part 2 of the Act provides for a new regulatory framework that will apply to all electronic communications networks, electronic communications services and associated facilities. Networks and services make up the communications infrastructure by means of which voice, content and other data are delivered to the consumer (the regulation of television and radio content is dealt with separately under Part 3 of the Act). This new regulatory framework implements a significant proportion of the harmonised framework for the regulation of electronic communications networks and services established by EC Communications Directives (see Appendices 2 and 3). The remainder will be implemented by secondary legislation or, where appropriate, administrative action.
85. The Act abolishes the criminal offence of running a telecommunications system without a licence currently contained in the Telecommunications Act 1984. In the new regulatory framework for electronic communications networks, electronic communications services and associated facilities, there will be no need to apply for a licence. Persons will automatically be entitled to provide an electronic communications network, electronic communications services or to make available associated facilities provided that, where required, they notify OFCOM of this intention and comply with certain regulatory conditions (known as conditions of entitlement) set by OFCOM.

Section 32: Meaning of electronic communications networks and services

86. This section sets out the meanings of the three key concepts – ‘electronic communications network’, ‘electronic communications service’, and ‘associated facility’ - that are referred to throughout this Part.
87. This section implements Article 2(a), (c), (e) and (m) of the Framework Directive.

**electronic communications network* is defined in *subsection (1)* as a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy of signals of any description, and associated apparatus, software and stored data. Examples of such networks include satellite networks, fixed networks (whether circuit- or packet-switched, and including the Internet) and mobile terrestrial networks and networks used for radio and television broadcasting, including cable TV networks.

**electronic communications service* is defined in *subsection (2)* as a service consisting, or having as its principal feature, the conveyance, by means of an electronic communications network, of signals except in so far as it is a content service. Examples of such services include telecommunications services and transmission services in networks used for broadcasting.

**associated facility* is defined in *subsection (3)* as a facility which is available for use in association with an electronic communications network or service in order to make the provision of that network or service (or other services) possible, or to support the provision of other services. Examples of such facilities include conditional access systems and electronic programme guides.

**content service* is defined in *subsection (7)* as so much of a service as consists in (i) the provision of material with a view to it being comprised in signals conveyed over an electronic communications network, or (ii) the exercise of editorial control over the contents of signals conveyed by means of such a network.

**a signal* is defined in *subsection (10)* as including anything consisting of speech, music, sounds, visual images and communications or data of any description, and signals serving for the impartation of anything or for actuating or controlling any apparatus.

Section 33: Advance notification to OFCOM

88. This section allows OFCOM to designate certain classes of networks, services or associated facilities as requiring notification. Under *subsection (1)* no one may provide any network, service or associated facility that has been designated in this way, unless he has notified OFCOM in advance of his intention to do so. If a network, service or associated facility already being provided is subsequently designated by OFCOM as requiring notification, the person concerned must notify OFCOM within the time period specified in the designation. OFCOM must also be informed when a person intends to modify or to cease to provide a designated network, service or associated facility.
89. *Subsection (5)* lists the information that OFCOM may require to be contained in a notification. This basically consists of the information necessary to enable OFCOM to identify the person giving the notification, such as his name and address, a declaration of his proposal to provide, modify or cease to provide the network or service described in the notification or to make available, modify or cease to make available an associated facility, and details of when he intends to commence these activities. OFCOM may also require details of a person who can accept service on behalf of that person and a person who can be contacted if there is an emergency.
90. This section implements Articles 3(2) and (3) and 6(1), of and condition 10 of Part A of the Annex to, the Authorisation Directive.

Section 34: Designations and requirements for the purposes of s. 33

91. This section details the procedural requirements imposed on OFCOM regarding the making or withdrawal of a designation by them under section 33. *Subsection (1)* provides that OFCOM must consult with those likely to be affected by OFCOM's actions, and *subsection (2)* requires OFCOM to consult with the Secretary of State prior to making or withdrawing a designation.
92. This section forms part of the implementation of Article 6(1) of the Authorisation Directive.

Section 35: Notification of contraventions of s. 33

93. This section provides that where OFCOM have reasonable grounds to believe that a person has contravened his obligations under section 33, they may notify that person and allow him a specified period of time (usually one month) in which to make representations to OFCOM and to comply with his obligations.
94. This section and sections 36 and 37 implement Article 10(2) and (3) of the Authorisation Directive in the context of the enforcement of the advance notification requirements.

Section 36: Enforcement notification for contravention of s. 33

95. If, by the end of the period specified in the notification given under section 35, OFCOM are satisfied that a person has contravened section 33 and he has not provided them with all the information needed to remedy the contravention, *subsection (2)* allows OFCOM to serve an enforcement notification on the relevant provider. Such a notification requires the relevant provider to provide OFCOM with the information specified in the notification. Those persons to whom an enforcement notice has been given are under a duty, enforceable by OFCOM via civil proceedings, to comply with it.

Section 37: Penalties for contravention of s. 33

96. If a person has contravened section 33 and, by the end of the period specified in the notification given under section 35, he has not provided OFCOM with all the information needed to remedy the contravention, OFCOM may impose a penalty. OFCOM may also impose a penalty if a person contravenes a requirement of an enforcement notification given under section 36. In deciding on the amount of a financial penalty under section 37, OFCOM are required to consider whether the financial penalty is appropriate and proportionate, and to take account of any representations made by the person concerned, and any steps taken by him to comply with section 33. The financial penalty shall not, in any event, exceed £10,000.

Section 38: Fixing of charges

97. This section gives OFCOM a power to require providers of particular designated networks, services or associated facilities, universal service providers designated by regulations under section 66 for the purposes of conditions relating to directories and directory enquiry facilities, suppliers of apparatus to whom SMP apparatus conditions apply (under section 93) and also persons to whom the electronic communications code has been applied who do not provide a designated electronic communications network (under section 106(4)), to pay a yearly administrative charge. Any such charges should be set by OFCOM in accordance with pre-determined “charging principles”, designed to ensure that the aggregate charges collected in any one year will just cover OFCOM’s costs - in that same year - of carrying out the administrative functions listed in *subsection (5)*. This section implements Articles 6(1), 12 and 13 of, and condition 2 of Part A of the Annex to, the Authorisation Directive. It should, however, be noted that although OFCOM are able to collect an administrative charge from a supplier of apparatus to whom an SMP apparatus condition (i.e. a condition set under section 45(9)) applies or from a provider of a system of conduits to whom the electronic communications code has been applied, the collection of the administrative charge for these purposes is not part of the implementation of those provisions.
98. Charges must also be objectively justifiable, proportionate and transparent. This implements Article 12(1) of the Authorisation Directive.
99. *Subsection (9)* obliges OFCOM to publish an annual statement of the aggregate charges collected (or to be collected) for that year, and the corresponding aggregate costs incurred in carrying out their administrative functions. Any deficit or surplus must be taken into account in setting charges for the following year. This implements Article 12(2) of the Authorisation Directive.
100. [Paragraph 12](#) of Schedule 18 (transitional provisions) provides that where any licence fees in respect of licences granted under section 7 of the Telecommunications Act 1984 remain outstanding on the abolition of such licences, that liability is to have effect after the abolition as a liability to pay OFCOM so much of the amount outstanding as does not relate to times after the abolition.
101. For the purpose of ascertaining who is liable to pay an administrative charge, sections 135 and 137(6) enable OFCOM to publish a general demand for information.

Section 39: Supplemental provision about fixing charges

102. This section lays down the procedures (including consultation and publication) OFCOM must follow when they are setting administrative charges and determining “charging principles”.
103. *Subsections (2) to (4)* provide that when setting an administrative charge, OFCOM may make provision for a deduction from the charge in cases where a network, service or associated facility has been provided, or the universal service condition, electronic communications code or SMP apparatus condition has applied, for part of a year only. Conversely, a charge may apply to networks, services or associated facilities that were being provided, or to persons to whom the universal service condition, electronic communications code or SMP apparatus condition applied, in a particular year before the charge for that year was set, as long as this is consistent with the “charging principles” for that year. This would, for example, mean that OFCOM would have the flexibility to set the amount of the charge for a particular year after that charging year has commenced.

Section 40: Notification of non-payment of charges

104. This section allows OFCOM to notify persons who do not pay part or all of the administrative charges due to OFCOM, and sets out the procedures, such as giving notice and allowing for representations, to be followed by OFCOM in such cases. OFCOM may not bring proceedings for the recovery of administrative charges unless they have given a notification under this section.
105. This section and sections 41 to 43 relate to the enforcement of the administrative charge requirements contained in the Act and implement Article 10 of the Authorisation Directive.

Section 41: Penalties for non-payment of charges

106. If a person has failed to pay an administrative charge fixed under section 38 and has not paid the whole of the amount outstanding in the period allowed by the enforcement notification under section 40, OFCOM may fine the notified charge payer. In deciding on the amount of a fine, OFCOM are required to consider whether the fine is appropriate and proportionate, and to take account of any representations made by the person concerned and any steps taken by him to comply with section 38. The maximum fine that may be imposed under this section is twice the amount of the relevant administrative charge for the year in question.

Section 42: Suspending service provision for non-payment

107. This section gives OFCOM a power to suspend a person’s entitlement to provide networks, services and/or associated facilities where OFCOM are satisfied that that person is or has been in serious and repeated breach of his obligations to pay administrative charges to OFCOM, that the breaches are not breaches relating only to charges in respect of the application of SMP apparatus conditions, that the bringing of proceedings and the imposition of penalties has failed to secure complete compliance and that such a response is appropriate and proportionate. However, under *subsection (6)* OFCOM may not issue a direction unless they have given the provider notice of the proposed direction and given him an opportunity to make representations about it and to propose steps to remedy the situation. *Subsection (7)* provides that this period must be at least one month.
108. A direction by OFCOM under this section may suspend entitlement generally or in relation to particular networks, services or associated facilities, or may restrict the entitlement in the way specified. A direction may impose conditions on the provider in order to protect the provider’s customers. *Subsection (8)* enables OFCOM to revoke or modify suspensions and restrictions where they consider it appropriate to do so.

Section 43: Enforcement of directions under s. 42

109. It is an offence, punishable by a fine, for any person to provide an electronic communications network, electronic communications service or associated facility while he is subject to a direction suspending his entitlement to do so, or to provide such a network, service or associated facility in contravention of a restriction in such a direction.
110. A contravention of a condition of a direction which results in any person sustaining loss or damage is actionable at the suit or instance of that person. It is a defence for the person providing the electronic communications network, electronic communications service or associated facility to show that he did all that was reasonable to avoid contravening the condition.

Section 44: Duty of OFCOM to keep publicly accessible register

111. This section places OFCOM under a duty to keep an up-to-date public register of designations made under section 33 or section 38, withdrawals of such designations and notifications given to them, or treated as given to them, under section 33. OFCOM must publish (and comply with) a notification setting out the times during which the register is available for public inspection and the fees (if any) that must be paid to inspect the register.
112. This section implements Article 3(3) of the Authorisation Directive.

Section 45: Power of OFCOM to set conditions

113. Under the regulatory framework provided for in Part 2, any person to whom OFCOM applies a condition under section 46 must comply with that condition. Section 45 gives OFCOM the power to set two categories of conditions – general conditions and specific conditions, the latter comprising universal service conditions, access-related conditions, privileged supplier conditions or significant market power (SMP) conditions. *Subsection (10)(e)* provides that the power to set conditions includes the power to revoke or modify conditions.
114. General conditions are conditions of general application and must be set in accordance with sections 51, 52, 57, 58 or 64. The ability to set such conditions implements Article 6(1) of, and partially implements Part A of the Annex to, the Authorisation Directive. It also implements Article 4(1) and 4(3) of the Access Directive.
115. Universal service conditions are conditions authorised or required under section 67 for the purpose of ensuring that certain minimum electronic communications networks and services and associated facilities are available at all times throughout the UK. The ability to set such conditions implements Article 6(2) of the Authorisation Directive and Articles 3 to 7 and 9 to 11 and Part A of Annex I to of the Universal Service Directive.
116. Access-related conditions are conditions authorised under section 73 for the purpose of ensuring adequate network access within communications infrastructure. The ability to set such conditions implements Article 6(2) of the Authorisation Directive and Articles 5(1) and (2) and 6 of the Access Directive.

**network access* is defined in section 151 as meaning (1) interconnection of public electronic communications networks; or (2) any services, facilities or arrangements (other than interconnection) by means of which a communications provider or a person making associated facilities available is able, for the purposes of the provision of an electronic communications service (whether by him or by another), to make use of any network or apparatus comprised in a network, or any service or facility capable of being used to provide a service.

117. Privileged supplier conditions can be applied where a communications provider enjoys special or exclusive rights in relation to the provision of any non-communications

services. They are intended to ensure the separation of the provider's activities as a communications provider from other aspects of his undertaking, and must comply with section 77. The ability to set such conditions implements Article 13 of the Framework Directive.

118. SMP conditions may be either an SMP services condition authorised or required under sections 87 to 92 or an SMP apparatus condition authorised under section 93. The ability to set SMP services conditions implements Article 6(2) of the Authorisation Directive, Articles 8 to 13 of the Access Directive, Article 16(2) of the Framework Directive and Articles 17 to 19 of the Universal Service Directive. SMP apparatus conditions are out with the scope of the EC Communications Directives because the supply of apparatus is not part of the provision of an electronic communications network or service. The power to set such conditions is therefore additional to the requirements of the Directives.

Section 46: Persons to whom conditions may apply

119. This section lists the persons to whom OFCOM may apply general conditions and specific conditions set in accordance with section 45.
120. Under *subsection (2)*, OFCOM may apply general conditions to all persons providing electronic communications networks or electronic communications services or to all persons providing networks and services of a particular description specified in the general condition. General conditions may not be applied to persons providing associated facilities. Subsection (2) implements Articles 2(a) and 6(1) of the Authorisation Directive.
121. Under *subsection (3)*, OFCOM may apply specific conditions to a particular person specified in the condition. This implements Article 6(2) of the Authorisation Directive and Article 13 of the Framework Directive.
122. *Subsection (4)* specifies that OFCOM may also apply a privileged supplier condition generally to public communications providers who enjoy special or exclusive rights in relation to the provision of services in other sectors (other than the provision of associated facilities) or to particular descriptions of public communications providers, as specified by OFCOM in the privileged supplier condition. Subsection (4) implements Article 13 of the Framework Directive.
123. Under *subsection (5)*, universal service conditions may only be applied by OFCOM to particular communications providers, persons providing directories and persons providing directory enquiry facilities designated by OFCOM in accordance with regulations adopted under the provisions of section 66. Subsection (5) implements Article 8 of the Universal Service Directive and Article 6(2) of the Authorisation Directive.
124. Under *subsection (6)*, where an access-related condition is imposed for the purpose of securing end-to-end connectivity as described in section 74(1), OFCOM may apply the condition to any person. In all other cases, access-related conditions may be applied by OFCOM to providers of electronic communications networks or associated facilities. Subsection (6) implements Article 6(2) of the Authorisation Directive and Article 5(1) (a) of the Access Directive.
125. *Subsection (7)* allows OFCOM to apply an SMP services condition to communications providers and persons providing associated facilities where (i) such persons have been designated as having significant market power in a specific market for electronic communications networks, electronic communications services or associated facilities; or (ii) for the purposes of compliance with an international obligation, it appears necessary to OFCOM to impose a condition that corresponds to an SMP services condition. Subsection (7) implements Article 6(2) of the Authorisation Directive, Article 16(4) of the Framework Directive, Articles 8(2) of the Access Directive and Articles 17 to 19 of the Universal Service Directive.

126. Finally, *subsection (9)* permits OFCOM to apply an SMP apparatus condition to persons who supply electronic communications apparatus and have been determined by OFCOM to have significant market power in a specific market for electronic communications apparatus.
127. “Significant market power” is defined in section 78.

Section 47: Tests for setting or modifying conditions

128. OFCOM must not set or modify any general, access-related, privileged supplier, universal service or SMP conditions unless they satisfy the test in *subsection (2)*. This provides that the condition or modification must be objectively justifiable, non-discriminatory, proportionate, and transparent. This implements Articles 6(1) and 14(1) of the Authorisation Directive, Articles 5(3) and 8(4) of the Access Directive and Articles 3(2), 9(5) and 17(2) of the Universal Service Directive.

Section 48: Procedure for setting, modifying and revoking conditions

129. This section sets out the procedural requirements for the setting, modification or revocation of conditions of entitlement. OFCOM are required by *subsections (2), (3)* and, where appropriate, *(4)* to consult on any proposal by them to set, modify or revoke a condition and to allow a period of at least one month for representations to be made to them on the matter. OFCOM are obliged by *subsection (5)* to set, modify or revoke a condition only after considering every representation received, and any international obligations of the UK drawn to their attention by the Secretary of State for this purpose. *Subsection (6)* requires OFCOM to publish each notification under this section in such manner as brings it to the attention of those to whom it is relevant. This implements Article 6 and 7 of the Framework Directive, Articles 5(3), 6(3), 8(4), and 15(1) of the Access Directive and Article 14(1) of the Authorisation Directive.

Section 49: Directions and approvals for the purposes of a s.45 condition

130. This section sets out the procedure that OFCOM or other authorised persons must follow when giving, modifying or withdrawing a direction, approval or consent that may be given under a condition of entitlement.
131. Where any authorised person other than OFCOM gives, modifies or withdraws a direction, approval or consent, that person must act in accordance with the six Community requirements set out in section 4.
132. Before a direction, approval or consent may be given, modified or withdrawn, a notification must be published that states that there is a proposal to give, modify or withdraw it, that identifies the person making the proposal, that explains what he is proposing and that sets out the direction, approval or consent that he proposes to modify or withdraw, its effect, the reasons for his decision and the period during which persons may comment on the proposal. The representations period must be at least one month, though (provided the notification is not one which needs to be sent to the European Commission in accordance with section 50(4) or (5)) it may be shorter in exceptional circumstances. If the condition to which the direction, approval or consent relates requires the authorised person to publish the notification, he must do so (*subsection (7)*). Otherwise OFCOM must publish the notification (*subsection (8)*).
133. An authorised person may adopt the direction, approval or consent, provided they have considered each comment made about the proposal within the period specified by him for comments and he has had regard to the international obligations of the UK as notified to them by the Secretary of State for the purposes of section 49(9).
134. Any direction, approval or consent given, modified or withdrawn must be objectively justifiable, non-discriminatory, proportionate and transparent. This section implements Articles 6 and 7 of the Framework Directive.

Section 50: Delivery of copies of notifications etc.

135. This section requires the relevant person to send a copy of each of the following to the Secretary of State: (i) a notification under sections 48(1) or (2), (ii) a notification published under section 49(4), (iii) each direction, approval or consent giving effect to a proposal that must be published under section 49(4); and (iv) any instrument modifying or withdrawing a direction, approval or consent giving effect to such proposals.

**The relevant person* means, in relation to a notification, direction, approval or consent, the person by whom it is published or (as the case may be) by whom it has been or is to be given, modified or withdrawn. Where a direction, approval or consent is given, modified or withdrawn by a person other than OFCOM for the purposes of giving effect to a proposal published by OFCOM under section 49(4), OFCOM are the relevant person.

136. The relevant person must also send to the European Commission a copy of each of the following: every notification that is published under section 48(1), which sets out his proposal with respect to an SMP services condition, every direction, approval or consent given under an SMP services condition and every instrument modifying or withdrawing them.
137. OFCOM are required to send to the European Commission and to the regulatory authorities of every other member State, a copy of every notification that they publish under section 48(2), which sets out their proposals with respect to the setting, modification or revocation of an access-related condition falling within section 73(2) or (4) or an SMP services condition, where such proposals would, in OFCOM's opinion, affect trade between member States. This implements Article 7(3) of the Framework Directive.
138. OFCOM must send to the European Commission and to the regulatory authorities of every other member State, a copy of every notification that they publish under section 49(4), which sets out their proposals relating to the giving, modification or withdrawal of a direction, approval or consent under an access-related condition falling within section 73(2) or (4) or an SMP services condition, and where such proposals would, in their opinion, affect trade between member States. Where another person publishes a notification mentioned in section 49(4), he is required by *subsection (5)* to refer the question of whether the proposal would affect trade between member States to OFCOM, who must decide the matter immediately, and the person publishing the notification must act accordingly.
139. In cases which OFCOM consider would not affect trade between member States, the relevant person must, where he considers it appropriate, send a copy of every notification published under sections 48(1), 48(2) or 49(4), every direction, approval or consent given pursuant to a condition set under section 45 and every instrument modifying or withdrawing them to the European Commission and to such of the regulatory authorities of other member States as the relevant person thinks fit. However, the relevant person is not required to comply with this obligation where the notification or the notified proposal relates to an SMP apparatus condition or to any direction, approval or consent modifying or withdrawing such a condition.
140. The requirements to send various matters to the European Commission and the national regulatory authorities of other member states set out in this section, implement Articles 8(5), 15(2) and 16(2) of the Access Directive and Article 36(2) of the Universal Service Directive.

Section 51: Matters to which general conditions may relate

141. **Sections 51 to 64** set out the scope of OFCOM's power to set general conditions, and the procedural provisions applicable for that purpose.

142. **Section 51** provides that, subject to sections 52 to 64, OFCOM may set general conditions only in relation to matters that are listed in *subsection (1)*. The matters listed in subsection (1) include protection of end-users of public electronic communications services; network access and interoperability of services; protection of the integrity of public electronic communications networks and services; prevention (in accordance with European Community obligations) of interference with networks and services; provision for financial contributions towards the cost of universal service; provision of networks and services in the event of disaster; protection of public health; and compliance with relevant international standards. Sections 52 to 64 relate to customer interests, the assignment and use of telephone numbers and must-carry obligations.

**public electronic communications service* is defined in section 151 as an electronic communications service provided to the public.

**public electronic communications network* is defined in section 151 as an electronic communications network provided principally for the purpose of making services available to the public.

**network access* is defined in section 151 as meaning (1) interconnection of public electronic communications networks; or (2) any services, facilities or arrangements (other than interconnection) by means of which a communications provider or a person making associated facilities available is able, for the purposes of the provision of an electronic communications service (whether by him or by another), to make use of any network or apparatus comprised in a network, or any service or facility capable of being used to provide a service.

**relevant international standards* are defined in section 151 as meaning (1) any standards or specifications from time to time drawn up and published in accordance with Article 17 of the Framework Directive; (2) the standards and specifications adopted by the European Standards Organisations; and (3) the international standards and recommendations adopted by the International Telecommunications Union, the International Organisations for Standardisation or the International Electrotechnical Committee.

143. The subject matter set out in subsection (1) implements most of Part A of the Annex to the Authorisation Directive. For more detailed information see the Table in Appendix 2.
144. *Subsection (3)* provides that general conditions must be of general application. This means that the same general conditions must apply equally to all providers of the particular class of network or service to whom they are expressed to apply.

Section 52: Conditions relating to customer interests

145. **Sections 52 to 55** place OFCOM under a duty to ensure that the communications industry has in place effective and accessible machinery for the protection of domestic and small business customers, including procedures for dealing with complaints and disputes. They allow OFCOM to take action if the industry does not voluntarily develop an effective regime for this purpose. Taken together these sections implement Article 34 of the Universal Service Directive and form part of the implementation of condition 8 of Part A of the Annex to the Authorisation Directive.
146. **Section 52** provides that OFCOM must set such general conditions (if any) as they consider appropriate for securing that public communications providers establish procedures for dealing with domestic and small business customer complaints, and for resolving domestic and small business customer disputes. OFCOM are to ensure that, so far as they consider appropriate, such procedures are simple, transparent and effective, and that they can be used free of charge. The procedures as respect complaints are to be met through securing compliance with a code of practice that has been approved by OFCOM. The requirement to establish procedures for resolving customer disputes is to be met by the public communications providers establishing dispute

resolution arrangements approved by OFCOM. The voluntary Ombudsman scheme for communications disputes recently adopted by Ofcom is likely to be submitted to OFCOM for approval under these provisions.

**public communications provider* is defined in section 151 as the provider of a public electronic communications network or service or an associated facility.

**the meaning of domestic and small business customer* is given in *subsection (6)* and covers customers of communications providers who are neither (a) communications providers, nor (b) undertakings for which more than 10 people work.

Section 53: Approval of codes of practice for the purposes of s. 52

147. This section sets out the procedures and criteria for approval by OFCOM of codes of practice for dealing with customer complaints. OFCOM shall only approve such a code if it adequately protects the customers of public communications providers to whom the code applies.
148. *Subsection (2)* places OFCOM under a duty to keep under review codes of practice previously approved by them and *subsection (3)* allows OFCOM to approve modifications made to an approved code, to withdraw their approval, or to make their continuing approval conditional on the responsible providers making appropriate modifications to the code within a defined period of time.
149. In considering whether to approve (or to continue to approve) a code of practice, OFCOM are obliged to take into account whether the code is easily understandable by customers, the need for consistency between approved codes of practice and the need to keep the number of different approved codes to a minimum.

Section 54: Approval of dispute procedures for the purposes of s.52

150. This section sets out the procedures and criteria for approval by OFCOM of dispute procedures. Before OFCOM approve a dispute procedure, they must be satisfied that the procedure satisfies the criteria set out in *subsection (2)*, including accountability, independence and transparency, and they must consult the Secretary of State. The procedures and criteria for approval of dispute procedures are similar to those for approval of codes of practice (outlined in the notes to section 53).

Section 55: Orders by OFCOM in the absence of conditions under s. 52

151. This section enables OFCOM, by order, with the consent of the Secretary of State, to take appropriate measures where public communications providers have failed to put in place suitable procedures, standards and policies for complaints handling and dispute resolution, and where OFCOM consider it necessary for the protection of customers or to comply with EU obligations. Appropriate measures by OFCOM may include establishing an independent body corporate to administer and enforce the necessary arrangements, and obliging public communications providers to pay for the establishment and maintenance of such a body.

Section 56: The National Telephone Numbering Plan

152. OFCOM are to publish a document (the National Telephone Numbering Plan) setting out the telephone numbers available for allocation and the restrictions on the adoption and use of telephone numbers allocated under the Plan. One way in which OFCOM might choose to set the numbers out could be as blocks or series of numbers. This implements Article 10(3) of the Framework Directive and Article 27 of the Universal Service Directive. OFCOM are under a duty to review and, if they think fit, to revise the Plan, but subject to the requirements of section 60. OFCOM must also keep day-

to-day records of the telephone numbers actually allocated by them under the National Telephone Numbering Plan.

*references to a *telephone number* are, under *subsection (5)*, references to any number used for identifying the origin, destination or route of an electronic communication. A *telephone number* is also a number that may be used for selecting a service or for identifying by whose service or network a communication is to be sent; but under *subsection (7)*, the Secretary of State may exclude any description of number from the numbers to be treated as telephone numbers.

**adoption of a telephone number* occurs, under *subsection (6)*, where a communications provider allocates or transfers that number to a customer or piece of apparatus, or uses that number for identifying the origin, destination or route of an electronic communication, or designates that number for use in selecting a service, or authorises the use of that number by others for any of the purposes mentioned in *subsection (5)*.

**number* is defined in *subsection (10)* as including data of any description.

Section 57: Conditions to secure access to telephone numbers

153. OFCOM may set general conditions to ensure that telephone users are able to communicate with every normal telephone number: this implements Article 6(1) of, and condition 4 of Part A of the Annex to the Authorisation Directive and Article 27 and 28 of the Universal Service Directive.

*a *normal telephone number* is defined in *subsection (2)* as a number allocated under the National Telephone Numbering Plan for the purpose of identifying the destination for, or the recipient of, communications which has been adopted by a communications provider as a number to be used for that purpose or which has been allocated in accordance with section 59 and is used for that purpose by a person other than a communications provider.

Section 58: Conditions about allocation and adoption of numbers

154. *Subsections (1) and (2)* allow OFCOM to set general conditions which provide for the matters listed, which broadly cover the requirements to be complied with by communications providers in respect of the adoption and use of telephone numbers; procedures for applying to OFCOM for numbers to be allocated; procedures for the adoption of numbers by communications providers; the circumstances in which numbers are required to be transferred from one provider to another; and payments to be made for allocation and transfer of numbers.
155. *Subsection (5)* provides that OFCOM may allocate particular telephone numbers by means of an auction.
156. *Subsections (6) to (9)* apply to any conditions set by OFCOM that enable them to determine the payments (including periodic payments) to be made to them in respect of the allocation or transfer of telephone numbers. OFCOM must stipulate in such conditions the principles in accordance with which they will determine the amounts of any such payments. For example, the amount may be determined by reference to bids at an auction, or to the costs incurred by OFCOM, or to any other factors OFCOM may think fit. OFCOM may require payments to be made by means of a lump sum or periodic payments or both. Conditions set subsequently may modify the amounts of (or the method of determining) periodic payments, except where the amount of these payments has been set by auction. Paragraph 16 of Schedule 18 (transitional provisions) provides that any telephone numbers allocated to a holder of a licence granted under section 7 of the Telecommunications Act 1984 shall be treated as if they were allocated to that person under section 58. This section implements most of Part C of the Annex to the Authorisation Directive. For more detailed information see the Table in Appendix 2.

Section 59: Telephone numbering conditions binding non-providers

157. OFCOM may set conditions to be complied with by persons who are not communications providers in respect of the allocation, transfer and use of telephone numbers. The duty will be enforceable by OFCOM in civil proceedings. OFCOM must comply with sections 47 to 49 when setting, modifying or revoking any telephone numbering condition which applies to non-communications providers or giving, modifying or withdrawing any direction, approval or consent given by them for the purpose of any condition.

Section 60: Modification of documents referred to in numbering conditions

158. This section sets out the procedure that OFCOM must follow when revising or otherwise modifying the National Telephone Numbering Plan or any other document referred to in a numbering condition authorised by section 57 or 58 or set by OFCOM under section 59.
159. Before revising or otherwise modifying a provision of the National Telephone Numbering Plan or other document referred to in a numbering condition (a “relevant provision”), OFCOM must publish a notification that explains the effect of and the reasons for the revisions or modifications. OFCOM must also give no less than one month for persons to comment on the proposal. OFCOM may modify the National Telephone Numbering Plan or other document if they have considered each comment made about the proposal within the period specified by them for comments and they have had regard to international obligations of the UK notified to them by the Secretary of State for the purposes of this section.
160. Any modification of a relevant provision of the National Telephone Numbering Plan or other document must be objectively justifiable, non-discriminatory, proportionate and transparent. This section implements, in part, Article 14.1 of the Authorisation Directive.

Section 61: Withdrawal of telephone number allocations

161. This section sets out the circumstances in which OFCOM may withdraw an allocation of telephone numbers.
162. *Subsection (2)(a) and (b)* provides that an allocation may be withdrawn by consent, or where this is necessary for a transfer of numbers. *Subsection (2)(c)* and section 62 provide that an allocation may be withdrawn to facilitate a “numbering reorganisation” in respect of a particular series of numbers. *Subsection (2)(d)* provides that an allocation may be withdrawn in circumstances specified in numbering conditions and for the purpose of securing the best and most efficient use of telephone numbers (*subsection (5)* provides that *subsection (2)(d)* does not apply to a numbering reorganisation and that any circumstances specified in a numbering condition must not unduly discriminate between communications providers and users). *Subsection (2)(e) and (f)* provides that an allocation may be withdrawn where it consists of numbers, or part of a series of numbers, which have not been adopted by the communications providers concerned during the time period stipulated in the general conditions. Before withdrawing an allocation under *subsection (2)(e) or (f)*, OFCOM must follow the procedures set out in *subsections (6) and (7)* with respect to notification and allowing for representations.
163. An allocation may also be withdrawn where the person allocated the number has repeatedly and seriously contravened the numbering conditions and where no other remedy is likely to secure compliance. Any contraventions of numbering conditions may justify withdrawal of numbers from a non-provider (*subsection (4)*). This implements Article 10(2) and 10(5) of the Authorisation Directive so far as enforcement of numbering conditions is concerned.

Section 62: Numbering reorganisations

164. An allocation can only be withdrawn for the purposes of a numbering reorganisation if it does not unduly discriminate against particular communications providers, users of the allocated numbers or a particular description of providers or users, and if OFCOM make a replacement allocation of similar numbers to the person affected. OFCOM may not require a new payment to be made for a replacement allocation. However, in cases where periodic payments are still outstanding in respect of the allocation which has been withdrawn, OFCOM may require the balance of those payments to be made in respect of the replacement allocation, with such adjustments as OFCOM may think fit. This implements condition 2 of Part C of the Annex to the Authorisation Directive.

Section 63: General duty as to telephone numbering functions

165. This section places OFCOM under a duty, in carrying out their functions under sections 56 to 62, to ensure the best use of telephone numbers. OFCOM are also required to ensure that communication providers do not discriminate against other providers in relation to the adoption of telephone numbers: this implements Article 10.2 of the Framework Directive.

Section 64: Must-carry obligations

166. General conditions may include provision to ensure that services on the must-carry list are carried by networks which are used by a significant number of end users as their principal means of receiving television.
167. The must-carry list contains the following services: a service of television programmes provided by the BBC in digital form (where the service is one in relation to which OFCOM have functions), digital Channel 3, digital Channel 4, digital Channel 5, S4C Digital and the digital public teletext service.
168. The requirement to carry a listed service will also apply to any ancillary services (such as subtitling or other assistance to disabled people) related to that service, and may be treated as consisting of such other services comprised in or provided with that service as may be determined by OFCOM.
169. General conditions containing provisions authorised under section 64 must comply with any order made by the Secretary of State under *subsection (5)* to set the minimum and maximum capacity that a listed service must or may use on a network.
170. The Secretary of State, when setting the maximum or minimum capacity to be used by a listed service, must have regard (a) to the objective of securing that the services on the must-carry list, together with any others to which provisions authorised under section 64 apply, are available for reception by as many members of the public in the United Kingdom as practicable, and (b) to the need to secure that the amount of capacity left available is reasonable and, accordingly, that the burden imposed on the cable operator under this section is proportionate to the public benefit obtained.
171. The Secretary of State can also make an order which sets the terms on which a service on the must-carry list is to be broadcast (or provides for OFCOM to set such terms). This can include a requirement that no payment is made by the service provider or the network provider.
172. The Secretary of State must, from time to time, review the must-carry list and any requirements as to the terms on which services in that list must be broadcast. When carrying out a review the Secretary of State must consult OFCOM and other parties likely to be affected by a modification to the must-carry list. Following such a review, the Secretary of State may, by order, amend the must-carry list. When determining whether or not it is appropriate to amend the list, she must consider the public benefit in doing so, the extent to which a service would otherwise be made available even if not added to the list, the amount of spare network capacity of providers of electronic

*These notes refer to the Communications Act 2003 (c.21)
which received Royal Assent on 17 July 2003*

communications networks to whom the must-carry obligations apply and whether the burden of compliance is proportionate to the objective of securing that must-carry services are made available to the public.

173. She must consult OFCOM and such persons who, in her opinion, are likely to be affected by an order, or who represent any of those persons, as she thinks fit:
- before making an order under *subsection (5)* (to set minimum and maximum capacity); and
 - before making an order under *subsection (11)* (as to the terms of carriage).

This does not apply when a review has been carried out under *subsection (7)*, as a full consultation is already required under *subsection (8)*.

174. This section implements Article 6(1) of, and condition 6 of Part A to the Annex to the Authorisation Directive and Article 31 of the Universal Service Directive.

Section 65: Obligations to be secured by universal service conditions

175. **Sections 65 to 72** describe OFCOM's and the Secretary of State's functions relating to universal service.
176. **Sections 65 and 67 to 69** implement Articles 3 to 7 and 9 to 11 of, and Part A of Annex I to, the Universal Service Directive. Section 66 implements Article 8 of the Universal Service Directive and Articles 4(2) and 6(2) of the Authorisation Directive and sections 70 to 72 implement Articles 12 to 14 of the Universal Service Directive.
177. Under section 65 the Secretary of State is required by order (which may be varied at any time) ("the universal service order") to set out the electronic communications networks, electronic communications services, associated facilities, directories and directory enquiry facilities, and particular methods of billing for services or of accepting payment for them that must be provided throughout the UK by universal service providers. Before making or varying the universal service order, the Secretary of State must consult OFCOM and other appropriate persons.
178. The objective behind "universal service" obligations is to ensure that the basic communications services which are used by the majority, and which are essential to full social and economic inclusion, are made available to everyone who reasonably requests them at an affordable price.

Section 66: Designation of universal service providers

179. OFCOM have the power, by regulations, to provide for a procedure for designation of communications providers (or persons who are not communications providers, in the case of supplying directories or directory enquiry facilities) who will be subject to universal service conditions. Such regulations must establish an efficient, objective, transparent, and non-discriminatory procedure for designation. Regulations made under this section are also to provide for a designation to cease to have effect where all the universal service conditions applying to a provider are revoked.
180. Where OFCOM designate a person as a universal service provider, or where a designation ceases to have effect, they must notify this fact to the European Commission. This implements Article 36(1) of the Universal Service Directive.

Section 67: Subject matter of universal service conditions

181. This section enables OFCOM to set universal service conditions for securing the provision of the networks, services and facilities etc. set out in the universal service order published by the Secretary of State under section 65. In setting such conditions OFCOM must have regard to any guidance about matters relating to pricing that is contained in the universal service order.

182. Persons who are subject to universal service conditions will be required to publish up-to-date information demonstrating how successful they are in complying with their obligations. The information is to be framed in accordance with the quality of service parameters, definitions and measurement methods set out in Annex III to the Universal Service Directive. The person may also be required to finance the independent auditing – for accuracy and usefulness - of such information. OFCOM may also impose performance targets.

Section 68: Tariffs etc. for universal services

183. This section requires OFCOM to keep under review universal service tariffs. Universal service conditions can require a common tariff (which includes any pricing structure) or, in specified cases, a special tariff for provision of the networks, services, apparatus, associated facilities, directories and directory enquiry facilities set out in the universal service order. At no time should the customer of a universal services provider be required to pay for any service which is not necessary for the provision of the universal service in question.

Section 69: Directories and directory enquiry facilities

184. This section provides that where the universal service conditions require the provision of directories or directory enquiry services, the provider must not excessively discriminate against any provider who provides information for use in that directory, or against any information so provided.

Section 70: Review of compliance costs

185. This section enables OFCOM periodically to analyse the financial cost to a designated provider of complying with universal service conditions applied to him. OFCOM must then have these costs audited by an independent auditor, or must themselves audit those figures. OFCOM are under a duty to publish their conclusions, alongside a summary of the audit report.

Section 71: Sharing of burden of universal service obligations

186. If, following a study of costs pursuant to section 70, OFCOM conclude that a financial burden is imposed on the provider of universal services, OFCOM must assess whether it would be unfair for that provider to shoulder the entire burden. If OFCOM determine that it would be unfair, and if the provider applies to OFCOM, OFCOM may determine that contributions from other communications providers, who themselves are subject to general conditions, are to be made. *Subsection (4)* provides that all this should be carried out in accordance with regulations made by OFCOM. These regulations should ensure that the calculation, collection and distribution of such contributions is to be done in an objective, transparent, and non-discriminatory way, and in a manner that avoids or minimises any distortion to competition or demand.
187. *Section 51(1)(d)* enables OFCOM to set general conditions giving effect to determinations or regulations made under this section. This implements condition 1 of Part A of the Annex to the Authorisation Directive.

Section 72: Report on sharing mechanism

188. This section provides that where regulations that provide for the sharing of the financial burden of providing universal services are in place under section 71, OFCOM must prepare and publish an annual report. However, OFCOM are not obliged to publish any confidential material.

*material is *confidential* if it falls within *subsections (7) or (8)*, i.e. if it relates specifically to the affairs of a particular body, or the private affairs of an individual,

in each case where publication could seriously prejudice that body's or person's interests.

Section 73: Permitted subject matter of access-related conditions

189. This section governs OFCOM's power to set access-related conditions. OFCOM may set access-related conditions only in relation to one or more of the matters listed in *subsections (2) to (5)*.
190. *Subsection (2)* allows OFCOM to set access-related conditions for the purpose of ensuring a level of network access and interoperability which will secure efficiency, sustainable competition and the greatest possible benefit to end-users. These access-related conditions include, but are not limited to, the specific type of access-related conditions set out in section 74. This provision, together with section 74, implements Article 5(1) of and Part II of Annex I to the Access Directive and Article 2(p) of the Framework Directive.
191. *Subsection (3)* allows OFCOM to set access-related conditions to secure the sharing of apparatus and the division of the costs incurred by those to whom the electronic communications code applies, in cases where there is no viable alternative. This implements Article 12(2) of the Framework Directive.
192. *Subsection (4)* allows OFCOM to set access-related conditions of a technical or operational nature to ensure the proper operation of an electronic communications network in compliance with any SMP services conditions falling within section 87(3). Section 87(3) allows OFCOM to set SMP conditions requiring the dominant provider to give entitlements in relation to network access, use of relevant networks and availability of relevant facilities. This provision, together with section 75(1), implements Article 5(2) of the Access Directive.
193. Finally, *subsection (5)* provides that OFCOM may set access-related conditions in respect of conditional access systems in accordance with section 75(2). This provision, together with sections 75(2) and 76, implements Article 6 of, and Part I of Annex I to, the Access Directive and Article 2(f) of the Framework Directive.

**conditional access system* is defined in section 75 (see below).

Section 74: Specific types of access-related conditions

194. **Section 73(2)** allows OFCOM to set access-related conditions for the purpose of ensuring a level of network access and interoperability which will promote efficiency and sustainable competition and the greatest possible benefit end-users. Section 74 provides that such conditions include those designed to ensure end-to-end connectivity. It also provides that conditions can be set for securing that the use of Application Programme Interfaces (APIs) and Electronic Programme Guides (EPGs) is provided on a fair, reasonable and non-discriminatory basis.

**end-to-end connectivity* is defined in *subsection (3)* as the ability for two parties to communicate with each other whether they are using the same or different public electronic communications services.

**the meaning of application programme interface* is given in *subsection (3)* as a facility for allowing software to use facilities in other software in order to allow someone to access a programme service or become the ultimate user of any network or service by means of which any programme service is broadcast or otherwise transmitted.

**electronic programme guide* is defined in *subsection (3)* as any facility by means of which a person may ascertain what programmes are included in a service, and may access that service.

Section 75: Conditional access systems and access to digital services

195. *Subsection (1)* provides that OFCOM must ensure, when setting an access-related condition of a technical or operational nature for providers with significant market power (SMP), that they take account of all relevant international standards (which are defined in section 151).

196. *Subsection (2)* provides that OFCOM are under a duty to ensure that access-related conditions are applied to every person who provides a conditional access system in relation to a protected programme service, and that such conditions comply with Part I of Annex I of the Access Directive.

**conditional access system* is defined in *subsection (3)* as any arrangements by means of which access to a programme service requires either subscription or authorisation.

**protected programme service* is defined in *subsection (3)* as a service which is encrypted such that the programmes on it can only be viewed or listened to in an intelligible form by the use of a conditional access system.

Section 76: Modification and revocation of conditions imposed under s.75

197. This section provides that OFCOM may not modify or revoke any access-related conditions that they have set falling within section 75(2) unless they have carried out a market analysis from which they have concluded that the provider of conditional access systems to whom the condition applies does not have SMP. They must ensure that the proposed modification or revocation will not adversely affect the accessibility to persons of must-carry services or the prospects for effective competition.

Section 77: Imposition of privileged supplier conditions

198. Where a public electronic communications provider enjoys special or exclusive rights in relation to the provision of services in other sectors (other than the provision of associated facilities), OFCOM must set such privileged supplier conditions as they think fit (unless that provider has an annual turnover in relation to all of his communications activities of less than €50 million, in which case OFCOM are not obliged to impose a condition, but may do so if they wish). Such conditions can require such providers to keep separate accounts (all of which should be audited and published), or to have structural separation between different activities. This implements Article 13 of the Framework Directive.

**special or exclusive rights* has the same meaning as in Article 86 of the Treaty establishing the European Community. Although the Treaty does not itself define them, guidance is given in Article 2(1)(f) and (g) of the Commission Transparency Directive OJ [1980] L 195/35. These rights are often, but need not be, given to public undertakings. Exclusive rights are largely self-explanatory but should be analysed in a functional rather than formalistic manner. Case law indicates that special rights are rights granted by a Member State to a limited number of undertakings where this limits – otherwise than according to objective, proportionate and non-discriminatory criteria – the number of undertakings authorised to provide a service in a particular area.

Section 78: Circumstances required for the setting of SMP conditions

199. **Sections 78 to 93** concern OFCOM's powers and duties to identify markets, determine whether persons have significant market power (SMP) on those markets, and to impose SMP conditions on persons whom they have determined as having SMP.

200. **Section 78** sets out when a person shall be taken to have SMP in relation to a particular market. A person will only be taken to have significant market power where he is, alone or with others, in a position of dominance in a market. A position of dominance

must be construed in accordance with any applicable provisions of Article 14 of the Framework Directive, which (at its paragraph 2) defines dominance as 'a position of economic strength affording the person the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers'. A determination of joint dominance must take into account, in particular, the criteria for joint dominance set out in Annex II to the Framework Directive. This implements Article 14 of and Annex II to the Framework Directive.

Section 79: Market power determinations

201. *Subsection (1)* provides that before making a determination that a person has SMP, OFCOM must first identify the markets in which they consider it will be appropriate to carry out a market analysis and then carry out that analysis. When identifying appropriate services markets and when making SMP determinations in relation to a services market, OFCOM are obliged to take due account of all relevant European Commission guidelines and recommendations - the first such recommendation was published by the European Commission on 11 February 2003: the recommendation can be viewed on the European Commission website (http://europa.eu.int/information_society/topics/telecoms/regulatory/maindocs/documents/recomen.pdf). The way in which a market is to be identified or a market determination made is by the publication of a notification under *subsection (4)*. This section implements Articles 15 and 16 of the Framework Directive. The Electronic Communications (Market Analyses) Regulations 2003 (S.I. 2003/330) empower Oftel to carry out market analyses and to make proposals for market power determinations and the setting of conditions in advance of the passing of the Act. Paragraph 10 of Schedule 18 to the Act provides that proposals confirmed under those Regulations have effect under this section and other relevant sections after the provisions of the Act have been commenced.

Section 80: Proposals for identifying markets and for market determination proposals

202. Before identifying a market for the purposes of making a market power determination or making a market power determination, OFCOM must publish a notification of what they are proposing to do. A notification under this section must state that OFCOM are proposing to identify that market or to make a market power determination, set out the effect of the proposal, give their reasons for making the proposal and specify the period (not less than one month from the date of the publication of the notification) within which representations about the proposal may be made to OFCOM.
203. Subject to sections 82 and 83, *subsection (6)* provides that OFCOM may give effect, with or without notifications, to a proposal notified in accordance with this section, provided they have considered every representation about the proposal made within the period specified by them and they have regard to every international obligation of the United Kingdom (if any) notified to them by the Secretary of State.
204. This section implements Articles 6, 7 and 16(1) of the Framework Directive.

Section 81: Delivery of copies of notifications under ss. 79 and 80

205. OFCOM must send a copy of every notification published under section 79(4) or 80 to the Secretary of State. OFCOM must also send to the European Commission: (i) a copy of every notification published under section 79(4) with respect to a market power determination in relation to an SMP services market; and (ii) a copy of every notification published under section 80 which relates to a proposal to identify a services market or to make a market power determination in relation to such a market; and which in OFCOM's opinion would affect trade between member States. A copy of a notification falling within (ii) must also be sent to the regulatory authorities of every other member State.

206. In all other cases when it appears to them appropriate to do so, OFCOM must send a copy of a notification published under section 80 which relates to a proposal to identify a services market or to make a market power determination in relation to such market to the European Commission and such of the regulatory authorities of the other member States as OFCOM think fit.
207. The various requirements in this section to send matters to the European Commission implement Article 16(2) of the Access Directive, Article 36(2) of the Universal Service Directive and Article 7(3) and (5) of the Framework Directive.

Section 82: European Commission's powers in respect of proposals

208. During the period given for representations under a notification under section 80 relating to an SMP services condition, the European Commission may inform OFCOM that they believe that the proposed market identified in the notice or OFCOM's proposed market determination may not be compatible with the single European market, or with any Community obligations. In such a case, OFCOM may not give effect to their proposal for a further two months. OFCOM must withdraw their proposal if in accordance with the procedure in Article 7(4) of the Framework Directive the Commission, within that two-month period, decides that the proposal must be withdrawn. This implements Article 7(4) of the Framework Directive.

Section 83: Special rules for transnational markets

209. When the European Commission identifies a transnational services market that includes the United Kingdom, OFCOM are required to make arrangements with all other relevant regulatory authorities to deal with the following issues:
- the identification of the market;
 - assessing whether a person has SMP in the relevant transnational services market(s);
 - the setting of appropriate SMP services conditions as well as the modification or revocation of such conditions; and
 - the procedures to be followed to secure that OFCOM and other regulatory authorities comply with their agreed arrangements.
210. This implements Articles 2(b), 15(4) and 16(5) of the Framework Directive.

Section 84: Review of services market identifications and determinations

211. Where OFCOM have identified and analysed a services market for the purposes of making a market power determination, OFCOM must, at such intervals as they consider appropriate, carry out further analyses of the identified market for the purposes of reviewing the determinations made on the basis of the earlier analysis and deciding whether to modify any SMP condition set on the basis of that earlier analysis (*subsection (2)*). Where OFCOM determine that a person to whom any SMP conditions are applied no longer has SMP, they must revoke every SMP services condition applied to that person by reference to the market power determination made on the basis of the earlier analysis.
212. *Subsection (3)* requires OFCOM to carry out further analysis of a services market as soon as reasonably practicable after the European Commission makes any recommendation that affects the matters that were (or could have been) taken into account in the earlier market analysis.
213. Before carrying out further analysis for the purposes of subsection (2), OFCOM may review any of their decisions identifying the appropriate markets that they considered in their earlier analysis. Where OFCOM conclude that the appropriate markets have

changed, OFCOM must identify the markets they now consider to be appropriate and those markets must be the identified markets for the purposes of further analysis.

214. Sections 79 to 83 apply in relation to the identification of a services market for the purposes of reviewing a market power determination and in relation to the review of such a determination.
215. This section implements Article 16(1) and (3) of the Framework Directive, Article 7(3) of the Access Directive and Articles 16(3) and 18(2) of the Universal Service Directive

Section 85: Review of apparatus market identifications and determinations

216. Where OFCOM have identified and analysed an apparatus market for the purposes of making a market power determination, OFCOM must, at such intervals as they consider appropriate, carry out further analyses of the identified market for the purposes of reviewing the determinations made on the basis of the earlier analysis and deciding whether to modify any SMP condition set on the basis of that earlier analysis (*subsection (2)*). Where OFCOM determine that a person to whom any SMP conditions are applied no longer has SMP, they must revoke every SMP apparatus condition applied to that person by reference to the market power determination made on the basis of the earlier analysis.
217. Before carrying out that further analysis OFCOM may review any of their decisions identifying the appropriate markets that they considered in their earlier analysis. Where OFCOM conclude that the appropriate markets have changed, OFCOM must identify the markets they now consider to be appropriate and those markets must be the identified markets for the purposes of further analysis.
218. Sections 79, 80 and 81(1) apply in relation to the identification of an apparatus market for the purposes of reviewing a market power determination and in relation to the review of such a determination.

Section 86: Cases where review required

219. This section prohibits OFCOM from setting an SMP services condition by a notification (other than by a notification which also makes the market power determination by reference to which the condition is set) unless (i) the condition is set by reference to a market power determination which has been reviewed under section 84; or (ii) the condition is set by reference to a market power determination made in relation to a market in which OFCOM are satisfied there has been no material change since the determination was made.

*A change is material for the purposes of this section if it is material to the setting of the condition in question or the modification or revocation in question.

220. OFCOM must not modify or revoke SMP services conditions applying to a person except where: (i) for the purpose of determining whether to make the modification or revocation, they have carried out further analysis under section 84 of the market in question and reviewed the market power determination for the time being in force in that person's case; or (ii) they are satisfied that there has not been a material change in the market identified or otherwise used for the purposes of the market power determination by reference to which the condition was set or last modified.
221. OFCOM must not modify SMP apparatus conditions applying to a person except where, for the purpose of determining whether to make the modification or revocation, they have carried out a further analysis under section 85 of the market in question; and reviewed the market power determination for the time being in force in that person's case.

Section 87: Conditions about network access etc.

222. Sections 87 to 92 make provision about the subject matter of SMP services conditions. Where OFCOM have identified a provider of a public electronic communications network or a person who makes available associated facilities in connection with such a network as having SMP in a services market, they may impose such SMP conditions authorised by this section, as they consider appropriate. These may include conditions requiring the provider to confer entitlements on other providers regarding the provision of network access, the use of that network, and the availability of facilities. Such conditions may include provision for securing fairness and reasonableness in the process and should be set having taken into account the matters set out in *subsection (4)*. These include the feasibility of providing network access; the need to ensure effective long-term competition in the markets; the investment made by the person initially providing or making available the network or facility in respect of which an entitlement to network access is proposed; the technical and economic viability of installing and using facilities that would make the proposed network access unnecessary; intellectual property rights; and the availability of services throughout the European Union.
223. *Subsection (6)* provides that SMP service conditions may require a person with SMP to publish such information as OFCOM may direct for the purpose of securing transparency in relation to network access. They may require such a person not to discriminate in relation to any matter connected with network access. They may require such a person to publish the terms and conditions on which the provider will enter an access contract and to modify those terms and conditions.
- *an *access contract* is defined in *subsection (12)* as any contract for the provision, by a dominant provider, of network access, or of associated facilities made available in relation to a public electronic communications network.
224. *Subsection (7)* provides that OFCOM may set SMP services conditions obliging a dominant provider to maintain separate accounts for such different matters relating to network access or the availability of associated facilities as OFCOM may direct.
225. *Subsection (9)* provides that OFCOM may set SMP services conditions requiring a person with SMP to comply with price-controls, rules on cost-recovery and cost accounting systems in relation to matters connected with network access or the availability of associated facilities. OFCOM may also, by setting such conditions, direct the provider to adjust its prices.
226. This section, together with sections 88 and 89, implement Articles 8 to 13 of the Access Directive, Article 6(2) of the Authorisation Directive and Article 16(4) of the Framework Directive.

Section 88: Conditions about network access pricing etc.

227. OFCOM may not set conditions under section 87(9) unless it appears to them from a market analysis that the provider in question might charge excessive prices or engage in other anti-competitive pricing behaviour. The condition must also be perceived by OFCOM as being efficient and pro-competitive, and as resulting in the maximum benefit to end-users. In setting an SMP services condition falling within section 87(9), OFCOM must take into account the extent of the investment that the person to whom the condition is to apply would need to make if the condition were to be applied.

Section 89: Conditions about network access in exceptional cases

228. In exceptional circumstances, OFCOM may decide that SMP services conditions additional to those set out in sections 87 and 88 (SMP services conditions about network access) need to be imposed on a provider. Such additional SMP services conditions must be submitted by OFCOM to the European Commission for approval and OFCOM can only apply them once they are approved.

Section 90: Conditions about carrier selection and pre-selection

229. Where the relevant market is one relating to services for the provision of public fixed line telephone networks, OFCOM may set conditions obliging providers with SMP to make a relevant connection facility available to any person to whom they provide a public electronic communications service, or to make interconnection facilities available to a person providing an electronic communications service. OFCOM must also set pricing conditions to ensure that charges imposed by the provider with SMP do not constitute a barrier to use of the facility. Conditions set by OFCOM under this section may impose obligations relating to the manner in which a relevant connection facility is to be made available or in which the facilities for interconnection that are to be made available to a person providing an electronic communications service. This section implements Article 19 of the Universal Service Directive Article 6(2) of the Authorisation Directive and Article 16(4) of the Framework Directive.

**relevant connection facility* is defined in *subsection (6)* as a facility which allows the end-user to select which carrier to use. This may be specified on every occasion of use (carrier selection), or by designating a carrier in advance (carrier pre-selection).

Section 91: Conditions about regulation of services etc. for end-users

230. This section deals with the situation where the relevant services market is one for the end-users of public electronic communications services, and where access-related conditions, and SMP conditions set under sections 87 to 90, are not sufficient to allow OFCOM to perform their duty under section 4. In such a case, OFCOM may set conditions obliging the provider to comply with such regulatory controls as OFCOM consider appropriate.

231. If such regulatory controls are imposed on tariffs, or on other matters to which costs are relevant, the provider may be obliged to use such cost accounting systems as OFCOM direct, to have those systems annually audited and to publish an annual statement as to its compliance with those obligations. OFCOM must provide the European Commission with whatever information they require about conditions authorised by this section. This section implements Article 17 of the Universal Service Directive, Article 6(2) of the Authorisation Directive and Article 16(4) of the Framework Directive.

Section 92: Conditions about leased lines

232. Where the relevant services market relates to the provision of such leased lines as are identified by the European Commission in the List of Standards published in the Official Journal of the European Communities, OFCOM may set and apply SMP services conditions obliging the provider to apply, so far as required by Annex VII of the Universal Service Directive, the principles of non-discrimination, cost orientation and transparency to dealings regarding leased lines. This section implements Article 18 of, and Annex VII to, the Universal Service Directive, Article 6(2) of the Authorisation Directive and Article 16(4) of the Framework Directive.

**a leased line* is defined in *subsection (4)* as an electronic communications service consisting in the reservation of a fixed amount of transmission capacity between fixed points on the same or different electronic communications networks.

Section 93: Conditions about apparatus supply

233. Where OFCOM determine that a supplier of electronic communications apparatus has SMP in an apparatus market, OFCOM may set conditions requiring the supplier to maintain accounting separation between such activities and other matters and also may set price controls in relation to the hiring of telephones which are hardwired to an electronic communications network. The SMP apparatus conditions may only apply to

apparatus in respect of which the supplier has been found to have significant market power.

*A telephone is hardwired to an electronic communications network if the telephone has to be physically attached to apparatus in the network by means of a tool before it can be used (*subsection (5)*).

*Apparatus in relation to SMP apparatus conditions is defined in *section 151(1)*, as apparatus designed or adapted for a use which consists of or includes the sending or receiving of communications or other signals (within the meaning of section 32) that are transmitted by means of an electronic communications network.

Section 94: Notification of contravention of condition

234. This section gives OFCOM powers of enforcement in respect of all types of conditions set pursuant to section 45. Where OFCOM have reasonable grounds to believe that a person is or has been in breach of any condition, they may notify that person accordingly, and allow him a specified period of time in which to make representations to OFCOM and to take steps to comply with the condition or remedy the breach. That period must be one month, other than in the circumstances provided for by *subsections (6) and (7)* or where the case is an urgent case (see section 98(3)).
235. OFCOM must not give such a notification where they decide that a more appropriate approach lies under the Competition Act 1998, in which case they must publish a notification to that effect.
236. This section, and sections 95 to 100 and 102 and 103, implement Article 10 of the Authorisation Directive and Article 11(6) of the Universal Service Directive in the context of the enforcement of the conditions of entitlement.

Section 95: Enforcement notification for contravention of conditions

237. If, by the end of the period specified in section 94, OFCOM are satisfied that the condition about which the provider was notified has still not been fully complied with, *subsection (2)* allows OFCOM to serve an enforcement notification on the notified provider. Such a notification requires the notified provider to take such steps as are specified in the notification to comply with the notified condition and remedy the consequences of any contravention, within the period specified in the notification. Those persons to whom an enforcement notification has been given are under a duty, enforceable by OFCOM via civil proceedings, to comply with it.

Section 96: Penalties for contravention of conditions

238. This section allows OFCOM to impose a penalty on a notified provider where a notification of contravention under section 94, has been issued, and the notified provider is in contravention of any of the conditions specified there and has not, within the period allowed by OFCOM for the making of representations, taken steps to comply with the condition(s) concerned and to remedy the consequences. OFCOM may also impose a penalty where a person is in contravention of a requirement of an enforcement notice under section 95. OFCOM must notify the decision to impose a penalty, the reasons for it, and the period within which the penalty is to be paid to the person on whom it is being imposed within one week of that decision.

Section 97: Amount of penalty under s. 96

239. In deciding on the amount of a financial penalty under section 96, OFCOM are required to consider whether the penalty is appropriate and proportionate, and to take account of any representations made by the person concerned, and any steps taken by him to comply with the notified condition. The penalty shall not, in any event, exceed 10 per cent of the turnover of that person's relevant business for the relevant period.

*These notes refer to the Communications Act 2003 (c.21)
which received Royal Assent on 17 July 2003*

**relevant business* is defined in *subsection (5) to (7)* as, broadly, business consisting of the provision of an electronic communications network, electronic communications service or associated facilities, and the supply of directories, directory enquiry facilities or electronic communications apparatus. In the case of a penalty imposed for the contravention of an SMP apparatus condition, the relevant business is only the business consisting of the supply of electronic communications apparatus.

**relevant period* is defined in subsection (5) – subject to exceptions for providers who have not been carrying on business for a full year, or who have gone out of business - as the period of one year ending on the 31 March preceding the notification.

Section 98: Power to deal with urgent cases

240. This section gives OFCOM additional powers where they determine that there are reasonable grounds for suspecting that a contravention of a condition of entitlement (other than an SMP apparatus condition) has caused, or creates a risk of, either a serious threat to public safety, public health or national security; or serious economic or operational problems or any communications provider or provider of associated facilities or any person who uses them.
241. In such exceptional circumstances, OFCOM may in a notification of the contravention under section 94, reduce the one-month period allowed to the person who is alleged to be in breach of a condition to make representations and to take steps towards compliance. In addition, OFCOM may suspend the person's entitlement to provide networks, services and/or associated facilities, or may restrict that entitlement in some way (*subsection (4)*). OFCOM may postpone the entry into effect of the suspension and may also impose such conditions on the person whose service is to be suspended as they consider necessary to protect customers. Those conditions may include requirements for payment of compensation to customers for loss or damage or for annoyance, inconvenience or anxiety caused in consequence of the suspension; however, such conditions have effect only where the direction is confirmed in accordance with section 99.

Section 99: Confirmation of directions under s.98

242. As soon as reasonably practicable after suspending or restricting a person's entitlement under section 98(4), OFCOM must give that person an opportunity of making representations to them about the grounds on which it was given and its effect and of proposing steps to remedy the situation.
243. As soon as practicable after the period allowed by OFCOM for making representations, OFCOM must determine whether the contravention providing the grounds for the suspension or restriction did occur and whether the circumstances made it an urgent case justifying the suspension or restriction. If OFCOM decide that the contravention did occur and that the suspension or restriction was justified, they may confirm the direction. If not, OFCOM must revoke the suspension or restriction. They must notify the person concerned of their decision.

Section 100: Suspending service provision for contraventions of conditions

244. Subject to compliance with section 102, this section gives OFCOM a power to suspend or restrict a person's entitlement to provide electronic communications networks, electronic communications services and/or associated facilities where OFCOM are satisfied that that person is in serious and repeated breach of any conditions imposed on him (other than an SMP apparatus condition) and that an attempt, by the imposition of penalties or the giving of an enforcement notification under section 95 or both, to

secure compliance has failed. The suspension or restriction must be appropriate and proportionate to the seriousness of the repeated contraventions.

245. A direction by OFCOM under this section may suspend entitlement generally or in relation to particular networks, services or facilities and may take effect indefinitely or for a fixed period. A direction may also include, where appropriate, conditions, such as the payment of compensation, to protect the customers of a provider. Where appropriate, OFCOM may revoke the suspension or restriction.

Section 101: Suspending apparatus supply for contraventions of conditions

246. Subject to compliance with section 102, OFCOM have the power under section 101 to give a direction suspending or restricting a person from supplying electronic communications apparatus where OFCOM are satisfied that the person is in serious and repeated breach of an SMP apparatus condition and that an attempt, by the imposition of penalties or the giving of an enforcement notification under section 95 or both, to secure compliance has failed. The suspension or restriction must be appropriate and proportionate to the seriousness of the repeated contraventions.
247. A direction by OFCOM under this section may take effect indefinitely or for a fixed period and may require the supplier to take measures to protect its customers. A direction may also include, where appropriate, conditions, such as the payment of compensation, to protect the customers of a supplier. Where appropriate, OFCOM may revoke the suspension or restriction.

Section 102: Procedure for directions under ss. 100 and 101

248. Unless a case is urgent, before exercising their powers under sections 100 and 101, OFCOM must notify a contravening provider or supplier of the proposed direction, allow him the least one month to make representations and consider each representation made by him.

*The meaning of an urgent case is set out in *subsection (4) and (5)* and arises where there is a serious threat to public safety, public health or national security or a serious economic or operational problem that makes it inappropriate to give a contravening provider or supplier time to make representations.

249. If a case is urgent, OFCOM may give a direction without consulting the relevant contravening provider or supplier. However, as soon as practicable after giving a direction in an urgent case OFCOM must provide the relevant contravening provider or supplier with an opportunity to make representations and to propose steps to remedy the contravention (see *subsection (3)*).

Section 103: Enforcement of directions under ss. 98, 100 and 101

250. It is an offence for any person to provide a network, service or associated facility or to supply electronic communications apparatus while he is subject to a direction given under sections 98, 100 and 101 suspending his entitlement to do so or where he does so in contravention of any restriction in such a direction. A person found guilty will be liable to a fine.

Section 104: Civil liability for breach of conditions or enforcement notification

251. This section provides that the obligation of a person to comply with any applicable conditions under section 45, or the conditions imposed by a direction under section 98 or 100, or any requirements imposed by an enforcement notification under section 95, is a duty owed to every person who may be affected by the contravention of the condition or requirement. Where a person sustains loss or damage as a result of a breach of that duty or of an act which induces a breach of the duty or interfering with its performance, that person may bring civil proceedings against the provider or supplier concerned.

OFCOM's consent is required before proceedings can be brought in respect of a breach of condition under section 45. In any such proceedings, a person may defend himself by demonstrating that he did everything reasonable and exercised all due diligence to avoid breaching the condition or requirement in question.

Section 105: Consideration and determination of network access questions

252. This section applies where a network access question has arisen and needs to be determined and OFCOM consider that, for the purpose of determining that question, it would be appropriate for them to exercise their powers to set, modify or revoke access-related conditions authorised by section 73(2) or (4) or SMP services conditions authorised by section 87.

*A network access question is defined in *subsection (6)* as a question relating to network access or the terms or conditions on which network access is or may be provided.

253. Before considering whether, for the purposes of determining the network access question, to set, modify or revoke access-related conditions authorised by section 73(2) or (4) or SMP services conditions authorised by section 84, OFCOM must publish a notification of their proposal. If, after considering the network access question, OFCOM decide not to set, modify or revoke such conditions, they must publish a notification of their decision. This section implements Article 5(4) of the Access Directive.

Section 106: Application of the electronic communications code

254. **Sections 106 to 119** and Schedule 3 amend the telecommunications code (set out in Schedule 2 to the Telecommunications Act 1984) in order to translate it into a code applicable to apparatus used in electronic communications networks and services. The telecommunications code is designed to facilitate the installation and maintenance of telecommunications systems. It confers rights on operators to install and maintain apparatus in, over or under land and results in considerably simplified planning procedures, similar to those given to other utilities. These provisions, along with Schedule 2 to the Telecommunications Act 1984, implement Articles 11 and 12(1) of the Framework Directive, and Article 4(1) and 6(1) of, and condition 5 of Part A of the Annex to, the Authorisation Directive.

255. **Sections 106 to 119** provide that “the electronic communications code” (as it will in the future be known) will no longer be applied to operators by way of licences (and licence conditions), but rather as a result of directions given by OFCOM in response to applications by individual providers of electronic communications networks or systems of conduits to be used for the provision of electronic communications networks. The principal changes to the code which will be effected under Schedule 3 include the replacement of references in it to telecommunications apparatus, services and systems with references to electronic communications apparatus, services and networks respectively; amendments to enable the application of the code to persons who provide a system of conduits by which an electronic communications network may be provided, but do not actually provide the network; and the addition of a provision to encourage the sharing of apparatus by operators to whom the code applies (which was previously contained in sections 10(3A), (3B) and (3C) of the Telecommunications Act 1984 and section 189 of the Broadcasting Act 1990; now see new paragraph 29 of the code).

256. **Section 106** provides that the electronic communications code will apply to any person in respect of whom OFCOM have given a direction for this purpose. *Subsection (5)* provides that such a direction may specify that the code is to apply to the person concerned only in relation to particular places, or particular networks or parts of networks or particular conduit systems or parts of conduit systems.

257. *Subsection (3)(b)* provides that the electronic communications code will also apply to the Secretary of State or any Northern Ireland department if either of them is providing or intends to provide an electronic communications network.
258. *Subsection (4)* provides that the code may only be applied to a person for the purposes of the provision of an electronic communications network or for the purposes of the provision of a system of conduits to be used in connection with the provision of an electronic communications network.
259. *Paragraph 17* of Schedule 18 provides that where, immediately before the coming into force of this section, the code applied to any person by virtue of the conditions of his telecommunications licence, that person shall be treated, after the coming into force of this section, as a person in whose case the code applies by virtue of a direction given by OFCOM.

Section 107: Procedure for directions applying code

260. This section provides that OFCOM may only give a direction applying the code in response to an individual application for this purpose, and specifies the procedures that apply to such applications. *Subsection (2)* provides that applicants must comply with all requirements as to form, content and manner of application as have been set out by OFCOM in a notification.
261. In deciding whether or not to give a direction applying the code OFCOM, in addition to their general duties and their duties for the purpose of fulfilling Community obligations under sections 3 and 4 respectively, must have regard to a number of factors, including the benefit to the public; the difficulty of providing the network or service without the code; the need to encourage shared use of apparatus; and whether the applicant has sufficient resources to meet any liabilities that may arise as a result of action taken by him under the code.
262. *Subsections (6) to (10)* lay down the procedures that OFCOM must follow when they propose to give a direction applying the code. These include obligations to publish a reasoned statement of the terms of their proposal, and to allow at least one month for representations to be made by persons likely to be affected. This implements Article 6 of the Framework Directive.

Section 108: Register of persons in whose case code applies

263. *Section 108* places OFCOM under a duty to keep an up-to-date public register of persons to whom the code applies and to record in this register every direction given under section 106. OFCOM must publish (and comply with) a notification setting out the hours during which this register will be open to the public and the fees for inspection.

Section 109: Restrictions and conditions subject to which code applies

264. The Secretary of State, following consultation with OFCOM and others may, by regulations, make the application of the code subject to restrictions and conditions. In making such regulations, the Secretary of State must consider OFCOM's general duties and their duties for the purpose of fulfilling Community obligations. She must also consider the environment, road-traffic management, the need to encourage the sharing of apparatus and the need to ensure that the provider will be able to meet any liabilities incurred due to the imposition of the code.

Section 110: Enforcement of restrictions and conditions

265. This section gives OFCOM powers of enforcement in respect of the restrictions and conditions subject to which the electronic communications code applies. Where it appears to OFCOM that a person to whom the code applies is or has been in breach of any condition or restriction subject to which the code applies, they are obliged to

notify that person accordingly and to allow him a specified period of time (usually one month) in which to make representations to OFCOM and to take steps to comply with the condition or restriction or to remedy the breach. This section and sections 111 to 113 implement Article 10 of the Authorisation Directive in the context of the enforcement of those restrictions and conditions.

Section 111: Enforcement notification for contravention of code restrictions

266. If, by the end of the period specified in the notification under section 110, OFCOM are satisfied that the condition or restriction in question has not been complied with, they may serve an enforcement notice on the notified provider. Such a notice requires the provider to comply with the requirements set out in the notice. This duty is enforceable by OFCOM in civil proceedings.

Section 112: Penalties for contravention of code restrictions

267. Where a notified provider has not complied with a requirement notified under section 110 or 111, or remedied the consequences of the notified contravention, OFCOM may impose a penalty. In deciding on the amount of a financial penalty, OFCOM are required to consider whether the fine is appropriate and proportionate, and to take account of any representations made by the person concerned, and any steps taken by him to comply with the condition or restriction in question. The maximum fine that may be imposed under this section is £10,000. The Secretary of State may by order amend this provision so as to substitute a different maximum penalty.

Section 113: Suspension of application of code

268. *Subsection (1)* allows OFCOM, if satisfied that a person has been in repeated and serious contravention of the requirements under section 38 to pay an administrative charge, that proceedings to recover any outstanding amounts have failed to secure complete compliance with section 38 and have no reasonable prospect of securing compliance and that the imposition of penalties under section 41 has failed to secure compliance, to give a direction suspending the application to that person of the electronic communications code. OFCOM must also be satisfied that the suspension of the application of the code is appropriate and proportionate to the seriousness of the repeated contraventions.
269. *Subsection (2)* allows OFCOM, having given a direction suspending a provider's entitlement to provide an electronic communications network, or part of such a network under section 42, 100, 132 or 140, to give a further direction suspending the application to that provider of the electronic communications code.
270. Similarly, under *subsection (4)*, if a provider has been in repeated and serious contravention of any restriction or conditions set out in the Secretary of State's regulations made under section 109, OFCOM can by giving a further direction suspend the code in relation to its application to parts of the provider's network which are not yet in existence, or where the disapplication of the code would not prevent the continued provision of the network.
271. Suspension of the application of the code will continue for as long as the suspension of entitlement remains in force (in the case of suspensions under *subsection (2)*) or until revoked by OFCOM. Suspension means that the provider cannot exercise any right conferred on him by the code but, unless OFCOM otherwise provide in a scheme made under section 117, suspension does not have any other effect on agreements entered into or on actions taken under the code. In other words, the suspension should not affect the rights of the operator to maintain service on the parts of its network unaffected by the suspension. This section implements Article 14(2) of the Authorisation Directive.

Section 114: Procedure for directions under s. 113

272. Except in an urgent case, OFCOM must not give a direction under section 113(4) suspending the application of the code to any person (“the operator”) unless they have: (i) notified the operator of the proposed suspension and of the steps (if any) that they are proposing to take under section 113; (ii) provided him with an opportunity of (during a period of not less than one month after the date of notification) making representations about the proposals and of proposing steps for remedying the situation that has given rise to the proposed suspension; and (iii) considered every representation and proposal made to them during that period.
273. As soon as practicable after giving a direction under section 113 in an urgent case, OFCOM must provide the operator with an opportunity to make representations about the effect of the direction and of any steps taken under section 113 in connection with the suspension and to propose steps for remedying the situation that has given rise to the situation.

**Subsection (4)* provides that a case is urgent for the purposes of this case if OFCOM consider that it would be inappropriate to allow time, before giving a direction under section 113, for the making and consideration of representations, because the circumstances appearing to OFCOM to require the suspension fall within *subsection (5)*.

*The circumstance listed in subsection (5) include a serious threat to public safety, public health or to national security, serious economic or operational problems for persons (apart from the contravening provider or supplier) who are communications providers or persons who make associated facilities available or serious economic or operational problems for persons who make use of electronic communications networks, electronic communications services or associated facilities.

Section 115: Modification and revocation of application of code

274. OFCOM may, by a further direction, alter the code’s application under section 106(5) to particular places or particular networks or parts of networks or particular conduit systems or parts of conduit systems. Under *subsections (2) and (3)*, OFCOM may, by a further direction, revoke a direction applying the electronic communications code either on the application of the person to whom the code applies or where such a person ceases to be a communications provider or a provider of a conduit system.
275. Before giving such directions OFCOM must, in accordance with section 106, first publish a notification of their proposal to give the direction and consider any representations made about that proposal. This implements Article 14(1) of the Authorisation Directive.

Section 116: Notification of cessation by person to whom code applies

276. Where the code has been applied to a person who provides an electronic communications network of a type not designated for the purpose of section 33 or who provides a system of conduits, and that person ceases to provide that network or system of conduits, he must notify OFCOM. Failure to do so may result in the provider being penalised an amount not exceeding £1,000. Secretary of State may by order amend this provision so as to substitute a different maximum penalty.

Section 117: Transitional schemes on cessation of application of code

277. This section gives OFCOM a power to put in place a transitional scheme in cases where the code has ceased to apply to a provider by reason of the code being either suspended, revoked or modified in relation to that provider.
278. *Subsection (3)* gives a non-exhaustive list of the type of provision that might be contained in a transitional scheme. The examples given relate to the removal or retention

of apparatus installed under the code, and the restoration of land affected by the code. Such a scheme may also provide for the transfer of rights and liabilities arising out of agreements made or obligations incurred under the code; authorise apparatus on code land to be retained for use by other providers; and provide for any issues arising from the scheme to be referred to OFCOM.

Section 118: Compulsory acquisition of land etc.

279. **Schedule 4** confers on code operators the power to purchase compulsorily land in England and Wales and Scotland, where authorised by the Secretary of State and with the consent of OFCOM. In Northern Ireland, code operators may purchase compulsorily land by requesting (with the consent of OFCOM) the Secretary of State to order that land vests in them. This provision re-enacts sections 34 to 40 of the Telecommunications Act 1984 (which are repealed by the Act), with certain consequential amendments to take account of the abolition of the regulatory regime under the Telecommunications Act 1984.

*A code operator is a provider of an electronic communications network to whom OFCOM have applied the electronic communications code.

280. The power to purchase compulsorily extends to land that is required by the code operator for or in connection with the establishment or running of an operator's network. For the purposes of Schedule 4, an operator's network does not include a conduit system.

281. In England and Wales, the Acquisition of Land Act 1981 and, in Scotland, the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 applies to compulsory purchases by code operators as if they were local authorities within the meaning of those Acts. Under these Acts, code operators must make and publish an order so that land owners are given the right to object to the purchase and to have their objections heard. Only after objections have been heard can the Secretary of State be requested to confirm the order. In Northern Ireland, the Secretary of State must follow the procedures laid down in Schedule 6 to the Local Government Act (Northern Ireland) Act 1972 and Schedule 8 to the Health and Personal Social Services (Northern Ireland) Order 1972.

282. Where land is acquired compulsorily in England and Wales and Scotland, the benefit of certain provisions in, respectively, the Town and Country Planning Act 1990 and Town and Country Planning (Scotland) Act 1997 applies to code operators.

283. A code operator may not dispose of any land purchased compulsorily in England, Wales, Scotland or Northern Ireland except with the consent of OFCOM.

284. **Paragraph 19** of Schedule 18 (transitional provisions) provides that any compulsory purchase orders, vesting orders or authorisations made by the Secretary of State which are effective immediately before the commencement of Schedule 4 are to have effect after the commencement of that Schedule as if made or given under that Schedule.

285. **Paragraphs 6, 7 and 8** of Schedule 4 enable representatives of code operators authorised by the Secretary of State in writing to enter upon and survey (at any reasonable time) any land (except land covered by buildings or used as a garden or pleasure ground) in England, Wales, Scotland and Northern Ireland for the purpose of ascertaining whether it would be suitable for use by them for, or in connection with, the establishment or running of their networks. The powers of entry conferred on code operators are subject to the following provisions:

- in England and Wales, sections 324(8) and 325(1) to (5), (8) and (9) of the Town and Country Planning Act 1990 (as modified);
- in Scotland, sections 269(9) and 270(1) to (5), (8) and (9) of the Town and Country Planning (Scotland) Act 1997 (as modified); and

*These notes refer to the Communications Act 2003 (c.21)
which received Royal Assent on 17 July 2003*

- in Northern Ireland, section 40(2) to (5) and (8) of the Land Development Values (Compensation) Act (Northern Ireland) 1965 (as modified).
286. Code operators must make good, or pay compensation for, any damage caused to land or chattels by the exercise of their power of entry. Compensation must also be paid for any disturbance in the enjoyment of land or chattels of any person by the exercise of their power of entry.
287. **Paragraph 9(1)** of Schedule 4 applies certain provisions of Part 1 of the Compulsory Purchase Act 1965 for the purpose of the acquisition of land in England and Wales by agreement by code operators. Sub-paragraphs (2) and (3) apply the corresponding enactments in Scotland and Northern Ireland, respectively.
288. In exercising her powers under Schedule 4, the Secretary of State must have regard to the duties imposed on OFCOM under sections 3 and 4 of the Act and the need to protect the environment, to ensure that highways are not damaged or obstructed, to minimise interference with traffic and to encourage the sharing of electronic communications apparatus (see paragraph 2).

Section 119: Power to give assistance in relation to certain proceedings

289. This section provides that in actual or prospective proceedings on a question relating to the application of the code, any party to the proceedings (other than the operator) may apply to OFCOM for assistance. OFCOM may grant an application for assistance on any one of the following grounds: (i) that the case raises a question of principle; (ii) that assistance is necessary, for example, because of the complexity of the case; or (iii) by reason of some other special consideration. Examples of the kind of assistance OFCOM might provide are given in *subsection (4)*, and include giving advice or arranging for the giving of advice by a solicitor or counsel, facilitating settlement, or arranging for legal representation.

*The meaning of *operator* is given in the electronic communications code, as amended by paragraph 3(1) of Schedule 3 and is, as the case may be, the person to whom the code is applied by a direction under section 106, or the Secretary of State or the relevant Northern Ireland department.

290. *Subsections (6) and (7)* allow OFCOM to recover any expenses they incur in providing assistance under this section, by way of a charge on any costs or expenses awarded to the applicant in proceedings or under any compromise or settlement.

Section 120: Conditions regulating premium rate services

291. This section gives OFCOM the power to set conditions for the purpose of regulating the provision, content, promotion and marketing of premium rate services. Such conditions are binding on premium rate service providers and may relate only to compliance with directions given in accordance with the premium rate services code approved by OFCOM under section 121 or, in the absence of a code, the provisions of an order made by OFCOM under section 122. A premium rate service for this purpose is defined in *subsections (7) and (8)*. Briefly, a service is a premium rate service if:

it consists of the contents of communications transmitted by an electronic communications network (e.g. a product helpline or ‘chatline’) or if it allows the user of an electronic communications service to make use, by making a transmission by means of that service, of a facility made available to the users of the service (including in particular a facility to make payments for goods and services, to enter a competition or claim a prize or to register a vote or record a preference); and

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which received Royal Assent on 17 July 2003*

there is a charge for the service, and that charge is paid to the provider of the electronic communications service by means of which the service in question is provided (e.g. through the customer's telephone bill)

292. Under *subsection (9)*, a person provides a premium rate service if he: -
- provides the contents of the service, or
 - exercises editorial control over the contents of the service, or
 - packages together the content of the service for the purpose of facilitating its provision, or
 - makes available a facility comprised in that service.
293. In addition, under *subsection (10)*, an electronic communications service provider who, by virtue of arrangements made with someone falling within any of the four categories set out at a) to d) who provides a service, is entitled to a share of the charges for the provision of that service or for the use of his electronic communications service for the purpose of that service is also taken to be a premium rate service provider. Likewise, (in accordance with *subsection (11)*) the provider of an electronic communications network used for the provision of a service who has an agreement relating to the use of that network for the provision of the service with a provider of the service falling within any of the four categories set out at a) to d) is taken to be a premium rate service provider, as is (under *subsection 12*) an electronic communications network provider whose network is used under an agreement made with a person falling within subsections (10 or (11) or with an intermediary service provider (as defined in *subsection (15)*). The obligations that may be placed on a person falling within subsection (12) are limited by section 121(3) and section 122(5) (see below).
294. Conditions set under this section may apply generally to each provider of a premium rate service or individually to specified providers or providers of specified services. Sections 47 and 48 apply to the setting, modification and revocation of a condition under this section.
295. In accordance with *paragraph 9 of Schedule 18*, OFCOM may issue continuation notices in respect of premium rate service conditions in licences issued under section 7 of the Telecommunications Act 1984 for a transitional period before the arrangements provided by sections 120 to 124 take full effect.

Section 121: Approval of code for premium rate services

296. This section enables OFCOM, where appropriate, to approve codes regulating the provision, content, promotion and marketing of premium rate services made by any person. OFCOM may not approve a code unless they are satisfied that the criteria listed in *subsection (2)* are met. These include the existence of a person whose function is to administer and enforce the code; adequate funding for the activities of that person; objective justification for the provisions in the code; provisions which do not unduly discriminate and are proportionate and transparent. *Subsection (3)* forbids OFCOM approving a code which places obligations on a communications provider falling within subsection 120(12), unless they are satisfied that the obligations only arise where the provider concerned is the only person against whom it is practicable to take regulatory action and only after notice has been given by the code enforcer identifying the premium rate service and the manner in which it is alleged to have breached the code, and the only obligation imposed is to secure that the network does not deliver the premium rate service to persons in the UK. OFCOM may (in accordance with *subsection (6)*) approve modifications made to an approved code or withdraw their approval of a code at any time.

Section 122: Orders by OFCOM in the absence of a code under s.121

297. This section permits OFCOM to make an order imposing requirements with respect to the provision, content, promotion and marketing of premium rate services (including pricing) and for the enforcement of such requirements, where OFCOM consider there is no third-party code which could be approved under section 121. OFCOM's power to make an order includes power to establish a corporate body to determine the jurisdiction of that body and any other person, to confer jurisdiction over any matter on OFCOM, to provide a person upon whom jurisdiction is conferred with the ability to compensate or reimburse expenses and to enforce any awards. *Subsection (5)* places restrictions comparable to those in section 121(3) on the obligations that an order may place on communications providers falling within subsection 120(12). OFCOM must obtain the consent of the Secretary of State before making an order under this section.

Section 123: Enforcement of s.120 conditions

298. OFCOM may enforce conditions set under section 120 in accordance with sections 94 to 96. In deciding on the amount of a financial penalty under section 96, OFCOM must consider whether the fine is appropriate and proportionate and take into account any representations made by the premium rate service provider concerned as well as any steps taken by him to comply with the notified condition and remedy any consequences of a contravention. The penalty may not exceed £100,000. The Secretary of State may by order amend the maximum penalty.

Section 124: Suspending service provision for contraventions of s.120 conditions

299. Subject to compliance with sections 102 and 103, this section gives OFCOM a power to suspend or restrict the right of a communications provider to provide premium rate services where OFCOM are satisfied that that provider is in serious and repeated breach of any conditions imposed on him under section 120, and that the imposition of penalties and enforcement notifications under sections 95 and 96 have not resulted in compliance with those conditions. The suspension or restriction must be appropriate and proportionate to the seriousness of the breach and necessary for reasons of public policy. OFCOM may similarly direct the suspension or restriction of the right to provide a service where a communications provider has contravened the conditions set under section 120 and the circumstances of that contravention are such that it is appropriate for OFCOM to proceed without the conditions mentioned above being satisfied and there is an urgent need to give the direction for reasons of public policy.
300. A direction by OFCOM under this section may suspend entitlement to provide any or all premium rate services and may take effect indefinitely or for a fixed period. A direction may also include, where appropriate, conditions to protect the interests of the premium rate service provider's customers, including requirements for the payment of compensation. Where appropriate, OFCOM may revoke or modify the suspension or restriction. Provisions for the procedures applying to the giving of directions under this section, equivalent to those applying to directions for breaches of other conditions of entitlement, are included via *subsection (8)*.

Section 125: Dishonestly obtaining electronic communications services

301. Anyone who dishonestly obtains an electronic communications service and intends to avoid paying for that service is guilty of an offence under section 125. A person found guilty of the offence will be liable to a fine or imprisonment, or both. Under *subsection (2)*, it is not an offence under this section to obtain a service mentioned in section 297(1) of the Copyright, Designs and Patents Act 1988. This section replaces section 42 of the Telecommunications Act 1984 which is repealed by Schedule 19.

*Section 297(1) of the Copyright, Designs and Patents Act 1988 mentions programmes included in a broadcasting or cable programme service (as defined in that Act).

Section 126: Possession or supply of apparatus etc. for contravening s.125

302. It is an offence under *subsection (1)* for a person to have in his possession or under his control anything, including data, which may be used for or in connection with obtaining an electronic communications service with the intent to use the thing or to allow it to be used to obtain, or for a purpose connected with the obtaining of, an electronic communications service dishonestly.
303. It is an offence under *subsection (2)* for anyone to supply or offer to supply anything that may be used for or in connection with obtaining an electronic communications service when he knows or believes that the recipient of those things intends to use them or to allow them to be used to obtain, or for a purpose connected with the obtaining of, an electronic communications service dishonestly.
304. A person found guilty of either offence will be liable to a fine or imprisonment, or both.
305. This section replaces section 42A of the Telecommunications Act 1984 which is repealed by Schedule 19.

Section 127: Improper use of public electronic communications network

306. Anyone who sends a message or other matter that is grossly offensive or is of an indecent, obscene or menacing character (other than in the course of providing a programme service) by means of a public electronic communications network, or who causes such a message or matter to be sent, is guilty of an offence. It is also an offence under *subsection (2)* for anyone to send or cause to be sent false messages by means of a public electronic communications network or persistently to make use of a public electronic communications network for the purpose of causing annoyance, inconvenience or needless anxiety.

*A *programme service* has the same meaning as in the Broadcasting Act 1990.

307. This section replaces section 43 of the Telecommunications Act 1984, which is repealed by Schedule 19.

Section 128: Notification of misuse of networks and services

308. This section gives OFCOM powers of enforcement in respect of persistent misuse of an electronic communications network or an electronic communications service. Where OFCOM determine that there are reasonable grounds to believe that a person has persistently misused an electronic communications network or an electronic communications service, OFCOM may notify that person accordingly, and allow him a specified period in which to make representations to OFCOM. The period to be allowed for the making of representations is one month, unless OFCOM consider that the misuse is continuing and the harm caused makes it necessary for it to be stopped as soon as possible, in which case, the period is 7 days. Under *subsection (8)*, the Secretary of State may by order specify uses of an electronic communications network or an electronic communications service that shall not be treated as a misuse of a network or service where she considers that appropriate alternative means of dealing with those uses exist.

*A person misuses an electronic communications network or an electronic communications service, under *subsection (5)*, if the effect or likely effect of its use causes another person unnecessarily to suffer annoyance, inconvenience or anxiety or if he uses a network or service to engage in conduct the effect or likely effect of which causes another person unnecessarily to suffer annoyance, inconvenience or anxiety.

*A person persistently misuses an electronic communications network or an electronic communications service under *subsection (6)* where his misuse is repeated on a sufficient number of occasions so that it is clear that the misuse forms

part of pattern of behaviour or constitutes recklessness as to whether persons suffer annoyance, inconvenience or anxiety.

Section 129: Enforcement notifications for stopping persistent misuse

309. If, by the end of the period specified in section 128, OFCOM are satisfied that the person has persistently misused an electronic communications network or an electronic communications service and that he has not taken all appropriate steps to secure that the misuse ceases and is not repeated, and to remedy the consequences of the misuse, they may serve an enforcement notice. Such a notice requires the notified person to take all steps to secure that the misuse ceases and is not repeated, and to remedy the consequences of the misuse.

Section 130: Penalties for persistent misuse

310. OFCOM may impose a penalty if a person notified under section 128 has persistently misused an electronic communications network or an electronic communications service. Where an enforcement notification issued in accordance with section 129 has not been complied with, OFCOM may also impose a penalty.
311. When deciding on the amount of financial penalty, OFCOM are required to consider whether the fine is appropriate and proportionate, and to take account of any representation made by the person concerned and any steps taken to secure that the misuse ceases and is not repeated and to remedy the consequences of the misuse. The penalty may not exceed £5000. However, the Secretary of State may by order amend the maximum penalty.
312. Under *subsection (8)*, people may be liable for an offence under sections 125 to 127 and have a penalty imposed on them by OFCOM under section 130 in respect of the same conduct.

Section 131: Statement of policy on persistent misuse

313. This section places OFCOM under a duty to publish and keep up-to-date a statement of policy on how they will use their powers under sections 128 to 130.

Section 132: Powers to require suspension or restriction of a provider's entitlement

314. This section gives the Secretary of State a power to direct OFCOM to issue a person with a direction to suspend or restrict that person's entitlement to provide an electronic communications network or service or an associated facility where she has reasonable grounds for believing that it is necessary to do so to protect the public from any threat to public safety or public health, or in the interests of national security. This is permitted by Article 3 of the Authorisation Directive.
315. *Subsection (2)* places OFCOM under a duty to comply with any such direction by the Secretary of State. Once a suspension or restriction is in place, both the Secretary of State and OFCOM must allow the person in question an opportunity to make representations to them, and to propose steps for remedying the situation. OFCOM may modify the terms of a suspension or restriction imposed under this section. The Secretary of State may direct OFCOM to revoke a suspension or restriction imposed under this section.
316. A direction by OFCOM under this section may suspend entitlement generally or in relation to particular networks, services or facilities, and may take effect indefinitely or for a fixed period. It may also postpone the suspension or restriction (and, if doing so, may also impose additional conditions - such as compensation of their customers for loss suffered - in order to protect the customers of the provider).

Section 133: Enforcement of directions under s. 132

317. It is an offence for any person to provide a network, service or associated facility while he is subject to a direction under section 132 suspending his entitlement to do so, or to provide such a network, service or facility in contravention of a restriction contained in such a direction. A person found guilty will be liable to a fine. A third party who sustains loss or damage as a result of a breach of such a direction or of an act which induces a breach of the duty or interferes with its performance may bring proceedings against the person concerned. In such proceedings, a person may defend himself by demonstrating that he did everything reasonable and exercised all due diligence to avoid breaching the condition in question.

Section 134: Restrictions in leases and licences

318. This section replaces section 96 of the Telecommunications Act 1984, which is repealed by Schedule 19. *Subsection (3)* amends any provision, in any lease, licence or other premises-related agreement granted or entered into after the commencement of this section, which prohibits or restricts an occupier's choice of electronic communications services providers to a person who has an interest in the relevant premises or a person selected by a person with an interest in the relevant premises. Where a lease, licence or other premise-related agreement contains a provision imposing such prohibitions or restrictions, that provision is to have effect as if it provided for the election of an alternative electronic communications service provider by the occupier, subject to the prior consent of the lessor, licensor or other party to the agreement, such consent not to be unreasonably withheld.

*The meaning of lease is given in *subsection (8)* and includes a leasehold tenancy (whether in the nature of a head lease, sub-lease or under lease) and an agreement to grant such a tenancy.

319. *Subsection (4)* amends any provision, in a lease of one year or more granted or entered into after the commencement of this section or more or in a premises-related agreement to which such a lease applies, that imposes any other prohibition or restriction on the lessee relating to an electronic communications matter where such prohibition or restriction relates to anything done inside a building occupied by the lessee or for purposes in connection with the provision of an electronic communications service by a communications provider to the lessee. Where a lease of one year or more or a premises-related agreement to which a lease of one year or more is applied contains a provision imposing such a prohibition or restriction, the provision is to have effect as if the prohibition or restriction applied only where the lessor had not given his consent, such consent not to be unreasonably withheld.

*For the purposes of this section, an electronic communications matter includes the provision of an electronic communications network, the provision of an electronic communications service, the connection of electronic communications apparatus to an electronic communications network specified in an order for the purposes of this section, the connection of an electronic communications network to another electronic communications network specified in an order for the purposes of this section, and the installation, maintenance, adjustment, repair, alteration or use of electronic communications apparatus for the purposes of providing an electronic communications network or an electronic communications service.

320. Under *subsection (6)*, OFCOM have the power by order to exclude certain provisions in leases, licences or other premises-related agreements from the remit of this section. This section only applies to leases, licences or other premises-related agreements entered into before the commencement of this section to the extent that OFCOM makes an order under *subsection (9)* providing for it to do so. The provisions of this section apply without prejudice to the application of the electronic communications code.

Section 135: Information required for purposes of Chapter 1 functions

321. This section gives OFCOM information-gathering powers. Subject to the restrictions in section 137, it allows OFCOM to require any person falling within *subsection (2)*, including a communications provider, to provide OFCOM with all such information as OFCOM consider necessary for the purpose of carrying out their functions under Chapter 1 of Part 2 of the Act.
322. This includes information for the following purposes:
- investigating possible breaches of conditions of entitlement, or of the electronic communications code, or of a transitional scheme after the cessation of the application of the code;
 - ascertaining or verifying the amount of any administrative charge payable under section 38, or of any financial contribution towards the cost of complying with universal service obligations;
 - ascertaining whether a condition set under section 45 continues to be effective;
 - designating a universal service provider under section 66;
 - carrying out a review under sections 66 or 70;
 - identifying markets and carrying out market analyses for the purposes of Chapter 1 Part 2 of the Act;
 - assessing whether any network access question gives rise to a duty under section 105 and considering any matter while exercising that duty;
 - statistical purposes connected with OFCOM's functions under Chapter 1 of Part 2 of the Act.

This section, section 136 and section 137, implement Article 5 of the Framework Directive, Articles 6(1), 10(1) and 11 of, and condition 10 of Part A to, the Annex to the Authorisation Directive, Article 11(2) of the Access Directive, and Articles 11, 21 and 22 (in so far as those Articles necessitate the provision of information) of the Universal Service Directive.

Section 136: Information required for related purposes

323. Subject to the restrictions in section 137, section 136 allows OFCOM to require communications providers and persons making available associated facilities to provide OFCOM with information required by OFCOM:
- to carry out comparative overviews of the quality and price of services provided by communications providers or of associated facilities;
 - for statistical purposes.

Section 137: Restriction on imposing information requirements

324. OFCOM may not use their powers under sections 135 and 136 to request information relating to a potential breach of a general condition unless OFCOM's investigation is in response to a complaint; they have reason to believe that a breach has occurred; they have decided to investigate to see whether the condition is being complied with; or the condition concerns sharing the burden of providing a universal service.
325. Any demands made by OFCOM must be proportionate to the use to which they intend to put the information, and must describe the information required and state the reasons why it is required. This implements Article 11(1) and (2) of the Authorisation Directive. Unless the demand is for the purpose of determining who is liable to a charge under

section 38 (in which case other appropriate methods may be used) any demand must be set out in a notice and be served on the person from whom the information is requested.

Section 138: Notification of contravention of information requirements

326. Where OFCOM have reasonable grounds to believe that a person is or has been in breach of any requirement under section 135 or 136, they may notify that person accordingly, and allow him a specified period of time (usually one month) in which to make representations to OFCOM, and to take steps to comply with the notified requirement. This section, and sections 139 to 144 relate to enforcement of the information provisions applicable to communications providers or persons making associated facilities available and together implement Article 10 of the Authorisation Directive.

Section 139: Penalties for contravention of information requirement

327. Where a notified provider has not complied with a requirement notified under section 138, has not remedied the consequences of the notified contravention and no proceedings for an offence under section 144 have been brought, OFCOM may impose a penalty. In deciding on the amount of a financial penalty, OFCOM are required to consider whether the penalty is appropriate and proportionate, and to take account of any representations made by the person concerned and any steps taken by him to comply with the condition or restriction in question. The maximum fine that may be imposed under this section is £50,000. Secretary of State may by order amend this provision so as to substitute a different maximum penalty.

Section 140: Suspending service provision for information contraventions

328. This section gives OFCOM a power to suspend or restrict a person's entitlement to provide networks, services and/or associated facilities where OFCOM are satisfied that that person is in serious and repeated breach of any requirements imposed on him under section 135 or 136, that the requirements are not requirements imposed for purposes connected with the carrying out of OFCOM's functions in relation to SMP apparatus conditions and that an attempt by the imposition of penalties under section 139 or the bringing of proceedings for an offence under section 144, to secure compliance has failed. The suspension or restriction must be appropriate and proportionate to the seriousness of the repeated contraventions.
329. A direction by OFCOM under this section may suspend entitlement generally or in relation to particular networks, services or facilities and may take effect indefinitely or for a fixed period. Where OFCOM exercise these powers, they must allow the person in question to make representations to them and, if appropriate, OFCOM may revoke the suspension or restriction. A direction may also include, where appropriate, conditions to protect the customers of a provider, including the payment of compensation.

Section 141: Suspending apparatus supply for information contraventions

330. This section gives OFCOM a power to suspend or restrict a person from supplying electronic communications apparatus where OFCOM are satisfied that that the person is in serious and repeated breach of any requirement of OFCOM to provide information for the purpose of section 135, and that an attempt, by the imposition of penalties under section 139 or the bringing of proceedings for an offence under section 144, to secure compliance has failed. The suspension or restriction must be appropriate and proportionate to the seriousness of the repeated contraventions.
331. A direction by OFCOM under this section may require a person to cease supplying electronic communications apparatus generally or in relation to particular electronic communications apparatus. The direction may take effect indefinitely or for a fixed period. A direction may also include, where appropriate, conditions to protect the customers of a supplier, including the payment of compensation. When OFCOM

exercise these powers, they must allow the person in question to make representations to them and, if appropriate, OFCOM may revoke the suspension or restriction.

Section 142: Procedure for directions under sections 140 and 141

332. Unless a case is urgent, before exercising their powers under sections 140 and 141, OFCOM must notify a contravening provider or supplier of the proposed direction, allow him at least one month to make representations and consider each representation made by him.

*The meaning of an urgent case is set out in *subsections (4) and (5)*. Such a case arises where there is a serious threat to public safety, public health or national security or a serious economic or operational problem that makes it inappropriate to give a contravening provider or supplier time to make representations.

333. If a case is urgent, OFCOM may give a direction without consulting the contravening provider or supplier. However, as soon as practicable after giving a direction in an urgent case, OFCOM must provide the relevant contravening provider or supplier with an opportunity to make representations and to propose steps to remedy the contravention.

Section 143: Enforcement of directions under ss. 140 and 141

334. It is an offence for any person to provide an electronic communications network, an electronic communications service or an associated facility while he is subject to a direction issued under section 140 suspending his entitlement to do so or where he does so in contravention of any restriction specified in the direction. It is also an offence for any person to supply electronic communications apparatus while he is subject to a direction issued under section 141 suspending his entitlement to do so or where he does so in contravention of any restriction specified in the direction. A person found guilty of either offence will be liable to a fine.

Section 144: Offences in connection with information requirements

335. It is an offence for any person to fail to provide information in response to a demand from OFCOM under section 135 or 136 and any such person shall be liable to a fine. However, *subsection (2)* makes provision for a defence where it is not possible for the recipient of a notice to provide the information within the period specified by OFCOM but the recipient has taken all reasonable steps to provide the information after that period. However, no proceedings for this offence may be brought in respect of failures for which OFCOM have imposed a financial penalty under section 139.

336. It is also an offence intentionally or recklessly to provide OFCOM with any false information in response to a request under section 135 or 136 and a person guilty of this offence is liable to a fine and/or imprisonment.

Section 145: Statement of policy on information gathering

337. This section places OFCOM under a duty to publish and keep up-to-date a statement of policy on how they will use their information-gathering powers under sections 135 and 136 and how they will use any information obtained in exercise of those powers. When exercising their information-gathering powers under sections 135 to 144, OFCOM must have regard to their published policy statement.

Section 146: Provision of information by OFCOM

338. This section places OFCOM under a duty to respond fully, within one week, (unless they have already conveyed the requested information) to any request made to them for information about any of the following:

*These notes refer to the Communications Act 2003 (c.21)
which received Royal Assent on 17 July 2003*

- whether or not the person making the request is required under section 33 to notify OFCOM in advance of his intention to provide a network, service or associated facility;
- whether a notification submitted by that person under section 33 is satisfactory;
- that person's rights, in order to allow him to negotiate his right to network access; or
- what is required of that person under section 106 in order to make an application in respect of the electronic communications code.

This section implements Article 9 of the Authorisation Directive.

Section 147: Repeal of provisions of Telecommunications Act 1984

339. This section repeals certain sections of the Telecommunications Act 1984. One of the principal effects of these repeals will be to abolish the current requirement for persons running telecommunications systems to hold individual or class licences.

*Sections 5 to 8 of the Telecommunications Act 1984 make it a criminal offence to run a telecommunications system without a licence and set out the powers of the Secretary of State and the Director General of Telecommunications to grant licences. Section 9 allows the Secretary of State to designate certain telecommunications systems as "public telecommunications systems". This designation confers additional rights and imposes additional duties on the licensee. Sections 10 and 11 relate to the telecommunications code (see the notes on section 106). Sections 12 to 15 set out the circumstances in which the Director General of Telecommunications may modify the conditions of telecommunications licences. Sections 16 to 19 deal with the powers of the Director General to enforce compliance with licence conditions. Finally, sections 27A to 27L make provision for standards of performance and service to customers in the telecommunications industry and for procedures for dealing with complaints and billing disputes. These sections also govern the terms upon which deposits may be required from customers, and the circumstances in which operators may disconnect customers.

340. As a result of the abolition of telecommunications licensing it is necessary to make certain savings and transitional provision. These are set out in paragraphs 3, 4, 9, 11-14 and 16-18 of Schedule 18 (transitional provisions).
341. [Paragraphs 3 and 4](#) provide savings for the effects of certain agreements expressed by reference to licences. Paragraphs 9 and 11 deal with the saving of certain licence conditions relating to the regulation of premium rate services, to significant market power or access, and to accounting, respectively. Paragraph 12 makes provision in respect of the payment of licence fees. Paragraph 13 enables OFCOM to enforce the licence conditions saved in paragraphs 9 and 11 and any liabilities saved under paragraph 12 which were previously enforceable by the Director General of Telecommunications under the Telecommunications Act 1984.
342. [Paragraph 14](#) provides that where an agreement entered into for the purposes of a condition of a licence granted under section 7 of the Telecommunications Act 1984 entitles a party to it to terminate the agreement if he or another party ceases to be a Schedule 2 public operator, that right is not to be exercisable by reason of the coming into force of provisions of the Act, providing that corresponding general conditions, access-related conditions or a provision made by an SMP condition are imposed on one or both of the parties to the agreement.
343. [Schedule 2](#) public operator has the same meaning as in Schedule 1 to the Telecommunications (Licence Modifications) (Standard Schedules) Regulations 1999 (S.I. 1999/2450).

*These notes refer to the Communications Act 2003 (c.21)
which received Royal Assent on 17 July 2003*

344. Paragraphs 16-18 provide savings for allocated telephone numbers, the grant of powers under the telecommunications code, and guarantees of liabilities of code operators.

Section 148: Powers of local authorities in connection with networks

345. This section replaces section 2 of the Telegraph Act 1899 and permits local authorities in England, Wales and Scotland to borrow money to provide public electronic communications networks or services, including where those networks or services extend outside their local authority areas.

Section 149: Grants by Department of Enterprise, Trade and Investment

346. This section confers power on the Northern Ireland Department of Enterprise, Trade and Investment (“DETI”) to fund expenditure on electronic communications infrastructure and to fund expenditure for any other purposes prescribed by regulations made with the approval of the Department of Finance and Personnel. DETI will have discretionary powers to support financially the development of a regional electronic communications infrastructure in Northern Ireland, specifically the provision of electronic networks and services, and the improvement of the extent, quality and reliability of such networks or services.

Section 150: Grants by district councils

347. This section provides that district councils in Northern Ireland may award grants to persons providing a public electronic communications network, a public electronic communications service, or a facility connected with such a network or service where they believe such network or service benefits their area. Such grants must be for the purposes of compensating such persons for losses sustained in the provision of such networks, services or facilities. Any grant would also need to comply with the European Community rules on state aid. This provision repeals and re-enacts section 97 of the Telecommunications Act, with certain consequential amendments, but only in so far as that provision relates to Northern Ireland.

Section 151: Interpretation of Chapter 1

348. This section provides for the interpretation of defined terms used in Chapter 1 of Part 2 of the Act.

Chapter 2: Spectrum Use

349. The existing law governing access to and use of radio spectrum is contained in the Wireless Telegraphy Acts 1949, 1967 and 1998, the Marine, etc., Broadcasting (Offences) Act 1967 and Part VI of the Telecommunications Act 1984. Under section 1(1) of the 1949 Act, it is an offence for any person to establish or use any station for wireless telegraphy or to install or use any apparatus for wireless telegraphy, otherwise than under and in accordance with a licence granted by the Secretary of State. Since radio spectrum is a finite resource, users of spectrum will continue to be licensed as at present, although the licensing and enforcement functions under the above legislation will be transferred to OFCOM (in accordance with section 2 of and Schedule 1 to the Act – see the notes for those provisions above).

*The expressions *wireless telegraphy*, *apparatus for wireless telegraphy* and *station for wireless telegraphy* are defined in section 19 of the Wireless Telegraphy Act 1949. *Wireless telegraphy* means the emitting or receiving of electromagnetic energy of a frequency not exceeding three million megacycles a second, which is equivalent to 3000 Giga-Hertz in modern terminology, (essentially radio signals) for the purposes of conveying messages, sounds or visual images or for the determination of position or distance. *Stations and apparatus for wireless telegraphy* are stations and apparatus for the emitting or receiving of radio signals.

350. Chapter 2 of Part 2 of the Act sets out new functions of OFCOM in relation to radio spectrum (which are in addition to the existing wireless telegraphy functions transferred to OFCOM under section 2 and Schedule 1). It introduces a new scheme of recognised spectrum access and continues the market-based approach to spectrum management introduced by the Wireless Telegraphy Act 1998 by allowing trading as a means of gaining access to spectrum. Additionally, Chapter 2 of Part 2 and Schedule 17 contain a large number of amendments to the existing law on wireless telegraphy, mainly for the purpose of implementing the new Directives.

Section 152: General functions of OFCOM in relation to radio spectrum

351. This section sets out general functions of OFCOM in relation to radio spectrum. These functions are:
- to give advice in relation to the use of radio spectrum and to provide other services and maintain records with respect to radio spectrum use within and outside of the United Kingdom, as OFCOM consider appropriate for the purposes of spectrum management.
 - OFCOM may also be required by the Secretary of State to give other advice and to provide other services or to maintain other records for the purpose of securing United Kingdom compliance with any of its international obligations. The services, records and advice may be in respect of spectrum use outside the United Kingdom.
352. For the purpose of the carrying out of these functions, OFCOM may carry out or commission research and development work on use of radio spectrum, including future developments and any connected matters. OFCOM may, with the consent of the Treasury, also make a grant to any person in order to encourage efficient spectrum-management or use.
353. Where OFCOM are required to give advice or provide another service, they may charge for doing so (if they are not required to do so, any charge would be under section 25).

Section 153: United Kingdom Plan for Frequency Authorisation

354. This section places OFCOM under a duty to publish a plan (to be known as “the United Kingdom Plan for Frequency Authorisation”) setting out the frequencies allocated for particular radio purposes in the UK that are available for assignment, and the purposes for which they have been allocated. This implements the requirement in Article 5(3) of the Authorisation Directive that there should be a national frequency plan.

Section 154: Duties of OFCOM when carrying out spectrum functions

355. This section sets out the duties of OFCOM when carrying out their functions under the enactments relating to radio spectrum management. OFCOM must have regard in particular to (i) the amount of spectrum available for use; (ii) the present and future demand for spectrum; and (iii) the desirability of promoting efficient management and use of the radio spectrum, the economic and other benefits of radio spectrum use, the development of innovative services and competition in the provision of electronic communications services. In regard to functions other than setting fees for licences or grants of recognised spectrum access under section 2 of the Wireless Telegraphy Act 1998, OFCOM may disregard such of these matters as do not appear relevant to the case in question. OFCOM must resolve any conflict between their duties under this section in the manner they think best in the circumstances. However, OFCOM must give priority to their duties under sections 3 to 6 in the event of any conflict between those duties and their duties under this section. This implements Article 9(1) of the Framework Directive.

Section 155: Advisory service in relation to interference

356. OFCOM may advise and help people complaining of interference with wireless telegraphy - in other words where the fulfilment of the purposes of the wireless telegraphy is prejudiced by any emission or reflection of electro-magnetic energy.

Section 156: Directions with respect to the radio spectrum

357. This section gives the Secretary of State a power, by order, to give general or specific directions to OFCOM about the carrying out of their spectrum functions. They may include a direction (i) to reserve certain frequencies for different classes of use, for example broadcasting, mobile telecommunications, private business systems, air traffic control or radio astronomy, or within a class, for example for the provision of additional digital television services or radio broadcasting multiplexes; or (ii) to exercise their powers under the proviso to section 1(1) of the Wireless Telegraphy Act 1949 and under sections 1, 3 and 3A of the Wireless Telegraphy Act 1998 in accordance with the provisions of the direction. This power is in addition to the power conferred on the Secretary of State by section 5 to give directions for limited purposes in accordance with which OFCOM must exercise their functions.

*The proviso to section 1(1) of the Wireless Telegraphy Act 1949 allows classes or descriptions of wireless telegraphy stations or apparatus to be exempted from licensing requirements by regulations made by the Secretary of State (such regulations will be made by OFCOM when the relevant provisions of the Act come into force). Section 1 of the Wireless Telegraphy Act 1998 (as amended by section 161) allows the Secretary of State to make regulations setting the fees to be paid on the issue and renewal of wireless telegraphy licences and grants of recognised spectrum access, and is subject to section 2 of that Act (which, as substituted by paragraph 147 of Schedule 17 to the Act, allows the Secretary of State to charge licence fees above the cost of exercising wireless telegraphy functions (“administrative incentive pricing”). Section 3 of the 1998 Act allows the Secretary of State to make regulations providing for wireless telegraphy licences to be awarded by means of spectrum auctions. Finally, section 3A of the 1998 Act is introduced by section 161. The regulations provided for in sections 1 to 3A of the 1998 Act will be made by OFCOM when the relevant provisions of the Act come into force.

Section 157: Procedure for directions under s.156

358. An order containing a direction under section 156 must state its purpose, unless the direction requires OFCOM to reserve certain frequencies for specified uses or requires OFCOM to exercise their powers under the proviso to section 1(1) of the Wireless Telegraphy Act 1949 or under section 1, 3 or 3A of the Wireless Telegraphy Act 1998 in a certain way. Before making an order containing a direction under section 156, unless urgency makes it inexpedient to do so, the Secretary of State must consult OFCOM and such other persons as she thinks fit. A draft of the order must be laid before Parliament and approved by each House, except where the Secretary of State considers the urgency of the case requires the order to be made straight away. An order containing a direction given by the Secretary of State in an urgent case ceases to have effect at the end of 40 days (excluding Parliamentary recesses) unless it is approved by a resolution of each House of Parliament.

Section 158: Special duty in relation to television multiplexes

359. If OFCOM reserve frequencies for the broadcasting of television programmes, they are under a duty, so far as practicable, to secure that sufficient multiplex capacity is available for qualifying services on television multiplexes licensed under the Broadcasting Act 1996. This is in accordance with condition 1 of Part B of the Annex to the Authorisation Directive.

*These notes refer to the Communications Act 2003 (c.21)
which received Royal Assent on 17 July 2003*

**qualifying service* has the same meaning as is given in section 2 of the Broadcasting Act 1996.

Section 159: Grant of recognised spectrum access

360. Sections 159 to 162 introduce a new scheme of grants of “recognised spectrum access”. Grants of recognised spectrum access (“RSA”) will be available, in circumstances to be specified by OFCOM in regulations, to persons who transmit radio signals for reception in the United Kingdom, but who are not, for whatever reason, required to hold a licence under the Wireless Telegraphy Acts. Possible examples include certain satellite services, radio astronomy and Crown users of spectrum.
361. Section 159 sets out the procedures that apply to the making by OFCOM of grants of recognised spectrum access. Subsection (3) allows OFCOM to specify, amongst other things, the frequencies used, reception coverage and strength and type of signal that are the subject of the grant. Subsection (5) allows OFCOM to make a grant of RSA subject to such restrictions and conditions as they think fit, for example as to strength and type of signal, times of use or sharing of frequencies.
362. Schedule 5 makes additional detailed provision about the procedure for the grant, modification and revocation of grants of RSA. OFCOM are to prescribe procedures for applications for a grant of RSA including requirements that must be fulfilled before, and restrictions and conditions subject to which, a grant will be made. Where an applicant fails to provide all the information reasonably required by OFCOM, their application may be refused. Any proposed refusal of an application must be notified to the applicant, stating the reasons and specifying the period (at least a month) within which the applicant may make representations about the proposed refusal. Similarly, if OFCOM propose to revoke or modify a grant or the restrictions or conditions to which it is subject, they must notify the person to whom the grant was made and give him the opportunity to make representations or, if applicable, to remedy a contravention of the restrictions or conditions of the grant.

Section 160: Effect of grant of recognised spectrum access

363. This section places OFCOM under a duty to take into account any grants of RSA to the same extent as if a licence under section 1 of the Wireless Telegraphy Act 1949 had been granted when (i) granting wireless telegraphy licences; (ii) making grants of RSA; and (iii) carrying out any of their other functions under the enactments relating to radio spectrum management where it is appropriate to have regard to whether wireless telegraphy licences are in force or to their terms.

Section 161: Charges in respect of grants of recognised spectrum access

364. This section amends section 1 of the Wireless Telegraphy Act 1998 to allow OFCOM to set the fees to be paid on the making of a grant of RSA. This section also inserts a new section 3A into the 1998 Act that makes provision for OFCOM to determine applications for the grant of RSA by means of an auction and for the procedures to be followed in such cases.

Section 162: Conversion into and from wireless telegraphy licences

365. Upon application, OFCOM may (in accordance with regulations made by them) convert a wireless telegraphy licence into a grant of RSA and vice versa.

Section 163: Payments for use of radio spectrum by the Crown

366. This section allows the Secretary of State to make payments (out of money provided by Parliament) for the operation by the Crown of stations and apparatus for wireless telegraphy or in respect of any grant of RSA made to the Crown. The Wireless

Telegraphy Act 1949 does not bind the Crown, which is therefore exempt from the obligation to obtain a licence for its use of spectrum. However, in order that public sector users should have incentives to use spectrum efficiently, a commitment was given during the passage of the Wireless Telegraphy Act 1998 that the Crown would pay for access to spectrum on a comparable basis to the private sector.

Section 164: Limitations on authorised spectrum use

367. Where OFCOM consider it appropriate to limit the number of wireless telegraphy licences or grants of RSA on certain frequencies, or for certain uses, for the purpose of securing efficient spectrum use, they must make an order imposing the limitations. The purpose of this duty is to ensure fairness between potential users. The order must set out the criteria OFCOM will apply in limiting the number of licences and grants and deciding to whom to issue licences or grants of RSA. The criteria must be objective, non-discriminatory, proportionate and transparent. OFCOM must keep the order under review. This section implements Article 7 of the Authorisation Directive.

Section 165: Terms etc. of wireless telegraphy licences

368. This section adds three new subsections to section 1 of the Wireless Telegraphy Act 1949. Subsection (2A) provides that any terms, provisions and limitations of a licence granted under that Act may include (i) provisions relating to the strength or type of signal, times of use, and frequency sharing, and (ii) prohibitions on or obligations requiring the transmission or broadcasting of particular content by the licence holder. Subsection (2B) enables licences to be granted in relation to stations or apparatus described by reference to specified factors or in relation to a particular station or apparatus. Subsection (2C) provides that a licence must not duplicate conditions already imposed by general conditions under this Act: this new subsection implements Article 6(4) of the Authorisation Directive.

Section 166: Exemption from need for wireless telegraphy licence

369. This section amends the Wireless Telegraphy Act 1949 to require OFCOM to exempt certain stations or apparatus from the requirement to be licensed under that Act where their use would not cause undue interference (as redefined in section 183). This implements Article 5(1) of the Authorisation Directive.

Section 167: Bidding for wireless telegraphy licences

370. This section makes some procedural amendments to section 3 of the Wireless Telegraphy Act 1998, which governs the conduct of spectrum auctions for wireless telegraphy licences. The principal changes are to combine the separate regulations and notices which at present govern spectrum auctions, to introduce greater flexibility on how bids may be expressed and to add a new provision allowing OFCOM to require payments to be made by a person who successfully bids for a wireless telegraphy licence but subsequently refuses to take the licence applied for.
371. [Paragraph 21](#) of Schedule 18 (transitional provisions) provides that any procedures set out in a notice issued by the Secretary of State under regulations made under section 3 of the Wireless Telegraphy Act 1998 before the commencement of this section shall have effect as if prescribed by OFCOM by regulations under that provision.

Section 168: Spectrum trading

372. This section gives OFCOM a power to make regulations authorising the holder of a wireless telegraphy licence or the holder of a grant of RSA to transfer the rights and obligations under their licence or grant of RSA to another person. This will enable the development of a secondary market in licences and grants of RSA where this is permitted by OFCOM.

373. *Subsections (1) and (2)* provide that regulations authorising spectrum trading may allow some or all of the rights and obligations attached to a wireless telegraphy licence or grants of RSA to be transferred to another person, or for such rights and obligations to be exercised concurrently by the transferee and the transferor. Sharing of rights could occur, for example, if it were intended that the licence or grants of RSA would revert after a period of time to the original holder, who meanwhile would remain responsible for ensuring compliance with the terms and conditions. *Subsection (2)* will thus allow secondary spectrum trading to take place in different ways and is designed to allow maximum flexibility.
374. *Subsection (3)* sets out the range of provisions that may be included in regulations authorising spectrum trading. For example, under *subsection 3(c) and (e)* regulations may require the approval of OFCOM before a trade can be made, and may make trades subject to compliance with conditions imposed by OFCOM. Under *subsection (3)(i)*, the regulations may require that trades be notified to OFCOM both before and after the trade takes place (and notification before the trade will be made a requirement because Article 9(4) of the Framework Directive requires it).
375. *Subsections (4) and (5)* provide that a transfer of rights and obligations under a wireless telegraphy licence or grant of RSA will be void unless it is made in accordance with either: (i) regulations authorising spectrum trading made under this section; or (ii) the provisions of an existing wireless telegraphy licence which allows the holder to confer the benefit of the licence on another.
376. This section implements Article 9(3) and (4) of the Framework Directive and condition 5 of Part B of the Annex to the Authorisation Directive.

Section 169: Variation and revocation of wireless telegraphy licences

377. This section substitutes a new section 1E of the Wireless Telegraphy Act 1949. The principal changes are an increase from 28 days to one month as the standard period of notice that OFCOM must give, new provisions about shorter notice in cases of serious and repeated breaches and urgency, and removal of the need for notice when the variation or revocation is at the request of, or with the consent of, the licence-holder. The first two of those changes implement paragraphs 2, 5, 6 and 10 of Article 10 and Article 14(1) of the Authorisation Directive (see also the notes on section 172 below).
378. In addition, paragraph 8 of Schedule 17 amends section 1D of the Wireless Telegraphy Act 1949 to provide that any application for a grant of a wireless telegraphy licence shall be determined in accordance with procedures prescribed in regulations made by OFCOM. Any decision on such an application must, in most cases, be published by OFCOM within six weeks. Paragraph 20 of Schedule 18 (transitional provisions) provides that any procedures set out in a notice under section 1D of the Wireless Telegraphy Act 1949 prior to the commencement of paragraph 8 of Schedule 17 shall be treated as if they are regulations made under the amended section 1D.

Section 170: Wireless telegraphy register

379. OFCOM may, by regulations, set up a public register of information about the holders of wireless telegraphy licences and persons to whom grants of RSA have been made. This may also include details about the licences and frequencies assigned.

Section 171: Information requirements in relation to wireless telegraphy licences

380. This section amends the Wireless Telegraphy Act 1949 by inserting new sections 13A and 13B. Section 13A allows OFCOM to require, by issuing a notice, any user of a wireless telegraphy station or apparatus to provide information relating to their use of the station or apparatus and any related matters to OFCOM for statistical purposes: the limitation on the purpose for which information may be required implements Article 11(1)(e) of the Authorisation Directive. Such a request must be proportionate (which

implements the requirement in Article 11(1), and OFCOM must explain why they are demanding that information and the statistical purposes for which the information will be used (which implements Article 11(2)). A person who fails to provide such information is guilty of an offence, although it is a defence to show that it was not reasonably practicable for him to comply within the period allowed, but that he took all reasonable steps to comply after that period had expired. It is also an offence for a person to provide information to OFCOM under this section that is materially false if he knows, or is reckless as to whether, it is materially false.

381. **Section 13B** imposes a requirement on OFCOM to publish a statement of their policy on the use of their powers under section 13A and the statistical purposes for which they will use any information gathered and to have regard to such statement for the time being in force when exercising the powers under section 13A.

Section 172: Contraventions of conditions for use of wireless telegraphy

382. Where OFCOM have reasonable grounds to believe that a wireless telegraphy licensee is or has been in breach of any term, provision, or limitation of that licence or any person is or has been in breach of any term, provision or limitation of an exemption under the proviso to section 1(1) of the Wireless Telegraphy Act 1949, they may notify that person accordingly, and allow him a specified period of time in which to make representations to OFCOM and to take steps to comply with the notified term, provision or limitation. The specified period of time must usually be one month, except, for example, in cases of repeated contraventions. This section implements Article 10(2) of the Authorisation Directive (see also the notes on sections 169 and 174).

Section 173: Meaning of “repeated contravention” in s. 172

383. This section defines a “repeated contravention” for the purposes of section 172. This section implements Article 10(2) and (5) of the Authorisation Directive.

Section 174: Procedure for prosecutions of wireless telegraphy offences

384. Proceedings for an offence under section 1 of the Wireless Telegraphy Act 1949 cannot be brought unless OFCOM have first notified the potential defendant under section 172 and considered any representations made by him (this implements Article 10(2) and (3) of the Authorisation Directive - see also the notes on section 172 above). However, OFCOM do not have to follow section 172 procedures in urgent cases, i.e. where there is a threat to public safety or health, or to national security, or where a person other than the defendant would suffer serious economic or operational problems (this implements Article 10(6) of the Authorisation Directive).

Section 175: Special procedure for contraventions by multiplex licence holders

385. This section gives OFCOM a power to impose fines for breach of terms, provisions or limitations falling within new section 1(2A)(b) or (c) of the Wireless Telegraphy Act 1949 (terms, provisions and limitations about service content) inserted by section 165. OFCOM may impose a fine under this section where they have notified the general multiplex licensee of their belief that he is in breach of the licence condition in question, provided that criminal proceedings have not already been commenced under the Wireless Telegraphy Act 1949 against that licensee in respect of that alleged breach. Once a fine has been imposed by OFCOM, *subsection (4)* provides that no criminal proceedings may be brought under the 1949 Act for that breach.

*a *general multiplex licence* is defined in *subsection (5)* as a wireless telegraphy licence issued for the purposes of a multiplex service, when no licence under the Broadcasting Act 1996 is held in respect of that multiplex service.

**multiplex service* is defined in *subsection (6)* as a service broadcast for general reception which provides, or is capable of providing, two or more digital services.

386. OFCOM must notify a general multiplex licensee on whom they decide to impose a fine, giving the reasons for their decision and allowing a reasonable period within which the fine must be paid.

Section 176: Amount of penalty under s. 175

387. This section provides that the maximum penalty that OFCOM may impose for a contravention of section 175 will be the greater of £250,000 and 5% of the relevant amount of gross revenue (which term is defined in section 177). *Subsection (3)* provides for the Secretary of State to amend by order the amount of £250,000. When determining the amount of a penalty to be imposed, OFCOM must have regard to their guidelines for fixing penalties published in accordance with section 392.

Section 177: “Relevant amount of gross revenue” for the purposes of s. 176

388. The relevant amount of gross revenue for the purpose of section 176 is to be calculated in accordance with a statement of principles made by OFCOM. Before making or revising a statement under this section, OFCOM must consult the Treasury and the Secretary of State. OFCOM must publish the statement or revision and send a copy to the Secretary of State, who must lay it before each House of Parliament.

Section 178: Proceedings for an offence relating to apparatus use

389. This section amends sections 11 and 12 of the Wireless Telegraphy Act 1949 in order to bring the mechanism for appeals against decisions of OFCOM about apparatus which causes or may cause undue interference (which are currently taken by the Secretary of State) into line with the new provisions for appeals in Chapter 3 of Part 2 of this Act.
390. The current arrangements for appeal to a tribunal established under section 9 of the 1949 Act, which is repealed by Schedule 19, have very rarely, if ever, been used.

Section 179: Modification of penalties for certain wireless telegraphy offences

391. *Subsections (1) and (2)* amend section 14 of the Wireless Telegraphy Act 1949. They alter the penalties and mode of trial for offences under sections 1 and 1A of the 1949 Act committed after the commencement of this section consisting of unlicensed transmission other than for broadcasting, or possession of apparatus for such transmission: these offences become triable summarily only, and the maximum penalties are now six months imprisonment and/or a fine not exceeding level 5 on the standard scale (currently £5,000). *Subsection (3)* amends section 79(1) of the Telecommunications Act 1984 so that, where authorised by warrant, apparatus and other property suspected of being used in connection with an offence under section 1A of the 1949 Act consisting of possessing apparatus for unauthorised transmission (whether broadcasting or not) may be seized and detained.

*As mentioned above, section 1(1) of the 1949 Act makes it an offence for any person to establish or use any station for wireless telegraphy or to install or use any apparatus for wireless telegraphy, otherwise than under and in accordance with a licence granted by the Secretary of State. Section 1A makes it an offence to possess or have control over any equipment with intent to use it in contravention of section 1 or knowing, or having reasonable cause to believe, that another person will so use it. The mode of trial and penalties for broadcasting offences are not affected by the 1949 Act.

Section 180: Fixed penalties for certain wireless telegraphy offences

392. This section gives effect to Schedule 6 to the Act, which introduces a fixed penalty regime for summary offences under the Wireless Telegraphy Act 1949.

393. **Schedule 6** allows OFCOM to send a “fixed penalty notice” to any person they believe has committed any summary offence under the 1949 Act. This notice must give particulars about the alleged offence, and will offer the alleged offender the opportunity to discharge any liability to conviction for the offence by payment of a fixed penalty within the specified period, which must be at least one month. The amount of the penalty may be prescribed in relation to that offence by regulations made by the Secretary of State, but must not be more than 25 per cent of the maximum fine on summary conviction). No proceedings may be brought for the alleged offence during the specified period, unless the alleged offender asks to be tried in accordance with the provisions of the notice. If the penalty is paid within the period specified in the notice, no further proceedings for that offence can be brought against the notified person.

Section 181: Power of arrest

394. This section applies the summary arrest powers contained in Schedule 1A to the Police and Criminal Evidence Act 1984 (which is being inserted by the Police Reform Act 2002) to offences under section 14(1) of the Wireless Telegraphy Act 1949. Section 14(1) provides that certain offences under the 1949 Act are triable either summarily or on indictment (“triable either way”). This section also amends the equivalent provision in the Police and Criminal Evidence (Northern Ireland) Order 1989.

Section 182: Forfeiture etc. of restricted apparatus

395. This section gives effect to Schedule 7, which replaces sections 80 and 81 of the Telecommunications Act 1984.
396. **Schedule 7** sets out the procedures which apply to the seizure and forfeiture of apparatus the custody or control of which is restricted under an order made under section 7 of the Wireless Telegraphy Act 1967. OFCOM are to notify each owner of such apparatus about its seizure and the grounds for that seizure. The principal change from the previous regime will be that restricted apparatus that has been seized will be deemed to be forfeited unless any person claiming that the apparatus is not liable to forfeiture gives notice of his claim in writing to OFCOM within one month of the date of the notice of seizure. In such cases OFCOM may take the matter to court. They must decide as soon as reasonably practicable after receipt of the claim either to do so or to return the apparatus to its owners.

*Section 7 of the Wireless Telegraphy Act 1967 provides for the Secretary of State to make orders restricting certain actions in relation to specified apparatus for the purpose of preventing or reducing the risk of interference. Restricted apparatus may be seized either under warrant under section 15 of the Wireless Telegraphy Act 1949 or in accordance with a power in section 79(3) of the Telecommunications Act 1984 to seize any apparatus or thing used in connection with offences specified in section 79(1) of that Act.

Section 183: Modification of definition of “undue interference”

397. This section modifies the definition of “undue interference” in section 19(5) of the Wireless Telegraphy Act 1949 (i) in implementation of condition 3 of Part B of the Annex to the Authorisation Directive, which refers to “harmful interference” as defined in Article 2(2)(b) of that Directive, and also (ii) in implementation of Article 7(2) of Directive 1999/5/EC on radio equipment and telecommunications terminal equipment, which refers to “harmful interference” as defined (in the same terms) in Article 2(i) of that Directive. The new definition provides that interference with wireless telegraphy will not be regarded as “undue interference” unless it is also harmful. “Harmful” interference means that the interference creates dangers or risks of dangers in relation to any radio service used for navigation or for any other purpose connected with safety, or that it degrades, obstructs or repeatedly interrupts lawful radio transmissions.

Section 184: Modification of definition of “wireless telegraphy”

398. This section gives the Secretary of State the power (exercisable by order, subject to the affirmative resolution procedure in both Houses of Parliament) to modify the definition of “wireless telegraphy” in section 19(1) of the Wireless Telegraphy Act 1949 so as to vary the upper frequency limit (currently 3,000 Giga-Hertz) of the electromagnetic spectrum to which the Wireless Telegraphy Acts apply. Although current technology does not permit the use for radiocommunications of frequencies anywhere near that limit, as technology progresses it may be necessary to raise the ceiling.

Chapter 3: Disputes and Appeals

399. The dispute provisions in the Act reflect the requirements of Articles 20 and 21 of the Framework Directive. Article 20 enables disputes under the Framework Directive and the other Communications Directives between persons providing electronic communications networks and electronic communications services in the same jurisdiction to be referred to OFCOM by either party. Article 21 of the Framework Directive stipulates the procedures to be followed when cross-border disputes arise. Sections 185 to 190 implement these provisions of the Directives accordingly.
400. The appeals mechanisms in the Act have been devised to meet the specific requirements of Article 4 of the Framework Directive. Article 4 of the Framework Directive, in effect, requires that any person who is affected by a decision of OFCOM or the Secretary of State which relates to networks or services or rights of use of spectrum must have the right of appeal on the merits against that decision to an appeal body that is independent of the parties involved. The Act therefore sets out a mechanism for appeal on the merits to the Competition Appeal Tribunal (CAT) against any decision (with specified exceptions) taken by OFCOM under Part 2 of the Act or the Wireless Telegraphy Acts 1949 or 1998, against certain specified decisions of the Secretary of State and against directions, approvals and consents pursuant to conditions under section 45. Once the CAT has reached its decision it must remit the decision under appeal to OFCOM, the Secretary of State or the person responsible for the direction, approval or consent as appropriate, with such directions, if any, as it considers necessary.

Section 185: Reference of disputes to OFCOM

401. This section enables parties to certain disputes relating to network access or dealing with obligations under Part 2 of the Act and other legislation relating to radio spectrum management to be referred by a party to OFCOM. The types of disputes that may be referred are: (i) network access disputes between different communications providers, between communications providers and persons making associated facilities available or between different persons making associated facilities available; (ii) disputes concerning the access-related conditions set under section 74(1) between communications providers or persons making associated facilities available and persons to whom that section applies or between different persons to whom that section applies; (iii) disputes between different communications providers dealing with obligations under Part 2 of the Act (other than disputes about obligations imposed by SMP apparatus conditions, the persistent misuse of networks or services, restrictions in leases and licences or offences relating to networks and services) or under other legislation relating to radio spectrum management.
402. Under *subsection (4)*, OFCOM may stipulate the manner in which a reference may be made by a party to the dispute. Any requirements imposed by OFCOM must be published in a notice. This section implements Article 20(1) of the Framework Directive.
403. [Paragraph 22](#) of Schedule 18 (transitional provisions) makes provision for OFCOM to deal with disputes arising under ‘old’ rules (notably, the Telecommunications (Interconnection) Regulations 1997). Such disputes will in effect continue to be resolved under the ‘old’ rules as regards their substance. This means that, for example,

only the latter's (more restricted) range of remedies can be applied; in particular, OFCOM cannot award costs or compensation. However, these disputes will be handled under the new *procedural* arrangements – so that, for example, the decisions will be appealable to the CAT, and must be taken within 4 months (rather than 6 as in the present rules) – (see subparagraph (1)). After the end of the transitional period (specified in section 408), OFCOM will only be able to deal with these disputes if they are satisfied that the circumstances are 'exceptional' – e.g. if it was not reasonable or possible for the issue in dispute to have been discovered before (subparagraph (2)(d)). Where they take a decision under these provisions, OFCOM must also take steps as soon as possible to decide whether or not to replace the direction giving effect to such a decision with a condition of entitlement under the new regime, and then to either introduce such a condition or else abandon the old direction.

404. Any direction given under regulation 6 before the Telecommunications (Interconnection) Regulations 1997 are revoked will be enforceable under paragraph 13 of Schedule 18. Paragraph 22 also provides (subparagraphs (5) to (7)) for directions made by Oftel to resolve disputes under the Interconnection Regulations to have continued effect even after the revocation of the Regulations by the Act. However OFCOM's powers to continue such directions are restricted to obligations which could be replaced by new-style obligations and are subject to the duty to review and either replace or abandon them as described above.

Section 186: Action by OFCOM on dispute reference

405. If a dispute is referred to OFCOM by a party under section 185, OFCOM must handle the dispute unless they believe that there are alternative means, which would promptly and satisfactorily resolve the dispute consistently with the European Community requirements in section 4. Where OFCOM conclude that it is appropriate for the referred dispute to be resolved by alternative means, they must inform the parties to the dispute of their decision as soon as practicable. However, if the dispute is not resolved by the alternative means within 4 months, under *subsection (6)* either party to the dispute may refer it back to OFCOM. Section 186 implements Article 20(2) of the Framework Directive.

Section 187: Legal proceedings about referred disputes

406. Subject to *subsection (8)* of section 190 (determinations bind the parties) and the terms of any agreement between the parties to a dispute, a reference of a dispute under section 185 or a reference of a dispute back to OFCOM under *subsection (6)* of section 186 is without prejudice to the rights of the person referring the dispute, the other parties to the dispute, OFCOM or any other person to bring or continue any legal proceedings dealing with the dispute. Any reference or reference back also does not prevent OFCOM from taking enforcement action in relation to the subject matter of the dispute. OFCOM, however, must comply with any court order requiring OFCOM to stay their handling of a dispute for the period of time specified by the court (which may be indefinite). The period of time specified by the court shall not be counted towards the 4 months that OFCOM have to resolve a dispute under section 185. Section 187 implements Article 20(5) of the Framework Directive.

Section 188: Procedure for resolving disputes

407. This section requires OFCOM to consider and determine any dispute referred under section 185 that they decide to handle or any dispute referred back to them under *subsection (6)* of section 186. Unless there are exceptional circumstances or it is reasonably practicable for OFCOM to make a determination in a shorter period of time, OFCOM must determine a dispute within 4 months of the date on which OFCOM determines that it is appropriate for them to handle the dispute or on which the dispute is referred back to them. OFCOM must send a copy of their determination and the reasons for their decision to each party to the dispute. Subject to commercial confidentiality,

OFCOM must also publish its determination. Section 188 implements Article 20(1) and (4) of the Framework Directive.

Section 189: Disputes involving other member States

408. This section requires OFCOM to consult with the regulatory authorities of other member States prior to handling, considering or making a determination of a dispute referred to them under section 185 or referred back to them under *subsection (6)* of section 186 if the dispute relates partly to anything done by means of an electronic communications network falling within the jurisdiction of those authorities.

*Under *subsection (2)*, a dispute falls within the jurisdiction of other regulatory authorities when it relates to the activities that are carried out by a party to the dispute in more than one member State or by different parties in different member States and the other regulatory authorities are the authorities for those activities in the other member State or one of the other member States.

409. Where a dispute involves other regulatory authorities, *subsection (5)* imposes a duty on OFCOM to agree with them, so far as practicable, the steps to be taken in relation to the dispute. *Subsection (6)* requires OFCOM to resolve the dispute within such period of time as may be agreed with the other regulatory authorities.

410. This section implements Article 21(2) of the Framework Directive.

Section 190: Resolution of referred disputes

411. When determining a dispute under Chapter 3 of Part 2 of the Act, OFCOM may:

- issue a declaration setting out the rights and obligations of each party to the dispute;
- fix terms or conditions of transactions between the parties to a dispute (except where the dispute relates to radio spectrum management legislation);
- impose enforceable obligations requiring the parties to enter into a transactions on terms or conditions set by OFCOM (except where the dispute relates to radio spectrum management legislation);
- direct a party to the dispute to make payments to adjust under- or overpayment (except where the dispute relates to radio spectrum management legislation);
- require a party to make payments in respect of costs and expenses incurred by another party;
- require a party to make payments in respect of costs and expenses incurred by OFCOM, where the dispute relates to radio spectrum management legislation or where it appears to OFCOM that the reference was frivolous or vexatious or that a party otherwise abused his right of reference under Chapter 3;
- take account of any decisions made by others and ratify any such decisions, where a dispute has been referred back under *subsection (6)* of section 186.

412. These powers to resolve a dispute do not prevent OFCOM from separately exercising their powers to (i) set, modify or revoke general conditions, specific conditions dealing with universal service, access, privileged suppliers or SMP, (ii) to modify or revoke wireless telegraphy licences or grants of recognised spectrum access; or (iii) to make, vary or revoke any regulations under section 1 or 3 of the Wireless Telegraphy Act 1949.

413. Any determination made by OFCOM is binding on the parties to the dispute; however, they may appeal against the determination in accordance with section 192.

Section 191: OFCOM's power to require information in connection with dispute

414. This section gives OFCOM powers to require parties to disputes and other persons to provide them with information that enables OFCOM to:
- decide whether they should handle a dispute;
 - determine whether they need to consult the regulatory authorities of other member States; and
 - consider and determine a dispute.
415. Information requested by OFCOM must be provided within the period specified by OFCOM. Requests for information under this section may be enforced by OFCOM using the procedure set out in sections 138 to 144. This section implements Article 5 and 21 of the Framework Directive.

Section 192: Appeals against decisions by OFCOM, the Secretary of State etc.

416. This section provides for appeal to the Competition Appeal Tribunal (CAT) against decisions (with specified exceptions) made by OFCOM under Part 2 of the Act and the Wireless Telegraphy Acts 1949 and 1998 and against decisions made further to a condition of entitlement set under section 45. The specified exceptions are set out in Schedule 8 and are either (i) decisions that do not have immediate effect on a person, but are of a legislative or quasi-legislative nature that require a further act or decision to be given effect, or (ii) decisions on matters which fall outside the scope of the Communications Directives. For example, a decision taken by OFCOM relating to the making or revision of a statement of policy on information-gathering under section 145 would not have immediate effect on any person. It would only be where OFCOM exercised their powers under section 135 to require the provision of information, in accordance with that statement, that there would be a decision that would actually have effect on any person. Another example is decisions under section 175 (special procedure for contraventions by multiplex licence holders), which fall outside the scope of the Directives.

*For the purposes of this section and the rest of this Chapter, a decision includes OFCOM's exercise of any power and any failure by them to grant an application or to exercise any power following a request (*subsection (7) and (8)*).

417. **Section 192** also applies to specific decisions of the Secretary of State given under section 5 (directions in respect of Part 2 functions) or section 156 (directions with respect to radio spectrum) (in both cases, excluding decisions specified by Schedule 8), under section 109 (restrictions and conditions subject to which the electronic communications code applies) or under section 132 (suspension or restriction of a communication provider's entitlement).
418. The right of appeal extends to any person affected by a decision to which this section applies. *Subsections (3) to (6)* provide that an appeal can be made only by sending a notice of appeal to the CAT, and prescribe the contents of the notice. This section and sections 193 to 195 implement Article 4 and 11(3) of the Framework Directive and Article 10(7) of the Authorisation Directive.

Section 193: Reference of price control matters to the Competition Commission

419. If an appeal under section 192(2) raises a price control matter specified in the rules of the CAT, the matter must be referred to the Competition Commission for determination in accordance with the rules and directions of the CAT and (subject to that) using such procedure as Competition Commission consider appropriate.

*A price control matter as defined in *subsection (10)* relates to the imposition of any form of price control by an SMP condition set under section 87(9), 92, or 93(3).

420. The Competition Commission must notify the CAT of a determination concerning a price control matter and the CAT must follow the determination of the Competition Commission unless it would be set aside under the principles of judicial review.

Section 194: Composition of Competition Commission for price control references

421. This section requires the Secretary of State to appoint not less than three members of the Competition Commission for the purposes of references of price control matters to them under section 193. In selecting a group to determine a matter referred to the Competition Commission under section 192, the chairman of the Competition Commission must select at least one, but no more than three, of the members appointed by the Secretary of State to be members of the group.

Section 195: Decisions of the Tribunal

422. The CAT is to decide an appeal on the merits, and then decide the appropriate action to be taken by the maker of the decision that is being appealed. Where an appeal is made against a decision under section 109 (restrictions and conditions subject to which the electronic communications code applies), the CAT must decide the appeal in accordance with the principles of good administration. The CAT's decision should be communicated to the original decision-maker along with directions regarding the implementation of the CAT's decision. However, the CAT cannot require the original decision-maker to take any action that he would not otherwise have the power to take.

Section 196: Appeals from the Tribunal

423. A decision of the CAT may be appealed on a point of law, with the permission of the CAT or the appellate court, to the Court of Appeal or, in Scotland, to the Court of Session. Such an appeal may be brought by a party to the original CAT proceedings, or by any third party who has sufficient interest in the decision.

Section 197: Interpretation of Chapter 3

424. This section provides for the interpretation of defined terms used in Chapter 3.