
EXPLANATORY NOTE

(This note is not part of the Order)

These Regulations implement Directive [2009/140/EC](#) of the European Parliament and of the Council (“the Better Regulation Directive”) and aspects of Directive [2009/136/EC](#) of the European Parliament and of the Council (“the Citizens’ Rights Directive”). The Better Regulation Directive amends Directive [2002/19/EC](#) (“the Access Directive”), Directive [2002/20/EC](#) (“the Authorisation Directive”) and Directive [2002/21/EC](#) (“the Framework Directive”). The Citizens’ Rights Directive amends Directive [2002/22/EC](#) (the “Universal Service Directive”) and Directive [2002/58/EC](#) (“the E-Privacy Directive”).

Regulation 2 provides that Schedule 1 to the Regulations, which contains provision amending the Communications Act 2003 (“the 2003 Act”), and various other enactments, have effect. It also provides that Schedule 2, which contains provision amending the Wireless Telegraphy Act 2006 (“the 2006 Act”), has effect. Regulation 4 provides that Schedule 3 to the Regulations, which contains transitional and saving provisions, has effect.

Regulation 3 introduces a 6 month deadline for competent authorities to decide an application to install facilities.

Regulation 5 contains provision requiring an ongoing five year review of the implementation of the Access, Authorisation, Framework and Universal Service Directives, whose amendment by the Better Regulation and the Citizens’ Rights Directives are implemented in these Regulations. The implementation of changes to the E-Privacy Directive is contained in separate Regulations.

Schedule 1 to the Regulations contains amendments to the 2003 Act as well as other primary legislation.

Paragraph 1 of Schedule 1 amends the Telecommunications Act 1984 consequential on the new deadline imposed by Regulation 3, which applies to certain applications made under that Act. Paragraph 2 makes a similar consequential amendment to the New Roads and Street Works Act 1991.

Paragraph 3 amends the Office of Communications Act 2002 to insert additional procedures for the removal of Ofcom’s non-executive board members.

Paragraphs 5 amends section 4 of the 2003 Act which contains Ofcom’s duties for fulfilling obligations under the four amended Directive listed above.

Paragraph 6 inserts a new section 4A into the 2003 Act which requires Ofcom to take into account any applicable recommendations issued by the European Commission under Article 19(1) of the Framework Directive in carrying out the functions listed in section 4(1).

Paragraph 7 amends section 5 of the 2003 Act to ensure that any direction issued by the Secretary of State under section 5 does not conflict with the requirements of Article 3(3a) of the Framework Directive on the independence of the national regulator (Ofcom). The amendments also ensure that the Secretary of State takes account of the principle of technological neutrality in giving a direction under section 5.

Paragraph 8 amends section 26 of the 2003 Act to replace the current power for Ofcom to publish the listed information, with a duty to do so. The amendment also adds to the list of people that Ofcom are required to make information available to, to add in persons affected by the application of the electronic communications code (which is defined in section 106 of the 2003 Act).

Paragraph 9 amends section 32 of the 2003 Act and the definitions of “electronic communications network” and “associated facility”.

Status: This is the original version (as it was originally made).

Paragraphs 10 to 13 amend the enforcement provisions for breach of the notification requirement in section 33 of the 2003 Act. Paragraphs 14 to 18 make similar amendments to the enforcement provisions for breach of the obligation to pay the administrative charge contained in section 38 of the 2003 Act.

Paragraphs 19 to 26 amend domestic and European consultation requirements in the 2003 Act that apply to the setting, modification or revocation of certain types of conditions, directions, approvals and consents.

Paragraph 27 amends section 51 of the 2003 Act, which contains details of the permitted subject matter of general conditions. The amendments give further examples of the matters which may be included in a general condition including equivalence of access for disabled end users and to impose conditions on operators to prevent the degradation of service. The amendments also require Ofcom to notify the European Commission when they propose to make a particular general condition (relating to minimum quality of service).

Paragraph 28 amends section 52 of the 2003 Act which contains permitted general conditions in relation to the interests of consumers. The amendments narrow the scope of the complaints procedures required to be maintained by service providers, and also provide for a condition to mandate the provision of a scheme to compensate end users in the event of delay or abuse in number porting.

Paragraph 29 amends section 54 of the 2003 Act to ensure that the dispute resolution procedures proposed by service providers are non discriminatory as well as transparent, easy to use and effective.

Paragraph 30 amends section 56(1) of the 2003 Act to clarify that Ofcom, through the National Telephone Numbering Plan, can set out restrictions relating to tariff principles and maximum prices. Paragraph 31 amends the numbering condition power in section 58(1) of the 2003 Act to make similar provision.

Paragraph 31 adds in a new section 56A of the 2003 Act which requires Ofcom, when allocating telephone numbers, to specify whether the allocation is transferable. It also requires any time limit imposed on an allocation to be objectively justifiable.

Paragraph 33 amends section 61 of the 2003 Act, which contains enforcement provisions for breach of a numbering condition.

Paragraph 34 amends section 64(4)(a) of the 2003 Act to clarify that services enabling access for disabled end-users are ancillary services in the context of must-carry obligations.

Paragraph 35 inserts a new subsection into section 65 of the 2003 Act which requires the Secretary of State to take into account the principle of technological neutrality before making or varying the universal service order under that provision.

Paragraph 36 amends section 67 of the 2003 Act to include provision to allow Ofcom to make a universal service condition which requires the universal service operators to inform Ofcom if they propose to sell or dispose of certain network assets.

Paragraph 37 amends section 68(6) of the 2003 Act to require Ofcom to monitor the prices charged for the universal service in the event that there is not a designated universal service provider.

Paragraph 38 amends section 73 of the 2003 Act and the permitted purposes for access-related conditions.

Paragraph 39 amends section 74 of the 2003 Act to introduce a further type of access-related condition which can be set by Ofcom under that provision.

Paragraph 40 removes subsection (1) of section 75 and paragraph 48 adds a slightly modified version of the provision into section 87(5C) of the 2003 Act.

Paragraph 41 inserts a new section 76A into the 2003 Act which allows Ofcom to share information about infrastructure that is suitable for shared use.

Paragraphs 42 to 48 amend the domestic and European consultation requirements for a market identification, and market power determination. They also contain new provisions on the timing of these market reviews.

Paragraph 49 amends section 87 of the 2003 Act to add to the factors that Ofcom must consider in setting significant market power conditions (“SMP conditions”, as defined in section 45 of the 2003 Act) and inserts a new type of condition permitted under section 87. This sort of condition was previously provided for in section 73(4), but was deleted by paragraph 37.

Paragraph 50 inserts new sections 89A and 89B into the 2003 Act which provide for a special type of SMP condition, one requiring functional separation. This paragraph also inserts new section 89C into the 2003 Act, which require prior notification to Ofcom of a voluntary separation (either functional or structural).

Paragraph 51 provides for the omission of section 90 of the 2003 Act.

Paragraph 52 makes a consequential amendment to section 91 and removes subsection (7), which is no longer needed because of new section 48C(2) (which was inserted by paragraph 23).

Paragraph 53 provides for the omission of section 92 of the 2003 Act.

Paragraphs 54 to 63 amend the current enforcement provisions for breach of a condition set by Ofcom under section 45 of the 2003 Act.

Paragraph 64 provides for the omission of section 105 of the 2003 Act.

Paragraph 65 inserts new sections 105A to 105D of the 2003 Act, which contain obligations relating to the security of public electronic communications network and services and the enforcement provisions for those new obligations.

Paragraph 66 amends section 107 of the 2003 Act consequential on the new deadline imposed by Regulation 3 which applies to applications for a direction under section 107 of the 2003 Act. It also introduces new obligations on Ofcom in making modifications to the application process provided for in section 107.

Paragraph 67 amends section 109(2) of the 2003 Act to require the Secretary of State to consider, before exercising the power to make regulations under section 109, the need to ensure that restrictions and conditions contained in the regulations are objectively justifiable and proportionate.

Paragraphs 68 to 74 amend the current enforcement provisions for breach of regulations made under section 109, and provisions providing for the disapplication of the electronic communications code following contraventions of other regulatory obligations.

Paragraph 75 inserts a new subsection into section 115 of the 2003 Act, which ensures that any modification of the application of the electronic communications code is objectively justifiable and proportionate.

Paragraphs 76 and 77 amend section 120 of the 2003 and insert a new section 120A. This provides for the procedure to be followed in setting a condition under section 120 and merely disapplies the procedural changes made to section 48 of the 2003 Act, which used to also govern section 120 conditions.

Paragraph 78 amends section 133(6) of the 2003 Act to ensure that the amended enforcement provisions in sections 96A to 99 of the 2003 Act apply to a breach of a condition of a direction given under section 132 of the 2003 Act.

Paragraph 79 amends section 135 of the 2003 Act to specify further types of information that Ofcom can require under this provision. Paragraph 80 amends section 137 of the 2003 Act, which contains restrictions on Ofcom’s information gathering powers under section 135. The amendments modify the application of the restrictions to the new types of information that Ofcom can request under section 135.

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Paragraphs 81 to 87 amend the enforcement provisions for contravention of the obligation to provide information under sections 135, 136 and 191 of the 2003 Act.

Paragraph 88 inserts a new section 146A into the 2003 Act. This section permits any person to use information published by communications providers free of charge for the purpose of providing a comparative tool to allow end-users to assess the costs of different usage patterns.

Paragraph 89 inserts a definition of “Proposals of EU significance” into the 2003 Act. This definition is used to determine which proposals are subject to the European consultation requirements in sections 48B, 49B and 80B.

Paragraph 90 updates various definitions contained in section 151 of the 2003 Act.

Paragraphs 91 to 96 amend the dispute resolution provisions in the 2003 Act. The amendments modify the subject matter of disputes which can be referred to Ofcom for determination and replace the current duty on Ofcom to resolve network access disputes with a power to do so, including the power to invite parties to refer the dispute. They also modify the provisions relating to cross-border disputes and introduce new rules on the ability of Ofcom to recover its own costs in relation to the resolution of a dispute.

Paragraph 97 amends section 393(6) of the 2003 Act to ensure that the new provision inserted by paragraph 40 is not limited by section 393(6).

Paragraph 98 amends section 395 of the 2003 Act by inserting a new subsection (6A) which clarifies that Ofcom can send electronic notifications (where notifications are required) to the European Commission, to the Body of European Regulators for Electronic Communications (“BEREC”) and to the regulators in other Member States.

Paragraph 99 inserts a definition for BEREC into the 2003 Act.

Paragraph 100 amends paragraph 9 of Schedule 18 to the 2003 Act to provide that the amended dispute provisions also apply to a dispute relating to a provision detailed in paragraph (4).

Paragraphs 101 and 102 amend the Marine and Coastal Access Act 2009 and the Marine (Scotland) Act 2010 consequential on the new deadline imposed by Regulation 3, which applies to certain applications made under those Acts.

Schedule 2 to the Regulations makes the following provision for amendments to the 2006 Act.

Paragraph 2 amends section 2 of the 2006 Act to ensure that the criteria applied in determining the allocation of frequencies in the UK Plan for Frequency Authorisation, are objectively justifiable, non-discriminatory, proportionate and transparent.

Paragraph 3 amends section 6 of the 2006 Act and inserts a requirement for the Secretary of State to consider the principle of technological neutrality before making an order under section 5.

Paragraph 4 amends section 8 of the 2006 Act, to ensure that any terms, provisions or limitations specified in regulations made under section 8 fall within Part A of the Annex to the Authorisation Directive, and that they are objectively justifiable, non-discriminatory, proportionate and transparent. Paragraph 4 also amends the criteria that must be met for Ofcom to exempt wireless telegraphy stations or apparatus from the requirement to hold a wireless telegraphy licence.

Paragraph 5 inserts a new section 8A into the 2006 Act, which requires Ofcom to periodically review licences which have been granted for 10 years or more and which are non-transferrable. Ofcom must establish whether the conditions enabling Ofcom to exempt wireless telegraphy stations or apparatus from the requirement to hold a licence are met, and if so, Ofcom must make regulations under section 8 of the 2006 Act, exempting the station or apparatus.

Paragraph 5 also inserts new sections 8B and 8C into the 2006 Act, which restrict Ofcom’s ability to grant exclusive licences except where certain general interest objectives (defined in section 8B(3)) are met. The new provisions also require the grant of any such licence to be subject to consultation.

Paragraph 6 inserts a new subsection (1A) into section 9 which ensures that any term, provision or limitation contained in a wireless telegraphy licence used for the provision of an electronic communications network or service, must fall within Part B of the Annex to the Authorisation Directive.

Paragraph 7 inserts a new section 9ZA into the 2006 Act, which provides that any limitation contained in a wireless telegraphy licence relating to the type of technology authorised under the licence or the frequency that can be used under the licence is only permitted if it is necessary for certain limited purposes set out in subsection (2) of that provision. Paragraph 7 also inserts a new section 9ZB into the 2006 Act which requires Ofcom to review any limitations of this nature imposed before these Regulations came into effect to establish whether the purposes in section 9ZB(2) are met.

Paragraph 8 amends section 14 of the 2006 Act to ensure that all of the restrictions on the terms, provisions and limitations that Ofcom can include in a wireless telegraphy licence, also apply where the licence is granted after a competitive process. In specifying the criteria that apply to any such competitive process, Ofcom must ensure that they are objectively justifiable, non-discriminatory, proportionate and transparent.

Paragraph 9 amends section 30 of the 2006 Act to amend the process that applies for spectrum trading.

Paragraph 10 inserts new sections 32A to 32E into the 2006 Act. These provisions contain a new information gathering power for Ofcom as well as the enforcement regime for contravention of this new provision.

Paragraph 11 applies the criminal offences in section 33 of the 2006 Act to the new information gathering power and also amends the current criminal penalties to ensure they are consistent with the equivalent penalties contained in section 144 of the 2003 Act, which apply to contraventions of Ofcom's information gathering powers under the 2003 Act.

Paragraph 12 amends section 34 of the 2006 Act so that the statement of policy that Ofcom is required to issue in respect of its current information gathering powers under the 2006 Act also applies to the new power in section 32A.

Paragraphs 13 to 15 modify the enforcement provisions for breach of a term of a wireless telegraphy licence or the exemption regulations made under section 8 of the 2006 Act.

Paragraph 16 amends Schedule 1 to the 2006 Act. The amendments require the licence application procedure provided for in regulations made under paragraph 1 of Schedule 1, to be open (except in certain circumstances), objective, transparent, non-discriminatory and proportionate. The amendments also modify Ofcom's power to modify or revoke a licence for contravention of the licence.

Schedule 3 contains transitional and saving provisions.

A transposition note and a full impact assessment of the effect that this instrument will have on the costs of business and the voluntary sector are available from the Department

for Culture, Media and Sport, 2 – 4 Cockspur Street, London, SW1Y 5DH and are published with the Explanatory Memorandum alongside the instrument on www.legislation.gov.uk