DATA (USE AND ACCESS) BILL

Memorandum from the Department for Science, Innovation and Technology to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee by the Department for Science, Innovation and Technology ("DSIT") to assist with its scrutiny of the Data (Use and Access) Bill ("the Bill").

2. This memorandum identifies the provisions of the Bill that confer new or amended powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

3. The Bill makes provision for a variety of measures relating to the use of and access to data.

4. Part 1 of the Bill provides powers to enable the establishment of "smart data" schemes. These schemes will enable the secure sharing of customer data, upon the customer's request, with authorised third-party providers, which can use the customer's data to provide services for the customer or business as well as sharing or publication of contextual business data.

5. Part 2 establishes a legislative structure for the provision of digital verification services ("DVS") in the UK, where providers of those services wish to be registered on a government register. For that purpose it makes provision for a trust framework of rules concerning the provision of DVS; rules which supplement the framework (known as supplementary codes); a publicly available register of persons providing DVS ("the DVS register"); and access for registered persons to a trust mark and an information gateway (through which public authorities may disclose personal information). It also amends existing powers to make subordinate legislation in the field of immigration law which will enable the Secretary of State to require employers and landlords who choose to carry out certain digital checks to use the services of organisations registered as complying with a supplementary code in the provision of those services.

6. Part 3 makes a number of amendments to the New Roads and Street Works Act 1991 and to the Street Works (Northern Ireland) Order 1995, in order to provide a legislative framework for the National Underground Asset Register.

7. Part 4 removes the requirement for paper registers of births and deaths and enables them to be registered electronically without a paper duplicate.

8. Part 5 of the Bill makes various changes to the UK's data protection framework, as set out in the UK GDPR and the Data Protection Act 2018 ("DPA 2018"), which regulates the processing of personal data. Part 5 includes changes in relation to processing for research purposes, the lawful grounds for processing personal data, automated decision-making ("ADM") and international data transfers. Changes to the law enforcement processing regime also include changes in relation to defining consent for processing, exemptions for legal professional privilege and national security. Changes to the intelligence services regime include provision enabling processing by "competent authorities" to take place under the intelligence services regime, instead of the law enforcement regime, in certain circumstances.

9. Part 5 also provides the Information Commissioner with additional enforcement powers and additional duties when exercising its powers and functions. This Part also makes changes to the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("the PEC Regulations"). These regulations include special rules which supplement the data protection legislation in relation to the processing of personal data through the use of cookies and for direct marketing purposes, including nuisance calls. The Bill makes some changes to these provisions, and also applies the DPA 2018 enforcement regime to the regulations, which are currently subject to the enforcement regime under the Data Protection Act 1998.

10. The existing data protection legislation provides for data protection principles, the grounds on which personal data may be processed, particular restrictions on processing sensitive personal data, rights of data subjects, obligations of data controllers and processors, and enforcement matters. The legislation provides for a regulator, the Information Commissioner, and sets out matters relating to its governance.

11. Part 6 establishes a statutory corporation, with a new governance structure, to replace the office of the Information Commissioner.

12. Part 7 contains other provisions about data, including:

    a. Provision concerning standards relating to the processing of information ("information standards") in relation to the health and adult social care sector enabling such information standards to be applied to providers of IT and related services. It does this by making clear that information standards published under section 250 of the Health and Social Care Act 2012 include standards relating to IT or IT services, and extending the persons to whom information standards may apply to persons who make available IT, IT services or information processing services using IT, in connection with the provision in, or in relation to, England, of health or adult social care.

    b. Granting a power to the Gas and Electricity Markets Authority to make regulations about the process for the grant of a Smart Meter Communication Licence under the Electricity Act 1989 and the Gas Act 1986 and to modify electricity and gas licence conditions and industry codes in consequence of the award of a Smart Meter Communication Licence.

    c. Extending an existing power in the Digital Economy Act 2017, which allows for data sharing that benefits households and individuals, to additionally allow data sharing to deliver public services that benefit businesses and other forms of undertaking.

    d. Amendments to the Online Safety Act 2023 requiring Ofcom to issue information notices requiring retention of data in certain circumstances.

    e. *C*onferring power on the Secretary of State to create a regime to allow researchers access to information held by certain providers of internet services, for the purposes of research into online harms.

    f. Amendments to the regime under which certain biometric data (fingerprints and DNA profiles) can be retained by law enforcement authorities for the purposes of national security.

    g. Amendments to Regulation (EU) No. 910/2014 on electronic identification and trust services for electronic transactions in the internal market (the eIDAS Regulation)

13. To support its policy objectives, the Bill includes a number of delegated powers. Many of these build on or have precedents in existing powers and frameworks in current legislation, as described in further detail in Section C. In the majority of cases regulation-making powers are subject to consultation requirements. In general terms, powers in relation to data protection and privacy laws and for information standards for health and adult social care build on existing frameworks. Powers in Part 2 of the Bill support the creation of a new framework and where appropriate precedents for these have been identified. Powers in Part 1 of the Bill replace an existing statutory framework with a new, enhanced one.

14. The majority of the delegated powers in the Bill are substantively the same as powers previously included in the Data Protection and Digital Information Bill which did not complete its passage before the end of the previous Parliament. The then Delegated Powers and Regulatory Reform Committee considered the powers in that bill before publishing its tenth report of the 2023-24 session. The government has considered the Committee's comments in that report and made some changes to the powers in response.

C. DELEGATED POWERS

15. The Bill includes the following delegated powers.

Clause 2(1), (3) and (4): require traders to provide their customers with improved access to their transactional data (customer data)

Power conferred on: Secretary of State and the Treasury

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure for first regulations and certain subsequent regulations - see paragraph 40

Context and Purpose

16. Before focusing on clause 2(1), (3) and (4), it is important to consider the purpose of the regulation-making powers in Part 1 of the Bill taken as a whole.

17. Those powers allow the government by regulations to require traders to provide their customers, or third parties authorised by them, in real time with information about the goods, services and digital content they receive, in accordance with requirements in those regulations such as in relation to how the data is securely to be provided or accessed. They also enable consequential provisions to ensure the effectiveness and usefulness of that data access. The provision of data access in this way is referred to as "smart data".

18. The objective of smart data is to improve data portability, beyond the limited right to data portability in the UK GDPR between traders and their customers, in order to overcome information asymmetry between them and thereby facilitate better outcomes for customers for instance in helping them to compare deals and switch suppliers.

19. Part 1 replaces existing regulation-making powers in sections 89-91 (supply of customer data) of the Enterprise and Regulatory Reform Act 2013 (ERRA) which enable the Secretary of State to require traders to provide customer data to a customer or to a person authorised by the customer at their request. The ERRA powers were introduced as a backstop should relevant businesses not develop voluntary programmes for the release of data to customers. The Department for Business, Innovation and Skills explained those powers in an Addendum to the delegated powers memorandum for that Bill (see the Committee's fourteenth Report for session 2012-13). Experience has shown such programmes have not generally been put in place and powers to put statutory programmes in place remain necessary.

20. Initially, it is intended to use the Part 1 powers to continue the open banking scheme and extend its benefits in an open finance scheme, which the government committed to support in its manifesto. The existing open banking scheme was established by the Competition and Markets Authority's (CMA) Retail Banking Market Investigation Order 2017 under its competition powers: it enables consumers and small businesses to share their bank and credit card transaction data securely with third parties who can provide them with applications and services; over 10 million customers now use it. The scheme was introduced as a temporary measure to deal with adverse effects on competition identified by the CMA in a market investigation: the Part 1 powers will enable the Treasury, with Parliamentary oversight, to put open banking on a long term footing. Open finance will enable extension of the benefits of open banking to a wider range of products including mortgages, pensions, investments and savings. Separately, the Department for Energy Security and Net Zero could use the powers to introduce a road fuel price data scheme subject to the government's response to the road fuels consultation which will be published in due course. This follows a CMA market study in 2023 which found that competition was not working as well as it should in the retail road fuel market and recommended a road fuel price data scheme that would improve price transparency and allow customers more easily to compare fuel prices.

21. The Part 1 powers will also allow the government, in future, to introduce smart data schemes in the context of other goods and services – where, further to consideration of (among other things) the matters to which it must have regard under clauses 2(5) and 4(5), and consultation under clause 22(3), the government concludes that it is necessary and proportionate to do so. The clauses largely reflect Part 3 of the Data Protection and Digital Information Bill of the 2022-3 and 2023-4 sessions the objective of which, further to a consultation in 2019, was to enact powers to introduce smart data schemes across the economy.

22. The "principal" power of clause 2 is subsection (1) which allows the Secretary of State or the Treasury, by regulations, to require traders supplying or providing goods, services and digital content and other persons holding the relevant data (collectively, "data holders") to provide their customers, or persons of a specified description who are authorised by a customer ("third party recipients"), with access to customer data. In practice, smart data schemes are most likely to provide access only to third party recipients but the clause does allow regulations to require direct provision of data to customers. Customer data (clause 1(2)) includes information relating to the goods, services or digital content supplied or provided to the customer including the price paid, their use or their performance and their quality.

23. Subsections (3) and (4) provide "ancillary" powers which ensure that the "principal" power in subsection (1) can be effective:

    a. Subsection (3)(a) confers a power to enable or require traders to collect and retain data. This ensures they have specific and accurate data to hand for disclosure.

    b. Subsection (3)(b) confers a power to enable or require a data holder to make changes to customer data including rectification of inaccurate data. This is necessary as, where a smart data scheme applies to a business customer, that customer might not be a data subject to which the UK GDPR rectification right applies.

    c. Subsection (4) confers a power to allow the third party recipient to take, on the customer's behalf, any action that a customer could take in relation to the goods, services or digital content supplied or provided by the trader ("action initiation"). Such actions might include accessing the customer's account, making a payment on the customer's behalf or negotiating an improved deal. This power is designed to facilitate the type of read and write access standards adopted under the open banking scheme and is also inspired by the action initiation (write access) provisions of the Customer Data Right in Australia. It

is critical to give customers the wherewithal to make effective use of their data once it is accessed.

24. Clause 3 illustrates how the clause 2 regulation-making powers may be used. That includes provisions for the following purposes: requirements as to how customers authorise third parties to act on their behalf, provisions restricting the persons who a customer may authorise to persons meeting specified conditions or who are accredited against those conditions by a decision-maker (subsection (2), and see further clause 6 on decision-makers); provisions about requests for data, including when a data holder must or may refuse to act on the request (subsection (3)); further requirements that may be imposed upon data holders, customers or third party recipients in relation to access or provision of data and action initiation and interface bodies, including requirements to use specified facilities and services and comply with specified standards (subsection (4)); requirements on data holders and third party recipients about collation and retention of records relating to provision of and access to data (subsection (5)); requirements on third parties who process the trader's customer data to assist the trader in complying with its obligations (subsection (6)); requirements on third party recipients including as to onward processing and disclosure of the data (subsection (7)); requirements on data holders and third party recipients to publish information including information making customers aware of their data rights (subsection (8)); and provisions for complaints handling and disputes resolution (subsections (9) and (10)).

25. Clause 6 (decision-makers) contains further provisions conferring powers relating to the appointment and functions of decision-makers to accredit those eligible to be authorised to receive customer data. It contains provisions, such as those relating to monitoring powers, which are aimed at ensuring the effectiveness of the decision-making function. It also requires the regulations to include provision about the rights of persons affected by the decision-maker's functions, which may encompass provisions for the review of the decision-maker's decisions and appeals to a court or procedures.

26. Critical to the secure and efficient operation of smart data schemes are requirements or rules to ensure the secure and up-to-date IT infrastructure in particular in relation to the interface between the IT systems of data holders and third party recipients. Clause 21(1)(f) makes allows regulations to make provision by reference to standards, arrangements, specifications or technical requirements as published from time to time and this clause is explained in more detail in paragraph 37 c. below. To allow for the establishment of bodies similar to the Open Banking Implementation Entity, which banking providers were required to set up under the existing open banking scheme, clause 7 (interface bodies) makes provision for the establishment, maintenance and regulation of bodies which can (inter alia) establish or manage interfaces, and set standards and make arrangements in relation to interfaces. Regulations may also require data holders and/or third party recipients to establish and fund an interface body.

27. Clause 2 applies in the context of trader-customer relationships. This is intended to reflect the disadvantages suffered by consumers in accessing information, but it allows the regulations to apply to business customers who, particularly in the case of small businesses, may suffer from some of the same disadvantages as consumers. Unlike ERRA section 89(9)(b), there is no specific regulation-making power to apply the regulations to business activities of a description specified in the regulations. Instead, clause 21(1)(a) and (b) would allow regulations to apply to customers generally (whether or not they are consumers as that term is defined in consumer protection legislation) or to a narrower category of customers as may be specified in the regulations for the smart data scheme in question.

28. In connection with clause 2, and Part 1 more generally, the Committee will want to note clause 21 (regulations under this Part: supplementary). The Committee's attention is drawn, in particular, to clause 21(1)(f) which allows regulations to make provision by reference to standards, arrangements specifications or technical requirements published from time to time by a specified person and 21(1)(g) which allows regulations to confer functions on a person including functions involving the exercise of a discretion. Clause 21 may also be applied in

relation to rules made by the Financial Conduct Authority (FCA) pursuant to Treasury regulations. The need for these provisions is explained below.

29. The Committee's attention is also drawn to clause 21(6), which confers a Henry VIII power in connection with provisions about the handling of complaints, dispute resolution, appeals and for provisions under clause 21(1)(h) (incidental, supplementary, consequential, transitory, transitional or saving provisions): this power is intended to enable regulations to extend, adapt or apply existing statutory complaints, disputes and appeals processes for the purpose of a smart data scheme and to allow regulations to make such consequential amendments as allow schemes to function effectively. In addition, clause 17 confers a power to amend section 98 of the Financial Services (Banking Reform) Act 2013. The need for this power is explained below.

30. Finally, clause 23(2) provides that the regulation-making powers in Part 1 may be exercised so as to make, in connection with other data provision in subordinate legislation, any provision that they could be exercised to make as part of, or in connection with, provision made under clause 2(1) to (4) or 4(1) to (4). This could enable, for example, the Treasury to amend existing open banking provisions in the Payments Services Regulations 2017, in addition to, or instead of, making separate provision under Part 1. Such regulations are treated as "data regulations" for the purposes of Part 1, to the extent they make provision described in clauses 2 to 7.

Justification for taking the power

31. The essential purpose of Part 1 is to update the government's regulation-making powers to allow the government to establish effective smart data schemes, in the near-term, for open banking, open finance and a potential road fuel price data scheme (subject to the government's response to the road fuels consultation) following a CMA market study in 2023.

32. However, the government considers it important to be able to establish smart data schemes in markets outside these sectors and the powers allow the government to establish smart data schemes in the context of goods, services and digital content of other kinds.

33. In doing so, the powers reflect the scope of the existing ERRA powers, in terms of an ability to impose requirements on persons who, in the course of a business, supply or provide goods or services of a description specified in regulations (section 89(1) and (2)(d)). The reference to digital content is added to reflect Part 1 of the subsequent Consumer Rights Act 2015 which contains separate provisions for the supply of goods, digital content and services.

34. As with ERRA, the regulation-making powers would allow the government to introduce smart data schemes in a broad range of markets, but to tailor each scheme to the circumstances of the sector to which it applies in respect of which provisions, such as the data to which the scheme applies, the persons on whom obligations are imposed and how data may be requested and accessed, will necessarily be detailed and vary according to the sector.

35. The government considers having a common framework of powers may facilitate cohesion between smart data schemes, for instance in terms of an appropriate degree of interoperability between them. Furthermore, seeking primary legislation for the establishment of each specific smart data scheme would significantly limit the feasibility of introducing such schemes. In any event, as evidenced by the complexity of the 2017 open banking order, the detail inherent in smart data schemes, would necessitate regulations and references to published standards and arrangements for each of those schemes even if introduced by a separate Act.

36. The intention is not to broaden the regulation-making powers, as compared with ERRA, in terms of the activities to which they may apply but to enhance and update them in terms of how they can be used, as the government considers that the ERRA powers would not enable smart data schemes with all the features required to be effective. The new powers principally

take into account the experience of the open banking scheme, but the government has also had regard to the recent enactment of powers in Part 4 of the Pension Schemes Act 2021 (which amends the Pensions Act 2004 and the Financial Services and Markets Act 2000 (FSMA 2000)) for pensions dashboards, an electronic communications service for individuals to access information about their pensions.

37. Within the scope of clause 2 and its ancillary clauses, key changes, as compared with ERRA, include:

    a. Collection / retention etc. of data (subsection (3)): to ensure the effectiveness of smart data schemes, it may be necessary to impose common requirements as to the collection and retention of data by traders in the sector in question.

    b. Action initiation (see subsection (4)): as noted, the ability of an authorised person to act on a customer's behalf is necessary for customers to be able to derive real benefit from access to their data.

    c. Technical requirements, standards and facilities: smart data schemes rely on the secure and rapid transfer of, or access to, customer data in usable formats. Accordingly, there is a critical need for adequate and up-to-date IT-related requirements, particular in relation to IT interfaces. Accordingly, clause 21(1)(f) allows the regulations to make provision by reference to standards, arrangements, specifications or technical requirements published from time to time. This clause reflects section 238A(5)(a) of the Pensions Act 2004 under which regulations may require the pensions dashboards service to comply with standards, specifications or technical requirements published from time to time by the Secretary of State, the Money and Pensions Service, or another person specified, or of a description specified, in the regulations. The addition of "arrangements" reflects clause 7, which envisages interface bodies making arrangements relating to, or to the use of, interfaces. This could include, for example, producing arrangements for scheme participants, to ensure standardised terms for the maintenance and use of interfaces for data sharing. In addition, to further facilitate and replicate the open banking scheme, clause 7 makes specific provision for the establishment and functioning of interface bodies.

    d. Decision-making and discretions: clause 21(1)(g), which largely re-enacts ERRA section 91(1)(b), is similar to the provision made in relation to pensions dashboards by section 238A(6) of the Pensions Act 2004 in which regulations may include provisions for determinations to be made by the Secretary of State, the Money and Pensions Service, or another person specified, or of a description specified, in the regulations. To allow for systems of accreditation of potential third party recipients, and procedural safeguards for those affected by their decisions, clause 6 makes specific provisions about decision-makers in that context.

    e. Traders and other parties: given that the provision of goods, services and digital content, and the processing of data in relation to them, can involve multiple parties, obligations may be placed on both the trader and on any other person who, in the course of business, processes the data (together, "data holder") (see clause 1(2)). Clause 3(6) envisages that regulations may require persons who process the trader's data to assist the trader in complying with the regulations.

    f. Data processing: it is considered prudent for regulations to be able to impose obligations on the processing and further disclosure of data by third party recipients (clause 3(7)); furthermore, reflecting section 238B(6) and (7) of the Pensions Act 2004 inserted by the Pension Schemes Act 2021, clause 20

(restrictions on processing and data protection) is added to clarify the relationship between the powers in Part 1 and data protection legislation.

g. Several ancillary provisions are introduced to enhance the effectiveness of smart data schemes including the powers to require data holders to publish information and for complaint and dispute resolution provisions.

38. The changes are balanced by significant strengthening of safeguards on the making of regulations, as compared with ERRA. Aside from the Parliamentary scrutiny of regulations, the clause 2 regulation-making power and related Part 1 provisions now require:

a. Substantive preconditions (see subsection (5)): in deciding whether to make regulations, the regulation-maker must (among other things) consider several specified matters. This applies to all regulations: by contrast, the statutory preconditions for exercise of the ERRA powers in section 89(7) do not apply in the case of regulations under section 89(2)(a)-(c) (supply of gas or electricity, mobile phone services and provision of current accounts and credit card facilities) and only apply in the case of other goods or services (section 89(2)(d)) (see section 89(7)).

b. Consultation (see clause 21(9)): there is a requirement of prior consultation of persons likely to be affected by the regulations, or their representatives, and sectoral regulators, as the Secretary of State or the Treasury consider appropriate, before the making of any regulations which are subject to affirmative scrutiny.

c. Periodic review: regulations will be subject to review, and the laying of a resulting report before Parliament, at least every five years. This is intended to ensure that smart data schemes are kept under review and that Parliament has ongoing oversight of smart data schemes after they are introduced. Clause 19(1) is explained further below.

Justification for the procedure

39. The affirmative resolution procedure is required in the case of the first regulations making provision under subsections (1), (3) and (4) about a particular description of customer data (see clause 22(1)(a)). This is designed to ensure that Parliament has an opportunity to debate the regulations whenever a smart data scheme is first introduced. By contrast, the ERRA powers only require the affirmative resolution procedure in the case of regulations to which section 89(2)(d) applies and for regulations containing enforcement provisions.

40. Subsequent regulations must also be subject to the affirmative resolution procedure (see clause 21(7)(c)-(e)) where those regulations make the requirements of existing regulations more onerous for data holders or interface bodies or where they contain other provisions for which the affirmative procedure is required including revenue -raising or enforcement provisions or amendments to any primary legislation.

Clause 4(1), (3) and (4): Power to require traders to publish, or provide their customers with access to, contextual information about their goods and services ("business data")

Power conferred on: Secretary of State and the Treasury

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure (apart from some amendment regulations)

Context and Purpose

41. Subsection (1) ensures that traders and other data holders may be required to publish, or provide customers or other persons of a specified description ("third party recipients") with, wider information about the goods, services and digital content they supply or provide that does not relate to individual customers ("business data": see clause 1(2)). This business data may include information on the availability of the trader's goods or services (for instance, geographic coverage), their use or performance, tariffs, key contractual terms and information about feedback. A key difference with clause 2 is that third party recipients do not need to be authorised by customers, since business data will not directly relate to a specific customer.

42. The publication or provision of wider business data is necessary to allow customers and prospective customers, to understand the relevant market and contextualise any customer data provided to them. This may, for instance, allow customers to compare alternative deals best suited to their means and needs.

43. As with clause 2(3)(a) in relation to customer data, subsection (3) provides a power to require traders to collect and retain specific kinds of business data.

44. Subsection (4) allows regulations to require traders and other data holders to provide business data to a public authority or a person appointed by it ("the public authority recipient") and to impose obligations, including publication and disclosure obligations (but not payment of the levy (clause 12)), on that public authority recipient as if it were a data holder. Instead of requiring traders to publish or provide business data directly to "end recipients", this model allows that data to be "centrally" collated, and then published or disclosed onwards, by the public authority recipient.

45. Clause 5 illustrates how the regulation-making power may be used and substantially mirrors clause 3. Clauses 6 (in relation to decision-makers) and 7 may also apply to regulations under clause 4.

46. The powers in clause 4 may be used in conjunction with a smart data scheme under clause 2, where the provision of business data supplements customer data, or separately for schemes limited to the publication or disclosure of business data.

Justification for taking the power

47. The ERRA powers do not extend to business data, and the expansion to cover this kind of data is necessary to enable continuation of certain aspects of the open banking scheme. It would also be necessary to enable smart data schemes such as a road fuel price data or similar schemes, the purpose of which would be to improve general information about what is sold to customers and prices.

Justification for the procedure

48. The powers to make regulations relating to business data are subject to the same parliamentary procedures in the same cases as those proposed for customer data as explained in the context of clause 2 so that the affirmative resolution procedure is required in the case of the first regulation-making provision under subsections (1), (3) and (4) about a particular description of business data (clause 22(1)(b)) and for subsequent regulations of the kind in clause 22(1)(c)-(e). The government considers that this level of scrutiny, the statutory conditions for making regulations and the requirements of consultation and periodic review provide appropriate safeguards, constraints and scrutiny on use of these powers.

Clause 8(1): Enforcement of regulations

Power conferred on: Secretary of State and the Treasury

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

49. This clause provides powers for regulations to provide for monitoring of compliance with the requirements imposed by, or under, regulations made under Part 1, and for their enforcement, by one or more specified public authorities ("enforcers").

50. In relation to monitoring compliance, regulations may confer investigatory powers on an enforcer (subsection (4)). These include powers to require provision of documents or information, powers to require an individual to attend at a place and answer questions, and powers of entry, inspection and seizure.

51. The investigatory powers are subject to restrictions in clause 9 (restriction on powers of investigation etc.): an enforcer may not enter a private dwelling without a warrant and there are restrictions on the information that the regulations may require a person to provide an enforcer, notably to maintain the privileges of Parliament, to maintain legal privilege and, subject to exceptions, to protect against self-incrimination. These restrictions represent considerably enhanced safeguards, as compared with ERRA section 90.

52. In relation to enforcement, subsection (5)(a) and (b) enable regulations to provide for an enforcer to issue a notice requiring compliance with regulations or requirements imposed under them (compliance notice); subsection (5)(c) enables regulations to provide for an enforcer to publish a statement that the enforcer considers that a person is not complying with the regulations, a compliance notice or any other requirement under the regulations which allows "naming and shaming" in, for instance, persistent or egregious cases.

53. In the case of such infringements or the provision of false or misleading information, the regulations may provide for an enforcer to impose a financial penalty (subsection (7)).

54. The possibility of regulations providing enforcers with powers to impose financial penalties is subject to the constraints in clause 10 (financial penalties) and clause 21(3) and (4). Clause 10(2) requires that (unless in the context of financial services clause 16 provides otherwise) the amount of a financial penalty must be specified in, or determined in accordance with, the regulations, or an amount not exceeding such an amount. Clause 21(3) prevents regulations (except where clauses 15 and 16 apply) from requiring or enabling a person to set the amount, or maximum amount of, a penalty or to set the method for determining that amount: but, under clause 21(4), regulations may make provision about that amount or method by reference to a published index and may require or enable a person to make decisions within the framework of a maximum amount or a methodology specified in the regulations. Where, in accordance with these parameters, the regulations provide an enforcer with a discretion to determine the amount of a penalty, clause 10(3)(a) requires the enforcer to publish, and have regard to, guidance about how the enforcer proposes to exercise that discretion.

55. Clause 10(3) requires regulations to include other procedural safeguards, for instance an enforcer must provide persons on whom it proposes to impose a penalty with notice of the proposed penalty and an opportunity to make representations (subsection (3)(c)-(f)) and rights of appeal to a court or tribunal (subsection (g)-(h)).

56. Clause 8(6) also allows for the creation of offences, punishable only with a fine, for the provision of false or misleading information or preventing an enforcer from accessing information or other material. These are designed to reflect broadly sections 144 and 148(2) of the Data Protection Act 2018.

Justification for taking the power

57. The government considers that the kinds of sanctions which regulations may provide for, including powers to provide for both compliance notices and financial penalties, are necessary and appropriate to deal with infringements of, and incentivise compliance with, the regulations. Regulation-making powers under section 238G of the Pensions Act 2004 in relation to pensions dashboards allow regulations, among other things, to provide for the Pensions Regulator to issue compliance notices and impose financial penalties.

58. Given that clauses 2 and 4 are of general application and can apply in a variety of contexts, the enforcement powers in this clause permit enforcement and sanctions appropriate to the smart data scheme in question. For instance, if sanctions are to be effective, it may be problematic for this clause and clause 10 to specify, or limit, the amount of the financial penalties that may be imposed as the appropriate amount may vary between the business sectors and activities to which schemes relate. However, use of both the investigatory powers (see clauses 8 and 9) and the power to impose financial penalties (clause 10) are subject to the statutory constraints explained so that provisions that the regulations can make should be circumscribed and procedurally fair.

Justification for the procedure

59. All regulations containing enforcement provisions must be subject to the affirmative resolution procedure (clause 22(1)(d)), which mirrors section 91(3)(b) of ERRA, and consultation (clause 22(3)). Subsequently, regulations under this clause are required to be subject to periodic review and report to Parliament.

Clause 11(1): Power to allow charging of fees

Power conferred on: Secretary of State and the Treasury

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

60. Clause 11(1)-(3) allows for regulations to provide that data holders, decision-makers, interface bodies, enforcers and other persons on whom duties are imposed or functions conferred by the regulations may require other persons to pay fees for the purpose of meeting expenses incurred (or to be incurred) in performing duties or exercising powers conferred under Part 1 regulations.

61. Subsection (4)(a) provides that regulations may only provide for fees to be payable by persons that appear capable of being directly affected by the performance of duties or the exercise of powers conferred by regulations under Part 1. Subsection (4)(b) provides that a fee can exceed the costs in respect of which it is charged: this is intended to ensure the efficacy and workability of the charging system, to allow the regulations to set fees by reference to “standard” amounts, or likely standard amounts, of costs rather than against the specific cost incurred in each particular case.

62. The amount of fees, or maximum amounts, must be specified in or determined in accordance with the regulations in the interests of certainty (subsection (5)). The regulations may allow for increases (subsection (6)) for instance to cater for inflation, subject to clause 21(3) and (4) and to certainty about the limits of any increase or how it is to be determined.

63. Clause 21(3) prevents regulations (except where clauses 15 and 16 apply in a financial services context) from requiring or enabling a person to set the amount, or maximum amount of, a fee or to set the method for determining that amount: but, under clause 21(4), regulations

may make provision about that amount or method by reference to a published index and may require or enable a person to make decisions within the framework of a maximum amount or a methodology specified in the regulations. Where, in accordance with these parameters, a person has a discretion to determine the amount of a fee, subsection (7) requires that person to publish information about the determination of that amount. Separate provision is made in respect of the FCA and interfaces linked to the financial services sector: the Treasury may delegate the ability to make provision about fees to the FCA (please see further explanation in respect of clauses 14 and 15 below).

Justification for taking the power

64. The principal objective of this clause, together with clause 12 (levy), is to ensure that smart data schemes are "self-funding" and revenue-neutral to the exchequer with enforcers and decision-makers able to recover the cost of the performance of their functions, which cannot be achieved by the ERRA powers.

65. The clause also allows for provision for the charging of fees by data holders: while it is intended that the provision of data should be free to customers and third party recipients acting on the customer's behalf, this clause would allow regulations to provide for charges for instance in the case of excessive and burdensome requests for data and is a reasonable safeguard in these cases.

Justification for the procedure

66. All regulations under this clause are subject to the affirmative resolution procedure and consultation (clause 22(1)(d) and (3)). It is considered that Parliament must have the opportunity to debate any regulations made under this clause bearing in mind the range of persons the clause might allow to impose, or require to pay, fees, the financial burden on those required to pay and the nature of the provisions that may be made under the clause. Subsequently, regulations under this clause are required to be subject to periodic review and report to Parliament.

Clause 12(1): Power to impose a levy

Power conferred on: Secretary of State and the Treasury

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

67. Clause 12(1)-(3) allows regulations to impose, or provide for a specified public authority to impose, a levy on data holders and third party recipients, for the purposes of meeting expenses incurred by decision-makers, interface bodies, enforcers and public authorities to which clause 4(4) applies in performing duties or exercising powers conferred under Part 1 regulations.

68. Subsection (4) requires that regulations may only provide for a levy to be imposed on data holders or third party recipients that appear capable of being directly affected by the exercise of some or all of the functions conferred by regulations under Part 1. If the regulations provide for a specified public authority to impose the levy, the regulations must provide how the rate of the levy and the period in which it is payable are to be determined (subsection (5)).

Justification for taking the power

69. The objective of this clause, together with clause 11 (fees), is to ensure that smart data schemes are "self-funding" and revenue-neutral to the exchequer which could not be achieved by the ERRA powers.

Justification for the procedure

70. All regulations under this clause are subject to the affirmative resolution procedure and consultation (clause 22(1)(d) and (3)), so that Parliament will have the opportunity to debate provisions for the levying of monies in the exercise of the powers of this clause. Subsequently, regulations under this clause are required to be subject to periodic review and report to Parliament.

Clause 14(1) and (5) - The FCA and financial services interfaces

Power conferred on: Treasury

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

71. Clause 14(1) gives the Treasury the ability to enable or require the FCA to make rules:

    a. requiring financial service providers to use a prescribed interface, comply with prescribed interface standards or participate in prescribed interface arrangements when providing or receiving customer or business data (where such data is required to be provided by or to the financial service provider under data regulations (clause 14(1)(a));

    b. requiring specified persons who, in the course of business, receive customer or business data from a financial services provider to use a prescribed interface, comply with prescribed interface standards or participate in prescribed interface arrangements (where such data is required to be provided to those persons under data regulations (clause 14(1)(b));

    c. relating to the composition, governance or activities of an interface body; the interface, interface standards or interface arrangements themselves; or their use (clause 14(1)(c) and (3)).

72. The interface-related requirements described in paragraph (c) may be imposed on interface bodies linked to the financial services sector (clause 14(3)(a)), persons who are required to set up an interface body linked to the financial services sector (clause 14(3)(b)), and persons who use an interface, or who comply with, or participate in interface standards or arrangements linked to the financial services sector, or are required to do so (clause 14(3)(c)).

73. Clause 14(6) allows the Treasury to empower the FCA to impose requirements on persons to whom FCA interface rules apply, either in response to a failure or likely failure by such person to comply with an FCA interface rule, or to advance a purpose specified by regulations.

74. Regulations made under clause 14 may also require or enable the FCA to make rules relating to fees. These rules may require persons falling within clause 14(3)(b) or (c) or financial services providers to pay fees to other such persons or the interface body (clause 15(6)) to meet the expenses of performing functions conferred on them by regulations or FCA rules made pursuant to regulations under clause 14. The rules may make provision about the

amount, or maximum amount, of fees (and of fee increases), including provision about how they are to be determined (clause 15(9)). Where relevant, the rules must require a person who determines the amount of fees (and fee increases) to publish information about how that amount is determined, in order to provide transparency.

75. Clause 15 places a number of limitations and safeguards on the clause 14 powers:

    a. the FCA cannot be empowered to require financial service providers to set up an interface body; that power may be exercised by the Treasury only (clause 15(2));

    b. the Treasury must set the FCA's purposes and matters to which it must have regard when exercising its powers (clauses 15(3)(a) and (b));

    c. the Treasury must make provision about the procedure for making FCA rules, including requiring consultation (clause 15(3)(c));

    d. the Treasury may impose other requirements, such as requiring the FCA to carry out a cost benefit analysis of their proposed rules, or to make clear the effect of rules, or to produce guidance as to how it proposes to exercise its functions (clause 15(4)); and

    e. the restrictions relating to the provision of information in clause 9 apply to the exercise of these powers.

Justification for taking the power

76. These powers reflect the central role of the FCA in financial services regulation in the UK. The Financial Services and Markets Act 2000 (FSMA 2000) is the foundational piece of financial services legislation, and it delegates the setting and enforcement of regulatory standards to the independent financial services regulators, including the FCA, that work within an overall policy framework and regulatory perimeter set by Parliament. This model was further strengthened by the Financial Services and Markets Act 2023. The FCA already regulates the conduct of all open banking scheme data holders.

77. It is consistent with the FSMA model that the Treasury is able to empower the FCA to make rules in relation to the open banking scheme, and any future scheme in the financial services sector. This model is well understood by the sector and provides for robust and transparent regulation which is also agile enough to reflect, and respond to, changes in what is a highly technical and dynamic area. This will be especially important in the context of open banking, where the regulation needs to be carefully calibrated and adaptable to ensure that the right incentives are in place to support innovation and investment, and to secure the continued development and success of the scheme. The CMA's Retail Banking Market Investigation Order 2017, together with the agreed arrangements for the Open Banking Implementation Entity, give an indication of how these powers are likely to be used, and the level of technical detail required. Regulations under clause 14 may provide that the FCA's powers include powers to do the things described in clause 21(1) (clause 15(10)). This is broadly consistent with the position under FSMA 2000, where section 137T makes similar provision in relation to the FCA's rule-making powers under that Act, and will enable the FCA to target its rules appropriately, for example by making different provision for different cases or purposes, or making consequential, transitional or saving provision where rules are changed. The potential to apply clause 21(1)(g), which allows for the conferral of functions, reflects the role of the interface body in open banking, allowing for additional flexibility should the FCA require the body to take certain discretionary decisions, such as on fees or pricing for interface arrangements. The Treasury will place appropriate limitations and safeguards on the FCA's powers, as required by clause 15. As noted above, the CMA has already established a clear model for regulatory oversight of the open banking interface body and scheme. It is the government's intention to transition this oversight from the CMA to the FCA, in order to put

the scheme on a longer-term footing. This will be facilitated by conferring these rulemaking powers onto the FCA.

Justification for the procedure

78. All regulations under clause 14 are subject to the affirmative resolution procedure and consultation (clause 22(1)(d) and (3)), so Parliament will have the opportunity to debate provisions granting FCA oversight in the exercise of the powers of this clause. Subsequently, regulations under this clause are required to be subject to periodic review and report to Parliament. In terms of parliamentary scrutiny, this arguably represents an improvement on the current position, where regulatory oversight is provided pursuant to a CMA order, which was implemented as a remedy under its competition powers.

Clause 16 – The FCA and financial services interfaces: penalties and levies

Power conferred on: Treasury

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

79. Clauses 16(1) and (2) makes clear that the Treasury, when exercising its powers to provide for the FCA to enforce requirements under FCA interface rules, may allow the FCA to either set the amount or maximum amount of a penalty, or to set the method for determining such an amount. This is subject to the safeguards that the Treasury must or may impose under clause 16(3), including that the FCA publish a statement of its policy with respect to the amount of the penalties.

80. Clause 16(4) allows the Treasury to impose, or provide for the FCA to impose, a levy on scheme participants to meet the FCA's expenses. A levy may only be imposed on persons that appear to the Treasury to be capable of being directly affected by the FCA's actions (clause 16(5)), and the power is subject to the same safeguards as described for clause 12(1) above.

Justification for taking the power

81. Clauses 16(1) and (2) are consistent with the FSMA model described above; in the FSMA model, the FCA has the discretion to determine the amount of the penalty, subject to it setting out its policy for such determination.

82. Clause 16(4) ensures that the FCA's expenses are met by the scheme participants to whom the regulation applies; this ensures that financial services smart data schemes revenue-neutral to the exchequer.

Justification for the procedure

83. All regulations under clause 16 are subject to the affirmative resolution procedure and consultation (clause 22(1)(d) and (3)), so that Parliament will have the opportunity to debate provisions made in exercise of the powers under this clause. Subsequently, regulations under this clause are required to be subject to periodic review and report to Parliament.

Clause 17 – The FCA and co-ordination with other regulators

Power conferred on: Treasury

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

84. Clause 17 (which has been added to the DUA Bill) enables the Treasury, by regulations, to amend section 98 of the Financial Services (Banking Reform) Act 2013 (FS(BR)A 2013). The regulations may amend the definition of "relevant functions" to add or remove a function conferred on the FCA by Part 1 regulations, and amend the definition of "objectives" so as to add or remove an objective of the FCA relevant to such a function. This is intended to ensure that the FCA's functions relating to financial services smart data schemes can be brought within scope of existing arrangements for co-ordination between the regulators of payment systems under Part 5 of FS(BR)A 2013. This co-ordination could be relevant, for example, where action initiation under such a scheme involves payments via a payment system which is regulated under Part 5.

Justification for taking the power

85. Section 98(2) of FS(BR)A 2013 places a duty on the regulators specified in subsection (1), including the FCA and Payment Systems Regulator, to co-ordinate the exercise of their relevant functions specified in subsection (5). Section 99 requires them to maintain a memorandum of understanding, describing in general terms the role of each regulator, and how they intend to comply with section 98. The power in clause 17 will enable the FCA's role and functions under Part 1 regulations to be reflected in these arrangements, as necessary. This can only be done once the regulations in question have been finalised and there is certainty as to the functions to be conferred and how they will interact with the other functions in section 98.

Justification for the procedure

86. Recognising that this is a power to amend primary legislation, it has been kept intentionally narrow in scope and is subject to the affirmative procedure and consultation. This will give Parliament the opportunity to consider the proposed amendments to section 98 of FS(BR)A 2013 when regulations are laid. Subsequently, regulations under this clause are required to be subject to periodic review and report to Parliament.

Clause 19(1) – Duty to review regulations

Power conferred on: Secretary of State and Treasury

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

87. Clause 19(1) requires that a person making regulations ("substantive regulations") under the other regulation-making powers of Part 1 must provide, by regulations, for the review of the provisions made by the substantive regulations at least every five years. The findings of the review must be published in a report, a copy of which must be laid before Parliament. Clause 19(8) ensures that regulations which merely amend substantive regulations which already contain a review clause do not themselves need to be reviewed.

88. The DPDI Bill set out a review requirement on the face of the Bill itself (clause 104 of the final version of that Bill) and it applied in relation only to data regulations under (what are now) clauses 2 and 4. By contrast, clause 19(1) requires provision for the review requirements to be made by regulations and it applies to regulations under all the regulation-making powers in Part 1. To avoid duplication of review requirements, it displaces section 28 of the Small Business, Enterprise and Employment Act 2015.

Justification for taking the power

89. Clause 19(1) ensures that smart data schemes are kept under periodic review and that Parliament retains oversight of smart data schemes after they are introduced. By setting out the requirement on the face of regulations, it is intended that the review requirement will be apparent to all those reading the regulations relating to the smart data scheme in question.

Justification for the procedure

90. The negative procedure is considered appropriate since the requirement is prescriptive and mandatory. In any event, the substantive regulations to which the review relates may be subject to the affirmative procedure in accordance with clause 22(1).

Clause 20 – Liability in damages

Power conferred on: Secretary of State and Treasury

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

91. Clause 20(1) allows the Secretary of State or the Treasury to provide that a public authority given functions under Part 1 is not liable in damages for anything done or omitted to be done in the exercise of those functions.

Justification for taking the power

92. Immunity from liability for damages is necessary in order to ensure that the relevant public authority can carry out its functions effectively. The provision replicates, in substance, the exemption from liability in damages for the FCA under paragraph 25 of Schedule 1ZA to the Financial Services and Markets Act 2000.

93. That exemption prevents the FCA from the need to defend vexatious claims that are a significant resource burden. The government considers that it is appropriate for it to be possible for regulations to provide for the FCA as well as other public authorities carrying out functions under Part 1 to have similar protection.

94. The immunity is not total: under subsection (3) a public authority would still be liable where an action or omission was in bad faith, or where incompatible with a right under the Human Rights Act 1998.

95. Regulations made under Part 1 will give affected parties alternative means of recourse: for instance, in respect of public authorities appointed as enforcers, clause 8(9) allows the Secretary of State or the Treasury to require enforcers to implement procedures for the handling of complaints.

Justification for the procedure

96. All regulations under this clause 20 are subject to the affirmative resolution procedure and consultation (clause 22(1)(d) and (3)) and, thereafter, periodic review, so that Parliament will have the opportunity to debate provisions granting immunity from liability in damages in the exercise of the powers of this clause. Subsequently, regulations under this clause are required to be subject to periodic review and report to Parliament.

Clause 28(1): Power to prepare the digital verification services (DVS) trust framework

Power conferred on: Secretary of State

Power exercised by: Publishing a Document

Parliamentary Procedure: None

Context and Purpose

97. Clause 28(1) confers a duty on the Secretary of State to prepare and publish the UK digital identity trust framework ("the trust framework"), a document setting out the rules that organisations providing digital verification services ("DVS providers") must comply with under Part 2; these include rules relating to a DVS provider and/or their conduct (subsection (2)). Proving compliance with the trust framework is essential to DVS providers being certified and then registered in the DVS register, maintaining that registration, and in turn enabling their use of the trust mark and information gateway.

98. Pursuant to clause 28(3), the Secretary of State must consult the Information Commissioner and anyone the Secretary of State considers appropriate when preparing this document. In accordance with subsection (4), that consultation can be undertaken before the coming into force of that section. The Secretary of State must, under jdvs02b, carry out a review of the trust framework at least every 12 months and in doing so must again consult the Information Commissioner and anyone the Secretary of State considers appropriate. The Secretary of State may revise and republish the trust framework, following such a review or otherwise (subsection (5)).

Justification for taking the power

99. This power is key to the Secretary of State providing a clear set of government-approved rules that DVS providers must follow if they wish to be registered on the DVS register and access the trust mark and information sharing gateway. Underpinning the trust framework in legislation not only obliges the Secretary of State to consult both the Information Commissioner and anyone the Secretary of State considers appropriate when preparing and publishing these rules, but also to do the same when carrying out a review of those rules, at least every 12 months. Bringing the trust framework within Part 2 also enables the Secretary of State to monitor the compliance of DVS providers with the high standards set out in the rules and to decide whether or not they should be registered, should continue to be registered and have access to, and continue to have access to the trust mark and the information gateway. Within this context, these rules will make it much easier for an individual who wants to use DVS to recognise trusted DVS providers within the digital identity market.

100. A non-legislative version of these rules is currently in operation and is published on gov.uk (the UK digital identity & attributes trust framework beta version (0.3)). It follows two

previous iterations of those rules and has been developed since 2020 by way of extensive engagement with stakeholders across industry, civil society and the public sector and via public consultation and piloting, with dozens of services already certified against this version.

Justification for the procedure

101. The particular nature of the rules that will be in the trust framework mean that they are best suited to oversight by way of the mechanisms set out in Part 2 and are not suitable for regulations.

102. Although there exist various disparate laws, standards and guidance which DVS providers should follow, by taking into account the Government's digital identity principles of privacy, transparency, inclusivity, interoperability, proportionality and good governance, the trust framework will aim to draw many of these together into a set of high standards with which DVS providers who wish to be registered on the DVS register must comply. In so doing it will therefore in the main draw on and often signpost existing (frequently highly-technical) standards, best practice, guidance and legislation. Amongst these are related Good Practice Guides, International Organization for Standardization technical standards, National Cyber Security Centre guidance, data protection legislation and associated Information Commissioner's Office guidance. The trust framework rules will include those relating to making products and services inclusive; business probity; responding to complaints and disputes; service and quality management; knowledge, information and risk management; information security; making products and services interoperable with others; encryption and cryptography; fraud management; and data protection.

103. As noted above, the non-legislative version of the framework has been developed through extensive engagement and the duty on the Secretary of State to prepare and publish the trust framework, and to review (and if applicable revise and republish) it in consultation with stakeholders, will allow the amendment of the rules to develop appropriately and informatively as the nascent digital identity market evolves. It will enable the Secretary of State to take into account matters such as technical changes, concerns of organisations or users within the industry and updates in practice and guidance. The requirement to also consult with the Information Commissioner as part of the preparation and review of the trust framework will require the Secretary of State to properly consider information rights in the public interest as the market matures. Together these requirements will ensure that DVS providers are being assessed against up-to-date rules and standards so that services are safely developed and deployed for the benefit of individuals who wish to use them. The Secretary of State will also be able to use information gathering powers in jdvs29 to assist with the review of the trust framework.

104. The power of the Secretary of State to revise and republish the trust framework at other times will also enable necessary and urgent changes to be made to the rules (without the need for consultation), for example to reduce a threat to security of privacy. This need may arise, for example, if a particular encryption standard were found to be no longer fit for purpose in ensuring data security or in mitigating cyber risks.

Clause 29(1): Power to prepare one or more supplementary codes

Power conferred on: Secretary of State

Power exercised by: Publishing a Document

Parliamentary Procedure: None

Context and Purpose

105. Clause 29(1) confers a power on the Secretary of State to prepare and publish one or more sets of rules which supplement the trust framework. These rules, referred to as supplementary codes, will respond to a specific sector or use case need and again cover rules which DVS providers must comply with under Part 2, and include rules relating to a DVS provider and/or their conduct (subsection (3)). Proving compliance with a supplementary code is required for DVS providers that wish to be certified against that code and have and maintain a supplementary note on the DVS register recording that they provide services in accordance with that supplementary code.

106. Pursuant to clause 29(4), the Secretary of State must consult the Information Commissioner and anyone the Secretary of State considers appropriate when preparing a supplementary code. In accordance with subsection (5), that consultation can be undertaken before the coming into force of that section. The Secretary of State must, under 31, at the same time as the review of the trust framework, carry out a review of any supplementary codes at least every 12 months and in doing so must again consult the Information Commissioner and anyone the Secretary of State considers appropriate. The Secretary of State may revise and republish a supplementary code following such a review or otherwise (subsection (6)).

Justification for taking the power

107. This power is key to the Secretary of State providing for government-approved rules to supplement the trust framework, where individual sectors or use cases have additional requirements exceeding those in that framework (for example where a sector has additional specific legislative or regulatory obligations). The Secretary of State will determine, through stakeholder engagement, whether a sector or use case has such additional needs and this power will ensure that when such a code is prepared and reviewed, it is done in consultation not only with anyone the Secretary of State considers appropriate but also with the Information Commissioner.

108. Underpinning the preparation and publication of a supplementary code with legislation not only ensures that any such code is developed and maintained according to the specific sector or use case need, but also places an obligation on the Secretary of State to monitor compliance by providers with its rules; only an organisation that meets that standard can request that the Secretary of State includes a note in the entry relating to that organisation recording that it provides services in accordance with a supplementary code. As with the trust framework, this will make it much easier for an individual who wants to use DVS to recognise specific trusted digital identity providers within a specific sector in the digital identity market.

Justification for the procedure

109. As with the trust framework, the particular nature of the rules in a supplementary code mean that they are best suited to oversight by way of the mechanisms set out in Part 2, particularly as they will in effect supplement the rules in the trust framework. Again, they are

likely to be highly technical and draw heavily on and signpost existing legislative requirements, standards, best practice and guidance specific to the particular sector or use case for which they were developed.

110. The duty on the Secretary of State to prepare, publish and review (and if applicable revise and republish) any supplementary codes in consultation with stakeholders, will allow amendment of these additional rules to develop appropriately and informatively according to that sector or use case. Again, the requirement to also consult with the Information Commissioner as part of that preparation and review will require the Secretary of State to properly consider information rights in the public interest. The Secretary of State will also be able to use information gathering powers in jdvs29 to assist with that review.

111. The power of the Secretary of State to revise and republish supplementary codes at other times (without the need for consultation) will also enable necessary and urgent changes to be made to the rules.

Clause 39(1): Fees for applications for registration, supplementary notes etc under jdvs12a, jdvs13, jdvs14 and jdvs15

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

112. Clause 39(1) provides a power for the Secretary of State by regulations, to make provision for or in connection with the payment of fees when a DVS provider applies to be registered in the DVS register (under clause 33); to have additional services provided by them added to their entry in the register (under clause 35); to have a supplementary note about services they provide in accordance with a supplementary code added to their entry (under clause 36) and to add services to the supplementary note (under clause 37); and in relation to continued registration in the DVS register.

113. Subsection (2) of this clause provides that the regulations may not require fees to be paid to anyone other than the Secretary of State. Subsection (3) requires the regulations to specify the amount or the maximum amount of a fee or provide for a fee or the maximum amount of a fee to be determined in accordance with regulations. Subsection (4) states that the regulations may provide for fees in excess of the administrative costs associated with applications for registration, and continued registration. Subsection (5) provides that the regulations may (among other things) make provision about certain matters in relation to the payment of fees, including provision conferring functions on the Secretary of State in relation to the matters in subsection (5)(a)-(e). Subsection (7) provides that regulations may make different provisions for different purposes and may make transitional, transitory or saving provision (for example, a fee could be set at a higher level for a certain type of DVS provider).

114. The governance of the UK's digital identity ecosystem, including the trust framework, will initially sit within the Department for Science, Innovation and Technology while an approach to a permanent location for governance is considered as the market develops and

matures. However, the Secretary of State may (under clause 42(1)) delegate these governance functions outside the Department to another public sector body, a regulator or to the private sector in future, including the ability to charge fees. The power to set out in regulations the amount, or the maximum amount of a fee, or the method to be applied in order to calculate a fee or maximum amount of a fee cannot be delegated, and neither can the ability to make provision regarding any interest to be paid on unpaid fees.

Justification for taking the power

115. The fee structure to be set is likely to be technical and complex, with different fees to be applied for different purposes as permitted by subsection (7). The fees can be set at a level which goes beyond purely recovering costs of administering the application to join or remain on the register itself (subsection (4)). If the fee were set at such a level as to go beyond cost-recovery, additional revenues are intended to fund wider governance functions that may be considered necessary within the digital identity market.

116. The digital identity market is nascent and the level of fees may need to be adjusted from time to time to keep pace with changes in the market. Given the technical, specific and fast-paced nature of the changes which may be required in the fee structure, we do not consider it would be appropriate to set out the fee structure in detail in primary legislation. Instead, the flexibility provided by regulations will help to ensure that the Government is able to respond swiftly to changes in the market, balance the interests of industry and the taxpayer, and support growth in this evolving market, whilst also ensuring opportunity for parliamentary scrutiny.

Justification for the procedure

117. Entry onto the DVS register is not mandatory for DVS providers in the UK, but entry onto the DVS register does confer certain advantages, such as access to the information gateway by which a public authority may disclose information to a registered DVS provider under clause 45 and the ability to use the trust mark under clause 50. Such advantages would undoubtedly serve as an incentive for DVS providers to apply to be registered in the DVS register. The fees that can be charged under clause 39 form part of this non-compulsory scheme which DVS providers can choose to partake in to provide a service to their users.

118. This power is limited in its scope and can only be used to make provision for or in connection with the payment of fees for applications under clauses 33, 35, 36 and 37 or in connection with continued registration. As such, the provision to be made in regulations will be limited and technical in nature, meaning that this power cannot be used for other purposes such as imposing additional duties on DVS providers. Further, whilst it is possible for some functions to be delegated to a third party in future, because of the way this provision has been crafted, the power to set the amount, or the maximum amount of a fee, or the method to be applied in order to calculate a fee or maximum amount of a fee cannot be delegated, and neither can the ability to make provision regarding any interest to be paid on unpaid fees.

119. In light of this, whilst the Government considers parliamentary scrutiny is required because of the ability under subsection (4) of clause 39 to set fees at levels which exceed those required for cost recovery, the negative procedure is considered to strike an appropriate balance between ensuring an appropriate level of parliamentary scrutiny and an appropriate use of parliamentary time.

Clause 49(1): Power to prepare and publish a code of practice about the disclosure of information

Power conferred on: the Secretary of State

Power exercised by: Publishing a Document

Parliamentary Procedure: Affirmative procedure (negative procedure where the Code is republished).

Context and Purpose

120. Clause 49 requires the Secretary of State to prepare and publish a code of practice about the disclosure of information by public authorities to registered DVS providers. It provides that a public authority must have regard to the code of practice in disclosing information relating to a registered DVS provider for the purposes of enabling a registered DVS provider to provide DVS for the individual under clause 45 (subsection (3)).

121. The code must be consistent with the data sharing code of practice prepared by the Information Commissioner under section 121 Data Protection Act 2018 and issued under section 125(4) of that Act (subsection (2)). The Secretary of State is able to revise and republish the code from time to time (subsection (4)).

122. When preparing or revising the code of practice under clause 49 the Secretary of State must consult the Information Commissioner, Welsh Ministers, Scottish Ministers, the Department of Finance in Northern Ireland, and any other persons the Secretary of State considers appropriate (subsection (5)). The consultation requirement may be satisfied by consultation undertaken before the coming into force of this section (subsection (6)).

Justification for taking the power

123. The code will provide guidance to public authorities on disclosing information to a registered DVS provider for the purpose of providing DVS to an individual, where that individual makes a request for those services. The code will provide practical guidance on the use of the powers in a way that is consistent with the data sharing code prepared by the Information Commissioner. The code does not create any new legal obligations.

124. In this context, it is appropriate for the power to be conferred on the Secretary of State and there are appropriate safeguards, such as the requirement for consultation before preparing or revising the code, which will contribute to ensuring that the code is drafted to a high standard. There is also strong precedent for powers to be taken for preparing and publishing codes of practice such as the code issued under section 43 of the Digital Economy Act 2017.

Justification for the procedure

125. Publication of the first version of the code will be subject to the affirmative procedure and require approval by both Houses of Parliament. Republication of the code will be subject

to the draft negative procedure with a requirement that before republishing the code a draft is laid before Parliament.

126. The code provides practical guidance to public authorities on the disclosure of information, including on matters such as data minimisation. It is considered that given the nature of the code, this procedure provides an appropriate level of parliamentary scrutiny.

Clause 52(1): Power to make arrangements for third party to exercise functions

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

127. This clause enables the Secretary of State to make arrangements for a person prescribed by regulations to exercise the functions of the Secretary of State under Part 2.

Justification for taking the power

128. The clauses in Part 2 create a legislative structure for the provision of DVS by registered DVS providers, with the aim of encouraging the development of secure and trustworthy DVS. The Secretary of State's governance functions in this regard, and the restrictions on the exercise of those functions, are set out on the face of the Bill.

129. These functions include a duty to prepare and publish the trust framework (clause 28) and one or more supplementary codes (clause 29) and to review these (clause 31); a power to withdraw a supplementary code (clause 30); a duty to establish and maintain a public register of DVS providers (clause 32), together with powers to register DVS providers (jdvs12(a)), and powers and duties to refuse such registration (jdvs12(b)); duties to register additional services (jdvs13) and supplementary notes and services (clauses 36 and 37); powers to determine how applications to the register should be made (clause 38); a power to make regulations relating to fees (clause 39); powers and duties to remove DVS organisations, their services and notes from the register (clauses 40 to 44); a duty to prepare and publish a code of practice about the disclosure of information by public authorities (clause 49); a power to designate a trust mark for use by registered DVS providers (clause 50); a power to require accredited conformity assessment bodies or registered DVS providers to provide information to the Secretary of State (clause 51); and a duty to prepare and publish a report on the operation of Part 2 (clause 53).

130. The responses to the public consultation identified that the governance of the UK's digital identity ecosystem, including the trust framework, should initially sit within the Department while the market is developing. Although during that period an approach to a permanent location for governance can be considered, the Secretary of State will need to react to the governance needs of the nascent digital identity market when deciding how and whether to exercise this power. In recognition of this evolving situation, the Government considers the Secretary of State should, if it becomes appropriate to do so, be able to delegate these governance functions (save for the power to make regulations, namely the

power to make provision for or in connection with the payment of fees under clauses 33, 35, 36 and 37 and in connection with continued registration in the DVS register, including the power to make provision about interest on any unpaid amounts).

131. It would be overly restrictive to identify a particular third party or to define a set of circumstances in which the Secretary of State should exercise the power under clause 52 to delegate functions under Part 2. This could lead to a situation where the governance needs of the digital identity market are not properly met, preventing the Government from realising its ambitions to grow this market in secure and trusted DVS. But in the future, it is possible that the Secretary of State will consider that trust and security can be better achieved by delegating some or all of these governance functions outside of the Department to another public sector body, a regulator or to the private sector.

Justification for the procedure

132. The regulations are subject to the affirmative procedure. This is considered appropriate given the nature of the functions to be delegated. While certain functions are administrative and operational in nature, for example, the duty to establish and maintain a register of DVS providers, there are functions, such as the duty to prepare and publish the trust framework and the power to remove DVS providers from the DVS register, that are substantive functions. Parliament should therefore have the opportunity to scrutinise and debate any proposals as to the third party to whom functions are to be delegated under this power. It is considered that the affirmative procedure provides the appropriate level of scrutiny.

Clause 55: Powers relating to verification of identity or status

Power conferred on: Secretary of State

Power exercised by: Orders/Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

133. This clause relates to powers of the Secretary of State to prescribe requirements under section 15(3) of the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act") and under the suite of powers to prescribe requirements in Chapter 1 of Part 3 of the Immigration Act 2014 ("the 2014 Act") which an employer or landlord respectively must comply with to obtain a statutory excuse against the imposition of a civil penalty for a contravention of section 15 of the 2006 Act or section 22 of the 2014 Act (including in circumstances in which an agent is responsible for the landlord's contravention under section 25 of that Act). It also relates to powers of the Secretary of State to prescribe right to work checks under paragraph 5(6)(b) and (c) of Schedule 6 to the Immigration Act 2016 that a person may be required to carry out to comply with the terms of an illegal working compliance order.

134. In particular, this clause elaborates on the parameters of related order/regulation-making powers by setting out the types of action that the Secretary of State may require employers, landlords, agents of landlords and persons specified in illegal working compliance orders to carry out, including by making provision that specifies documents provided to, and

generated by, a DVS-registered person and specifying steps and checks involving the use of services provided by such a person.

135. This clause defines a DVS-registered person as a person who is registered in the DVS register established under Part 2 of this Bill (see clause 32 on the DVS register) and confers a power on the Secretary of State to further define a subset of DVS-registered person by describing/prescribing a description of DVS-registered person which has a supplementary note next to its entry in the DVS register recording that the person provides, in accordance with an applicable recognised supplementary code, specified/prescribed services (see clause 36 on supplementary notes).

136. These powers will enable the Secretary of State to define a sub-set of DVS-registered person in subordinate legislation made under them by reference to a statutory register that changes from time to time. Whether or not a DVS-registered person would fall within that subset will ultimately be determined by whether, at the time the check is carried out, a supplementary note is contained next to its entry on that register which relates to the applicable set of services specified/prescribed in those orders/regulations.

Justification for taking the power

137. DVS organisations may be added to, or removed from, the register (see clauses 40 and 41 on the duty and power to remove a person from the DVS register). Moreover, a DVS-registered person may have a supplementary note added or removed from the DVS register (see clause 43 on the duty to remove supplementary notes from the DVS register). The Government considers that there is a compelling justification for enabling flexibility in these circumstances as, without it, subordinate legislation would need to be made every time there is a relevant change to the register. It would also mean that a DVS-registered person could continue to provide digital verification services even after it is removed from the register, or even after a supplementary note confirming its compliance with the applicable approved supplementary code is removed, up until the point that amending regulations/orders could be brought into force to remove those organisations from scope of the orders/regulations made under the powers being amended. The orders/regulations need to be able to keep pace with changes made to the DVS register in real-time to be effective and achieve the policy objective.

Justification for the procedure

138. The amendments do not alter the parliamentary procedure for the regulation/order-making powers they amend. Regulations/orders made under these powers will be subject to negative resolution procedure. The regulation/order-making powers are largely technical and operational in nature and so it is considered that the negative resolution procedure provides an appropriate level of Parliamentary scrutiny.

The National Underground Asset Register

139. Clauses 56 to 60 of and Schedules 1 and 2 to the Bill set out a new legal framework which will put the National Underground Asset Register ("NUAR") on a statutory footing for England and Wales, and Northern Ireland. NUAR is a digital map that will improve both the

efficiency and safety of underground work by providing secure access to location data about pipes, cables and other types of apparatus installed in streets.

140. These clauses build upon and modernise existing provision made by the New Roads and Street Works Act 1991 ("the 1991 Act") in England and Wales and the Street Works (Northern Ireland) Order 1995 (S.I. 1995/3210 (N.I. 19)) ("the 1995 Order").

141. In relation to England and Wales, section 79(1) and (2) of the 1991 Act currently impose duties on "undertakers" (as defined by sections 48(5) and 89(4) of the 1991 Act in relation to apparatus, or in a context referring to having apparatus in a street) to make and maintain records of apparatus they install or locate in a street. Section 79(3) currently imposes a duty on undertakers to make their records available for inspection, free of charge, to certain persons (including those who have authority to execute works in the street).

142. Equivalent provision is made, in relation to Northern Ireland, by articles 39(1) and (2) of the 1995 Order, with article 4 providing the relevant definition of "undertakers" for these purposes. Similarly, article 39(3) imposes an equivalent duty on undertakers to make their records available for inspection.

143. An undertaker that fails to comply with their duties under section 79 or article 39 (as the case may be) commits an offence and is liable on summary conviction to an unlimited fine (in England and Wales) or a fine not exceeding level 5 on the standard scale in Northern Ireland). Their failure can also give rise to liability to compensate any person in respect of damage or loss incurred by that person in consequence of the failure. Section 79(4) and (5), and article 39(4) and (5), provide further detail in respect of these matters.

144. Existing powers in section 79 of the 1991 Act have been exercised so as to make two sets of regulations. The first, the Street Works (Records) (England) Regulations 2002 (S.I. 2002/3217) were made by the Secretary of State in relation to England. The second (and near identical) were the Street Works (Records) (Wales) Regulations 2002 (S.I. 2005/1812), made by the National Assembly for Wales in relation to Wales. Both sets of regulations prescribe the form of records of apparatus placed in streets to be kept by undertakers, make provision as to the use of electronic records, and set out exceptions to the duty to keep a record in certain cases. Equivalent provision has been made for Northern Ireland, through the exercise of existing powers in article 39(1) and (2) of the 1995 Order, by the Street Works (Records) Regulations (Northern Ireland) 2004 (S.I. 2004/276).

145. For England and Wales, section 80 of the 1991 Act would – if in force - impose duties on persons executing works of any description in a street to, depending on the circumstances, notify an undertaker or the relevant street authority or take other specified steps where they identify missing or incorrect information in existing records, or where they find apparatus and cannot ascertain its owner. As with section 79, a failure to comply with duties under section 80 is a criminal offence, albeit one that is punishable by a fine not exceeding level 4 on the standard scale. Neither section 80, nor amendments made to that section by the Traffic Management Act 2004, have yet been commenced.

146. Similar provision is made for Northern Ireland by article 40 of the 1995 Order, with a failure to comply with such duties also being a criminal offence punishable by a fine not exceeding level 4 on the standard scale. As is the position for section 80 of the 1991 Act, article 40 of the 1995 Order has not been commenced, either.

147. In practice, the approach provided for in the 1991 Act and the 1995 Order gives rise to a number of difficulties and has not kept pace with more recent technological developments. Persons looking to execute works in the street typically have to contact multiple different undertakers to obtain relevant information that each individually holds before works can commence, or to make use of third-party intermediaries to assist with this process. The information provided might be in different formats, or in a combination of hard copy or electronic documents.

148. NUAR seeks to address these issues by providing a single source of information for persons looking to execute works in the street. An important change being made by these clauses is the repeal of section 79(3) of the 1991 Act and article 39(3) of the 1995 Order so that undertakers will no longer be required to make their records available for inspection. Instead, this requirement will be replaced with a new duty to share information from those records with the Secretary of State. In turn, the Secretary of State will be required to keep a register - NUAR - that will include this information provided by undertakers. The Secretary of State will also be able to then make information kept in NUAR available to other persons.

149. To facilitate this new approach, and as set out in more detail below, the Secretary of State will be empowered to make regulations setting out exemptions to these requirements, or to specify the type of information that undertakers are to enter into NUAR (and the form and manner in which it must be entered). The Secretary of State will also be empowered to set out in regulations who and in what circumstances a person should be provided with access to information kept in NUAR. Additional provision (as discussed below) is also made which imposes a duty on certain persons executing works in a street to inform an undertaker of any information recorded in NUAR which is in fact incorrect, or where they identify information that is missing from NUAR.

150. Provision is also made through these clauses, and as set out in more detail below, for the Secretary of State to make regulations setting out a scheme under which undertakers having apparatus in a street will be required to pay fees to fund the running costs of NUAR, and can be required to provide information relating to this new fees scheme. These requirements will be enforced through a power conferred on the Secretary of State to impose monetary penalties for non-compliance. In addition, provision is also made for the Secretary of State to enter into arrangements with one or more other persons to exercise certain functions of the Secretary of State, with a requirement that any such persons be prescribed in regulations.

151. Currently, regulation-making powers in section 79 of the 1991 Act are exercisable by the Welsh Ministers in relation to Wales (noting that Part III of the 1991 Act extends and applies to England and Wales). However, in order for NUAR to operate effectively across England and Wales, it is necessary to make provision to enable a consistent approach to be taken across both of these parts of the United Kingdom. As such, whilst the Welsh Ministers will retain their existing powers under Part III of the 1991 Act, provision is made so that these existing powers can also be exercised by the Secretary of State; these existing powers will – in the future – be exercisable concurrently by the Secretary of State or the Welsh Ministers. These clauses will, as set out below, also confer a number of new regulation-making powers; where such powers are solely exercisable in relation to NUAR, they are conferred solely on the Secretary of State (who can make provision in respect of England and Wales). Where such powers are exercisable in relation to NUAR, but could also be used for other purposes

("mixed purpose powers"), they are exercisable by the Secretary of State in relation to England and Wales and are also concurrently exercisable by the Welsh Ministers in relation to Wales.

152. A similar approach is also taken in relation to Northern Ireland; the existing regulation-making powers in article 39 are retained by the Department for Infrastructure in Northern Ireland, whilst provision is made for these powers to also be exercised by the Secretary of State. Further, new NUAR-specific powers will be exercisable by the Secretary of State in relation to Northern Ireland, whilst new mixed purpose powers are exercisable concurrently by the Secretary of State and the Northern Ireland Executive (i.e. the Department for Infrastructure), in relation to Northern Ireland.

153. The end result delivers the policy intention of enabling provision to be made for a consistent approach across all three parts of the United Kingdom through the Secretary of State being empowered to make regulations in respect of England, Wales and Northern Ireland.

154. As set out below, wherever the Secretary of State proposes to make regulations in exercise of any of these powers, they must first consult the Welsh Ministers and/or the Department for Infrastructure in Northern Ireland (as the case may be), so as to ensure their views are taken into account. In addition, before exercising certain powers (as set out below), the Secretary of State must also consult such representatives of persons likely to be affected by the regulations, and such other persons, as the Secretary of State considers appropriate.

155. The practical effect of these clauses is that a person looking to execute works in a street will be able to access relevant information from a single, digital source. Such an approach will be significantly more efficient and bring considerable economic benefits. It will also help to reduce inadvertent "asset strikes" on apparatus already buried underground and to reduce disruption for citizens and businesses.

Clause 56(1): New section 106A(3) - National Underground Asset Register
Clause 58(3): New article 45A(3) – National Underground Asset Register

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

156. A key aspect of the new legislative framework for NUAR is the requirement, imposed by new section 106A to be inserted into the 1991 Act, and new article 45A to be inserted into the 1995 Order, for the Secretary of State to keep a register of information relating to apparatus in streets in England, Wales and Northern Ireland. This register is referred to in the Act as "NUAR". NUAR will be the central depository of information into which, as discussed elsewhere in this memorandum, certain persons will be required to enter information. It is envisaged that NUAR will be a digital register and the information within it will be used to form a digital underground map displaying information about apparatus "in" a

street. In accordance with these new legislative provisions, various persons will be able to access information in NUAR. Section 106A(3) and article 45A(3) each confers a power on the Secretary of State to prescribe, through regulations, the form and manner in which NUAR must be kept.

157. New section 106I(2), or new article 59(A2) and section 17(5) of the Interpretation Act (Northern Ireland) 1954, (as the case may be), apply in respect of regulations made in exercise of this power. As a result, such regulations may make different provision for different purposes, and may also make supplementary and incidental provision.

158. New section 106I(4) and new article 59(A1) require the Secretary of State, before making regulations in exercise of this power, to consult the Welsh Ministers and the Department for Infrastructure in Northern Ireland. This requirement may be satisfied by consultation undertaken before the day on which the Act is passed as provided for by clause 60.

Justification for taking the power

159. As noted above, new section 106A and article 45A imposes a duty on the Secretary of State to keep a register. The Government does not consider it appropriate to specify the detail of how this register should be kept, or in what form, in primary legislation; specific aspects of these matters will be further developed as part of the detailed implementation of this provision in due course, taking into account a wide range of practical considerations. In addition, it is important that the form and manner in which NUAR is kept can change over time so as to adapt to new technological developments or any further expansion of NUAR in order to maximise the public benefit of the information it contains.

160. The Government therefore considers it appropriate for the form and manner in which NUAR is kept to be provided for in regulations. The specific nature of the provision likely to be made, and the requirement for flexibility as set out above, are such as to render it inappropriate to include such provision in primary legislation. The power is limited in scope and does not affect the main duties of the Secretary of State, set out in section 106A(1) and (4) and article 45A(1) and (4). These duties are to keep a register and to make arrangements so as to enable any person who is required, by a provision of the 1991 Act or by the 1995 Order, to enter information into NUAR to have access to NUAR for that purpose.

Justification for the procedure

161. By virtue of new section 106A(5) (read with new section 106I(6)) of the 1991 Act, and new article 59(1C) (read with new paragraph (1H)) of the 1995 Order), regulations made by the Secretary of State in exercise of this power will be subject to the negative procedure. The negative procedure is considered appropriate because, as set out above, the power is limited in its scope and can only be used to set out the form and manner in which the Secretary of State must keep the register. The provision to be made in regulations will be limited and technical in nature and this power cannot, for example, be used to impose any additional duties on other persons. As such, the Government believes this procedure to strike an appropriate balance between affording a degree of Parliamentary scrutiny and making proportionate use of Parliamentary time.

Clause 56(1): New section 106B – Initial upload of information into NUAR
Clause 58(3): New article 45B – Initial upload of information into NUAR

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and purpose

162. As detailed elsewhere in this memorandum, many of the new provisions relating to NUAR concern how the register will be populated with information, and how the register will operate, in the future. At the core of this is the requirement, in new section 79(3B) of the 1991 Act and article 39(3B) of the 1995 Order, that when an undertaker records or updates information as required by section 79(1) or new section 79(1B), or article 39(1) or 39(1B) (as the case may be), the undertaker must then enter the recorded or updated information into NUAR. Additional powers, through which further provision can be made in respect of new section 79(3B) and article 39(3B) are considered elsewhere in this memorandum.

163. However, for NUAR to be a reliable and comprehensive source of information it is crucial that, from the outset, it also contains *existing* information which is already held in undertaker's records. New section 106B(1) and new article 45B(1), require undertakers to enter relevant information, already held in their records, into NUAR. In practice, this will involve undertakers having to enter the relevant information held in their records as of a fixed date, referred to in these provisions as the "archive upload date". The entry of such information into NUAR will have to take place within a fixed period, referred to in these provisions as the "initial upload period". As discussed below, in relation to both England and Wales, and Northern Ireland, five separate powers are conferred on the Secretary of State that will apply to these requirements.

164. The first power is found in new subsection 106B(1)(b) and new article 45B(1)(b). As provided for by the new subsection (3B) inserted into both section 79 of the 1991 Act and article 39 of the 1995 Order, undertakers will be required, on an ongoing basis, to enter two types of information into NUAR, namely information recorded pursuant to the requirement in section 79(1) or article 39(1), and such "other information" as may be prescribed, as per new section 79(1B) and new article 39(1B). Undertakers will also be required, when they update such information, to enter that updated information into NUAR.

165. To ensure the effective operation of NUAR, the intention is for two types of information to *also* be included in the "archive" of information that will need to be entered into NUAR before the end of the initial upload period; provision is made for this in the new section 106B(1) and new article 45B(1). These two types of information will be information recorded pursuant to the requirement in section 79(1) or article 39(1), and "other information". The Secretary of State may, by regulations, set out a prescribed description of such "other information" pursuant to the power conferred by new section 106B(1)(b) and new article 45B(1)(b). Being able to "describe" such information will be necessary in this context, given the need to capture information that is already in an undertaker's records.

166. The approach therefore aligns with that taken in the new section 79(3B) and new article 39(3B), in relation to the entry into NUAR of information on an ongoing basis, with a standalone power being taken to prescribe "other information" specifically for the purposes of the "initial" upload of information to NUAR.

167. The four other powers addressed in this group all interact with and related to this duty in new section 106B(1):

a. New section 106B(2) and article 45B(2) empowers the Secretary of State to prescribe, by regulations, cases in which the duty under new section 106B(1) and article 45B(1) (that is, the duty to enter "archive" information into NUAR before the end of the initial upload period") does not apply. This power reflects a similar, existing approach in section 79(1) of the 1991 Act and article 39(1) of the 1995 Order, and the approach set out in respect of new section 79(1B) and article 39(1B). It provides a means through which the Secretary of State can, upon identifying circumstances where the imposition of the new requirements in subsection 106B(1) and article 45B(1) would be inappropriate or unduly burdensome, make provision to address this.

b. New section 106B(3) and article 45B(3) enables the Secretary of State to prescribe, through regulations, the form and manner in which information must be entered into NUAR under new section 106B(1) and article 45B(1).

c. New section 106B(8)(a) and article 45B(7)(a) requires the Secretary of State to specify, by regulations, a date as the "archive upload date" (i.e. the date on which a "snapshot of the undertaker's information must be taken), which will help determine the information to be entered into NUAR before the end of the "initial upload period".

d. New section 106B(8)(b) and article 45B(7)(b) requires the Secretary of State to specify, by regulations, a period beginning with the archive upload date as the "initial upload period", by the end of which the "snapshot" of information must have been entered into NUAR.

168. In line with the existing approach in section 79 of the 1991 Act and article 39 of the 1995 Order, a failure to comply with a duty in new section 106B or new article 45B is a criminal offence, triable summarily and punishable by a fine in England and Wales and a fine not exceeding level 5 on the standard scale in Northern Ireland.

169. New section 106I(2), or new article 59(A2) and section 17(5) of the Interpretation Act (Northern Ireland) 1954, (as the case may be) apply in respect of regulations made in exercise of this power. As a result, such regulations may make different provision for different purposes, and may also make supplementary and incidental provision.

170. New section 106I(4) and new article 59(A1) requires the Secretary of State, before making regulations in exercise of this power, to consult the Welsh Ministers and the Department for Infrastructure in Northern Ireland. This requirement may be satisfied by consultation undertaken before the day on which the Act is passed as provided for by clause 60.

Justification for taking the powers

171. The first power, as provided for by new section 106B(1)(b) and article 45B(1)(b), is equivalent to the power in the new section 79(1B) of the 1991 Act and article 39(1B) of the 1995 Order, to prescribe "other information" that must be recorded by an undertaker when one of the events listed in subsection/paragraph (1B)(a) to (d) occurs. The nature of the information required to be included in the initial upload of information to NUAR is likely to be technical and specific in nature, potentially relating to particular aspects or attributes of a range of different types of apparatus, such that regulations are considered to be a more appropriate legislative vehicle than seeking to set out such matters in primary legislation. Following Royal Assent of the Bill, as detailed work progresses to prepare for the full implementation of NUAR in accordance with these new legislative provisions, additional information which undertakers already have in their records – beyond that already specified in section 79(1) of the 1991 Act and article 39(1) of the 1995 Order – is likely to be identified as useful to be included in the "archive" information that must be entered into NUAR.

172. It is necessary to include, in new section 106B(1)(b) and new article 45B(1)(b), a separate power to that in new section 79(1B) and article 39(1B) for these purposes. The purposes of these two powers, although related in some ways, is different; through the latter power the Secretary of State can specify information that undertakers are to record (and then enter into NUAR) from the point at which these new requirements come into force. However, the former power enables the Secretary of State to describe existing information, not required to be recorded by section 79(1) and article 39(1B), but nevertheless already recorded by undertakers (as at the archive upload date) and entered into NUAR before the end of the initial upload period. In the Government's view, these different purposes, together with the greater clarity provided by such an approach, warrant the conferral of separate regulation-making powers on the Secretary of State.

173. The second power, in new section 106B(2) and article 45B(2), empowers the Secretary of State to, through regulations, prescribe cases in which the duty in new section 106B(1) and article 45B(1) does not apply. This reflects the wider approach, which already exists in section 79 of the 1991 Act and article 39 of the 1995 Order, and which is being included in respect of the new section 79(1B) and 79(3B), and article 39(1B) and 39(3B) , whereby provision can be made so that duties to record or share information do not apply. Similar reasons to those set out elsewhere in this memorandum, in respect of the new section 79(1B) and 79(3B) and article 39(1B) and 39(3B), apply to this new section 106B(2) and article 45B(2). Making provision for any such exceptions will form part of the detailed implementation of these new provisions. As such, in light of the potential degree of specificity that will be required, the Government considers it appropriate for such provision to be made by way of regulations. To attempt to set out such exceptions at this stage, in primary legislation, would be an unduly restrictive approach.

174. In relation to the third power, the Government does not consider it appropriate to specify, in primary legislation, the form and manner in which information must be entered into NUAR under new section 106B(1) and new article 45B(1). Instead, a power is conferred on the Secretary of State by new section 106B(3) and new article 45B(3) which will enable the specific and detailed nature of such matters to be fully considered and set out in detail in due course, as work progresses on the implementation of the new NUAR legislative framework.

175. As set out above, new subsection 106B(8) and article 45B(7) contain the fourth and fifth powers which allow the Secretary of State to define both the "archive upload date" and the "initial upload period" respectively. Determining these dates will require careful

consideration of a range of different factors, including operational readiness of NUAR to receive information being entered into it and first identifying, as discussed above, any "other information" that undertakers must enter into NUAR pursuant to the duty in new section 106B(1)(b) and article 45B(1)(b). As such, it would not be appropriate to seek to specify either of these dates in primary legislation and instead the Government considers provision should be made for this through regulations in due course.

Justification for the procedure

176. By virtue of new section 106B(9) (read with new section 106I(6)) of the 1991 Act, and new article 59(1C) (read with new paragraph (1H)) of the 1995 Order, regulations made by the Secretary of State in exercise of this power will be subject to the negative procedure.

177. In considering the Parliamentary procedure which will apply in respect of the first power, the Government has taken into account the fact that information prescribed by the Secretary of State will inevitably affect the breadth of the duty in new section 106B(1) and new article 45B(1); the greater the amount of prescribed "other information", the more onerous compliance with the duty will be for those required to comply with it.

178. At the same time, the information is likely to be specific in nature and of a level of technical detail such that, in the Government's view, it would not warrant a requirement for Parliament to proactively have to consider regulations setting out, or making changes to, the information in every case. The information that can be prescribed is ultimately for the purposes of it being included in NUAR. This important factor will therefore serve to inform and shape the nature of any provision to be made in regulations under this power, whilst such information will - once included in NUAR - further support the benefits to the public that this new register will offer. Further, in this context, the information will only need to be provided on a "one-off" basis as part of entering "archive" information into NUAR, with this taking place within a period of time also set by regulations, which further limits the extent of any resulting obligation on undertakers.

179. In light of these considerations, the Government considers the negative procedure to provide an appropriate degree of Parliamentary scrutiny for regulations made under the first power; Parliament will still have an opportunity to scrutinise the regulations if it wishes to do so, whilst this approach avoids the unnecessary use of Parliamentary time in circumstances where provision about, or changes made to, the prescribed information are more limited in their effect.

180. The application of the negative procedure to regulations made in exercise of the second power in this group, as set out in new section 106B(2) and new article 45B(2), is considered appropriate given that this is consistent with the existing approach, for similar prescribed exceptions, as set out in section 79(1) of the 1991 Act and article 39(1) of the 1995 Order in respect of the duty to record information therein. As with the "exceptions" power in new section 79(1B) and article 39(1B), the negative procedure is considered to strike an appropriate balance between Parliamentary scrutiny and a proportionate use of Parliamentary time, given that the power only enables the Secretary of State to reduce or limit the extent and impact of the duty in new section 106B(1) and article 45B(1); it cannot be used to impose any additional obligations on undertakers.

181. Equally, the application of the negative procedure to regulations made in exercise of the third power in this group, as set out in new section 106B(3) and article 45B(3), is also considered appropriate given the limited scope of the power; it can only be used to set out the form and manner in which information must be entered into NUAR and cannot be used to impose any other duties on other persons. As such, the Government also believes this procedure to, in respect of this power, strike an appropriate balance between affording a degree of Parliamentary scrutiny and making proportionate use of Parliamentary time.

182. The fourth and fifth powers in new section 106B(8) inserted into the 1991 Act, and in article 45B(7) of the 1995 Order, are limited in their scope; they simply provide a means through which - taking into account practical considerations of the type discussed above - the Secretary of State can set dates for two aspects of the legislative provision made in primary legislation. Such regulations will be simple and straightforward; as such, the Government considers the negative procedure to provide an appropriate degree of Parliamentary scrutiny together with a proportionate use of Parliamentary time.

Clause 56(1): New section 106C(1) - Access to information kept in NUAR
Clause 58(3): New article 45C(1) – Access to information kept in NUAR

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

183. New section 106C(1) of the 1991 Act, and article 45C(1) of the 1995 Order, enable the Secretary of State to, by regulations, make provision in connection with making information kept in NUAR available to others.

184. Section 106C(2) and article 45C(2) set out a non-exhaustive list of types of provision that can be included in such regulations. This can include provision as to which information may be made available, to whom (by reference to descriptions of persons) and for exceptions to this. Provision can include authorising all information kept in NUAR to be made available to prescribed persons under prescribed conditions, whilst also providing for the purposes for which, and the form and manner in which, information may be made available. In addition, and in recognition of the potential sensitivities of such information, the regulations can require or authorise the Secretary of State to take steps to adapt, modify or obscure information before making it available.

185. In addition, the Secretary of State may, in such regulations, make provision for or in connection with the granting of licenses by the Secretary of State in relation to any “non-Crown IP rights” (as defined by section 106C(5) and article 45C(4)). Further, provision may be made for information kept in NUAR to be made available for free or for a fee, and about the amounts of such fees and how funds raised by means of such fees must or may be used, including where funds are to be paid to persons who are required to enter information into NUAR.

186. By way of an example, the Government currently anticipates that these regulations will be used to make information provided by undertakers available, free of charge, to street works undertakers for the purpose of carrying out street works, while obscuring some data relating to sensitive assets. Other potential uses include permitting access to other government departments to aid in resiliency planning, flood risk, or emergency response. As a further example, future developments might also include the licensing data, for a fee, to planners to inform the roll out of electric vehicle charge points.

187. A form of NUAR has already been developed and is currently being operated on a voluntary basis through collaboration with undertakers; this will be developed further and statutorily underpinned by these new clauses. Access to the information kept in this voluntary form of NUAR is currently provided free of charge for the purposes of carrying out street works excavations; however, users must accept an end-user licence agreement which stipulates terms and conditions of use. The Government currently anticipates that data in NUAR, once these new provisions come into force, will generally continue to be supplied under a licence which establishes obligations on the part of the user, including onward use conditions to protect the data held in the register. In the future, the use of information in NUAR may be supplied under licence for other use cases. These licences may include charging end users for access to the information, or allowing third parties to act as intermediaries between the NUAR end users to provide value added services.

188. New section 106I(2), or new article 59(A2) and section 17(5) of the Interpretation Act (Northern Ireland) 1954, (as the case may be), apply in respect of regulations made in exercise of this power. As a result, such regulations may make different provision for different purposes, and may also make supplementary and incidental provision.

189. New section 106I(4) and new article 59(A1) require the Secretary of State, before making regulations in exercise of this power, to consult the Welsh Ministers and the Department for Infrastructure in Northern Ireland. This requirement may be satisfied by consultation undertaken before the day on which the Act is passed as provided for by clause 60.

Justification for taking the power

190. As set out elsewhere in this memorandum, NUAR (and the information it contains) has the potential to provide significant benefits and to support a range of different types of economic activity. The making available of information held in NUAR to other persons will be a crucial part of achieving this, while increasing the deployment and utilisation of a fixed and non-exhaustible asset (NUAR), thereby promoting efficiency and economic growth. The Government recognises the importance of ensuring that this is done in a carefully considered way, including making provision in respect of some or all of the matters set out in new section 106C(2) and new article 45C(2), and the putting in place of any necessary arrangements to ensure information is handled appropriately. Such provision is envisaged to be detailed in nature and to have to apply to a range of different circumstances. The Government also envisages such arrangements changing over time, or being added to, as new or different ways of using information held in NUAR are identified and explored. Undue limitations placed, at this stage, on how NUAR is accessed could result in unnecessary administrative burdens on industry which would then have to share the same data separately through other means as well as duplicating costs for those requesting that data.

191. As set out above, the Government anticipates a need to make detailed provision in respect of these matters, and to be able to adapt such provision to changing circumstances (such as technological advances), experience gained through the operation of NUAR, and feedback from asset owners and users. In light of this, the Government believes that making such provision through regulations is more appropriate than seeking to do so in primary legislation.

Justification for the procedure

192. By virtue of new section 106C(4) (read with new section 106I(5)) of the 1991 Act, and the new paragraph (1D) read with new paragraph (1G) of article 59 of the 1995 Order, the affirmative procedure will apply to regulations made in exercise of this power. The Government recognises that this power can be used to make comprehensive provision as to the way in which information held in NUAR can be made available to others. Such information will have been entered into NUAR by persons in accordance with new duties being included in new section 106B(1), in existing section 79 (as amended by clause 57), and in the new section 80 (as inserted by that clause) of the 1991 Act (and in accordance with the equivalent provisions of the 1995 Order) and so must be handled appropriately. As per new section 106C(2)(i) - (k), and new article 45C(2)(i) - (k), regulations made in exercise of this power may make provision for information to be made available under a licence for a fee, and about the amount of such fees and the use to which funds raised by means of such fees can be used. Taking into account all of these factors, the Government believes the affirmative procedure to provide an appropriate level of Parliamentary scrutiny of regulations made in exercise of this power.

Clause 56(1): New section 106C(3) - Access to information kept in NUAR
Clause 58(3): New article 45C(3) – Access to information kept in NUAR

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

193. As set out above, new section 106C and article 45C enable the Secretary of State, through regulations, to make provision as to the making available of information kept in NUAR. New subsection 106C(3) and article 45C(3) make provision, in primary legislation (and subject to section 106H and article 45H), so as to make clear that the exercise by the Secretary of State of functions under new sections 106A and 106C, and articles 45A and 45C, does not breach any obligation of confidence or any other restriction however imposed.

194. The Government recognises that there could be circumstances, which become apparent as NUAR is implemented and operated over time, in which it would not be appropriate for this general position to apply. New section 106C(3) and article 45C(3) therefore permit the Secretary of State, through regulations, to prescribe exceptions to this approach.

195. New section 106I(2), or new article 59(A2) and section 17(5) of the Interpretation Act (Northern Ireland) 1954, (as the case may be), apply in respect of regulations made in exercise of this power. As a result, such regulations may make different provision for different purposes, and may also make supplementary and incidental provision.

196. New section 106I(4) and new article 59(A1) require the Secretary of State, before making regulations in exercise of this power, to consult the Welsh Ministers and the Department for Infrastructure in Northern Ireland. This requirement may be satisfied by consultation undertaken before the day on which the Act is passed, as provided for by clause 60.

Justification for taking the power

197. New sections 106A and 106C, and new articles 45A and 45C, form part of an entirely new legal framework to support the operation of NUAR. The provision made by new section 106C(3) and new article 45C(3) sets out the general approach which reflects the policy intention in respect of these issues. However, as the new legal framework is implemented, unforeseen circumstances or situations may arise which require a different approach to be taken in order to properly strike a balance between the public interest in ensuring NUAR can operate effectively and comprehensively, and the interests of those whose information, for example, would otherwise be protected by an obligation of confidence. In light of these considerations, the Government believes that having the general approach set out on the face of the Bill, but with the ability for the Secretary of State to provide for exceptions through regulations, is an appropriate approach.

Justification for the procedure

198. By virtue of new section 106C(4) (read with new section 106I(5)) of the 1991 Act, and new paragraph (1D) (read with new paragraph (1G)) of article 59 of the 1995 Order, the affirmative procedure will apply to regulations made in exercise of this power. The Government believes this affords an appropriate degree of Parliamentary scrutiny given the important balance that such regulations will need to strike between the public interest and the interests of any affected persons.

Clause 56(1): New Section 106D(1) - Fees payable by undertakers in relation to NUAR
Clause 58(3): New Article 45D(1) – Fees payable by undertakers in relation to NUAR

Power conferred on: Secretary of State

Power exercised by: Regulations (and the publication of a statement in certain circumstances)

Parliamentary Procedure: Affirmative procedure for most cases, negative procedure in particular circumstances (regulations), laying before Parliament (statement)

Context and Purpose

199. The Government's intention is for NUAR to operate on a sustainable funding model, with undertakers with apparatus in a street collectively covering the costs of running the service instead of the taxpayer.

200. The new section 106D(1) and new article 45D(1) make provision for this by empowering the Secretary of State to make provision, through regulations, requiring undertakers having apparatus in a street to pay fees to the Secretary of State ("the fees scheme"). Such fees will be for the purpose of funding the costs incurred in operating NUAR (or more specifically, to pay fees for or in in connection with the performance of any function of the Secretary of State under the new Part 3A to be inserted into the 1991 Act, or as provided for in a "NUAR provision" (defined by article 2(2) in the 1995 Order).

201. New section 106D(2) and new article 45D(2) provides that the regulations may specify the amounts of such fees, or may set out the maximum amounts of the fees that the Secretary of State can require undertakers to pay. Alternatively, the regulations may provide for such amounts to be determined in accordance with the regulations. Where the regulations adopt any of these approaches other than specifying the amount of the fees, there is a further requirement, in new section 106D(4) and new article 45D(4), for the Secretary of State to specify the amounts of the fees in a statement which must be published and laid before Parliament.

202. New section 106D(3) and new article 45D(3) reflect the policy intention that the fees raised through the exercise of this new regulation-making power are intended to match the expenses incurred by the Secretary of State in providing and running NUAR for England, Wales and Northern Ireland, whilst recognising that there will likely be times where the amounts received, and running costs, vary each year.

203. In addition, new section 106D(5) and new article 45D(5) expressly provide for the regulations to be able to make provision as to when, and the manner in which, a fee is to be paid, together with provision for discounted fees, exceptions to a requirement to pay fees and for refunds of fees.

204. A requirement to pay a fee as set out in regulations made in exercise of this power may be enforced by the Secretary of State through the issuing of a monetary penalty (see new section 106F and the new Schedule 5A (found at Schedule 1 to the Bill), and new article 45F and new Schedule 2ZA (found at Schedule 2 to the Bill).

205. New section 106I(2), or new article 59(A2) and section 17(5) of the Interpretation Act (Northern Ireland) 1954, (as the case may be), apply in respect of regulations made in exercise of this power. As a result, such regulations may make different provision for different purposes, and may also make supplementary and incidental provision.

206. New section 106I(4) and new article 59(A1) require the Secretary of State, before making regulations in exercise of this power, to consult the Welsh Ministers and the Department for Infrastructure in Northern Ireland. This requirement may be satisfied by consultation undertaken before the day on which the Act is passed, as provided for by clause 60.

207. The Government recognises the impact that the requirement to pay a fee will have on undertakers and has therefore included a consultation requirement in new section 106D(6)

and new article 45D(6). Before making regulations under this power, the Secretary of State must therefore consult such representatives of persons likely to be affected by the regulations as the Secretary of State considers appropriate, together with any such other persons as the Secretary of State considers appropriate. Again, this requirement may be satisfied by consultation undertaken before the day on which the Act is passed, as provided for by clause 60.

Justification for taking the power

208. In order to provide for a proportionate, fair and efficient fees scheme, specific and detailed provision is likely to be required in respect of a number of matters. Provision will need to be made as to the amount of such fees. Additional matters will also need to be addressed, as set out at new section 106D(5) and new article 45D(5) (for example, when a fee is to be paid, the manner in which a fee is to be paid and any exceptions to the requirement to pay a fee). Lessons learned or experience gained from the implementation and operation of NUAR over time may necessitate changes to such provision. In those circumstances, the Government considers it will be more appropriate to provide for such matters in regulations rather than be fixed in primary legislation.

209. The power is subject to a number of safeguards. As set out above, new section 106D(3) and new article 45D(3) impose a requirement on the Secretary of State to seek to secure, so far as possible and taking one year with another, that the amount raised from fees matches the overall cost of running NUAR. Indeed, it is the need to comply with this requirement, and to change the amount of fees as necessary in order to ensure it is satisfied, which provides a further reason in support of such provision being made through regulations; it would be disproportionate if, in order to make changes so as to ensure continued compliance with this requirement, primary legislation was required.

210. As set out above, the Government's policy as to the amount of any fees will be provided for in regulations, which can include the maximum amount of a fee that the Secretary of State may require to be paid, or the setting out of the way in which such an amount is to be determined. Where either of these approaches are taken, the Government considers it appropriate for the *actual* amounts of fees to be clearly and transparently set out for the public and, in particular, for the benefit of those required to pay a fee. In light of this, provision is made in new section 106D(4)(a) and (b)(i), and in new article 45D(4)(a) and (b)(i), for the Secretary of State to specify such amounts in a statement which must be published. In addition, to ensure Parliament is kept informed about these amounts, new section 106D(4)(b)(ii) and new article 45D(4)(b)(ii) also requires such a statement to be laid before Parliament.

Justification for the procedure

211. Subsections (7), (8) and (9) of new section 106D, and new paragraphs (1D) to (1F) (read with new paragraphs (1G) to (1I)) inserted into article 59 of the 1995 Order, make provision as to which Parliamentary procedure applies to regulations made in exercise of this power. In general the affirmative procedure will apply to such regulations, including where such regulations make provision as to when a fee is to be paid, the payment of discounted fees or exceptions to requirements to pay fees. The Government considers this to be an appropriate level of Parliamentary scrutiny given the scope for such regulations to set out these (and other) "structural" aspects of the fees regime, both in the first instance and if

changed in the future.

212. However, as an exception to this general approach, where regulations only make provision of a kind mentioned in new section 106D(2) and new article 45D(2) (i.e. where regulations only relate to the *amount* of fees to be payable), the Government considers that the negative procedure strikes a good balance between ensuring an appropriate level of Parliamentary scrutiny, effective use of Parliamentary time and a potential need to act promptly, particularly in light of the requirement set out in new section 106D(3) and new article 45D(3). As discussed above, the Secretary of State does not have unfettered discretion to determine such amounts (or the basis for determining such amounts); the approach must be in accordance with new section 106D(3) and new article 45D(3) and the requirement therein for the Secretary of State to seek to secure that, so far as possible and taking one year with another, the income from fees matches the expenses incurred by the Secretary of State in operating NUAR in accordance with this new legal framework. In circumstances where regulations are limited to this specific, more focused use of the power in new section 106D(1) and new article 45D(1), the negative procedure is considered appropriate.

213. Equally, the Government acknowledges the likely heightened Parliamentary interest when provision is made in relation to the amounts of such fees for the first time. Accordingly, provision is made in new section 106D(9) and the new paragraph (1F) inserted into article 59 of the 1995 Order so that the affirmative procedure applies in those circumstances. Thereafter, when such an amount is changed in the future, the negative procedure will apply as set out above.

214. No formal Parliamentary procedure applies in respect of any statement made and published by the Secretary of State pursuant to new section 106D(4) and new article 45D(4) in which amounts of fees are specified by the Secretary of State, although such a statement must nevertheless be laid before Parliament (as per new section 105D(4)(b)(ii) and new article 45D(4)(b)(ii)). The statement will reflect the amount of fees determined in accordance with (or below any maximum amount specified in) existing regulations made by the Secretary of State (with such regulations themselves having already been the subject of a Parliamentary procedure as set out above). In such circumstances, it is not considered necessary for any formal Parliamentary procedure to apply.

Clause 56(1): New section 106E(1) - Providing information for purposes of regulations under section 106D
Clause 58(3): New article 45E(1) – Providing information for purposes of regulations under article 45D

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

215. The new section 106E and new article 45E each contain two regulation-making powers through which the Secretary of State may require an undertaker having apparatus in

a street to provide information to the Secretary of State in the context of fees that can be imposed through regulations under new section 106D(1) and new article 45D(1).

216. The first regulation-making power, set out at new section 106E(1) and new article 45E(1), enables the Secretary of State to request information that will assist in the development of the policy relating to the amount of, and approach to, fees to be paid pursuant to regulations made under new section 106D and new article 45D. This power can be exercised where the Secretary of State is considering what new provision, or changes to existing provision, it would be appropriate to make. For example, if a proposed approach to fees may rely on a form of categorisation of undertakers, or "tiers" to which undertakers will be allocated, the Secretary of State may require information to be provided in order to develop those proposals and ensure that appropriate provision, including compliance with the requirement at new section 106D(3) and new article 45D(3) , can be made.

217. The Secretary of State will be required, when making such provision pursuant to new section 106D(1) and new article 45D(1), to satisfy the consultation requirements set out at new section 106D(6) and new article 45D(6); undertaking such consultation will likely result in the provision of helpful information to the Government. However, the Government considers it necessary to have the option of imposing legally binding requirements on undertakers to provide information, to enable the Government's approach to fees to be developed on a fully informed basis.

218. Regulations made in exercise of the power in new subsection 106E(1) and new article 45E(1) may require an undertaker to notify the Secretary of State of any changes to information previously provided under the regulations (see new section 106E(3)) and new article 45E(3)). Such regulations may also, by virtue of new section 106E(4) and new article 45E(4), make provision about when information is to be provided (which may be at prescribed intervals), the form and manner in which information is to be provided, and exceptions to any requirement to provide information.

219. A requirement to provide information as set out in regulations made in exercise of this power may be enforced by the Secretary of State through the issuing of a monetary penalty (see new section 106F and the new Schedule 5A (found at Schedule 1 to the Bill), and new article 45F and new Schedule 2ZA (found at Schedule 2 to the Bill)).

220. New section 106I(2), or new article 59(A2) and section 17(5) of the Interpretation Act (Northern Ireland) 1954, (as the case may be), apply in respect of regulations made in exercise of this power. As a result, such regulations may make different provision for different purposes, and may also make supplementary and incidental provision.

221. New section 106I(4) and new article 59(A1) require the Secretary of State, before making regulations in exercise of this power, to consult the Welsh Ministers and the Department for Infrastructure in Northern Ireland. This requirement may be satisfied by consultation undertaken before the day on which the Act is passed, as provided for by clause 60.

Justification for taking the power

222. The Government considers it appropriate for the detail of such requirements to provide information to be set out in regulations. When determining the provision that is

appropriate to be made through regulations under section 106D(1), a wide range of different factors and circumstances will need to be taken into account. It is not possible at this stage to comprehensively identify all of these factors and circumstances, which will likely change over time in any event. The Government recognises the need to only request information that is relevant to the issues under consideration when determining the appropriate provision to be made, and the need to be proportionate in its approach. Indeed, new section 106E(1)(a) and (b) and new article 45E(1)(a) and (b) set out clear purposes for which the information can be required.

223. Seeking to fix, in primary legislation, the specific information to be provided risks missing types of information that are subsequently identified as necessary, or alternatively, risks imposing requirements that may in time not be required, thus resulting in unnecessary obligations being imposed on undertakers. The ability to make specific provision in regulations will enable these risks to be mitigated, with regulations making more detailed and focused provision that can be modified more easily (and more quickly) over time in response to changing circumstances. Requiring such changes to be included in primary legislation on each occasion would not, in the Government's view, be an appropriate use of Parliamentary time.

224. The Government has carefully considered whether a consultation requirement similar to that in new section 106D(6) and new article 45D(6) should also be included in respect of this power. Given the purposes for which regulations under new section 106E(1) and new article 45E(1) can be made (as set out in subsection/paragraph (1)(a) and (b)), the inclusion of such a requirement is not considered necessary. Information can be required under section 106E(1) and new article 45E(1) for - in effect - policy development purposes. Where the chosen policy approach results in a need to make regulations under new section 106D(1) and new article 45(D)(1), the existing requirement to consult found in new section 106D(6) would apply in any event. To include an additional stage of consultation would be disproportionate. It would also likely be of limited benefit; the information being sought is for policy development purposes, and so it is likely to be requested at an early stage in the policy development process. A legal duty to consult on what information might be appropriate to request, in order to then develop a policy position, is unnecessary in such circumstances.

225. However, for completeness, the Government does consider that the overarching requirement to consult the Welsh Ministers and the Department for Infrastructure in Northern Ireland in respect of the exercise of any regulation-making power in the new Part 3A inserted into the 1991 Act or in a "NUAR provision" in the 1995 Order should nevertheless apply in respect of the power in new subsection 106E(1) and new article 45E(1).

Justification for the procedure

226. By virtue of new section 106E(5) (read with new section 106I(6)) of the 1991 Act, and new article 59(1C) (read with new paragraph (1H)) of the 1995 Order, regulations made by the Secretary of State in exercise of this power will be subject to the negative procedure. This level of scrutiny is considered appropriate given that the scope of any information that can be requested is limited; the regulations can only require undertakers to provide information for the purposes set out in new section 106E(1)(a) and (b) and new article 45E(1)(a) and (b). As such, the Government considers that the negative procedure strikes an appropriate balance between the need to ensure a proportionate approach to the use of Parliamentary time, whilst still providing a means of Parliamentary scrutiny.

Clause 56(1): New section 106E(2) - Providing information for purposes of regulations under section 106D
Clause 58(3): New article 45E(2) - Providing information for the purposes of regulations under article 45D

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

227. New section 106E(2) and new article 45E(2) set out the second of the two regulation-making powers through which the Secretary of State may require an undertaker having apparatus in a street to provide information to the Secretary of State in the context of fees that can be imposed through regulations under new section 106D(1) and new article 45D(1).

228. This power enables the Secretary of State to request information for the purposes of ascertaining whether a fee is payable by person under regulations under new section 106D(1) and new article 45D(1), and for the purpose of working out the amount of a fee payable by a person. In practice, this will enable the Secretary of State to request information that is more "operational" in nature, relating to the fees scheme as provided for by regulations under new section 106D(1) and new article 45D(1).

229. As set out above, regulations made under new section 106D(1) and new article 45D(1) may make different provision for different purposes (see new section 106I(2)(a) to be inserted into the 1991 Act by this clause, and existing section 17(5) of the Interpretation Act (Northern Ireland) 1954). This could mean that different categories of undertakers (with such categories to be set out in the regulations) pay fees of different amounts. Regulations under new section 106D(1) and new article 45D(1) can also provide for fees to not be payable, or for a discounted fee to apply, in different circumstances. In light of this, it is important that the Secretary of State will be able, through regulations made under new section 106E(2) and new article 45E(2), to request information so as to be able to ascertain whether a fee is payable (for example, whether an undertaker is exempt in accordance with any such provision that might be made by the regulations) and, if so, the amount of that fee (including, for example, which category or "tier" an undertaker is to be allocated so as to ascertain the fee they are required to pay).

230. Regulations under new section 106E(2) and new article 45E(2) may require an undertaker to notify the Secretary of State of any changes to information previously provided under the regulations (see new section 106E(3) and new article 45E(3)). They may also, by virtue of new section 106E(4) and new article 45E(4), make provision about when information is to be provided (which may be at prescribed intervals), the form and manner in which information is to be provided, and exceptions to any requirement to provide information.

231. A requirement to provide information as set out in regulations made in exercise of this power may be enforced by the Secretary of State through the issuing of a monetary penalty

(see new section 106F and the new Schedule 5A (found at Schedule 1 to the Bill), and new article 45F and new Schedule 2ZA (found at Schedule2 to the Bill).

232. New section 106I(2), or new article 59(A2) and section 17(5) of the Interpretation Act (Northern Ireland) 1954, (as the case may be), apply in respect of regulations made in exercise of this power. As a result, such regulations may make different provision for different purposes, and may also make supplementary and incidental provision.

233. New section 106I(4) and new article 59(A1) require the Secretary of State, before making regulations in exercise of this power, to consult the Welsh Ministers and the Department for Infrastructure in Northern Ireland. This requirement may be satisfied by consultation undertaken before the day on which the Act is passed as provided for by clause 60.

Justification for taking the power

234. The Government considers it appropriate for the detail of such requirements to provide information to be set out in regulations. The information to be required will likely depend on the approach taken, through regulations made under new section 106D(1) and new article 45D(1), to the imposition of requirements to pay a fee. For example if undertakers were to be assigned categories or "tiers", with a different fee then applying as a result of such categorisation, specific information might be required in order to ascertain or confirm the correct category or tier that will apply in any particular case. Similarly, depending on the nature of exceptions (if any) to the requirement to pay a fee, specific information might be required; this might change over time should the exceptions themselves also be modified. As such, it is not considered feasible to set out such requirements in primary legislation.

235. In addition, the ability to impose requirements to provide information through regulations will enable appropriate and specific provision to be made which can be amended more readily in response to changing circumstances over time. As increased experience of operating the new NUAR framework is acquired over time, new or additional requirements might be identified and there could be a need to impose these comparatively quickly, if crucial to the effective operation of the fees scheme put in place by the Secretary of State. The Government considers that a requirement for any such changes to be made through primary legislation would not be a proportionate use of Parliamentary time.

236. The Government has carefully considered whether a consultation requirement similar to that in new section 106D(6) and new article 45D(6) should also be included in respect of this power. As with the power in new section 106E(1) and new article 45E(1) (see above), and in light of the limited purposes for which regulations under new section 106E(2) and new article 45E(2) can be made (as set out in subsection (2)(a) and (b) and paragraph (2)(a) and (b) respectively), the inclusion of such a requirement is not considered necessary. The information that can be requested through the exercise of this power will be directly linked to provision made as to the "structure" of the fees regime set out through regulations under section 106D(1) and new article 45D(1); the existing requirement to consult found in new section 106D(6) and new article 45D(6) would apply to those regulations in any event. The Government considers the inclusion of an additional stage of consultation, focused solely on specific information to be requested for the purposes set out in new section 106E(2)(a) and (b), and in new article 45E(2)(a) and (b), to be disproportionate.

237. However, for completeness, the Government does consider that the overarching requirement (as per new section 106I(4) inserted into the 1991 Act and the new paragraph (A1) inserted into article 59 of the 1995 Order) to consult the Welsh Ministers and the Department for Infrastructure in Northern Ireland - in respect of the exercise of any regulation-making power in the new Part 3A to be inserted into the 1991 Act and any "NUAR provision" inserted into the 1995 Order - should nevertheless apply in respect of the power in new subsection 106E(2) and new article 45E(2).

Justification for the procedure

238. By virtue of new section 106E(5) (read with new section 106I(6)) of the 1991 Act, and new article 59(1C) (read with new paragraph (1H)) of the 1995 Order, regulations made by the Secretary of State in exercise of this power will be subject to the negative procedure. This level of scrutiny is considered appropriate given that the scope of any information that can be requested is limited; the regulations can only require undertakers to provide information for the purposes set out in new section 106E(2)(a) and (b) and new article 45E(2)(a) and (b). Any specific requirements to be included in regulations made in exercise of this power will, in effect and in part at least, be linked to the "structure" of the fees regime as provided for through regulations made under new section 106D(1) and new article 45D(1); such regulations will themselves have been subject to the affirmative procedure as required by new section 106D(7) inserted into the 1991 Act and the new paragraph (1D) inserted into article 59 of the 1995 Order.

239. As such, the Government considers that the negative procedure strikes an appropriate balance between the need to ensure a proportionate approach to the use of Parliamentary time, whilst still providing a means of Parliamentary scrutiny.

Clause56(1): Paragraph 1(2) of new Schedule 5A - Monetary Penalties
Clause58(3): Paragraph 1(2) of new Schedule 2ZA – Monetary Penalties

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

240. As set out above, the new sections 106D(1) and 106E(1) and (2) to be inserted into the 1991 Act, and new articles 45D(1) and 45E(1) and (2) to be inserted into the 1995 Order, empower the Secretary of State to impose, through regulations, requirements on undertakers to pay fees or provide information.

241. Notwithstanding the high level of compliance the Government anticipates in respect of these requirements, provision is made (by new section 106F and Schedule 1, which inserts a new Schedule 5A into the 1991 Act, and new article 45F and Schedule 2, which inserts a new Schedule 2ZA into the 1995 Order) for the enforcement of these requirements through the imposition of monetary penalties. The intention is to provide a simple yet effective scheme which can readily be applied in practice. The requirements - in respect of which penalties can

be imposed for non-compliance - are anticipated to be straightforward in nature, namely a requirement to pay a fee (in an amount set out on the face of the regulations, or in a statement made and published in accordance with new section 106D(4) or new article 45D(4)) or a requirement to provide specific information to the Secretary of State.

242. The intention behind the penalty scheme is to encourage compliance with any such requirements. The provisions in new Schedules 5A and 2ZA reflect this in a number of ways. The Secretary of State will have discretion over whether to impose a penalty. There will also be a requirement for a "warning notice" to be sent to the person concerned where the imposition of a penalty is being proposed, together with provision for a period during which written representations can be made. These provisions, together with the ability to bring an appeal in respect of a decision to impose a penalty, build a number of safeguards into the process.

243. The Government has carefully considered the most appropriate approach through which the amount of such penalties should be determined. In light of the comparatively uncomplicated nature of a breach of the relevant requirements (that is, it will be readily apparent whether or not the required fee has been paid, or required information has been provided), it is not considered proportionate to create a system whereby the Secretary of State is required to determine the amount of a penalty on a case-by-case basis. Instead, paragraph 1(2) in each of the new Schedules 5A and 2ZA empowers the Secretary of State to set out, in regulations, the amount of any penalty to be imposed or to set out the methodology through which such a penalty should be determined. Should any person then be in breach of a relevant requirement, and the Secretary of State is considering the imposition of a monetary penalty, the amount of such a penalty will be that which is already provided for in existing regulations.

244. New section 106I(2), or new article 59(A2) and section 17(5) of the Interpretation Act (Northern Ireland) 1954, (as the case may be), apply in respect of regulations made in exercise of this power. As a result, such regulations may make different provision for different purposes, and may also make supplementary and incidental provision.

245. New section 106I(4) and new article 59(A1) require the Secretary of State, before making regulations in exercise of this power, to consult the Welsh Ministers and the Department for Infrastructure in Northern Ireland. This requirement may be satisfied by consultation undertaken before or after the coming into force of clause the day on which the Act is passed, as provided for by clause 60.

Justification for taking the power

246. As set out above, the Government does not consider it proportionate to provide for a complex system whereby the Secretary of State has to determine a monetary penalty on a case-by-case basis since the nature of the breach in question will be simple and readily apparent. Equally, it would not be appropriate for the amounts of such fixed penalties to be set out in primary legislation; the amounts may need to change over time in order to reflect the experience of operating this new legislative framework, or to ensure that the penalties continue to serve as an effective deterrent to non-compliance.

247. The Government therefore considers it necessary for a regulation-making power to be conferred on the Secretary of State through which provision can be made as to the amount

of such penalties. The use of regulations will enable the Secretary of State to respond to changing circumstances in the future and, if appropriate, to make specific or bespoke provision. In due course it might also be considered appropriate to make provision for penalty amounts to differ depending on the nature of the specific requirement being breached. Since the detail of those requirements will be set out in regulations made under new sections 106D(1) or 106E(1) or (2), and new articles 45D(1) or 45E(1) or (2), it follows that the corresponding penalties should also be set out in regulations.

248. Provision is made in paragraph 1(2) of each of the new Schedules 5A and 2ZA for the regulations to specify the amount of a penalty, or to set out the methodology through which a penalty should be determined. The Government believes it is important to have both approaches, or a combination of the two, available for the future. Depending on the nature of the requirements to be imposed by regulations, it might be that the amount of specific penalties can be comprehensively determined in advance and set out in regulations. However, it might be considered more appropriate, and reflect an approach that is both proportionate and serves as an effective deterrent for non-compliance, if the regulations can instead set out the way in which the amount of a penalty should be determined. Whichever approach is adopted, by setting this out in regulations, the penalty for non-compliance with any relevant requirement will be readily accessible to those to whom such requirements apply. The use of regulations will also, as set out below, be subject to an appropriate degree of Parliamentary scrutiny.

Justification for the procedure

249. By virtue of paragraph 1(5) of the new Schedule 5A (read with new section 106I(5)) to the 1991 Act, and new paragraph (1D) (read with new paragraph (1G) of article 59 of the 1995 Order), the affirmative procedure will apply to regulations made in exercise of this power. This level of scrutiny is considered appropriate given that this power will enable the Government to set penalties of an amount that, whilst remaining proportionate, must also be capable of serving as an effective deterrent to non-compliance.

Clause 56(1): New section 106G(1) and (6) - Arrangements for third party to exercise functions
Clause 58(3): New section 45G(1) and (6) – Arrangements for third party to exercise functions

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

250. The new Part 3A to be inserted into the 1991 Act by clause 56, and the “NUAR provisions” inserted into the 1995 Order by clause 58, confer a range of different functions on the Secretary of State as part of the statutory framework for NUAR. Many of these

functions are “operational” in nature, relating to the day-to-day running of NUAR. For example, the requirement in new section 106A(1) and new article 45A(1) for the Secretary of State to “keep” a register of information relating to apparatus in streets in England and Wales, and in Northern Ireland. A further example is the making of information kept in NUAR available in accordance with new section 106C and new article 45C (and in accordance with any regulations made in exercise of the powers in that section). It is in this context that new section 106G and new article 45G each confer two powers on the Secretary of State.

251. New section 106G(1) and new article 45G(1) enable the Secretary of State to make arrangements for another person to exercise relevant functions of the Secretary of State. This will enable the Secretary of State to identify which functions, typically those which are more “operational” in nature, could be exercised by another person. As reflected in new section 106G(1) and new article 45G(1), the details of when and how these functions can be exercised by another person will be set out in more detailed arrangements entered into by the parties.

252. As per new section 106G(2) and new article 45G(2), more than one person can be prescribed for the purposes of new section 106G(1) and new article 45G(1). In practice, this means that the Secretary of State can, if considered appropriate, enter into arrangements with different persons to exercise different functions, or can enter into arrangements through which more than one person can exercise the same function.

253. New section 106G and new article 45G make further provision about the arrangements into which the Secretary of State can enter. New section 106G(3) and new article 45G(3) expressly provide that such arrangements may provide for the Secretary of State to make payments to the person and to make provision as to the circumstances when any such payments are to be repaid. Entering into arrangements in respect of a function does not prevent the Secretary of State from also exercising that function (see new section 106G(5) and new article 45G(5)).

254. The Government considers it important that the Secretary of State has discretion to enter into such arrangements as may be appropriate, taking into account all relevant circumstances at the time. However, it is recognised that a crucial element of this approach is the identity of the person, or persons, with whom the Secretary of State will enter into arrangements. The functions which such a person could exercise, although “operational” in nature, are nevertheless important. In light of this, and the corresponding importance of the identity of the person, or persons, the Government considers it appropriate for this to be set out in legislation.

255. This is provided for in the first of two powers in new section 106G and new article 45G. As set out in new section 106G(1) and new article 45G(1), in order to enter into arrangements with a person for that person to exercise a relevant function of the Secretary of State, the person must first be prescribed, through regulations made by the Secretary of State. “Relevant function” for these purposes is defined by new section 106G(8) and new article 45G(7).

256. A second power is conferred on the Secretary of State in new section 106G(6) and new article 45G(6). This subsection makes similar provision to that found in new section 106C(3) and new article 45C(3), making clear that the disclosure of information between the Secretary of State and a person in connection with the person’s entering into arrangements

under this section, or exercise of functions to which such arrangements relate, does not breach any obligation of confidence owed by the person making the disclosure, or any other restriction on the disclosure of information however imposed (albeit this is subject to new section 106H and new article 45H, as the case may be).

257. As with the provision made in new section 106C(3) and new article 45C(3), the Government recognises that there could be circumstances, which become apparent as any arrangements under new section 106G and new article 45G are entered into and operated over time, in which it would not be appropriate for this general position to apply. New section 106G(6) and new article 45G(6) therefore permits the Secretary of State, through regulations, to prescribe exceptions to this approach.

258. New section 106I(2), or new article 59(A2) and section 17(5) of the Interpretation Act (Northern Ireland) 1954, (as the case may be), apply in respect of regulations made in exercise of this power. As a result, such regulations may make different provision for different purposes, and may also make supplementary and incidental provision.

259. New section 106I(4) and new article 59(A1) require the Secretary of State, before making regulations in exercise of this power, to consult the Welsh Ministers and the Department for Infrastructure in Northern Ireland. This requirement may be satisfied by consultation undertaken before the date on which the Act is passed as provided for by clause 60.

Justification for taking the powers

260. The Government does not consider it appropriate to set out a specific person or persons, in primary legislation, with whom the Secretary of State can enter into arrangements of the type described in new section 106G(1) and new article 45G(1). The identity of such persons will depend on which functions of the Secretary of State the person will be able to exercise, in accordance with relevant arrangements, and could change over time. As reflected by the provision in new section 106G(2) and new article 45G(2), arrangements could be entered into with different persons to exercise different functions, or for more than one person; it is important that there is the ability to reflect any such arrangements in due course. It will also be important, prior to prescribing any person for these purposes, for the Secretary of State to be content that the person is willing and able to enter into arrangements, and to exercise the functions in an effective manner in accordance with all relevant legal requirements. The need might also arise to terminate arrangements with a person and enter into new arrangements with someone different. To identify a specific person in primary legislation at this stage would be an unduly restrictive approach in these circumstances.

261. In addition, the role of a prescribed person, in terms of the functions that they can exercise, is limited. As noted above, new section 106G(8) makes provision in this regard, defining “relevant function” so as to exclude any regulation-making power of the Secretary of State, in relation to the 1991 Act, in new Part 3A and to exclude a function of the Secretary of State under section 106D(4) (the function of specifying the amount of fees in a statement published by the Secretary of State). Equivalent provision is made in relation to the 1995 Order, with new article 45G(7) defining “relevant function” so as to exclude any regulation-making power of the Secretary of State under a “NUAR provision” and to exclude a function of the Secretary of State under article 45D(4).

262. At the same time, and in these particular circumstances, the Government recognises the importance of the identity of a person with whom the Secretary of State is proposing to make arrangements. Accordingly, this new provision adopts the approach of requiring this to be set out in regulations to be made under the first power which, as discussed below, will be scrutinised by Parliament.

263. The Government's rationale for taking the second power is similar to that set out in respect of new section 106C(3) and new article 45C(3), above. Provisions in this Bill set out an entirely new legal framework to support the operation of NUAR, including a range of different functions which, if arrangements are entered into, a prescribed person will be able to exercise. As such arrangements are developed, implemented and then operated in practice, unforeseen circumstances or situations may arise. This might then require a different approach to be taken in order to properly strike a balance between the public interest in ensuring such arrangements can operate effectively and comprehensively, and the interests of those whose information, for example, would otherwise be protected by an obligation of confidence.

264. In light of these considerations, the Government believes that having the general approach set out on the face of the Bill as per new section 106G(6) and new article 45G(6), but with the ability for the Secretary of State to provide for exceptions through regulations, is an appropriate approach.

Justification for the procedure

265. By virtue of new section 106G(7) (read with new section 106I(5)) of the 1991 Act, and new paragraph (1D) (read with new paragraph (1G) of article 59 of the 1995 Order), the affirmative procedure will apply to regulations made in exercise of these powers.

266. In respect of the first power, the Government considers this to be an appropriate level of Parliamentary scrutiny in light of the nature of the functions which the person concerned could exercise, having entered into appropriate arrangements with the Secretary of State. Although such functions are generally operational in nature, they are nevertheless an important part of the new NUAR regime, such that it is appropriate Parliament should be required to scrutinise any such regulations before they can be made.

267. In respect of the second power, the Government also considers the affirmative procedure to afford an appropriate level of Parliamentary scrutiny given the important balance that such regulations will need to strike between the public interest and the interests of any affected persons.

Clause 57 - Amendments to sections 79 and 80 of the 1991 Act
Clause 59 – Amendments to articles 39 and 40 of the 1995 Order

268. Collectively, clause 57 and clause 59 insert a total of nine new powers into Part 3 of the 1991 Act, and an equivalent set of nine new powers into the 1995 Order, through which, by making regulations, the Secretary of State can make further provision in order to deliver the Government's policy relating to NUAR as part of the detailed implementation of the new legislative framework.

269. Some of these powers apply in respect of more than one duty imposed by these new provisions, whilst some of the duties are affected by more than one power. In order to address and explain these powers as clearly and comprehensively as possible, the Government has - for the purposes of this memorandum - grouped these powers together, depending on the duty to which the powers relate. There are three groups in total and each of these groups is then considered in a separate section of this memorandum, below. The groupings are as follows:

a. Clause 57(3)(c) inserts a new subsection (1B) into section 79 of the 1991 Act, and clause 59(3)(c) inserts a new paragraph (1B) in article 39 of the 1995 Order; these provisions impose a duty on undertakers to record, in respect of apparatus belonging to them, other information beyond that that are already required to record under the existing section 79(1) or article 39(1). New subsection/paragraph (1B) contains two powers which relate to this duty. The first is a power to prescribe cases in which this duty does not apply. The second is a power to prescribe "other information" for the purposes of this duty. Both of these powers are considered together as a single group in this memorandum.

b. Clause 57(3)(f) inserts new subsections (3B) and (3C) into section 79 of the 1991 Act, and clause 59(3)(f) inserts new paragraphs (3B) and (3C) into article 39 of the 1995 Order; Whereas new section 106B imposes (as set out above) a duty on undertakers to complete an *initial* entry of information into NUAR, new subsection/paragraph (3B) imposes an *ongoing* duty on undertakers to enter information into NUAR. Three new powers in total are found in new subsections (3B) and (3C). The first is a power to prescribe the period within which this duty must be complied. The second is a power to prescribe cases in which this duty does not apply. The third is a power to prescribe the form and manner in which information must be entered into NUAR. These three these powers are considered together as a single group in this memorandum.

c. Clause 57(4) substitutes a new section 80 into the 1991 Act (bearing in mind that the existing section 80 in the 1991 Act has not yet been commenced) and clause 59(4) substitutes a new article 40 into the 1995 Order (likewise, the existing article 40 in the 1995 Order has not been commenced). New section 80/article 40 imposes a duty on persons executing works in a street to take certain steps in relation to missing or incorrect information in relation to apparatus with the aim of ensuring such information is entered into, or corrected in, NUAR.

d. This duty is set out in new section 80(2)/article 40(2). There are a total of four powers relating to this duty. The first is a power to prescribe information which, if not entered into NUAR, or if it has been incorrectly entered into NUAR, triggers the duty in new section 80(2)/article 40(2). The second is a power to prescribe the information which, pursuant to the duty in new section 80(2)/article 40(2), must be entered into NUAR. The third is a power to prescribe the form and manner in which such information must be entered into NUAR. The fourth is a power to prescribe exceptions to the duty in new section 80(2)/article 40(2). These four powers are considered together as a single group in this memorandum.

270. "Prescribed" in relation to section 79(1) and (2) has the meaning given by new section 79(7)(a). In these cases, prescribed means, in relation to apparatus in streets in England,

prescribed by regulations made by the Secretary of State. In relation to apparatus in streets in Wales, prescribed means by regulations made by the Secretary of State or the Welsh Ministers. All other instances of "prescribed" in section 79 mean – as per new section 79(7)(b) - prescribed by regulations made by the Secretary of State. "Prescribed" in relation to new section 80 means, as per existing s.104 of the 1991 Act, prescribed by regulations made by the Secretary of State.

271. Similarly, in Northern Ireland, "prescribed" in relation to article 39(1) and (2) has the meaning given by new article 39(6). In these cases, prescribed means prescribed by regulations made by the Secretary of State or the Department for Infrastructure in Northern Ireland. All other instances of "prescribed" in article 39 mean – as per new article 39(6)(b) – prescribed by regulations made by the Secretary of State. "Prescribed" in relation to new article 40 means, as per the amended definition inserted into article 2 of the 1995 Order, prescribed by regulations made by the Secretary of State.

272. New section 104(1A), as inserted by clause 57(6)(b), provides that regulations made in exercise of these powers may make different provision for different cases, together with supplementary or incidental provision. As is the case for other NUAR-related powers discussed elsewhere in this memorandum, some of the regulations to be made under these powers will, in practice and in order to provide sufficient clarity and certainty, likely need to make comprehensive provision for a range of different scenarios and circumstances. The provision made by new section 104(1A) therefore reflects the practical realities that will arise in exercising these new powers.

273. Similar provision is made in relation to articles 39 and 40 by the new paragraph (A2) inserted into article 59 of the 1995 Order by clause 58(4)(a) and the existing section 17(5) of the Interpretation Act (Northern Ireland) 1954).

274. In addition, existing section 104(3) provides that regulations made in exercise of powers in amended section 79 and new section 80 may provide for references in the regulations to any specified document to operate as references to that document as revised or re-issued from time to time. Equivalent, existing, provision is made in relation to regulations made under any provision of the 1995 order by (existing) article 59(2). This existing provision is left undisturbed by the Bill clauses and so will also apply to any new regulation-making powers inserted into sections 79 and 80 of the 1991 Act, or into the 1995 Order.

275. Such provision will enable the Secretary of State, if considered appropriate, to adopt a more practical and effective approach in response to particular circumstances. For example, if it was more useful to those persons required to comply with new requirements, the Secretary of State could set out detailed technical standards or specifications in such a document. Nevertheless, the policy intention is to still ensure consistency of approach across England and Wales, and Northern Ireland. The ability to revise such a document will ensure such standards or specifications can be adapted quickly where necessary, whilst the technical nature of the document is such that, in the Government's view, it would not be necessary for Parliament to scrutinise revisions each and every time they are made.

276. Each of these separate "groups" of powers, arising under clause 57and 59 are considered in turn below.

Clause 57(3)(c): New section 79(1B) - Information in relation to apparatus
Clause 59(3)(c): New article 39(1B) – Information in relation to apparatus

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

277. Clause 57(3)(c) inserts a new subsection (1B) into section 79 of the 1991 Act, and clause 59(3)(c) inserts a new paragraph (1B) into article 39 of the 1995 Order; this new subsection/paragraph confers two regulation-making powers on the Secretary of State.

278. As set out above, section 79 of the 1991 Act and article 39 of the 1995 Order impose a number of record-keeping requirements on undertakers in relation to items of apparatus belonging to them. Section 79(1) and article 39(1) require an undertaker, as soon as reasonably practicable after specific events occur (as set out in section 79(1)(a) to (c) and article 39(1)(a) to (c)), to record the location of every item of apparatus, including the nature of the apparatus (if known) and whether it is for the time being in use.

As per the new subsection/paragraph (3B) inserted into section 79 of the 1991 Act and article 39 of the 1995 Order (as the case may be, and discussed further below), undertakers will be required to enter this information into NUAR. However, NUAR has the potential to include information beyond that which must currently be recorded pursuant to section 79(1) and article 39(1). The Government intends to explore opportunities for such additional information to be included, and made available from NUAR, in order to fully maximise the potential benefits of this new system.

279. New subsection/paragraph (1B) imposes a duty on undertakers to record other information beyond that they are required to record under section 79(1) and article 39(1). This new subsection also makes clear that this duty must be complied with as soon as reasonably practicable after certain events, as set out in new subsection/paragraph (1B), occur.

280. The first power in new subsection/paragraph (1B) enables the Secretary of State to prescribe cases in which the duty, described in the preceding paragraph, does not apply. This power, which reflects the existing approach in section 79(1) and article 39(1), provides a means through which the Secretary of State can, upon identifying circumstances or instances where the imposition of the new requirements in subsection/paragraph (1B) would be inappropriate or unduly burdensome, make provision to address this.

281. The second power enables the Secretary of State to prescribe the particular information, beyond that currently required to be recorded pursuant to section 79(1) and article 39(1), which the duty in new subsection/paragraph (1B) requires undertakers to record. This approach therefore builds upon the existing requirement in section 79(1) and article 39(1) which, following the occurrence of any of the events listed in section 79(1)(a) to (c) and article 39(1)(a) to (c), requires an undertaker to record the location of apparatus whilst also

stating the nature of the apparatus and (if known) whether it is for the time being in use.

282. In line with the existing approach in section 79 of the 1991 Act and article 39 of the 1995 Order, a failure to comply with a duty in new subsection/paragraph (1B) is a criminal offence, triable summarily and punishable by a fine.

283. Before making regulations under these powers, the Secretary of State must consult (as the case may be) the Welsh Ministers (see new section 79(8)) or the Department for Infrastructure in Northern Ireland (see new article 39(7)). This requirement may be satisfied by consultation undertaken before the day on which the Act is passed as provided for by clause 60.

Justification for taking the powers

284. As set out above, the first power in new subsection (1B) enables the Secretary of State to prescribe, through regulations, exceptions to the requirement to record additional information. This mirrors existing provision made by section 79(1) in respect of the duty to record information therein. Such exceptions form part of the detailed implementation of these new provisions and, in light of both the potential specificity that will be required, and the need to be able to create, adapt or remove such exceptions in response to changing circumstances and experience gained from the operation of NUAR, the Government considers it appropriate for such provision to be made by way of regulations. To attempt to set out such exceptions at this stage, in primary legislation, would be an unduly restrictive approach.

285. The duty to record information in new subsection (1B) is supplemented by the second power conferred on the Secretary of State as described above. The Government considers it appropriate for the detail of this additional information to be set out - or prescribed - in regulations. The nature of the information required could be technical and specific in nature, potentially relating to specific aspects or attributes of a range of different types of apparatus, such that regulations are the most appropriate legislative vehicle for such provision. In addition, it is likely that the information to be recorded (and then in turn, be entered into NUAR) could change over time as new and different uses and benefits of NUAR are identified; the ability to provide for this through regulations is therefore much more appropriate, and a more proportionate use of Parliamentary time, than requiring amendments to primary legislation for these purposes.

Justification for the procedure

286. By virtue of amended section 104(2) of the 1991 Act, and new article 59(1C) (read with new paragraph (1H)) of the 1995 Order, regulations made in exercise of these powers are subject to the negative procedure.

287. The application of the negative procedure to regulations made in exercise of the first power is considered appropriate given that this is consistent with the existing approach, for similar prescribed exceptions, as set out in section 79(1) of the Bill in respect of the duty to record information therein. Further, the negative procedure is considered to strike an appropriate balance between Parliamentary scrutiny and a proportionate use of Parliamentary time, given that the power only enables the Secretary of State to reduce or limit the extent and impact of the duty in new subsection (1B); it cannot be used to impose any additional obligations on undertakers.

288. In considering the Parliamentary procedure which will apply in respect of the second power, the Government has taken into account the fact that information prescribed by the Secretary of State will inevitably affect the breadth of the duty in new subsection (1B); the greater the amount of prescribed information, the greater the duty will be on those required to comply with it.

289. At the same time, the information is likely to be specific in nature and of a level of technical detail such that, in the Government's view, it would not warrant a requirement for Parliament to proactively have to consider regulations setting out, or making changes to, the information in every case. The information that can be prescribed is ultimately for the purposes of it being included in NUAR. This important factor will therefore serve to inform and shape the nature of any provision to be made by regulations under this power, whilst such information will - once included in NUAR - further support the benefits to the public that this new register will offer.

290. In light of these considerations, the Government considers the negative procedure to provide an appropriate degree of Parliamentary scrutiny for regulations made under this second power; Parliament will still have an opportunity to scrutinise the regulations if it wishes to do so, whilst this approach avoids the unnecessary use of Parliamentary time in circumstances where provision about, or changes made to, the prescribed information are more limited in their effect.

Clause 57(3)(f) and (h): New section 79(3B) and (3C) - Information in relation to apparatus
Clause 59(3)(f) and (g): New article 39(3B) and (3C) – Information in relation to apparatus

Powers conferred on: Secretary of State

Powers exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and purpose

291. Clause 57(3)(f) inserts new subsections (3B) and (3C) into section 79 of the 1991 Act and clause 59(3)(f) inserts new paragraphs (3B) and (3C) into article 39 of the 1995 Order. A total of three new powers are conferred on the Secretary of State by these new subsections/paragraphs. Given the interaction between these different powers, they are addressed here as a single group, in order to provide as clear and comprehensive a description as possible of their effect, and the Government's rationale in support of the approach they take.

292. Once the initial upload of "archive" has taken place (pursuant to the duty in new section 106B of the 1991 Act and article 45B of the 1995 Order), undertakers must then continue to enter information into NUAR on an ongoing basis. New subsection/paragraph (3B) makes provision for this, requiring an undertaker to enter information into NUAR once they have, as required by subsection/paragraph (1) or new subsection/paragraph (1B) of section 79/article 39, recorded or updated such information in their own records.

293. The first power is set out in new subsection/paragraph (3B) itself; information that has been recorded or updated by undertakers must then be entered into NUAR "within a prescribed period". The Secretary of State can therefore set the duration of this period through regulations.

294. The second power is also set out in new subsection/paragraph (3B) and enables the Secretary of State to prescribe, by regulations, cases in which the duty under new subsection/paragraph (3B) does not apply. This power, which reflects the existing approach in section 79(1) of the 1991 Act and article 39(1) of the 1995 Order, and the approach set out in respect of new subsection/paragraph (1B) above, provides a means through which the Secretary of State can, upon identifying circumstances or instances where the imposition of the new requirements in subsection/paragraph (3B) would be inappropriate or unduly burdensome, make provision to address this.

295. The third power is set out in new subsection/paragraph (3C) which enables the Secretary of State to prescribe, through regulations, the form and manner in which information must be entered into NUAR under subsection/paragraph (3B).

296. In line with the existing approach in section 79 of the 1991 Act and article 39 of the 1995 Order, a failure to comply with a duty in new subsection/paragraph (3B) is a criminal offence, triable summarily and punishable by a fine.

297. Before making regulations under these powers, the Secretary of State must consult (as the case may be) the Welsh Ministers (see new section 79(8)) or the Department for Infrastructure in Northern Ireland (see new article 39(7)). This requirement may be satisfied by consultation undertaken before the day on which the Act is passed as provided for by clause 60.

Justification for taking the powers

298. The first power, enabling the Secretary of State to determine a "prescribed period" within which the duty in new subsection/paragraph (3B) must be complied with, relates to the entry into NUAR of information on an ongoing basis. As part of the detailed implementation of these provisions, careful consideration will need to be given to the duration of this period. A number of factors will be relevant, including the nature of any "other information" that might be prescribed for purposes of the new duty in new subsection/paragraph (1B).

299. As such, it will be important that there is flexibility in setting the duration of the prescribed period for new subsection/paragraph (3B), including the possibility (as discussed above) to potentially make different provision for different cases where appropriate to do so in light of all relevant circumstances. Experience gained from the implementation and operation of NUAR over time could also inform changes to the duration of this prescribed period such that it would be appropriate to change it in the future; the Government considers that making such changes through regulations, rather than through primary legislation, would be a more proportionate use of Parliamentary time.

300. The second power, in new subsection/paragraph (3B), empowers the Secretary of State to, through regulations, prescribe cases in which the duty in subsection/paragraph (3B) does not apply. The inclusion of this power reflects the wider approach, which already exists

in section 79 of the 1991 Act and article 39 of the 1995 Order, and which is being included in the new subsection/paragraph (1B) being inserted into that section/article, whereby provision can be made for duties to record or share information to not apply. Similar reasons to those set out above in respect of new subsection/paragraph (1B) also apply in this context; making provision for any such exceptions will form part of the detailed implementation of these new provisions and, in light of both the potential specificity that will be required, and the need to be able to create, adapt or remove such exceptions in response to changing circumstances and experience gained from the operation of NUAR, the Government considers it appropriate for such provision to be made by way of regulations. To attempt to set out such exceptions at this stage, in primary legislation, would be an unduly restrictive approach.

301. The third power, in new subsection/paragraph (3C), reflects the Government's view that it would not be appropriate to specify, in primary legislation, the form and manner in which information must be entered into NUAR under subsection/paragraph (3B). Instead, this power will enable the specific and potentially detailed nature of such matters to be fully considered and comprehensively set out in due course, as work progresses on the implementation of the new NUAR legislative framework. As NUAR develops and increased operational experience is gained over time, this power will also provide the necessary flexibility to make changes to the form and manner in which information is to be provided, if appropriate.

Justification for the procedure

302. By virtue of amended section 104(2) of the 1991 Act, and new article 59(1C) (read with new paragraph (1H)) of the 1995 Order, regulations made in exercise of these powers are subject to the negative procedure.

303. The application of the negative procedure to regulations made in exercise of the first power discussed above (through which the Secretary of State can determine the "prescribed period" within which the duty in new subsection/paragraph (3B) must be complied) is considered appropriate given the limited scope of the power; it cannot change the nature of the duty, or extend it to new or different persons, but can only be used to determine the period within which information must be entered into NUAR. Although not a determining factor, circumstances could arise in which it could be useful to make such a change at pace, for example if it becomes apparent that any existing prescribed period is proving impractical or unduly burdensome in practice. Equally, the Government recognises the practical importance of this period, the duration of which will need to strike a balance between operational practicalities and a desire for NUAR to be updated as quickly as possible; as such, Parliament should have the opportunity to scrutinise these regulations if considered necessary. In light of these considerations, the negative procedure is considered to appropriately balance this potential need for scrutiny and the need to ensure Parliamentary time is used appropriately.

304. The application of the negative procedure to regulations made in exercise of the second power (through which the Secretary of State can prescribe, by regulations, cases in which the duty under new subsection/paragraph (3B) does not apply) is considered appropriate for similar reasons to those set out above in respect of the application of new section 106B(2) and new article 45B(2). Such an approach is consistent with the existing approach, for similar prescribed exceptions, as set out in section 79(1) of the 1991 Act (and article 39(1) of the 1991 Order) in respect of the duty to record information therein. In respect of this second power, and as (for example) with the "exceptions" power in new subsection/paragraph (1B) inserted into section/article 79/39, the negative procedure is

considered to strike an appropriate balance between Parliamentary scrutiny and a proportionate use of Parliamentary time, given that the power only enables the Secretary of State to reduce or limit the extent and impact of the duty in new subsection/paragraph (3B); it cannot be used to impose any additional obligations on undertakers.

305. Equally, the application of the negative procedure to regulations made in exercise of the third power in this group, as set out in new subsection/paragraph (3C), is also considered appropriate given the limited scope of the power; it can only be used to set out the form and manner in which information must be entered into NUAR (pursuant to the obligation in new subsection/paragraph (3B) and cannot be used to impose any other duties on other persons. As such, the Government believes this procedure to strike an appropriate balance between affording a degree of Parliamentary scrutiny and making proportionate use of Parliamentary time.

Clause 57(4): New section 80 (1) and (2) - Duties to report missing or incorrect information in relation to apparatus
Clause 59(4): New article 40 (1) and (2) – Duties to report missing or incorrect information in relation to apparatus

Powers conferred on: Secretary of State

Powers exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and purpose

306. Clause 57(4) substitutes a new section 80 into the 1991 Act and clause 59(4) substitutes a new article 40 into the 1995 Order; as highlighted above the existing section 80 and article 40 have not yet been commenced. Both new section 80 and new article 40 set out a duty with which persons undertaking works in the street must comply. This duty is set out in subsection/paragraph (2) (read with subsection/paragraph (1)) of new section 80 and new article 40, and applies where a "relevant person" (defined by new section 80(6) and new article 40(6)) executing any works in a street finds an item of apparatus in relation to which prescribed information is missing from NUAR, or where such information is in NUAR but is incorrect. In such circumstances, the person must take such steps as are reasonably practicable to inform the undertaker to whom the item belongs of the missing or incorrect information. If, having taken such steps, the person is unable to inform the undertaker to whom the item belongs of the missing or incorrect information, the person must enter information into NUAR.

307. Four powers are conferred on the Secretary of State in respect of this duty. Given the interaction between these four powers, they are addressed here as a single group, in order to provide as clear and comprehensive a description as possible of their effect, and the Government's rationale in support of the approach they take.

308. The first power, set out in new subsection/paragraph (1) enables the Secretary of State to prescribe, through regulations, information for the purposes of this duty. That is, the

Secretary of State can prescribe information which, if missing from or incorrect in NUAR, triggers the duty to take reasonably practicable steps to inform the undertaker of this.

309. The second power enables the Secretary of State to prescribe the information which, pursuant to the duty in new subsection/paragraph (2), must be provided to the undertaker to whom the item belongs, or must be entered into NUAR.

310. The third power enables the Secretary of State to prescribe the form and manner in which such information must be entered into NUAR; this power, a version of which is included in a number of other NUAR-related provisions, will enable provision to be made which, among other things, can require information to be inserted into NUAR in a consistent format, such that it can be easily incorporated into, and operate effectively within, NUAR.

311. The fourth and final power in this group enables the Secretary of State to prescribe exceptions to the duty in new subsection/paragraph (2); this power, which is similar to the existing approach in section 79(1) of the 1991 Act and article 39 of the 1995 Order, provides a means through which the Secretary of State can, upon identifying circumstances or instances where the imposition of the new requirements in subsection/paragraph (2) would be inappropriate or unduly burdensome, make provision to address this.

312. In line with the existing (albeit not yet commenced) approach in section 80 of the 1991 Act and article 40 of the 1995 Order, a failure to comply with a duty in new section 80 or new article 40 is a criminal offence, triable summarily and punishable by a fine in England and Wales and a fine not exceeding level 5 on the standard scale.

313. New subsection (1A), inserted into section 104 of the 1991 Act by clause 57(6)(b), provides that regulations made in exercise of these powers may make different provision for different cases, together with supplementary or incidental provision. Similar provision is made in relation to articles 39 and 40 by the new paragraph (A2) inserted into article 59 of the 1995 Order by clause 58(4)(a) and the existing section 17(5) of the Interpretation Act (Northern Ireland) 1954).

314. The Government notes that neither the existing section 80 of the 1991 Act, nor the existing article 40 of the 1995 Order, have been commenced and are, through these clauses, being substituted with new provisions. The bringing into force of this new section 80 and new article 40 will therefore be the first time persons executing works in a street will be required to comply with a duty of the type set out in new section 80(2) and article 40(2). The Government recognises the need to ensure these specific duties are implemented in a practical and effective way, whilst also noting the likely need for a range of specific issues and factors to be taken into account.

315. In light of this, new section 80(5) imposes a requirement on the Secretary of State, before making regulations under new section 80, to consult such representatives of persons likely to be affected by the regulations as the Secretary of State considers appropriate, together with any such other persons as the Secretary of State considers appropriate. Equivalent provision is made for Northern Ireland by new article 40(5). When making regulations made in exercise of these powers, the Secretary of State will be able to take into account responses to any such consultation.

316. This is in addition to the requirement for the Secretary of State to also consult the Welsh Ministers (see section 80(5)) and the Department for Infrastructure in Northern Ireland (see article 40(5)), as the case may be. These consultation requirements may be satisfied by consultation undertaken before the day on which the Act is passed, as provided for by clause 60.

Justification for taking the powers

317. The first and second powers found in new section/article 80/40 are considered necessary for similar reasons to those set out in respect of the second power taken in relation to the new subsection (1B) inserted into section 79 of the 1991 Act and paragraph (1B) inserted into article 40 of the 1995 Order (as discussed above). The nature of the relevant information could be technical and specific in nature, potentially relating to particular aspects or attributes of a range of different types of apparatus, such that regulations are the most appropriate legislative vehicle for such provision. In addition, it is likely that the information to be communicated to an undertaker about apparatus the undertaker owns (and then in turn, be entered into NUAR) could change over time as new and different uses and benefits of NUAR are identified, or as new techniques for recording information about apparatus are developed. There is also likely to be a need to ensure consistency with information, specified in regulations made under other powers provided for by amendments to section 79 and the substitution of section 80, and to article 39 and the substitution of article 40, that is also to (ultimately) be entered into NUAR. As such, the ability to provide for this through regulations is much more appropriate, and a more proportionate use of Parliamentary time, than requiring amendments to primary legislation for these purposes.

318. The third power, set out in new section 80(2) and new article 40(2), enables the Secretary of State to prescribe the form and manner in which information is to be entered into NUAR pursuant to section 80(2)(b) and article 40(2)(b). Conferring this power on the Secretary of State reflects the Government's view that it would not be appropriate to specify, in primary legislation, the form and manner in which information must be entered into NUAR under these provisions. Instead, this power will enable the specific and potentially detailed nature of such matters to be fully considered and set out in detail in due course, as work progresses on the implementation of the new NUAR legislative framework. As NUAR develops and increased operational experience is gained over time, this power will also provide the necessary flexibility to make changes to the form and manner in which information is entered into NUAR, if appropriate.

319. The fourth power enables the Secretary of State to prescribe, through regulations, exceptions to the duty set out at new section 80(2) and article 40(2). Such an approach already exists in section 79(1) of the 1991 Act (and article 39(1) of the 1995 Order) and, as set out elsewhere in this memorandum, has also been adopted in respect of a number of other new duties and requirements imposed by the amendments made by this Bill. Such exceptions form part of the detailed implementation of these new provisions and, in light of both the potential specificity that will be required, and the need to be able to create, adapt or remove such exceptions in response to changing circumstances and experience gained from the operation of NUAR, the Government considers it appropriate for such provision to be made by way of regulations. Again, to attempt to set out such exceptions at this stage, in primary legislation, would also be an unduly restrictive approach.

Justification for the procedure

320. By virtue of amended section 104(2) of the 1991 Act, and new article 59(1C) (read with new paragraph (1H)) of the 1995 Order, regulations made in exercise of these powers are subject to the negative procedure.

321. As with similar powers discussed earlier in this memorandum, in considering the Parliamentary procedure which will apply in respect of the first and second powers, the Government has taken into account the fact that information prescribed by the Secretary of State will inevitably affect the breadth of the duty in new section 80(2); the greater the amount of prescribed information, the more likely it is the duty will be triggered, and the more onerous compliance with the duty will be for those upon whom it is imposed.

322. At the same time, the information is likely to be specific in nature and of a level of technical detail such that, in the Government's view, it would not warrant a requirement for Parliament to proactively have to consider regulations setting out, or making changes to, the information in every case. The information that can be prescribed is ultimately for the purposes of it being included in NUAR. This important factor will therefore serve to inform and shape the nature of any provision to be made in regulations under this power, whilst such information will - once included in NUAR - further support the benefits to the public that this new register will offer.

323. In addition, the Government highlights the consultation requirements with which the Secretary of State must comply before making regulations in exercise of this power. Any responses received through any such consultation will need to be taken into account by the Secretary of State, serving as a further safeguard in respect of the first and second powers included in respect of the duty in new section 80(2).

324. In light of these considerations, the Government considers the negative procedure to provide an appropriate degree of Parliamentary scrutiny for regulations made under these two powers; Parliament will still have an opportunity to scrutinise the regulations if it wishes to do so, whilst this approach avoids the unnecessary use of Parliamentary time in circumstances where provision about, or changes made to, the prescribed information are more limited in their effect.

325. The application of the negative procedure to regulations made in exercise of the third power in this group is also considered appropriate given the limited scope of the power; it can only be used to set out the form and manner in which information must be entered into NUAR (pursuant to the obligation, when it arises, in new section 80(2)(b)) and cannot be used to impose any other duties on other persons. As such the Government believes this procedure to strike an appropriate balance between affording a degree of Parliamentary scrutiny and making proportionate use of Parliamentary time.

326. The application of the negative procedure to regulations made in exercise of the fourth power is considered appropriate given that this is consistent with the existing approach, for similar prescribed exceptions, as set out in (for example) section 79(1) of the Bill in respect of the duty to record information therein. Further, the negative procedure is considered to strike an appropriate balance between Parliamentary scrutiny and a proportionate use of Parliamentary time, given that the power only enables the Secretary of State to reduce or

limit the extent and impact of the duty in new section 80(2); it cannot be used to impose any additional obligations on undertakers.

Clause 63(2): Power to set out requirements in relation to signing a birth or death register

Power conferred on: The Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

327. This clause inserts a new section 38B into the Births and Deaths Registration Act 1953 (BDRA), enabling the Secretary of State to make regulations in relation to the requirement to sign a birth or death register where the register is required to be kept otherwise than in hard copy form. The regulations may provide that a person's duty under the BDRA to sign the birth or death register is to have effect as a duty to comply with alternative, specified requirements, and a person who complies with those requirements is to be treated as having signed the register and to have done so in the presence of the registrar. Under new section 38B(2) of the BDRA, the regulations may (among other things) require a person to sign something other than the birth or death register and/or provide evidence of identity.

Justification for taking the power

328. The main purpose of the "registers of births and deaths" clauses is to remove the requirement for births and deaths registers to be held in hard copy form, thus enabling the introduction of an electronic register. A number of provisions in the BDRA require an informant to sign the register in the presence of the registrar when registering a birth or a death. The power conferred by this clause would enable alternative requirements to be set, so that the informant does not need to sign the register in the presence of the registrar once the register is no longer maintained in hard copy form. It is considered appropriate for the detail of the alternative requirements to be contained in regulations, as they will set out detailed administrative procedure and may require adjustment over time.

Justification for the procedure

329. Regulations made under this power will, pursuant to new section 39A(6), be subject to the affirmative resolution procedure requiring a draft to be laid before and approved by a resolution of both Houses of Parliament. We propose that this is the appropriate procedure for these regulations, allowing Parliament to consider the alternative requirements that will replace signing the register and ensure they are robust.

Clause 70: Power to amend new lawful ground for processing

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

330. Clause 70 amends Article 6(1) of the UK GDPR to add a new lawful ground for processing personal data (new Article 6(1)(ea): processing necessary for the purposes of a recognised legitimate interest). It also inserts a new Annex 1 into the UK GDPR to set out the detailed conditions relating to the new lawful ground. These include important public interest grounds such as safeguarding vulnerable adults and children, safeguarding national security, public security and defence or where a public authority requests information that may include personal data. Under current law non-public authority data controllers would need to conduct a balancing of interests test to determine whether personal data should be processed for these purposes (Article 6(1)(f) UK GDPR). If a data controller is not sure whether its interests outweigh the rights of the individual, it might decide to delay or stop the processing data due to worries about liability. The government is keen to encourage personal data processing and sharing for important public interest scenarios and considers that the burden of the balancing test should not be on data controllers in these circumstances. New Article 6(6)-(10) UK GDPR, inserted by clause 70(4), introduces a regulation-making power to amend Annex 1 by adding to or varying the conditions or omitting conditions added by regulations.

Justification for taking the power

331. The government is proceeding with the limited list of conditions set out in new Annex 1 on the basis that this is a departure from long-standing and well-understood lawful grounds for processing and will need to assess the extent to which they are relied on. However, the government is concerned that difficulties applying the balancing test in Article 6 (1)(f) for other processing activities may come to light in the future, interfering with important processing, particularly in light of wider changes made to the lawful ground for processing in the Bill. The grounds might alternatively need to be varied, for example to add additional safeguards if they were being relied on inappropriately by data controllers, or new grounds added by Regulations might need to be omitted for similar reasons. The ability for the government to act swiftly in these circumstances justifies the need for a regulation-making power in order to account for these situations.

332. The power allows direct amendment of Annex 1 in order to ensure legislative coherence and clarity for the reader. Data controllers and data subjects are used to being able to consult Article 6(1) UK GDPR to identify lawful grounds and will now need to consult Annex 1 also. The government would like to keep these additions to the lawful processing grounds in one place given their fundamental importance to the data protection framework. This approach of making direct amendments to the DPA 2018 is consistent with existing regulation-making powers in the DPA 2018 that permit exemptions from important principles and rights (eg. section 16(1)(b) - powers to exempt from data subject rights and section 10(6) power to add, vary or omit conditions added by regulations in relation to the processing of sensitive data). There are limitations on the power: no provisions that were added to Annex 1 by primary legislation can be omitted. Also, the Secretary of State must take into account the interests and fundamental rights and freedoms of data subjects and where relevant, the fact that children may be less aware of the risks and consequences associated with processing of personal data and of their rights in relation to such processing. In addition, the Secretary of State may only exercise the power to add conditions to new Annex 1 where the Secretary of State considers that processing in the case to be added to Annex 1 is necessary to safeguard an objective listed in Article 23(1)(c) to (j) UK GDPR.

333. Before making regulations under this power, the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see new Article 91A UK GDPR added by clause 106 of this Bill).

Justification for the procedure

334. By virtue of new Article 6(10) UK GDPR (as inserted by clause 70(4)), the regulations are subject to the affirmative procedure. This level of scrutiny is considered appropriate given that the regulations permit changes to fundamental lawful processing grounds. Given that the effect of clause 70 is to introduce new lawful grounds that are exempt from the balancing of interests test, the procedure is consistent with existing regulation-making powers in DPA 2018 that permit exemptions from important principles and rights (eg. section 16(1)(b) - powers to exempt from data subject rights - and section 10(6) - power to add, vary or omit conditions added by regulations in relation to the processing of sensitive data).

Clause 71: Power to amend conditions in which processing is treated as compatible with the original purpose

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

335. Clause 71(6) inserts new Annex 2 into the UK GDPR. Annex 2 sets out a limited set of circumstances in which processing of personal data for a different purpose is treated as compatible with the original purpose without a specific law being required. The context for these provisions is that the existing law as set out in the UK GDPR (carried over on EU exit from the EU GDPR) is confusing. The main provision in the text (Article 6(4) UK GDPR) is unclearly drafted, and is supported by a recital (with non-legislative effect) - recital 50 - which provides more detail but is also difficult to decipher. As such, controllers and data subjects have had difficulty accessing these important rules, which relate to a fundamental principle in the UK GDPR that processing in a manner incompatible with the original purpose is not permitted. New Article 8A(5)-(8) contains a regulation-making power to amend Annex 2 by adding to or varying the provisions in the Annex or omitting provisions added by regulations made under Article 8A(5). The power can only be exercised where the Secretary of State considers that processing in these cases is necessary to safeguard an objective listed in Article 23(1)(c) to (j) of the UK GDPR. New Article 8A(7) provides that regulations can identifying processing by any means, eg. by reference to the controller, the processor or the personal data.

Justification for taking the power

336. The power is needed because new Article 8A is clarifying the rules on purpose limitation to make them easier for data controllers and data subjects to understand them. The rules affect data controllers across all sectors of the UK. There is a risk that in clarifying those rules for the first time, certain important public interest processing activities are inadvertently affected, given that the current rules allow for a degree of ambiguity in interpretation. Controllers may only realise that these problems arise when they come to apply the new rules to processing activities. It is important that the government is able to deal with any such situations swiftly and on a case by case basis in case the codification of these rules leads to the impediment of important processing for an important objective of public interest, for example. It is also important that where new exemptions are added but evidence arises that these are being relied on inappropriately, these are able to be removed or varied.

337. The power allows direct amendments of Annex 2 in order to ensure legislative coherence and clarity for the reader. Data controllers and data subjects will need to consult Annex 2 and provisions in the main body of the UK GDPR to understand the framework for processing personal data for a different purpose. The key aim of clause 71 is to provide clarity

for data subjects and data controllers around an important data processing principle that has previously been lacking. Having a coherent and complete set of rules around processing for a different purpose in new Article 8A and Annex 2 will give controllers more confidence about using personal data correctly and data subjects a better understanding of their rights. This approach of making direct amendments to DPA 2018 is consistent with existing regulation-making powers in DPA 2018 that permit exemptions from important principles and rights (eg. section 16(1)(b) - powers to exempt from data subject rights - and section 10(6) - power to add, vary or omit conditions added by regulations in relation to the processing of sensitive data). By way of limitation on the power, it does not permit conditions that were added by primary legislation to be omitted.

338. Before making regulations under this power, the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see new Article 91A UK GDPR added by clause 71 of this Bill).

Justification for the procedure

339. By virtue of new Article 8A(8), as inserted by this clause, the regulations are subject to the affirmative procedure. This level of scrutiny is considered appropriate given that the new cases that can be added by regulations amount to exemptions from one of the key data protection principles (the purpose limitation principle in Article 5(1)(b) UK GDPR). The procedure is consistent with existing regulation-making powers in DPA 2018 that permit exemptions from important principles and rights (eg. section 16(1)(b)- powers to exempt from data subject rights) and section 10(6)- power to add, vary or omit conditions added by regulations in relation to the processing of sensitive data).

Clause 72: Power to amend conditions in which processing is treated as having a basis in relevant international law

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

340. Articles 6(1)(e) and 9(2)(g) of the UK GDPR provide that data controllers can process personal data and special category data (personal data which is more sensitive in nature) on public interest grounds if certain requirements are met, including that the basis for the processing is set out in 'domestic law'. They can also process personal data relating to criminal offences and convictions if, among other things, the processing is authorised by 'domestic law' (Article 10(1)). Controllers may also further process personal data if, among other things, that processing is authorised by an enactment or rule of law under Article 8A(3)(e) (inserted by Clause 71 of this Bill).

341. Clause 72 amends these Articles to make it clear that personal data can also be processed on these grounds if the processing has a basis in or is authorised by 'relevant international law'. This clause inserts s.9A into the DPA 2018, which sets out that processing will have a basis in 'relevant international law' if it meets a condition in new Schedule A1 to the DPA 2018. Conditions in Schedule A1 must relate to international treaties, ratified by the United Kingdom.

342. The clause inserts one condition in Schedule A1, relating to processing necessary to respond to requests under the Data Access Agreement between the UK and the United States of America (the DAA). The DAA permits telecommunications operators (TOs) in the

UK to share information about serious crimes with law enforcement agencies in the US; and vice versa.

343. Disclosures made by UK TOs under the DAA are already lawful under the UK GDPR and the relevant domestic framework. However, some UK TOs feel that the domestic framework is not sufficiently clear in respect of the basis that can be relied on when responding to DAA requests under public interest grounds. In light of the importance of the DAA to enable law enforcement on both sides of the Atlantic to promptly and efficiently access data that is vital to helping keep people safe, the Government considers it necessary to put it beyond any possible doubt that the DAA provides a basis / authorisation for disclosures under the above provisions of the UK GDPR through this amendment.

344. The clause also inserts a Henry VIII power to add further conditions to Schedule A1 by regulations. These conditions must relate to an international treaty ratified by the UK. The power also allows conditions to be varied or omitted, and for further safeguards to be specified.

Justification for taking the power

345. The power is needed to ensure that important processing under future international agreements that may face similar issues to the DAA should not be compromised. While no other conditions (i.e. relating to other international treaties) have been added alongside the DAA, given the wide range of international treaties the Government enters into, it cannot be precluded that similar issues may arise in different contexts. Therefore the Government considers it necessary to include the power to specify other international agreements. The Government considers that a power to specify further individual agreements is a proportionate way to ensure that this provision is capable of providing that clarification, where necessary.

346. In practice, there will be certain checks and limitations on the exercise of the power in addition to parliamentary scrutiny required by the procedure. The power is limited to specifying conditions relating to 'treaties' that have been 'ratified' by the UK, applying the definitions found in s.25 Constitutional Reform and Governance Act 2010 (CRAGA 2010). This means that future agreements specified may have already been subject to parliamentary scrutiny via the process set out in section 20 CRAGA 2010 (as was the case with the DAA). In addition, the Secretary of State would, in practice, only add conditions relating to agreements they consider fulfil the other requirements of Article 6(3), 9(2)(g) and 10(1) (as the case may be), including that the relevant international law must meet an objective of public interest and be proportionate to the legitimate aim pursued (Article 6(3)), respect the essence of the right to data protection (Article 9(2)(g)) and provide for safeguards for the rights and freedoms of data subjects (Article 9(2)(g) and Article 10(1)). Finally, any regulations would be subject to consultation with the ICO and such others as the Secretary of State considers appropriate as required by section 182 DPA 2018.

Justification for the procedure

347. By virtue of section 9A(5), as inserted by this clause, the regulations are subject to the affirmative procedure. This level of scrutiny is considered appropriate given that this power will permit direct amendments to the DPA 2018, including adding further conditions to Schedule A1.

348. The procedure is consistent with existing regulation-making powers in DPA 2018 which supplement Articles 9 and 10 of the UK GDPR such as section 10(6) (power to add, vary or omit conditions added by regulations in relation to the processing of sensitive data and criminal convictions data).

Clause 74: Powers to add to the types of processing of special categories of personal data under the UK GDPR and sensitive processing under the Data Protection Act 2018 (DPA 2018)

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

349. Article 9(1) UK GDPR sets out an exhaustive list of special categories of personal data, sometimes known as "sensitive data". Processing of data in this list is prohibited unless an exception (also known as a "condition" for processing special category data) in Article 9(2) UK GDPR is met together with any associated conditions under Schedule 1 to DPA 2018 where required.

350. Parts 3 and 4 DPA 2018 have similar provisions in place with regards to "sensitive processing" to those referred to above in the UK GDPR for the processing of "special categories of personal data". These regimes set requirements that must be met when processing any of the categories of sensitive processing set out in the legislation (sections 35(8) and 86(7) DPA 2018). For processing under part 3 DPA 2018, this will include meeting a condition under schedule 8 if processing without the data subject's consent. Such processing under part 4 DPA 2018, will need to meet a condition set out in schedule 10 DPA 2018.

351. Clause 74(1) inserts a new Article 11A into UK GDPR which confers powers on the Secretary of State, by regulations, to make provision relating to the categories of processing of special categories of personal data under the UK GDPR.

352. The clause also provides equivalent powers in relation to processing under each of the separate law enforcement (Part 3, DPA 2018) (jDP53(5)) and intelligence service (Part 4, DPA 2018) (jDP53(8)) data protection regimes, as well as making a consequential amendment with regards section 202 of the Investigatory Powers Act 2016 (IPA 2016).

353. The new regulation-making powers under each regime will enable the Secretary of State, by regulations to:

a. add new special categories of data and categories of sensitive processing to the relevant regimes;

b. remove those categories of special category data, or sensitive processing that have been added by regulations;

c. make provision that any of the existing exceptions in UK GDPR or conditions in DPA 2018 can or cannot be relied on in relation to any new category added by regulations; and

d. make provision to vary any of the existing exceptions or conditions, but only as it relates to any new categories added by regulations.

354. Article 11A(2) UK GDPR sets out the meaning of "added processing" as meaning new descriptions of special category processing added under regulations made under Article 11A(1). The powers cannot be used to remove existing special categories from Article 9(1) or to remove or vary exceptions for existing special categories under Article 9(2). Similar provisions are in place, reflecting the Parts 3 and 4 DPA 2018 regimes by virtue of new sections 42A(2) and 91A(2). Under these regimes there are already powers to add conditions

to Schedule 8 and Schedule 10 DPA 2018 and to remove those added by regulations. However, as there is not a power to vary conditions added by regulations, such a power is being added by subsections (4)(a) and (7)(a) of clause 74.

355. These provisions contain powers enabling textual amendments to DPA 2018 with regards definitions that may need amending if new categories of processing are added to the lists of special categories of data or sensitive processing.

356. These provisions further amend section 202 IPA 2016 and include a new section 202A in that Act. This section relates to considerations undertaken when determining whether a class bulk personal data warrant can be relied on to retain and examine a bulk personal dataset, such considerations include reference to sensitive personal data and specified categories of sensitive processing under part 4 DPA 2018. The powers under new section 202A IPA 2016 will enable the Secretary of State, by regulations, to make provision that a description of part 4 DPA 2018 sensitive processing, is to be considered sensitive processing for the purposes of the section 202 IPA 2016 considerations, and to make provision so that any added processing is not to be considered sensitive processing for those purposes. The existing provisions referred to in section 202 IPA 2016 could not therefore be removed.

Justification for taking the power

357. The government requires delegated powers to enable the government to rapidly respond to evolving technologies in the future, and to keep pace with technological and societal developments. These regulation-making powers will provide the option to include further categories to the list of special categories of data, and sensitive processing if and when it is deemed necessary, to afford greater protections to such data under the legislation, without the need to await primary legislation.

358. The government believes there are strong arguments for including such powers given the aim of this amendment is to ensure the legislation anticipates future requirements and enables the government to respond rapidly to emerging technologies to provide additional protections to specific groups that require greater protection to avoid risks of bias, discrimination and wider harms. Importantly, the powers sought for this amendment would only be used to enhance existing protections of rights and freedoms and not erode them.

359. This provision follows on from a recommendation from the Regulatory Horizons Council, that neurodata be added to the list of special categories of personal data under Article 9 UK GDPR. Ada Lovelace Institute have also recommended that 'biometric categorisation' be included as a special category in addition to 'biometric identification' which is already included on the list of special categories of data. This in turn highlighted the government's inability to add to this list and the safeguards it contains without primary legislation. This is an unsustainable approach given the need to ensure the protections afforded to people's personal data keep pace with innovation and technological change. In the future, there may also be calls to add currently known types of data to the special categories and sensitive processing lists. These regulation-making powers will provide the option to add further categories to these lists, if and when it is deemed necessary, to afford greater protections to such data under the legislation, without the need to await primary legislation.

360. The powers to make provision that any of the existing exceptions in UK GDPR or conditions in DPA 2018 can or cannot be relied on in relation to any new category added by regulations (referred to above) are needed because the exceptions to the general prohibitions (UK GDPR) and the conditions in the DPA 2018 were drafted with only the current special categories or categories of sensitive processing in mind. If a new category is recognised in the future, it may be necessary to alter the exceptions or conditions on which it can rely in order to provide more specific protection. The powers to make provision to vary any of the existing exceptions or conditions, but only as it relates to any new categories added by

regulations (referred to above) enable the existing exceptions (UK GDPR) and conditions in the DPA 2018 to be amended, but only with regards any added special categories of data or categories of sensitive processing. This is to ensure that any conditions available to added categories are appropriate.

361. The powers to enable amendments of the DPA 2018 enable the amendment of primary legislation (Henry VIII powers). This is important in ensuring legislative coherence, clarity and simplicity for the reader. In contrast, a regulation-making power that does not permit the amendment of primary legislation would mean the reader would have to look to additional legislation in order to see the full provisions given the key information about what constitutes sensitive data would not all be in one place.

362. Before making regulations under these powers the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see new Article 91A UK GDPR added by clause 106 of this Bill and section 182 DPA 2018).

363. The power provided for in new section 202A IPA 2016 is needed to ensure that should new categories of sensitive processing be added to part 4 DPA 2018 by virtue of new section 91A referenced above, there is a mechanism to enable the Secretary of State to, by regulations, make provisions that any new categories are also to be considered sensitive for the purposes of section 202 IPA 2016 providing appropriate protections for this data.

Justification for the procedure

364. The regulation making powers inserted by this clause, are subject to the affirmative procedure. This level of scrutiny is considered appropriate given that the regulations will be capable of adding to the types of processing of special categories of personal data or categories of sensitive processing and amending primary legislation.

Clause 75(2)(a): Power to require controllers to produce guidance about fees

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

365. This clause amends existing regulation-making powers already conferred on the Secretary of State by section 53. The Secretary of State already has the power to specify by regulations limits on the fees that a controller may charge for responding to a subject access request. The amendment will also allow the Secretary of State to:

a. Require controllers to produce and publish guidance about the fees that they charge in reliance on section 53 DPA 2018 as amended, and

b. Specify what this guidance must include.

Justification for taking the power

366. The Secretary of State has an existing regulation-making power in section 53(4) DPA 2018 to specify limits on the fees that a controller may charge under section 53. The new power in subsection 4A of section 53 DPA 2018 is needed so that the Secretary of State may also make regulations requiring controllers to produce and publish guidance about the fees they can charge. The purpose of this new power is to ensure that there is consistency and to

reduce fragmentation across the Part 2 and Part 3 regimes. An equivalent regulation-making power already exists in connection with general processing subject to the UK GDPR (see section 12(2) DPA 2018).

367. Before making regulations under this power, the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see section 182 DPA 2018).

Justification for the procedure

368. The existing regulation-making power in section 53(4) DPA 2018 is subject to the negative resolution procedure and the additional power in section 53(4A), will be subject to the same procedure. The negative procedure remains appropriate as it affords the appropriate level of parliamentary scrutiny for the existing power in s. 53(4) as well as for the new power given that it simply imposes a duty on controllers to produce and publish guidance about fees that they charge in section 53(4A). The power to make regulations pursuant to section 12(2) DPA 2018 in respect of controllers processing under the UK GDPR (which this provision is reading across to Part 3), is also subject to the negative procedure.

Clause 80 re: Automated decision-making for general/commercial processing

Clause 80: Powers to make further provision about automated decision-making - Article 22A (new Article 22D(1) and Article 22D (2))

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

369. Article 22 of the UK GDPR sets out the conditions under which solely automated decisions, including profiling, that produce legal or similarly significant effects on data subjects may be carried out. Existing Article 22 restricts such activity to cases satisfying three conditions: (i) where necessary for entering into, or the performance of, a contract between a controller and a data subject; (ii) where such activity is required or authorised by law; or (iii) where a data subject has provided explicit consent.

370. New Article 22A(1)(a) clarifies that a decision is based on solely automated processing if there is no meaningful human involvement ('solely ADM'). New Article 22A(1)(b)(i) and (ii) set out the meaning of a significant decision as one that produces legal or similarly significant effects on a data subject. New Article 22B(1)-(3) sets out the restrictions on solely ADM with respect to special category data. New Article 22B(4) prohibits a reliance on new Article 6(1)(ea) for the purposes of carrying out solely ADM. New Article 22C sets out the safeguards that must be applied when undertaking solely ADM. The government requires regulation-making powers to amend new Article 22A(1).

Justification for taking the power

371. The government requires delegated powers which will allow a dynamic response to the growing evidence base that will emerge from the increased adoption of evolving technologies using solely automated decision-making. The powers will provide clarity to data

subjects and controllers as to whether an activity falls within scope of new Article 22A. There are two powers which are required:

a. The power in Article 22D(1) will enable the Secretary of State to bring in regulations to provide, for the purposes of Article 22A(1)(a), what is, or is not, to be taken to be meaningful human involvement in particular cases. Given the range of use cases that fall within the scope of Article 22A, and the fast-moving pace of innovation and uptake of technology using automated decision-making, it would not be feasible to address the range of specific cases that require clarity, within the timescales needed in practice, in primary legislation. For example, the application of this power is likely to relate to some significant decisions that are taken on the basis of profiling as defined in Article 4(4) UK GDPR, an automated process which, in some cases, can play a heavy role in determining the outcome reached for a data subject. Since profiling can be used in a diverse set of ways and can be relied on to different degrees in different contexts, a delegated power may be exercised to provide legal certainty, if and when, a growing evidence base suggests that certain applications should or should not be regarded as having meaningful involvement. This is necessary to ensure the circumstances in which the prohibitions in Article 22B and applicable safeguards in new Article 22C UK GDPR apply are clear.

b. The power in new Article 22D(2) serves a similar purpose, ensuring Article 22A(1)(b)(ii), can be amended as necessary to keep pace with the adoption of technologies using solely automated decision-making. The regulation-making power will enable the government to describe decisions that are and are not to be taken as having a "similarly significant effect" for the purposes of Article 22A(1)(b)(ii). This is necessary to ensure the circumstances in which the specific safeguards should apply are clear, and can be updated in line with societal expectations of what constitutes a significant effect in a privacy context. The power in Article 22D(2) will ensure legislative coherence and clarity for the reader and user.

372. Before making regulations under these powers, the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see new Article 91A UK GDPR added by clause 106 of this Bill).

Justification for the procedure

373. Both of the powers in Article 22D(1) and Article 22D(2) will be subject to the affirmative procedure. This is considered appropriate given the exercise of the power may affect how the new Article 22A to Article 22C will apply.

Clause 80: Power to supplement safeguards for automated decision-making (New Article 22 D(3))

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

374. There are existing safeguards in place to protect the rights and freedoms of data subjects where a significant decision has taken place based on solely automated processing. These are currently contained in Article 22(3)-(3A) of the UK GDPR and are supplemented by section 14 DPA 2018. Under the safeguards in Article 22(3), controllers are required to put in place suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, being at least the right to obtain human intervention on the part of the controller, to express his or her point of view, and to contest the decision. Under the safeguards in section 14(4) DPA 2018 the controller must notify the data subject that a decision has been taken based solely on automated processing and within a month of notification the data subject can ask the controller to (i) reconsider the decision, or (ii) take a new decision that is not based solely on automated processing. The controller must then comply with the request in writing pursuant to section 14(5) DPA 2018. There is a power at section 14(7) to amend the section.

375. Clause 80 replaces both the existing safeguards in Article 22 UK GDPR, and the further requirements set out in section 14 DPA 2018 which have been omitted in full, with new Article 22C, which simplifies and consolidates these safeguards for solely ADM. These safeguards include the right to: (i) be provided with information with respect to significant decisions taken using solely automated processing; (ii) make representations about such decisions; (iii) obtain human intervention on the part of the controller in relation to such decisions and (iv) contest such decisions.

376. The existing power in section 14(7) DPA 2018 for the Secretary of State to add or amend current safeguards will be removed by the Bill. The power in new Article 22D(3) will enable the Secretary of State to make further provisions about the safeguards under Article 22C(1):

a. requiring the safeguards to include measures in addition to those described in Art 22C(2);

b. imposing supplementary requirements to those in Art 22C(2) including for example specifying how and when a measure must be carried out; and

c. about what is not to be taken as satisfying the safeguards in Art 22C(2).

377. New section 22D(4) provides that regulations made under paragraph 3 may not amend Article 22C.

Justification for taking the power

378. The safeguards are drafted following a broad, principles-based approach to align with the overall structure of the UK GDPR. The intention is that specific provisions addressing a range of specific circumstances will be set out in the regulations - as what is appropriate to fulfil the safeguards in respect of one controller may not be an effective method of implementing the safeguards for another controller. For example, a requirement for controllers to act within a month may be suitable for certain sectors and situations. However, in other cases, the data subject might need the information sooner, as that period may be far too long for the information provided to allow for any of the other safeguards to be effectively executed. Conversely, some decisions may require particularly swift and efficient handling by controllers to avoid undue delays in critical processes. Therefore, it might be reasonable to expect a data subject to contest decisions more promptly in such circumstances.

379. The government believes a new power is necessary to ensure that the safeguards can address a range of specific circumstances and remain appropriate and effective, in light of the fast-moving advances and adoption of technologies relevant to automated decision-making. This will ensure data subjects are afforded sufficient protections against risks to their rights and freedoms being infringed when their personal data is processed for solely ADM purposes.

380. This power may be exercised to ensure the safeguards include measures which remain fit for purpose. This is in light of the rapid advancement and adoption of technologies related to automated decision-making that may inform when meaningful involvement can be said to have taken place, as well as changing societal expectations of what constitutes a significant decision in a privacy context.

381. Article 22D(3) provides a narrow, clearly delineated power, which permits additional measures to those described, or permits supplemental requirements. Regarding the specific provisions, the reference in Article 22D(3)(a) to 'requiring the safeguards to include measures in addition' might include (for example) requiring the controller to publish information or a report. In Article 22D(3)(b) the reference to 'requirements which supplement what Article 22C(2) requires the safeguards to consist of' includes examples to help the reader of the legislation to understand what 'supplementary' requirements might involve. Our intention is that when would include time limits, and 'how' could be a requirement that information is provided in writing. Before making regulations under this power, the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see new Article 91A UK GDPR added by clause 80 of this Bill).

Justification for the procedure

382. New Article 22D(5) provides that regulations made under Article 22D(3) are subject to the affirmative procedure, This is considered appropriate given the exercise of the power could alter the measure to safeguard a data subject rights. The Secretary of State already has a power under section 14(7) DPA 2018 to make further provisions to provide suitable measures to safeguard a data subject rights, freedoms and legitimate interests in significant decisions based solely on automated processing.

Clause 80: Powers for automated decision-making ("ADM") in the law enforcement context under Part 3 DPA 2018

Clause 80: Powers to make further provision about ADM, new section 50A (new sections 50D(1) and 50D(2))

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

383. These changes to the Part 3 regime mirror the equivalent Clause 80 amendments to the UK GDPR concerning Article 22D set out above and will therefore also apply to automated decision-making in the law enforcement context.

Context and Purpose

384. Sections 49 and 50 DPA 2018 provide limitations and safeguards on solely automated decisions involving processing to which Part 3 of the DPA 2018 applies (law enforcement processing), that produce adverse legal or other significant effects on data subjects. Such activity is only permitted where it is required or authorised by law.

385. Clause 80 repeals sections 49 and 50 DPA 2018, replacing them with new sections 50A-D. These new sections align the approach in Part 3 of the DPA with that in new Articles 22A-D in the UK GDPR, reflecting the broader aim to ensure consistency across the data protection regimes where possible. New section 50A clarifies that a decision is based on solely automated processing, if there is no meaningful human involvement in the taking of the decision ('solely ADM'). Sections 50A(1)(b)(i) and (ii) set out the meaning of a significant decision as one that produces adverse legal or similarly significant adverse effects on a data subject. New section 50B places restrictions on solely ADM based on sensitive processing and new section 50C sets out the safeguards that must be applied when undertaking solely ADM. New section 50D(1) and 50(2) mirrors the powers of the Secretary of State, set out under Article 22D(1) and 22D(2) to make further provisions about solely ADM relating to the scope of section 50A(1). Subsection 50D(3) enables regulations made under new subsection 50D(1) and (2) to amend section 50A directly.

Justification for taking the power

386. These changes to the Part 3 regime mirror the equivalent Clause 80 amendments to the UK GDPR set out above. They therefore adopt the same approach to powers as those provisions bringing clarity to both controllers and data subjects. The justification is therefore the same as already detailed above for the equivalent UK GDPR reforms. As with their UK GDPR counterparts, the powers will also enable Part 3 controllers to take a dynamic response to the growing evidence base that will emerge from the increased adoption of solely ADM.

a. The power in subsection 50D(1) will enable the Secretary of State to bring in regulations to specify what is, or is not, to be taken to be meaningful human involvement. Given the range of processing that falls within the scope of Section 50A, and the fast-moving pace of innovation and uptake of technology using automated decision-making, it would not be feasible to address in primary legislation the range of specific cases that require clarity, within the timescales needed in practice. For example, the application of this power is likely to relate to some significant decisions that are taken on the basis of profiling as defined in section 33(4) of the DPA 2018, an automated process which, in some cases, can play a heavy role in determining the outcome reached for a data subject. Since profiling can be used in many different ways and can be relied on to different degrees in different contexts, a delegated power may be exercised to provide legal certainty, if and when, a growing evidence base suggests that certain applications should or should not be regarded as having meaningful involvement.

b. The power in subsection 50D(2), serves a similar purpose ensuring the provisions can keep pace with the adoption of technologies. The power will enable the government to describe decisions that are and are not to be taken as having a "similarly significant adverse effect" for the purposes of section

50A(1)(b)(ii) . This is necessary to ensure the specific circumstances in which the safeguards should apply are clear, and can be updated in line with societal expectations of what constitutes a significant effect in a privacy context.

c. Regulations made under 50D(1) and (2) may amend section 50A and are therefore Henry VIII powers, This is considered necessary to ensure legislative coherence and clarity for the reader. If amendment to the primary legislation were not permitted, the necessary information as to the scope of section 50A would not all be in one place. The Government intend to keep this information together, for the clarity and simplicity of the reader, noting the importance of understanding the circumstances in which the prohibitions in section 50B and safeguards in section 50C are to be applied. These powers will therefore enable us to be more responsive to the evolution of new technology, providing legal certainty, as well as importantly ensuring legislative coherence, clarity and simplicity for the reader. As set out below consultation will be required before making regulations under these provisions. Paragraphs 80-82 of the Delegated Powers and Regulatory Reform Committee,12th Report of Session 2021-22[1]) recognises that there are times when it is appropriate to use a Henry VIII power and we consider the powers within Clause 80 fall within these circumstances.

387. Before making regulations under these powers, the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see section 182 DPA 2018).

Justification for the procedure

388. The powers in subsection 50D(1) and 50D(2) are subject to the affirmative procedure. This level of scrutiny is considered appropriate given that the regulations will permit the Secretary of State to amend the scope of sections 50(A) and 50(C).

Clause 80: Power to supplement safeguards for automated decision-making under Part 3 DPA 2018 (New subsection 50D(4))

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

389. There are existing safeguards in place to protect the rights of data subjects where a qualifying significant decision has taken place based solely on automated processing. These are currently provided for in section 50 of the DPA 2018 which includes a right for the data subject to ask the controller to reconsider the decision or to take a new decision that is not based solely on automated processing.

[1] https://committees.parliament.uk/publications/7960/documents/211660/default/

390. In order to ensure consistency between the two regimes, new section 50C replaces these existing safeguards with similar safeguards which mirror the reforms being made to automated decision-making under the UK GDPR, via new Article 22C. This includes the right to:

(i) be provided with information with respect to significant decisions taken using solely automated processing;

(ii) make representations about such decisions;

(iii) obtain human intervention on the part of the controller in relation to such decisions and

(iv) contest such decisions.

391. Subsection 50D(4) provides for the Secretary of State to make further provisions about the safeguards required in new section 50C(1). Specifically, it provides them with the power to make provisions:

(i) requiring the safeguards to include additional measures to those listed in new section 50C(2),
(ii) imposing supplementary requirements to those in section 50C(2) for example specifying how a measure in that section must be carried out; and
(iii) about what is not to be taken to satisfy the safeguards set out under sub-sections 50C(2)(a)-(d).

392. Before making regulations under this power the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see section 182 of the DPA 2018).

Justification for taking the power

393. As already detailed above for the equivalent UK GDPR reforms, the government believes that the new power is necessary to ensure that the safeguards continue to provide sufficient protection to data subjects, especially in the light of rapidly developing technology. It will also ensure that they are aligned with those under UK GDPR thereby, bringing clarity to both controllers and data subjects.

394. The Secretary of State already has a power under section 50(4) and (5) of the DPA 2018 to add or amend safeguards for significant decisions based solely on automated processing.

Justification for the procedure

395. As with the existing power under section 50(4) of the DPA 2018, the power in subsection 50D(4) is subject to the affirmative procedure. Given that the exercise of the powers could alter the way in which the safeguards operate, this is considered to be a necessary level of Parliamentary scrutiny.

Clause 85(2): Power to amend safeguards for processing for research etc purposes

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

396. There are existing safeguards in place to protect the rights and freedoms of data subjects when their data is being processed for research purposes. This includes processing for scientific research, historic research, archiving in the public interest and processing for statistical purposes. These are currently contained in Article 89(1) of the UK GDPR as supplemented by section 19 DPA 2018. Under these safeguards, organisations are required to put in place technical and organisational measures, such as pseudonymisation, to protect the rights of data subjects when they are processing for research purposes. There is also a prohibition on processing for research purposes if processed in such a way that causes substantial damage or distress to the data subject. Processing that supports measures or decisions with respect to a particular individual unless the processing is for approved medical research as set out in section 19(4) DPA 2018 is also prohibited. There is an existing power in section 19(5) DPA 2018 to allow the Secretary of State to change the meaning of approved medical research by regulations.

397. Clause 85(2) will move and combine the existing safeguards in section 19 DPA 2018 and Article 89 UK GDPR for research, archiving and statistical purposes (referred to as RAS purposes) into a new Chapter 8A of the UK GDPR for greater clarity. Article 84B will set out what these safeguards are and Article 84C will make further provision as to when these requirements are met. This clause also creates a new power in Article 84D for the Secretary of State to make further provision as to when the requirement for appropriate safeguards is, or is not, met under Article 84B. But the power will not allow the Secretary of State to amend or revoke Article 84C (2), (3) or (4), but will allow the Secretary of State to change the meaning of "approved medical research" for the purposes of Article 84C. The purpose of the power is to ensure that safeguards for RAS purposes are kept up to date as technology changes. While this power is a new power for the purposes of the new clause, it replicates and adds to the existing powers contained in s.19(5) DPA 2018 which is to be omitted by the new clause.

Justification for taking the power

398. The government believes a new power is necessary to ensure there are sufficient safeguards in place to protect data subjects against risks to their rights and freedoms in light of rapid advancement in technology when their data is being processed for RAS purposes. This is power is considered necessary to ensure the definition of "approved medical research" is kept up to date to provide sufficient protections for data subjects when their personal data is being processed for RAS purposes.

399. Before making regulations under this power, the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see new Article 91A UK GDPR added by clause 106 of this Bill).

Justification for the procedure

400. Regulations under new Article 84D will be subject to the affirmative procedure. This is considered appropriate given the exercise of the power could alter what safeguards are in place to protect the rights and freedoms of data subjects.

Clause 88(2): Power to specify which competent authorities may be issued with designation notices for joint processing with the intelligence services

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

401. This clause will enable specified qualifying competent authorities to process data under Part 4 of the DPA 2018 (the regime currently only applicable to the intelligence services) when it is required for the purpose of safeguarding national security. The purpose of this proposal is to simplify data protection considerations by enabling a single set of data protection rules to apply to joint processing activity by qualifying competent authorities and intelligence services, which is judged to have significant operational benefits, enabling closer working in efforts to detect and combat national security threats.

402. The Secretary of State will have the power to issue designation notices, specifying that joint processing between the intelligence services and specified qualifying competent authorities can be governed by Part 4 of the DPA 2018. Competent authorities are defined in section 30 of the DPA 2018, with a list of named authorities provided at Schedule 7 to the DPA 2018 (including the police, national crime agency etc.). The Secretary of State will have the power to make regulations which specify or describe which of these competent authorities should be treated as "qualifying competent authorities". This means notices cannot be issued to a competent authority listed in Schedule 7, unless specified in regulations made by the Secretary of State.

Justification for taking the power

403. This power is needed to ensure that the Secretary of State can specify which competent authorities can apply for and be subject to a designation notice. Competent Authorities are defined by s.30 DPA 2018 and are listed in Schedule 7, however it is recognised that it is unlikely to be necessary for notices to be issued to some of the competent authorities listed in Schedule 7, so it was important to have the ability to restrict the new notice provisions to a more limited range of "qualifying competent authorities". Given the exceptional effect of a designation notice it is essential that it can and should only be possible for such notices to apply where it is proportionate and necessary to do so. Listing qualifying competent authorities in the DPA 2018 itself was considered, but ultimately such an approach was rejected as tending to be overinclusive. It is more appropriate to consider on a case by case basis (as and when the need arises) whether a particular competent authority should be capable of being subject to a notice based on up-to-date information, rather than attempting to pre-empt such considerations by a wider general listing of such bodies on the

face of the legislation. It is also recognised that the list at Schedule 7 to DPA 2018 could be subject to further change, so creating a restrictive list of qualifying competent authorities at this stage may mean it becomes out of date. The focused and specific regulation-making power ensures that the Secretary of State can more proportionately respond and keep under regular review which competent authorities should be regarded as qualifying.

404. Before making regulations under this power, the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see section 182 DPA 2018).

Justification for the procedure

405. Regulations designating competent authorities as "qualifying competent authorities" will be subject to the affirmative procedure. It is considered that given the Secretary of State can issue designation notices to those competent authorities specified in such regulations, this procedure provides an appropriate level of Parliamentary scrutiny.

Clause 91(2): Power to require the Information Commissioner to prepare codes of practice for data processing

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

406. Section 128 DPA 2018 provides a power for the Secretary of State to make regulations requiring the Information Commissioner to prepare codes of practice giving guidance as to good practice in the processing of personal data and to make them available to such persons as the Commissioner considers appropriate. Any code of practice required to be issued under regulations made under section 128 would be in addition to the four topic-specific codes that the Information Commissioner is required to produce under section 121 to 124 DPA 2018. Where a code of practice is issued under section 121 to 124, the code is subject to additional requirements in section 125 to 127 DPA 2018 which set out the process for approval of those codes, requirements for publication and review of the codes and the effect of the codes.

407. Clause 91 replaces section 128 DPA 2018 with new section 124A, restating the Secretary of State's existing power to make regulations requiring a new code of practice to be produced and requiring consultation with the Secretary of State and other relevant persons on the code. It also provides that where a new code of practice is required by regulations, that code of practice will be subject to the same parliamentary approval process, requirements for publication and review and have the same legal effect as other codes of practice issued under section 121 to 124. This is intended to remedy the discrepancy between codes of practice issued under section 121 to 124 and those that may be required by regulations.

408. As for other codes of practice, codes issued under new section 124A will also be subject to new requirements inserted into the DPA 2018 by clause 92 to establish a panel to consider the code, prepare an impact assessment on the code and to submit the code to the Secretary of State for approval.

Justification for taking the power

409. This is a restatement of the Secretary of State's existing power to make regulations requiring the Information Commissioner to prepare a code of practice under section 128 DPA 2018 and the amendments made are intended to remedy the discrepancy between codes of practice issued under section 121 to 124 and those that may be required by regulations made by the Secretary of State. The power to require an additional code of practice through regulations has not yet been exercised by the Secretary of State, but remains necessary as there may be situations where, due to the evolution of new technologies or in response to societal pressure, additional codes of practice may be desirable to set out good practice and support data protection compliance.

410. Before making regulations under this power, the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see section 182 DPA 2018).

Justification for the procedure

411. The existing regulation-making power under section 128 DPA 2018 is subject to the negative resolution procedure and the power as restated in new section 124A will be subject to the same procedure. The negative procedure remains appropriate as any regulations made under this power will simply impose a duty on the Information Commissioner to provide practical guidance on good practice in the processing of personal data and the negative procedure affords the appropriate level of parliamentary scrutiny for this.

Clause 92: Power to disapply/modify requirements for panels to consider code of practice

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

412. This clause inserts new section 124B into the DPA 2018 which requires the Information Commissioner to establish a panel to consider a code of practice which is prepared under section 121 to 124A of the DPA 2018 and submit a report on the code to the Commissioner. The panel should be made up of individuals with relevant expertise and those who are most likely to be affected by the code. The Information Commissioner is required to publish a statement identifying the members of the panel and the process for selection. The Commissioner is also required to make arrangements for members of the panel to consider the code with one another and prepare and submit a report on the code to the Commissioner.

After the report has been submitted, the Commissioner must make any alterations to the code that the Commissioner considers to be appropriate in light of the report and publish the code in draft along with the report (or a summary of it). Where a recommendation in the report has not been accepted by the Commissioner, an explanation of why it has not been accepted should be published.

413. Subsection (11) of new section 124B allows the Secretary of State to make regulations disapplying or modifying the requirements of new section 124B in the case of a code which the Commissioner is required to prepare under regulations made under new section 124A (as such this is a limited Henry VIII power). This is because, whilst we anticipate that the panel consultation requirements will ordinarily apply to a new code prepared under new section 124A, it may not be feasible or proportionate for all of these requirements to apply to every new code of practice which the Secretary of State requires the Commissioner to prepare under this section. For example, it may be that due to the nature of the matter covered by the code it would not be appropriate for an external panel of experts to consider the code or it may not be appropriate to identify individual panel members.

Justification for taking the power

414. This power is needed as it is not possible to anticipate what codes of practice may be required by regulations made under section 124A because, as set out above, this will depend on the evolution of new technologies or emerging societal issues that need to be addressed. It is therefore not possible to anticipate now whether it will always be appropriate to apply the new requirements for a panel consultation to that code and a power to disapply or modify the new section 124B requirements is needed to allow for this decision to be taken at the time that a new code of practice is required based on the proposed topic of the code.

415. Before making regulations under this power, the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see section 182 DPA 2018).

Justification for the procedure

416. The negative resolution procedure is considered to be appropriate for regulations made using this power as the regulation-making power may only be used to disapply or modify the new section 124B requirements in relation to codes of practice required by regulations made under new section 124A. Regulations requiring a code to be produced under new section 124A are subject to the negative resolution procedure and before a code takes effect it will be laid before Parliament and be subject to a parliamentary procedure akin to the negative resolution procedure in accordance with section 125(3) of the DPA 2018. It is considered that it is appropriate for the same level of scrutiny to apply to regulations disapplying or modifying the panel consultation requirements for that code. There is no power to disapply or modify the panel consultation requirements for codes of practice which the Information Commissioner is required to produce under section 121 to 124 of the DPA. In addition, only the requirements in new section 124B relating to a panel consultation on a new code of practice may be disapplied or modified using this power. Where such powers are used, the code would continue to be subject to scrutiny through requirements in new section 124A(4) of the DPA 2018 to consult the Secretary of State and other relevant persons on the code, requirements in new section 124C to prepare and publish an impact assessment on

the code and requirements in new section 124D to submit the code to the Secretary of State for approval.

Clause 102: Power to require controllers to notify Information Commissioner of the number of complaints received

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

417. This clause inserts new section 164B into DPA 2018, giving a power to the Secretary of State by regulations to require a data controller to notify the Information Commissioner of the number of complaints made to it under new section 164A. (Section 164A requires data controllers to facilitate the making of complaints, and to respond to and make enquiries into the subject matter of complaints from data subjects).

418. This clause aims to give the Information Commissioner the ability to take a more risk-based approach to complaints and, where possible, to devote fewer resources to dealing with those complaints which can be more quickly and efficiently resolved directly between data controllers and data subjects. This provision gives the Secretary of State the power - if attempts to encourage data controllers voluntarily to report complaints are unsuccessful - to require transparency from controllers regarding the number of complaints they receive, enabling the Commissioner more easily to monitor the volume of complaints data controllers are receiving over a specified period.

Justification for taking the power

419. It is important for the Secretary of State to have the power to set reporting requirements on controllers through secondary legislation. In particular, the government envisages applying varying thresholds for the notification of complaints to the Commissioner to different categories of controllers (for example, large controllers, and controllers in certain data-intensive sectors may be subject to different notification thresholds from some smaller controllers). In the first instance, the intention is to set out a non-legislative route to encourage controllers to report the number of complaints received to the Information Commissioner (on a voluntary basis), and then to exercise the power to make regulations only to the extent to which the non-legislative route does not give the information required. At that stage if voluntary reporting has not yielded the information required, the Information Commissioner would be likely to have a clear idea of which sectors it should target for reporting purposes: for example, controllers which process a large quantity of data, or particularly sensitive, personal data, may be subject to different notification thresholds.

420. Before making regulations under this power, the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see section 182 DPA 2018).

Justification for the procedure

421. This power is subject to the negative procedure. Controllers will simply be required to provide a figure (the relevant number of complaints received) to the Commissioner, so this should not be overly onerous. A key principle of the data protection legislative framework is that data protection is processed lawfully, fairly and in a transparent manner, and the publication of the number of complaints received from data protection subjects will support (in particular) the third limb of this principle. As such, the government believes that the negative procedure affords an appropriate level of parliamentary scrutiny for the exercise of this power.

Clause 111: Power to provide exceptions to Regulations 6(1)
Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

422. Current regulation 6 of Privacy and Electronic Communications (EC Directive) Regulations 2003 (the "PEC Regulations") sets out rules on the confidentiality of communications in "terminal equipment" such as computers, mobile phones, wearable technology, smart TVs and connected devices, including the Internet of Things. Regulation 6(1) prohibits the storing of information or gaining access to information stored in the terminal equipment of an individual (e.g. via the placement of cookies or similar technologies), unless the individual is provided with clear and comprehensive information about the purposes of the storage of, or access to, that information; and the subscriber or user has given consent.

423. The government wishes to reduce the friction caused by numerous cookie consent pop ups, banners etc that are used on websites and apps to request user consent to cookies and similar technologies. The Bill will therefore introduce some limited exceptions to the requirements that user consent must be obtained for the use of cookies and similar technologies. The exceptions being introduced are considered to present a low risk to people's privacy. For example, Schedule A1 to PEC Regulations in Schedule 12 of the bill introduces an exception that permits the technical storage of, or technical access to, information for the sole purpose of carrying out the transmission of a communication over an electronic communications network. The exception applies only where the user is provided with clear and comprehensive information about the purpose and is given a simple and free means of objecting to the storage or access. The other exceptions are set out in schedule 12.

424. Regulation 6A will introduce a power for the Secretary of State to provide exceptions to Regulation 6(1). The power would also allow the Secretary of State to omit or vary any existing exceptions to the consent requirements as well as make consequential, supplementary, incidental, transitional, transitory or saving provisions which are necessary to give effect to exceptions made by regulations made under these provisions.

Justification for taking the power

425. The government believes a new power is necessary as this is an area where technological advancements are constantly evolving and it is crucial to have a power safeguard and/or to amend regulation 6 to keep pace with the development. The power will ensure that the government is able to make changes to the exceptions to regulation 6(1) in the light of experience of how the exceptions operate in practice.

Justification for the procedure

426. These regulations will be subject to the affirmative procedure and include a duty to consult. This is considered appropriate given the exercise of the power could alter the scope of the exceptions to Regulation 6 (1) and what safeguards are in place to protect individuals' privacy rights.

Clause 113(4): Power to amend fixed penalty amount

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

427. The PEC Regulations include rules on reporting breaches of personal data to the Information Commissioner for organisations providing electronic communications services to the public (e.g. telecoms providers and internet service providers). These rules are supplemented by provisions in the retained version of the Commission Regulation (EU) No 611/2013 on the measures applicable to the notification of personal data breaches under Directive 2002/58/EC of the European Parliament and of the Council on privacy and electronic communications ("Regulation 611/2013").

428. Under Article 2 of Regulation 611/2013 if a data breach occurs the "service provider" (a provider of a public electronic communications service) must notify the Information Commissioner no later than 24 hours of becoming aware of the breach, and also the user concerned if the breach is likely to adversely affect their privacy without undue delay. Failure to do so incurs a fixed penalty of £1000 under regulation 5C of the PEC Regulations.

429. Clause 110 amends regulation 5A and Article 2 so that breaches need to be reported without undue delay and, where feasible, no later than 72 hours after having become aware of the breach.

430. Similar requirements exist under articles 33 and 34 UK GDPR. Under article 33, a controller must communicate a personal data breach to the Information Commissioner within 72 hours unless the breach is unlikely to result in a risk to the rights and freedoms of natural persons. Under article 34 the controller must communicate the breach to the data subject if there is a high risk to the rights and freedoms of natural persons without undue delay. Infringement of these obligations is subject to a penalty of the standard maximum level, which could be up to 2% of global annual turnover or £8.7 million (whichever is higher).

431. It has been decided to include a power in the PEC Regulations for the Secretary of State to change the fixed penalty amount set in regulation 5C of the PEC Regulations. The power would also allow the Secretary of State to make transitional provisions which are necessary to give effect to the new fixed penalty amount made by regulations made under these provisions.

Justification for taking the power

432. The Bill will ensure that the enforcement regimes and penalty levels of the PEC Regulations with other data protection legislation create a more cohesive framework, including introducing the two-tier system of fines found in DPA 2018 and UK GDPR. The fixed penalty amount under regulation 5C of the PEC Regulations is a remaining notable disparity between the PEC Regulations and similar infringements under the UK GDPR.

433. However, the reporting requirements under the PEC Regulations and UK GDPR whilst similar are not identical. Articles 33 and 34 UK GDPR have a wider scope relating to controllers/processors, whilst the PEC Regulations relate to public electronic communication service providers (which is mainly telecommunications and internet providers). Therefore, it is not necessary to bring the PEC Regulations' penalty in line with UK GDPR right now as the government is satisfied that the £1000 fixed penalty is presently sufficient due to the Information Commissioner's effective relationship with the telecommunications sector. This current effectiveness may change in the future as technology and practices evolve and therefore the capability is needed to ensure the fixed penalty amount remains proportionate and dissuasive.

Justification for the procedure

434. Given the potentially significant increase in monetary penalties, parliamentary scrutiny under the affirmative procedure is considered appropriate. This will also cohere to the approach taken in the power for amending the fixed penalty for failure to report suspicious traffic, as set out above.

Clause 118: Power to make a scheme for the transfer of property, rights and liabilities from the Information Commissioner to the Information Commission.

Power conferred on: Secretary of State

Power exercised by: n/a

Parliamentary Procedure: None

Context and Purpose

The power enables the Secretary of State to make a scheme for the transfer of property, rights and liabilities from the Information Commissioner to the Information Commission. It facilitates the transfer of functions from the existing regulator, the Information Commissioner, to the new body, the Information Commission.

Justification for taking the power

The transfer of property, rights and liabilities is a technical exercise, and it is appropriate for this to be done through a transfer scheme. An efficient and smooth transfer of assets means the newly established body can operate effectively from the outset. There are many precedents for Secretaries of State being granted the authority to create transfer schemes which reassign property, rights and liabilities due to the establishment of a new public body or the dissolution an existing one (see the Health and Care Act 2022 – including sections 23 and 38).

Justification for the procedure

No parliamentary oversight is required by the legislation. Transfer schemes often contain information that is commercially sensitive, confidential or personal and not appropriate for parliamentary consideration.

Clause 121: Power to disclose information to improve public service delivery to undertakings

Power conferred on: The appropriate national authority (Secretary of State, MCO, devolved counterparts)

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

435. This clause extends section 35 of the Digital Economy Act 2017 ('DEA') to allow information sharing to improve public service delivery to undertakings, being any person, other than a public authority, carrying on a trade or business, including for charitable purposes. Currently, information may only be shared between specified public bodies for specific purposes related to public service delivery aimed at improving the well-being of individuals or households.

436. Section 35 of the DEA contains delegated powers to (i) specify data sharing objectives, and (ii) specify public authorities that can share data for a specified objective by amending Schedule 4 to the DEA (a Henry VIII power). These powers are subject to the affirmative procedure and, under section 44(4) DEA, a duty to consult various bodies including the Information Commissioner, the Commissioners for Her Majesty's Revenue and Customs, appropriate national authorities and other persons considered appropriate.

437. The DEA allows the "appropriate national authority" to make regulations to add "specified persons" and to specify "specified objectives". The "appropriate national authority", as defined in sections 44 and 45 of the DEA is the Secretary of State or Minister for the Cabinet Office, Scottish Ministers, Welsh Ministers or the Department of Finance in Northern Ireland.

438. This clause will extend the section 35 public delivery power to include undertakings but will not change the robust safeguards in place around the use of section 35 powers.

439. Section 35 is a permissive gateway, which means it is at the discretion of the specified persons whether or not they choose to disclose information under the power.

440. The use of the information sharing power is underpinned by the statutory Code of Practice issued under section 43 of the DEA which contains guidance setting out best practice and the procedures and practices to be followed by specified persons.

Justification for taking the power

441. The specified objectives are set out in secondary rather than primary legislation as it will be necessary to regularly add and amend the list of objectives for which information may be disclosed. This flexibility is essential to ensure the power can keep pace with emerging social and economic needs, as well as incorporate new streams of information to address these needs.

442. The list of specified persons is set out in Schedule 4 to the DEA, which can be amended using secondary legislation. Again, it is appropriate to have a delegated power to ensure the list can be regularly updated to meet changing data sharing requirements and to enable further changes as new use cases emerge. The list may also need to be updated using the power at section 35(6)(b) to remove specified persons; an intended sanction for non-compliance with the DEA statutory Code of Practice.

443. Given the relative breadth of the power to share information under section 35, it is considered important that there be tightly controlled limits on the delegated power to specify persons, in particular it is recognised that there must be limits around the nature of the bodies that could be included in these lists. Therefore, there are a number of constraints on this delegated power.

444. To be a specified person, the person must be a public authority or a person providing services to a public authority, as per section 35(4). In making regulations under section 35 the appropriate national authority must have regard to the systems and procedures the person has in place to ensure the secure handling of information by that person (section 35(6)(a)). This is to ensure as far as possible that the integrity of the information shared is maintained.

445. To be specified as a specified objective for the purposes of the section, an objective must meet three conditions set out on the face of the legislation. The first is that the objective has as its purpose a) the improvement or targeting of a public service provided to individuals or households, or b) the facilitation of the provision of a benefit (whether or not financial) to individuals or households (section 35 (9)). The second is that the objective has as its purpose the improvement of the well-being of individuals or households (section 35(10)). The third is that the objective has as its purpose the supporting of a) the delivery of a specified person's functions, or b) the administration, monitoring or enforcement of a specified person's functions (section 35(12)). This clause will amend each of these three conditions to capture undertakings (i.e. businesses and charities) as beneficiaries of the public services, but the essential framework and safeguards remain.

446. When it was introduced, the section 35 delegated powers regime was developed in line with DPRRC's recommendations (13th Report of Session 2016–17, published 19 January 2017 and the government's response in the 18th Report of Session 2016–17 published 23 February 2017). This clause will operate within that same regime.

447. Any data sharing done under section 35 must be carried out in accordance with the requirements of the DPA 2018 and UK GDPR, in addition to any other relevant legal requirements as expressly preserved in the DEA, including specified sections of the Investigatory Powers Act 2016, the Human Rights Act 1998 and EU legal obligations which are binding in UK law.

Justification for the procedure

448. As this clause provides the appropriate national authority with a delegated power to specify objectives and bodies which bodies may share information under each objective, it is considered appropriate that the use of the power is debated and subject to more intensive scrutiny by Parliament via the affirmative procedure as well as consulting the Information Commissioner, other appropriate national authorities, the Commissioners for Her Majesty's Revenue and Customs and such other persons as the appropriate national authority thinks appropriate.

Clause 122(3): Power to describe a kind of regulated service to whom Ofcom must issue an information notice

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

449. This clause amends section 101 of the Online Safety Act 2023 ("OSA") (and other related sections) creating a requirement for OFCOM, when notified of a case by the Coroner (or Procurator Fiscal in Scotland) involving a child death, to issue an information notice requiring retention of certain information relating to a child's use of a regulated service identified under new subsection (E1) by providers of those services. It also gives OFCOM the power, where relevant, to issue such information notices to any other relevant person (as defined in s.101 OSA) requiring retention of information relating to a child's use of a regulated service identified in new subsection (E1)[2].

450. The amendments made by Subsection (3) give the Secretary of State a power to specify through regulations the kinds of regulated service which are to be caught by this measure (see new s.101(E1)), in addition to any regulated services notified to OFCOM by the Coroner or Procurator Fiscal as having been brought to their attention as being of interest in connection with the child's death.

[2] This is intended to capture, for example, information held by ex-providers.

451. Following receipt of notification by a Coroner (or Prosecutor Fiscal equivalent powers to amend DPA 2018 in Scotland) OFCOM will then have to issue an information notice to providers of those services, who will then have to conduct a search for any relevant data held, and make any changes to their processes and systems to ensure that data is not deleted until the information notice expires or is cancelled by OFCOM, following an instruction by the Coroner or Procurator Fiscal. The providers will also be required to respond to the information notice within a specified period by OFCOM to confirm that either no such data is held, or to confirm the steps they have taken to ensure the retention of the data.

452. Failure to comply with the requirements of the information notice may lead to enforcement action, following the processes applicable to information notices issued under s.101(1) of the OSA, and includes a limited number of criminal offences.

Justification for taking the power

453. This clause amends provisions in the OSA, some of which only recently received Royal Assent, and which have not all been commenced yet.

454. Given this is a new regime, there is a need for flexibility in terms of identifying which regulated services ought to be caught by this provision. Specifying the kind of regulated services at this stage and in primary legislation would be premature and may lead to the provision becoming redundant given the rapidly changing landscape of online service providers.

455. Giving the Secretary of State the power to describe the kinds of regulated provider to fall within this provision will provide the opportunity to identify with greater accuracy the kinds of regulated services which need to be caught by the provision, helping to ensure the range of services caught is appropriate and proportionate.

456. In giving the Secretary of State the power to describe the kinds of regulated services caught by this provision, it will be possible to monitor the effectiveness of the provision and amend the kinds of regulated services more quickly should the need arise. This is particularly important given the aim of this provision and the speed with which the online services landscape changes. It would not be feasible to seek primary legislation whenever such a change was required.

Justification for the procedure

457. The regulations are subject to the negative procedure. This is considered appropriate for the reasons below.

458. The requirements and obligations on parties are set out in the clause itself, and this power is limited to naming the kinds of regulated service caught by the provision. The power is limited so that it can only be used to identify kinds of service which fall within the definition of “regulated service” in the OSA, and must be exercised in a proportionate way.

459. Under s.101(1) OSA OFCOM has the power to issue an information notice to any relevant person, and it is left to its discretion as to whom exactly they serve the notices on with no parliamentary scrutiny. With that in mind, it is considered appropriate for the negative

procedure to apply when the Secretary of State specifies kinds of regulated service to be caught by this new information notice provision.

460. Further, we note that the negative procedure also applies to the regulation-making powers in Schedule 11 to the OSA, and those regulations have a much more widespread and significant impact on regulated services (although we note there are additional requirements which must be met prior to making the regulations in those cases given the complexity and significance of the impact of those regulations).

461. With the above in mind, the negative procedure is considered appropriate.

Clause 123: Power to require the provision of information for research about online safety matters

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure for the first regulations (negative procedure for subsequent regulations)

Context and Purpose

462. This clause amends the Online Safety Act 2023 ("OSA") to confer power on the Secretary of State to create a regime to allow researchers access to information held by certain providers of internet services, for the purposes of research into online safety matters. The power is exercisable following consultation with OFCOM, the Information Commissioner and other appropriate persons.

463. The issue of access to data for research purposes was considered during passage of the OSA and the previous Data Protection and Digital Information Bill and follows similar provisions being included in the EU Digital Services Act. Good quality research will help identify unknown or emerging risks and will provide a robust evidence-base on the impact of providers' activities, enabling protective actions from OFCOM, Government, providers and civil society. Providing researchers reliable access to data will support UK academia and will ease the research burden on OFCOM.

Justification for taking the power

464. OFCOM are currently preparing a report that will provide significant evidence on the issue of access to data, upon which informed regulations can subsequently be made. The report, which must be published by July 2025, will describe how, and to what extent, persons carrying out independent research into online safety matters are currently able to obtain information from providers of regulated services to inform their research. It will also explore the legal and other issues which currently constrain the sharing of information with researchers and will assess the extent to which greater access to information for such purposes might be achieved.

465. Whilst the clause sets out in broad terms the nature and key parts of the policy, it is considered appropriate to confer a power to provide the substantive detail of the framework (including the necessary procedural provision). There are many different ways in which an access regime could be implemented and evidence is required from a large number of stakeholders. To install a detailed researcher access regime on the face of the Bill without the evidence-base provided by the OFCOM report and a thorough Government consultation risks including measures that are problematic, unworkable in practice and/or which do not deliver the policy aim or reflect upon and consider the important opinions of key stakeholders who will be most affected by the regulations. In particular, the Government is mindful of risks in relation to personal data and commercially sensitive information and the need to avoid the potential destabilisation of any access regime as it is implemented.

Justification for the procedure

466. The affirmative resolution procedure is considered appropriate for the first set of regulations made under this power, given the likely Parliamentary interest in the detail of the framework and to allow a suitable level of scrutiny.

467. The negative procedure is considered to afford adequate scrutiny on subsequent exercises of the power, since it is thought most likely that those regulations will make minor amendments to the existing framework, rather than introduce wholesale reform.

Clause 126(3): Retention of biometric data from INTERPOL

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: affirmative procedure

Context and purpose

468. Clause 126 inserts a new section into the Counter-Terrorism Act 2008 ("CTA 2008")). New section 18AA sets out updated retention rules for biometric data that has been received by a UK law enforcement authority from INTERPOL. The NCA, in its capacity as the UK's National Central Bureau ("NCB"), receives daily notifications from INTERPOL of all new, updated and cancelled requests for co-operation or notification of potential threats, that have been sent to the UK by INTERPOL members through the INTERPOL systems.

469. Such requests etc. are often accompanied by fingerprint data (and could potentially be accompanied by a DNA profile). The information provided with such requests, including the biometric data, is of great assistance to law enforcement authorities, in particular Counter-Terrorism Police, in combatting national security-related threats to the UK.

470. A law enforcement authority processing such biometric data is required to comply with the retention provisions set out in sections 18 to 18E CTA 2008. However, those provisions are not aligned with the data retention rules under which INTERPOL operates. As a result, in some cases a law enforcement authority may be required to destroy biometric data that relates to an ongoing request or notification.

471. New section 18AA provides that a law enforcement authority may retain biometric data received from INTERPOL until the authority has been informed that the request or notification has been cancelled or withdrawn.

472. Clause 126 also inserts new section 18AB into CTA 2008. Section 18AB provides a delegated power for the Secretary of State to amend new section 18AA by way of regulations to recognise any changes that are made in the future to the current INTERPOL arrangements. Amendments can be made to reflect changes to INTERPOL's name, changes to the arrangements under which biometric material is shared with INTERPOL members, and changes to liaison arrangements between INTERPOL and its members or between two members.

Justification for the power

473. The purpose of making this amendment, and inserting new section 18AA into CTA 2008, is to ensure that the UK domestic biometric data retention provisions are aligned with the relevant provisions of INTERPOL biometric data retention regime. The current differences between the two regimes mean that UK law enforcement authorities are, in some cases, required to destroy valuable biometric data that relates to outstanding requests, and that can be retained under the INTERPOL regime.

474. New section 18AA is framed in accordance with the existing arrangements under which biometric data is shared. It is possible that INTERPOL may make changes in the future that could render that section unworkable, and lead to a new divergence between the two regimes. For example, new section 18AA(2) to (4) make reference to the NCB, as under the current arrangements the UK is required to designate an organisation as its NCB to receive requests etc. However, if in the future INTERPOL was to make alternative arrangements that resulted in requests etc. being sent to the UK via alternative means, new section 18AA is unlikely to operate in the way intended by Parliament.

475. The power will enable new section 18AA to be updated to reflect changes to INTERPOL arrangements, and thereby achieve Parliament's intention of aligning the two regimes.

476. It would be possible to make any required amendments to new section 18AA through primary legislation. However, this might result in a period during which that section did not operate as intended by Parliament; which could lead to the loss of biometric data that is of potential value to national security.

Justification for the procedure

477. As the regulations permit amendments to be made to primary legislation, the affirmative procedure is considered to be appropriate.

Clause 129(1): Power to remove the current recognition of trust services and trust service products which are qualified under equivalent EU law

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

478. This clause will allow for the amendment and revocation of article 24A of *Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market* ("the UK eIDAS Regulation").

479. Under the UK eIDAS Regulation, trust service products provided by a *qualified* trust service provider established in the UK ("UK qualified trust service products") (including qualified electronic signatures, seals, timestamps, and registered delivery services) benefit from a presumption of legal integrity (for example Article 25(2) prescribes that a *qualified* electronic signature has the equivalent legal effect of a handwritten signature).

480. Article 24A of the UK eIDAS Regulation currently allows for elements of trust services (including trust service products) which are qualified under equivalent EU law, to be treated as *qualified* for the purposes of the UK eIDAS Regulation. This legal recognition under UK law is unilateral. Although trust service standards under EU law and UK law currently remain aligned post EU exit, trust services and products which are qualified for the purposes of the UK eIDAS Regulation only (i.e. provided by a qualified trust service provider established in the UK) are not legally recognised under equivalent EU law.

481. Article 24A requires that the UK continues to recognise EU qualified trust services and products on a unilateral basis, even if current aligned EU standards change and continuing to recognise new EU standards is not in the UK's national interests. In future the UK may wish to end the current recognition of EU qualified trust services, either because the EU changes its current trust service standards, and/or the UK qualified trust service market matures to an extent that it is no longer appropriate to unilaterally recognise EU qualified trust services.

Justification for taking the power

482. This clause allows for revocation of Article 24A at the point in future, once it is no longer appropriate from a policy perspective to recognise EU qualified trust services and products.

483. This power will also allow for amendment of Article 24A in order to wind down the current recognition of EU qualified trust services on a staggered basis (this might be necessary depending on potential future changes to EU trust service standards, and the comparative maturity of the UK qualified trust service market in future). For example, if standards for EU qualified signature and seal creation device do not change, whereas other EU trust service standards do, and such devices are still heavily relied upon by UK qualified trust service providers, this power could be exercised to amend Article 24A in order to only allow for the continued recognition of electronic signature and seal creation devices, which are qualified under EU law.

484. A staggered winding down of Article 24A is not possible to achieve, otherwise than through delegated legislation, whilst the final details of the right staggered approach (if necessary) are currently unknown and subject to future changes in EU trust service standards.

485. As well as the revocation and amendment of Article 24A, at the same time as ending the recognition of EU qualified trust services and products, this power will also allow for the revocation (and amendment) of other articles of the UK eIDAS Regulation and associated Implementing Decision (EU) 2015/1506 (which from a policy perspective are contingent upon recognising EU qualified trust services and products). This includes (amongst others) the power to revoke the recognition of EU conformity assessment bodies under new Article 24B, and the power to remove references to a "trust service provider established in the EU".

Justification for the procedure

486. It is appropriate that this power is subject to negative rather than affirmative procedure. This is on the basis that the power is not capable of altering the original policy underlying the UK eIDAS Regulation (standards and regulatory requirements for trust services within the UK) but instead is primarily limited to revoking provisions and removing related references, which were only necessary to insert within the UK eIDAS Regulation upon EU exit to ensure that the qualified trust service market within the UK could continue to operate.

487. So far as the power goes beyond the revocation of provisions and removal of references, in allowing for the amendment of Article 24A, this is to wind down the provision only, and is not capable of altering the fundamental policy behind Article 24A (recognition of EU trust services). Nor does the power to amend Article 24A allow for a widening of the scope of the provision, as there is no power to add an assumption to Article 24A(2) in order to recognise any element of EU qualified trust services which is not recognised currently.

Clause 130(2): Power to specify that certain overseas trust service products shall be treated as equivalent to qualified trust service products under the UK eIDAS Regulation (New Article 45A(1) of the UK eIDAS Regulation)

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative Procedure

Context and Purpose

488. This clause will insert new Article 45A into the UK eIDAS Regulation, in order to allow the Secretary of State by regulations to specify that certain trust service products (electronic signatures, seals, time stamps and registered delivery services) provided by a trust service provider established in a country or territory outside the UK, shall benefit from the same legal presumption of integrity and accuracy of data, that equivalent UK qualified trust service products benefit from under the UK eIDAS Regulation.

489. The purpose behind new Article 45A is to allow for the international interoperability of trust service products (in terms of their legal effect). In particular, by allowing the UK to make required changes to domestic law where UK qualified trust service products currently have a specified legal effect, in order to extend that effect to specified overseas trust service products. This will allow for international mutual recognition agreements, where it is agreed on a mutual basis that UK trust service products and their overseas equivalents shall have an equal legal effect.

Justification for taking the power

490. At this stage, recognising specified overseas trust service products on the face of the Bill would be premature. This is given that there are not yet any mutual recognition agreements in place with other countries allowing for the interoperability of trust service products.

491. A delegated power is therefore necessary in order to achieve recognition of specified overseas trust service products, at a point in future once it is appropriate to do so, either in order to give effect to a mutual recognition agreement concerning the interoperability of trust service products, or as part of wider trade negotiations, where the UK wishes to allow for the interoperability of trust service products.

492. Under new Article 45A(3) the Secretary of State may not make regulations specifying that a certain overseas trust service product shall be treated as legally equivalent to a comparable UK qualified trust service product, unless satisfied that the reliability of an overseas trust service product is at least equivalent to the reliability of the comparable UK qualified trust service product.

493. Recognising specified overseas trust service products through a delegated assessment of equivalent reliability, provides the scope to respond to future technological advances or changes to standards, which mean that further and new elements of overseas trust service frameworks will be relevant to consider in ensuring equivalent reliability of end trust service products.

494. The alternative approach of allowing for the recognition of certain overseas trust service products on the basis that rigid standards set within primary legislation are met (likely modelled around the UK's current trust service framework) would be at risk of redundancy, where overseas trust service frameworks advance over time, or differ from the UK's framework.

Justification for the procedure

495. This power is subject to negative procedure and a requirement under new Article 45C(1) for the Secretary of State to consult the UK's supervisory body for trust services (currently the Information Commissioner) before making regulations. Additional parliamentary scrutiny under the affirmative procedure, is not considered to be necessary for the reasons outlined below.

496. The exercise of this delegated power is subject to appropriate safeguards, including the requirement under Article 45A(3) that the Secretary of State must be satisfied that specified overseas trust service products are at least equivalent to the reliability of their

counterparts under the UK eIDAS Regulation. There is also an additional constraint on the exercise of this power under Article 45A(4), that when making regulations the Secretary of State must have regard to (among other things) the relevant overseas law concerning the type of trust service product to be recognised.

497. Having had regard to the relevant overseas law, the Secretary of State may consider it appropriate to include conditions upon which the legal recognition of specified overseas trust service products is contingent, including conditions as to meeting specific requirements within overseas law, or meeting specific technical or regulatory standards.

498. The assessment of whether certain overseas trust service products are at least equivalent in terms of their reliability to comparable UK qualified trust service products will be technical and will require expertise of the UK qualified trust service industry. Through the consultation requirement under Article 45C(1), the Information Commissioner as the supervisory body for trust services with its technical and industry expertise, will therefore be best placed in order to assist with, and scrutinise, the Secretary of State's assessment as to whether overseas trust service products should be recognised.

499. Detailed and technical assessment of the factors as to whether an overseas trust service product offers equivalent reliability, would also form part of the negotiation process for agreeing any mutual recognition agreement giving rise to the need to exercise this delegated power.

Clause 130(2): Power to specify that certain overseas electronic signatures and seals shall be treated as equivalent for the use of online public services, to their counterparts under Articles 27(1) and (2), and 37(1) and (2) of the UK eIDAS Regulation (new Article 45B(1) and 45B(2) of the UK eIDAS Regulation)

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative Procedure

Context and Purpose

500. Existing Articles 27(1) and 37(1) of the UK eIDAS Regulation provide (respectively for electronic signatures and seals) that public sector bodies must recognise electronic signatures and seals which meet advanced standards, and additional technical standards under Implementing Decision 2015/1506 (assimilated law), where those public sector bodies require an advanced signature or seal for the use of an online public service.

501. Existing Articles 27(2) and 37(2) requires public sector bodies to recognise advanced electronic signatures and seals based on a qualified certificate (or qualified signatures and seals) which meet additional technical standards within Implementing Decision 2015/1506, where those public sector bodies require an advanced signature or seal based on a qualified certificate for the use of an online public service.

502. This clause will insert new Article 45B(1) into the UK eIDAS Regulation, in order to allow the Secretary of State by regulations to specify that certain electronic signatures provided by overseas trust service providers shall be treated for the purposes of Articles 27(1) or 27(2) respectively, as equivalent to advanced signatures which comply with Implementing Decision 2015/1506, or as equivalent to, advanced signatures based on qualified certificates (or qualifying signatures) which comply with Implementing Decision 2015/1506.

503. This clause will also insert new Article 45B(2) into the UK eIDAS Regulation, in order to allow the Secretary of State by regulations to specify that certain electronic seals provided by overseas trust service providers shall be treated for the purposes of Article 37(1) or 37(2) respectively, as equivalent to advanced seals with comply with Implementing Decision 2015/1506, or as equivalent to, advanced seals based on a qualified certificate (or qualifying seals) which comply with Implementing Decision 2015/1506.

504. The purpose behind new Article 45B(1) and (2) (as with Article 45A) is to allow for the international interoperability of trust service products (in terms of their legal effect). In particular, by allowing the UK to make required changes to domestic law so that specified overseas electronic signatures and seals are accepted (on an equal basis to their counterparts under the UK eIDAS Regulation) for the purposes of accessing online public services. This will allow for international mutual recognition agreements, where it is agreed on a mutual basis that UK trust service products, and their overseas equivalents shall have an equal legal effect.

Justification for taking the power

505. At this stage, recognising specified overseas electronic seals and signatures (in the context of use within online public services) on the face of the Bill would be premature. This is because there are not yet any mutual recognition agreements in place with other countries allowing for the interoperability of trust service products.

506. A delegated power is therefore necessary in order to achieve recognition of specified overseas electronic seals and signatures (in the context of use within online public services) at a point in future once it is appropriate to do so, either in order to give effect to a mutual recognition agreement concerning the interoperability of trust service products, or as part of wider trade negotiations, where the UK wishes to allow for the interoperability of trust service products.

507. Under new Article 45B(4) the Secretary of State may not make regulations specifying that certain overseas electronic signatures or seals shall be accepted for the purposes of accessing online public services on an equal basis to their counterparts under the UK eIDAS Regulation, unless satisfied that the reliability of certain overseas electronic signatures or seals is at least equivalent to the reliability of their respective counterparts under Article 27(1), 27(2), 37(1), or 37(2) of the UK eIDAS Regulation.

508. Recognising specified overseas electronic signatures and seals through a delegated assessment of equivalent reliability, provides the scope to respond to future technological advances or changes to standards which mean that further and new elements of overseas trust service frameworks will be relevant to consider in ensuring equivalent reliability.

509. The alternative approach of allowing for the recognition of certain overseas electronic signatures and seals on the basis that rigid standards set within primary legislation are met (likely modelled around the UK's current trust service framework) would be at risk of redundancy, where overseas trust service frameworks advance over time, or differ from the UK's framework.

Justification for the procedure

510. This power is subject to negative procedure and a requirement under new Article 45C(1) for the Secretary of State to consult the UK's supervisory body for trust services (currently the Information Commissioner) before making regulations. Additional parliamentary scrutiny under the affirmative procedure, is not considered to be necessary for the reasons outlined below.

511. The exercise of this delegated power is subject to appropriate safeguards, including the requirement under Article 45B(4) that the Secretary of State must be satisfied that specified overseas electronic signatures and seals are at least equivalent to the reliability of their counterparts under the UK eIDAS Regulation. There is also an additional constraint on the exercise of this power under Article 45B(5), that when making regulations, the Secretary of State must have regard to (among other things) the relevant overseas law concerning the type of electronic signature or seal to be recognised.

512. Regulations made under Article 45B are able to include conditions upon which the legal recognition of specified overseas signatures or seals is contingent, including conditions as to meeting specific requirements within overseas law, or meeting specific technical or regulatory standards.

513. The assessment of whether certain overseas signatures and seals are at least equivalent in terms of their reliability to their counterparts under the UK eIDAS Regulation will be technical and will require expertise of the UK trust service industry. Through the consultation requirement under Article 45C(1), the Information Commissioner as the supervisory body for trust services with its technical and industry expertise, will therefore be best placed in order to assist with, and scrutinise, the Secretary of State's assessment as to whether certain overseas electronics signatures or seals should be recognised.

514. Detailed and technical assessment of the factors feeding into whether a type of overseas electronic signature or seal offers equivalent reliability, would also form part of the negotiation process for agreeing any mutual recognition agreement giving rise to the need to exercise this delegated power.

Clause 131(3) & (5): Power to designate overseas authorities with which the Information Commissioner can share information, give assistance, or otherwise cooperate with

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative Procedure

Context and Purpose

515. Existing Article 24A of the UK eIDAS Regulation allows for the unilateral legal recognition within domestic law of trust service products which are qualified under equivalent EU law. Linked to this recognition, existing Article 18(1) of the UK eIDAS Regulation allows the Information Commissioner as the UK's supervisory body for trust services to give information and assistance to, and otherwise co-operate with a public authority in the EU, if the Information Commissioner considers that to do so would be in the interests of effective regulation or supervision of trust services.

516. Once the current unilateral recognition of trust service products which are qualified under equivalent EU law ends (through exercise of the delegated power under clause 129) it will no longer be necessary for the Information Commissioner to give information and assistance to, and otherwise co-operate with a public authority in the EU specifically.

517. Once specified overseas trust service products are given a legal effect within domestic law (through exercise of the delegated power under clause 130), in the interests of effective regulation and supervision of trust services, it will be helpful for the Information Commissioner to have the power to give information and assistance to or otherwise co-operate with another supervisory or regulatory body for trust services, but in respect of overseas supervisory and regulatory bodies more widely.

518. Accordingly, this clause amends Article 18(1) of the UK eIDAS Regulation, to include a power for the Information Commissioner to share information with, give assistance to, or otherwise co-operate with a *designated* overseas authority, instead of a public authority in the EU. Article 18(3) then contains a power for the Secretary of State by regulations to designate certain overseas regulatory or supervisory bodies for trust services, for the purposes of Article 18(1).

Justification for taking the power

519. At this stage, recognising certain overseas regulatory or supervisory bodies for trust services with which the Information Commissioner may give information and assistance to, or otherwise cooperate with, would be premature. This is because overseas trust service products are not yet recognised through either mutual recognition agreements with other countries or within domestic law, and so information sharing and co-operation between the Information Commissioner and overseas supervisory and regulatory bodies, is not yet required.

520. A delegated power can be exercised on multiple occasions, where necessary, each time a mutual recognition agreement is entered into with another country and specified overseas trust service products are subsequently recognised within domestic law through the exercise of the separate new regulation-making powers under Articles 45A and 45B. Enabling designation of overseas supervisory or regulatory authorities through secondary legislation, will mean that once mutual recognition agreements are signed, the Information Commissioner is able to co-operate and share information with those authorities without delay which would be experienced if this had to be provided for through future primary legislation.

Justification for the procedure

521. This power is subject to negative procedure and a requirement under new Article 18(4) for the Secretary of State to consult the Information Commissioner, as the UK's supervisory body for trust services before making regulations. Additional parliamentary scrutiny under the affirmative procedure, is not considered to be necessary, in part because the scope of the power to designate an *overseas authority* (which is defined as a person, or description of person, with functions relating to the regulation or supervision of trust services outside the UK) is relatively narrow.

522. Once an overseas authority has been designated by regulations, there is also an additional safeguard, in that the Information Commissioner in order to exercise its power under Article 18(1) must consider that giving information and assistance to, or co-operating with a designated overseas authority is in the interests of effective regulation or supervision of trust services. This means that the additional requirement for the Secretary of State to consult with the Information Commissioner before making regulations, should prevent an overseas authority being designated, where the Information Commissioner considers that it would not be able to exercise its power under Article 18(1) in respect of such an authority, in the interests of effective regulation or supervision of trust services.

523. In practice therefore, the exercise of the power to make regulations under Article 18(3) should be limited to the designation of overseas authorities which are responsible for the regulation or supervision of trust service products which are recognised by the UK, as these will be the overseas authorities to which giving information and assistance to and cooperating with, will be in the interests of effective regulation or supervision of trust services.

Clause 133(1): Power to make consequential amendments

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure where regulations amend primary legislation; otherwise negative procedure

Context and Purpose

524. This clause provides the Secretary of State with the power to make provision that is consequential on this Bill.

525. Regulations made under this power may amend or repeal or revoke provisions of primary legislation (subsection (2)(c)), and it is therefore a Henry VIII power.

526. Regulations making provision consequential on the abolition of the Information Commissioner, and his replacement by the new Information Commission, are permitted to amend primary legislation whenever passed or made, including the Bill. But regulations making provision consequential on other provisions of the Bill may only amend primary legislation passed or made before the end of the Session in which the Bill is passed.

527. Subsection (4) allows regulations made in consequence of new section 183A (inserted into the Data Protection Act 2018 by clause 105 of the Bill) to amend, repeal or revoke provision which refers to the data protection legislation (as defined in section 3 of the 2018 Act) as they could if the provision referred instead to the main data protection legislation (as defined in section 183A of the 2018 Act).

528. New section 183A DPA 2018 will provide a new presumption about the relationship between the main data protection legislation and certain other "relevant enactments". "Relevant enactments" are enactments passed or made on or after the day on which clause 105(2) (new section 183A) of the Bill comes into force. There may be provisions in enactments which pass, or are made after, new s.183A is commenced en which will contain provision achieving the same effect as the new presumption, but which refer to the "data protection legislation" rather than the "main data protection legislation". These Bills when passed will become "relevant enactments" and so there will be duplication. Subsection (4) will enable the removal of provision which achieves the same as the new presumption (and is therefore superfluous).

Justification for taking the power

529. The power conferred by this clause is wide but is limited by the fact that any amendments made under it must be consequential on provisions in the Bill. It will be necessary to use this power to amend the Bill itself in order to ensure that the provisions in the Bill operate correctly with respect to the new regulator.

530. The Bill makes numerous amendments to existing legislation, in particular the UK GDPR and DPA 2018, which may require updates to any relevant cross-references in other legislation to provide legal certainty. It is not possible to establish in advance all consequential amendments that may be required. The power will therefore be used to make any relevant provision upon the commencement of the substantive provisions of this Bill. There are numerous precedents for such a power, for example, section 211 DPA 2018.

Justification for the procedure

531. If regulations under this clause do not repeal, revoke or otherwise amend primary legislation they will be subject to the negative resolution procedure (by virtue of subsection (6)). If regulations under this clause amend or repeal provision in primary legislation (including this Bill) they will be subject to the affirmative resolution procedure (by virtue of subsection (5)) as befitting a Henry VIII power of this type. It is considered that this provides the appropriate level of parliamentary scrutiny for the powers conferred by this clause.

Clause 136(1): Power to commence provisions

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: None

Context and Purpose

532. This clause deals with the commencement of the provisions of the Bill. The provisions listed in subsection (2) will come into force when the Act is passed. The remaining provisions will come into force on a day appointed by the Secretary of State by regulations. Different days can be appointed for different provisions.

Justification for taking the power

533. Leaving provisions in the Bill to be brought into force by regulations will enable the government to commence the provisions of the Bill at the appropriate time, having regard to the need to make any necessary secondary legislation, issue guidance, and enable businesses and other organisations adequate time to undertake appropriate training and put the necessary systems and procedures in place, as the case may be.

Justification for the procedure

534. As usual with commencement powers, regulations made under this clause are not subject to any parliamentary procedure. The principle of the provisions to be commenced will already have been considered by Parliament during the passage of the Bill. Commencement by regulations enables the provisions to be brought into force at a convenient time.

Clause 137(1): Power to make transitional, transitory and saving provision

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure for amendments to Schedule 21 DPA 2018 and Part 2 of Schedule 9 to this Bill, otherwise none

Context and Purpose

535. This clause confers a power on the Secretary of State to make regulations making transitional, transitory, or saving provision in connection with the coming into force of any provision of the Bill.

536. This power enables the Secretary of State to amend Schedule 21 to DPA 2018 (Further transitional provision etc) or Part 2 of Schedule 9 to this Bill (Consequential and transitional provision) and is therefore a Henry VIII power. Schedule 21 was added to DPA 2018 by the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 and includes transitional provisions designed to ensure that established data flows from the UK to third countries could continue after the UK left the EU. Part 2 of Schedule 9 to this Bill includes transitional provisions designed to ensure a smooth transition to new rules on international transfers introduced by this Bill.

Justification for taking the power

537. This standard power ensures that the Secretary of State can provide a smooth commencement of new legislation and transition between existing legislation (principally DPA

2018) and the Bill, without creating any undue difficulty or unfairness in making these changes. There are numerous precedents for such a power, including in section 213 DPA 2018.

538. If the international transfer rules (currently in Parts 2 & 3 of the DPA 2018 and Chapter V of the UK GDPR) are amended during the Bill's progress through Parliament that might necessitate changes to the transitional provisions in Part 2 of Schedule 9 to the Bill. Ensuring that such provision is as effective as possible for businesses and other organisations affected may require changes to related transitional provisions in Schedule 21 to DPA 2018. For this reason the power enables changes to be made to these provisions, but is limited to these provisions and does not extend to other transitional provisions such as in Schedule 20 to DPA 2018.

Justification for the procedure

539. Exercise of this power is not subject to any parliamentary procedure, except when it is used to amend primary legislation.

540. Such a power is commonly included as part of a bill's power to make commencement regulations and such regulations are not usually subject to any parliamentary procedure on the grounds that Parliament has already approved the principle of the provisions in the Bill by enacting them. Although drafted as a free-standing power on this occasion, the same principle applies.

541. Where the power is exercised to amend primary legislation it is appropriate to subject it to parliamentary procedure. Whilst powers to amend primary legislation would usually be subject to the affirmative procedure, the negative procedure is appropriate in this case because of the nature of the power as described above. This is consistent with the approach taken in section 213 DPA 2018.

Schedule 7, paragraph 4: Power to approve transfers by regulations

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

542. The UK GDPR currently provides for three mechanisms under which personal data can be transferred overseas. The first of these mechanisms is where the Secretary of State has made regulations specifying that the data protection standards of the jurisdiction provide an adequate level of protection. Such regulations effectively 'whitelist' a country for the purposes of personal data transfers.

543. This regulation-making power already exists in the current legislation in section 17A DPA 2018, read alongside Chapter V of the UK GDPR. The Bill will amend the provisions associated with the power to create a clearer regime for approving transfers to other

countries, to reflect the way in which the UK approaches such determinations. The regulation-making power and associated provisions will be moved into the UK GDPR in new Article 45A(1).

Justification for taking the power

544. This restates a Secretary of State power that already exists in the current legislation. There will be some changes to the test which has to be met in order for the Secretary of State to approve a country to receive unrestricted transfers of personal data to which the UK GDPR applies, and other aspects of the associated provisions, but the underlying effect of the power will remain the same.

545. Given that countries' data protection regimes evolve frequently, and given the length of time it takes to conduct an assessment of a country's data protection regime, it would be impractical and lead to unnecessary delays if new primary legislation were required each time it was considered appropriate to allow unrestricted transfers of personal data to a new country. Granting the power to the Secretary of State to approve countries which meet the standards set out in primary legislation will mean that countries can be approved more quickly, benefiting UK organisations and individuals. Transfers under this mechanism lead to significant reductions in barriers that businesses, researchers and government organisations face when transferring personal data overseas.

546. Before making regulations under this power, the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see new Article 91A UK GDPR added by clause 106 of this Bill).

Justification for the procedure

547. The existing regulation-making power under section 17A DPA 2018 is subject to the negative resolution procedure and the power as restated in paragraph 4 of Schedule 7 will be subject to the same procedure. Negative resolution is considered sufficient scrutiny given the clear parameters, set out in primary legislation in new Article 45A(2) and 45B (data protection test), within which this power can be used.

Schedule 7, paragraph 8: Power to specify standard contractual clauses by regulations

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

548. The UK GDPR currently provides for three mechanisms under which personal data can lawfully be transferred overseas. The first of these mechanisms is set out above. The second of these mechanisms allows personal data to be transferred if appropriate safeguards are put in place. Appropriate safeguards may be provided, among other methods, by the use of standard contractual clauses which the Secretary of State has laid by way of regulations.

549. The regulation-making power under Article 47A already exists in current legislation in section 17C DPA 2018, read alongside Chapter V of the UK GDPR. The Bill will amend the provisions associated with this regulation making power to create a clearer regime for transferring data subject to appropriate safeguards. Under the reforms made by the Bill a transfer will be made subject to appropriate safeguards if the data transferor considers that the data protection test is met and if safeguards listed in Article 46 are provided. One of the safeguards listed in Article 46 are standard contractual clauses which the Secretary of State has laid by way of regulations.

550. The regulation-making power and associated provisions will be moved into the UK GDPR.

Justification for taking the power

551. This restates a Secretary of State power that already exists in current legislation. This reflects the wording of EU GDPR, which gives both the EU Commission and supervisory authorities the power to adopt standard data protection clauses.

552. Before making regulations under this power, the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see new Article 91A UK GDPR added by clause 106 of this Bill).

Justification for the procedure

553. The existing regulation-making power in section 17C DPA 2018 is subject to the negative resolution procedure and the power as restated in paragraph 8 of Schedule 7 will be subject to the same procedure. Negative resolution is considered sufficient scrutiny given the clear parameters, set out in primary legislation, within which this power can be used. In particular, power is only exercisable if the Secretary of State considers that the standard data protection clauses they specify in regulations are capable of securing that the data protection test set out in Article 46 is met.

Schedule 7, paragraph 8: Power to make provision about further safeguards by regulations

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

554. The power under new Article 47A(4)will give the Secretary of State the power to recognise new mechanisms for transfers to complement those set out in new Article 46(2) and (3) of UK GDPR. The Secretary of State will be empowered to recognise new transfer mechanisms that can be relied on as safeguards for the purposes of Article 46, provided that the further safeguard is capable of meeting the data protection test. If a data controller or

processor wishes to rely on a further safeguard recognised under this power, in order to make a transfer subject to appropriate safeguards they will still be required to consider the data protection test and be satisfied that the test is met.

Justification for taking the power

555. This power will support the UK government to adapt at pace to international developments in data protection law, as well as reflect the increasing importance of multilateral cooperation in maintaining global data flows while ensuring a high standard of data protection.

556. The power will complement and extend the Secretary of State's existing power under section 17C DPA 2018 to specify standard data protection clauses for the purposes of Article 46(2)(c). While some novel transfer mechanisms (such as the EU's new standard contractual clauses issued in accordance with Article 46(2)(c) of EU GDPR) could be recognised under this existing power, there are other tools, such as those created under international privacy schemes, which may not fit within the bounds of Article 46(2)(c).

557. Before making regulations under this power, the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see new Article 91A UK GDPR added by clause 106 of this Bill).

Justification for the procedure

558. The affirmative resolution procedure will maintain Parliamentary scrutiny over the process of designating transfer mechanisms as being capable of meeting the data protection test. Opening new routes for personal data flows overseas has the potential to have a substantial effect on data subjects and their rights, so it is appropriate that Parliament maintains scrutiny over this process. It is also a broader power than set out in section 17C DPA 2018, which empowers the Secretary of State to specify in regulations (subject to the negative resolution procedure) standard contractual clauses that the Secretary of State considers to provide appropriate safeguards. As such, it is appropriate that its use is subject to the affirmative resolution procedure.

Schedule 7, paragraph 9(5): Power to specify where a transfer is taken to be necessary or not necessary for the public interest

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Made affirmative procedure where the Secretary of State has made an urgency statement in respect of them, otherwise the affirmative procedure

Context and Purpose

559. The UK GDPR currently provides for three mechanisms under which personal data can be transferred overseas. The first and second of these mechanisms are set out above. The third of these mechanisms allows personal data to be transferred using derogations if

specific circumstances apply. One such situation includes where the transfer is necessary for important reasons of public interest which have been recognised in domestic law (whether by regulations or otherwise) ("the Article 49(1)(d) derogation").

560. A power already exists in section 18(1) DPA 2018 to specify by regulations circumstances in which a transfer is taken to be necessary for important reasons of public interest, and circumstances in which a transfer is not taken to be necessary for important reasons of public interest, for the purposes of the Article 49(1)(d) derogation.

561. The Bill moves the existing power in section 18(1) DPA 2018 into Article 49(4A), as part of the restructuring of the international transfers regime provisions in the UK GDPR and DPA 2018 so that all provisions relating to international transfers will be contained in Chapter V of the UK GDPR, for clarity and ease of reference. No changes are being made to the power itself.

Justification for taking the power

562. This restates a power of the Secretary of State which already exists in the current legislation. It is not possible for the UK government to identify and set out all current and future matters of public interest in the Bill - and should any need emerge in future, this power will give the Secretary of State the power to specify any such matters. This power will also give the Secretary of State the ability to stop or prevent improper uses of the Article 49(1)(d) derogation which are not in the public interest, which it is not possible to predict at this time. Although no such uses have been identified for inclusion in the Bill at this time, the power provides a valuable safeguard to help protect individuals' personal data.

563. Before making regulations under this power, the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate, except where the Secretary of State has made an urgency statement (see new Article 91A UK GDPR added by clause 106 of this Bill).

Justification for the procedure

564. The existing regulation-making power in section 18(1) DPA 2018 is subject to the made affirmative resolution procedure where the Secretary of State has made an urgency statement in respect of them; otherwise it is subject to the affirmative resolution procedure. The power as restated in Article 49(4A) of the UK GDPR will be subject to the same procedure, which is considered appropriate as while Parliament should have the ability to approve matters designated as being necessary or not necessary for important reasons of public interest through the affirmative procedure, there may be circumstances in which action needs to be taken quickly to protect individuals' personal data - particularly in relation to specifying matters not in the public interest - so permitting the made affirmative procedure in urgent circumstances is appropriate.

Schedule 7, paragraph 10: Power to restrict transfers for the public interest

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Made affirmative procedure where the Secretary of State has made an urgency statement in respect of them, otherwise the affirmative procedure

Context and Purpose

565. Section 18(2) DPA 2018 currently confers on the Secretary of State a power to restrict the transfer of categories of personal data to a third country or international organisation, if the Secretary of State considers that such a restriction is necessary for important reasons of public interest. This power can only be exercised where there are no adequacy regulations in place permitting the transfers in question.

566. The Bill moves the existing power in section 18(2) DPA 2018 into new Article 49A, as part of the restructuring of the international transfers regime provisions in the UK GDPR and DPA 2018 so that all provisions relating to international transfers will be contained in Chapter V of the UK GDPR, for clarity and ease of reference. No changes are being made to the power itself.

Justification for taking the power

567. This restates a power of the Secretary of State which already exists in the current legislation. It provides a further safeguard to protect individuals' personal data by preventing categories of personal data from being transferred to another country where the Secretary of State believes it is in the public interest to do so. There are no such situations which currently exist, but it is not possible to predict all of the possible future scenarios in which personal data may be at risk, and so it is appropriate for the Secretary of State to be given the power to impose such restrictions.

568. Before making regulations under this power, the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate, except where the Secretary of State has made an urgency statement (see new Article 91A UK GDPR added by clause 106 of this Bill).

Justification for the procedure

569. The existing regulation-making power in section 18(2) DPA 2018 is subject to the made affirmative resolution procedure where the Secretary of State has made an urgency statement in respect of them; otherwise it is subject to the affirmative resolution procedure. The power as restated in new Article 49A of the UK GDPR will be subject to the same procedure, which is considered appropriate as while Parliament should have the ability to approve restrictions being imposed on the transfer of categories of personal data to another country, there may be circumstances in which action needs to be taken quickly to mitigate against risks to individuals' personal data which arise when they are transferred to other countries, so permitting the made affirmative procedure in urgent circumstances is appropriate.

Schedule 8, paragraph 4: Power to approve transfers by regulations

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

570. Chapter 5 of Part 3 of the DPA 2018 currently provides for three mechanisms under which personal data can be transferred overseas for law enforcement purposes. The first of these mechanisms is where the Secretary of State has made regulations specifying that the data protection standards of the jurisdiction provide an adequate level of protection. See new sections 74AA and 74AB. Such regulations reduce the barriers for sharing personal data with third countries and international organisations, helping to ensure such important data sharing can take place.

571. This regulation-making power already exists in the current legislation in section 74A DPA 2018. This Bill will amend the provisions associated with the power to create a clearer regime for approving transfers to other countries, to reflect the way in which the UK approaches such determinations. See new sections 74AA and 74AB. The changes being made to this power in Part 3 of the DPA 2018 mirror the changes being made to the equivalent power in the UK GDPR (paragraph 4 of Schedule 7) already detailed above.

Justification for taking the power

572. This restates a Secretary of State power that already exists in the current legislation. There will be some changes to the test which has to be met in order for the Secretary of State to approve a country for transfers of personal data to which Part 3 of the DPA 2018 applies, and other aspects of the associated provisions, but the underlying effect of the power will remain the same.

573. As already detailed for the equivalent change in the UK GDPR (paragraph 4 of Schedule 7), it would be impractical and lead to unnecessary delays if new primary legislation were required each time the Secretary of State assessed and considered it was appropriate to allow transfers of personal data to a new country. Allowing this to be done by regulations ensures the process can be done more quickly, which benefits competent authorities needing to share data for law enforcement purposes overseas, enabling them to share data with international partners.

574. Before making regulations under this power, the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see section 182 DPA 2018).

Justification for the procedure

575. The existing regulation-making power under section 74A DPA 2018 is subject to the negative resolution procedure and the power as restated in paragraph 4 of Schedule 7 will be subject to the same procedure. Negative resolution is considered sufficient scrutiny given the clear parameters, set out in primary legislation, within which this power can be used.

Schedule 9, paragraph 20: Power to specify standard clauses for transfers to third countries

Power conferred on: Information Commissioner

Power exercised by: Issue of a document

Parliamentary Procedure: Document must be laid before Parliament. Either House has 40-days in which to resolve not to approve the document.

Context and Purpose

576. UK GDPR and Part 3 DPA 2018 allow personal data to be transferred if appropriate safeguards are put in place. Appropriate safeguards may be provided, among other methods, by the use of standard contractual clauses which have been issued by the Information Commissioner.

577. Under the reforms made by the Bill a transfer will be made subject to appropriate safeguards if the data transferor considers that the data protection test is met and if safeguards listed in Article 46 or section 75 are provided. One of the safeguards listed in Article 46 is standard contractual clauses which have been issued by the Information Commissioner. This provision amends this existing power to provide that, in order to issue standard data protection clauses, the Information Commissioner must be satisfied that they are capable of meeting the data protection test set out in Article 46 UK GDPR or section 75 DPA 2018 (or both).

Justification for taking the power

578. This amends a power that already exists in current legislation in order to align the wording of section 119A DPA 2018 with the new data protection test set out in Article 46 UK GDPR as amended.

579. This also extends the power to allow the Information Commissioner to specify that the clauses are capable of meeting the data protection test set out in section 75 DPA 2018. This will ensure consistency between the UK GDPR and Part 3 DPA 2018 by allowing competent authorities sharing data overseas for law enforcement purposes to rely on standard data protection clauses issued by the Commissioner in order to meet the data protection test set out in section 75 DPA 2018.

580. Before issuing a document specifying standard data protection clauses under this power, the Information Commissioner must consult the Secretary of State and, as they consider appropriate, trade associations, data subjects and persons who appear to the Commissioner to represent the interests of data subjects.

Justification for the procedure

581. The existing regulation-making power in section 119A DPA 2018 is subject to same procedure. A requirement to lay the standard data protection clauses before Parliament with the possibility of a resolution not to approve them is considered sufficient scrutiny given the clear parameters, set out in primary legislation, within which this power can be used. In

particular, the power is only exercisable if the Information Commissioner considers that the standard data protection clauses are capable of securing that the data protection test set out in Article 46 UK GDPR or section 75 DPA 2018 (or both) is met.

Schedule 13, paragraph 1: Power to make provision about penalties

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

582. As part of the objective of aligning the PEC Regulations' enforcement regime with that of the DPA 2018, sections 157 and 159 DPA 2018 will be applied to the PEC Regulations. The applied version of section 157 DPA 2018 sets out the maximum penalty amounts that the Commissioner can impose on a person for infringement of the PEC Regulations. Just as there is under DPA 2018, there are two penalty maximums depending on the nature of the infringements: a higher maximum amount and a standard maximum amount. The higher maximum amount, in the case of "an undertaking", is £17.5 million or 4% of the undertaking's total annual worldwide turnover in the preceding financial year, and in any other case the higher maximum amount is £17.5million. The standard maximum amount, in the case of "an undertaking", is £8.7 million or 2% of the undertaking's total annual worldwide turnover in the preceding financial year, and in any other case the higher maximum amount is £8.7 million.

583. Section 159 DPA 2018 enables the Secretary of State to make regulations which make further provision about administrative penalties and this section will be applied to the PEC Regulations. The provision which such regulations can make are:

a. whether a person is or is not "an undertaking";
b. how an undertaking's turnover is to be determined; and
c. whether a period is or is not a financial year.

584. As section 159 will now be applied to the PEC Regulations, this is effectively an extension of scope of the Secretary of State's powers.

Justification for taking the power

585. The provisions in the DPA 2018 as applied to the PEC Regulations provide for different maximum fines depending on whether the person on whom the fine is to be imposed is an "undertaking". Having established in the DPA 2018 (and on the face of the Bill for application to the PEC Regulations) a formula for calculating the maximum fine that may be imposed on an undertaking, it is appropriate to leave to regulations the secondary detail as to which legal persons are to be treated as being, or not being, an undertaking (which may range from commercial undertakings to different forms of public body), how to determine an undertaking's turnover (which may vary according to the nature of the undertaking) and how to define an undertaking's financial year.

586. These powers replicate those which already exist in the DPA 2018 and are required to ensure cohesion and consistency between the enforcement regimes of DPA 2018 and the PEC Regulations.

Justification for the procedure

587. These powers are subject to the affirmative procedure. This is considered appropriate given that, in particular, the definition of an undertaking will determine those organisations which are potentially subject to a higher maximum monetary penalty calculated by reference to a percentage of their turnover. This is the procedure already decreed in section 159(3) DPA 2018.

Schedule 14, paragraph 2(3) of new Schedule 12A to the DPA 2018: Power to amend the maximum number of members of the Information Commission

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

588. This part of the legislation s changes the governance structure of the regulator, a corporation sole, with all powers and responsibilities vested in the office of the Information Commissioner. The Bill creates a statutory corporation with a new governance model which provides for the functions of the Information Commissioner to be shared between its executive and non-executive members. The legislation sets both an upper and lower limit on the number of members. Paragraph 2(3) gives the Secretary of State the power to alter the maximum number of members of the Commission set out in paragraph 2(2) by regulations, and it is therefore a Henry VIII power. There is a relevant precedent for a power of this sort to be subject to the negative resolution procedure: see section 1(7) and (8) of the Office of Communications Act 2002 (establishing the regulator OFCOM).

Justification for taking the power

589. A power to vary the maximum number of members is designed to ensure that the new governance model works efficiently and effectively. It may be necessary, over time, to make changes to the maximum number of members of the new body so it can best discharge its functions and ensure that the requisite skills and expertise are represented . It is appropriate that the Secretary of State retains that flexibility as the Information Commission transitions to its new governance structure.

590. Before making regulations under this power, the Secretary of State is required to consult the Information Commission and such other persons as the Secretary of State considers appropriate (see section 182 DPA 2018).

Justification for the procedure

591. The government believes that the negative resolution procedure affords sufficient parliamentary oversight for this power which is a narrow power that enables the Secretary of State only to alter the maximum number of members. The power is designed to ensure that the newly constituted body can perform effectively under its new governance model and that the Secretary of State can act quickly to ensure a diversity of candidates and perspectives are represented. Section 1(7) and (8) of the Office of Communications Act 2002 sets a precedent for a power of this sort to be subject to the negative resolution procedure.

Schedule 14, paragraph 3(7) of the new Schedule 12A to the DPA 2018: Power to set a maximum and minimum number of executive members of the Information Commission by direction

Power conferred on: Secretary of State

Power exercised by: Directions

Parliamentary Procedure: None

Context and Purpose

592. This provision states that the Secretary of State may by direction set a maximum and minimum number of executive members.

Justification for taking the power

593. This provision should be read together with paragraph 2 of Schedule 12A to the DPA 2018, which sets a maximum and minimum number of members of the Commission and enables the Secretary of State to make regulations to vary the l maximum number of members. The government believes it is appropriate to give the authority to the Secretary of State, if necessary, to set by direction both an upper and a lower limit on the number of executive members to ensure a sensible balance between executive and non-executive members. The Secretary of State in exercising the power to direct must comply with her statutory obligation to secure, so far as practicable, that the number of non-executive members is, at all times, greater than the number of executive members (see paragraph 4).

Justification for the procedure

594. To ensure the agility and efficiency of the Information Commission, and to ensure a range of skills are represented on the board, it is important that the Secretary of State should have the power to set by direction the maximum and minimum number of executive members. The government believes that there may be situations in which quick action is necessary to ensure that the Commission has the right mix of skills and experience among the members, and its ability to adjust those limits quickly will assist it to do this There is a precedent for this approach at section 1(6)(a) of the Office of Communications Act 2002.

Schedule 15, paragraphs 3 and 5: Power to publish information standards

Power conferred on: Secretary of State

Power exercised by: Published standards

Parliamentary Procedure: None

Context and Purpose

595. Section 250 of the Health and Social Care Act 2012 (HSCA 2012), as amended by the Health and Care Act 2022, concerns information standards. These are standards in relation to the processing of information which may be prepared and published by the Secretary of State (in connection with the provision of health and adult social care) and NHS England (in connection with the provision of NHS services). Under section 250, as amended, information standards must be complied with.

596. These provisions amend section 250 to make it clear that information standards published under that section can include standards relating to information technology or information technology services used to process information. They also extend the categories of persons to which information standards may be applied to include information technology providers i.e. persons involved in making available information technology, information technology services or a service which consists of processing information using information technology, for use in connection with the provision in, or in relation to, England of health or adult social care. Currently, under section 251(3) of the HSCA 2012, the Secretary of State or NHS England may adopt an information standard prepared or published by another person. These provisions expand this to such information standards as they have effect from time to time, and enable provision to be made by reference to international agreements or other documents (including as they have effect from time to time).

597. These provisions would also have the consequential effect of expanding the scope of existing regulation-making powers and duties which apply in relation to section 250 under the HSCA 2012, namely:

a. a power for regulations to enable the Secretary of State or NHS England to waive compliance with information standards (section 250(6B)) which may limit the circumstances in which waivers may be granted, set out the procedure to be followed in connection with waivers, and require an information standard to include specified information about waivers (section 250(6C));

b. a duty to make regulations about the procedure to be followed in connection with the preparation and publication of information standards (section 251(1)(a));

c. a power for regulations to require an information standard to be reviewed periodically (section 251(1)(b));

d. a power for regulations to provide for financial penalties in respect of failure to comply with information standards (section 277E(1)(a)); or in respect of a requirement imposed under section 251ZA(1) to provide the Secretary of State with information for the purposes of monitoring compliance with information standards (section 277E(1)(b)); or in respect of the provision of false or misleading information (section 277E(1)(c)).

Justification for taking the power

598. The information standards to be applied in relation to information technology and information technology services will largely be of a technical nature (for example, interface specifications) and relate to matters such as design, quality, capabilities, arrangements for marketing and supply, functionality, connectivity, interoperability, portability and storage and security of information. These are matters of detail that are more appropriate for published, technical standards which are created and can be updated through a statutory procedure. The information technology landscape is an evolving one and could necessitate frequent changes to the standards imposed in order for them to be kept up to date. The delegated powers engaged by these provisions will enable the government to keep pace with change and adapt the standards accordingly.

Justification for the procedure

599. Given that the information standards will largely be of a technical nature and reflect the current state of advancement in the field of information technology, it is not considered necessary for such information standards to be subject to Parliamentary scrutiny when published. The regulation-making powers and duties affected by these changes (including powers and duties to make provision about the procedure by which information standards are prepared and published and about financial penalties) will be subject to the affirmative Parliamentary procedure and this continues to represent the appropriate level of scrutiny (see section 304(5) of the HSCA 2012).

Schedule 15, paragraph 8, new section 251ZD: Power to direct a public body or to make arrangements for a person prescribed by regulations to exercise functions relating to monitoring and requesting compliance

Power conferred on: Secretary of State

Power exercised by: Regulations and directions

Parliamentary Procedure: Negative procedure in relation to regulations; no procedure in relation to directions

Context and Purpose

600. New section 251ZD(1) enables the Secretary of State to direct a public body (person whose functions are of a public nature) to exercise the Secretary of State's functions under section 251ZA of the HSCA 2012 (power to require information for the purposes of monitoring compliance with information standards) so far as they relate to information technology providers, and under section 251ZB (power to request information technology providers to comply with information standards). It also enables the Secretary of State to give directions about the exercise of those functions, including directions as to the processing of information obtained by exercising the functions. New section 251ZD(2) also enables the Secretary of State to make arrangements for a person prescribed by regulations to exercise those functions.

Justification for taking the power

601. The Secretary of State needs to have options for the exercise of the functions in operational terms, and to retain the discretion to delegate, or to not delegate, them to another person, to revoke a decision to delegate and to ensure that the most appropriate person exercises the functions, the identity of which may fluctuate over time. The power to direct a public body about the exercise of the functions in question is necessary in order to cover matters such as how the functions are to be exercised. Thus, the directions would contain matters of administrative or operational detail which may need to be updated regularly. This would enable the Secretary of State to cater to changing circumstances.

Justification for the procedure

602. The regulations would relate to the identity of the person to whom the Secretary of State's functions are to be delegated and this may fluctuate over time. The negative procedure is considered to provide the appropriate level of scrutiny for this. In relation to directions, which would be required to be given in writing (see section 304(12)), the power would concern the question of whether an existing function should be exercised by a public authority rather than the substance of the functions. The authority would be bound by any constraints which apply in relation to the exercise of the functions. Given the administrative and operational nature of the directions, Parliamentary scrutiny is considered unnecessary.

Schedule 15, paragraph 8, new section 251ZE: Power to establish accreditation scheme

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

603. This provision would enable the Secretary of State, by regulations, to establish an accreditation scheme that might be run by a specified person. The scheme would relate to information technology or information technology services. Subsections (3) and (4) of inserted section 251ZE indicate the potential scope of the regulations, for example they may require the personal running a scheme ("the operator") to set accreditation criteria by reference to information standards or to provide for the review of decisions. The operator may also be required by the regulations to provide advice to applicants for accreditation. An accreditation scheme would be intended essentially to grant a quality mark to information technology and information technology services that meet specified criteria to enable information technology providers to demonstrate that that technology or those services meet the necessary quality standards. The operator could be given power under the regulations to determine the accreditation criteria or be permitted to charge a reasonable fee in respect of an application for accreditation.

Justification for taking the power

604. The procedures and criteria for the operation of an accreditation scheme would be technical and require more detail to describe than would usually be included in primary legislation.

605. The accreditation criteria to be applied in relation to information technology and information technology services will largely be of a technical nature. These are matters of detail that are more appropriate to be created and updated by means of regulations. The information technology landscape is an evolving one and could necessitate frequent changes to the criteria specified in order for them to be kept up to date with changes in technology, to the provider landscape and their interaction with the changing nature of health and social care services. The delegated powers engaged by this provision will enable the government to keep pace with change and adapt the accreditation scheme accordingly.

Justification for the procedure

606. The negative resolution procedure provides for the appropriate level of scrutiny for standard provisions of this kind. There is precedent for this in relation to regulations concerning accreditation schemes under section 267 of the HSCA 2012, which are similarly subject to the negative procedure.

Schedule 16, new section 91A(1), regulation making power for The Gas and Electricity Authority "the Authority" to make provision about the procedure to be followed in relation to the grant of a smart meter communication licence.

Power conferred on: The Gas and Electricity Markets Authority, with Secretary of State approval

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

607. The regulation making power provided by new section 91A(1) of the Energy Act 2008 will enable the Authority to make regulations about the procedure to be followed in relation to the grant of a Smart Meter Communication Licence (SMCL) under section 7AB of the Gas Act 1986 or section 6(1)(f) of the Electricity Act 1989. The proposed regulation making power will enable the Authority to make regulations providing for a determination by the Authority, on a competitive basis or the selection, on a non-competitive basis, of the person to whom a SMCL is to be granted.

608. Existing powers provide that the Authority is responsible for the award of future smart meter communication licences and for determining the content (terms and conditions) of those licences as the role of the licensee evolves. The process for awarding the licence (competitive or non-competitive) needs to be appropriate for the types of organisation that would be suited to operate under the conditions of the licence.

609. Given that Authority is responsible for specifying the content of the licences, it is appropriate that they are also able to design the suitable process to follow to award the licences – and hence to have the powers to make the regulations.

610. The approval of the Secretary of State will be required for the making of regulations under new section 91A(1).

Justification for taking the power

611. The power will provide the Authority with the flexibility to make regulations to provide for determination on a competitive or selection on a non-competitive basis of the person to whom a SMCL is to be granted. The department considers that provision about procedures to be followed is detail which is best suited to secondary legislation and the flexibility afforded by the proposed regulation making power will ensure that the process for granting the SMCL enables appointment in a timely and efficient way and in the best interests of consumers.

612. Given that the Authority is responsible for awarding future licences and for specifying the conditions of those licences, it also needs to be able to choose the process for awarding the licence (competitive or non-competitive) that is appropriate, given the types of organisation that would be suited to operate under those licence conditions.

613. The Authority requires appointment and handover to the new licensee to occur within a specified timeframe if it is to avoid the situation where it needs to extend the current licence term under a distressed scenario, such scenario potentially resulting in material cost increases for consumers. As the current competitive licence award process progresses, should it become apparent that it is unlikely to identify a suitable successor licence holder within the required timescales, the flexibility will enable the Authority to move to a non-competitive appointment in the requisite timeframes to avoid the distressed extension scenario.

614. Existing regulations made under sections 56FC and 60 of the Electricity Act, and sections 41HC and 47 of the Gas Act set out the current process for appointing a successor licensee on a competitive basis, therefore there is existing legislative precedent for this detail being left to secondary legislation.

Justification for the procedure

615. The Department considers that there is suitable precedent for the use of the negative procedure. The existing Regulations which apply to the process for identifying a successor licensee for the SMCL, The Electricity and Gas (Competitive Tenders for Smart Meter Communication Licences) Regulations 2012/2414 (“the 2012 Regulations”), are made under sections 56FC and 60 of the Electricity Act, and sections 41HC and 47 of the Gas Act.

616. Provision is made in the Energy Act 2023 for regulations to be made in broadly equivalent circumstances, namely in relation to the selection of a code manager (Section 187, Energy Act 2023) subject to the negative procedure (Section 198(1) Energy Act 2023).

617. Given the narrow and defined scope of the regulation making power and the existing precedents for the use of the negative procedure we consider that the negative procedure provides an appropriate level of parliamentary scrutiny.

Schedule 16, new section 91D(1), regulation making power for the Gas and Electricity Markets Authority to modify the conditions of gas and electricity licences granted under the Gas Act 1986 and the Electricity Act 1989

Power conferred on: The Gas and Electricity Markets Authority ("the Authority").

Power exercised by: administrative action, following consultation with persons who are relevant licence holders in relation to the modification, the Secretary of State such other persons as the Authority considers appropriate.

Parliamentary Procedure: None

Context and Purpose

618. Supplementary power for the Gas and Electricity Markets Authority to modify the conditions of gas and electricity licences (and industry codes maintained under those licences) granted under the Gas Act 1986 and the Electricity Act 1989 where such modifications are necessary or expedient for the purposes of, or in preparation for, the grant of a smart meter communication licence under new section 91A of the Energy Act 2008.

619. There are alternative ways in which the power could be used, for example:

a. The power could be used to modify an industry code to require the creation and ownership of a body under it to which the successor licence could be granted.

b. The power could be used to modify an existing licence to require that licence holder to own the body that is awarded the SMCL licences.

Justification for taking the power

620. In exercising its power to make regulations about the grant of a smart meter communication licence, the Authority may need to make amendments to other gas and electricity licences (and industry codes issued under those licences) in order to enable the communication licence award. This is to ensure that the licence award process can take place expediently and that the gas and electricity licencing framework continues to operate in a consistent manner after the award.

621. Similar powers to modify licence conditions exist in section 169 of the Energy Act 2023 in relation to the designation of the Independent System Operator and Planner under section 162 of that Act.

Justification for the procedure

622. The power under section 88 of the Energy Act 2008 for the Secretary of State to modify gas and electricity licences for purposes relating to smart meters is subject to section 89 of that Act, which requires a draft of modifications made by the Secretary of State to be laid before Parliament.

623. The power under section 88 of the Energy Act 2008 has been used multiple times since it was introduced and no changes that have been laid before Parliament have ever been debated in Parliament. The section 89 process requires substantial legal and

administrative resource (and hence costs) which seems disproportionate, including in terms of use of Parliamentary time, especially as the section 88 power has been used effectively and efficiently without resulting in Parliamentary debates. In the case of this new power, it is also likely that the Authority may need to act quickly if it is to avoid a distressed extension scenario (please refer to paragraph 613 above discussing why a timely appointment is needed for further information on this scenario).

624. As part of the process of awarding the licence, it is important that the Authority has the ability to make modifications of this type in a straightforward manner and has the flexibility to make additional licence modifications for the purposes of or in preparation for the grant of the smart meter communication licence where those are required.

625. There are many examples of where a similar power is not required to follow the s89 procedure. A (non-exhaustive) list of powers to modify licences and/or industry codes that did not/do not require a parliamentary process is set out below:

Legislation	**Ref**	**Purpose**	**Inclusion of powers to modify licences and codes?**	**Requirement to lay changes in parliament**
Utilities Act 2000	s68	New electricity trading arrangements (NETA)	Yes	No
Energy Act 2004	s90	Changes to facilitate offshore transmission or distribution	Yes	No
Energy Act 2004	s134	BETTA – extending NETA to GB	Yes	No
Energy Act 2008	S84	Access to offshore transmission systems	Yes	No
Energy Act 2008	s94 and s97	GEMA payments into the consolidated fund	Yes	No
Energy Act 2010	s12	Fuel poverty reconciliation mechanism	Yes	No
Energy Act 2010	s18	Prevention of exploitation of trading arrangements	Yes	No
Energy Act 2010	s25	Notification of changes in supply contract terms	Yes	No
Energy Act 2011	s17, s18, s19, s20	Green deal related matters	Yes	No
Energy Act 2013	s26	CfD counterparty matters	Yes	No
Energy Act 2013	s37	Capacity market related matters	Yes	No
Energy Act 2013	s45	Business separation for the SO	Yes	No
Energy Act 2013	s49	Market participation and liquidity	Yes	No
Energy Act 2013	s50	Investment in generation	Yes	No

Energy Act 2013	s139	Domestic supply contracts	Yes	No
Energy Act 2013	s147	Offshore transmission	Codes only	No
Smart Meters Act 2018	s11	Half hourly settlement	Codes only	No
Energy Act 2023	s46(1)	Modification of Transport and Storage company licences	Licences only	No
Energy Act 2023	s89(1) and (2)	Purposes related to levy obligations	Yes	No
Energy Act 2023	s136(1)	Hydrogen pipeline projects	Yes	No
Energy Act 2023	s169(1)	Modifications relating to System Operator and planner	Yes	No
Energy Act 2023	s245(1)	Load control	Yes	No

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