

# United Kingdom

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## Introduction

### History, Significance, and Trends

The history, significance and trends in the development of electronic communications<sup>1</sup> in the United Kingdom<sup>2</sup> are unique.<sup>3</sup> Their history can be traced to the 19th century when private municipal telephone companies and the General Post Office (GPO)<sup>4</sup> competed for the provision of telecommunications. Since then, this sector has come full circle from nationalization to liberalization.<sup>5</sup>

The United Kingdom used to be a Member State of the EU, but as a result of the referendum on EU membership held on 23 June 2016, the UK has now left the EU. However, EU case law that has adopted prior to the EU exit will be retained as Retained EU case law, until otherwise repealed by UK law. The United

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1 Electronic communications means telecommunications, data communications, sound radio and broadcasting.

2 The United Kingdom consists of England, Scotland, Wales and Northern Ireland. All legal analysis in this chapter is based on English law and reflects updates up to October 2021.

3 The author thanks Grace Walker for her assistance in updating this chapter.

4 The GPO was a Government Department headed by a Government Minister (the Postmaster General).

5 The milestones of the history of electronic communications in the United Kingdom are as follows: In 1912, telecommunications were nationalized and brought under the control of the GPO. However, the Kingston upon Hull City Council escaped this nationalization process and it continued to run the network in the Hull area. This duopoly continued largely unchanged until 1981, when British Telecom ('BT') was created and independent telecommunications providers were again permitted. In 1982, Mercury Communications Limited (Mercury) received a license to build and operate an independent network. Mercury was owned by Cable and Wireless, the former telecommunications operator of the British Empire and other private sector investors. In 1984, BT was converted into a public limited company and about 50 per cent of its shares were floated on the London Stock Exchange. Cellular mobile telephony and cable television networks were being licensed from 1984 onwards. By 1993, virtually all the remainder of BT's shares had been sold to the public and, by 1995, the privatization of Cable and Wireless was completed, leaving the sector almost completely in private ownership. In the 1990s, investment in cable television networks increased dramatically and cable operators also commenced offering voice telephony over their networks.

Kingdom has the largest number of operators and was the first EU member state to introduce functional separation of the incumbent operator's network.<sup>6</sup>

This unique history puts electronic communications at the core of the United Kingdom's economy and society. Businesses rely heavily on them, both in terms of direct sales and of internal production processes management.<sup>7</sup>

Consumers also rely on electronic communications in their daily activities, with the average UK consumer spending almost seven hours each day engaging in media and communication activities, such as watching television, listening to the radio, social networking or accessing services online.<sup>8</sup> High speed and reliable communications are not only important to business and consumers but also are crucial to the functioning of Government and the delivery of emergency services.<sup>9</sup>

In addition to acting as a key enabler of economic and social activity, the electronic communications sector in the United Kingdom is significant in its own right. In 2019, the telecoms market alone was worth approximately £31.5 billion.<sup>10</sup> It is estimated that there are more than 600 providers in the United Kingdom, divided into the following categories: fixed operators, mobile network operators (MNOs), cable operators and service providers.

The latter category (service providers) includes firms that provide access to electronic communications even though they do not operate a network, for example, internet service providers (ISPs) and mobile virtual network operators (MVNOs).<sup>11</sup>

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6 In 2005, BT entered into binding undertakings with Ofcom for the functional separation of the provision of wholesale network access to competitors from the provision of retail services to end customers. Openreach opened for business in January 2006 and is now responsible for managing open access to BT's former wholesale network.

7 The Boston Consulting Group, 'The Connected Kingdom: How the Internet is Transforming the United Kingdom Economy' (2010). See also Ofcom, 'The Consumer Experience': the majority of businesses use landline, Internet and mobile telephone services, with firms placing a high degree of importance on all of these. According to Ofcom's 'SME Experience of Communication Services Report' (2017), few SMEs (approximately five per cent) are dissatisfied overall with each service (landline, Internet and mobile).

8 Ofcom, 'Communications Market Report' (2021). See also Ofcom, 'The Consumer Experience' (2015): the overwhelming majority of households have digital television (96 per cent) and listen to the radio (91 per cent) on a weekly basis, whilst more than 90 per cent of individuals in the United Kingdom now have a mobile telephone and 86 per cent access the Internet. The Boston Consulting Group, 'The Connected Kingdom: How the Internet is Transforming the United Kingdom Economy' (2010) estimates that consumer surplus from free Internet content is worth around £5 billion annually.

9 Government, 'A Strong Britain in an Age of Uncertainty: The National Security Strategy' (2010).

10 Ofcom, 'Communications Market Report' (2021), at p3.

11 There are 41 MVNOs active on the UK market – see European Commission, 'Scoreboard 2015 – Report on the Implementation of the Telecommunications Regulatory Package (UK)' (19 June 2015), at p 315.

Every year, Ofcom produces a Communications Market Report which summarises key revenues in sectors including radio, TV and telecoms, as well as outlining current trends. The history, significance and trends in the development of the United Kingdom's electronic communications sector have largely been driven by the interplay between sector-specific regulation and general competition rules, which has made the United Kingdom a forerunner in market liberalization in the EU.

### **Concept and History of Telecommunications Policy and Regulation**

The United Kingdom liberalized the majority of its electronic communications sector ahead of the other EU member states.

A major milestone was the adoption of the Telecommunications Act 1984, which laid down the foundations for liberalization of telecommunications equipment, networks and services throughout the 1990s, thus anticipating the Commission's 1987 Green Paper on the Liberalization of Telecommunications across the EU.<sup>12</sup> In line with the Commission's 1987 Green Paper, the key concepts underlying the foundations of the Telecommunications Act 1984 were:

- The liberalization of the supply of telecommunications services and equipment;
- The establishment of harmonized and open access conditions to telecommunications networks of the incumbent operator; and
- The application of general competition rules.

The Telecommunications Act 1984 remained in force for almost two decades. In the late 1990s, the telecommunications, broadcasting and information technology sectors were converging with each other. The traditional separation of regulatory functions between these converging sectors was, therefore, no longer appropriate.<sup>13</sup> Accordingly, in 2002, the European Parliament and Council adopted a new EU electronic communications regulatory framework (the 'EU Regulatory Framework'), aimed at making regulation technology neutral across the EU.

The EU Regulatory Framework applies to all electronic communications networks and services, irrespective of their means of transmission and regardless of the type of information conveyed. In addition, the EU Regulatory Framework introduced the following significant changes:

- The adoption of competition law-based sector-specific regulation;
- The harmonization of national regulatory systems, through coordination procedures between the Commission and the national regulatory agencies (NRAs); and

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12 Commission, 'Towards a dynamic European economy: Green Paper on the development of the common market for telecommunications services and equipment' COM (87)290 final (1987).

13 Commission Communication, 'Towards a new framework for Electronic Communications infrastructure and associated services - The 1999 Communications Review', COM(1999) 539 final (November 1999).

- A ‘sunset clause’ for the gradual phasing out of sector-specific regulation once markets have become competitive, thereafter making general competition rules the primary instrument of regulation.

The United Kingdom was amongst the first EU member states to implement the EU Regulatory Framework into national law with the adoption of the Communications Act 2003 (CA03) and the Wireless Telegraphy Act 2006 (WTA06). The CA03 established the Office of Communications (Ofcom), a single regulator responsible for regulation of all electronic communications and almost all content transmitted over them. In 2009, the European Parliament and Council adopted new measures amending the EU Regulatory Framework.<sup>14</sup> These changes were transposed into national law through amendments of the CA03 and the WTA06, which entered into force on 26 May 2011.<sup>15</sup> The Secretary of State for Culture, Media, and Sport (DCMS) must carry out an on-going five-year review of the implementation of these changes. The latest review resulted in a proposed Digital Economy Bill 2016/17, whose adoption is still pending at the time of writing.<sup>16</sup> In 2018, the EU adopted a new directive recasting the existing EU Regulatory Framework into a European Electronic Communications Code (EECC) and update it to, amongst other things, take into account more recent technological developments like over-the-top (“OTT”) services. The deadline for transposing the EECC into national law was 21 December 2020. The United Kingdom has partially transposed the EECC into UK law prior to this date via the Electronic Communications and Wireless Telegraphy (Amendment) (European Electronic Communications Code and EU Exit) Regulations 2020.

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14 The consolidated framework is made up of a package of five Directives and one Regulation: Framework Directive (2002/21/EC) on a common regulatory framework, as amended by Directive 2009/140/EC (‘Better Regulation Directive’); Access Directive (2002/19/EC) on access and interconnection, as amended by Directive 2009/140/EC (‘Better Regulation Directive’); Authorisation Directive (2002/20/EC) on the authorization of electronic communications networks and services, as amended by Directive 2009/140/EC (‘Better Regulation Directive’); Universal Service Directive (2002/22/EC) on universal service and users’ rights relating to electronic communications networks and services, as amended by Directive 2009/136/EC (‘Citizens’ Rights Directive’); e-Privacy Directive (2002/58/EC) on privacy and electronic communications, as amended by Directive 2009/136/EC (‘Citizens’ Rights Directive’); and Regulation (EC) 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

15 The Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011, Number 1208, implementing articles 2 and 3 of the Citizens’ Rights Directive; The Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2015, Number 355; the Electronic Communications (Universal Service) (Amendment) Order 2011, Number 1209, implementing article 1(1)–(9) of the Citizens’ Rights Directive; and the Electronic Communications and Wireless Telegraphy Regulations 2011, Number 1210, implementing the Better Regulation Directive and the other aspects of the Citizens’ Rights Directive.

16 Further information is *available at*: <https://services.parliament.uk/bills/2016-17/digitaleconomy.html>.

## **Legal Sources of Regulation and Enforcement Agencies, International Instruments**

### *Main Legal Sources*

The CA03 remains the main statutory instrument of electronic communications regulation in the United Kingdom, including key provisions transposing the EECC into UK law. The CA03 is divided into the following six parts:

- Part 1: functions of Ofcom;
- Part 2: regulation of the conditions for the provision of networks and services (chapter 1), the use of radio spectrum (chapter 2), and disputes and appeals (chapter 3);<sup>17</sup>
- Part 3: television and radio services, including provisions on media ownership and control;
- Part 4: licensing of television reception (including additional Parts 4A and 4B for on-demand programme services and video-sharing platform services);
- Part 5: competition in communications markets, including media mergers; and
- Part 6: miscellaneous, including guidelines on penalties imposed by Ofcom.

A major change to the CA03 in light of the EECC is the scope of its application to electronic communications services. The Electronic Communications and Wireless Telegraphy (Amendment) (European Electronic Communications Code and EU Exit) Regulations 2020 introduced a new category of electronic communications service under the CA03: “Number-based Interpersonal Communications Services”. By contrast, “Number-independent interpersonal communications services” are not included in the definition of electronic communications services under the CA03.

Certain aspects of UK regulation have also remained in legacy technology-specific legislation (*e.g.*, wireless technology and broadcasting services). In addition, various other laws have an impact on the communications and media sectors and, as such, must be taken into account by Ofcom in exercising its functions. These include:

- The WTA06;

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17 On 22 October 2015, Ofcom published a consultation regarding a draft statement of policy on its approach to using the statutory information-gathering powers afforded by Part 2 CA03, WTA06 and the Postal Services Act 2011. The existing policy on information gathering was published in March 2005. The new proposals include: (i) setting out in greater detail how Ofcom goes about issuing notices requiring information to be provided; (ii) a statement that Ofcom will seek to obtain information using its statutory information-gathering powers and use such powers to confirm or verify information to ensure a robust, complete and non-biased evidence base; and (iii) a statement that Ofcom will assess on a case-by-case basis whether it is appropriate to send a statutory information request in draft form to the person holding the relevant information. Responses to the consultation must be submitted by 4 December 2015. *See* [http://stakeholders.ofcom.org.uk/binaries/consultations/general-policy-on-information-gathering/summary/consultation\\_s1351.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/general-policy-on-information-gathering/summary/consultation_s1351.pdf).

- The Broadcasting Acts 1990 and 1996;
- The Enterprise Act 2002;
- The national competition rules (ie, Chapters I and II of the Competition Act 1998);
- Retained EU case law implementing articles 101 and 102 of the Treaty on the Functioning of the EU (TFEU).

#### *Enforcement Agencies*

The main enforcement agency is Ofcom. In applying the statutory provisions outlined above, Ofcom's key tasks include promoting public interest objectives and competition, through sector-specific regulation and competition rules.<sup>18</sup> Ofcom provides greater detail on its approach to regulation and its objectives on its website and in its Annual Plan.<sup>19</sup>

Ofcom's approach is based on a bias against intervention but it is prepared to intervene when necessary and, in such circumstances, to intervene with the least intrusive mechanism to meet its objectives.<sup>20</sup> Although many key policy initiatives are developed and pursued by Ofcom (in coordination with the Commission and BEREC), the Department of Culture, Media and Sport (DCMS) has responsibility for high-level policy formulation and the promulgation of legislation, such as legislative reform, broadband policy<sup>21</sup> and sponsorship of Ofcom.<sup>22</sup>

Ofcom is now also a member of the Digital Regulation Cooperation Forum, together with Competition and Markets Authority, the Information Commissioner's Office, and the Financial Conduct Authority. The scope of the Digital Regulation Cooperation Forum is to ensure greater cooperation on online regulatory matters.

#### *Adherence to International Institutions*

The framework within which Ofcom regulates the electronic communications sector is influenced to a certain extent by the Commission and BEREC, because the CA03

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18 CA03, s 3.

19 See <http://www.ofcom.org.uk>. According to Ofcom's Plan of Work for 2021/22, Ofcom is prioritizing five goals, namely to: (1) invest in strong, secure networks; (2) get everyone connected; (3) ensure fairness for consumers; (4) support and develop UK broadcasting; and (5) prepare to regulate online harms. The Plan of Work highlights key work areas that Ofcom will seek to deliver in order to support and meet these goals. The closing date for consultation responses was 5 February 2021 and Ofcom's final Annual plan was published on 26 March 2021. For further information, see Ofcom, 'Plan of Work 2021/22' available at [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0019/216640/statement-plan-of-work-202122.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0019/216640/statement-plan-of-work-202122.pdf).

20 It follows that, in considering whether to pursue a complaint or start an investigation *ex officio*, Ofcom will take into account not only the merits of the matter but also whether the matter falls within its priorities.

21 See, e.g., 'Connectivity, content and consumers: Britain's digital platform for growth' (2013).

22 CA03, section 5 requires that any direction issued by the Government, in particular the DCMS, does not conflict with Ofcom's independence, as required by articles 7-9 of the EEC. See also Case C-82/07, *Comisión del Mercado de las Telecomunicaciones* [2008] ECR I-1265, paras 14–20 and 22–27.

has been amended by the implementation of the EECC. However, Ofcom no longer has to notify certain proposed regulatory measures to the Commission and BEREC for prior approval before these measures can take effect.<sup>23</sup>

The United Kingdom is also a signatory to the World Trade Organization (WTO) Agreement on Basic Telecommunications, the International Telecommunications Union (ITU) and numerous other international instruments.<sup>24</sup>

### **Strategic Review of Digital Communications 2015**

On 17 July 2015, Ofcom published a discussion document on its Strategic Review of Digital Communications. The document outlines possible changes to the regulatory regime applying to all digital communications services in the United Kingdom, including broadband, mobile, landline and bundled services.<sup>25</sup> In its discussion document, Ofcom sought views from the public on four main topics:

- Investment and innovation in the market that can help make services widely available;
- Competition to deliver quality services and affordable prices;
- Empowerment of consumers and businesses, particularly making sure they have the information and means to choose and switch between providers; and
- Targeting of regulation on areas of concern, and deregulation where possible to allow markets to function well.

This was the first time in a decade that Ofcom had undertaken such a wide-ranging strategic review. A 2005 review led to the creation of Openreach, a functionally separate business unit of BT. Through Openreach, BT is required to provide access to competing telecoms providers on equal terms, to enable them to offer telecoms services to consumers.<sup>26</sup> In the 2015 review, Ofcom considered the following options:

- Retaining the current model, where Openreach operates as ‘functionally separate’ from BT, and using regular market reviews to address any concerns around competition;
- Strengthening the current model by applying new price control rules to BT;
- Separating Openreach from BT; and
- Deregulating and promoting competition between networks.

According to Ofcom, Virgin Media and a variety of smaller operators own networks that allow them to provide phone and broadband services without using BT’s network at all. This kind of ‘end-to-end’ competition, which sometimes involves running fiber lines directly to premises, can help incentivize Openreach to improve its infrastructure. However, it also could lead to duplication of networks and weak competition.

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23 CA03, ss 78–86.

24 CA03, s 22.

25 Strategic Review of Digital Communications: Discussion document of 17 July 2015, see <http://stakeholders.ofcom.org.uk/consultations/der-discussion/>.

26 See <http://stakeholders.ofcom.org.uk/telecoms/policy/bt-undertakings/>.

In deciding which options to take, Ofcom had to take into account potentially market-changing developments, such as the merger by EE with BT; the attempted merger between Telefonica UK and mobile network Three (which was eventually blocked by the European Commission);<sup>27</sup> and BT's failed appeal before the Competition Appeal Tribunal against Ofcom's 'margin squeeze test' to reduce the wholesale price of superfast broadband that Openreach can charge BT's rivals.<sup>28</sup>

In the end, Ofcom decided to require a legal separation of Openreach from BT, whilst maintaining the two entities within the BT Group. In order to achieve this Ofcom would need the approval of the European Commission, so in November 2016, Ofcom opted to prepare a notification to the Commission to require the changes to Openreach's independence.

## Licensing of Telecommunications Systems

### Licensing Policy

Under the CA03,<sup>29</sup> there is no requirement to apply for a license to provide electronic communications networks,<sup>30</sup> electronic communications services,<sup>31</sup> associated facilities<sup>32</sup> or content service.<sup>33</sup>

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27 See Case M.7612, *Hutchison 3G UK / Telefonica UK* at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_7612](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7612).

28 The Telegraph, *BT challenges Ofcom over broadband prices*, 24 November 2015, see <http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/telecoms/11616798/BT-challenges-Ofcom-over-broadband-prices.html>.

29 CA03, s 32.

30 In CA03, s 32(1), an 'Electronic communications network' is defined as a transmission system for the conveyance, by the use of electrical, magnetic or electromagnetic energy, of signals of any description, and associated apparatus, software and stored data. Examples of such networks include satellite networks, fixed networks (whether circuit- or packet-switched, and including the Internet) and mobile terrestrial networks and networks used for radio and television broadcasting, including cable television networks.

31 In CA03, s 32(2) and (2A), an 'Electronic communications service' is defined as an internet access service, a number-based interpersonal communications service, or any other service consisting, or having as its principal feature, the conveyance of signals, such as a transmission service used for machine-to-machine services or for broadcasting. Examples of such services include telecommunications services and transmission services in networks used for broadcasting.

32 In CA03, s 32(3), an 'Associated facility' is defined as a facility which is available for use, or has the potential to be used, in association with an electronic communications network or service to make the provision of that network or service (or other services) possible, or to support the provision of other services. Examples of such facilities include conditional access systems and electronic program guides.

33 'Content service' is defined as so much of a service as consists in the provision of material with a view to it being comprised in signals conveyed over an electronic communications network or the exercise of editorial control over the contents of signals conveyed by means of such a network.



Persons will automatically be entitled to provide an electronic communications network, electronic communications services or to make available associated facilities, provided that, where required, they notify Ofcom of this intention and comply with certain General Conditions as well as any Specific Conditions, if applicable to them.

### **Grant of Licenses**

The CA03 stipulates that certain classes of electronic communications networks, electronic communications services and associated facilities may be designated by Ofcom as requiring prior notification.<sup>34</sup> To date, Ofcom has refrained from making any such designations and, therefore, the provision of electronic communications networks, electronic communications services and associated facilities does not require any prior notification to Ofcom.

However, certain activities, such as use of radio spectrum or broadcasting, may still require an authorization or license under the WTA06 or the Broadcasting Acts. These will be discussed later in this chapter. In addition, providers may still be required to furnish certain information to Ofcom, for example, within the administrative fees scheme discussed below.

### **Conditions and Terms of Licenses**

#### *In General*

There are two types of conditions of entitlement to provide electronic communication services or networks in the United Kingdom, i.e., ‘General Conditions’ (GCs), applying either to all providers or to certain specified classes of providers, and ‘Specific Conditions’ (SCs), applying to individual providers or certain classes of providers.<sup>35</sup>

A provider that is subject to additional SCs will be notified individually by Ofcom when SCs are imposed. Persons to whom one or more of these conditions apply must comply with the relevant conditions. For most providers, the only relevant conditions are the GCs, as these apply to anyone who is providing a service or network. The conditions of entitlement can be modified or revoked by Ofcom, as discussed below.

#### *General Conditions*

**In General.** The GCs were last revised with effect from 1 October 2018, but there are three further changes coming into effect in December 2021, June 2022, and December 2022. Ofcom is also currently consulting on proposed further amendments to take effect in April 2023. The closing date for responses to this consultation is 9 November 2021.<sup>36</sup>

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<sup>34</sup> CA03, s 33.

<sup>35</sup> CA03, s 45.

<sup>36</sup> See <https://www.ofcom.org.uk/consultations-and-statements/category-2/simpler-broadband-switching>.

The current General Conditions of Entitlement<sup>37</sup> contain 17 GCs, applying to various categories of provider. The four main categories from the 2015 GCs remain:

- All persons that provide ‘Electronic Communications Networks’ (ECN) or ‘Electronic Communications Services’ (ECS) generally;
- Persons that provide a ‘Public Electronic Communications Service’ (PECS), which is defined as an electronic communications service that is provided so as to be available for use by members of the public. A network used wholly or mainly for the purpose of providing PECS is referred to as a ‘Public Electronic Communications Network’ (PECN);
- Persons that provide a ‘Publicly Available Telephone Service’ (PATs), which is defined as a service made available to the public for originating and receiving, directly or indirectly, national or international calls through a number or numbers in a national or international telephone numbering plan. This category essentially comprises the traditional fixed and mobile voice telephone networks; and
- Persons that provide ‘Public Pay Telephone’ (PPT), which means a telephone available to the general public, for the use of which the means of payment may include coins and/or credit/debit cards and/or pre-payment cards, including cards for use with dialing codes.

In addition, the 2021 GCs define several more categories of provider than the previous version, in response to technological development:

- **Appropriate network:** An ECN by means of which PECS are provided for the principal means of receiving television programmes;
- **Publicly available internet access service (PAIAS):** A service made available to the public that provides access to the internet, excluding connectivity services that directly link to a private network
- **Voice over Internet Protocol Outbound Call Service (VoIPOCS):** A service that allows end-users to make (but not receive) a voice call to a number included in the National Telephone Numbering Plan using an internet connection where the service is provided independently of the provision of the internet connection, excluding any click to call service.

The GCs apply to the various types of provider as follows:

**All providers.** All providers are subject to the following conditions:

- Confidentiality of information obtained during negotiations for network access (GC A1.3);<sup>38</sup>

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<sup>37</sup> CA03, s 45(2)(a) and (3). There has been a number of modifications to the GC since their adoption, which Ofcom made by way of notification under CA03, s 48(1). These have been published in a consolidated text, most recently on 4 January 2021, *available at*: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0021/112692/Consolidated-General-Conditions.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0021/112692/Consolidated-General-Conditions.pdf).

<sup>38</sup> Such information must be used solely for the purpose for which it was supplied, and the confidentiality of the information must be respected at all times. The information

- Compliance with European and International standards and specifications (GC A2);<sup>39</sup>
- Conditions relating to the allocation, adoption and use of telephone numbers (GC B1);<sup>40</sup> and
- Granting, limiting and blocking access to numbers and services (GC B4.2-B4.4).<sup>41</sup>

ECN/ECS must also comply with GC B3 ('Number portability'),<sup>42</sup> and ECS in particular are subject to the following further conditions:

- Emergency call numbers and caller location information (A3.4-3.6(b));<sup>43</sup> and
- Missing children hotline number (B4.5).<sup>44</sup>

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must not be passed on to any other party to whom it could provide a competitive advantage.

39 This GC refers to Article 17 of the Framework Directive, which has now been superseded by Article 39 of the EECC, but requires providers to comply with any relevant compulsory standards/specifications listed in the *Official Journal of the European Union* (OJEU) for the provisions of services, technical interfaces and/or network functions. Providers should also comply with non-compulsory standards/specifications in the OJEU, along with any adopted by the European Committee for Standardisation (CEN), the European Committee for Electrotechnical Standardisation (CENELEC) and the European Telecommunications Standards Institute (ETSI). Furthermore, all providers must take full account of international standards/recommendations adopted by the International Telecommunications Union (ITU), the European Conference of Postal and Telecommunications Administrations (CEPT), the International Organisation for Standardisation (ISO) and the International Electrotechnical Committee (IEC).

40 All providers must only use telephone numbers from the National Telephone Numbering Plan (NTNP) that have been allocated to them, or where their use has been authorised by the person to whom the number is allocated. Providers must comply with all restrictions and requirements in the NTNP, along with any specified by Ofcom, and must not discriminate against other providers in relation to their adoption or use of telephone numbers. There are further specific provisions about the transfer and withdrawal of allocated numbers and the process of application for allocation or reservation, along with detailed provisions about charging.

41 Providers must ensure that end-users in any part of the UK or EU can access and use non-geographic numbers that the provider adopts and access all telephone numbers in the UK or EU, where technically and economically feasible. Providers must also limit access for calling end-users in specific geographical areas to numbers assigned for a subscriber where that subscriber has chosen to limit access for commercial reasons. Finally, providers should block access to telephone numbers and/or PECS and withhold associated revenue when requested to do so by Ofcom on the basis of fraud or misuse.

42 Number portability should be provided within the shortest possible time and on reasonable terms; this GC sets out specific requirements for the process and speed at which this should happen.

43 All end users must be able to access emergency organisations via the numbers '999' and '112' at no charge, and such organisations should be able to access accurate and reliable caller location information at the time the call is answered without charge.

44 Any end user must be able to access a hotline for missing children by using the number '116000'.

PECN are subject to the following further conditions:

- Obligation to negotiate interconnection (A1.2);<sup>45</sup>
- Availability of services, including access to emergency services (A3.2);<sup>46</sup>
- Emergency planning for provision or restoration of services (A4);<sup>47</sup>
- Contract requirements (C1.2-1.9);<sup>48</sup>
- Information publication requirements (C2.2-2.15);<sup>49</sup> and
- Calling line identification facilities (C6).<sup>50</sup>

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45 To the extent requested by any other PECN in the UK or EU, a PECN must negotiate with a view to concluding or amending an agreement for interconnection within a reasonable period.

46 PECN providers must ensure the fullest possible availability of their services in the event of catastrophic network breakdown or force majeure, and uninterrupted access to emergency organisations as part of any PATS offered. *See also* 'Ofcom's Guidance on security requirements in sections 105A to D of the Communications Act 2003': [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0021/51474/ofcom-guidance.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0021/51474/ofcom-guidance.pdf).

47 PECN must make such arrangements for provision or rapid restoration of communications services as are practicable and may reasonably required in the event of a disaster, at the request of and in consultation with emergency organisations and such governmental departments as Ofcom may direct (see 'Ofcom's emergency planning direction': [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0021/116364/Emergency-Planning-Direction.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0021/116364/Emergency-Planning-Direction.pdf)). PECNs may recover the costs incurred and make the implementation conditional upon being indemnified.

48 Minimum specific requirements for contracts with consumers are set out. PECNs must also ensure that provisions regarding contract termination do not act as disincentives for changing provider, and must not stipulate a fixed commitment period that lasts longer than 24 months. Subscribers must be able to subscribe to a contract with a maximum duration of 12 months, and must be informed at least one month in advance of both any contractual modifications likely to be of material detriment to the subscriber, and the subscriber's right to terminate the contract if such modifications are not acceptable to them. An increase in core subscription price is listed as a specific example of such a contractual modification.

49 This condition lists specifically which information must be provided to end users regarding applicable prices, tariffs, terms and conditions regarding the services provided by them, in addition to information publication requirements regarding unbundled tariff and personal numbers and Premium Rate Service information. Specifications about methods of publication are also given, along with internal processes and procedures for PECNs and information that must be displayed in PPTs.

50 PECNs must provide such facilities unless they can demonstrate that it is not technically feasible or economically viable to do so, and if they do not, they must inform subscribers that such facilities are not available. PECNs must not charge subscribers and additional or separate fee. PECNs must also take all reasonable steps to identify calls in relation to which invalid or non-diallable CLI Data is provided and prevent them being connected to the called party, excepting calls to emergency organisations.

PECS are subject to the following further conditions:

- Contract requirements (C1);<sup>51</sup>
- Information publication requirements (C2.2-C2.15);<sup>52</sup>
- Accurate billing (C3.2-3.3);<sup>53</sup>
- Complaints handling and dispute resolution (C4);<sup>54</sup> and
- Measures to meet the needs of vulnerable consumers and end users with disabilities (C5).<sup>55</sup>

PATS are subject to the following further conditions:

- Availability of services, including access to emergency services (A3.2);<sup>56</sup>

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51 See fn 76. In addition, PECS must send an end-of-contract notification to a subscriber when a contract has a fixed commitment period that can be automatically prolonged after its expiry, and specific information to include in such a notification is set out in this GC. PECS must also provide subscribers with annual best tariff information at least annually, and as with the end-of-contract notification, the GC sets out information to include and the manner in which it should be presented and sent.

52 This condition lists specifically which information must be provided to end users regarding applicable prices, tariffs, terms and conditions regarding the services provided by them, in addition to information publication requirements regarding unbundled tariff and personal numbers and Premium Rate Service information. Specifications about methods of publication are also given, along with internal processes and procedures for PECNs and information that must be displayed in PPTs.

53 PECS must not charge end users unless every amount charged represents and does not exceed the true extent of the service provided to that end user, and should retain records of bills for at least 12 months from the date that they were created.

54 PECS must comply with the Ofcom Approved Complaints Code (annexed within the GCs), which governs the way in which providers should deal with complaints; requires PECS to be a member of an Alternative Dispute Resolution Scheme which customers are informed about in bills and have a right to use free of charge; and requires PECS to monitor their compliance with the obligations imposed by the Ofcom Approved Complaints Code and GC C4.

55 PECS must establish and make staff aware of their policy for consumers whose circumstances make them vulnerable and take necessary measures to end users with disabilities listed within this GC, including making directory information accessible in appropriate alternative formats; providing access to a relay service; providing SMS access to emergency organisations; providing a priority fault repair service for end users with disabilities; making arrangements for third party bill management in certain situations; and ensuring that bills and contracts are *available in accessible format* (see ‘Ofcom’s guidance to publicising services available to disabled people’: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0015/81132/guidance.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0015/81132/guidance.pdf) and ‘Ofcom’s guide setting out the difference between third party bill management and power of attorney’: <https://www.ofcom.org.uk/phones-telecoms-and-internet/advice-for-consumers/problems/power-of-attorney>). PECS must also consult the consumer panel on request, to ensure that the needs of end users who are vulnerable or who have disabilities are met.

56 PECN providers must ensure the fullest possible availability of their services in the event of catastrophic network breakdown or force majeure, and uninterrupted access to

- Emergency planning for provision or restoration of services (A4);<sup>57</sup>
- Directory information (B2);<sup>58</sup>
- Total metering and billing systems, access to billing information and debt collection/disconnection (C3.4-3.12);<sup>59</sup> and
- Calling line identification facilities (C6).<sup>60</sup>

PPT are subject to the following further conditions:

- Emergency call numbers and caller location information (A3.4-3.6(b));<sup>61</sup> and
- Missing children hotline number (B4.5).<sup>62</sup>

Appropriate networks must also comply with the GC regarding ‘Must carry obligations’ (A5),<sup>63</sup> whilst VoIPOCS have their own tailored GCs regarding ‘Availability of services, including access to emergency services’ and ‘Caller

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emergency organisations as part of any PATS offered. *See also* ‘Ofcom’s Guidance on security requirements in sections 105A to D of the Communications Act 2003’: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0021/51474/ofcom-guidance.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0021/51474/ofcom-guidance.pdf).

57 PECN must make such arrangements for provision or rapid restoration of communications services as are practicable and may reasonably required in the event of a disaster, at the request of and in consultation with emergency organisations and such governmental departments as Ofcom may direct (see ‘Ofcom’s emergency planning direction’: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0021/116364/Emergency-Planning-Direction.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0021/116364/Emergency-Planning-Direction.pdf)). PECNs may recover the costs incurred and make the implementation conditional upon being indemnified.

58 PATS must meet all reasonable requests to make directory information available on fair terms, and must supply such information to each of their subscribers on request, omitting the information of subscribers who have exercised their right to be excluded from the directory. Directories must be updated at least once a year, and reasonable fees may be charged for provision of the directory and/or inclusion within it.

59 PATS must obtain approval of their total metering and billing systems and provide detailed billing information to each of their subscribers. When a bill is unpaid, any measures a PATS takes must be proportionate and not unduly discriminatory, and due warning should be given to the subscriber.

60 PECNs must provide such facilities unless they can demonstrate that it is not technically feasible or economically viable to do so, and if they do not, they must inform subscribers that such facilities are not available. PECNs must not charge subscribers and additional or separate fee. PECNs must also take all reasonable steps to identify calls in relation to which invalid or non-diallable CLI Data is provided and prevent them being connected to the called party, excepting calls to emergency organisations.

61 All end users must be able to access emergency organisations via the numbers ‘999’ and ‘112’ at no charge, and such organisations should be able to access accurate and reliable caller location information at the time the call is answered without charge.

62 Any end user must be able to access a hotline for missing children by using the number ‘116000’.

63 Appropriate networks must broadcast any service specified in a direction made by Ofcom and comply with any direction from the Secretary of State in connection with section 64 of the CA03.

location information' (A3.3, 3.6(c)).<sup>64</sup> **PAIAS** must comply with the conditions regarding 'Total metering and billing systems, access to billing information and debt collection/disconnection' (C3.4-3.12).<sup>65</sup>

There are further transparency requirements in GC C2.16-2.19 relation to customers who are small or medium enterprises (SME customers) when a provider is offering a fixed voice or other fixed line service, or a broadband service.

These updated General Conditions also contain a new section on 'Switching' (GC C7), which aims to protect domestic and SME customers when they change provider for landline, broadband or mobile. The condition deals with:

- Obligations to prevent mis-selling (C7.3);<sup>66</sup>
- Information at point of sale (C7.4);<sup>67</sup>
- Switching customer's termination rights (C7.5);<sup>68</sup>
- Records retention (C7.6);<sup>69</sup>
- Record of consent (C7.7-7.8);<sup>70</sup>
- Notification letters (C7.9-7.12);<sup>71</sup>
- Simultaneous transfers and other migrations of broadband services (C7.13-7.16);<sup>72</sup>

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64 VoIPOCS must inform domestic and small business customers that access to emergency organisations using their service may cease if there is a power cut or power failure, or a failure of internet connection. VoIPOCS must also recommend to such customers that they should register the address at which the service is to be used prior to its activation and update this prior to accessing the service if the VoIPOCS is to be used at multiple locations.

65 PATS must obtain approval of their total metering and billing systems and provide detailed billing information to each of their subscribers. When a bill is unpaid, any measures a PATS takes must be proportionate and not unduly discriminatory, and due warning should be given to the subscriber.

66 Providers must make sure information is not misleading, and provide it in a durable form if requested to.

67 Reasonable steps must be taken by the provider gaining a customer to ensure that the switching customer is authorised to request migration and provided with the appropriate information listed in the GC.

68 The switching customer must have the ability to terminate the contract before completion of the transfer period without charge and without unreasonable effort.

69 The provider gaining the customer must keep records of its initial contact with the new customer and how the contract was entered into (ie, means, place).

70 Providers must keep details of the switching customer's consent to switch provider, along with further details about the customer, for at least twelve months.

71 Both the provider that gains the customer and the provider that loses the customer must send that customer a letter containing details specified in this condition.

72 Specific provisions for gaining providers who co-ordinate a transfer of broadband and fixed-line telecommunications services, and for home-move requests, and for switching that does not involve a change of location.

- General requirements and publication of information (C7.17-7.20);<sup>73</sup> and
- Detailed conditions about mobile switching in particular (C7.21-7.44).<sup>74</sup>

Another addition is GC C8, ‘Sales and marketing of mobile communications services’, which aims to protect domestic and SME customers by imposing minimum obligations and standards on providers their retailers.<sup>75</sup>

The changes coming into effect on 19 December 2021 will update the ‘C’ conditions, as well as adding in the definition of ‘Number-based Interpersonal Communication Service’ (NB-ICS) in order to align the GCs with the updated CA03. Key changes include:

- Requirements that the switching process does not act as a disincentive to customers are being extended to bundles, and guidance on this is included in Annex 10;
- A ban on selling locked mobile devices (ie, devices that cannot be used on another provider’s network); and
- Some existing GCs are being applied specifically to bundles, which are defined by Ofcom as a contract(s) for provision of internet access or NB-ICS, combined with another contract which can be for content services or terminal equipment.<sup>76</sup>

The further changes in June 2022 relate to improvements to contract information and termination rights, along with the provision of an emergency video-relay service.<sup>77</sup> The December 2022 changes aim to improve the switching process for broadband,<sup>78</sup> but this is subject to the findings of the

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73 Providers must ensure staff are appropriately trained to comply with this condition and should monitor their own compliance with it. A copy of GC C7 should be provided to the switching customer free of charge upon reasonable request.

74 The condition is extensive, and covers the technicalities of PAC or N-PAC codes that are necessary for switching mobile provider. This condition ensures that information is provided to customers clearly and can be requested easily. Customers must also not be charged for mobile communications services after the switching process has been completed, and the switching process must be completed within one working day from either SIM activation or submission of the PAC to the new provider. Customers should be compensated if this process is not followed properly or promptly enough.

75 In particular, there are obligations to prevent mis-selling; requirements for publication of providers’ obligations; monitoring and training of mobile retailers; specifications for necessary information at point of sale; retention of records; and due diligence when selecting mobile retailers.

76 See [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0016/209500/annex-3-revised-gc-eccc-17-dec-21.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0016/209500/annex-3-revised-gc-eccc-17-dec-21.pdf).

77 See [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0017/209501/annex-4-revised-gc-eccc-17-jun-22.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0017/209501/annex-4-revised-gc-eccc-17-jun-22.pdf).

78 See [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0018/209502/annex-5-revised-gc-eccc-19-dec-22.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0018/209502/annex-5-revised-gc-eccc-19-dec-22.pdf).



ongoing consultation on landline and broadband switching which closed on 9 November 2021.<sup>79</sup>

### *Specific Conditions*

**In General.** In addition to GCs, providers may be subject to conditions specifically addressed to them. The CA03 provides for five types<sup>80</sup> of SC:

- Universal Service Conditions;<sup>81</sup>
- Social tariff conditions;<sup>82</sup>
- Access-related Conditions;<sup>83</sup>
- Privileged Supplier Conditions;<sup>84</sup> and
- Significant market power (SMP) Conditions.<sup>85</sup>

**Universal Service Conditions.** Universal Service Conditions transpose into national law articles 86 to 122 of the EEC Directive, which requires EU member states to make available certain minimum services in the quality specified to all end-users in their territory, at an affordable price.

CA03, sections 65–68, empower the DCMS to define the types of services that must be made available on a universal service basis, and Ofcom is empowered to designate universal service providers and impose Universal Service Conditions on them.<sup>86</sup>

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79 See [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0020/225632/statement-quick-easy-reliable-switching.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0020/225632/statement-quick-easy-reliable-switching.pdf).

80 CA03, s 45(2)(b).

81 CA03, s 45(4). A universal service condition is a condition that contains only provisions authorized or required by CA03, s 67.

82 CA03, s45(4A). A social tariff condition is a condition that contains only provisions authorized or required by CA03, s 72F.

83 CA03, s 45(5). An access-related condition is a condition that contains only provisions authorized by CA03, s 73.

84 CA03, s 45(6). A privileged supplier condition is a condition that contains only the provision required by CA03, s 77.

85 CA03, s 45(7), (8), and (9). An SMP condition is either (a) an SMP services condition; or (b) an SMP apparatus condition. An SMP services condition is a condition which contains only provisions which (1) are authorized or required by one or more of CA03, ss 87–91; or (2) in the case of a condition applying to a person falling within CA03, s 46(8)(b), correspond to provisions authorized or required by one or more of CA03, ss 87–89A. SMP apparatus condition is a condition containing only provisions authorized by CA03, s 93.

86 Electronic Communications (Universal Service) Order 2003, SI 1904/2003, as amended by the Electronic Communications (Universal Service) (Amendment) Order 2011, SI 1209/2011, and the Electronic Communications (Universal Service) (Broadband) Order 2018, SI 445/2018. See also Ofcom's 'Notification of modifications to the Universal Services Conditions' (2011) and 'Notification which revoked Condition 4 imposed on BT' (2012). The following services have currently been

Ofcom has designated BT and Kingston Communications as universal service providers.<sup>87</sup> BT's universal service obligation extends to the whole of the United Kingdom except Hull. Kingston's universal service obligation covers the Hull area only. If Ofcom decides that compliance with the universal service obligations imposes a financial burden on a designated universal service provider and that it is unfair for that provider to bear the costs of universal service alone, it may determine that contributions are to be made by service providers to whom the GCs apply. Ofcom may make regulations establishing a scheme or fund for that purpose and may appoint a person to administer the scheme or fund.

**Access-Related Conditions.** CA03, sections 73–76, provide that Access-related Conditions may be imposed on any provider of electronic communications networks or services or associated facilities, regardless of whether they have been designated as SMP operators or not. These sections implement the provisions of article 61 of the EEC Directive. Access-related Conditions may include conditions relating to the provision of such network access and service interoperability 'as appears to Ofcom appropriate' for the securing of efficiency, sustainable competition, the bringing into operation (where Ofcom considers it appropriate) of very high capacity networks, efficient investment and innovation, and the greatest possible benefit for end-users.<sup>88</sup>

Such conditions may include requirements for the sharing of apparatus and apportionment of costs of shared apparatus, impose network access obligations, require interconnection to secure end-to-end connectivity for end-users, and impose obligations on a person providing facilities for the use of application program interfaces (APIs) or electronic program guides (EPGs) as are necessary to secure access to such program services provided in digital form as Ofcom may determine.<sup>89</sup>

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designated as universal services: (1) connection at a fixed location to the public electronic communications network, capable of allowing end-users to make and receive local, national and international telephone calls, facsimile communications and data communications, at data rates that are sufficient to permit functional Internet access, taking into account prevailing technologies used by the majority of subscribers and technological feasibility; (2) at least one comprehensive directory of all subscribers of publicly available telephone services; (3) at least one comprehensive telephone directory enquiry facility, including all subscribers of publicly available telephone services; (4) public pay telephones or other public voice telephony access points to meet the reasonable needs of end-users in terms of geographical coverage and the number of telephones, including the ability to make emergency calls free of charge; (5) appropriate tariff options and packages for subscribers on low incomes or with special social needs; (6) facilities and billing and payment methods that enable subscribers to monitor and control their expenditure; and (7) certain special measures for end-users with a disability.

87 Ofcom, 'Designation of BT and Kingston as Universal Service Providers, and the Specific Universal Service Conditions' (2003).

88 CA03, s 73.

89 CA03, s 74.

In justified cases and to the extent that is necessary, Ofcom may also impose interoperability obligations on companies that control access to end-users.<sup>90</sup> Access-Related Conditions must be implemented in accordance with the consultation and notification procedures for the imposition of SMP Conditions (*see text, below*).

Finally, Ofcom is under a duty to apply Access-related Conditions to every person who provides a conditional access system (CAS) in relation to a protected program service. This requirement implements article 62 of the EECC Directive. Ofcom has imposed such conditions on Sky relating to its interactive and pay-per-view services, sports services as well as its conditional access services on its digital platform, obliging Sky to provide such services on fair, reasonable and non-discriminatory terms to BT, Virgin and Top-Up TV.<sup>91</sup>

**Privileged Supplier Conditions.** A privileged supplier of electronic communications is a supplier who enjoys special or exclusive rights in relation to the provision of non-communications services (i.e., other than the provision of electronic communications services or networks) and is not such a provider only in respect of associated facilities.

Ofcom is under a duty to ensure that such privileged suppliers comply with strict accounting rules and may impose conditions accordingly.<sup>92</sup> This category of specific conditions is intended to carry into effect article 17 of the EECC Directive. However, these provisions appear to have had limited practical application in the United Kingdom.

**SMP Conditions.** The SMP Conditions are by far the most important SC category, as they implement the core of the EU Regulatory Framework set out in articles 63-74 of the EECC Directive.

The EECC Directive reiterates the requirement from the Framework Directive that NRAs, including Ofcom, must identify and analyze markets for electronic communications services and networks, with a view to determining whether or not these markets are fully competitive (the SMP regime). This SMP regime is implemented in the United Kingdom through CA03, sections 78–93.

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<sup>90</sup> CA03, s 74(1A).

<sup>91</sup> Ofcom, ‘Pay television Statement’ (2010); Case 1152/8/3/10 (IR) *Sky v Ofcom*, Order of the President of the CAT (2010); Decision ‘Top Up television complaint against Sky under the wholesale must-offer obligation’ (2010); ‘Review of Sky’s access control services regulation’ (2013), and Statement ‘Review of the pay TV wholesale must-offer obligation’. See also Case 1245/3/3/16, BT wanted Ofcom to be directed to impose a license condition on Sky to distribute sports channels to other pay TV retailers without a requirement of reciprocal provision by other pay TV retailers as a condition for supply of Sky sports channels. BT also asked that Ofcom be directed to undertake analysis of the wholesale sports channel market to determine whether prices are prejudicial to fair and effective competition. The appeal was rejected by the CAT.

<sup>92</sup> CA03, s 77.

*Domestic Notification Procedure*

Where Ofcom finds that a particular market is not fully competitive because an operator possesses SMP,<sup>93</sup> it is required to impose one or more of the SMP Conditions provided for in CA03, sections 87–93 (implementing articles 68–74 of the EECC Directive).<sup>94</sup>

Before Ofcom makes a final determination on (a) relevant market definition, (b) SMP designation and/or (c) the setting or modification of an SMP Condition, Ofcom must publish a notification of what it is proposing to do for public consultation for a period of at least one month.<sup>95</sup> A copy of the notification is sent to the DCMS.

The operators concerned by Ofcom's proposed determinations and any interested third parties may submit comments in response to the notification procedure. They may appeal against any of Ofcom's final determinations to the Competition Appeal Tribunal (CAT), whose rulings may in turn be appealed to the Court of Appeal (England & Wales) or the Court of Sessions (Scotland) on points of law.

*SMP Conditions List*

The SMP Conditions that Ofcom may impose on an operator that has been found to have SMP in a particular relevant market include the following obligations:

- Provide network access or local loop unbundling on reasonable request;<sup>96</sup>
- Not unduly discriminate;<sup>97</sup>
- Publish information so as to ensure transparency;<sup>98</sup>
- Publish a reference offer for network access;<sup>99</sup>
- Include or change certain terms and conditions in a reference offer;<sup>100</sup>

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93 SMP is defined by reference to the concept of single and collective dominant position, as well as leveraging of market power on closely related markets, in the same way as in s18(1) of the Competition Act 1998: CA03, s 78. For an application of these principles in the United Kingdom, cf. Ofcom, 'Suspected margin squeeze by Vodafone, O2, Orange, and T-Mobile', (CW/00615/05/03), paras 96–104, in which Ofcom applied the *Airtours* case law criteria on collective dominance and concluded that the MNOs in question did not hold a collective dominant position on the relevant market for mobile termination.

94 Case C-424/07, *Commission v Germany*, 3 December 2009, paras 38, 63–78, 80–83, 95–98, and 105–107 (2009 I-11431).

95 CA03, ss 80 and 80A.

96 CA03, s 87(3). See also Case C-227/07, *Commission v Poland* [2008] ECR I-8403, paras 23, 35–47, 49; Case C-192/08, *TeliaSonera Finland Oyj*, 12 November 2009, paras 26–36, 40, 43–48 (2009 I-10717); Case C-387/06, *Commission v Finland* [2008] ECR I-1, paras 21–28.

97 CA03, s 87(6)(a).

98 CA03, s 87(6)(b).

99 CA03, s 87(6)(c).

100 CA03, s 87(6)(d) and (e).

- Maintain accounting separation;<sup>101</sup>
- Observe price controls, cost orientation of tariffs and cost accounting rules;<sup>102</sup> and
- Accept any additional condition if justified by exceptional circumstances, in particular, functional separation.<sup>103</sup>

SMP Conditions for carrier selection and pre-selection and leased lines provisions have been abolished. SMP Conditions must be based on the nature of the competition problem identified and be proportionate and justified in the light of the objectives set out in article 3 of the EECC Directive.<sup>104</sup>

Accordingly, price controls, cost orientation of tariffs and cost accounting rules may only be imposed where there is a risk of adverse effects arising from price distortion in the relevant market and the setting of such conditions is appropriate for promoting efficiency and sustainable competition and conferring the greatest possible benefits on end-users — having regard where relevant to the long-term interests of end-users in the use of next-generation networks and the promotion of new and enhanced networks.<sup>105</sup> Article 74 of the EECC Directive also requires that, when imposing cost recovery and price controls, Ofcom must take into account the investment in NGN made by the designated provider, to allow him a reasonable rate of return on adequate capital employed.

In addition, Ofcom may, where an operator is found to have SMP in a market for electronic communications services for end-users, and the imposition of Access-related Conditions or SMP Conditions in relation to the underlying wholesale market would not be sufficient, impose conditions on the SMP operator relating to the relevant end-user market as appropriate, including tariff controls.<sup>106</sup> Finally, Ofcom may impose SMP Conditions, including tariff and cost accounting controls, on a supplier found to have SMP on an apparatus market.<sup>107</sup>

#### *Status of Market Analyses*

The process of identification and analysis of relevant markets, the making of SMP determinations, and the setting of SMP Conditions, as was previously required

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101 CA03, s 87(7). Case C-262/06, *Deutsche Telekom AG* [2007] ECR I-10057, paras 37–41.

102 CA03, s 87(9).

103 CA03, s 89A. Voluntary separation (either functional or structural) requires prior notification to Ofcom: CA03, ss 89B and 89C. See BEREC ‘Guidance on functional separation under Articles 13a and 13b of the revised Access Directive and national experiences’ at: [http://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/download/0/195-berec-guidance-on-functional-separation-0.pdf](http://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/195-berec-guidance-on-functional-separation-0.pdf).

104 CA03, s 87. EECC Directive, art 68. See also Case C-217/04, *United Kingdom v European Parliament and Council* [2006] ECR I-3771, paras 48–55; Case C-424/07, *Commission v Germany*, 3 December 2009, paras 85–93 (2009 I-11431).

105 CA03, s 88.

106 CA03, s 91.

107 CA03, s 93.

under the EU Regulatory Framework, was started by Ofcom in early 2003 and later continued by Ofcom. The current form of the CA03 post-Brexit still requires Ofcom to carry out a market review every five years, and the most recent one at the time of writing was in 2021.<sup>108</sup>

This was the Wholesale Fixed Telecoms Market Review 2021-26, which led to modification of certain SMP conditions.<sup>109</sup> The relevant markets in question are the supply of:

- Wholesale access to Telecoms Physical Infrastructure for deploying a telecoms network in the UK (excluding the Hull area);
- Wholesale local access at a fixed location in WLA AREA 2;
- Wholesale local access at a fixed location in WLA Area 3;
- Leased line access in the LLA HNR Area;
- Leased line access in LLA Area 2;
- Leased line access in LLA Area 3;
- Interexchange connectivity in BT Only exchanges;
- Interexchange connectivity in BT+1 exchanges; and
- Interexchange connectivity in BT+2 exchanges.

The 12 SMP conditions applicable to these markets are the following:

- Network access on reasonable request (Condition 1);
- Specific forms of network access (Condition 2);
- Requests for new forms of network access (Condition 3);
- No undue discrimination (Condition 4);
- Equivalence of inputs (Condition 5);
- Basis of charges (Condition 6);
- Publication of a Reference Offer (Condition 7);
- Notification of charges and terms and conditions (Condition 8);
- Notification of technical information (Condition 9);
- Quality of service (Condition 10);
- Regulatory financial reporting (Condition 11); and
- Charge controls (Condition 12).

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<sup>108</sup> CA03, s84A(7).

<sup>109</sup> See 'Promoting investment and competition in fibre networks – Wholesale Fixed Telecoms Market Review 2021-26': <https://www.ofcom.org.uk/consultations-and-statements/category-1/2021-26-wholesale-fixed-telecoms-market-review>.

A summary of the changes to the SMP conditions based on the most recent market review is as follows:

- The definition of ‘Miscellaneous Ancillary Services’ in Condition 12E has been expanded:
  - Ethernet Access Direct: managed migration options, cancellation charges, termination charges, Ethernet Access Direct modify shift circuit charges;
  - Ethernet Backhaul Direct: upgrade charges, cancellation charges, shift charges, service features charges;
  - Wholesale Extension Service & Wholesale End-to-End Extension Service: upgrade charges, re-grade charges, additional charges, cancellation charges, circuit shift charges;
  - Backhaul Network Services: upgrade charges, additional charges, cancellation charges;
  - Openreach Network Backhaul Services: cancellation charges;
  - Backhaul Extension Service: additional charges, upgrade charges, circuit shift charges, cancellation charges;
  - Optical Spectrum Access: upgrade charges, cancellation charges, shift charges, service reconfiguration charges, abortive visit charges, amend order request charges, optical assist charges;
  - Optical Spectrum Extended Access: cancellation charges, shift charges, service reconfiguration charges;
  - Optical Spectrum Access Filter Connect: upgrade charges, cancellation charges, abortive visit charges; and
  - Optical Spectrum Access Filter Connect: upgrade charges, cancellation charges, abortive visit charges.
- The calculation formulas in Conditions 12F and 12.G have been updated.

### License Fees

CA03, section 38, empowers Ofcom to levy administrative charges on providers of electronic communications networks or services and certain other parties. The aggregate amount of charges may not, on a year-by-year basis, exceed the cost to Ofcom of carrying out its functions in relation to electronic communications.<sup>110</sup>

Under the administrative charging regime introduced by Ofcom,<sup>111</sup> an annual turnover-based administrative charge is payable by providers of electronic communications networks or services, and persons making available associated facilities, whose turnover from relevant activities exceeds £5 million.<sup>112</sup>

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<sup>110</sup> CA03, s 38(4)(a).

<sup>111</sup> Ofcom, ‘Licence and Administration Fees—Statement of Changing Principles’ (2005).

<sup>112</sup> ‘The Definition of ‘Relevant Activity’ for the Purposes of Administrative Charging’, Guidelines issued by the Director General of Telecommunications (2003). ‘Relevant

The level of the administrative charge is set as a percentage of the turnover on relevant activities. This percentage will be set by Ofcom for each charging year ending on 31 March. The turnover on relevant activities taken into account for each charging year is that for the 12 calendar months to 31 December in the preceding charging year, deducting sales rebates, value-added tax, and other taxes directly related to turnover.

There are turnover bands, and the percentage is applied to the bottom of the band in which the provider's turnover falls. The percentages for 2021–2022 have been set at 0.1064 per cent (networks and services sector), 0.01743–0.59591 per cent (various bands of television provider) and 0.121–0.273 per cent (radio sector) of relevant turnover in the calendar year ended 31 December 2019.<sup>113</sup> Ofcom has the power to issue a general demand for information in respect of turnover data for the purpose of calculating the applicable administrative charges. However, Ofcom will generally rely on a self-assessment by operators of their relevant turnover.<sup>114</sup>

In certain instances, however, Ofcom may use a different methodology to set licensee fees – and the so-called Administered Incentive Pricing (AIP). AIP is used to promote particular aspects of efficient use of spectrum, so it is mostly used in connection with WTA licenses (as to which *see further* below).<sup>115</sup>

AIP is calculated by reference to the 'opportunity cost', i.e. the value to society of the most valuable alternative use of the spectrum that is foregone by the fact that a particular license holder is using it.<sup>116</sup> Ofcom's reasoning for this pricing model is that it encourages users to hold only the spectrum that they value as highly as the best alternative user or use, and thus enables a well-functioning spectrum market.

When a spectrum is in excess demand, the fees will be set using the AIP model, but where there is not excess demand then the fee will simply reflect Ofcom's spectrum management costs. For example, in 2021 Ofcom consulted on a proposal to set license fees for the 412–414 MHz and 422–424 MHz bands using the AIP model, noting that excess demand was likely.<sup>117</sup>

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activities' are defined as follows: (1) the provision of public electronic communication services to end users; (2) the provision of electronic communication networks, electronic communication services and network access to communication providers; and (3) the making available of associated facilities to communication providers.

113 Ofcom's Tariff Tables 2016/17 (issued 30 March 2016).

114 CA03, s 135.

115 See Ofcom 'Wireless Telegraphy Act Licensing Policy Manual' (January 2018): [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0025/77209/licensing.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0025/77209/licensing.pdf).

116 See Ofcom 'SRSP: The revised Framework for Spectrum Pricing': [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0024/42909/srsp-statement.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0024/42909/srsp-statement.pdf).

117 See Ofcom, 'Setting licence fees for 412 MHz' (2021) consultation document: [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0008/220220/consultation-licence-fees-412-mhz.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0008/220220/consultation-licence-fees-412-mhz.pdf).



### **Modification and Revocation of Licenses**

To set, modify or revoke any of the GCs or SCs, Ofcom must publish a notice setting out its proposals, their effect, and the reasons behind such proposals specifying a period (of not less than one month) for representations to be made.

Where a modification to, or a revocation of, an Access-related Condition or an SMP Condition is sought, in addition to the above, Ofcom is required to carry out a market review in accordance with the provisions of the SMP regime described above, before modifying or revoking such a condition.

Once these procedures have been complied with, Ofcom is required to publish the terms of the proposed new condition, modification or revocation.<sup>118</sup> Modification or revocation of specific licenses (*e.g.*, granted under the WTA06) are discussed below.

### **Enforcement of Licenses**

#### *In General*

The CA03 confers significant enforcement powers to Ofcom and a right of civil action for breach of the conditions of entitlement.

#### *Enforcement Action by Ofcom*

Ofcom has the power to impose penalties of up to 10 per cent of the relevant turnover on persons who contravene a GC and/or a SC<sup>119</sup> and daily penalties of up to £20,000 per day for continued contraventions.<sup>120</sup> In either case, the penalty must be, in the judgment of Ofcom, appropriate and proportionate to the matter in respect of which it is imposed.<sup>121</sup> When Ofcom determines that there are reasonable grounds for believing that a contravention has occurred, it may send a notification of the contravention to the person believed to be in contravention, with details of the alleged contravention.

The notification must specify a period during which the person notified has an opportunity to make representations, bring him into compliance, or remedy the

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118 CA03, ss 48–50.

119 CA03, s 97 (1).

120 CA03, s 96B.

121 CA03, s 97. Ofcom published revised guidelines in December 2015 following a two-month consultation process, which attracted 14 responses (Ofcom, ‘Revising the penalty guidelines Consultation document’, 30 July 2015). The revised guidelines took effect immediately and are substantially the same as those proposed in the consultation. They attempt to create a more explicit link between the objective of deterrence and the size and turnover of the regulated company. Ofcom also makes clear that it will not necessarily be constrained by the penalties imposed in previous cases. *See* Francesco Liberatore, ‘UK Telecoms Regulator Adopts New Penalty Guidelines’, December 2015, *available at*: <http://www.mondaq.co.uk/x/454058/Antitrust+Competition/UK+Telecoms+Regulator+Adopts+New+Penalty+Guidelines>.

consequences of the contravention. The applicable period is normally one month unless extended by Ofcom.<sup>122</sup>

Once the period for making representations has expired and no steps have been taken for complying with the condition or remedying the consequences of the contravention, Ofcom may issue a reasoned confirmation decision, in which Ofcom may impose a requirement to take specific steps to comply with, or remedy the consequences of, the notified contravention, fix a reasonable time for the taking of those steps and impose a penalty. Ofcom may make an application for an injunction, specific performance of a statutory duty or other appropriate relief, to enforce compliance with the requirements of the confirmation decision.<sup>123</sup>

Entitlements may be suspended permanently when there have been serious and repeated contraventions, the imposition of penalties and the giving of confirmation decisions have failed to secure compliance, and Ofcom is satisfied that so doing is both appropriate and proportionate. Providing services while in suspension is an offence punishable by a fine.<sup>124</sup>

Ofcom also has special powers to deal with urgent cases, i.e., contraventions that have resulted in, or create an immediate risk of, a serious threat to public safety, public health or national security; and serious economic or operational problems for other communications providers or persons who make associated facilities available for users.<sup>125</sup>

In such cases, Ofcom has the power to give a direction restricting/suspending the person's entitlement to provide electronic communications networks or services or to make associated facilities available, either generally or in relation to particular networks, services or facilities.

Furthermore, in issuing such directions, Ofcom may impose such conditions on the contravening provider as it deems appropriate for the purpose of protecting the provider's customers, and may even attach conditions requiring the making of payments to the contravening provider's customers by way of compensation for loss suffered as a result of the suspension. Providing services in breach of such direction is an offence in itself punishable by a fine.<sup>126</sup> When a case is deemed urgent, the period that would otherwise be available for the making of representations may be shortened by Ofcom.

On 23 January 2017, Ofcom published a consultation document on potential changes to the enforcement guidelines. The proposed changes were aimed at

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122 CA03, s 94 (for SMP apparatus conditions) and s 96A (for any conditions other than SMP apparatus conditions).

123 CA03, s 96C.

124 CA03, s 103. It also is an offence to supply electronic communication apparatus while one is suspended from so doing.

125 CA03, s 98.

126 CA03, s 103.

introducing more transparency in, and streamlining of, Ofcom's enforcement procedures.<sup>127</sup>

The substantive changes proposed in the consultation included an update on the scope of the guidelines to cover new enforcement powers, and clearer guidance on decisions, publication of cases and the procedure for settlement of regulatory investigations.<sup>128</sup> Ofcom also proposed a suite of draft documents that provided specific guidelines for various types of investigation (ie, regulatory, Competition Act, Broadcasting Act).

The updates carried into the new Guidelines included the availability of Procedural Officers to deal with issues during regulatory/Competition Act investigations, regular monitoring by Ofcom of its enforcement activity, and the publication of regular updates about Ofcom's enforcement action. These procedures took effect from 28 June 2017 when they were published.

#### *Civil Action for Damages for Breach of Condition*

The CA03 also creates a statutory civil right of action for losses sustained as a result of a contravention of conditions of entitlement or non-compliance with requirements imposed under a confirmation decision or the conditions imposed under a direction issued in urgent cases or a direction to suspend services which is available to any person affected by the contravention.<sup>129</sup>

When the cause of action is the contravention of conditions of entitlement, proceedings may be brought only with the consent of Ofcom. Additionally, in such proceedings, it is a defense to show that all reasonable steps were taken and all due diligence exercised to avoid the contravention giving rise to the action.<sup>130</sup>

### **Licenses for Special Systems**

#### *Licenses for Systems Using Radio*

**In General.** It is a criminal offence to use radio systems ('wireless telegraphy'<sup>131</sup>) except under and in accordance with an individual license, a class license, or a

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127 See Francesco Liberatore, "UK Communications Regulator Consults on New Enforcement Guidance" (February 2017), available at: <http://www.squirepattonboggs.com/insights/publications/2017/02/uk-communications-regulator-consults-on-new-enforcement-guidance>.

128 See 'Ofcom's approach to enforcement' (28 June 2017) [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0016/102517/Ofcoms-approach-to-enforcement.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0016/102517/Ofcoms-approach-to-enforcement.pdf).

129 CA03, s 104.

130 Case C3/2011/1683, *BT v Ofcom* [2012] EWCA Civ 1051, para. 90.

131 WTA06, ss 116 and 117: 'wireless telegraphy' means emitting or receiving, over paths that are not provided by any material substance constructed or arranged for the purpose, of electromagnetic energy of a frequency not exceeding 3,000 gigahertz that (a) serves for conveying messages, sound or visual images (whether or not the

recognized spectrum access granted by Ofcom, unless exempt.<sup>132</sup> There are therefore three relevant licensing regimes for systems using radio in the United Kingdom, namely:

- Systems requiring (individual or class) WTA06 licenses;<sup>133</sup>
- Systems exempt from WTA06 licenses altogether;<sup>134</sup> and
- Systems subject to recognized spectrum access (RSA).<sup>135</sup>

**WTA06 Licenses.** The majority of systems using radio in the United Kingdom fall within the first category (WTA06 licenses), including existing public wireless network, maritime and aeronautical systems. These can be class licenses (by sector), individual licenses, shared access licenses or local access licenses. These latter two types of license were announced in July 2019 to make it easier for UK users to access radio spectrum on a shared basis.

WTA06 licenses are issued by Ofcom, upon application by a prospective licensee.<sup>136</sup> Normally, applications are processed within six weeks, except in cases that involve international co-ordination. Having regard to the desirability of promoting the optimal use of the electro-magnetic spectrum, Ofcom may reserve certain radio frequencies for allocation by way of auction or other bidding processes,<sup>137</sup> as it has

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messages, sound or images are actually received by anyone), or for operating or controlling machinery or apparatus; or (b) is used in connection with determining position, bearing or distance, or for gaining information as to the presence, absence, position or motion of an object or of a class of objects.

132 WTA06, s 8 and CA03, ss 172–182.

133 WTA06, s 8(1).

134 WTA06, s 8(3).

135 WTA06, s 18.

136 WTA06, s 8. The majority of license applications are made by completing the relevant application form (available from Ofcom's website or on request) and sending the form to Ofcom. Applications also can be sent electronically to Ofcom. For use of radio stations and networks that involve high antennas or powerful transmitting equipment being installed, part of the license issuing process might involve a process called 'site clearance'. The site clearance procedure enables existing users of the radio spectrum to conduct an assessment of a range of site-specific compatibility issues, eg, blocking, inter-modulation, obstructions and the like and, if there is a potential problem, to provide comments back to the Radio Site Clearance Committee (an inter-Governmental group) and 'hold' an application until a satisfactory solution has been agreed by all parties. The procedure does not take into account the effect of radio services on non-radio equipment, eg, electronic devices, unless there is a direct safety-of-life concern. The procedure does therefore consider aircraft and munitions, which could malfunction in the presence of radio transmissions. Site clearance should not be confused with obtaining planning permission to put up a mast site. Ofcom has no responsibility for planning permission that is a matter for local authority planning departments. Stations and networks for some locations and classes also require co-ordination arrangements with other countries before rights to use them can be granted. These reflect international agreements with those countries.

137 WTA06, s23(1).

done recently, for example, with the auctions for 5G frequencies<sup>138</sup> and Public Sector Spectrum Release (PSSR) frequencies.<sup>139</sup> The procedures for allocation of licenses must be open, objective, transparent, non-discriminatory, and proportionate and must promote competition and ensure the efficient use of spectrum.<sup>140</sup>

WTA06 licenses can be granted subject to such terms, provisions and limitations as Ofcom think fit,<sup>141</sup> but must be technology neutral. Any limitation relating to the type of technology that can be used under the license is only permitted if it is necessary for certain limited purposes, i.e., avoiding undue interference, protection of public health against electromagnetic fields, ensuring technical quality of service, maximization of spectrum sharing, efficient use of available spectrum and general interest objectives.<sup>142</sup>

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138 On 13 March 2020, Ofcom published finalised rules for the release of more mobile airwaves in the 700 MHz and 3.6-3.8 GHz bands via an auction, in order to improve mobile broadband and supporting the rollouts of 5G: <https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2020/mobile-airwaves-auction>.

139 On 26 October 2015, Ofcom set out plans to release more radio spectrum to meet growing demand for mobile broadband services, including telemedicine or, as Ofcom prefers to call it, telehealth. The current spectrum being made available comprises: (i) 2.3 GHz band: 40 MHz of spectrum between 2350 and 2390 MHz; and (ii) 3.4 GHz band: 150 MHz of spectrum above 3410 MHz and below 3600 MHz. It is no coincidence that a portion of this spectrum comprises of 2014's release of mHealth spectrum by the U.S. Federal Communications Commission, namely the 2360-2400MHz band. This spectrum was in fact decided upon with the agreement of the relevant global and local stakeholders that Ofcom are seeking to bring on board. On 3 December 2015, Ofcom decided to postpone the PSSR spectrum release to wait for the conclusion of the merger control reviews of the proposed mergers between EE/BT and Three/O2. See Ofcom Statement, 'Public Sector Spectrum Release (PSSR) Competition and auction design issues for the 2.3 and 3.4 GHz spectrum award, including reserve prices', 2015. On 16 November 2016, Ofcom set out new plans to release the new spectrum in the 2.3 and 3.4 GHz bands and notably set a cap of 42 per cent on the amount of 'immediately useable' spectrum which can be owned by an operator. This would in effect prevent BT/EE from bidding for any spectrum in the 2.3 GHz band because the operator currently owns 45 per cent of the immediately useable spectrum and the proposed release would bring that share down to 42 per cent. Ofcom's current spectrum management strategy going forward into the 2020s was outlined on 19 July 2021 (see [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0017/222173/spectrum-strategy-statement.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0017/222173/spectrum-strategy-statement.pdf)) and key focus areas include supporting wireless innovation, considering further options for local spectrum use, and promoting spectrum sharing.

140 EEC Directive, articles 45, 46, 48, 51, 52, and 93as implemented in the UK. In previous cases, state proposals (e.g., auctions or tenders) resulting in the accumulation of allegedly too much spectrum in a given frequency band have given rise to complaints under state aid rules (see, for example, Case C-431/07, *P Bouygues SA and Bouygues Telecom Sa against the judgment of the Court of First Instance*, delivered on 4 July 2007 in Case T-475/04, *Bouygues and Bouygues Telecom v Commission* [2007] C269/37), and non-discrimination rules (see Case C-462/99, *Connect Austria* [2003] ECR I-5197, paras 113–118).

141 WTA06, s 9(1).

142 WTA06, s 9ZA. As soon as reasonably practicable after 26 May 2016, Ofcom must review any limitations of this nature that were imposed before 25 May 2011 to bring

Once granted, the license authorizes the licensee to establish and use stations or install or use apparatus for wireless telegraphy, subject to the terms, provisions and limitations of that license, as Ofcom thinks fit.<sup>143</sup> However, Ofcom must ensure that such terms, provisions and limitations do not duplicate obligations that are already imposed on the licensee by virtue of the GCs or SCs,<sup>144</sup> as well as being objective, non-discriminatory, proportionate and transparent.<sup>145</sup> Most licenses issued by Ofcom may be renewed annually (unless stated in the license or the licensee wishes to surrender the license at the end of the year). Licenses are renewed upon payment of the renewal fee, for which Ofcom normally sends reminders, although the responsibility to renew a license lies with the licensee.

In 2013, Ofcom proposed to increase the fees for the use of legacy wireless frequency allocations in the 900 MHz and 1800 MHz bands more than fourfold in light of the money paid in recent 4G auctions. New base fee levels for 2015 were set at £1.128m per MHz per annum for the 900 MHz band and £0.815m per MHz per annum for the 1800 MHz band. These revised annual license fees took effect in two phases from 31 October 2015 and 31 October 2016 and are said to reflect full market value after completion of the UK 4G auction.<sup>146</sup> In 2015, Ofcom

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them in compliance, for example, by freeing spectrum previously reserved to a specific technology (so-called spectrum re-farming): WTA06, s 9ZB. See also Framework Directive, article 9: all types of technology may be used in the available frequency bands, only subject to proportionate and non-discriminatory restrictions aimed at avoiding harmful interference or achieving other specific public interest objectives — in particular, EU member states must make 900 MHz and 1800 MHz frequencies available for both 2G and 3G services and for any other application that can coexist with these services (Council Directive 2009/114/EC of 16 September 2009, amending Directive 87/372/EEC on the frequency bands to be reserved for the coordinated introduced for pan-European cellular digital land-based mobile communications in the Community, OJ 2009 L274/25, and Council Decision of 16 October 2009 on the harmonization of the 900 MHz and 180 MHz frequency bands for terrestrial systems capable of providing pan-European electronic communications services in the Community, 2009/1766/EC, C(2009) 7801, in OJ 2009 L274/32). On 7 October 2010, the CAT dismissed an appeal by mobile operator O2 against Ofcom, challenging Ofcom's refusal to allow deployment of 3G services in 900 Mhz frequencies (Case 1154/3/3/10, *Telefonica O2 Limited v Ofcom*, [2010] CAT 25). Ofcom adopted its refusal decision because, as a result of the dissolution of Parliament, the Government had failed to adopt the implementing legislation that Ofcom deemed necessary to give effect to EU spectrum re-farming rules. O2 argued that such rules are directly applicable and do not need to be transposed into national legislation to have effect. The Government eventually adopted the implementing legislation on 20 December 2010 (Directions to Ofcom 2010 Number 3024).

143 WTA06, s 9(1). Ofcom, 'Wireless Telegraphy Act Licensing - Terms, Provisions and Limitations' (2010). See also Cases A3/2007/0658 and 2007/0665, *Ofcom and T-Mobile v Floe Telecom Limited* [2009] EWCA Civ 47 and Case HT 11-102, *Arqiva et al v Everything Everywhere et al* [2011] EWHC 2016 (TCC).

144 WTA06, s 9(6).

145 WTA06, s 9(7).

146 Ofcom, 'Annual Licence Fees for 900 MHz and 1800 MHz Spectrum', 24 September 2015.

launched a Spectrum Management Costs analysis, aimed at (i) identifying spectrum license classes subject to cost-based fees, where there is a significant misalignment between WTA06 fees and spectrum management costs; and (ii) reviewing WTA06 fees, identified as misaligned, to create a fee structure which reflects a reasonable and consistent contribution to our spectrum management costs. This work is done as part of Ofcom's duty to ensure spectrum is used in the most efficient and effective way for the benefit of the United Kingdom.<sup>147</sup>

In 2021 Ofcom consulted on license fees for the 2100 MHz spectrum, proposing £0.567m per MHz for paired 2100 MHz spectrum and £0.290m per MHz for unpaired, applying from 1 January 2022. At the time of writing, Ofcom's decision and fee regulations are expected by the end of 2021.<sup>148</sup>

The name of the license holder is a unique part of the license and something that cannot be changed except, for instance, in relation to administrative changes of the details of a company.<sup>149</sup> Therefore, a change of the identity (or control) of the license holder from one person or legal corporate entity to another person or entity will normally require either the revocation of the license and the re-issue of the new license (but without any guarantee as to transferability)<sup>150</sup> or, if the license is tradable, a transfer of all or parts of the spectrum usage rights, pursuant to Ofcom's applicable spectrum trading regulations.<sup>151</sup> Ofcom may vary and revoke a WTA06 license for a number of reasons. Non-payment of license fees at the renewal interval for licenses which runs on from year to year is the most common reason for revocation.<sup>152</sup>

For all variations and revocations, Ofcom (except where the licensee consents) must give the licensee a notice stating the reasons for the revocation and

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147 Ofcom, 'Spectrum management costs and fees' Analysis 2015/2016.

148 Ofcom, 'Proposed annual licence fees for 2100 MHz spectrum' 2021.

149 Case HT 11-102, *Arqiva Limited et al v Everything Everywhere et al* [2011] EWHC 2016 (TCC), para 65.

150 Case HT 11-102, *Arqiva Limited et al v Everything Everywhere et al* [2011] EWHC 2016 (TCC), para 66.

151 CA03, s 168, and WTA06, s 30. Operators can transfer or lease their rights to use specific frequencies, subject to a short notification to Ofcom that is available on Ofcom's website (Ofcom application form OfW206) in accordance with the Wireless Telegraphy (Spectrum Trading) Trading Regulations 2004 (SI 3154). Ofcom is required to ensure that the accumulation of portions of radio spectrum does not result in a distortion of competition. See Case HT 11-102, *Arqiva Limited et al v Everything Everywhere et al* [2011] EWHC 2016 (TCC), para 75; and Ofcom Decision under Regulation 7(3) of the Wireless Telegraphy (Mobile Spectrum Trading) Regulations 2011 (Reference Numbers TNR-2011-07-031 and TNR-2011-07-032) concerning two spectrum trading applications from Orange.

152 Other causes of revocation include where: (1) a breach of the license has occurred, which means non-adherence to the terms and conditions of the license; (2) the licensee is not using the spectrum in a responsible manner (*e.g.*, if the licensee has previously breached another license's conditions); and (3) the use of the radio equipment is causing or contributing to undue interference, to the use of other authorized radio equipment.

specifying a period (generally a month) during which the licensee can make representations or, where a licensee is not complying with the terms of a license, comply with the license terms.<sup>153</sup> Ofcom's decision to vary or revoke a license may be appealed before the CAT. A decision of the CAT may be appealed to the Court of Appeal (England and Wales) or Court of Session (in Scotland) on points of law.

**License Exemptions.** There are currently a number of exemptions from the requirement for licensing under the WTA06.<sup>154</sup> To fall within an exemption, it is normally necessary for the licensed system to comply with appropriate standards and not to cause undue radio interference.

Exempted apparatus may not be used to provide a wireless telegraphy link by means of which a communication service is provided by way of business to another person. There is a sub-exemption that does permit the use of unlicensed WLAN, RLAN and point-to-point links for the purposes of providing a telecommunication service. The operation of so-called 'Wi-Fi hotspots' is, therefore, permitted without requirement for a license.

The most recent form of the Wireless Telegraphy (Exemption) Regulations came into force on 12 May 2021, allowing more spectrum to be used on a license-exempt basis by certain short-range devices such as Wi-Fi, smart meters and 'Internet of Things'. The changes can be summarized as follows:

- The lower 6 GHz band became available for Wi-Fi and other RLAN use, and the Dynamic Frequency Selection requirements for Wi-Fi channels in the 5.8 GHz band were removed;
- Technical parameters for certain categories of short-range devices were harmonized across several frequency bands;
- The 870 to 874.4 MHz band became more usable for data networks; and
- Equipment transmitting above 40 dBm in the 57 to 71 GHz band would cease to be exempt and be covered by a light licensing approach instead.

**RSA.** Grants of RSA are available to persons who transmit radio signals for reception in the United Kingdom, but who are not, for whatever reason, required to hold a license under the WTA06.<sup>155</sup> Examples of radio signals that fall with the RSA include transmission made from outside of the United Kingdom for reception in the United Kingdom, in particular, satellite downlinks, and scientific applications such as radio astronomy.

Ofcom may charge for grants of RSA in a similar way as for WTA06 licenses and the auctioning of grants of RSA also is permitted. Applications to obtain grants of RSA are voluntary. The effect of a grant of RSA is that the holder's interests must be taken into account by Ofcom in its management of the radio spectrum as if the

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<sup>153</sup> CA03, s 169; WTA06 Schedule 1 para 7(3).

<sup>154</sup> Wireless Telegraphy (Exemption) Regulations 2021.

<sup>155</sup> WTA06, ss 18-26.



holder had a WTA06 license. It allows users of the radio spectrum that are not subject to a licensing requirement under the WTA06 to effectively reserve a right of interest in the part of the spectrum relevant to their application. RSA grants also are tradable.

#### *Licenses for Systems Providing Broadcast Services*

Ofcom is generally responsible for all aspects of the regulation, including the licensing of systems providing broadcast services<sup>156</sup> (with the exception of the BBC<sup>157</sup> and the Welsh Authority<sup>158</sup>). The public service television licenses have been granted, and further licenses will only be issued on expiry, replacement or re-tendering of any of these licenses or if further public service channels are created. Public service television licenses and sound broadcasting service licenses can be issued by competitive tender.

The granting of licenses, other than public television service licenses and sound broadcasting service licenses, is normally straightforward provided that Ofcom is satisfied that the prospective licensee is a 'fit and proper person' and is not disqualified by statute from holding the license and that the proposed service is not contrary to the standard objectives laid out in the Act. A small fixed license fee is payable on application, and ongoing license fees are charged as a percentage of revenue of up to one per cent. Licensing of local cable systems has been abolished.<sup>159</sup>

#### *Licenses for Systems Using Satellite Services*

Uplinking and downlinking to and from satellites inevitably involves the use of wireless telegraphy and orbit resources. As such, an operator of a satellite earth station generally requires a WTA06 license, or the benefit of an exemption, as well as possibly an application to the ITU. Currently, Ofcom provides for the following licenses for systems using satellite services:

- Permanent Earth Station (PES);<sup>160</sup>
- Transportable Earth Station (TES);<sup>161</sup>

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156 CA03, ss 211 *et seq* (television) and ss 245 *et seq* (radio).

157 CA03, s 198.

158 CA03, ss 203–207.

159 CA03, ss 213.

160 Ofcom, 'Licensing Procedures Manual For Satellite (Permanent Earth Station) Applications' (2018) for a satellite earth station operating from a permanent, specified location to a satellite, normally one that is in geostationary orbit. A PES is typically used to provide telephony and data backhaul, broadcast feeder links, private corporate networks or satellite telecommand and control.

161 Ofcom, 'Licensing Procedures Manual For Satellite (Transportable Earth Station) Applications' (2018) for a satellite earth station operating from a specified location to a satellite in the fixed satellite service. TES operations are commonly associated with the broadcasting industry, where they are used to provide outside broadcast links either back to a studio or directly to a broadcasting satellite. Installations range from small fly-away terminals to large vehicles.

- Very Small Aperture Terminal (VSAT);<sup>162</sup>
- Non-Fixed Earth Station (NFES);<sup>163</sup>
- Non-Geostationary Earth Station (NGES);<sup>164</sup> and
- Mobile Satellite Systems (MSS).<sup>165</sup>

Applications for all of these licenses may be submitted online, using a form available on Ofcom's website. License fees apply and will be calculated according to a specified formula for each license.<sup>166</sup> It is not necessary for satellite network operators to hold a license when providing services to satellite earth stations on vessels (ESV) in the band 14.0–14.25 GHz. The requirement for vessels to hold a Notice of Variation (NoV) to the ship's radio license for the installation of an ESV remains. The removal of the requirement for a network license only applies to the ESV satellite networks in the band 14.0–14.25 GHz.<sup>167</sup>

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162 Ofcom, 'Licensing Procedures Manual For Satellite (Earth Station Network) Applications' (2018) for systems operating as part of a network of terminals where all traffic is routed via satellite to and from a central control hub earth station. Applications include: consumer and SOHO broadband; Point of Sale communications; private corporate networks; and remote monitoring for the utilities industries.

163 Ofcom, 'Licensing Procedures Manual for Satellite (Non-Fixed Satellite Earth Station) Applications' (2018).

164 Ofcom, 'Licensing Procedures Manual for Satellite (Non-Geostationary Earth Station) Applications' (2018).

165 The Authorisation of Frequency Use for the Provision of Mobile Satellite Services (European Union) Regulations (as amended) SI/2010/672, implementing EU Decisions 2009/449/EC and No 626/2008/EC. Two operators (Inmarsat Ventures Limited and Solaris Mobile Limited) have been selected to provide mobile satellite services throughout the EU: *see* European Commission paves the way for European mobile satellite services, Press Release IP/09/770. On 11 March 2015, Ofcom issued compliance notices to Inmarsat Ventures Limited and Solaris Mobile Limited setting out steps they must take to comply with conditions that came with some of their spectrum holdings. In particular, their authorizations required them to be providing these services by 14 May 2011. By that date, both companies had not yet taken the necessary steps to meet their commitments under the assigned frequencies. As a result, Ofcom notified both companies that they must put this spectrum to use no later than 1 December 2016. If the companies do not meet these requirements by the dates specified, Ofcom will consider taking further regulatory action, in conjunction with other EU member states. This could include a fine and/or revocation of that company's authorization in the United Kingdom.

166 The Wireless Telegraphy (Licence Charges) Regulations (as amended) SI/2011/1128, pursuant to WTA06, ss 12, 13(2), and 122(7). Before making these regulations, Ofcom must give notice of, and conduct a public consultation on, its proposal to do so in accordance with WTA06, s 122(4).

167 Ofcom, 'Policy guidance regarding authorisation for Earth Stations on Vessels (ESVs)' (2010).

## Terminal Equipment

### Approval Procedures

The Radio Equipment Regulations 2017 (RE Regulations) prescribe the essential requirements that must be satisfied by terminal equipment (electronic communications apparatus) in the United Kingdom. They prohibit such equipment from being placed on the market or put into service until certain provisions have been complied with. The RE Regulations replace the Radio Equipment and Telecommunications Terminal Equipment Regulations 2000 (RTTE Regulations), which needed to be updated in order to conform with the Radio Equipment Directive (RED) 2014/53/EU. The relevant case law under the previous RTTE Directive, Directive 1999/5/EC, may remain useful where provisions have not substantially changed.<sup>168</sup> The Radio Equipment Directive excludes wired equipment but covers broadcast TV and radio receivers and radio determination equipment. Equipment covered under the Radio Equipment Directive must also comply with the Low Voltage Directive 2014/35/EU (but without limitation on voltage) and the Electromagnetic Compatibility (EMC) Directive 2014/30/EU.

Once the appropriate essential requirements have been complied with, the putting into service of apparatus for its intended purpose is allowed and connection of the terminal equipment to appropriate interfaces cannot be refused on technical grounds<sup>169</sup>, whereby Member States can only introduce additional requirements for reasons related to the effective and efficient use of the radio spectrum, the avoidance of harmful interference, the avoidance of electromagnetic disturbances or public health.

### Withdrawal of Approvals

Apparatus covered by the scope of Radio Equipment Directive 2014/53/EU is presumed to conform to the essential requirements and therefore with the safety standards to which it refers.<sup>170</sup> The installation of such apparatus may be impeded only under the conditions laid down by that Directive itself.

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168 Joined Cases C-388/00 and C-429/00, *Radiosistemi* [2002] ECR I-5845, para 47; Case C-13/01, *Safalero Srl* [2003] ECR I-8679, paras 43–46; Case C-132/08, *Lidl Magyarország Kereskedelmi bt*, 30 April 2009, paras 41, 42, and 45 (2009 I-03841); Case C-296/00, *Carbone* [2002] ECR I-04657, paras 28, 29, 33, and 35; Case C-314/93, *Rouffeteau* [1994] ECR I-3274, paras 6–8 and 11; Joined Cases C-46/90 and C-93/91, *Lagauche* [1993] ECR I-5267, paras 40 and 41; Case C-202/88, *France v Commission* [1991] ECR I-1223, paras 51–52; Case C-18/88, *GB-Inno-BM* [1991] ECR I-5941, paras 25–26; Case C-92/91, *Criminal Proceedings against Neny* [1993] ECR I-5383, para 15; Case C-69/91, *Criminal Proceedings against Gillon* [1993] ECR I-5335, para 16; Case C-13/01, *Safalero Srl* [2003] ECR I-8679, paras 49, 50, and 54–56.

169 Cases A3/ 2007/0658 and 2007/0665, *Ofcom and T-Mobile v Floe* [2009] EWCA Civ 47.

170 Article 16 of the Radio Equipment Directive.

Where Ofcom takes the view that the conformity with a harmonized standard does not guarantee compliance with the essential requirements of that Directive which that standard is supposed to cover, Ofcom may, pursuant to article 5 thereof, refer the matter to the Telecommunications Conformity Assessment and Market Surveillance Committee. In the case of shortcomings of harmonized standards with respect to the essential requirements, those standards may be withdrawn only in accordance with the procedure set out in article 5 of Directive 1999/5.<sup>171</sup>

Where apparatus that was declared to be compliant with the essential requirements risks causing serious damage to a network or harmful radio interference or harm to the network or its functioning, the operator may be authorized to refuse connection, to disconnect such apparatus or to withdraw it from service. In case of emergency, an operator may disconnect apparatus if the protection of the network requires the equipment to be disconnected without delay and if the user can be offered, without delay and without costs for him, an alternative solution. The operator shall immediately inform Ofcom. Ofcom may notify the Commission, which must convene a meeting of the Telecommunications Conformity Assessment and Market Surveillance Committee for the purpose of giving its opinion on the matter.

### **Marketing and Advertising**

The procedures for conformity assessment and for drawing up a declaration of conformity are the same as those set out in article 10 of RTTE Directive 1999/5/EC. The requirements for CE marking correspond to those set out in article 12 of RTTE Directive 1999/5/EC. The information to be provided on or accompanying the apparatus includes its intended use and a declaration of conformity to the applicable essential requirements.

In the case of radio equipment, the declaration of conformity must be accompanied by sufficient information to identify the EU member states where it is intended to be used and information on any restrictions or requirements for authorization of the use of the radio equipment that may apply in certain member states. In the case of telecommunications terminal equipment, it must be accompanied by sufficient information to identify the interfaces of public telecommunications networks to which the equipment is intended to be connected.

In the case of radio equipment using frequency bands whose use is not harmonized throughout the EU, notice in writing of the intention to place such equipment on the market in the United Kingdom must be given to Ofcom.<sup>172</sup> The 'responsible person' subject to these obligations is the manufacturer of apparatus or his

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171 Case C-132/08, *Lidl Magyarország Kereskedelmi bt*, 30 April 2009, paras 22, 29–32, 43, and 44 [2009] ECR I-3841.

172 The notice must contain: (1) such information as is required by Ofcom about the radio characteristics of the equipment, in particular its frequency bands, channel spacing, type of modulation and RF power; and (2) where appropriate, the identification number of all the notified bodies used.

authorized representative within the EU, or any other person who places the apparatus on the market.

Apparatus may not be regarded as being placed on the market where, broadly speaking, that apparatus is intended to be exported or re-exported or is imported for further processing or integration into another product (although, in the latter case, compliance with the above regulations is still required in respect of the end-product prior to it being placed on the market).

In addition, apparatus not compliant with the above obligations may be displayed at a trade fair, exhibition or demonstration if a notice is displayed in relation to the apparatus stating that it does not satisfy the provisions of the RTTE Regulations and that it may not be placed on the market or put into service until those provisions are satisfied.

### **Electromagnetic Compatibility**

As mentioned above, electronic communications apparatus which conform to the Radio Equipment Directive must also comply with the EMC Directive.<sup>173</sup>

### **Domestic Resale Restrictions**

Article 34 of the TFEU no longer applies in the United Kingdom. . Equipment imported from outside the EU may attract import tariffs. In addition, the person importing such goods for placing them on the market in the United Kingdom must ensure compliance with the regulations described above.<sup>174</sup>

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173 Electromagnetic Compatibility Regulations 2016, s 74.

174 Most of the harmonising legislation that existed in the UK before 30 December 2020 has become retained EU law via the European Union Withdrawal Act 2018, therefore old case law under Article 34 TFEU may still be relevant, but the UK can now depart from it. Article 34 of the TFEU precludes legislation and national administrative practice which — in the context of a system where matters concerning conformity assessment procedures for the purposes of placing radio equipment on the market and putting such equipment into service have been delegated to the administrative authorities, to be decided at their discretion — prevented economic operators from importing, marketing or holding in stock, with a view to selling, radio equipment that has not undergone national type-approval, and which does not admit other forms of evidence, equally reliable but less burdensome to obtain, to prove that such equipment is in conformity with requirements concerning the proper use of the radio frequencies authorized under national law: Joined Cases C-388/00 and C-429/00, *Radiosistemi* [2002] ECR I-5845, para 47; Case C-13/01, *Safalero Srl* [2003] ECR I-8679, paras 43–46; Case C-132/08, *Lidl Magyarország Kereskedelmi Bt*, 30 April 2009, paras 41, 42, and 45 [2009] ECR I-03841. However, article 34 of the TFEU did not preclude national rules which prohibit traders, with penalties for infringement, from importing terminal equipment which has not been approved for release for consumption, possessing it with a view to sale, selling, distributing or advertising it, even if the importer, holder or vendor has clearly stated that such equipment is intended solely for re-export, where there is no certainty that it will actually be re-exported and is

## Radio Communications Frequency Management

The United Kingdom is a member of the ITU and is obliged to manage radio spectrum in accordance with the ITU's Radio Regulations. Co-ordination of spectrum allocation and allotment also is subject to regulation at EU level.<sup>175</sup> Within the constraints of these international and EU frameworks, Ofcom has primary responsibility for the civil use of radio spectrum.<sup>176</sup>

Ofcom is under a duty to produce and publish a national Plan for Frequency Authorization that sets out the frequencies that have been allocated for particular purposes and are available for assignment.<sup>177</sup> Ofcom carries out regular reviews of the use of spectrum, with a view to ensuring that spectrum is being efficiently managed and put to the maximum benefit.<sup>178</sup> Ofcom must also provide advice and assistance to persons complaining of interference.<sup>179</sup>

## Broadcasting

### In General

#### *Legal Sources and Authorities*

As mentioned above, Ofcom is responsible for all aspects of the regulation of broadcasting,<sup>180</sup> with the exception of the BBC<sup>181</sup> and the Welsh Authority (S4C).<sup>182</sup> From 3 April 2017, Ofcom has regulated the BBC under the BBC Royal Charter.

#### *Types of Broadcasting Services Regulated and Distinguished*

Broadcasting services can be broadly divided into the following categories:

- Television program services;
- Radio program services; and
- Public service channels for television programming.<sup>183</sup>

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therefore not suitable for connection to the public network: Case C-314/93, *Rouffeteau* [1994] ECR I-3274, paras 6–8 and 11; Joined Cases C-46/90 and C-93/91, *Lagauche* [1993] ECR I-5267, paras 40–41.

175 EECC Directive, arts 4, 45 and 51. Case C-380/05, *Centro Europa 7 Srl* [2008] ECR I-349, paras 72–76, 79, 80, 85, 86, and 93–115.

176 WTA06, s 1.

177 WTA06, s 2.

178 WTA06, s 3.

179 WTA06, s 4.

180 CA03, ss 211 *et seq* (television) and ss 245 *et seq* (radio).

181 CA03, s 198.

182 CA03, ss 203–207.

183 Licensees in this category are under particular obligations regarding program content, such as quality and diversity.

*Types of Broadcasting Media Regulated and Distinguished*

Broadcasting media can be broadly divided into the following categories:

- Traditional terrestrial analogue broadcasting;
- Terrestrial digital broadcasting through digital multiplexes;
- Satellite broadcasting; and
- Distribution through cable networks or other electronic communications networks.

**Regulation of Various Services and Installations***In General*

The transmission of a broadcast, whether via analogue, digital, satellite, cable or other electronic communications networks, is regulated like any other electronic communications service or network (as to which, see above), subject to the conditions of entitlement and wireless telegraphy regulations, to the extent that their service uses radio spectrum. The content transmitted over such networks is subject to the following provisions.

*Services Provided by BBC and Welsh Authority*

Television and radio programs provided by the BBC are not commercial. They are provided under the Royal Charter granted to the British Broadcasting Corporation in 1927, which has been successively renewed ever since. The latest Royal Charter was granted to the BBC in 2017, and it will expire on 31 December 2027. The new Royal Charter makes the BBC regulated by Ofcom and it is run by a new BBC unitary board. The BBC is funded by the license fee charged on television receiver licenses.

The other television service outside the remit of the regulatory regime for independent television is that provided by S4C (Sianel Pedwar Cymru). This authority is constituted in accordance with provisions of the Broadcasting Act 1990 and the CA03,<sup>184</sup> and its functions are laid down in those provisions.

*Licensed Public Service Television Programs*

The category of licensed public service television programs comprises, in essence, the traditional analogue terrestrial independent television services. These are:

- National and regional Channel 3 services;
- Channel 4 service; and
- Channel 5 service.

Together, they are referred to as licensed public service channels. All licensed public service channels are currently mainly financed through advertising revenues.

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<sup>184</sup> Broadcasting Act 1990, ss 56–64; CA03, ss 203–207.

Licenses for these public service channels and the public teletext service were originally issued under the provisions of the Broadcasting Act 1990. In 2004, Ofcom issued replacement licenses for digital broadcasting to all Channel 3, 4 and 5 broadcasters to facilitate the planned switchover of all public television from analogue to digital.

This switchover began in 2008 and was completed in 2012. CA03, section 264, requires Ofcom to report on the effectiveness of the existing licensed public service broadcasters and the BBC and S4C in the delivery of their public service broadcasting (PSB) obligations, and to make recommendations for the continuation of public service broadcasting in the years ahead.<sup>185</sup>

### *Teletext*

Channels 3, 4 and 5 used to operate a teletext service. The public service, provided by Teletext Ltd, provided text pages behind the analogue broadcasts of Channel 3 and Channel 4 on digital terrestrial television. On 16 July 2009, the Daily Mail & General Trust plc announced that it would be handing back its PSB license and shut down the teletext service.

Teletext Ltd stopped providing public teletext services in December 2009 and its license was revoked by Ofcom in January 2010. The BBC has also announced that Ceefax, its teletext service, has been phased out. The full service is no longer carried on by any digital services, although many channels on Sky still broadcast teletext subtitles. Teletext has ended in each region following the digital switchover.

### *Multiplexes*

As stated above, cable operators, operators of broadcasting facilities (whether analogue or digital), satellite operators and other persons who distribute programs by means of electronic communications networks do not require any broadcasting license. They remain subject to the regulatory regimes for electronic communications networks and wireless telegraphy described above, where applicable. However, one exception exists for multiplexers for historical reasons. The Broadcasting Act 1996 introduced television multiplex services and required a license for the provision thereof.

A television multiplex service is the packaging of television program services in digital form for terrestrial broadcasting. Simply, it is a group of television channels that are mixed together (multiplexed) for broadcast over a digital

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<sup>185</sup> In 2013, the Annual Report on PSB, which focused on how effectively, taken together, the designated public service broadcasters (BBC, Channel 3, Channel 4, Channel 5, S4C and Teletext) are meeting the purposes set out for them in the CA03, was published. Ofcom noted that audiences continue to value PSB programming. Ofcom's fourth review of PSB, published in July 2016, shows that audience ratings regarding the importance of the PSB purposes and characteristics remain high. The 2021 review highlighted the fact that some quotas were not met in 2020 due to COVID-19 restrictions on production.



television channel and separated out again (demultiplexed) by the receiver. The existing television multiplex service licenses were awarded under the Broadcasting Act 1996.

The current multiplexes include Mux 1, Mux 2, Mux A, Mux B, Mux C, Mux D, Mux E, Mux L, Mux Northern Ireland and Mux Manchester. Multiplex 1 is allocated to the BBC, and it is licensed under the WTA06 and not under the Broadcasting Act 1996. Multiplex B also is allocated to the BBC. Multiplex 2, which transmits Channel 3 and Channel 4, has been licensed to Digital 3 and 4 Limited, a consortium of ITV plc, STV Group plc and Channel Four Television Corporation.

Multiplex A has been granted to SDN Limited, a company now wholly owned by ITV plc. Part of the capacity on Multiplex A is reserved for services provided by Channel 5, S4C in Wales and Gaelic programming in Scotland. The remaining capacity is available for the provision of services by other suppliers. Multiplexes B, C and D contain Freeview and Arqiva channels.

Following the digital switchover, a multiplex services license under the Broadcasting Act 1996 is only required if the WTA06 license for the associated radio spectrum contains a condition that such a license is required.<sup>186</sup> A parallel regime to that described above for television multiplexes exists for digital radio multiplexes.<sup>187</sup>

#### *Digital Television Program Services*

A digital television program service (DTPS) is a service consisting of the provision of television programs comprising wholly or mainly of images capable of being seen as moving pictures with a view to their being broadcast on a digital television multiplex for reception by members of the public. DTPS does not include the public service channels and the teletext service.

In essence, DTPS is the category for non-public service television program providers wishing to provide programs through available capacity on one of the multiplexes A–D. DTPS licenses are granted in respect of a particular digital television program service provider rather than an individual digital television program service. Each license can cover one or more digital television program services on one or more television multiplexes.

#### *Digital Television Additional Services*

Digital television additional services (DTAS) are television services broadcast in digital form on a digital television multiplex that are not public television services or digital television program services. In essence, this category comprises digital teletext and other non-moving image services broadcast on a digital multiplex.

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<sup>186</sup> CA03, s 241(4).

<sup>187</sup> CA03, ss 258 *et seq.*

Licenses are granted in respect of a particular DTAS provider rather than an individual DTAS service. Each license can cover one or more DTAS on one or more television multiplexes. Licenses will, however, be valid only for those services the details of which the licensee supplies from time to time to Ofcom and to which Ofcom agrees.

#### *Television Licensable Content Services*

A television licensable content service (TLCS) is a service provided in digital or analogue form broadcast from a satellite or distributed using an electronic communications network that is to be made available for reception by members of the public and consists of television programs (including text services) or electronic program guides, or both, and which does not fall into any of the other categories described above.<sup>188</sup> In essence, TLCS is the catch-all category for non-public service television program providers wishing to provide programs through satellite, cable or other electronic communications networks (except digital multiplexes).

TLCS replaces the previously existing separate categories of satellite television services and licensable program services which were established under the Broadcasting Act 1990. There is no limit to the number of TLCS licenses that can be held by one person and, unlike DTPS, TLCS licenses are granted in respect of a particular licensable service, rather than in relation to a particular service provider. A service provider providing three separate services will, therefore, need three licenses.

The policy of one license per service applies equally to services that utilize only part of a cable or satellite channel or, as with a near video-on-demand service, comprises programming spread across a number of channels. In October 2010, Ofcom clarified their position on TLCS, saying that for more than one feed to be a single TLCS, the public must be able to view the same television programs at the same time on both services. Feeds with different program schedules will need separate licenses.

Therefore, feeds of different editorial content with the same or different advertisements also are likely to require separate licenses, as are feeds of the same editorial content but with different, or differently scheduled, advertisements. Some services remain outside of the scope of the TLCS license and are thus unlicensed. In broad terms, TLCS does not include Internet services, pure video on demand services, and two-way services (such as a videophone).

Furthermore, TLCS does not include a service which is distributed by means of an electronic communications network only to persons who are within a single set of premises and that network is wholly within those premises and not connected to an external electronic communications network. In 2013, Ofcom decided to levy fees on TLCS providers for their use of wireless spectrum.

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<sup>188</sup> CA03, ss 232–240.

*Restricted Television Services*

Restricted service licenses (RSLs) cover the usage of otherwise redundant analogue frequencies on a leasehold basis for broadcasts to a particular establishment or defined location or for a particular event.

*Radio Services*

Broadcast radio licenses fall into the same broad categories as television broadcast licenses.<sup>189</sup> On 2 July 2010, Ofcom published a consultation on proposals relating to the renewal of radio multiplex licenses.

As a result of the consultation, Ofcom confirmed that it would not set any additional coverage obligations for the national radio multiplex license holder, Digital One, or for any local licenses. All licensees, however, were invited to submit a technical plan showing how current levels of coverage would be provided throughout the period of the renewed license.

Ofcom has also introduced small scale multiplex licenses, with 25 having been awarded by the end of July 2021. This is to enable access to the UK's digital radio platform for smaller stations and stations that have previously internet-only, by granting licenses that cover smaller geographical areas.<sup>190</sup> A separate license is required for each multiplex being operated, and a licensee can hold several such licenses. Individual radio stations still need their own digital sound programme services license too.

*Video-on-Demand*

Video-on-demand (VOD) means a service provided by a media service provider for the viewing of programs at the moment chosen by the user and at their individual request on the basis of a catalogue of programs selected by the media service provider.<sup>191</sup> Contrary to programs provided by a media service provider at a scheduled time and watched simultaneously by viewers (linear services), VOD normally includes on-demand content selected by viewers over an electronic communications network (typically mobile devices or the internet) for watching at a time of their choice.

Because users have different degrees of choice and control over VOD, only a basic tier of rules applies to them, including provision of certain information,<sup>192</sup> prohibition to broadcast harmful material,<sup>193</sup> prohibition of advertising of, and sponsorship from, certain products (eg, cigarettes, and drugs) and minimum advertising quality standards,<sup>194</sup> prohibition of product

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189 CA03, ss 245 *et seq.*

190 See Ofcom, 'Small-scale radio multiplex licences' (2021).

191 CA03, s 368A (as modified by the Audiovisual Media Services Regulations 2020).

192 CA03, s 368D.

193 CA03, s 368E.

194 CA03, s 368F.

placement (with some exceptions),<sup>195</sup> and general promotion and distribution of European works.<sup>196</sup>

Failure to comply with these provisions could expose the VOD provider to penalties of up to five per cent of its relevant turnover or £250,000, whichever is the greater amount.<sup>197</sup> In serious contravention cases, the VOD provider may be suspended or restricted from continuing its service.<sup>198</sup>

### *New Media*

At present, no formal regulations apply to broadcasting to mobile devices or IPTV, above and beyond those that apply in any event to the network operator (*e.g.*, the relevant WTA06 license in the case of 3G operators) and the relevant content or channel provider (*e.g.*, a TLCS license).

The four major MNOs in the United Kingdom did, however, sign up to a Code of Practice in 2004 designed to help them self-regulate broadcasting content available on mobile devices which was updated in 2009 and 2013. The Code of Practice is intended to help mobile operators to classify content that is suitable only for 18-year-olds and over.

### **Attempts to Regulate Foreign Broadcasts**

Before the UK's exit from the EU, a provider of a television or radio service fell under the United Kingdom's jurisdiction where that provider was established in the United Kingdom or made use of an uplink in the United Kingdom (the so-called 'country of origin principle'). For television services, 'establishment' is defined in accordance with articles 49–55 of the TFEU.

As a general rule,<sup>199</sup> the United Kingdom could not restrict which broadcasts people received or what programs foreign broadcasters retransmitted in the United Kingdom, provided that the broadcasts comply with the EU Audiovisual Media Services Directive in the country where they originate. Since the UK's exit from the EU, the UK now follows a destination system, meaning that television services made available in the UK must be licensed and regulated by Ofcom. This is not the case for countries that are signed up to the European Convention on Transfrontier Television (ECTT); the UK Broadcasting (Amendment) (EU Exit)

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195 CA03, s 368H.

196 Directive 2018/1808/EU of 14 November 2018 on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the provision of audiovisual media services (Audiovisual Media Services Directive), art 18. This modifies the previous Audiovisual Media Services Directive 2010/13/EU to ensure that at least a 30 per cent share of works in VOD service providers' catalogues are European and enjoy prominence. The UK implemented this legislation via the Audiovisual Media Services Directive Regulations SI 2020/1062, which are still in force post-Brexit despite being derived from EU law.

197 CA03, s 368J.

198 CA03, s 368K.

199 Audiovisual Media Services Directive, art 3.

Regulations 2019 implemented the ECTT in the UK, so the ‘country of origin principle’ described above still applies to ECTT countries and they do not need a license from Ofcom to broadcast into the UK. However, broadcasters in EU countries that are not signed up to the ECTT will have to apply for a license from Ofcom.

Furthermore, the DCMS, upon application by Ofcom, can restrict the reception of unsuitable content that may not be banned in its country of origin but violates local laws in the United Kingdom.<sup>200</sup> This is governed by the Broadcasting Code produced by Ofcom, which implemented the Audiovisual Services Directive 2010/13/EU (as amended by Directive 2018/1808/EU), and only allows such restrictions under certain exceptional circumstances including and serious violations against human dignity (incitement to hatred) or children (*eg*, pornography, and gratuitous violence), or a serious and grave risk to public health or security.<sup>201</sup>

Restrictions must in any event be proportionate and applied only in the United Kingdom. The country where the content originates must be given advance notice.

### **Ownership Restrictions, Cross Ownership Restrictions, Foreign Participation**

#### *Ownership Restrictions*

There are a number of restrictions on who may hold broadcasting licenses.<sup>202</sup> The following are among those who are disqualified from holding a broadcasting license or from controlling a licensed company:

- A local authority, except where the service is provided exclusively for the purposes of carrying out the functions of a local authority;
- A political body;
- A religious body, in relation to certain types of license;
- A company controlled by any of the above or by their officers or associates; and
- An advertising agency or any company controlled by such an agency or in which it holds more than a five per cent interest.<sup>203</sup>

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200 CA03, s 329. Foreign Satellite Service Proscription Orders 1993 (SI 1993/1024), 1995 (SI 1995/2917), 1996 (SI 1996/2557), 1997 (SI 1997/1150), 1998 (SI 1998/1865 and SI 1998/3083) and 2005 (SI 2005/20).

201 Audiovisual Media Services Directive 2018/1808, art 4, as implemented by Ofcom’s ‘Broadcasting Code’ (2020).

202 Broadcasting Act 1990, Schedule 2 Part II.

203 Ofcom recently consulted on the future of media plurality in the UK and as of 17 November 2021, suggested that this latter prohibition be removed. It remains to be seen whether the Secretary of State will implement this recommendation. See ‘Ofcom: the future of media plurality in the United Kingdom’: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0019/228124/statement-future-of-media-plurality.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0019/228124/statement-future-of-media-plurality.pdf).

Ofcom may determine, in certain circumstances, that a person with less than a 50 per cent share can be deemed to nevertheless control a company. Ofcom may revoke any existing license where a change of control or function in the licensee that renders him ineligible under the above criteria takes effect.

#### *Cross-Ownership Restrictions*

Cross-media ownership restrictions in the United Kingdom were relaxed with the entry into effect on 15 June 2011 of the Media Ownership (Radio and Cross-media) Order 2011, Number 1503. As a result, all previous local media ownership restrictions have largely been repealed.

However, some limits remain at national level. For example, there is a limit to joint ownership of national newspapers and Channel 3. No publisher controlling more than 20 per cent of the national newspaper market (or company holding a 20 per cent interest in such a national newspaper publisher) may itself hold a Channel 3 license or more than a 20 per cent stake in a Channel 3 company. Conversely, no Channel 3 company may hold more than a 20 per cent stake in a national newspaper publisher.

#### *Foreign Participation*

The provisions previously contained in the Broadcasting Act 1990 preventing persons not resident or established in the European Economic Area (EEA) from holding broadcasting licenses have been repealed by the CA03. There are thus no longer any foreign ownership restrictions in the United Kingdom.

### **License Conditions**

Providers of ‘appropriate networks’ have a must-carry obligation with respect to certain television programs. An ‘appropriate network’ is an electronic communications network by means of which public electronic communications services are provided that are used by a significant number of end-users as their principal means of receiving television programs.

Cable networks primarily fall into this category, but its definition is flexible enough to accommodate delivery of television programs through other means in the future. The must-carry obligations form part of the General Conditions of Entitlement applicable to ECN providers.<sup>204</sup> The television services that must be carried by operators of appropriate networks currently are included in a list that can be amended by the DCMS. The following television services are currently included in the must-carry list:

- A service of television programs provided by the BBC in digital form;
- Channel 3 services, so far as provided in digital form;

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204 General Conditions of Entitlement, GCA5.

- Channel 4, so far as provided in digital form;
- S4C digital;
- Digital Channel 5, so far as provided in digital form; and
- Digital public teletext service.

Corresponding obligations are imposed by the CA03 on the providers of public service television and any other providers that may be added to the must-carry list. Such providers must offer their television program service for distribution to all appropriate networks. In addition, providers of public service television and any other television services that may be specified by the DCMS must offer their television program service to all satellite services available for reception in the United Kingdom. In addition, there is a must-provide obligation imposed on television program providers listed in the must-provide list. This list is currently the same as the must-carry list, but can be amended by the DCMS. Television program providers under a must-provide obligation must make all necessary arrangements to ensure that their program can be received free of charge anywhere in the intended area or the whole of the United Kingdom, as the case may be.

### **Net Neutrality**

The EU adopted a new regulation on net neutrality in 2015 which came into effect starting 30 April 2016 (Net Neutrality Regulation).<sup>205</sup> The Net Neutrality Regulation was implemented in the UK by the Open Internet Access (EU Regulation) Regulations 2016 (Open Internet Regulations), and has not been repealed since Brexit.

The Net Neutrality Regulation requires that providers of internet access services treat all traffic equally when providing internet access services to the public, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used. An exception is included which allows such providers to implement reasonable traffic management measures so long as they are transparent, non-discriminatory and proportionate and shall not be based on commercial considerations.<sup>206</sup>

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205 Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service, and users' rights relating to electronic communications networks and services and Regulation (EU) 531/2012 on roaming on public mobile communications networks within the Union (OJ 2015 L301/1).

206 Net Neutrality Regulation, Article 3.

## Network Interconnection

### Regulatory Background

In principle, access<sup>207</sup> and interconnection<sup>208</sup> are subject to the simultaneous application of sector-specific rules and competition law.<sup>209</sup> Therefore, any service or network provider faced with access and interconnection problems could submit a complaint to Ofcom, under general competition rules as well as sector-specific regulation.

Where conduct violates both the competition rules and the sector-specific regulatory obligations imposed under the CA03, Ofcom can commence an investigation under the competition rules or under its general regulatory powers pursuant to the CA03. However, Ofcom has expressed a preference to use the competition rules in such cases.<sup>210</sup>

### Factors in Interconnection Agreements

As mentioned above, all PECS providers, regardless of their market power, have a right and obligation to negotiate interconnection in good faith and on reasonable terms (GC A1).

As a general rule, therefore, factors in interconnection agreements such as charges, capacity, equal access and quality of service are largely a matter of commercial negotiation between the parties. However, Ofcom may regulate these factors by way of specific SMP Conditions or in the context of dispute resolution proceedings.<sup>211</sup>

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207 Article 2(27) of the EECC Directive defines access as the making available of facilities and/or services to another undertaking, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services, including when they are used for the delivery of information society services or broadcast content services.

208 Interconnection is a specific type of access implemented between public network operators. It is defined in article 2(28) of the EECC Directive as the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking.

209 The General Court of the EU has confirmed that such simultaneous application of remedies by national regulators and competition law authorities in the EU would address different problems in electronic communications markets, and are therefore not mutually exclusive: Case C-280/08 P, *Deutsche Telekom v Commission*, [2010] ECR I-09555.

210 Ofcom, 'Guidelines on handling competition complaints, and complaints and disputes about breaches of conditions imposed under the EU directives' (2012) and 'Dispute resolution guidelines' (2011). See also Case 1007/2/3/02, *Freeserve.com plc v Director General of Telecommunications* [2002] CAT 8, paras 76–81.

211 CA03, ss 185–191. See also Ofcom, 'Dispute Resolution Guidelines' (2011). For example, in resolving a dispute regarding access pricing, Ofcom could impose the use of



## Competition Law

The CA03 gave Ofcom concurrent jurisdiction with the CMA for the enforcement of national (and some transferred EU) competition rules in the electronic communications sector in the United Kingdom.<sup>212</sup> Under arrangements agreed between Ofcom and the CMA, Ofcom has primary responsibility to enforce national rules<sup>213</sup> prohibiting anti-competitive agreements and abuses of dominant positions in the electronic communications sector and investigate electronic communications markets within the United Kingdom and make references to the CMA.<sup>214</sup>

Guidelines published by Ofcom<sup>215</sup> and the OFT<sup>216</sup> used to describe how they intended to apply these competition rules in such cases.<sup>217</sup> These arrangements have largely been endorsed by the CMA. However, there are five changes to this concurrency regime from the previous arrangements, namely:

- Ofcom is obliged to use its competition enforcement powers instead of its regulatory enforcement powers, unless its sector regulatory powers are more appropriate than general competition law powers to solve a competition issue;
- The CMA coordinates competition policy between itself and Ofcom through bilateral discussions and through a newly created inter-agency forum, the United Kingdom Competition Network (chaired by the CMA and composed of the United Kingdom sector regulators);
- The CMA must publish an annual report on the effectiveness of the concurrency regime and the application of competition law powers in the regulated sectors;
- In certain circumstances, the CMA has the power to take a case from Ofcom and advance it itself; and
- The Secretary of State (ie, the Government) can remove competition law powers from Ofcom if it does not use them, the so-called ‘use it or lose it’ rule.

In February 2017, Ofcom published a consultation document on New Competition Enforcement Guidelines for investigating breaches of UK/EU competition law under the Competition Act and Articles 101 and 102 of the Treaty on the

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a particular cost methodology to calculate the price that would be most adequate to enforce the provisions of the CA03 and UK implementation of the EECC Directive.

212 CA03, s 371. See ‘Memorandum of understanding between the Competition and Markets Authority and the Office of Communications – concurrent competition powers’ (2016) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/502645/Ofcom\\_MoU.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/502645/Ofcom_MoU.pdf).

213 Competition Act 1998, chs I and II.

214 Enterprise Act 2002, s 131.

215 Ofcom, ‘Paper Liaison on Competition Matters’ (2003).

216 OFT Guidelines 417 (2004).

217 See <http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/>.

Functioning of the EU. The common thread to the proposed changes is making Ofcom's enforcement processes more transparent and streamlined. In many cases, the proposed changes have the effect of bringing Ofcom's enforcement practice more in line with the CMA's enforcement practice, not only with respect to competition law investigations, where the CMA and Ofcom have concurrent powers to enforce competition rules, but also with respect to regulatory investigations, where Ofcom has sole jurisdiction.

In particular, Ofcom has for the first time set out guidance on its settlement procedure. Although the practice of reaching a settlement in order to close an investigation is not a novel practice for the regulator, having guidance on this will help to make the process more transparent for companies and their advisors.<sup>218</sup>

### **Substantive Assessment**

#### *Market Definition*

Crucial to the application of competition rules is the definition of the relevant market. Although the factual and economic circumstances of the electronic communications sector are often novel, in many cases it is possible to apply established competition law principles.

For example, when looking at market definition in this sector, it is useful to bear in mind existing case law and Commission decisional practice in defining the relevant market, in terms of product<sup>219</sup> and geographic<sup>220</sup> scope.<sup>221</sup> Although the UK has now left the EU, retained EU case law can still provide guidance about market definition (but the UK is free to overturn it in future). Ofcom will normally

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218 Francesco Liberatore, "UK Communications Regulator Consults on New Enforcement Guidance" (February 2017), *available at*: <http://www.squirepattonboggs.com/~media/files/insights/publications/2017/02/uk-communications-regulator-consults-on-new-enforcement-guidance/uk-communications-regulator-alert.pdf>.

219 Product market definition involves identifying those products that are reasonably interchangeable as indicated by buyer behavior. However, given the pace of technology evolution in the sector, supply-substitution also is important: Commission Guidelines on market analysis and the assessment of significant market power, OJ [2002] C165/6, paras 33–54.

220 Geographic market definition has traditionally been determined by reference to two main criteria: (i) the area covered by the network; and (ii) the existence of legal and regulatory barriers, such as the geographic area covered by a license, authorization or right of use of the assigned portion of radio spectrum: Commission Guidelines on market analysis and the assessment of significant market power, OJ [2002] C165/6, paras 55–60.

221 For example, an important source of reference is provided by the Commission Recommendation on Relevant Product and Service Markets within the electronic communication sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Second Edition), C (2007) 5406.

only depart from a previous market definition where it is justified in light of its market analysis.<sup>222</sup>

#### *Anti-Competitive Agreements*

Access and interconnection agreements are unlikely to be anti-competitive, because the risk of foreclosure is limited, since most networks have more capacity than any single user is likely to need and they likely have pro-competitive effects, as they can improve access to the downstream services market.<sup>223</sup> This may arguably hold true *a fortiori* in relation to NGNs, because of the efficiencies inherent in developing this new technology.

Certain clauses, however, may have anti-competitive effects, in breach of Chapter I of the Competition Act (which is based on article 101 TFEU), for example, an exchange between the interconnecting parties of certain commercially sensitive customer and traffic-related information; long-term exclusivity; collusion on retail prices or market sharing; or discrimination with regard to price, quality or other commercially significant aspects of the termination agreement.<sup>224</sup>

#### *Abuse of Dominant Position*

Under Chapter II of the Competition Act (based on article 102 TFEU), a company is in a dominant position if it can operate on a market without regard to its competitors, customers or suppliers.<sup>225</sup> In practice, relevant market definition is crucial for a finding of dominance. Assuming a dominant position can be found, the main types of abuse which would likely be relevant to access and interconnection are:

- Excessive pricing;<sup>226</sup>

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222 See Joined Cases T-125 and 127/97, *The Coca-Cola Company v Commission* [2000] II ECR 1733, paras 81 and 82, where the General Court of the EU held that markets defined in previous cases are not binding on the competition agency, so would not be of decisive relevance for the market definition in subsequent cases, even if involving the same parties; a new analysis is always required.

223 Commission Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector (Access Notice), OJ [1998] C265/2, paras 132–133.

224 Access Notice, OJ [1998] C265/2, paras 134–143.

225 Case 322/81, *Michelin v Commission* [1983] ECR 3461; Case 311/84, *Télémarketing* [1985] ECR 3261; Case 27/76, *United Brands v Commission* [1978] ECR 207; Case 85/76, *Hoffmann-La Roche v Commission* [1979] ECR 461. On collective dominance, see Case C-413/06 P, *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)*, 2010 ALL ER (EC) 377. See Case T-342/99, *Airtours plc v Commission*, [2002] ECR II-02585, paras 60 *et seq.* Cf. Ofcom, ‘Suspected margin squeeze by Vodafone, O2, Orange and T-Mobile’, (CW/00615/05/03), paras 96–104, in which Ofcom applied the *Airtours* case law criteria and concluded that the MNOs in question did not hold a collective dominant position on the relevant market for mobile termination.

226 See, in general, Case T-228/97, *Irish Sugar plc v Commission* [1999] ECR 2975; Case 26/75, *General Motors Continental v Commission* [1975] ECR 1367, para 12;

- Predatory pricing;<sup>227</sup>
- Price or margin squeeze;<sup>228</sup>
- Refusal to grant access for the purposes of a service where another operator has been given access by the access provider to operate on that services market (discrimination);<sup>229</sup>
- Refusal to grant access for the purposes of a service where no other operator has been given access by the access provider to operate on that services market (essential facilities doctrine);<sup>230</sup>
- Withdrawal of access from an existing customer;<sup>231</sup>
- Tying and bundling;<sup>232</sup>
- Network configuration;<sup>233</sup> and
- Deterioration of the level of access services provided (for example, through de-peering and certain types of traffic management).<sup>234</sup>

### Other Relevant Competition Rules

With effect from April 2014, the CMA has taken over from the OFT and the CC responsibility for market investigations, cartel cases, and merger control in the electronic communications sector (as in any other sector), and it will have wider enforcement powers and tighter procedural timetables.

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and Case 27/76, *United Brands v Commission* [1978] ECR 207; in relation to electronic communications in particular, see Access Notice, paras 105–109; and Commission, ITT Promedia/Belgacom, XXVIIth Report on Competition Policy (1997), at p 67.

227 Case C-202/07, *France Telecom v Commission*, Judgment of 2 April 2009 (not yet reported). See also Commission MEMO/09/147 (2009): Commission welcomes judgment of the Court of Justice in French broadband case.

228 Commission Guidance on the Commission's enforcement priorities in applying article 102 of the TFEU to abusive exclusionary conduct by dominant undertakings, C (2009) 864 final, pp 23 *et seq.*; and, in the electronic communications sector in particular, see Cases T-336/07 and T-398/07, *Telefónica de España and Spain v European Commission*, not yet reported in ECR; Case 280/08 P, *Deutsche Telekom AG v European Commission* [2006] [2010] ECR I-09555; Access Notice, paras 117–119; and Ofcom, CW/988/06/08, *THUS and Gamma v BT* (20 June 2013).

229 Access Notice, paras 85–86.

230 Access Notice, paras 87–98. See also Case 1158/8/3/10, *British Sky Broadcasting Limited v Office of Communications*, [2012] CAT 20.

231 Access Notice, paras 99–100.

232 Access Notice, para 103.

233 Access Notice, para 102.

234 Cf. OFT Decision ME/1584/05, Anticipated acquisition by SBC Communications, Inc. of AT&T Corporation (2005); and Commission press release IP/11/486 (2011), 'Digital Agenda: Commission underlines commitment to ensure open Internet principles applied in practice'.

### **Cartel Offense**

The CMA has exclusive powers to conduct criminal investigations into cartels. The previous criminal cartel offense required that an individual must have ‘dishonestly’ agreed with one or more other persons to engage in cartel activities. Under the new regime, this dishonesty element has been removed, but new defenses are allowed. To establish criminal cartel activity the CMA now needs only to prove intent to enter into an agreement and to operate the arrangement in question.

### **Merger Control**

In the United Kingdom, a transaction falls under the jurisdiction of the CMA if two or more enterprises cease to be distinct (or there are arrangements in place to this effect) and either of the following two tests is met:

- The target’s revenue in the United Kingdom exceeds £70 million; or
- The parties have a combined share of supply of any reasonable description of goods or services in the United Kingdom of 25 per cent or more.

The United Kingdom has a voluntary merger notification regime. Contrary to expectations that the Government would replace this with a mandatory merger notification process, it has decided to keep the voluntary system. Accordingly, merging parties continue to be able to take a view as to whether to notify a transaction to the CMA.

However, the CMA has the power to investigate completed mergers and prevent the merging parties from completing, or compel them to unwind, the transaction at any stage of a post-closing investigation, if it has grounds to believe that implementing the transaction would prejudice the outcome of an investigation.

The CMA does not need to confirm that it has jurisdiction over the deal before it exercises these powers. Previous criminal penalties for failure to comply with an order to suspend or unwind the implementation of a merger have been replaced with civil penalties of up to five per cent of the merging parties’ aggregate group worldwide turnover.

Previously, problematic mergers were referred by the OFT to the CC for an in-depth review. In order to keep this peer review process, the CMA Board is now responsible for Phase 1 investigations and the CMA appoints a panel of experts responsible for Phase 2 decisions. A notable change in relation to Phase 2 investigations is that some members of the case team are likely to have been involved in the Phase 1 investigation.

This should allow for a greater level of continuity from Phase 1 than has historically been the case, although it may remove an element of the objective fresh pair of eyes approach currently adopted. The CMA will work closely with Ofcom in reviewing mergers in the United Kingdom electronic communications sector falling within its jurisdiction.

In June 2014, following the introduction of the Enterprise and Regulatory Reform Act, the two bodies developed a Memorandum of Understanding, which set out in more practical detail how they will work together within the framework of competition law.<sup>235</sup>

### **UK National Security and Investment Regime**

From 4 January 2022, the National Security and Investment Act (NSIA) will come into force, allowing the UK government to intervene in certain acquisitions that will harm the UK's national security. Certain acquisitions in specified sectors require mandatory notification, and communications is listed as one of those sectors.<sup>236</sup>

When the entity being acquired is one of the following, a mandatory notification must be made to the Investment Security Unit ("ISU") before the transaction completes:<sup>237</sup>

- A PECN or PECS with a UK turnover of at least £50 million (or an undertaking that makes an 'associated facility' or cable-landing station available to a PECN/S, or provides repair/maintenance to one);
- Owns a building where its main purpose is to host active telecoms equipment;
- Has a top-level domain name registry, domain name system resolver, authoritative hosting service or internet exchange points (subject to certain thresholds); or
- Provides broadcast infrastructure for the BBC, Channel 3 (ITV/STV), Channel 4, Channel 5, S4C or national commercial radio.

The definitions above are developed with regard to the CA03 to ensure consistency. It is yet to be seen what the enforcement pattern of the NSIA regime will look like.

### **Market Investigations**

Previously, the OFT had the power to refer markets to the CC for investigation where the OFT had reasonable grounds to believe that any feature of a market was anticompetitive. Under the new regime, the CMA carries out these markets inquiries directly, without need for a referral, in two phases, and Ofcom continues to have powers to refer electronic communications markets to the CMA for investigation.

Market participants will benefit from the introduction of statutory time limits, which have reduced the duration of the process to a maximum of 12 months for a Phase 1

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235 See [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/320900/MoU\\_CMA\\_and\\_OFCOM.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/320900/MoU_CMA_and_OFCOM.pdf).

236 NSIA21 s.14; draft National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021, Schedule 5.

237 See National Security and Investment Act: guidance on notifiable acquisitions <https://www.gov.uk/government/publications/national-security-and-investment-act-guidance-on-notifiable-acquisitions/national-security-and-investment-act-guidance-on-notifiable-acquisitions#communications>.

market study and 18 months for an optional Phase 2 market investigation. The CMA also has taken over from the CC its role in determining telecoms price control references from the Competition Appeal Tribunal in appeals against Ofcom's decisions. The CMA has issued guidance on the approach it intends to take on cost recovery in price control references.<sup>238</sup>

### **Broadcasting Competition Related Conditions**

Anti-competitive practices in the broadcasting sector are at present controlled only by general competition laws, as SMP Conditions for broadcasting transmission services have been repealed.

For example, in a recent case regarding the broadcasting of Premier League football matches in pubs in the United Kingdom, the European Court of Justice held that the clauses of an exclusive license agreement concluded between the content right holder (in this case, the Football Association Premier League) and a broadcaster constitute a violation of the general EU competition rules prohibiting anti-competitive agreements,<sup>239</sup> where they are designed to prohibit or limit the cross-border provision of broadcasting services across the EU.<sup>240</sup> Given that the Competition Act 1998 is based on the TFEU, this case law informs the UK approach.

As discussed below, Ofcom may refer a communications market to the Competition and Markets Authority (CMA) for further investigation under the Enterprise Act, if it suspects that any feature of that market may be harmful to competition.

In August 2010, Ofcom referred the United Kingdom's pay television market to the Competition Commission (CC), now replaced by the CMA. In October 2012, the CC published its final findings report in which the CC stated that Sky's rights to films sold by Hollywood studios in the first subscription 'pay window' (FSPTW) do not adversely affect competition in the pay-television retail market. The CC said that competition was increasing through other providers such as Netflix, Lovefilm and Apple, amongst others. For this reason, the CC decided not to take the following remedial actions:

- Restricting the number of major studios from which Sky may exclusively license FSPTW rights;
- Restricting the nature of the exclusive FSPTW rights which Sky can license from the major studios (*e.g.*, so that rights for distribution methods such as subscription video on demand could be made available to other providers); and

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238 CMA 5, 'Cost recovery in telecoms price control references: Guidance on the CMA's approach' (January 2014).

239 TFEU, art 101.

240 Joined Cases C-403/08 and C-429/08, *FAPL v Karen Murphy and Others*, judgment of 4 October 2011), ECR [2011] I-09083, paras 134–146. Cf. Case 262/81 *Coditel II* [1982] ECR 3381, para 15.

- Imposing ‘must retail’ measures requiring Sky to acquire on a wholesale basis and offer to its subscribers any movie channel containing FSPTW movie content created by a rival.

However, the CC’s final report noted that competition in the retail market overall ‘remains ineffective’.<sup>241</sup>

### Merger References

When a merger involving a broadcasting enterprise or a cross-media merger (between a newspaper enterprise and a broadcasting enterprise) raises public interest considerations, the DCMS may intervene in the merger control process, by issuing an intervention notice.<sup>242</sup> Public interest considerations include:

- The need for there to be a sufficient plurality of persons with control of the media enterprises serving that audience in relation to every audience in the United Kingdom or a part of the United Kingdom;
- The need for the availability throughout the United Kingdom of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests; and
- The need for persons carrying on media enterprises and for those with control of such enterprises to have a genuine commitment to the attainment in relation to broadcasting of the standard objectives contained in the CA03 relating to due impartiality of news, taste and decency.<sup>243</sup>

In response to an intervention notice, Ofcom reports to the DCMS as to whether the proposed merger is against the public interest, along with a recommendation on whether the merger should be referred to the CMA for detailed investigation. A reference to the CMA, in light of the report received from Ofcom and the OFT, if relevant, can be made by the DCMS either because:

- The proposed merger would result in a substantial lessening of competition and, taking into account of this together with the public interest issues, the merger may be expected to operate against the public interest; or
- While there is no anticipated substantial lessening of competition arising from the merger, the public interest issues are such that it may nevertheless be expected to operate against the public interest.

Merger parties may try to avoid a reference by offering suitable early remedial commitments (so-called undertakings in lieu of a reference). Where a reference to the CMA is made on public interest grounds, the DCMS has the final decision on

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241 See [http://www.competition-commission.org.uk/inquiries/ref2010/movies\\_on\\_pay\\_tv/index.htm](http://www.competition-commission.org.uk/inquiries/ref2010/movies_on_pay_tv/index.htm).

242 CA03, Pt 5, ch 2; Enterprise Act, s 58(2C).

243 Ofcom, 'Guidance for the Public Interest Test for Media Mergers' (2011).



the merger following the CMA's report.<sup>244</sup> Ofcom may advise the DCMS in this regard. The leading cases in which public interest considerations regarding media plurality have been considered are Sky/ITV<sup>245</sup> and News Corporation/BSkyB.<sup>246</sup>

### Judicial Review

Ofcom's decisions (whether adopted pursuant to sector-specific regulation or competition rules) can be appealed to the CAT on the merits.<sup>247</sup> However, the scope of the CAT's appellate and review jurisdictions is complex and certain Ofcom's decisions can only be appealed to the High Court on judicial review grounds.<sup>248</sup> Therefore, it may be prudent in all but the clearest cases to consider commencing proceedings in both *fora*.

Neither an appeal before the CAT nor judicial review before the High Court has the automatic effect of suspending Ofcom's decision. However, the appellant may ask the CAT or the High Court for an interim measure suspending the decision under appeal, whereby the legal standard for granting such interim relief is

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244 The DCMS is, however, bound to accept any decision made by the CC on competition grounds.

245 OFT Decision Acquisition by British Sky Broadcasting Group plc of a 17.9 per cent stake in ITV (2007); Ofcom, Report for the DCMS pursuant to s 44A of the Enterprise Act 2002 (2007); CC Report to the DCMS (2007).

246 In June 2010, News Corporation ('News Corp') offered BSkyB 675p a share of 61 per cent. In October 2010, an alliance of media companies, including BT, Channel 4 and the publishers of the *Guardian*, *Daily Mirror*, *Daily Mail* and *Daily Telegraph*, wrote to the business secretary concerned that the merger could have 'serious and far-reaching consequences for media plurality'. In November 2010, News Corp informed the Commission of its intention to take over BSkyB. The business secretary, Vince Cable, issued an intervention notice and asked Ofcom to investigate the merger. The Commission cleared the News Corp/Sky merger on competition grounds in December 2010 (Case M.5932, *News Corp / B Sky B*). The OFT and Ofcom have been involved in discussions with BSkyB and News Corp. On 3 March 2011, Jeffrey Hunt, the culture secretary, approved News Corporation's plan to spin off Sky News, clearing the way for its proposed £8 billion purchase. However, after the outbreak of a phone hacking scandal at *News of the World*, a newspaper owned by News Corporation, News Corporation announced on 13 July 2011 that it was dropping its takeover bid. Cf. DCMS Order 2010 pursuant to Enterprise Act, s 4(2)–(5).

247 CA03, s 192 (very broadly, applying to electronic communications and spectrum management functions), ss 294 and 317 (applying to broadcasting licensing functions), and Regulation 14(1) of the Mobile Roaming (European Union) Regulations 2007 (applying to mobile roaming tariff functions). These provisions implement article 31 of the EECC Directive. See also Case C-438/04, *Mobistar*, [2006] ECR I-6675, paras 38–43, and Case C-426/05, *Tele2 Telecommunication GmbH* [2008] ECR I-685, paras 16, 17, 20, 26–29, 31–36, 38–43, and 49–56.

248 Court of Appeal, *T-Mobile v Ofcom* [2008] EWCA Civ 1373, [2009] 1 WLR 1565, at para. 50: 'all legislative powers of Ofcom to make regulations have been systematically included in Schedule 8 [of the CA] It is not the function of a statutory tribunal [ie the CAT] to impugn statutory instruments or regulations made pursuant to statutory powers. Challenges to these are classically matters for judicial review [ie before the High Court]'.

generally more flexible in the High Court than it is in the CAT.<sup>249</sup> A final judgment of the CAT or the High Court may itself be appealed before the Court of Appeal (England and Wales) or the Court of Session (Scotland), limited only to points of law.<sup>250</sup> The CA03 requires the CAT to refer any price control matter to the CMA for preliminary adjudication, before reaching a judgment.<sup>251</sup>

The CMA must determine the reference made by the CAT in accordance with any directions given by the CAT, using such procedures as the CMA considers appropriate. At the time of writing, the CMA's predecessor, the CC, has so far dealt with eight price control appeals, including cases regarding price controls for leased lines,<sup>252</sup> wholesale line rentals,<sup>253</sup> metallic path facilities,<sup>254</sup> superfast broadband,<sup>255</sup> business connectivity services,<sup>256</sup> wholesale broadband access charge,<sup>257</sup> and two cases on mobile termination charges.<sup>258</sup>

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249 CAT Rule 61. Cases 1151/3/3/10, 1168/3/3/10, and 1169/3/3/10, *BT and Everything Everywhere v Ofcom* [2011] CAT 28.

250 CA03, s 196. Cases C3/2011/3121, 3124, 3315, 3316, and 2012/0692, *Telefonica and Others v BT and Ofcom*, [2012] EWCA Civ 1002.

251 CA03, s 193. Liberator 'Court of Appeal to Decide Competition Commission's Powers in Telecoms Price Control Investigation', see <http://www.jonesday.com/antitrust-alert-uks-court-of-appeal-to-decide-competition-commissions-powers-in-telecoms-price-control-investigation-07-18-2012/>.

252 Leased lines price control: reference to the CC made by the CAT on 17 December 2009 in connection with the *Cable and Wireless United Kingdom v Office of Communications Appeal* (Case 1112/3/3/09) and to the CMA on 17 November 2016 in connection with the joined cases *CityFibre Infrastructure Holdings plc v Office of Communications* (Case 1261/3/3/16) and *TalkTalk Telecom Group plc v Office of Communications* (Case 1259/3/3/16).

253 WLR (Wholesale Line Rental) price control: reference to the CC made by the CAT on 18 February 2010 in connection with *The Carphone Warehouse Group plc v Office of Communications Appeal* (Case 1149/3/3/09).

254 LLU (Local Loop Unbundling) price control: reference to the CC made by the CAT on 27 November 2009 in connection with *The Carphone Warehouse Group plc v Office of Communications Appeal* (Case 1111/3/3/09).

255 Superfast broadband price control: reference to the CC made on 22 July 2013 in connection with *Verizon UK Limited and Vodafone Limited v Office of Communications* (Case 1210/3/3/13).

256 Business connectivity services: reference to the CMA made on 5 January 2016 in connection with the joined cases *British Telecommunications plc v Office of Communications* (Case 1238/3/3/15).

257 Wholesale broadband access charge: reference to the CC made on 2 November 2011 in connection with *British Telecommunications plc v Office of Communications* (Case 1187/3/3/11).

258 Wholesale mobile voice call termination: (1) reference to the CC made by the CAT on 18 March 2008 in the consolidated appeals *Hutchison 3G United Kingdom Limited v Office of Communications* (Case 1083/3/3/07) and *British Telecommunications plc v Office of Communications* (Case 1085/3/3/07), and (2) reference to the CC made by the CAT on 30 June 2011 in connection with *British Telecommunications plc v Office of Communications* (Case 1180/3/3/11), *Everything Everywhere Limited v Office of Communications* (Case 1181/3/3/11), *Hutchison 3G United Kingdom Limited v Office*

The CC also adopted new guidelines on the appeals process, which have been endorsed by the CMA.<sup>259</sup>

### Property and Environmental Law

Electronic communications network providers who wish to construct electronic communications networks, and those who wish to construct conduits to be made available to network providers, must be registered in the Electronic Communications Code, as maintained by Ofcom.

The Code was last updated in 2017 as part of the Digital Economy Act 2017, giving operators greater rights and facilitating the sharing of network apparatus. One notable update was that operators automatically had the right to assign Code agreements.

The Code enables providers to construct infrastructure on public land (streets), and to take rights over private land, either with the agreement with the landowner or applying to the County Court (England and Wales) or the Sheriff in Scotland.

It also conveys certain immunities from the Town and Country Planning legislation in the form of Permitted Development. Registration in the Code is made at Ofcom's direction, following a public consultation and consideration of the responses to that consultation.<sup>260</sup> Any change in the identity (or control) of a person registered in the Code will normally require a standard notification to Ofcom, for the purpose of the keeping of the register by Ofcom. In addition to the administrative charges that are applicable to any providers (*see text, above*), there is an annual charge for persons who have been granted rights of way under the Code.

The charge is calculated by taking the total estimated cost of carrying out Ofcom's functions under the Code and dividing this by the total number of operators having powers under the Code. This charge has been set at £1,000 for 2021/2022. In addition, persons who have been granted powers under the Code in a particular

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*of Communications* (Case 1182/3/11) and *Vodafone Limited v Office of Communications* (Case 1183/3/11).

259 CC, 'Price Control Appeals under s 193 of the Communications Act 03' (2011). *See* Francesco Liberatore, 'UK Competition Commission to Reform Telecoms Price Control Appeals' (2011), *available at*: <http://www.jonesday.com/antitrust-alert--uk-competition-commission-to-reform-telecoms-price-control-appeals-02-10-2011/>.

260 CA03, ss 106, 107(3) and 108(4). The Code has effect in all cases subject to the conditions and restrictions set out in the Electronic Communications Code (Conditions and Restrictions) Regulations 2003, SI Number 2003/2553, as amended by the Electronic Communications Code (Conditions and Restrictions) (Amendment) Regulations 2009, SI Number 2009/584, Electronic Communications Code (Conditions and Restrictions) (Amendment) Regulations 2013, SI Number 2013/1403, Electronic Communications Code (Conditions and Restrictions) (Amendment) Regulations 2016, SI Number 2016/1049, and the Electronic Communications Code (Conditions and Restrictions) (Amendment) Regulations 2017, SI Number 2017/753.

charging year must pay a one-off application charge in respect of the estimated costs of dealing with their applications for the Code.

This charge has been set at £10,000 for 2021/2022.<sup>261</sup> A consultation on reforming the Code ran from 27 January 2021 to 24 March 2021.

## Intellectual Property

### Copyright and Infringing Act with Respect to Transmission and Retransmission

Copyright owners possess an exclusive right to copy their copyright work, issue copies of the work to the public, rent or lend the work to the public, and perform, show or play the work in public.<sup>262</sup> They also own an exclusive right to communicate their work to the public.

These rights should be understood in a broad sense, covering all communications to the public not present at the place where the communication originates.<sup>263</sup> The copyright in a broadcast is normally not infringed if the retransmission is made by cable in pursuance of a relevant requirement or is made for reception in the area in which it is re-transmitted by cable forming part of a qualifying service.<sup>264</sup>

In a recent landmark ruling, the European Court of Justice held that there can be nothing in law or in a broadcast license to prevent pub owners in the United Kingdom from showing foreign broadcast of Premier League football matches in their premises using a foreign decoder card, regardless of how the foreign decoders were procured or enabled.<sup>265</sup> Although the UK has now left the EU, this case law remains persuasive in the UK.

Remarkably, the Court also held that the premium paid by broadcasters to the content right holders (in this case, the Football Association Premier League) in order to be granted territorial exclusivity is irreconcilable with EU internal market rules.<sup>266</sup> Consequently, the payment of such a premium goes beyond what is necessary to ensure appropriate remuneration for those right holders.<sup>267</sup>

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261 Ofcom's Tariff Tables 2021/22 (2021).

262 Copyright and Related Rights Regulations 2003 (SI 2003/2598), s 16.

263 European Copyright in the Information Society Directive, Recital 23.

264 Case 155/73, *Sacchi* [1974] ECR 409: it is not contrary to the TFEU for an EU member state to grant exclusive right to transmit television signals, including advertisement. Nor is it contrary to the TFEU to prohibit or regulate advertisements on television, even if it has the effect of preventing the retransmission on television in another EU member state: Case 52/79, *Procureur du Roi v Debauve* [1980] ECR 833.

265 Joined Cases C-403/08 and C-429/08, *FAPL v Karen Murphy and Others*, judgment of 4 October 2011 (2011 I-09083) and Case CO/7295/2007, *Karen Murphy v Media Protection Services Ltd*, [2012] EWHC 529.

266 TFEU, arts 34, 36 and 56.

267 Joined Cases C-403/08 and C-429/08, *FAPL v Karen Murphy and Others*, judgment of 4 October 2011, para 116.

Finally, the Court held that where the broadcast contents (in this case, the football matches) are not covered by intellectual property rights, the contents right holder cannot insist on requiring its permission for their transmission and retransmission.

However, it added that the contents right holder can assert copyright in various own works contained in the broadcasts (in this case, the opening video sequence, the Premier League anthem, pre-recorded films showing highlights of recent Premier League matches, or various graphics). The transmission and retransmission of such works will continue to require the right holder's prior authorization on copyright law grounds.<sup>268</sup> Depending on the complexity of the issues and the value of a claim, actions for copyright infringement can be heard either in the High Court (Chancery Division) or Patents County Court.<sup>269</sup> In addition to criminal sanctions, remedies for an infringement of copyrights may include interim and final injunctions, damages (including additional damages where infringement has been flagrant) or an account of profits, delivery up and destruction of infringing items, and search and seizure of infringing items.

### Abuse of Rights

In line with EU case law,<sup>270</sup> refusal to license intellectual property rights may amount to an infringement of Chapter II of the Competition Act 1998 (based on article 102 TFEU), prohibiting the abuse of a dominant position, only in exceptional circumstances.<sup>271</sup> These exceptional circumstances are likely to arise where:

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268 Jones Day Commentary, 'Pub Landlady Obtains Landmark Ruling of ECJ Over Right to Use Foreign Decoder to Show Football Matches' (2011), *see* [http://www.jonesday.com/pub\\_landlady/](http://www.jonesday.com/pub_landlady/). More recently, a publican has been granted permission to appeal a judgment for breach of copyright law for showing Premier League football matches using a foreign satellite card. The issue becomes more pertinent following the sale of the viewing rights for 2016–2019 for more than £5 billion, *see* <http://www.bbc.com/news/uk-wales-south-west-wales-25968200>.

269 Recent reforms to the English Civil Procedure rules, which came into force on 1 October 2010, were designed to make the Patents County Court a more streamlined and cost-effective alternative to the High Court. At present, only patent and design disputes can be heard in the Patents County Court, although there are proposals to extend the court's jurisdiction to all forms of IP. Cases involving complex issues or high values will still be heard in the High Court. Both courts have the power to grant a wide range of interim remedies. Parties also are encouraged to explore alternative forms of dispute resolution, such as arbitration or mediation. Criminal proceedings may be initiated in cases of piracy.

270 Case 238/87, *Volvo AB v Erik Veng (United Kingdom) Ltd* [1988] ECR 6211; Cases C-241 and 242/91, *P RTE and ITP v Commission*, Judgment of 6 April 1995; Case C-7/97, *Oscar Bronner GmbH and Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH and Co KG* [1999] ECR I-7791; Case C-418/01, *IMS Health GmbH and Co OHG v NDC Health GmbH and Co KG* [2004] All ER (D) 340.

271 *Claritas (United Kingdom) Ltd v The Post Office and Others* [2001] UKCLR 2. *See also* OFT official press release PN 94/03 (2003): the OFT initiated an investigation into whether the British Standards Institution's (BSI) refusal to license a competitor

- The intellectual property right (or the product covered by the intellectual property right) is an essential or indispensable input for a third party to compete on the downstream market (because there is no real or potential substitute or viable alternative for it, taking into account the cost, time or both needed to produce an alternative);
- The third party that requests the license intends to offer, on the downstream market, new products or services not offered by the copyrights holder and for which there is potential consumer demand;
- The refusal is not justified by objective considerations; and
- The refusal reserves the downstream market for the owner of the rights.

EU case law also identifies other instances where a dominant company's conduct in relation to its intellectual property rights might be considered to be an abuse. In particular, the following activities may be contrary to Chapter II of the Competition Act by analogy: setting unfair licensing terms (ie, terms that are onerous and go beyond what is necessary to protect legitimate interests of the licensor); charging excessive royalties; discriminatory licensing practices; tying or bundling of other technologies or products; abusing regulatory procedures to delay or hinder competition entering the market; and using IP in such a way as to hinder the ability of consumers to identify alternative products.

### **Rights in Standards**

Standardization is generally encouraged by sector-specific regulation.<sup>272</sup> Standards are essential for the wide adoption of new technologies. The objective of a standard setting body (SSB), as well as participating companies, is to establish standardized technology that can be used as widely as possible. However, right holders may have a commercial interest in pushing for the adoption of their own patented technology in the framework of the standard, so that they could benefit from royalties, or in restricting access to the standards by third parties.

In certain circumstances, this conduct may give rise to potential competition law issues, in particular when it results in high royalties or it restricts access by third parties to a specific market.<sup>273</sup> Therefore, many SSBs require the parties

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to offer BSI standards online was contrary to Chapter II of the Competition Act. The investigation was closed when the parties reached a settlement.

<sup>272</sup> GC A2 and EECC Directive, art 39.

<sup>273</sup> Commission Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ [2011] C11/1; Commission Decision, X-Open Group, OJ [1987] L 35/36; Commission Decision, Global European Network, OJ [1994] C55/3; and Commission Decision, ETSI intellectual property right Undertaking, OJ [1995] C76/5. Cf., more recently, Commission official press release IP/09/1897 (2009): Commission accepts commitments from Rambus lowering memory chip royalty rates; MEMO/09/516 (2009): Commission closes formal proceedings against Qualcomm; IP/12/345 (2012): Commission opens proceedings against Motorola; and IP/12/89 (2012): Commission opens proceedings against Samsung.

involved in the standard-setting process to disclose information regarding relevant patents (and, sometimes, also patent applications), in order to include the relevant information into the standard-setting process. However, the SSBs are generally not involved in either arrangements related to patents (such as license agreements) or in settling disputes in respect of the validity and scope of the relevant patents.

As with any other policy issues, if the SSB's patent policy has not been drafted in a clear and unambiguous manner, different interpretations may be the source of disputes among the parties with respect to their obligations.<sup>274</sup> One way to address the situation where different patentees own a number of patents relevant to the standard is to set up a patent pool.

Although each patent pool may be different, typically, a pool enables participating patentees to use the pooled patents, provides a standard license in respect of the pooled patents for licensees who are not members of the pool, and allocates to each member of the pool a portion of the licensing fees in accordance with the agreement. Patent pool agreements may provide competitive benefits through, for example, bundling patented technologies, removing patent-blockages or avoiding the need to conclude multiple licenses. On the other hand, certain types of patent pool agreements, for example, where they include patents that are substitutes for each other, may raise concerns as to their effect on competition. The Commission has adopted guidelines for the assessment of patent pools, which also are valid for the assessment of patent pools in electronic communications.<sup>275</sup> These provide useful guidance for UK scenarios.

#### *Standard Essential Patents*

Standard essential patents (SEPs) cover technologies that are deemed essential to industry standards. In principle, SEP holders undertake that if their patented technology is to be included in an agreed industry standard, they will issue a license granted under fair, reasonable and non-discriminatory terms (FRAND terms) to any willing licensee.

For some time, however, SSBs have been aware of the potential for SEP holders to misuse their power in agreeing (or refusing to agree) such licenses; a natural risk when intellectual property is contributed to open standards. It has been argued that such SEP holders may:

- Hold a dominant position in relation to the protected technology; and
- Be abusing their dominant position under Article 102 TFEU by seeking, threatening to enforce, or actually enforcing an injunction against an alleged infringer who requires the technology to manufacture products that comply

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<sup>274</sup> Case A3/2006/0948, *Nokia Corporation v InterDigital Technology Corporation* [2006] EWCA Civ 1618.

<sup>275</sup> Commission Guidelines on technology transfer agreements, OJ [2004] C101/2, paras 220 *et seq.*

with the agreed standard and has shown willingness to negotiate a license on FRAND terms.<sup>276</sup>

On 16 July 2015, the Court of Justice of the EU (CJEU) handed down its long-awaited judgment in *Huawei Technologies*,<sup>277</sup> concerning the circumstances in which EU competition law will prevent holders of SEPs from seeking such injunctions against willing licensees. The CJEU ruled that an owner of an SEP who has granted a FRAND license may be abusing its dominant position by seeking an injunction against an alleged infringer, unless that SEP holder alerts the alleged infringer of the infringement and presents a specific written offer for a license on FRAND terms, specifying, in particular, the royalty and the way in which it is to be calculated.

If the other party continues to use the SEP in question and does not respond 'diligently...in accordance with recognized commercial practices in the field and in good faith', then the SEP holder may be entitled to seek an injunction. If the alleged infringer adopts 'delaying tactics', then it will lose the right to object to a claim for injunctive relief as an abuse of a dominant position. Furthermore, the alleged infringer must 'promptly' submit in writing a 'specific counter-offer that corresponds to FRAND terms'.

The judgment in *Huawei Technologies* builds upon the recent EU decisions in *Samsung* and *Motorola*, where the Commission noted that 'seeking SEP-based injunctions against a willing licensee could risk excluding products from the market'.<sup>278</sup> The *Huawei* decision purports to 'strike a balance between maintaining free competition...and the requirement to safeguard [the SEP holder's] intellectual property rights and its right to effective judicial protection'. However, despite providing welcome guidance and clarification, it also leaves a number of questions unanswered. In particular, the precise definition of a license on FRAND terms remains ambiguous and concepts such as 'diligently' and 'promptly' are largely open to the interpretation of the national courts, so it will be up to the UK courts to decide precisely how to apply these terms.

### Digital Economy Act

The Digital Economy Act 2010 (DEA) arose out of several recent policy developments in respect of online copyright enforcement. These included the Gowers Review of the United Kingdom Intellectual Property Framework (2006), the industry-led Memorandum of Understanding process to trial subscriber notifications (2008), and the Government's Digital Britain reports (2009).<sup>279</sup> The DEA is part of the government's plan to tackle online copyright infringement. The

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<sup>276</sup> Fountoukakos and Root, 'Huawei Technologies: More Certainty on SEP Injunctions, But Not the End of the Story', *CPI Antitrust Chronicle*, October 2015(2), at p 3.

<sup>277</sup> Case C-170/13.

<sup>278</sup> EC Press Release, 'Antitrust: Commission accepts legally binding commitments by Samsung Electronics on standard essential patent injunctions' (29 April 2014).

<sup>279</sup> Ofcom, *Online Infringement of Copyright and the Digital Economy Act 2010*, 26 June 2012, at p 2.



Act imposes new responsibilities on Ofcom to implement and administer measures to achieve this aim. The DEA amends the Communications Act 2003 to the extent that it creates two new obligations (the ‘initial obligations’) for internet service providers (ISPs):

- The first of these is that ISPs must ‘notify their subscribers if the internet protocol (IP) addresses associated with them are reported by copyright owners as being used to infringe copyright’; and
- The second is that ISPs must keep track of the number of reports about each subscriber, and compile, on an anonymous basis, a list of those subscribers who are reported on above a threshold to be set in the Initial Obligations Code.<sup>280</sup>

The DEA requires that the implementation and regulation of the initial obligations must be set out in a Code. Ofcom is responsible for drafting that Code in accordance with the provisions of the DEA. Preliminary proposals for the Code were published on 28 May 2010 in a consultation document: ‘Online Infringement of Copyright and the Digital Economy Act 2010: Draft Initial Obligations Code’.<sup>281</sup> Ofcom subsequently published a revised Code in June 2012, which included measures to inform the public and promote lawful access to digital content.<sup>282</sup>

## Security of Communications

### Tapping into Cables

Interception of communications transmitted over public or private electronic communications systems is unlawful and constitutes a criminal offence.<sup>283</sup> However, a person controlling a private telecommunications system and intercepting on its own network does not commit an offence.

Examples of this type of activity are an individual using a second handset in a house to monitor a telephone call, or a financial services company routinely recording calls from the public to retain a record of transactions. However, such interception, if unlawful, may still give rise to civil liability. Broadly, interception of communications is lawful in the following circumstances:

- Where there are reasonable grounds for believing that both the sender and the intended recipient of a communication have consented to its interception;
- Where one party to a communication has consented to its interception and the interception is part of an authorized surveillance operation; and

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280 The list is referred to as a ‘Copyright Infringement List (‘CIL’). After obtaining a court order to obtain personal details, copyright owners will be able to take action against those included in the list.

281 For further information, see <http://www.lexology.com/library/detail.aspx?g=63e0770a-07e2-4e94-94ba-c536cd3fbbcb>.

282 Ofcom, ‘Online Infringement of Copyright and the Digital Economy Act 2010’ (26 June 2012), at p 6.

283 Investigatory Powers Act 2016 (c. 25), s 3.

- Under international mutual assistance agreements, to permit certain kinds of interception in the course of lawful business practice, under prison rules, in hospital premises where high security psychiatric services are provided, and in state hospitals in Scotland.<sup>284</sup>

In addition, the Government may issue warrants to law enforcement authorities to obtain information needed to detect or prevent serious crime, in the interests of national security or to safeguard the economic well-being of the United Kingdom, including interception of communications<sup>285</sup> and access to encrypted data or encryption keys.<sup>286</sup>

Additional obligations may be imposed on PECS and PECN providers, such as the installation of interception facilities so as to ensure that any interception order can be readily complied with,<sup>287</sup> and the retention and provision of access to communications data (including details of telephone numbers, email addresses and websites contacted, subscriber details, itemized billing information, mobile telephone location data, routing information and other traffic data).<sup>288</sup>

### **Supply and Use of Counterfeit Decoders**

Knowingly supplying and using counterfeit decoders in the United Kingdom is a criminal offence.<sup>289</sup> Different regimes apply to the forfeiture of unauthorized decoders in England, Wales and Northern Ireland, on the one hand,<sup>290</sup> and Scotland, on the other.<sup>291</sup>

Providers of the decoders being counterfeit have the same rights and remedies available to copyright owners in relation to an infringing copy.<sup>292</sup> In addition to criminal sanctions, remedies for an infringement of the decoder copyrights will include interim and final injunctions, damages (including additional damages where infringement has been flagrant) or an account of profits, delivery up and destruction of infringing items, and search and seizure of infringing items.

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284 Investigatory Powers Act 2016 (c. 25), s 6.

285 Investigatory Powers Act 2016 (c. 25), s 15-22.

286 Regulation of Investigatory Powers Act 2000 (c. 23), s 49.

287 Investigatory Powers Act 2016 (c. 25), s235.

288 Data Retention and Acquisition Regulations 2018, SI Number 2018/1123, s 8. An additional regime has been created by the Anti-terrorism, Crime and Security Act 2001. Under Part 11 of the Anti-terrorism, Crime and Security Act, a voluntary code of practice has been introduced to provide for the retention of communications data by electronic communications service providers. This data can then be accessed by security, intelligence and law enforcement agencies for purposes of national security.

289 Copyright Designs and Patent Act 1988, s 297A.

290 Copyright Designs and Patent Act 1988, s 297C.

291 Copyright Designs and Patent Act 1988, s 297D; CA03, ss 125 and 126.

292 Copyright Designs and Patent Act 1988, s 298.



