

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

First Delegated Legislation Committee

DRAFT ELECTRONIC COMMUNICATIONS AND
WIRELESS TELEGRAPHY (AMENDMENT ETC.)
(EU EXIT) REGULATIONS 2019

Monday 7 January 2019

No proofs can be supplied. Corrections that Members suggest for the final version of the report should be clearly marked in a copy of the report—not telephoned—and must be received in the Editor’s Room, House of Commons,

not later than

Friday 11 January 2019

© Parliamentary Copyright House of Commons 2019

This publication may be reproduced under the terms of the Open Parliament licence, which is published at www.parliament.uk/site-information/copyright/.

The Committee consisted of the following Members:

Chair: STEWART HOSIE

- | | |
|---|---|
| † Aldous, Peter (<i>Waveney</i>) (Con) | † Johnson, Gareth (<i>Dartford</i>) (Con) |
| Betts, Mr Clive (<i>Sheffield South East</i>) (Lab) | † Mann, Scott (<i>North Cornwall</i>) (Con) |
| Bryant, Chris (<i>Rhondda</i>) (Lab) | † Mercer, Johnny (<i>Plymouth, Moor View</i>) (Con) |
| † Byrne, Liam (<i>Birmingham, Hodge Hill</i>) (Lab) | † Prentis, Victoria (<i>Banbury</i>) (Con) |
| Campbell, Mr Ronnie (<i>Blyth Valley</i>) (Lab) | † Smeeth, Ruth (<i>Stoke-on-Trent North</i>) (Lab) |
| † Duguid, David (<i>Banff and Buchan</i>) (Con) | Stephens, Chris (<i>Glasgow South West</i>) (SNP) |
| † Elmore, Chris (<i>Ogmore</i>) (Lab) | † Williamson, Chris (<i>Derby North</i>) (Lab) |
| † Green, Chris (<i>Bolton West</i>) (Con) | |
| † Huddleston, Nigel (<i>Mid Worcestershire</i>) (Con) | Bradley Albrow, Ben Rayner, <i>Committee Clerks</i> |
| † James, Margot (<i>Minister for Digital and the Creative Industries</i>) | † attended the Committee |

First Delegated Legislation Committee

Monday 7 January 2019

[STEWART HOSIE *in the Chair*]

Draft Electronic Communications and Wireless Telegraphy (Amendment etc.) (EU Exit) Regulations 2019

6 pm

The Minister for Digital and the Creative Industries (Margot James): I beg to move,

That the Committee has considered the draft Electronic Communications and Wireless Telegraphy (Amendment etc.) (EU Exit) Regulations 2019.

I wish you a happy new year, Mr Hosie; it is a pleasure to serve under your chairmanship.

The draft regulations were laid before the House on 29 November. If the UK were to leave the EU without an agreement in place, they would provide legal clarity and consistency for the regulator and telecoms operators. They are being introduced, under powers set out in section 8 of the European Union (Withdrawal) Act 2018, to correct deficiencies in the statute book that result from the UK's exiting the EU. They will make a number of amendments, mostly minor and technical, to telecoms law by removing obligations that would no longer apply if no agreement were reached with the EU.

A technical notice was published on 13 September to reassure telecoms businesses, consumers and the regulator, Ofcom, that irrespective of the outcome of negotiations between the UK and the EU, we would not expect a significant impact on how businesses operate under the telecoms regulatory framework or on how consumers of telecoms services are protected in the UK.

The draft regulations cover only corrections made to the body of telecoms regulatory law; other matters of relevance to the sector, such as legislation on roaming, spectrum or cross-border data flows are covered by separate instruments. By way of background, the domestic telecoms framework establishes key principles for the regulation of the sector: the promotion of competition between operators, the protection of consumers of telecoms services, the efficient use of radio spectrum, and the independence of the regulator, Ofcom, whose functions it outlines. These rules derive from a set of EU directives and regulations that have already been implemented in UK law, predominantly the Communications Act 2003 and the Wireless Telegraphy Act 2006.

The purpose of the draft regulations is, first, to make good deficiencies such as EU procedures designed to ensure the harmonised application of the regulatory framework across the EU, and secondly to ensure that such corrections enable the continuity of the current regime in a no-deal scenario. These EU rules have been implemented in UK law since 2003 and cover a variety of matters in telecoms law.

The deficiencies that have been identified are mostly minor and technical. All the changes that the draft regulations will make have been considered on a case-by-case

basis and discussed with the regulator and stakeholders where possible. An example of a minor amendment to the Communications Act is the removal of the duty for Ofcom to ensure that its

“activities contribute to the development of the European internal market.”

In some places, technical amendments are needed to ensure the continued effect of certain obligations whose interpretation currently relies on direct references to EU directives in UK law. For instance, the obligation for Ofcom to have regard to the desirability of ensuring the security and availability of telecoms networks and services when performing its duties currently has effect as a result of a form of cross-reference to the relevant EU directive, but the draft regulations will insert it specifically into the Communications Act to ensure continuity from the current regime.

With respect to the UK's compliance with the EU regulatory system, the draft regulations will remove the requirement for Ofcom to notify, consult or provide information to the European Commission and other EU bodies. The information requested by EU bodies is generally provided to enable the European Commission to monitor compliance with the EU framework or to ensure harmonisation of measures across the EU. However, sharing information with the Commission, with EU bodies or with other regulators in the EU may well remain beneficial to the UK after exit. It can help to foster co-operation on regulatory matters. That is why the instrument makes amendments to make it clear that Ofcom may notify or share information, where it considers it appropriate, for matters such as security breaches affecting communication networks or services. In such cases, however, Ofcom will continue to be subject to statutory duties relating to confidentiality and data protection.

Certain deficiencies were identified in provisions relating to the making of universal service orders. It is important to make the preliminary point that the corrections do not affect the services that are required to be made universally available across the UK under the existing universal service orders. An amendment is made to remove the requirement to comply with EU obligations when the Secretary of State makes future universal service orders. That incidentally will provide more flexibility to consider what service provision is most appropriate for the UK.

As is currently the case, the Communications Act will continue to require that consultation takes place before a universal service order is made, providing an opportunity for representations to be made about the requirements or form of any new universal service obligation. Ofcom has put in place various rules to ensure the protection of consumers of telecoms services, some of which implement specific requirements of EU law. The instrument makes provision to ensure that Ofcom can continue to maintain consumer protection measures that are currently required under the relevant EU directive. That will ensure that current levels of consumer protection are maintained.

Moving on to corrections relating to the regulation of communication providers with significant market power, SMP regulation is based on competition law principles, and enables Ofcom to impose regulatory remedies on providers with significant market power to address competition issues in a particular market. Under the EU regulatory framework, SMP is equivalent to the

concept of dominance in EU competition law. The Communications Act provides that SMP is to be construed in accordance with the requirements of the EU regulatory framework. The instrument amends the Communications Act to ensure that, after exit, references to dominance in a market are to be construed consistently with the concept of market dominance in the Competition Act 1998. That approach aims to ensure that there will be a single concept of market dominance across domestic competition law and regulation of the telecoms sector post-exit.

Scott Mann (North Cornwall) (Con): On the issue of significant market power, did Ofcom have those powers previously, or is it just because we are leaving the EU that we have to implement them? Did Ofcom have the power to control market dominance before this process, or will the instrument put in place the opportunity for us to do that?

Margot James: I reassure my hon. Friend that Ofcom has those powers, and the purpose of the statutory instrument is to ensure that Ofcom is in a position to continue in the exercise of them.

With regard to Ofcom's powers to make regulations when spectrum licences are required, and to attach conditions to those licences, the instrument removes requirements that derive from the EU authorisation directive while maintaining an obligation on Ofcom to ensure that licences and conditions are objectively justifiable, non-discriminatory, proportionate and transparent.

The body of telecoms law includes directly applicable EU regulations that require correction. The instrument revokes the regulations that provide for financial assistance for the EU Connecting Europe Facility to support projects in the field of trans-European networks in the area of telecoms infrastructure. That includes funding to install wi-fi equipment in public spaces. In the unlikely event of a no-deal exit, UK organisations will no longer be eligible for such funding. If the EU stops making payments to UK organisations delivering CEF-funded projects after exit, the Government guarantee will support UK organisations to meet their obligations, including continued project delivery until completion. This Government guarantee will also cover successful applications that have been submitted to the EU before exit day, but with an award made after exit.

This instrument makes minor corrections to the eCall legislation, so that it will continue to operate effectively after exit. eCall is an initiative established by the European Commission as part of the intelligent transport system project. It enables a mobile transmission to be sent to emergency services by a vehicle when it is involved in an accident. The eCall legislation refers in parts to technical standards, and regulation 5 of this instrument confers a legislative power on the Secretary of State to make provision to replace the standards listed, which will enable the standards to be updated should that be necessary to ensure continued public safety and effective operation of the eCall technology.

Finally, this instrument revokes the regulation establishing BEREC, the body of national regulators from EU member states. Ofcom is currently a member. The main purpose of BEREC is to ensure the consistent implementation of the EU regulatory framework; BEREC's membership

is therefore limited to the regulators of EU member states. Ofcom will no longer be a member after exit, but as the UK will no longer be part of the EU regulatory framework, this will have no significant effect on regulation in the UK. However the Government recognise that Ofcom would benefit from the continued exchange of best practice with other regulators, and from the exchange of information about telecoms matters more generally. In this respect, we should note that the new BEREC regulation, in force since 20 December 2018, provides that BEREC should be open to the participation of regulators of third countries, where those countries have entered into agreements with the EU to that effect.

Ofcom intends to seek observer status after the UK has exited the EU, in the way in which other regulators of states in the European Economic Area, such as Norway and EU candidate countries, currently participate. Although observer status would remove Ofcom's right to vote, the likely impact would be fairly minimal, as this is more of a co-operative forum.

In conclusion, the Government are committed to ensuring that the regulation of telecoms markets remains functional post-exit, and these regulations will help to achieve that by making minor and technical changes to existing legislation. I commend the regulations to the Committee.

6.13 pm

Liam Byrne (Birmingham, Hodge Hill) (Lab): It is a pleasure to serve under your chairmanship, Mr Hosie, and a very happy new year to you and the Committee.

I was grateful to the Minister for providing such a long and detailed explanation of the orders, but nevertheless I was quite surprised that she did not explain to the Committee just how the regulations have a bearing on the big game in town: whether we are going to secure an adequacy agreement on data transfer between the UK and the EU in the event of no deal, or indeed at the end of the transition period.

The absolutely critical nature of this adequacy agreement was well discussed during the passage of the Data Protection Act 2018. Over 40% of European tech companies are based in this country, and 75% of our cross-border data flows are with other countries in the European Union. Services are getting on to about half our exports and are data-enabled, and yet under the new regime we will be treated as a third country. I think the Minister is trying to ensure a degree of regulatory harmonisation with the EU on telecoms. That is important in itself, but frankly it will mean very little unless it contributes meaningfully to ensuring that we have an adequacy agreement in place, especially in the event of no deal.

As the Minister will know, the Irish data protection authority issued guidance just before Christmas underlining that the UK will be treated as a third country, and that there is no guarantee that an adequacy agreement will fall into place. It also made the point that it has taken a long time for an adequacy agreement to be pronounced in some cases, even when a country looks like it meets the requisite conditions. In Argentina, it took about 18 months; in other cases it took something like five years. If we face such an elongated timetable before we get such an agreement in place, there will be a very meaningful impact on UK services exports extremely quickly.

[Liam Byrne]

Will the Minister let us know her views on two or three important questions? First and foremost, do the institutions that will acquire this new power actually have the capability to implement the new regulations? We are transferring supervisory responsibilities from agencies in the European Union to domestic authorities. The Minister did not say anything about whether she is satisfied that Ofcom and other regulators have the capability to perform those new responsibilities satisfactorily.

Secondly, we heard nothing about any kind of contingency planning for no deal if the adequacy agreement is not forthcoming. We heard nothing about when the timeframe for negotiating it might start.

Finally, can the Minister assure us that there will not be a regulatory race to the bottom? The tone that she struck in her remarks suggested that she is trying to ensure the regulatory regime remains in lockstep. Is that indeed her view of how regulation will evolve in this country when it comes to data adequacy?

We have some pretty big new telecoms regulations to get sorted over the next few years. The advent of 5G will require authorities in this country to work incredibly closely with their former partners in the EU. It is obviously a matter of regret that we will not have voting rights over the way the new standards are set. It would be extremely welcome if the Minister can assure us that we will nevertheless be able to influence some of those cross-European standards.

This set of regulations is important in itself, but it is merely a piece in a much bigger jigsaw puzzle. If the Minister is not able to get the jigsaw puzzle right, significant bits of British industry will shut down very quickly. I hope she can reassure us about a few of those points.

6.17 pm

Margot James: I thank the right hon. Gentleman for his questions and remarks. I will reassure him on the question of adequacy, as far as I am able. In the event of a deal, the Commission has agreed to start adequacy discussions at the beginning of the transition period, which will last two years. He made the point that, once the Commission starts adequacy discussions, they usually take an average of two years. I am optimistic that we will have concluded adequacy decisions and got an adequacy agreement by the end of the implementation period.

In the event of no deal, that is less easy to predict. I have no doubt that the Commission will wish to start adequacy discussions if the country leaves without a deal.

The right hon. Gentleman and I agree—I hope, anyway—that that is unlikely, but it is possible, hence the need for this statutory instrument. In that event, it is harder to predict, but the Government’s absolute intention is to secure an adequacy agreement. We will co-operate with the Commission as soon as it initiates discussions.

Liam Byrne: I want to make sure I have understood this correctly. Is the Minister saying to the Committee that, in the event of no deal, it is harder to predict whether an adequacy agreement will come into force?

Margot James: No. I am sorry if I gave that impression. It is harder to predict the timing of the adequacy decision. I am confident that we will get an adequacy decision whether we leave with a deal or with no deal, but I feel more confident that it will be a swift process if it takes place in the context of our implementation period and our discussions about the future framework, in line with the political declaration. There is a framework, which is highly beneficial to the swift agreement of an adequacy decision if we leave with the deal that the Prime Minister has negotiated. I urge the right hon. Gentleman to support that deal, if he is so concerned about the timing of an adequacy decision.

Let me move on to supervisory powers. The draft regulations will not introduce new powers; they will merely facilitate the smooth operation of existing powers by the regulator in accordance with UK legislation, without the need to consult the EU or to satisfy, report to or consult the Commission. They will allow the regulator to pursue its existing powers without needing to do things that are required by our membership of the European Union but that will no longer apply once we have left.

I absolutely concur with the right hon. Gentleman and reassure him that the draft regulations are not a race to the bottom in terms of consumer protection, regulation of the telecoms industry or support for the regulator. We are introducing them because we wish to maintain existing powers, rights and protections. The UK has a robust telecoms regulatory framework; the draft regulations will make no changes to that regime, beyond correcting deficiencies in retained EU law. I think we can all agree that it is essential for the regulations to be in place in the unlikely event of a no-deal outcome.

Question put and agreed to.

6.21 pm

Committee rose.

