

2016 No. 700

ELECTRONIC COMMUNICATIONS

**The Communications (Access to Infrastructure) Regulations
2016**

<i>Made</i>	- - - -	<i>4th July 2016</i>
<i>Laid before Parliament</i>		<i>4th July 2016</i>
<i>Coming into force</i>	- -	<i>31st July 2016</i>

The Secretary of State makes these Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972, as read with paragraph 1A of Schedule 2 to that Act(a).

The Secretary of State has been designated for the purposes of section 2(2) in respect of matters relating to electronic communications(b).

These Regulations make provision for a purpose mentioned in section 2(2) and it appears to the Secretary of State that it is expedient for references to the Framework Directive(c) to be construed as references to that instrument as amended from time to time.

PART 1

Introduction

Citation and commencement

1. These Regulations may be cited as the Communications (Access to Infrastructure) Regulations 2016 and come into force on 31st July 2016.

Interpretation

2. In these Regulations—

“the 2003 Act” means the Communications Act 2003(d);

(a) 1972 c. 68. Section 2(2) was amended by section 27 of the Legislative and Regulatory Reform Act 2006 (c. 51) (“the 2006 Act”) and section 3 of, and Part 1 of the Schedule to, the European Union (Amendment) Act 2008 (c. 7). Paragraph 1A was inserted by section 28 of the 2006 Act.

(b) S.I. 2001/3495, to which there are amendments not relevant to these Regulations.

(c) For the definition of “the Framework Directive”, see regulation 2.

(d) 2003 c. 21.

“access point” means a physical point, located inside or outside a building and accessible to network providers, where connection is made available to in-building physical infrastructure intended to host elements or enable delivery of high-speed electronic communications networks;

“civil works” means building or civil engineering works which involve the construction, maintenance, repair or replacement of physical infrastructure, and for which—

- (a) a permit has been granted;
- (b) an application for a permit has been made; or
- (c) such an application is envisaged within the next six months,

but the term does not include works to which the roads coordination duty applies;

“electronic communications network” has the meaning given in section 32(1) of the 2003 Act^(a);

“electronic communications service” has the meaning given in section 32(2) of the 2003 Act;

“end-user” has the meaning given in section 151(1) of the 2003 Act;

“the Framework Directive” means Directive 2002/21/EC^(b) of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, as amended from time to time;

“high-speed” means capable of delivering access to broadband services at speeds of at least 30 megabits per second;

“in-building physical infrastructure” means physical infrastructure or installations at the end-user’s location, including elements under joint ownership, intended to host wired or wireless access networks, where such access networks are capable of delivering electronic communications services and connecting the access point of the building with the network termination point;

“infrastructure operator” means—

- (a) a network provider;
- (b) an undertaking providing physical infrastructure intended to provide a service of production, transport, transmission or distribution of—
 - (i) gas;
 - (ii) electricity, including public lighting;
 - (iii) heating; or
 - (iv) water, including disposal or treatment of waste water and sewage, and drainage systems; or
- (c) an undertaking providing physical infrastructure intended to provide transport services, including railways, roads, ports and airports;

“Minister of the Crown” has the meaning given in section 8(1) of the Ministers of the Crown Act 1975^(c) and “appropriate Minister of the Crown” is to be construed in accordance with regulation 10(3);

“network provider” means an undertaking providing or authorised to provide a public electronic communications network (within the meaning of section 151(1) of the 2003 Act);

“network termination point” has the same meaning as in the Framework Directive;

“OFCOM” means the Office of Communications^(d);

(a) Section 32 was amended by S.I. 2011/1210.

(b) OJ L 108, 24.4.2002, p 33. Amended by Regulation (EC) No 717/2007 (OJ L 171, 29.6.2007, p 32), Regulation (EC) No 544/2009 (OJ L 167, 29.6.2009, p 12) and Directive 2009/140/EC (OJ L 337, 18.12.2009, p 37).

(c) 1975 c. 26.

(d) Established by the Office of Communications Act 2002 (c. 11).

“permit” means an explicit or implicit decision of an authority granting permission to an undertaking to carry out building or civil engineering works, where an application has been made by the undertaking to the authority for such permission, and the carrying out of the works without that permission would be unlawful;

“physical infrastructure” means any network element which is intended to host other network elements and which is not itself active, such as pipes, masts, ducts, inspection chambers, manholes, cabinets, buildings or entries to buildings, antenna installations, towers and poles. The term does not include cables (including strands of optical fibre) and elements of networks used for the provision of water intended for human consumption, as defined in point 1 of Article 2 of Council Directive 98/83/EC(a) on the quality of water intended for human consumption;

“rights holder” means any person who holds a right to use—

- (a) an access point; or
- (b) in-building physical infrastructure;

“roads coordination duty” means—

- (a) in England and Wales, the duty under section 59(1) of the New Roads and Street Works Act 1991(b);
- (b) in Scotland, the duty under section 118(1) of that Act(c); and
- (c) in Northern Ireland, the duty under Article 19(1) of the Street Works (Northern Ireland) Order 1995(d);

“Tribunal” means the Competition Appeal Tribunal;

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

Other rights and obligations

3.—(1) A requirement on an infrastructure operator or rights holder to provide access to physical infrastructure or in-building physical infrastructure arising under Part 2 is not to be taken to prejudice the property rights of any other person.

(2) These Regulations are without prejudice to rights and obligations arising under the electronic communications code (within the meaning of section 106(1) of the 2003 Act).

PART 2

Rights and obligations

Information about physical infrastructure

4.—(1) A network provider may make a request to an infrastructure operator for disclosable information about the operator’s existing physical infrastructure provided the request—

- (a) is in writing;
- (b) is limited to a specified geographical area; and
- (c) is made because the provider envisages deploying elements of a high-speed electronic communications network in that area.

(2) “Disclosable information” in paragraph (1) refers to—

(a) OJ L 330, 5.12.1998, p 32. Amended by Regulation (EC) No 1882/2003 (OJ L 284, 31.10.2003, p 1), Regulation (EC) No 596/2009 (OJ L 188, 18.7.2009, p 14) and Directive 2015/1787 (OJ L 260, 7.10.2015, p 6).
(b) 1991 c. 22. Section 59 was amended by the Traffic Management Act 2004 (c. 18), section 42.
(c) Section 118 was amended by the Transport (Scotland) Act 2005 (asp 12), section 23.
(d) S.I. 1995/3210 (N.I. 19). Article 19 is prospectively amended by S.I. 2007/287 (N.I. 1).
(e) 2002 c.40.

(a) the location, route, type and current use of the infrastructure; and

(b) a point of contact for any further requests about the infrastructure.

(3) Subject to paragraphs (4) and (5) and regulation 10(1) (national security), the infrastructure operator must, within a period of two months beginning with the date of receipt of the request, make available, on proportionate, non-discriminatory and transparent terms, the requested disclosable information that it holds.

(4) The infrastructure operator may refuse to disclose information if, or to the extent, the relevant infrastructure is of a description set out in Schedule 1.

(5) The infrastructure operator may refuse to disclose information if, or to the extent, compliance would, or would be likely to, prejudice—

(a) the security or integrity of any network;

(b) a duty of confidentiality owed by the infrastructure operator to another person;

(c) operating or business secrets of any person; or

(d) safety or public health.

(6) If the infrastructure operator refuses to any extent a request, it must, within the time for complying with paragraph (3), give the network provider a notice which—

(a) indicates that the request has been refused or sets out the extent of the refusal; and

(b) provides the grounds for refusing and the reasons those grounds apply.

(7) The grounds and reasons need not be given to the extent giving them would, or would be likely to, prejudice those grounds or reasons (but regulation 10(8) applies to the extent the refusal is on national security grounds).

Surveys of physical infrastructure

5.—(1) A network provider may make a request to an infrastructure operator for an on-site survey of elements of the operator's physical infrastructure provided the request—

(a) is in writing;

(b) specifies the elements of the operator's infrastructure to which the request relates; and

(c) is made with a view to deploying elements of a high-speed electronic communications network to which the elements to be surveyed are relevant.

(2) Subject to paragraphs (3) to (5) and regulation 10(1) (national security), the infrastructure operator must, within a period of one month beginning with the date of receipt of the request, agree to grant a survey on proportionate, non-discriminatory and transparent terms.

(3) The infrastructure operator may refuse to grant a survey if, or to the extent, the relevant infrastructure is of a description set out in Schedule 1.

(4) The infrastructure operator may refuse to grant a survey if, or to the extent, compliance would, or would be likely to, prejudice—

(a) the security or integrity of any network;

(b) a duty of confidentiality owed by the infrastructure operator to another person;

(c) operating or business secrets of any person; or

(d) safety or public health.

(5) Without prejudice to paragraphs (3) and (4), the infrastructure operator may refuse to grant a survey if, or to the extent, the request cannot reasonably be met.

(6) If the infrastructure operator refuses to any extent a request, it must, within the time for complying with paragraph (2), give the network provider a notice which—

(a) indicates that the request has been refused or sets out the extent of the refusal; and

(b) provides the grounds for refusing and the reasons those grounds apply.

(7) The grounds and reasons need not be given to the extent giving them would, or would be likely to, prejudice those grounds or reasons (but regulation 10(8) applies to the extent the refusal is on national security grounds).

Access to physical infrastructure

6.—(1) A network provider may make a request to an infrastructure operator for access to the operator's physical infrastructure provided the request—

- (a) is in writing;
- (b) specifies the infrastructure to which the request relates;
- (c) is made with a view to deploying elements of a high-speed electronic communications network using that infrastructure;
- (d) specifies the network elements it proposes to deploy; and
- (e) specifies the time frame required for deploying those elements.

(2) Subject to paragraph (3) and regulation 10(1) (national security), the infrastructure operator must, within a period of two months beginning with the date of receipt of the request, agree to provide access on fair and reasonable terms.

(3) The infrastructure operator may refuse to provide access if, or to the extent, it considers the request to be unreasonable, based on objective, transparent and proportionate grounds, such as—

- (a) the technical suitability of the physical infrastructure to host any of the network elements;
- (b) the availability of space in the physical infrastructure to host the network elements, taking into account the infrastructure operator's sufficiently demonstrated future needs;
- (c) safety or public health concerns;
- (d) the security or integrity of any network;
- (e) the risk that the proposed electronic communications services would seriously interfere with the provision of other services over the physical infrastructure; or
- (f) the availability of viable alternative means of wholesale access to the physical infrastructure provided by the same infrastructure operator and suitable for the provision of a high-speed electronic communications network, provided that such access is offered on fair and reasonable terms.

(4) If the infrastructure operator refuses to any extent a request, it must, within the time for complying with paragraph (2), give the network provider a notice which—

- (a) indicates that the request has been refused or sets out the extent of the refusal; and
- (b) provides the grounds for refusing and the reasons those grounds apply.

(5) The grounds and reasons need not be given to the extent giving them would, or would be likely to, prejudice those grounds or reasons (but regulation 10(8) applies to the extent the refusal is on national security grounds).

Access to in-building physical infrastructure

7.—(1) A network provider may make a request to a rights holder for access to the rights holder's access point or in-building physical infrastructure provided the request—

- (a) is in writing;
- (b) specifies the location to which the request relates; and
- (c) is made with a view to deploying elements of a high-speed electronic communications network using that access point or infrastructure.

(2) Subject to paragraph (3) and regulation 10(1) (national security), the rights holder must, within a period of two months beginning with the date of receipt of the request, agree to provide access on fair and non-discriminatory terms.

(3) A rights holder may refuse to provide access if, or to the extent—

- (a) it would be technically possible and economically efficient for the network provider to install additional in-building physical infrastructure; or
 - (b) the request cannot reasonably be met.
- (4) If the rights holder refuses to any extent a request, it must, within the time for complying with paragraph (2), give the network provider a notice which—
- (a) indicates that the request has been refused or sets out the extent of the refusal; and
 - (b) provides the grounds for refusing and the reasons those grounds apply (but regulation 10(8) applies to the extent the refusal is on national security grounds).

Information about civil works

8.—(1) A network provider may make a request to an infrastructure operator for disclosable information concerning civil works relating to the operator’s physical infrastructure (including where the works have already commenced) provided the request—

- (a) is in writing;
- (b) is limited to a specified geographical area; and
- (c) is made because the provider envisages deploying elements of a high-speed electronic communications network in that area.

(2) “Disclosable information” in paragraph (1) refers to—

- (a) the location and type of the works;
- (b) the network elements involved;
- (c) the start date (which may be an estimated start date) for the works and their duration; and
- (d) a point of contact for any further requests about the works.

(3) Subject to paragraphs (4) to (6) and regulation 10(1) (national security), the infrastructure operator must, within a period of two weeks beginning with the date of receipt of the request, make available on proportionate, non-discriminatory and transparent terms the disclosable information that is requested.

(4) The infrastructure operator may refuse to disclose information if, or to the extent, the operator’s works are of a description set out in Schedule 2.

(5) The infrastructure operator may refuse to disclose information if it is already publicly available.

(6) The infrastructure operator may refuse to disclose information if, or to the extent, compliance would, or would be likely to, prejudice—

- (a) the security or integrity of any network;
- (b) a duty of confidentiality owed by the infrastructure operator to another person;
- (c) operating or business secrets of any person; or
- (d) safety or public health.

(7) If the infrastructure operator refuses to any extent a request, it must, within the time for complying with paragraph (3), give the network provider a notice which—

- (a) indicates that the request has been refused or sets out the extent of the refusal; and
- (b) provides the grounds for refusing and the reasons those grounds apply.

(8) The grounds and reasons need not be given to the extent giving them would, or would be likely to, prejudice those grounds or reasons (but regulation 10(8) applies to the extent the refusal is on national security grounds).

(9) Subject to paragraph (10), the infrastructure operator must make publicly available in electronic form any information made available under paragraph (3).

(10) The infrastructure operator need not make publicly available information if doing so would, or would be likely to, prejudice any of the grounds listed in paragraph (6).

Coordination with civil works funded from public funds

9.—(1) If an infrastructure operator is carrying out, or proposes to carry out, civil works, a network provider may make a request to that operator to coordinate with those works, civil works that the provider proposes to carry out provided—

- (a) the request is in writing;
- (b) the request is made with a view to deploying elements of a high-speed electronic communications network; and
- (c) the works being carried out by the infrastructure operator are funded wholly or partly from public funds.

(2) Subject to paragraphs (3) and (4) and regulation 10(1) (national security), the infrastructure operator must, within a period of one month beginning with the date of receipt of the request, agree to coordinate the works on proportionate, non-discriminatory and transparent terms.

(3) The infrastructure operator may refuse to coordinate the works if, or to the extent, the operator's works are of a description set out in Schedule 2.

(4) The infrastructure operator may refuse to coordinate the works if, or to the extent—

- (a) the request has not been made promptly and in any event at least one month before the date of the final submission of the infrastructure operator's project to the relevant permit granting authority for a permit to carry out the works to which the provider's request relates;
- (b) coordination would give rise to any additional costs to the infrastructure operator (including costs occasioned by any delay that would be caused by coordination of the works); or
- (c) coordination would materially impede the infrastructure operator's control over its works.

(5) If the infrastructure operator refuses to any extent a request, it must, within the time for complying with paragraph (2), give the network provider a notice which—

- (a) indicates that the request has been refused or sets out the extent of the refusal; and
- (b) provides the grounds for refusing and the reasons those grounds apply (but regulation 10(8) applies to the extent the refusal is on national security grounds).

Refusal on national security grounds

10.—(1) A request made by a network provider under regulations 4 to 9 must be refused if, or to the extent, complying with the request would be prejudicial to national security.

(2) If an infrastructure operator or rights holder considers that a request made to it may be one that it is required to refuse on national security grounds (to any extent), it must not make a decision until it has received the opinion of the appropriate Minister of the Crown.

(3) The appropriate Minister of the Crown is the Minister who exercises those functions of a public nature most relevant to whether, or to what extent, the request must be refused on national security grounds.

(4) For the purposes of paragraph (2), the infrastructure operator or rights holder must consult the person it considers the appropriate Minister as soon as reasonably practicable after receipt of the request.

(5) The appropriate Minister must provide an opinion.

(6) The opinion may include such information as the Minister considers appropriate except that—

- (a) it must, as a minimum, include a statement as to the extent to which (if at all) the request should be refused on national security grounds; and
- (b) it must not include information the disclosure of which might prejudice national security.

(7) In deciding whether to refuse a request (or any part of it) on national security grounds, the infrastructure operator or rights holder must follow the Minister's opinion.

- (8) If a request is to be refused (to any extent) on national security grounds—
- (a) the infrastructure operator or rights holder must consult the appropriate Minister as to what information (if any) may be given to the requester to explain why the request has been refused;
 - (b) the Minister must provide an opinion; and
 - (c) the infrastructure operator or rights holder must follow the Minister’s opinion.
- (9) Where the appropriate Minister is required under this regulation to give an opinion, the Minister must do so within a timescale that has regard to the applicable time limit under regulation 4, 5, 6, 7, 8 or 9 for the infrastructure operator or rights holder to respond to the request.

Confidential information

11.—(1) It is the duty of a network provider which acquires information in confidence from an infrastructure operator or rights holder as a result of the exercise of its rights under these Regulations, to—

- (a) use such information solely for the purpose for which it was supplied, restrict access to only those persons who require it for that purpose and respect at all times the confidentiality of the information provided; and
- (b) not pass such information to, or allow it to be used by, any other person within the network provider or otherwise.

(2) The duty is enforceable, by a person who is or might be prejudiced by a failure to comply with it, in civil proceedings—

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

(3) Nothing in this regulation affects any other rights a person may have to protect confidential information.

(4) This regulation does not prevent the disclosure of information—

- (a) for the purposes of the network provider obtaining professional advice about its rights and obligations under these Regulations;
- (b) to OFCOM where disclosure is required so that they may carry out their functions under these Regulations;
- (c) where required for the bringing and carrying on of proceedings before the Tribunal or a court in relation to matters arising under these Regulations; or
- (d) to any person, where disclosure is required under any other provision of United Kingdom law or the law of any part of the United Kingdom.

PART 3

Disputes

Reference of disputes to OFCOM

12.—(1) This regulation applies in relation to a request made by a network provider under regulation 4, 5, 6, 7, 8 or 9.

(2) Subject to paragraph (3), if the request is in dispute it may be referred to OFCOM by the person making the request or the person to which the request was made.

(a) 1988 c. 36.

(3) A reference to OFCOM must not be made until there is no realistic prospect of the dispute being resolved without that reference.

(4) A request is in dispute if—

- (a) it has been refused in whole or in part;
- (b) the terms under which the request is to be granted cannot be agreed; or
- (c) there has been no response to the request within the time limit given for responding.

(5) In the case of a dispute falling within paragraph (4)(c), only the network provider making the request may refer the dispute.

(6) A reference under this regulation must be made in such manner as is required by OFCOM.

(7) A requirement under paragraph (6) is to be imposed, withdrawn or modified by OFCOM publishing a notice in such manner as they consider appropriate for bringing the requirement, withdrawal or modification to the attention of persons who, in OFCOM's opinion, are likely to be affected by it.

(8) Different requirements may be imposed for different cases.

Resolution of disputes by OFCOM

13.—(1) OFCOM must—

- (a) consider a dispute referred to them under regulation 12; and
- (b) make a determination for resolving it.

(2) Subject to paragraph (3), the determination must be made as soon as reasonably practicable, and, except in exceptional circumstances—

- (a) in the case of a dispute relating to a request under regulation 6, within a period of four months beginning with the date of receipt of the complete reference; or
- (b) in any other case, within a period of two months beginning with the date of receipt of the complete reference.

(3) A “complete reference” is a reference which complies with the requirements imposed by OFCOM under regulation 12(6).

(4) It is the duty of a network provider, infrastructure operator or rights holder to comply with OFCOM's determination.

(5) That duty is enforceable in civil proceedings by OFCOM or a relevant person—

- (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.

(6) A “relevant person” is a person who is or might be affected by a failure to comply with the duty.

Resolution of disputes: OFCOM's powers

14.—(1) When making a determination under regulation 13, the powers that may be exercised by OFCOM are those listed in paragraph (2).

(2) Those powers are—

- (a) to make a declaration setting out the rights and obligations of parties to the dispute;
- (b) to give a direction fixing the terms of transactions between parties to the dispute;
- (c) to give a direction imposing an obligation on parties to the dispute to enter into a transaction between themselves on the terms fixed by OFCOM;
- (d) to require a party to the dispute to pay all or part of another party's reasonable costs and expenses in connection with the dispute;

- (e) to require a party to pay all or part of OFCOM's reasonable costs and expenses in dealing with the dispute;
- (f) to require a party to pay all or part of the reasonable costs and expenses incurred by a person consulted under regulation 15(2).

Resolution of disputes: procedure

15.—(1) The procedure for the consideration and determination of a dispute is the procedure OFCOM consider appropriate (except to the extent the procedure is provided for in these Regulations).

(2) Before making a determination, OFCOM must consult any person who has functions of a public nature that OFCOM consider relevant.

(3) The only person consulted in respect of whether a request (or any part of it) was correctly refused on national security grounds must be the appropriate Minister of the Crown (and paragraphs (4) to (6) apply when OFCOM consult in respect of such a refusal).

(4) The Minister must provide an opinion.

(5) The opinion may include such information as the Minister considers appropriate except that—

- (a) it must, as a minimum, include a statement as to whether it was correct to refuse the request on national security grounds (to the extent it was refused on those grounds); and
- (b) it must not include information the disclosure of which might prejudice national security.

(6) OFCOM must follow the opinion of the Minister.

(7) Subject to paragraphs (8) and (9), OFCOM must send a copy of their determination, together with a full statement of their reasons for it, to—

- (a) every party to the dispute; and
- (b) any person who has functions of a public nature that OFCOM consider relevant.

(8) Information must not be included in the material sent under paragraph (7) where its inclusion would be prejudicial to national security (see paragraph (13)).

(9) The requirement in paragraph (7) is not to be taken to require disclosure of information that is commercially confidential.

(10) OFCOM must publish so much of their determination and the reasons for it as (having regard in particular to the need to preserve commercial confidentiality and subject to paragraph (11)) they consider appropriate.

(11) OFCOM must not publish information under paragraph (10) where to do so would be prejudicial to national security (see paragraph (13)).

(12) Information published under paragraph (10) must be published in such manner as OFCOM consider appropriate for bringing it to the attention (to the extent they consider appropriate) of members of the public.

(13) If the appropriate Minister of the Crown has provided an opinion under paragraph (4), OFCOM must consult the Minister as to the application of paragraphs (8) and (11) and follow the opinion of the Minister in that regard.

(14) Where the appropriate Minister of the Crown is required to give an opinion under paragraph (4), the Minister must do so within a timescale that has regard to the time limit applicable under regulation 13(2) for OFCOM to make a determination.

(15) Where a person (other than an appropriate Minister of the Crown being consulted about national security) is consulted under paragraph (2), OFCOM must not proceed to make a determination until—

- (a) the person consulted has responded; or
- (b) no response has been provided and a reasonable period for providing a response has been allowed (having regard to the time limit applicable under regulation 13(2)).

Resolution of disputes: access to physical infrastructure

16.—(1) This regulation applies where a dispute relating to a request under regulation 6 has been referred under regulation 12 to OFCOM.

(2) In fixing any terms as to price, OFCOM must—

- (a) ensure that the infrastructure operator has a fair opportunity to recover its costs, and
- (b) take into account the impact of the access on the operator's business plan, including the investments made by the operator, in particular in the physical infrastructure used for the provision of high-speed electronic communications services.

(3) Where the infrastructure operator is a network provider, OFCOM must take into account the objectives set out in Article 8 of the Framework Directive.

Resolution of disputes: information

17.—(1) This regulation applies where a dispute has been referred under regulation 12 to OFCOM.

(2) Subject to paragraph (8), OFCOM may require a person to provide them with specified information, in the specified manner and within the specified period.

(3) The information that may be specified is information required by OFCOM for the purpose of considering the dispute and making a determination under regulation 13.

(4) The specified period must be reasonable.

(5) In fixing that period, OFCOM must have regard, in particular, to—

- (a) the information that is required;
- (b) the nature of the dispute; and
- (c) the obligation imposed by regulation 13(2) (time limits for making a determination).

(6) Sections 138 to 139A of the 2003 Act^(a) apply to a requirement made under paragraph (2).

(7) The following modifications to sections 138 to 139A apply for the purposes of paragraph (6)—

- (a) in section 138(1), the reference to a requirement imposed under section 135 or 136 is to a requirement imposed under paragraph (2);
- (b) in section 138(2)(d), the reference to a requirement under section 135 or 136 is to a requirement under paragraph (2); and
- (c) sections 138(2)(f) and (9A) and 139(2), (9) and (10) are omitted.

(8) The power in paragraph (2) must not be exercised by OFCOM for the purposes of obtaining information in connection with whether a request made under regulations 4 to 9 was correctly refused on national security grounds.

Reference not to affect legal proceedings or OFCOM's powers

18.—(1) A reference of a dispute under regulation 12 does not prevent any person from bringing or continuing any civil or criminal proceedings in respect of any of the matters under dispute.

(2) Paragraph (1) is subject to—

- (a) regulation 13(4) (duty to comply with OFCOM's determination); and
- (b) any agreement to the contrary.

(3) Any reference of a dispute to OFCOM, or consideration or determination by OFCOM of a dispute, does not prevent OFCOM from exercising any of their powers (or from doing anything in connection with the exercise of any of their powers) in relation to the subject-matter of the dispute.

^(a) Sections 138 and 139 were amended, and section 139A was inserted, by S.I. 2011/1210. Section 139 was also amended by S.I. 2011/1773.

PART 4

Proceedings before the Tribunal and Appeals from the Tribunal

Proceedings before the Tribunal

19.—(1) This regulation applies if OFCOM—

- (a) have made a determination under regulation 13; or
- (b) have, by virtue of regulation 17, given a confirmation decision to a person under section 139A of the 2003 Act.

(2) A party to the dispute about which OFCOM made the determination or a person to which a confirmation decision was given may apply to the Tribunal for a review of that determination or decision.

(3) Except in so far as a direction to the contrary is given by the Tribunal, the effect of the determination or confirmation decision is not suspended by reason of the making of the application.

(4) In deciding an application the Tribunal must apply the same principles as would be applied by a court on an application for judicial review.

(5) The application must be brought by way of an appeal before the Tribunal, and OFCOM must be a party to the proceedings.

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

(7) The notice of appeal must be sent within the period specified in those rules.

(8) The grounds of appeal must be set out in sufficient detail to indicate why the appellant contends that the determination or confirmation decision (or any part of that determination or decision) was not lawful.

(9) The Tribunal must either—

- (a) dismiss the appeal, or
- (b) quash, in whole or part, the determination or confirmation decision.

(10) If the Tribunal quashes a determination (or any part of it), it must refer the matter back to OFCOM with a direction to reconsider and make a new determination that is consistent with the Tribunal's ruling.

(11) If the Tribunal quashes a confirmation decision (or any part of it), it must—

- (a) refer the matter back to OFCOM with a direction to reconsider the application of the contravention process to the matter in a manner consistent with the Tribunal's ruling; or
- (b) make such other direction about the confirmation decision as it considers appropriate.

(12) The “contravention process” is the process set out in sections 138 to 139A of the 2003 Act as applied by regulation 17.

Appeals from the Tribunal

20.—(1) An appeal lies to the appropriate court on any point of law arising from a decision of the Tribunal under regulation 19.

(2) 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 a sufficient interest in the matter.

(3) An appeal under this regulation requires the permission of the Tribunal or the appropriate court.

(4) In this regulation “the appropriate court” means—

- (a) in relation to England and Wales and Northern Ireland, the Court of Appeal; and

- (b) in relation to Scotland, the Court of Session.

PART 5

General

Guidance

21. OFCOM—

- (a) must issue, and may from time to time revise, guidance for the purposes of these Regulations;
- (b) must, before issuing their guidance or revised guidance, consult such network providers, infrastructure operators and other persons as OFCOM think appropriate; and
- (c) must publish their guidance or revised guidance in such manner as they think appropriate.

Prescribed forms: requests and notices

22.—(1) OFCOM—

- (a) may prescribe, and may from time to time revise, the form in which a request or notice provided for in Part 2 is made or given;
- (b) must, before prescribing or revising a form, consult such network providers, infrastructure operators and other persons as OFCOM think appropriate; and
- (c) must publish any prescribed form in such manner as they think appropriate.

(2) Where OFCOM have prescribed a form, a network provider, infrastructure operator or rights holder may not make a request or give a notice other than by way of that form.

Procedures for giving notice

23. Sections 394 and 395 of the 2003 Act (giving of notices and sending of documents)(a) apply for the purposes of Parts 2 and 3 as if those Parts were listed in section 394(2).

Review

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

- (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 have regard to how Directive 2014/61/EU(b) of the European Parliament and of the Council on measures to reduce the cost of deploying high-speed electronic communications networks is implemented in other member States.

(3) The report must in particular—

- (a) set out the objectives intended to be achieved by 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 in another way which involves less onerous regulatory provision.

(a) Section 394 was amended by the Wireless Telegraphy Act 2006 (c. 36), Schedule 9, Part 1 and by the Postal Services Act 2011 (c. 5), Schedule 12, Part 2, paragraph 65.

(b) OJ No L 155, 23.5.2014, p 1.

(4) The first review period is the period of five years beginning with the date on which these Regulations come into force.

(5) Each subsequent review period is a period of five years beginning with the date on which the preceding review was published.

(6) “Regulatory provision” has the meaning given in section 32(4) of the Small Business, Enterprise and Employment Act 2015(a).

4th July 2016

Ed Vaizey
Minister of State
Department for Culture, Media and Sport

SCHEDULE 1 Regulations 4(4) and 5(3)

Exempt physical infrastructure

Water

1.—(1) Any physical infrastructure used, or intended for use, in the production, transport or distribution of water(b) (including disposal or treatment of waste water and sewage, and drainage systems) which is—

- (a) a pipe with an internal diameter less than 225 millimetres;
- (b) a sewer downstream of a combined storm overflow and is within 100 metres of that overflow;
- (c) a sewer in an area of known inundation or hydraulic incapacity;
- (d) a sewer in respect of which, if cables were to be installed as part of a high-speed electronic communications network, they would need to be installed in the invert;
- (e) a sewer in respect of which the mandatory maintenance work required is greater than may normally be expected for a sewer; or
- (f) equipment used to pump sewage.

(2) “Mandatory maintenance work” is the work done by, or on behalf of, the undertaking responsible for the sewer in consequence of any requirement to maintain the sewer imposed on the undertaking under the law of the United Kingdom, or the law of any part of the United Kingdom.

Gas

2. A pipe used, or intended for use, in the production, transport or distribution of gas with an internal diameter less than 225 millimetres.

SCHEDULE 2 Regulations 8(4) and 9(3)

Exempt civil works

Minor works

1.—(1) Any civil works concerning physical infrastructure used, or intended for use, in the production, transport, transmission or distribution of water (including disposal or treatment of

(a) 2015 c. 26.

(b) In relation to water intended for human consumption, see the definition of “physical infrastructure” in regulation 2.

waste water and sewage, and drainage systems), gas or electricity where those works satisfy condition 1 or condition 2.

(2) Condition 1 is that the works directly relate to the connection between the network over which the water, gas or electricity has been transported, transmitted or distributed and the premises of a customer.

(3) Condition 2 is that the works have a cost of less than £10,000, a duration of less than 10 working days or a total length of less than 100 metres.

(4) “Premises” includes any land, building or other structure.

2.—(1) Any civil works concerning physical infrastructure used, or intended to be used, to provide a public electronic communications network which have a cost of less than £40,000, a duration of less than 25 working days or, subject to sub-paragraph (2), a total length of less than 1000 metres.

(2) The exemption for civil works with a total length of less than 1000 metres does not apply to works concerning infrastructure intended to host elements of a wireless electronic communications network.

3.—(1) Any civil works concerning the physical infrastructure of a railway (except the Docklands Light Railway) which have a cost of less than £7,000,000, a duration of less than 14 working days or a total length of less than 500 metres.

(2) “Railway” has the meaning given in section 67(1) of the Transport and Works Act 1992(a).

4.—(1) Any civil works concerning the physical infrastructure of the Docklands Light Railway or a tramway, which have a cost of less than £1,500,000, a duration of less than 14 working days or a total length of less than 500 metres.

(2) “Tramway” has the meaning given in section 67(1) of the Transport and Works Act 1992.

5. The “total length” for the purposes of paragraphs 1 to 4 is the length of all the physical infrastructure that is the subject of the civil works added together.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement certain of the requirements of Directive 2014/61/EU on measures to reduce the cost of deploying high-speed electronic communications networks (OJ No L 155, 23.5.2014, p.1) (“the Directive”).

Part 1 contains introductory provisions. Regulation 2 gives the definition of terms used in the Regulations. Regulation 3 sets out that the Regulations are without prejudice to certain rights and obligations.

Part 2 sets out rights and obligations that arise under the Regulations in relation to infrastructure; in particular the requests that may be made by network providers and the circumstances in which requests (in whole or in part) may or must be refused by infrastructure operators or rights holders. Regulation 4 deals with the provision of information about physical infrastructure; regulation 5, the surveying of physical infrastructure; regulation 6, access to physical infrastructure; regulation 7, access to in-building physical infrastructure; regulation 8, information about civil works; regulation 9, the coordination of a network provider’s civil works with civil works funded from public funds. Regulations 4(4) and 5(3) introduce Schedule 1 and regulations 8(4) and 9(3) introduce Schedule 2. The Schedules provide for certain grounds on which requests may be refused. Regulation 10 makes provision about refusing requests on national security grounds. Regulation 11 makes provision about how confidential information acquired by a network provider as a result of a request is to be treated.

(a) 1992 c. 42.

Part 3 contains provisions about the reference of disputes arising out of requests to OFCOM. Regulation 12 sets out the circumstances in which a dispute can be referred to OFCOM. Regulation 13 contains provision about the making of a determination about a dispute by OFCOM. Regulation 14 sets out the powers OFCOM may exercise. Regulation 15 contains provision about the procedure to be adopted by OFCOM when considering and determining a dispute. Regulation 16 contains provision about the resolution of disputes arising from a request made under regulation 6 for access to physical infrastructure. Under regulation 17, OFCOM may require a person to provide information required by OFCOM for considering and determining a dispute. Regulation 18 sets out that the reference of a dispute under regulation 12 does not prevent the bringing or continuing of proceedings.

Part 4 is about proceedings before the Competition Appeal Tribunal and appeals from that Tribunal. Regulation 19 sets out the circumstances in which proceedings may be brought before the Tribunal and the procedure to be used for those proceedings. Regulation 20 contains provisions about appeals arising from decisions made by the Tribunal.

Part 5 contains general provisions. Regulation 21 imposes a requirement on OFCOM to produce guidance for the purposes of these Regulations and contains connected provisions. Regulation 22 contains provisions about the prescribing of forms by OFCOM. By reference to sections 394 and 395 of the Communications Act 2003, regulation 23 makes provision about the giving of notices and sending of documents under Parts 2 and 3 of these Regulations. Regulation 24 imposes a requirement on the Secretary of State to review the Regulations.

A full impact assessment of the effect that these Regulations will have on the cost of business has been prepared. A copy of this document and the transposition note in relation to the implementation of the Directive have been placed in the Library of each House of Parliament and are annexed to the Explanatory Memorandum which is available alongside these Regulations at www.legislation.gov.uk.

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