



Department
for Culture
Media & Sport

**UK Non-Paper:
Review of the Electronic Communications
Regulatory Framework**

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Review of the Electronic Communications Regulatory Framework

Summary

The UK issued a paper on the digital economy¹ in January 2015 setting out our vision for a digital single market and where we believe the EU should deliver over the next five years to achieve this vision. In that paper we recognised that electronic communications are essential to a successful European digital single market. This non paper on the review of the electronic communications regulatory framework should be read in this context.

The UK welcomes the Commission's Digital Single Market Strategy and the proposed ambitious overhaul of the electronic communications regulatory framework. Life can be made simpler, easier and more productive if Europe develops its infrastructure to meet the evolving needs of users. Completing the digital single market will give those users the freedom to access electronic communication services for business or for leisure across the EU. Through supporting competition and innovation, and with better regulation, there are opportunities to encourage investment by existing players and make it easier for start-ups across the EU to provide new and innovative services for local and cross-border customers, with a clear focus on quality of service and reliability. A digital single market with a simple, effective set of rules is essential.

We therefore agree that the framework should evolve to remain fit for the purpose of supporting well-functioning markets to deliver access to high performance infrastructure and quality of service to consumers and businesses. In this paper we set out the UK's initial thoughts and our priorities for a revised framework.

The UK's objectives for a revised regulatory framework

Electronic communications services are essential in Europe for driving economic growth, technological innovation and social cohesion. These services have become integral to everyday life for all of our citizens and businesses.

There have been significant changes in electronic communications since the start of the last framework review in 2007. Consumers' expectations have been considerably raised, fuelled by the increase in the number of mobile devices in use, the growth in capability of such devices and the range of services and applications that can be accessed on them. Users are now increasingly seeing connectivity as a right, rather

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<https://www.gov.uk/government/publications/the-uks-vision-for-the-european-unions-digital-economy/uk-vision-for-the-eus-digital-economy>

than a privilege. They commonly expect to have the freedom to be connected and to access services and applications, wherever they are and whenever they want, at all times. The willingness of consumers to pay for communications services may not necessarily rise with their expectations and so this is a real investment challenge to industry. This challenge is intensified by the costs associated with developing new technologies; the emergence of new, non-traditional players delivering electronic communication services; and changes in market structures across Europe. Within this context, the regulatory framework needs to support industry to make the necessary investments in our digital communications infrastructure, rather than create burdens on public finances or on the businesses investing in infrastructure. Deregulation should therefore be the starting point for this review.

The previous framework review sought to ensure that regulation kept pace with technological and market change. Keeping up the pace is still critical. We are already witnessing some of these changes such as the emergence of cloud-based services, ever-increasing levels of data consumption, increased mobility and new electronic communications networks technology that is more responsive to user needs. Other changes are clearly on the horizon such as 5G and the rapid expansion of the Internet of Things. We are also witnessing increasing pressures for consolidation within markets as well as convergence of traditional electronic communications services, over the top services and media content (e.g. bundling of services). This review will need to pay close attention to current and impending changes such as convergence, new innovations and market concentration. Failure to do so runs the risk of the review being considered out of date by the time it is agreed.

The scale and rapidity of these changes presents a challenge to any regulatory framework. We see the review as an opportunity to make sure the regulatory framework is able to accommodate these changes and remains technology neutral. It is essential that the framework enables innovative electronic communication services and supporting infrastructure to develop to meet the future needs of users, both consumers and business. The review will need to look forwards, not backwards, in determining what services might be considered to be in scope and the extent to which these services are considered equivalents. At present there are services that users may consider to be the same yet are regulated in different ways and provide different levels of protection to the user. Careful consideration of these elements and avoiding knee-jerk reactions to change will be crucial to achieve the Commission's desire to see a transparent and competitive market in a way that does not undermine the balance of competences between the EU and member states. It is also important that this review does not undermine the current UK telecoms market, impose unnecessary transition or regulatory costs, or erode Member States' ability to place obligations on service providers in areas of national competence.

As a starting point, we identify six broad objectives that will underpin the UK's approach to the review which we hope are shared by the Commission. We want to see a stable, balanced, but flexible, regulatory framework that:

1. Supports investment and innovation, and accommodates changes in technology and market structure;
2. Encourages competition as the most effective way to deliver the desired outcomes, through simple and more proportionate regulation recognising that communication providers need to be able to achieve a return on investment. However the limitations of private investment, requiring a commercial return, in delivering infrastructure capable of providing an acceptable level of service to all users need to be understood;
3. Supports deployment of communication networks that meet the needs of users over the next decade enabling competitiveness and economic growth and delivering social benefits. The effectiveness of networks needs to be judged by the quality of experience enjoyed, or suffered, by the user, be they an individual consumer or business and not just by the speed of connection. This is essential to encourage the market to drive up standards. Increasingly users will need not just a particular access speed, but will need to be sure of the reliability of the connection, its resilience, and other factors that can impact the user experience;
4. Offers every citizen access to an acceptable level of connectivity;
5. Empowers and protects consumers through greater transparency and awareness of services and safeguards consumer privacy and use of their data;
6. Respects the principle of subsidiarity and ensures Member States' competency (national security and justice and home affairs (JHA) matters) such that their ability to place appropriate obligations on service providers is not eroded.

Specific priorities

To achieve these six objectives, we believe that the following issues should be considered a priority for the framework review. These priorities and our position on each are set out below.

Investment in infrastructure: A framework that incentivises private sector investment in electronic communications networks that offer users a high quality of

experience and improves geographic coverage is essential. Competition remains a key driver for investment and innovation, whilst recognising that private investment will have its limits in delivering ubiquitous levels of service. Certain areas of any Member State will not be commercially viable for existing operators, so how can these gaps be filled? Promoting efficient investment must remain a high priority, recognising the risks involved.

The Commission should consider how to further encourage competition across Europe as a means of driving investment and innovation. Removal or reduction of any regulatory barriers hindering investment and innovation in new or enhanced infrastructure and services, such as the continued regulation of legacy networks, should be the starting point. In doing so, the Commission should remain firm on the need to retain appropriate regulations, fairly applied, where these are necessary to protect the public. Due account should be taken of complementary directives such as Directive 2014/61/EU “on measures to reduce the cost of deploying high speed electronic communications networks”. The framework should also continue to provide regulatory certainty as to how infrastructure investments will be treated under such measures.

Market Reviews: Market reviews by national regulatory authorities every 3 years create a continual cycle of regulatory change that could discourage investment. In the UK the time taken to complete and implement one review’s recommendations can often be such that it is closely followed by the start of the next review.

The Commission should consider whether carrying out market reviews every 3 years as required by the Framework Directive provides greater regulatory certainty and incentivises private sector investment. We believe, subject to any significant market change (although we would expect this to be looked at by the relevant regulatory authorities) 5 years may be a more appropriate time frame.

Regulatory Appeals: A stable regulatory environment that allows for timely interventions by National Regulatory Authorities (NRAs) is important for the protection of consumers and a competitive market. Article 4 of the Framework Directive requires Member States to ensure that an effective mechanism exists under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a NRA has the right to appeal against the decision to an appeal body that is independent of the parties involved. The current wording of Article 4 requires that the merits of an appeal case are duly taken into account. In the UK, implementation of this requirement can result in lengthy and costly appeals which delay the implementation of Ofcom’s decisions and impact upon regulatory certainty. The UK believes that a right of appeal to an independent body and an effective appeal mechanism are essential parts of the

framework, but that the basis upon which an appeal case must be considered should be reviewed.

The Commission should consider whether specifying that the merits of an appeal case must be duly taken into account in Article 4(1) of the Framework Directive is required in order to ensure an effective appeal mechanism and whether it contributes to the promotion of competition and consumer protection.

Innovation: We are unlikely to see implementation of the outcome of this framework review until 2019/2020. During this time, we will move closer to the commercial deployment of new technologies such as 5G, G.Fast (an ultrafast broadband technology), and more responsive networks (e.g. network function virtualisation and software defined networks). These - and other currently unforeseen technological developments - will undoubtedly disrupt the market, challenging current operators and introducing new players.

So that Europe does not fall behind economically and so users can access the best services, the Commission should ensure that the future framework allows the market to adopt and invest in new technologies and allows these to flourish, while also ensuring that proper safeguards are in place to ensure that this does not inhibit public security.

Spectrum: We share the Commission's desire to achieve more effective spectrum management. Common spectrum assignments across Europe can create value, but it is by no means clear that legislative harmonisation is the best route to achieve this, particularly as it needs to respect Member State competence around use of spectrum in defence and national security. International coordination of frequencies beyond the EU through existing mechanisms (for example through the ITU) can be more valuable than EU coordination alone, e.g. through greater economies of scale for equipment manufacture, without requiring binding legislation.

In general, spectrum allocation should be achieved through non-binding means, with potential for improving cooperation between Member States by enhancing the role of the existing EU spectrum management advisory group (RPSG). We do not believe there is a need for common and coordinated assignment conditions for wireless broadband to support fixed and wireless convergence. A mandatory approach risks unanticipated impacts on Member States that result in excessive costs and will have implications for industry as well - Member States will seldom be in identical positions, meaning a need in some cases for costly remediation of services. Furthermore, some of these differences arise from the physics of radio transmission in the different geographies of different Member States: the presence of hills, mountains, trees and rain all impact on radio transmissions at some frequencies. We would welcome the

Commission continuing to facilitate more effective coordinated spectrum management by Member States within the existing regulatory framework, while respecting the underlying historical and geographical differences between Member States.

The Commission should not take a mandatory, legislative approach to spectrum allocation, and should respect the competence of Member States in international spectrum discussions. Instead, the Commission and Member States should actively consider together how the use of spectrum could be better coordinated across (and beyond) the EU to support economic growth and productivity and deliver benefits to consumers and citizens, with Member States taking a common position by mutual agreement with the Commission.

End-User Interests and rights: The Commission's review should pay close attention to the need for citizens and consumers to access and benefit from the provision of electronic communication services. With the increasing importance of these services, we believe that Europe will need widespread availability of networks providing an excellent quality of experience, subject to commercial and technical considerations, to remain in a strong position globally as a place to live and do business and to contribute to strong economic growth.

The experience of the user when accessing electronic communications services should be a key consideration for the revised framework. Other aspects of network performance, such as reliability, capacity, latency and resilience, are becoming just as important as connection speed to the user experience, both for business and personal use. Users should have easy access to relevant information that allow them to determine the level of service they are receiving. This transparency will drive further innovation and competition between communication providers, consequently improving the standard of consumer experience.

The Commission should place increased emphasis on all round quality of experience for all users when considering the types of networks that a future framework will need to encourage. The Commission should drive greater transparency on network performance to improve quality of experience, rather than pursue EU wide rules. The Commission should also consider the role that a USO for broadband could play in supporting these objectives. This is something the UK is actively considering.

Consumer protection: It is important that consumers feel safe and secure when using electronic communications services and the regulatory framework must provide the right safeguards for their protection. These safeguards should however be proportionate and be balanced with need for communication providers to operate effectively and efficiently. The protection of users also needs to be balanced with the

protection of the public. We should also consider the extent to which innovative technology solutions may provide suitable levels of protection without the need for regulation.

As technology develops and the market changes, it is vital that consumers have access to clear, accurate information about the services on offer and that costs are transparent. That enables consumers to take informed choices and be increasingly engaged and economically active in the market. In a single market, there should be effective redress mechanisms, including across borders, when consumers do not receive the level or quality of service that they reasonably expect to receive.

The Commission should take account of changing and emerging user needs. Increasing take-up of bundled services - including bundles of electronic communications services with other products and services - demonstrate the need of NRAs to have the flexibility to make conditions that apply to such bundled services. That is particularly important in terms of setting standards for how such services are sold and how consumers may switch between them. If NRAs have limited flexibility to set conditions for such bundled services, there may be less provision for consumer protection and switching in the market, meaning that opportunities for innovation and competition are not maximised.

Over the top services: Over the top players provide innovative new services that meet consumer and business needs. Achieving the Commission's objective of creating a transparent and competitive market must not stifle this innovation and any new regulation needs to be proportionate and the benefits clearly understood. Changes in technology will create winners and losers, but new regulation should not be used to shield companies from the competition of legitimate, more popular alternatives and the Commission should use the existing competition framework effectively where there is evidence of market abuse. The Commission should also make the distinction between regulation of infrastructure networks and the regulation of communication services, reflecting that OTT service providers have no control over the infrastructure upon which they rely.

We should avoid knee-jerk reactions to change. Creating a transparent and competitive market should not automatically mean extending regulation to all over the top services. Consistent with the UK's better regulation agenda as well as the Commission's own Better Regulation Guidelines, it should be possible to explore a deregulatory approach where this does not harm consumer interests or hinder Member States' ability to protect public security by placing obligations on services. Where users now consider OTT services to be close substitutes for traditional electronic communication services, deregulation of those traditional services could reduce the financial and regulatory burden on the telecoms industry at a time where

the Commission and Member States are looking for significant levels of investment in infrastructure and services.

To create a transparent and competitive market, the Commission should consider deregulation of existing electronic communications services where this does not harm consumer interests or compromise national security, public security or prevention, detection and prosecution of criminal offences. When exploring extension of regulation, the Commission must consider whether there is clear economic evidence that regulation is proportionate and necessary to protect consumers from harm.

E-privacy: Protection of users' data and privacy should remain a key objective. Given the vast increase in the acquisition and use of data, a trend that is likely to continue, it is important that the review properly assesses whether the existing directive provides proportionate protection to avoid the abuse of personal data whilst still ensuring the existing provisions to derogate from these obligations when this is necessary and proportionate to do so, consistent with EU law. This is particularly important in relation to the need to protect national security, defence, public security and prevention, detection and prosecution of criminal offences. Due consideration needs to be given to the impending changes to the Data Protection Regulation and the extent to which the E-Privacy Directive needlessly repeats or creates additional and disproportionate burdens to the protection afforded by the Data Protection Regulation. In particular, we need to be mindful of any changes to consent of personal data and of the proposed differences in reporting breaches and these should be harmonised where possible. This is likely to be even more critical should the Commission suggest a Regulation rather than a Directive, which we do not believe to be necessary.

The Commission should review the existing directive to ensure it is still fit for purpose, and consider how far the revised Data Protection Regulation offers suitable levels of protection that would allow for a simpler, more focused, E-Privacy Directive.