

COMMUNICATIONS ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 6: Miscellaneous and Supplemental

Section 390: Annual report on the Secretary of State's functions

851. This section requires the Secretary of State to prepare and lay before Parliament annual reports about the performance of her functions under the following legislation: this Act, the enactments relating to the management of the radio spectrum which are not part of this Act, the Office of Communications Act 2002 and the Broadcasting Acts 1990 and 1996. The first report must be prepared as soon as reasonably practicable after the first anniversary of the first order under section 2 transferring functions to OFCOM. The enactments relating to the management of the radio spectrum, in addition to Chapter 2 of Part 2 of the Act, are the Wireless Telegraphy Acts 1949, 1967 and 1998, the Marine, &c., Broadcasting (Offences) Act 1967 and Part 6 of the Telecommunications Act 1984 (see section 405).

Section 391: Review of media ownership

852. OFCOM are required to carry out regular reviews of the operation of all media ownership and news provider provisions. OFCOM will provide a report on every review to the Secretary of State, including recommendations on whether the Secretary of State should exercise the powers available to modify, repeal or revoke rules contained in enactments and secondary legislation. OFCOM must publish every report in such a manner that it is brought to the attention of those persons whom OFCOM feel are likely to be affected by it. The first review must be carried out no more than 3 years after the commencement of this section, and subsequent reviews must be carried out at least every 3 years.

Section 392: Penalties imposed by OFCOM

853. This section requires OFCOM to prepare, publish and keep up-to-date guidelines for determining the penalties to be imposed by them under the Act (including any that the BBC may be liable to pay) or under any other enactment, except the Competition Act 1998. Before publishing any guidelines, OFCOM must consult the Secretary of State and other appropriate persons. When determining the amount of any penalty to be imposed OFCOM must have regard to their published guidelines.

Section 393: General restrictions on disclosure of information

854. With the exception of information obtained in accordance with section 196 of the Broadcasting Act 1990 (powers of entry and search, under which stricter rules apply), this section imposes limits on the disclosure of information relating to the affairs of any particular business obtained under this Act, the other enactments relating to the management of the radio spectrum and the Broadcasting Acts 1990 and 1996. *Subsection (1)* prohibits the disclosure of such information while the business in

question is still being carried on, unless consent has been obtained from the person carrying on that business.

855. *Subsections (2) to (5)* provide for a limited number of exemptions from this prohibition where the disclosure satisfies certain criteria. Examples of exempt disclosures include those required to facilitate the carrying out by OFCOM of their duties; disclosures necessary for the carrying out by Ministers, the OFT, the Competition Commission, the Consumer Panel or the Welsh Authority of duties under this Act or other specified enactments; and disclosures made in connection with civil proceedings brought under this Act or other specified enactments.
856. In addition, *subsection (6)* provides that this section will not (i) limit information that may be published by OFCOM under sections 15 and 26 as results of research or as information or advice, in the Secretary of state's annual report under section 390 or in reports by OFCOM under any other provision of this Act or the Office of Communications Act 2002; (ii) prevent the disclosure of information for the purposes of a report of legal proceedings or (iii) apply to any information that has already been published or made public under (i) or (ii).
857. *Subsection (10)* makes it an offence for any person to disclose information in contravention of this section.

Section 394: Service of notifications and other documents

858. When any person is authorised or required to send a notification and/or document to another person under this Act, the Office of Communications Act 2002, the enactments relating to radio spectrum management not contained in this Act, Schedule 2 to the Telecommunications Act 1984 or the Broadcasting Acts 1990 and 1996, it may be delivered, left at the proper address or sent by post.

*The meaning of proper address is given in *subsection (7)* and *(8)*

859. When the recipient is a company, a partnership or unincorporated association, the notification and/or document may be addressed to the person(s) specified, respectively, in *subsections (4), (5) and (6)*.

Section 395: Notifications and documents in electronic form

860. This section applies where a person is authorised under section 394 to give or send a notification or other document by delivering it to another person and does so either by transmitting it electronically by means of an electronic communications network or transmitting it by other means but in a form that means that other apparatus must be used to make it intelligible (e.g. sending a computer disk by post). If the intended recipient is not OFCOM, he must have agreed with the sender to that the notification and/or document may be delivered in that way and form (and not have withdrawn his agreement), and must have provided the sender with his address and other information needed to send them.
861. If the intended recipient is OFCOM, OFCOM must have indicated their agreement to receive the notification and/or document in the form in question and the thing transmitted and the means of transmission must comply with any conditions and procedures determined and published by OFCOM. When transmitting a notification and/or document, OFCOM may determine the means of transmission used and the form in which they may be transmitted (subject to *subsection (5)*).
862. *Subsection (5)* provides that, if the intended recipient is not OFCOM, he must have agreed with the sender that the notification and/or document may be delivered in that way and in that form (and not have withdrawn his agreement), and must have provided the sender with his address and other information needed to send the notification or document.

Section 396: Timing and location of things done electronically

863. The Secretary of State may by order make provision for determining the times and places at which things are done electronically under this Act, the Office of Communications Act 2002, the enactments relating to radio spectrum management not contained in this Act, Schedule 2 to the Telecommunications Act 1984 and the Broadcasting Acts 1990 and 1996. The Secretary of State may also specify how anything carried out electronically for the purposes of those Acts, including any requirements relating to time and place, may be proved in legal proceedings.

Section 397: Purchase of Duchy of Lancaster land

864. This section gives the Duchy of Lancaster a general power to sell land to persons who provide public electronic communications networks.

Section 398: Repeal of certain provisions of the Telecommunications Act 1984

865. This section will repeal the spent provisions dealing with the privatisation of British Telecommunications set out in sections 60, 61(1) to (6), 62, 63(1) to (4), 64 to 67, 69 to 71, 72(2), (4) and (5) and 73 of the Telecommunications Act 1984. This section also amends section 68(2) of the 1984 Act to reflect the fact that the only outstanding liability of British Telecommunications plc for which the Secretary of State might be responsible is the payment of pensions, and repeals sections 93 and 97 of the Telecommunications Act 1984.

*Section 93 of the 1984 Act allows the Secretary of State (with the consent of the Treasury) to make grants towards fees or expenses incurred in the development or use of apparatus that is designed or adapted for disabled persons. Section 97 allows local authorities to contribute towards the cost of the provision by public telecommunications operators of telecommunications facilities that they consider to be of benefit to their area.

Section 399: Expenses

866. Any expenditure by the Secretary of State in carrying out her functions under the Act, and any increase caused by this Act in sums payable under other Acts, shall be met from money provided by Parliament.

Section 400: Destination of licence fees and penalties

867. Where OFCOM receive money in any of the circumstances listed in *subsection (1)*, they must pay it into the Consolidated Fund of the United Kingdom or Northern Ireland in accordance with *subsection (2)*. The circumstances in subsection (1) include the imposition by OFCOM of a fine under Chapter 1 of Part 2, section 175 or Part 3 of this Act (including any imposed on the BBC), Part 1 or 3 of the 1990 Act or Part 1 or 2 of the 1996 Act and the receipt of fees for auctioned telephone numbers, of spectrum fees under the [Wireless Telegraphy Act 1998 \(c. 6\)](#) and of amounts paid to OFCOM under a Broadcasting Act licence by way of additional payments during the period for which the licence is in force and for subsequent years.
868. OFCOM must prepare an annual account that shows the amounts received by them, the sums paid into the Consolidated Funds of the United Kingdom and Northern Ireland, the amount retained by them in accordance with any statement of principles they may make under section 401 and the cost to OFCOM of carrying out the functions to be covered by that retained amount. The report must be sent to the Comptroller and Auditor General, who must certify and report on the account. He must also lay a copy of OFCOM's annual account and his report before each House of Parliament.

Section 401: Power of OFCOM to retain costs of carrying out spectrum functions

869. This section allows OFCOM, subject to the approval of the Treasury, to introduce a new system for meeting the cost carrying out their spectrum functions. Section 400(1) (c) provides for sums received by OFCOM under the Wireless Telegraphy Act 1998 to be paid to the Consolidated Fund. Under this section, OFCOM would be able to retain out of those sums sufficient amounts to cover the cost of carrying out most of their spectrum functions.
870. *Subsections (1) and (2)* would enable OFCOM to make a statement of principles under which they could retain amounts received by them under the Wireless Telegraphy Act 1998. Under *subsections (3) and (4)*, the principles contained in any statement must secure, on the basis of such estimates of the likely costs as it is practicable to make, that on a year by year basis, the aggregate amount retained by OFCOM does not exceed the amount required to meet the annual cost to OFCOM of carrying out their functions in relation to the management of the radio spectrum. The amounts retained by OFCOM must be objectively justifiable and proportionate to the costs and the relationship between the costs and the amounts retained must be transparent. *Subsection (5)* excludes functions under sections 22(2), 28, 152(1), (2), (5) and (8), 155, 158, 168 and 175 to 177 of this Act and section 5 of the Wireless Telegraphy Act 1949 (since inclusion of those functions would be contrary to the EC Electronic Communications Authorisation Directive).
871. As charges for licences covering several years are sometimes paid as a lump sum in one year, *subsection (6)* allows for amounts received in one year to be treated as referable to costs incurred in that year and in one or more subsequent years and to be brought into account in each of those years in accordance with an apportionment made in the statement of principles. *Subsection (7)* allows any deficit or surplus to be carried forward and taken into account in determining what is required by OFCOM in the following year to meet the costs of carrying out their spectrum functions.
872. Where a statement of principles has effect for a limited period or is withdrawn, *subsection (8)* provides that it does not apply to any amounts paid to OFCOM after the end of the period or after the withdrawal takes effect. *Subsection (9)* enables OFCOM to revise a statement of principles. *Subsection (10)* requires the consent of HM Treasury to be given for the making, revision or withdrawal of any statement of principles. *Subsection (11)* requires publication of so much of a statement of principles as demonstrates compliance with the requirements of *subsection (3)*.

Section 402: Power of Secretary of State to make orders and regulations

873. This section sets out how the Secretary of State is to exercise her powers to make orders or regulations under the Act (other than those conferred by Schedule 4), and makes additional provisions in respect of these powers.

Section 403: Regulations and orders made by OFCOM

874. This section sets out how OFCOM are to exercise their powers to make orders or regulations under the provisions in the Act and provisions inserted in other Acts which apply this section, and makes additional provision in respect of these powers. The orders and regulations concerned must be made by statutory instrument; and where the provision in the Act and provisions inserted in other Acts under which the instrument is made provides for it to be laid before Parliament, OFCOM must send it to the Secretary of State for that to be done. *Subsections (4) to (6)* provide that OFCOM must give notice before making orders or regulations to which this section applies and must allow a period of at least one month for representations to be made on any proposal by them to make such orders or regulations. The procedural requirements in this section implement Articles 14(1) and 33 of the Universal Service Directive and Article 6 of the Framework Directive.

Section 404: Criminal liability of company directors etc.

875. This section provides that, where an offence under this Act, the Wireless Telegraphy Act 1949, the Marine, &c., Broadcasting (Offences) Act 1967, or the Telecommunications Act 1984 is committed by a body corporate, then a director, manager, secretary or other officer of that body corporate (including a member of a body corporate which is managed by its members) will also be liable for prosecution if it is proved that he had given their consent to the offence or had connived in its commission or if the commission is attributable to neglect on the part of the person in question.

Section 405: General interpretation

876. This section provides for interpretation of defined terms in the Act.

Section 406: Minor and consequential amendments, transitionals and repeals

877. *Schedule 17*, which provides for minor and consequential amendments to other legislation, and *Schedule 18*, which contains transitional provisions in connection with other legislation, have effect. Furthermore, the provisions set out in *Schedule 19* are repealed or revoked as specified in that Schedule. These Schedules are described in more detail below. *Subsections (2), (3) and (5)* also give the Secretary of State a limited power and, in the case of some local legislation, a duty to make consequential amendments of other legislation by order. *Subsection (4)* confers a further power by order to make consequential modifications to enactments extending only to Scotland, enactments extending only to Northern Ireland, local enactments and subordinate legislation.

Section 407: Pre-consolidation amendments

878. The Secretary of State may by order modify enactments relating to the management of the radio spectrum (as defined in section 405), the enactments relating to broadcasting (the Broadcasting Acts 1990 and 1996, Part 3 of the Act and other provisions of the Act dealing with them) and other enactments referring to these enactments in order to facilitate consolidation. An order may not be made unless an Act for repealing and re-enacting the enactments has been presented to Parliament.

Section 408: Transitional provision for anticipatory carrying out of functions

879. This section applies where an order made under section 411 bringing into force any of the following provisions of the Act: (i) a provision of Part 2 of the Act, (ii) a provision of Chapter 1 of Part 5; or (iii) a provision of Part 1 or 6 relating to a provision of Part 2 or of Chapter 1 of Part 5 or any enactment relating to the management of the radio spectrum, states that such a provision is brought into force for the purposes of enabling specified networks and services functions, or specified spectrum functions, to be carried out during the transitional period by the Director General of Telecommunications or the Secretary of State.

880. Any provision brought into force during the transitional period has effect as if references in that provision to OFCOM and references to OFCOM inserted by that provision in any other enactment were references to either the Director General of Telecommunications or the Secretary of State, as the case may be.

**Subsection (6)* defines *the transitional period*. *Subsections (7) and (8)*, respectively, define *networks and services functions* and *spectrum functions*.

881. This section should be read with paragraph 2 of *Schedule 18*, which provides that steps taken by the Secretary of State or OFCOM before a power or duty is conferred or imposed on either of them or transferred to OFCOM are to be treated as satisfying any requirement for steps to be taken prior to the exercise of the power or duty. This

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

provision also applies to steps taken by the Director General of Telecommunications or the Secretary of State when section 408 applies.

882. The provisions of the Act which implement the four EC Communications Directives will be brought into force very quickly between Royal Assent and the date on which those Directives must be implemented: 25 July 2003. The necessary steps under the Act for OFCOM to be able to exercise its functions under these provisions have not yet been completed. As a result, these functions will initially be exercised by the Director General of Telecommunications and the Secretary of State under section 408; and they have taken preparatory steps in advance under paragraph 2 of Schedule 18.

Section 409: Modifications consequential on regulations implementing Directives

883. This section permits the Secretary of State (by order, subject to approval of a draft by Parliament) to amend the Act if regulations have been made under the European Communities Act 1972 to implement the four Directives cited in subsection (4) prior to the passing of the Act. These Directives have to be implemented in the European Community on 25 July 2003. Subsection (2) permits the Secretary of State to repeal provisions of the Act which have become redundant, modify the Act as necessary in consequence of the regulations, revoke the regulations and make transitory or transitional provisions. In the event, regulations of the type described in subsection (1) were not made before the Act was passed, the condition in that subsection can never be satisfied and, accordingly, it is not intended that this section will be brought into force.

Section 410: Application of enactments to territorial sea and other waters

884. This section permits Her Majesty by an Order in Council to apply the provisions of Part 2 of the Act, the enactments relating to the management of the radio spectrum not contained in Part 2 of the Act and any related provision in Chapter 1 of Part 5 of the Act to the territorial sea and other waters of the United Kingdom.

Section 411: Short title, commencement and extent

885. This section gives the Secretary of State a power to bring the provisions of this Act into force by order on appointed days and different days may be appointed for different purposes. This section and sections 31(1) to (4) and (6) and 405 came into force upon Royal Assent. This section also provides that the Act extends to Northern Ireland and that it may, by Order in Council, be extended to the Channel Islands and the Isle of Man.