

# COMMUNICATIONS ACT 2003

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 3: Television and Radio Services**

##### ***Chapter 2: Regulatory Structure for Independent Television Services***

457. Paragraph 30 of Schedule 18 provides that, subject to any express provision of this Act, any pre-transfer Broadcasting Act licence shall continue to have effect on the same terms and conditions, and for the same period, as it would have done had this Act not been passed.

##### ***Section 211: Regulation of independent television services***

458. This section specifies the television services that OFCOM are required to regulate. The first group of services comprises television broadcasting services (other than those broadcast only from a satellite), restricted television services and additional television services broadcast or provided from places in the United Kingdom, and television licensable content services and digital television programme services provided by persons under United Kingdom jurisdiction for the purposes of the Television without Frontiers Directive (see below). OFCOM are not under this section to regulate these services where they are provided by the BBC or the Welsh Authority. The second group of services comprises television multiplex services provided from places in the United Kingdom and digital additional television services provided by persons under United Kingdom jurisdiction. OFCOM are not under this section to regulate these services where they are provided by the BBC.

\*“*television broadcasting service*” is defined in section 362 as a service (other than any text service) which consists in a service of television programmes provided with a view to its being broadcast (whether in digital or in analogue form), and which is provided so as to be available for reception by members of the general public. It does not include a restricted television service, a television multiplex service, a service provided under the authority of a licence to provide a television licensable content service, or a service provided under the authority of a licence to provide a digital television programme service.

\*“*restricted television service*” has the same meaning as in section 42A of the Broadcasting Act 1990 (as amended by Schedule 19 to this Act), namely a service which consists in the broadcasting of television programmes for a particular establishment or other defined location, or a particular event, in the United Kingdom. The label in the 1990 Act is simply a “restricted service”: the word “television” has been added here, and also in relation to digital television programme services and digital additional television services, to distinguish them from radio-related services which, in the 1990 and 1996 Acts are given the same name.

\*the meaning of “*television licensable content services*” is given in section 232 and is described in more detail in the notes to that section below.

\*a “*digital additional television service*” is defined under section 24 of the Broadcasting Act 1996, which is amended by Schedule 15 to this Act, as being any service provided with a view to its being broadcast to the public in digital form by means of a television or general multiplex service, but not including a Channel 3 service, Channel 4, Channel 5, a public television service of the Welsh Authority, the digital public teletext service, a digital television programme service, a digital sound programme service, an ancillary service, or a technical service.

\*a “*digital television programme service*” means any digital programme service within the meaning of section 1(4) of the Broadcasting Act 1996, namely a service consisting in the provision of television programmes (together with any ancillary services as defined by section 24(2) of that Act) with a view to its being broadcast in digital form so as to be available for reception by members of the public (see the amendment in paragraph 74 of Schedule 15). It does not include a teletext service, any service in the case of which the visual images to be broadcast do not consist wholly or mainly of images capable of being seen as moving pictures (except to the extent that either of these services are ancillary to the television programme) or a qualifying service.

\*persons under United Kingdom jurisdiction for the purposes of the Television without Frontiers Directive are primarily persons established in the United Kingdom. A provider is deemed to be established in the United Kingdom if its head office is located here and this is where editorial decisions are taken, or if a significant part of the workforce engaged in the television broadcasting activity operates in the United Kingdom, or if this is where the provider first began broadcasting, assuming that the provider still maintains a stable and effective link with the economy of the United Kingdom. If these tests are not met, persons established under UK jurisdiction may also, in descending order, be persons using a frequency granted by the United Kingdom, persons who use a satellite capacity appertaining to the United Kingdom, and persons who use a satellite up-link situated in the United Kingdom. References to the Television without Frontiers Directive are to Council Directive [89/552/EEC](#), as amended by Directive [97/36/EC](#).

\*“*additional television service*” is defined in section 48 of the Broadcasting Act 1990 as any service which consists in the sending of electronic signals for transmission by wireless telegraphy by means of the use of spare capacity within the signals carrying any television broadcasting service.

\*“*qualifying service*” has the meaning given in section 2 of the Broadcasting Act 1996.

\*an “*ancillary service*” is defined in section 24 of the Broadcasting Act 1996, as amended by paragraph 93(3) of Schedule 15 to this Act, and refers to assistance for disabled people in relation to some or all of the programmes included in a digital programme service or qualifying service provided by a licence-holder, a service (apart from advertising) that relates to the promotion or listing of programmes included in such a service or in a digital sound programme service so provided or any other service (apart from advertising) that is ancillary to one or more programmes so included, and relates directly to their contents.

\*a “*technical service*” is a service provided for the encryption or decryption of digital programme services, digital sound programme services, or digital additional services and specified in an order made by the Secretary of State (see section 24(3) of the Broadcasting Act 1996, as amended by paragraph 93(4) of Schedule 15 to this Act).

***Section 212: Abolition of function of assigning television frequencies***

459. The Secretary of State shall no longer have the power to assign television frequencies for independent television services which are licensable under Part 1 of the Broadcasting Act 1990, for S4C, or for television multiplex services which are licensable under Part 1 of the Broadcasting Act 1996. The function of managing radio spectrum (from which the function of assigning frequencies derives) is transferred by the Act to OFCOM.

***Section 213: Abolition of licensing for local cable systems***

460. From the television transfer date the provision of a local delivery service shall no longer require a licence under Part 2 of the Broadcasting Act 1990.

\*a “local delivery service” is defined in section 72 of the 1990 Act to mean (broadly) a service of a kind specified by the Secretary of State consisting in the use of a telecommunication system (whether run by the person providing the local delivery service or not) for the delivery of various television and radio services listed in section 72(2). Licences are awarded on a system of cash bids.

\*“television transfer date” means the date on which the ITC’s functions under the Broadcasting Acts of 1990 and 1996 are transferred to OFCOM.

***Section 214: Digital Channel 3 and Channel 5 licences***

461. Any Channel 3 or a Channel 5 licence granted after the television transfer date must provide for the licensed service to be broadcast digitally. Such a licence may also contain such conditions requiring the service also to be provided in analogue form as OFCOM consider appropriate. In such cases the programming (apart from advertisements) should replicate that of the digital service (see *subsection (4)*).
462. The conditions included in the licence must enable compliance with any directions given from time to time by the Secretary of State about the continuation of analogue services.
463. Any licence taking effect before “the initial expiry date”(which is 31st December 2014 or any later date set by the Secretary of State under section 224) must remain in force until the end of that day. Any licence taking effect thereafter must remain in force from the time when it takes effect until the end of the licensing period beginning or current at that time.

\*the meaning of “the initial expiry date” can be found in section 224. *Subsection (6)* of section 214 provides that a licensing period is the period beginning with the commencement of that section and ending with the initial expiry date, or any subsequent period of 10 years beginning with the end of the previous licensing period.

464. There can be no charge levied for the use of a licensed service or for any related assistance for disabled people or for ancillary services: *subsections (8) and (9)*.

***Section 215: Replacement of existing Channel 3 and Channel 5 licences***

465. As soon as practicable after the television transfer date OFCOM must offer persons who hold a Channel 3 or Channel 5 licence the opportunity to exchange that licence for a replacement licence, being a licence of the kind described in the notes to section 214 above. The replacement licence must provide for a service that is equivalent in all material respects to the present one, and for it to be provided for substantially the same area and times, although it does not have to be identical in all respects.
466. Any offer made by OFCOM to replace an existing licence must specify the terms of the proposed replacement licence, the conditions on which they propose to grant it, the

time frame of their offer, the date on which the licence will be granted if the offer is accepted, the time from which the licence will take effect if the offer is accepted (which must fall within the period of twelve months after the television transfer date) and the time from which the licence will cease to have effect if the offer is rejected.

467. The financial terms of the offer must propose that the licensee will pay the same annual amount and percentage of qualifying revenue as would have been payable under the existing licence had it continued in force until the end of the period for which the replacement is granted.
468. A licence holder refusing this offer will have his existing licence revoked on a date specified by OFCOM in the offer. This date must fall no later than eighteen months after the closing date for agreeing the offer.

### ***Section 216: Renewal of Channel 3 and 5 licences***

469. This section permits the holders of a licence to provide a Channel 3 service or a licence to provide Channel 5 to apply to OFCOM for the renewal of his licence for the next licensing period.
470. An application for renewal may only be made in the period beginning four years before the end of the current licensing period and ending three months before the day that OFCOM determine they would have to publish a tender notice if they were proposing to grant a fresh licence to take effect from the end of the current licensing period. Any determination of that date must be made at least one year before the date on which the tender notice would have to be published and must be notified to every person who is, at the time of the determination, a holder of a licence to provide a Channel 3 service or the Channel 5 licence.
471. Unless the Secretary of State makes an order suspending the rights of renewal under section 230 (see *subsection (11)*), where OFCOM receive an application for the renewal of a licence, they must determine whether or not they will be renewing the licence and, if they will, the financial terms on which the licence will be renewed. They must also notify the applicant accordingly. *Subsections (6) and (7)* provide that OFCOM may determine that they will not renew a licence if:
- they are not satisfied that the applicant (if his licence were renewed) would provide a service complying with the requirements imposed under Chapter 4 of Part 3 of the Act relating to the public service remit for the licensed service, programming quotas, news and current affairs programmes or regional programming; or
  - they propose to grant a fresh licence for a service replacing the licensed service which would differ from the licensed service in the areas where it would be provided or the times of the day, or days of the week, between or on which it would be provided.
472. OFCOM must not grant a renewal under this section more than 18 months before the end of the current licensing period: *subsection (9)*.
473. Where OFCOM determine that a licence should be renewed, they must renew it on the same terms and subject to the same conditions, with such modifications as are required to give effect to the requirements imposed under section 217(4) (*subsection (10)*).

### ***Section 217: Financial terms of licence renewed under s.216***

474. Any offer made by OFCOM to renew an existing licence under section 216 must specify the amount that the licensee is required to pay during the first year of the replacement licence and the percentage of qualifying revenue to be paid for each accounting period of the applicant falling within the relevant licence period.

475. The amount payable for the first year of the renewed licence must approximate to what OFCOM estimate would have been the cash bid of the licensee had the licence been offered by a notice requesting tenders under section 15 of the Broadcasting Act 1990. When determining the percentage of qualifying revenue, OFCOM may set different percentages (including nil percentages) for different accounting periods.
476. OFCOM must include conditions in any replacement licence requiring payment of: the amount for the first calendar year of the licence, that amount increased by an appropriate percentage for each subsequent year and a specified percentage of the qualifying revenue attributable to a licence holder in each accounting period of the licence term. Payments required under these conditions are in addition to the fees required by OFCOM under section 4(1)(b) of the Broadcasting Act 1990.

***Section 218: Duty to secure the provision of a public teletext service***

477. This section imposes a duty on OFCOM to secure (i) the provision of a single, nationwide, public teletext service in a digital format broadcast by way of a television multiplex service, and (ii) the provision of an analogue teletext service on the spare capacity available on Channels 3 and 4 and S4C until the first of these services ceases to transmit in analogue format. The licence holder will thereafter have the option of continuing to provide an analogue service.

*\*Subsection (4) specifies that the analogue teletext service is a single additional television service that uses the spare radio spectrum allocated to Channel 3 services, Channel 4 and S4C for the provision of additional television services.*

478. OFCOM must ensure that the analogue and digital teletext services are provided by the same person, although the content of the two services may differ and the licence holder may appoint third parties to provide the teletext services in accordance with section 220.
479. OFCOM shall have regard to their duties under this section when making radio spectrum available to providers of Channel 3 services, Channel 4 and S4C and when making determinations of spare capacity under section 48(2)(b) of the Broadcasting Act 1990.

***Section 219: Licensing of the public teletext service***

480. The public teletext service is to be licensed under Part 1 of the Broadcasting Act 1990, subject to the restrictions and conditions set out in this section. For example, *subsection (5)* specifies that OFCOM must include in the public teletext service licence a condition prohibiting the imposition of charges for the reception of the licensed service in the United Kingdom.
481. *Schedule 10* specifies the procedure with which OFCOM must comply when it seeks to award a licence to provide the public teletext service and the conditions to be included in the licence. It also gives OFCOM powers to enforce the conditions included in the public teletext service licence.
482. When OFCOM propose to award a licence to provide a public teletext service, they must publish (along with general guidance) a notice that sets out the information listed in paragraph 1(2). OFCOM must include the additional information listed in paragraph 1(3) if the teletext service must be provided in analogue form.
483. Any application made in response to a notice published by OFCOM must be accompanied by the appropriate fee and must also include the information listed in paragraph 3(1), e.g. a technical plan indicating the nature of the service proposed to be provided. OFCOM may require the applicant to provide further information once they have received the application. Following the closing date for applications, OFCOM must then publish the name of each applicant along with certain details of each application as described in paragraph 4(1). OFCOM must also invite the public to make representations.



484. Before OFCOM may consider whether to award a public teletext service licence to an applicant, they must find that: (i) the applicant's technical plan and its proposals relating to the fulfilment of the public service remit for the public teletext service, the inclusion and updating of news items and the inclusion of material of interest to different communities in the United Kingdom are acceptable to them; and (ii) the provision of the proposed services can be maintained during the licence term. OFCOM must then award the licence in accordance with sections 17 and 17A of the Broadcasting Act 1990 (as modified by this Schedule).
485. [Paragraph 6](#) permits OFCOM to revoke and re-award a public teletext service licence when the licensee indicates that he does not intend to provide the service or OFCOM have reasonable grounds to believe that the licensee will not provide the service. Before revoking a licence, OFCOM must serve a notice on the licensee and offer him a reasonable opportunity to submit representations.
486. [Paragraph 7](#) requires OFCOM to include in a public teletext service licence conditions requiring payment of the following determined in accordance with Schedule 10, during the licence term: an annual amount, increased by an appropriate percentage, and a specified percentage of the qualifying revenue for each accounting period of the licensee falling within the licence term. Payments required under these conditions are in addition to those required by OFCOM under section 4(1)(b) of the Broadcasting Act 1990.
- \*Appropriate percentage has the same meaning as in section 19 of the Broadcasting Act 1990 (i.e. it takes account of inflation).
487. OFCOM may also include conditions permitting them to estimate the amount of payments due from the licence holder during an accounting period and requiring him to make monthly interim payments. Conditions permitting OFCOM to revise their estimate and the monthly interim payments made by the licence holder and to make adjustments for any over- or under payment made may also be included.
488. [Paragraph 8](#) provides that section 40 of the Broadcasting Act 1990 (power to direct correction or statement of findings) has effect in relation to the public teletext service.
489. [Paragraphs 9 and 10](#) confer on OFCOM the power to enforce the conditions included in the public teletext service licence. Where OFCOM are satisfied that a licence holder has contravened a condition of the licence or has failed to comply with a direction given by OFCOM under the Broadcasting Acts 1990 or 1996 or Part 3 of this Act, they may impose a penalty and/or reduce the term of the licence by up to two years. Licences may also be revoked for contraventions of licence conditions or directions. Where OFCOM do not revoke the licence they may fine the offender up to 5 per cent of the qualifying revenue for its last complete accounting period.
490. Before imposing a penalty or reducing the term of the public teletext service licence, OFCOM must notify the licence holder and provide him with a reasonable opportunity to make representations. A licence may be revoked where OFCOM are satisfied that the conduct of the licence holder justifies its revocation.
491. Where OFCOM decide to revoke a public teletext service licence, they must also notify the former licence holder of the penalty that he must pay. A maximum fine (whichever is the greater) of either £500,000 or 7 per cent of either the estimated or actual qualifying revenue may be imposed. The Secretary of State can modify the amount of the maximum fine by order.

\*“qualifying revenue” is defined for the purposes of this Schedule in paragraph 15.

### ***Section 220: Delegation of provision of public teletext service***

492. A licence for the provision of the public teletext service may enable the licence holder to subcontract the provision of all or part of the service to a third party, subject to and

in accordance with the requirements of conditions set by OFCOM. Contravention by the relevant third party of a condition imposed under this section will be treated for the purposes of Chapter 2 of Part 3 and the Broadcasting Act 1990 as a contravention by the licensee.

***Section 221: Replacement of existing public teletext provider's licence***

493. As soon as practicable after the television transfer date, OFCOM must offer the person who holds the existing licence to provide the public teletext service the opportunity to exchange that licence for a replacement licence. The replacement licence must provide for a service that is equivalent in all material respects both to the existing service and to the digital service that the licensee is required to provide under section 30 of the Broadcasting Act 1996. The replacement licence must be awarded in accordance with section 219 and Part 1 of the Broadcasting Act 1990. However, the procedure in Part 1 of Schedule 10 is not to apply to the replacement licence.
494. The offer of the replacement licence must specify each of the following as determined by OFCOM: the conditions on which they propose to grant the replacement licence, the timeframe of their offer, the date on which the licence will take effect if the offer is accepted (which must fall within the period of twelve months after the television transfer date), and the time from which the licence will cease to have effect if the offer is rejected. The financial terms of the offer must propose that the licensee will pay the same annual amount and percentage of qualifying revenue as would have been payable under the existing licence had it continued in force until the end of the period for which the replacement is granted. A licence holder refusing this offer will have his existing licence revoked on a date specified by OFCOM in the offer. This date must fall no later than eighteen months after the closing date for agreeing the offer.

***Section 222: Renewal of public teletext licence***

495. This section permits the holder of the licence to provide the public teletext service to apply to OFCOM for the renewal of his licence for the next licensing period.
- \**Subsection (12)* provides that a licensing period is the period beginning with the commencement of this section and ending with the initial expiry date (see section 224); or any subsequent period of 10 years beginning with the end of the previous licensing period.
496. An application for renewal may only be made in the period beginning four years before the end of the current licensing period and ending three months before the day that OFCOM determine they would have to publish a tender notice if they were proposing to grant a fresh licence to take effect from the end of the current licensing period. Any determination of that date must be made at least one year before the date on which the tender notice would have to be published and must be notified to the person who is holding the public teletext licence at the time that the determination is made.
497. Unless the Secretary of State makes an order suspending the rights of renewal under section 230, where OFCOM receive an application for the renewal of a licence they must determine whether or not they will renew the licence and, if they do intend to renew the licence, the financial terms on which they intend to do so. They must also notify the applicant accordingly. *Subsections (6) and (7)* provide that OFCOM may determine that they will not renew a licence if:
- they are not satisfied that the applicant (if his licence were renewed) would provide a service complying with the requirements imposed under Chapter 4 of Part 3 of the Act relating to the public service remit for the public teletext service, news programmes and regional matters; or
  - they propose to grant a fresh licence for a service replacing the licensed service which would differ from the licensed service in any material respect.

498. OFCOM must not grant a renewal under this section more than 18 months before the end of the current licensing period.
499. Where OFCOM determine that a licence should be renewed, they must renew it on the same terms and conditions, subject only to such modifications as are required to give effect to the requirements imposed under paragraph 7 of Schedule 10 (payments to be made to OFCOM by the licence-holder).

***Section 223: Financial terms of licence renewed under s. 222***

500. Any offer made by OFCOM to renew an existing licence under section 222 must include a determination of the amount that the licensee is required to pay during the first complete calendar year of the renewal period and the percentage of qualifying revenue to be paid for each accounting period of the applicant falling within the relevant renewal period. The amount for the first year of the replacement licence must approximate to what OFCOM estimate would have been the highest cash bid of the licensee had the licence been awarded under Part 1 of Schedule 10. When determining the percentage of qualifying revenue, OFCOM may set different percentages (including nil percentages) for different accounting periods.

***Section 224: Meaning of “initial expiry date”***

501. The initial expiry date for the purposes of Part 3 of the Act is 31<sup>st</sup> December 2014, unless it is postponed under this section.
502. The Secretary of State may postpone the initial expiry date on one or more occasions. This is to ensure that the licences will not expire less than eighteen months after the date set for digital switchover. This power can only be exercised where switchover is later than 30th June 2013.
503. *Subsections (4) and (5)* have the effect that the initial expiry date must always fall at least 18 months after digital switchover (so that the licences will continue for at least that long after switchover).
504. The extended licence will be deemed to be granted on the same terms as the original one.
505. “The date for digital switchover” is defined by *subsection (8)* as the date that appears to the Secretary of State to be the date after which Channel 3 and Channel 5 services are no longer to be broadcast to any significant extent in analogue form.

***Section 225: Application for review of financial terms of replacement licences***

506. The holder of a licence granted under section 215 (Channel 3 or 5) or 221 (the public teletext service) may apply for a review of the financial terms of this licence, on one or more different occasions. The first one may happen at any time during the first review period, i.e. the period starting four years before the first notional expiry date (see below) and ending on a date fixed by OFCOM. The subsequent reviews may happen at any point during any subsequent review period, which begins four years before the relevant subsequent notional expiry date and ends on a date fixed by OFCOM.
507. No such application may be made when an application for a review under section 226 is pending or less than twelve months after a determination of new financial terms has been made by OFCOM under that section.
508. *Subsection (7)* defines the “first notional expiry date” as the date on which the existing licence would have expired if not renewed and “subsequent notional expiry date”, in relation to a replacement licence, as either the tenth anniversary of the last notional expiry date, or, if the licensee has previously applied for a review under this section, the tenth anniversary of the date on which OFCOM’s determination of that review was notified to the licensee.



***Section 226: Application for review of financial terms in consequence of new obligations***

509. This section applies where a commencement order brings into force any of sections 272, 273 or 274 (must-offer in relation to networks and satellite services and must-provide). In that event a Channel 3 service provider or the provider of Channel 5 or of the public teletext service may apply for a review of the financial terms of his licence. Any application for a review must be made during the review period, namely the period running from the day on which the order is made until the coming in to force of the relevant section (or sections). Sections 272(10), 273(8) and 274(11) have the effect of ensuring that this period is at least six months long.

***Section 227: Reviews under ss. 225 and 226***

510. A determination made by OFCOM under this section following an application for a review must include the amount to be paid for the first calendar year of the period under review (which must be what OFCOM think would have been the amount that the licensee would have bid if the licence were awarded in response to a notice under section 15 of the Broadcasting Act 1990) and the percentage of qualifying revenue to be used for each accounting period.
511. When determining these new financial terms, OFCOM must have regard to any additional costs that are likely to be incurred by the licence holder as a consequence of the new conditions imposed following the commencement of sections 272, 273 and/or 274.

***Section 228: Giving effect to reviews under ss. 225 and 226***

512. This section provides that, as soon as reasonably practicable after making a determination under section 227, OFCOM must send to the applicant a notification setting out this determination, the modifications required in the applicant's licence, a response date by which the applicant has to notify his acceptance to OFCOM, and an end date by which the licence will cease to have effect if he does not.
513. *Subsection (5)* provides that the new licence conditions are to have effect when the applicant notifies OFCOM that he accepts the determination. If the applicant does not notify his acceptance before the response date set by OFCOM, his licence will cease to have effect on the end date set by OFCOM.

***Section 229: Report in anticipation of new licensing round***

514. This section gives a duty to OFCOM, no later than 30 months before the end of each licensing period, to report to the Secretary of State on the effects of the conditions which would be included in the renewed licences on the capacity of the holders of Channel 3, 5 and public teletext service licences to contribute to the fulfilment of the public service remit at a cost that is commercially sustainable for them.
515. Under *subsection (4)*, OFCOM will also include any recommendations that they consider appropriate to make as to the use by the Secretary of State of her powers under section 230 or under Chapter 4 of Part 3 of this Act.
516. When the Secretary of State has made an order extending the licences under section 224, after the report was submitted, she has, under subsection (5), the power to require a supplementary report.

***Section 230: Orders suspending rights of renewal***

517. This section applies when the Secretary of State receives a report made by OFCOM under section 229. If the report contains a recommendation to make an order under this section, or (in the absence of a recommendation) where the Secretary of State believes

it is appropriate to do so, she may by order provide that specified licences are not to be renewed under section 216 or 222 from the end of the current licensing period.

518. *Subsection (3)* provides that such an order must be made at least eighteen months before the end of the current licensing period.
519. Under *subsection (4)*, the power to prevent the renewal of the licences from the end of the initial licensing period can be exercised only if a date for switchover has been fixed which falls before the end of that period. *Subsection (5)* provides that if the Secretary of State postpones the date for switchover after she has made an order preventing the renewal of licences, this order will not have effect if the new date for switchover falls after the end of that initial licensing period. However, in such a case, the Secretary of State will be able to make another order preventing the renewal of licences. But this power will be subject to the requirement, set by subsection 224(5), that she must postpone the initial expiry date of the licences when this date falls within the period of eighteen months after switchover.
520. Under *subsection (7)*, an order with respect to Channel 3 licences must apply to all licences to provide a Channel 3 service, or to all licences to provide a national Channel 3 service, or to all licences to provide a regional Channel 3 service. Any order made by the Secretary of State will be subject to the affirmative resolution procedure.

### ***Section 231: Replacement of Channel 4 licence***

521. When *subsection (1)* comes into force, Channel 4 shall be granted a new licence under this section. Its licence granted under section 24(3) of the Broadcasting Act 1990 shall no longer apply. In advance of this, OFCOM must prepare a draft replacement licence and consult the Channel Four Television Corporation on its contents. The replacement licence must provide for the service to be broadcast digitally and may provide that the service is also to be provided in analogue form until such time as is determined according to conditions in the licence giving effect to the Secretary of State's directions as to how long the service must continue to be provided in analogue form. The programming of the analogue service should replicate that of the digital service, or such part of it as is specified by the licence conditions included under *subsection (3)(b)*. There can be no charge levied for the use of such a service or for any assistance for disabled people or for other ancillary services included in the service.
522. *Subsection (6)* provides that such a replacement licence must continue in force until the end of 2014. The licence may be renewed as OFCOM think fit.

### ***Section 232: Meaning of "television licensable content service"***

523. A "television licensable content service" is defined in this section as any service (i) which is provided (whether in digital or analogue form) as a service to be made available for reception by members of the public (as defined in section 361) by being broadcast from a satellite, or distributed by an electronic communications network, and (ii) which consists of television programmes or electronic programme guides (or both). The service covered by a single licence will comprise not only what *subsection (3)* calls a "main service" (which could consist either of television programmes or of an electronic programme guide, or both) but also such of the ancillary services and facilities provided with it as are "relevant ancillary services" and are not "two-way services". "Two way services" are defined in *subsection (5)* and encompass services such as video conferencing. The term "relevant ancillary services" encompasses both services that are actually provided by the provider of the "main service" and those facilities which are no more than links to services provided by others. It is not intended to encompass any apparatus (such as a television set, a PC, or a set-top box).
524. A licensee is not held to be providing services which may be accessed from the "main service", unless he has general control over them (*subsection (4)*).

525. Ancillary services that are not “relevant” ones are not to be covered by the licence for the main service (although some might be licensable in their own right, e.g. if they constitute a television licensable content service provided by someone other than the provider of the main service). To give some examples, say you are watching a wildlife programme on the “main service” i.e. a television channel in the conventional sense, albeit that it includes all the enhanced features to be expected from digital services. A menu might offer access to different camera angles: these would constitute “relevant ancillary services” which would be part of the licensed service. The menu might also give you access to additional factual information (provided within the broadcast stream) about the animals you are watching. That is expected to be within the scope of the licence too. But there might be a link (a “facility”) which might take you to a website. The fact that the link is provided would be within the licence (and so OFCOM might require it to be removed if it led directly to unsuitable material), but the website at the end of the link would neither be regulated nor within the licence of the “main service” as it would not be a service made “available for reception by members of the public”. Also outside the scope of the licence would be content that could be accessed from the “main service” but which is not under the general control of the provider of the “main service”, such as a television service provided by someone else showing similar wildlife programmes. Other services, such as being able to order takeaway food, or engage in on-line banking, or participate in an on-line chatroom, would not be within the licence either. These are just examples, and the question of whether particular services fall within the scope of a person’s television licensable content service licence would depend on the exact nature of the services and facilities offered and the circumstances in which they were offered.

\*an *electronic programme guide* is defined in *subsection (6)* as a service which lists and/or promotes television programmes, including programmes of providers other than the provider of the guide. The service must also allow the user to access programmes contained in the guide.

### ***Section 233: Services that are not television licensable content services***

526. This section sets out the services that are excluded from the definition of a television licensable content service in section 232. A service is not a television content service licence if it is broadcast by means of a multiplex service or to the extent that it consists of a service which is authorised by a licence to provide a television broadcasting service, the licence to provide the public teletext service or a licence to provide additional television services. Nor does it meet the description of a television licensable content service if it forms part only of a service provided by means of an electronic communications service or is one of a number of services that may be accessed through such a service where the purpose of the service provided by these means is not wholly or mainly to make available television and/or radio programmes for reception by members of the public. A service is also excluded if it is a two-way service (as defined in the previous section). The aim of these provisions is, broadly, to maintain licensing obligations in respect of services which are or equate to broadcasting while excluding Internet services, such as web sites or web-casting, from OFCOM’s regulatory powers. The effect of *subsection (3)* is to exclude not only any website material provided as part of another service (for example, a website which is accessed via an ISP which also provides its own in-house content) but also material provided from a stand alone site, whether it be text, web-cast or video images. *Subsection (6)* also excludes a service that is distributed to a single set of premises by an electronic communications network that is contained within the premises and is not connected to any external network. *Subsections (7) and (8)* exclude a service that is provided for the purpose only of being received by persons who have an interest in receiving the service for use in their business or employment, such as stockbrokers or bookmakers.

***Section 234: Modification of ss. 232 and 233***

527. The Secretary of State may modify sections 232 or 233 by order, if she considers it appropriate. In making any modification, she must have regard to the level of protection expected by the public as regards the content of television programmes and text services, taking into account the means of reception; the ability of the public – having been made aware of the contents of a forthcoming programme – to control what they watch; technical innovation; the financial consequences of modification; and the relative ease or difficulty of setting different levels of regulation for different services.

***Section 235: Licensing of television licensable content services***

528. A television licensable content service is required for the purposes of section 13 of the Broadcasting Act 1990 to have a licence under Part 1 of that Act awarded according to an application procedure that is set by OFCOM. OFCOM must approve the application unless they are not satisfied that the applicant is a fit and proper person to hold the licence, or if the person is disqualified from holding the licence by virtue of Part 2 of Schedule 2 of the Broadcasting Act 1990 or if there would be a contravention of Schedule 14 of this Act if he held the licence. OFCOM are entitled to refuse an application if satisfied that the service would be unlikely to comply with OFCOM's standards code or the code on fairness issued under Part 5 of the Broadcasting Act 1996.
529. *Subsection (4)* requires that a provider must seek a separate licence for every television licensable content service he proposes to offer. In other words, if a provider is intending to offer three television licensable content services he must have three licences, one for each service. *Subsection (5)* provides that a single licence may authorise different programmes to be broadcast simultaneously, or virtually so, for example where a service provides a choice of programmes that may be viewed at any one time.
530. Each licence for a television licensable content service will be valid until surrendered or revoked.

***Section 236: Direction to licensee to take remedial action***

531. If the licence holder has breached a condition of his television licensable content service licence then, if this will sufficiently remedy the breach, OFCOM may, after giving him a chance to comment, require the licence holder to include a correction in the licensed service or broadcast a finding by OFCOM against the licence holder. The licence holder may announce that he is making a correction or a statement of findings because OFCOM have directed him to do so. OFCOM must send a copy of any direction given to a BBC company requiring the broadcasting of a correction and/or statement of findings and any representations received from that BBC company to the Secretary of State.
532. OFCOM may direct a television licensable content service licence holder not to include a programme in the service on a future occasion if satisfied that the previous inclusion of that programme in the service involved a contravention of a licence condition.

***Section 237: Penalties for contravention of licence condition or direction***

533. If OFCOM are satisfied that a television licensable content service licence holder has breached a condition of that licence, or has not complied with a direction given by OFCOM, they may serve a notice on that person imposing a fine. The maximum fine is the greater of £250,000 or 5 per cent of qualifying revenue within the relevant period. OFCOM may not impose a fine unless they have first given the licence holder the chance to comment. If OFCOM serve a notice on a BBC company, they must send a copy of that notice, and of any representations received from the company, to the Secretary of State. The Secretary of State may vary the amount of the maximum fine by order.

\*“qualifying revenue” is calculated in accordance with section 19(2) to (6) of the Broadcasting Act 1990 and Part 1 of Schedule 7 to that Act, with any necessary modifications.

***Section 238: Revocation of television licensable content service licence***

534. If satisfied that a television licensable content service licence holder is in contravention of the terms of his licence, or is failing to comply with a direction, and that such a contravention or failure would, if not remedied, warrant revocation of the licence, OFCOM must serve a notice on the licence holder. The notice must specify the nature of the contravention or failure and state that the licence will be revoked unless the licence holder takes specified steps within a specified period. If the licence holder does not comply within the specified period then OFCOM may, if satisfied that this is necessary in the public interest, revoke the licence. At each stage in the process, OFCOM shall first give the licence holder the chance to comment. The provisions in this section do not apply to the revocation of a licence under section 239 (see below).
535. *Subsections (4) and (5)* provide that OFCOM may revoke a television licensable content service licence if satisfied that the licence holder is no longer providing the service, or that the licence holder provided false or misleading information in support of his licence application.
536. If OFCOM serve a notice on a BBC company under this section, they must send a copy of that notice, and of any representations received from the company, to the Secretary of State.

***Section 239: Action against licence holders who incite crime or disorder***

537. OFCOM must serve a notice under *subsection (2)* on a television licensable content service licence holder if satisfied that the service has included one or more programmes which contain material likely to encourage or to incite crime or disorder, that this has contravened a licence condition, and that the contravention warrants the revocation of that licence. A notice under subsection (2) must specify the nature of the contravention, state that the licence may be revoked at the end of 21 days beginning with the date of service of the notice, and inform the licence holder of his right to make representations. The effect of the notice is to suspend the licence until revocation, or until OFCOM decide not to revoke the licence. At the end of 21 days, and having considered any representations, OFCOM may, if satisfied that this is necessary in the public interest, serve on the licence holder a notice of revocation. This may not take effect less than 28 days after being served.

***Section 240: Abolition of separate licences for certain television services***

538. This section abolishes the two forms of licence which the television licensable content services licence replaces, that is satellite television service and licensable programme service licences. It puts in place transitional provisions so that after the television transfer date, any person holding one of the abolished licence types is to be regulated by OFCOM as if he held a television licensable content services licence, unless the service is of a kind that falls outside the new definition and so no longer requires a licence at all. To the extent that any existing licence takes effect as a licence to provide a television licensable content service, OFCOM must use their power under section 3 of the Broadcasting Act 1990 to modify that licence if they feel that it is necessary to do so in order to comply with their duty under section 263 (see below).

***Section 241: Television multiplex services***

539. References in Part 1 of the Broadcasting Act 1996 to a television multiplex service are references to a service (i) which is broadcast for general reception, otherwise than by satellite, so as to be available to members of the public and (ii) which provides,



or is capable of providing, two or more services which include at least one “relevant television service” (as defined in *subsection (9)*) for simultaneous broadcast on the same frequency.

540. *Subsection (3)* provides that it is not an offence to provide a television multiplex service that is not licensed under the Broadcasting Act 1996. Only where a wireless telegraphy licence provides that any television multiplex service being broadcast using the station or apparatus to which that licence relates must itself be licensed, shall that multiplex service require a licence. This will be assumed to be the case where the multiplex service is already licensed under the Broadcasting Act 1996 and the service is broadcast using a station or apparatus that is authorised by a wireless telegraphy licence. Where this assumption applies, and a person affected by it either ceases to be licensed under Part 1 of the Broadcasting Act 1996 or ceases to exist, OFCOM may revoke the wireless telegraphy licence relating to the provision by that person of the television multiplex service in question.

### ***Section 242: Composition of services in television multiplexes***

541. This section amends section 12 of the Broadcasting Act 1996. OFCOM will now be able to include conditions in any multiplex licence granted under that Act to secure that: (i) all digital programme services and digital additional services provided by the BBC may be carried on that multiplex, (ii) the digital sound programme services broadcast under the licence are either provided by the BBC or licensed under section 60 of that Act and (iii) a licensee does not show undue discrimination either against or in favour of a digital sound programme service provider, or restrict that provider’s ability to share any of his spare capacity (unless it is reasonable to do so in order to ensure the technical quality of the multiplex service).
542. Currently, section 12(1)(h) requires that at least 90 per cent. of digital capacity on the frequency of the service to which the licence relates be available for broadcasting digital programmes and related services. *Subsection (1)(f)* amends the 90 per cent. threshold to ‘the required percentage’. This figure, to be set by OFCOM as they think appropriate, must be 90 per cent or higher. The Secretary of State retains the power to amend the minimum percentage, by order. *Subsection (2)* adds digital programme services and digital sound programme services provided by the BBC to the services currently listed in section 12(1)(h). Digital sound programme services provided otherwise than by the BBC must be accommodated within the remaining capacity. *Subsection (3)* of this section makes a consequential change to the test that the Independent Television Commission currently apply where a multiplex licence holder applies for a variation of any condition imposed relating to the implementation of any proposals as to the characteristics of the digital programme services to be broadcast.

### ***Section 243: Powers where frequencies reserved for qualifying services***

543. OFCOM, in fulfilling their spectrum management role, may require providers of television multiplex services to reserve digital capacity on their frequencies for the provision of certain types of service. The Secretary of State may by order provide that OFCOM must ensure that the holders of licences for multiplex services on these reserved frequencies enter into agreements with relevant public service broadcasters for the broadcasting of services provided by those broadcasters on the reserved digital capacity. An order under this section may also require OFCOM to include in the licence conditions requiring any such broadcaster to pay the licence holder for use of the reserved digital capacity. The amount paid is to be agreed between the broadcaster and the television multiplex licensee or (in the absence of any agreement) determined by OFCOM.

\*a “relevant public service broadcaster” is defined in *subsection (7)* as a holder of a Channel 3 service licence, the C4 Corporation, the holder of a Channel 5 licence,

the Welsh Authority or the public teletext provider. This definition excludes the BBC.

\*“*public teletext provider*” is defined in section 362 as the person who holds the licence to provide that service awarded under section 217 (or, in relation to a time before such a licence is awarded, the holder of the additional services licence under the 1990 Act which relates to the public teletext service).

***Section 244: Local digital television services***

544. The Secretary of State may, by order, apply (with modifications) the provisions of Part 3 of the Act (except for this section and any provisions relating exclusively to sound services), or any part of Part 1 of the Broadcasting Act 1990, or of Part 1 of the Broadcasting Act 1996, to make special provision for local digital television services of the type further described in *subsections (3) to (5)*. Such services should be provided with a view to including them in a television multiplex service. Such an order can be made only where the Secretary of State is satisfied that this will enhance the provision of such services. In turn, this should benefit the locality where the services are to be received, not least by broadening the range of programmes that can be received in that locality. The order may restrict advertising and programme sponsorship in the service.