6

AUTHORIZATION AND LICENSING

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6.1 INTRODUCTION

Licensing is a key aspect of telecommunications regulation. At a basic level, a licence permits a telecommunications provider to offer specified equipment, networks, and/or services, and often conditions that permission on certain requirements. Licensing, however, can control market entry and, therefore, can be used to shape the market by limiting, or not, the number of players or the types of services. Licensing can create legal certainty for new entrants where the telecommunications regulatory or general legal framework is not comprehensive or otherwise adequate. Here, conditions and rights integrated into licences can substitute for such frameworks. Similarly, eg where private property rights might be uncertain, the licence can serve as a contract between governments and investors, a departure from the traditional legal nature of a licence. As a binding contract, it could guarantee exclusivity, ensure due process[1] as well as impose performance obligations, eg market penetration or network roll-out requirements. Investors

[1] This is used here as shorthand for legal substantive and procedural requirements for fairness however they arise whether pursuant to statutory obligation or otherwise. A contract can provide these, including remedies such as early termination payments and what procedures will be used to resolve disputes or adjudicate breaches, eg arbitration procedures and rules as well as limitations on the reasons it can be abrogated or breached.

Anne Flanagan, 6 Authorization and Licensing In: Telecommunications Law and Regulation. Fifth Edition. Edited by: Ian Walden, Oxford University Press (2018).
DOI: 10.1093/oso/9780198807414.003.0009

might otherwise be reluctant to commit the capital required to roll out new technologies and/or networks to improve and update services. Without performance obligations, countries might be unwilling to involve private parties in running the state-owned incumbent.[2] Licensing can also foster competitive markets by imposing obligations on incumbents to level the playing field as well as ensure the continuation of socially desirable services or outcomes such as disabled access or universal service that competition will not.

Licensing is, therefore, an important regulatory tool in both developing markets and competitive markets although the same considerations may not equally apply. For example, one of the most significant aspects of the current EU framework is that, generally, electronic communications providers need not obtain individual licences requiring approvals to provide networks or services.[3] Since the 2002 Authorisation Directive, a scheme of general authorizations applies to all providers.[4] EU Member States can subject these authorizations only to the defined and limited set of general conditions it permits. Individual conditions can be applied only in certain circumstances, explored below. Individual grants of rights may only be required for access to scarce resources, in the EU only radio spectrum and numbers.

Licensing as a means to allocate, re-allocate, and manage radio spectrum for efficient telecommunications' and other rapidly evolving, increasingly complex, and potentially shared uses is an important issue in light of the unabated demand and spectrum's importance to an ever mobile, wireless, and digital society.[5] Due to these considerations and the distinct policy and licensing attributes that spectrum involves, it is considered in a separate chapter.[6]

This chapter examines the current EU framework for authorization of electronic communications services and networks that, essentially, has been in place since 2002 albeit with some, more recent, harmonizing reforms intended to address ongoing Single Market and other concerns. It considers briefly the problems that the

[2] For an examination of issues arising in developing markets, see Chapter 17.

[3] This focuses primarily on the nature and scope of approvals needed to provide communications networks and services. However, equipment intended to be attached to the network typically must also be 'authorized'. In many countries, it must meet type and safety requirements via an established approval process. Although Chapter 4 (at Section 4.4.3) details the EU process and legislation governing this, the purpose of and legal justification for licences, *inter alia*, examined in this chapter, encompass public and consumer safety and extend, of necessity, to the regulation of equipment used to provide communications networks and services. The discussion in this regard will make reference where applicable to this aspect of 'authorization'.

[4] Directive 2002/20/EC on the authorization of electronic communications networks and services, OJ L 108/21, 24 April 2002 (the Authorisation Directive).

[5] See eg Report from Aspen Institute Roundtable on Spectrum Policy: 'Revisiting Spectrum Policy: Seven Years After the National Broadband Plan' (Bollier D, Rapporteur, The Aspen Institute 2016), <http://csreports.aspeninstitute.org/Roundtable-on-Spectrum-Policy/2016/report/details/0227/Spectrum-2016>.

[6] See Chapter 7.

2002 and the previous EU framework were designed to address, before discussing some currently proposed reforms to address substantially the same concerns. The chapter also explores the UK's implementation of the EU regulatory scheme under the Communications Act 2003 with the ensuing amendments and refining regulation. The chapter will first, however, briefly examine the history and jurisprudential underpinnings of licensing as it has evolved in England and the United States and its use as a tool to both restrict markets and open them to competition.

6.2 LICENCES: PRIVILEGES AND NECESSITIES

Telecommunications licensing, generally, is a recent development. Most countries provided telecommunications as a public service, usually with posts, telegraph, and, sometimes, transport, via a government entity not subject to licensing. Licensing of telecommunications providers, however, did not emerge solely from the liberalization and privatization of state-owned incumbents that has swept the globe since the 1980s. This 'modern' development has much earlier foundations[7] and ties to historical events that are worth exploring to put a context and order to the study of today's telecommunications licensing laws.

6.2.1 Meaning and history of economic restrictions

'Licence' comes from the Latin 'licere', meaning 'to permit'.[8] This sense of 'permission' to do an act or acts otherwise unlawful or comprising a trespass or tort appears to apply in all legal meanings or contexts of 'licence',[9] such as a licence to enter onto land, to use a work protected by intellectual property, or to operate an automobile on public roads: licences under real property law, contract law, and government regulation, respectively.[10] This chapter deals primarily with licensing under government regulation,[11] which can be defined as 'authority to do some act

[7] The focus here primarily on law and principles derived from English common law does not suggest a lack of comparable historical precedent within civil law systems.

[8] See Bouvier's Law Dictionary 711 (Baldwin WE, ed, Library Edition 1928). Accord, Black's Law Dictionary 829–830 (6th edn 1979). The other secondary sense is that of the document that embodies these permissions in writing. See, eg *State ex rel Peterson v Martin*, 180 Or 459, 474, 176 P 2d 636, 643 (1947); *Mathias v Walling Enterprises*, 609 So 2d 1323, 1332 (Fla App 1992); 53 Corpus Juris Secundum, *Licenses* §2 (1983) (CJS). In telecommunications licensing, the licensing document or certificate is often a complex writing with descriptions of grants, rights, networks, approved equipment, and schedules of conditions and definitions. The two senses are somewhat merged.

[9] See eg Bouvier's Law Dictionary, n 8. [10] Ibid.

[11] Overlap exists with other contexts, eg in US communications licensing, some state and local franchise and licence requirements stem from the use of public lands by communications companies. See Quirk, WJ, 'A Constitutional and Statutory History of the Telephone Business in South Carolina', (2000) 51 South Carolina L Rev 290, 293. Use of public land is among the privileges suggested as underlying the rationale for imposing

or carry on some trade or business, in its nature lawful but prohibited by statute except with the permission of the civil authority or which otherwise would be unlawful'.[12] It examines this in the context of England and its derivative common law systems, primarily the US.

Public regulation of private parties providing goods or services, such as telecommunications, stems partly from the common law's imposition of greater duties and legal obligations on so-called 'public' or 'common' callings.[13] These selected trades or undertakings that changed over time according to their economic necessity[14] and often scarcity, frequently comprising a monopoly,[15] had a duty to serve all members of the public on reasonable terms and with reasonable care.[16] Inns and carrier coaches that were essential[17] to travel and travellers on the then few roads were soon included within this group that is today referenced primarily by the term 'common carriers', now far more limited.[18] These are relevant here for several reasons. Inns were the first post offices in Britain and, innkeepers, the first postmasters in a system before that also ultimately governing telegraph and telecommunications in the UK. Further, licensing of inns and common houses serves to illustrate the nature and scope of licensing jurisdiction, generally, as exercised over time in the UK and US. Finally, the 'common carrier' classification continues

regulation on common callings and undertakings granted privileges. See Burdick, C, 'The Origin of the Peculiar Duties of Public Service Companies', (1911) 11 Colum L Rev 514, 616, 743.

[12] Bouvier's Law Dictionary, n 8.

[13] See Wyman, B, 'The Law of Public Callings as a Solution of the Trust Problem' (1904) 17 Harv L Rev 156, 156–159 (suggesting that akin to this common law theory, enhanced duties be placed on monopolies in light of their privileges and their economic necessity to society).

[14] That the scarcity of inns and their importance to Britain's emerging internal trade was a factor critical to their regulation is suggested by the fact that prior to their inclusion as a common calling, they could be indicted as a public nuisance 'if it was set up where it was not needed'. Webb, S, and B, 'The First Century of Licensing' in *The History of Liquor Licensing in England*, at 5, n 1 (Longmans, Green & Co, 1903).

[15] 'The rule that one who pursued a common calling was obliged to serve all comers on reasonable terms seems to have been based on the fact that innkeepers, carriers, farriers, and the like, were few, and each had a virtual monopoly in his neighborhood.' *Wilson v Newspaper and Mail Deliverer's Union of NY*, 197 A 720, 722 (NJ Ch 1938) (citing Wyman, n 13). Another commentator notes that the doctrine emerged from the Statute of Labourers in 1349 to prevent unjust wage demands due to labour shortages created by the Black Death and eventually to those few tradesmen or professionals who worked outside the feudal domain. See Cherry, B, 'Utilizing "Essentiality of Access" Analyses to Mitigate Risky, Costly and Untimely Government Interventions in Converging Telecommunications Technologies and Markets', (2003) 11 Common L Conspectus 251, at n 31.

[16] See Speta, JB, 'A Common Carrier Approach to Internet Connection', (2002) 54 Fed Comm LJ 225, 251–256.

[17] The concept of an 'essential facility' under US competition law whereby access is an economic necessity was noted by the court to have its roots in common carrier doctrine. See *Munn v Illinois*, 94 US 113, 125–126 (1877) (citing extensively Hale, De Portibus Maris, 1 Harg, Tracts 78).

[18] Since the nineteenth century, US courts have applied the 'common carrier' doctrine to undertakings related to infrastructure such as docks, roads, railroads, telegraph, and ultimately telephone, and constitutes a narrower group. See eg Candeub, A, 'Network Interconnection and Takings', (2004) 54 Syracuse L Rev 369, 381.

to apply in the US today to telecommunications companies licensed[19] as such by and called 'carriers' under the US Communications Act of 1934.[20] Thus, the history and licensing of the inns within which the first postal system emerged evinces elements of law, economics, and social policy continuing to this day within regulation and licensing of electronic communications providers.

The Tudors' system of posts at regular intervals along key routes outside of London enhanced the reach and efficiency of the monarch's messenger services.[21] Largely established at the few inns along each route, the innkeepers became the first postmasters with each responsible for forwarding the monarch's mail by horse dispatch to the next post. (This system evolved into the General Post Office, a government department later encompassing the telegraph and telephone systems as detailed in Chapter 3.) The Tudor postal system was based on a daily retainer fee and a monopoly grant to the innkeepers for the letting of horses for hire to all travellers on that road.[22] The linking of a grant of monopoly with a public benefit or service seems a requirement[23] by medieval common law courts for legal recognition of restrictions on the freedom of any man to practise a trade even when

[19] In the US, telecommunication common carriers are not granted a licence certificate but rather, where required, approval to enter a market is made via an order by the FCC under the Communications Act 1934, s 214. This individual approval process applies only to international service common carriers including facilities-based carriers, resellers, prepaid calling card providers, and various wireless service providers offering calling between the US and foreign points. Some of these are entitled to an expedited processing of 14 days. Here this comprises licensing since the regulator makes the decision to allow market entry on an individual basis. For US application and approval processes, see Crowe, TK, *'FCC 214 Licensing'*, <https://www.avvo.com/legal-guides/ugc/fcc-section-214-licensing-for-telecommunications-providers-offering-international-calling> (last updated 11 September 2012). Domestic, interstate services are subject to blanket approval pursuant to s 214 powers, with all individual scrutiny discontinued. This chapter will refer to this as a general authorization, in keeping with the EU's classifications. The FCC imposes conditions and requirements for the performance of carriers' service and network provision by further orders, regulations, and approval of filed tariffs.

[20] 47 USC 151 *et seq*. These businesses are also categorized as 'public utilities' both falling under a larger category of businesses 'affected with a public interest', a doctrine expounded by Lord Chief Justice Hale and utilized by US courts to justify economic regulation. See *Munn v Illinois*, 94 US 113, 125–126 (1877) n 17. US courts in the early twentieth century struggled to pin the boundaries of this doctrine in various scenarios, including minimum wage statutes, ticket brokers, and employment agencies. They failed to do so with any real cohesive analysis and appear to have largely turned away from the doctrine as a source of power for economic regulation. See Candeub, n 18.

[21] Postmaster General, 'The Posts Before 1711' *Monarchs of All They Surveyed: The Story of the Post Office Surveyors* (London: HMSO, 1952) , at 6–7. Those originally surveying distances between and establishing these posts later oversaw enforcement of the GPO's monopoly and proper collection of its postage rates. See generally, ibid. Innkeepers remained postmasters under new systems by bidding for the contract to provide such services which then extended to private mail and for which these postmasters recouped their contract price and earnings from postage charged.

[22] Ibid.

[23] However, the 'pretence d'un publike bien' served as the basis for the grant of many privileges by the King. 4 Holdsworth, *A History of English Law* 344 at n 6 (2nd edn, 1938) (quoting YB Ed III Pasch pl 8).

these restrictions arose as the result of a royal franchise or privilege.[24] Other legal justifications were few. 'Custom' or 'prescription'[25] could legitimize royal privileges or franchises held since the time of memory that often had the result of restraining trade[26] such as the grants of political and commercial self-governance[27] to guilds and local authorities.[28] A national or public interest justified more recent grants. Beyond this, the principle of medieval common law, upheld by subsequent courts,[29] was that 'prima facie trade must be free, and that freedom could only be curtailed by definite restrictions known to and recognized by the common law'.[30] The prerogative to restrict economic liberty via limitations on trade, grants of intellectual property, etc, was subsequently vested in Parliament, although the royal prerogative did not disappear quickly or readily.[31] Hence, sources and kinds of lawful restrictions on trade, while limited by these legal principles, were still numerous and varied. Moreover, common law understanding of freedom to practise a trade without restriction was limited to the concept of freedom from arbitrary restriction not defensible by public policy.[32]

6.2.2 Licensing powers and historical purposes

Defensible restrictions could vary according to the grant and circumstance. Application in the context of inns is worth examining as justifications for limitations on the economic liberty of innkeepers in the form of a licence requirement can be seen to apply more generally to licensing of other common callings or common carriers, including, subsequently, telecommunications carriers. Inns and other public houses selling alcohol were very early on subject to licence by

[24] See 4 Holdsworth, n 23, at 344. This commentator notes, ibid at n 4, that grants of the King could be contrary to the common law and public policy as restraints on trade. Accord, Webb, S, and B, n 14 at 5, n 1 (quoting the King's 1604 circular letter to the Privy Council that 'By the law and statutes of this our realm, the keeping of alehouses and victualling houses is none of those trades which it is free and lawful for any subject to set up and exercise, but inhibited to all save such as are thereto licensed').

[25] Usage beyond the time of memory, defined as that before Richard I. 3 *Blackstone's Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*, 36 at n 7 (St George Tucker, 1803) (reprinted Rothman Reprints, 1969).

[26] Freedom from restraint according to common law standards was freedom from arbitrary restraints only, ie those not recognized by law. See Maitland, WH, *The Domesday Book and Beyond: Three Essays on the Early History of England* (CJ Holt, 1897), at 261–264.

[27] These numerous and varied grants often included not only the right to revenues collected in whatever undertaking it applied to but also jurisdiction over the persons and activities involved, or 'soke' and 'sake', respectively. See Maitland, WH, n 26, at 261–264. Hence trade and governance were often intertwined.

[28] 4 Holdsworth, n 23, at 346.

[29] See eg *Darcy v Allin*, (1602) Moore KB 671–675.

[30] 4 Holdsworth, n 23, at 350.

[31] See generally, ibid, at 344–362. The English Statute of Monopolies of 1623, 21 Jac 1, ch 3, made void all privileges, commissions, and grants of monopoly not confirmed by statute.

[32] 4 Holdsworth, n 23, at 350–352.

the local justices of the peace who under 'the statute of 5 and 6 Edward VI c 25 (1552) … were authorized to select from time to time, at their discretion, certain persons who were alone to exercise the trade of keeping a common alehouse'[33] and inns when they became subject to the legal regimen of common callings.[34] This regulation arose from a balancing of public interests: making available a then perceived necessity of life, the beer consumed at every meal, and control over the disorder and problems produced by excessive drinking.[35] This strengthened their earlier powers to eliminate any alehouses that went beyond that number required to serve the needs of the market,[36] perhaps an early example of natural monopoly theory that served to justify the virtually exclusive licensing of monopoly providers of telecommunications in the twentieth century.[37]

Parliament's delegation to justices of the peace included 'three distinct forms of control: the power of selection, the power of withdrawal, and the power of imposing conditions'[38] (controls which also describe accurately telecommunications licensing authority, until recently, in the EU). Purposes, broadly, for which licensing might be imposed, were described over 100 years ago as follows:

> The device of licensing—that is, the requirement that any person desiring to pursue a particular occupation shall first obtain specific permission from a governing authority—may be used to attain many different ends. The license may be merely an occasion for extracting a fee or levying a tax. It may be an instrument for registering all those who are following a particular occupation, in order, for some reason or another, to ensure their being brought under public notice. It may be a device for limiting the numbers of those so engaged, or for selecting them according to their possession of certain qualifications. Finally, the act of licensing may be the means of imposing special rules upon the occupation, or of more easily enforcing the fulfilment either of these special rules or of the general law of the land.[39]

These same purposes continue to apply to contemporary licensing as do some new ones, as examined below. However, the source of the authority underlying the purposes is important for their legitimacy and scope. For example, the exercise of

[33] Webb, S, and B, n 14, at 5, n 1. [34] Ibid, at 5, n 1. [35] Ibid, at 2–3. [36] Ibid, at 5–6.

[37] Civil law countries in Europe apparently had similar systems for authorizing and regulating transportation carriers as businesses affected with a public interest under a theory akin to that of common carriers and limiting their numbers within certain regions for reasons that seem premised on natural monopoly and public interest. See Fulda, CH, 'The Regulation of Surface Transportation in the European Economic Community', (1963) 12 Am J Comp L 303, 308–313 (commenting that while Germany, Belgium, Italy, and others limited numbers of competitors in trucking and railroads operations to ensure continued availability and safe operation without threat of unlimited competition that here would cause more harm than in other economic sectors, the limiting of numbers of business units by the US seems generally to have been confined to the liquor industry).

[38] Webb, S, and B, n 14, at 4–5. [39] Ibid, at 4.

the regulatory or the 'police' power of the state ordinarily comprises the primary foundation of licensing requirements considered necessary for the public interest or general welfare such as public health, morals, or safety.[40] In the US, a significant number of states view licensing of legitimate businesses or occupations without such interests as outside the limits of their police power.[41]

The source of power underlying licence fees is less clear. While the sovereign's power to tax has sometimes been considered to underlie the imposition of licence fees, it has also been held that a true 'licence fee' is imposed under the police power with application only to a type of business that is supervised or subject to regulation that does in fact occur, the expense of which is intended to be defrayed by the fees equated to the 'probable cost' of supervision.[42] Fees unrelated to the cost of regulation have been considered a 'tax' on occupations in the nature of an excise under the power to raise revenue, and subject to review under different standards from licensing fees.[43] It has been suggested that perhaps both powers can apply within the same fee and be valid. Licence fees for telecommunications providers appear to vary greatly within and across jurisdictions. However, since 2002, fees under the EU's framework, other than those associated with scarce public resources, must not only be based on the costs of licence issuance and enforcement, but must also be demonstrably so or otherwise adjusted. They are then truly 'licence fees'. The CJEU has, however, upheld, in contrast, a regional tax based on 'establishment' as applied to communications providers in light of the presence of their poles, pylons, and masts installed on private or public property in a province as distinct from any fee to install or operate that equipment under the Authorisation Directive.[44]

[40] See *Sharp v Wakefield* [1891] AC 173, (Bramwell, LJ) (noting that the licensing of public houses was largely police rather than economic regulation). Accord, 53 CJS, n 8 at §5.

[41] See 53 CJS, Licenses § 5.

[42] *National Biscuit Co v City of Philadelphia*, 98 A 2d 182, 187–188 (Pa 1953). Accord, *Hunt v Cooper*, 110 SW 2d 896, 899–900 (Tex 1937).

[43] See eg *National Biscuit*, n 42 at 187–189; *Hunt*, 110 SW 2d at 899–901. Where the licence requirement is seen as revenue-raising rather than regulatory, it has been held that the licence is merely a receipt rather than a permission. See *Royall v State of Virginia*, 6 Sup Ct 510 (US 1886) (noting that a municipal occupation licence could not prevent an attorney licensed by the State to practise law in any part of the State from practising within the city limits, although a valid tax). Failure to obtain or comply with a licence that is seen as administrative or merely revenue producing may have lesser consequences at law than one which seeks to regulate skills or proficiency or is otherwise imposed for public safety or health. See eg *Dubray v Horshaw*, 884 P 2d 23, 28 (Wyo 2000) (where statutory requirement for licence transfer was merely administrative rather than intended to protect a class of persons from a particular harm, citing s 286 of the Restatement 2d of Torts, it created no duty of care on the plaintiff).

[44] Joined Cases C-256/13, C-264/13, *Provincie Antwerpen v Belgacom NV, Mobistar* (2014).

A different source of authority may underlie the privilege, licence, or franchise involving the grant of a valuable resource belonging to the public, such as land,[45] or in the case of telecommunications, radio spectrum.[46] These have long been considered to be administered by the state on behalf of the public under the doctrine of 'public trust', based on Roman law.[47] Payment of a fee that reflects value of the resource unrelated to its regulation, and that ensures its effective and efficient use, is therefore considered appropriate to be levied, although not always done.[48] These policies in connection with spectrum will be examined further in Chapter 7.

6.2.3 Purposes of contemporary telecommunications licensing

The following explores how the historical purposes for licensing underlie communications licensing, tracing this in the few telecommunications markets where licensing existed before the last forty years' liberalization, and in modern telecommunications licensing regimes since.

6.2.3.1 *Licences as a control over market entry*

Licensing has been a common 'device for limiting the numbers of those so engaged' in telecommunications to control market structure. In both the UK and US, eg, this included the extreme aspect of protecting a monopoly. In the UK, the Telegraph Act 1869 established 'exclusive privilege' in the General Post Office to operate telegraph services in the UK but not itself subject to licence or regulation as a government department. While the Act exempted certain entities such as railroads, canals, and limited other undertakings, eg Lloyds of London, for their own use, other companies wishing to provide telegraph services had to obtain a licence granted by the Postmaster General.[49] This protective legislation later was construed to encompass telephony[50] that thereafter could no longer be provided

[45] See *Shively v Bowlby*, 152 US 1 (1984) (noting that public lands were traditionally held by the king for the benefit of the nation under *jus publicum*, with such vesting in the federal and state governments of the US upon the American Revolution).

[46] Corbett, K, Note 'The Rise of Private Property Rights in Broadcast Spectrum', (1996) 46 Duke LJ 611, 616–619.

[47] See Institutes of Justinian 2.1 (T Cooper trans. 2d edn 1841) positing that 'Things common to mankind by the law of nature, are the air, running water, the sea, and consequently the shores of the sea …'

[48] See eg Corbett, K, n 46.

[49] Events in Telecommunications History, BT Group Archives, <http://www.btplc.com/Thegroup/BTsHistory/1851to1880/1869.htm>.

[50] *Attorney-General v The Edison Telephone Co of London, Ltd* [1880–81] LR 6 QBD 244. In upholding the Postmaster General's monopoly, the court relied on the public interest of the Act's grant of special powers to build networks/install equipment on public and private lands and related duties and its obligation not to divulge the content of a communication which would not apply to an unlicensed entity acting outside the scope of the Act. See ibid, 254–255.

by a private company without the granted licence, ensuing revenue sharing and liability to takeover.[51]

Historically in the US, except for some small, rural carriers, American Telephone & Telegraph (AT&T) was the exclusive 'common carrier' licensed under the Communications Act of 1934 pursuant to a natural monopoly theory and after AT&T had acquired most of the other carriers in the country.[52]

Licensing to limit the numbers of market entrants was neither exclusive to these two countries nor a mere historical curiosity. In 1999, the EU reported that the individual licences required by a majority of Member States with their ensuing complexities and, in some states, delay and expense, lack of transparency, and excessive regulatory discretion were barriers to market entry.[53] EU licensing then had the effect, if not also the object, of limiting the number of market entrants and, therefore, of protecting the national incumbent and maintaining near-monopoly market structures. The present EU framework has largely resolved concern about the authorization grant itself as a barrier to entry with its mandate for general authorizations without individual regulatory decisions or permissions, although associated market entry concerns remain.[54]

Licensing to control against market entry must be contrasted with licensing as a tool to introduce competition. This is done by requiring licensing of the incumbent that may or may not be still government-owned and/or granting licences to new entrant(s) that will offer services in competition with the incumbent. To level the playing field, asymmetric conditions are often imposed on the incumbent, usually via the licence, such as requiring it to interconnect on a non-discriminatory basis and at regulated, sometimes cost-based rates and maintaining separate accounting to ascertain and verify such cost. Specific examples of a licence to open markets include the UK's licensing of Mercury under the British Telecommunications Act 1981 to provide a second fixed network in competition with British Telecommunications (BT), therein granted an 'exclusive privilege'[55] and the 1969 licensing of MCI by the US Federal Communications Commission to

[51] See Events in Telecommunications History, n 49.

[52] See Chapter 5 for a discussion of the early history of US telecommunications. For a further discussion of natural monopoly, see Chapter 2.

[53] Commission Communication, 'Toward a new framework for electronic communications infrastructure and associated services: The 1999 Communications Review' (1999 Communications Review), COM(1999) 539, 10 November 1999. Accord, Commission Communication, '5th Report on the implementation of the Telecommunications Regulatory Package' (1999).

[54] These include such issues as rights of way, fees, and cost transparency, see ECTA Regulatory Scorecard Report 2009, that continue in the Next Generation Access context. See also Allen, J and Arnell, A, Report for ECTA: 'The digital single market and telecoms regulation going forward' (18 September 2015). Both at: <https://www.ectaportal.com/policy-publications/reports>.

[55] See Chapter 3.

construct a microwave network and provide long-distance services over it to subscribers for interoffice communications.[56] Both were merely first steps, requiring further intervention including additional legislation and court action to achieve what could be called a competitive market.

Licensing can serve simultaneously to limit and open markets as evidenced with wireless communications. Limited spectrum availability and the need to protect revenue flows of a state-owned or recently privatized monopoly incumbent (possibly operating in both fixed and wireless markets) have caused countries to delimit the number of wireless providers licensed in a market essential for its ability to penetrate geographically more broadly with lower infrastructure costs than was possible by installing new or upgrading aged fixed-lines infrastructure. Wireless telephony, therefore, in developing countries, leapfrogged the old technology to compete as an alternative infrastructure to fixed lines and enhanced greatly the historically poor telephony penetration rates. The leapfrogging has continued with developed countries now seeing a marked decline in fixed-line subscriptions and mobile telephony penetration rates approaching 100 per cent in developing countries.[57]

In a hybrid of these dual licensing objectives, regulators have limited the number of 3G market entrants but then used licensing conditions to open further these limited markets. Hong Kong, eg, seeking to increase both competition and innovation, set 'open network access' conditions on the four 3G licensees, requiring them to make a minimum of 30 per cent of their capacity available to virtual mobile network operators (MVNO), effectively at least doubling the number of market entrants with access negotiated at market rates.[58] In 2011, France, in awarding only four 4G licences, credited spectrum auction participants agreeing to enhanced MVNO access conditions with a multiplier on their bid price, increasing their chance to win a licence.[59]

Limits on market entry can also be imposed via requirements for multiple licences, ie different licences for different types of networks and services. Providers might be required to have numerous licences based on the network operated or the type of service provided. For example, before the 1999 EU reforms, the UK had twenty-two licence categories based on the network operated. Some countries

[56] See Chapter 5.

[57] See ITU, 'Key ICT indicators for developed and developing countries and the world', 2017, <https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx>.

[58] Special Condition 12, Hong Kong Mobile Carrier Licence for 3G Networks, <http://www.ofta.gov.hk/en/3g-licensing/publications_c12_mcl.html>. (archived)

[59] See Maxwell, W, 'French 4G Auction Results Announced', International Spectrum Rev (Hogan Lovells 23 December 2011), < https://www.hoganlovells.com/blogs/hlspectrumreview/french-4g-auction- results-announced>.

may license providers of mobile voice telephony but limit licensing of fixed voice or international voice to the national incumbent for various reasons. For example, starting in 2006 and until recently, the UAE allowed a second provider in fixed line services to compete only in different geographic markets from the incumbent. The delayed duopoly in all fixed markets via mutual local loop unbundling, scheduled for the end of 2011, only occurred in late 2015 well after the competitors were already competing in mobile markets.[60] This delayed liberalization is typical of Middle Eastern and African countries.[61] Licensing with fixed network and services markets' exclusivity for a defined period has been a common strategy to attract investors in newly privatized incumbents in order to ensure a return on their investment. Technologies using Voice over Internet Protocols (VoIP), such as Voice on the Net or peer-to-peer applications, however, have challenged such exclusivity with numerous countries limiting competing VoIP services. Wireless VoIP telephony poses licensing and other regulatory challenges with the growth of WiFi hot spots providing broadband internet access using unlicensed (possibly illegal) spectrum, and the growing availability of WiFi handsets and soft phone software to convert mobile internet access devices into phones.

6.2.3.2 *Licensing to impose eligibility requirements*

Telecommunications licensing can be used to ensure professional and technical or other eligibility requirements, another historical 'end' justifying the 'device of licensing'. Licensing processes to ensure applicants possess various qualifications are not uncommon, eg, to ensure that potential providers are solvent, able to deliver the services or complete the network they apply to provide, or will use scarce resources well. These can range from a 'fit and proper' standard applied to persons running the company[62] to the provision of an appropriate business plan[63] evincing expertise or the proof of a specific experience, such as numbers of years of provision elsewhere. These are common in comparative licence award processes, often called 'beauty contests', where providers compete for the licence to be awarded

[60] See Kapur, V, 'UAE resident alert: You may now switch your Internet, fixed line provider' (Emirates 24/7 20 October 2015), <http://www.emirates247.com/news/emirates/uae-resident-alert-you-may-now-switch-your-internet-fixed-line-provider-2015-10-20-1.607422>.

[61] Algeria only recently required LLU by its incumbent. See 'Algerian government adopts new telecoms bill, report says' (Telegeography 3 January 2017), <https://www.telegeography.com/products/commsupdate/articles/2017/01/03/algerian-government-adopts-new-telecoms-bill-report-says/>.

[62] See Carrier or Service Provider Licence, Form I, sec G, Jamaica Telecommunications Act 2000, Telecommunications (Forms) Regulations 2000, <http://www.our.org.jm/ourweb/sites/default/files/documents/sector_documents/application_for_carrier_license_or_service_provider_license.pdf>.

[63] eg Japan requires the filing of a business plan for telecommunications licences and applies disqualifying fitness criteria. See Ministry of Internal Affairs and Communications, *Manual for Market Entry into Japanese Telecommunications Business* (2006).

against identified arguably merit-based criteria. Numerous countries around the world used beauty pageants to allocate 3G spectrum.[64] Sometimes minimum qualifications serve as the threshold for entry to auctions for licences, a process frequently used with spectrum licences. Price or another criterion then becomes the deciding factor.[65]

6.2.3.3 *Licensing as a means to impose special rules or operating controls*

Licensing as a 'means of imposing special rules upon the occupation' can readily be seen in modern telecommunications regulation. Licences impose all sorts of controls, usually via 'conditions' on the grant of permission especially regarding basic services.[66] Licences often impose technical requirements for equipment attached to or interconnected with the network for its protection and that of employees of providers and users. Conditions can also attempt to ensure efficient use of numbers, spectrum, and other resources considered scarce by a jurisdiction. In the EU, such conditions premised on 'non-economic reasons in the general public interest' called 'essential requirements', comprise a limited and harmonized set of conditions honed over time to ensure essentiality and remove barriers to entry.[67] Their application can vary according to the nature of the equipment or service at issue.

Conditions imposed for specific technologies or with different effect on a technology risk a costly or difficult regulatory burden on this technology not existing for others and possibly undermining its development and use. For this reason and in light of technological convergence, eg, the EU's regulatory framework seeks to be technology neutral although this is not always achieved such as when regulation to address bottlenecks in a relevant market not considered substitutable for another (often due to the nature of the technology), imposes distinct requirements.

Other non-economic conditions imposed via licences are used to achieve social objectives, such as the funding/provision of some services on a non-competitive basis to ensure that all citizens, irrespective of location, have access to a minimum specified level of affordable service and/or to ensure consumer protections unique to telecommunications, such as the provision of emergency service operators on a toll-free basis. These and other mandated services, depending on the individual jurisdiction's policies, can comprise the 'universal service obligation' (USO), ordinarily the monopolist's *quid pro quo* to providing all services. In liberalized markets,

[64] See ITU 3G License Table (2001) (11 of 49 countries used beauty contest), <https://www.itu.int/osg/spu/ni/3G/.../licensing_policy/3G_license_table_FINAL-3.xls>.

[65] Ibid. This is discussed further in Chapter 7.

[66] Enhanced, or information services, in contrast, may be unlicensed and not regulated, eg in the US. See Chapter 5.

[67] See Chapter 4, European Union Communications Law at Section 4.4.2.

imposing a USO obligation (or right to exploit this opportunity, as the EU now views such service provision) or a duty of USO financial contribution may require a licensing condition or right. These can be individual USO conditions imposed on specific providers, still often the former monopolist with its state-revenue-built networks and large market share. Contribution can be via a general condition imposed on all or a defined group of providers, such as providers of public telecommunications networks and services. As in the UK, these can exist but be untriggered, eg for potential future contributions to any USO fund that might be established if the cost to the former incumbent becomes unduly burdensome. This avoids the difficulty of amending the licence after issuance.

6.2.3.4 *Licensing as a means of enforcement*

Licensing as a means 'of more easily enforcing the fulfilment either of these special rules or of the general law of the land' is, or has been, true for telecommunications. Many sector-specific regulators rely on licensing powers as their primary means of enforcement. Powers to modify or revoke licences and/or impose sanctions, even if subject to review, can ensure compliance with obligations. Conditions may encompass not only requirements under telecommunications legislation but also other laws. For example, the UK telecommunications regulator formerly imposed a duty to comply with competition law under a 'fair trade' condition in the licence, removed under the 2002 EU telecommunications licensing reforms precluding conditions for compliance with general laws.[68] In the EU, therefore, this licensing purpose is delimited. EU law also further restricts the sector-specific rules that can be applied via licence conditions. (See Sections 6.4.1, 6.4.2.4.)

Enforcement of sector-specific conditions does not preclude regulatory reliance on other laws if the sector enforcement power is too limited in scope or effectiveness. Thus, the UK telecommunications regulator, Ofcom, is further empowered under the UK Competition Act 1998 and the Enterprise Act 2002. It can choose, therefore, which avenue will be more effective for specific anti-competitive behaviour. In 2005, it chose to address likely abuses of dominant behaviour in wholesale access and backhaul markets by British Telecommunications (BT), by means of the Enterprise Act. Pursuant to section 154 of that Act, Ofcom accepted a series of binding undertakings by BT to functionally separate its operations in order to provide access to its core network and to ensure product equivalence for downstream competitors, etc.[69] Section 154 allows Ofcom, in lieu of a formal

[68] Authorisation Directive, Art 6(3).

[69] See generally, Ofcom, 'Notice under s 155 (1) of the Enterprise Act 2002 Consultation on undertakings offered by British Telecommunications plc in lieu of a reference under Part 4 of the Enterprise Act', 2005, at <http://www.ofcom.org.uk/static/telecoms_review/june05.htm>.

referral for full market investigation by the Competition and Markets Authority (and potential for the full structural separation of BT), to enter into binding undertakings to remedy, mitigate, or prevent any adverse effect on competition, or any detrimental effect on customers which has or may be expected to result from the adverse effect on competition. After a market review, in 2017, Ofcom varied the 2005 undertakings to provide for the legal separation of the unit running the network, Openreach, as the prior undertakings were found insufficient to address its bias in favour of BT's retail business.[70] Openreach will now operate as a limited private company wholly owned by BT with its own employees and a board that pursuant to governance commitments will oversee its own operating strategy and accountability.[71]

The ability to correct market abuses via sanctions under licence conditions remains a valuable tool, however. Arguably, this is especially true in emergent and developing markets where the need to control the former incumbents may be more acute than in more evolved competitive markets. The serious and repeated regulatory intervention required in the UK, one of the world's most evolved markets, belies this, suggesting that control over the essential facility of the core telecommunications network always permits exclusionary behaviour. Recognizing the limitations of its sectoral conditions, the EU now requires national regulatory authorities (NRAs) to have the extraordinary sectoral power of functional separation for such persistent problems, the impetus for the UK's sectoral provision.[72]

One scenario evidenced in contemporary telecommunications, if not historically, is licensing as a substitute for either and/or both special rules and general laws of the land, eg, where the need exists to get outsiders to risk money and time either to invest in the incumbent or competitors, but where the general legal framework might not be developed sufficiently to protect that investment. It might also be helpful absent a general competition law framework that places duties on all players in the market or where authorities are without telecommunications expertise. Licences with clear obligations and rights can protect new entrants where no adequate sector-specific regulations exist, such as for cost-based interconnection which competition law is unlikely to require.

[70] Although sector-specific regulation now provides for this option, see Communications Act 2003, s 89A, with requisite notification to the Commission under s 89B, the legal basis for the revised undertakings does not appear to have changed, although Ofcom did notify the Commission as s 89B requires.

[71] BT, 'Proposals agree with Ofcom', <http://www.btplc.com/UKDigitalFuture/Agreed/index.htm>, accessed 10/09/2017.

[72] See Chapter 4. Also see n 70.

6.2.3.5 *Licensing and fees*

Considering other historical purposes of licensing, it does not appear typically the case that telecommunications licensing is merely a device to extract a fee.[73] However, licensing fees are very common and not usually *de minimis* sums, even where based on the cost of regulation. The former individual licences under the UK regime for public telecommunications operators were as much as £40,000 annually and purportedly cost-based. Cost allocation and transparency issues exist even in the EU where fee regimes are required to be based on the cost of regulation other than for spectrum, scarce numbers, and possibly rights of way over land.[74] There does, however, seem to be a trend of lower licensing fees in India, Zimbabwe, and other developing nations with the growing recognition that lowering such costs is key to more competitive markets and, ultimately, lower consumer costs.[75]

However, even where licences to provide services in a particular market are not formally limited numerically, prohibitively high licence fees have been used to limit entrants to a lucrative market that is de facto being reserved for the incumbent former monopolist. This can be found, for example, in the fees set by numerous African countries for the provision of private international gateways that would compete with the national champion in international services.[76]

6.2.3.6 *Licensing and monitoring*

Returning to its historical justifications, licensing does help ensure that those providing electronic communications networks and services are on the radar screen of the public and regulators who can oversee their compliance with laws and ensure that the licensing fee and any required payments, such as contributions to a USO,

[73] But see 'Testimony of Barry M. Aarons et al before the US Senate Commerce, Science and Transportation Committee' (7 March 2006) (stating that US municipality licence and franchise fees for telecommunications providers bear no relation to access to municipal rights of way (and therefore falling within the limited resource category) but are rather merely revenue raisers and ultimately a service tax on end users), <http://www.ipi.org/ipi_issues/detail/testimony-before-the-senate-commerce-science-and-transportation-committee-regarding-video-franchise-reform-and-voip>. See eg Chapter 3.24, Midvale Municipal Telecommunications License Tax Code, Codification of General Ordinances of Midvale, Utah (1988 and as amended 2004)(3 ½ % tax rate based on gross receipts).

[74] See ECTA Regulatory Scorecard Report 2009, n 54, at 10. Also see Pyddoke, R, 'Transparency and accountability of telecommunications in Sweden' (2013) (Koncurrensverket Projekt 2012/310), at 16, 20–22 (positing that even a regulator as effective as the Swedish PTS could be more accountable and transparent, eg failing to publish a 2013 annual work plan with budget), <http://www.konkurrensverket.se/globalassets/forskning/projekt/2012-310-transparency-and-accountability-of-telecommunications-regulation-in-sweden.pdf>.

[75] See 'Zambia lowers international gateway license fee' (Lusakatimes.com 16 June 2010) (noting that Zambia was seeking to attract investment comparable to Uganda, Tanzania, and Kenya which had much lower license fees), <https://www.lusakatimes.com/2010/06/16/zambia-lowers-international-gateway-license-fee/>.

[76] See OECD Investment Policy Reviews: Zambia (2012), at 145 (noting that $12.5 million gateway fee in Zambia limited competition to incumbent until it was lowered to $300,000).

are made. In the EU, this historical licensing function is met by the Authorisation Directive's permitted notification procedure or registry. Implementation is varied. For example, while the UK regulator has eschewed this general register, other more limited registers exist. The Electronic Communications Code registry allows persons to check if an undertaking has powers to install networks on public and private land and has completed its annual financial security filing. Premium rate providers (services and networks) must register with the Phone-paid Services Authority under a code of practice authorized by Ofcom under the Communications Act 2003. Ofcom also created a registry to allow it and other possible spectrum users to know how spectrum is being traded and reused, although seemingly unavailable on Ofcom's site.[77]

6.2.3.7 *Licensing as a binding agreement*

A final but contemporary licensing purpose is as a contract between the government and the provider.[78] This is the case, for example, where private sector strategic investment and expertise is required to modernize large telecommunications infrastructure and provide new services or substantially improve services but where the government is not ready to or does not want to privatize or fully privatize the state-owned provider and transfer ownership. The relationship between the government and the private undertaking(s)[79] with allocation of risk, rights, and obligations from a continuum of possible options is often spelled out in complex agreements. Just one example is found in build-operate-transfer (BOT) agreements whereby the private undertakings are given a concession to operate for a fixed time (often fifteen to twenty-five years) the infrastructure that they have built[80] (eg new mobile network or an upgrading a fixed network) which is then turned over to the government at the end of the concession period. Beyond project financing provisions, the contract may also contain conditions under which the service will be provided as well as the nature of the service and roll-out obligations. To ensure protection of the private parties' investment, the BOT agreement may provide the concessionaire with exclusive authority to provide some or all services for specified periods. It may also limit the changes in national regulation that can affect the BOT operations and rights or apply a choice of law. Essentially,

[77] Wireless Telegraphy (Register) Regulations 2004, SI 2004/3155 as amended. See also Ofcom TNR, <http://spectruminfo.ofcom.org.uk/spectrumInfo/trades>.

[78] See Wellenius, B, and Neto, I, 'The Radio Spectrum: Opportunities and Challenges for the Developing World' (World Bank, 2008).

[79] More than one can be involved, for example, in a joint-venture type of public/private partnership (PPP).

[80] The financing may come from a variety of sources including the host government and/or may, according to its nature as debt or equity, require sovereign obligations.

the contract fulfils the purposes of licensing and may effectively serve as the licence. However, there may be a separate licence included or referenced within the BOT contract.

6.2.4 The legal nature of licences

The licence that gives rise to contractual obligations is contrary, however, to the traditional legal nature of government licensing. While a licence ordinarily does confer a right or a power to engage in a certain occupation or economic activity, or a right to use property that does not exist without it, and subject to restrictions and revocation, a licence has not historically been considered a contract between the issuing authority and the licensee.[81] Rather, US and UK courts have considered them privileges of an individual nature that created no property rights[82] and could not, therefore, be conveyed to third parties. Renewals had the same status as the initial licence; both were within the discretion of the granting authority to issue and revoke, subject only to the jurisdictional limits of their authority.[83]

This would appear to be changing in telecommunications. In the EU, the Authorisation Directive makes the general authorization to provide electronic communications networks and services virtually automatic with its accompanying rights subject only to limited conditions and, perhaps, a notification. It is as well, perhaps, perpetual with revocation possible only in certain serious, limited circumstances. As this framework also requires that any decision that affects the interest of any party be subject to the right to comment and to appeal[84] ultimately to a judicial body, the removal of an authorization is entitled to due process typically commensurate in democracies with property interests.[85] The 2002 Framework took much of the discretion to grant and remove permissions to provide networks and services away from the granting authority (although the 2009 reforms restored a bit of balance with the enhanced sanction potential). The EU framework's continued movement towards a system permitting spectrum licence transfers to third parties is a further development that signals recognition of the

[81] See CJS, n 8, at 3.

[82] See eg *Lap v Axelrod* 95 A 2d 457 (NY App Div 3d Dept 1983), *appeal denied*, 460 NE 2d 1360. Also see *Sharp v Wakefield* [1891] AC 173 ('The hardship of stopping the trade of a man who is getting an honest living in an honest trade, and has done so, perhaps, for years, with probably an expense at the outset, may well be taken into consideration; but it must be done so in conjunction with considerations the other way, and must be left to the discretion of the justices.' Bramwell LJ, 182–183).

[83] See *Sharp v Wakefield*, n 82 (noting that, absent a provision in the enabling statute to the contrary, local justices had the same discretion to renew as to issue).

[84] Directive 2002/21/02 EC on a common regulatory framework for electronic communications networks and services, L 108/33, 24 April 2002, Art 4.

[85] See n 1.

great value of these rights of use and that the ability to trade or 'resell' spectrum rights may be important to their effective and efficient use, particularly with projected 5G characteristics suggesting a greater need for spectrum sharing.[86]

The nature of such greater rights seems a 'propertization', as one usually cannot trade or sell something without having some legally recognized property interest in it. This almost seems implicit in any creation of such secondary markets that need to make spectrum legally transferable. The US FCC implemented a legal framework for trading seemingly structured to avoid this legal effect. It originally only permitted non-prior approval for spectrum leasing where the original licensee retained the full licence and remained responsible for compliance.[87] For transfers or assignments, the licence had to be returned to the FCC and new licence(s) issued with regulatory obligations running to the new licensee (or to both licensees if the spectrum was merely partitioned).[88] Clouding the prior legal distinction somewhat, the FCC has, under its power of regulatory forbearance, streamlined the process once described as 'clumsy',[89] to allow certain transactions in both categories of leased and transferred/assigned spectrum to receive an 'instantaneous' (overnight), expedited processing based on parties' certification of compliance with various set criteria and has also created the concept of a 'private commons' where licensees can allow for device-to-device type communications not involving the full network infrastructure.[90]

Grant holder concerns about the nature of their interest and extent of their controls over other intangible interests granted via regulatory permissions, eg for numbers or rights of access, where a premium has been paid, are understandable. Efforts to make the status legally clearer can be seen, eg in Australia with 'Smartnumbers' (ie those arranged so as to be more memorable) that are auctioned by the Australian Communications and Media Authority. ACMA advises applicants that the auction creates only an enhanced 'right of use' in the number (ROU) but that they don't become an 'owner' although the number 'remains' theirs unless inactive for three years and that they can sell or lease it.[91]

[86] See eg Johnson, N, 'Reality Check: The need for new spectrum sharing and small cell strategies' (RCR Wireless News 4 October 2016), <https://www.rcrwireless.com/20161004/opinion/reality-check-need-new-spectrum-sharing-small-cell-strategies-tag10>.

[87] See generally, FCC 03-113, First Report and Order and Further Notice of Proposed Rulemaking that authorizes spectrum leasing in a broad array of Wireless Radio Services (FCC Washington, DC, 15 June 2003).

[88] Ibid.

[89] Judge, P, 'Ofcom to throw radio spectrum wide open' (Tech-World, 23 November 2004).

[90] See 'Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets', Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, FCC 04-167, 17529-33, paras 53–66 (FCC Washington, DC, 8 July 2004). Also see Sayle Carnell, W, ' "Private Commons" in Radio Spectrum: The FCC Avoids a Tragic Result', (2004) 6(1) Engage, The Journal of the Federalist Society Practice Groups 150.

[91] ACMA, 'About Smartnumbers', <https://www.thenumberingsystem.com.au/#/about-smartnumbers>.

6.2.5 Types of licences and licensing processes

6.2.5.1 *Licence form*

Thousands of licence types are theoretically possible in telecommunications, globally. However, they can generally be distilled into three primary overarching categories: individual provider/operator/carrier licences; general authorizations (or class licences); and no licence requirement.

Individual licences require an approval or exercise of discretion by the regulator or some other entity, eg minister or possibly the incumbent, for a specific undertaking to provide specified services or approved networks. Many countries require such individual authorizations that may be called by other names. For example, Trinidad and Tobago requires all persons operating a public telecommunications network or providing a public telecommunications service or broadcast service to obtain a 'concession' from the minister responsible for telecommunications.[92] Individual licences may be subject to conditions applying exclusively to a provider and possibly individually negotiated; or may all have the same conditions. This was the case with the UK's former licensing scheme implemented under the EU's Licensing Directive.[93] Oftel harmonized licences and conditions by licence type, eg 'Standard Fixed PTO (with Code Powers)' and 'Standard Fixed PTO (without Code Powers)'. Identical conditions were applicable to all those running that kind of network or telecommunications 'system'. The running of that network or system was the triggering event for the UK licence requirement as opposed to providing services. In those harmonized licences, there were a few unique conditions: those limited to BT and another small incumbent system, then, Kingston-on-Hull (Kingston Communications), based on market power definitions.

With individual provider/operator/carrier licensing, there is usually an application and decision process that may vary by country as to the information required to be provided by the potential provider, the length of time that such decision and process can take, and the fee to be paid. However, with the WTO's transparency requirements for such information, evaluating the barrier that individual licensing represents in a specific country will be easier, if not ultimately lessened.[94]

General authorizations, formerly called 'class licences' in the UK, do not require individual decisions or the exercise of discretion. Rather, the undertaking meeting the conditions is authorized to operate the network and/or services described by that authorization if it does so in conformity with its conditions. There

[92] Republic of Trinidad and Tobago Telecommunications Act, 2001, §21 (Act 4 of 2001).

[93] Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorizations and individual licences in the field of telecommunications services, OJ L 117, 7 May 1997.

[94] See further Chapter 16, at Section 16.4.

may be an information, registration, or notification requirement, and the payment of a fee, which may be annual or otherwise. The authorization may be for a specified period, as were the UK class licences, but that has little consequence if the entitlement is virtually automatic. The general authorization does not mean simplicity, however. For example, under the UK's former system, there were twenty-three types of class licence, some of which had up to 115 pages of conditions in a template licence, although identical for each type. The general authorization, the foundation of the EU's current framework, is intended to further harmonize and simplify the licensing system throughout the Member States.

New Zealand does not require a licence for telecommunications or broadcast services. It therefore has what can be called 'open entry'.[95] A provider of these services need not, but may, obtain an individual designation of 'network operator' upon application from the Minister of Communications where such rights are needed to provide the services.[96] Such designation is an individual grant of rights of access to land, and in particular the road reserve,[97] to lay or construct lines where this is required to commence and carry on a telecommunications or broadcast business.[98] It also entitles the operator to approve all equipment connected to its network (s 106) and grants rights to recover damages for contravention of this process (s 110). It is, therefore, the only 'licensing' of connected equipment (except that regarding electromagnetic interference) that is imposed by the NRA.

Europe appears to have at least one free or 'open entry' jurisdiction. Denmark has no licence, authorization, or notification or declaration requirements for any providers; Germany has only a notification requirement.[99]

Open entry is not necessarily equivalent to unregulated as it is possible for statute or administrative orders, applicable to the sector, to impose industry obligations.[100]

[95] NZ Ministry of Business, Innovation & Employment, 'Telecommunications and Broadcasting Network Operator' (ICT Policy & Programmes, Wellington 2017), <http://www.mbie.govt.nz/info-services/sectors industries/technology-communications/communications/telecommunications-broadcasting-network-operators/how-to-register>.

[96] NZ Telecommunications Act 2001, ss 102–105, SI 2001/103.

[97] Term used in New Zealand and Australia to define that area of land between the front boundary of private property and the road. For purposes of rights of access, this entails the road plus this area, a boundary-to-boundary concept.

[98] This grant would be called 'Code Powers' in the UK. See Section 6.4.4.

[99] See Sixth Report on the Implementation of the Telecommunications Regulatory Package, COM(2000) 814, 7 December 2000, at Annex 1, Licensing, n 3.

[100] See ICT Regulation Toolkit, Module 3, Authorization of Telecommunications/ICT Services, Section3.2 General Authorization and Open Entry Policies (infoDev ITU 2011), <http://www.ictregulationtoolkit.org/toolkit/3.2>.

6.2.5.2 *Licensing procedures*

The processes for obtaining licences are probably almost as varied as licence types. Each country will have unique aspects even if the general process is like that of another country. This chapter has already touched on the primary procedures, such as an individual application with a review process and issuance. This can vary as to the information sought and the nature of the review, which may be done by a different person or body from the issuing entity. For example, in Trinidad and Tobago, the Minister of Public Administration grants 'concessions' to authorize the operation of a public telecommunications network and/or the provision of any public telecommunications or broadcasting service. However, the application is made to the Telecommunications Authority (TATT) which must review and within ninety days of its receipt make recommendation to the Minister, who then has sixty days to approve, reject, or modify the recommendation.[101] The review criteria and procedures are vague, however, since the TATT states that these include *but may not be limited to*: company information, industry track record and expertise, financial stability, and business plan viability, including specifics of the financial plan and risk analysis, the marketing and service plan, the technical plan and manpower.[102] While of itself, this information might not be extraordinary, the specified evaluation criteria are somewhat subjective with the business plan viability worth up to 70 per cent of the total evaluation criteria used by the regulator whose own entrepreneurial expertise to evaluate 'viable' must be questioned.[103] The process is also cumbersome and not fully transparent. Separate network and service concessions are sometimes required since a Type 1 network concession does not grant the right to provide services over that network.[104] Also, the provision of virtual networks and services is a unique type of concession category (Type 3)[105] which is closed rather than on a first come, first served basis as with other telecommunications service concessions. The key stated difference in this category is not that the service provider does not own the network, or that the service has characteristic of pure telecommunications services, but rather the provision of multiple services over the network used.[106]

If licences are to be limited such as with fixed-line duopolies or where spectrum demand exceeds availability, there must be a process to determine who obtains the

[101] See Telecommunications Act, 2001 as amended in 2004, at s 21. The Telecommunications Authority, in contrast, grants all licences for radio spectrum equipment or services pursuant to s 36 of the Act.

[102] See Eligibility and Evaluation Criteria for Concessions, p 22 (TATT 15 October 2007), <http://www.tatt.org.tt/Portals/0/Documents/Eligibility%20and%20Evaluation%20Criteria%20for%20Concessions.pdf>.

[103] See ibid, at 23. [104] Ibid, at 11.

[105] Stated to be a service concession in one place, see ibid, at 6, a network concession in another, see ibid, at 10, and a network/service concession in another, see ibid, at 18, adding to the confusion.

[106] Ibid, at 18.

licence. This may comprise a comparative evaluative process such as the 'beauty contests' first used in the US. Of concern here, however, is that these may not be based on objective criteria and fair to all parties (discussed further in Chapter 7).

A competitive auction process may also be used. However, to ensure that entrants have the expertise to utilize the spectrum effectively, a pre-qualification procedure to enter the bidding has recently become a common approach. The same concerns arise as with comparative procedures. Competitive auctions can be used to award concessions with respect to any limited opportunity or resource, eg the operation of Singapore's NGN,[107] spectrum and unique number grants. Here, the monetary bid and additional criteria meeting economic or social objectives serve as the determinants. These can encompass such things as minority or local ownership minimums, tariffs to be charged, service obligations to be met, or geographical roll-out of network and services. Multiple-round auctions having a series of bidding rounds with all licences remaining open to further bidding for the entire process are those currently favoured by the US and other countries. The process can vary from country to country but:

> [t]ypical features of the rules governing such an auction include requirements that bidders make upfront payments; minimum opening bid requirements and increments for bid increases; activity rules to limit the ability of bidders to sit out rounds; rules regarding auction stages (points at which introduction of tighter activity rules may eliminate some bidders) and stage advancement designed to move the process along; stopping rules to determine when the auction closes; and rules and penalties for removal or withdrawal of bids.[108]

Many believe auctions to be the best way to allocate the use of public resources. They raise revenues for the state and are considered to ensure efficient and best use of the resource since only those most likely to do this will reflect this value in their bid price, assuming sufficient bidders for there to be true competition. The auction rules can also achieve social objectives as discussed. Since there are winners and losers based on the auction criteria that must be fairly clear, auctions are considered the most transparent means of allocation. Auctions are not, however, without their perceived flaws. A key concern is how highest-price auctions can accommodate other public interests. This is especially the case where these are represented by non-governmental organizations that individually could not

[107] ITU, 'Singapore: Towards a Next Generation Connected Nation', 10 December 2010, <http://www.itu.int/net/wsis/stocktaking/docs/activities/1291981845/Towards%20a%20Next%20Generation%20Connected%20Nation_Singapore.pdf>.

[108] Goodman, E, McCoy, S, and Kumar, D, 'An overview of problems and prospects in US spectrum management', in *Telecommunications Convergence: Implications for the Industry & for the Practicing Lawyer*, 698 PLI/Pat 341 (Practising Law Institute, New York, 1 May 2002).

compete with for-profit undertakings. For example, where pristine public land use is contemplated, consortia of environmental and other groups might wish to be allowed to bid against communications or associated facilities providers. Also, the effectiveness and efficiency of the use of the scarce resource is not typically further examined once the auction has concluded.

6.3 INTERNATIONAL LAW AND TELECOMMUNICATIONS LICENSING STANDARDS

Telecommunications is an important industry in its own right as well as the platform for delivering other critical information society services. The effective opening of such service markets to trade is likely to depend on the modernization and upgrading of electronic communications networks, necessitating foreign direct investment and liberalization of communications markets for equipment, services, and networks.[109] Despite the global variation in licensing procedures and permissions ultimately obtained, the importance of telecommunications licensing as the means of market access and the need for some minimum harmonization of regulatory standards for licensing is agreed to be a critical aspect of multilateral trade agreements. The most effective international accord for telecommunications regulation is the World Trade Organization's General Agreement on Trade in Services (GATS)[110] with its separate Annex on telecommunications, the Basic Agreement on Telecommunications, and the Reference Paper. Both the individually agreed, sector-specific provisions and general conditions of the GATS framework applicable to all Members have relevance for licensing, as the following details.

Under the overarching GATS framework:

- the 'Most-Favoured-Nation Treatment' (MFN)[111] general condition (Article II)[112] requires a Member's licensing regime to provide market access on terms and conditions 'no less favourable' than accorded to providers of another country for all services even where no specific commitment is included in the Schedules;

[109] Issues surrounding the complexities of opening emerging markets to competition are discussed in Chapter 17.

[110] TS 58(1996) Cm 3276; (1994) 33 ILM 44. See further Chapter 16.

[111] There are limited circumstances for reservations to the MFN condition. See Chapter 16.

[112] 'With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than it accords to like services and suppliers of any other country.' Art II (1), GATS.

- the 'Transparency' general condition (Article III) requires all Members to publish their laws and regulations that affect trade in all services, scheduled or not. Licensing qualifications and conditions meet that criteria;
- the 'Domestic Regulation' condition (Article VI) requires where service or sector commitments have been made, that licensing, qualifications, and standards be based on transparent and objective criteria (4(a)) and not more burdensome than is necessary to ensure quality (4(b)). Licensing procedures must not restrict service supply, (4(c)); Members must inform applicants of decisions within a reasonable time after the submission of completed application and, upon request, advise of the status of the application, without delay (3);
- the 'National Treatment' condition (Article XVII) requires that there be no discrimination against a foreign service or suppliers of that service as compared to those domestic services or suppliers where the Member has included a scheduled commitment.

Under the sector-specific agreements:

- the Annex on Telecommunications requires transparency for access to and use of public telecommunications,[113] and that relevant information about conditions affecting access and use be made publicly available, including notification, registration, or licensing. Conditions imposed must be necessary to safeguard the obligation of public telecommunications network and services providers to supply the general public and to ensure network integrity (5(e)). Conditions meeting these criteria include:
  - requirements for notification, registration, or licensing (5(f)(vi)),
  - limitations on resale or shared use of services (5(f)(i)),
  - use of interface or interoperability protocols (5(f)(ii), (iii)),
  - type approval of equipment interconnecting with public telecommunications networks (5(f)(iv)),
  - interconnection limitations for private leased or owned circuits (5(f)(v));
- the 'Reference Paper' requires public availability of all licensing criteria, the normal time for decisions on applications and the terms and conditions for an individual licence. Reasons for licence denial must be disclosed upon the applicant's request (4, Reference Paper);
- the 'Reference Paper' further requires transparency in procedures for allocating and using scarce resources which include spectrum, numbers, and rights of way, and that the procedures be timely, objective, and non-discriminatory. The

[113] This Annex is intended to encompass the provision of communications networks/services only to the extent of Members' scheduled commitments. See Annex on Telecommunications at s 2(c).

current state of allocated frequency bands is to be made publicly available, except specific government frequency use (6, Reference Paper).

The EU's legal framework is one clearly compliant with WTO standards for licensing and authorizations as well as allocation of scarce resources. The following examines it at length.

6.4 THE EU'S LICENSING REGIME

In 1999, the EU proposed a new framework to ensure equal regulation for converging markets and technologies. With respect to licensing, the new framework was to sweep under one scheme all public electronic communications and services, not merely those involving telecommunications networks.[114] The ensuing 2002 Authorisation Directive[115] does this but is not, however, radically different from the prior Licensing Directive[116] as it was intended to work. Rather, the Authorisation Directive further refines the Licensing Directive with provisions to ensure implementation of its intended light-touch regulatory scheme with individual grants of rights and conditions permitted only where justified. Examining the former scheme is helpful, therefore. A new framework with a consolidated, recast single Directive is now being considered that further emphasizes general authorizations over individual licence grants and obligations particularly for spectrum. It intends a lighter, more harmonized touch. Its key changes to the Authorisation Directive, are noted in the discussions below.

6.4.1 The Licensing Directive

Under the Licensing Directive, if Member States made the provision of telecommunications services subject to any permission, the Directive's default was for a general authorization requiring no explicit decision. Individual licences, in contrast, were to be limited only to:

1. public voice telephony where conditions had to be imposed, including USO;
2. the grant of rights to use of numbers and spectrum, both scarce resources;
3. where conditions had to be imposed on undertakings with significant market power (SMP) as previously defined by the EU; and
4. where rights of access to public or private land were granted (Article 7).

[114] See Chapter 4. [115] Directive 2002/20/EC as amended by Directive 2009/140/EC.
[116] Directive 97/13/EC, n 93.

Member States could impose any of a limited set of conditions on all licences where justified and proportionate (but that comprised the 'least onerous system possible' for general authorizations) in the areas of: essential requirements, information required to verify compliance, prevention of anti-competitive behaviour and discriminatory tariffs, and efficient use of numbering capacity (Annex, 2). General authorization conditions encompassed a range of consumer protections, including billing and contract format (Annex, 3.1), provision of: emergency services, customer information needed for directory services and services for disabled people, compliance with interconnection, and contribution to universal services (Annex, 3.2–3.6). Beyond these, Member States could further impose on individual licences only those conditions related to the circumstances justifying the requirement for an individual licence in the first place (Article 8). The permitted additional conditions, therefore, included those linked to allocation of numbering rights, efficient use of radio spectrum, specific environmental or local planning requirements, maximum duration to promote certainty and planning ability, provision of universal service, quality and permanence of service/networks, mandatory provision of publicly available networks and services, and interconnection and leased lines obligations pursuant to other directives (Annex, 4).

Individual licences were to be granted pursuant to objective, transparent, and time-limited procedures that applied to all unless objectively justified, and that were published in an appropriate manner (Article 9). Licences for any service or infrastructure category could be limited in number only to the extent necessary to ensure efficient use of spectrum, or for the time needed to make available sufficient numbers, and only via a published decision detailing the reasons for the limitation (Article 10). Detailed, objective, transparent, non-discriminatory, proportionate, and pre-published criteria for awarding the limited licences were required, according due weight to promoting competition and maximizing user benefits (Article 10(3)). Procedures to permit interested parties to comment on the limitation were required, as were invitations to parties to apply. Appeal to an independent body from any licence denial was required as was Member State review of the limitations on licensing, at reasonable intervals (Article 10(2)).

An undertaking complying with the conditions imposed on general authorizations could not be prevented from providing the relevant network or service, although there could be a requirement to notify the NRA of intent to provide these and to supply that information concerning the service needed to ensure compliance with applicable conditions (Article 5). A waiting period of four weeks could be imposed from receipt of this information prior to commencing service/network provision (Article 5(2)).

General authorization fees could be based solely on administrative costs of controlling, managing, and enforcing the general authorization scheme and were to

be sufficiently detailed and published in an accessible way (Article 6). Fees for individual licences were to encompass only those administrative costs incurred in the issuance, management, control, and enforcement of the applicable individual licences. With spectrum or numbers, charges could reflect a value to ensure their optimal use (Article 11), permitting Member States to auction spectrum. The Directive suggested further that all imposed charges be based on objective, non-discriminatory, and transparent criteria (Recital 12).

Where a general authorization holder failed to comply with any of its conditions, the NRA could notify it that it could no longer avail itself of the authorization 'and/or' impose specific measures to ensure compliance (Article 5(3)). Individual licensees failing to comply with their licence conditions could have the licences withdrawn, amended, or suspended, or have imposed measures to ensure compliance. The undertaking had the opportunity to state its views on the condition's application and to remedy its breach within one month. The Directive imposed time limits for making and communicating that the decision had been confirmed, modified, or annulled, and procedures for appeal to an independent body (Articles 5(3), 9(4)).

The Directive, to facilitate Community-wide services, established a 'one-stop shop' for obtaining licences from the Member States via a single application point (Article 13) and authorized the Commission to charge various European telecommunications regulatory groups, such as CEPT, with developing a harmonized regime for general authorizations (Article 12). Neither was very successful. The current EU regulatory framework including the Authorisation Directive proposed by the Commission soon pre-empted this only two years after the Licensing Directive's adoption.

As the Authorisation Directive notes, there was a documented need for more harmonized and 'less onerous' regulation of market access (Recital 1, 2002/20/EC). The problem was not with the legal framework as promulgated but rather as implemented and enforced in many Member States. Rather than limiting individual licences to those circumscribed circumstances necessary to impose conditions, the Licensing Directive's flexibility was exploited. Individual licences were mandated for many situations and general authorizations were the exception rather than the rule as intended. Marked divergence among the Member States as to types of licences, time for decisions, costs, and information required, especially in connection with individual licences, meant that the EU licensing and authorization regime was a barrier not only to national market entry but to the Single Market.[117] This was a significant problem. The EU premises its continued evolution

[117] See Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee, and the Committee of the Regions, Towards a new framework for Electronic Communications infrastructure and associated services, COM(1990) 539, at vii.

and economic development on the implementation of dynamic and competitive information society services, including pan-European services, and infrastructure.[118] The following examines the 2002 authorization framework that sought to and, generally, has significantly remediated the problems. It also addresses some subsequent amendments.

6.4.2 The Authorisation Directive

The EU 2002 framework for electronic communications comprised five Directives and a Regulation. These were intended to reform, streamline, and replace existing regulation.[119] The Authorisation Directive, still effective, sought to enforce what the Licensing Directive really intended by eliminating much of the discretion that the former Directive left to Member States. Although requiring further harmonization in 2009, this approach has been successful in many aspects. As a recent review indicates, the framework has largely 'delivered on its main objectives'.[120] Since 2002, EU most markets have become competitive with many new entrants and services, significant market investment with the build-out of competitive alternative infrastructure in some Member States, and generally lower consumer prices.[121]

Yet, despite a higher level of competition in EU telecommunications markets based on opening access to networks, studies identify a persistent gap in investment in the EU telecoms sector compared to the US that may have contributed to EU sector revenue stagnation, lower average revenue per user, and its slower 4G development.[122] Current reforms initiated by the Commission, via a proposed

[118] Ibid.

[119] See further Chapter 4. The 2002 regulatory framework was amended largely in 2007 and December 2009. The 2007 reforms generally comprised a regulation mandating a glide path of price caps for mobile roaming, Regulation (EC) No 717/2007 (Roaming Regulation). The 2009 amendments were via two Directives, the so-called 'Better Regulation' Directive (Directive 2009/140/EC) and the 'Citizens' rights' Directives (Directive 2009/136/EC), amending the various 2002 Directives. The Regulation establishing a body of European regulators for electronic communications, Regulation (EC) No 1211/2009 (BEREC Regulation) also amended this. To understand the reform's scope it's helpful to read consolidated versions of the five Directives that can be found at <https://ec.europa.eu/digital-single-market/en/telecoms-rules > and <http://www.culture.gov.uk/images/consultations/10-1134-implementing-revised-electronic-communications-framework-revisions-directives.pdf>.

[120] Executive Summary, 'Support for Impact Assessment, Review of the regulatory framework for electronic communications' (SMART 2015/0005), <https://ec.europa.eu/digital-single-market/en/news/support-studies-impact-assessment-telecoms-review>.

[121] See Commission Communication 'Progress Report on the Single European Electronic Communications Market 2007 (13th Report)', COM(2008) 153, 19 March 2008. The 15th Report notes a slight drop in investment by 1.5% from 2007, possibly attributable to the economic slowdown, but still significant at €46 billion.

[122] See Fourneron, K, and Ciriani, S, 'Investments in Telecommunications Services higher in the US than in the EU: a robust, enduring and increasing gap observed whatever the source', at Sec 4 (Orange 2015) (noting other recent comparable study findings), <https://www.orange.com/fr/content/download/32216/955794/version/2/file/telecom_investment_comparison_US_vs_EU.pdf>.

Directive for a new Electronic Communications Code ('proposed EECC'), focus on enhancing EU levels of very high-speed connectivity. They also seek to address market and technological developments and to simplify and remove redundant or inefficient regulation such as outmoded universal service obligations, eg, public call boxes or consumer protections duplicated in horizontal laws. The proposed EECC intends a lighter touch to encourage investment, more harmonized and legally certain approaches to spectrum, and equivalent regulation for over the top players where appropriate, as well as greater roles for the Commission and BEREC to address remaining pan-EU weaknesses but which are as controversial as prior attempts to limit Member State sovereignty over spectrum. Changes to the Authorisation Directive would encompass both form and substance. This chapter will discuss these proposals in the context of the current Authorisation Directive that it now examines.

A good starting point is its application and scope. The Directive applies to the authorization of all electronic communications networks and electronic communication services. The Framework Directive definitions control with 'electronic communication services' encompassing those:

> normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC,[123] which do not consist wholly or mainly in the conveyance of signals on electronic communications networks. (Article 2(b), 2002/21/EC)

The electronic communications framework generally carves out information society services to the extent they do not comprise primarily carriage of signal services.[124] The Framework Directive parallels that of the E-commerce Directive (2000/31/EC) which governs 'information society services' provision, intended to encompass those content services provided in the layers above network provision and transmission services. In both Directives, the other layer of services is defined and excluded by reference to that which it is not.

The language 'normally provided for remuneration' qualifying the framework's regulatory scope for electronic communications services, derives from Article 60,

[123] OJ L 204/37 (21 June 1998) as amended by Directive 98/48/EC, OJ L 217/18 (5 August 1998).

[124] eg email conveyance posited by the Framework Directive as a communications service rather than an information society service. See Recital 10.

EC Treaty (Article 50 as amended; now Article 56 TFEU)[125] regarding freedom of movement of services in the Single Market and is considered to encompass an 'economic' activity. Where this line is drawn is not absolutely clear. Private networks are intended to be included under the Authorisation Directive, according to its Recitals and without mention of the 'normally provided for remuneration' requirement. As self-services may not be provided for remuneration, they could be beyond the Directive's reach, although a clear link between the service and other economic/commercial activity could suffice.[126] If, however, provided over a private network, an authorization for the network appears required.

The Directive also applies to 'electronic communications networks' which is defined in the Framework Directive as those:

> transmission systems, and where applicable switching and routing equipment and other resources, *including network elements which are not active*,[127] which permit the conveyance of signals by wire, by radio, optical or other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed. (Article 2(a), 2002/21/EC) (italics indicate 2009 changes)

The framework intends a horizontal approach to authorization that governs irrespective of the technology used.

The Commission's proposed EECC,[128] if agreed, would repeal the current framework's directives (Framework, Authorisation, Access, Universal Service) and

[125] See Recital 2, Directive 98/48/EC, n 123. Accord, Europarl Ref E-0969/09, Answer by M Barrot on behalf of Commission (16 April 2009) (noting further the linkage between Article 50 and the Article 95 basis of the Framework Directive), <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2009-0969&language=EN>.

[126] See eg Europarl Ref E-4364/09, Answer by Mrs Reding on behalf of the Commission (16 September 2009), <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2009-4364&language=EN>.

[127] Added by Directive 2009/140/EC; UK implementation at Communications Act 2003, s 32(1) as amended by para 9, Sch 1, The Electronic Communications And Wireless Telegraphy Regulations 2011. That this intends a wide range of physical structures can be seen from the legislative history as this wording appears to derive from the EU Parliament's proposed additions to Article 12, Access Directive on first reading which provided in part: 'including entries to buildings, building wiring, masts, antennae, towers and other supporting constructions, ducts, conduits, manholes, cabinets and all other network elements which are not active'. European Parliament legislative resolution of 24 Sept 2008 on the proposal for a directive of the European Parliament and of the Council amending Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and Directive 2002/20/EC on the authorization of electronic communications networks and services (COM(2007)0697, C6-0427/2007, 2007/0247(COD)).

[128] COM(2016) 590 final, Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (Recast) ('EECC').

recast their revised content as a single directive governing providers of electronic communications networks (ECN) as previously defined and of three categories of electronic communications services (ECS): internet access services (IAS), interpersonal communications services (ICS)[129] characterized as either number-based or number independent (to encompass over the top communications) and, the conveyance of signals, including broadcasting and machine-to-machine (M2M) communications.[130]

6.4.2.1 *General authorization: procedures and rights*

The Authorisation Directive directs Member States to 'ensure the freedom' to provide electronic communications networks and services (Article 3(1)) limited only by its permitted conditions.[131] Member States may only subject their provision to a general authorization requirement (Article 3(2)) that does not require an explicit decision or other administrative act (Recital 8). The proposed EECC emphasizes preference for general authorizations, including for spectrum, which is not different from that intended under the current framework. While specifically including them as a distinct form of ICS, the proposed EECC then specifically excludes number-independent ICS from the general authorization regime as unwarranted due to their not benefiting from the numbering resources or participating in a 'publicly assured interoperable ecosystem'.[132]

Member States may now require a notification before the provider can enter the market. This encompasses only a declaration of intent to provide networks or services and provision of information to enable the NRA to maintain a register of providers (Article 3(2)). The information is restricted to that needed to identify the provider, such as company registration numbers, location, contact details, and a brief description of the services and when they commence (Article 3(3)). Notification by cross-border providers of services to undertakings in several Member States are limited to only one notification per Member State concerned (Article 3(2)). The information requirement remains unchanged under the EECC proposal but notification would be made to BEREC (transformed into an EU

[129] Defined as services usually provided for remuneration that enable 'direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons, whereby the persons initiating or participating in the communication determine its recipient(s)'. See proposed EECC, Art 2.

[130] Ibid.

[131] This freedom is also subject to restrictions pursuant to Member States' power to legislate in defined areas under EU Treaty, Art 46 (1), including public health, policy, and security. See Authorisation Directive, 2002/20/EC, at Art 3(1); Recital 3.

[132] See Recital 42, proposed EECC.

agency, a proposal encountering great resistance)[133] that would in turn notify the relevant Member State authority.

These Authorisation Directive mandates limit Member States' discretion and arguably remove the possibility of delaying the provider's entry into the market. This 'least onerous' system was viewed necessary to stimulate development of new electronic communications services, including pan-European services, a significant focus of the 2002 regulatory framework, and to permit persons to benefit from EU Single Market economies of scale (Recital 7), not possible under the Licensing Directive's implementation.[134] Cross-border focus also partly underlies the Authorisation Directive's requirement that rights of undertakings providing networks and services be included within the authorization itself (see Recital 9). Such harmonization creates greater certainty about the ability to enter a new national market and, as Recitals note, ensure a level playing field throughout the Community. Specifically, the Directive requires Member States to ensure at least the right to:

- provide electronic communication networks and service (Article 4(1)a);
- apply for rights of way to install facilities on/over/under private and public land:
  - to a competent authority structurally separate from any provider of public networks and publicly available services which it controls or owns,
  - pursuant to procedures that are simple, efficient, transparent, publicly available, and applied in a non-discriminatory way and without delay, but in any event within six months of the application,
  - but that can differ for public and private communications networks, and which impose conditions only pursuant to principles of transparency and non-discrimination,
  - with an effective appeal mechanism to an independent body (Article 4(1)(b)); Framework Directive, Article 11), including for undue delay.

The Recitals to Directive 2009/140/EC indicate that the NRA should be able to coordinate acquisition of rights of way and make information available on their websites. Beyond the requirement for simple, efficient processes by the relevant authority, this does not require NRA power to grant the rights of way or over local or other authorities that may control them.

The general authorization must further grant those providing communications networks and services to the public the right to:

[133] See Teffer, P, 'EU telecom watchdog plan dead on arrival' (EU Observer, 27 April 2017), <https://euobserver.com/digital/137706>.

[134] As to its continued relevance, see Recitals 26, 33, Art 9, Directive 2009/140/EC.

- negotiate and obtain interconnection with and access to other publicly available networks covered by a general authorization anywhere in the EU under conditions set by the Access Directive (Article 4 (2)(a));[135]
- be given the opportunity to provide elements of universal service (Article 4 (2)(b)).[136]

With the same right to negotiate and obtain interconnection and access essentially guaranteed in each Member State to those providing public networks and/or services, cross-border entry and the possibility for pan-European services is facilitated. There is no longer the need for an individual designation as an operator entitled to obtain such rights, as was the case under the early regime. Here again, Member State discretion has been limited.

Those providing networks and services to other than the public are to negotiate interconnection on commercial terms (Recital 10). Member States are to provide declarations, either automatically upon entry notification or request, that confirm rights under the general authorization to interconnection and rights of way in order to facilitate interconnection or negotiations with other authorities (Article 9). Such declarations, however, do not create or condition the exercise of rights.

As with the current framework, only the specified conditions (whether to the general authorization or individually) can be imposed. These cannot duplicate other obligations or national law. The proposed EECC reform leaves the above rights unchanged but adds two new rights: to use spectrum as specified and to have applications for numbers considered pursuant to provisions that are not generally dissimilar from the current regime,[137] discussed below. BEREC, as the body to be notified of market entry if required, would make the necessary facilitation declarations.[138]

6.4.2.2 *Individual rights*

The current framework mandates that the only exceptions to the 'general authorization' requirement concern individual grants of rights to use spectrum and numbers. This discretion, however, is not unlimited.[139] Grants of individual rights for the use of spectrum and numbers must follow certain substantive and procedural safeguards, addressed below in the context of numbers.[140] Member

[135] See further Chapter 8.

[136] See further Chapter 9.

[137] See proposed Art 2, EECC. That is once you get beyond the proposed enhanced roles of the Commission and BEREC in numbering and spectrum conditions that are likely controversial.

[138] See proposed Art 12 (3), EECC.

[139] The requirements for making spectrum available are discussed in Chapter 7.

[140] See also Recital 11. An amendment to Art 5, however, makes clear that these apply to both rights to use numbers and spectrum. See Directive 2009/140/EC, Art 3.

States must make available such individual rights of use to any undertaking *for the provision* of networks and services, irrespective of whether granted to the network/service provider or their users (Article 5(2)).[141] Addressing an inconsistency[142] the proposed EECC makes clear that numbers may be awarded to other than providers as long as they are capable of managing them and there are sufficient numbering resources available.[143]

6.4.2.3 *Procedures for granting individual rights to use numbers*

To the extent that individual rights of use of numbers are necessary, Member States must grant them via open, *objective*, transparent, non-discriminatory, *and proportionate* procedures.[144] They must inform the grantees of their ability, if any, to transfer such rights to third parties and under what conditions (Article 5(2)). The time period allocated to grants of rights of use must be appropriate to the specific service if granted for a limited time (Article 5(2)). Decisions should be made, communicated, and made public as soon as possible. This is no more than three weeks from receipt of a completed application for numbers from the national plan allocated to specific uses (Article 5(3)).

A further period of up to three weeks applies where rights to use numbers of unique economic value (eg 1 800 FLOWERS) are granted by competitive or comparative procedures (Article 5(4)). This can only be done after a consultation that complies with Article 6 of the Framework Directive (Article 5(4)). The Framework requires that any measures that have a 'significant impact on the relevant market' can be taken only after interested parties have an opportunity to comment within a reasonable period. The consultation must be done pursuant to published procedures; all current consultations must be available through a single accessible point with the result publicly available except that involving confidential information according to either national or Community law (Article 6, 2002/21/EC). These provisions are largely unchanged by the proposed EECC.

Also unchanged is that time-limited grant of rights to numbers must be appropriate for the nature of the service in view of the '*objective pursued taking due*

[141] Italics reflect amendments by Directive 2009/140/EC.

[142] Authorisation Directive, Recital 12 does not mention numbering in stating that it is irrelevant whether the grantee is the provider or the user. Art 5(2) indicates that where an individual grant of rights to use numbers is made, that Member States '*shall* grant such rights, upon request, to any undertaking for the provision of network or services under the general authorisation', indicating that it is not a matter of discretion. In contrast, however, Recital 14 states that Member States are 'neither obligated to grant nor prevented from granting rights to use numbers from the national numbering plan … to undertakings other than providers of electronic communications networks or services', suggesting that it is totally a matter of discretion.

[143] Although PECN/PECS are not subject to capability criteria, this might be justified for other parties not subject to conditions.

[144] Italics reflect amendments by Directive 2009/140/EC.

account of the need to allow for an appropriate period for investment amortization' (Article 5(2)).[145] The 'objective pursued' appears to refer to the regulatory objective underlying the need for an individual grant and its time-limitation, although clearly there could be more than one. Investment recovery is also a concern to ensure a balance of incentive with regulatory objectives. In the context of numbers, it is possible that £ millions could be invested not only in procuring a particular number but also in marketing and development costs. With an auction procedure, however, the market's valuation and shortened amortization of up-front time limitations should be reflected in a lower price. If the period were too short, there would be no takers or only those gambling on a future renewal right.

The Authorisation Directive itself does not specify an appeal right from the decision regarding the granting of individual rights of use.[146] The Framework Directive, however, requires Member States to ensure effective mechanisms for any provider or user affected by any NRA decision to appeal its merits to an independent body with appropriate expertise[147] that must issue its decision in writing, if not a judicial body (Article 4, 2002/21/EC). In this case, further review to a court or judicial tribunal must exist.[148] These requirements are unchanged in the proposed EECC.

6.4.2.4 *Conditions*

EU network and service providers may have only three types of conditions imposed on them: (i) those under the general authorization, (ii) individual obligations that attach to the granting of rights of use of numbers and spectrum, and (iii) specific conditions to impose obligations under the Access and Universal Service Directives (Article 6). Any condition imposed under any of these categories, however, must be proportionate, transparent, and non-discriminatory[149] with further procedures and limitations for the last two categories as per the Framework and applicable specific Directive. The following examines each category in turn.

Conditions under the general authorization The Authorisation Directive limits conditions to a general authorization to those falling with the Annex, Part A's

[145] Italics reflect amendments by Directive 2009/140/EC.

[146] This is in contrast to Art 10, which requires an appeal procedure from the imposition of conditions. See Section 6.4.2.7.

[147] A 2009 wording refinement makes clear that the appeal body must itself have appropriate expertise for effective review rather than merely having such expertise available to it. See Directive 2009/140/EC, Art 1.

[148] Ibid, at Art 4(2).

[149] The 2009 reforms removed a requirement that NRAs objectively justify a condition under the general authorization in light of the network/service concerned. Although theoretically lessening the NRA's burden to trigger or include a specific condition within Part A of the Annex's permitted categories that may apply to all providers or merely certain ones, after ten years in effect, such rationalizing on a per-service basis had likely already taken place.

maximum list of nineteen categories, including a 2009 transparency condition about limitations/degradations in service[150] if permitted by a Member State.[151] NRAs may impose conditions on all providers of electronic communications networks and services under the general authorization, if justified. However, as the Directive cautions, for networks and services not provided to the public, it 'is appropriate to impose fewer and lighter conditions' than are justified for public networks and services (Recital 16).

The maximum list includes conditions or obligations including as detailed in other Directives as noted, regarding:

1. administrative charges (Article 12, Authorisation Directive);
2. information requirements (Articles 3(3), 11, Authorisation Directive);
3. general access obligations (Access Directive);
4. interoperability of services, interconnection of networks (Access Directive);
5. end-user accessibility to numbers under national plans, **from the European Numbering Space**,[152] the Universal International Freephone Numbers, and where technically/economically feasible, other Member States numbering plans (Universal Service Directive);
6. conditions for spectrum use not under individual grant (Radio and Telecommunications Terminal Equipment Directive 99/5/EC[153]);
7. contributions to universal service obligations (Universal Service Directive);[154]
8. 'must carry' TV and radio broadcast obligations (Universal Service Directive);
9. use during major disasters to ensure emergency services' and authorities' communications and public broadcasts;[155]

[150] Authorisation Directive, Art 6. See also Part A, Annex's maximum list of subject areas that a general condition may govern.

[151] Until 2016, the Universal Service Directive allowed Member States to determine whether to require 'net neutrality', ie the ability of a provider to restrict access to content or provide unequal treatment to different traffic for other than technical reasons, limiting itself to the above transparency. See Directive 2002/22/EC, Art 1(3) as amended by Directive 2009/136/EC. Now, non-discriminatory access to content of choice is required by Regulation 2015/2120/EU 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 531/2012/EU on roaming on public mobile communications networks within the Union. The proposed EECC removes the related condition area.

[152] Bold text indicates proposed EECC's redactions.

[153] Repealed and replaced by Directive 2014/53/EU on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment, OJ L 153/62, 22 May 2014.

[154] This condition would be unnecessary under the proposed EECC that would require payment for any unfairly burdensome USO from public revenues.

[155] A further s (11a) clarifies that conditions regarding use for public communications can encompass electronic communications beyond broadcast and encompasses the warning of imminent threats and the mitigation of a major disaster. See Annex A.

10. personal data/privacy protection (Electronic Communications Privacy Directive);[156]
11. security of public networks against unauthorized use (Electronic Communications Privacy Directive);
12. enabling lawful interception (Data Protection Directive (95/46/EC), Electronic Communications Privacy Directive);
13. sector-specific consumer protection rules **and *access conditions for disabled users*** (Universal Service Directive);[157]
14. illegal content restrictions (Electronic Commerce Directive (2000/31/EC), Audiovisual Media Services Directive (2010/13/EU));
15. standards and specifications conformity (Article 17, Framework Directive);
16. limiting public exposure to electromagnetic fields (Community Law);
17. maintenance of public communications network integrity, prevention of electromagnetic interference (Universal Service and Access Directives, Harmonized Standards for Electromagnetic Compatibility Directives (89/336/EEC));
18. **environmental, planning, and other requirements for access to public/private land, conditions for co-location, facilities sharing (Framework Directive), financial and technical guarantees to ensure proper execution of installation**;[158]
19. *transparency obligations on network providers providing communications services to the public to ensure end-to-end connectivity**, disclosure with respect to any (provider) conditions limiting access to/use of services and application where these are allowed by a Member State** and proportional information obligations by providers necessary to verify disclosure accuracy.*

General authorization conditions must be sector-specific and not duplicate requirements applicable under national law.[159] Arguably, the Authorisation Directive largely legislated away flexibility for Member State divergence, at least *de jure* but not reflecting the differences possible under any 'margin of appreciation'.

[156] See further Chapter 13.

[157] Italics denote 2009 amendments; bold text, proposed EECC redactions. The referenced access as required by Art 6, is equivalent access and affordability of public telephony service (voice supporting local, national and international calling and data at functional internet levels), Universal Service Directive.

[158] Bold indicates text redacted in proposed EECC. This condition duplicates national law that applies otherwise.

[159] Art 6(3).

The proposed EECC would further reduce flexibility. While it does not greatly change the substance of conditions under the general authorization,[160] it divides them into three groupings with different potential applicability:

1. those applicable generally to any provider[161]
2. those applicable to providers of networks[162]
3. those applicable to providers of electronic communications services, except number-independent services.[163]

Conditions and individual grants of rights Individual obligations can be attached to the grant of rights to use of numbers and spectrum. Conditions for numbers are limited to those regarding:

- service designation for a number, requirements linked to its provision, tariffing principles/maximum prices that can apply in the specific number range for the purposes of ensuring consumer protection;[164]
- usage fees;[165]
- efficient and effective use;
- providing public directory services;
- number portability;[166]
- the grant's duration and transfer;
- international obligations regarding agreed use of numbers; and
- commitments made during competitive/comparative selection procedures.[167]

[160] The bold text above indicates the proposed EECC's redactions.

[161] Administrative charges, information, general access, use in major disasters, privacy/data protection, conformity to standards and specifications, transparency obligations. See proposed EECC, Part A, Annex I, General conditions which may be attached to a general authorization.

[162] Service interoperability/network interconnection, spectrum use, 'must carry', limiting electromagnetic field exposure, network integrity and electromagnetic interference prevention, transparency. Proposed EECC, Part B, Annex I, Specific conditions which may be attached to a general authorisation for the provision of electronic communications networks.

[163] Service interoperability/network interconnection, end-user access to numbers, sector-specific consumer protection rules and illegal content restrictions. Proposed EECC, Part C, Annex I, Specific conditions which may be attached to a general authorisation for the provision of electronic communications services.

[164] The full import of this amendment is not clear. While it suggests merely a transparency obligation for charging consumers, eg premium rate services, the only other use of the phrase is in connection with the justifications for the Commission's authority to issue a decision or recommendation in the area. See Framework Directive, Art 19.

[165] Ofcom after consulting on charging for the use of geographic numbers due to their growing scarcity set a pilot programme to charge CPs for geographic numbers. On review in 2016, Ofcom determined that the charging resulted in a significant one-off return in number blocks, delaying scarcity and is proposing to charge providers for numbers in areas where scarcity threatens.

[166] See Sections 6.4.3 and 6.4.4.3 regarding number portability requirements.

[167] Annex, Part C, s 6(1).

These individual obligations must be objectively justified with respect to the service, proportionate, transparent, and non-discriminatory. They may not duplicate the general conditions. The proposed EECC requires NRAs to ensure compliance with other Member States' consumer laws and rules on number use for numbers used extraterritorially. A new number condition would permit obligations to ensure this, effectively importing those requirements into the individual grant.[168]

SMP and access-related individual conditions Specific conditions under the Access and Universal Service Directives can only be imposed on network and service providers for a limited number of reasons.[169] These can be divided into two overarching categories: (a) those imposed on undertakings found to have significant market power (SMP), joint or otherwise, in relevant markets and according to the Framework Directive's requirements; and (b) those imposed for other public interest reasons on non-SMP undertakings.

With respect to the first, under the Access Directive, the NRA must impose appropriate conditions on SMP operators where, after a market analysis (complying with Article 16 of the Framework Directive), it concludes that there is not effective competition in the relevant market.[170] The ordinary SMP obligations specifically contemplated by the Access Directive govern transparency,[171] non-discrimination,[172] accounting separation,[173] access and interconnection,[174] and price controls and cost accounting.[175] Member States must publish the specific conditions imposed on undertakings pursuant to these Articles, identifying the specific product/service. Current and easily accessible, non-confidential information must be made available to all interested parties.[176] Conditions beyond this specific list are possible if allowed by the Commission, which must take utmost account of the opinion of the Body of European Regulators for Electronic Communications (BEREC) that was created under 2009 reforms.[177]

The Universal Service Directive requires that where these specific Access SMP conditions will not achieve the Framework Directive's objectives[178] in retail markets

[168] See proposed Art 88(6), Annex II E (10), EECC.

[169] Art 6(2). [170] Directive 2002/19/EC, at Art 8. See further Chapter 8.

[171] Ibid, at Art 9 (revised to include technologically neutral wholesale reference offers under Art 12. Additional transparency obligations regarding the impact on quality of services from traffic management measures are imposed by Regulation (EU) 2015/2120 discussed at n 151).

[172] Ibid, at Art 10. [173] Ibid, at Art 11. [174] Ibid, at Art 12. [175] Ibid, Art 13.

[176] Ibid, at Art 15.

[177] See ibid, at Art 8(3) (via the cross-reference to Art 14(2), this decision also requires adherence to comitology procedures set forth in Arts 5 and 6 of Decision 1999/468/EC).

[178] Framework Directive, Art 8 states the objectives of promoting competition and the interests of EU citizens and contributing to the internal market's development.

that are not effectively competitive, NRAs must impose appropriate regulatory obligations on entities with SMP in related markets[179] to prevent leveraging in the retail markets.[180] These may include bans on: excessive and predatory pricing, undue preferential treatment, or unreasonable bundling of products/services.[181] These must meet the Framework Directive's requirements for transparency, objectivity, proportionality, and consultation as with other conditions. NRAs can also apply appropriate retail price caps to control individual tariffs or other measures to steer pricing towards cost-based or that of other comparable markets.[182]

In the 2009 reforms, the Commission sought a killer solution for residual bottlenecks in access markets despite on-going regulatory intervention. The Access Directive requires NRAs to be empowered to impose the further extraordinary SMP remedy of functional separation of wholesale access provision on vertically integrated entities with SMP in relevant access markets, where persistent and important market failures exist despite appropriate conditions.[183] This approach was essentially a page from Ofcom's playbook in forcing BT to agree to restructure its operations with the core network in a separate operating unit under UK competition law powers, as previously noted. Under this EU sectoral remedy, the separate unit would have to supply such services to all undertakings including the parent, on equivalent terms and over the same systems.[184] The NRA must justify the need for and suitability of this extraordinary remedy to the Commission with particulars of the transaction proposed and its regulatory oversight;[185] as with all SMP conditions under the Access Directive, following the notification procedures under Article 6 of the Framework Directive.[186] The new business unit could also be subject to other Access Directive conditions as above.[187]

The proposed EECC seeks in the access regime to address concerns that access policies have promoted service-based over infrastructure-based competition with an ensuing lag in the build-out of very high capacity networks throughout the EU. Specific SMP access conditions at the wholesale level could be imposed only where and when necessary to address retail market failures, in

[179] Universal Service Directive, Art 17(1); also see Framework Directive, Art 14(3) as amended by Directive 2009/140/EC.

[180] Framework Directive, Art 14(3).

[181] See 2002/22/EC, Art 16 as amended by Directive 2009/136/EC (deleting specific retail price controls, minimum leased lines, and carrier selection obligations).

[182] Ibid, at (2).

[183] See Access Directive, Art 13a. The Directive also provides for voluntary separation at Art 13b.

[184] Ibid, at Art 13a(1). [185] Ibid, at Art 13a(2), (3).

[186] See also Commission Recommendation 2008/850/EC on notifications, time limits, and consultations provided for in Article 6 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (15 October 2008).

[187] Art 13a(5). See further Chapter 8.

light of end-user outcomes and via what might be considered a least-restrictive alternative approach that considers eg whether access to civil engineering infrastructure alone might be more conducive to sustained competition than other *ex ante* controls. This would be only after a modified market review process evaluating, on a forward-looking basis, emerging commercial trends (eg co-investment or access agreements) and the potential impact of regulation on these and applying previously only recommended criteria for evaluating markets amenable to continuing *ex ante* regulation (that would be codified under the EECC).[188] A lighter touch access regime based only on fair, reasonable, and non-discriminatory (FRAND) terms and dispute resolution obligations would apply to wholesale-only SMP network providers.[189] Retail price regulation would be eliminated.

The second category of specific conditions under the current Access Directive concerns those NRAs may impose on non-SMP providers to ensure end-to-end connectivity or to make services interoperable where they control access to end-users (eg via unique numbering or addresses).[190] These may include mandated interconnection if commercial negotiations pursuant to general authorization conditions fail[191] as well as conditions imposing access to electric programme guides (EPGs) and application programme interfaces (APIs) by providers of these associated facilities on FRAND terms where needed to ensure end-user accessibility to digital TV and radio services.[192] The Directive also requires conditions on providers of conditional access services necessary for end-user access to digital TV and effective competition in such services.[193]

The proposed EECC would continue such non-SMP access conditions, adding the additional requirement of being subject to a general authorization. In justified cases where access to emergency services or end-to-end connectivity between end-users is at risk from lack of interoperability, conditions necessary to address this, including adherence to standards, could be imposed on number-independent ICS providers but only after the Commission determines that national regulatory intervention is needed following a report from BEREC under the rules for delegated acts.[194] The proposed framework would also allow, where no other viable alternative is offered on fair terms, obligations for reasonable access to non-SMP owned network elements not readily replicable (economically or physically) such as wiring/cables within a

[188] Art 65 (1), proposed EECC. [189] Art 77, proposed EECC.

[190] Non-SMP providers can also be required to share specific facilities where it will increase structural-based competition and lower rollout costs for new networks. See Framework Directive, Art 12(1).

[191] 2002/19/EC, Art 5(1)(a). [192] Ibid, at Art 5(1)(b). [193] Ibid, at Art 6; see Chapter 8.

[194] See Arts 59 (1), 110, proposed EECC.

building, to the first concentration/distribution point outside the building and further where 'strictly necessary' or 'insurmountable' barriers exist.[195] These may include rules governing access, transparency, non-discrimination, and cost allocation in light of risk.

Universal Service Conditions The 2009 reforms via the 'Citizens' Rights Directive' made some changes to the Universal Service and Users' Rights Directive but did not really change the defined EU-wide universal service level, itself. This remains as access to a communications network at a fixed location and service that supports voice, data, and 'functional' internet access defined as dial-up modem, or 'narrowband' connection.[196] The proposed EECC would upgrade the level to functional internet access reflecting that used by most end-users but capable of supporting a minimum list of services[197] enabling civil society participation and voice communications services at a nationally specified quality, at least at a fixed location.[198] Universal service would, however, no longer encompass access to directory enquiry services or directories or provision of public pay phones unless a national need for these is demonstrated.[199] The requirement that Member States ensure equivalence of access and choice for disabled end-users, a significant 2009 reform,[200] continues in the proposed EECC, although seemingly only via a specific designation as the proposed EECC deletes the relevant wording of the condition under the General Authorisation.[201]

Currently the specific US conditions that can be imposed on designated US providers, including non-SMP, are:

1. universal connection to the public *communications* network and access to a defined, minimum set of publicly available telephone services (PATS)[202] at a fixed location (Article 4, 2002/22/EC as amended);

[195] See Art 59 (2), proposed EECC.

[196] Member States can change this to reflect a level of function in keeping with the majority trend in a national market but pay for it with public funds. Recital 5, Citizens' Rights Directive. See also, Case C-1/14, *Base Co. NV v Ministerraad* (2015), paras 38–42. The Commission's proposed reform would mandate both the majority measure of functionality and the public funding obligation. See Art 79, proposed EECC.

[197] Annex V, proposed EECC details these as voice and video calls, email, search engines, online education/training, news services, goods and services purchase, professional networking, online banking, use of eGovernment services, social media and instant message, refinable at the national level.

[198] Also at an affordable price in light of national conditions. See Art 79, proposed EECC. Member States can, if needed, include mobile.

[199] Art 82, proposed EECC.

[200] Art 23a, Universal Service Directive (as amended by Directive 2009/136/EC).

[201] Annex V (B)(3), proposed EECC.

[202] The Universal Service Directive amended the definition of 'PATS' to remove the provision of 'emergency services' from its defining criteria and a list of other possibly relevant specific services such as directory enquiry eliminating the possibility that service providers otherwise meeting the definition are not excluded from

2. provision of public pay phones and *other voice telephony access points* (Article 6, 2002/22/EC as amended);
3. provision of a printed or electronic directory, as required, comprising all PATS subscribers and directory enquiry services accessible to all end-users (Article 5, 2002/22/EC);
4. measures for disabled persons to ensure equivalent access to PATS, emergency services, directory enquiry (Article 7, 2002/22EC);[203] and
5. affordable tariffing for such services where necessary to provide specified access to persons with low income or having special needs.

The proposed EECC would modify or eliminate most of these.

Although SMP providers are most likely to be designated USO providers, others may seek to be considered for all or part of USO provision, as described above. The Authorisation Directive, therefore, allows Member States to impose universal service obligations on non-SMP providers via specific conditions imposed concerning their provision and tariffing. Any specific USO condition must also comply with the substantive and procedural requirements for imposing conditions of the Framework Directive and Universal Service Directives[204] that here would include Commission reporting. Any specific condition must constitute a separate legal obligation from those in the general authorization. To ensure transparency, the criteria for imposing such obligations on individuals must, however, be referred to in the general authorization (Article 6(3)). These requirements would be unchanged.

A provider with USO obligations must notify the NRA, in advance, of its intention to dispose of a substantial part of its local access networks to another legal entity under different legal ownership.[205] This allows the NRA to assess how this impacts the fixed access obligation and to impose, amend, or withdraw specific obligations, considered below. This obligation would remain.[206]

obligations because they don't provide emergency services. PATS is now defined under the Directive (and in the UK General Conditions of entitlement) as 'a service made available to the public for originating and receiving, directly or indirectly, national or national and international calls through a number or numbers in a national or international telephone numbering plan' (Art 2(c); Definitions, Revised UK General Conditions of Entitlement).

[203] See Art 7(1), suggesting that such USO obligations might be obviated where equivalence of access to services and choice of providers enjoyed by the majority of end-users is provided for in consumer contracts.

[204] The Access Directive imposes the requirement that such specific conditions comply with Arts 6 and 6a of the Framework Directive (Arts 5(3), 6(3)), governing transparency, consistency and consultation, as above described in connection with the granting of individual rights of use, see Section 6.4.2.3, and the reporting requirements for certain NRA actions. The Universal Service Directive, in contrast, refers only to its own requirements for consultation (Art 33) and Commission notification (Art 36), although it is likely, that Art 6 of the Framework Directive governs too, with Art 33, USD, a refinement to include manufacturers and end-user groups within interested parties.

[205] Universal Service Directive as amended by Directive 2009/136/EC, at Art 8(3).

[206] Art 81(5), proposed EECC.

6.4.2.5 *Amendments and modifications of rights and conditions*

Rights, conditions, and procedures concerning general authorizations, rights of use, and rights to install facilities can be modified only in objectively justified cases and in a proportionate manner (Article 14(1)). *Unless these are minor and agreed with rights or general authorization holders*, appropriate notice must be given and interested parties must have at least four weeks to comment, except in exceptional circumstances (Article 14(1)). These requirements would remain unchanged.

Rights cannot be withdrawn or restricted before the grant period except where justified. Where applicable, compensation must be made pursuant to national law. These requirements would remain but the proposed EECC adds a formal consultation requirement for any intent to withdraw or restrict authorization/rights to use numbers with at least a thirty-day period for comment.[207]

6.4.2.6 *Reporting obligations*

Information reporting to regulators can be a costly and burdensome process. The Authorisation Directive limits the information undertakings must provide. To permit monitoring of compliance with conditions under the general authorization, for rights of use or specific obligations, NRAs may request, without additional justification, proportionate and objectively justified information necessary to verify systemic or case-by-case compliance with:

1. payment obligations for USO contributions, administrative fees under the general authorization, and usage fees;
2. those specific conditions permitted to be imposed under Article 6(2) of the Authorisation Directive (see Section 6.4.2.4) (Article 11(a)).

These information requirements would remain, modified only to conform to the revised conditions as above[208] as would the ability of NRAs to require proportionate, objectively justified information necessary to verify compliance with applicable conditions on a case-by-case basis where a complaint has been received, or investigation or other reasons suggest problems with compliance as currently under Article 11(b)).[209]

Such information can also be required for:

- procedures for and assessment of rights of use (Article 11(c));
- comparative quality/price reports for consumers (Article 11(d));
- clearly defined statistical purposes (Article 11(e));
- market analyses for effective competition pursuant to the Access and Universal Service Directives (Article 11(f));

[207] Arts 19 (4) and 23, proposed EECC. [208] Art 21, proposed EECC. [209] Ibid.

- *evaluating network or service developments with an impact on future wholesale provision to competitors (Article 11(h)).*

The proposed EECC retains these, adding other competent national authorities as possible overseers,[210] and adds an ability for NRAs to require information on electronic communications networks and associated facilities disaggregated at a local level so as to be able to conduct a geographical survey of the reach of broadband networks for planning purposes and designating digital exclusion zones wherein the NRA can make calls for interest in deploying networks.[211] The EEEC would authorize NRAs to sanction the deliberate provision of misleading, erroneous, or inaccurate information, including the failure to respond to a call, the latter of which seems controversial as possible future plans for network deployment would seem to be confidential business data.[212]

6.4.2.7 *Compliance and enforcement*

After the 2002 Authorisation Directive tempered the consequences for failing to comply with general authorization conditions under the former Licensing Directive, concerns about lack of enforcement and inadequate enforcement powers led to 2009 modifications of the Directive. These included the:

- *NRA obligation to monitor and supervise compliance with conditions of the general authorization or rights of use and those non-SMP specific access or universal service conditions as discussed above (Article 10 (1));*
- *Mandated power rather than a discretionary potential to require provision of information necessary to verify compliance with such obligations (Article 10(1));*
- *Mandated NRA power to impose dissuasive financial penalties (Article 10(3)(a));*
- *NRA power to require the cessation of a breach, including immediately (Article 10(3)); and*
- *Ability to order the delay or cessation of a service or service bundle likely to cause significant harm to competition pending SMP compliance with a specified access obligation (Article 10(3)(b)).*[213]

The proposed EECC would not change these.[214]

The Authorisation Directive requires that sanctions be dissuasive, effective, and proportionate and can be *applied retroactively, including where the breach is*

[210] Under the proposed EECC, Member States must ensure that a minimum list of tasks defined at Art 5(1) are assigned to NRAs only, eg implementing *ex ante* regulation such as access and interconnection obligations, granting general authorizations, ensuring dispute resolution, etc. See Art 5. Beyond that, Member States have flexibility to designate roles either to NRAs or other competent authorities, but must ensure the independence of these other authorities.

[211] Arts 20 (1), 22 (3), proposed EECC. [212] Art 22 (4).

[213] Directive 2002/20/EC, as amended by Directive 2009/140/EC. [214] Art 30, proposed EECC.

corrected (Article 10(5)). In exceptional circumstances where serious *or* repeated[215] breaches are not remedied despite financial and/or other proportionate sanctions, an NRA can preclude an undertaking from providing electronic communications networks and services and/or withdraw or suspend rights of use. These provisions remain under the proposed EECC.

Where an NRA finds that the provider is not complying with any condition of the general authorization, rights of use, or specific conditions imposed under Article 6.2 of the Authorisation Directive, the NRA shall notify the undertaking and give it the opportunity to state its views within a reasonable period (Article 10(2)).[216]

Where evidence of a breach indicates a serious and immediate threat to public health, safety, or security, or poses operational or economic problems for users or other providers, the NRA may impose an interim, immediate measure as a remedy. The undertaking must then have a reasonable opportunity to be heard and propose other remedies prior to a final decision. NRAs may confirm the interim solution where it is appropriate *for up to three months with one such further extension possible where enforcement measures are not completed* (Article 10(6)).[217]

The Authorisation Directive requires undertakings to have the right to appeal all measures to sanction or remedy breach of conditions under procedures mandated by Article 4 of the Framework Directive. This requires that all network/service providers or users 'affected by a decision' of the authority have an effective means of appeal to a body independent from the parties and with the appropriate expertise to enable it to carry out its functions *effectively*.[218] These provisions would remain but require the body to have 'complete' independence both from the parties and from 'external intervention or political pressure liable to jeopardise its independent assessment of matters'.[219]

The 2009 Authorisation Directive reforms tightened its somewhat flaccid enforcement regime. They seemed also to provide for a more streamlined enforcement process although 'reasonable' may give rise to wiggle room and delays. They clearly required that NRAs have more decisive and deterrent enforcement powers of fine and sanction that should allow NRAs, previously identified by Commission

[215] Art 10(5), Directive 2002/20/EC as amended by Art 3(6)(c), Directive 2009/140/EC (substituting 'or' for 'and'). Italics indicate the 2009 amendments.

[216] This would remain unchanged. Art 30(2), proposed EECC.

[217] Italics indicate 2009 amendments. This would remain unchanged in Art 30(2), proposed EECC.

[218] The body must itself have the expertise rather than merely have it available to it. Directive 2002/21/EC, Art 4(1) as amended by Directive 2009/140/EC. The revised Directive clarifies that interim measures may substitute for the NRA's decision where granted in accordance with national law. Ibid.

[219] Art 31, proposed EECC.

market implementation reports as not having adequate powers,[220] to effect change. The proposed EECC, basically, does not change this.

6.4.2.8 *Fees*

The 2002 Authorisation Directive, like its predecessor, mandates that administrative charges imposed under the general authorization be only those incurred in its 'management, control and enforcement' (Article 12 (1)). This includes charges for activities connected with rights of use and specific conditions imposed under Article 6(2) (see Section 6.4.2.4). It also details as permissible chargeable activities those incurred for international cooperation (eg radio frequencies, numbering schemes), harmonization and standardization, market analysis, monitoring compliance and other market control, as well as regulatory work involving preparation and enforcement of secondary legislation and administrative decisions, such as decisions on access and interconnection (Article 12(1)). It requires administrative fees or charges to be imposed in an objective, transparent, and non-discriminatory manner but, also, one that minimizes additional costs (Article 12(b)).

The Authorisation Directive further provides not only that the charges be published annually but that regulators provide an annual overview of their administrative costs for the permitted activities. This effectively requires accounting separation. It also requires an appropriate adjustment to be made when there is a difference between costs and charges (Article 12(2)). While accounting separation and cost justification are tools previously used in EU telecommunications regulation, they were controls imposed on former monopolist incumbents that enjoyed special or exclusive rights and privileges and, subsequently, on SMP operators. The proposed EECC would maintain these requirements, extending them to any other competent authorities imposing administrative charges.[221]

Finally, the Authorisation Directive anticipates that non-cost related fees may be imposed for ensuring optimal use of numbers, spectrum, and rights to install facilities on public or private land (Article 13). In doing so these must be objectively justified, transparent, and non-discriminatory, as well as proportionate to their intended use. This, with other Articles in the Directive that permit a comparative/competitive procedure for granting individual rights of use, contemplates the possibility of usage fees determined by auction. The proposed EECC does not substantively change this but deals with numbers separately from the other individual rights,[222] authorizing other 'competent' authorities to impose the charges in this latter group.[223]

[220] See eg Commission '15th Progress Report on the Single European Electronic Communications Market', COM(2010)253 final, 25 August 2010.

[221] Art 16, proposed EECC. [222] Art 89, proposed EECC. [223] Art 42, proposed EECC.

6.4.3 The EU Authorisation Directive—recent developments

The 2009 changes intended a further EU-wide harmonization and measurably greater regulatory ability to address persistently weak enforcement in some countries, including milquetoast remedies. While some were potentially transformative of serious competition impediments such as the potential recourse to structural separation, this remedy has not been implemented by any EU Member State other than the recent further infrastructure/legal separation of BT beyond the original functional/governance separation 'agreement' imposed on it in 2006 under UK law and before the 2009 reform.[224]

Some 2009 changes to existing regulatory practice such as the mandatory three-year market review for imposing, modifying, or removing individual conditions appear to have been too onerous. Complaints that this did not allow enough time for markets to adjust to regulatory changes sufficiently before they were reviewed anew for SMP has resulted in a proposed EECC return to a review every five years, if adopted.[225]

Others, such as the provisions for encouraging more extensive infrastructure sharing, were not only welcome by the market as cost-saving and market enabling,[226] but were enhanced via a new 2014 Directive on measures to reduce the cost of deploying high-speed electronic communications networks in light of the very limited Member State implementation of the earlier provisions, seen as delaying the roll-out of high speed networks.[227] As noted, the proposed EECC attempts further incentives to accelerate such networks but they are not tied to any governmental financial incentives, even in the 'exclusion' areas. There are also concerns about the required planning information sharing.

Some 2009 reforms, such as the Article 6a notification and Commission 'approval' processes for remedies were largely repackaging. Most had no element of discretion, so were fairly straightforward enactments. Others were more complex, eg determining what comprises 'dissuasive' sanctions, with the much greater potential financial penalties viewed as an effective deterrent, and implemented accordingly, at least in the UK.[228]

[224] Ofcom, 'BT agrees to legal separation of Openreach', 10 March 2017. It is to be noted that in 2015 O2 Czech Republic chose to avail itself of a 2009 reform (Art 13b, Framework Directive) and spun off its infrastructure into a separate company as a measure to enhance shareholder value, a measure it hailed as the 'world's first voluntary' structural separation. 'O2 Czech Republic Investor Presentation', September 2015.

[225] Art 65(5)(a), proposed EECC.

[226] See generally 'Mobile Infrastructure Sharing' (GSMA 2012) (although noting that it is technologically challenging and involves different considerations for different market players according to their status).

[227] Recital 10, Directive 2014/61/EC.

[228] See Ofcom, 'Penalty Guidelines: Section 392 Communications Act, (2003)', 14 September 2017, at 1–2 (noting deterrence as the primary purpose and the need for sanctions to be appropriately high to have an impact).

The 2009 changes intended a further EU-wide harmonization of competences and measurably greater ability to address persistently weak enforcement in some countries. The proposed EECC, however, is partly driven by a continuing and marked lack of uniform competences across the Member States[229] despite nearly thirty years of stipulated requirements and the continuing inability to address cross-border issues.[230] To address the former, the proposed EECC specifies a list of functions, including authorizations, that the NRA alone must perform as well as a requirement of independence for and the application of the framework by other 'competent' authorities. The proposed reforms arguably continue an ongoing re-balancing of regulation to incent competition according to EU market conditions while promoting the roll-out of evolving technologies, crucially the 5G networks anticipated in another year or so.

The continued removal of markets from the list of relevant markets to be reviewed for SMP since the 2009 reforms, with only four wholesale markets remaining as of 2014 from the original 2002 list of eighteen, marks the ongoing development of competition and relevance of these frameworks, including the Authorisation Directive, as there are fewer markets for which SMP conditions can be attached. However, the prospect that cross-border regulation will be markedly improved is not optimal. The Commission has already twice sought enhanced competences and been rejected, a result that seems quite possible with the proposed EECC.[231] A similar fate is likely for BEREC's proposed transformation into an EU agency with enhanced powers rather than a collaborative, advisory body. Thus, the proposed reform to harmonize market entry information requirements and create a kind of one-stop shop via BEREC may not survive tri-partite negotiations.

The proposed amendments to the definition of electronic communications services to extend telecoms regulation to over-the-top providers are somewhat light touch, for number-independent interpersonal communications services, as likely limited to security and other possible requirements necessary in the public interest for end-to-end connectivity, emergency services, or interoperability. The obligations for services using numbers would certainly impose additional requirements[232] and clarify others such as the extent to which access to emergency services must be provided that now is vague. However, some governments are concerned

[229] Explanatory Memorandum, proposed EECC, at 2.

[230] Ibid, at 3 (noting only 'modest' Single Market results).

[231] Report, 'House of Commons Select Committee on European Scrutiny, Digital Single Market: Connectivity (Telecoms) Package' (UK Parliament, 25 April 2017), <https://publications.parliament.uk/pa/cm201617/cmselect/cmeuleg/71-xxxvii/7114.htm>.

[232] These would encompass the range of end-user protections under the conditions to the general authorization such as transparency and minimum service quality requirements, minimum contract requirements, and restrictions case.

about the impact on innovation and national/EU start-ups and are urging caution in imposing equivalent regulation on OTT providers absent evidence of market failure or consumer harm. As nothing is agreed until all is agreed, the proposed reforms remain uncertain. The Council has set a deadline of June 2018 for negotiation agreement.

6.4.4 The UK implementation of the 2002 Authorisation Framework as amended

The UK has implemented the EU framework for permissions to provide electronic communications networks and services in the Communications Act 2003[233] and its ensuing secondary legislation. The following examines the Act as well as its implementation and enforcement by Ofcom.

6.4.4.1 *The Communications Act 2003*

The Act, Part 2, Chapter 1 'Electronic Communications Networks and Services' governs the provision of electronic communications networks and services. Lengthy and complex, it put in place the Directive's general authorization scheme by:

1. repealing provisions of the Telecommunications Act 1984 that governed powers and requirements for licences, their modification and enforcement, public telecommunications operator designations, and rights to access public and private land associated with these (s 147); and
2. empowering Ofcom to set certain general and specific conditions (s 45) on specified persons providing electronic communications networks and services (s 46).

There is no 'general authorization' document or grant per se needed to provide electronic communications networks and services in the UK. Providers are merely subject to a set of General Conditions of Entitlement[234] notified and promulgated by the former regulator, the Director-General of Telecommunications, and continued with effect and as modified by Ofcom, the converged regulator for all electronic communications including broadcast. Ofcom recently completed a series of consultations in review of the General Conditions of Entitlement, which it has revised with effect from 1 October 2018, although Ofcom has urged earlier compliance.[235] The General Conditions of Entitlement comprise over eighty pages of

[233] 2003, Chapter 21.

[234] Ofcom, 'Original Notification setting general conditions under section 45 of the Communications Act 2003', 22 July 2003, <http://stakeholders.ofcom.org.uk/telecoms/ga-scheme/general-conditions/archive/>.

[235] Ofcom, 'Statement and Consultation: Review of the General Conditions of Entitlement, Executive Summary', 19 September 2017. 'Consolidated version of General Conditions as at 13 September 2014 (including annotations)', <http://stakeholders.ofcom.org.uk/binaries/telecoms/ga/general-conditions.pdf>.

rights, obligations, and definitions, implementing sections 51–64 of the Act. These specify the permissible content and scope of general conditions which the Act permits to be applied 'generally' to every person providing an electronic communications network or service (s 46(2)(a)), or to every person providing those networks or services of a particular description as defined in the condition (s 46(2)(b)). These will be examined, as recently revised subsequently.

6.4.4.2 *Notification procedure*

The Communications Act 2003 requires that a person not provide a designated electronic communication network or service without advance notification to Ofcom of the intent to do so (s 33(1)(2)). It also requires that any person 'making available a designated associated facility' similarly notify its intent (s 33(3)).[236] The Act also requires that Ofcom create a public register of notifying providers (s 44), and authorizes sanctions for failure to notify (ss 35–37). This notification requirement is premised on being a 'designated' network for which a notification is required (s 33(2)). Ofcom, however, has not 'designated' any networks, services, or facilities for mandatory notification under these sections. Rather, while it originally planned a voluntary register for Public Electronic Communications Networks (PECNs) to facilitate negotiation of interconnection pursuant to their rights under the general authorization, Ofcom determined that this was not in keeping with the permissive nature of the general authorization and decided not to proceed.[237] This would have implemented certificates under the Authorisation Directive to facilitate interconnection and to obtain rights to access public and private land. Ofcom believed that this was unnecessary in light of sufficient guidance as to who comprised a provider of PECN in the 2003 Interconnection Guidelines[238]

[236] This separate listing of associated facilities in the Communications Act 2003 addressed a gap in the EU framework. The Framework Directive defines its scope and aim at Art 1(1) as a 'harmonized framework for the regulation of electronic communication services, electronic communications networks, associated facilities and associated services'. It then proceeds to define these latter categories as 'facilities associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services via that network and/or service. It includes conditional access systems and electronic programme guides' (Art 2(e)). The Authorisation Directive's aim and scope, however, states only that it applies to 'authorisations for the provision of electronic communications networks and services' and carves out as unnecessary conditional access system/services authorizations at Recital 6, provisions having previously been made for the free movement of conditional access services in Directive 98/84/EC on the legal protection of services based on, or consisting of conditional access. It appears implicit in this, therefore, that associated facilities are services other than conditional access, while defined separately, are intended to fall within electronic communications networks and services authorizations.

[237] See Ofcom Consultation, 'Proposal that all provisions continued from licences made under the Telecommunications Act 1984 and all continued interconnection directions will cease to have effect except for specific provisions in specific markets listed in this document as exceptions', 9 September 2004, <http://www.ofcom.org.uk/consult/condocs/Prop1984tele/provis_terminiate/>.

[238] Oftel, Statement of DGT, 'Guidelines for the interconnection of public electronic communications networks', 23 May 2003.

and that the register added nothing since it did not itself create or condition the exercise of rights.[239] If the BEREC notification procedure under the proposed EECC remains to foster cross-border market entry, these requirements may need to be revisited.

6.4.4.3 *Conditions*

Section 45 of the Act authorizes Ofcom to set the general conditions of entitlement (s 45(2)(a)) and specified individual conditions comprising: (i) universal service conditions; (ii) access-related conditions; and (iii) significant market power conditions (s 45(2)(b)).[240] Each is considered in turn below.

General conditions 'General conditions' address topics that can be grouped under headings of 'consumer protection', 'access and interconnection-related', 'essential requirements', 'universal service-related', and 'scarce resources' (s 45).[241]

Section 51(1)(b) provides for appropriate conditions governing service interoperability and network access and interconnection. Conditions governing 'essential requirements' under the Act encompass:

- proper and effective functioning of public networks (s 51(1)(c));
- prevention or avoidance of the exposure of individuals to electro-magnetic fields created in connection with the operation of electronic communications networks (s 51(1)(f));
- compliance with relevant international standards (s 51(1)(g)).

The Act's provisions concerning 'universal service' relate to:

- assessment, collection, and distribution of financial contributions to any universal service obligation (s 51(1)(d));
- the provision, availability, and use, in the event of a disaster, of electronic communications networks, services, and associated facilities (s 51(1)(e));
- *the provision of equivalent services to disabled users* (s 51(2)(c));[242]
- the broadcast or other transmission of 'must carry' services by electronic communications networks, *including, but not limited to, a service enabling access for disabled end-users* (s 64).

[239] See Consultation, n 237.

[240] Section 45 also authorizes conditions on providers with exclusive and special privileges from other industries where relevant communications revenues exceed £50 million. None have been designated.

[241] Ofcom recently grouped these into three main categories of 'network functioning' (Part A); 'numbering and technical conditions' (Part B), and 'consumer protection' (Part C) in its consultation and revision of the General Conditions of Entitlement, Statement and Consultation, n 235, at 2.2.

[242] Italics represent implementation of the 2009 EU amendments.

Finally, the Act's permitted general conditions for 'scarce resources' concern:

- access for end-users to numbers under the national numbering plan (s 57);
- the allocation to and adoption of numbers by providers and non-providers (s 58); and
- *the conditions for limiting any transfers of allocated numbers to another party* (s 56A).[243]

Falling within 'consumer protection' are those conditions under the Act regarding:

- protection of 'end-users' of public services (s 51(1)(a));
- *provision of specified information free of charge to end-users* (s 51(2)(d));[244]
- *minimum quality requirements for public electronic networks to prevent degradation of service and the hindering or slowing of traffic over them* (s 51(2)(e));[245]
- *requirements to block access to telephone numbers or services to prevent fraud or misuse and to allow withholding of fees to another provider* (s 51(2)(f));
- *limitations on duration of contracts between end-users and communications providers* (s 51(2)(g));
- *requirements to ensure contract termination conditions and procedures are not disincentives to an end-user to change providers* (s 51(2)(h));[246]
- standards and policies concerning transparent, easy to use, and *non-discriminatory* procedures regarding:
  - handling of complaints from domestic and small business customers *related to contract conditions or performance of supply of a network or service*;
  - resolution of disputes *related to contract conditions or performance of supply of a network or service*;
  - remedies and redress for such complaints/disputes;
  - *compensation for delay or abuse of process in porting a number to another service provider*;
  - making information about service standards and rights available to these customers (s 52).

The Digital Economy Act 2017[247] amended section 51(2) of the Act by adding a new subsection (da) that specifies Ofcom's power to set conditions requiring a

[243] This section also details the obligation to justify any time limitations on number allocation as discussed previously at Section 6.4.2.3.

[244] This obligation together with the right granted under new s 146A of the Act to third parties to use any published information for provision of an interactive guide or other technique to evaluate alternative service usage costs implements Art 23, Universal Service Directive as amended by Directive 2009/136/EC.

[245] Requiring Ofcom's notification to the Commission and BEREC and that it take 'due account' of the Commission's comments and recommendations (s 52(2A)).

[246] The italicized text indicates changes based on the 2009 reforms, implemented via The Electronic Communications and Wireless Telegraphy Regulations 2011.

[247] Digital Economy Act 2017, ch 30 (27 April 2017).

communications provider to pay automatic compensation to an end-user where it fails to meet a specified standard or obligation.

These sections of the Act largely track the permitted general conditions under Annex A of the Authorisation Directive.[248] Currently implementing these sections are twenty-four General Conditions of Entitlement. These have been modified in a somewhat piecemeal approach over the years since 2003 when they were first promulgated to implement the then new EU regime with the general authorization default reforms. Ofcom has added to and otherwise amended the Conditions to address evolutions in markets and market conduct, technology, fall-out from competition, as well as further EU reforms, notably in 2009 that required:

- providers to offer users a contract of a maximum duration of twelve months and consumers a contract with a maximum initial term of twenty-four months as well as the provision of additional information regarding the length of contracts and conditions for termination (GC 9);
- equivalent access to emergency services by provision of emergency SMS to speech and hearing impaired users (GC 15);
- porting of numbers, both fixed and mobile within one business day as defined and porting delay/abuse compensation (GC 18).

Sections 46–49C reflect the Act's implementation of the EU procedural and substantive requirements for publication, consultation, approval of domestic conditions and *those with EU significance* requiring Commission notification, and modification and revocation of conditions, in light of the 2009 reforms.[249]

Following on from its 2015 Digital Communications Review, Ofcom conducted a review and revision of the General Conditions (GCs) of Entitlement. One of its primary goals going forward from the Review was to ensure 'a step change in quality of service' and the 'empowering and protecting' of consumers.[250] Revisions to the General Conditions, that will be reduced to seventeen with effect from October 2018, to address these include:

- broadening the complaint process requirements to include general customer service and strengthening it to ensure more prompt and efficient handling with progress reports to complainants and earlier access to alternative dispute resolution where the provider does not intend to take further action;

[248] See Section 6.4.2.4.

[249] See Communications Act 2003, ss 48(A)–49(C) regarding notification to the Commission of imposition, modification of universal service conditions.

[250] Ofcom, 'Initial conclusions from the Strategic Review of Digital Communications', 25 February 2016, at 22.

- enhancing protections from nuisance calls by requiring all providers of PATS and PECNs over which PATS is provided to make available without additional charge calling line identification facilities with information that uniquely identifies the caller, to identify and block non-valid/non-dialable numbers as well as enhanced power for Ofcom to remove numbers used abusively;
- protecting vulnerable consumers via requirements for providers to develop, publish, and implement policies for their fair and appropriate treatment;
- requiring all communications providers (now including broadband) to provide priority fault repair for the disabled, third-party bill management, and accessible bill formats;
- the extension of billing and metering schemes to ensure billing accuracy to data;
- greater obligations for transparency re: compensation schemes for consumers, small business customers and service level guarantees, if any, for SMEs.

In addition, the review intended to remove redundant, unused, and unnecessary provisions, the latter in compliance with Ofcom's section 6 duties under the Communications Act 2003 to review regulatory burdens. It also set out to simplify and clarify the text of the GCs including by removing unnecessary words, directly inserting requirements into conditions instead of mere cross-references or via codes of practices, consolidating overlapping conditions (eg GCs 8 and 19) and assembling definitions into a single section with any modifications needed in a specific condition. Additionally, it has added a recital to each condition to clarify its scope and purpose. Comprising only the second authoritative, comprehensive version since the 2003 original notice (consolidating any applicable post-2003 amendments),[251] Ofcom has reorganized the revised GCs into three parts: Part A. Network Functioning Conditions; Part B. Numbering and Technical Conditions; and Part C. Consumer Protection Conditions.

The revisions removed, as unnecessary, conditions regarding:

- obligations to ensure end-user access to operator assistance, directory enquiry services in GCs 6.1(b), 8.1 (a) and (b) and the obligation for 'reasonable' fees for directory enquiry service in GC 8.4 (market conditions make it likely these will be provided);
- the derogation to allow providers to share confidential information with OFCOM (redundant of OFCOM powers);

[251] That being said, the September 2017 publication of the revised, consolidated Conditions is already no longer complete in light of the November 2017 addition of GC 24 requiring enhanced transparency for SMEs regarding service levels that was simultaneously revised as C2.16–2.19. See Table 6.1.

- requirements for public pay phone accessibility design, removal, or detailed pricing information in GC 6 (market developments, adequate USO conditions on BT and KCOM make these unnecessary);
- requirements that provider access conditions ensure fullest availability of public electronic communications network (PECN) during catastrophic network failure or force majeure be proportionate, non-discriminatory, and based on pre-determined objective criteria in GC 3.2 (addressable by Ofcom powers for wholesale conditions under Access Directive);
- Ofcom's powers to determine minimum itemization requirements for billing in GC 12.3 (never exercised);
- itemization exemption for pre-paid services in GC 12.5 (redundant of new requirement on all communications providers to provide access to sufficient billing information);
- Ofcom's powers to set standards and related conditions in GC 2.3–2.6 (never exercised);
- requirement under GC 14.1 for basic code of practice setting out where domestic/small business customers can find the information CPs are required to publish under GC 10.2 (unnecessary in light of new direct publication/information obligations);
- publication of and compliance with a code of practice for premium rate services regarding information, complaints and dispute resolution in GC 14.2 (unnecessary in light of new direct obligation in C.2);
- obligation to provide tone dialling in GC 16.1 (market developments make obligation unnecessary);
- requirements for European Numbering Space in GC 20.4 (no longer operational).

The revised General Conditions are outlined in Table 6.1. These are worth reviewing, as they will comprise the bulk of the regulatory framework for many providers of networks and services. As with the prior GCs, the revised scheme generally distinguishes among three different categories of providers: providers of electronic communications networks (ECN) or services (ECS), providers of public electronic communications services (PECS) and networks (PECN), and providers of publicly available telephone services (PATS)[252] as well as PECN networks over which PATS are provided (a seeming substitute for the PTN/PCN previously used by Ofcom in particular conditions referencing telephony).

[252] While it previously did so, the definition of 'Publicly Available Telephone Service' (PATS) no longer encompasses access to emergency services as a defining criteria and references only a service for originating and receiving, directly or indirectly, national or national and international calls through a number or numbers in a national or international telephone numbering plan. There are also provisions applicable to public internet access services (PAIS). See C 3.

Table 6.1 General Conditions of Entitlement[253]

Part A: Network Functioning Conditions

A1: General Network Access and Interconnection Obligations

- PECN providers to negotiate interconnection on request by any PECN in EU with view to concluding interconnection agreement within reasonable time (A1.2)[254]
- All ECN providers to keep confidential information obtained *in confidence* in connection with access negotiations; use only for purpose provided and not passed on to any party (eg, department/subsidiary) to whom it could provide competitive advantage (A1.3).[255]

A2: Standardization and specified interfaces

- All communications providers to:
  - comply with existing compulsory European standards/specifications published in EU Official Journal (A2.2);
  - take account of:
    - non-compulsory European standards/specifications adopted by CEN, ETSI, CENELEC (A2.3a);
    - any relevant international standards/specifications adopted by ISO, IEC, ITU and CEPT where no European (A2.3b).[256]

A3: Availability of services and access to services

- Providers of PATS or PECNs over which PATS provided[257] to take all necessary measures to ensure:
  - fullest possible availability to PATS provided by them in catastrophic network breakdown or force majeure,
  - uninterrupted access to any emergency organization (EOs) provided as part of PATS (A3.2).[258]
- Providers of VoIP Outbound Call Services to notify Domestic/Small Business customers in plain English and easily accessible manner that access to EOs using VoIP Outbound Call Services may cease in a power cut/failure, or failure of internet connection on which service relies
  - During sales process, in terms and conditions of use and in any user guide provided (A3.3).[259]
- Provider of end-user ECS or access via pay telephones, for originating calls to a number in national numbering plan (not 'click to call' services) to:
  - ensure end-user access to EOs via '112' or '999' without charge and without coins or cards for pay phones and for mobile communications, end-user access to EOs by eCalls (A3.4).
  - make available, at the time the call is made, to extent technically feasible, accurate and reliable caller location information to EOs called on '112' or '999' without charge to the EOs handling calls (A3.5).[260]

[253] As noted by Ofcom, the definitions relating to Conditions reflect the change from 'Public Telephone Network' to 'Public Communications Network' (PCN), and the amendments to PATS and telephone number under the 2009 EU framework. See Consolidated Version of General Conditions of Entitlement as at 13 September 2011, at n 2. These continue but there are further divisions, eg Public Internet Access Service (PAIS) in C 3.4.

[254] Very minor revision of GC 1.1.

[255] Largely replicates GC 1.2; omits Ofcom disclosure exemption.

[256] Replicates GC 2.1, 2.2; omits 2.3–2.6, Ofcom powers re: standards.

[257] Removes limitation to fixed networks.

[258] Minor revision of GC 3.1.

[259] Transposes para 11(a), former Annex 3, GC 14.

[260] Replicates GC 4.2.

- If at fixed location, caller location information must at least include terminal equipment location and full postal address (A3.6 (a)).[261]
- For mobile services, the cell identification of the cell from where the call is made and radius of cell coverage where available
  - zone code, exceptionally, if cell identification temporarily unavailable for technical reasons (A3.6 (b)).[262]
- For VoIP Outbound Call Services at fixed location, providers to recommend that domestic/small business users register address prior to service, keep updated (A3.6 (c)(i)).[263]
- Where VoIP Outbound Call Service reasonably expected to be accessed from multiple locations, provider to recommend domestic/small business users register location data associated with it update whenever accessed from new location (A3.6 (c)(ii)).[264]

A4: Emergency Planning

- Providers of PATS or PECNs over which PATS provided:
  - to make arrangements to provide/restore rapidly reasonable and practicable services in a disaster on request of/in consultation with central and local government and EOs.
  - to implement arrangements as requested by any designated person as is reasonable/practicable
  - may seek compensation and be conditioned on indemnification.[265]

A5: Must carry obligation

- Regulated providers (designated broadcast network providers) to:
  - comply with direction from Ofcom to transmit service from must-carry list under Section 64 of the Act.
  - comply with any order of Secretary of State under Section 64 re: terms on which services must be broadcast or otherwise transmitted.[266]

Part B: Numbering and Technical Conditions

B1: Allocation, adoption and use of telephone numbers[267]

- Provider of ECN, ECS:
  - not to adopt, use or transfer numbers from national numbering plan unless allocated to it or to another person who authorizes adoption, use.
  - to comply with applicable restrictions, requirements of National Numbering Plan or in Ofcom notifications recording specific number allocations to it.
  - to ensure effective, efficient adoption/other use of allocated/transferred numbers; take all reasonably practicable steps to secure that its customers' use of numbers comply with Condition, National Numbering Plan and Non-provider Numbering Condition.[268]

[261] Replicates GC 4.3, in part.

[262] Minor revision of GC 4.3, in part.

[263] Essentially transposes 12(a), Annex 3, GC 14.

[264] Essentially transposes 12(b), Annex 3, GC 14.

[265] Largely transposes GC 5.1–5.3; adds specification of radioactive/toxic/other events with significant impact on general public as disasters.

[266] Transposes GC 7.1, 7.2.

[267] Largely replicates GC 17; omits GC 17.11, 17.12 (allocation/withdrawal of numbers for limited period), 17. 20, 17.21 (pre-2015 application).

[268] A 2013 transparency condition that requires that calls to non-geographic numbers be divided into their component parts, the access charge by their communications providers and the service charge by company being called, which must show the applicable service charges on all advertising and promotional material that includes the non-geographic number using Ofcom mandated wording: 'This call will cost you X pence per minute plus your phone company's access charge.' Ofcom, 'Telephone call chargers to be made simpler', 12 December 2013, <https://www.ofcom.org.uk/aboutofcom/latest/media/media-releases/2013/telephone-call-charges-to-be-made-simpler>.

- not unduly discriminate in other provider's adoption/use of numbers.
- pay Annual Number Charge within 14 days of Ofcom invoicing for allocated geographic numbers in areas specified in Annex[269] whether used or not, billed in arrears and calculated as specified.

- Ofcom's withdrawal of numbers where:
  - not adopted by provider within 6 months or other designated period as Ofcom may direct from date of allocation
  - provider unable to demonstrate that numbers are or were assigned to Subscriber in last 12 months and withdrawal is for assuring best and most efficient use of numbers (new, B1.18).
- Compliance with tariffing principles for unbundled tariff numbers and the requirements for and calculation of access and service charges and price points

B2: Directory Information[270]

- PATS providers assigning telephone numbers to subscribers:
  - to meet all reasonable requests to make directory information available on fair, objective, cost-oriented and non-discriminatory terms, in agreed format, to enable directory/enquiry service provision.
  - to provide subscribers, on request, a directory or directories for any specified area of the UK of subscribers choosing to be in that directory.
  - to ensure any directory produced is updated once a year.
  - may charge reasonable fees for directory and inclusion of subscriber information in directory.

B3: Number portability[271]

- ECN Provider or provider of ECS to subscribers with number(s) from the National Numbering Plan
  - to provide number portability to any requesting subscriber, within shortest possible time, including subsequent activation, on reasonable terms/conditions, including charges, including (B3.3).
    - for mobile, within 1 business day from subscriber's request; recipient provider (RP) to request porting from donor provider (DP) as soon as reasonably practicable
    - where mobile porting and fewer than 25 requests, DP to allow customer to request porting authorization code (PAC) by phone to be provided immediately, where possible, or sent via SMS within 2 hours of phone request or by other means agreed by subscriber/DP (B 3.4).[272]
    - for mobile, porting of numbers and activation to be completed by RP within one business of subscriber request
    - for all others (fixed), within 1 business day of necessary validations, network readiness and recipient provider's (RP) request for porting activation to donor provider (DP) (B3.5).[273]
    - RP to request porting from DP as soon as reasonably practicable after customer request (B3.6).[274]

[269] Places where Ofcom has identified a likely potential number shortage in its consultation on the General Conditions of Entitlement.

[270] Omits obligation to provide directory enquiry/operator access but otherwise largely replicates GC 8.2–8.6, GC 19.

[271] Replicates GC 18 with minor edit re: plain English.

[272] Transposes GC 18.2.

[273] Transposes GC 18.3.

[274] Transposes GC 18.4.

- porting by DP to be done as soon as reasonably practicable, at cost-based, incremental charges with no DP charges for porting system set-up, additional conveyance costs or, if mobile, ongoing costs for registration of ported number.
- any direct charges to subscribers not to be disincentive to change providers (B3.7).[275]
- subscribers to be reasonably compensated for porting delay beyond one business day or abuse as soon as reasonably practicable (B3.11).[276]
- subscribers to be informed of portability date, how to access compensation for porting delay/abuse in plain English, easily accessible manner (B3.12).[277]
- provide Ofcom with record of each ported number with RP in each case (B3.9).[278]

B4: Access to numbers and services[279]

- Providers of ECN, ECS to ensure:
  - EU end-users can access, use non-geographic numbers adopted by provider, where technically, economically feasible, subject to Condition C6.6 (requiring blocking of invalid/non-dialable calling line information) and access all EU telephone numbers, regardless of technological device used.
  - limited end-user access to geographical areas as the subscriber chooses for commercial reasons.
  - blocked access to numbers/PECS as Ofcom requests to prevent fraud, misuse and withheld associated revenues.
- Providers of ECS to end-users or of access to ECS by means of a pay telephone, for originating calls to a number or numbers in the National Telephone Numbering Plan (excluding any click to call service) to provide end-user access to missing child hotline at '116000'.

Part C: Consumer Protection Conditions
C1: Contract requirements[280]

- Providers of PECN/PECS to offer consumers and, on request, other end-users, contracts specifying at least the following minimum requirements in clear, comprehensive, easily accessible form:
  - name, registered address of provider.
  - description of services provided, whether access to Emergency Organisations and caller location information are provided and whether any limitation on access to Emergency Organisations.
  - conditions limiting access to/use of services/applications, if permitted by national law.
  - details on minimum service quality levels including initial connection time.
  - any procedures to manage ('shape') traffic to avoid network congestion and how could affect service quality
  - types of maintenance, customer support services offered; how to contact.

[275] Transposes GC 18.5.
[276] Transposes GC 18.9.
[277] Transposes GC 18.10.
[278] Transposes GC 18.7.
[279] Replicates GC 20 but removes GC 20.4 re: no longer existing EU Telephony Space.
[280] Replicates GC 9.2–9.6, 9.7; adds provisions re: details of pricing information and material changes to core pricing (in bold) (at C1.2 (i) and C1.7–C1.9, respectively) and; substitutes 'fixed' commitment periods for initial commitment periods.

- any restrictions on type of terminal equipment.
- options for inclusion or not of personal data in directory and data involved.
- pricing, tariff particulars (indicating services provided and content of each tariff element with regard to charges for access, usage and/or maintenance and including details of any standard discounts applied, any special and targeted tariff schemes, other additional charges); payment methods offered with any cost difference and how to obtain current pricing/charging information.
- duration, conditions for renewal and termination including:
  - minimum usage/duration for promotional benefits.
  - charges for number/identifier portability.
  - contract termination charges, including terminal equipment cost recovery.
- applicable compensation/arrangements, if any, for quality level failures.[281]
- provider's possible actions for security/integrity threats or incidents and vulnerabilities.
- dispute resolution means.

- Providers to ensure that contract termination procedures/conditions are not end-user disincentives to change provider, particularly that:
  - express consumer and small business (not more than 10 employees, volunteers) consent[282] is obtained for renewal of further commitment periods for public electronic communications services
- Providers not to include provision stipulating fixed commitment period of more than 24 months
- Providers to ensure that all users can subscribe to a maximum 12-month contract
- Providers shall ensure any contract modifications materially detrimental to that subscriber are made only on at least 1-month notice with right of cancellation without penalty and notice of ability to withdraw if change unacceptable.
- During fixed commitment period, increase to core subscription price considered material detrimental, including:
  - reduction in any service that provider is bound to provide for core subscription price;
  - exercise of discretion resulting in increase;
  - any modification of term/condition for Subscriber to pay provider that results in increase;
  - providers to pass on any reduction in VAT or other applicable tax or regulatory levy;
    - Does not include:
      - requirement to pay different price during fixed commitment period that is made sufficiently prominent and transparent so that subscriber can be said to have agreed to different payments at different times.
      - pass through of compulsory VAT increase or other tax or regulatory levy.

[281] The service quality failure transparency condition is in addition to a voluntary Industry Scheme for automatic compensation recently approved by Ofcom for 18 months as a trial in lieu of a regulatorily imposed scheme. See Ofcom, 'Statement: Automatic compensation—protecting consumers from service quality problems', 10 November 2017.

[282] Must be distinct for each commitment period and in a manner allowing for informed choice. See Definitions, Revised General Conditions of Entitlement.

C2: Information publication and transparency requirements[283]

- All PECN/PECS providers to publish clear, current information on prices, tariffs, standard terms, and conditions for access to and use of services by end-users containing:
  - name, registered office of provider
  - description of services offered
  - standard tariff details concerning access, usages and maintenance; standard discounts applied, special and targeted tariff schemes; any additional charges
  - standard contract provisions, including any fixed commitment period, termination of the contract, and procedures and direct charges related to Number Portability
  - available dispute resolution mechanisms
  - any compensation and/or refund policies, including specific details of compensation and/or refund schemes offered (C2.2–C2.3).[284]
- For unbundled tariff numbers, providers to publish access charges payable for tariffs they make available to consumers with same prominence in terms of location, format on provider's website, price lists and call pricing advertising as charges for geographic, call packages including bundles, and calls to mobiles (C2.4).[285]
- Provider to ensure particular prominence to:
  - access charges payable for each package of tariffs
  - whether calls to Unbundled Tariff Numbers included in bundles of inclusive calls/call minutes, specifying in particular:
    - unbundled tariff numbers to which bundle terms apply;
    - if relevant, number of call minutes included;
    - if relevant, whether included calls conditional upon time/day of call; and
  - whether special offers, discount schemes or call bundling arrangements apply to service charges payable for call minutes/calls to included unbundled tariff numbers (C2.5).
- For personal number tariffs available to consumers, providers to publish:
  - on websites/price lists, usage charges including any variation by time/day with same prominence in terms of location, format as charges for geographic, call packages including bundles, calls to mobiles
  - in advertising/promotional material, call pricing, maximum charges applying to Personal Numbers (C2.6).
- Provider to ensure particular prominence to:
  - whether personal numbers included within bundles of inclusive calls/call minutes purchased by consumers specifying, and if relevant:
    - number of call minutes included
    - whether conditioned on time/day (C2.7).
    - Where provider promotes/advertises unbundled tariff numbers in connection with service provision to consumer by means of that number, must:
      - include applicable service charge for consumer calls to number
      - ensure prominently displayed in close proximity to number in any advertisement/promotion of unbundled tariff number (C2.8).

[283] Minor clarification re: pricing details.
[284] Largely transposes GC 10.1–10.2.
[285] C2.4–C2.8 essentially transpose GC 14.8–14.12.

- Where different tariffs applied to small business customers, provider to ensure pricing is transparent; inform if a business tariff (C2.9).[286]
- For controlled premium rate services (CPRS), providers to provide domestic/small business customers, on request and free of charge, advice and information about:
  - UK CPRS mechanisms, such as operator billing, premium rate Short Message Service (PSMS) payments, CPRS number service, voice shortcode charges, and how applied to the customer's phone bill;
  - Provider's role regarding:
    - general CPRS enquiries, requests for number checks via number-checker facilities provided by Phone-paid Services Authority on its website; and
    - dealing with formal complaints about service content abuses, non-compliance with Phone-paid Services Authority's code of practice, other alleged unlawful operation of services/numbers (C2.10).[287]
- Provider to include information about:
  - basics of CPRS, including whether routed to service providers hosted on own network or different network; how revenue shared
  - applicable tariffs for calls to any CPRS number range; any access charge
  - individual service provider or hosting communications provider's contact details; where info available
  - service providers' customer service contact details; where consumers can get info about services provided on CPRS numbers found on their bills
  - Phone-paid Services Authority's role in complaints; how to make formal complaint via their website/ helpline or in writing
  - alternative dispute resolution schemes' role in resolving CPRS-related disputes
  - how consumers can bar access to all/specific range of CPRS numbers for cost/content reasons
  - consumer refund options for scams/abuses (C2.11).[288]
- Required information publication to be effected by:
  - sending a copy to any end-user reasonably requesting it, free of charge
  - placing plain English copy prominently/easily accessible, on provider's website or as Ofcom directs if no website (C2.12).[289]
- Providers to have:
  - procedures to ensure enquiry/helpdesk staff aware of above requirements to respond to complaint/enquiries and monitor compliance with requirements (C2.13).
  - fully documented procedures ensuring customers, advice agencies aware of requirements' existence, eg, by referring to them in sales/marketing materials (C2.14).[290]

[286] New condition, requiring general transparency as to fact of business tariff but not detailed contrast with consumer prices.

[287] Transposes s 3.2 of Annex 1, GC 14 as direct information obligations. In light of these, the requirement for Code of Practice regarding provision of information to consumers is removed as discussed above. (Removes GC Condition 14.6.)

[288] Transposes s 3.3, Annex 1, GC 14 as direct obligation.

[289] Largely transposes GC 10.3, removes requirement for posting at major offices.

[290] C2.13 and 14 transpose ss 4.1–4.2, Annex 1, GC 14 as direct obligations.

- PECN/PECS providers providing public pay phones to display/take reasonable steps to keep displayed on/around all public pay phones, notice of:
  - minimum charge for call connection
  - location info sufficient to enable EO's swift location
  - emergency calls to '112' or '999' are free with no coins/cards needed
  - whether phone able to receive calls, and, if so, the phone number (C2.15).[291]
- PECN/PECS providers to publish, in plain English and reasonably prominent/easily accessible on its website or other place as per Ofcom direction, information re: standard fixed voice/other fixed services/broadband contracts for SMEs that includes:
  - service level agreements, if any, regarding:
    - activating the service on a confirmed date and for failing to do so;
    - the event of a loss of service;
    - keeping a pre-agreed appointment to the SME's premises and for failing to do so.
  - service level guarantees, if any of the above.
  - whether no agreement/guarantees exist.
  - whether may be available on individual negotiation (C2.16–C2.17).[292]
- Where SME enters into an agreement for such services whether standard or bespoke, provider to provide the above information with respect to the contract in a durable medium distinct from the contract (C2.18–2.19).

C3: Billing requirements

- PECS providers not to charge/bill end-user for PECS provision unless every charge represents true extent of provided service (C3.2).[293]
- PECS providers, subject to data protection requirements, to maintain records for at least 12 mos. to establish compliance (C3.3). [294]
- Providers of PATS/Publicly Available Internet Access (PAIS) with revenues not less than £55 million to:
  - comply with direction that Ofcom may issue on process/standards for approval of total metering and billing systems (C3.4).[295]
  - apply to approval body for approval of total metering/billing systems according to Ofcom directed process, obtaining approval as soon as practicable and complying with approval body direction for approval (C3.5).[296]
  - take approval body recommended action where approval withdrawn/not granted or cease use of system; inform Ofcom of either date (C3.6).[297]

[291] Transposes GC 6.2; omits other payphone provision, accessibility, design requirements as either redundant of general law (Equality Act 2010) or unnecessary in light of market developments (NGT Lite app on smartphones obviating need for text payphones).

[292] Transposes the new GC 24 that Ofcom recently set with effect from the period of 1 June 2018 to 1 October 2018 when the Revised Conditions are effective. See Ofcom, 'Statement: Automatic Compensation—protecting consumers from service quality problems', 10 November 2017, at Annex 2.

[293] Transposes GC 11.1.

[294] Transposes GG 11.2, directly specifies the minimum period.

[295] Effectively transposes GC 11.7(e), extends metering and billing system obligations to data via inclusion of PAIS in scope.

[296] Transposes GC 11.4.

[297] Transposes GC 11.5.

- All PATS/PAIS providers to provide, on request, at no extra charge, access to billing information adequate to enable subscriber to:
  - verify/control charges and monitor usage/expenditures and control bills (C3.7).[298]
- For consumer subscribers, billing information to include access charge applied to enable calculation of amounts payable for calls to unbundled tariff numbers as per condition B.1 (C3.8).[299]
- If by request for a printed bill, PATS/PAIS providers may charge reasonable fee (C3.9).[300]
- PATS/PAIS providers to ensure that calls/SMS to '999' or '112' or any other 'free' call/SMS including to helplines are not identified on itemised bills/other records available to subscriber (C3.10).[301]
- Where bill for PATS/PAIS not paid, measures to effect payment or disconnection to:
  - be proportionate and not unduly discriminatory.
  - give due warning of possible interruption/disconnection to subscribers
  - confine interruption to concerned service if technically feasible, except in fraud/chronic non-payment (C3.11).[302]
- PATS/PAIS providers to publish details of possible measures to disconnect/interrupt service by sending copy to requesting subscriber without charge or accessible, prominent post on provider website in plain English; other means on Ofcom direction, if no website (C3.12).[303]

C4: Complaints handling and dispute resolution[304]

- PECS providers to domestic and small business customers have/comply with handling procedures for small business/domestic customer complaints (all expressions of dissatisfaction with products/services, including customer services/complaint handling where a response explicitly or implicitly expected) and customer complaints code conforming to Ofcom approved complaints code;[305] maintain written records to show compliance (C4.2).
- Providers to join and comply with approved alternative dispute resolution scheme, abide by its final decisions within specified time; ensure small business/domestic customers can use ADR scheme for free and; provide information about scheme in bills as per Ofcom approved complaints code[306] (C4.3)

[298] Largely transposes GC 12.1, in part.

[299] Largely transposes GC 12.2.

[300] Transposes GC 12.1's ability to charge reasonable fees but limits to written bills.

[301] Transposes GC 12.4, details '999' and '112' as free calls, specifies 'SMS'.

[302] Transposes GC 13.1, includes PAIS.

[303] Transposes GC 13.2, specifies without charge, publication attributes.

[304] Effectively transposes GC 14.4, 14.5, and Annex 4 to GC 14.

[305] Annex, Condition C4 encompasses the Ofcom code for consumer service and complaints handling setting out high-level minimum standards for accessible processing procedures (Section 1) and consumer complaint codes (Section 2), including information provision requirements and standards, as well as obligations to retain for at least 12 months from resolution/closing, accessible written records re: complaint, handling and resolution for compliance monitoring purposes as well as complaint metadata (eg monthly complaints, resolutions, ADR letters, etc.) (Section 3).

[306] Contained in Annex to C3.4 requiring: timely complaints processing procedures with prompt handling until resolved (where after 28 days after consumer advised of outcome, does not indicate dissatisfaction); accessibility by disabled, vulnerable customers; ability to make complaints by mail, email/webpage form free/geographic phone numbers: staff training and posted procedures; prompt issuance of ADR letter in plain English, durable medium where customer indicates not satisfied with outcome of provider's investigation and with details about independent ADR scheme contact info, and right to pursue without cost. Consumer bills also to inform of rights to no-cost, independent ADR access for unresolved complaints ordinarily after 8 weeks, contact details, existence, location of Complaints Code (Section 4, Annex).

- Providers to monitor compliance with requirements of condition/Ofcom approved code, including customer service/complaint staff's compliance; take appropriate steps to prevent recurrence (C4.4).

C5: Measures to meet needs of vulnerable, consumers and end-users with disabilities[307]

- PECS providers to:
  - establish, publish and comply with clear, effective policies to ensure that needs of vulnerable[308] consumers are met and that include:
    - fair and appropriate treatment practices when informed/otherwise reasonably aware of vulnerability
    - how information about needs to be recorded
    - different channels for contacting/receiving information from the provider
    - how effectiveness/impact to be monitored/evaluated (C5.2, C5.3).
  - provide Ofcom with information needed to verify compliance (C5.4).
  - ensure staff aware of policies/appropriately trained including how to refer to specialists/further trained staff (C5.5).
- To meet the needs of end-users with disabilities, providers to take measures to:
  - provide disabled end users of PATS unable easily to use printed directory with free of charge access to appropriate alternative directory information and enquiry facilities with call connection service (C5.7).[309]
  - ensure access to text relay services where needed, at equivalent pricing (C.8).[310]
  - ensure mobile SMS access to '999', '112' for hearing/speech impaired end-users at no charge
  - provide urgent fault repair services to any fixed-line telecommunications service where genuinely needed at standard charge (C5.11).[311]
  - permit a nominee to safeguard service where user dependent on service, extended to all ECS (C5.12).[312]
  - provide bills/contracts in accessible format suitable for blind/visually impaired, extended to all ECS (C5.13).[313]
  - publish/disseminate widely information about disabled services in appropriate formats and channels (C5.6).[314]
- Providers to consult with consumer panel on such interests/requirements for vulnerable/disabled users on request (C5.14).[315]

[307] Enhances GC 15 to include requirements to consider and adequately address the needs of the vulnerable.
[308] Includes circumstances such as age, physical or learning disability, physical or mental illness, low literacy, communications difficulties or changes in circumstances such as bereavement. See C5.3.
[309] Largely transposes GC 15.2, adds 'easily' to unable to use.
[310] Transposes GC 15.3–15.5.
[311] Transposes GC 15.6.
[312] Transposes GC 15.7.
[313] Transposes GC 15.9.
[314] Transposes GC 15.10.
[315] Transposes GC 15.1.

C6: Calling line identification facilities

- Provider of PATS, networks over which PATS provided to:
  - make available calling line identification facilities, enable them by default, unless demonstrably not technically feasible/economically viable (C6.2).
  - inform subscribers where not available for service (C6.3).
  - ensure that any CLI data provided/associated with a call includes valid, dialable telephone number uniquely identifying the caller
  - where identified, prevent calls from invalid/ non-dialable CL numbers from being connected
  - respect privacy choices by not displaying CLI where caller opts not to

C7: Switching

- Any gaining fixed line/broadband services communications providers providing services to switching customers where a service provider migration on KCOM or Openreach occurs, must ensure in marketing and selling services, that:
  - it does not engage in slamming
  - information it provides to switching customers is accurate, not misleading, including about:
    - its relevant services
    - the impact of buying its services on any other services the customer is currently receiving
    - the impact of buying its services on any of the customer's existing contractual obligations
  - it enquires whether the customer also wants the information in a durable form; if so, provide that (C.7.3).[316]
  - before contract entered, the customer requesting a service provider migration:
    - is authorised to do so
    - intends to enter into a contract
    - is provided, in a clear, comprehensible, accurate and prominent manner and in a durable medium or by telephone if a sales call:
      - identity of contracting legal entity, website/email, telephone contact details
      - requested services' description, key charges (including minimum contract/early termination charges, payment terms, any termination rights/procedures, access charges for calls to unbundled tariff numbers), right to cancel at no cost until transfer, the order process, provision date, fixed commitment period (C7.4).[317]
- Gaining provider to:
  - permit switching customer to terminate contract at no cost from point of sale until end of transfer period
  - have procedures to enable this without unreasonable effort by email, telephone, post (C7.5).[318]
  - create, retain records of sales for not less than 6 months, that contain time, date, place, means switching contracted entered into, allowing subsequent identification of salesperson and to assist any query (C7.6).[319]

[316] Transposes, enhances GC 22.3.
[317] Transposes GC 22. 4.
[318] Transposes GC 22.5, 22.6.
[319] Transposes GC 22.7.

- For each contract entered into with switching customer, gaining provider, to create, keep for not less than 12 months (irrespective of whether terminated before then):
  - individually retrievable, direct record of consent to migrate services/begin acquiring services via the target line.
  - record of explanation that customer consent record required
  - switching customer name, address
  - time, means, place of consent
  - salesperson, if applicable
  - target address
  - calling line information of target line (C7.7, C7.8)[320]
- Gaining provider to send to switching customer letter that clearly, intelligibly sets out: date, fact that transferring services and relevant services to be transferred, estimated date of migration, contract details, the calling line identification of all relevant transferred communications services, right to terminate as above with specific applicable dates (C7.10)[321]
- Losing provider to send letter, on paper or other durable medium and by post unless otherwise explicitly agreed, advising clearly, intelligibly, in neutral terms that migration to be effected without need for further contact to cancel existing services, date of migration, bill to be sent after transfer, whether any contract early termination charges and relevant explanation and estimate as of migration date, how to be paid, and the transfer's impact on any remaining services (C7.11, C7.12).[322]
- Where transfer of broadband and fixed line telecommunications services over same line, gaining provider order to Openreach/KCom for simultaneous transfer to minimise loss of service (C 7.13).[323]
- Where gaining provider elects to coordinate the CP migration on behalf of switching customer and not involving a change of location,[324]
  - Both GP and LP to adhere to Annex 1, (C7.14 (a)), requiring:
    - GP to place transfer order in reasonable time
    - LP not to issue 'cancel other' unless:
      - verified slamming has occurred
      - GP has failed to cancel transfer order at switching customer's request as verified
      - telephone line to be ceased in transfer period
      - Ofcom directed circumstances
      - industry forum agreed reasons unrelated to switching customer's request to cancel, agreed by Ofcom.
    - LP to confirm order cancellation by durable medium to switching customer unless not appropriate/possible
    - LP to record reason in each case with appropriate code as approved by Ofcom for such as:
      - switching customer never had contact with GP or authorised a transfer

[320] Transposes GC 22.8, 22.9.
[321] Transposes GC 22.11.
[322] Transposes GC 22.12, GC 22.13.
[323] Transposes GC 22.14.
[324] Essentially transposes GC 22.16–22.20.

        - GP ordered transfer for wrong service/product not agreed by customer
        - customer agreed to transfer but misled as to identity of service provider (Annex 1, C7).[325]
    - Both GP and LP to ensure that switching customer does not have to contact LP for CP migration to be effected (C7.14 (b)).
    - LP not to require consent or information from switching customer to effect migration (C7.14(c)).
- For broadband migrations not falling within C7.14 (ie, those not using Openreach/KCom platforms (eg, Virgin Media), providers to ensure migration carried out fairly, reasonably, timely and with minimum service loss (C7.16).[326]
- Where GP elects to carry out line takeover for home move request, to comply with Annex 2 (C7.15),[327] requiring:
    - GP to ensure that working line takeover order is placed and only for matched line
    - GP to take reasonable steps to identify target line
    - Incumbent provider to send incumbent switching customer letter on paper or other durable medium, by post or electronically if otherwise agreed, containing:
        - letter date
        - notification that inbound switching customer wants to take over the target line
        - all relevant communications services affected and their calling line identification
        - expected migration date
        - that incumbent switching customer should contact the incumbent provider if not moving or moving later than migration date
        - relevant contact details (Annex 2, C7).[328]
- Providers to:
    - ensure any agents/representatives comply (C7.17).
    - ensure staff/agents trained appropriately (C7.18).
    - monitor compliance, including audits; take steps to prevent recurrence of identified problems (C7.19).
    - publish copy of condition on website, easily accessible and prominently or where ordered by Ofcom if none; provide free of charge copy to switching customer on request (C7.20).[329]

C8: Sales and marketing of mobile communications services

- Providers of mobile communications services, including SMS, to domestic, small business customers when selling and marketing to ensure:
    - any information they provide to customers is accurate and not misleading
        - that they ask if customers want information in durable medium and provide it, if so (C8.2).[330]

[325] Transposes Annex 1, GC 22.
[326] Transposes GC 22.25.
[327] Essentially transposes GC 22.22.
[328] Transposes Annex 2, GC 22.
[329] Transposes GC 22.26–22.29.
[330] Essentially transposes GC 23.2 but with focus on accuracy of information.

- if acting as retailer, it creates, keep sales records for six months and related sales incentives for 90 days after redemption date, but not less than 6 months with date, means and place of contract (if available); not applicable to pre-paid or SIM only (C8.7);

- Providers to publish summary of C8 obligations on website, easily accessible and in prominent manner, or other manner as Ofcom may order; provide free of charge copy to customer on request (C8.3).[331]
- Providers to monitor, ensure own retailers aware, comply with condition; make reasonable efforts to ensure third-party retailer compliance, sanction non-compliance (C8.4).[332]
- Providers to ensure retailers (not of prepaid/SIM only) appropriately trained (C8.8).[333]
- Before entering, amending contract (except for pre-paid, SIM only), providers to reasonably endeavour to ensure customers authorized, intend to enter contract and have clear, comprehensible, accurate information in durable medium (or if by phone for phone sales shortly thereafter, in good time) about:
  - contracting party's legal identity, address, telephone, fax and/or email;
  - description of service, key charges including: contract minimums, applicable early termination; payment terms; any termination right and procedures; likely service date if not immediate; any fixed commitment period; and for consumers, any relevant access charges for calls to unbundled tariff numbers (C8.5).[334]
- Provider to ensure relevant services are available for customer to receive (C8.6).[335]
- Providers to ensure that it (reasonable endeavours to ensure that it or a person acting on its behalf) carries out and retains for its mobile service retailers (not including prepaid/SIM only) a minimum of a check of credit references, director disqualification, director of entity with bankruptcy/administration filing, ongoing checks for relevant updates of this information, information provided by retailer to be kept confidential, used only for monitoring, not given to anyone (eg, partners, subsidiaries) for whom it provides competitive advantage (C8.9–8.10).
- Where customer to receive deferred sales incentive after contract entry, provider must ensure terms & conditions not unduly restrictive, that customer receives in a durable medium (unless by phone, durable medium to follow, in good time) clear, comprehensive, accurate information that includes:
  - Legal entity making sales incentive offer and undertaking obligations, its address, contact detail (telephone, fax, email)
  - Description of sales incentive and its terms & conditions; any process customer has to follow to obtain the incentive (C8.11–8.12).[336]

[331] Transposes GC 23.3.
[332] Transposes GC 23.4.
[333] Transposes GC 24.7.
[334] Transposes GC 23.5 with access charge requirement added.
[335] New requirement.
[336] Transposes GC 23.10.

The current revisions have moved the definitions from each condition to a single section at the end of the Condition Schedule but with the possibility that the terms can still have a meaning particular to a specific condition if the context suggests it.[337] Each revised condition indicates the providers to which it applies in its 'Scope', the first section of each. A particular condition or part of a condition may apply only to a subset of electronic communications service and networks providers. As noted, Ofcom has added a recital to each condition that explains what it intends and to whom it applies but which has no legal effect. These are helpful, however, as are the efforts to specify the actual requirements in the text rather than mere cross-references.[338] Yet, the GCs can still be somewhat difficult to understand readily and there are often background issues that arise in consultations, which give context. For example, the current revision is the product of a series of consultations with the proposal and background rationales and set out in the earlier documents that are cross-referenced but only partly explained. Similarly frustrating is the failure to provide regularly updated consolidated versions with any interim modification or at least a rolling index of all changes. The new conditions that govern transparency about automated compensation schemes promulgated two months after the revision are just the latest example of changes that are not readily apparent. Guidance and orders that can affect scope or interpretation but which are not part of the GCs can as well create uncertainty.[339] The GCs are not models of clarity, therefore.[340]

The enhanced competition that flowed from early EU/UK liberalization reforms produced some questionable sales and other marketing practices, such as slamming (switching providers without customer consent), highly pressured sales pitches, and retailer mobile cash-back schemes that defer its payment until much later and then impose requirements not made clear to customers. Ofcom sought to address these with conditions governing marketing transparency and sales practices.[341] It

[337] Ofcom, 'Statement: Review of the General Conditions', 19 September 2017, at Annex 14.

[338] Not always adhered to. See eg definition of Controlled Premium Rate Services as having 'the meaning set out in the condition issued by Ofcom under section 120 of the Act' with a footnote reference to the 2015 'Changing the implementation date of the new rules governing Freephone and revenue sharing ranges from 26 June 2015 to 1 July 2015'.

[339] See eg Ofcom, 'Guidance on "Material Detriment" under GC 9.6 in relation to price rises and notification of contract modifications', 23 January 2014 (withdrawn as of the revision's effect and some, but not all, of the guidance specifications are now transposed to C1.7 and C1.8 and possibly as well the general transparency requirements of C.2).

[340] Nor is Ofcom's website an aid to clarity.

[341] Previously, GC 14, governing codes of practice, provided for the fixed-line marketing/sales code of practice to address 'slamming' or unauthorized transfers of accounts to another provider. With the need for a mobile code, Ofcom promulgated both as distinct general conditions, then GC 23 and 24, removing the fixed lines code from GC 14.

imposed requirements for codes of practice governing information provision to consumers and small businesses in order to enhance transparency about service provision generally and for calls to non-geographic and personal numbers as well as premium rate services, the latter to enable customers to understand the difficult (and often very costly) tariffing structures.[342] With the current revision of the General Conditions, however, Ofcom has removed provisions for codes of practice concerning the different transparency requirements. Instead it has consolidated many information provision requirements, especially about charging, into a single condition that imposes a direct general transparency/information disclosure obligation applicable to all ECN/ECS providers and specific service-related information publication/provision requirements as applicable (eg for unbundled tariff and personal numbers, controlled premium rate services, public payphone charges) contained in C2. The charging obligations reflect 2015 reforms requiring that free calls using 080 or 116 apply to mobile[343] as well as fixed lines and the disclosure of unbundled tariffs (access and service charges) for calls to other non-geographic numbers.[344]

The revisions, however, delimit the specific transparency requirements imposed only on VoIP services to a direct condition requiring disclosure in pre-sales terms and conditions and user guides about possible limitations in reliability of VoIP outbound call services for access to emergency service organizations in the event of a power or internet service outage (A3.3) and requirements to advise end-users to register and update their address or access location information (A3.6).

The 2017 revisions eliminate the code of conduct in current Annex 3, GC 14 with its additional and more onerous information and documentation requirements while maintaining the previous application to providers of VoIP outbound call services of requirements for network integrity, access to emergency organizations, free use of 999 or 112 emergency numbers and caller location information if technically feasible. Another emergency service revision mandates that mobile communications providers ensure that end-users can access 999/112 emergency numbers using eCalls (that must be rolled out in all EU cars in 2018) (A3.4).

Ofcom has sought to ensure that competition in technologically evolving markets is encouraged and that end-users are not deterred from changing providers.

[342] Annex 1, GC 14.

[343] Ofcom, 'Simplifying Non-Geographic Numbers—change in implementation date', 26 February 2015.

[344] Ibid. See also GCs 14, 17.

Some of its reforms have focused on consumers/small businesses seeking to change broadband providers and that they are not obstructed by uncooperative providers or difficulties in changing residences.[345] Ofcom's 2015 reforms required gaining provider-led switching coordination so that customers of fixed line/broadband providers using Openreach/KCOM platforms need not contact their current provider, a deterrent to consumers, as Ofcom's research indicated.[346] It is currently consulting on how mobile switching can be made easier for customers who still must directly procure a provider authorization code. In a bit of a turn around, Ofcom's revisions remove the ban on customer 'save' efforts by losing providers, recognizing that this can also enable a potentially better deal for consumers.

Before 2005, the only QoS reporting obligations[347] were individual obligations specifically imposed on BT[348] some of which now fall within BT Openreach's 'undertakings' following its original functional separation[349] that have now been restructured. These now also reflect BT's new separate organizational structure with Openreach as a subsidiary under distinct management and extended to reflect KPIs related to revised quality of service requirements concerning timeframes for wholesale fixed line access to address the delays and cancelled appointments by Openreach in effecting this service provision to other providers.[350] While in 2005 Ofcom triggered GC 21 requiring communication providers providing fixed telephony services to publish 'Quality of Service' information,[351] it disapplied it in 2009, after research

[345] See GC 22; Ofcom, 'Statement and Notification 'Broadband migrations: enabling consumer choice', 13 December 2006.

[346] See Ofcom Media Release, 'Easier broadband switching from tomorrow', 19 June 2015.

[347] In early 2003, Oftel set a list of key performance indicators (KPIs) as a checklist against which BT could perform to attain relaxed retail price controls. Technically, therefore, these 15 KPIs against which performance was measured, while quality of service reporting, were voluntary and not conditions under the BT licence. See Oftel Statement, 'Wholesale Line Rental', 11 March 2003.

[348] See Ofcom, 'Statement and Directions: Requirement on BT to publish Key Performance Indicators', 23 September 2004, <http://www.ofcom.org.uk/consult/condocs/bt_kpi/statement/statement_directions.pdf>. These comprised a range of month and/or quarterly reports regarding different performance parameters with regard to end user access (data stream), wholesale line rental, virtual path facilities, FRIACO, and specified interconnection circuits.

[349] See 'Our Undertakings: Key Performance Indicators' (BT Group Plc London), <http://www.btplc.com/Thegroup/RegulatoryandPublicaffairs/Ourundertakings/KeyPerformanceIndicators/KeyProductPerformance Indicators/index.htm>.

[350] See eg Ofcom, 'Quality of Service Direction for WLR: Direction setting further minimum standards for WLR provisions under the SMP condition imposed in the 2014 Fixed Access Market Reviews', 22 November 2016.

[351] Ofcom Notification of Direction, 'A Statement on setting quality of service parameters', 27 January 2005.

found the cost-benefit was not justified.[352] The 2017 revisions of the General Conditions eliminate GC 21. This however was in light of the new powers that the Digital Economy Act 2017 grants to Ofcom to require and publish comparative quality of service information, broader than that in GC 21 and likely rendering it unnecessary.[353]

Despite not relying on GC 21 for quality of service metrics, Ofcom has produced annual consumer experience reports for nearly a decade and following on from its Digital Communications Review, its first quality of service report in 2017.[354] Ofcom found that consumers have experienced slow repairs and installation delays and missed appointments for new and migrated services. Although the Digital Economy Act 2017 has empowered Ofcom to impose an automatic compensation for such service failures, while Ofcom was consulting on such a scheme, the majority of fixed line/broadband providers proposed a voluntary scheme in lieu of regulation.[355] The scheme will require them automatically to pay residential service customers (that can include SMEs using these services):

- £8 each day for failure to a repair service after two days;
- £25 for each engineer's appointment missed or cancelled within less than 24 hours;
- £5 for each day of delayed service after promised start date.

Ofcom will review its operation in a year to determine whether regulation will still be needed. Ofcom, however, recently imposed additional SME transparency regarding service level guarantees, adding GC 24 until October 2018 and then within C2.16–C2.17 in the revised conditions.[356]

Ofcom's quality of service concerns have also focused on general customer service and complaint handling, finding that the sector trails behind others with longer wait times, perceived lack of ease and flexibility, and consumer frustration.[357] To address these, in the 2017 revisions Ofcom has honed and reinforced

[352] Ofcom, 'Topcomm Review: Quality of Service Review', 29 July 2009.

[353] Ofcom, 'Review of the General Conditions of Entitlement', 20 December 2016, at 5.31–5.34.

[354] See eg Ofcom, 'Research Report: The customer experience', 28 January 2015.

[355] See 'Communications Providers' Voluntary Code of Practice for an Automatic Compensation Scheme for service related issues relating to residential fixed-line telephony and broadband services', 10 November 2017, at: <https://www.ofcom.org.uk/__data/assets/pdf_file/0024/107691/Annex-1-industry-automatic-compensation-scheme.pdf>.

[356] See text accompanying n 292 above.

[357] Ofcom, 'Comparing Quality Service', 12 April 2017, at 46–62.

the Ofcom Approved Code of Complaints Practice, the only GC 14 code of practice retained (now Annex, C.4).[358] Providers must provide, among other things, greater signposting about complaint handling and faster access to alternative dispute resolution once it is clear that the provider will not take further action to resolve the complaint.[359]

Individual conditions

(i) Universal service conditions 'Universal service' is the first of section 45 of the Communication Act's permitted specific conditions that Ofcom may establish if it deems appropriate for securing compliance with obligations set out in the 'universal service order' by the Secretary of State for Trade and Industry (s 67).

In the Electronic Communications (Universal Service) Order[360] the Secretary of State originally defined the scope of the universal service obligation to include PATS, public pay telephones, directory and directory enquiry facilities, special measures for disabled end-users, and special tariff and billing options, including those for low income users. Pursuant to Communications Act, section 66(1),[361] Ofcom designated that universal service conditions apply to BT and Hull (now Kingston Communications (KCOM)) but only within the latter's geographical service area. Ofcom imposed specific USO obligations following the Order[362] that, although slightly modified after prior reviews,[363] still include the obligation to:

- provide a connection enabling to the fixed telephone network at a uniform price[364] following a reasonable request, and provide a connection that allows functional internet access;

[358] Ofcom Consultation, 'Review of alternative dispute resolution and complaints handling procedures', 10 July 2008.

[359] See text and accompanying nn 304–308.

[360] 2003 c. 21, SI 2003/1904.

[361] Implemented by The Electronic Communications (Universal Service) Regulations 2003, SI 2003/33.

[362] See Ofcom, 'Strategic Review of Telecommunications Phase 1 Consultation, Annex G', 2003.

[363] eg in 2006, low-income schemes, including a pre-pay option, were approved, as was the ability to modify some provision of public call boxes due to their cost and low utilization and the rules for removing them, including a 'local veto' for qualifying boxes. See Ofcom, Statement, 'Review of the Universal Service Obligation', 14 March 2006. None of these, however, altered the basic requirement in each of the areas, just the extent of the obligation or how it may be satisfied.

[364] Ofcom, in its 2006 review, determined that BT could charge non-uniform prices when the connection cost was more than the standard charge of £3,400, although recommending that it use the standard charge for particularly vulnerable customers. See ibid at 29. The Digital Economy Act's broadband USO authorization maintains this base cost limitation.

- provide at least one low-cost scheme for consumers with special social needs who have difficulty affording telephone services;
- provide uniformly priced public call box services;
- ensure that tariffs for universal services do not entail payment for additional unnecessary services;
- provide itemized billing at no extra charge;
- provide universal services that meet the defined quality thresholds;
- supply and maintain directories and databases for the provision of directory services.[365]

The 2009 EU reforms required only limited changes to existing USO obligations. Under BT's revised condition 9 and KCOM's condition 6 each must notify Ofcom if it intends to dispose of all or a significant part of their local access network to a separate legal entity under different ownership.

The Electronic Communications (Universal Service) (Amendment) Order made few changes. For definitional consistency, it substitutes 'public communications network' for 'public telephony network'.[366] The Order also limited USO special disabled end-user obligations to where an 'equivalence' provision has been implemented.[367] In 2012, Ofcom removed Condition 4 regarding the provision of Next Generation Text Relay from BT and KCOM in light of the modification to GC 15 that required equivalent access of all communications providers.

Ofcom has also, to date, concluded that both BT and KCOM should continue to bear the costs of the USO, in light of findings that the benefits to both of the USO continue to equal or outweigh the costs. Therefore, no USO fund or other method has been required for the current USO obligation.[368]

The Digital Economy Act 2017[369] enables the adoption of a broadband USO with a specified speed that must be at least 10mps.[370] Both Ofcom[371] and the government

[365] Ofcom's decision found that the USO Condition 7 requiring BT to provide any party the contents from the OSIS database was not lawful as outside the scope of the Universal Service Directive's obligation. This was upheld in a March 2011 preliminary reference decision by the CJEU in C-16/10, *The Number Ltd and Conduit Enterprises Ltd*. Thus, cost-orientated access to BT's OSIS data set by other providers is beyond the scope of the Universal Service Obligation 6.

[366] See the Electronic Communications (Universal Service) (Amendment) Order 2011, SI 2011/1209, Art 5(a).

[367] Ibid, at 4.

[368] See Ofcom Statement 'Review of the Universal Service Obligation', 14 March 2006. Reportedly, BT would like the obligations removed in connection with its NGA roll out commitments.

[369] Digital Economy Act 2017 c. 30 (27 April 2017).

[370] Ibid, s 1, Pt 1.

[371] Ofcom, 'Designing the Broadband universal service obligation: Call for inputs', 7 April 2016.

have held consultations as to scope, potential speed mandate, other quality parameters, pricing and funding of this undertaking.[372] These suggest that it could apply on demand only to the estimated 3 per cent of UK premises that would not be served by existing commercial arrangements rather than a uniform universal service roll-out. There is also a seeming government preference for a USO fund by industry to pay for the reform, highly contested by ISPs. With no other communications provider indicating an interest in being designated as the broadband USO provider in the Ofcom's call for inputs, BT recently volunteered to do so in lieu of regulation and using a range of technologies and not only fibre, a proposal currently being considered by the government while it simultaneously proceeds with the consultation and next steps of the regulatory USO.[373] The Government rejected this offer so that customers will have the legal right to demand an upgrade.[374]

(ii) Access conditions Ofcom is authorized by the Act to impose conditions concerning the provision of network access and service interoperability appropriate to secure provider efficiency, sustainable competition, and the greatest possible benefit to end-users (s 73(2)). Where a person controls access to any electronic communications network, that person may have an access condition imposed on him without being a provider of a Public Electronic Communications Network (PECN) or of associated facilities (s 46(6)). Otherwise, specific access conditions must be imposed on providers of networks.[375] Sections 73 and 74 specify the permitted content of such conditions and include those relating to network access and service interoperability considered appropriate by Ofcom in light of the Framework Directive's regulatory considerations (s 73(2)). These include specific conditions to require interconnection of networks for the purpose of ensuring end-to-end connectivity for end-users of PECNs (s 74(1)). In 2006, in order to ensure end-connectivity for telephony,[376] Ofcom imposed an access condition on BT. Before this no such condition had been imposed on BT, yet BT and the market acted as if BT had such a connectivity obligation as a universal service operator, following earlier guidance in this regard.[377] Also included are obligations on a

[372] Dept for Digital, Culture, Media & Sport, 'A new broadband Universal Service Obligation: consultation on design' (July 2017).

[373] Ibid.

[374] Fildes, N, 'BT's £600m rural broadband offer rejected' (Financial Times, 19 December 2017), <https://www.ft.com/content/ebaf1ed6-e4e2-11e7-8b99-0191e45377ec>.

[375] Section 65 requires that Ofcom impose access conditions of providers of conditional access services for protected programmes.

[376] End-to-end connectivity ensures that retail customers can make calls to other customers on that same network or any other network.

[377] *T-Mobile et al v Ofcom* [2008] CAT 12, 28 (citing Guidance issued by the former Director General of Telecommunications on 'End-to-end connectivity' dated 27 May 2003).

person providing facilities for the use of application programme interfaces or electronic programme guides (s 74(2)).[378]

Section 73 was amended to permit an access-related condition to be set requiring the sharing of infrastructure. Section 73(3A) indicates that this is to be exercised for the purpose of 'encouraging efficient investment in infrastructure' and 'promoting innovation', a balance that the 2009 framework and NGA recommendations require of NRAs. The only NGA access conditions, however, are SMP conditions in relevant wholesale access markets imposed on BT and KCOM.[379]

The non-SMP specific access-related conditions within the parameters of the Act are conditions to provide conditional access and electronic programme guide services on fair and reasonable terms that are published, on a non-discriminatory basis, and maintaining accounting separation.[380] These were originally applied to Sky entities with others applied as the pay TV market evolved.[381] Other types of specific access conditions have been imposed in connection with other PECS.

(iii) SMP obligations Section 45 permits Ofcom to apply the SMP conditions to specific providers designated as having dominance either alone or collectively with others in relevant markets (s 78). Dominance may also be found in adjacent markets so closely related as to permit market power in one to influence the other, strengthening market power there (s 78(4)). Dominance, according to the Framework Directive, is a 'position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers'.[382] Ofcom must identify relevant markets and apply the Framework's factors for determining dominance and taking utmost account of all applicable guidelines of the Commission.

After initial determination, the Act requires that, within three years of a service market power determination, Ofcom carry out a further analysis to determine whether the SMP findings remain valid and whether the conditions imposed need

[378] See further Chapter 8.

[379] See Ofcom, 'Review of the Wholesale Local Access Market', 7 October 2010. These may be in addition to the possible non-framework possible infrastructure sharing pursuant to the Communications (Access to Infrastructure) Regulations 2016 that implement the Broadband Cost Reduction Directive 2014.

[380] See Oftel Explanatory Statement and Notice, 'The Regulation of conditional access; Setting of regulatory conditions', 24 July 2003; Ofcom Consultation, 'Access regulation, regulation of electronic program guides', 18 August 2005, at s 3, <http://www.ofcom.org.uk/consult/condocs/epg/epg/stat_provisions/>. Similarly, see Ofcom Statement, 'Technical platform services: Guidelines and explanatory statement', 13 September 2006. Also, see Chapter 8.

[381] See Ofcom Consultation, 'The setting of access-related conditions upon Top Up TV', 15 February 2007. The final statement expected in May 2007 has not been found on the Ofcom website.

[382] 2002/21/EC, Art 14(2).

to be modified (s 84A(6)). In the case of service conditions, the condition can be modified or revoked after such further market and market power reviews (s 86(3)) or if Ofcom determines that there has not been a material change in the market since that condition was set or last modified (s 86(4)), thereby allowing Ofcom some flexibility to try something else. With apparatus conditions, however, Ofcom may only modify/revoke conditions after the full relevant market/market power review (s 86(5)).

In setting, modifying, or removing SMP conditions, Ofcom must first do a domestic consultation with interested/affected parties and publish notifications of the proposed determinations that identify: the relevant markets, the parties determined to have SMP with the reasons for making these determinations (s 80A), and, if in a single notice, any proposed SMP condition/modification/removal in respect thereof (s 80(4)(c)). Section 80B requires notifications to the Commission, BEREC, and other NRAs of those determinations with EU relevance with periods for Commission objection and reservations, provisions that largely provide the emperor with 'new clothes'.

Sections 87 to 92 implement the SMP-related provisions under Articles 9 to 13 of the Access Directive and Articles 17 to 19 of the Universal Service Directive.[383] The Act specifies the subject matter of these permitted SMP conditions in conformity with the Directives (ss 87–93), including those related to network access and use and network access pricing, undue discrimination, publication of such information as Ofcom directs to ensure transparency regarding any of these matters, publication of acceptable access terms and conditions (usually called a 'reference offer'), separate accounting, accounting methods, and, as permitted, access price controls (ss 87–88). Section 89 of the Act permits other appropriate access conditions to be imposed 'under exceptional circumstances' where dominance exists in a service market by a person who is a provider of electronic communications networks or associated facilities. These, however, must be notified to and approved by the Commission (s 89(2)).

Sections 89A, B, and C have been added to the Act which transpose the functional separation powers rather literally from the Access Directive.

Sections 90 and 92 regarding leased lines and carrier selection provision have now been deleted (s 91).

The analysis and imposition of SMP conditions is a time-consuming, complex process. The 2009 EU reforms made it more so with the consecutive, rather than concurrent, domestic and EU consultations and comment periods.

[383] Ofcom 'S 4.4, Review of Wholesale Broadband Access Markets', June 2004.

The process is also one that market participants seem increasingly willing to challenge.[384] There is a growing similarity to the US market, with its vast numbers of parties lined up on each side of an issue with seemingly perpetual challenges to the FCC's regulatory measures that can take years to resolve finally, and often after the market has reached another solution or the technology has moved on.

(iv) Privileged operator The last of the section 45 specific conditions concerns public communications providers with special or exclusive rights regarding the provision of any non-communications services (s 77(2)).[385] Conditions to ensure transparency and service provision without cross-subsidies from the privileged business must be applied but not where revenues from all communications activities are less than £50 million (s 77(4)). The conditions may include separate accounting, audit, and published financials and structural separation (s 77(3)). Ofcom has not designated any 'privileged operators'.

6.4.4.4 *Compliance and enforcement*

The Communications Act 2003 enforcement scheme for the section 45 conditions is found in sections 96A to 104 of the Act, with powers, including to impose financial and other penalties, granted to Ofcom. Where a condition has been breached, Ofcom must issue a notification under Section 96A specifying:[386] Ofcom's preliminary determination of the condition allegedly breached and how; steps that Ofcom considers necessary for remediation of the breach and possibly its consequences; any penalty Ofcom is considering; a proposed suspension or restriction for a single serious breach or repeated breaches of a condition (s 100);[387] and, in connection with a SMP service condition, a direction of suspension (s 100A). The notice must also specify the period during which the provider may make representations.

[384] See eg *BT v Ofcom* [2017] CAT 25 (successfully challenging Ofcom's definition of a single relevant market for all bandwidths of contemporary interface symmetric broadband origination (CISBO) and imposing of a SMP dark fibre access remedy); *Talk Talk v Ofcom* [2013] EWCA Civ 1318 (upholding unsuccessful challenge that Ofcom's application of charge control condition six months after SMP determination failed to comply with s 86 requirement that either the condition be set upon or after determination that market conditions had not materially changed, as OFCOM was aware of Talk Talk's likely entry into relevant exchanges at the time of determination).

[385] This is not the case where this is solely in connection with associated facilities.

[386] Ofcom has set out how its enforcement investigations will proceed, including the s 96A breach notification in its 'Enforcement Guidelines for regulatory investigations', 28 June 2017.

[387] With repeated, non-serious breaches, intermediate penalties must be sought.

Proposed penalties must be appropriate and proportionate but may include both a fixed amount for a past breach and, for a breach allegedly continuing, a daily penalty accruing until it is remedied. However, the fixed penalty is capped at 10 per cent of annual revenues of that person's relevant business (s 97(1)) and the daily penalty, no more than £20,000. These could clearly comprise 'dissuasive' amounts as required by the Framework Directive.

When the representation period has expired, Ofcom can choose to withdraw the notice or issue a section 96C notice of confirmation of a penalty within the scope notified but with lesser penalties possible in light of representations or efforts at compliance/mitigation.[388] Ofcom has detailed how these discounts to penalties will operate in its Penalty Guidelines.[389]

Conditions on SMP apparatus providers are enforced under sections 94–96 which retain the Act's former enforcement provisions requiring notification of at least a month to make representations comply and remediate the consequences (s 94(3), (4)) with a separate enforcement notice for penalties (s 95).

Recently, Ofcom has issued some unprecedented fines. In early 2017, it fined BT in excess of £42 million (after a 30 per cent reduction for cooperating and admitting culpability) for breach of its SMP conditions in failing to properly compensate its wholesale customers under their contracts for delayed provision of 'Ethernet' leased lines services in 2013–2014 and for failing to provide full and accurate information to Ofcom during the investigation and its prior market review.[390] Before that Ofcom's largest fine was £4.6 million (after a 7.5 per cent discount for entering a settlement agreement), imposed on Vodafone in late 2016 for: failing to meet GC 11's billing accuracy requirements when it failed to credit top-up payments made by over 10,000 pay-as-you-go customers whose accounts that were deactivated for non-use and its billing and metering procedure requirements in failing to prevent these payments after moving to a new billing system; breaching GC 23.2(a)'s requirements for accurate information in mobile marketing and sales in advising customers who purchased such top-ups by different means that they would be given services in return; and as well lacking adequate customer complaints handling policies and procedures under GC 14, including the failure to advise customers in writing of their rights to proceed to ADR after eight weeks of an unresolved complaint.[391]

[388] See Ofcom, 'Penalty guidelines', 13 June 2011, <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>.

[389] Ofcom, 'Penalty Guidelines, Section 392 Communications Act 2003', 14 September 2017, <https://www.ofcom.org.uk/__data/assets/pdf_file/0022/106267/Penalty-Guidelines-September-2017.pdf>.

[390] Ofcom Media Release, 'BT to be fined £42m for breaching contracts with telecoms providers', 26 March 2017.

[391] See Ofcom Media Release, 'Vodafone fined £4.6 million for failing customers', 26 October 2016.

Ofcom has enforcement powers under the Communications Act 2003 beyond the section 45 general and specific conditions. These include, inter alia, powers concerning: the electronic communications code governing rights of way (ss 106–119); premium rate services (ss 120–124); administrative fees payment (ss 38–43); information provision (s 135–144); and network security requirements (ss 105A–D). The enforcement powers were enhanced under the 2009 reforms to the framework with increased financial penalties across the board for enforcement (potentially up to 10 per cent of turnover for the relevant period), including for the section 45 conditions with daily fines possible for up to 1 per cent of the maximum lump sum penalty where there are continuing contraventions.

There are also circumstances where the Act makes the failure to comply with a condition or authorization requirement a criminal offence. These include, eg the provision of a network, service, or associated facility when the entitlement to do so is suspended or so restricted (s 103), and the failure to provide required information[392] (s 143).

The following considers the electronic communications code, premium rate services, and administrative charges regulation.

Rights of access to install facilities: The Electronic Communications Code For over thirty years, Ofcom and its predecessor has granted rights of access over land for the installation and maintenance of communications equipment pursuant to what is called the Electronic Communications Code.[393] However, after a Law Commission review in 2013 and further consultations, the UK government, believing then current Code inadequate for network providers to ensure the timely and cost-effective network build outs and enhancements that will be needed for superfast broadband and 5G networks, proposed a new Code in the Digital Economy Bill 2017. Under the Act that received royal assent in April 2017, the new Code comprising Schedule 3A to the Communications Act 2003 will replace the prior Code in its entirety[394] except for some transitioning provisions[395] that will govern arrangements existing at its effective date on 28 December

[392] Section 135 empowers Ofcom to require providers and other persons to provide justified, proportionate information for specified purposes including determining a condition breach or to ascertain or verify a payable charge, universal service reviews, relevant market and market power analyses, statistical purposes, etc. This has been revised to encompass network security obligations. Here as well there are enhanced potential penalties with the maximum increased from £50,000 to £2 million.

[393] Currently Sch 2, Telecommunications Act 1984 retained via deeming provisions under Sch 18 of the Communications Act 2003.

[394] Digital Economy Act 2017, pt 2, s 4.

[395] These transitioning provisions, inter alia, disapply new Code provisions concerning assignment, upgrades and infrastructure sharing to agreements under the current Code. Digital Economy Act 2017, pt 2, s 4, Sch 2.

2017.[396] As previously, the Code will apply pursuant to a direction from Ofcom under section 106(3)(a) of the Communications Act to operators for providing their networks and providers of infrastructure systems to operators for use by them to provide their networks for agreements with occupiers of land for these purposes.[397] The applicable rights provided are to:

- install and keep installed electronic communications apparatus on, under or over the land,
- inspect, maintain, adjust, alter, repair, upgrade or operate electronic communications apparatus which is on, under or over the land,
- carry out any works on the land for or in connection with the installation of electronic communications apparatus on, under or over the land or elsewhere,
- carry out any works on the land for or in connection with the maintenance, adjustment, alteration, repair, upgrading or operation of electronic communications apparatus which is on, under or over the land or elsewhere,
- enter the land to inspect, maintain, adjust, alter, repair, upgrade or operate any electronic communications apparatus which is on, under or over the land or elsewhere,
- connect to a power supply,
- interfere with or obstruct a means of access to or from the land (whether or not any electronic communications apparatus is on, under or over the land), or
- lop or cut back, or require another person to lop or cut back, any tree or other vegetation that interferes or will or may interfere with electronic communications apparatus.[398]

Under the Code, operators can also automatically upgrade apparatus or share its use with another operator where the resulting changes have no or only minimal adverse impact on its appearance and impose no additional burden on the landowner.[399] The practical implications of these qualifications to the right remain to be seen since upgrades or sharing may require additional equipment and/or site maintenance. An operator can assign its Code rights to another.[400] The Code delimits the ability to contract out of these statutory rights where the above conditions have been met or to impose additional conditions, including conditions for further payment.[401] Thus, landlords may have reduced control over their land.

[396] The Digital Economy Act 2017 (Commencement No. 3) Regulations, SI 2017/1286 (c. 119).
[397] Digital Economy Act 2017, pt 2, s 4, Sch 1.
[398] Schedule 3A, Communications Act 2003, s 5. [399] Ibid, s 17. [400] Ibid, s 16.
[401] Ibid, s 17(5). This does not affect the ability to impose guarantor status on the operator for purposes of ensuring the assignee meets its obligations.

That they certainly should have reduced expectations of potential earnings is a further consequence of the Code's intended objectives to reduce network costs as well as ensure greater ease of rolling out infrastructure. If twenty-eight days after the required notice to the landowner of the Code rights and terms an operator wishes to pursue, the parties are unable to agree on consideration or other terms, the operator can apply to the court (the specialist Lands Chamber of the Upper Tribunal[402]) for imposition of Code rights and their valuation. As under the former Code, the test to be applied in deciding whether to impose Code rights binding a person was whether (1) the prejudice caused to that person by the order can be adequately compensated by money and (2) the public interest outweighs the likely prejudice to the person including the public interest in access to a choice of high quality electronic communications services.[403] Under the new Code, however, the court cannot impose Code rights where it believes that the owner intends to develop all or part of the land or neighbouring land and the order would mean that it could not reasonably do so.[404] What this will require in terms of proof is not provided for in the Code. The new Code also differs in that it provides for compensation intended to be akin to the compulsory purchase principles for other utilities and based on the market value of an agreement between a willing buyer and seller not taking into account the value to the communications provider or the potential for assignment, upgrading, or sharing and based on the assumption that other sites are available.[405] Effectively, this means the value of the land to its owner without the agreement. This is projected to lower site rents by as much as 40 per cent.[406]

The former Code did not specify its relationship with the Landlord and Tenant Act 1954 and that has led to confusion.[407] The new Code however specifies that the Act does not apply to agreements the primary purposes of which are to grant Code rights, creating certainty that the security of tenure provisions of that Act do not apply. Defining 'land' to exclude apparatus so that there is no question whether or not it becomes a fixture annexed to the land under real

[402] In respect of England and Wales. The Electronic Communications Code (Jurisdiction) Regulations 2017, SI 2017/1284 (14 December 2017) (also establishing original jurisdiction in the Lands Tribunal for Scotland and continuing the jurisdiction in the country court for Northern Ireland; in England, the First Tier Tribunal can hear cases referred to it by the Upper Tier Tribunal).

[403] Communications Act 2003, s 21, Sch 3A. [404] Ibid, s 21(5).

[405] Ibid, s 24.

[406] Rathbone, D, Briefing Paper CPB7203 'Reforming the Electronic Communications Code' (House of Commons Library, 1 June 2016) 13.

[407] See eg *Crest Nicholson (Operations) Ltd v Crest Nicholson (Operations) Ltd v Arqiva Services Ltd and others* (Cambridge County Court, 28 April 2015) unpublished.

property law creates similar certainty.[408] The Code continues existing provisions that allow for tenure of rights with successors in interests without the need for their registration.[409]

The new Code also changes the termination procedures. The landowner must now provide eighteen months' notice rather than the current twenty-eight days and specify grounds for termination that must be one of the following:

- substantial breaches by the operator of its obligations under the agreement;
- persistent delays by the operator in making payments to the site provider under the agreement;
- the site provider intends to redevelop all or part of the land at issue, or any neighbouring land, and could not reasonably do so unless the code agreement ends;
- the original criteria for the court's determination whether to apply the code rights no longer apply.[410]

The operator has three months to serve a counter-notice indicating that it does not want the agreement to end and wants the owner to either continue to be bound under the former Code or under the new Code.[411] Within three months from the date of service, it must file with the court for an order. The court may not grant the order if it finds that the site provider has not established any of the above grounds but must do so otherwise.[412] The Code makes provision as well for temporary rights pending a final order[413] and for removal of equipment including after a court refuses to enter an order for a new/extended agreement or where the equipment is unused.[414]

The new Electronic Communications Code requires Ofcom to establish a Code of Practice that addresses the provision of information by operators, the conduct of negotiations and of operators in relation to persons with an interest in land under the Code.[415] Ofcom must also develop standard terms that the parties may use for

[408] See eg *Peel Land and Property (Ports No.3) Ltd v TS Sheerness Steel Ltd* [2013] EWHC 1658 (Ch).
[409] Communications Act 2003, s 4, Sch 3A.
[410] Communications Act 2003, s 31, Sch 3A.
[411] Ibid, s 32 (for prior Code agreements).
[412] Ibid.
[413] Communications Code 2003, ss 25–26, Sch 3A.
[414] See Communications Act 2003, Pt 6, Sch 3A.
[415] Ofcom Statement, 'Electronic Communications Code: Digital Economy Act: Code of Practice, Standard Terms of Agreement and Standard Notices', 15 December 2017. The Digital Economy Act, however, does not have a provision requiring operators to comply with it, rendering its status non-binding. The Code of Practice states that it suggests 'best practice' and in defining its scope indicates that it 'provides a reference framework'. Ofcom, 'Electronic Communications Code: Code of Practice', 15 December 2017.

agreements[416] and for template notices that the parties must use where required under the Code[417] and may use, otherwise.[418]

Under Communications Act provisions not modified by the Digital Economy Act 2017, Ofcom must maintain a public register of providers granted Code powers (s 108), currently 125.[419] Many on the current register previously held Code powers under the former regime (retained via deeming provisions under Schedule 18 of the Communications Act).

In order to obtain a grant of Code powers, a provider of networks or infrastructure systems for networks must still make a standalone application[420] to Ofcom with the following:

- provider's identity, address, including any company number, registered office and details of any subsidiaries, parents, and affiliates;
- description of the network or system of its infrastructure's provision, including its location;
- reasons for seeking Code powers; explanation of why the network or conduit system provision is not otherwise practicable;
- the types of services to be provided and those likely to benefit; if a conduit system, evidence of its availability for use by networks and the applicant's ability and willingness to share apparatus;
- alternative arrangements to Code powers sought, if any.[421]

Guidance indicates that a business plan should evince the need for the grant as part of the application.[422] Applicants must also provide evidence of ability to meet any fiscal liabilities under the Act.[423] This can encompass letters from potential guarantors or company directors indicating willingness

[416] Ofcom Statement, 'Electronic Communications Code: Standard Terms', 15 December 2017 (a template agreement).

[417] Communications Act 2003, ss 88–89, Sch 3A.

[418] Ofcom, 'Electronic Communications Code template notices, December 2017 (file of various template notices (eg requesting rights, assigning rights, requesting removal of apparatus, etc).

[419] See Register, <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/policy/electronic-comm-code>.

[420] Those with grants of Code powers under PTO or other individual licences were deemed to have Code powers without new application. See Statement DGT, 'Statement: The Granting of Electronic Communications Code by the Director General of Telecommunications', 10 October 2003, at 2.4.

[421] DGT, 'Notification under Section 106(2) of the Communications Act 2003: Requirements with respect to the content of an application for a direction applying the Electronic Communications Code and the manner in which such application is to be made', 10 October 2003.

[422] Statement, n 420, at 2.64. [423] Section 109(e), Communications Act 2003.

to ensure such arrangements are in place.[424] These information requirements clearly relate to Ofcom's considerations under the Act in granting Code powers (s 107(4)(a)–(d)). These must be balanced, however, with the EU regulatory principles that include the need to promote competition.[425] An example of the possible tension between the economic and social policies that underlie these mandatory factors is where Code powers are sought to facilitate the roll-out of alternative infrastructure presumed to promote competition or make access to new services available except that building of that infrastructure will require significant highway disruptions and infrastructure sharing might alleviate this.

Ofcom must allow for consultation on an application by interested parties. While all providers are eligible to apply, providers of essentially private networks are unlikely to be granted Code powers.[426] Preference will be given to providers willing and able to share apparatus, although inability or unwillingness does not bar the grant.

An administrative charge is associated with a successful application and an annual charge, reflecting respectively the costs of processing the application, and maintaining and administering the Code.[427] These remain a £10,000 one-time application charge for the application and a £1,000 annual charge as of 2017/2018.[428] No charge is made to unsuccessful applicants and the annual charge, unchanged since 2005, reflects the cost of administering all grants of Code powers to an undertaking. Ofcom found that its costs were largely related to the scheme as a whole rather than attributable meaningfully to any individual operator, some of which due to historical reasons had multiple grants of Code powers.[429] It has been suggested that this separate charging reflects not only a true 'licence fee' as previously discussed based on regulatory costs, but also a measure to ensure that use of the public resources is by those that will maximize the benefit and may cause providers to evaluate critically their need for Code powers.[430]

[424] Statement, n 420, at 2.85–2.88.

[425] Ibid, at 2.57 (noting the factors that will be considered in this balancing). See, eg, Ofcom Consultation, 'Proposal to apply Code powers to IX Wireless Ltd', 5 January 2018, at 2.13–2.22.

[426] Statement, n 420, at 2.101.

[427] These are authorized by the Communications Act 2003, s 36(1)(d).

[428] Ibid. See Ofcom's Tariff Tables, 30 March 2017.

[429] See Consultation, n 380.

[430] See Section 6.2.2. Indeed, a significant number of code operators have requested that their code powers be revoked. See the 20 Directions revoking these at the A–Z Document List, <http://www.ofcom.org.uk/atoz/?letter=D&publication=All&sector=All>.

The specific direction applying Code powers to a provider is a personal benefit and may not be assigned to a third party.[431] It may be limited geographically, determined on a case-by-case basis and as dictated by limited needs of networks, such as where the business plan indicates it is largely based on leased lines or that the Code power is needed only to facilitate minor interconnections or installations.[432]

The application of Code powers in addition to the rights previously discussed also provides the following benefits to the grantee:

- simplified compliance with planning requirements due to exemptions for 'permitted development' under the Town and Country Planning framework;[433]
- power to install apparatus in the streets without a 'street works' licence.

Code operators must comply with obligations imposed under the Electronic Communications Code (Conditions and Restrictions) Regulations 2003[434] (Regulations). These replaced the former licence conditions and restrictions although are largely unchanged substantively.

These, inter alia, detail requirements for providers exercising Code powers in connection with local planning. An example of their interaction with the planning regime is that while most apparatus installation does not require even notice to local planning authority under the General Permitted Development Order (GDPO), the Regulations require a month's notice to local planning authorities and compliance with their reasonable conditions where the provider has not previously installed apparatus in the area or plans to install certain sized cabinets and boxes that do not require planning permission.[435] The Regulations also provide for notice to local planning authorities of fifty-six days, and other compliance requirements for works in connection with listed buildings and ancient monuments, conservation, and other protected areas.[436] The Regulations seek to minimize the aesthetic, environmental, and functional impact of the installation appropriate to the public or private land on which it is installed[437] by, eg requiring underground installations to be deep enough so as not to interfere

[431] See s 106, Communications Act. [432] See Statement, n 420 at 2.89–2.96.

[433] See the Town and Country Planning, England and Wales (General Permitted Development) Order 1995, SI 1995/418, Pt 24 as amended. Planning (General Development) (Amendment) Order (Northern Ireland) 2003 SR No 98, Town and Country Planning (General Permitted Development) (Scotland) Amendment (No 2) Order 2001 SSI 2001/266.

[434] The Electronic Communications Code (Conditions and Restrictions) Regulations 2003 ('the Code Regulations'), SI 2003/2553 (as amended by the Electronic Communications Code (Conditions and Restrictions) (Amendment) Regulations 2009, the Electronic Communications Code (Conditions and Restrictions) (Amendment) Regulations 2013, and the Electronic Communications Code (Conditions and Restrictions) (Amendment) Regulations 2017).

[435] Ibid, at reg 5. [436] Ibid, regs 6–8. [437] See eg ibid, at reg 3.

with its use, such as agricultural land. They require coordination between providers and others installing utilities,[438] or coordinating public works such as highway and road authorities, and impose inspection and maintenance obligations for safety to persons and property.[439]

The Regulations provide more detailed procedures for 'funding liabilities' than the former licence conditions. These involve an annual section 16 certification on 1 April by the provider, if an individual, or its board, detailing amounts available and how this determination was made.[440] This encompasses 'relevant events' triggering the need for the funds' availability, including a specified insolvency level.[441] Providers not exercising their Code powers must certify two weeks prior to doing so. Ofcom maintains a list of filed certifications.

Ofcom's predecessor had no powers to take any specific action for a breach of a Code condition as such breaches would likely be in violation of private rights actionable in the courts or comprise breaches of other statutes such as unauthorized street works.[442] The Communications Act 2003, however, authorizes Ofcom to specify directions for remediation and to issue penalties (s 110(2)(e)), including financial, under revised procedures similar to those for other conditions which may include a daily penalty up to £100 per day for a continuing contravention while a fixed penalty may not exceed £10,000 per contravention (s 110A).

Suspension of the Code application to a provider is possible for repeated or serious contraventions of the Regulations (s 112), for urgent cases necessary to protect health and safety or the economic or operational interests of others (s 111A),[443] and for serious or repeated failures to pay the administrative charge (s 113(1)). These would appear to apply to the entire network.[444]

The grant exists as long as the network or conduit system provider does unless suspended or revoked on request.

[438] Ibid, at reg 14. [439] Ibid, at reg 10.

[440] The annual certificate shall, in the case of a company state, that in the Code Operator's Board's reasonable opinion, the Code Operator has fulfilled its duty to put funds in place in compliance with the Regulations, the systems and processes which enabled the Board to form that opinion, and the amount of funds which have been provided for. A copy of the relevant instrument that will provide the funds should accompany the certificate.

[441] SI 2003/2553 (as amended), n 434, at reg 16.

[442] Consultation on the Draft Electronic Communications Code (Conditions and Restrictions) Regulations, 3 (DTI, April 2003), <http://www.communicationsbill.gov.uk/implementation_consultations.html>.

[443] Requiring confirmation/removal within three months (plus one further extension of three months).

[444] Except to the extent that they concern unconfirmed urgent cases.

Premium rate services Section 120 of the Communications Act 2003 authorizes a condition that is general in nature as it may be imposed on all persons providing premium rate services (PRS) or to a person providing a specific description of such services. PRS comprise those goods and services that people can buy like chat lines, call-in contests, access to ringtones and horoscopes, and more recently calling card-like services providing access to a block of long-distance minutes, in exchange for an amount billed to their telephones as with pre-paid accounts or via their communications service bill.[445] The Act defines a PRS as one that provides the user with access to content or a facility via an electronic communications service where the charge paid to the communications service provider for that facility accessed or that content is included in the use of the service (s 120(8)). The section 120 condition applies to persons who provide the content, exercise editorial control, make available the facility, package the service, or provide the service over their network under an agreement with the provider or retain part of the service charge. It authorizes Ofcom to approve a code of conduct with which such premium service providers with a section 120 condition must comply (s 120(3)(za)), or, if none is arrived at, to enter an order regulating the provision and content of such services, including pricing and charge-sharing arrangements.

This intends continuation of a prior regulatory framework and its industry-funded regulator, the former Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS). Although for a while this was rebranded 'PhonePayPlus' apparently in an effort to create a higher profile and eliminate the vagaries about its name, in 2016, this co-regulator with Ofcom was renamed as the Phone-paid Services Authority (PSA). It regulates premium rate services as an agent of Ofcom and pursuant to its Fourteenth Code of Practice (2016) approved by Ofcom pursuant to sections 120 and 121, Communications Act. This requires prior registration by all network operators and providers of all non-exempt premium rate services (including various indirect providers) with annual renewal.[446] After investigation of a complaint, PSA can impose sanctions for failure to comply with the Code that regulates such things as clear, accurate rate information, truthful and appropriate advertising, unreasonable delays in service, or service prolongation. The Code provides for an emergency investigation procedure with an immediate preliminary investigation for an apparent serious and urgent breach with the possibility to order the withholding of payments

[445] See further Chapter 9.

[446] As discussed above, revisions to the General Conditions will eliminate Ofcom's Code of Practice regarding requirement and directly impose information publication and provision obligations in the consumer protection conditions contained in C.2, including those that also govern premium rate services information provision.

and the suspension of/blocking access to the provider service, as provided in the revised EU consumer protections under the Universal Service and Users' Rights Directive. Sanctions for established breaches can include reprimands, imposition of prior approval requirements, orders to reimburse complainants, fines, orders limiting access to services with requirements for compliance advice sought, and bans on named individuals from providing services.[447] A database of sanctions adjudicated by a tribunal selected from an Adjudication Panel established by the PSA code is available on the PSA website.[448] Where the premium rate services involve broadcasters, Ofcom may also address breaches under the Broadcast Code.[449] The Communications Act sections 94–96 procedures, discussed above, apply to breaches of section 120 condition (s 123) with a penalty of up to £250,000 possible if proportionate and appropriate (s 123(2)). Section 124 that retains the 'serious and repeated' wording of the Act governs suspension. Ofcom has additional powers to promulgate orders necessary to address issues involving premium rate services for which there is not a code (s 122).

6.4.4.5 *Fees—administrative charges and licence fees*

Ofcom may impose annual administrative charges on designated providers of electronic communications networks, services, or associated facilities, designated USO providers, SMP apparatus suppliers, and a person with a grant of Code powers[450] (s 38). Each year Ofcom must publish a statement of charges in keeping with a current statement of charging principles (s 38). On or before 31 March, Ofcom publishes a table of charges that allocate its costs by sector. According to its current statement of charging principles, Ofcom's cost allocation is based on the budgeted direct costs of individual projects and programmes, according to the relevant regulatory sector and regulatory categories within those sectors, to permit further particularization of regulatory fees.[451] Overhead, projects and activities not directly attributable or allocated to specific projects, categories, and sectors are apportioned across these according to Ofcom's judgement as to time spent and levels of expenditure.

[447] For a list of barred service providers, see < https://psauthority.org.uk/for-business/prohibitions-further-sanctions-and-suspensions>.

[448] Tribunal Service Provider Adjudications (Phone-paid Services Authority), < https://psauthority.org.uk/for-business/tribunal-adjudications?date=>.

[449] See Notice of Sanction 'Square 1 Management Ltd., Smile TV' (22 May 2007; 22:17), Broadcast Bulletin No 114-21/07/08, <http://www.ofcom.org.uk/tv/obb/prog_cb/obb114/>.

[450] Code power charges are discussed above at Section 6.4.4.4.

[451] Ofcom, 'Statement of charging principles', 8 February 2005, s 2.18. Also see, Ofcom's Tariff Tables 2017/2018, 30 March 2017, at s 1.10 (noting that it applies the 2005 Charging Principles).

The charging principles provide for administrative fees to be charged as a percentage of annual turnover, currently 0.112 per cent applied to 2015 revenues,[452] in accordance with a system of revenue bands derived from 'relevant activities' under the Act but not for annual revenues of less than £5 million. The turnover data is based on the last but one calendar year, allowing for a bit of certainty and cross-market analysis. Relevant activities under the charging principles include:

- provision of public electronic communication services to end users;
- provision of electronic communication networks, electronic communication services, and network access to communication providers; or
- making available of associated facilities to communication providers.[453]

There is some complexity to determining what falls within the categories, especially in the separation of content services that are excluded and transmissions involving content layers that remain communications services. However, providers are to determine their revenue for 'relevant activities' and certify this information to Ofcom within twenty-eight days of the publication of a general demand for such information.[454] Based on this information, Ofcom calculates the individual administrative charge. Charges in excess of £75,000 per annum may be paid in monthly instalments.[455]

While Ofcom has committed to lower its costs progressively, its current budget for 2017–2018 is £121.7 million, an increase of £5.1 million or 2.5 per cent (stated in 'real terms') over the 2016–2017 restated budget with a resulting average increase of administration fees of network and service provision, set out in Annex 1, of 12.9 per cent from those of the prior annual period.[456] Ofcom cites continued work on the implementation of the Digital Communications Review and the requirement to conduct several market reviews going forward as the reasons for the sector increase.[457]

Table 6.2 sets out the schedule of charges by revenue bands in light of the increased budget for relevant activities for the year 2017–2018.

This detailed level of fiscal analysis in light of Ofcom work plans and with retroactive adjustment suggests full compliance with Article 12, Authorisation Directive requirements.

[452] Ofcom's Tariff Tables 2017/2018, 30 March 2017, at s 2.3.

[453] DGT Guidelines, 'The definition of "relevant activity" for the purposes of administrative charging', 29 July 2003, at 2.1.

[454] See Ofcom, Networks and service, general demand for information, March 2004.

[455] Ofcom's Tariff Tables 2017/2018, 30 March 2017, at s 2.4. [456] Ibid, at Annex 1.

[457] Ibid, at s 1.7. Increased costs for the regulation of the BBC and costs for modifications to Ofcom's headquarters are also cited for the overall increased budget.

Table 6.2 Ofcom's 2017–2018 Networks and Services Administrative Charges Bands

• Bottom (£)	• Top (£)	• Relevant Turnover (£)	• Fee Payable (£)
0	5,000,000	0	
5,000,000	10,000,000	5,000,000	5,635
10,000,000	25,000,000	10,000,000	11,270
25,000,000	50,000,000	25,000,000	28,175
50,000,000	75,000,000	50,000,000	56,350
75,000,000	100,000,000	75,000,000	84,525
100,000,000	150,000,000	100,000,000	112,700
150,000,000	200,000,000	150,000,000	169,050
200,000,000	300,000,000	200,000,000	225,400
300,000,000	400,000,000	300,000,000	338,100
400,000,000	500,000,000	400,000,000	450,800
500,000,000	600,000,000	500,000,000	563,500
600,000,000	750,000,000	600,000,000	676,200
750,000,000	1,000,000,000	750,000,000	845,250

As previously noted, the administrative charge and costing of the application for, and oversight of, the Electronic Communications Code is separate from that of the administrative charge under the general authorization.[458]

Compliance with administrative charge requirement Where, under the Communications Act, a person is reasonably believed by Ofcom to have failed to pay the applicable administrative charge, it may issue a notification of non-payment. This must set out Ofcom's determination of this and notify the person of the opportunity to make representations, however with compliance required and without the previous framework's allowance for at least a month to do so (s 40). Where no action is taken, a financial penalty that is proportionate and appropriate can be imposed (s 41). The penalty, however, is capped at twice the annual administrative charge (s 41(5)). A separate penalty for each notified period of non-payment can apply, however (s 41(3)).

As with other serious or repeated contraventions, Ofcom may suspend or otherwise restrict the entitlement of network or service provision for non-payment (s 42). Where this is for a single, serious contravention, this may only be done after a notice and expiration of the period to comment under section 40 with financial penalties under section 41 failing to secure compliance. The possibility exists therefore not only for these penalties to apply with a single serious infraction but also in the context of repeated infractions over a twenty-four-month period (s 42(9)(b), as amended) that individually might not might

[458] Ibid, ss 2.5–2.7.

comprise 'serious'.[459] In each case, however, the penalty has to be proportionate and appropriate to the notified contravention with notice of the further penalty given under section 42 with a reasonable period for making representations or proposing how to remedy the contravention (s 42(6)). These procedures comply with those provided for in the Framework and Authorisation Directive.

6.4.4.6 *Possible future revisions to UK framework*

The UK framework will likely need to be amended to implement some of the reforms contemplated in the proposed EU Electronic Communications Code after they are agreed and finalized. With its recent amendments, the UK regime will have already implemented a broadband USO that will make this less onerous and accelerate the planning needed to achieve its objectives. Some of the EU requirements surrounding the USO may still remain to be addressed, eg the funding if the BT voluntary proposed solution proves inadequate. Ofcom is likely to continue its simplification and deregulation where possible, meaning that there will likely be on-going consultations and revisions to the general conditions.[460]

6.5 CONCLUDING REMARKS

For those new to telecommunications law, licensing and authorization might have seemed merely an administrative exercise. However, as the above analysis has demonstrated, while licensing and authorization involves the procedural aspects of filling out the proper forms (if virtual), it is a complex area of telecommunications law concerned not only with the structure and nature of a particular telecommunications market but also the attainment of social policy objectives. Licensing and authorization can be used as a tool to implement important national economic priorities. This is true whether these are the preservation of a monopoly for the time being in order to, inter alia, permit investors to recoup their expenditures or continue a revenue stream for the government, to open the markets for equipment, services, and networks to immediate or gradual competition or to adapt to technological developments in the market. The EU experience with the latter objectives also shows that licensing is a tool that requires skill on the part of the regulator as well as strong and appropriate conditions and sanctions to address market failures inherent in networked product and services market where the former monopolist still controls the access network. The proposed reforms to the EU framework that will govern market entry and market conduct via general authorization are fairly

[459] Ofcom found compliance with the 12-month limitation for two sets of notices to be difficult.

[460] None of these considerations touches on Brexit and what changes it may produce, if any.

minor of themselves, but they reflect continued reliance on this regulatory tool to hone the application and enforcement of other specific reforms.

This further fine-tuning of the EU licensing regime shows that, despite the fact that licensing is a regulatory tool with old legal roots, those roots continue to underlie regulatory foundations of telecommunications markets today, even if not always readily apparent. However, the law is an organic thing. It grows, evolves, and adapts as the societal, technological, and economic conditions that produced it change, with the laws of authorization/licensing no exception.

The evolution in telecommunications licensing, especially in the UK, shows this clearly. The earliest providers, after the invention of the telephone, entered the market and sold their apparatus and services, without the need for any formality. When telecommunications was deemed to be a service with a public interest, it was reserved to a single provider either under a licence or by requiring any others to have a licence. When this monopolist provider could no longer meet the economic and social needs in an increasingly computerized world that required creative and competitive communications networks and services, licensing was used as a tool to pry open markets and control the level of play. Finally, the removal of individual licence requirements in the UK for everything but access to spectrum brings us almost full circle since no licence is needed or justified under the common law free market principles regarding limitations placed on a person's economic freedom.

At the same time, licensing law has also evolved in the EU to try to address the concerns about convergence in technologies and to provide a consistent, harmonized, and technology-neutral framework for any electronic communications network or service. More specifically and recently, its authorizations policies have sought to meet the market's demand for new technologies in a way that does not limit their development or entry but that at the same time seeks to impose *ex ante* reasonable conditions for their provision and use. While it is to be hoped that the proposed reforms will address the EU's continued and self-identified weaknesses in the implementation of authorization, particularly for cross-border market development, the continued Member State opposition to the enhanced and more centralized powers possibly essential to achieve the EU's cross-border and pan-European digital agenda is understandable but regrettable.

Whatever changes loom in the future, the 'student' of EU licensing and authorization law for electronic communications providers will likely continue to witness this dynamic evolution.