

2020 No. 0000

ELECTRONIC COMMUNICATIONS

**The Electronic Communications (Universal Service) (Costs)
Regulations 2020**

Made - - - - [...]

Coming into force - - [...]

The Office of Communications (“OFCOM”), in exercise of the powers conferred by sections 71(4), 71(5), 71(7), 71(9) and 403(7) of the Communications Act 2003(a) (the “Act”) 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 [...].

Interpretation

2. In these Regulations—

“the Act” means the Communications Act 2003;

“amount to be collected” should be construed in accordance with regulation 7;

“amount to be compensated” means the amount in pounds sterling which OFCOM have determined, under section 71(2) of the Act, that 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 10(1);

“contributor” means either—

(a) a communications provider OFCOM have determined must contribute to a particular amount to be collected; or

(b) a person falling within the subset of communications providers OFCOM have determined must contribute to a particular amount to be collected;

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

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

“outstanding sum” has the meaning given in regulation 5(1);

“specific turnover” means the turnover that a person generates—

- (a) in a 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) which is calculated in a 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 in relation to any matter with any 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(a) to provide the whole or part of a universal service.

Matters OFCOM must have regard to and information OFCOM must take into account when determining the extent of a financial burden

3.—(1) When determining, under section 70(1) of the Act, the extent of the financial burden which 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 it, OFCOM must have regard to such of the matters set out in paragraph (2) as appear to them to be appropriate in that particular case.

(2) The matters are—

- (a) the costs incurred in complying with the relevant universal service conditions;
- (b) the extent to which these costs were efficiently and necessarily incurred for the purpose of complying with the relevant universal service conditions;
- (c) the revenues and any other 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 its designation as a universal service provider and the compliance with the relevant universal service conditions;
- (e) whether or not the universal service provider has made a request that OFCOM make a determination under section 70(1) of the Act and the sufficiency of information which has been provided to OFCOM together with that request; and
- (f) any other matters which OFCOM consider to be relevant having regard to the facts and circumstances of the case.

(3) OFCOM must have regard to all of the information relating to the matters set out in paragraph (2) provided to OFCOM by the universal service provider (or by any other person) including, in particular—

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

(a) The Electronic Communications (Universal Service) Regulations 2003 and The Electronic Communications (Universal Service) Regulations 2018.

- (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 accounts and any other information described in paragraph (d);
- (f) the evidence that the costs of complying with the relevant universal service conditions were efficiently and necessarily incurred; and
- (g) any other information which OFCOM consider to be relevant having regard to the facts and circumstances of the case.

Information to be provided to OFCOM if a universal service provider makes a request for a review

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 described in regulations 3(3)(a) to 3(3)(f) to OFCOM together with that request.

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

5.—(1) When determining under section 71(2) of the Act whether it is or would be unfair for the universal service provider to bear, or to continue to bear, the whole or any part of so much of the burden of complying with one or more of the universal service conditions applied to it, OFCOM must have regard to such of the matters set out in paragraph (2) as appear to OFCOM to be appropriate in 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 type and nature of the particular designation procedure set out in regulations made under section 66(1) of the Act which has been used for the designation of that universal service provider, including whether or not a competitive procedure has been used;
- (d) the likely costs to OFCOM and other persons associated with establishing and operating a fund under these Regulations;
- (e) any previous determinations under section 71(2) of the Act relating to the burden of complying with universal service conditions relating to the same universal service; and
- (f) any other matters which OFCOM consider to be relevant having regard to the facts and circumstances of the case.

(3) OFCOM must also have regard to 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 conditions.

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

6. If the universal service provider wishes to make an application to OFCOM for a determination under section 71(3)(b) of the Act and OFCOM have announced the commencement of a review under section 70(1) of the Act—

- (a) it must submit the application on or before the date falling two months after the date on which OFCOM announced the commencement of the review, under section 70(1) of the Act, of the extent of the financial burden which 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 it; and
- (b) the application must—
 - (i) be made in writing to OFCOM;
 - (ii) state that it is an application for a determination under section 71(3)(b) of the Act; and
 - (iii) be signed by a director of the universal service provider.

Calculating the amount to be collected

7.—(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 conditions;
- (b) the universal service provider has made an application under regulation 6 which meets the requirements set out in that regulation; and
- (c) regulation 7(3) does not apply,

OFCOM must determine the amount to be collected for meeting the unfair financial burden of complying with the relevant universal service conditions.

(2) The amount to be collected, in pounds sterling, must 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 16.

(3) Where it appears to OFCOM that central funds are to 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 determination 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

8. If the total amount to be collected is greater than zero, OFCOM must put in place a fund for the purposes of collecting and distributing contributions in respect of that particular amount to be collected.

Identifying contributors

9. If the total 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 subset of them;
- (b) the threshold of specific turnover, if any, below which particular communications providers or a particular subset of them, are not to be required to contribute to the fund; and
- (c) the particular communications providers, or the particular subset of them, who must contribute to the fund.

Determining contributions

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

(2) OFCOM may divide the overall pool of contributors into different categories of contributors based on their characteristics.

(3) If OFCOM have not divided the overall pool of contributors into different categories of contributors based on their characteristics, in determining the proportions in which particular contributors must contribute to the fund, OFCOM must determine that all contributors must contribute to the fund the percentage of the total amount to be collected which corresponds to that person's specific turnover as a proportion of the sum of the specific turnover figures of all of the contributors.

(4) If OFCOM have divided the overall pool of contributors into different categories of contributors based on their characteristics, in determining the proportions in which particular contributors must contribute to the fund, OFCOM must determine that all contributors must contribute to the fund a sum calculated by way of a formula specified by OFCOM which takes account of—

- (a) which of the categories of contributors a particular contributor has been allocated to under paragraph (2); and
- (b) that contributor's specific turnover.

Determinations concerning the assessment, collection and distribution of contributions

11. When making the determinations referred to in regulations 9(a), 9(b), 9(c) and 10(1), OFCOM must have regard to the principles of—

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

Consultation on determinations

12.—(1) If OFCOM come to a provisional view on matters referred to in regulations 3(1), 5(1), 7(1), 9(a), 9(b), 9(c) and 10(1), OFCOM must consult on that view in accordance with the consultation process set out in paragraphs (2) to (6).

(2) Proposals for a determination referred to in regulations 3(1), 5(1), 7(1), 9(a), 9(b), 9(c) and 10(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 12(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 12(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 12(5) must in the case of the determination referred to in regulation 10(1)—

- (a) set out the amount in pounds sterling 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 is to increase after the assumed date of payment referred to in paragraph (b);
- (d) identify each person who is a contributor; and
- (e) set out the percentage of the overall amount to be compensated that person must contribute.

Collection of contributions to the fund

13.—(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 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 if it were a debt due to OFCOM.

Distribution of contributions

14. OFCOM must transfer such contributions, or parts of contributions, as they have received from contributors to the universal service provider on one occasion each month unless, in OFCOM's opinion, it would not be reasonably practicable to do so.

Outstanding sums and additional contributions

15.—(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, or additional 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 15(3) as appear to them be appropriate in that particular case;
- (e) no central funds have been committed to compensating the universal service provider for the outstanding sum; and
- (f) the universal service provider has not waived its right to the outstanding sum under regulation 16,

OFCOM may require additional contributions from the contributors, or such subset 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;
- (c) the likely costs to OFCOM and other persons; and
- (d) any other matters which OFCOM consider to be relevant having regard to the facts and circumstances of the case.

(4) When determining the subset of contributors from which additional contributions are to be required, OFCOM may have regard to, among other things, whether a contributor has paid its contribution or additional contribution.

(5) Where a contribution or additional contribution is being paid in instalments, the deadline for payment referred to in regulation 15(2)(a) is the deadline for payment of the final instalment of the contribution or additional contribution.

(6) OFCOM must determine the proportions of the outstanding sum which are to be payable by particular additional contributors, or particular categories of them.

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

(8) If OFCOM require additional contributions under regulation 15(2), OFCOM must send each of the additional contributors a notification which—

- (a) sets out the percentage of the overall outstanding sum that person must contribute;
- (b) sets out the amount in pounds sterling that person must 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 is to increase after the assumed date of payment referred to in paragraph (c); and
- (e) explains why additional contributions are required.

(9) OFCOM shall collect additional contributions in accordance with the process set out in regulation 13 and that regulation shall apply—

- (a) to additional contributors as if they were contributors; and
- (b) to additional contributions as if they were contributions.

(10) OFCOM shall distribute additional contributions in accordance with the process set out in regulation 14.

Waiver

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

(2) Such a notice 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 16; and
- (d) be signed by a director of the universal service provider.

(3) If OFCOM receive a notice under regulation 16(1), which complies with the requirements in regulation 16(2), 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 16(1).

(5) OFCOM must transfer such amounts as they have received from the universal service provider under regulation 16(4) to the contributors (excluding the universal service provider) in the proportion in which contributors were required to contribute.

Cessation of steps to collect and distribute contributions to a particular amount to be collected

17.—(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, having regard to the matters set out in regulation 15(3), to take further steps to collect and distribute contributions in respect of that particular amount to be compensated,

OFCCOM may publish a notification of the cessation of steps to collect and distribute contributions in respect of the applicable amount to be compensated under this regulation.

(2) The notification referred to in regulation 17(1) must provide details of the particular amount to be compensated to which it relates.

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

(4) In the circumstances specified in regulation 17(1)(b)(ii), following the publication of a notification under regulation 17(1)—

- (a) OFCCOM must not take any further steps to secure the payment of unpaid contributions towards the amount to be compensated referred to in the notification published under this regulation;
- (b) OFCCOM may not require additional contributions under regulation 15(2) towards the amount to be compensated referred to in the notification published under this regulation; and
- (c) the obligation in regulation 14 is, in respect of the amount to be compensated referred to in the notification published under this regulation, to be replaced with an obligation to transfer such contributions, or parts of contributions, as OFCCOM receive from contributors as soon as, in OFCCOM's opinion, it is reasonably practicable to do so.

[Name]

[Role]

[...]

For and by the authority of the Office of Communications

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations set out the rules and procedures which the Office of Communications (“OFCCOM”) will follow when assessing the extent of the financial burden associated with the provision of a universal service and, where appropriate, compensating a universal service provider for those costs in exercise of their powers under sections 70 and 71 of the Communications Act 2003 (c.21) (the “Act”).

Regulation 3 sets out the matters and information that OFCCOM will have regard to when assessing the financial burden associated with the provision of a universal service.

Regulation 5 sets out the matters and information that OFCOM will have regard to when determining whether and, if so, to what extent, it would be unfair for a universal service provider to bear the financial burden associated with the provision of a universal service.

Regulation 7 specifies how and when OFCOM must calculate the amount of an unfair financial burden in respect of which a universal service provider is to be compensated by means of contributions from other communications providers. Regulation 8 sets out the circumstances in which OFCOM is to put in place an administrative arrangement for so compensating a universal service provider.

Regulation 10 sets out the ways in which OFCOM may determine the proportions in which contributors are to contribute.

Regulation 13 provides that OFCOM will send invoices to each person required to contribute towards the sum to be provided to the universal service provider by way of compensation, obliges the recipients of such invoices to make payment as specified in the invoice and specifies that OFCOM may recover unpaid sums as a debt. Regulation 13 also permits OFCOM to allow a person to pay the amount invoiced in instalments.

Regulation 15 relates to the provision additional contributions in circumstances in which one or more persons in receipt of an invoice have not paid the sum due.

Regulation 17 sets out the circumstances and means by which OFCOM may cease to take steps to collect and distribute contributions to a particular unfair financial burden.

A full regulatory impact assessment of the effect that these Regulations will have on cost to business is available to the public from OFCOM's website at <http://www.ofcom.org.uk> or from the OFCOM library at Riverside House, 2a Southwark Bridge Road, London SE1 9HA. Copies of this assessment have also been placed in the library of the House of Commons.