

EXPLANATORY MEMORANDUM TO
THE ELECTRONIC COMMUNICATIONS (UNIVERSAL SERVICE)
(AMENDMENT) ORDER 2022

2022 No. 937

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Digital, Culture, Media and Sport (DCMS) and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The purpose of this instrument is to amend the Electronic Communications (Universal Service) Order 2003 (2003 Order) so as to remove the requirement that the publicly available telephone services that a universal service provider must provide, where reasonably requested by an end-user, must be capable of allowing end-users to make and receive facsimile. The instrument also substitutes a new definition of “publicly available telephone service” for the existing definition, to clarify that the service is for originating and receiving national or national and international calls through a telephone number or numbers in a national or international telephone numbering plan.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The substitution of the new definition of “publicly available telephone service” in the 2003 Order effectively consolidates, with clarification, amendments made to that definition by the Electronic Communications (Universal Service) (Amendment) Order 2011 (S.I. 2011/1209) (2011 Order). The 2011 Order was reported by the Joint Committee on Statutory Instruments for defective drafting, see Joint Committee on Statutory Instruments, *Twenty-fifth Report of Session 2010–12*, (2011, HL172, HC354-xxv). This report is available online at: <https://publications.parliament.uk/pa/jt201012/jtselect/jtstatin/172/172.pdf>.
- 3.2 The 2011 Order, among other amendments to the definition, inserted the words ‘or national’ after the word ‘national’ by its article 3(b)(iii). As the word ‘national’ appeared twice in the definition, the committee asked the Department for Culture, Media and Sport (as DCMS then was) to explain ‘which of the occurrences of the word “national” in the definition of “publicly available telephone service” in article 2 of the Electronic Communications (Universal Service) Order 2003 is referred to in article 3(b)(iii)’. The department responded that the intention was to refer to the first instance.
- 3.3 The 2003 Order was amended by the Electronic Communications (Universal Service) (Broadband) Order 2018. However, no changes were made at that time to clarify the amendment to the definition made by the 2011 Order. DCMS acknowledges the issue

should have been addressed in 2018 and seeks to rectify that oversight through this instrument.

- 3.4 The new amendment effectively clarifies that the words ‘or national’ inserted by the 2011 Order were to be inserted after only the first instance of the word ‘national’ in the definition.

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

6. Legislative Context

- 6.1 The universal service obligations in UK are derived from EU directives, mainly, Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services (sometimes referred to as the “universal service directive” (USD)) and Directive (EU) 2018/1972 establishing the European Electronic Communications Code (EECC Directive), which consolidated the USD with other relevant directives. These universal service obligations were implemented in the UK primarily via the Communications Act 2003 (2003 Act).
- 6.2 Section 65 of the 2003 Act gave the Secretary of State the power to set out the extent to which certain things set out in its subsection (2) had to be provided, made available or supplied throughout the United Kingdom. These things included and, notwithstanding amendments made in December 2020¹, still include electronic communications networks and electronic communications services and facilities capable of being made available as part of or in connection with an electronic communications service.
- 6.3 The Secretary of State exercised the power to make the 2003 Order, which, among the things in subsection (2) of s. 65, required at least one designated universal service provider to meet all reasonable requests by end-users for connection at a fixed location to the public telephone network and for access to publicly available telephone services at a fixed location. Under the 2003 Order, that connection had – and, but for this order, would still have – to be capable of allowing end-users to make and receive local, national and international facsimile communications.
- 6.4 In 2003 BT and KCOM were designated as universal service providers, having effect as a designation in accordance with regulations under s. 66 of the 2003 Act. This means BT and KCOM are required to provide facsimile communications as set out in the 2003 Order in the absence of the amendment this order makes to the 2003 Order.
- 6.5 The amendment that this order makes to the definition of ‘publicly available telephone service’ is to clarify an earlier amendment made by the 2011 Order (see paragraphs 3.1 to 3.4 above).

¹ Amendments were made by the Electronic Communications and Wireless Telegraphy (Amendment) (European Electronic Communications Code and EU Exit) Regulations 2020 (S.I. 2020/1419) to implement the EECC Directive, which fell to be implemented shortly before IP completion day.

- 6.6 The wording in the definition of “publicly available telephone service” in the 2003 Order reflected the wording in the USD which mandated a service for originating and receiving national and international calls through numbers in a national or international telephone numbering plan. The USD was amended by Directive 2009/136/EC, which amended the definition of “publicly available telephone service” (Article 1(2)(b)) to (emphasis added) “national *or national* and international calls through a number or numbers in a national or international telephone numbering plan”. The 2011 Order (which implemented the changes introduced by the 2009 directive) inserted the words “or national” in the definition of “publicly available telephone service” to reflect the changes made by the 2009 directive.
- 6.7 The EECC Directive introduced a new “voice communications service” definition (Article 2(32)), which is synonymous with the “publicly available telephone service” definition previously used in the USD. The definition under the EECC Directive identifies the nature of the universal call service which may be one providing for national calls or for national and international calls. Also, the directives recognise the nature of telephone numbering plan which could be a national or international numbering plan.
- 6.8 This order makes the amendment to clarify that the words “or national” were intended to be inserted after only the first instance of the word ‘national’ in the definition of “publicly available telephone service” in the 2003 Order, consistently with the USD as amended (and what was subsequently in the EECC Directive).

7. Policy background

- 7.1 The Public Switched Telephone Network (PSTN) has traditionally provided telephony services including landline calls across the UK. However, the PSTN is an aging network and is becoming harder and more expensive to maintain. Providers are moving from the old PSTN to new Voice over Internet Protocol (VoIP) technology.
- 7.2 Most traditional facsimile (fax) machines utilise the PSTN to provide fax services reliably. In short, fax services require both ends of the fax call to support analogue voice-band data channels. Although this may still be converted to VoIP, the timing and synchronisation that fax relies on for the duration of the fax transmission means providers could no longer guarantee that fax transmissions would work efficiently following the move to VoIP.
- 7.3 Moreover, the 2003 Order is designed to offer a minimum safety net of services for consumers. The government is now satisfied that numerous alternatives to facsimile are available (some of which are free of charge) meaning this instrument will have a minimal impact on businesses, the public sector, and individuals. Alternatives to facsimile include document sharing services and email. The latter can also include read-receipts.
- 7.4 DCMS also notes that the COVID-19 pandemic is likely to have accelerated changes in business practices, likely reducing the impact of this change even further.
- 7.5 Taking these factors into account, and following engagement with the telecommunications sector and consultation findings from Ofcom, the Secretary of State considers it is no longer appropriate to require facsimile communications to be included as part of the 2003 Order (with the result they must be provided, made available or supplied throughout the United Kingdom).

- 7.6 It is important to note that it will still be possible for some end-users to use a facsimile service via digital means, but this will be dependent on the equipment and network they use.
- 7.7 No policy change is being introduced by the amendment to the definition of “publicly available telephone service”.

8. European Union Withdrawal and Future Relationship

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

9. Consolidation

- 9.1 The Secretary of State has carefully considered whether to consolidate the 2003 Order, incorporating, in passing, the amendments this order makes to that order.
- 9.2 On balance, the Secretary of State does not consider this the appropriate juncture to consolidate the 2003 Order. This is because those affected by the amendment to remove the requirement for facsimile from the 2003 are familiar with it, have been consulted on the minor change (via Ofcom) and have not expressed any concern about a loss in clarity or utility of the legislation; the amendment made by this order to the definition of ‘publicly available telephone service’ is to clarify an earlier amendment made by the 2011 Order and introduces no substantive changes to the 2003 Order. In addition, consolidation would take up a considerable amount of departmental resources, which it is currently preferred to direct towards other matters.

10. Consultation outcome

- 10.1 Before making or varying an order under s. 65 of the 2003 Act, the Secretary of State must consult Ofcom and such other persons as she considers appropriate.
- 10.2 In September 2021, Matt Warman, the Minister for Digital Infrastructure, wrote to Ofcom to consult them about the proposal to remove the requirement for facsimile from the 2003 Order.
- 10.3 The proposal to amend the definition of “publicly available telephone service” was notified to Ofcom by DCMS, following which Ofcom confirmed to the department that it was satisfied with the changes.
- 10.4 After receiving the minister’s letter in September 2021 Ofcom conducted a public consultation. This concluded that Ofcom remained of the view that it would be appropriate for facsimile to be removed from the universal service obligations of the 2003 Order. The consultation findings are available online at: https://www.ofcom.org.uk/_data/assets/pdf_file/0028/238555/telephony-USO-statement.pdf.
- 10.5 Ofcom received 13 responses to their consultation.
- 10.6 Nine respondents (including BT, KCOM, four local councils and three individual respondents) agreed with Ofcom’s view that facsimile should be removed.
- 10.7 Two respondents (the Comms Council UK and an individual) raised concerns that facsimile services were still in use, particularly in certain professions (legal, travel and healthcare). DCMS followed up with relevant stakeholders in these professions (see below) to ascertain if these professions would be disproportionately affected by the proposed changes. In the vast majority of cases facsimile machines were not actually in use, and if they were, it was being used only for back-up purposes. Furthermore,

the department has been engaging to ensure that there is awareness about the move to all-IP services across these sectors. It is also worth reiterating that the proposed change does not necessarily mean facsimile services will cease to function, only that universal service providers will not be mandated to provide them.

- 10.8 Ofcom's view remains that it would no longer be appropriate for the universal service obligations of the 2003 Order to require the provision of facsimile communications. This is mainly because of the effect of PSTN migration on the functionality of these services, especially in light of the numerous alternatives available. Further details on the consultation findings can be found in Ofcom's letter to the department available online at: https://www.ofcom.org.uk/data/assets/pdf_file/0026/238553/annex-3-letter-to-dcms.pdf.
- 10.9 Having conducted stakeholder engagement with affected sectors, DCMS agrees with Ofcom's consultation conclusions.
- 10.10 DCMS approached the travel association, ABTA, about the use of fax machines in remote locations. ABTA agreed to engage with their members and found that no members still use fax in their day-to-day operations to contact customers in remote destinations. In the cases where fax was used, this was purely for back-up purposes.
- 10.11 DCMS asked Ofcom for further clarity with regard to their engagement with the legal sector. To raise awareness about the proposed changes to fax machines and potential effects on the legal sector (regarding sending sensitive documents) the Legal Services Board distributed a briefing to various professional bodies in autumn 2020 to raise awareness. Ofcom were subsequently satisfied that the proposed changes would have minimal impact on the legal profession.
- 10.12 DCMS approached the government unit, NHSX, for further assurances that the proposed changes to the fax requirements in the 2003 Order would have minimal impact on NHS operations. They noted the ban on fax machines (<https://www.gov.uk/government/news/health-and-social-care-secretary-bans-fax-machines-in-nhs>) which was introduced by Secretary of State for Health and Social Care in December 2018. Furthermore, during the pandemic there was an expedited rollout of "NHSmail", which NHSX noted to have improved the situation with regard to fax, that is, reducing reliance on the use of the technology.

11. Guidance

- 11.1 We are not expecting to produce any further guidance, but Ofcom may do so given its role in enforcing the 2003 Order.

12. Impact

- 12.1 There is no significant impact on business, charities or voluntary bodies as a result of the amendment to the universal service order to remove facsimile communications.
- 12.2 There is no significant impact on the public sector as a result of the amendment to the universal service order to remove facsimile communications.
- 12.3 A full Impact Assessment has not been prepared for this instrument because not many businesses are affected and where they are, there is a low level of impact; when quantified, the amounts involved fall below the threshold for producing an Impact Assessment.

12.4 DCMS has conducted appropriate analysis finding that fax usage is in significant decline and that numerous alternatives are already available to businesses. Therefore, the effects of the policy change are expected to be negligible. The impact on the general economy is also expected to be negligible.

12.5 The amendment to the definition of “publicly available telephone services” is a clarification and makes no policy change. As such, no impact is anticipated.

13. Regulating small business

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

14. Monitoring and review

14.1 The Secretary of State has determined that it would not be appropriate to make provision in this Order for a review under sections 28 to 32 of the Small Business, Enterprise and Employment Act 2015, in reliance on section 31(2)(a) of that Act.

14.2 This is because the expected annualised net impact on business or on voluntary or community bodies as a result of this order would be well under \pm £5 million net annualised, and as such a review would be disproportionate, taking into account the economic impact of the regulatory provision on “qualifying activity” (that is, activity, by a business for the purposes of the business, or by a voluntary or community body for the purposes of the body).

15. Contact

15.1 Henry Robinson, Broadband Strategy and Regulation Adviser, Digital Infrastructure, at the Department for Digital, Culture, Media and Sport: email: henry.robinson@dcms.gov.uk, can be contacted with any queries regarding the instrument.

15.2 Mark Hitchen, Deputy Director for Broadband Regulation and Investment, at the Department for Digital, Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.

15.3 Matt Warman at the Department for Digital, Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.