

2007 No. 1933

ELECTRONIC COMMUNICATIONS

**The Mobile Roaming (European Communities) Regulations
2007**

<i>Made</i> - - - -	<i>5th July 2007</i>
<i>Laid before Parliament</i>	<i>9th July 2007</i>
<i>Coming into force</i> - -	<i>30th July 2007</i>

The Secretary of State makes these Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972(a).

The Secretary of State has been designated for the purposes of section 2(2) of the European Communities Act 1972 in relation to electronic communications(b).

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Mobile Roaming (European Communities) Regulations 2007 and shall come into force on 30th July 2007.

(2) In these Regulations—

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

“the EU Mobile Roaming Regulation” means the Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27th June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC(d);

“OFCOM” means the Office of Communications as established by the Office of Communications Act 2002(e);

“the Tribunal” means the Competition Appeal Tribunal; and

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

National Regulatory Authority

2. OFCOM shall be the national regulatory authority for the purposes of the EU Mobile Roaming Regulation.

(a) 1972 c.68.
(b) S.I. 2001/3495.
(c) 2003 c.21.
(d) OJ No L171, 29.6.2007, p.32.
(e) 2002, c.11.
(f) 2002 c.40.

Notification of breach

3.—(1) Where OFCOM determine that there are reasonable grounds for believing that a person is breaching, or has breached, an obligation under the EU Mobile Roaming Regulation or regulation 13, they may give that person a notification under this regulation.

(2) A notification under this regulation is one which—

- (a) sets out the determination made by OFCOM;
- (b) specifies the obligation and the breach in respect of which that determination has been made; and
- (c) specifies a reasonable period during which the person notified has an opportunity of making representations about the matters notified.

(3) A notification under this regulation—

- (a) may be given in respect of more than one breach; and
- (b) if it is given in respect of a continuing breach, may be given in respect of any period during which the breach has continued.

(4) Where a notification under this regulation has been given to a person in respect of a breach of an obligation under the EU Mobile Roaming Regulation or regulation 13, OFCOM may give a further notification in respect of the same breach of that obligation if, and only if—

- (a) the breach is one occurring after the time of the giving of the earlier notification;
- (b) the breach is a continuing breach and the subsequent notification is in respect of so much of a period as falls after a period to which the earlier notification relates; or
- (c) the earlier notification has been withdrawn without a penalty having been imposed in respect of the notified breach.

Penalties for breach

4.—(1) This regulation applies where—

- (a) a person (the “notified provider”) has been given a notification under regulation 3;
- (b) OFCOM have allowed the notified provider a reasonable period for making representations about the matters notified; and
- (c) the period allowed for the making of the representations has expired.

(2) OFCOM may impose a penalty on the notified provider if he has, in one or more of the respects notified, been in breach of an obligation under the EU Mobile Roaming Regulation or regulation 13 of these Regulations.

(3) Where a notification under regulation 3 relates to more than one breach, a separate penalty may be imposed in respect of each breach.

(4) Where such a notification relates to a continuing breach, no more than one penalty may be imposed in respect of the period of breach specified in the notification.

(5) Where OFCOM impose a penalty on a person under this regulation, they shall—

- (a) within one week of making their decision to impose the penalty, notify that person of that decision and of their reasons for that decision; and
- (b) in that notification, fix a reasonable period after it is given as the period within which the penalty is to be paid.

(6) A penalty imposed under this section—

- (a) must be paid to OFCOM; and
- (b) if not paid within the period fixed by them, is to be recoverable by them accordingly.

Amount of penalty under regulation 4

5.—(1) The amount of a penalty imposed under regulation 4 shall be such amount, in the case of a breach of Article 7(4) of the EU Mobile Roaming Regulation not exceeding £50,000, and in the case of any other breach of that Regulation or breach of regulation 13, not exceeding ten per cent of the turnover of the notified provider's relevant business for the relevant period, as OFCOM determine to be—

- (a) appropriate; and
- (b) proportionate to the breach in respect of which it is imposed.

(2) In making that determination OFCOM must have regard to any representations made to them by the notified provider.

(3) For the purposes of this regulation the turnover of a person's relevant business for a period shall be calculated in accordance with regulation 6.

(4) In this regulation and regulation 6—

“notified provider” has the same meaning as in regulation 4;

“relevant business” means so much of any business carried on by the notified provider as consists in the provision of terrestrial public mobile telephony services;

“relevant period” means—

- (a) except in a case falling within subparagraphs (b) or (c), the period of one year ending with the 31st March next before the time when notification of the breach was given under regulation 6;
- (b) in the case of a person who at that time has been carrying on that business for a period of less than a year, the period, ending with that time, during which he has been carrying it on; and
- (c) in the case of a person who at that time has ceased to carry on that business, the period of one year ending with the time when he ceased to carry it on.

Calculation of turnover of notified provider's relevant business

6.—(1) The turnover of a notified provider shall be calculated in conformity with accounting practices and principles which are generally accepted in the United Kingdom.

(2) The turnover of a notified provider shall be limited to the amounts derived by that provider from the relevant business after deduction of sales rebates, value added tax and other taxes directly related to turnover.

(3) When a notified provider's relevant business consists of two or more undertakings that each prepare accounts then the turnover shall be calculated by adding together the turnover of each, save that no account shall be taken of any turnover resulting from the supply of goods or the provision of services between them.

(4) Any aid (within the meaning of Article 87 of the EEC Treaty) granted by a public body to a notified provider which relates to one of that provider's ordinary activities shall be included in the calculation of turnover if the notified provider is himself the recipient of the aid and if the aid is directly linked to the carrying out by that provider of the relevant business.

Reference of disputes to OFCOM

7.—(1) One or more of the parties to a dispute between different communications providers relating to obligations laid down in the EU Mobile Roaming Regulation may refer the dispute to OFCOM.

(2) A reference made under this regulation is to be made in such manner as OFCOM may require.

(3) The way in which a requirement under paragraph (2)—

- (a) is to be imposed; or

(b) may be withdrawn or modified,
is by a notice published in such manner as OFCOM consider appropriate for bringing the requirement, withdrawal or modification to the attention of the persons who, in their opinion are likely to be affected by it.

(4) Requirements imposed under paragraph (3) may make different provision for different cases.

(5) In this regulation “communications provider” has the same meaning as in section 405(1) of the Act.

Action by OFCOM on dispute reference

8.—(1) This regulation applies where a dispute is referred to OFCOM under and in accordance with regulation 7.

(2) OFCOM must decide whether or not it is appropriate for them to handle the dispute.

(3) Unless they consider—

- (a) that there are alternative means available for resolving the dispute;
- (b) that a resolution of the dispute by those means would be consistent with the Community requirements set out in section 4 of the Act; and
- (c) that a prompt and satisfactory resolution of the dispute is likely if those alternative means are used for resolving it,

their decision must be a decision that it is appropriate for them to handle the dispute.

(4) As soon as reasonably practicable after OFCOM have decided—

- (a) that it is appropriate for them to handle the dispute; or
- (b) that it is not,

they must inform each of the parties to the dispute of their decision and of their reasons for it.

(5) The notification must state the date of the decision.

(6) Where—

- (a) OFCOM decide that it is not appropriate for them to handle the dispute; but
- (b) the dispute is not resolved by other means before the end of the four months after the day of OFCOM’s decision,

the dispute may be referred back to OFCOM by one or more of the parties to the dispute.

Legal proceedings about referred disputes

9.—(1) Where a dispute is referred to OFCOM under regulation 7 or referred back to OFCOM under regulation 8(6), the reference is not to prevent—

- (a) the person making it;
- (b) another party to the dispute;
- (c) OFCOM; or
- (d) any other person,

from bringing, or continuing, any legal proceedings with respect to any of the matters under dispute.

(2) Nor is the reference under regulation 7 or reference back under regulation 8(6) of a dispute to prevent OFCOM from—

- (a) giving a notification in respect of something that they have reasonable grounds for believing to be a breach of an obligation imposed by the EU Mobile Roaming Regulation or by or under any enactment;
- (b) exercising any of their powers under the EU Mobile Roaming Regulation or any enactment in relation to a breach of such an obligation; or

- (c) taking any other step in preparation for, or with a view to doing, anything mentioned in the preceding sub-paragraphs.
- (3) If, in any legal proceedings with respect to a matter to which a dispute relates, the court orders the handling of the dispute by OFCOM to be stayed or sisted—
 - (a) OFCOM are required to make a determination for resolving the dispute only if the stay or sist is lifted or expires; and
 - (b) the period during which the stay or sist is in force must be disregarded in determining the period within which OFCOM are required to make such a determination.
- (4) Paragraph (1) is subject to regulation 12(7) and to any agreement to the contrary binding the parties to the dispute.
- (5) In this regulation “legal proceedings” means civil or criminal proceedings in or before a court.

Procedure for resolving disputes

- 10.—(1) This regulation applies where—
 - (a) OFCOM have decided under regulation 8(2) that it is appropriate for them to handle a dispute; or
 - (b) a dispute is referred back to OFCOM under regulation 8(6).
- (2) OFCOM must—
 - (a) consider the dispute; and
 - (b) make a determination for resolving it.
- (3) The procedure for the consideration and determination of the dispute is to be the procedure that OFCOM consider appropriate.
- (4) In the case of a dispute referred back to OFCOM under regulation 8(6), that procedure may involve allowing the continuation of a procedure that has already been begun for resolving the dispute by alternative means.
- (5) Except in exceptional circumstances and subject to regulation 9(3), OFCOM must make their determination no more than four months after the following day—
 - (a) in a case falling within paragraph (1)(a), the day of the decision by OFCOM that it is appropriate for them to handle the dispute; and
 - (b) in a case falling within paragraph (1)(b), the day on which the dispute is referred back to them.
- (6) Where it is practicable for OFCOM to make their determination before the end of the four month period, they must make it as soon in that period as practicable.
- (7) OFCOM must—
 - (a) send a copy of their determination, together with a full statement of their reasons for it, to every party to the dispute; and
 - (b) publish so much of their determination as (having regard, in particular, to the need to preserve commercial confidentiality) they consider it appropriate to publish.
- (8) The publication of information under this regulation must be in such manner as OFCOM consider appropriate for bringing it to the attention, to the extent that they consider appropriate, of members of the public.

Disputes involving other member States

- 11.—(1) This section applies where it appears to OFCOM that a dispute referred to them under regulation 7 or referred back to them under regulation 8(6) relates partly to a matter falling within the jurisdiction of the regulatory authorities of another member State.

(2) A dispute relates to matters falling within the jurisdiction of the regulatory authorities of another member State to the extent that—

- (a) it relates to the carrying on of activities by one or both of the parties to the dispute in more than one member State or to activities carried on by different parties to the dispute in different member States; and
- (b) the activities to which the dispute relates, so far as they are carried on in another member State, are carried on in the member State for which those authorities are the regulatory authorities.

(3) For the purposes of paragraph (2) the activities that are carried on in a member State include anything done by means of an electronic communications network, or part of such a network, which is situated in that member State.

(4) Before taking any steps under these Regulations in relation to the reference or the dispute, OFCOM must consult the other regulatory authorities within whose jurisdiction the matter falls.

(5) It shall be the duty of OFCOM to secure that steps taken in relation to the reference or dispute (whether taken by them or by the other regulatory authorities) are, so far as practicable, agreed between OFCOM and those authorities.

(6) Accordingly, regulation 10 is to have effect in relation to the reference as if the period for making a determination which is specified in paragraph (5) of that regulation were such period (if any) as may be agreed between—

- (a) OFCOM; and
- (b) the other regulatory authorities within whose jurisdiction the matter falls.

(7) In this regulation—

- (a) references, in relation to a dispute, to the regulatory authorities of other member States are references to such of the authorities of the other member States as have been notified under Directive 2002/21/EC of the European Parliament and of the Council 7 March 2002 on a common regulatory framework for electronic communications networks and services (“the Framework Directive”) to the European Commission as the regulatory authorities of those States for the purposes of the matters to which the dispute relates;
- (b) “electronic communications network” has the same meaning as in section 32(1) of the Act.

Resolution of referred disputes

12.—(1) Where OFCOM make a determination for resolving a dispute referred to them under regulation 7 or referred back to them under regulation 8(6), their only powers are those conferred by this regulation.

(2) Their main power is to do one or more of the following—

- (a) to make a declaration setting out the rights and obligations of the parties to the dispute;
- (b) to give a direction fixing the terms or conditions of transactions between the parties to the dispute;
- (c) to give a direction imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by OFCOM; and
- (d) for the purpose of giving effect to a determination by OFCOM of the proper amount of a charge in respect of which amounts have been paid by one of the parties to the dispute to the other, to give a direction, enforceable by the party to whom the sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment.

(3) Nothing in this regulation prevents OFCOM, in consequence of their consideration under these Regulations of any dispute, from exercising any of the powers mentioned in section 190(4) of the Act.

- (4) In the case of a dispute referred back to OFCOM under regulation 8(6)—
- (a) OFCOM may, in making their determination, take account of decisions already made by others in the course of an attempt to resolve the dispute by alternative means; and
 - (b) the determination made by OFCOM may include provision ratifying decisions so made.
- (5) Where OFCOM make a determination for resolving a dispute, they may require a party to the dispute—
- (a) to make payments to another party to the dispute in respect of costs and expenses incurred by that other party in consequence of the reference of the dispute to OFCOM, or in connection with it; and
 - (b) to make payments to OFCOM in respect of costs and expenses incurred by them in dealing with the dispute.
- (6) OFCOM are not, under paragraph (5)(b), to require payments to be made to them by a party to the dispute except where it appears to OFCOM that the reference of the dispute by that party was frivolous or vexatious or that that party has otherwise abused the right of reference conferred by these Regulations.
- (7) A determination made by OFCOM for resolving a dispute referred under regulation 7 or referred back to them under regulation 8(6) binds all the parties to the dispute.
- (8) Paragraph (7) is subject to regulation 14.

Other dispute resolution

13.—(1) Undertakings subject to obligations under the EU Mobile Roaming Regulation shall ensure that—

- (a) existing procedures for the resolution of disputes for the time being approved by OFCOM under section 54 of the Act are available to their end-users in connection with the EU Mobile Roaming Regulation; or
- (b) procedures are established for the resolution of disputes in connection with the EU Mobile Roaming Regulation which are available to their end-users and approved by OFCOM and in determining whether to give such approval OFCOM shall comply with the provisions of section 54 of the Act as if that section applied to the approval of dispute procedures for the purposes of this sub-paragraph as it applies to the approval of dispute procedures for the purposes of section 52 of the Act; or
- (c) where procedures for the resolution of disputes have been established by OFCOM under section 55 of the Act, they comply with those procedures as if they extended to their end-users.

(2) In this regulation “end user” has the same meaning as in section 151 of the Act.

Appeals against decisions by OFCOM

14.—(1) A person affected by a decision by OFCOM under the EU Mobile Roaming Regulation or these Regulations may appeal against it to the Tribunal.

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

(3) The notice of appeal must be sent within the period specified, in relation to the decision appealed against, in those rules.

(4) The notice of appeal must set out—

- (a) the provision under which the decision appealed against was taken; and
- (b) the grounds of appeal.

(5) The grounds of appeal must be set out in sufficient detail to indicate—

- (a) to what extent (if any) the appellant contends that the decision appealed against was based on an error of fact or was wrong in law or both; and

- (b) to what extent (if any) the appellant is appealing against the exercise of a discretion by OFCOM.

(6) In this regulation references to a decision—

- (a) include references to a decision that is given effect to by the exercise or performance of a power or duty conferred or imposed by the EU Mobile Roaming Regulations or these Regulations; but
- (b) include references to a failure to make a decision, and to a failure to exercise a power or to perform a duty, only where the failure constitutes a failure to comply with any form of request to make the decision, exercise the power or perform the duty;
and references in the following regulations to a decision appealed against are to be construed accordingly.

(7) For the purposes of this regulation and the following regulations a decision to which effect is given by the exercise or performance of a power or duty conferred or imposed by the EU Mobile Roaming Regulation or these regulations, shall be treated, except where provision is made for the making of that decision at a different time, as made at the time when the power is exercised or the duty performed.

Decisions of the Tribunal

15.—(1) The Tribunal shall dispose of an appeal under regulation 14 in accordance with this regulation.

(2) The Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal.

(3) The Tribunal's decision must include a decision as to what (if any) is the appropriate action for OFCOM to take in relation to the subject-matter of the decision under appeal.

(4) The Tribunal shall then remit the decision under appeal to OFCOM with such directions (if any) as the Tribunal considers appropriate for giving effect to its decision.

(5) The Tribunal must not direct OFCOM to take any action which OFCOM would not otherwise have power to take in relation to the decision under appeal.

(6) It shall be the duty of OFCOM to comply with every direction given under paragraph (4).

(7) In any document recording the decision of the Tribunal under this regulation, the Tribunal shall have regard to the need for excluding, so far as practicable, commercial information the disclosure of which would or might, in its opinion, significantly harm the legitimate business interests of any person to whom it relates.

Appeals from the Tribunal

16.—(1) A decision of the Tribunal on an appeal under regulation 15 may itself be appealed.

An appeal under this regulation—

- (a) lies to the Court of Appeal or to the Court of Session; and
- (b) must relate only to a point of law arising from the decision of the Tribunal.

(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 sufficient interest in the matter.

(3) An appeal under this regulation requires the permission of the Tribunal or of the Court to which it is to be made.

(4) In this regulation references to a decision of the Tribunal include references to a direction given by it under regulation 15(4).

5th July 2007

Stephen Timms
Minister of State for competitiveness and Consumer Affairs
Department for Business, Enterprise and Regulatory Reform

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement Articles 8 and 9 of the Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC (“the Roaming Regulation”) (OJ No L171, 29.6.2007, p32).

Article 8(1) requires that the dispute resolution procedures in Articles 20 and 21 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (the Framework Directive) (OJ L108, 24.4.2002, p.33) relating to disputes between communications providers are available in relation to disputes between different communications providers under the Roaming Regulation.

Article 8(2) of the Roaming Regulation requires that member States ensure that the dispute resolution procedures in Article 34 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (the Universal Service Directive) (OJ L108, 29.4.2002, p.51) relating to disputes between communications providers and end users are available for disputes under the Roaming Regulation.

Article 9 requires that member States lay down the rules on penalties applicable to infringements of the Roaming Regulation.

Regulation 2 of these Regulations designates OFCOM as the national regulatory authority for the purposes of the Roaming Regulation.

Regulation 3 of these Regulations provides for a notification procedure where OFCOM determine that there has been a breach of the Roaming Regulation or these Regulations.

Regulation 4 of these Regulations gives OFCOM the power to impose a penalty for breach of the Roaming Regulation or these Regulations.

Regulation 5 of these Regulations provides for the amount of penalty which may be imposed under Regulation 4. A penalty of up to £50,000 may be imposed for breach of a requirement under Article 7(4) of the Roaming Regulation to provide OFCOM with information in relation to the implementation and enforcement of the Roaming Regulation. A penalty of up to 10% of turnover of “relevant business”, as defined in these Regulations, may be imposed by OFCOM for all other breaches of the Roaming Regulation or regulation 13 of these Regulations.

Regulation 6 specifies how the turnover of “relevant business” is to be calculated for the purposes of regulation 5 of these Regulations.

Regulations 7 to 12 of these Regulations implement Article 8(1) of the Roaming Regulation.

Regulation 13 of these Regulations implements Article 8(2) of the Roaming Regulation.

Regulations 14 to 16 of these Regulations provide that a person affected by a decision of OFCOM under the Roaming Regulation or these Regulations may appeal that decision to the Competition Appeal Tribunal. Decisions of the Competition Appeal Tribunal may be appealed on a point of law to the Court of Appeal or the Court of Session in Scotland.

A full Regulatory Impact Assessment and Transposition Note have been produced. Copies may be obtained from Geoff Smith, Business Relations Directorate (BR2) of 1 Victoria Street, London, SW1H 0ET and are annexed to the Explanatory Memorandum which is available on the OPSI website.

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