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How will Brexit transform UK telecoms regulation?



Brexit's impact on UK telecoms regulation will hinge on the model that the UK and EU adopt to manage their future relationship. The UK government has stated that it does not seek membership of the single market, but rather it aims to negotiate a new trade agreement with the EU. This has significant potential implications for the future development of telecoms regulation in the UK—particularly for network access regulation and net neutrality.

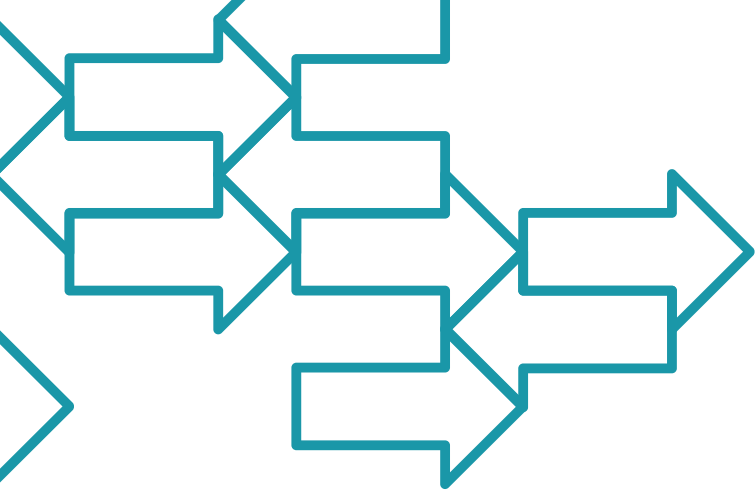
ACCESS REGULATION POST-BREXIT

Many of the directives that comprise the EU Regulatory Framework for Electronic Communications (the Framework) are already transposed into UK law. There are also a number of EU regulations that are directly applicable to the UK and did not previously need to be transposed into UK law. These include regulations on roaming and net neutrality, and the recommendation on non-discrimination and costing methodologies for network access.

The UK government has committed to a Repeal Bill that will remove the European Communities Act 1972 from UK law and pass large parts of European Union law, including EU regulations, into UK law to keep them in force post-Brexit.¹ But depending on the terms of the trading agreement, the government could modify the UK regulatory regime through national legislation after Brexit—for example, to give the Office of Communications (Ofcom) further powers or additional duties.

In addition, directives that are in force at the date of a UK exit but have not been transposed into UK law may cease to apply after Brexit—unless they are included in the planned Repeal Bill.

¹ Queen's Speech, 21 June 2017



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A further important factor to consider is the proposal for a new European Electronics Communications Code (EECC) that will replace the existing directives. The EECC, which is expected to be enacted in EU law in 2018, contains a number of important changes to network access regulation. These changes are intended to ensure that the Framework is fit for its purpose and provides support for the large-scale fibre investment that the Commission's Digital Single Market strategy calls for.

So, what might happen to UK telecoms regulatory policy post-Brexit?

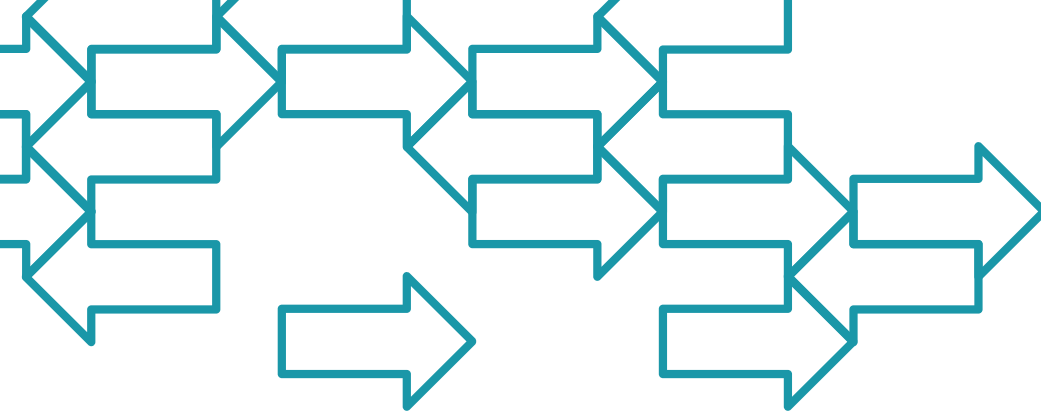
Although it is not possible to predict exactly how UK regulation will develop after Brexit, Ofcom's published documents (most notably relating to the Digital Communication Review, and Ofcom's consultation response to the European Commission's review of the Framework) suggest a number of areas where Ofcom may wish to diverge from the Framework.

Ofcom is likely to err on the side of caution and take a gradual approach to regulatory change. This is because it has had significant influence on the form of the existing regime, which it broadly believes has performed well, and because it will be concerned about maintaining regulatory stability and certainty. However, if Ofcom is no longer required to follow a harmonized approach with the rest of the EU we could potentially see a progressive divergence between the UK and EU post-Brexit.

A more flexible approach to market reviews

After Brexit, Ofcom may have the freedom to adopt a more flexible approach to market reviews. For example, it could move to a system where formal market reviews are triggered by a material change in competitive conditions, or where market participants petition for a change, rather than by a fixed timetable. It may also have greater flexibility to determine which markets to review. That would, for example, allow it to focus on a broad infrastructure market that supports both broadband and leased line services, implementing remedies that allow communications providers to exploit economies of scale and scope across the full range of business and residential markets.

Ofcom would likely not want to follow the Commission's proposal in the EECC to remove National Regulatory Authorities' (NRAs) ex ante powers to regulate retail markets. Rather, it would prefer to have flexibility to deal with situations where wholesale regulation is insufficient to ensure effective retail competition. In fact, that situation arose recently when Ofcom proposed to regulate significant market power (SMP) in the standalone fixed voice services markets in the light of concerns about weak retail competition.



Ofcom may seek enhanced powers to regulate oligopoly markets

Ofcom recognises that oligopoly markets with a small number of large players may become more common in the future, in both fixed and mobile markets. Ofcom also believes that the Framework does not give NRAs the tools to deal effectively with competition problems that might arise in this type of market structure.

Ofcom may seek changes to the UK regulatory regime that would allow it to regulate non-collusive oligopoly markets. This would, however, require the UK Parliament to change the Communications Act. There would likely be concerns about how such a change would fit into the overall competition law framework in the UK, given that the Enterprise Act already provides broad powers for the Competition and Markets Authority to investigate competition problems in oligopoly markets. There are also likely to be concerns that enhanced powers to regulate oligopolies could potentially result in an inappropriate extension of regulation that might chill competition and investment in fibre networks.

Ofcom may seek stronger structural separation powers

Ofcom may seek legislative change to clarify, or possibly strengthen, its powers to impose structural separation under UK law. We think this is especially likely because of the concerns it raised in its Digital Communications Review relating to the independence of BT's access division, Openreach, which were undermining the effectiveness of non-discrimination regulation in various ways. Ofcom has stated that it can use Article 8(3) of the Access Directive to impose structural separation on BT if other remedies are insufficient, subject to approval by the Commission.

This power has been transposed into the Communications Act, and going forward Ofcom will continue to be able to pursue this course of action after Brexit if it wishes, presumably without needing to seek the Commission's approval. But this would likely be hotly contested and controversial, and Ofcom may seek legislative change to clarify, or possibly strengthen, its powers to impose structural change.

Ofcom is unlikely to adopt some of the restrictions in the EECC

The Commission's proposed EECC includes a number of modifications to the Framework that will constrain NRAs' application of access regulation in future (although the final form of the Framework is uncertain as it will be subject to negotiations between the EU institutions). For example, the Commission's proposed EECC:

- includes provisions that limit NRAs' powers to regulate wholesale-only undertakings;
- prevents NRAs from imposing SMP remedies where co-investment offers meet certain criteria; and
- imposes requirements in relation to symmetric access regulation that could prevent NRAs from intervening to address localized service bottlenecks, or potentially inefficient network duplication.

Ofcom will be averse to giving any kind of unconditional regulatory forbearance to wholesale-only undertakings or co-investments. It is much more likely to consider each case on the merits, based on the market circumstances and policy considerations in the UK.

NET NEUTRALITY REGULATION AFTER BREXIT

The application of the net neutrality regulation in the UK after Brexit will depend on whether it is transposed into UK law in the Repeal Bill. It will also depend on the extent to which any free trade agreement requires harmonisation between UK and EU laws. This is a matter of uncertainty, and it is possible that Ofcom will have greater flexibility than other NRAs in the way it seeks to enforce the principle of net neutrality. That could have important implications for consumers, internet access providers, and content providers in the UK.

For example, if Ofcom has the scope to depart from a strict application of BEREC's net neutrality guidelines without infringing EU law, it may be able to take a more permissive approach to commercial offers, such as allowing internet access providers to agree paid prioritization of internet traffic with content providers or a wider range of zero rating offers to consumers.

This could be an important consideration when it comes to incentivising the development of 5G services in the UK, which will require substantial

network investment. The regulatory regime must provide operators with enough commercial freedom to recover the investment cost and earn a rate of return commensurate with the risks involved in deploying new networks. Furthermore, operators should be able to share risks with other players in the value chain that are better placed to bear them.

CONCLUSION

UK telecoms operators and their investors will be affected by any changes to the UK regulatory regime. There are both opportunities and threats for these stakeholders. They should develop their views on the regulatory regime that they believe will be most appropriate for the UK post-Brexit and form their strategy for influencing the debate. They should also consider the range of potential outcomes of any regulatory changes, the implications for the UK telecoms market and the impact on the value of UK telecoms businesses. **A**

This article was adapted from a longer article published in the International Bar Association Communications Committee newsletter.

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