
DRAFT STATUTORY INSTRUMENTS

2004 No.

**CONTRACTING OUT
BROADCASTING**

**Contracting Out (Functions relating to Broadcast Advertising)
and Specification of Relevant Functions Order 2004**

Made - - - - 2004
Coming into force - - 2004

Whereas, by virtue of section 1(7) of the Communications Act 2003⁽¹⁾, Part 2 of the Deregulation and Contracting Out Act 1994⁽²⁾ is to have effect in relation to the functions conferred on the Office of Communications⁽³⁾ by or under any enactment as if the Office of Communications were an office holder within the meaning of that Part and a power of the Office of Communications to make subordinate legislation were excluded from section 69 of that Act to the extent only that it is exercisable by statutory instrument;

And whereas the Secretary of State has consulted the Office of Communications as required by section 69(3) of the Deregulation and Contracting Out Act 1994;

And whereas section 393(4) of the Communications Act 2003 authorises the Secretary of State to specify by order relevant functions for the purposes of that subsection;

Now therefore the Secretary of State, in exercise of the powers conferred upon her by section 69 and section 77(1) of the Deregulation and Contracting Out Act 1994 and section 393(4) of the Communications Act 2003, hereby makes the following Order, a draft of which has been laid before Parliament in accordance with section 77(2) of the 1994 Act and section 393(11) of the 2003 Act respectively and approved by a resolution of each House of Parliament:

Citation and commencement

1. This Order may be cited as the Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004 and shall come into force on the day after the day on which it is made.

(1) 2003 c. 21.

(2) 1994 c. 40.

(3) The Office of Communications was established by the Office of Communications Act 2002 (c. 11).

Interpretation

2.—(1) In this Order—

“the 1988 Regulations” means the Control of Misleading Advertisements Regulations 1988(4);

“the 1990 Act” means the Broadcasting Act 1990(5);

“the 1994 Regulations” means the Medicines (Monitoring of Advertising) Regulations 1994(6);

“the 1996 Act” means the Broadcasting Act 1996(7);

“the 2003 Act” means the Communications Act 2003;

“authorised person” means a person authorised by OFCOM for the purposes of article 3, 6 or 7; and

“employee” in relation to a body corporate, includes any director or other officer of that body.

(2) Except where an indication to the contrary appears, expressions used in this Order have the same meaning in this Order as they do in the 2003 Act.

Contracting out functions relating to advertising in the Communications Act 2003

3.—(1) Subject to article 5, any function relating to advertising may be exercised by, or by employees of, such persons (if any) as may be authorised in that behalf by OFCOM—

(a) either wholly or to such extent as may be specified in the authorisation;

(b) either generally or in such cases as may be so specified; and

(c) either unconditionally or subject to the fulfilment of such conditions as may be so specified.

(2) In this Order, a “function relating to advertising” means a function which is a function of OFCOM and which is—

(a) described in Part 1, 2 or 3 of the Schedule ; and

(b) exercised only for the purposes of or in connection with regulating standards and practice in advertising to be included in television and radio services.

4.—(1) Any function relating to advertising described in Part 2 of the Schedule may be exercised by a person authorised by virtue of article 3 where he considers that a contravention of OFCOM’s standards code (in so far as it relates to the regulation of standards and practice in advertising) in relation to a service to which that Part of the Schedule applies can be appropriately remedied by the inclusion of a correction or statement of findings (or both) in that service.

(2) Any function relating to advertising described in Part 3 of the Schedule may be exercised by a person authorised by virtue of article 3 only so far as to determine that no such notice as is mentioned in that Part should be served on the holder of a Broadcasting Act licence or the Welsh Authority.

5. Nothing in this Order allows OFCOM to authorise the exercise by a person of any function relating to advertising for the purposes of or in connection with—

(a) securing the standards objectives referred to in—

(i) section 319(2)(g) of the 2003 Act (prohibition on political advertising),

(ii) section 319(2)(j) of the 2003 Act (prevention of unsuitable sponsorship), and

(4) S.I.1988/915. Regulations 8-11 were amended by paragraph 51 of Schedule 20 to the 1990 Act, S.I. 2000/914 and S.I. 2003/3183.

(5) 1990 c. 42.

(6) S.I. 1994/1993. Regulations 9 and 11 were amended by S.I. 2003/3093.

(7) 1996 c. 55.

- (iii) section 319(2)(k) of the 2003 Act (prevention of undue discrimination between advertisers);
- (b) section 321(4) of the 2003 Act (general responsibility with respect to advertising etc.);
- (c) section 321(5) of the 2003 Act (consulting the Secretary of State about advertising etc.);
- (d) giving directions pursuant to section 322 of or paragraph 16 of Part 2 of Schedule 12 to the 2003 Act in relation to a licensed service or the Welsh Authority respectively;
- (e) reporting to the Secretary of State pursuant to section 325(3) of the 2003 Act on any issues with regard to OFCOM's standards code;
- (f) general standards and practice governing the sponsorship of programmes, including the prohibition of any form or method of sponsorship.

Contracting out functions relating to advertising in the Control of Misleading Advertisements Regulations 1988

6.—(1) Any function relating to the control of misleading advertising in the 1988 Regulations may be exercised by, or by employees of, such persons (if any) as may be authorised in that behalf by OFCOM—

- (a) either wholly or to such extent as may be specified in the authorisation;
- (b) either generally or in such cases as may be so specified; and
- (c) either unconditionally or subject to the fulfilment of such conditions as may be so specified.

(2) In this article, a “function relating to the control of misleading advertising” means a function conferred on OFCOM by or under the 1988 Regulations in connection with the following provisions of those Regulations—

- (a) regulation 8 (consideration of complaints about misleading or comparative advertisements in a licensed service);
- (b) regulation 9 (control by OFCOM of misleading advertisements and comparative advertising);
- (c) regulation 10 (consideration of complaints about misleading or comparative advertisements on S4C or S4C Digital); or
- (d) regulation 11 (control of misleading advertisements and comparative advertisements on S4C and S4C Digital).

Contracting out functions relating to advertising in the Medicines (Monitoring of Advertising) Regulations 1994

7.—(1) Any function relating to medicines advertising in the 1994 Regulations may be exercised by, or by employees of, such persons (if any) as may be authorised in that behalf by OFCOM—

- (a) either wholly or to such extent as may be specified in the authorisation;
- (b) either generally or in such cases as may be so specified; and
- (c) either unconditionally or subject to the fulfilment of such conditions as may be so specified.

(2) In this article, a “function relating to medicines advertising” means a function conferred on OFCOM by or under the 1994 Regulations in connection with the following provisions of those Regulations—

- (a) regulation 9(1) (consideration of complaints about breaches of regulation 9 of the Medicines (Advertising) Regulations 1994⁽⁸⁾);
- (b) regulation 11(1) (directions for preventing the publication or further publication of an advertisement); or
- (c) regulation 11(4) (giving and communicating reasons for the decision).

Exercise of functions by an authorised person

8.—(1) Where any provision of the enactments listed in paragraph (3) authorises or requires anything to be done by OFCOM in connection with or for the purposes of a function which may also be exercised by an authorised person, each such enactment shall have effect in any case where that function is so exercised by that person as if a reference to OFCOM included a reference to the authorised person.

(2) In the enactments listed in paragraph (3) any reference to a thing done by OFCOM shall have effect where it is done by an authorised person as though it included a reference to a thing done by that person.

(3) The enactments are—

- (a) the 2003 Act;
- (b) the 1996 Act;
- (c) the 1990 Act;
- (d) the 1994 Regulations; and
- (e) the 1988 Regulations.

Production and retention of recordings

9.—(1) The modifications made by this article have effect in relation to any time at which an authorisation given by OFCOM by virtue of article 3 has effect.

(2) In relation to any such time, section 69 of the Copyright, Designs and Patents Act 1988⁽⁹⁾ (no infringement of copyright by use of recordings for certain supervisory purposes) shall have effect as if—

- (a) in subsection (2)(d), the reference to section 334(3) of the 2003 Act were a reference to that provision as modified by article 8; and
- (b) in subsection (3)—
 - (i) the reference to the use of any thing mentioned in paragraph (a) or (b) of that subsection by OFCOM in connection with the performance of any function of theirs under the 1990, 1996 or 2003 Act included a reference to the use of that thing by another person in connection with his performance of any such function which he is authorised to perform by virtue of article 3; and
 - (ii) the reference in paragraph (a) of that subsection to the provision of that thing to OFCOM included a reference to its provision to that other person.

(3) In relation to any such time, paragraph 17 of Schedule 2 to that Act of 1988 (no infringement of rights in performances by use of recordings for certain supervisory purposes) shall have effect as if—

⁽⁸⁾ S.I. 1994/1932. Regulation 9 was amended by S.I. 1994/3144.

⁽⁹⁾ 1988 c. 48. Section 69 was amended by paragraph 31 of Schedule 10 to the 1996 Act, by paragraph 91 of Schedule 17 to the 2003 Act and by paragraph 1 of Schedule 19 to that Act; and paragraph 17 of Schedule 2 was amended by paragraph 32 of Schedule 10 to the 1996 Act and by paragraph 93 of Schedule 17 to the 2003 Act.

- (a) in sub-paragraph (2)(d), the reference to section 334(3) of the 2003 Act were a reference to that provision as modified by article 8; and
- (b) in sub-paragraph (3)—
 - (i) the reference to the use of any thing mentioned in paragraph (a) or (b) of that sub-paragraph by OFCOM in connection with the performance of any function of theirs under the 1990, 1996 or 2003 Act included a reference to the use of that thing by another person in connection with his performance of any such function which he is authorised to perform by virtue of article 3; and
 - (ii) the reference in paragraph (a) of that subsection to the provision of that thing to OFCOM included a reference to its provision to that other person.

Provision of information

10.—(1) Where OFCOM have authorised any person to exercise any function relating to advertising by virtue of article 3 (the relevant function)—

- (a) each of the provisions mentioned in paragraph (2) shall have effect as if the reference to conditions requiring the licence holder to provide or as the case may be furnish OFCOM in such manner and at such times with such information as is described there included a reference to conditions requiring the licence holder to provide the person so authorised with such information as that person may require for the purpose of exercising the relevant function; and
 - (b) section 343 of the 2003 Act shall have effect as if the reference to the duty of the Welsh Authority to comply with every direction given to them by OFCOM to provide OFCOM with such information as is described there included a reference to a duty to comply with a direction given to the Welsh Authority by the person so authorised to provide him with such information as he may require for the purpose of exercising the relevant function in relation to the Welsh Authority.
- (2) The provisions are—
- (a) in the 1990 Act, sections 4(1)(c) and 87(1)(d);
 - (b) in the 1996 Act, sections 4(1)(c) and 43(1)(d).

Disclosure of information

11.—(1) Section 393 of the 2003 Act (general restrictions on disclosure of information) shall apply to a person authorised by virtue of article 3 who obtains information with respect to a particular business in exercise of a power mentioned in subsection (1) of that section as it would apply to OFCOM in exercise of the same such power.

(2) For the purposes of section 393(4) of the 2003 Act (relevant functions for the purposes of restrictions on disclosure of information), the following function is specified, namely any function of the Health Ministers conferred by or under the 1994 Regulations.

(3) In this article “the Health Ministers” means the Ministers specified in section 1(1)(a) of the Medicines Act 1968⁽¹⁰⁾ and in the case of anything falling to be done by them under the 1994 Regulations means any one of them acting alone or any two or more of them acting jointly.

⁽¹⁰⁾ 1968 c. 67. Section 1(1)(a) of the 1968 Act was amended by article 2(2) of and Schedule 1 to S.I. 1969/388 and by article 5 of and paragraph 1(1) of the Schedule to S.I. 1999/3142. By virtue of article 2(2) of and Schedule 1 to S.I. 1969/388 and article 2(1) and 5 of and paragraph 1(1) of the Schedule to S.I. 1999/3142, the functions of the Secretaries of State respectively concerned with health in Scotland and in Wales under the Medicines Act 1968 are exercised by the Secretary of State concerned with Health in England. The functions of the Minister of Health and Social Services for Northern Ireland are now exercised by the Department for Health, Social Services and Public Safety by virtue of section 1(8) of and paragraph 4(1)(b) of the Schedule to the Northern Ireland Act 2000 (c. 1).

Transitional provisions

12.—(1) In this article, references to an unresolved complaint are references to a complaint which—

- (a) was made before the date (“the effective date”) on which an authorisation given for the purposes of article 3, 6 or (as the case may be) 7 took effect, but had not been disposed of by OFCOM by that date; and
- (b) had it been made after the effective date, could have been disposed of by an authorised person by virtue of that authorisation.

(2) The provision that may be made by an authorisation given for the purposes of article 3, 6 or 7 includes provision authorising a person to dispose of unresolved complaints; and where, and to the extent that, a person is so authorised—

- (a) anything done, or treated as done, by or in relation to OFCOM before the effective date for the purposes of or in connection with any such complaint shall be treated as if it had been done by or in relation to the person authorised to dispose of that complaint; and
- (b) this Order shall have effect as if that person had been authorised to dispose of the complaint at the time when the thing referred to in paragraph (a) was done.

(3) In this article, references to disposing of a complaint are references to handling and resolving or (as the case may be) considering that complaint.

2004

Parliamentary Under Secretary of State,
Department for Culture, Media and Sport

SCHEDULE

Article 3

OFCOM FUNCTIONS RELATING TO ADVERTISING WHICH MAY BE CONTRACTED OUT

PART 1

1. Functions conferred by or under the following provisions of the 2003 Act relating to programme standards for television and radio:

- (a) section 319(1) (setting, reviewing and revising content standards);
- (b) section 325(2) (handling and resolution of complaints about the observance of standards set under section 319);
- (c) section 325(4) in so far as it provides for a direction to be given to a licence holder with respect to any of the matters mentioned in paragraphs (a) and (b) of section 325(5);
- (d) paragraph 14(1) of Part 2 of Schedule 12 in so far as it provides for a direction to be given to the Welsh Authority with respect to any of the matters mentioned in subparagraphs (a) and (b) of paragraph 14(2) of that Schedule.

PART 2

2. Functions conferred by or under the following provisions relating to directions to broadcast a correction or statement of findings:

- (a) section 40(1) of the 1990 Act⁽¹¹⁾ (power to direct licensee to broadcast correction or statement of findings);
- (b) section 109(3) of the 1990 Act⁽¹²⁾ (power to require broadcasting of correction or statement of findings);
- (c) section 236(2) of the 2003 Act (direction to the holder of a licence to provide a television licensable content service to take remedial action);
- (d) paragraph 15(2) of Part 2 of Schedule 12 to the 2003 Act (inclusion of a correction or statement of findings in a public television service of the Welsh Authority).

PART 3

3.—(1) In the 1990 Act, functions conferred by or under—

(11) In addition to Channels 3 and 5, section 40(1) (as amended by section 344 of the 2003 Act and paragraph 18 of Part 1 of Schedule 15 to that Act) applies to Channel 4 by virtue of section 40(5) of the 1990 Act; a restricted service by virtue of section 42B(2) of the 1990 Act (as amended by paragraph 4(1) of Schedule 13 to the 2003 Act read with paragraph 4(4) of that Schedule); to a digital programme licence by virtue of section 23(8) of the 1996 Act (as amended by paragraph 92(6) of Part 2 of Schedule 15 to the 2003 Act); to a digital additional services licence by virtue of section 27(8) of the 1996 Act; and to the public teletext service by virtue of paragraph 8 of Part 2 of Schedule 10 to the 2003 Act, with the modifications specified in that paragraph of that Schedule.

(12) Section 109(3) (as amended by section 344 of the 2003 Act and paragraph 50 of Part 1 of Schedule 15 to that Act) applies to a national, local or restricted service (within the meaning given in section 245(4) of the 2003 Act); to a digital sound programme licence by virtue of section 62(10) of the 1996 Act (as amended by paragraph 121(6) of Part 2 of Schedule 15 to the 2003 Act); to a digital additional services licence by virtue of section 66(10) of the 1996 Act (as amended by paragraph 124(7) of Part 2 of Schedule 15 to the 2003 Act); and to a radio licensable content service by virtue of section 250(3) of the 2003 Act.

- (a) section 41(1) (power to impose financial penalty or shorten licence period)(**13**);
- (b) section 42(1) (power to revoke a licence)(**14**);
- (c) section 55(1) (power to impose penalty on holder of additional services licence)(**15**);
- (d) section 110(1) (power to impose financial penalty or shorten licence period)(**16**);
- (e) section 111(1) (power to revoke licence)(**17**);
- (f) section 120(1) (enforcement of additional services licences)(**18**).

4.—(1) In the 1996 Act, functions conferred by or under—

- (a) section 17(1) (power to impose financial penalty on the holder of a multiplex licence)(**19**);
- (b) section 23(1) (power to impose financial penalty on the holder of a digital programme licence)(**20**);
- (c) section 27(1) (power to impose financial penalty on the holder of a digital additional services licence)(**21**);
- (d) section 59(1) (power to impose financial penalty on the holder of a radio multiplex licence)(**22**);
- (e) section 62(1) (power to impose financial penalty on the holder of a digital sound programme licence)(**23**);
- (f) section 66(1) (power to impose financial penalty on the holder of a digital additional services licence)(**24**);

5. In the 2003 Act, functions conferred by section 341(2).

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- (13) Section 41 (as amended by paragraph 18 of Part 1 of Schedule 15 to the 2003 Act and paragraph 3 of Part 1 of Schedule 13 to that Act) applies to a restricted service by virtue of section 42B(2) of the 1990 Act, with the modifications specified in subsections (3) and (4) of section 42B.
 - (14) Section 42 (as amended by paragraph 18 of Part 1 of Schedule 15 to the 2003 Act) applies to a restricted service by virtue of section 42B(2) of the 1990 Act; to an additional service by virtue of section 55(4) of that Act, with the modifications specified in that section; to a multiplex licence by virtue of section 17(6) of the 1996 Act, with the modifications specified in that section; to a digital programme licence by virtue of section 23(8) of the 1996 Act, with the modifications set out in section 23(9) of that Act; to a digital additional services licence by virtue of section 27(8) of the 1996 Act, with the modifications set out in section 27(9) of that Act.
 - (15) Section 55(1) was amended by paragraph 27 of Part 1 of Schedule 15 to the 2003 Act.
 - (16) Section 110(1) was amended by paragraph 50 of Part 1 of Schedule 15 to the 2003 Act.
 - (17) Section 111 (as amended by paragraph 50 of Part 1 of Schedule 15 to the 2003 Act) applies to a radio multiplex licence by virtue of section 59(8) of the 1996 Act, with the modifications specified in section 59(9) of that Act; to a digital sound programme licence by virtue of section 62(10) of the 1996 Act, with the modifications specified in section 62(12) of that Act; and to a digital additional services licence by virtue of section 66(10) of the 1996 Act, with the modifications specified in section 66(12) of that Act.
 - (18) Section 120(1) was amended by paragraph 58 of Part 1 of Schedule 15 to the 2003 Act.
 - (19) Section 17(1) was amended by paragraph 89 of Part 2 of Schedule 15 to the 2003 Act.
 - (20) Section 23(1) was amended by paragraph 92 of Part 2 of Schedule 15 to the 2003 Act.
 - (21) Section 27(1) was amended by paragraph 96 of Part 2 of Schedule 15 to the 2003 Act.
 - (22) Section 59(1) was amended by paragraph 118 of Part 2 of Schedule 15 to the 2003 Act.
 - (23) Section 62(1) was amended by paragraph 121 of Part 2 of Schedule 15 to the 2003 Act.
 - (24) Section 66(1) was amended by paragraph 124 of Part 2 of Schedule 15 to the 2003 Act.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order permits the contracting out of functions of OFCOM relating to the regulation of broadcast advertising under the following legislation:

- (a) the Communications Act 2003, the Broadcasting Act 1996 and the Broadcasting Act 1990 (article 3);
- (b) the Control of Misleading Advertisements Regulations 1988 (article 6); and
- (c) the Medicines (Monitoring of Advertising) Regulations 1994 (article 7).

In the case of functions under the Communications Act 2003 which may be contracted out, the Order identifies certain matters in connection with those functions which cannot be contracted out (article 5).

Where a person is authorised to exercise any function by virtue of this Order, the legislation under which the function is exercised will have effect as though it authorised or required that person to do the same things as OFCOM would also be authorised or required to do in connection with the same function (article 8).

Where a person is authorised to carry out a function by virtue of article 3, the Order makes provision—

- (a) for that person to be able to request broadcasters to produce recordings of programmes included in their services or to make and use such recordings himself without infringing the Copyright, Designs and Patents Act 1988 (article 9);
- (b) for that person to require broadcasters to provide him with the information he may require for the purpose of exercising that function (article 10); and
- (c) for that person to be subject to the same general restrictions on disclosure of information under section 393 of the 2003 Act as OFCOM would be in exercise of the same power to obtain information (article 11).

Article 11 also provides, under the power in section 393 of the Communications Act 2003, to add functions conferred by the Medicines (Monitoring of Advertising) Regulations 1994 to the range of ‘relevant functions’ pursuant to which the disclosure of information may be permitted under that Act.

There are transitional arrangements under which a person authorised to consider complaints by virtue of this Order can assume responsibility for relevant complaints which remained unresolved by OFCOM at the date on which his authorisation took effect (article 12).

A full regulatory impact assessment has not been produced for this instrument as it has no impact on the costs of business.