EXPLANATORY MEMORANDUM TO

THE COMMUNICATIONS ACT 2003 (DISCLOSURE OF INFORMATION) ORDER 2024

2024 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Science, Innovation and Technology and is laid before Parliament by Command of His Majesty.

2. Declaration

2.1 Baroness Jones of Whitchurch, Parliamentary Under-Secretary of State for the Future Digital Economy and Online Safety at the Department for Science Innovation and Technology confirms that this Explanatory Memorandum meets the required standard.

2.2 Daniel Okubo, Deputy Director for Security & Online Harms, at the Department for Science Innovation and Technology confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Simon Quinn at the Department for Science, Innovation and Technology Telephone: 07922 576012 or email: simon.quinn2@dsit.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This instrument is required to ensure that Ofcom can share business information it has obtained using statutory powers with the Secretary of State and other relevant persons for the purpose of the Secretary of State (or other relevant person) fulfilling their online safety functions. Ofcom may only share such information in certain circumstances, including to facilitate a relevant person in carrying out a relevant function. The instrument sets out that any functions conferred by or under the Online Safety Act 2023 (OSA) are specified as relevant functions for the purposes of s393(4) of the Communications Act 2003 (the 2003 Act). Section 393(3) sets out the relevant persons.

Where does the legislation extend to, and apply?

4.2 The extent of this instrument (that is, the jurisdictions which the instrument forms part of the law of) is England and Wales, Scotland and Northern Ireland.

4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales, Scotland and Northern Ireland.

5. Policy Context

What is being done and why?

5.1 During development of the regulatory framework under the Online Safety Act 2023, ensuring that information could be shared between Ofcom and other relevant bodies was seen as important to the functioning of the regime, and the OSA includes measures to enable this. Sections 393 and 24B of the 2003 Act make a general restriction on Ofcom disclosing business information they hold but allow exemptions from this, for example for Ofcom to share information in order to carry out their functions. Sections 115 and 117 of the OSA amended the 2003 Act to allow information relevant to online safety to be disclosed to other parties, including the Secretary of State, in certain circumstances.

5.2 Subsequent legal analysis has identified a potential gap in provision that this instrument aims to address. Although Ofcom is permitted to share business information with the Secretary of State for the purposes of fulfilling Ofcom's functions, it is not permitted to do this for the purposes of fulfilling the Secretary of State's functions. The Secretary of State has several key functions relating to the implementation of the framework under the OSA which may require this in future, in particular the setting of thresholds for payment of fees under s86 and carrying out the post-implementation review of the framework under s178. If Ofcom were not able to share business information relating to these areas, then there is a risk that implementation and review of the framework could be delayed or ineffective.

What was the previous policy, how is this different?

5.3 The original intention of the OSA provisions were to allow Ofcom to share business information with the Secretary of State, where it would be necessary, within the framework of the 2003 Act. The OSA amended s393 of the 2003 Act to restrict Ofcom's disclosure of information they have gathered under their information-gathering powers in the OSA (s100), permitting Ofcom to share information with the Secretary of State only in connection with certain functions under the OSA. It now appears that there may be a gap left by this approach. This instrument is intended to ensure that there are no barriers to Ofcom in appropriately sharing information to facilitate any of the Secretary of State's functions under the OSA.

6. Legislative and Legal Context

How has the law changed?

6.1 Section 393(1) of the 2003 Act prohibits the disclosure of information about a particular business which has been obtained using powers under certain acts, listed in the subsection. The OSA amended section 393(1) to add the Online Safety Act 2023 to this list, with the result that Ofcom is restricted in disclosing information obtained using its powers to require information and other powers under the OSA. Subsection (2) lists the exceptions to the prohibition, which include disclosures made "*for the purpose of facilitating the carrying out by any relevant person of any relevant function"* (subsection (2)(b)). Relevant persons are described at subsection (3) and include Ministers of the Crown.

6.2 By specifying functions under the OSA as relevant functions for the purpose of subsection (4), this Order permits Ofcom to disclose information obtained using powers under the OSA (and other acts listed at subsection (1)) for the purpose of facilitating relevant persons (including the Secretary of State) to carry out their

functions under the OSA. Functions under the OSA are primarily conferred on either the Secretary of State or Ofcom. There are also certain functions relating to definitions conferred on Scottish and Welsh Ministers and Northern Ireland departments, which are also relevant persons, although these are unlikely to require business information for their exercise.

6.3 The change will allow the disclosure of information which was obtained prior to the date the Order comes into force, where the disclosure falls under subsection (2)(b). As the information in question will have been obtained in the exercise of relevant powers, there would not have been scope for businesses to act differently had they anticipated this change in the law, which, in any case, simply brings the OSA in line with other acts conferring powers on Ofcom.

Why was this approach taken to change the law?

6.4 The only alternative approach to achieve the policy outcome was to amend section 393(5) of the 2003 Act by primary legislation to add "the Online Safety Act 2023" to the list of enactments and instruments at that subsection. As there is a power to achieve the same result using secondary legislation, this was considered the most proportionate approach. This approach also allows the change to be in force sooner, assisting the prompt implementation of the OSA regime.

7. Consultation

Summary of consultation outcome and methodology

7.1 No formal public consultation has been undertaken in preparing this instrument, though the Secretary of State has consulted with Ofcom to understand what is required in order for Ofcom to be able to share information lawfully. The instrument is intended to address a potential gap in provision in order to ensure that Ofcom can share information required for effective implementation of the OSA framework, rather than introducing any new measure, and does not place any additional burden on businesses.

8. Applicable Guidance

8.1 We do not intend to produce separate guidance for businesses for this instrument. Any relevant information will be included in Ofcom's guidance to businesses to accompany any information-gathering activity it carries out.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because it relates only to interaction between Ofcom and the Secretary of State and does not impose any additional costs to businesses regulated under the OSA framework.

Impact on businesses, charities and voluntary bodies

9.2 There is no, or no significant, impact on business, charities or voluntary bodies because the instrument relates only to the sharing of information between Ofcom and the Secretary of State.

9.3 The legislation does not impact small or micro businesses.

9.4 There is no, or no significant, impact on the public sector because the instrument relates only to the sharing of information.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The approach to monitoring this legislation is to assess its impact as part of broader monitoring of implementation of the Online Safety Act regulatory framework. Section 178 of the OSA requires that the Secretary of State carry out a review of the framework between two and five years of key provisions coming into force, with a report being published and laid before Parliament.

10.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Baroness Jones of Whitchurch has made the following statement: "no review clause has been included as the instrument is not in scope of the definition of 'Regulatory Provision' provided in the Better Regulation Framework guidance dated September 2023."

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 This instrument comes into force on the day after the day in which it is made to facilitate the prompt implementation of the Online Safety Act 2023. The instrument does not oblige or permit any person except Ofcom to act, or act differently, and Ofcom is aware of, and content with, the intention to bring the instrument into force on this day.

12. European Convention on Human Rights

12.1 The Parliamentary Under-Secretary of State for the Future Digital Economy and Online Safety has made the following statement regarding Human Rights.

"In my view the provisions of the Communications Act 2003 (Disclosure of Information) Order 2024 are compatible with the Convention rights."

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").