

Postal Services Bill

Memorandum by the Department for Business, Innovation and Skills for the Delegated Powers and Regulatory Reform Committee

Introduction

1 This Memorandum identifies every provision for delegated legislation in the Postal Services Bill and: explains its purpose; describes why the power has been left to delegated legislation rather than substantive provisions being included in the Bill; and explains the choice of parliamentary scrutiny procedure provided for each power (affirmative, negative or none at all).

Background

2 The previous government introduced a Postal Services Bill in February 2009 to implement the recommendations of the Hooper Review which was published in December 2008. This was an independent review commissioned by the previous government and chaired by Richard Hooper to consider how the universal postal service in the UK can best be maintained. Hooper's report recommended a package of measures which were the focus of the 2009 Bill.

3. Given the various events and changes that have taken place since the original report, both in the postal market and the wider economy, the Government asked Richard Hooper to review his original report and consider whether his conclusions remained valid. The updated report was published in September 2010 and concludes that the recommendations of the earlier report remain broadly valid today. In particular Richard Hooper recommends that in order to protect the universal postal service, the Government should implement a package of measures: introduce private sector capital and disciplines into Royal Mail; tackle the historic pension deficit; and reform the regulatory framework.

4 The Government believes that, in order to get the best deal for both Royal Mail and the taxpayer, there should be flexibility around the sale of Royal Mail in terms of the timing and form of the process. Accordingly, the Postal Services Bill 2010 makes provisions to enable the separation of Post Office Ltd from the Royal Mail Group of companies and the sale of shares in Royal Mail's Holdings plc or Royal Mail Group Ltd and ensuring that Post Office Ltd remains fully owned by the Crown, unless it moves to a mutual ownership structure. Secondly, it makes provisions for the transfer of Royal Mail's historic pension deficit to a public sector scheme. Thirdly, it makes provisions for a new regulatory regime for the postal services sector, including transferring regulatory responsibility from Postcomm to OFCOM and making maintenance of the universal service the primary duty of the regulator in respect of postal services. Finally it makes provision for a special administration regime to protect the universal service in case of Royal Mail or any other universal service provider being at risk of entering insolvency proceedings.

5 The Department for Business, Innovation and Skills has considered the use of powers in the Bill as set out below and is satisfied that they are necessary and justified.

PART 1: RESTRUCTURING OF POST OFFICE AND ROYAL MAIL

Clause 6: Meaning of “Post Office company”

Powers conferred on: Secretary of State

Power exercised by: Order

Parliamentary procedure: None

6 Clause 6(1)(c) confers a power on the Secretary of State to designate a company by order provided it meets the condition in clause 6(2) that it is wholly owned by the Crown immediately prior to designation. Such a designated company will constitute a “Post Office company” for the purposes of the Bill if it also meets the other conditions in clause 6(1). Those conditions are that a company must be engaged in the provision of a network of post offices and have been a subsidiary of the original holding company, i.e. Royal Mail Holdings plc (the top company in the Royal Mail group), or be in the same group as a company that is or was, designated under this clause. As a result of the provisions in clause 4(1), a Post Office company must remain wholly owned by the Crown or relevant mutual body to whom shares or share rights have been transferred. This means that no further subsequent designation is required if the company were to be transferred from one mutual body to another.

7 Clause 6(4) provides that key restrictions applying to the ownership of shares in Post Office Ltd (“POL”) under the Postal Services Act 2000 cannot be repealed until POL has been designated under clause 6(1). Given that POL is the only company currently engaged in the provision of a network of Post Offices, the Secretary of State’s power to make a designation order under clause 6(1)(c) can only effectively be exercised in respect of POL and until that company is designated the existing ownership restrictions will remain. It is therefore not felt necessary for the initial order under clause 6(1) to be subject to any parliamentary process because the principle will have been debated during the parliamentary passage of the Bill.

8 Thereafter, the power will provide flexibility to ensure that should POL change the corporate structure of its business, the Secretary of State is able to designate other companies to which the ownership restrictions in clause 4 should apply.

9 Clause 6(3) provides that an order made under clause 6(1) may not be amended or revoked, thereby ensuring that primary legislation will be required to lift a designation. In the circumstances the Department considers it appropriate that this power is exercisable by order that is not subject to any parliamentary procedure.

PART 2: ROYAL MAIL PENSION PLAN

10 The purpose of this Part of the Bill is, in the context of the provisions enabling private sector investment, to enable the removal of some of Royal Mail’s historic pension liabilities from the company so that they are taken into the Government. The exact nature of the historic liabilities which are removed will depend on a number of factors including the Government’s key objective to protect taxpayers and the nature of any State Aid clearance. The formal notification process for such approval is due to begin in late 2010 and it is anticipated that the process may take 12-18 months.

11 The provisions in this Part of the Bill therefore provide a framework to enable the transfer of historic liabilities once state aid clearance has been obtained. It is envisaged that these powers will only be used when State aid clearance has been given by the

European Commission, and arrangements for the disposal of shares in Royal Mail Holdings plc (except for those in POL) or Royal Mail Group Ltd have been agreed or are in the process of being finalised.

12 This Part of the Bill enables the transfer of the liabilities which the Government will assume to a new scheme set up by the Government. (“the new scheme option”). In addition the Bill contains a power to create a separate segregated section in the principal Royal Mail pension scheme (called the Royal Mail Pension Plan or “RMPP”) for certain pension liabilities in relation to Royal Mail employees currently engaged in the business of POL. This is necessary as POL will not be included in any disposal of shares.

13 This Part of the Bill has four main functions:

- ▶ To enable the Secretary of State to establish a new statutory unfunded pension scheme which may be used to provide benefits to members of the Royal Mail Pension Plan.
- ▶ To enable the Secretary of State to transfer existing pension rights from the Royal Mail Pension Plan to the new scheme and for the corresponding removal of liabilities from the Royal Mail Pension Plan.
- ▶ To permit the Secretary of State to divide the Royal Mail Pension Plan into sections, allocate assets, rights, liabilities and obligations between those sections and determine which employers will participate in them.
- ▶ To permit the Secretary of State to transfer assets from the Royal Mail Pension Plan to a new Government fund.

14 This Part provides for further ancillary powers, including a power to require information to enable the Secretary of State to exercise powers under this Part and a power to make consequential changes to the Royal Mail Pension Plan trust deed and rules and supporting documentation.

15 A constraint on certain of the Secretary of State’s powers under this Part is set out in clause 19, which requires the Secretary of State to ensure, when exercising them, that the relevant pension rights in respect of each person who is or has been a member of the Royal Mail Pension Plan (not just those who have rights which are transferred) are, in all material respects, at least as good immediately after the Secretary of State has exercised the power as the provision was immediately before the exercise of the power.

16 The powers in question are the power under clause 16 to establish a new scheme or to transfer qualified accrued rights to a new scheme and the powers exercisable under clause 17 or 18 of this Part. In addition there is a separate provision (clause 21) in relation to the Secretary of State’s power to transfer assets which requires that if this power is exercised the Secretary of State must ensure that the ratio of assets to liabilities in the Royal Mail Pension Plan immediately after any assets transfer is at least equal to the ratio immediately before the asset transfer. The power to transfer assets cannot be exercised unless a power under clause 16 is being or has been exercised.

17 All the powers in Part 2 (except clause 23 (provision of information)) can only be exercised with the consent of the Treasury (clause 24(2)).

Clause 15: Definitions of “qualifying member of the RMPP” & “the qualifying time”
Powers conferred on: Secretary of State
Power exercised by: Order
Parliamentary procedure: Negative resolution procedure

18 Clause 15(1) enables those members of the RMPP who will be included within the new public scheme to be prescribed by the Secretary of State as “qualifying members of the RMPP” for the purposes of the Bill. It is intended that the new scheme will cover rights which such qualifying members have accrued up to a specific time. This specific time may also be prescribed by the Secretary of State and is referred to in the Bill as “the qualifying time”. Clause 25(1) (Interpretation of Part 2) provides that “prescribed” means prescribed by order.

19 Both the definitions of the “qualifying members” and the “qualifying time” will depend on a number of factors, including the Government’s key objective to protect taxpayers and the nature of any state aid clearance. It is therefore not possible to set out in the Bill which members of the RMPP will be qualifying members for the purposes of different clauses or the time of service which will constitute the “qualifying time”. These matters can only be determined once the outcome of the state aid reference is known, an agreement in principle has been reached regarding any disposal of shares and consultation has taken place with the RMPP Trustees and a Royal Mail company.

20 It is envisaged that these powers would only be used as part of an order made under clause 16 (to set up a new scheme and to transfer liabilities). In view of the purpose for which the power is provided the Department considers it appropriate that an order under this clause is subject to the negative resolution procedure.

Clause 16: Establishment of new scheme and transfer of rights to new scheme
Powers conferred on: Secretary of State
Power exercised by: Order
Parliamentary procedure: Negative resolution procedure

21 Clause 16 confers on the Secretary of State two different powers concerning:

- the establishment of a new pension scheme
- the transfer of accrued qualifying rights to the new scheme, and the discharge of the RMPP trustee’s liability in respect of such rights.

22 Clause 16(1) confers a power on the Secretary of State by order to establish a new public scheme for pensionable service in the RMPP. This provision is closely modelled on the provisions in the Armed Forces (Pensions and Compensation) Act 2004 which gave the power to set up an armed forces pension scheme.

23 The purpose of the new scheme is to provide pensions or other benefits in respect of the pensionable service of qualifying members before the qualifying date. As the definition of qualifying accrued rights in clause 15 makes clear this covers the payment of pensions or other benefits to:

- Current members of the scheme still in employment with Royal Mail who have accrued pension rights to future benefits through years of service up to the qualifying time (or others such as spouses who may have a claim in respect of such members)

- Members of the scheme who have an entitlement to be paid now or in the future in respect of service up to the qualifying time (principally current or deferred pensioners)
- Others entitled to payments now in respect of members' service up to the qualifying time (e.g. widows or widowers of members).

24 Subsection (4) sets out that the new scheme can provide increases to the amounts payable in respect of qualifying accrued rights. This would allow for example the payment of increases in line with inflation.

25 Clause 16(2) confers a power on the Secretary of State to make an order transferring qualifying accrued rights from the RMPP to the new scheme. Subsection (3) confers a power on the Secretary of State under that order to provide a discharge of liabilities in respect of the qualifying accrued rights which are transferred to the new scheme. The power to transfer accrued rights may be exercised without any requirement to obtain the approval or consent of anyone. However this and the other main powers under this Part can only be exercised after consultation with the RMPP trustees and a Royal Mail company (clause 24(1)).

26 The Department intends that the powers to create a new scheme and to transfer accrued qualifying rights (and discharge the corresponding liabilities of the RMPP trustees) will only be used as part of a disposal of shares and subject to state aid clearance and the required consultation with the RMPP trustees and a Royal Mail company. For these reasons it is not possible to identify at present the key parameters of any new scheme, or to include such information in the Bill.

27 In addition to these two main powers there are a number of ancillary or consequential matters which may be included in orders made under this clause, either as provisions in an order made under clause 16(1) and/or (2) or separately.

28 Clause 16(4) makes it clear that the provisions that can be made in respect of the new scheme include the following:

- To increase payments in respect of qualified accrued rights.
- To enable the payments of benefits other than on the basis that they are deferred. Clause 15(3) provides that in determining the qualified accrued rights of members of the new scheme they are to be calculated on the basis that they had terminated service. This power therefore permits the payment of benefits other than on a deferred basis. This may be useful in respect of 'active members' (i.e. members of the new scheme and the RMPP scheme) as it would enable the new scheme to make provision to treat an application for ill-health early retirement on the basis that the applicant was an active rather than deferred member.
- To enable a transfer value to be paid in respect of a qualifying accrued right.
- To enable the new scheme to accept transfers from the RMPP scheme. The Department anticipates that this power will be used as part of an order establishing the scheme. It is likely that this provision will enable members of the RMPP who have bought money purchase additional voluntary contributions (AVCs) to transfer a proportion of their AVC fund from the RMPP to the new Government scheme immediately prior to their retirement (only to the extent needed to ensure that members can take as much of their AVCs in cash as they could immediately before the exercise of the power to set up a new scheme under clause 16(1)). Without this

flexibility members may not be able to take as much of their AVCs as a lump sum from the RMPP due to the HMRC limit on lump sums as 25 per cent of benefit value. This provision is needed to ensure that the pensions provisions of members with money purchase AVCs is as good immediately after the exercise of the power in clause 16(1) as it is immediately before, as required by clause 19(2).

29 The new scheme will not fall within the existing definition of 'occupational pension scheme' or 'public service pension scheme' under section 1(1) of the Pension Schemes Act 1993, as it will not have been established by an employer for its employees. As a result pensions legislation would not apply to the new scheme in the same way as it applies to other schemes in the public sector. Clause 16(5) addresses this issue and enables the Secretary of State to provide that the new scheme be treated as an 'occupational pension scheme' for the purpose of any legislation specified in the order.

30 Benefits in the Royal Mail pension scheme build up on a 'contracted-out' basis (i.e. at least part of the pension built up under the Royal Mail pension scheme replaces members' entitlement to the earnings related element of the state pension). A scheme in which contracted-out benefits accrue is required to be contracted out under Part 3 of the Pension Schemes Act 1993, which requires a 'contracting-out' certificate to be issued by HMRC. The new scheme is not eligible to be contracted out because it is not established by an employer for its employees.

31 Clause 16(6)(a) and (b) enable the Secretary of State to provide for the new scheme to be treated as a contracted-out scheme for the purposes of Part 3 of the Pension Schemes Act 1933 so that the provisions apply to the new scheme, with modifications to address the point that the new scheme (which will have no active members in current employment with the Government) will not easily fit into those provisions, which are aimed at schemes with current employees.

32 When exercising powers under this clause, the Secretary of State can delegate the administration of the new scheme to another person (clause 16(8)). This would enable the Secretary of State to delegate the administration of the scheme to those with the appropriate expertise, e.g. a professional pension scheme administrator. Similar delegation provision is contained in section 1 of the Armed Forces (Pensions and Compensation) Act 2004.

33 The retrospective power in Clause 16(7) is required because it may be necessary to establish the Government's new scheme with effect from a date in the past. This might in particular be the case if, for example, an effective date is agreed for the transfer of liabilities to Government which precedes the date on which the order is made establishing the new scheme.

34 The Department recognises that the power to set up a new scheme under clause 16(1) and to transfer qualifying accrued rights under clause 16(2) are significant powers. The use of these powers will be determined by a combination of factors, notably the nature of any state aid clearance and the outcome of negotiations for a disposal of shares and the consultation with the RMPP trustees and a Royal Mail company.

35 These powers are also subject to the provisions in clause 19 of the Bill (protection against adverse treatment), which provide a fundamental safeguard of the interests of members of the Royal Mail pension scheme.

36 In particular, the power of the Secretary of State to make amendments to the rules of the new scheme is circumscribed by clause 19(6), which provides that no amendment can be made if it may adversely affect qualifying accrued rights unless the modification is made by consent or by order. The consent of the Treasury is required to the making of an order under this clause. For these reasons the Department believes that it is appropriate that an order under clause 16(1) and (2) is subject to the negative resolution procedure.

Clause 17: Division of the Royal Mail Pension Plan into different sections

Powers conferred on: Secretary of State

Power exercised by: Order

Parliamentary procedure: Negative resolution procedure

37 Clause 17(1) confers a power on the Secretary of State to make an order to divide the RMPP into sections, to make provision for the participation of different companies in different sections and to allocate assets, rights, liabilities and obligations between the different sections.

38 The power is to be used in relation to POL. POL is currently a subsidiary of Royal Mail Group and staff working in POL are employed by Royal Mail and seconded to POL. The Bill makes provision to enable the separation of POL from the Royal Mail Group ("RMG"). Shares in POL would not be included in any disposal, but would remain 100 per cent Government owned unless the Secretary of State agrees to move POL to a mutual ownership model (as set out in clause 4). Accordingly, there will be some restructuring, which is likely to include the transfer of POL employees from Royal Mail to POL and the creation of a separate section in the Royal Mail pension scheme for POL employees, with future service to be funded by POL, rather than by RMG.

39 The clause is modelled on section 96 of the Transport Act 2000 which gives the Secretary of State power to 'sectionalise' the Civil Aviation Authority Pension Scheme. The powers under that section were subject to the negative resolution procedure.

40 A retrospective power is required because it may be necessary to establish the Government's new scheme with effect from a date in the past. This might in particular be the case if, for example, an effective date is agreed for the transfer of liabilities to Government which precedes the date on which the order is made establishing the new scheme.

41 The power to 'sectionalise' the RMPP is a significant one. Its use will be subject to the requirements of clause 19 and will be determined by the combination of factors identified in respect of the use of the clause 16 central powers. The consent of the Treasury is required to the making of an order under this clause. Given the purposes of and parameters within which the power can be used, the Department believes that it appropriate that an order under this clause is subject to the negative resolution procedure.

Clause 18: Amendments of the RMPP

Powers conferred on: Secretary of State

Power exercised by: Order

Parliamentary procedure: Negative resolution procedure

42 Clause 18(1) confers a power on the Secretary of State to make amendments to the RMPP in connection with an order under clause 16 or 17. These may be necessary to make provision for the payment of further benefits. For example, this power enables the

Secretary of State to make amendments of the RMPP scheme to provide that responsibility for certain enhanced benefits which may become due in the future in respect of pre and post qualifying accrued rights service would remain with the RMPP.

43 Such a power would be exercisable only after consultation with the RMPP trustees and a Royal Mail company as required by clause 24(1). The consent of the Treasury is required to the making of an order under this clause. In the circumstances the Department believes it is appropriate that the order is subject to the negative resolution procedure.

Clause 19: Protection against adverse treatment

Powers conferred on: Secretary of State

Power exercised by: Order

Parliamentary procedure: Negative resolution procedure

44 Clause 19 sets out restrictions on the exercise of the power of the Secretary of State to make an order under clauses 16, 17 and 18 so as to protect the pension and other accrued rights of members of the RMPP. However, clause 19(6) provides that the power of the Secretary of State to amend a new public scheme may adversely affect qualified accrued rights provided the prescribed consent requirements are satisfied in respect of the consent of affected members and the scheme amended in the prescribed manner. Prescribed means prescribed by an order of the Secretary of State.

45 This reflects the current protection for RMPP members under section 67 of the Pensions Act 1995. This provision is modelled on section 3 of the Armed Forces (Pension and Compensation) Act 2004. The consent of the Treasury is required to the making of an order under this clause. The power in the 2004 Act is subject to the negative resolution procedure and the Department believes that it is appropriate that the order is subject to the negative resolution procedure.

Clause 20: Transfer of assets of the Royal Mail pension plan

Powers conferred on: Secretary of State

Power exercised by: Order

Parliamentary procedure: Negative resolution procedure

46 This clause confers a power on the Secretary of State by order to transfer assets of the RMPP. Where the Secretary of State exercises powers under clause 16 or 17 to take on responsibility for meeting liabilities in respect of qualifying accrued rights, it is intended that the Secretary of State should be able to transfer assets from the RMPP to the Government to meet those liabilities in part. The intention, subject to state aid considerations, would be to leave the company with a smaller amount of liabilities and a matching level of assets at the point of any transfer.

47 The power permits the Secretary of State to transfer assets of the RMPP at the same time that an order is being made under clause 16. Assets transferred from the RMPP may be held by the Secretary of State, a nominee of the Treasury or in a fund established by the Secretary of State and any cash held may be paid into the Consolidated Fund.

48 The consent of the Treasury is required to the making of an order under this clause. In addition there are certain constraints on the exercise of this power by the provisions of clause 21. For this reason the Department considers it appropriate that the order is subject to the negative resolution procedure.

Clause 21: Restriction on power to transfer assets

Power conferred on: Secretary of State

Power exercised by: Order

Parliamentary procedure: Negative resolution procedure

49 Clause 21 imposes an important additional restriction on the transfer of assets of the RMPP under an order made under clause 20. Clause 21(1) requires that the Secretary of State must ensure, on transfer, that the ratio of assets to liabilities in the RMPP immediately after such an order is made is at least equal to the ratio of assets to liabilities immediately before the order is made.

50 Assets and liabilities are to be valued by a person prescribed by and in a manner prescribed by order of the Secretary of State under clause 21(3). This provision is similar in ambit to the provision in section 75(5) of the Pensions Act 1995 concerning the valuation of assets and liabilities in an occupational scheme for the determination of deficits. In accordance with clause 24 the Secretary of State is required to consult the RMPP trustees and a Royal Mail company before appointing a person to value the plan assets and liabilities and setting the basis for such valuation, and also before exercising any asset transfer power under clause 20.

51 Although an assets transfer order can only have effect after a new scheme or sectionalising order is made, it is intended that an order is made at the same time as an order under clause 16 or 17. The reason for the delay in the order taking effect is that there will be some time between an order being made and assets being valued before a transfer is effected.

52 The consent of the Treasury is required to the making of an order under this clause. Given the purpose of the power to prescribe the person determining the value of the assets or liabilities and the manner in which such determination is to be conducted the Department considers it appropriate that the order is subject to the negative resolution procedure.

Clause 22: Taxation

Powers conferred on: Treasury

Power exercised by: Regulations

Parliamentary procedure: Subject to annulment by resolution in the House of Commons

53 Clause 22(1) confers a power on the Treasury by regulations to vary the way tax would have effect on the new public scheme, its members and a fund established by the Secretary of State and clause 22(2) explicitly provides that the scheme may be treated as a registered pension scheme.

54 Clause 22(3) confers a power on the Treasury by regulations to vary the way tax would have effect on the RMPP and its members and in relation to the tax consequences that could arise from the changes

55 These powers are necessary to ensure that the tax position of the scheme and members following the changes made under the provisions in this Part is broadly similar to what the tax position was prior to the changes. The powers are also necessary to ensure

that provision may be made in relation to Royal Mail group companies should it prove necessary to prevent a tax charge arising as a consequence of the proposed changes. Until arrangements are finalised it cannot be determined precisely what provisions will be needed to modify the tax rules so the tax rules cannot be set out in the Bill.

56 In addition Clause 22(5) provides that the regulations may have retrospective effect except where tax relief is withdrawn or tax is charged.

57 Clause 22(6) confers a power on the Treasury by regulations to extinguish losses made in a trade in respect of qualifying accounting periods as are attributable to deductions made for contributions in respect of qualifying members of the RMPP but only if the company in question is wholly owed by the Crown on the day before the trigger date. Such regulations would prevent companies in the Royal Mail group from using the losses to offset future tax liabilities.

58 While the powers in clause 22 enable the amendment of primary legislation, they are intended to safeguard the tax position of the relevant pension schemes and their members, and any fund set up to handle the assets, and possibly to prevent a consequential tax charge arising on a small number of Royal Mail group companies. In the circumstances the Department considers it appropriate that regulations made under this clause are subject to the negative resolution procedure in the House of Commons.

Clause 23: Information

Powers conferred on: Secretary of State

Powers exercised by: Order

Parliamentary procedure: Negative resolution procedure

59 Clause 23 confers a power on the Secretary of State to make an order requiring any prescribed person to disclose any information. Prescribed means prescribed by order of the Secretary of State. This power is necessary to ensure that the Secretary of State is able to have access to all information necessary for the purposes of making decisions about the exercise of any powers under this Part. In the light of this purpose the Department believes that it is appropriate that the consent of the Treasury is not required to the making of an order under this clause and that it is subject to the negative resolution procedure.

PART 3: REGULATION OF POSTAL SERVICES, ETC

Clause 26: Postal services, postal packets and postal operators

Powers conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Affirmative resolution procedure

60 Clause 26(4) provides that the definition of a postal operator is not to apply to a person by reason only of receiving postal packets in the course of acting as an agent of or otherwise under the direction of another. Clause 26(5) confers a power on the Secretary of State by regulations to prescribe circumstances in which Clause 26(4) should not apply.

61 The reason for this provision is to ensure that a provider of postal access facilities only which acts as a purely passive receiver of mail which is then fed into the network of a postal provider, should not, in the capacity of agent or subcontractor of a postal operator,

be caught by the definition of postal operator through the activity of “receiving” postal items, and thereby subject to the full regulation provided by Part 3 of the Bill.

62 The power in clause 26(5) enables the Secretary of State to prescribe circumstances in which this exception is not to apply, potentially to narrow its scope at some later time as the market for postal services develops, should it become apparent that is necessary to regulate such persons to any extent.

63 The power is exercisable by regulations which will be subject to the affirmative procedure. The Department considers that it is appropriate that the regulations are subject to the affirmative resolution procedure because they could have the effect of widening the scope of regulation under Part 3 of the Bill and should therefore be subject to parliamentary debate.

Clause 29: Universal Postal Service Order

Powers conferred on: Office of Communications (“OFCOM”)

Power exercised by: Order

Parliamentary procedure: None

64 Clause 29 confers a duty on OFCOM to make a universal postal service order to set out a description of the services they consider should be part of the universal postal service and the standards with which those services must comply.

65 OFCOM must ensure that this order includes as minimum certain services as part of the universal postal service. These services include the requirements of the (amended) Postal Services Directive and go beyond them. The services are set out in clause 30 and include at least one delivery and one collection of letters every Monday to Saturday; a service of conveying postal packets from one place to another by post at affordable prices determined in accordance with a uniform public tariff; a registered and insured items service; certain services free of charge to the blind or partially sighted; and a free service to convey certain legislative petitions and addresses. OFCOM as independent regulator of postal services can determine what else in addition to this is needed in the UK as part of the universal postal service, following a review of the market.

66 The procedure that applies to this order-making power and to all powers for OFCOM to make orders and regulations under Part 3 is, by virtue of clause 61 of the Bill that of section 403 of the Communications Act 2003. This provides amongst other things that before making an order OFCOM must give notice of their proposal to do so to such persons or representative of the persons likely to be affected by the proposals as OFCOM thinks fit; to publish a notice of their proposal in such a manner as they think appropriate; and to consider any representation made to OFCOM before the time specified in the notice.

67 The Department considers it appropriate that an order under clause 29 will not be subject to parliamentary procedure because through the passage of this Bill, Parliament has agreed that OFCOM should be the independent regulator for postal services and as such should be entrusted with the task of deciding, subject to the minimum requirements, what the universal service should be in the UK, following a market review.

Clause 33: Review of minimum requirements

Powers conferred on: Secretary of State

Power exercised by: Order

Parliamentary procedure: Affirmative resolution procedure

68 Clause 33 provides for OFCOM to carry out a review from time to time of the minimum requirements in a universal postal service set out in clause 30 in view of the reasonable needs of users of the service.

69 The Secretary of State may also direct OFCOM to carry out a review of the minimum requirements for a universal postal service. This is included to give the Secretary of State the ability to initiate a review should he feel it would be appropriate.

70 Clause 33(5) confers a power on the Secretary of State to make an order amending the minimum requirements in clause 30 but only after a review has been carried out by OFCOM in accordance with clause 33(1). The order may include any necessary or expedient amendments to Part 3 as a consequence of provisions made by the order. This may be necessary to ensure that the needs of the users of the universal service are properly being met. However the order may not provide for amendments which could result in a service that is non-uniform throughout the country.

71 The Department considers it appropriate that the order is subject to the affirmative resolution procedure because the power enables the amendment of primary legislation. It is considered necessary that Parliament should be able to debate the provisions given the importance of the universal postal service and the impact of any changes to the provision of such a service as may be effected by this power.

Clause 34: Designation of universal postal services providers

Powers conferred on: OFCOM

Power exercised by: Regulations

Parliamentary procedure: None

72 Clause 34 provides for the designation of one or (in limited circumstances) more than one universal postal service provider(s) by OFCOM.

73 Clause 34(6) confers a power on OFCOM to make regulations providing for the procedure to be followed for designating a universal postal services provider. Clause 34(8) confers a further power to make regulations providing for the procedure to be followed on a review of a designation. Clause 34(9) requires that regulations must provide for a designation to cease to be effective where the operator is no longer subject to any universal service obligations.

74 Clause 34(10) requires that the procedure for making designations and the conduct of reviews of designations must be efficient, objective, proportionate, transparent and should not give rise to any undue discrimination.

75 OFCOM are also required under clause 34(5) to publish designations in a way appropriate to bringing them to the attention of the public.

76 Since OFCOM will be responsible for deciding the services that should be included as part of the universal service beyond the minimum requirements and will be under a duty to exercise their functions in a way that will secure the universal service, OFCOM the independent regulator will be best placed to decide whether there is a need to designate, who to designate and how to do so. Furthermore clause 61 provides that section 403 of the Communications Act 2003 applies to the exercise of power by OFCOM to make

regulations. Section 403 of the Communications Act 2003 imposes, amongst other things, duties on OFCOM to consult, publish notices of their proposals and consider representations made.

77 The purpose of the requirement to set out the procedure in regulations is to ensure that the procedure is transparent in order that interested parties can see that the procedure meets the requirements of clause 34(10). The Department considers therefore that it is not necessary for Parliament to scrutinise the regulations.

Clause 43(3) and (10): Fairness of bearing burden of universal service obligations.

Powers conferred on: OFCOM

Power exercised by: Regulations

Parliamentary procedure: None

78 Clause 43 relates to the position where after having conducted a review of costs under clause 42 OFCOM has concluded that compliance with its obligations has imposed a financial burden on a universal service provider and has published that conclusion and OFCOM must determine whether it would be unfair for the provider to continue to bear the whole or part of that burden.

79 Clause 43(3) provides that the determination by OFCOM as to whether it is fair for the provider to bear the burden of complying with its universal service obligations or the extent to which it would be unfair for it to do so must be in accordance with regulations made by OFCOM. This determination is subject to a review undertaken pursuant to clause 42 the conclusions of which have been published by OFCOM.

80 If OFCOM conclude that it would be unfair for the provider to continue to bear the burden of complying with its universal service obligations, it may recommend to the Secretary of State, among other options, that OFCOM should make a procurement determination (clause 43(8)(c)). A procurement determination is a determination as to whether the service can be carried out by other postal operators so there was either no or less of a burden imposed on the operator. Clause 43(10) confers a power on OFCOM to make regulations providing the way in which a procurement determination must be made.

81 The procedures and safeguards specified in section 403 of the Communications Act 2003 apply to the exercise of these powers by OFCOM by virtue of clause 61 of the Bill. Section 403 of the Communications Act 2003 imposes, amongst other things, duties on OFCOM to consult, publish notices of their proposals and consider representations made.

82 The purpose of the requirement to set out in regulations the way in which a determination of the fairness of the burden to comply with the universal service obligation must be made and the way in which a procurement determination must be made is to ensure that the procedure is transparent for those who may have an interest in the determination. The Department considers therefore that it is not necessary for Parliament to scrutinise these regulations.

Clause 44(4): Contributions for meeting burden

Power conferred on: OFCOM

Power exercised by: Regulations

Parliamentary procedure: Affirmative resolution procedure

83 Clause 44 provides a power for OFCOM to require contributions to the burden of meeting obligations imposed by any designated USP conditions to be made by postal operators providing services within the scope of the universal service or users of such services, both within the scope of the universal postal service once the Secretary of State has directed OFCOM to require a contribution to be made to meet the burden under clause 43.

84 Clause 44(4) confers a power on OFCOM to make regulations containing a scheme providing for the assessment, collection and distribution of contributions to the burden of meeting USP conditions.

85 Clause 44(5) provides that OFCOM must exercise the powers to make such regulations in a manner they consider will secure that a cost-sharing scheme operates in an objective, proportionate and transparent manner, does not involve undue discrimination and avoids (or at least minimises) distortion of competition.

86 These provisions are largely based on the model provided by section 71 of the Communications Act 2003 (2003 c. 21), which gives effect to very similar mechanisms for the funding of universal service obligations specified in articles 12 and 13 of Directive 2002/22/EC on universal service users' rights relating to electronic communications networks and services.

87 The scheme or any fund set up for the purposes of the scheme may be administered by OFCOM or some other person specified in the regulations.

88 The exercise of the power to make regulations under this clause is also subject to the requirements of section 403 of the Communications Act 2003. The consent of the Secretary of State must also be obtained to the making of any regulations under clause 44(8). Nevertheless given the importance of the subject matter of the regulations, the Department considers it appropriate that the regulations should be subject to the affirmative resolution procedure.

Clause 46: Notification by postal operators

Powers conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Negative resolution procedure

89 The Bill does not require postal operators to inform OFCOM prior to providing postal services. However clause 46(1) confers a power on the Secretary of State to make regulations requiring persons to notify OFCOM before they carry on business as a postal operator. The Secretary of State must consult OFCOM before making such regulations (clause 46(2)). The regulations may make provision, with appropriate modifications, corresponding to sections 33-37 of the Communications Act 2003 (requirements to notify before carrying on a regulated activity)(clause 46(3)).

90 The regulations will provide the detail of the procedure for notification, what information can be required for a notification and set out the penalties for non-compliance with notification requirements.

91 This power is delegated to avoid prescribing detailed technical requirements on the face of the Bill. The Department considers it appropriate that the regulations should be

subject to the negative resolution procedure because Parliament can see what types of provision will be able to be made in exercise of these powers by virtue of clause 46(3).

Clause 54: General restriction on disclosure of information
Powers conferred on: Secretary of State
Power exercised by: Order
Parliamentary Procedure: Affirmative resolution procedure

92 Clause 54 provides that information obtained by virtue of Part 3 which relates to the affairs of an individual or to a particular business must not be disclosed during the lifetime of the individual or so long as the business is carried on, except as permitted under this clause.

93 There is a list in clause 54(2) of when disclosure is permitted. This includes permitting disclosure for the purpose of enabling the carrying out of functions by a prescribed body or under a prescribed enactment (54(2)(d)), for the purposes of any civil proceedings brought by virtue of this Part or any prescribed enactments or instrument (clause 54(2)(f)) and any other prescribed circumstances or any other prescribed purpose (clause 54(2)(h)). "Prescribed" is defined in clause 54(3) as meaning prescribed by order of the Secretary of State. This order is subject to the affirmative resolution procedure (clause 54(4)).

94 Both the Communications Act 2003 (sections 393) and the Postal Services Act 2000(section 119 and Schedule 7) have similar provision in relation to permitted disclosure. These Acts list the functions and enactments in relation to which disclosure is permitted. Currently there is a greater number of enactments in relation to which disclosure is permitted in the Postal Services Act 2000 than there is in the Communications Act 2003. The policy is to align these provisions, whilst retaining any additional disclosure gateways currently in the Postal Services Act 2000 that are necessary. The power in clause 54 allows the Secretary of State to fill in this detail.

95 Information that could be provided under Part 3 could potentially include sensitive commercial information. Since the order would allow the disclosure of such information, the Department considers it appropriate that the order is subject to the affirmative resolution procedure. The Department considers it right that there should be a full opportunity for Parliament to debate the order. This is consistent with similar powers under section 393(11) of the Communications Act 2003.

Clause 58: Section 57: supplementary
Power conferred on: Secretary of State
Power exercised by: Order
Parliamentary procedure: Negative resolution procedure

96 This clause provides supplementary provisions in relation to appeals under section 57.

97 Clause 58(1) enables the Competition Commission to make rules about appeals under clause 57 (appeals against price control decisions). The rules must be consulted on prior to being made and published so as to be brought to the attention of those likely to be affected by them. There is no Parliamentary procedure in relation to these rules. The purpose of the rules is to ensure that those interested in appeals know clearly in advance the procedure in relation to appeals.

98 Clause 58(6) confers a power on the Secretary of State to make an order applying sections 109 to 117 Enterprise Act 2002 in relation to appeals made under clause 57 and making provision in relation to the extension of the time within which appeals may be determined in cases of non compliance with requirements imposed under section 109.

99 This power is delegated to avoid prescribing detailed technical requirements on the face of the Bill. The Department considers it appropriate that the regulations should be subject to the negative resolution procedure because Parliament can see what types of provision will be able to be made in exercise of these powers by consulting the relevant provisions of the Enterprise Act 2002.

Clause 59: Duties in relation to social and environmental matters

Powers conferred on: Secretary of State

Power exercised by: Guidance

Parliamentary procedure: Negative resolution by either House.

100 Clause 59(1) confers a power on the Secretary of State to give guidance about the making by OFCOM of a contribution to the attainment of social or environmental policies. OFCOM must have regard to this guidance when carrying out its functions in relation to postal services. Before making such guidance the Secretary of State must consult OFCOM, the National Consumer Council and any other person the Secretary of State considers appropriate.

101 The guidance given by the Secretary of State may affect the way in which OFCOM carries out its statutory functions in relation to Government social and environmental policies which may include access to the postal network. It is therefore appropriate that Parliament should have an opportunity to scrutinise the guidance and for either House to pass a negative resolution within 40 days of the draft guidance being laid before Parliament (not including periods when Parliament is dissolved or prorogued or where both Houses are adjourned for more than 4 days). The Secretary of State must publish the guidance in an appropriate manner.

102 This provision replicates for OFCOM provisions relating to the Postal Services Commission under section 43 of the Postal Services Act 2000. The procedure set out in the Postal Services Act 2000 is the negative resolution procedure. The Department is of the view that the procedure is the correct one allowing for the right amount of Parliamentary scrutiny before such guidance can have effect.

PART 4: SPECIAL ADMINISTRATION REGIME

Clauses 71 and 85: Conduct of administration, transfer schemes etc. and Northern Ireland

Power conferred on: Lord Chancellor and Secretary of State

Power exercised by: Rules made by statutory instrument

Parliamentary procedure: Negative resolution procedure

103 Clause 71(3) extends the power to make company insolvency rules conferred by section 411 of the Insolvency Act 1986, for the purposes of giving effect to Part 4 of the Bill. Such rules would be likely to cover procedural issues such as the quorum required for various meetings and the detail of what constitutes service of documents. In accordance with section 411, rules will be made, in the case of England and Wales, by the Lord

Chancellor with the concurrence of the Secretary of State and in the case of Scotland by the Secretary of State. Such rules would be made by statutory instrument and need to be laid before each House of Parliament after being made.

104 The requirement in section 413(2) of the Insolvency Act 1986 to consult the Insolvency Rules Committee in relation to rules made under section 411 is disapplied in respect of the power to make postal administration rules. There are precedents for this in the case of the special administration regimes for the water industry and railways. The requirement is disapplied on the basis that the intention is that the postal administration rules will be modelled closely on the existing rules for an ordinary administration (on which the Insolvency Rules Committee has been consulted) with only such modifications as are necessary to adapt them to a postal administration. It is also the intention that the postal administration rules should be closely modelled on the rules for an energy administration under the Energy Act 2004. The Insolvency Rules Committee was consulted on those rules as they were the first set of rules to be made in respect of a special administration regime based on the new administration procedures introduced into the Insolvency Act 1986 by the Enterprise Act 2002. In these circumstances, a full and formal consultation with the Insolvency Rules Committee as regards the postal administration rules does not seem appropriate.

105 By virtue of clause 85(2), in the case of Northern Ireland, rules will be made under the provision of the Insolvency (Northern Ireland) Order 1989 which equates to s. 411 of the Insolvency Act 1986. The rules will be made by the Lord Chancellor with the concurrence of the Department for Enterprise, Trade and Investment and the Lord Chief Justice in Northern Ireland.

106 In the same way as it is necessary for “ordinary” administration to provide by rules for the detailed procedural requirements, this power is necessary to provide the detailed procedural requirements applicable to the special postal administration regime which is provided for in the Bill. Without it the Bill would need to be expanded to address the very detailed issues of procedure applicable to the various aspects of a postal administration. The Department considers that the negative resolution procedure is appropriate for statutory instruments providing for these detailed procedural matters and also provides the flexibility to deal with adjustments which need to be made to the procedures.

Clause 80: Regulatory powers exercisable during postal administration

Power conferred on: Secretary of State

Power exercised by: Order

Parliamentary procedure: None

107 Clause 80(2) confers a power on the Secretary of State by order to modify the universal postal service order made by OFCOM under clause 29 where a postal administration order has been made. The power can only be exercised after consultation with OFCOM and anyone else the Secretary of State considers appropriate.

108 This is a regulatory power which is exercisable by OFCOM in normal circumstances but which is given instead to the Secretary of State in the event of a postal administration. The power is only exercisable by the Secretary of State whilst the postal administration order is in force. Once the postal administration has ended, regulatory responsibility in these areas returns to OFCOM and, under provisions in Part 3, any provision made under Clause 80(2) can be modified or revoked if OFCOM deemed necessary.

109 This power is needed in order to allow the Secretary of State, if it is felt appropriate, to modify the universal postal service order. That would enable the regulatory requirements placed on the universal service provider to be adjusted in a way that reflects the fact that the business is in administration. This could, for example, relate to price control or products that fall within the scope of the universal service.

110 The power when exercised by OFCOM is not subject to any Parliamentary procedure and the Department considers there to be no reason for the position to be different when it is exercised by the Secretary of State. It should also be borne in mind that the use of the power by the Secretary of State is restricted to a special administration scenario; and that, in such a scenario, an ability to make swift changes might be critical.

Clause 80: Regulatory powers exercisable during postal administration

Power conferred on: Secretary of State

Power exercised by: Order

Parliamentary procedure: Approval after being made affirmative resolution procedure

111 Clause 80(5) confers a power on the Secretary of State, in the event that a postal administration order is made, to amend the minimum requirements to be included in the universal service. The power may only be exercised whilst the postal administration order is in force. The order may include any necessary or expedient amendments to Part 3 as a consequence of provisions made by the order. This may be necessary to ensure that the needs of the users of the universal service are properly met.

112 The power is not subject to the same restrictions and conditions as attach to any modification of the minimum requirements by the Secretary of State under clause 33. This is because in the circumstances of a postal administration urgent action may be needed to amend the minimum requirements and, subject to the requirements of the Postal Services Directive, the Secretary of State needs to be able to make whatever changes are appropriate to preserve the universal service in the face of the insolvency of a universal service provider.

113 It is considered that the appropriate procedure for the order should be that after being made it should be laid before Parliament and cease to have effect if within 28 days it is not approved by a resolution of each House of Parliament. This takes account of the possible need to take urgent action but ensures that the order is debated in Parliament. This is felt to be important given that the power enables the amendment of primary legislation as well as the importance of the universal postal service and the impact of any changes to the provisions of such a service.

Clause 82: Modification of this Part under Enterprise Act 2002

Power conferred on: Secretary of State

Power exercised by: Order or regulations under the Enterprise Act 2002

Parliamentary procedure: Negative resolution procedure

114 The Enterprise Act 2002 made substantial changes to the regime for ordinary administration and inserted Schedule B1 (which sets out the new provisions on administration) into the Insolvency Act 1986. The special administration regime in Part 4 of the Bill is based on Schedule B1 of the Insolvency Act 1986.

115 Under sections 248, 254 and 277 of the Enterprise Act 2002 the Secretary of State has power to make consequential amendments to the administration regime and to apply it to foreign companies. Clause 82 provides that those powers include the power to make such consequential modifications of Part 4 as the Secretary of State considers appropriate. This would enable any changes made to the ordinary administration regime under the powers in the Enterprise Act to be included where appropriate in the regime for postal administration to ensure that the two do not get out of line.

116 Although the power enables the amendment of primary legislation, the negative resolution procedure was considered appropriate for the exercise of the powers in the Enterprise Act 2002 and the Department considers it appropriate that the negative resolution procedure should apply to consequential amendments of Part 4.

Clauses 84 and 85: Partnerships and Northern Ireland
Power conferred on: Lord Chancellor and Secretary of State
Power exercised by: Order
Parliamentary procedure: Negative resolution

117 Clause 84(1) confers a power on the Lord Chancellor, with the concurrence of the Secretary of State and the Lord Chief Justice, by order to apply (with or without modifications) any provision of Part 4 relating to the special administration regime, in relation to partnerships, (other than Scottish firms). Clause 85(4) provides that in the case of Northern Ireland, an order under clause 84(1) may be made by the Lord Chancellor with the concurrence of the Department for Enterprise, Trade and Investment and the Lord Chief Justice in Northern Ireland.

118 Clause 84(5) confers a power on the Secretary of State by order to apply (with or without modifications) any provision of Part 4 in relation to Scottish firms.

119 Part 4 of the Bill is drafted with companies in mind. However as it is a possibility that a universal service provider could be a partnership it was thought advisable to have a power to apply the special administration regime to partnerships and firms with any necessary modifications to reflect the nature of a partnership. This power mirrors that in section 420 of the Insolvency Act 1986 which allows provisions of that Act to be applied with modifications to insolvent partnerships.

120 Notwithstanding the power to amend primary legislation by order, the Department considers it appropriate that orders under this clause should be subject to the negative resolution procedure given that the changes required to adapt Part 4 in its application to partnership/firms will be technical in nature.

PART 5: GENERAL

Clause 87: Orders and regulations made by Ministers of Crown
Powers conferred on: the Secretary of State, the Treasury or Lord Chancellor
Power exercised by: Orders or regulations
Parliamentary procedure: As provided for in individual clauses

121 Clause 87(2) enables the inclusion of a number of matters in orders and regulations under the Bill. These include incidental, supplementary, consequential, transitional transitory and savings provisions and the making of different provisions for different cases.

This power is required to effect necessary provisions and therefore enlarges the powers to make orders and regulations under the Bill.

Clause 89: Minor and consequential amendments

Powers conferred on: The Secretary of State or the Treasury

Power exercised by: Order

Parliamentary procedure: Negative resolution procedure

122 Clause 89(3) confers a power on the Secretary of State or the Treasury by order to make such other provision amending, repealing, revoking or modifying any enactment as they consider necessary or expedient in consequence of any provision made by or under this Bill. Enactment in this context includes an enactment contained in, or an instrument made under an Act of the Scottish Parliament, under Northern Ireland legislation and a Measure or Act of the National Assembly for Wales.

123 Certain necessary consequential amendments have already been identified and are included in Schedule 12 to the Bill. This power to make amendments is provided in order to ensure that any consequential amendment which has not yet been identified as being required to date and amendments to secondary legislation may be made as necessary..

124 This power is a narrow one, confined to amendments that are consequent on provisions in the Bill. However the powers in clause 87 permitting the making of incidental, supplementary, consequential, transitional, transitory or savings provisions and different provisions for different cases of circumstances would apply to orders making consequential amendments that are made under this power. Nevertheless, clause 87 or the power in this clause cannot be used to amend provisions of this Bill.

125 There are precedents for the use of a negative resolution instrument for consequential amendments to primary legislation. This is the case in respect of the power in section 24(3) of the Financial Services Act 2010 (section 23(5) relates to the parliamentary procedure required). Other examples are the power in section 28 of the Welfare Reform Act 2007 (section 26 contains details of the Parliamentary procedure required) and the power in section 57 of the Child Maintenance and Other Payments Act 2008 (section 55(6) relates to the parliamentary procedure required). In these cases, in correspondence with the Delegated Powers and Regulatory Reform Committee, the argument was made that, due to the limited nature of the power (i.e. that it was a power to make consequential amendments and did not extend to incidental or supplementary provisions on their own) it was not inappropriate for the negative resolution procedure to be used. In fact the power in sections 9(4), (5) and (10) of the Welfare Reform Act 2009 goes further in permitting amendments to future Acts of Parliament by means of the negative resolution procedure. Finally, a similar provision in clause 59(3) of the previous Postal Services Bill 2009 was considered by the Committee and found to be appropriate. For these reasons the Department considers it appropriate that an order under this clause should be subject to the negative resolution procedure.

Clause 91: Short title, commencement and extent

Powers conferred on: Secretary of State

Power exercised by: Order

Parliamentary procedure: None

126 Clause 91(3) of the Bill contains a power to commence the majority of the Bill provisions by order.

127 Clause 91(4) confers a power on the Secretary of State to make by order such transitional provisions and savings as they consider necessary or expedient in connection with the commencement of any provision made by this Act. This power is required to enable the Secretary of State to ensure a smooth transition, in particular between the system of regulation of postal services currently in place under the Postal Services Act 2000 and the current licensing regime, and the new regulatory authorisation system which OFCOM will administer. The Department considers it appropriate that these orders should not be subject to any parliamentary procedure, given that the provisions which may be made under this clause will be purely transitional and saving and will relate back to provisions of the Bill which will be debated during the passage of the Bill.

Schedule 7: Enforcement of Regulatory requirements

Paragraph 7 – Penalties for contravention of regulatory requirements

Powers conferred on: Secretary of State

Power exercised by: Order

Parliamentary procedure: Affirmative resolution procedure

128 Schedule 7 provides for the enforcement of regulatory requirements imposed by OFCOM. OFCOM may impose a penalty on a person who has been given a contravention notification or an enforcement notification under Schedule 7. Penalties must be appropriate, proportionate and not exceed 10 per cent of turnover of the person's postal services business for the relevant period, calculated in accordance with rules made in an order by the Secretary of State (paragraph 7(2)).

129 It is considered appropriate to have a power to set this out in secondary legislation to avoid prescribing detailed technical requirements on the face of the Bill. Such an order is subject to affirmative resolution procedure. The Department considers it appropriate that the order should be subject to the affirmative resolution procedure because Parliament should have an opportunity to debate these rules and this reflects the position as it was in relation to these matters in the Postal Services Act 2000 (see sections 30(2) and 122(12) and the Postal Services Act 2000 (Determination of Turnover Penalties) Order 2001 (SI 2001/1135).

Schedule 8: Information Provisions

Paragraph 7: Penalty for contravention of information requirements

Powers conferred on – Secretary of State

Power exercised by – Order

Parliamentary Procedure– Affirmative resolution procedure

130 The maximum penalty that OFCOM may impose for the contravention of information requirements is set in paragraph 7(6) of schedule 8 as £50,000. Paragraph 7(10) confers on the Secretary of State a power by order to substitute a different maximum penalty for contravention of information requirements. This power is needed to ensure that the maximum penalty may be updated to be in line with changing circumstances. The Department considers it appropriate that the order should be subject to the affirmative resolution procedure because the maximum penalty is a matter that should be debated in Parliament.

Schedule 9: Transitional provisions for Part 3

Paragraph 8(2) Power to extend operation of time limited licence conditions

Power conferred on: Secretary of State

Power exercised by: Order
Parliamentary procedure: None

131 Paragraph 8(2) confers on the Secretary of State a power to make an order amending a licence condition applicable before the appointed day when the relevant provision comes into force. This is exercisable where the condition depends on a universal service provider's continuing operation on forecast figures indicating the volume of business in index years set out in the condition and where the index years and forecast figures in the condition do not extend beyond the index year ending 31 March 2011. The Secretary of State may amend the condition so as to specify a forecast figure for the index year ending 31 March 2012.

132 The power is a prudent provision that would give the Secretary of State the ability to set the volume forecast in the event that there was an unforeseen delay or other difficulty in effecting a licence change in time.

133 Exercise of the power is subject to prior consultation and consideration of any representations made before the end of a 21 day consultation period. Given the nature of these powers the Department considers it appropriate that the order is not subject to any parliamentary procedure.

Schedule 10: Conduct of postal administration

Part 1 – Modification of Schedule B1 to the 1986 Act

Paragraph 1 – Introductory

Power conferred on: Secretary of State

Power exercised by: Order

Parliamentary procedure: Negative resolution procedure

134 Paragraph 1 of Schedule 10 applies various paragraphs of Schedule B1 to the Insolvency Act 1986 to a postal administration, including paragraph 110 of Schedule B1. Paragraph 110 confers on the Secretary of State a power to amend provisions in the Schedule about time limits for doing things or giving notice etc. This allows certain procedural matters to be adjusted where for any reason the time limit specified in the Schedule needs to be modified. Although this is a power to amend primary legislation, it is subject to the negative resolution procedure which the Department considers appropriate given the limited and technical nature of the changes to which it relates.

Part 2 – Further modifications of Schedule B1 to 1986 Act: foreign companies

Paragraph 32 – Introductory

Power conferred on: Secretary of State

Power exercised by: Order

Parliamentary procedure: Negative resolution procedure

135 Paragraph 32(3) of Schedule 10 confers on the Secretary of State a power to make modifications to the provisions of Part 2 of Schedule 10. Part 2 applies specified provisions of Schedule B1 to the Insolvency Act 1986 with further modifications in respect of foreign companies (defined in clause 143(1) as a company incorporated outside the United Kingdom).

136 The new special administration regime has largely been formulated with UK-registered companies in mind, since foreign companies do not play a role in the relevant activities at present. Although a number of adaptations to the special administration

regime to cater for foreign companies have been made by Part 2 of Schedule 10, it may be that as the postal market continues to develop more foreign companies could become active in transportation, conveyance and delivery of postal services (and these may relate to the universal postal service) and that further modifications are needed to Schedule B1 to account for this.

137 The power will only enable the Secretary of State to make new modifications not to amend modifications that have already been made by Schedule 10 of the Bill to ensure that a special administration can proceed appropriately. Although this is a power to modify primary legislation, the Department considers it appropriate that the order is subject to the negative resolution procedure as it would be making detailed technical changes.

Part 3 – Other modifications

Paragraph 46 – Power to make further modifications

Power conferred on: Secretary of State

Power exercised by: Order

Parliamentary procedure: Affirmative resolution procedure

138 Paragraph 46(1) of Schedule 10 confers on the Secretary of State the power to amend Part 3 of that Schedule by making further modifications of the Insolvency Act 1986 and any other enactment made before the passage of the Postal Services Bill which relates to or impacts on insolvency. The modifications must be ones the Secretary of State considers appropriate in relation to provisions made by or under Part 4 of the Bill. This power is needed to enable additional modifications to be made to the insolvency regime, insofar as it impacts on postal administration. There is a need to be able to amend the detail of the regime as experience of its application highlights any difficulties or areas of concern. This is particularly so as the postal services market is going through rapid structural change and future developments cannot be accurately predicted.

139 The power can only be used to make new modifications (not to alter those modifications already provided for in the Bill). The Department considers it appropriate that the order is subject to the affirmative resolution procedure because this is a power to modify statutory provisions relating to ordinary administration so as to apply to postal administration. It is considered appropriate that the exercise of the power should be open to debate by Parliament.

Schedule 12: Minor and consequential amendments

Part 3 – Other enactments

Paragraph 84(1) – Amendment of the Public Records Act 1958

Power conferred on: Lord Chancellor

Power exercised by: Order

Parliamentary procedure: Negative resolution procedure

140 Paragraph 84(1) confers on the Lord Chancellor a power to make an order to amend Schedule 1 to the Public Records Act 1958 (PRA) to either omit or re-insert a company nominated under section 62 of the Postal Services Act 2000 (i.e. Royal Mail Holdings plc), a Royal Mail company (as defined in this Bill) or a Post Office company (as defined in this Bill). The exercise of this power is subject to the consent of the Secretary of State.

141 The power to amend is necessary because as the ownership of these companies changes as a result of the provisions in Part 1 of the Bill, the nature of their records will

also change. This power enables the Lord Chancellor to ensure that the records they create and maintain are treated correctly. The records of a company listed in Schedule 1 of the PRA are deemed to be public records. It would not be appropriate for the records created by a Royal Mail company which has private ownership to be treated as public records. In these circumstances, a Royal Mail company would be omitted from Schedule 1 of the PRA but paragraph 84(2) enables the Lord Chancellor to make provision that records that were created prior to private ownership need to be maintained by the company after that company may have been removed from Schedule 1 of the PRA.

142 The intention here is to ensure that there is clarity about where the responsibility lies for maintaining certain records. Although this is a power to amend primary legislation the Department considers that it is appropriate that these regulations should be subject to the negative resolution procedure. This is consistent with the order making powers in paragraphs 4(1)(a) and 7(2) of Schedule 1 to the Public Records Act 1958.

**Department for Business, Innovation and Skills
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