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STATUTORY INSTRUMENTS

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**2016 No. 700**

The Communications (Access to  
Infrastructure) Regulations 2016

**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.

(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(7) A requirement under paragraph (6) is to be imposed, withdrawn or modified by OFCOM publishing a notice in such manner as they consider appropriate for bringing the requirement, withdrawal or modification to the attention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.

<sup>F1</sup>(3) .....

<p><b>F1</b> <a href="#">Reg. 16(3)</a> omitted (31.12.2020) by virtue of <a href="#">The Electronic Communications and Wireless Telegraphy (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/246)</a>, reg. 1(2), <b>Sch. 2 para. 2</b>; 2020 c. 1, Sch. 5 para. 1(1)</p>
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**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 <sup>M1</sup> 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.

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#### **Marginal Citations**

**M1** 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](#).

#### **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.

**Changes to legislation:**

There are currently no known outstanding effects for the The Communications (Access to Infrastructure) Regulations 2016, PART 3.