EXPLANATORY MEMORANDUM TO

THE ELECTRONIC COMMUNICATIONS CODE (JURISDICTION) REGULATIONS 2017

2017 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Digital, Culture, Media and Sport and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument confers jurisdiction for determining certain disputes under the Electronic Communications Code on specialist tribunals, as part of a number of reforms intended to improve the resolution of such disputes.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 This entire instrument applies to England and Wales and Scotland.

3.3 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland. It does not include Northern Ireland, where it is not possible for necessary supporting statutory instruments to be made at this time.

4. Legislative Context

4.1 Part 2 of the Digital Economy Act 2017 introduced, in Schedule 1 to that Act, a reformed Electronic Communications Code which is inserted as Schedule 3A to the Communications Act 2003.

4.2 Part 16 of the new code makes provision for enforcement and dispute resolution. Paragraph 95 confers power on the Secretary of State to confer jurisdiction for certain code disputes on specialist tribunals. These regulations are the first use of that power.

4.3 The Electronic Communications Code (Jurisdiction) Regulations 2017 are made under this power and confers jurisdiction for the resolution of code disputes, in England, on the Upper Tribunal and, where cases are transferred to it (under rule 5(3)(k)(ii) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (S.I. 2010/2600); in Wales, on the Upper Tribunal; and in Scotland, on the Lands Tribunal for Scotland. The Lands Tribunal for Northern Ireland continues to have jurisdiction in relation to disputes in Northern Ireland.

4.4 These Regulations will enable code disputes to be dealt with by specialist tribunals with established expertise in matters relating to land law. In relation to England and Wales, the conferral of jurisdiction on the Upper Tribunal (to be exercised by its specialist Lands Chamber) was recommended by the Law Commission for England and Wales (see Law Com No 336, paragraph 9.47: https://s3-eu-west-

2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc336_electronic_communications_code.pdf. It was also suggested that the Upper Tribunal might transfer suitable cases to the specialist property chamber of the First-tier Tribunal (see paragraph 9.45). That chamber is currently constituted for England, but not for Wales, and so these Regulations confer jurisdiction on the First-tier Tribunal for transferred cases in England only. The same approach has been taken, following consultation with the Scottish Government, so that jurisdiction is conferred on the specialist lands tribunals in that jurisdictions also. Following consultation with colleagues in the Northern Ireland Department of Justice, the decision has been taken to defer extending these regulations to Northern Ireland until a legislative executive is in place that can consider these provisions and ensure necessary supporting instruments are made (see paragraph 4.5).

4.5 These Regulations give rise to the need for minor consequential procedural rule changes in the specialist tribunals. The Ministry of Justice for England and Wales and the Scottish Government and Scottish Courts and Tribunals Service for Scotland intend to make separate Statutory Instruments to make provision for such rules.

5. Extent and Territorial Application

5.1 This instrument extends to England and Wales and Scotland.

5.2 The territorial application of this instrument is England and Wales and Scotland.

6. European Convention on Human Rights

6.1 The Minister of State for Digital and Culture, Matt Hancock, has made the following statement regarding Human Rights:

"In my view the provisions of The Electronic Communications Code (Jurisdiction) Regulations 2017 are compatible with the Convention rights".

7. Policy background

What is being done and why

7.1 The Electronic Communications Code (the code) set out in Schedule 3A to the Communications Act 2003 (as amended by the Digital Economy Act 2017) governs the rights of network operators to build and maintain digital communications infrastructure on land. It replaced the previous Electronic Communications Code set out in Schedule 2 to the Telecommunications Act 1984, which had been criticised as out-dated and no longer providing adequate regulatory support for the deployment of modern communications infrastructure.

7.2 The government asked the Law Commission for England and Wales to review the code in 2011. The Law Commission reported in February 2013 (Law Com No 336).

7.3 Chapter 9 of the Law Commission's report deals with dispute resolution including changing the forum for code disputes.

7.4 DCMS subsequently conducted its own 9-week consultation which ended on 30 April 2015. The government response document was published on 17 May 2016 and is available on the following web page: https://www.gov.uk/government/publications/government-publishes-proposals-for-a-new-electronic-communications-code

7.5 The government subsequently legislated for a new code in the Digital Economy Act 2017, which received Royal Assent on 27 April 2017. One of the key policy aims of the Act is to improve the speed and effectiveness of the dispute resolution process when, for example operators and landowners cannot reach agreement on access to land. The code in the Telecommunications Act 1984 provided for disputes to be heard by the county court in England and Wales, a county court in Northern Ireland and the sheriff court in Scotland.

7.6 In Chapter 9 of their report, the Law Commission recommended that the forum for almost all code disputes should, in England and Wales, be the Lands Chamber of the Upper Tribunal, stating that "this will be one of the most important changes brought in by the revised Code; [as] many consultees regarded it as crucial for the revised Code to be backed by an adjudication system with more specialist expertise than the County Court can offer". DCMS agreed with that recommendation. In subsequent discussions with the Scottish Government and Northern Ireland Administration consensus was reached that the specialist lands tribunals in those jurisdictions were the appropriate forums to hear disputes under the code. However, Northern Ireland colleagues agree that the transfer of jurisdiction for code disputes in Northern Ireland needs to be deferred until such time as a legislative executive is in place that can make domestic statutory instruments needed to support this change.

7.7 This change has broad support from stakeholders and Government believes that changing the forum for code disputes is an essential change which will see disputes handled faster and more effectively by drawing upon the specialist expertise of the relevant Lands Tribunals.

7.8 Part 16 of the code provides a power on the Secretary of State to make regulations to confer jurisdiction for code disputes on the specialist tribunals. These regulations implement the policy aims described above

8. Consultation outcome

8.1 The Law Commission and DCMS public consultation exercises relating to the reform of the Electronic Communications Code generally are described above. The response of consultees to the Law Commission can be seen in the discussion at paragraphs 9.6 to 9.45 of the Law Commission report[1] (and see paragraphs 9.18 and 9.40 in particular) and were generally supportive of the proposed transfer of jurisdiction.

8.2 The policy was given effect by paragraph 95 of the new code. In addition, to the above consultations, DCMS has consulted and liaised closely with the Scottish Government, the Department of Justice in Northern Ireland, and the Ministry of Justice and tribunal judiciary in England and Wales about the policy objectives, the detail of the drafting of these Regulations and consequential matters such as any necessary amendments to the tribunal procedure rules.

8.3 The Secretary of State has accordingly consulted the Scottish Ministers and the Department of Justice in Northern Ireland as required by paragraph 95(5) of the Code.

[1] See footnote 1.

9. Guidance

9.1 DCMS will not be issuing guidance associated with this change. OFCOM will be publishing a Code of Practice regarding Electronic Communications Code agreements under the reformed Code, which will include guidance on dispute procedures[2].

10. Impact

10.1 There is no, or negligible, impact on business, charities or voluntary bodies.

10.2 There is no, or negligible, impact on the public sector.

10.3 A stand-alone Impact Assessment has not been prepared for this instrument.

10.4 However changes to the dispute resolution process under the new electronic communications code were considered as part of the overall Impact Assessment on the "Electronic Communications Code Reform". This is available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/524895/ECC_Impact_Assessment.pdf

10.5 The Ministry of Justice approved a Justice Impact Test for the transfer of jurisdiction for disputes under Electronic Communications Code Reform in March 2016.

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses. It does not regulate business activity and creates no substantive rights or burdens. Rather it makes administrative judicial system changes so as to provide for disputes under the code to be dealt with in specialist tribunals rather than in the generalist jurisdiction of the sheriff court and county court.

12. Monitoring & review

12.1 DCMS will be monitoring the impact of the Code reforms as a whole to ensure they are delivering their policy aims. This will include monitoring any increase / decrease in Code disputes.

13. Contact

13.1 Lisa Price at the Department for Digital, Culture, Media and Sport, Telephone: 0207 211 6642 or email: lisa.price@culture.gov.uk can answer any queries regarding the instrument.

[2] See paragraph 103 of the code.