

EXPLANATORY MEMORANDUM TO
THE OFFICE OF COMMUNICATIONS (PROVISION OF INFORMATION)
REGULATIONS 2020

2020 No. 125

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Digital, Culture, Media and Sport and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 These Regulations specify descriptions of information which are exempt from the duty under section 24A(1) of the Communications Act 2003 on the Office of Communications (Ofcom) to provide the Secretary of State with any information that they proposed to publish at least 24 hours before publication. These Regulations also have the effect of bringing the duty under section 24A(1) of the 2003 Act into effect.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

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 whole of the United Kingdom.
4.2 The territorial application of this instrument is the whole of the United Kingdom.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation no statement is required.

6. Legislative Context

- 6.1 Section 24A(1) of the Communications Act 2003 (as inserted by section 98 of the Digital Economy Act 2017) imposes a duty on Ofcom to provide the Secretary of State, at least 24 hours before publication, with any information that they proposed to publish.
6.2 This duty is subject to a number of provisos and exceptions. Subsection (2) provides that if exceptional circumstances make it impracticable to provide the information 24 hours before publication it must be provided as long as before publication as is practicable. Subsection (3) provides that the duty is subject to any agreement between the Secretary of State and Ofcom in relation to a specific piece of information. And

subsection (4) provides that the Secretary of State may by regulations specify descriptions of information in relation to which the duty does not apply. This instrument is made under this power and is the first exercise of this regulation-making power.

- 6.3 Section 24A also restricts what Ministers can do with the information provided by Ofcom under this duty. Ministers may not disclose the information to any person before the information is either published by Ofcom or Ofcom consents to the disclosure. Ministers may not make any representations to Ofcom during this period about changes that Ministers consider should be made to the information. See subsections (6) to (9).
- 6.4 The duty under subsection (1) comes into effect on the day this instrument comes into force - see section 98(3) of the Digital Economy Act 2017.

7. Policy background

What is being done and why?

- 7.1 The primary purpose of the duty on Ofcom to provide information prior to publication is to aid Government in the development of policy. The Government's ability to create and deliver effective policy to maintain and improve the delivery of vital services for consumers is very much supported by Ofcom's expertise in the sectors it regulates.
- 7.2 DCMS and Ofcom currently operate under the DCMS Ofcom Operating Framework which includes a 'protocol of pre-disclosure'. However, this is not legally binding, and so there is no legal requirement on Ofcom to share information with Government nor a requirement on the time in which the regulator should disclose it. From a policy perspective this does not work, as notifications from Ofcom of upcoming publications under this protocol are not guaranteed and only include limited information. This can make it difficult for Ministers and officials to prepare accordingly.
- 7.3 Therefore, this duty ensures that Ministers and officials are kept well informed of key research and decisions made by Ofcom in a timely manner in order to give them sufficient opportunity to formulate policy and advise on the Government's response, especially on policy areas for which ministers are held accountable.
- 7.4 For example, the Statement of Strategic Priorities means that for telecoms, radio spectrum and postal services, Ofcom now has a statutory duty to have regard to policy priorities designated by the relevant Secretary of State when carrying out its regulatory functions in these areas. Therefore it is vital Ministers have advance sighting of important information and decisions in these fields, in order to assess the wider policy implications they have for government and prepare for Parliamentary, public and media scrutiny in respect of them.
- 7.5 This new duty will not, nor does it seek to, interfere with Ofcom's investigations or decision making; nor will it impact the companies they regulate. The statutory limitations on what Ministers, and officials acting on behalf of Ministers, can do with information shared by Ofcom provides sufficient safeguards, including the prohibition on making any representations to Ofcom on any information disclosed and strict limitations on who information can be shared with within Government before publication.

What information will be exempt and why?

- 7.6 Following consultation with Ofcom, the Secretary of State has decided to exempt the following descriptions of information from the duty: information relating to programme and fairness standards for television and radio (e.g. the Ofcom Broadcasting Code); information relating to the enforcement of television and radio licences; and information relating to Ofcom's constitutional and funding arrangement and its management.
- 7.7 We agreed that it was appropriate to make the exemptions relating to broadcasting information in order to avoid any suggestions of interference, real or perceived, from government in the setting of broadcasting standards or licencing decisions. For example, it would look inappropriate for government to have had advance sighting of Ofcom's decisions around potential breaches of the Broadcasting Code. Similarly, any decisions made by Ofcom in relation to changes to broadcasting licences would also be excluded to safeguard the necessary separation between government and the media.
- 7.8 We also agreed that it was appropriate to exempt Ofcom's corporate information as we do not think it will aid Ministers in the development of policy. Ofcom are already required to share their annual accounts ahead of publication, and other documents are either subject to public consultation or concern issues where Ofcom are operationally independent, i.e. salary scales and Ofcom Board expenses.

What about market sensitive information

- 7.9 Ofcom will only be required to provide information of significant market sensitivity once markets have closed (i.e. after 4:30pm) on the working day before publication. This exemption applies to any information where its disclosure would prejudice the commercial interests of any person.

How will this work in practice?

- 7.10 A Memorandum of Understanding (MoU) will set out how this duty will work in practice. The MoU will explain what we mean by information and publication, how the various exceptions to the duty will apply, the processes for the provision of information by Ofcom (including setting out who will have sighting of the information) and the consequences of any failure to comply with the statutory requirements. The MoU will be available on the gov.uk website in due course.

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

- 8.1 This instrument does not relate to withdrawal from the European Union

9. Consolidation

- 9.1 There are no plans for consolidation of the relevant legislation.

10. Consultation outcome

- 10.1 The Secretary of State has, in accordance with section 24A(5) of the 2003 Act, consulted Ofcom before making this instrument. Their views have been taken into consideration in the development of these Regulations and informed the Secretary of State's final decision on exemptions from the duty. Consultation correspondence

between DCMS and the Ofcom Board has been published [here](#) on GOV.uk, as well as the Ofcom website.

11. Guidance

- 11.1 The Secretary of State, Department for Business, Energy and Industrial Strategy (for post-related information), and Ofcom will agree a memorandum of understanding which will explain how this duty will operate in practice.

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 Impact Assessment has not been prepared for this instrument because no, or no significant, impact on the private and voluntary sector is foreseen. This duty does not affect the companies Ofcom regulates; neither does it affect how Ofcom undertakes its regulatory functions.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 DCMS and Ofcom will monitor the impact of the changes introduced by this instrument on an ongoing basis. The memorandum of understanding will be reviewed six months after the commencement of this instrument and section 24A of the 2003 Act.
- 14.2 As this instrument does not make any regulatory provision in relation to any qualifying activity, no review clause is required under the Small Business, Enterprise and Employment Act 2015.

15. Contact

- 15.1 Aimee Bell at the Department for Digital, Culture, Media and Sport Telephone: 020 7211 2195 or email: aimee.bell@culture.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Robert Specterman-Green, Director, at the Department for Digital, Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Minister of State for Sport, Media and Creative Industries Nigel Adams at the Department for Digital, Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.