
STATUTORY INSTRUMENTS

2019 No. 980

ELECTRONIC COMMUNICATIONS

**The Intra-EU Communications
(EU Regulation) Regulations 2019**

<i>Made</i>	- - - -	<i>3rd June 2019</i>
<i>Laid before Parliament</i>		<i>4th June 2019</i>
<i>Coming into force</i>	- -	<i>30th June 2019</i>

The Secretary of State makes these Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972(1).

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(2).

Citation, commencement, saving and interpretation

1.—(1) These Regulations may be cited as the Intra-EU Communications (EU Regulation) Regulations 2019 and come into force on 30th June 2019.

(2) These Regulations cease to have effect immediately before the end of 14th May 2024.

(3) In respect of any breach or alleged breach of Article 5a or of these Regulations occurring before these Regulations cease to have effect, these Regulations continue to have effect as if paragraph (2) were omitted from them.

(4) In these Regulations—

“Article 5a” means Article 5a of the EU Regulation as inserted by Article 50 of the BEREC Regulation and, with respect to penalties applicable to infringements of Article 5a and necessary measures, this includes reference to Article 6 of the EU Regulation as amended by Article 50 of the BEREC Regulation.

“BEREC Regulation” means Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11th December 2018(3);

“OFCOM” means the Office of Communications as established by the Office of Communications Act 2002(4);

(1) 1972 c.68. Section 2(2) was amended by section 27 of the Legislative and Regulatory Reform Act 2006 (c.51) and section 3 of and Part I of the Schedule to the European Union (Amendment) Act 2008 (c.27).

(2) S.I. 2001/3495. This has been amended, but the amendments are not relevant for the purposes of these Regulations.

(3) OJ No L 321, 17.12.2018, p.1.

(4) 2002 c.11.

“EU Regulation” means Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25th November 2015⁽⁵⁾, as amended by the BEREC Regulation.

National Regulatory Authority

2.—(1) OFCOM is the national regulatory authority for the purposes of Article 5a.

(2) References in these Regulations to OFCOM’s functions under Article 5a should be read accordingly.

BEREC guidelines

3. In performing its functions under the EU Regulation and these Regulations, OFCOM must take due account of all applicable guidelines issued by the Body of European Regulators for Electronic Communications in accordance with Article 5a (6).

Information requirements

4.—(1) OFCOM may require a person falling within paragraph (2) to provide them with such information as they consider necessary for the purpose of carrying out their function under Article 5a and these Regulations.

(2) Any person who appears to OFCOM to have information required by them for the purpose of carrying out their functions under Article 5a and these Regulations is a person falling within this paragraph.

(3) A person required to provide information under this regulation must provide it in such manner and within such reasonable period as may be specified by OFCOM.

(4) OFCOM are not to require the provision of information under this regulation except—

- (a) by a demand for the information that describes the required information and sets out OFCOM’s reasons for requiring it; and
- (b) where the making of a demand for the information is proportionate to the use to which the information is to be put in carrying out OFCOM’s functions.

(5) A demand for information required under this regulation must be contained in a notice served on a person from whom the information is required (an “information requirement”).

Notification of breach

5.—(1) Where OFCOM determine that there are reasonable grounds for believing that a person is breaching or has breached an obligation under Article 5a or these Regulations 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;
- (c) specifies a reasonable period during which the person notified has an opportunity of making representations about the matters notified;
- (d) to the extent that the notification relates to an information requirement, specifies the information to be provided by the person to OFCOM in order to comply with the requirement;

(5) OJ No L 310, 26.11.2015.

- (e) to the extent that the notification relates to an obligation which is not an information requirement, specifies the steps that OFCOM think should be taken by the person in order to—
 - (i) comply with the obligation; and
 - (ii) remedy the consequences of the breach; and
 - (f) specifies any penalty which OFCOM are minded to impose in accordance with regulation 7.
- (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 Article 5a or these Regulations, 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.

Enforcement of notification under regulation 5

- 6.—(1) This regulation applies where—
- (a) a person has been given a notification under regulation 5 (a “notified person”);
 - (b) OFCOM have allowed the notified person an opportunity to make representations about the matters notified; and
 - (c) the period allowed for the making of representations has expired.
- (2) OFCOM may—
- (a) give the notified person a decision (a “confirmation decision”) confirming the matters referred to in regulation 5(2); or
 - (b) inform the notified person that that they are satisfied with the person’s representations and that no further action will be taken.
- (3) OFCOM may not give a confirmation decision to a notified person unless, after considering any representations, they are satisfied that the person has, in one or more of the respects notified, been in breach of an obligation specified in the notification under regulation 5.
- (4) A confirmation decision—
- (a) must be given to the notified person without delay;
 - (b) must include reasons for the decision;
 - (c) may require immediate action by the notified person to comply with the obligations specified in the notification under regulation 5, or may specify a period within which the person must comply with those obligations;
 - (d) may require the notified person to pay—
 - (i) the penalty specified in the notification under regulation 5; or

- (ii) such lesser penalty as OFCOM consider appropriate in the light of the notified person's representations or steps taken by the notified person to comply with the obligation or remedy the consequences of the breach; and
- (e) may specify the period within which the penalty is to be paid.
- (5) It is the duty of the notified person to comply with a confirmation decision.
- (6) That duty is enforceable in civil proceedings by OFCOM—
 - (a) for an injunction;
 - (b) for specific performance of a statutory duty under section 45 of the Court of Session Act 1988(6); or
 - (c) for any other appropriate remedy or relief.
- (7) A penalty imposed by a confirmation decision—
 - (a) must be paid to OFCOM; and
 - (b) if not paid within the period specified by them, is to be recoverable by them accordingly.

Penalties for breach

- 7.—(1) This regulation applies where—
- (a) a person has been given a notification under regulation 5 which specifies a proposed penalty.
- (2) OFCOM may not specify a penalty in relation to a breach of an information requirement made pursuant to regulation 4(5) if proceedings for an offence under regulation 11 have been brought against the notified person in respect of the breach.
- (3) Where a notification under regulation 5 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 the breach specified in the notification.
- (5) But in relation to a continuing breach, a penalty may be specified in respect of each day on which the breach continues after—
- (a) the giving of a confirmation decision under regulation 6(2)(a) which requires immediate action; or
 - (b) the expiry of any period specified in the confirmation decision for complying with a requirement so specified.
- (6) The amount of a penalty under paragraph (5) is to be such amount not exceeding £500 per day for a breach of an information requirement and £20,000 per day for any other breach as Ofcom determine to be—
- (a) appropriate; and
 - (b) proportionate to the breach in respect of which it is imposed.

Amount of penalty under Regulation 7

- 8.—(1) The amount of a penalty imposed under regulation 7 other than a penalty falling within regulation 7(4) shall be such amount in the case of a breach of an information requirement not exceeding £2,000,000 and in the case of any other breach of Article 5a or these Regulations not exceeding ten per cent of the turnover of the notified provider's relevant business for the relevant period, as OFCOM determine to be—

(6) 1988 c.36 (S.)

- (a) appropriate; and
 - (b) proportionate to the breach in respect of which it is imposed.
- (2) For the purposes of this regulation the turnover of a person's relevant business for a period shall be calculated in accordance with regulation 9.
- (3) In this regulation and regulation 9—
- “notified person” has the same meaning as in regulation 6;
 - “relevant period” means—
 - (a) except in the 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 5;
 - (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.
- “relevant business” means so much of any business carried on by the notified person as consists in the provision of electronic communications services.

Calculation of turnover of notified person's relevant business

- 9.—(1) The turnover of a notified person shall be calculated in conformity with accounting practices and principles which are generally accepted in the United Kingdom.
- (2) The turnover of a notified person shall be limited to the amounts derived by that person from the relevant business after deduction of sales rebates, value added tax and other taxes directly related to turnover.
- (3) When a notified person'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 107 of the Treaty on the Functioning of the European Union) granted by a public body to a notified person which relates to one of that person's ordinary activities is to be included in the calculation of turnover if the notified person is himself the recipient of the aid and if the aid is directly linked to the carrying out by that person of the relevant business.

Destination of penalties

10. Where OFCOM receives an amount in respect of a financial penalty under these regulations, OFCOM must pay that amount into the Consolidated Fund.

Offences in connection with information requirements

- 11.—(1) A person who fails to provide information in accordance with an information requirement made pursuant to regulation 4(5) is guilty of an offence and will be liable—
- (a) on summary conviction, to a fine in England and Wales, or in Scotland and Northern Ireland to a fine not exceeding the statutory maximum;
 - (b) on conviction on indictment, to a fine.
- (2) In proceedings against a person (“A”) for an offence under paragraph (1) it is a defence for A to show—

- (a) that it was not reasonably practicable for A to comply with the requirement within the period specified by OFCOM; but
 - (b) that A has taken all reasonable steps to provide the required information after the end of that period.
- (3) Proceedings for an offence under paragraph (1) may be brought in respect of a breach by a person of an information requirement only if—
- (a) OFCOM have given the person notification under regulation 5 in respect of that breach;
 - (b) that notification required a person to provide information;
 - (c) a confirmation decision has been given under regulation 6 in respect of that requirement;
 - (d) the period allowed under that decision has expired without the required information having been provided; and
 - (e) OFCOM have not imposed a financial penalty under regulation 7 in respect of that breach.
- (4) A person (“B”) is guilty of an offence if—
- (a) in pursuance of any information requirement, B provides any information that is false in any material particular; and
 - (b) at the time B provides it, B either knows it to be false or is reckless as to whether or not it is false.
- (5) A person guilty of an offence under paragraph (4) will be liable—
- (a) on summary conviction, to a fine in England and Wales, or in Scotland and Northern Ireland to a fine not exceeding the statutory maximum;
 - (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or both.
- (6) Where an offence under this regulation is committed by a body corporate and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of—
- (a) a director, manager, secretary or other similar officer of the body corporate; or
 - (b) a person who was purporting to act in any such capacity,

that person (as well as the body corporate) is guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(7) Where an offence under this regulation—

- (a) is committed by a Scottish firm; and
- (b) is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a partner of a firm,

that person (as well as the firm) is guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(8) In this regulation, “director”, in relation to a body corporate whose affairs are managed by its members, means a member of the body corporate.

Appeals against decisions by OFCOM

12.—(1) In this regulation—

“the Tribunal” means the Competition Appeal Tribunal; and

“Tribunal rules” means rules made under section 15 of the Enterprise Act 2002(7)

(7) 2002 c.40. Section 15 was amended by section 81 of, and Part 2 of Schedule 8 to, the Consumer Rights Act 2015 (c. 15).

(2) A person affected by a decision by OFCOM under Article 5a or these Regulations may appeal against it to the Tribunal.

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

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

(5) The notice of appeal must set out—

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

(6) 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.

(7) 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 Article 5a 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.

(8) 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 a duty conferred or imposed by Article 5a 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

13.—(1) The Tribunal shall dispose of an appeal under regulation 12 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

- 14.**—(1) A decision of the Tribunal under regulation 13 may itself be appealed.
- (2) 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.
- (3) 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.
- (4) An appeal under this regulation requires the permission of the Tribunal or of the Court to which it is to be made.
- (5) In this regulation references to a decision of the Tribunal include references to a direction given by it under regulation 13(4).

Service of notifications and other documents

- 15.**—(1) This regulation applies where provision made (in whatever terms) by or under these Regulations authorises or requires—
- (a) a notification to be given to any person; or
 - (b) a document of any other description (including a copy of a document) to be sent to any person.
- (2) The notification or document may be given or sent to the person in question—
- (a) by delivering it to the person;
 - (b) by leaving it at the person's proper address; or
 - (c) by sending it by post to the person at that address.
- (3) The notification or document may be given or sent to a body corporate by being given or sent to the secretary or clerk of that body.
- (4) The notification or document may be given or sent to a firm by being given or sent to—
- (a) a partner in the firm; or
 - (b) a person having the control or management of the partnership business.
- (5) The notification or document may be given or sent to an unincorporated body or association by being given or sent to a member of the governing body of the body or association.
- (6) For the purposes of this regulation and section 7 of the Interpretation Act 1978⁽⁸⁾ (service of documents by post) in its application to this regulation, the proper address of a person is—
- (a) in the case of body corporate, the address of the registered or principal office of the body;
 - (b) in the case of a firm, unincorporated body or association, the address of the principal office of the partnership, body or association;
 - (c) in the case of a person to whom the notification or other document is given or sent in reliance on any of paragraphs (3) to (5), the proper address of the body corporate, firm or (as the case may be) other body or association in question; and
 - (d) in any other case, the last known address of the person in question.
- (7) In the case of—
- (a) a company registered outside the United Kingdom,

⁽⁸⁾ 1978 c.30

(b) a firm carrying on business outside the United Kingdom, or
(c) an unincorporated body or association with offices outside the United Kingdom,
the references in paragraph (6) to its principal office include references to its principal office within the United Kingdom (if any).

(8) In this regulation—

- (a) “document” includes anything in writing;
- (b) “notification” includes notice; and
- (c) references to giving or sending a notification or other document to a person include references to transmitting it to that person and to serving it on that person.

(9) This regulation has effect subject to regulation 16.

Notifications and documents in electronic form

16.—(1) This regulation applies where—

- (a) regulation 15 authorises the giving or sending of a notification or other document by its delivery to a particular person (“the recipient”); and
- (b) the notification or other document is transmitted to the recipient—
 - (i) by means of an electronic communications network; or
 - (ii) by other means but in a form that nevertheless requires the use of apparatus by the recipient to render it intelligible.

(2) The transmission has effect for the purposes of these Regulations as a delivery of the notification or other document to the recipient, but only if the requirements imposed by or under this regulation are complied with.

(3) Where the recipient is OFCOM—

- (a) they must have indicated their willingness to receive the notification or other document in a manner mentioned in paragraph (1)(b);
- (b) the transmission must be made in such a manner and satisfy such other conditions as they may require; and
- (c) the notification or other document must take such form as they may require.

(4) Where the person making the transmission is OFCOM, they may (subject to paragraph (5)) determine—

- (a) the manner in which the transmission is made; and
- (b) the form in which the notification or other document is transmitted.

(5) Where the recipient is a person other than OFCOM, the recipient or the person on whose behalf the recipient receives the notification or other document must have indicated to the person making the transmission the recipient’s willingness to receive notifications or documents transmitted in the form and manner used.

(6) An indication to any person for the purposes of paragraph (5)—

- (a) must be given to that person in such manner as he may require;
- (b) may be a general indication or one that is limited to notifications or documents of a particular description;
- (c) must state the address to be used and must be accompanied by such other information as that person requires for the making of the transmission; and
- (d) may be modified or withdrawn at any time by a notice given to that person in such manner as that person may require.

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(7) An indication, requirement or determination given, imposed or made by OFCOM for the purposes of this regulation is to be given, imposed or made by being published in such manner as they consider appropriate for bringing it to the attention of the persons who, in their opinion, are likely to be affected by it.

(8) Regulation 15(8) applies for the purposes of this regulation as it applies for the purposes of that regulation.

3rd June 2019

Margot James
Minister of State for Digital and the Creative
Industries
Department for Digital Culture Media and Sport

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement Article 6 of the Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25th November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union ("the Telecoms Single Market Regulation") (OJ No L310/1, 26.11.2015) (OJ No 321/32, 17.12.2018, p) on retail charges for regulated intra-EU communications and amending Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 ("the Telecoms Single Market Regulation") (OJ No L310/1, 26.11.2015).

Article 6 of the EU Regulation as inserted by Article 50(5) of the BEREC Regulation requires that Member States lay down penalties applicable to infringements of Article 5a of the Telecoms Single Market Regulation.

Regulation 1 provides that these Regulations come into force on 30th June 2019 and cease to have effect immediately before the end of 14th May 2024.

Regulation 2 of these Regulations designates OFCOM as the national regulatory authority for the purpose of Article 5a.

Regulation 3 requires OFCOM, when performing its functions under the EU Regulation or these Regulations, to take due account of all applicable guidelines issued by BEREC in accordance with Article 5a (6).

Regulation 4 gives OFCOM the power to require the provision of information as considered necessary for the purpose of OFCOM carrying out functions under Article 5a.

Regulation 5 provides for a notification procedure where OFCOM determines that there has been a breach of Article 5a or these Regulations.

Regulation 6 provides for an enforcement procedure by OFCOM for notifications made pursuant to regulation 5.

Regulation 7 provides that penalties may be imposed for breaches of Article 5a and these Regulations. In the case of continuing breaches, this regulation provides that OFCOM may impose a penalty not exceeding £500 per day for breach of information requirements and £20,000 for any other breach as OFCOM determine to be appropriate and proportionate.

Regulation 8 specifies the amount of a penalty that may be imposed by OFCOM. A penalty of up to £2,000,000 may be imposed for breach of a requirement to provide OFCOM with information in relation to the implementation and enforcement of Article 5a. 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 Article 5a.

Regulation 9 specifies the turnover of "relevant business" is to be calculated for the purposes of regulation 6 of these regulations.

Regulation 10 specifies that OFCOM must pay all amounts received in respect of financial penalties into the Consolidated Fund.

Regulation 11 makes it a criminal offence to breach an information requirement and sets out the relevant sanctions.

Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

Regulations 12 to 14 of these regulations provide that a person affected by a decision of OFCOM under Article 5a 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.

Regulation 15 specifies the requirements for service of notifications and other documents.

Regulation 16 specifies the requirements for notifications and documents in electronic form.

A Transposition Note has been produced for these Regulations and is published with the Explanatory Memorandum alongside the instrument on www.legislation.gov.uk.