
EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations, made under section 2(2) of the European Communities Act 1972, amend the Regulation of Investigatory Powers Act (“the Act”) in order fully to implement provisions of Directive 2002/58/EC on privacy and electronic communications (OJ L 201, 31.7.2002, p.37) and of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995 p.31) insofar as those provisions are applied by Directive 2002/58/EC.

Section 1(1) of the Act makes it a criminal offence for a person intentionally and without lawful authority to intercept, at any place within the United Kingdom, any communication in the course of its transmission by means of a public postal service or telecommunications system. Regulation 2 of these Regulations gives a new power to the Interception of Communications Commissioner (“the Commissioner”) to serve a monetary penalty notice on a person whom he considers has intercepted without lawful authority, at any place in the United Kingdom, any communication in the course of its transmission by means of a public telecommunications system. The Commissioner may not serve a monetary penalty notice if he considers that the person has committed an offence under section 1(1) of the Act, or if he considers that the interception could be explained by the person’s attempt to act in accordance with an interception warrant. Pursuant to section 1(5) of the Act, conduct that takes place in accordance with an interception warrant has lawful authority.

Sections 3 and 4 of the Act authorise certain kinds of interception without the need for an interception warrant. Section 3(1) of the Act authorises interception of a communication where there are reasonable grounds for believing that both the sender and the recipient of the communication have consented to its interception. Regulation 3 of these Regulations repeals the reference to reasonable grounds for belief, with the effect that the interception will be authorised only where both the sender and recipient have consented to it.

Regulation 2 of these Regulations also inserts into the Act a new Schedule A1 which makes further provision about monetary penalty notices. Part 1 of the Schedule deals with monetary penalty notices. In particular:

- (i) Paragraph 1 sets the maximum penalty (£50,000), the period within which payment may be requested by the Commissioner and the information that is to be included in the monetary penalty notice;
- (ii) Paragraph 2 allows the Commissioner to include one or more enforcement obligations in a monetary penalty notice. These may require the person on whom the notice is served to cease the interception within a specified time;
- (iii) Paragraph 3 requires the Commissioner to serve a notice of intent on a person before he serves a monetary penalty notice. It further sets out the information that is to be included in such a notice and the Commissioner’s obligations to deal with representations received in response;
- (iv) Paragraph 4 gives the Commissioner powers to vary or cancel a monetary penalty notice;
- (v) Paragraph 5 establishes the right for a person on whom a monetary penalty notice is served to appeal to the First Tier Tribunal, and sets out the powers of that Tribunal on appeal. The appeal right includes the right to appeal against any refusal by the Commissioner to vary or cancel the monetary penalty notice. Paragraph 5 further sets out the effect that an appeal has on obligations arising under the monetary penalty notice;

(vi) Paragraph 6 gives the Commissioner powers to recover the penalty or enforce an enforcement obligation through the civil proceedings;

(vii) Paragraph 7 requires the Commissioner to prepare and issue guidance on these new functions.

Part 2 to the Schedule deals with information provisions. In particular:

(viii) Paragraph 9 allows the Commissioner to request information from a person in order to assist the Commissioner in deciding whether to serve a notice of intent on that person. It sets out the information that is to be included in the notice and gives the Commissioner the power to cancel the notice or vary time for compliance where an appeal has been lodged;

(ix) Paragraph 10 establishes the right for a person on whom an information notice is served to appeal to the First Tier Tribunal, and sets out the powers of the Tribunal on appeal;

(x) Paragraph 11 allows the Commissioner to serve a monetary penalty notice on a person who has without reasonable excuse failed to comply with an information notice or who has knowingly or recklessly given false information in response to such a notice. Paragraph 11 gives a maximum penalty (£10,000) and sets out manner in which the penalty may be calculated;

(xi) Paragraph 12 requires OFCOM to comply with any reasonable request made by the Commissioner for advice on technical and similar matters relating to electronic communications, where the request arises in connection with the Commissioner's new functions.