

EXPLANATORY MEMORANDUM TO
THE OPEN INTERNET ACCESS (AMENDMENT) (EU EXIT) REGULATIONS 2018
2018 No. 1243

1. Introduction

- 1.1 This explanatory memorandum has been prepared by Department for Digital, Media, Culture and Sport and is laid before Parliament by Act.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument is being made using powers in the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the United Kingdom from the European Union.

Explanations

What did any relevant EU law do before exit day?

- 2.2 The EU Open Internet Access Regulation (Regulation (EU) 2015/2120) establishes common (cross-EU) rules which member States must apply in order to safeguard net neutrality. Net neutrality is the principle that Internet Service Providers should treat all Internet traffic in an equal and non-discriminatory way. The UK Regulations (the Open Internet Access (EU Regulation) Regulations 2016 (SI 2016/607)) implement certain provisions of the EU Regulation by designating a UK National Regulatory Authority (Ofcom), which has responsibility for safeguarding net neutrality in the UK in accordance with the rules in the EU Regulation and making provision for enforcement and penalties. The UK Regulations also set out that Ofcom must take due account of all applicable guidelines issued by the Body of European Regulators for Electronic Communications (BEREC)

Why is it being changed?

- 2.3 We are changing it to fix deficiencies in the EU Regulation and the UK Regulations arising from EU exit. These deficiencies include terminology contained in the legislation, which will no longer be appropriate post EU exit (such as references to “national regulatory authorities”). The SI also removes the need for Ofcom to take due account of applicable BEREC guidelines, and removes a requirement for the Commission to review the EU Regulation.

What will it now do?

- 2.4 The UK Regulations also currently require that OfCom take “due account” of all applicable guidelines issued by BEREC when applying the EU Regulations, and this has been removed. We are also removing a requirement that Ofcom provide reports to the Commission and BEREC, which will not be appropriate once the UK has left the EU. Despite these changes, we consider that the overall policy position will remain the same, with OfCom regulating according to the same.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This statutory instrument was laid for sifting on 25 October 2018 as a proposed negative resolution procedure instrument. The sifting committees agreed with the government that this statutory instrument should be subject to negative resolution procedure.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

- 5.1 The Minister for Digital and the Creative Industries has made the following statement regarding Human Rights:

“In my view the provisions of the Open Internet Access (Amendment) (EU Exit) Regulations 2018 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 These Regulations are made in exercise of the power in section 8 of the European Union (Withdrawal) Act 2018 (c. 16) in order to address failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the United Kingdom from the European Union.
- 6.2 Part 2 amends the Open Internet Access (EU Regulation) Regulations 2016. Part 3 amends ‘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 (OJ No L 310 26.11.2015, p. 1)’.
- 6.3 Amendments to the subordinate legislation are made to reflect that the EU Regulation will be amended to refer to Ofcom directly and so there is no need for the Regulations to designate Ofcom as the “National Regulatory Authority” for the purposes of the EU Regulation, and to remove the requirement that Ofcom take “due account” of applicable guidelines by the Body of European Regulators for Electronic Communications (BEREC).
- 6.4 Amendments to the EU Regulation include removing references to Union law, replacing references to “National Regulatory Authorities” with references to Ofcom, and removing provisions relating to penalties and review that will not be appropriate to retain following the UK’s exit from the EU.

- 6.5 The removal of references to “Union law” is best illustrated by reference. Paragraph 3(1) of the EU Open Internet Access Regulation currently states:
- “End-users shall have the right to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice, irrespective of the end-user’s or provider’s location or the location, origin or destination of the information, content, application or service, via their internet access service.
- This paragraph is without prejudice to Union law, or national law that complies with Union law, related to the lawfulness of the content, applications or services.”
- 6.6 In the above paragraph, we are substituting the term “national law” for “Union law, or national law that complies with Union law” via our Statutory Instrument. We considered that it was inappropriate to retain the references to “Union law” post EU exit in a ‘no deal’ scenario.
- 6.7 The EU Regulation sets out tasks to be carried out by National Regulatory Authorities for the purposes of the Regulation. In the UK, the 2016 Regulations designated Ofcom as the UK Regulatory Authority for the purposes of the EU Regulation. In a post EU exit scenario we consider it inappropriate to retain references to ‘National Regulatory Authorities’, which is an EU term. References in the EU Regulation to national regulatory authorities are therefore replaced with references to Ofcom.
- 6.8 The draft SI omits Article 6 of the EU Regulation. Article 6 requires EU Member States to lay down penalties for infringement of the EU Regulation’s net neutrality rules in their national legislation. It also includes a requirement to notify the Commission of rules on penalties, and any change to these. We considered that it would be inappropriate to retain this Article in light of EU exit, when the UK would no longer be a member of the EU. It is not considered appropriate for the UK to be required to notify the Commission of any changes to the rules on penalties which the UK may make after Exit Day. Penalties are currently laid down by subordinate UK legislation and are unaffected by the draft SI.
- 6.9 The draft SI also omits Article 9 of the EU Regulation. This requires the Commission to review certain Articles in the EU Regulation and submit a report on these Articles to the European Parliament and Council. We consider it is not appropriate to retain this requirement in UK legislation post EU exit. The removal of Article 9 will have no practical impact.

7. Policy background

What is being done and why?

- 7.1 As summarised at paragraph 2.2 (Explanations), the EU Open Internet Access Regulation establishes common (cross-EU) rules which Member States must apply in order to safeguard net neutrality. Net neutrality is the principle that Internet Service Providers should treat all Internet traffic in an equal and non-discriminatory way. The UK Regulations (the Open Internet Access (EU Regulation) Regulations 2016) implement the EU Regulation by designating a UK National Regulatory Authority (Ofcom) which has responsibility for safeguarding net neutrality in the UK in accordance with the rules in the EU Regulation.
- 7.2 The SI amends the EU Regulation (as retained in UK law) and the UK regulations to fix deficiencies in the EU Regulation and the UK Regulations arising from EU exit.

For example, the EU Regulation on open internet access (Regulation (EU) 2015/2120) makes reference to the national regulatory authority/national regulatory authorities. The Open Internet Access (EU Regulation) Regulations 2016 designated Ofcom as the UK's National Regulatory Authority for this purpose. The SI amends the EU Regulation (as retained in UK law) so that references to the national regulatory authority are replaced with references directly to OfCom. Another example is Article 1 of Regulation (EU) 2015/2120, which sets out the subject matter and scope of the Regulation. Paragraph 1 explains that the Regulation establishes "common rules" to safeguard equal and non-discriminatory treatment of traffic. Once the UK has left the EU it will not be appropriate to refer to "common" rules and it is therefore appropriate to remove the word "common".

- 7.3 The UK Regulations also currently require that OfCom take "due account" of all applicable guidelines issued by BEREC when applying the EU Regulations, and this has been removed. The SI also removes a requirement that Ofcom provide reports to the Commission and BEREC, which will not be appropriate once the UK has left the EU.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. The instrument is also made under paragraph 21(b) of Schedule 7 to the Withdrawal Act. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

- 9.1 No consolidation is being carried out.

10. Consultation outcome

- 10.1 No formal consultation was carried out. We consider that this Statutory Instrument retains the policy status quo. However, a range of stakeholders, including OfCom, major UK Internet service providers, mobile network operators and online content producers have been informed of our EU exit intentions in a 'no deal' scenario, also covering our plans to amend retained legislation via this Statutory Instrument.

11. Guidance

- 11.1 Guidance is not required to accompany this Statutory Instrument.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A full Impact Assessment has not been prepared for this instrument because this Statutory instrument has a low level of impact per business and relates to maintenance of existing regulatory standards. A De-Minimus Assessment was prepared which

confirms that, as this relates to maintenance of existing regulatory standards, there is little impact on business.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is that it will not be monitored, as the change is technical and minimal.

14.2 As this instrument is made under the EU Withdrawal Act 2018, no review clause is required.

15. Contact

15.1 Abbie Gillgan at the Department for Digital, Culture, Media and Sport Telephone: 020 7271 8956 or email: abbie.gillgan@culture.gov.uk can answer any queries regarding the instrument

15.2 Oscar Scott-Tapping at the Department for Digital, Media, Culture and Sport can confirm that this Explanatory Memorandum meets the required standard.

15.3 Margot James, Minister for Digital and the Creative Industries, at the Department for Digital, Media, Culture and Sport can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Sifting statement(s)

- 1.1 The Minister for Digital and the Creative Industries, Margot James, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Open Internet Access (Amendment) (EU Exit) Regulations 2018 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure)”.

- 1.2 This is the case because: it does not meet the criteria for an affirmative procedure in the Withdrawal Act. It also does not alter UK regulation of net neutrality or underlying UK policy on net neutrality

2. Appropriateness statement

- 2.1 The Minister for Digital and the Creative Industries, Margot James, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Open Internet Access (Amendment) (EU Exit) Regulations 2018 does no more than is appropriate”.

- 2.2 This is the case because: it does not go beyond the scope of the powers afforded by Section 8 of the EU Withdrawal Act in remedying deficiencies arising from EU exit.

3. Good reasons

- 3.1 The Minister for Digital and the Creative Industries, Margot James, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action”.

- 3.2 These are: due to EU exit and the necessity of correcting deficiencies arising from EU exit in retained EU legislation and UK implementing legislation

4. Equalities

- 4.1 The Minister for Digital and the Creative Industries, Margot James, has made the following statement(s):

“The instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.”

- 4.2 The Minister for Digital and the Creative Industries, Margot James, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the instrument, I, Margot James, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”.

5. Explanations

- 5.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.