

# Authorisation & Licensing

Attendance code:

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# Licensing

- In general
  - Permission, authorisation, privilege or entitlement to do something otherwise unlawful
    - e.g. drive a car, practice law, use software
- Some history...
  - Freedom to engage in commercial activity unless restricted
  - Justifications for restrictions via public regulation
    - Public order and safety
    - Allocation of scarce resources
      - “radio spectrum is a public good that has an important social, cultural and economic value” (EECC, Art. 45(1))
    - Requisite level of skill, knowledge
    - Freedom of expression
      - *Cable & Wireless (Dominica) v Marpin Telecom* [2001] 1 W.L.R. 1123

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# Telecommunications licensing

- Telecommunication licence
  - Control market entry
    - From ‘barrier to entry’ to tool of liberalization
      - Phased entry, e.g. mobile; foreign investment
  - Notification of market participation
  - Revenue source
  - Conditions of supply, use, participation etc.
    - Statutory substitute or enhancement/refinement
- Licensable activities
  - Authorise supply of equipment, networks, services
  - Use of spectrum and numbers
  - Install equipment on private/public land

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## Authorisation

- Means to grant rights and impose obligations
  - Ensure access by market entrants
    - Condition the behaviour of the incumbent
  - Efficient use of scarce, valuable public resources
- Means to ensure provision of socially valued services
  - Universal services, e.g. network roll-out in rural areas
    - e.g. UK: 92% of the geographic landmass of England within 14 years
- Ensure network safety/interoperability

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## License types

- Authorisation & licence structure
  - Specific grant
    - Different grant for different networks, services, etc.
    - Shift towards multiservice or unified licensing frameworks
    - EU: 'country-of-origin' principle (e.g. broadcast) v country of destination
- Individual
  - Requiring application and individual administrative determination
- Class
  - Permission for conforming group of providers for specific class of services, networks, equipment
- Open market
  - No authorisation or exemption

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## License Issues I

- By whom?
  - Government or independent regulator
- To whom?
  - Providers of public or private networks & services
- How?
  - Application, auction or 'beauty parade'?
- Term?
  - Issues of legal & investment certainty
  - Renewal & review process

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## Licensing Issues II

- Application process
  - Time
  - Cost
    - Public revenue or funding regulator
  - Criteria
    - Open, objective, necessary, non-discriminatory, proportionate procedures
  - Transparency
    - e.g. WTO GATS, Reference Paper: 4. Public availability of licensing criteria
      - Where a licence is required, the following will be made publicly available:
        - (a) all the licensing criteria and the period of time normally required to reach a decision concerning an application for a licence and
        - (b) the terms and conditions of individual licences.
      - The reasons for the denial of a licence will be made known to the applicant upon request.
  - Review
  - Conditions

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## License Issues III

- Conditions
  - Type and number
    - Individual, general
  - Purpose
    - Safety, economic, social, international/EU obligations
  - Consequences of breach
    - Criminal, administrative or contractual
  - Modifications
    - by law or by agreement
  - Transfers & trades
    - Secondary markets

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## Telecommunications Equipment

- Freedom to provide
  - Making available/placing on market of radio equipment
    - Commission Directives 88/301/EEC & 2008/63/EC
- Imposing standards
  - ‘Type approval’ process
    - e.g. Radio Equipment Directive (RED) (2014/53/EU)
      - Low Voltage and Electromagnetic Compatibility Directive compliance (sole regime for fixed lines)
  - ‘essential requirements’
    - list of non-economic requirements in the general interest
      - Commission Delegated Regulation 2022/30 re: ‘internet-connected radio equipment’;
        - e.g. wearables and toys

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## Equipment II

- Technical standards bodies  
ETSI, FCC, ITU, CENELEC
- Harmonised standards (ETSI)
  - Self-declaration of conformity
- Where not harmonised
  - Declaration of conformity or certificate from accredited testing body
  - ‘notified bodies’
- CE Marking Scheme

intertek  
Total Quality Assured.



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## EU Networks and Services

- Licensing Directive (97/13/EC)
  - Intent of light touch regulation
    - ‘Least onerous system possible’
  - Default set for ‘authorisation’
  - Individual license only where required
    - Special rights, obligations, use of scarce resources
  - Individual conditions only where justified
  - General conditions limited to essential requirements, other limited list

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## 1999 Review

- Implementation too varied across MS
  - Barriers to entry
  - Individual licenses the rule in many states
  - Maximum imposition of conditions common
  - Too confusing, burdensome:
    - Times, information requirements, costs
- Need for reform: greater harmonization, deregulation, simplification to achieve ‘least onerous’ system to meet single market requirements

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## Authorisation Directive (2002/20/EC)

- General authorizations only:
  - No individual determination, exercise of discretion possible
    - Individual grants/licenses only for spectrum, numbers (where needed due to scarcity) and rights of way
  - Notification requirement allowed
    - Merely “Declaration of intent to commence”
    - Not in UK (but permissible under the Communications Act 2003)
  - Limited information requirement permitted
    - Name, address, brief description of service, network, start date

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## General scheme

- Distinction between public and private
  - Lighter touch obligations and more limited rights for private
- Rights (all)
  - To provide networks and services
    - Governs all electronic communications networks and services provision
  - To apply for rights of installation on public and private land
    - Publicly available, transparent, non-discriminatory procedures, without delay
    - Transparent, non-discriminatory conditions

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## General

Maximum list of 18 categories of conditions that may be attached general authorisation (Annex A)

e.g.,

- possible USO contribution obligation
- payment of admin charges,
- requirements to ensure interoperability of services, compliance with data protection, consumer protection, etc.
- UK: Ofcom’s *General Conditions of Entitlement*
  - <https://www.ofcom.org.uk/phones-and-broadband/accessibility/general-conditions-of-entitlement/>
    - Part A: Network functioning conditions
    - Part B: Numbering and technical conditions
    - Part C: Consumer protection conditions

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## SMP Operator

- Finding of 'Significant Market Power' (Week 4)
  - Also 'privileged supplier'
- Individual conditions must be imposed to remediate this, appropriate to problem
  - Network, service access and interconnection obligations (e.g., mandatory reference offer)
  - Accounting obligation
  - Other individual conditions to be notified to the Commission

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## Information Obligations

- Limited, objectively justified, proportionate info requirements and circumstances
  - To verify compliance on systematic or case-by-case basis for certain conditions (e.g., payment of charges, USO contribution)
  - To respond to complaints on systematic or case-by-case basis
  - For clear, specified statistical purposes
  - For assessing rights of use requests
  - For comparative quality studies to benefit consumers
  - For market analysis

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## EUROPEAN ELECTRONIC COMMUNICATIONS CODE

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## General authorisation

- ‘the least onerous authorisation system possible’
  - Except number-independent interpersonal communication services
  - No explicit decision or act from NRA
  - Declaratory notification only with no administrative cost
    - Art. 12(4): limited list
    - Denmark and France do not impose notification requirement
  - Private operators: “impose fewer and lighter conditions, if any”
- Minimum rights (Art. 15)
  - To negotiate interconnection & be designated to provide USO
- Maximum conditions (Annex I)
  - ‘strictly necessary to ensure compliance..’
  - Separate obligations
    - SMP operators & USO

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## Individual rights of use

- Spectrum
  - Individual rights *where necessary*, otherwise general authorisation
    - e.g. ‘small area wireless access points’
    - Limiting the number of rights of use
      - competitive (e.g. auction) or comparative (e.g. beauty parade) selection procedure
    - Grants to achieve a ‘general interest objective’ (Art. 48(3))
    - Joint authorisation process (Art. 37)
  - Duration & renewal
    - EEC, Art. 49(2): “at least 15 years and include...an adequate extension”
  - Transfer or lease to other undertakings (Art. 51)
  - Fees that “ensures efficient assignment and use”
    - Commissioner Breton (Oct. 23): “for too long has been used by some governments as a cash cow and taken away funds from investments”

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## Individual rights of use

- Rights to install facilities on, over or under public or private property
  - Within 6 months (except expropriation)
  - Transparency: Public notifications & register
  - Ownership & structural separation
  - Co-location & sharing requirements
- Use of numbers
  - Transferable?
  - Duration (allowing for investment amortization)
  - Within 3 weeks of application
  - Fees
    - Numbering resources of ‘exceptional economic value’

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## General (Part A)

1. Administrative charge
  - Flat rate and/or turnover related
  - De minimis threshold: e.g. UK, £5m
  - Accountability
    - Art. 16: "Where there is a difference between the total sum of the charges and the administrative costs, appropriate adjustments shall be made."
2. Privacy (Directive 02/58/EC)
  - Service provider-subscriber
    - e.g. Processing of traffic & location data; security breach notification
3. Notification information
4. Enabling legal interception
  - e.g. Investigatory Powers Act 2016: 'Technical Capability Notices'
    - C-339/21 *Colt Technology Services SpA v Ministry of Justice (Italy)*, 16 March 2023

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## General (Part A)

5. Emergency public warning system for public authorities (Art. 110)
6. Terms of use during national emergencies for communications between emergency services & public authorities
7. Access obligations
8. Standards compliance
9. Transparency obligations re: end-to-end connectivity
10. [Recital 47: Accessibility for end-users with disabilities]
  - Directive (EU) 2019/882 'on the accessibility requirements for products and services'
    - Electronic communication services (except M2M transmission services) from 28 June 2025

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## Networks (Part B)

1. Interconnection
2. 'Must carry' obligations
  - Specified radio & television programmes
3. Protection of public health against electromagnetic fields
4. Maintain network integrity, including prevent electromagnetic interference
5. Security against unauthorised access
  - e.g. UK: Telecommunications (Security) Act 2021
    - Security obligations and designated vendor notices

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## Services (Part C)

1. Interoperability of services
  - Digital Markets Act (Regulation 2022/1925), Art. 7 *Obligation for gatekeepers on interoperability of number-independent interpersonal communications services*
    - e.g. Meta's [WhatsApp Reference Offer](#)
  - Data Act (Regulation 2023/2854), Chap VII: "ensure compatibility with open interoperability specifications or European standards for interoperability"
    - Transport, syntactic, semantic data, behavioural & policy interoperability
2. Accessibility by end-users of numbers

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## Services (Part C)

3. Consumer protection rules specific to the sector
4. Rules regarding the transmission of illegal & harmful content
  - Digital Services Act (Regulation 2022/2065), amending Directive 00/31/EC
    - Art. 9 *Orders to act against illegal content*
  - Audiovisual Media Services Directive (2010/13/EU)
    - Art 6a (minors) & Art. 28b (video-sharing platform providers)

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## Spectrum (Part D)

1. Service obligation or use of a type of technology
2. Effective & efficient use of spectrum
  - Sharing passive or active infrastructure; joint roll-out and/or roaming agreements
3. Avoidance of harmful interference
4. Maximum duration
5. Transfer or leasing rights and conditions
  - UK: Wireless Telegraphy (Spectrum Trading) Regulations 2012 (SI No. 2187): authorized transfers
6. Usage fees

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## Spectrum (Part D)

7. Any commitments made by the undertaking
  - e.g. geographic coverage
8. Obligations to pool or share spectrum
9. Obligations under international agreement
  - EEC, Art. 45, para 2: “Member States shall respect relevant international agreements, including the ITU Radio Regulations and other agreements adopted in the framework of the ITU applicable to radio spectrum”
10. Obligations specific to experimental use of radio bands

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## Numbers (Part E)

1. Designation of applicable service
2. Effective & efficient use of numbering resources
3. Number portability requirements
4. Obligation to provide public directory end-user information
5. Maximum duration
6. Transfer of rights and conditions
7. Usage fees
8. Any commitments made by the undertaking
9. Obligations under international agreement relating to the use of numbers
10. Obligations concerning the extraterritorial use of numbers
  - e.g. permanent roaming for in-car connectivity

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## Enforcement

- ‘Appropriate, effective, proportionate and dissuasive’ (EECC, Art. 29)
- Communications Act 2003
  - Notification & opportunity to respond
  - Administrative penalties
    - 10% of relevant turnover in relevant period
    - e.g. BT contravention of General Conditions C1.3-1.7 (May 2024): £2.8m (£4m)
  - Directions suspending or restricting entitlement
    - offence for non-compliance

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