

2016 No. 607

ELECTRONIC COMMUNICATIONS

The Open Internet Access (EU Regulation) Regulations 2016

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The Secretary of State, being a Minister designated^(a) for the purposes of section 2(2) of the European Communities Act 1972^(b) in respect of matters relating to electronic communications, in exercise of the powers conferred by that section makes the following Regulations:

PART 1
PRELIMINARY

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Open Internet Access (EU Regulation) Regulations 2016 and come into force on 17th June 2016.

(2) In these Regulations—

“the EU Regulation” means Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25th November 2015 laying down measures concerning open internet access

(a) S.I. 2001/3495. This has been amended, but the amendments are not relevant for the purposes of 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).

and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union(a);

“information requirement” has the meaning given in regulation 16; and

“OFCOM” means the Office of Communications as established by the Office of Communications Act 2002(b).

Service of notifications and other documents

2.—(1) This regulation applies where provision made (in whatever terms) by or under these Regulations authorises or requires—

- (a) a notification to be given to any person; or
- (b) a document of any other description (including a copy of a document) to be sent to any person.

(2) This regulation has effect subject to regulation 3.

(3) The notification or document may be given or sent to the person in question—

- (a) by delivering it to the person;
- (b) by leaving it at the person's proper address; or
- (c) by sending it by post to the person at that address.

(4) The notification or document may be given or sent to a body corporate by being given or sent to the secretary or clerk of that body.

(5) The notification or document may be given or sent to a firm by being given or sent to—

- (a) a partner in the firm; or
- (b) a person having the control or management of the partnership business.

(6) The notification or document may be given or sent to an unincorporated body or association by being given or sent to a member of the governing body of the body or association.

(7) For the purposes of this regulation and section 7 of the Interpretation Act 1978(c) (service of documents by post) in its application to this regulation, the proper address of a person is—

- (a) in the case of a body corporate, the address of the registered or principal office of the body;
- (b) in the case of a firm, unincorporated body or association, the address of the principal office of the partnership, body or association;
- (c) in the case of a person to whom the notification or other document is given or sent in reliance on any of paragraphs (4) to (6), the proper address of the body corporate, firm or (as the case may be) other body or association in question; and
- (d) in any other case, the last known address of the person in question.

(8) In the case of—

- (a) a company registered outside the United Kingdom,
- (b) a firm carrying on business outside the United Kingdom, or
- (c) an unincorporated body or association with offices outside the United Kingdom,

the references in paragraph (7) to its principal office include references to its principal office within the United Kingdom (if any).

(9) In this regulation—

“document” includes anything in writing;

(a) OJ No L 310, 26.11.2015, p.1.

(b) 2002 c. 11.

(c) 1978 c. 30.

“notification” includes notice; and references to giving or sending a notification or other document to a person include references to transmitting it to that person and to serving it on that person.

Notifications and documents in electronic form

3.—(1) This regulation applies where—

- (a) regulation 2 applies; and
- (b) the notification or other document is transmitted to the recipient—
 - (i) by means of an electronic communications network; or
 - (ii) by other means but in a form that nevertheless requires the use of apparatus by the recipient to render it intelligible.

(2) The transmission has effect for the purposes of these Regulations as a delivery of the notification or other document to the recipient, but only if the requirements imposed by or under this regulation are complied with.

(3) Where the recipient is OFCOM—

- (a) they must have indicated their willingness to receive the notification or other document in a manner mentioned in paragraph (1)(b);
- (b) the transmission must be made in such manner and satisfy such other conditions as they may require; and
- (c) the notification or other document must take such form as they may require.

(4) Where the person making the transmission is OFCOM, they may (subject to paragraph (5)) determine—

- (a) the manner in which the transmission is made; and
- (b) the form in which the notification or other document is transmitted.

(5) Where the recipient is a person other than OFCOM—

- (a) the recipient, or
- (b) the person on whose behalf the recipient receives the notification or other document,

must have indicated to the person making the transmission the recipient’s willingness to receive notifications or documents transmitted in the form and manner used.

(6) An indication to any person for the purposes of paragraph (5)—

- (a) must be given to that person in such manner as that person may require;
- (b) may be a general indication or one that is limited to notifications or documents of a particular description;
- (c) must state the address to be used and must be accompanied by such other information as that person requires for the making of the transmission; and
- (d) may be modified or withdrawn at any time by a notice given to that person in such manner as that person may require.

(7) An indication, requirement or determination given, imposed or made by OFCOM for the purposes of this regulation is to be given, imposed or made by being published in such a manner as they consider appropriate for bringing it to the attention of the persons who, in their opinion, are likely to be affected by it.

(8) Regulation 2(9) applies for the purposes of this regulation as it applies for the purposes of that regulation.

PART 2

NATIONAL REGULATORY AUTHORITY

National Regulatory Authority

4.—(1) OFCOM is the national regulatory authority for the purposes of Articles 3, 4 and 5 of the EU Regulation.

(2) References in these Regulations to OFCOM's functions under the EU Regulation should be read accordingly.

BEREC guidelines

5. In performing its functions under the EU Regulation and these Regulations, OFCOM must take due account of all applicable guidelines issued by the Body of European Regulators for Electronic Communications^(a) in accordance with Article 5(3) of the EU Regulation.

Certification of monitoring mechanisms

6. OFCOM may certify one or more monitoring mechanisms to measure the performance of internet access services for the purposes of Article 4(4) of the EU Regulation.

PART 3

REQUIREMENTS

Power to impose requirements

7.—(1) OFCOM shall have the power to impose requirements for either or both of the purposes in paragraph (2).

(2) Those purposes are—

- (a) to ensure compliance with Articles 3 and 4 of the EU Regulation;
- (b) to ensure the continued availability of non-discriminatory internet access services at levels of quality that reflect advances in technology.

(3) OFCOM's power to impose a requirement under paragraph (1) includes the power to—

- (a) impose a duty on the person or persons to whom the requirement is applied to comply with such directions with respect to the matters to which the requirement relates as may be given from time to time by OFCOM or by another person specified in the requirement;
- (b) impose a duty with respect to those matters that is framed by reference to, or is conditional upon, the giving of a consent or of an approval, or on the making of a recommendation, by OFCOM or by another person so specified;
- (c) confer, for the purposes of provision made by virtue of either of the preceding subparagraphs, a discretion exercisable from time to time by OFCOM or by another person specified in the requirement or determined in accordance with provision contained in it;
- (d) impose different requirements for different cases (including different requirements in relation to different parts of the United Kingdom);
- (e) revoke or modify the requirements for the time being in force.

(a) As established by Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25th November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office. OJ No L 337, 18.12.2009, p.1.

(4) Any person to whom requirements set under paragraph (1) are applied in accordance with paragraph (5) must comply with those requirements.

(5) A requirement imposed under paragraph (1) may be applied to any provider of electronic communications to the public, including any provider of internet access services.

(6) In this regulation, “provider of electronic communications to the public” and “internet access service” have the meanings given in Article 2 of the EU Regulation.

Test for imposing, modifying or revoking requirements

8. OFCOM must not impose a requirement under regulation 7, or modify or revoke such a requirement, unless they are satisfied that to do so is—

- (1) objectively justifiable in relation to the networks or services to which it relates;
- (2) proportionate to what the requirement or modification is intended to achieve; and
- (3) in relation to what it is intended to achieve, transparent.

Procedure for imposing, modifying or revoking requirements

9.—(1) Subject to the following provisions of these Regulations—

- (a) the way in which requirements are to be imposed or modified under regulation 7 is by the publication of a notification setting out the requirements or modifications of those requirements;
- (b) the way in which such a requirement is to be revoked is by the publication of a notification stating that the requirement is revoked.

(2) OFCOM must comply with the applicable requirements of regulation 10 before—

- (a) imposing requirements under regulation 7; or
- (b) modifying or revoking a requirement so imposed.

(3) The publication of a notification under this regulation must be in such manner as appears to OFCOM to be appropriate for bringing the contents of the notification to the attention of such persons as OFCOM consider appropriate.

Consultation for requirements

10.—(1) Subject to paragraph (2), this regulation applies where OFCOM propose to impose a requirement under regulation 7, or modify or revoke a requirement so imposed.

(2) This regulation does not apply where in OFCOM’s opinion—

- (a) there are exceptional circumstances; and
- (b) there is an urgent need to act in order to ensure compliance with the EU Regulation.

(3) OFCOM must publish a notification—

- (a) stating that they are proposing to impose, modify or revoke the requirements that are specified in the notification;
- (b) setting out the effects of those requirements, 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 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) OFCOM may then give effect to the proposal, with any modifications that appear to OFCOM to be appropriate.

(8) The publication of a notification under this regulation must be in such manner as appears to OFCOM to be appropriate for bringing the contents of the notification to the attention of such persons as OFCOM consider appropriate.

Delivery of copies of notifications in respect of requirements

11. OFCOM must send to the Secretary of State a copy of every notification published under regulation 9(1) or regulation 10(3).

Test for giving, modifying or withdrawing directions, approvals and consents for the purposes of a requirement imposed under regulation 7

12.—(1) This regulation applies where—

- (a) a requirement imposed under regulation 7 has effect by reference to directions, approvals or consents given by a person (whether OFCOM themselves or another); and
- (b) that person (referred to in this regulation and regulations 13, 14 and 15 as “the responsible person”) is proposing to give a direction, approval or consent that affects the operation of that requirement or to modify or withdraw a direction, approval or consent so as to affect the requirement’s operation.

(2) The responsible person must not give, modify or withdraw the direction, approval or consent unless the responsible person is satisfied that to do so is—

- (a) objectively justifiable in relation to the networks or services to which it relates;
- (b) proportionate to what it is intended to achieve; and
- (c) in relation to what it is intended to achieve, transparent.

Procedure for giving, modifying or withdrawing directions, approvals and consents

13.—(1) Subject to the following provisions of these Regulations—

- (a) the way in which directions, approvals and consents under regulation 7(3) are to be given or modified is by the publication of a notification setting out the directions, approvals or consents, or modifications of those directions, approvals or consents;
- (b) the way in which such a direction, approval or consent is to be withdrawn is by the publication of a notification stating that the direction, approval or consent is withdrawn.

(2) The responsible person must comply with the applicable requirements of regulation 14 before—

- (a) giving a direction, approval or consent; or
- (b) modifying or withdrawing a direction, approval or consent.

(3) The publication of a notification under this regulation 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 the responsible person considers appropriate.

Consultation for directions, approvals and consents

14.—(1) This regulation applies where the responsible person is proposing to give, modify or withdraw a direction, approval or consent under regulation 7(3).

(2) This regulation does not apply where in OFCOM’s opinion—

- (a) there are exceptional circumstances; and
 - (b) there is an urgent need to act in order to ensure compliance with the EU Regulation.
- (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 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 end no 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 purpose of this paragraph by the Secretary of State.
- (7) The responsible person may then give effect to the proposal, with any modifications that appear to the responsible person to be appropriate.
- (8) The publication of a notification under this regulation 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 the responsible person considers appropriate.

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

- 15.**—(1) The responsible person must send to the Secretary of State—
- (a) a copy of every notification published under regulation 13(1) or 14(3);
 - (b) a copy of every direction, approval or consent given for the purposes of a requirement; and
 - (c) a copy of every instrument modifying or withdrawing such a direction, approval or consent.
- (2) 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 regulation 13(1) or 14(3);
 - (b) a copy of every direction, approval or consent given for the purposes of a requirement; and
 - (c) a copy of every instrument modifying or withdrawing such a direction, approval or consent.

PART 4

INFORMATION REQUIREMENTS

Meaning of “information requirement”

16. In this Part and Part 5 “information requirement” means a requirement of OFCOM under Article 5(2) of the EU Regulation or regulation 17.

Information to be provided to OFCOM

17.—(1) OFCOM may require a person falling within paragraph (2) to provide them with such information as they consider necessary for the purpose of carrying out their functions under the EU Regulation and these Regulations.

(2) Any person who appears to OFCOM to have information required by them for the purpose of carrying out their functions under the EU Regulation and these Regulations is a person falling within this paragraph.

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

(4) OFCOM are not to require the provision of information under this regulation 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 carrying out OFCOM’s functions.

(5) A demand for information required under this regulation must be contained in a notice served on the person from whom the information is required.

PART 5

ENFORCEMENT AND PENALTIES

Interpretation of Part 5

18.—(1) For the purposes of this Part, where there is a breach of an obligation under the EU Regulation or these Regulations that requires a person to do anything within a particular period or before a particular time, that breach shall be taken to continue after the end of that period, or after that time, until that thing is done.

(2) References in this Part to remedying the consequences of a breach include references to paying an amount to a person—

- (a) by way of compensation for loss or damage suffered by that person; or
- (b) in respect of annoyance, inconvenience or anxiety to which that person has been put.

(3) In this Part—

“notified person” means a person who has been given a notification under regulation 19;

“relevant business” means so much of any business carried on by the notified person as consists in the provision of public electronic communications networks or publicly available electronic communications services;

“relevant period” means—

- (a) except in a case falling within subparagraphs (b) or (c), the period of one year ending with the 31st March next before the time when notification of the breach was given under regulation 19;

- (b) in the case of a person who at that time has been carrying on that business for a period of less than a year, the period, ending with that time, during which he has been carrying it on; and
- (c) in the case of a person who at that time has ceased to carry on that business, the period of one year ending with the time when he ceased to carry it on.

Notification of breach

19.—(1) Where OFCOM determine that there are reasonable grounds for believing that a person is breaching, or has breached an obligation under Articles 3, 4 or 5 of the EU Regulation or under these Regulations they may give that person a notification under this regulation.

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

- (a) sets out the determination made by OFCOM;
- (b) specifies the obligation and the breach in respect of which that determination has been made;
- (c) specifies the period during which the person notified has an opportunity of making representations;
- (d) to the extent that the notification relates to a breach of an information requirement, specifies the information to be provided by the person to OFCOM in order to comply with the requirement;
- (e) to the extent that the notification relates to an obligation which is not an information requirement, specifies the steps that OFCOM think should be taken by the person in order to—
 - (i) comply with the obligation; and
 - (ii) remedy the consequences of the breach; and
- (f) specifies any penalty which OFCOM are minded to impose in accordance with regulation 20.

(3) A notification under this regulation—

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

(4) Where a notification under this regulation has been given to a person in respect of a breach of an obligation under the EU Regulation or a breach of an obligation under these Regulations, OFCOM may give a further notification in respect of the same breach of that obligation if, and only if—

- (a) the breach is one occurring after the time of the giving of the earlier notification;
- (b) the breach is a continuing breach 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 breach.

Penalties for breach

20.—(1) This regulation applies where a person is given a notification under regulation 19 which specifies a proposed penalty.

(2) OFCOM may not specify a penalty in relation to a breach of an information requirement if proceedings for an offence under regulation 23 have been brought against the notified person in respect of the breach.

(3) Where a notification under regulation 19 relates to more than one breach, a separate penalty may be specified in respect of each breach.

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

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

- (a) the giving of a confirmation decision under regulation 22 which requires immediate action; or
- (b) the expiry of any period specified in the confirmation decision for complying with an obligation so specified.

(6) The amount of a penalty under paragraph (5) is to be such amount as OFCOM determine to be—

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

but not exceeding £500 per day for a breach of an information requirement and £20,000 per day for any other breach.

Amount of penalty under regulation 20

21.—(1) The amount of a penalty notified under regulation 19 (other than a penalty falling within regulation 20(5)) is to be such amount as OFCOM determine to be—

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

but in the case of a breach of an information requirement not exceeding £2,000,000, and in the case of any other breach of the EU Regulation or these Regulations, not exceeding ten per cent. of the turnover of the notified person's relevant business for the relevant period.

(2) For the purposes of this regulation the turnover of a notified person's relevant business for a period shall be calculated in accordance with regulation 24.

Enforcement of notification under regulation 19

22.—(1) This regulation applies where—

- (a) a person has been given a notification under regulation 19;
- (b) OFCOM have allowed the notified 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 notified person a decision (a "confirmation decision") confirming the matters referred to in regulation 19(2); or
- (b) inform the notified 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 notified person unless, after considering any representations, they are satisfied that the person has, in one or more of the respects notified, been in breach of an obligation specified in the notification under regulation 19.

(4) A confirmation decision—

- (a) must be given to the notified person without delay;
- (b) must include reasons for the decision;
- (c) may require immediate action by the notified person to comply with the obligations specified in the notification under regulation 19, or may specify a period within which the person must comply with those obligations;
- (d) may require the notified person to pay—

- (i) the penalty specified in the notification under regulation 19; or
 - (ii) such lesser penalty as OFCOM consider appropriate in the light of the notified person's representations or steps taken by the notified person to comply with the obligation or remedy the consequences of the breach; and
 - (e) may specify the period within which the penalty is to be paid.
- (5) It is the duty of the notified person to comply with 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.

Offences in connection with information requirements

23.—(1) A person who fails to provide information in accordance with an information requirement is guilty of an offence and will be liable—

- (a) on summary conviction, to a fine in England and Wales, or in Scotland and Northern Ireland to a fine not exceeding the statutory maximum;
- (b) on conviction on indictment, to a fine.

(2) In proceedings against a person (“A”) for an offence under paragraph (1) it is a defence for A to show—

- (a) that it was not reasonably practicable for A to comply with the requirement within the period specified by OFCOM; but
- (b) that A has taken all reasonable steps to provide the required information after the end of that period.

(3) Proceedings for an offence under paragraph (1) may be brought in respect of a breach by a person of an information requirement only if—

- (a) OFCOM have given the person a notification under regulation 19 in respect of that breach;
- (b) that notification required a person to provide information;
- (c) a confirmation decision has been given under regulation 22 in respect of that requirement;
- (d) the period allowed under that decision has expired without the required information having been provided; and
- (e) OFCOM have not imposed a financial penalty under regulation 20 in respect of that breach.

(4) A person (“B”) is guilty of an offence if—

- (a) in pursuance of any information requirement, B provides any information that is false in any material particular; and
- (b) at the time B provides it, B either knows it to be false or is reckless as to whether or not it is false.

(5) A person guilty of an offence under paragraph (4) will be liable—

- (a) on summary conviction, to a fine in England and Wales, or in Scotland and Northern Ireland to a fine not exceeding the statutory maximum;
- (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or both.

(6) Where an offence under this regulation is committed by a body corporate and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of—

- (a) a director, manager, secretary or other similar officer of the body corporate; or
- (b) a person who was purporting to act in any such capacity,

that person (as well as the body corporate) is guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(7) Where an offence under this regulation—

- (a) is committed by a Scottish firm; and
- (b) is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a partner of the firm,

that person (as well as the firm) is guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(8) In this regulation, “director”, in relation to a body corporate whose affairs are managed by its members, means a member of the body corporate.

Calculation of turnover of notified person’s relevant business

24.—(1) The turnover of a notified person shall be calculated in conformity with accounting practices and principles which are generally accepted in the United Kingdom.

(2) The turnover of a notified person shall be limited to the amounts derived by that person from the relevant business after deduction of sales rebates, value added tax and other taxes directly related to turnover.

(3) When a notified person’s relevant business consists of two or more undertakings that each prepare accounts then the turnover is to be calculated by adding together the turnover of each, save that no account shall be taken of any turnover resulting from the supply of goods or the provision of services between them.

(4) Any aid (within the meaning of Article 107 of the Treaty on the Functioning of the European Union) granted by a public body to a notified person which relates to one of that person’s ordinary activities is to be included in the calculation of turnover if the notified person is himself the recipient of the aid and if the aid is directly linked to the carrying out by that person of the relevant business.

Destination of penalties

25. Where OFCOM receives an amount in respect of a financial penalty under these Regulations, OFCOM must pay that amount into the Consolidated Fund.

PART 6

APPEALS

Interpretation of Part 6

26.—(1) In this Part—

“the Tribunal” means the Competition Appeal Tribunal; and

“Tribunal rules” means rules made under section 15 of the Enterprise Act 2002(a).

(2) For the purposes of this Part a decision to which effect is given by the exercise or performance of a power or duty conferred or imposed by the EU Regulation or these Regulations,

(a) 2002 c. 40. Section 15 was amended by section 81 of, and Part 2 of Schedule 8 to, the Consumer Rights Act 2015 (c. 15).

is to be treated, except where provision is made for the making of that decision at a different time, as made at the time when the power is exercised or the duty performed.

Appeals against decisions by OFCOM or another person

27.—(1) This regulation applies to the following decisions—

- (a) a decision by OFCOM under the EU Regulation or these Regulations;
- (b) a decision (whether by OFCOM or another) to which effect is given by a direction, approval or consent given for the purposes of a requirement imposed under regulation 7;
- (c) a decision to which effect is given by the modification or withdrawal of such a direction, approval or consent.

(2) A person affected by a decision to which this regulation applies may appeal against it to the Tribunal.

(3) The means of making an appeal is by sending the Tribunal a notice of appeal in accordance with Tribunal rules.

(4) The notice of appeal must be sent within the period specified, in relation to the decision appealed against, in those rules.

(5) The notice of appeal must set out—

- (a) the provision under which the decision appealed against was taken; and
- (b) the grounds of appeal.

(6) The grounds of appeal must be set out in sufficient detail to indicate—

- (a) to what extent (if any) the person making the appeal (“the appellant”) contends that the decision appealed against was based on an error of fact or was wrong in law or both; and
- (b) to what extent (if any) the appellant is appealing against the exercise of a discretion by OFCOM or another person.

(7) In this regulation references to a decision—

- (a) include references to a decision that is given effect to by the exercise or performance of a power or duty conferred or imposed by the EU Regulation or these Regulations; but
- (b) include references to a failure to make a decision, and to a failure to exercise a power or to perform a duty, only where the failure constitutes a failure to comply with any form of request to make the decision, exercise the power or perform the duty;

and references in the following regulations to a decision appealed against are to be construed accordingly.

Decisions of the Tribunal

28.—(1) The Tribunal must dispose of an appeal under regulation 27 in accordance with this regulation.

(2) The Tribunal must decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal.

(3) The Tribunal’s decision must include a decision as to what (if any) is the appropriate action for the decision-maker to take in relation to the subject-matter of the decision under appeal.

(4) The Tribunal may then remit the decision under appeal to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its decision.

(5) The Tribunal must not direct the decision-maker to take any action which the decision-maker would not otherwise have power to take in relation to the decision under appeal.

(6) The decision-maker must comply with every direction given under paragraph (4).

(7) In any document recording the decision of the Tribunal under this regulation, the Tribunal shall have regard to the need for excluding, so far as practicable, commercial information the

disclosure of which would or might, in its opinion, significantly harm the legitimate business interests of any person to whom it relates.

- (8) In this regulation the “decision-maker” means—
- (a) OFCOM; or
 - (b) in the case of an appeal against—
 - (i) a direction, approval or consent given by a person other than OFCOM, or
 - (ii) the modification or withdrawal by that person of such a direction, approval or consent,that other person.

Appeals from the Tribunal

- 29.**—(1) A decision of the Tribunal on an appeal under regulation 28 may itself be appealed.
- (2) An appeal under this regulation—
- (a) lies to the Court of Appeal or to the Court of Session; and
 - (b) must relate only to a point of law arising from the decision of the Tribunal.
- (3) An appeal under this regulation may be brought by—
- (a) a party to the proceedings before the Tribunal; or
 - (b) any other person who has sufficient interest in the matter.
- (4) An appeal under this regulation requires the permission of the Tribunal or of the court to which it is to be made.
- (5) In this regulation references to a decision of the Tribunal include references to a direction given by it under regulation 28(4).

PART 7

REVIEW

Review

- 30.**—(1) The Secretary of State must from time to time—
- (a) carry out a review of these Regulations,
 - (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 EU Regulation (which is implemented by these Regulations) is implemented in other member States.
- (3) The report must in particular—
- (a) set out the objectives intended to be achieved by the regulatory system established by the EU Regulation and these Regulations,
 - (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) The first report under this regulation must be published before the end of the period of five years beginning with the day on which these Regulations come into force.
- (5) Reports under this regulation are afterwards to be published at intervals not exceeding five years.

Ed Vaizey

24th May 2016

Minister of State
Department for Culture, Media and Sport

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement certain provisions of Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25th November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union ("the EU Regulation") (OJ No L 310, 26.11.2015, p 1).

Article 5(1) of the EU Regulation requires national regulatory authorities to closely monitor and ensure compliance with Articles 3 and 4 of that Regulation, and to promote the continued availability of non-discriminatory internet access services at levels of quality that reflect advances in technology. For those purposes, national regulatory authorities may impose requirements concerning technical characteristics, minimum quality of service requirements and other appropriate and necessary measures on one or more providers of electronic communications to the public, including providers of internet access services.

Article 6 of the EU Regulation requires that member States lay down the rules on penalties applicable to infringements of Articles 3, 4 and 5 of that Regulation.

Regulations 2 and 3 make provision governing the giving of notifications and the sending of other documents under these Regulations.

Regulation 4 designates OFCOM as the national regulatory authority for the purposes of Articles 3, 4 and 5 of the EU Regulation.

Regulation 5 requires OFCOM, when performing its functions under the EU Regulation or these Regulations, to take due account of all applicable guidelines issued by BEREC in accordance with Article 5(3) of the EU Regulation.

Regulation 6 gives OFCOM the power to certify one or more monitoring mechanisms, as envisaged by Article 4(4) of the EU Regulation. Article 4(4) provides that any significant continuous or regularly recurring discrepancy, where established by a monitoring mechanism certified by the national regulatory authority, between the actual performance of an internet access service regarding speed or other quality of service parameters and the performance indicated by the provider in the contract, should be deemed to constitute non-conformity of performance for the purposes of triggering the remedies available to the consumer in accordance with national law. Guidelines issued by BEREC will specify criteria for and make recommendations in relation to such monitoring mechanisms. In accordance with regulation 5 of these Regulations, in certifying monitoring mechanisms, OFCOM must take due account of all applicable guidelines issued by BEREC.

Regulations 7 to 15 make provision for OFCOM to impose, modify or revoke requirements to ensure compliance with Articles 3 and 4 of the EU Regulation or to ensure the continued availability of non-discriminatory internet access services at levels of quality that reflect advances in technology. These Regulations also make provision concerning directions, approvals and consents, which can be given by OFCOM or another person, for the purposes of a requirement, and for consultation for requirements and for directions, approvals and consents.

Regulation 17 contains provisions relating to OFCOM's powers to obtain information that they consider necessary for the purpose of carrying out their functions under the EU Regulation and these Regulations.

Regulation 19 provides for a notification procedure where OFCOM determine that there has been a breach of Articles 3, 4 or 5(2) of the EU Regulation or these Regulations ("a relevant breach").

Regulation 20 gives OFCOM the power to impose a penalty for a relevant breach.

Regulation 21 provides for the amount of penalty which may be imposed under regulation 20. A penalty of up to £2,000,000 may be imposed for breach of an information requirement. A penalty of up to 10% of the turnover of “relevant business” as defined in these Regulations may be imposed by OFCOM for all other breaches of the EU Regulation or these Regulations.

Regulation 22 provides for a confirmation procedure where OFCOM is satisfied that a person has been in breach of an obligation specified in a notification given under regulation 19 of these Regulations. A person who is given a confirmation decision is under a duty to comply with it. OFCOM can enforce that duty through civil proceedings.

Regulation 23 makes it a criminal offence to breach an information requirement and sets out the relevant penalties.

Regulation 24 specifies how the turnover of “relevant business” is to be calculated for the purposes of regulation 21 of these Regulations.

Regulation 25 requires OFCOM to pay any financial penalties received under these Regulations into the Consolidated Fund.

Regulation 27 to 29 provide that a person affected by a decision of OFCOM (or, where relevant, another person) under the EU Regulation or these Regulations may appeal that decision to the Competition Appeal Tribunal. Decisions of the Competition Appeal Tribunal may be appealed on a point of law to the Court of Appeal or the Court of Session in Scotland.

Regulation 30 requires the Secretary of State to review the operation and effect of these Regulations and publish a report within five years after they come into force and within every five years after that. Following a review it will fall to the Secretary of State to consider whether the Regulations should remain as they are, or be revoked or be amended. A further instrument would be needed to revoke the Regulations or to amend them.

An impact assessment of the effect that this instrument will have on the costs of business is available from the Department of Culture, Media and Sport at 100 Parliament Street, London, SW1A 2BQ and is published with the Explanatory Memorandum alongside the instrument on www.legislation.gov.uk.

A Transposition Note has been produced for these Regulations and is published with the Explanatory Memorandum alongside the instrument on www.legislation.gov.uk.

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