EXPLANATORY MEMORANDUM TO

THE ELECTRONIC COMMUNICATIONS (AMENDMENT ETC.) (EU EXIT) REGULATIONS 2019

2019 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Digital, Culture, Media and Sport and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument is being made in order to address deficiencies arising from the withdrawal of the United Kingdom from the European Union in legislation relating to electronic communications, in a no deal scenario.

2.2 In particular, the instrument makes technical amendments to legislation relating to the notification of personal data breaches by providers of electronic communications services, and revokes direct EU legislation which is redundant or otherwise inappropriate to retain on the UK's statute book after exit from the EU.

Explanations

What did any relevant EU law do before exit day?

2.3 Directive 2002/58/EC concerns the processing of personal data and the protection of privacy in the electronic communications sector and requires, relevantly, providers of publicly available electronic communications services to notify personal data breaches to the relevant national authority and to any subscriber or individual likely to be adversely affected. Commission Regulation (EU) 611/2013 supplements the Directive's requirements by specifying requirements concerning the circumstances, format and procedures applicable to those notifications.

2.4 The instrument also addresses other directly applicable EU legislation relating to electronic communications. This includes EU legislation establishing EU bodies, EU legislation relating to the .eu top-level domain name used on the internet – which is available to EU-based businesses, organisations and natural persons, alongside country code domains (such as .uk) – and forthcoming rules regulating charges for certain intra-EU communications. Further information on this legislation can be found in section 6 of this memorandum.

Why is it being changed?

2.5 The instrument makes technical corrections to Commission Regulation (EU) 611/2013 to ensure it operates effectively after exit from the EU, such as replacing references to the "competent national authority" with references to the Information Commissioner.

2.6 The instrument revokes other directly applicable EU legislation which is redundant or otherwise inappropriate to retain on the UK's statute book after exit from the EU. For instance, EU bodies will continue to be established as a matter of EU law, but the

relevant EU legislation concerning their governance would have no practical effect if converted into UK law. Further information can be found in section 7 of this memorandum.

What will it now do?

2.7 The requirements for notification of personal data breaches by providers of publicly available electronic communications service will remain substantively the same as before exit. The other directly applicable EU legislation is being revoked and will have no effect after exit day. Further information can be found in section 7 of this memorandum.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument was laid in draft before the Sifting Committees on 18 February 2019.

3.2 In its Nineteenth Report of Session 2017-19 published on 6 March 2019, the Secondary Legislation Scrutiny Committee (Sub-Committee A) agreed that the instrument should follow the negative procedure.

3.3 In its Twentieth Report of Session 2017-19 published on 7 March 2019, the European Statutory Instruments Committee recommended that the instrument should follow the affirmative procedure. The committee referred to the provision made in the instrument revoking rules regulating the prices charged to consumers for certain intra-EU communications which are to apply within the EU from 15 May 2019 (see further paragraph 7.12 of this explanatory memorandum) and said that: "The Committee believes that the issues relating to consumer rights in this area post exit are important. The Committee therefore recommends that the appropriate procedure for the instrument is for a draft of it to be laid before, and approved by a resolution of, each House of Parliament before it is made (i.e. the affirmative procedure) on the ground that it is of political importance."

3.4 The Department has accepted the committee's recommendation.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.5 The territorial application of this instrument includes Scotland and Northern Ireland.

3.6 The powers under which this instrument is made cover the entire United Kingdom (see section 24 of the European Union (Withdrawal) Act 2018) and the territorial application of this instrument is not limited either by the Act or by the instrument.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the entirety of the United Kingdom.

4.2 The territorial application of this instrument is the entirety of the United Kingdom.

5. European Convention on Human Rights

5.1 The Minister for Digital and the Creative Industries, Margot James, has made the following statement regarding Human Rights:

"In my view the provisions of the Electronic Communications (Amendment etc.) (EU Exit) Regulations 2019 are compatible with the Convention rights."

6. Legislative Context

6.1 This instrument addresses deficiencies in the following legislation:

Privacy and electronic communications

6.2 Directive 2002/58/EC concerns the processing of personal data and the protection of privacy in the electronic communications sector. It was transposed into UK law principally by the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR). PECR sit alongside the Data Protection Act 2018 and the General Data Protection Regulation (GDPR) to provide for specific privacy rights and obligations in relation to electronic communications.

6.3 Relevantly, the Directive requires that providers of publicly available electronic communications services notify personal data breaches to competent national authorities and to any subscriber or individual likely to be adversely affected.

6.4 *Commission Regulation (EU) No 611/2013* supplements those requirements by specifying the circumstances, format and procedures applicable to those notifications.

6.5 The instrument also makes technical corrections to regulation 37 of PECR, which places a duty on the Secretary of State to carry out a review of the implementation in the UK of Directive 2002/58/EC.

EU legislation establishing EU bodies

6.6 *Regulation (EU) 2018/1971* establishes the Body of European Regulators for Electronic Communications (BEREC) and the BEREC Office, an EU agency that provides professional and administrative support to BEREC. It repealed and replaced Regulation (EC) 1211/2009 with effect from 20 December 2018.

6.7 *Commission Decision notified under document number C(2014) 462* establishes the European Regulators Group for Audiovisual Media Services. The group advises the Commission on the implementation of Directive 2010/13/EC (the Audiovisual Media Services Directive) and any audiovisual matter within the Commission's competence, and ensures cooperation and the sharing of good practice between national regulatory authorities.

6.8 *Commission Decision 2005/752/EC* establishes an expert group on electronic commerce. The group comprises a representative from each of the Member States and representatives of the European Commission, and is a forum for the exchange of views on the practical implementation and application of Directive 2000/31/EC on electronic commerce.

EU legislation relating to the .eu top-level domain

6.9 EU legislation sets out the rules for the operation of the .eu top-level domain, which is available to EU-based businesses, organisations and natural persons, alongside country code domains (such as .uk).

6.10 *Regulation (EC) No 733/2002* sets out the conditions for implementation of the .eu top-level domain, including the designation of a registry to administer the domain, and establishes the general policy framework within which the registry functions. It

was amended by Regulation (EU) No 1137/2008 in relation to the committee procedures applying to EU tertiary legislation.

6.11 *Commission Regulation (EC) No 874/2004* lays down public policy rules concerning the implementation and functions of the .eu top-level domain and the principles governing registration of a .eu domain. It has been amended by the following instruments: Commission Regulation (EC) No 1654/2005, Commission Regulation (EC) No 1255/2007, Commission Regulation (EC) No 560/2009 and Commission Regulation (EU) 2015/516.

6.12 *Commission Implementing Decision 2014/207/EU* re-designated EURid (the European Registry for internet domains) as the registry for the administration and management of the .eu top-level domain for a further five year period.

EU legislation relating to telecoms

6.13 *Regulation (EU) 2015/2120* establishes common (cross-EU) rules which Member States must apply in order to safeguard net neutrality (see further the explanatory memorandum to the Open Internet Access (Amendment etc.) (EU Exit) Regulations 2018 (S.I. 2018/1243)). Regulation (EU) 2018/1971 amended it to introduce common rules regulating the prices charged to consumers for certain intra-EU communications (that is, communications originating in one Member State and terminating at a fixed or mobile number in another Member State). These rules apply from 15 May 2019.

6.14 *Commission Decision 2003/548/EC* set out a minimum set of leased lines for the purposes of Article 18 of the Universal Service Directive (Directive 2002/22/EC). National regulatory authorities were required to assess the need to impose obligations regarding the provision of these leased lines on undertakings with significant market power in relevant markets for leased lines. However, the list of leased lines was removed by Commission Decision 2008/286/EC and Article 18 of the Universal Service Directive was then revoked by Directive 2009/136/EC.

6.15 *Commission Decision 2007/176/EC* establishes a list of standards and specifications for electronic communications networks, services and associated facilities and services. It was amended by Commission Decision 2008/286/EC. Article 17(2) of the Framework Directive (Directive 2002/21/EC) requires Member States to encourage the use of these standards and specifications, to the extent strictly necessary to ensure interoperability of services and to improve freedom of choice for users, which is implemented through a duty placed on Ofcom under section 4(9) and (10) of the Communications Act 2003 and in turn through general conditions set by Ofcom which apply to communications providers.

6.16 *Regulation (EC) No 544/2009* formed part of the progressive regulation of charges for mobile roaming within the EU. It was known as 'Roaming II' and operated by substantially amending Regulation (EC) No 717/2007, or 'Roaming I'. Roaming I was repealed and replaced by Regulation (EU) No 531/2012, but Roaming II remains partially in force because it also includes a minor amendment to the Framework Directive.

EEA agreement

6.17 Annex 11 to the EEA agreement refers to EU instruments relating to electronic communications. The effect is to apply those EU instruments to the EEA, with any adaptations set out in the Annex. Annex 13 to the EEA agreement relates to transport and includes references to EU instruments on 'eCall'(relating to mobile transmissions

sent to emergency services by a vehicle when it is involved in an accident) (see further the explanatory memorandum to the Electronic Communications and Wireless Telegraphy (Amendment etc.) (EU Exit) Regulations 2019).

7. Policy background

What is being done and why?

7.1 This instrument addresses deficiencies arising from the UK's exit from the EU in the legislation set out in section 6 of this explanatory memorandum.

Privacy and electronic communications

7.2 This instrument makes minor and technical amendments to Commission Regulation 611/2013, to address EU-related references, procedures and functions which will not be appropriate once the UK has left the EU. These ensure that the law continues to operate effectively and that requirements for notification of personal data breaches by providers of publicly available electronic communications service will remain substantively the same as before exit.

7.3 These are mostly technical corrections to substitute references to the "competent national authority" for references to the Information Commissioner. A reciprocal arrangement for competent national authorities to notify other national authorities where the breach affects subscribers or individuals in other Member States is removed; after exit it is anticipated that the Information Commissioner will cooperate with EEA authorities under the framework of Article 50 GDPR. Certain powers and functions conferred on the Commission are removed where there is no need to recreate them. Article 4(3) confers a power on the Commission to publish an indicative list of appropriate technical measures for the purpose of demonstrating that any personal data would not have been intelligible to a person accessing it without authorisation (in which case, notification to the subscriber or individual concerned is not required). The Commission has not used this power to date and it is not considered necessary to recreate this. The Commission also has a requirement to review and report on the Regulation, but there is no need to recreate this as data breach reporting requirements would be considered as part of the Secretary of State's duty to review PECR and other legislation implementing Directive 2002/58/EC.

7.4 In addition, the instrument amends the Secretary of State's duty to review the implementation in the UK of Directive 2002/58/EC. It reframes that duty so that the requirement is to review domestic law which implemented Directive 2002/58/EC before exit day, to ensure that this continues to operate effectively.

EU legislation establishing EU bodies

7.5 This instrument revokes the EU legislation establishing BEREC, the expert group on electronic commerce, and the European Regulators Group for Audiovisual Media Services. This legislation would have no practical effect in relation to the UK if it were to be retained in UK law. The EU bodies will continue to operate within the framework of the EU legislation.

7.6 BEREC's main purpose is to ensure the consistent implementation of the EU regulatory framework for electronic communications. BEREC's membership is therefore limited to the national regulatory authorities of EU Member States. Ofcom

will not be a member after EU exit, but this has no significant impact on regulation in the UK.

7.7 As stated in the explanatory memorandum to the Electronic Communications and Wireless Telegraphy (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/246) (which included a provision to revoke the predecessor EU Regulation establishing BEREC), the Government notes that EU law provides for BEREC to be open to the participation of regulatory authorities of third countries where those countries have entered into agreements with the EU to that effect.

7.8 The European Regulators Group for Audiovisual Media Services was established in 2014 as an advisory body to the Commission in relation to implementation of the regulatory framework for audiovisual media services and to provide for exchange of experience and good practice among the national regulators. Ofcom has been a member of the group, as the UK's audiovisual regulator, but its membership will cease when the UK leaves the EU.

7.9 The expert group on electronic commerce comprises a representative from each Member State and representatives from the Commission. The UK's representation will cease when the UK leaves the EU.

EU legislation relating to the .eu top-level domain

7.10 This instrument revokes the EU legislation relating to the .eu top-level domain. This legislation would have no practical application in relation to the UK if it were to be retained in UK law. The .eu top-level domain will continue to operate within the framework of the EU legislation.

7.11 Only undertakings and organisations established in the EEA are eligible to obtain a .eu domain. Accordingly, after exit undertakings and organisations established only in the UK would not be eligible to register .eu domain names or, if they are .eu registrants, to renew .eu domain names registered before exit. The Government published guidance on .eu top level domain name registrations on 21 December 2018 (see section 11 of this explanatory memorandum). This was updated on 5 March 2019. EURid, the registry for .eu, has also issued further advice to those affected, last updated on 6 March 2019.

EU legislation relating to telecoms

7.12 This instrument revokes rules regulating the prices charged to consumers for certain intra-EU communications (that is, communications originating in one Member State and terminating at a fixed or mobile number in another Member State) which are to apply within the EU from 15 May 2019. These provisions would limit the charges EU operators can charge consumers making phone calls from one EU Member State to another at €0.19 plus VAT per minute for fixed and mobile calls and €0.06 plus VAT per SMS. This is a reciprocal EU single market measure and it would not be appropriate to introduce regulated charges for calls and SMS from the UK to the EU, given that calls and SMS from the EU to the UK will not be included.

7.13 In addition, this instrument revokes Commission Decision 2007/176/EC, which sets out a list of non-compulsory standards and specifications to serve as a basis for encouraging interoperability of services and freedom of choice for consumers. Ofcom will continue to be required to encourage compliance with these standards where necessary for those ends, but the policy approach is that it should refer to the list as it

exists in EU law and as amended from time to time (and a minor technical amendment is made to section 4(10) of the Communications Act 2003 to ensure this). There is accordingly no need to incorporate a version of the list as it stood at exit day into UK law.

7.14 This instrument also revokes Regulation (EC) No 544/2009 (Roaming II) and Commission Decision 2003/548/EC as these would be redundant if converted into domestic law.

EEA Agreement

7.15 This instrument revokes certain references in the Annexes to the EEA agreement to EU instruments relating to electronic communications (so far as incorporated into UK law by the EU (Withdrawal) Act 2018). These references – the effect of which is to convert into domestic law EU regulations, decisions and tertiary legislation as they apply to, and are adapted for, the EEA context - are redundant after EU exit.

7.16 The references being revoked correspond to EU instruments revoked or amended to operate effectively in a *domestic* (rather than EEA) context in this instrument, or in other EU exit instruments which have already been made – i.e. the Radio Spectrum (EU Exit) Regulations 2018, the Open Internet Access (Amendment etc.) (EU Exit) Regulations 2018 and the Electronic Communications and Wireless Telegraphy (Amendment etc.) (EU Exit) Regulations 2019.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

9.1 There are no plans to consolidate the legislation amended by this instrument.

10. Consultation outcome

10.1 No formal consultation has taken place in relation to this instrument as it does not introduce new policies and the deficiencies it addresses are minor in nature.

10.2 DCMS engaged with Ofcom and the Information Commissioner's Office in relation to the legislation relevant to them. DCMS has also engaged with stakeholders in the telecoms sector about matters relating to EU exit. In relation to the .eu top-level domain, DCMS engaged with a number of trade associations and business organisations from February 2018 to raise awareness of the effects of EU exit on .eu domain registration in the event of "no deal", based on Commission's notice of March 2018 and further guidance from EURid, the registry for .eu.

11. Guidance

11.1 No guidance is to be issued in relation to this instrument. The Government published updated guidance on .eu top level domain name registrations in the event of a 'no

deal' EU exit on 5 March 2019 which is available online at: https://www.gov.uk/government/publications/guidance-on-eu-top-level-domain-name-registrations-in-the-event-of-a-no-deal-eu-exit.

12. Impact

12.1 There is no significant impact on business, charities or voluntary bodies. Businesses will incur a limited one-off cost when familiarising themselves with the limited changes to the regulatory regime following EU exit. This instrument will have no impact on UK registrants of .eu except for the cost to familiarise themselves with the content of this secondary legislation.

12.2 There is no significant impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because the impact on businesses is below £5m. Several 'De Minimis' assessments were conducted separately for different aspects of the SI which confirmed that the cumulative impact is low.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 The legislation does not introduce new requirements on small businesses. Instead it corrects deficiencies arising from the UK's withdrawal from the EU in legislation which applies to them. No disproportionate impact on small business is therefore expected.

14. Monitoring & review

14.1 As this instrument is made under the EU Withdrawal Act 2018, no review clause is required.

15. Contact

15.1 Antonio Irranca at the Department for Digital, Culture, Media and Sport (telephone: 07864 604633 or email: antonio.irranca@culture.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Jenny Morgan (Deputy Director, EU Strategy) at the Department for Digital, Culture, Media and Sport can confirm that this explanatory memorandum meets the required standard.

15.3 The Minister for Digital and the Creative Industries, Margot James, at the Department for Digital, Culture, Media and Sport can confirm that this explanatory memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

1.1 The Minister for Digital and the Creative Industries, Margot James, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Electronic Communications (Amendment etc.) (EU Exit) Regulations 2019 does no more than is appropriate".

1.2 This is the case because the instrument principally revokes direct EU legislation which is redundant or otherwise inappropriate to retain on the UK's statute book after exit from the EU, as well as making certain minor and technical corrections to other legislation to ensure that it operates effectively after exit from the EU.

2. Good reasons

2.1 The Minister for Digital and the Creative Industries, Margot James, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action".

2.2 These are that the instrument ensures that there is clarity and certainty in retained EU law after exit from the EU, by making technical corrections or removing EU legislation which is redundant or otherwise inappropriate to retain. Further information is set out in section 7 of the main body of this explanatory memorandum.

3. Equalities

3.1 The Minister for Digital and the Creative Industries, Margot James, has made the following statement:

"The draft instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts".

3.2 The Minister for Digital and the Creative Industries, Margot James, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the draft instrument, I, the Minister for Digital and the Creative Industries, Margot James, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010".

4. Explanations

4.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.