

## SCHEDULES

### SCHEDULE 11

Sections 291 and 294

#### APPROVAL, IMPOSITION AND MODIFICATION OF NETWORKING ARRANGEMENTS

##### *Application of Schedule*

- 1 (1) This Schedule applies where OFCOM's approval of networking arrangements entered into by the holders of regional Channel 3 licences is required—
  - (a) for the purposes of conditions included in regional Channel 3 licences in accordance with section 291; or
  - (b) in order for networking arrangements made by OFCOM to cease to have effect in accordance with section 292.
- (2) This Schedule also has effect as respects—
  - (a) the imposition by OFCOM under section 292 of networking arrangements;
  - (b) the modification of such arrangements following a review under section 293; and
  - (c) the making of proposals for modifications of networking arrangements following such a review.

##### *Approval required for modifications*

- 2 (1) Where networking arrangements are approved by OFCOM for purposes mentioned in paragraph 1(1), those arrangements are not to be modified unless OFCOM have approved the modifications in accordance with this Schedule.
- (2) This paragraph does not apply to modifications proposed by OFCOM under section 293.

##### *Procedure for giving approval*

- 3 (1) This paragraph applies where arrangements or modifications are submitted to OFCOM for their approval.
- (2) OFCOM must publish a description of the arrangements or modifications that have been submitted.
- (3) The publication must be in such manner as OFCOM consider appropriate for bringing the matters published to the attention of the persons who, in OFCOM's opinion, are likely to be affected by the arrangements or modifications.
- (4) After allowing a reasonable time after the publication for the making of representations, OFCOM must consider the arrangements or modifications and decide whether or not to approve them.

*Decision of OFCOM whether or not to approve arrangements or modifications*

- 4 (1) The decision made by OFCOM under paragraph 3(4) has to be one of the following—
- (a) a decision to approve the arrangements or modifications unconditionally;
  - (b) a decision to give a conditional approval to the arrangements or modifications;
  - (c) a decision to refuse approval.
- (2) A conditional approval is one that has effect only if effect is given, in relation to the proposed arrangements or modifications, to changes proposed by OFCOM.
- (3) Before deciding to give a conditional approval, OFCOM must consult every holder of a regional Channel 3 licence about the changes they are proposing.
- (4) When OFCOM have made their decision, they must prepare a report setting out—
- (a) their decision; and
  - (b) their reasons for that decision.
- (5) OFCOM must publish the report and send a copy of it to—
- (a) the Office of Fair Trading; and
  - (b) every person to whom the relevant arrangements will apply, or do apply.
- (6) The relevant arrangements are—
- (a) the arrangements for which approval has been sought; or
  - (b) the arrangements which are the subject of the modifications for which approval has been sought.

*Notification of decisions on imposition of arrangements*

- 5 (1) Where OFCOM impose arrangements they must prepare and publish a report setting out details of the imposed arrangements.
- (2) Where OFCOM carry out a review under section 293, they must prepare and publish a report setting out—
- (a) their conclusions on the review;
  - (b) their reasons for those conclusions; and
  - (c) the modifications (if any) that they are proposing, or intend to make, following the review.
- (3) OFCOM must send a copy of a report prepared under this paragraph to—
- (a) the Office of Fair Trading; and
  - (b) every person to whom the relevant arrangements will apply or do apply.
- (4) The relevant arrangements are—
- (a) the arrangements which are imposed; or
  - (b) the arrangements which are the subject of the modifications proposed by OFCOM or to be made by them.

*Competition tests applying to OFCOM's decisions*

- 6 (1) OFCOM must not—
- (a) approve arrangements or modifications,
  - (b) impose arrangements or modify imposed arrangements, or

- (c) propose modifications following a review under section 293, unless they are satisfied that the arrangements, or the arrangements as proposed to be modified, satisfy the first or second competition test.
- (2) Before making a decision about whether a competition test is satisfied OFCOM must consult the Office of Fair Trading.
- (3) Arrangements satisfy the first competition test if they do not have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom.
- (4) Arrangements satisfy the second competition test if—
  - (a) they do have such an object or effect; but
  - (b) they would satisfy the criteria set out in section 9 of the Competition Act 1998 (c. 41) (agreements contributing to improving the production or distribution of goods or to promoting technical or economic progress).
- (5) For the purposes of the second competition test, arrangements imposed by OFCOM and modifications of such arrangements are to be treated as if they were given effect to by an agreement between undertakings.
- (6) In determining whether arrangements or modified arrangements would satisfy either of the competition tests, OFCOM must act with a view to securing that there is no inconsistency between—
  - (a) the principles they apply and the decision they reach; and
  - (b) any principles or decisions referred to in sub-paragraph (7).
- (7) Those principles and decisions are—
  - (a) the principles laid down by the Treaty establishing the European Community and the European Court, and any decisions of that Court, that are relevant to the construction of Article 81 of that Treaty; and
  - (b) any decisions under Part 1 of the Competition Act 1998, and any decisions of a court in the United Kingdom, that are relevant to the construction of a provision of that Act that is equivalent to the provisions of this Schedule imposing the competition tests.
- (8) In the case of a conditional approval, the requirements of this paragraph have to be satisfied in relation to the arrangements or modified arrangements as they will be after giving effect to the changes proposed by OFCOM.
- (9) In this paragraph, the “European Court” includes a court attached to the European Court.

*Other matters to be taken into account*

- 7
- (1) OFCOM must not—
    - (a) approve arrangements or modifications,
    - (b) impose arrangements or modify imposed arrangements, or
    - (c) propose modifications following a review under section 293,unless they consider that the arrangements, or the arrangements as proposed to be modified, are satisfactory.
  - (2) OFCOM’s consideration under sub-paragraph (1) must include consideration of the following two factors.

---

*Status: This is the original version (as it was originally enacted).*

---

- (3) The first factor is whether the arrangements, or the arrangements as proposed to be modified, represent a satisfactory means of achieving the purpose set out in section 290(4)(c).
- (4) The second factor is the likely effect of the arrangements, or the arrangements as modified, on the ability of the persons who will be or are the holders of regional Channel 3 licences, or of any of them, to maintain the quality and range of—
  - (a) regional programmes included in regional Channel 3 services; and
  - (b) the other programmes included in such services which contribute to the regional character of the services.
- (5) In this paragraph “regional programme”, in relation to a regional Channel 3 service, means a programme (including a news programme) which is of particular interest—
  - (a) to persons living within the area for which the service is provided;
  - (b) to persons living within a part of that area; or
  - (c) to particular communities living within that area.

*Duty to refuse approval in certain cases*

- 8 (1) This paragraph applies to a decision by OFCOM—
  - (a) to approve arrangements or modifications;
  - (b) to impose arrangements or to modify imposed arrangements; or
  - (c) to propose modifications following a review under section 293.
- (2) OFCOM must not make that decision if it appears to them that the arrangements, or the arrangements as proposed to be modified, would be likely to be prejudicial to the ability of holders of regional Channel 3 licences, or of any of them, to comply with—
  - (a) their public service remits;
  - (b) conditions imposed on them under section 286;
  - (c) conditions imposed on them under section 287; or
  - (d) conditions imposed on them under section 352.

*Appeals against decisions relating to competition test*

- 9 (1) A person holding a regional Channel 3 licence may appeal to the Tribunal against the following decisions by OFCOM—
  - (a) a decision on how to dispose of an application for the approval of arrangements or modifications;
  - (b) a decision to impose arrangements or to modify imposed arrangements; or
  - (c) a decision to propose modifications following a review under section 293.
- (2) An appeal can be made only by sending the Tribunal a notice of appeal within the period specified, in relation to the decision appealed against, in Tribunal rules.
- (3) The notice of appeal must set out the grounds of appeal.
- (4) The only grounds on which an appeal may be brought are—
  - (a) that OFCOM have wrongly decided that a competition test is or is not satisfied in relation to arrangements or modifications submitted to them for approval;

- (b) that a competition test is not satisfied in the case of arrangements proposed by OFCOM;
  - (c) that provisions contained in arrangements proposed by OFCOM for satisfying a competition test are not required for that purpose;
  - (d) that the requirement to satisfy a competition test should be discharged in a different manner from that in which it would be satisfied in accordance with arrangements proposed by OFCOM.
- (5) In sub-paragraph (4) “arrangements proposed by OFCOM” means—
- (a) arrangements or modified arrangements as they will have effect after giving effect to changes proposed by OFCOM in giving a conditional approval;
  - (b) arrangements imposed by them;
  - (c) imposed arrangements as modified by them;
  - (d) arrangements as modified by proposals made by OFCOM following a review under section 293.
- (6) The holder of a regional Channel 3 licence is not required by the conditions of his licence to take steps for giving effect to a decision of OFCOM at any time when an appeal under this Schedule against that decision is pending.

*Decisions on an appeal*

- 10 (1) Appeals to the Tribunal under paragraph 9 are to be disposed of in accordance with this paragraph.
- (2) The Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal.
- (3) The Tribunal shall decide what (if any) is the appropriate decision for OFCOM to have made in relation to the matters to which those grounds relate.
- (4) The Tribunal shall then either—
- (a) confirm OFCOM’s decision; or
  - (b) remit the matter to OFCOM with such directions (if any) as the Tribunal considers appropriate for giving effect to its decision.
- (5) The Tribunal must not direct OFCOM to take any action which they would not otherwise have had power to take in relation to the matter under appeal.
- (6) It shall be the duty of OFCOM to comply with every direction given to them under sub-paragraph (4).
- (7) In its application to a decision of the Tribunal under this paragraph, paragraph 1(2)(b) of Schedule 4 to the Enterprise Act 2002 (c. 40) (exclusion of commercial information from documents recording Tribunal decisions) is to have effect as if for the reference to the undertaking to which commercial information relates there were substituted a reference to the person to whom such information relates.

*Appeals against decisions of the Tribunal*

- 11 (1) A decision of the Tribunal on an appeal under paragraph 9 may itself be appealed.
- (2) An appeal under this paragraph—
- (a) lies to the Court of Appeal or to the Court of Session; and

---

*Status: This is the original version (as it was originally enacted).*

---

- (b) must relate only to a point of law arising from the decision of the Tribunal.
- (3) An appeal under this paragraph may be brought by a party to the proceedings before the Tribunal.
- (4) An appeal under this paragraph requires the permission of the Tribunal or of the court to which it is to be made.
- (5) In this paragraph references to a decision of the Tribunal include references to a direction given by it under paragraph 10(4).

#### *Information for OFCOM*

- 12 (1) OFCOM may by notice require a person—
- (a) to produce to them such documents specified or described in the notice, or
  - (b) to furnish them with such other information so specified or described,
- as they consider necessary in order to determine for the purposes of section 293 or this Schedule whether the competition tests are satisfied.
- (2) A requirement imposed by a notice under this paragraph has to be complied with by producing the document, or by furnishing the required information, at the time and place specified in the notice.
  - (3) If the requirement is one for the furnishing of information otherwise than by the production of a document, the information must be furnished in the manner specified in the notice.
  - (4) The only documents that a person is required to produce by a notice under this paragraph are those that are in his custody or under his control—
    - (a) at the time of the notice; or
    - (b) at a time between that time and the time when the notice must be complied with.

#### *Enforcement of information provisions*

- 13 (1) The court may, on an application by OFCOM, enquire into whether any person (“the defaulter”) has refused or otherwise failed, without reasonable excuse, to comply with a requirement contained in a notice under paragraph 12.
- (2) An application under sub-paragraph (1) shall include details of the possible failure which OFCOM consider has occurred.
  - (3) In enquiring into a case under sub-paragraph (1), the court shall hear—
    - (a) any witness who may be produced against or on behalf of the defaulter; and
    - (b) any statement which may be offered in defence.
  - (4) Sub-paragraphs (5) and (6) apply where the court is satisfied, after hearing any witnesses and statements as mentioned in sub-paragraph (3), that the defaulter has refused or failed, without reasonable excuse, to comply with the requirement contained in the notice under paragraph 12.
  - (5) The court may punish the defaulter as it would have been able to punish him had he been guilty of contempt of court.

- (6) Where the defaulter is a body corporate, the power of the court to punish the defaulter includes power to punish a director or officer of the body corporate.
- (7) Where the defaulter is a partnership constituted under the law of Scotland, the power of the court to punish the defaulter includes power to punish a member of the partnership.
- (8) A person is guilty of an offence if he intentionally alters, suppresses or destroys a document which he has been required to produce by a notice under paragraph 12.
- (9) A person is guilty of an offence if—
  - (a) he supplies information to OFCOM in purported compliance with a notice given to him under paragraph 12;
  - (b) the information is false or misleading in a material respect; and
  - (c) he knows that it is false or misleading in a material respect or is reckless as to whether it is false or misleading in a material respect.
- (10) A person is guilty of an offence if—
  - (a) he supplies information to another person knowing that the information is to be used for complying with a notice under paragraph 12;
  - (b) the information is false or misleading in a material respect; and
  - (c) he knows that it is false or misleading in a material respect or is reckless as to whether it is false or misleading in a material respect.
- (11) A person guilty of an offence under this paragraph shall be liable—
  - (a) on summary conviction, to a fine not exceeding the statutory maximum;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.
- (12) In this paragraph “the court” means—
  - (a) in relation to England and Wales, the High Court;
  - (b) in relation to Scotland, the Court of Session; and
  - (c) in relation to Northern Ireland, the High Court or a judge of the High Court.

### *Confidentiality and defamation*

- 14
- (1) When publishing a report prepared under paragraph 4 or 5, OFCOM must have regard to the need to exclude from the publication, so far as practicable, the matters which are confidential in accordance with sub-paragraphs (2) and (3).
  - (2) A matter is confidential under this sub-paragraph if—
    - (a) it relates specifically to the affairs of a particular body; and
    - (b) publication of that matter would or might, in OFCOM’s opinion, seriously and prejudicially affect the interests of that body.
  - (3) A matter is confidential under this sub-paragraph if—
    - (a) it relates to the private affairs of an individual; and
    - (b) publication of that matter would or might, in OFCOM’s opinion, seriously and prejudicially affect the interests of that individual.
  - (4) For the purposes of the law of defamation absolute privilege attaches to every report prepared under paragraph 4 or 5.

---

**Status:** This is the original version (as it was originally enacted).

---

### *Interpretation of Schedule*

15 In this Schedule—

“competition test” is to be construed in accordance with paragraph 6;

“the Tribunal” means the Competition Appeal Tribunal; and

“Tribunal rules” means rules made under section 15 of the Enterprise Act  
[2002 \(c. 40\)](#).