

[2020] No.

ELECTRONIC COMMUNICATIONS

The Electronic Communications
(Universal Service) (Costs) Regulations
[2020]

Made - - - - ***
Coming into force - - [***] [2020]

The Office of Communications, in exercise of the powers conferred by sections 71(4), 71(5), 71(7) and 403(7) of the Communications Act 2003(a), make the following Regulations.

Before making these Regulations, OFCOM have given notice of their proposal to do so in accordance with section 403(4)(a) of the Act, published notice of their proposal in accordance with section 403(4)(b) of the Act, and have considered the representations made to them before the time specified in the notice in accordance with section 403(4)(c) of the Act.

Citation and commencement

1. These Regulations may be cited as the Electronic Communications (Universal Service) (Costs) Regulations [2020] and shall come into force on [***] [2020].

Interpretation

2. In these Regulations—

“the Act” means the Communications Act 2003;

“additional contribution” means the amount payable by a particular additional contributor pursuant to a determination made by OFCOM under regulation 18(6);

“additional contributor” means a contributor required to make an additional contribution under regulation 18(2);

“amount to be collected” has the meaning given in regulation 9(2);

“amount to be compensated” means the amount in pounds sterling (if any) which OFCOM has determined, under section 71(2) of the Act, that it is or would be unfair for the universal service provider to bear, or continue to bear;

“contribution” means the part of the amount to be collected which is payable by a particular contributor pursuant to a determination made by OFCOM under regulation 12;

“contributor” means either—

(a) a communications provider OFCOM has determined shall contribute to a fund; or

Proposed Draft Regulations

(b) a person falling within the description of communications providers OFCOM have determined shall contribute to a fund;

“deadline for payment” has the meaning given in regulation 18(5);

“director” includes any person occupying the position of director, by whatever name called;

“fund” means an arrangement set up to compensate a universal service provider for a particular amount to be collected through contributions made by contributors;

“review” means a review under section 70(1) of the Act;

“turnover” means the turnover that a person generates—

(a) in the time period specified by OFCOM;

(b) in respect of such networks, services or facilities provided or made available by that person as specified by OFCOM;

(c) calculated in the manner specified by OFCOM; and

(d) after deducting such payments made to other persons as are specified by OFCOM;

“unfair financial burden” means the part of the financial burden of complying with one or more universal service conditions calculated in accordance with section 70(3) of the Act which OFCOM have determined that it is or would be unfair for a universal service provider to bear, or continue to bear, in accordance with section 71(2) of the Act;

“universal service” means the provision in the United Kingdom of one or more of the things falling within section 65(2) of the Act set out in any universal service order made by the Secretary of State under section 65(1) of the Act; and

“universal service provider” means a person who is designated in accordance with regulations made by OFCOM under section 66(1) of the Act to provide the whole or part of a universal service.

Matters OFCOM shall have regard to and information OFCOM shall take into account when determining the existence and extent (if any) of a financial burden

3.—(1) In reviewing and determining, under section 70(1) of the Act, the existence and extent (if any) of the financial burden that exists for a particular designated universal service provider of complying in relation to any matter with any one or more of the universal service conditions applied to him, OFCOM shall have regard to such of the matters set out in paragraph (2) as appear to them to be appropriate to that particular case.

(2) The matters are—

(a) the costs incurred in complying with the relevant universal service conditions and, to the extent distinct, any costs that the universal service provider would have avoided had the relevant universal service conditions not been imposed on it;

(b) the extent to which the costs referred to in paragraph (a) were efficiently and necessarily incurred;

(c) the revenues and any direct benefits generated as a result of complying with the relevant universal service conditions;

(d) any indirect benefits that the Universal Service Provider derives from his designation as a universal service provider and the application to him of the relevant universal service conditions; and

(e) any other matters identified as appropriate by OFCOM having regard to the facts and circumstances pertaining to the case.

(3) In making the determination referred to in paragraph (1) OFCOM shall take into account all of the information provided to OFCOM by the universal service provider, and any further information which OFCOM may request under section 135 of the Act from the universal service provider or any other person including, in particular—

(a) the universal service provider’s estimate of the financial burden of complying with the relevant universal service condition or conditions;

Proposed Draft Regulations

- (b) the calculations performed by the universal service provider in order to arrive at the estimate referred to in paragraph (a);
- (c) the universal service provider's explanation of the methodology adopted when performing the calculations referred to in paragraph (b);
- (d) the accounts and any other information serving as the basis for the calculations referred to in paragraph (b);
- (e) the universal service provider's explanation of the steps taken to verify the information described in paragraph (d);
- (f) the evidence that the costs of complying with the relevant universal service condition or conditions were efficiently and necessarily incurred; and
- (g) any other information identified as appropriate by OFCOM having regard to the facts and circumstances pertaining to the case.

Information to be provided to OFCOM if a request in relation to a financial burden is made by a universal service provider

4. If a universal service provider requests that OFCOM make a determination under section 70(1) of the Act, that provider must provide the information listed in regulations 3(3)(a) to 3(3)(f) to OFCOM at the time it makes the request.

Matters OFCOM shall have regard to and information OFCOM shall take into account when determining the unfairness of any financial burden which has been determined to exist

5.—(1) In determining under section 71(2) of the Act—

- (a) whether it is or would be unfair for the universal service provider to bear, or continue to bear, the burden of complying with one or more of the universal service conditions applied to him; and
- (b) the extent (if any) to which it is or would be unfair,

OFCOM must have regard to such of the matters set out in paragraph (2) as appear to OFCOM to be appropriate to that particular case.

(2) The matters are—

- (a) the extent to which the universal service provider is subject to competition in relevant markets;
- (b) the extent to which the universal service provider is constrained by regulation in relevant markets;
- (c) the nature of the particular procedure set out in regulations made under section 66 of the Act which has been used for the designation of that universal service provider;
- (d) the likely costs to OFCOM and others associated with establishing and administering a fund under these Regulations; and
- (e) any other matters identified as appropriate by OFCOM having regard to the facts and circumstances pertaining to the case.

(3) In making the determinations referred to in paragraph (1) OFCOM shall take into account any explanation provided by the universal service provider as to why that provider considers that it is or would be unfair for it to bear, or continue to bear, the whole or part of the financial burden of complying with the relevant universal service condition or conditions.

Information to be provided to OFCOM if a request in relation to unfairness of any financial burden is made by a universal service provider

6. If a universal service provider requests that OFCOM make a determination under section 71(2) of the Act, that provider must provide the explanation specified in regulation 5(3) to OFCOM at the time it makes the request.

Proposed Draft Regulations

Consultation on determinations concerning financial burden and unfairness

7.—(1) If OFCOM come to a provisional view on the matters set out in paragraph (2), OFCOM shall consult on that view in accordance with the consultation process set out in paragraphs (3) to (6).

(2) The matters are—

- (a) the extent (if any) of the financial burden that exists for the universal service provider of complying with one or more of the universal service conditions applied to him;
- (b) whether it is or would be unfair for the universal service provider to bear, or continue to bear, the burden of complying with one or more of the universal service conditions applied to him; and
- (c) the extent (if any) to which it is or would be unfair.

(3) OFCOM must consult on proposals relating to the determinations referred to in regulations 7(2)(a), 7(2)(b) and 7(2)(c) with the persons who, in OFCOM's opinion, are likely to have an interest in, or be affected by, one or more of those determinations.

(4) Proposals for making the determinations referred to in regulation 7(2) must be by means of a notification published by OFCOM —

- (a) stating that OFCOM are proposing to make such of the determinations referred to in regulation 7(2) as OFCOM proposes to make;
- (b) giving the reasons for making those proposals; and
- (c) specifying the period within which representations about OFCOM's proposals may be made.

(5) The period specified for the purposes of regulation 7(4)(c) must be one of not less than one month, beginning with the day after the day on which the notification was published.

(6) The publication of a notification under this regulation must be in such manner as appears to OFCOM to be appropriate for bringing it to the attention of the persons who, in OFCOM's opinion, are likely to have an interest in it, or be affected by it.

(7) If OFCOM have considered every representation about the proposals set out in a notification published under regulation 7(4) that is made to them within the period specified in the notification, OFCOM may, by publication of a further notification, make the proposed determinations, with or without modification.

Application for a determination that contributions are to be made by communications providers to whom general conditions are applicable for meeting an unfair financial burden

8.—(1) An application, by a universal service provider, for a determination under section 71(3)(b) of the Act, that contributions to a particular unfair financial burden are to be made by communications providers to whom general conditions are applicable, must be received by OFCOM no later than two months after the commencement of the review, under section 70(1) of the Act, of the financial burden of complying with the relevant universal service condition or conditions.

(2) The application referred to in regulation 8(1) must —

- (a) be made in writing to OFCOM;
- (b) state that it is an application for a determination under section 71(3)(b) of the Act; and
- (c) be signed by a director of the universal service provider.

Establishing a fund - calculating the amount to be collected

9.—(1) If—

- (a) OFCOM have determined, under section 71(2) of the Act, that it is or would be unfair for the universal service provider to bear, or continue to bear, the whole or part of the financial burden of complying with the relevant universal service condition or conditions;

Proposed Draft Regulations

- (b) the universal service provider has made an application under regulation 8(1) which meets the requirements set out in regulations 8(1) and 8(2); and
- (c) regulation 9(3) does not apply,

OFCOM must calculate the amount to be collected.

(2) The amount to be collected, in pounds sterling, shall be calculated by deducting from the amount to be compensated—

- (a) any part of the amount to be compensated which has been compensated from central funds; and
- (b) any part of the amount to be compensated which the universal service provider has waived its entitlement to under regulation 19.

(3) Where it appears to OFCOM that central funds may be committed to compensating the whole or part of the financial burden of complying with one or more of the relevant universal service conditions, OFCOM must postpone the calculation of the amount to be collected until such time as the part of the amount to be compensated from central funds is known.

Establishing a fund – opening the fund

10.—(1) If the amount to be collected is greater than zero, OFCOM shall open a fund for the purposes of collecting and distributing contributions in respect of that particular amount to be collected.

(2) OFCOM shall open a separate fund to compensate each amount to be collected which is greater than zero.

Establishing a fund - identifying contributors

11. If the amount to be collected is greater than zero, OFCOM must determine—

- (a) that contributions are to be made for meeting that burden by particular communications providers to whom general conditions are applicable, or a particular description of them;
- (b) the turnover threshold,^a if any, below which particular communications providers or a particular description of them, shall not be obliged to contribute to the fund; and
- (c) the particular communications providers, or a particular description of them, who shall contribute to the fund.

Establishing a fund – determining contributions

12.—(1) If the amount to be collected is greater than zero, OFCOM shall also determine the proportions in which particular communications providers, or a particular description of them, shall contribute to the fund.

(2) In determining the proportions in which particular communications providers, or a particular description of them, shall contribute to the fund under regulation 12(1), OFCOM may determine that—

- (a) all contributors shall contribute to the fund the percentage of the total amount to be collected which corresponds to that person's turnover as a proportion of the sum of the turnover figures of all of the contributors; or
- (b) all contributors shall contribute to the fund a sum calculated by way of a formula specified by OFCOM which takes account of—
 - (i) which of the classes of contributor established by OFCOM a contributor falls within; and
 - (ii) that contributor's turnover.

^a Turnover is defined in regulation 2.

Proposed Draft Regulations

Establishing a fund – consultation on determinations concerning contributors and the proportions in which they shall contribute

13.—(1) If OFCOM come to a provisional view on the matters referred to in regulations 11(a), 11(b), 11(c) and 12(1), OFCOM shall consult on that view in accordance with the consultation process set in paragraphs (2) to (4).

(2) Proposals for a determination referred to in regulation 11(a), 11(b), 11(c) and 12(1) must be by means of a notification published by OFCOM—

- (a) setting out their proposals;
- (b) giving the reasons for making those proposals; and
- (c) specifying the period within which representations about OFCOM’s proposals may be made.

(3) The period specified for the purposes of regulation 13(2)(c) must be one of not less than one month, beginning with the day after the day on which the notification was published.

(4) The publication of a notification under this regulation must be in such manner as appears to OFCOM to be appropriate for bringing it to the attention of the persons who, in OFCOM’s opinion, are likely to have an interest in it, or be affected by it.

(5) If OFCOM have considered every representation about the proposals set out in a notification published under regulation 13(2) that is made to them within the period specified in the notification, OFCOM may, by publication of a further notification, make the proposed determination, with or without modification.

(6) The notification in regulation 13(5) must in the case of the determination referred to in regulation 12(1)—

- (a) set out the amount to be compensated;
- (b) specify the assumed date of payment on the basis of which the amount to be compensated has been calculated;
- (c) specify the rate at which the amount to be compensated shall increase after the assumed date of payment referred to in paragraph (b);
- (d) identify each person who meets the definition of a contributor; and
- (e) set out the percentage of the overall amount to be compensated that person shall contribute.

Determinations concerning the assessment, collection and distribution of contributions

14. In making the determinations referred to in regulations 11(a), 11(b), 11(c) and 12(1), OFCOM shall have regard to the principles of—

- (a) transparency;
- (b) least market distortion;
- (c) no undue discrimination; and
- (d) proportionality.

Timing of consultation and determinations

15. OFCOM may—

- (a) publish proposals for making two or more of the determinations referred to in regulations 7(2)(a), 7(2)(b), 7(2)(c), 11(a), 11(b), 11(c) and 12(1) and consult on those proposals separately or at the same time and in the same document; and
- (b) make two or more of the determinations referred to in regulations 7(2)(a), 7(2)(b), 7(2)(c), 11(a), 11(b), 11(c) and 12(1) separately or at the same time.

Proposed Draft Regulations

Collection of contributions to the fund

16.—(1) OFCOM must send an invoice to each contributor except the universal service provider.

(2) A person who receives an invoice relating to the payment of a contribution must pay the sum prescribed in the invoice to OFCOM—

- (a) in the manner specified in the invoice; and
- (b) by the deadline specified in the invoice.

(3) OFCOM may permit a person to elect to pay the invoice in instalments.

(4) Where all or part of—

- (a) a contribution; or
- (b) an instalment of a contribution,

has not been paid by the relevant deadline, the unpaid sum shall be recoverable by OFCOM as a debt due to them from the person obliged to pay it.

Distribution of contributions

17. OFCOM must transfer such contributions, or parts of contributions, as they have received from contributors to the universal service provider once per month unless, in OFCOM's opinion, it would be inappropriate to do so.

Unpaid contributions

18.—(1) For the purposes of this regulation, outstanding sum means the proportion of the amount to be collected in respect of which the universal service provider has not received compensation.

(2) If—

- (a) one or more persons in receipt of an invoice have not paid the contribution due, either in full or at all, to OFCOM by the deadline for payment;
- (b) a period of at least six months from the deadline for payment has elapsed;
- (c) OFCOM have taken such steps as appear to them to be reasonable in the circumstances to recover the outstanding sum;
- (d) OFCOM consider that the outstanding sum is material having regard to such of the matters set out in regulation 18(3) as appear to them be appropriate to that particular case;
- (e) the universal service provider has not waived its right to the outstanding sum under regulation 19; and
- (f) no central funds have been committed to compensating the universal service provider for the outstanding sum,

OFCOM may require additional contributions from the contributors, or such sub-set of them, as appear to OFCOM to be appropriate.

(3) The matters are—

- (a) the amount to be compensated;
- (b) the contributions received by the universal service provider; and
- (c) any other matters identified as appropriate by OFCOM having regard to the facts and circumstances pertaining to the case.

(4) In determining the sub-set of contributors from which additional contributions shall be required, OFCOM may have regard to whether a contributor has paid the contribution due.

(5) For the purpose of regulation 18(2) the deadline for payment is—

- (a) in the event that a contribution is not being paid in instalments, the deadline for payment of the contribution;

Proposed Draft Regulations

(b) in the event that a contribution is being paid in instalments, the deadline for payment of the final instalment of the contribution.

(6) OFCOM shall determine the proportions of the outstanding sum which shall be payable by particular additional contributors, or a particular description of them.

(7) OFCOM must use the turnover figures used for the purposes of calculating individual contributions to calculate individual additional contributions.

(8) If OFCOM require additional contributions under regulation 18(2), OFCOM must send each of the contributors required to make those additional contributions, a notification which—

- (a) sets out the percentage of the overall outstanding sum that person shall contribute;
- (b) sets out the amount in pounds sterling that person shall contribute;
- (c) specifies the assumed date of payment on the basis of which the additional contribution has been calculated;
- (d) specifies, in percentage terms, the amount by which the additional contribution shall increase each day after the assumed date of payment referred to in paragraph (c); and
- (e) explains why additional contributions are required.

(9) OFCOM must send an invoice to each person required to make additional contributions except the universal service provider.

(10) Regulations 16(2), 16(3), 16(4), 17 and 18 apply to amounts invoiced under regulation 18(9) as if they were invoiced under regulation 16(1).

Waiver

19.—(1) The universal service provider may, at any time, waive its entitlement to all or part of the amount to be collected by sending a notice to OFCOM.

(2) A notice under regulation 19(1) must—

- (a) be in writing;
- (b) specify the amount to be compensated to which it relates;
- (c) state that it is a notice of waiver sent in accordance with this regulation 19; and
- (d) be signed by a director of the universal service provider.

(3) Upon sending a notice under regulation 19(1) the universal service provider shall be deemed to have been compensated for the sum in respect of which it has waived its entitlement.

(4) If the universal service provider waives its entitlement to any sum in respect of which it has already received payment, the universal service provider must return an equivalent sum to OFCOM within fourteen days of submitting a notice under regulation 19(1).

(5) OFCOM must transfer such amounts as they have received from the universal service provider under regulation 19(4) to the contributors (excluding the universal service provider) in the proportion in which contributors were required to contribute.

Closure of a fund for a particular amount to be collected

20.—(1) If—

- (a) the deadline for the payment of all contributions towards a particular amount to be compensated has elapsed; and
- (b) either—
 - (i) all of that particular amount to be compensated has been distributed to the universal service provider; or
 - (ii) OFCOM determine that it would not be appropriate to take further steps to collect and distribute contributions in respect of that particular amount to be compensated,

OFCOM may publish a notification of the closure of the fund opened to compensate the universal service provider for the applicable amount to be compensated.

Proposed Draft Regulations

(2) The notification referred to in regulation 20(1) must provide details of the particular fund to which it relates.

(3) The publication of a notification under this regulation must be in such manner as appears to OFCOM to be appropriate for bringing it to the attention of the persons who, in OFCOM's opinion, are likely to have an interest in it, or be affected by it.

(4) In the circumstances specified in regulation 20(1)(b)(ii), following the publication of a notification under regulation 20(1)—

- (a) OFCOM shall not take any further steps to secure the payment of unpaid contributions towards the unfair financial burden referred to in the notification published under this regulation;
- (b) OFCOM may not require additional contributions under regulation 18(2) towards the unfair financial burden referred to in the notification published under this regulation; and
- (c) the obligation in regulation 17 shall, in respect of the unfair financial burden referred to in this regulation, be replaced with an obligation to transfer such contributions, or parts of contributions, as OFCOM receive from contributors as soon as, in OFCOM's opinion, it is reasonably practicable to do so.

EXPLANATORY NOTE

(This note is not part of the Regulations)

[*****]