

2011 No. 1210

ELECTRONIC COMMUNICATIONS

**The Electronic Communications and Wireless Telegraphy
Regulations 2011**

<i>Made</i>	- - - -	<i>4th May 2011</i>
<i>Laid before Parliament</i>		<i>5th May 2011</i>
<i>Coming into force</i>	- -	<i>26th May 2011</i>

The Secretary of State is designated(a) for the purposes of section 2(2) of the European Communities Act 1972(b) in relation to electronic communications.

The Secretary of State makes the following Regulations in exercise of the powers conferred by section 2(2) of that Act.

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Electronic Communications and Wireless Telegraphy Regulations 2011.

(2) These Regulations come into force on 26th May 2011.

(3) Subject to paragraphs (4) and (5), these Regulations extend to England and Wales, Scotland and Northern Ireland.

(4) Paragraphs 2 and 101 of Schedule 1 extend to England and Wales only.

(5) Paragraph 102 of that Schedule extends to Scotland only.

Implementation of Directives 2009/136/EC and 2009/140/EC

2.—(1) Schedule 1 (which contains provision amending the Communications Act 2003(c) and other enactments for the purpose of implementing Directive 2009/136/EC of the European Parliament and of the Council(d) and Directive 2009/140/EC of the European Parliament and of the Council(e)) has effect.

(2) Schedule 2 (which contains provision amending the Wireless Telegraphy Act 2006(f) for the purpose of implementing Directive 2009/140/EC) has effect.

(a) S.I. 2001/3495: which has been amended, but those amendments are not relevant to these regulations.
(b) 1972 c. 68. Section 2(2) was amended by section 27 of the Legislative and Regulatory Reform Act 2006 (c. 51) and section 3 of, and Part 1 of the Schedule to, the European Union (Amendment) Act 2008 (c. 7).
(c) 2003 c. 21
(d) OJ No L 337, 25/11/2009, p11
(e) OJ No L 337, 25/11/2009, p37
(f) 2006 c. 36

6 month period for deciding application to install facilities

3.—(1) This regulation applies where—

- (a) a person authorised to provide public electronic communications networks applies to a competent authority for the granting of rights to install facilities on, over or under public or private property for the purposes of such a network,
- (b) a person authorised to provide electronic communications networks other than to the public applies to a competent authority for the granting of rights to install facilities on, over or under public property for the purposes of such a network, or
- (c) a person applies to OFCOM for a direction applying the electronic communications code in the person's case.

(2) Except in cases of expropriation, the competent authority must make its decision within 6 months of receiving the completed application.

(3) In this regulation “public electronic communications network”, “electronic communications network” and “OFCOM” have the same meanings as in Chapter 1 of Part 2 of the Communications Act 2003(a).

Transitional provisions

4. Schedule 3 (which contains transitional and saving provisions) has effect.

Review of implementation

5.—(1) Before the end of each review period the Secretary of State must—

- (a) carry out a review of the implementation in the United Kingdom of the listed EU Directives,
- (b) set out the conclusions of the review in a report, and
- (c) publish the report.

(2) In carrying out the review the Secretary of State must, so far as is reasonable, have regard to how the listed EU Directives are implemented in other member States.

(3) The report must in particular—

- (a) set out the objectives intended to be achieved by the implementation in the United Kingdom of the listed EU Directives,
- (b) assess the extent to which those objectives are achieved, and
- (c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.

(4) “Review period” means—

- (a) the period of five years beginning with 26th May 2011, and
- (b) subject to paragraph (5), each successive period of five years.

(5) If a report under this regulation is published before the last day of the review period to which it relates, the following review period is to begin with the day on which that report is published.

(6) The listed EU Directives are—

- (a) Directive 2002/19/EC(b) of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and associated facilities,
- (b) Directive 2002/20/EC(c) of the European Parliament and of the Council on the authorisation of electronic communications networks and services,

(a) 2003 c. 21

(b) OJ No L 108, 24/4/2002, p7, as amended by Directive 2009/140/EC

(c) OJ No L 108, 24/4/2002, p21, as amended by Directive 2009/140/EC

- (c) Directive 2002/21/EC^(a) of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, and
- (d) Directive 2002/22/EC^(b) of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services.

4th May 2011

Ed Vaizey
Parliamentary Under Secretary of State
Department for Culture, Media and Sport

(a) OJ No L 108, 24/4/2002, p33, as amended by Directive 2009/140/EC
(b) OJ No L 108, 24/4/2002, p51, as amended by Directive 2009/136/EC

SCHEDULES

SCHEDULE 1

Regulation 2(1)

Amendments to Communications Act 2003 and related amendments

Telecommunications Act 1984

1. In Schedule 2 to the Telecommunications Act 1984(a) (the Telecommunications Code), after paragraph 24 insert—

“Electronic communications networks: determination of applications to install facilities

24A. Regulation 3 of the Electronic Communications and Wireless Telegraphy Regulation 2011 makes provision about the time within which certain applications under this code for the granting of rights to install facilities must be determined.”

New Roads and Street Works Act 1991

2. In Schedule 3 to the New Roads and Street Works Act 1991(b) (street works licences), after paragraph 2 insert—

“Electronic communications networks: determination of applications to install facilities

2A. Regulation 3 of the Electronic Communications and Wireless Telegraphy Regulations 2011 makes provision about the time within which certain applications for the granting of rights to install facilities must be determined.”

Office of Communications Act 2002

3. In the Schedule to the Office of Communications Act 2002(c) (further provision about OFCOM), after paragraph 2(4) insert—

“(5) At the time of removing a person from office under sub-paragraph (4) the Secretary of State must make public the decision to remove the person.

(6) The Secretary of State must—

- (a) give the person a statement of reasons for the removal, and
- (b) if so requested by the person, publish the statement.”

Communications Act 2003

4. Amend the Communications Act 2003(d) as follows.

5. In section 4 (duties for purpose of fulfilling Community obligations)—

(a) after subsection (6) insert—

“(6A) The fourth Community requirement does not apply to—

(a) 1984 c. 12.
(b) 1991 c. 22.
(c) 2002 c. 11.
(d) 2003 c. 21.

- (a) the imposition, in relation to a wireless telegraphy licence, of a limitation of a kind falling within section 9ZA(1) of the Wireless Telegraphy Act 2006; or
- (b) the review, variation or removal of such a limitation.”,
- (b) in subsection (8)—
 - (i) in paragraph (a) omit the words from “in the markets” to the end,
 - (ii) after paragraph (a) omit “and” and insert—
 - “(aa) efficient investment and innovation; and”, and
 - (iii) in paragraph (b) for “such facilities” substitute “associated facilities”,
- (c) in subsection (10)—
 - (i) for “or” after paragraph (b)(ii) substitute “and”,
 - (ii) after paragraph (c)(ii) omit “or” and insert—
 - “(iia) the European Conference of Postal and Telecommunications Administrations; and”,
- (d) in subsection (12), omit the definition of “the Framework Directive”, and
- (e) after subsection (12) insert—
 - “(13) In this section and sections 4A and 5, “the Framework Directive” has the same meaning as in Chapter 1 of Part 2.”

6. After section 4 insert—

“Duty to take account of European Commission recommendations for harmonisation

4A.—(1) This section applies to the following functions of OFCOM—

- (a) their functions under Chapter 1 of Part 2;
- (b) their functions under the enactments relating to the management of the radio spectrum;
- (c) their functions under Chapter 3 of Part 2 in relation to disputes referred to them under section 185;
- (d) their functions under sections 24 and 25 so far as they relate to information required for purposes connected with matters in relation to which functions specified in this subsection are conferred on OFCOM; and
- (e) their functions under section 26 so far as they are carried out for the purpose of making information available to persons mentioned in subsection (2)(a) to (c) of that section.

(2) In carrying out those functions, OFCOM must take due account of all applicable recommendations issued (whether before or after the coming into force of this section) by the European Commission under Article 19(1) of the Framework Directive.

(3) Where OFCOM decide not to follow such a recommendation they must notify the Commission of their decision, and of the reasons for it.”

7. In section 5 (directions in respect of networks and spectrum functions)—

- (a) after subsection (3) insert—
 - “(3A) The Secretary of State may not give a direction under this section in respect of a function that Article 3(3a) of the Framework Directive requires OFCOM to exercise without seeking or taking instructions from any other body.”, and
- (b) after subsection (4) insert—
 - “(4A) Before giving a direction under this section, the Secretary of State must take due account of the desirability of not favouring—
 - (a) one form of electronic communications network, electronic communications service or associated facility, or

(b) one means of providing or making available such a network, service or facility, over another.”

8. In section 26 (publication of information and advice)—

- (a) in subsection (1) for “may” substitute “must”, and
- (b) after subsection (2)(b) insert—

“(ba) any person affected by the application of the electronic communications code (within the meaning of section 106(1));”.

9. In section 32 (meaning of electronic communications networks and services)—

- (a) in subsection (1)(b)—

- (i) omit “and” before sub-paragraph (iii), and
- (ii) after that sub-paragraph insert—

“; and

- (iv) (except for the purposes of sections 125 to 127) other resources, including network elements which are not active.”, and

- (b) for subsection (3) substitute—

“(3) In this Act “associated facility” means a facility, element or service which is available for use, or has the potential to be used, in association with the use of an electronic communications network or electronic communications service (whether or not one provided by the person making the facility, element or service available) for the purpose of—

- (a) making the provision of that network or service possible;
- (b) making possible the provision of other services provided by means of that network or service; or
- (c) supporting the provision of such other services.”

10. In section 35 (notification of contravention of section 33)—

- (a) in subsection (2) omit “and” after paragraph (a) and for paragraph (b) substitute—

“(b) specifies the contravention in respect of which the determination has been made;

- (c) specifies the period during which the person notified has an opportunity to make representations;
- (d) specifies information to be provided by the person to OFCOM; and
- (e) specifies any penalty which OFCOM are minded to impose in accordance with section 35A.”, and

- (b) omit subsections (3) to (7) and (10).

11. After section 35 insert—

“Penalties for contravention of section 33

35A.—(1) This section applies where a person is given a notification under section 35 which specifies a proposed penalty.

(2) Where the notification relates to more than one contravention, a separate penalty may be specified in respect of each contravention.

(3) Where the notification relates to a continuing contravention, no more than one penalty may be specified in respect of the period of contravention specified in the notification.

(4) But, in relation to a continuing contravention, a penalty may be specified in respect of each day on which the contravention continues after—

- (a) the giving of a confirmation decision under section 36(4)(c) which requires immediate action; or

- (b) the expiry of any period specified in the confirmation decision for complying with a requirement so specified.
- (5) The amount of a penalty under subsection (4) is to be such amount not exceeding £100 per day as OFCOM determine to be—
 - (a) appropriate; and
 - (b) proportionate to the contravention in respect of which it is imposed.
- (6) The amount of any other penalty specified in a notification under section 35 is to be such amount not exceeding £10,000 as OFCOM determine to be—
 - (a) appropriate, and
 - (b) proportionate to the contravention in respect of which it is imposed.
- (7) The Secretary of State may by order amend this section so as to substitute a different maximum penalty for the maximum penalty for the time being specified in subsection (6).
- (8) No order is to be made containing provision authorised by subsection (7) unless a draft of the order has been laid before Parliament and approved by a resolution of each House.”

12. In section 36 (enforcement notification for contravention of section 33)—

- (a) for subsections (2) and (3) substitute—
 - “(2) OFCOM may—
 - (a) give the notified provider a decision (a “confirmation decision”) confirming the imposition of requirements in accordance with the notification under section 35; or
 - (b) inform the notified provider that they are satisfied with the notified provider’s representations and that no further action will be taken.
 - (3) OFCOM may not give a confirmation decision to the notified provider unless, after considering any representations, they are satisfied that the notified provider has, in one or more of the respects notified, been in contravention of section 33.”,
- (b) for subsection (4) substitute—
 - “(4) A confirmation decision—
 - (a) must be given to the person without delay;
 - (b) must include reasons for the decision;
 - (c) may require immediate action by the person to comply with requirements imposed by virtue of section 35(2)(d), or may specify a period within which the person must comply with those requirements; and
 - (d) may require the person to pay—
 - (i) the penalty specified in the notification under section 35, or
 - (ii) such lesser penalty as OFCOM consider appropriate in the light of the person’s representations or steps taken by the person to comply with the condition or remedy the consequences of the contravention, and
 - may specify the period within which the penalty is to be paid.”,
- (c) in subsection (5)—
 - (i) for “an enforcement notification” substitute “a confirmation decision”, and
 - (ii) for “it” substitute “any requirement imposed by it”,
- (d) after subsection (6) insert—
 - “(7) A penalty imposed by a confirmation decision—
 - (a) must be paid to OFCOM; and
 - (b) if not paid within the period specified by them, is to be recoverable by them accordingly.”, and
- (e) in the heading for “Enforcement notification” substitute “Confirmation decision”.

- 13.** Omit section 37.
- 14.** In section 38 (fixing of charges), omit subsection (6)(f).
- 15.** In section 40 (notification of non-payment of charges)—
- (a) in subsection (3)(b) for “doing the things specified in subsection (4)” substitute “making representations about the notified determination”, and
 - (b) omit subsections (4) to (8) and (11).
- 16.** In section 41 (penalties for non-payment of charges)—
- (a) in subsection (2) omit paragraph (b) (and “and” after paragraph (a)), and
 - (b) in subsection (7)(a) for “within one week of making their decision to impose the penalty,” substitute “without delay,”.
- 17.** In section 42 (suspending service provision for non-payment)—
- (a) in subsection (1)—
 - (i) in paragraph (a) for “serious and repeated” substitute “serious or repeated”,
 - (ii) after paragraph (b) insert—
 - “(ba) that, in the case of a single serious contravention, a notification has been given to the contravening provider under section 40 and the period for making representations under that section has expired;”
 - (iii) in paragraph (c) after “that” insert “, in the case of a repeated contravention,”
 - (iv) in paragraph (d) after “that” insert “, in the case of a repeated contravention,”, and
 - (v) for paragraph (e) substitute—
 - “(e) that the giving of the direction is appropriate and proportionate to the contravention in respect of which it is given.”,
 - (b) for subsection (7) substitute—
 - “(7) That period is such reasonable period as OFCOM may specify, beginning with the day of the giving of the notification.”, and
 - (c) in subsection (9)(b) for “twelve” substitute “24”.
- 18.** In section 43(6) (enforcement of directions under section 42) for “94” substitute “96A”.
- 19.** In section 45(8) (power of OFCOM to set conditions) —
- (a) in paragraph (a) for “92” substitute “91”, and
 - (b) in paragraph (b) for “89” substitute “89A”.
- 20.** In section 46(8)(b) (persons to whom conditions may apply) for “89” substitute “89A”.
- 21.** In section 47 (test for setting or modifying conditions)—
- (a) in subsection (2)(a), at the end insert “(but this paragraph is subject to subsection (3))”, and
 - (b) after subsection (2) insert—
 - “(3) Subsection (2)(a) does not apply in relation to the setting of a general condition.”
- 22.** In section 48 (procedure for setting, modifying and revoking conditions)—
- (a) for subsections (2) and (3) substitute—
 - “(2) Where section 48A applies, OFCOM must comply with the applicable requirements of that section and section 48B before—
 - (a) setting conditions under section 45; or
 - (b) modifying or revoking a condition so set.

(2A) Where section 48A does not apply to the setting, modification or revocation of conditions because of subsection (2) of that section—

- (a) the conditions, or their modification or revocation, must be temporary; and
- (b) the notification published under subsection (1) of this section must state the period for which the conditions, or their modification or revocation, are to have effect.

(2B) Where OFCOM propose to extend or make permanent any such temporary conditions, modification or revocation—

- (a) sections 48A and 48B(1) do not apply in relation to the proposal; and
 - (b) subsections (2) to (9) of section 48B apply in relation to the proposal as if the words from the beginning of subsection (2) to “appropriate” were omitted.”,
- (b) in subsection (4) for “notification under subsection (2)” substitute “proposal by OFCOM”,
- (c) omit subsection (5),
- (d) in subsection (6) after “this section” insert “or section 48A”, and
- (e) in subsection (7), at the end insert “, section 48A or section 48B”.

23. After section 48 insert—

“Domestic consultation for section 45 conditions

48A.—(1) This section applies where OFCOM propose to set, modify or revoke—

- (a) SMP apparatus conditions; or
- (b) any other conditions set under section 45 where what is proposed would, in OFCOM’s opinion, have a significant impact on a market for any of the services, facilities, apparatus or directories in relation to which they have functions under this Chapter.

(2) But this section does not apply where the proposal is of EU significance and in OFCOM’s opinion—

- (a) there are exceptional circumstances; and
- (b) there is an urgent need to act in order to safeguard competition and to protect the interests of consumers.

(3) OFCOM must publish a notification—

- (a) stating that they are proposing to set, modify or revoke the conditions that are specified in the notification;
- (b) setting out the effect of those conditions, modifications or revocations;
- (c) giving their reasons for making the proposal; and
- (d) specifying the period within which representations may be made to OFCOM about their proposal.

(4) That period must end no less than one month after the day of the publication of the notification.

(5) But where OFCOM are satisfied that there are exceptional circumstances justifying the use of a shorter period, the period specified as the period for making representations may be whatever shorter period OFCOM consider reasonable in those circumstances.

(6) OFCOM must—

- (a) consider every representation about the proposal made to them during the period specified in the notification; and
- (b) have regard to every international obligation of the United Kingdom (if any) which has been notified to them for the purposes of this paragraph by the Secretary of State.

(7) Where the proposal is not of EU significance, OFCOM may then give effect to it, with any modifications that appear to OFCOM to be appropriate.

EU consultation for section 45 conditions

48B.—(1) This section applies where, after complying with section 48A(6) in relation to a proposal of EU significance, OFCOM wish to proceed with the proposal.

(2) After making any modifications of the proposal that appear to OFCOM to be appropriate, OFCOM must send a copy of the proposal, and of a statement setting out the reasons for it, to—

- (a) the European Commission;
- (b) BEREC; and
- (c) the regulatory authorities in every other member State.

(3) If at the end of the period of one month referred to in Article 7(3) of the Framework Directive no notification has been given to OFCOM by the Commission under Article 7a(1) of that Directive, OFCOM may give effect to the proposal, with any modifications that appear to OFCOM to be appropriate.

(4) Before giving effect to the proposal under subsection (3), OFCOM must consider any comments made by—

- (a) the Commission;
- (b) BEREC; and
- (c) any regulatory authority in any other member State.

(5) Subsections (6) to (9) apply where such a notification is given by the Commission to OFCOM during that period.

(6) During the period of 3 months beginning with the notification, OFCOM must cooperate with the Commission and BEREC to identify the most appropriate and effective measure.

(7) OFCOM may give effect to the proposal, with any modifications that appear to them to be appropriate, within one month (or such longer period as may be allowed under paragraph (6) of Article 7a of the Framework Directive) of the Commission—

- (a) issuing a recommendation to amend or withdraw the proposal in accordance with paragraph (5)(a) of that Article; or
- (b) taking a decision to lift its reservations in accordance with paragraph (5)(b) of that Article.

(8) In a case in which OFCOM give effect to the proposal despite a recommendation of the Commission to amend or withdraw the proposal, OFCOM must send to the Commission a copy of a reasoned justification for their decision.

(9) If at the end of the period of one month referred to in paragraph (5) of Article 7a of the Framework Directive the Commission has neither issued a recommendation nor lifted its reservations in accordance with that paragraph, OFCOM may give effect to the proposal, with any modifications that appear to them to be appropriate.

Delivery of copies of notifications etc. in respect of section 45 conditions

48C.—(1) OFCOM must send to the Secretary of State a copy of every notification published under section 48(1) or 48A(3).

(2) OFCOM must send to the European Commission a copy of every notification published under section 48(1) with respect to—

- (a) a universal service condition;
- (b) an access-related condition falling within section 73(2);
- (c) an SMP services condition.

(3) OFCOM must send to BEREC a copy of every notification published under section 48(1) with respect to a proposal of EU significance.

(4) Where a notification published under section 48(1) relates to a proposal to which section 48A did not apply because of subsection (2) of that section, OFCOM must send a copy of a statement setting out the reasons for the proposal and for the urgent need to act to—

- (a) the Commission;
- (b) BEREC; and
- (c) the regulatory authorities in every other member State.”

24. In section 49 (directions and approvals for the purposes of a s. 45 condition)—

(a) in subsection (1)(b) after “that person” insert “(referred to in this section and sections 49A to 49C as “the responsible person”);”,

(b) in subsection (2)—

- (i) in the opening words for “A person” substitute “The responsible person”, and
- (ii) at the end of paragraph (a) insert “(but this paragraph is subject to subsection (2A))”,

(c) after subsection (2) insert—

“(2A) Subsection (2)(a) does not apply in relation to a direction, approval or consent affecting a general condition.”,

(d) in subsection (3) for the words from the beginning to “OFCOM shall” substitute “Where the responsible person is a person other than OFCOM, that person shall in giving, modifying or withdrawing the direction”,

(e) for subsections (4) to (10) substitute—

“(4) Where section 49A applies, the applicable requirements of that section and section 49B must be complied with before the direction, approval or consent is given, modified or withdrawn.

(4A) Where section 49A does not apply because of subsection (2) of that section—

- (a) the direction, approval or consent given, or its modification or withdrawal, must be temporary; and
- (b) the instrument that gives, modifies or withdraws the direction, approval or consent must state the period for which it is to have effect.

(4B) Where it is proposed to extend or make permanent any such temporary direction, approval or consent, or modification or withdrawal—

- (a) sections 49A and 49B(1) do not apply in relation to the proposal; and
- (b) subsections (2) to (10) of section 49B apply in relation to the proposal as if for the words from the beginning of subsection (2) to “the person” were substituted “The responsible person”.

(4C) Where the responsible person is a person other than OFCOM, that person must refer to OFCOM such of the following questions as are relevant in the case in question—

- (a) whether OFCOM is of the opinion mentioned in section 49A(1)(b);
- (b) whether OFCOM is of the opinion mentioned in section 49A(2); and
- (c) whether the proposal is of EU significance.

(4D) OFCOM must immediately determine any question so referred to them.”.

25. After section 49 insert—

“Domestic consultation for directions, approvals and consents

49A.—(1) This section applies where the responsible person is proposing to give, modify or withdraw a direction, approval or consent for the purposes of—

- (a) an SMP apparatus condition; or
 - (b) any other condition set under section 45 where what is proposed would, in OFCOM's opinion, have a significant impact on a market for any of the services, facilities, apparatus or directories in relation to which they have functions under this Chapter.
- (2) But this section does not apply where the proposal is of EU significance and in OFCOM's opinion—
- (a) there are exceptional circumstances; and
 - (b) there is an urgent need to act in order to safeguard competition and to protect the interests of consumers.
- (3) The responsible person must publish a notification—
- (a) stating that there is a proposal to give, modify or withdraw the direction, approval or consent;
 - (b) identifying the responsible person;
 - (c) setting out the direction, approval or consent to which the proposal relates;
 - (d) setting out the effect of the direction, approval or consent or of its proposed modification or withdrawal;
 - (e) giving reasons for the making of the proposal; and
 - (f) specifying the period within which representations may be made about the proposal to the responsible person.
- (4) That period must be one ending not less than one month after the day of the publication of the notification.
- (5) But where the responsible person is satisfied that there are exceptional circumstances justifying the use of a shorter period, the period specified as the period for making representations may be whatever shorter period that person considers reasonable in those circumstances.
- (6) The responsible person must—
- (a) consider every representation about the proposal made to that person during the period specified in the notification; and
 - (b) have regard to every international obligation of the United Kingdom (if any) which has been notified to OFCOM for the purposes of this paragraph by the Secretary of State.
- (7) Where the proposal is not of EU significance, the responsible person may then give effect to the proposal, with any modifications that appear to that person to be appropriate.
- (8) The publication of a notification under this section must be in such manner as appears to the responsible person to be appropriate for bringing the contents of the notification to the attention of such persons as that person considers appropriate.

EU consultation for directions, approvals and consents

49B.—(1) This section applies where, after complying with section 49A(6) in relation to a proposal of EU significance, the responsible person wishes to proceed with it.

(2) After the responsible person has made any modifications of the proposal that appear to the person to be appropriate, the person must send a copy of the proposal, and of a statement setting out the reasons for it, to—

- (a) the European Commission;
- (b) BEREC; and
- (c) the regulatory authorities in every other member State.

(3) If at the end of the period of one month referred to in Article 7(3) of the Framework Directive no notification has been given to the responsible person by the Commission under

Article 7a(1) of that Directive, the responsible person may give effect to the proposal, with any amendments that appear to the responsible person to be appropriate.

(4) Before giving effect to the proposal under subsection (3), the responsible person must consider any comments made by—

- (a) the Commission;
- (b) BEREC; and
- (c) any regulatory authority in any other member State.

(5) Subsections (6) to (10) apply where such a notification is given by the Commission to the responsible person during that period.

(6) During the period of 3 months beginning with the notification, the responsible person must co-operate with the Commission and BEREC to identify the most appropriate and effective measure.

(7) The responsible person may give effect to the proposal, with any modifications that appear to that person to be appropriate, within one month (or such longer period as may be allowed under paragraph (6) of Article 7a of the Framework Directive) of the Commission—

- (a) issuing a recommendation to amend or withdraw the proposal in accordance with paragraph (5)(a) of that Article; or
- (b) taking a decision to lift its reservations in accordance with paragraph (5)(b) of that Article.

(8) In a case in which the responsible person is a person other than OFCOM and the Commission has recommended that the proposal be amended or withdrawn, the responsible person may give effect to the proposal only with the agreement of OFCOM.

(9) In a case in which the responsible person gives effect to the proposal despite a recommendation of the Commission to amend or withdraw it, the responsible person must send to the Commission a copy of the responsible person's reasoned justification for the decision.

(10) If at the end of the period of one month referred to in paragraph (5) of Article 7a of the Framework Directive the Commission has neither issued a recommendation nor lifted its reservations in accordance with that paragraph, the responsible person may give effect to the proposal, with any modifications that appear to that person to be appropriate.

Delivery of copies of notifications etc. in respect of directions, approvals and consents

49C.—(1) The responsible person must send to the Secretary of State—

- (a) a copy of every notification published under section 49A(3);
- (b) a copy of every direction, approval or consent given for the purposes of a condition set under section 45; and
- (c) a copy of every instrument modifying or withdrawing such a direction, approval or consent.

(2) The responsible person must send to the European Commission—

- (a) a copy of every direction, approval or consent given for the purposes of a universal service condition, an access-related condition falling within section 73(2) or an SMP services condition; and
- (b) a copy of every instrument modifying or withdrawing such a direction, approval or consent.

(3) The responsible person must send to BEREC—

- (a) a copy of every direction, approval or consent given for the purposes of a condition set under section 45 where the proposal to give the direction, approval or consent was a proposal of EU significance;

- (b) a copy of every instrument modifying or withdrawing a direction, approval or consent given for the purposes of a condition set under section 45 where the proposal to modify or withdraw the direction, approval or consent was a proposal of EU significance.

(4) In a case in which the responsible person is a person other than OFCOM, the responsible person must send to OFCOM—

- (a) a copy of every notification published under section 49A(3);
- (b) a copy of every direction, approval or consent given for the purposes of a condition set under section 45;
- (c) a copy of every instrument modifying or withdrawing such a direction, approval or consent;
- (d) a copy of every proposal and statement to which section 49B(2) applies;
- (e) a copy of any comments about such a proposal made by the Commission, BEREC or any regulatory authority in any other member State;
- (f) a copy of every notification given to the responsible person by the Commission under Article 7a(1) of the Framework Directive;
- (g) a copy of every recommendation made in respect of the proposal by the Commission under Article 7a(5)(a) of the Framework Directive.

(5) Where because of subsection (2) of section 49A, that section did not apply in relation to a proposal to give a direction, approval or consent for the purposes of a condition, or to modify or withdraw such a direction, approval or consent, the responsible person must send a copy of a statement setting out the reasons for the proposal and for the urgent need to act to—

- (a) the Commission;
- (b) BEREC; and
- (c) the regulatory authorities in every other member State.

(6) In a case in which the responsible person is a person other than OFCOM, references to OFCOM in section 395(4), (5) and (6A) are to be read as references to the responsible person in relation to copies of directions, approvals, consents, instruments and statements to which subsections (2), (3) and (5) of this section apply.”

26. Omit section 50.

27. In section 51 (general conditions)—

- (a) in subsection (1)(e) omit “or regulating”,
- (b) in subsection (2)—
 - (i) at the end of paragraph (a) omit “and”, and
 - (ii) after paragraph (b) insert—
 - “(c) specify requirements in relation to the provision of services to disabled end-users;
 - (d) require the provision, free of charge, of specified information, or information of a specified kind, to end-users;
 - (e) in order to prevent the degradation of service and the hindering or slowing down of traffic over networks, impose minimum requirements in relation to the quality of public electronic communications networks;
 - (f) require a communications provider, in specified circumstances, to block access to telephone numbers or services in order to prevent fraud or misuse, and enable them to withhold fees payable to another communications provider in those circumstances;
 - (g) impose a limit on the duration of a contract between an end-user and a communications provider; and

- (h) ensure that conditions and procedures for the termination of a contract do not act as a disincentive to an end-user changing communications provider.”,
- (c) after subsection (2) insert—
 - “(2A) Where OFCOM propose to set a general condition of a kind specified in subsection (2)(e), they must—
 - (a) notify the European Commission and BEREC, and
 - (b) take due account of comments and recommendations made by the Commission.”,
 - and
- (d) in subsection (4)(b) for “92” substitute “91”.

28. In section 52 (customer interests)—

- (a) in subsection (2)(a) after “customers” insert “, where the complaint relates to contractual conditions, or to the performance of a contract for the supply of an electronic communications network or service”,
- (b) in subsection (2)(b) after “customers” insert “, where the complaint relates to contractual conditions, or to the performance of a contract for the supply of an electronic communications network or service”,
- (c) after subsection (2)(c) insert—
 - “(ca) the payment of compensation to a person in respect of delay in porting a number to another public communications provider, or abuse of the process for porting a number;”, and
- (d) in subsection (3)(a), after “transparent” insert “, non-discriminatory”.

29. In section 54(2)(b), after “transparent” insert “, non-discriminatory”.

30. In section 56(1) (National Telephone Numbering Plan), after paragraph (b) omit “and” and insert—

“(ba) such requirements as they consider appropriate, for the purpose of protecting consumers, in relation to the tariff principles and maximum prices applicable to numbers so adopted or available for allocation; and”.

31. After section 56 insert—

“Conditions for limitations on allocation of telephone numbers

56A.—(1) When OFCOM allocate telephone numbers in accordance with the National Telephone Numbering Plan, they must specify whether an allocation may be transferred from one person to another, and may set out the conditions under which the allocation may be transferred.

(2) If OFCOM allocate telephone numbers for a limited period of time, the limitation must be objectively justifiable in relation to the services to which it relates, taking account of the need to allow for an appropriate period of investment amortisation.”

32. In section 58(1) (conditions about allocation and adoption of numbers), after paragraph (a) insert—

“(aa) impose tariff principles and maximum prices for the purpose of protecting consumers in relation to the provision of an electronic communications service by means of telephone numbers adopted or available for use;”.

33. In section 61 (withdrawal of telephone number allocations)—

- (a) in subsection (3)(a) for “serious and repeated” substitute “serious or repeated”, and
- (b) in subsection (8)—
 - (i) for paragraphs (a) and (b) substitute—

- “(a) in the case of a previous notification of a contravention given to that person under section 96A, OFCOM have given a confirmation decision to that person under section 96C(2) in respect of the contravention; and
 - (b) in the period of 24 months following the giving of that confirmation decision, one or more further confirmation decisions have been given to the person in respect of contraventions of numbering conditions;”, and
 - (ii) in the words following paragraph (b) for “notifications” substitute “confirmation decisions”.
- 34.** In section 64(4)(a) (must-carry obligations), after “listed service” insert “(including, but not limited to, a service enabling access for disabled end-users)”.
- 35.** In section 65 (universal service conditions) after subsection (4) insert—
- “(5) Before making or varying the universal service order, the Secretary of State must take due account of the desirability of not favouring—
 - (a) one form of electronic communications network, electronic communications service or associated facility, or
 - (b) one means of providing or making available such a network, service or facility, over another.”
- 36.** In section 67 (subject matter of universal service conditions), after subsection (1) insert—
- “(1A) OFCOM may also set universal service conditions which apply to a designated universal service provider who proposes to make a disposal to another person of a substantial part or all of the designated universal service provider’s local access network assets.
 - (1B) But subsection (1A) does not apply where the disposal is made by a company to a connected company (within the meaning given by section 1122(2) of the Corporation Tax Act 2010).”
- 37.** In section 68(6) (tariffs), after “providers” insert “or, where there is no designated universal service provider, by other persons,”.
- 38.** In section 73 (permitted subject-matter of access-related conditions)—
- (a) in subsection (2)—
 - (i) in paragraph (a) omit the words from “on the part of” to the end,
 - (ii) in paragraph (b) omit “between them”, and
 - (iii) after paragraph (b) omit “and” and insert—
 - “(ba) efficient investment and innovation; and”,
 - (b) in subsection (3) omit “, in cases where there are no viable alternative arrangements that may be made,”,
 - (c) after that subsection insert—
 - “(3A) The power to set access-related conditions falling within subsection (3) is to be exercised for the purpose of—
 - (a) encouraging efficient investment in infrastructure; and
 - (b) promoting innovation.”, and
 - (d) omit subsection (4).
- 39.** In section 74 (specific types of access-related conditions), after subsection (1) insert—
- “(1A) The conditions that may be set by virtue of section 73(2) also include conditions which impose such obligations on a person controlling network access to customers as OFCOM consider necessary for the purpose of securing service interoperability.”
- 40.** In section 75 (conditional access systems etc), omit subsection (1).

41. After section 76 insert—

“Information about electronic communications apparatus available for shared use

76A.—(1) OFCOM may make available to such persons as they consider appropriate information about electronic communications apparatus that in OFCOM’s opinion is suitable for shared use.

(2) OFCOM may impose such restrictions as they consider appropriate on the use and further disclosure of information made available under this section.”

42. In section 80 (proposals for identifying markets and for market power determinations)—

(a) for subsections (1) to (6) substitute—

“(1) Where section 80A applies, OFCOM must comply with the applicable requirements of that section and section 80B before—

- (a) identifying a market for the purposes of making a market power determination, or
- (b) making a market power determination.

(1A) Where section 80A does not apply because of subsection (2) of that section—

- (a) any identification of a market or market power determination must be temporary; and
- (b) the notification published under section 79(4) containing the identification or determination must state the period for which the identification or determination is to have effect.

(1B) Where OFCOM propose to extend or make permanent any such temporary identification or determination—

- (a) sections 80A and 80B(1) do not apply in relation to the proposal; and
 - (b) subsections (2) to (8) of section 80B apply in relation to the proposal as if the words from the beginning of subsection (2) to “appropriate” were omitted.”, and
- (b) in subsection (7) for the words from “give effect” to the end substitute “identify a market or make a market power determination is subject to section 83”.

43. After section 80 insert—

“Domestic consultation for market identifications and market power determinations

80A.—(1) This section applies where—

- (a) OFCOM propose—
 - (i) to identify a market for the purposes of making a market power determination; or
 - (ii) to make a market power determination; and
- (b) (in the case of a services market) the proposed identification or determination is in OFCOM’s opinion likely to result in the setting, modification or revocation of SMP services conditions that will have a significant impact on the market.

(2) But this section does not apply where the proposal is of EU significance and in OFCOM’s opinion—

- (a) there are exceptional circumstances; and
- (b) there is an urgent need to act in order to safeguard competition and to protect the interests of consumers.

(3) OFCOM must publish a notification of what they are proposing to do.

(4) Notifications for the purposes of subsection (3)—

- (a) may be given separately;

- (b) may be contained in a single notification relating to both the identification of a market and the making of a market power determination in relation to that market; or
 - (c) may be contained in a single notification under section 48A(3) with respect to the setting or modification of an SMP condition and either—
 - (i) the making of the market power determination by reference to which OFCOM are proposing to set or modify that condition; or
 - (ii) the making of that market power determination and the identification of the market in relation to which they are proposing to make that determination.
- (5) A notification under this section relating to a proposal to identify a market or to make a market power determination must—
- (a) state that OFCOM are proposing to identify that market or to make that market power determination;
 - (b) set out the effect of the proposal;
 - (c) give their reasons for making the proposal; and
 - (d) specify the period within which representations may be made to OFCOM about their proposal.
- (6) That period must be a period of not less than one month after the day of the publication of the notification.
- (7) But where OFCOM are satisfied that there are exceptional circumstances justifying the use of a shorter period, the period specified as the period for making representations may be whatever shorter period OFCOM considers reasonable in those circumstances.
- (8) The publication of a notification under this section must be in such manner as appears to OFCOM to be appropriate for bringing the contents of the notification to the attention of the persons who, in OFCOM's opinion, are likely to be affected by the matters notified.
- (9) OFCOM must—
- (a) consider every representation about the proposal made to them during the period specified in the notification; and
 - (b) have regard to every international obligation of the United Kingdom (if any) which has been notified to them for the purposes of this paragraph by the Secretary of State.
- (10) Where the proposal is not of EU significance, OFCOM may then give effect to it, with any modifications that appear to OFCOM to be appropriate.

EU consultation for market identifications and market power determinations

80B.—(1) This section applies where, after complying with section 80A(9) in relation to a proposal of EU significance, OFCOM wish to proceed with the proposal.

(2) After making any modifications of the proposal that appear to OFCOM to be appropriate, OFCOM must send a copy of the proposal, and of a statement setting out the reasons for it, to—

- (a) the European Commission;
- (b) BEREC; and
- (c) the regulatory authorities in every other member State.

(3) If at the end of the period of one month referred to in paragraph (3) of Article 7 of the Framework Directive no indication has been given to OFCOM by the Commission under paragraph (4) of that Article, OFCOM may give effect to the proposal, with any modifications that appear to them to be appropriate.

(4) Before giving effect to the proposal under subsection (3), OFCOM must consider any comments made by—

- (a) the Commission;
- (b) BEREC; and
- (c) any regulatory authority in any other member State.

(5) Subsections (6) to (8) apply where such an indication is given by the Commission to OFCOM during that period.

(6) If under Article 7(5)(a) of the Framework Directive the Commission requires OFCOM to withdraw the proposal, OFCOM must amend or withdraw the proposal within 6 months of the date of the Commission's decision.

(7) Where the proposal is amended under subsection (6), section 80 applies in relation to the amended proposal as if it were a new proposal.

(8) OFCOM may give effect to the proposal, with any modifications that appear to them to be appropriate—

- (a) if the Commission takes a decision to lift its reservations in accordance with paragraph (5)(b) of Article 7 of the Framework Directive; or
- (b) if at the end of the period of 2 months referred to in paragraph (4) of that Article the Commission has neither required OFCOM to withdraw the proposal under paragraph (5)(a) nor lifted its reservations under paragraph (5)(b)."

44. For section 81 substitute—

“Delivery of copies of notifications under sections 79 and 80A

81.—(1) OFCOM must send to the Secretary of State a copy of every notification published under section 79(4) or 80A(3).

(2) OFCOM must send to the European Commission a copy of every notification published under section 79(4) in relation to a services market.

(3) OFCOM must send to BEREC a copy of every notification published under section 79(4) where the proposal to identify the market or make a market power determination was a proposal of EU significance.

(4) Where a notification published under section 79(4) relates to a proposal to which section 80A did not apply because of subsection (2) of that section, OFCOM must send a copy of a statement setting out the reasons for the proposal and for the urgent need to act to—

- (a) the Commission;
- (b) BEREC; and
- (c) the regulatory authorities in every other member State.”

45. Omit section 82.

46. In section 84 (review of services market identifications and determinations)—

- (a) in subsection (2) for “must, at such intervals as they consider appropriate,” substitute “may (and, when required to do so by section 84A, must)”, and
- (b) omit subsection (3).

47. After that section insert—

“Timing of services market identifications and determinations

84A.—(1) This section makes provision about the exercise by OFCOM of their powers—

- (a) to identify and analyse services markets;
- (b) to make and review market power determinations in respect of such markets; and

(c) to set, modify and revoke SMP services conditions by reference to such determinations.

(2) Where under Article 15(1) of the Framework Directive the European Commission has adopted a revised recommendation identifying a services market not previously notified to the Commission, OFCOM must ensure that within the specified period they have—

- (a) carried out any identification and analysis of markets that is necessary in consequence of the recommendation; and
- (b) sent the Commission copies of any resulting proposals with respect to market identification, market power determinations and SMP services conditions.

(3) Where, following the identification and analysis of a services market, OFCOM have made a market power determination in relation to it, they must ensure that within the specified period they have—

- (a) carried out a further analysis of the market and reviewed the identification and determination made on the basis of the earlier analysis; and
- (b) sent the Commission copies of any resulting proposals with respect to market identification, market power determinations and SMP services conditions.

(4) Subsection (3) applies only where the market power determination was made after 25 May 2011.

(5) Where it appears to OFCOM that they are unlikely to be able to comply with the requirements of subsection (2) or (3) within the specified period, they may request assistance from BEREC under Article 16(7) of the Framework Directive.

(6) Where OFCOM request such assistance—

- (a) they must inform the Commission of the request;
- (b) subsection (2) or (as the case may be) (3) applies in the case in question as if the words “within the specified period” were omitted; and
- (c) within 6 months of the assistance being provided they must send copies of any resulting proposals to the Commission.

(7) In this section “the specified period” means—

- (a) in the case of subsection (2), the period of 2 years from the adoption of the recommendation; and
- (b) in the case of subsection (3), the period of 3 years from the publication under section 79(4) of the notification of the market power determination made on the basis of the earlier analysis, subject to any extension of that period under Article 16(6)(a) of the Framework Directive.”

48. In section 85(7) (review of apparatus market identifications and determinations) for “80 and 81(1)” substitute “80, 80A and 81(1)”.

49. In section 87 (SMP conditions about network access etc)—

- (a) in subsection (4)(a) after “viability” insert “(including the viability of other network access products, whether provided by the dominant provider or another person)”,
- (b) at the end of subsection (4)(c) insert “(taking account of any public investment made)”,
- (c) in subsection (4)(d) after “competition” insert “(including, where it appears to OFCOM to be appropriate, economically efficient infrastructure based competition)”, and
- (d) after subsection (5) insert—

“(5A) The SMP conditions authorised by this section also include a condition which—

- (a) is of a technical or operational nature; and
- (b) appears to OFCOM to be appropriate for securing the proper operation of an electronic communications network in compliance with a condition under subsection (3).

(5B) A condition falling within subsection (5A) may provide that compliance with the condition is not required unless a person on whom an entitlement is or may be conferred in pursuance of a requirement imposed by a condition under subsection (3) fulfils such technical or operational requirements as may be specified by OFCOM.

(5C) It shall be the duty of OFCOM, when setting a condition falling within subsection (5A), to ensure that it contains all such provision as they consider appropriate for the purpose of taking account of the relevant international standards.”

50. After section 89 insert—

“Functional separation

89A.—(1) This section applies where—

- (a) OFCOM have made a determination that a person (“the dominant provider”) has significant market power in an identified services market;
- (b) that person is the provider of a public electronic communications network or a person who makes available facilities that are associated facilities by reference to such a network;
- (c) it appears to OFCOM that the setting of conditions applying to the dominant provider under section 87 (and, where OFCOM think it appropriate, section 88) has failed to address competition problems identified by OFCOM in carrying out a market analysis for the purpose of setting or modifying those conditions; and
- (d) OFCOM have identified important and persisting competition problems or market failures in relation to the provision of network access.

(2) OFCOM may set an SMP services condition (referred to in this section and section 89B as a “functional separation condition”) requiring the dominant provider to transfer activities relating to the provision of network access to an independently operating business entity which is a part of the dominant provider.

(3) Where a functional separation condition is imposed on the dominant provider, the products or services specified in the condition must be given to the dominant provider and to other persons—

- (a) on the same timescales, terms and conditions, including those relating to price and service levels, and
- (b) by means of the same systems and processes.

(4) A functional separation condition must, where relevant, specify—

- (a) the precise nature and level of separation, specifying in particular the legal status of the entity to which activities are transferred;
- (b) an identification of the assets of that entity and the products or services to be supplied by it;
- (c) the governance arrangements (including incentive structures) to ensure the independence of the staff employed in that entity;
- (d) rules for ensuring compliance with the obligations imposed by the condition;
- (e) rules for ensuring transparency of operational procedures, in particular towards persons, other than the dominant provider, who in OFCOM’s opinion are likely to be affected by the condition; and
- (f) a monitoring programme to ensure compliance, including a requirement for the publication of an annual report.

Functional separation conditions: consultation and notification

89B.—(1) Where OFCOM propose to apply a functional separation condition to a person, they must submit their proposal, including the draft functional separation condition, to the European Commission.

(2) The proposal must set out—

- (a) evidence justifying the conclusions mentioned in section 89A(1)(c) and (d);
- (b) a reasoned assessment that there is little or no prospect of effective and sustainable infrastructure based competition within a reasonable time frame;
- (c) an analysis of the expected impact of the condition on—
 - (i) OFCOM;
 - (ii) the person on whom the condition is to be imposed;
 - (iii) the staff of the entity to which activities are to be transferred;
 - (iv) the electronic communications sector as a whole;
 - (v) incentives to invest in the electronic communications sector, particularly with regard to the need to ensure social and territorial cohesion;
 - (vi) competition in the services market affected by the condition; and
 - (vii) other persons who in OFCOM’s opinion are likely to be affected by the condition, including, in particular, consumers; and
- (d) an analysis of the reasons why a functional separation condition would be the most effective means of addressing important and persisting competition problems or market failures identified by OFCOM.

(3) OFCOM may set the functional separation condition and apply it to a person if—

- (a) the Commission has approved the imposition on the person of the obligations contained in the condition, and
- (b) OFCOM have considered the impact that the obligations contained in the condition and approved by the Commission are likely to have on SMP services conditions set in relation to the services markets which, in OFCOM’s opinion, will be affected by the proposed condition.

(4) A proposal for a functional separation condition is to be submitted to the European Commission under this section before OFCOM carry out a consultation under section 48A in relation to the condition.

Obligation to notify OFCOM of voluntary separation

89C.—(1) This section applies where—

- (a) OFCOM have made a determination that a person (“the dominant provider”) has significant market power in an identified services market;
- (b) the dominant provider is the provider of a public electronic communications network or a person who makes associated facilities available; and
- (c) the dominant provider decides to transfer a substantial part or all of the dominant provider’s local access network assets to an independently operating business entity (which may be a part of the dominant provider or another person) for the purpose specified in subsection (2).

(2) That purpose is to use the assets to provide products or services to the dominant provider and to other persons—

- (a) on the same timescales, terms and conditions, including those relating to price and service levels; and
- (b) by means of the same systems and processes.

(3) The dominant provider must notify OFCOM of—

- (a) the decision to transfer the assets;
- (b) any changes to its intentions; and
- (c) the taking effect of the transfer.

(4) Where OFCOM receive a notification under this section, they must, as soon as reasonably practicable, consider the impact that the transfer is likely to have on SMP services conditions set in relation to the services markets which, in OFCOM's opinion, will be affected by the proposed transfer."

51. Omit section 90.

52. In section 91 (conditions relating to end-users)—

- (a) in subsection (3)(b) for "90" substitute "89", and
- (b) omit subsection (7).

53. Omit section 92.

54. In section 94 (notification of contravention of conditions)—

- (a) in subsection (1) for "a condition set under section 45" substitute "an SMP apparatus condition", and
- (b) in the heading, before "conditions" insert "SMP apparatus".

55. After section 96 insert—

"Notification of contravention of condition other than SMP apparatus condition

96A.—(1) Where OFCOM determine that there are reasonable grounds for believing that a person is contravening, or has contravened, a condition (other than an SMP apparatus condition) set under section 45, they may give that person a notification under this section.

(2) A notification under this section is one which—

- (a) sets out the determination made by OFCOM;
- (b) specifies the condition and contravention in respect of which that determination has been made;
- (c) specifies the period during which the person notified has an opportunity to make representations;
- (d) specifies the steps that OFCOM think should be taken by the person in order to—
 - (i) comply with the condition;
 - (ii) remedy the consequences of the contravention;
- (e) specifies any penalty which OFCOM are minded to impose in accordance with section 96B;
- (f) where the contravention is serious, specifies any direction which OFCOM are minded to give under section 100; and
- (g) where the contravention relates to a condition set under sections 87 to 91, specifies any direction which OFCOM are minded to give under section 100A.

(3) A notification under this section—

- (a) may be given in respect of more than one contravention; and
- (b) if it is given in respect of a continuing contravention, may be given in respect of any period during which the contravention has continued.

(4) Where a notification under this section has been given to a person in respect of a contravention of a condition, OFCOM may give a further notification in respect of the same contravention of that condition if, and only if—

- (a) the contravention is one occurring after the time of the giving of the earlier notification;

- (b) the contravention is a continuing contravention and the subsequent notification is in respect of so much of a period as falls after a period to which the earlier notification relates; or
 - (c) the earlier notification has been withdrawn without a penalty having been imposed in respect of the notified contravention.
- (5) OFCOM must not give a notification under this section in a case in which—
- (a) they decide that a more appropriate way of proceeding in relation to the contravention in question would be under the Competition Act 1998; and
 - (b) they publish a statement to that effect in such manner as they consider appropriate for bringing their decision to the attention of the persons who, in their opinion, are likely to be affected by it.

Penalties for contravention of conditions

96B.—(1) This section applies where a person is given a notification under section 96A which specifies a proposed penalty.

(2) Where the notification relates to more than one contravention, a separate penalty may be specified in respect of each contravention.

(3) Where the notification relates to a continuing contravention, no more than one penalty may be specified in respect of the period of contravention specified in the notification.

(4) But, in relation to a continuing contravention, a penalty may be specified in respect of each day on which the contravention continues after—

- (a) the giving of a confirmation decision under section 96C(4)(c) which requires immediate action; or
- (b) the expiry of any period specified in the confirmation decision for complying with a requirement so specified.

(5) The amount of a penalty under subsection (4) is to be such amount not exceeding £20,000 per day as OFCOM determine to be—

- (a) appropriate; and
- (b) proportionate to the contravention in respect of which it is imposed.

Enforcement of notification under section 96A

96C.—(1) This section applies where—

- (a) a person has been given a notification under section 96A;
- (b) OFCOM have allowed the person an opportunity to make representations about the matters notified; and
- (c) the period allowed for the making of representations has expired.

(2) OFCOM may—

- (a) give the person a decision (a “confirmation decision”) confirming the imposition of requirements on the person, or the giving of a direction to the person, or both, in accordance with the notification under section 96A; or
- (b) inform the person that they are satisfied with the person’s representations and that no further action will be taken.

(3) OFCOM may not give a confirmation decision to a person unless, after considering any representations, they are satisfied that the person has, in one or more of the respects notified, been in contravention of a condition specified in the notification under section 96A.

(4) A confirmation decision—

- (a) must be given to the person without delay;

- (b) must include reasons for the decision;
- (c) may require immediate action by the person to comply with requirements of a kind mentioned in section 96A(2)(d), or may specify a period within which the person must comply with those requirements; and
- (d) may require the person to pay—
 - (i) the penalty specified in the notification under section 96A, or
 - (ii) such lesser penalty as OFCOM consider appropriate in the light of the person’s representations or steps taken by the person to comply with the condition or remedy the consequences of the contravention, and
 may specify the period within which the penalty is to be paid.

(5) It is the duty of the person to comply with any requirement imposed by a confirmation decision.

(6) That duty is enforceable in civil proceedings by OFCOM—

- (a) for an injunction;
- (b) for specific performance of a statutory duty under section 45 of the Court of Session Act 1988; or
- (c) for any other appropriate remedy or relief.

(7) A penalty imposed by a confirmation decision—

- (a) must be paid to OFCOM; and
- (b) if not paid within the period specified by them, is to be recoverable by them accordingly.”

56. In section 97 (amount of penalty)—

- (a) in subsection (1) after “section 96” insert “or notified under section 96A (other than a penalty falling within section 96B(4))”,
- (b) in subsections (1), (2)(a) and (5), for “notified provider” substitute “person”,
- (c) in subsection (2) for “that determination” substitute “a determination in relation to a penalty imposed under section 96”,
- (d) in subsection (5), in paragraph (a) of the definition of “relevant period” after “94” insert “or 96A”,
- (e) in subsection (7) after “95” insert “or a confirmation decision under section 96C”,
- (f) omit subsection (8), and
- (g) in the heading after “s. 96” insert “or 96A”.

57. In section 98 (power to deal with urgent cases)—

- (a) in subsection (1)(a) for “94” substitute “96A”, and omit “other than an SMP apparatus condition”,
- (b) omit subsection (3), and
- (c) in subsection (4) omit “also”.

58. In section 99 (confirmation of directions under section 98)—

- (a) in subsection (2), after “ended” insert “(and in any event within 3 months beginning with the day on which the direction under section 98(4) was given)”, and
- (b) after subsection (2) insert—

“(2A) The period of 3 months mentioned in subsection (2) may be extended by up to 3 months if OFCOM—

 - (a) require additional time to consider representations received; or
 - (b) decide that it is necessary to obtain additional information from the person in order to make a determination under subsection (2).”

59. In section 100 (suspending service provision for contravention of conditions)—

(a) for subsection (1) substitute—

“(1) OFCOM may give a direction under this section to a person where—

- (a) either Condition A or Condition B is satisfied in relation to the person; and
- (b) the giving of a direction is appropriate and proportionate to the contravention in respect of which it is imposed.

(1A) Condition A is that—

- (a) the person is in serious contravention of a condition set under section 45, other than SMP apparatus conditions; and
- (b) the proposed direction has been notified to the person under section 96A and confirmed by a confirmation decision under section 96C.

(1B) Condition B is that—

- (a) the person has repeatedly contravened a condition set under section 45, other than SMP apparatus conditions; and
- (b) an attempt, by the imposition of penalties or the giving of notifications under section 96A and confirmation decisions under section 96C, or both, to secure compliance with the contravened conditions has failed.

(1C) Where Condition A is satisfied, a direction under this section is given where OFCOM give a confirmation decision under section 96C to the person in respect of a direction proposed in a notification under section 96A.

(1D) Where Condition B is satisfied, a direction under this section is to be given in accordance with the procedure set out in section 102.”,

(b) in subsections (2)(a), (4)(b) and (5)(a) for “contravening provider” substitute “person”, and

(c) in subsection (7)—

(i) for paragraph (a) substitute—

“(a) in the case of a previous notification of a contravention given to that person under section 96A, OFCOM have given a confirmation decision to that person under section 96C(2) in respect of the contravention;”,

(ii) for paragraph (b) substitute—

“(b) in the period of 24 months following the giving of that confirmation decision, one or more further confirmation decisions have been given to the person in respect of contraventions of a condition under section 45;”, and

(iii) in paragraph (c) for “notification” substitute “confirmation decision”.

60. After section 100 insert—

“Suspending service provision for breach of SMP services condition

100A.—(1) OFCOM may give a direction under this section to a person who provides a public electronic communications network, or a person who makes available facilities that are associated facilities by reference to such a network, if OFCOM are satisfied that—

- (a) the person is or has been in contravention of conditions set under sections 87 to 91; and
- (b) the provision of an electronic communications service by the person on that public electronic communications network could result in significant harm to competition.

(2) A direction under this section is given where OFCOM give a confirmation decision under section 96C to the person in respect of a direction proposed in a notification under section 96A.

- (3) A direction under this section is—
 - (a) a direction that the entitlement of the person to provide an electronic communications service over the public electronic communications network to which the contravened condition relates is suspended (either generally or in relation to particular services); or
 - (b) a direction that the person may not begin to provide an electronic communications service over the public electronic communications network to which the contravened provision relates.
- (4) A direction under this section—
 - (a) must specify the electronic communications services to which it relates, and
 - (b) takes effect for an indefinite period beginning with the time at which a confirmation decision relating to the direction is given to the person under section 96C.
- (5) A direction under this section—
 - (a) may provide for a suspension or prohibition to take effect only at a time determined by or in accordance with the terms of the direction; and
 - (b) in connection with a suspension or prohibition contained in the direction or with the postponement of its effect, may impose such conditions on the person to whom it is given as appear to OFCOM to be appropriate for the purpose of protecting that person’s customers.
- (6) Those conditions may include a condition requiring the making of payments—
 - (a) by way of compensation for loss or damage suffered by the person’s customers as a result of the direction; or
 - (b) in respect of annoyance, inconvenience or anxiety to which they have been put in consequence of the direction.
- (7) If OFCOM consider it appropriate to do so (whether or not in consequence of representations or proposals made to them), they may revoke a direction under this section or modify its conditions—
 - (a) with effect from such time as they may direct;
 - (b) subject to compliance with such requirements as they may specify; and
 - (c) to such extent and in relation to such services, or parts of a service, as they may determine.”

61. In section 102 (procedure for directions under section 100 and 101)—

- (a) in subsection (1) after “case,” insert “or a case where Condition A in section 100 is satisfied,”
- (b) for subsection (2) substitute—
 - “(2) That period must be—
 - (a) in relation to a direction under section 100, such reasonable period as OFCOM may determine, and
 - (b) in relation to a direction under section 101, a period ending not less than one month after the day of the giving of the notification.”
- (c) after subsection (3) insert—
 - “(3A) In relation to a direction under section 100 in an urgent case, as soon as practicable after the period allowed by OFCOM for making those representations has ended (and in any event within 3 months beginning with the day on which the direction was given), they must determine—
 - (a) whether the contravention providing the grounds for the giving of the direction did occur; and

(b) whether the circumstances made it an urgent case justifying the giving of the direction.

(3B) The period of 3 months mentioned in subsection (3A) may be extended by up to 3 months if OFCOM—

(a) require additional time to consider representations received; or

(b) decide that it is necessary to obtain additional information from the person in order to make a determination under subsection (3A).”, and

(d) in subsection (6) for the definition of “contravening provider” substitute—

““contravening provider” means a person who is a communications provider or makes associated facilities available;”

62. In section 103 (enforcement of directions)—

(a) in subsection (1)(a) for “98(4) or 100” substitute “98(4), 100 or 100A”,

(b) for subsection (4) substitute—

“(4) Sections 96A to 99 apply in relation to a contravention of conditions imposed by a direction under section 98, 100 or 100A as they apply in relation to a contravention of conditions set under section 45, other than SMP apparatus conditions.

(5) Sections 94 to 96 and 97 to 99 apply in relation to a contravention of conditions imposed by a direction under section 101 as they apply in relation to a contravention of SMP apparatus conditions.”, and

(c) in the heading after “100” insert “, 100A”.

63. In section 104 (civil liability for breach of conditions etc)—

(a) after subsection (1)(b) omit “and” and insert—

“(ba) requirements imposed on the person by a notification under section 96A and a confirmation decision under section 96C; and”,

(b) in subsection (1)(c) for “or 100” substitute “, 100 or 100A”, and

(c) in the heading for “enforcement notification” substitute “confirmation decision”.

64. Omit section 105.

65. Before the cross-heading immediately before section 106, insert—

“Security of public electronic communications networks and services

Requirement to protect security of networks and services

105A.—(1) Network providers and service providers must take technical and organisational measures appropriately to manage risks to the security of public electronic communications networks and public electronic communications services.

(2) Measures under subsection (1) must, in particular, include measures to prevent or minimise the impact of security incidents on end-users.

(3) Measures under subsection (1) taken by a network provider must also include measures to prevent or minimise the impact of security incidents on interconnection of public electronic communications networks.

(4) A network provider must also take all appropriate steps to protect, so far as possible, the availability of the provider’s public electronic communications network.

(5) In this section and sections 105B and 105C—

“network provider” means a provider of a public electronic communications network, and

“service provider” means a provider of a public electronic communications service.

Requirement to notify OFCOM of security breach

105B.—(1) A network provider must notify OFCOM—

- (a) of a breach of security which has a significant impact on the operation of a public electronic communications network, and
- (b) of a reduction in the availability of a public electronic communications network which has a significant impact on the network.

(2) A service provider must notify OFCOM of a breach of security which has a significant impact on the operation of a public electronic communications service.

(3) If OFCOM receive a notification under this section, they must, where they think it appropriate, notify—

- (a) the regulatory authorities in other member States, and
- (b) the European Network and Information Security Agency (“ENISA”).

(4) OFCOM may also inform the public of a notification under this section, or require the network provider or service provider to inform the public, if OFCOM think that it is in the public interest to do so.

(5) OFCOM must prepare an annual report summarising notifications received by them under this section during the year, and any action taken in response to a notification.

(6) A copy of the annual report must be sent to the European Commission and to ENISA.

Requirement to submit to audit

105C.—(1) OFCOM may carry out, or arrange for another person to carry out, an audit of the measures taken by a network provider or a service provider under section 105A.

(2) A network provider or a service provider must—

- (a) co-operate with an audit under subsection (1), and
- (b) pay the costs of the audit.

Enforcement of obligations under sections 105A to 105C

105D.—(1) Sections 96A to 96C, 98 to 100, 102 and 103 apply in relation to a contravention of a requirement under sections 105A to 105C as they apply in relation to a contravention of a condition set under section 45, other than an SMP apparatus condition.

(2) The obligation of a person to comply with the requirements of section 105A to 105C is a duty owed to every person who may be affected by a contravention of a requirement, and—

- (a) section 104 applies in relation to that duty as it applies in relation to the duty set out in subsection (1) of that section, and
- (b) section 104(4) applies in relation to proceedings brought by virtue of this section as it applies in relation to proceedings by virtue of section 104(1)(a).

(3) The amount of a penalty imposed under sections 96A to 96C, as applied by this section, is to be such amount not exceeding £2 million as OFCOM determine to be—

- (a) appropriate; and
- (b) proportionate to the contravention in respect of which it is imposed.”

66. In section 107 (procedure for directions applying the electronic communications code)—

(a) after subsection (1) insert—

“(1A) Regulation 3 of the Electronic Communications and Wireless Telegraphy Regulations 2011 makes provision about the time within which an application under subsection (1) must be determined.”, and

(b) after subsection (3) insert—

“(3A) A modification may not be made under subsection (3) unless the modification is—

- (a) objectively justifiable, and
- (b) proportionate to what it is intended to achieve.

(3B) Before making a modification under subsection (3), OFCOM must publish a notification of the proposed modification which contains the following—

- (a) a statement of the proposal,
- (b) a statement of their reasons for the proposal, and
- (c) a statement of the period within which representations may be made to them about the proposal.

(3C) The period specified under subsection (3B)(c) must end no less than one month after the day of the publication of the notification.”

67. In section 109(2) (restrictions and conditions subject to which electronic communications code applies), after paragraph (d) insert—

“(da) the need to ensure that restrictions and conditions are objectively justifiable and proportionate to what they are intended to achieve;”.

68. In section 110 (enforcement of restrictions and conditions)—

- (a) after subsection (2)(b) omit “and”,
- (b) for subsection (2)(c) substitute—
 - “(c) specifies the period during which the person notified has an opportunity to make representations;
 - (d) specifies the steps that OFCOM think should be taken by the person in order to—
 - (i) comply with the requirement;
 - (ii) remedy the consequences of the contravention;
 - (e) specifies any penalty which OFCOM are minded to impose in accordance with section 110A; and
 - (f) where the contravention is serious, specifies any direction which OFCOM are minded to give under section 113(4).” , and
- (c) omit subsections (3) to (7) and (10).

69. After section 110 insert—

“Penalties for contravention of code restrictions

110A.—(1) This section applies where a person is given a notification under section 110 which specifies a proposed penalty.

(2) Where the notification relates to more than one contravention, a separate penalty may be specified in respect of each contravention.

(3) Where the notification relates to a continuing contravention, no more than one penalty may be specified in respect of the period of contravention specified in the notification.

(4) But, in relation to a continuing contravention, a penalty may be specified in respect of each day on which the contravention continues after—

- (a) the giving of a confirmation decision under section 111(4)(c) which requires immediate action; or
- (b) the expiry of any period specified in the confirmation decision for complying with a requirement so specified.

(5) The amount of a penalty under subsection (4) is to be such amount not exceeding £100 per day as OFCOM determine to be—

- (a) appropriate; and

(b) proportionate to the contravention in respect of which it is imposed

(6) The amount of any other penalty specified in a notification under section 110 is to be such amount not exceeding £10,000 as OFCOM determine to be—

(a) appropriate, and

(b) proportionate to the contravention in respect of which it is imposed.

(7) The Secretary of State may by order amend this section so as to substitute a different maximum penalty for the maximum penalty for the time being specified in subsection (6).

(8) No order is to be made containing provision authorised by subsection (7) unless a draft of the order has been laid before Parliament and approved by a resolution of each House.”

70. In section 111 (enforcement notification for contravention of code restrictions)—

(a) for subsections (2) and (3) substitute—

“(2) OFCOM may—

(a) give the notified provider a decision (a “confirmation decision”) confirming the imposition of requirements on the notified provider, or the giving of a direction to the notified provider, or both, in accordance with the notification under section 110; or

(b) notify the notified provider that they are satisfied with the representations and that no further action will be taken.

(3) OFCOM may not give a confirmation decision to the notified provider unless, after considering any representations, they are satisfied that the notified provider has, in one or more of the respects notified, been in contravention of a requirement specified in the notification under section 110.”,

(b) for subsection (4) substitute—

“(4) A confirmation decision—

(a) must be given to the person without delay;

(b) must include reasons for the decision;

(c) may require immediate action by the person to comply with requirements of a kind mentioned in section 110(2)(d), or may specify a period within which the person must comply with those requirements; and

(d) may require the person to pay—

(i) the penalty specified in the notification under section 110(2)(e), or

(ii) such lesser penalty as OFCOM consider appropriate in the light of the person’s representations or steps taken by the person to comply with the condition or remedy the consequences of the contravention, and

may specify the period within which the penalty is to be paid.”,

(c) in subsection (5)—

(i) for “an enforcement notification” substitute “a confirmation decision”, and

(ii) for “it” substitute “any requirement imposed by it”,

(d) after subsection (6) insert—

“(7) A penalty imposed by a confirmation decision—

(a) must be paid to OFCOM; and

(b) if not paid within the period specified by them, is to be recoverable by them accordingly.”, and

(e) in the heading, for “Enforcement notification” substitute “Confirmation decision”.

71. After section 111 insert—

“Power to deal with urgent cases

111A.—(1) This section applies where OFCOM determine—

- (a) that they are entitled to give a notification under section 110 with respect to a contravention by a person (“P”) of a requirement imposed by virtue of any restrictions or conditions under section 109;
- (b) that there are reasonable grounds for suspecting that the case is an urgent case; and
- (c) that the urgency of the case makes it appropriate for OFCOM to take action under this section.

(2) A case is an urgent case for the purposes of this section if the contravention has resulted in, or creates an immediate risk of—

- (a) a serious threat to the safety of the public, to public health or to national security;
- (b) serious economic or operational problems for persons (other than P) who are communications providers or persons who make associated facilities available; or
- (c) serious economic or operational problems for persons who make use of electronic communications networks, electronic communications services or associated facilities.

(3) OFCOM may, to the extent specified in subsection (4), give a direction suspending the application in P’s case of the electronic communications code if the electronic communications code has been applied to P by a direction under section 106.

(4) The extent of a suspension under subsection (3) must not go beyond the following applications of the code in that person’s case—

- (a) its application for the purposes of electronic communications networks, or parts of such a network, which are not yet in existence at the time of the suspension;
- (b) its application for the purposes of conduit systems, or parts of such systems, which are not yet in existence or not yet used for the purposes of electronic communications networks; and
- (c) its application for other purposes in circumstances in which the provision of an electronic communications network, or part of such a network, would not have to cease if its application for those purposes were suspended.

(5) A direction under subsection (3), except so far as it otherwise provides, shall continue in force until such time (if any) as it is withdrawn by OFCOM.

(6) Subject to subsection (7), where the application of the electronic communications code is suspended in a person’s case, the person is not entitled to exercise any right conferred by or by virtue of the code.

(7) The suspension of the application of the electronic communications code in a person’s case does not, except so far as otherwise provided by a scheme contained in an order under section 117—

- (a) affect (as between the original parties to it) any agreement entered into for the purposes of the code or any agreement having effect in accordance with it;
- (b) affect anything done under the code before the suspension of its application; or
- (c) require the removal of, or prohibit the use of, any apparatus lawfully installed on, in or over any premises before that suspension.

Confirmation of direction under section 111A

111B.—(1) As soon as reasonably practicable after giving a direction under section 111A(3), OFCOM must give the person to whom it is given—

- (a) an opportunity to make representations to them about the grounds on which it was given and its effect; and
- (b) an opportunity to propose steps to remedy the situation.

(2) As soon as practicable after the period allowed by OFCOM for making those representations has ended (and in any event within 3 months beginning with the day on which the direction was given), they must determine—

- (a) whether the contravention providing the grounds for the giving of the direction did occur; and
- (b) whether the circumstances made it an urgent case justifying the giving of the direction.

(3) The period of 3 months mentioned in subsection (2) may be extended by up to 3 months if OFCOM—

- (a) require additional time to consider representations received; or
- (b) decide that it is necessary to obtain additional information from the person in order to make a determination under subsection (2).

(4) If OFCOM decide that the contravention did occur and that the direction was justified, they may confirm the direction.

(5) If not, they must exercise their power to revoke it.

(6) As soon as reasonably practicable after determining whether to confirm the direction, OFCOM must notify the person to whom it was given of their decision.”

72. Omit section 112.

73. In section 113 (suspension of application of code)—

(a) in subsection (1)—

(i) in paragraph (a) for “serious and repeated” substitute “serious or repeated”,

(ii) after paragraph (a) insert—

“(aa) that, in the case of a single serious contravention, a notification has been given to the contravening provider under section 40 and the period for making representations under that section has expired;”,

(iii) in paragraphs (b) and (c) after “that” insert “, in the case of a repeated contravention”, and

(iv) for paragraph (d) substitute—

“(d) that the suspension of the application of the code is appropriate and proportionate to the contravention.”,

(b) in subsection (2)(b) after “100” insert “(including that section as applied by section 105D)”,

(c) in subsection (4)(b) for “repeated and serious” substitute “repeated or serious”, and

(d) after subsection (12) insert—

“(13) For the purposes of subsection (4) there are repeated contraventions by a person of conditions or restrictions under section 109 if—

(a) in the case of a previous notification given to the person under section 110, OFCOM have given a confirmation decision to the person under section 111(2);

(b) in the period of 24 months following the giving of that confirmation decision, one or more further confirmation decisions have been given to the person in respect of contraventions of a condition or restriction under section 109; and

(c) the previous confirmation decision and the subsequent ones all relate to contraventions of the same condition or restriction (whether the same contravention or different contraventions).”

74. In section 114 (procedure for directions under section 113)—

(a) in subsection (1) after “case” insert “, or a case of a single serious contravention”,

(b) for subsection (2) substitute—

“(2) That period is such reasonable period as OFCOM may specify, beginning with the day on which the notification is given.”,

(c) after subsection (3) insert—

“(3A) As soon as practicable after the period allowed by OFCOM for making those representations has ended (and in any event within 3 months beginning with the day on which the direction was given), they must determine—

- (a) whether the contravention providing the grounds for the giving of the direction did occur; and
- (b) whether the circumstances made it an urgent case justifying the giving of the direction.

(3B) The period of 3 months mentioned in subsection (3A) may be extended by up to 3 months if OFCOM—

- (a) require additional time to consider representations received; or
- (b) decide that it is necessary to obtain additional information from the person in order to make a determination under subsection (3A).

(3C) If OFCOM decide that the contravention did occur and that the direction was justified, they may confirm the direction.

(3D) If not, they must revoke it.”

75. In section 115 (modification and revocation of application of electronic communications code), after subsection (4) insert—

“(4A) A modification under this section may not be made unless the modification is—

- (a) objectively justifiable, and
- (b) proportionate to what it is intended to achieve.”

76. In section 120 (conditions regulating premium rate services)—

- (a) in subsection (5) for “Sections 47 and 48 apply” substitute “Section 47 applies” and for “they apply” substitute “it applies”, and
- (b) omit subsection (6).

77. After section 120 insert—

“Procedure for setting, modifying and revoking premium rate services conditions

120A.—(1) The way in which conditions are to be set or modified under section 120 is by the publication of a notification setting out the conditions or modifications.

(2) The way in which such a condition is to be revoked is by the publication of a notification stating that the condition is revoked.

(3) Before setting such conditions, or modifying or revoking a condition so set, OFCOM must publish a notification—

- (a) stating that they are proposing to set, modify or revoke the conditions that are specified in the notification;
- (b) setting out the effect of those conditions, modifications or revocations;
- (c) giving their reasons for making the proposal; and
- (d) specifying the period within which representations may be made to OFCOM about their proposal.

(3) That period must end no less than one month after the day of the publication of the notification.

(4) But where OFCOM are satisfied that there are exceptional circumstances justifying the use of a shorter period, the period specified as the period for making representations may be whatever shorter period OFCOM consider reasonable in those circumstances.

(5) OFCOM may give effect to the proposal, with any modifications that appear to OFCOM to be appropriate, after—

- (a) considering every representation about the proposal made to them during the period specified in the notification; and
- (b) having regard to every international obligation of the United Kingdom (if any) which has been notified to them for the purposes of this paragraph by the Secretary of State.

(6) The publication of a notification under this section must be in such manner as appears to OFCOM to be appropriate for bringing the contents of the notification to the attention of the persons who, in OFCOM's opinion, are likely to be affected by its contents.

(7) OFCOM must send a copy of every notification published under this section to the Secretary of State."

78. In section 133(6) (enforcement of directions under section 132), for "94" substitute "96A", and after "45" insert " , other than SMP apparatus conditions".

79. In section 135 (information required for purpose of OFCOM functions)—

- (a) in subsection (3)—
 - (i) omit paragraph (h), and
 - (ii) after paragraph (id) insert—
 - "(ie) assessing the security of a public electronic communications network or a public electronic communications service;
 - (if) assessing the availability of a public electronic communications network;
 - (ig) identifying electronic communications apparatus that is suitable for shared use;"
- (b) after subsection (3) insert—
 - "(3A) The descriptions of information that a person may be required to provide under subsection (1) include, in particular—
 - (a) information concerning future developments of an electronic communications network or electronic communications service that could have an impact on the wholesale services made available by the person to competitors, and
 - (b) if a market power determination made in relation to a wholesale market is in force in the person's case, accounting data relating to any retail market associated with the wholesale market."

80. In section 137 (restrictions on information requirements)—

- (a) in subsection (2)—
 - (i) after paragraph (c) omit "or", and
 - (ii) after paragraph (d) insert—
 - “; or
 - (e) the condition in question is one relating to the effective and efficient use of telephone numbers.”, and
- (b) after subsection (2) insert—
 - "(2A) OFCOM are not to require the provision of information for a purpose specified in section 135(3)(ie) or (if) unless—
 - (a) the requirement is imposed for the purpose of investigating a matter about which OFCOM have received a complaint;
 - (b) the requirement is imposed for the purposes of an investigation that OFCOM have decided to carry out into whether or not an obligation under section 105A has been complied with; or

- (c) OFCOM have reason to suspect that an obligation under section 105A has been or is being contravened.”

81. In section 138 (notification of contravention of information requirements)—

- (a) in subsection (2), omit “and” before paragraph (c) and for paragraph (c) substitute—
 - “(c) specifies the period during which the person notified has an opportunity to make representations;
 - (d) specifies the information to be provided by the person to OFCOM in order to comply with a requirement under section 135 or 136;
 - (e) specifies any penalty which OFCOM are minded to impose in accordance with section 139; and
 - (f) where the contravention is serious, specifies any direction which OFCOM are minded to give under section 140.”,
- (b) omit subsections (3) to (7) and (10), and
- (c) after subsection (9) insert—
 - “(9A) OFCOM may not give a person a notification under this section in respect of a contravention of a requirement imposed under section 135(3)(ig) if the information required was previously provided by the person to OFCOM within the period of 6 months ending with the day on which the requirement was imposed.”

82. In section 139 (penalties for contravention of information requirements)—

- (a) for subsection (1) substitute—
 - “(1) This section applies where a person is given a notification under section 138 which specifies a proposed penalty.”,
- (b) in the opening words of subsection (2) for “impose a penalty on the notified person” substitute “specify a penalty”,
- (c) omit subsection (2)(a) and (b),
- (d) in subsections (3) and (4) for “imposed” substitute “specified”,
- (e) after subsection (4) insert—
 - “(4A) But, in relation to a continuing contravention, a penalty may be specified in respect of each day on which the contravention continues after—
 - (a) the giving of a confirmation decision under section 139A(4)(c) which requires immediate action; or
 - (b) the expiry of any period specified in the confirmation decision for complying with a requirement so specified.
 - (4B) The amount of a penalty under subsection (4A) is to be such amount not exceeding £500 per day as OFCOM determine to be—
 - (a) appropriate; and
 - (b) proportionate to the contravention in respect of which it is imposed.”,
- (f) in subsection (5) for “a penalty imposed” substitute “any other penalty notified”, and
- (g) omit subsections (6) to (8).

83. After section 139 insert—

“Enforcement of notification under section 138

139A.—(1) This section applies where—

- (a) a person has been given a notification under section 138;
- (b) OFCOM have allowed the person an opportunity to make representations about the matters notified; and

- (c) the period allowed for the making of representations has expired.
- (2) OFCOM may—
- (a) give the person a decision (a “confirmation decision”) confirming the imposition of requirements on the person, or the giving of a direction to the person, or both, in accordance with the notification under section 138; or
 - (b) inform the person that they are satisfied with the person’s representations and that no further action will be taken.
- (3) OFCOM may not give a confirmation decision to a person unless, after considering any representations, they are satisfied that the person has, in one or more of the respects notified, been in contravention of a requirement notified under section 138.
- (4) A confirmation decision—
- (a) must be given to the person without delay;
 - (b) must include reasons for the decision;
 - (c) may require immediate action by the person to comply with a requirement notified under section 138(2)(d), or may specify a period within which the person must comply with the requirement; and
 - (d) may require the person to pay—
 - (i) the penalty specified in the notification under section 138, or
 - (ii) such lesser penalty as OFCOM consider appropriate in the light of the person’s representations or steps taken by the person to comply with the condition or remedy the consequences of the contravention,
 and may specify the period within which the penalty is to be paid.
- (5) It is the duty of the person to comply with any requirement imposed by a confirmation decision.
- (6) That duty is enforceable in civil proceedings by OFCOM—
- (a) for an injunction;
 - (b) for specific performance of a statutory duty under section 45 of the Court of Session Act 1988; or
 - (c) for any other appropriate remedy or relief.
- (7) A penalty imposed by a confirmation decision—
- (a) must be paid to OFCOM; and
 - (b) if not paid within the period specified by them, is to be recoverable by them accordingly.

Power to deal with urgent cases

- 139B.**—(1) This section applies where OFCOM determine—
- (a) that they are entitled to give a notification under section 138 with respect to a contravention by a person (“P”) of a requirement imposed under section 135 or 136;
 - (b) that there are reasonable grounds for suspecting that the case is an urgent case; and
 - (c) that the urgency of the case makes it appropriate for OFCOM to take action under this section.
- (2) A case is an urgent case for the purposes of this section if the contravention has resulted in, or creates an immediate risk of—
- (a) a serious threat to the safety of the public, to public health or to national security;
 - (b) serious economic or operational problems for persons (other than P) who are communications providers or persons who make associated facilities available; or

- (c) serious economic or operational problems for persons who make use of electronic communications networks, electronic communications services or associated facilities.
- (3) OFCOM may give P a direction—
 - (a) that the entitlement of P to provide electronic communications networks or electronic communications services, or to make associated facilities available, is suspended (either generally or in relation to particular networks, services or facilities); or
 - (b) that that entitlement is restricted in the respects set out in the direction.
- (4) Subsections (3) to (6) of section 140 apply in relation to a direction under subsection (3) as they apply in relation to a direction under section 140.

Confirmation of direction under section 139B

139C.—(1) As soon as reasonably practicable after giving a direction under section 139B(3), OFCOM must give the person to whom it is given—

- (a) an opportunity to make representations to them about the grounds on which it was given and its effect; and
 - (b) an opportunity to propose steps to remedy the situation.
- (2) As soon as practicable after the period allowed by OFCOM for making those representations has ended (and in any event within 3 months beginning with the day on which the direction was given), they must determine—
- (a) whether the contravention providing the grounds for the giving of the direction did occur; and
 - (b) whether the circumstances made it an urgent case justifying the giving of the direction.
- (3) The period of 3 months mentioned in subsection (2) may be extended by up to 3 months if OFCOM—
- (a) require additional time to consider representations received; or
 - (b) decide that it is necessary to obtain additional information from the person in order to make a determination under subsection (2).
- (4) If OFCOM decide that the contravention did occur and that the direction was justified, they may confirm the direction.
- (5) If not, they must exercise their power to revoke it.
- (6) As soon as reasonably practicable after deciding whether to confirm the direction, OFCOM must notify the person to whom it was given of their decision.”

84. In section 140 (suspending service provision for information contraventions)—

- (a) in subsection (1)—
 - (i) in paragraph (a) for “serious and repeated” substitute “serious or repeated”,
 - (ii) in paragraph (c), at the beginning insert “in the case of a repeated contravention,” and for “under section 139” substitute “or the giving of notifications under section 138 and confirmation decisions under section 139A, or both,” , and
 - (iii) for paragraph (d) substitute—
 - “(d) that the giving of the direction is appropriate and proportionate to the contravention in respect of which it is given.”, and
- (b) in subsection (7)—
 - (i) for paragraphs (a) and (b) substitute—

- “(a) in the case of a previous notification of a contravention given to that person under section 138, OFCOM have given a confirmation decision to that person under section 139A(2) in respect of the contravention; and
- (b) in the period of 24 months following the giving of that confirmation decision, one or more further confirmation decisions have been given to the person in respect of contraventions of numbering conditions;”, and
- (ii) in the words following paragraph (b) for “notifications” substitute “confirmation decisions”.

85. In section 142 (procedure for directions under sections 140 and 141)—

- (a) in subsection (1) after “case,” insert “or a case where a proposed direction has been notified to a person in accordance with section 138(2)(f)”,
- (b) for subsection (2) substitute—
 - “(2A) That period must be—
 - (a) in relation to a direction under section 140, such reasonable period as OFCOM may determine, and
 - (b) in relation to a direction under section 141, a period ending not less than one month after the day of the giving of the notification.”, and
 - (c) after subsection (3) insert—
 - “(3A) In relation to a direction under section 140 in an urgent case, as soon as practicable after the period allowed by OFCOM for making those representations has ended (and in any event within 3 months beginning with the day on which the direction was given), they must determine—
 - (a) whether the contravention providing the grounds for the giving of the direction did occur; and
 - (b) whether the circumstances made it an urgent case justifying the giving of the direction.
 - (3B) The period of 3 months mentioned in subsection (3A) may be extended by up to 3 months if OFCOM—
 - (a) require additional time to consider representations received; or
 - (b) decide that it is necessary to obtain additional information from the person in order to make a determination under subsection (3A).”

86. In section 143 (enforcement of directions under sections 140 and 141) for subsection (4) substitute—

- “(4) Sections 96A to 99 apply in relation to a contravention of conditions imposed by a direction under section 139B or 140 as they apply in relation to a contravention of conditions set under section 45, other than SMP apparatus conditions.
- (5) Sections 94 to 96 and 97 to 99 apply in relation to a contravention of conditions imposed by a direction under section 141 as they apply in relation to a contravention of SMP apparatus conditions.”

87. In section 144(5) (offences in connection with information requirements), for paragraph (b) substitute—

- “(b) the notification required the person to provide information, a confirmation decision has been given under section 139A in respect of that requirement and the period allowed under that decision has expired without the required information having been provided; and”.

88. After section 146 insert—

“Rights of third parties to use information without charge

146A.—(1) Any person has a right to use, free of charge, information published by a communications provider if the use is for the purpose specified in subsection (2).

(2) That purpose is to sell or make available an interactive guide or other technique for evaluating the cost of alternative usage patterns in relation to electronic communications services.”

89. Before section 151 (but after the cross-heading immediately before it) insert—

“Proposals of EU significance

150A.—(1) This section applies in relation to a proposal—

- (a) to set, modify or revoke a condition under section 45;
- (b) to give a direction, approval or consent for the purposes of such a condition;
- (c) to modify or withdraw such a direction, approval or consent;
- (d) to identify a market for the purposes of making or reviewing a market power determination; or
- (e) to make or review a market power determination.

(2) The proposal is of EU significance for the purposes of this Chapter if—

- (a) paragraph (3) of Article 7 of the Framework Directive applies, or would apply but for paragraph (9) of that Article, in relation to it;
- (b) (in a case within paragraph (a), (b) or (c) of subsection (1)) the condition is an access-related condition falling within section 73(2) or an SMP services condition;
- (c) (in a case within paragraph (d) or (e) of subsection (1)) the market in question is a services market; and
- (d) in OFCOM’s opinion it would affect trade between member States.”

90. In section 151 (interpretation of Chapter 1 of Part 2)—

- (a) in subsection (1)—
 - (i) in the definition of “the Access Directive”, at the end insert “, as amended by Directive 2009/140/EC of the European Parliament and of the Council”,
 - (ii) in the definition of “the Framework Directive”, at the end insert “, as amended by Directive 2009/140/EC of the European Parliament and of the Council”, and
 - (iii) in the definition of “the Universal Service Directive”, at the end insert “, as amended by Directive 2009/136/EC of the European Parliament and of the Council”,
- (b) in subsection (3)(b)(ii) for “a communications provider or person making available associated facilities” substitute “a person”,
- (c) after subsection (4)(b) insert—

“(ba) any electronic communications apparatus;”, and
- (d) after subsection (4) insert—

“(4A) In subsections (3)(b)(ii) and (4)(d), the references to an electronic communications service include the conveyance by means of an electronic communications network of signals, including an information society service or content service so conveyed.

(4B) In subsection (4A)—

“content service” has the meaning given by section 32(7), and

“information society service” has the meaning given by Article 2(a) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.”

91. In section 185 (reference of disputes to OFCOM)—

- (a) in subsection (1) omit paragraphs (d) and (e),
- (b) after subsection (1) insert—

“(1A) This section also applies in the case of a dispute relating to the provision of network access if—

- (a) it is a dispute between a communications provider and a person who is identified, or is a member of a class identified, in a condition imposed on the communications provider under section 45; and
 - (b) the dispute relates to entitlements to network access that the communications provider is required to provide to that person by or under that condition.”,
- (c) in subsection (2)(a) for the words from “this Part or” to the end, substitute “a condition set under section 45, or any of the enactments relating to the management of the radio spectrum”, and
 - (d) in subsection (7), omit paragraphs (b) to (d).

92. After section 185, insert—

“Power of OFCOM to invite parties to refer dispute

185A. OFCOM may invite any one or more of the parties to a dispute falling within section 185(1) to refer the dispute to OFCOM under section 185(3).”

93. In section 186 (action by OFCOM on dispute reference)—

- (a) after subsection (2) insert—

“(2A) In relation to a dispute falling within subsection 185(1), OFCOM may in particular take into account their priorities and available resources in considering whether it is appropriate for them to handle the dispute.”, and

- (b) at the beginning of subsections (3) and (6) insert “In relation to a dispute falling within section 185(1A) or (2).”.

94. In section 189 (disputes involving other member States)—

- (a) in subsection (1), after “Chapter” insert “(other than a dispute falling within section 185(1))”,

- (b) in subsection (4), for the words from “must” to the end substitute—

“(a) must co-ordinate their efforts with the other regulatory authorities within whose jurisdiction the matter falls,

(b) may consult BEREC in order to bring about a consistent resolution of the dispute, and

(c) may request BEREC to adopt an opinion as to the action to be taken to resolve the dispute.”,

- (c) after subsection (5) insert—

“(5A) Where an opinion is received from BEREC in relation to the reference or dispute, it shall be the duty of OFCOM to secure that steps taken in relation to the reference or dispute take account of the opinion (whether the opinion was requested by OFCOM or by the other regulatory authorities).”, and

- (d) after subsection (6) insert—

“(7) OFCOM must—

- (a) ensure, so far as practicable, that a period agreed under subsection (6) is long enough for BEREC to provide an opinion, if one has been requested by OFCOM or by the other regulatory authorities, and

- (b) agree to any necessary extension of the period if an opinion is requested from BEREC (by OFCOM or by the other regulatory authorities) after the period has been agreed.

(8) Subsection (7) does not apply if the dispute in question has resulted in, or creates an immediate risk of—

- (a) a serious threat to the safety of the public, to public health or to national security;
- (b) serious economic or operational problems for persons who are communications providers or persons who make associated facilities available; or
- (c) serious economic or operational problems for persons who make use of electronic communications networks, electronic communications services or associated facilities, or for other users of the radio spectrum.”

95. In section 190 (resolution of referred disputes)—

- (a) after subsection (2) insert—

“(2A) In relation to a dispute falling within section 185(1), OFCOM must exercise their powers under subsection (2) in the way that seems to them most appropriate for the purpose of securing—

- (a) efficiency;
- (b) sustainable competition;
- (c) efficient investment and innovation; and
- (d) the greatest possible benefit for the end-users of public electronic communications services.”,

- (b) in subsection (6), after paragraph (b) insert—

“and may determine the amount of the costs and when the costs are to be paid.”,

- (c) after subsection (6) insert—

“(6A) OFCOM may not, under subsection (6)(a), require a party to the dispute to make payments to another party unless OFCOM have considered—

- (a) the conduct of the party before and after the reference to OFCOM (including, in particular, whether any attempt has been made to resolve the dispute), and
- (b) whether OFCOM has made a decision in the party’s favour in respect of the whole or a part of the dispute.

(6B) OFCOM may not, under subsection (6)(b), require payments to be made to them by a party to the dispute unless—

- (a) the dispute relates to the rights and obligations of the parties to the dispute under the enactments relating to the management of the radio spectrum, or
- (b) they have considered the matters referred to in subsection (6A)(a) and (b).”, and

- (d) omit subsection (7).

96. In section 191 (OFCOM’s power to require information in connection with dispute), omit subsection (6).

97. In section 393(6) (exceptions from general restrictions on disclosure of information)—

- (a) after paragraph (a) insert—

“(aa) limits the information that may be made available under section 76A;”, and

- (b) in paragraph (d) for “or made public” substitute “, made public or made available”.

98. In section 395 (notifications and documents in electronic form) after subsection (6) insert—

“(6A) Subsections (5) and (6) do not apply in relation to a notification or other document given by OFCOM under Part 1 or Chapter 1 of Part 2 to the European Commission, BEREC or the regulatory authorities of member States (within the meaning of that Chapter).”

99. In section 405(1) (general interpretation), after the definition of “the BBC” insert—
““BEREC” means the Body of European Regulators for Electronic Communications;”.

100. In Schedule 18 (transitional provisions)—

(a) in paragraph 9 (continuation notices), after sub-paragraph (14) insert—

“(14A) Sections 185 to 191 apply to a dispute relating to a provision of a kind mentioned in paragraph (4), other than a dispute relating to provision that OFCOM have power to include in SMP apparatus conditions, as they apply to disputes of a kind mentioned in subsections (1A) and (2) of section 185.”, and

(b) in paragraph 13(8) (enforcement: breaches of licence conditions) at the end insert “, as amended by Directive 2009/140/EC of the European Parliament and of the Council”.

Marine and Coastal Access Act 2009

101. In section 69 of the Marine and Coastal Access Act 2009(a) (determination of applications), after subsection (5) insert—

“(5A) Regulation 3 of the Electronic Communications and Wireless Telegraphy Regulations 2011 makes provision about the time within which certain applications under this section for the granting of rights to install facilities must be determined.”

Marine (Scotland) Act 2010

102. In section 27 of the Marine (Scotland) Act 2010(b) (determination of applications), after subsection (6) insert—

“(6A) Regulation 3 of the Electronic Communications and Wireless Telegraphy Regulations 2011 makes provision about the time within which certain applications under this section for the granting of rights to install facilities must be determined.”

(a) 2009 c. 23.
(b) 2010 asp 5.

SCHEDULE 2

Regulation 2(2)

Amendments to Wireless Telegraphy Act 2006

1. Amend the Wireless Telegraphy Act 2006(a) as follows.
2. In section 2 (United Kingdom Plan for Frequency Authorisation), after subsection (2) insert—

“(3) Before publishing the plan, OFCOM must ensure that the criteria applied to determine the allocation of frequencies for particular purposes are—

 - (a) objectively justifiable in relation to the frequencies or uses to which they relate,
 - (b) not such as to discriminate unduly against particular persons or against a particular description of persons;
 - (c) proportionate to what they are intended to achieve; and
 - (d) in relation to what they are intended to achieve, transparent.”
3. In section 6 (procedure for directions), after subsection (3) insert—

“(3A) Before making an order under section 5, the Secretary of State must take due account of the desirability of not favouring—

 - (a) one form of electronic communications network, electronic communications service or associated facility, or
 - (b) one means of providing or making available such a network, service or facility, over another.”
4. In section 8 (licences and exemptions)—
 - (a) after subsection (3) insert—

“(3A) OFCOM may not make regulations under subsection (3) specifying terms, provisions or limitations in relation to the establishment, installation or use of wireless telegraphy stations or wireless telegraphy apparatus for the provision of an electronic communications network or electronic communications service unless the terms, provisions or limitations are of a kind falling within Part A of the Annex to Directive 2002/20/EC of the European Parliament and of the Council.

(3B) Terms, provisions and limitations specified in regulations under subsection (3) must be—

 - (a) objectively justifiable in relation to the wireless telegraphy stations or wireless telegraphy apparatus to which they relate,
 - (b) not such as to discriminate unduly against particular persons or against a particular description of persons,
 - (c) proportionate to what they are intended to achieve, and
 - (d) in relation to what they are intended to achieve, transparent.”,
 - (b) in subsection (4) for “the condition in subsection (5) is” substitute “the conditions in subsection (5) are”, and
 - (c) for subsection (5) substitute—

“(5) The conditions are that the use of stations or apparatus of that description is not likely to —

 - (a) involve undue interference with wireless telegraphy;
 - (b) have an adverse effect on technical quality of service;

(a) 2006 c. 36

- (c) lead to inefficient use of the part of the electromagnetic spectrum available for wireless telegraphy;
- (d) endanger safety of life;
- (e) prejudice the promotion of social, regional or territorial cohesion; or
- (f) prejudice the promotion of cultural and linguistic diversity and media pluralism.”

5. After section 8 insert—

“Review of long licences

8A.—(1) Subsection (2) applies in respect of a wireless telegraphy licence where—

- (a) the licence is granted for a period of 10 years or more; and
- (b) the rights and obligations under it may not be transferred to another person.

(2) OFCOM must, at such intervals as they consider appropriate, or at the reasonable request of the holder of the licence—

- (a) review whether the conditions in section 8(5) are met in relation to the use of a wireless telegraphy station or wireless telegraphy apparatus under the licence, and
- (b) if the conditions are met, make regulations under section 8(3) exempting the establishment, installation or use of stations or apparatus of that description from section 8(1).

(3) The first review under this section, and the making of any regulations under section 8(3) in consequence of the review, must be completed on or before 19 December 2011.

Restriction on grant of exclusive licence

8B.—(1) OFCOM may not grant an exclusive licence unless a condition in subsection (2) is met.

(2) Those conditions are—

- (a) that it is necessary to grant an exclusive licence in order to protect safety of life services, or
- (b) that there are other exceptional circumstances which, in OFCOM’s opinion, justify the grant of an exclusive licence in order to ensure a general interest objective.

(3) The general interest objectives are—

- (a) safety of life;
- (b) the promotion of social, regional or territorial cohesion;
- (c) avoidance of inefficient use of frequencies;
- (d) the promotion of cultural and linguistic diversity and media pluralism;
- (e) fulfilment of a requirement under the ITU Radio Regulations.

(4) In subsection (3) “the ITU Radio Regulations” means the radio regulations of the International Telecommunication Union.

(5) If OFCOM grant an exclusive licence they must—

- (a) at such intervals as they consider appropriate, review whether a condition in subsection (2) continues to be met, and
- (b) publish the outcome of the review in such manner as they think fit.

(6) In this section and section 8C, “exclusive licence” means a wireless telegraphy licence which includes a term conferring exclusive rights on the holder to use a frequency specified in the licence (throughout the United Kingdom or in a specified part of the United Kingdom).

Consultation before grant of exclusive licence

8C.—(1) This section applies where—

- (a) OFCOM propose to grant an exclusive licence, and
- (b) they think that the grant of the licence would have a significant impact on a market for the use of the electromagnetic spectrum for wireless telegraphy in relation to which OFCOM have functions under the enactments relating to the management of the radio spectrum.

(2) Before granting the licence OFCOM must publish, in such manner as they think fit, notice of their intention to grant the licence.

(3) The notice must specify—

- (a) OFCOM’s reasons for proposing to grant an exclusive licence, and
- (b) the period within which representations may be made to OFCOM.

(4) The period specified under subsection (3)(b) may not be less than one month beginning with the day on which the notice is published.”

6. In section 9 (terms, provisions and limitations) —

(a) after subsection (1) insert—

“(1A) But a licence in relation to the establishment, installation or use of wireless telegraphy stations or wireless telegraphy apparatus for the provision of an electronic communications network or electronic communications service may not be made subject to a term, provision or limitation unless the term, provision or limitation is of a kind falling within Part B of the Annex to Directive 2002/20/EC of the European Parliament and of the Council.”, and

(b) in subsection (8) after “subject to” insert “section 9ZA and to”.

7. After section 9 insert—

“Restrictions on imposition of limitations etc under section 9

9ZA.—(1) OFCOM may grant a wireless telegraphy licence subject to a limitation on the nature of a station that may be established or used, or the apparatus that may be installed or used, only if the limitation is necessary for a purpose specified in subsection (2).

(2) Those purposes are—

- (a) avoiding undue interference with wireless telegraphy;
- (b) the protection of public health against electromagnetic fields;
- (c) ensuring technical quality of service;
- (d) ensuring maximisation of frequency sharing;
- (e) safeguarding the efficient management and use of the part of the electromagnetic spectrum available for wireless telegraphy;
- (f) ensuring the fulfilment of a general interest objective.

(3) OFCOM may grant a wireless telegraphy licence incorporating a provision requiring the use of a specified frequency for the activity authorised by the licence only if the requirement is imposed in order to ensure the fulfilment of a general interest objective.

(4) In this section “general interest objective” has the meaning given by section 8B(3).

(5) Subsection (6) applies where OFCOM think that the imposition of a limitation or provision within subsection (1) or (3) in relation to a wireless telegraphy licence would have a significant impact on a market for the use of the electromagnetic spectrum for wireless telegraphy in relation to which OFCOM have functions under the enactments relating to the management of the radio spectrum.

(6) Before deciding whether to impose the limitation or provision, OFCOM must consult the applicant for the licence and must take any representations into account.

(7) If OFCOM have imposed limitations or provisions under subsection (1) or (3) in relation to a wireless telegraphy licence, they must, at such intervals as they consider appropriate—

- (a) review whether those limitations or provisions are necessary, and
- (b) publish the outcome of the review in such manner as they think fit.

(8) But subsection (7) does not apply to a provision requiring the use of a specified frequency for the activity authorised by the licence where the licence holder has an opportunity to ask for a different frequency to be specified.

Review of pre-26 May 2011 limitations etc.

9ZB.—(1) This section applies where OFCOM have imposed limitations or provisions of a kind falling within section 9ZA(1) or (3) in relation to a wireless telegraphy licence granted on or before 25 May 2011.

(2) As soon as reasonably practicable after 26 May 2016, OFCOM must review such limitations or provisions with a view to determining whether, if the licence had been granted after 25 May 2011, section 9ZA would have prevented OFCOM from imposing the limitation or provision.

(3) If OFCOM concludes that section 9ZA would have prevented the imposition of a limitation or provision, it must vary the licence in order to remove the limitation or provision.

(4) This section does not apply in relation to a provision requiring the use of a specified frequency for the activity authorised by the licence where the licence holder has an opportunity to ask for a different frequency to be specified.”

8. In section 14 (bidding for licences)—

- (a) in subsection (3)(h), after “granted” insert “(but this is subject to subsection (3A))”, and
- (b) after subsection (3) insert—

“(3A) If a provision of section 8B, 9(1A) or 9ZA would prevent OFCOM from specifying a term, provision or limitation on the grant of a wireless telegraphy licence, regulations may not specify the term, provision or limitation.

(3B) OFCOM must satisfy themselves, in making regulations specifying criteria to be taken into account in deciding whether, or to whom, to grant a licence, that the criteria are—

- (a) objectively justifiable in relation to the frequencies or uses to which they relate,
- (b) not such as to discriminate unduly against particular persons or against a particular description of persons,
- (c) proportionate to what they are intended to achieve, and
- (d) in relation to what they are intended to achieve, transparent.”

9. In section 30 (spectrum trading)—

- (a) after subsection (1) insert—

“(1A) Where the European Commission identifies a frequency under article 9b(3) of Directive 2002/21/EC of the European Parliament and of the Council, OFCOM must ensure that regulations under subsection (1) authorise the transfer of a licence or grant relating to that frequency.”,

- (b) at the end of subsection (3)(d) insert “, or in any other way”,
- (c) for subsection (3)(i) substitute—

- “(i) impose requirements, of a kind specified in the regulations, as to the procedure to be followed for a transfer and, in particular, as to the notification about a transfer falling within subsection (2)(b) that must be given to OFCOM, both in advance of its being made and afterwards;”
 - (d) after subsection (3) insert—
 - “(3A) Regulations must make provision as to the notification about a transfer falling within subsection (2)(a) which is to be given to OFCOM and published, both in advance of the transfer being made and afterwards.”, and
 - (e) in subsection (5)(a) omit the words from “granted before” to the end.
10. After section 32 insert—

“Information required for purposes of radio spectrum functions

32A.—(1) OFCOM may require a person falling within subsection (2) to provide them with all such information as they consider necessary for the purpose of carrying out their radio spectrum functions.

(2) The persons falling within this subsection are—

- (a) a person who is using, or has established, installed or used a wireless telegraphy station or wireless telegraphy apparatus, and
- (b) any other person who appears to OFCOM to have information required by them for the purposes of their radio spectrum functions.

(3) The information that may be required by OFCOM under subsection (1) includes, in particular, information that they require to ascertain whether a contravention has occurred of—

- (a) a term, provision or limitation specified in regulations under section 8, or
- (b) a term, provision or limitation of a wireless telegraphy licence.

(4) A person required to provide information under this section must provide it in such manner and within such reasonable period as may be specified by OFCOM.

(5) The powers in this section are subject to the limitations in section 32B.

Restrictions on imposing information requirements

32B.—(1) This section limits the purposes for which, and manner in which, information may be required under section 32A.

(2) OFCOM are not to require the provision of information for the purpose of ascertaining whether a contravention of a term, provision or limitation has occurred or is occurring, unless—

- (a) the requirement is imposed for the purpose of investigating a matter about which OFCOM have received a complaint;
- (b) the requirement is imposed for the purposes of an investigation that OFCOM have decided to carry out into whether or not the term, provision or limitation in question has been complied with;
- (c) the term, provision or limitation in question is one which OFCOM have reason to suspect has been or is being contravened;
- (d) the term, provision or limitation in question relates to the effective and efficient use of frequencies; or
- (e) the term, provision or limitation in question relates to sums payable to OFCOM in respect of a wireless telegraphy licence.

(3) OFCOM are not to require the provision of information except—

- (a) by a demand for the information that describes the required information and sets out OFCOM's reasons for requiring it; and
 - (b) where the making of a demand for the information is proportionate to the use to which the information is to be put in the carrying out of OFCOM's functions.
- (4) A demand for information must be contained in a notice served on the person from whom the information is required.

Notification of contravention of information requirements

32D.—(1) Where OFCOM determine that there are reasonable grounds for believing that a person is contravening, or has contravened, a requirement imposed under section 32A, they may give that person a notification under this section.

- (2) A notification under this section is one which—
 - (a) sets out the determination made by OFCOM;
 - (b) specifies the requirement and contravention in respect of which the determination has been made;
 - (c) specifies the period during which the person notified has an opportunity to make representations;
 - (d) specifies information to be provided by the person to OFCOM; and
 - (e) specifies any penalty which OFCOM are minded to impose in accordance with section 32D.
- (3) A notification under this section—
 - (a) may be given in respect of more than one contravention; and
 - (b) if it is given in respect of a continuing contravention, may be given in respect of any period during which the contravention has continued.
- (4) Where a notification under this section has been given to a person in respect of a contravention of a requirement, OFCOM may give a further notification in respect of the same contravention of that requirement if, and only if—
 - (a) the contravention is one occurring after the time of the giving of the earlier notification;
 - (b) the contravention is a continuing contravention and the subsequent notification is in respect of so much of a period as falls after a period to which the earlier notification relates; or
 - (c) the earlier notification has been withdrawn without a penalty having been imposed in respect of the notified contravention.

Penalties for contravention of information requirements

32D.—(1) This section applies where a person is given a notification under section 32C which specifies a proposed penalty.

(2) OFCOM may specify a penalty only if no proceedings for an offence under section 33 have been brought against the person in respect of the contravention.

(3) Where the notification relates to more than one contravention, a separate penalty may be specified in respect of each contravention.

(4) Where the notification relates to a continuing contravention, no more than one penalty may be specified in respect of the period of contravention specified in the notification.

(5) But, in relation to a continuing contravention, a penalty may be specified in respect of each day on which the contravention continues after—

- (a) the giving of a confirmation decision under section 32E(4)(c) which requires immediate action; or

- (b) the expiry of any period specified in the confirmation decision for complying with a requirement so specified.
- (6) The amount of a penalty under subsection (5) is to be such amount not exceeding £20,000 per day as OFCOM determine to be—
 - (a) appropriate; and
 - (b) proportionate to the contravention in respect of which it is imposed
- (7) The amount of any other penalty specified under this section is to be such amount not exceeding £2 million as OFCOM determine to be both—
 - (a) appropriate; and
 - (b) proportionate to the contravention in respect of which it is imposed.

Enforcement of notification under section 32C

- 32E.**—(1) This section applies where—
- (a) a person has been given a notification under section 32C;
 - (b) OFCOM have allowed the person an opportunity to make representations about the matters notified; and
 - (c) the period allowed for the making of representations has expired.
- (2) OFCOM may—
- (a) give the person a decision (a “confirmation decision”) confirming the imposition of requirements in accordance with the notification under section 32C; or
 - (b) inform the person that they are satisfied with the person’s representations and that no further action will be taken.
- (3) OFCOM may not give a confirmation decision to a person unless, after considering any representations, they are satisfied that the person has, in one or more of the respects notified, been in contravention of a requirement notified under section 32C.
- (4) A confirmation decision—
- (a) must be given to the person without delay;
 - (b) must include reasons for the decision;
 - (c) may require immediate action by the person to comply with a requirement notified under section 32C, or may specify a period within which the person must comply with the requirement; and
 - (d) may require the person to pay—
 - (i) the penalty specified in the notification under section 32C, or
 - (ii) such lesser penalty as OFCOM consider appropriate in the light of the person’s representations or steps taken by the person to comply with the requirement or remedy the consequences of the contravention,
 and may specify the period within which the penalty is to be paid.
- (5) It is the duty of the person to comply with any requirement imposed by a confirmation decision.
- (6) That duty is enforceable in civil proceedings by OFCOM—
- (a) for an injunction;
 - (b) for specific performance of a statutory duty under section 45 of the Court of Session Act 1988; or
 - (c) for any other appropriate remedy or relief.
- (7) A penalty imposed by a confirmation decision—
- (a) must be paid to OFCOM; and

(b) if not paid within the period specified by them, is to be recoverable by them accordingly.”

11. In section 33 (offence of failing to provide information)—

- (a) in subsection (1) after “32” insert “or 32A”,
- (b) in subsection (3) for “a fine not exceeding level 3 on the standard scale” substitute—
 - “(a) on summary conviction, to a fine not exceeding the statutory maximum; or
 - (b) on conviction on indictment, to a fine.”
- (c) in subsection (4)(a) after “32” insert “or 32A”,
- (d) in subsection (5) for “a fine not exceeding level 5 on the standard scale” substitute—
 - “(a) on summary conviction, to a fine not exceeding the statutory maximum; or
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years, or to a fine, or to both.”, and
- (e) after subsection (5) insert—
 - “(6) Proceedings for an offence under this section may be brought in respect of a contravention by a person of a requirement imposed under section 32A only if OFCOM have not imposed a financial penalty under sections 32C and 32E in respect of that contravention.”

12. In section 34 (statement of policy), in subsections (1)(a) and (4) for “section 32” substitute “sections 32 and 32A”.

13. In section 39 (contravention of terms, etc)—

- (a) in subsection (2)(c) for “doing the things specified in subsection (3)” substitute “making representations”, and
- (b) omit subsections (3) to (8)(a).

14. Omit section 40.

15. In section 41(4)(b) (procedure for prosecutions)—

- (a) after sub-paragraph (i) omit “or”, and
- (b) after sub-paragraph (ii) insert—
 - “; or
 - (iii) are other users of the radio spectrum.”

16. In Schedule 1 (procedure for wireless telegraphy licences)—

- (a) at the end of paragraph 1 insert—
 - “(3) The procedures must be—
 - (a) open (except where sub-paragraph (4) applies);
 - (b) objective;
 - (c) transparent;
 - (d) not such as to discriminate unduly against particular persons or against a particular description of persons; and
 - (e) proportionate to what they are intended to achieve.
 - (4) The requirement for a procedure to be open does not apply if—
 - (a) the procedure relates to licences for frequencies for the broadcasting of television and radio programmes, and

(a) Subsection (8) was inserted by the Audiovisual Media Services Regulations 2009 (S.I. 2009/2979), regulation 13(4).

- (b) OFCOM think that, in order to ensure the fulfilment of a general interest objective (within the meaning given by section 8B(3)), the procedure should not be open.”
- (b) after paragraph 6 insert—
 - “6A. OFCOM may not revoke or vary a wireless telegraphy licence unless the proposed revocation or variation is objectively justifiable.”
- (c) in paragraph 7(1)(b) for “to do the things specified in sub-paragraph (2)” substitute “to make representations about the proposal”,
- (d) omit paragraph 7(2),
- (e) for paragraph 7(3) substitute—
 - “(3) The period for making representations—
 - (a) if the proposal is the result of a contravention of a term, provision or limitation of a licence, is such period as OFCOM may specify; and
 - (b) in any other case, must be the period of one month beginning with the day after the one on which the notification was given (but this is subject to sub-paragraphs (4) to (6)).”
- (f) in paragraph 7(6)(a) omit “or a case of serious and repeated contravention”,
- (g) omit paragraph 7(8), (9) and (13),
- (h) in paragraph 7(10)—
 - (i) at the end of paragraph (a) omit “and”, and
 - (ii) at the end of paragraph (b) insert—
 - “; and
 - (c) in the case of a variation of a wireless telegraphy licence extending the duration of the licence, publish the notification and the reasons for the decision.”
- (i) after paragraph 7(11)(a) omit “and” and insert—
 - “(aa) must give reasons for the decision; and”, and
- (j) at the end of paragraph 7(12), insert “(but OFCOM must, where a proposal is made by or with the consent of the holder of the licence to vary a wireless telegraphy licence in order to extend the duration of the licence, publish the notification of their decision and the reasons for it)”.

SCHEDULE 3

Regulation 4

Transitional and saving provision

1. Regulation 3 and paragraphs 1, 2, 66(a), 101 and 102 of Schedule 1 do not apply in relation to an application received before 26th May 2011.
2. Nothing in these regulations affects the continuing operation of any condition set under Chapter 1 of Part 2 of the Communications Act 2003(a) before 26th May 2011.
3. Paragraphs 10 to 13 of Schedule 1 do not apply in relation to a contravention of section 33 of the Communications Act 2003 which occurred before 26th May 2011 (and, in relation to a continuing contravention, do not apply in respect of any period of contravention before 26th May 2011).
4. Paragraphs 15 to 18 of Schedule 1 do not apply in relation to non-payment of charges under section 38 of the Communications Act 2003 in any case where the payment fell due before 26th May 2011.
5. In section 42(9)(b) of the Communications Act 2003, the reference to 24 months is to be read, in relation to a determination made before 26th May 2011, as a reference to 12 months.
6. Paragraphs 22 and 23 of Schedule 1 do not apply in relation to a proposal of which notification was published under section 48(2) of the Communications Act 2003 before 26th May 2011.
7. Paragraphs 24 and 25 of Schedule 1 do not apply in relation to a proposal of which notification was published under section 49(4) of the Communications Act 2003 before 26th May 2011.
8. Paragraph 26 of Schedule 1 does not apply in relation to a proposal of which notification was published under section 48(2) or 49(4) of the Communications Act 2003 before 26th May 2011.
9. Paragraph 33 of Schedule 1 does not apply in relation to a contravention of a numbering condition (within the meaning given by section 61(9) of the Communications Act 2003) occurring before 26th May 2011.
10. In relation to a contravention of a numbering condition (within the meaning given by section 61(9) of the Communications Act 2003) occurring on or after 26th May 2011, section 61(8) of that Act has effect subject to the following modifications—
 - (a) the reference in paragraph (a) to a notification under section 96A includes a reference to a notification under section 94,
 - (b) the references in paragraphs (a) and (b) to a confirmation decision under section 96C(2) includes a reference to a determination for the purposes of section 95(2) and 96(2) that a contravention did occur, and
 - (c) the reference in paragraph (b) to 24 months is to be read, in relation to a period following a determination for the purposes of section 95(2) or 96(2), as a reference to 12 months.
11. Paragraphs 42 to 45 and 48 of Schedule 1 do not apply in relation to a proposal of which notification was published under section 80(1) of the Communications Act 2003 before 26th May 2011.
12. Paragraph 46 of Schedule 1 does not apply in relation to a market power determination made before 26th May 2011.

(a) 2003 c. 21

13. Paragraphs 54 to 63 of Schedule 1 do not apply in relation to a contravention of a condition set under section 45 of the Communications Act 2003 which occurred before 26th May 2011 (and, in relation to a continuing contravention, do not apply in respect of any period of contravention before 26th May 2011).

14. In relation to a contravention of a condition set under section 45 of the Communications Act 2003 occurring on or after 26th May 2011, section 100 of that Act has effect subject to the following modifications—

- (a) the references in subsections (1B) and (7) to notifications under section 96A include references to notifications under section 94,
- (b) the references in subsections (1B) and (7) to a confirmation decision under section 96C, or to a confirmation decision, include a reference to a determination for the purposes of section 95(2) or 96(2) that a contravention did occur, and
- (c) the reference in subsection (7)(b) to 24 months is to be read, in relation to a period following a determination for the purposes of section 95(2) or 96(2), as a reference to 12 months.

15. Paragraphs 68 to 74 of Schedule 1 do not apply in relation to a contravention of any requirement imposed by a restriction or condition under section 109 of the Communications Act 2003 which occurred before 26th May 2011 (and, in relation to a continuing contravention, do not apply in respect of any period of contravention before 26th May 2011).

16. Paragraphs 76 and 77 of Schedule 1 do not apply in relation to a proposal of which notification was published under section 48(2) of the Communications Act 2003 (as applied by section 120(5) of that Act) before 26th May 2011.

17. Paragraph 78 of Schedule 1 does not apply in relation to a contravention of conditions set under section 132 of the Communications Act 2003 which occurred before 26th May 2011 (and, in relation to a continuing contravention, does not apply in respect of any period of contravention before 26th May 2011).

18. Paragraphs 81 to 87 of Schedule 1 do not apply in relation to a contravention of a requirement imposed under section 135 or 136 of the Communications Act 2003 before 26th May 2011 (and, in relation to a continuing contravention, do not apply in respect of any period of contravention before 26th May 2011).

19. In relation to a contravention of a requirement imposed under section 135 or 136 of the Communications Act 2003 occurring on or after 26th May 2011, section 140 of that Act has effect subject to the following modifications—

- (a) the references in subsections (1)(c) and (7)(a) to confirmation decisions under section 139A(2) include determinations for the purposes of section 139(2) which were made before 26th May 2011 (“pre-commencement determinations”), and
- (b) the reference in subsection (7)(b) to 24 months is to be read, in relation to a period following a pre-commencement determination, as a reference to 12 months.

20. So far as is necessary for giving effect to, or continuing the effect of, anything done before 26th May 2011, the definitions in section 151(1) of the Communications Act 2003 of “the Access Directive”, “the Framework Directive” and “the Universal Service Directive” have effect as if they had not been amended by paragraph 90(a) of Schedule 1.

21. A power to vary a licence under paragraph 7 of Schedule 1 to the Wireless Telegraphy Act 2006(a) may not be exercised in such a way as to include a term, provision or limitation which could not be included in a licence granted under that Act on or after 26th May 2011.

(a) 2006 c. 36

EXPLANATORY NOTE

(This note is not part of the Order)

These Regulations implement Directive 2009/140/EC of the European Parliament and of the Council (“the Better Regulation Directive”) and aspects of Directive 2009/136/EC of the European Parliament and of the Council (“the Citizens’ Rights Directive”). The Better Regulation Directive amends Directive 2002/19/EC (“the Access Directive”), Directive 2002/20/EC (“the Authorisation Directive”) and Directive 2002/21/EC (“the Framework Directive”). The Citizens’ Rights Directive amends Directive 2002/22/EC (the “Universal Service Directive”) and Directive 2002/58/EC (“the E-Privacy Directive”).

Regulation 2 provides that Schedule 1 to the Regulations, which contains provision amending the Communications Act 2003 (“the 2003 Act”), and various other enactments, have effect. It also provides that Schedule 2, which contains provision amending the Wireless Telegraphy Act 2006 (“the 2006 Act”), has effect. Regulation 4 provides that Schedule 3 to the Regulations, which contains transitional and saving provisions, has effect.

Regulation 3 introduces a 6 month deadline for competent authorities to decide an application to install facilities.

Regulation 5 contains provision requiring an ongoing five year review of the implementation of the Access, Authorisation, Framework and Universal Service Directives, whose amendment by the Better Regulation and the Citizens’ Rights Directives are implemented in these Regulations. The implementation of changes to the E-Privacy Directive is contained in separate Regulations.

Schedule 1 to the Regulations contains amendments to the 2003 Act as well as other primary legislation.

Paragraph 1 of Schedule 1 amends the Telecommunications Act 1984 consequential on the new deadline imposed by Regulation 3, which applies to certain applications made under that Act. Paragraph 2 makes a similar consequential amendment to the New Roads and Street Works Act 1991.

Paragraph 3 amends the Office of Communications Act 2002 to insert additional procedures for the removal of Ofcom’s non-executive board members.

Paragraphs 5 amends section 4 of the 2003 Act which contains Ofcom’s duties for fulfilling obligations under the four amended Directive listed above.

Paragraph 6 inserts a new section 4A into the 2003 Act which requires Ofcom to take into account any applicable recommendations issued by the European Commission under Article 19(1) of the Framework Directive in carrying out the functions listed in section 4(1).

Paragraph 7 amends section 5 of the 2003 Act to ensure that any direction issued by the Secretary of State under section 5 does not conflict with the requirements of Article 3(3a) of the Framework Directive on the independence of the national regulator (Ofcom). The amendments also ensure that the Secretary of State takes account of the principle of technological neutrality in giving a direction under section 5.

Paragraph 8 amends section 26 of the 2003 Act to replace the current power for Ofcom to publish the listed information, with a duty to do so. The amendment also adds to the list of people that Ofcom are required to make information available to, to add in persons affected by the application of the electronic communications code (which is defined in section 106 of the 2003 Act).

Paragraph 9 amends section 32 of the 2003 Act and the definitions of “electronic communications network” and “associated facility”.

Paragraphs 10 to 13 amend the enforcement provisions for breach of the notification requirement in section 33 of the 2003 Act. Paragraphs 14 to 18 make similar amendments to the enforcement provisions for breach of the obligation to pay the administrative charge contained in section 38 of the 2003 Act.

Paragraphs 19 to 26 amend domestic and European consultation requirements in the 2003 Act that apply to the setting, modification or revocation of certain types of conditions, directions, approvals and consents.

Paragraph 27 amends section 51 of the 2003 Act, which contains details of the permitted subject matter of general conditions. The amendments give further examples of the matters which may be included in a general condition including equivalence of access for disabled end users and to impose conditions on operators to prevent the degradation of service. The amendments also require Ofcom to notify the European Commission when they propose to make a particular general condition (relating to minimum quality of service).

Paragraph 28 amends section 52 of the 2003 Act which contains permitted general conditions in relation to the interests of consumers. The amendments narrow the scope of the complaints procedures required to be maintained by service providers, and also provide for a condition to mandate the provision of a scheme to compensate end users in the event of delay or abuse in number porting.

Paragraph 29 amends section 54 of the 2003 Act to ensure that the dispute resolution procedures proposed by service providers are non discriminatory as well as transparent, easy to use and effective.

Paragraph 30 amends section 56(1) of the 2003 Act to clarify that Ofcom, through the National Telephone Numbering Plan, can set out restrictions relating to tariff principles and maximum prices. Paragraph 31 amends the numbering condition power in section 58(1) of the 2003 Act to make similar provision.

Paragraph 31 adds in a new section 56A of the 2003 Act which requires Ofcom, when allocating telephone numbers, to specify whether the allocation is transferable. It also requires any time limit imposed on an allocation to be objectively justifiable.

Paragraph 33 amends section 61 of the 2003 Act, which contains enforcement provisions for breach of a numbering condition.

Paragraph 34 amends section 64(4)(a) of the 2003 Act to clarify that services enabling access for disabled end-users are ancillary services in the context of must-carry obligations.

Paragraph 35 inserts a new subsection into section 65 of the 2003 Act which requires the Secretary of State to take into account the principle of technological neutrality before making or varying the universal service order under that provision.

Paragraph 36 amends section 67 of the 2003 Act to include provision to allow Ofcom to make a universal service condition which requires the universal service operators to inform Ofcom if they propose to sell or dispose of certain network assets.

Paragraph 37 amends section 68(6) of the 2003 Act to require Ofcom to monitor the prices charged for the universal service in the event that there is not a designated universal service provider.

Paragraph 38 amends section 73 of the 2003 Act and the permitted purposes for access-related conditions.

Paragraph 39 amends section 74 of the 2003 Act to introduce a further type of access-related condition which can be set by Ofcom under that provision.

Paragraph 40 removes subsection (1) of section 75 and paragraph 48 adds a slightly modified version of the provision into section 87(5C) of the 2003 Act.

Paragraph 41 inserts a new section 76A into the 2003 Act which allows Ofcom to share information about infrastructure that is suitable for shared use.

Paragraphs 42 to 48 amend the domestic and European consultation requirements for a market identification, and market power determination. They also contain new provisions on the timing of these market reviews.

Paragraph 49 amends section 87 of the 2003 Act to add to the factors that Ofcom must consider in setting significant market power conditions (“SMP conditions”, as defined in section 45 of the 2003 Act) and inserts a new type of condition permitted under section 87. This sort of condition was previously provided for in section 73(4), but was deleted by paragraph 37.

Paragraph 50 inserts new sections 89A and 89B into the 2003 Act which provide for a special type of SMP condition, one requiring functional separation. This paragraph also inserts new section 89C into the 2003 Act, which require prior notification to Ofcom of a voluntary separation (either functional or structural).

Paragraph 51 provides for the omission of section 90 of the 2003 Act.

Paragraph 52 makes a consequential amendment to section 91 and removes subsection (7), which is no longer needed because of new section 48C(2) (which was inserted by paragraph 23).

Paragraph 53 provides for the omission of section 92 of the 2003 Act.

Paragraphs 54 to 63 amend the current enforcement provisions for breach of a condition set by Ofcom under section 45 of the 2003 Act.

Paragraph 64 provides for the omission of section 105 of the 2003 Act.

Paragraph 65 inserts new sections 105A to 105D of the 2003 Act, which contain obligations relating to the security of public electronic communications network and services and the enforcement provisions for those new obligations.

Paragraph 66 amends section 107 of the 2003 Act consequential on the new deadline imposed by Regulation 3 which applies to applications for a direction under section 107 of the 2003 Act. It also introduces new obligations on Ofcom in making modifications to the application process provided for in section 107.

Paragraph 67 amends section 109(2) of the 2003 Act to require the Secretary of State to consider, before exercising the power to make regulations under section 109, the need to ensure that restrictions and conditions contained in the regulations are objectively justifiable and proportionate.

Paragraphs 68 to 74 amend the current enforcement provisions for breach of regulations made under section 109, and provisions providing for the disapplication of the electronic communications code following contraventions of other regulatory obligations.

Paragraph 75 inserts a new subsection into section 115 of the 2003 Act, which ensures that any modification of the application of the electronic communications code is objectively justifiable and proportionate.

Paragraphs 76 and 77 amend section 120 of the 2003 Act and insert a new section 120A. This provides for the procedure to be followed in setting a condition under section 120 and merely disapplies the procedural changes made to section 48 of the 2003 Act, which used to also govern section 120 conditions.

Paragraph 78 amends section 133(6) of the 2003 Act to ensure that the amended enforcement provisions in sections 96A to 99 of the 2003 Act apply to a breach of a condition of a direction given under section 132 of the 2003 Act.

Paragraph 79 amends section 135 of the 2003 Act to specify further types of information that Ofcom can require under this provision. Paragraph 80 amends section 137 of the 2003 Act, which contains restrictions on Ofcom's information gathering powers under section 135. The amendments modify the application of the restrictions to the new types of information that Ofcom can request under section 135.

Paragraphs 81 to 87 amend the enforcement provisions for contravention of the obligation to provide information under sections 135, 136 and 191 of the 2003 Act.

Paragraph 88 inserts a new section 146A into the 2003 Act. This section permits any person to use information published by communications providers free of charge for the purpose of providing a comparative tool to allow end-users to assess the costs of different usage patterns.

Paragraph 89 inserts a definition of "Proposals of EU significance" into the 2003 Act. This definition is used to determine which proposals are subject to the European consultation requirements in sections 48B, 49B and 80B.

Paragraph 90 updates various definitions contained in section 151 of the 2003 Act.

Paragraphs 91 to 96 amend the dispute resolution provisions in the 2003 Act. The amendments modify the subject matter of disputes which can be referred to Ofcom for determination and replace the current duty on Ofcom to resolve network access disputes with a power to do so, including the power to invite parties to refer the dispute. They also modify the provisions relating to cross-border disputes and introduce new rules on the ability of Ofcom to recover its own costs in relation to the resolution of a dispute.

Paragraph 97 amends section 393(6) of the 2003 Act to ensure that the new provision inserted by paragraph 40 is not limited by section 393(6).

Paragraph 98 amends section 395 of the 2003 Act by inserting a new subsection (6A) which clarifies that Ofcom can send electronic notifications (where notifications are required) to the European Commission, to the Body of European Regulators for Electronic Communications (“BEREC”) and to the regulators in other Member States.

Paragraph 99 inserts a definition for BEREC into the 2003 Act.

Paragraph 100 amends paragraph 9 of Schedule 18 to the 2003 Act to provide that the amended dispute provisions also apply to a dispute relating to a provision detailed in paragraph (4).

Paragraphs 101 and 102 amend the Marine and Coastal Access Act 2009 and the Marine (Scotland) Act 2010 consequential on the new deadline imposed by Regulation 3, which applies to certain applications made under those Acts.

Schedule 2 to the Regulations makes the following provision for amendments to the 2006 Act.

Paragraph 2 amends section 2 of the 2006 Act to ensure that the criteria applied in determining the allocation of frequencies in the UK Plan for Frequency Authorisation, are objectively justifiable, non-discriminatory, proportionate and transparent.

Paragraph 3 amends section 6 of the 2006 Act and inserts a requirement for the Secretary of State to consider the principle of technological neutrality before making an order under section 5.

Paragraph 4 amends section 8 of the 2006 Act, to ensure that any terms, provisions or limitations specified in regulations made under section 8 fall within Part A of the Annex to the Authorisation Directive, and that they are objectively justifiable, non-discriminatory, proportionate and transparent. Paragraph 4 also amends the criteria that must be met for Ofcom to exempt wireless telegraphy stations or apparatus from the requirement to hold a wireless telegraphy licence.

Paragraph 5 inserts a new section 8A into the 2006 Act, which requires Ofcom to periodically review licences which have been granted for 10 years or more and which are non-transferrable. Ofcom must establish whether the conditions enabling Ofcom to exempt wireless telegraphy stations or apparatus from the requirement to hold a licence are met, and if so, Ofcom must make regulations under section 8 of the 2006 Act, exempting the station or apparatus.

Paragraph 5 also inserts new sections 8B and 8C into the 2006 Act, which restrict Ofcom’s ability to grant exclusive licences except where certain general interest objectives (defined in section

8B(3)) are met. The new provisions also require the grant of any such licence to be subject to consultation.

Paragraph 6 inserts a new subsection (1A) into section 9 which ensures that any term, provision or limitation contained in a wireless telegraphy licence used for the provision of an electronic communications network or service, must fall within Part B of the Annex to the Authorisation Directive.

Paragraph 7 inserts a new section 9ZA into the 2006 Act, which provides that any limitation contained in a wireless telegraphy licence relating to the type of technology authorised under the licence or the frequency that can be used under the licence is only permitted if it is necessary for certain limited purposes set out in subsection (2) of that provision. Paragraph 7 also inserts a new section 9ZB into the 2006 Act which requires Ofcom to review any limitations of this nature imposed before these Regulations came into effect to establish whether the purposes in section 9ZB(2) are met.

Paragraph 8 amends section 14 of the 2006 Act to ensure that all of the restrictions on the terms, provisions and limitations that Ofcom can include in a wireless telegraphy licence, also apply where the licence is granted after a competitive process. In specifying the criteria that apply to any such competitive process, Ofcom must ensure that they are objectively justifiable, non-discriminatory, proportionate and transparent.

Paragraph 9 amends section 30 of the 2006 to amend the process that applies for spectrum trading.

Paragraph 10 inserts new sections 32A to 32E into the 2006 Act. These provisions contain a new information gathering power for Ofcom as well as the enforcement regime for contravention of this new provision.

Paragraph 11 applies the criminal offences in section 33 of the 2006 Act to the new information gathering power and also amends the current criminal penalties to ensure they are consistent with the equivalent penalties contained in section 144 of the 2003 Act, which apply to contraventions of Ofcom's information gathering powers under the 2003 Act.

Paragraph 12 amends section 34 of the 2006 Act so that the statement of policy that Ofcom is required to issue in respect of its current information gathering powers under the 2006 Act also applies to the new power in section 32A.

Paragraphs 13 to 15 modify the enforcement provisions for breach of a term of a wireless telegraphy licence or the exemption regulations made under section 8 of the 2006 Act.

Paragraph 16 amends Schedule 1 to the 2006 Act. The amendments require the licence application procedure provided for in regulations made under paragraph 1 of Schedule 1, to be open (except in certain circumstances), objective, transparent, non-discriminatory and proportionate. The amendments also modify Ofcom's power to modify or revoke a licence for contravention of the licence.

Schedule 3 contains transitional and saving provisions.

A transposition note and a full impact assessment of the effect that this instrument will have on the costs of business and the voluntary sector are available from the Department

for Culture, Media and Sport, 2 – 4 Cockspur Street, London, SW1Y 5DH and are published with the Explanatory Memorandum alongside the instrument on www.legislation.gov.uk

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