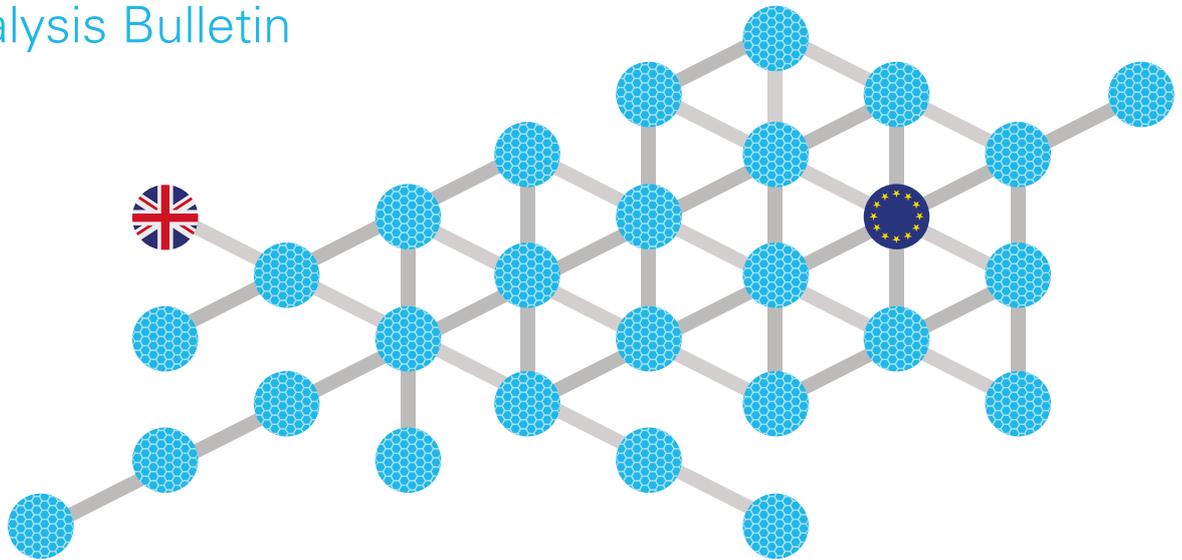


Brexit Analysis Bulletin

Telecoms



The possibility of Britain voting to leave the European Union (causing a so-called “Brexit”) looms nearer. A referendum vote on the UK’s membership has been promised before the end of 2017, although it seems likely that it will be sooner, depending on the outcome of the present negotiations. How the relationship between the newly separated UK and the EU would look remains uncertain, although numerous potential models have been touted as possibilities.

In this briefing, we look at some of these potential models and the impact for TMT clients. The real certainty is uncertainty in the event that the UK votes to leave the EU, and we attempt below to outline some outcomes of such an event to the telecoms industry in the UK. The following three models in particular stand out:

Norwegian style European Economic Area (EEA) agreement:

The UK would be included in the European Economic Area and would retain full access to the single market, but in return would still need to adopt EU standards and regulations. This model seems unlikely because it might not address the perceived desire to remove the UK from the so called “yoke” of EU regulation.

Free Trade Agreement based approach:

The UK’s relationship with the EU is governed by a free trade agreement. The UK would be able to negotiate free trade agreements with other countries separately.

Bilateral Accords:

The model utilised by Switzerland, whereby the UK negotiates a series of bilateral accords with the EU which govern UK access to the single market in specific sectors.

Executive Summary: Impact on Telecoms

One of the key areas in which the UK has been heavily influenced by EU laws is in respect of electronic

communications. The UK model of regulation is underpinned by the Europeans Telecoms framework. The relative success of this model to date leads us to believe that following Brexit, the Government would be unlikely to radically change the existing model of telecommunication regulation in place in the UK, rather it would develop a similar stand-alone framework for the UK.

That said, however, even if the Government did not radically depart from the EU model in the standalone UK framework there are clear areas where freedom from the European Telecoms framework is likely to bring about changes which may well have a significant impact on the telecoms market over the medium term. Some of these could be seen as potentially beneficial to the UK electronic communication market.

However, what is clear is that electronic communications in the UK are, at present, very much entwined in a larger European context of policy and regulation, and it may prove very difficult to untangle from this in the formation of a new stand-alone telecommunications framework should the UK leave the EU. The following outlines some of the key issues facing the electronic communications sector should Brexit occur, highlighting the potential routes the UK could follow. However, this will depend on timelines, and the UK political and regulatory environment at the time of the departure.



Independent Regulator and Market Power

Given that the European Telecommunications Framework (the Framework) has come to be considered as a successful model, it is likely that the Government will continue to adopt the basic premises of the directives from which the Framework is built. These are (i) an independent regulator (the position currently held by Ofcom) and (ii) a process for market reviews in order to determine market power, and the ability to impose defined remedies to address market failures. Even countries that are not part of the European Union have adopted this basic structure of market reviews, while the existence of an independent regulator is seen as fundamental for investor certainty. This structure is therefore unlikely to change materially following Brexit.

Definition of Markets and Regulation of Content

If the UK were not confined within the Framework, it would be at liberty to define the 'markets' in the electronic communications sector to regulate without regard to the Commission's Recommendation on Relevant Markets or even move to a less formulaic model. Of particular note is that the exclusions in the Framework in connection to 'Content' would no longer be relevant. In light of the increasing popularity of bundled services (e.g. a combined landline, internet, mobile and pay-tv package), it is possible that the UK may choose to adopt a new definition of 'Electronic Communications Services' to include content, thereby bringing it within the scope of regulation and putting it on a level playing field with the other elements of a bundled service. Were this to happen, Ofcom would be enabled to adopt a market review of 'Content', and would be able to apply ex ante 'significant market power' remedies on dominant operators in order to address market failures. Ofcom would also be less constrained by precedent from the EC in other areas e.g. on wholesale access to cable networks.

Ofcom may also seek to review mobile markets other than 'mobile termination', in particular should the Commission clear the on-going 02 / 3 merger. This would allow Ofcom to examine mobile access markets and potential remedies, a significant departure from current EU policy.

The Standard of Appeal in Regulatory Cases

In addition to the inability to regulate content, one of the biggest controversies that has arisen in the electronic communications sector in the UK has been the debate about the standard of appeal of regulator's decisions. The Framework requires that "the merits of the case are duly taken into account." This has been implemented in the UK by section 192 of the Communications Act as requiring the Competition Appeals Tribunal to decide the appeal on "the merits and having regard to the grounds

of appeal". The Government has made it clear that it believes that the Communications Act mechanism "gold plates" the requirements under the Framework and has indicated a desire to move away from the current standard of appeal in order to reduce the number, complexity and cost of appeals. The Government's 2013 proposal was that either a straight judicial review standard should be adopted, or that the standard of review should be determined by clear grounds of appeal focused on identifying material errors or unreasonable judgements on the part of a regulator. In an environment where the Framework no longer applied, this proposal, which has been shelved for the moment, is likely to reappear, and it is expected that these proposals would become the appeal standard in an independent telecoms framework.

Powers of the Regulator: Reviews and Remedies

With Brexit and the disapplication of the Framework, Ofcom would no longer be strictly limited to the remedies prescribed under the Framework. These include the remedy of functional separation, and the Framework also allows for voluntary separation by a vertically integrated undertaking. However, the remedy of structural separation may only be imposed by the Competition and Markets Authority following a reference from Ofcom. Were the UK no longer bound by the Framework, the Government would be in a position to pass legislation imbuing Ofcom with the power to impose such remedies. This would allow Ofcom to order structural separation should an overarching sectoral review (such as Ofcom's current Digital Strategic Review) suggest this to be an appropriate way of remedying market failures.

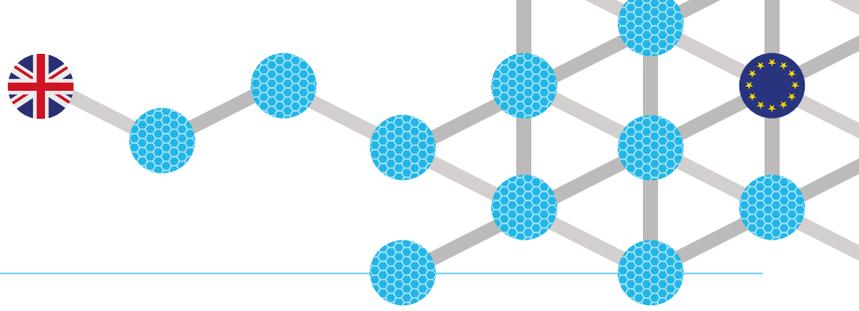
It is also possible that the UK regulator would adopt a more flexible timeframe for market reviews, rather than the rigid three year period that is currently stipulated in the Framework.

Spectrum Harmonisation

Were the UK to leave the EU, the current control of, and policy on, spectrum and spectrum harmonisation is unlikely to change in any meaningful way. Spectrum is currently a national competence in which Ofcom is guided by decisions and recommendations at an EU and international level, for example from the Electronic Communications Committee (ECC) of the European Conference of Postal and Telecommunication Administrations (CEPT) at a European level, and the International Telecommunication Union (ITU) at an international level. Given the desire, globally, to harmonise spectrum allocation, it is not expected that the UK would depart in a significant way from the guidance of these international organisations.

Roaming

The Commission's latest regulation on roaming requires



the abolition of roaming charges within Europe for SMS, voice and data from June 2017. Although, post-Brexit, the UK will no longer be required to implement this regulation, the Government has indicated that British customers will continue to benefit, referring to the fact that Norway as a member of the European Economic Area also benefits from the roaming regulation. However, if the UK does not join the European Economic Area, the issue of ensuring free roaming for British customers in Europe would appear to be more complicated and may well depend on individual negotiation between mobile operators, which will be a lot less clear cut than the present model.

Cross Border Portability

Like the roaming regulation, the draft cross border portability regulation recently released by the Commission would deliver benefits to UK subscribers to online content by allowing them to access those services for which they have a contract whilst temporarily present in another European state. Again, how the UK deals with this following Brexit may well depend on which of the models are adopted. If the EEA model is adopted then the benefits of the proposed regulation may continue to flow to UK consumers whereas under the free trade model ensuring cross border portability may be far more complex.

Net Neutrality

It is not expected that the Government would significantly depart from the Commission's approach to Net Neutrality. The regulation reflects the approach of the UK to date, in essence: no blocking or throttling of online content, applications and services, but with certain critical caveats for telecoms service providers.

Audio Visual Services Media Directive

Given that Ofcom's response to the Commission's recent consultation on amending the Audio Visual Services

Media Directive was largely supportive of the existing approach, a major shift away from the principles that underlie the directive is unlikely in the event of Brexit. It is probable, however, a clarification of the definition of Audio Visual Media Service may be made in the UK, as at present there is some ambiguity over what constitutes a "television-like" programme, and the boundaries of the "principal purpose" test.

Universal Service Obligation

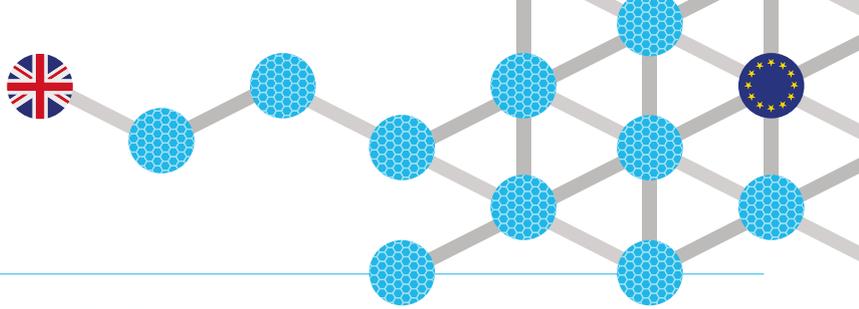
The Government has already indicated that it intends to impose a universal service obligation for 10Mbps broadband. Freedom from the Framework would allow for easier implementation of such an objective and may also provide greater freedom in terms of funding mechanisms such as state aid.

State Aid

Were the UK no longer subject to European state aid rules, it may ease its ability to address some of the not-spot issues relating to mobile networks and the 'last 5%' for fixed broadband networks. Whilst major changes to the Government's approach are not expected, given the sensitivity of operators to government funding of network build, it does provide some level of additional flexibility.

Frequency of Market Reviews

Currently the Framework requires that market reviews are carried out every three years (unless there are exceptional circumstances). In practice this means, as soon as one market review ends, the preparation for the next market review begins, placing resource constraints not only on the regulator but on operators themselves. Adoption of a longer period between reviews may be beneficial both for Ofcom and for operators and it is therefore possible that this approach is taken in event of Brexit.



SHEPHERD AND WEDDERBURN'S BREXIT ADVISERS JOINING THE DOTS OF THE EU REFERENDUM

What If?

Shepherd and Wedderburn has been for many years offering balanced and impartial advice on how the different scenarios might play out in the event of constitutional change.

With the EU referendum now only months away, members of our dedicated Brexit Advisers will continue to interrogate the 'what if' questions, relating to specific sectors, that will emerge when the UK decides whether to remain in or leave the EU.

For further information in the first instance, please contact:

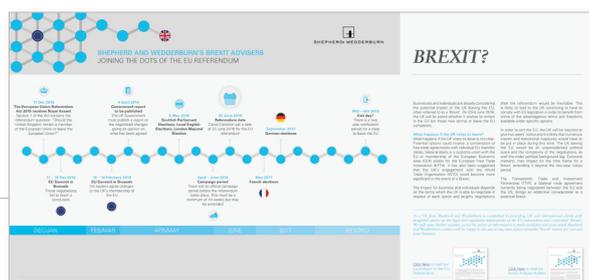


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