EXPLANATORY MEMORANDUM TO

THE ECONOMIC GROWTH (REGULATORY FUNCTIONS) (AMENDMENT) ORDER 2024

2024 No. 587

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Business and Trade ("DBT") and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 Under section 108 of the Deregulation Act 2015 ("the Act"), a person exercising a specified regulatory function must have regard to the desirability of promoting economic growth, known as "the Growth Duty". This statutory instrument brings the regulatory functions exercisable by the Office of Communications (Ofcom), the Gas and Electricity Markets Authority (Ofgem) and the Water Services Regulation Authority (Ofwat) within the scope of the Growth Duty by amending the Economic Growth (Regulatory Functions) Order 2017 (S.I. 2017/267) ("the 2017 Order").

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments.

3.1 None.

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is the United Kingdom.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the United Kingdom.

5. European Convention on Human Rights

5.1 The Minister for State at the Department for Business and Trade, Lord Dominic Johnson, has made the following statement regarding Human Rights:

"In my view the provisions of the Economic Growth (Regulatory Functions) (Amendment) Order 2024 are compatible with the Convention rights."

6. Legislative Context

6.1 Section 108 of the Act provides that a person exercising a specified regulatory function must have regard to the Growth Duty. Under section 109 of the Act, a UK Minister has the power to specify the regulatory functions to which the Growth Duty will apply. The regulatory functions are specified in the 2017 Order. This instrument amends Part 1 of the Schedule to the 2017 Order to add most of the regulatory functions exercisable by Ofgem, Ofwat and Ofcom (with some exclusions as discussed further in section 7 below), thereby bringing these three additional regulators within the scope of the Growth Duty.

6.2 Related to this instrument, a UK Minister may issue guidance on the Growth Duty from time to time under section 110(1) of the Act, and those subject to the Growth Duty must have regard to such guidance (section 110(3) of the Act). New guidance entitled "Growth Duty: Statutory Guidance Refresh" will be introduced alongside this instrument, superseding the previous guidance brought into force under the Deregulation Act 2015 (Growth Duty Guidance) Order 2017 (S.I. 2017/268). The guidance is discussed further in section 11 below.

7. Policy background

What is being done and why?

7.1 The Growth Duty applies to over 50 different regulators but does not currently apply to Ofgem, Ofwat and Ofcom (responsible for the regulation of the energy, water, and telecoms sectors respectively).

7.2 Ofgem, Ofwat and Ofcom regulate critical economic sectors which account for around four per cent of the UK's GDP, and over thirteen per cent of annual private UK investment. The Government recognises the importance of these regulators in shaping the UK economy, particularly at a time when we face investment challenges to meet our infrastructure needs across the energy, water, and telecoms sectors.

7.3 Bringing these three regulators within scope of the Growth Duty will help ensure they consider how best to promote growth in their sectors as they carry out their core functions, support businesses and the vital investment needed to ensure a quality service to current and future consumers.

7.4 The extension of the Growth Duty to Ofcom, Ofgem and Ofwat will not include the concurrent competition powers they share with the Competition and Markets Authority (CMA). As the Growth Duty does not apply to the CMA or the concurrent competition law powers held by the Civil Aviation Authority or Office of Rail and Road, this exclusion will ensure there remains a consistent application of competition law by authorities with concurrent powers.

7.5 The Growth Duty will also not apply to Ofcom's regulatory functions under Part 3 of the Enterprise Act 2002, which concern mergers. In particular, this will ensure that Ofcom are not required to consider other factors when providing advice to the Secretary of State on the public interest considerations on media merger cases.

7.6 The Growth Duty will also not apply to the online safety functions of Ofcom under the Online Safety Act 2023 until 6 April 2026. Providing a delay before the Growth Duty applies to online harms functions will allow Ofcom to develop these new functions during a transition period before the Growth Duty comes into force.

7.7 The Growth Duty statutory guidance has been updated to assist regulators in discharging their responsibilities under the Growth Duty. The guidance provides a more detailed outline on how regulators should consider economic growth alongside principles- based and outcomes-based regulation, to help with decision making. The Growth Duty statutory guidance has also been updated to reflect the extension of the Growth Duty to the economic regulators (Ofgem, Ofwat and Ofcom), the consultation responses, and the changes the economy has undergone since 2017. The revised guidance intends to encourage transparency and accountability for growth across regulators.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union or trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 There are no plans to consolidate legislation at this time, but this will be kept under review.

10. Consultation outcome

10.1 In compliance with the statutory consultation requirements in section 109(2) of the Act, DBT carried out a public consultation between 20 July 2023 and 24 August 2023 to seek views on extending the Growth Duty to Ofcom, Ofgem and Ofwat.

10.2 DBT engaged with Ofgem, Ofcom and Ofwat prior to the publication of the consultation. During the consultation period DBT engaged with eight stakeholders including regulators and sponsorship departments via virtual meetings and email.

10.3 The consultation received 58 written responses from a range of stakeholders including industry representatives, businesses, regulators, and advocacy organisations. All respondents to the consultation were subsequently contacted by email when the initial consultation period was extended by a further week to 24 August 2023 and offered a meeting. This was to ensure that any further considerations would be captured and considered.

10.4 The majority (62%) of respondents were in favour of the Governments proposal to extend the Growth Duty to Ofcom, Ofgem and Ofwat, 25% of respondents were in opposition, and the remaining 13% of respondents were neutral.

10.5 Some stakeholders raised concerns that growth would be pursued at the expense of consumer and environmental protections. The Government has reflected these concerns within the updated statutory guidance by detailing how the Growth Duty should interact with consumers and consumer protections. The statutory guidance provides examples as to how regulators might choose to balance their duties. The Government and the updated statutory guidance recognise that in some cases other duties or objectives may take precedence to growth.

10.6 The environmental and net zero impact of extending the Growth Duty to Ofcom, Ofgem and Ofwat was a consistent theme across the consultation responses. Some respondents (including environmental groups, as well as industry representative organisations, government bodies and private businesses) raised concerns about any potential reduction in environmental protections brought about by a Growth Duty. A reduced focus on infrastructure that was compatible with net zero with a pursuit of growth by the cheapest means possible was also raised. There were calls for ‘the right kind of growth’ with many respondents specifying a desire to see sustainable growth codified in the statutory guidance. As set out in the Government Response and in both the original and new guidance, the Government's view is that the Growth Duty does not legitimise non-compliance with existing protections including environmental, net zero, and consumer protections.

10.7 Reporting on the Growth Duty and guidance were also raised during the consultation by multiple respondents as important factors for ensuring regulatory transparency and accountability. Almost all responses called for improved guidance around the Growth

Duty to support regulators in the balancing of a Growth Duty with existing duties. The statutory guidance is discussed further at section 11 below.

10.8 Having considered the responses to the consultation, the Government is satisfied that it is appropriate to bring Ofgem, Ofcom and Ofwat within scope of the Growth Duty.

10.9 The consultation response is available on DBT's website at: https://assets.publishing.service.gov.uk/media/655cd387d03a8d000d07fdff/consultation-on-extending-growth-duty-government-response.pdf.

11. Guidance

11.1 Revised statutory guidance for regulators to assist them with discharging their Growth Duty obligations has been laid alongside this instrument and requires approval by resolution from each House of Parliament. A separate explanatory memorandum has been prepared for the statutory guidance. Once it has been approved, the guidance will be brought into force by statutory instrument.

11.2 The refreshed statutory guidance sets out how the regulators in scope of the Growth Duty can better support sustainable economic growth through the decisions they take and through the way that they regulate. Updating this guidance will ensure regulators have a clearer understanding of what is expected from them, and businesses will be able to benefit from fair, balanced regulation which does not hinder their opportunities for growth.

11.3 DBT consulted on the revised guidance (as required under section 110(5) of the Act) between 22nd November 2023 and 17th January 2024.

11.4 More information and the full consultation response is available on DBT's website at: https://www.gov.uk/government/consultations/smarter-regulation-regulating-for-growth.

12. Impact

12.1 There is no, or no significant, impact on charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses; the amendments made are unlikely to affect small businesses in any significant respect.

14. Monitoring & review

14.1 The approach to monitoring this legislation is to review the impact of the statutory duty on regulators, who undertake specified regulatory functions in scope of the duty, to have regard to economic growth. The Government will continue to review the statutory guidance, including in relation to the changes made by the Order, so as to monitor its impact both on the regulators and on businesses and consumers.

14.2 The objectives of reviewing the Growth Duty are to assess the impact of the duty in minimising the burdens of compliance on business and promoting growth. Also, to

review the impact of the Growth Duty on regulators. We will consider whether the Growth Duty has led to changes in regulator behaviour. The Impact Assessment outlines further details on intended monitoring and review.

15. Contact

15.1 Craig Bowdery at the Department for Business and Trade email: craig.bowdery@businessandtrade.gov.uk can be contacted with any queries regarding the instrument.

15.2 James Silcox, Deputy Director for Strategy and Regulator Performance, at the Department for Business and Trade can confirm that this Explanatory Memorandum meets the required standard.

15.3 Lord Dominic Johnson of Lainston, Minister of State for Regulatory Reform in the Department for Business and Trade can confirm that this Explanatory Memorandum meets the required standard.