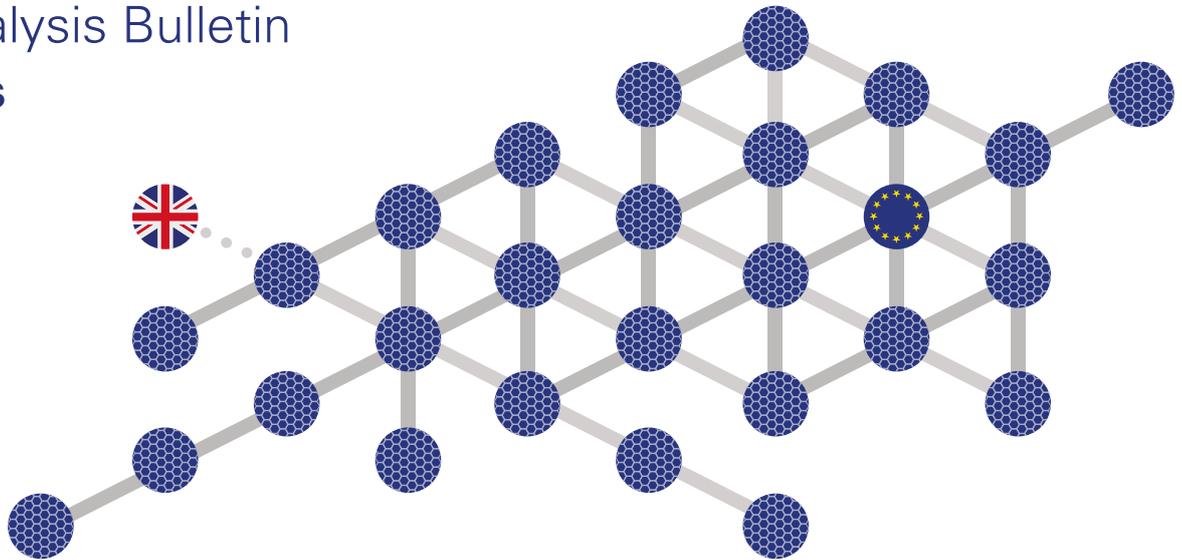


Brexit Analysis Bulletin

Telecoms



On 23 June, the UK voted to leave the European Union. In last month's bulletin, we considered in detail the potential impact of Brexit on the UK telecoms landscape, highlighting a number of areas of uncertainty. These areas remain no less clear following the referendum, as intense debate surrounds the timing and nature of any exit deal, and markets continue to experience significant volatility. However, the key message is that there has been no immediate change to the legal status of the UK and the EU as a result of the referendum and that the many provisions of EU law that affect the UK telecommunications regime will continue, for now, to apply.

In this briefing, we look at some of the potential models which might be adopted and the impact for TMT clients. 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 some of the EU obligations that the leave campaign focused on, such as freedom of movement.

Free Trade Agreement based approach:

The UK's relationship with the EU would be 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

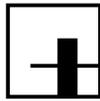
One of the key areas in which the UK has been heavily influenced by EU law is in respect of electronic communications. The UK model of regulation is underpinned by the European Telecoms framework. The relative success of this model to date leads us to believe that, despite the vote to leave, the Government will be unlikely to radically change the existing model of telecommunication regulation in place in the UK. Rather, it is likely that it will develop a similar stand-alone framework for the UK.

That said, however, even if the Government does not radically depart from the EU model, there are areas where we will see changes which could have a significant impact on the telecoms market.

The following outlines some of the key issues highlighting the potential routes the UK could follow.

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 despite the vote to leave.

Definition of Markets and Regulation of Content

If the UK was 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', including mobile access. This would represent a significant departure from current EU policy. This would turn, to a large extent, on any deemed price increases, or a loss of competition in the market, given recent consolidations and the pressure for more such mergers or 'alliances'.

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 a 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 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, these proposals would likely become the appeal standard in an independent telecoms framework.

Powers of the Regulator: Reviews and Remedies

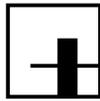
Following an exit and the disapplication of the Framework, the Government could give Ofcom the power to impose remedies over and above those currently stipulated in the Framework. In terms of separation, whilst the Framework allows functional separation, and voluntary separation by a vertically integrated undertaking, it does not allow for a regulator to impose structural separation. The UK Government could choose to pass legislation providing Ofcom with the power to impose such a remedy (rather than leaving this power with the Competition and Markets Authority in respect of telecoms).

Spectrum Harmonisation

Although the UK electorate has voted 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. Consumers will therefore benefit from this regulation prior to the finalisation of the UK's exit from the EU. Having enjoyed this, it is impossible to think that customers will accept the reintroduction of roaming charges, as the UK has left the EU. Prior to the vote, the Government indicated that British customers would 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. Whilst the Government (or the electorate) would not want to see the re-introduction of roaming rates, how willing other carriers will be to 'play ball' with UK carriers is, however, an interesting question. It also remains to be seen how the international carrier groups will deal with the 'UK issue'. Will they continue their commercial arrangements, generally providing special deals in their footprint countries?

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 will significantly depart from the Commission's approach to Net Neutrality. The regulation reflects the approach of the UK to date, which in essence prohibits 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 Media Services Directive was largely supportive of the existing approach, a major shift away from the principles that

underlie the directive and its proposed revision is unlikely apart from as regards the provisions around European content. We could also see on demand audio visual providers establishing themselves in the United Kingdom in order to avoid having levies to support European content imposed on them by other countries. Whether this is workable will depend on the exit arrangement and trade arrangements that are negotiated.

Universal Service Obligation

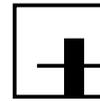
The Government has already indicated that it intends to impose a universal service obligation for 10Mbps broadband. Freedom from the Framework would allow for easier implementation of such an objective and may also provide greater freedom in terms of funding mechanisms such as state aid.

State Aid

If as part of the exit negotiation the UK ceases to be bound by European state aid rules, this 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 could 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 we expect to see the Government legislate for such a process.



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

What next?

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.

Now that the vote has been cast to leave the EU, members of our dedicated Brexit group continue to interrogate the regulatory and commercial issues and to advise clients on next steps and outcomes.

For further information in the first instance, please contact:

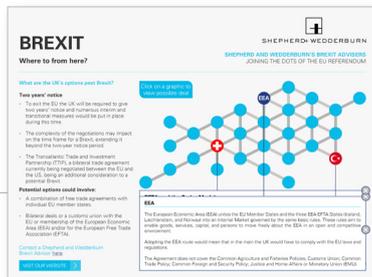


Gordon Moir
Partner
T +44(0)207 429 4988
M +44(0)741 426 7467
E gordon.moir@shepwedd.co.uk



Bookmark our Brexit Advisers page for a comprehensive collection of Brexit updates and guidance

Click here to view our 'Where to from here' Brexit infographic.



Click here to read our 'What now' Brexit bulletin.

