Department for
Digital, Culture,
Media & Sport

Government response to the public consultation on implementing the European Electronic Communications Code

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Contents

1. Ministerial foreword

Electronic communications are fundamentally important to our daily lives, causing radical shifts in the way we live. This trend has been cemented by the COVID-19 pandemic. Electronic communications have allowed many people in the UK to work, socialise and maintain as much as possible their day to day life without leaving the home. The current networks have done a fantastic job of ensuring the connectivity which has underpinned the way society has responded to COVID-19.

We anticipate that the positive changes implemented during the pandemic will outlast the pandemic itself. For example, it has clearly demonstrated that technology enables many businesses to be agile, allowing many people to work from home. Technology has also played a critical role in continued learning, and has played a more important role than ever in keeping people in touch with friends and family and others in their communities.

Increasing reliance on and use of digital infrastructure brings new expectations around these services, and the infrastructure must keep up with growing levels of demand. Combined with future expectations around new technologies and services including 5G, building future-proofed networks will be essential to our future economy.

Facilitating this transition to future-proofed networks will require a collaborative approach from government, Ofcom and industry. The government and Ofcom will encourage investment in areas that can support commercial investment, and where such investment is unlikely, the government will intervene to ensure both receive investment in parallel. Indeed,

Budget 2020 committed a record £5 billion investment in gigabit-capable broadband rollout in the hardest-to-reach areas of England, Scotland, Wales and Northern Ireland.

An essential aspect of delivering the transition to future-proofed networks is ensuring that both the government and Ofcom have the tools required to deliver the government's connectivity ambitions. The transposition of the European Electronic Communications Code into UK law provides an opportunity to do so. Between autumn 2016 and summer 2018, the government negotiated the proposed changes to the regulatory framework alongside EU member states, which for the large part reflects UK best practice and objectives to promote investment in future-proofed networks.

Matt Warman MP - Minister for Digital Infrastructure

2. Introduction

Section 2.1: Aims

This document sets out the government's approach to implementation of the European Electronic Communications Code Directive,[1] and follows our 2019 public consultation.[2]

The European Electronic Communications Code was published in the Official Journal of the European Union in December 2018. Member states, and the UK, have until 21 December 2020 to implement the provisions in domestic law. Following the UK's exit from the European Union on 31 January 2020, the UK is in a transition period which will end on December 31 2020. Under the transition arrangements, the UK is required to transpose the Directive. The European Electronic Communications Code is a revision of the current EU regulatory framework for electronic communications. The transposition of the Directive provides an opportunity to introduce new provisions that will help facilitate our digital objectives set out by the government in the 2020 Budget and in the Future Telecoms Infrastructure Review.[3]

This document describes our approach to transposition of the Directive, and is based on our analysis of the responses to our public consultation. We received 39 responses to the consultation, and a full list of those who submitted non-confidential responses is provided in Annex B of this document. These include responses from fixed and mobile telecommunications companies, industry groups, consumer organisations and members of the public. Alongside this document, we have published non-confidential stakeholder responses to the public consultation and our impact analysis.

Section 2.2: Background

The existing telecommunications legislative and regulatory framework in the UK is largely underpinned by six European Union directives:

- the Framework Directive[4]
- the Access Directive[5]
- the Authorisation Directive[6]
- the Universal Service Directive[7]
- the ePrivacy Directive[8]
- the Better Regulation Directive[9]

[1] European Commission, 2018. *Official Journal of the European Union, Volume 61 (December 2018).*
[2] DCMS, 2019. *Implementing the European Electronic Communications Code*.
[3] HMT, 2020. *Budget 2020*; DCMS, 2018. *Future Telecoms Infrastructure Review*
[4] European Commission, 2002. *Framework Directive*
[5] European Commission, 2002. *Access Directive*
[6] European Commission, 2002. *Authorisation Directive*
[7] European Commission, 2002. *Universal Service Directive*
[8] European Commission, 2002. *ePrivacy Directive*
[9] European Commission, 2009. *Better Regulation Directive.*

These set out the core objectives for member states and the UK in regard to telecoms markets and provide for the duties and powers for the 'national regulatory authorities' - in the UK this is Ofcom. These earlier directives were largely transposed in the UK through the Communications Act 2003 and the Wireless Telegraphy Act 2006. The Better Regulation Directive made modifications to the existing framework, which were reflected in UK legislation using The Electronic Communications and Wireless Telegraphy Regulations 2011.

The European Electronic Communications Code combines and updates these directives to create a revised telecoms regulatory framework for the EU. The UK played a leading role in the negotiations for the European Electronic Communications Code prior to its exit from the EU, and in the development of the directives which preceded it, which for the most part reflect UK best practice. The Directive's core objectives are to:

- drive investment in very high capacity networks and services through sustainable competition
- support efficient and effective use of radio spectrum frequencies
- maintain the security of networks and services
- provide an improved level of protections for consumers

The European Electronic Communications Code broadly aligns with the principles of the original directives, but makes changes to accommodate technological evolution and consumer behaviour. The Directive recasts the objectives and regulatory tools of the current framework to place a stronger emphasis on incentivising investment in very high-capacity broadband networks, e.g. full fibre networks, promoting more efficient spectrum management to support 5G roll-out, and ensuring effective consumer protection and engagement. It also introduces a new flexibility to assign duties and powers to bodies that are not the national regulatory authority, bodies that are known as competent authorities. Lastly, it includes new provisions for cross-EU bodies and their powers - these will not apply to the UK given our departure from the EU and we therefore do not address these provisions in this consultation response.

Section 2.3: Transposition approach

The government has published guidance on transposition of EU directives into UK law.[10] In accordance with this, the government's approach to implementation of the European Electronic Communications Code aligns with the following principles:

- meeting the minimum requirements of the Directive
- minimising additional costs to business
- ensuring updates to the UK regulatory framework contribute to the government's digital connectivity ambitions where there is discretion and justification to do so

Broadly speaking, this means the government will adopt a 'copy out' approach to the Directive where we consider change is needed in UK legislation. This will be done in order to ensure consistency with the minimum requirements of the Directive.

[10] BEIS, 2018. *Transposition guidance: how to implement EU Directives into UK law effectively.*

In some cases, we will adopt an alternative approach to transposition to certain provisions in a way that is tailored to UK markets. We take this approach where there is sufficient justification and evidence for doing so, for example, where it would contribute to the government's ambitions for digital connectivity.

Furthermore, given the impact of the COVID-19 pandemic, we have taken an approach to ensure the best outcomes for the UK when transposing the European Electronic Communications Code. We have prioritised the transposition of certain articles for the original transposition deadline, and deprioritised others. Each article that places a requirement on the UK in the Directive falls into one of three categories:

- **Articles which we consulted on given their potential to support the UK's digital ambitions.** These were raised in our consultation and are dealt with in the main body of this document by theme
- **Incremental changes to the existing framework which we intend to transpose in a minimal way or already exist in UK legislation.** These are not specifically addressed unless raised by stakeholders, however, the rationale for transposition can be found in Annex A
- **Deprioritised from the 21 December 2020 deadline.** The wider rationale for this approach can be found in Section 8 including specific justification for individual provisions

For ease of reference we set out where each article falls below.

Category	**Article**
Articles which we consulted on given their potential to support the UK's digital ambitions	2, 3, 20, 22, 29, 40, 41, 47, 49, 52, 54, 57, 61 (4), 67, 76, 79, 85, 87, 92, 103, 107, 110.
Incremental changes to the existing framework which will be transposed in a minimal way or already exist in UK legislation	1, 2, 3, 4, 5, 6, 9, 10,11,12,13,14, 15, 16, 17,18, 19, 21,23, 24, 25, 26, 27, 28, 30, 31, 34, 35, 36, 37, 38, 39, 42, 43, 44, 45, 46, 48, 50, 51, 53, 55, 56, 58, 59, 60, 61, 62, 63, 64, 66, 68, 69, 70, 71, 72, 73, 74, 77, 78, 80, 81, 82, 83, 84, 86, 88, 89, 90, 91, 93, 94, 95, 96, 97, 98, 100, 101, 102, 104, 105, 106, 108, 109, 111, 112, 113, 114, 115, 116.
Deprioritised from the 21 December deadline	The application of Articles 40, 41, 61 and consumer protection articles to number independent interpersonal communications services as well as articles, 7, 8, 32, 33, 65, 75, 99.

Following this document we will work to finalise the legislation required to transpose the Directive by the 21 December 2020. We intend to lay the Statutory Instrument in autumn 2020 and use it to correct deficiencies arising from transposition to ensure that UK law remains operable.

Ofcom's existing power to set General Conditions will enable it to implement a significant number of provisions set out in the European Electronic Communications Code's end-user rights articles. As such, in December 2019, Ofcom published its consultation with proposals to implement all the European Electronic Communications Code end-user rights provisions that are not already reflected in its general conditions. We understand Ofcom intends to issue a further consultation in July and then publish a Statement confirming its approach to implementation of the end-user rights provisions in Autumn 2020. Implementing these provisions in full is in line with the government's approach to transposition of the EECC.[11]

We recognise that the COVID-19 pandemic has brought significant challenges to the telecoms sector. Ofcom published a statement on its website on 7 May 2020 explaining that for the most onerous measures, industry would have at least 12 months for implementation. Ofcom will publish its statement, setting out its detailed approach in the autumn.

Section 2.4: Document structure

The structure of this document reflects the subject areas covered in the European Electronic Communications Code. We will deal with each theme in turn, addressing stakeholder responses to our consultation questions and presenting our final analysis and decisions. The final chapters deal with issues that do not neatly sit within these wider themes.

[11] With the exception of Article 81 - see section 3.

3. Access and investment incentives

The government's ambition is for nationwide coverage of gigabit-capable broadband. To meet this ambition, our overarching strategy is to:

- incentivise investment in gigabit-capable networks by promoting network competition and commercial investment wherever possible
- make the cost of deploying gigabit-capable networks as low as possible by addressing barriers to deployment
- support market entry and expansion by alternative operators through effective access to Openreach's ducts and poles complemented by access to other telecoms and utility infrastructure
- promote stable and long term regulation that supports network investment and ensures fair and effective competition between new and existing operators
- invest in the areas that are unlikely to get gigabit-capable broadband commercially. In the 2020 Budget, we announced a record £5 billion investment in gigabit-capable broadband roll-out in the hardest-to-reach areas of the UK[12]
- ensure that there is a copper to fibre switchover process to enable consumer migration to faster and more resilient gigabit-capable networks

The UK's transposition of the European Electronic Communications Code supports this strategy. Transposition will build on our existing regulatory framework to:

- allow Ofcom to impose longer term, pro-investment regulation, focused on promoting higher capacity networks
- support availability of build plan information to industry and the government to better inform any roll-out plans
- allow co-operation between network providers which should support these primarily rural deployments

Section 3.1: General objective to promote deployment of very high capacity networks (Article 3)

The European Electronic Communications Code introduces a new general objective requiring national regulatory authorities, and other authorities carrying out regulatory functions, to promote availability and take-up of very high capacity networks (VHCNs).[13] Recital 13 provides more information about how to interpret this objective, including confirmation we should maintain a technologically neutral regulatory approach as established in the existing framework. As noted in our consultation, it also provides further background on defining VHCNs, including two examples of distribution points.

Furthermore, the Body of European Regulators for Electronic Communications (BEREC) will publish non-binding guidelines by 21 December 2020 on the criteria that a network should

[12] HMT, 2020. *Budget 2020*.
[13] A VHCN is an electronic communications network which consists wholly of optical fibre, or one that contains a mix of technologies that would provide a similar network performance. See European Electronic Communications Code definition 2 for the full explanation.

fulfil in order to be considered a VHCN. These guidelines are expected to provide criteria on down- and uplink bandwidth, resilience, error-related parameters and latency. BEREC consulted on draft guidelines earlier this year.[14]

In our consultation, we proposed the following options:

Option 1 (retain the status quo)

Not applicable for this article, we will need to transpose this article into UK law.

Option 2 (transpose the minimum requirements)

Transposing the minimum requirements would involve bringing the new objective and accompanying definition of very high capacity networks into UK law.

Option 3 (alternative approach to transposition)

The European Electronic Communications Code recitals provide clarification that Ofcom may differentiate between different technologies in its regulatory decision-making, and that the objective of promoting VHCNs is to further increase network capabilities, paving the way for future generations of wireless networks. To ensure that Ofcom is able to reflect these in its regulatory actions, we proposed an option of clarifying Ofcom's duty to act in accordance with the principle of neutrality under section 4 of the communications act, specifically that:

- Ofcom must aim for the highest capacity networks and services economically sustainable in a given area – balancing this with the pursuit of convergence in capacity between different areas
- certain technologies have physical characteristics and architectural features that can be superior in terms of quality of service, capacity, maintenance cost, energy efficiency, management flexibility, reliability, robustness and scalability, and performance – which must be reflected in regulatory actions
- Ofcom's regulatory actions related to fixed and wireless networks must aim to further increase the capabilities of networks and support 5G roll-out

Consultation question

Question 1. We propose that Ofcom's regulatory actions must reflect the benefits of future-proofed networks. To what extent does this approach support objectives set out in the Future Telecoms Infrastructure Review, for 15 million premises to be connected to gigabit-capable networks by 2025, with nationwide coverage by 2033, and 5G deployment to the majority of the country by 2027?

Summary of responses

Several respondents argued Option 3, as described above, could support the government's ambitions for gigabit-capable broadband delivery. Another respondent argued Option 3 could enable Ofcom to promote the most appropriate technologies for gigabit-capable connectivity. Telefonica and Three also supported Option 3, as in their view it could help support the fibre

[14] BEREC, 2020. Draft BEREC Guidelines on Very High Capacity Networks

backhaul necessary to meet the increasing demands for 5G. TechUK supports our proposal for including that the physical characteristics and architectural features of different technologies must be reflected in regulatory actions.

Sky and another respondent considered Option 2 would be able to deliver in line with the government's overall objectives. A range of technologies could deliver gigabit-capable connections, and this approach is reflected in the definition of VHCNs in the Directive. One respondent noted concerns that Option 3 may lead to Ofcom prioritising fibre over legacy networks where it is not efficient, which could lead to adverse outcomes for consumers. Concerns about potential competition issues were also raised.

One respondent also noted that while taking an alternative approach to transposition would be useful, a more substantial impact could be actioned by making it easier to deploy gigabit-capable broadband, such as making changes to wayleaves or addressing skills shortages.[15]

Government response

We agree with Sky and other respondents' concerns around Option 3, the alternative approach to transposition. Option 2 - transposition of Article 2 and some elements of Recital 13 without compromising technological neutrality - is our preferred approach. We think this is sufficient to meet our digital ambitions, including our wider digital ambitions for the delivery of 5G services.

There is a well established practice of technological neutrality in UK and EU telecoms legislation and regulation which has produced good outcomes for UK end-users. Diverging from this approach could have unintended consequences for the telecoms market. We do not think this would be appropriate given our intention to encourage a pro-investment climate, particularly considering potential impacts of EU Transition period exit and COVID-19. In many cases, having the flexibility to create innovative solutions will be a benefit, particularly when providing connectivity to those in remote locations. This option supports our wider approach of a minimalist transposition.

Section 3.2: Geographical surveys of network deployments (Article 22)

Context

Article 22 is a new provision that requires national regulatory authorities, Ofcom in the UK, or another competent authority, to conduct a geographical survey of the reach of electronic communications networks capable of delivering broadband by 21 December 2023 and at least every three years afterwards.

This survey must include the details required for the relevant authorities to fulfill their responsibilities under the Directive and for the application of state aid rules.[16] In addition to current network coverage, the survey may include a forecast of planned build by all networks

[15] A wayleave is a right of way granted by a landowner, to a company for the purpose of deploying telecommunications infrastructure in exchange for payment.
[16] In practice this means that the survey can require data that would inform Ofcom's regulatory functions, such as market analysis. This data can also be used to inform the government's State aid programme.

in a specific area (up to and including the whole of the UK).[17] It also creates the option for Ofcom, or another competent authority, to designate areas of the country as those without existing network coverage or planned very high capacity network build and invite interest from operators for building in that area.

In our consultation, we described the following options in regard to Article 22:

Option 1 (retain the status quo): Not applicable, we will need to transpose this article into UK law.

Option 2 (Ofcom only transposition): There are two aspects to this:

- *Forecasting*: in this scenario, Ofcom would be obliged to conduct a survey of current network coverage, and make non-confidential survey information public, similar to the process it already undertakes for its Connected Nations reports
- *Designation and build plan clarification:* transposing discretionary provisions would give Ofcom powers to designate areas in which there is no planned build for VHCNs in the forecast period and follow the procedure described in the article - the use of these powers would be at Ofcom's discretion

Option 3 (alternative approach to transposition):

- *Forecasting:* going further than a copy out transposition of Article 22, by tailoring Ofcom's survey and forecast process to better support accelerated commercial roll-out of gigabit-capable broadband, removal of barriers and broadband planning initiatives, reducing costs to operators
- *Designation and build plan clarification*: rather than Ofcom, the government would be the competent authority for the designation process in Article 22 - we consider that the ability for the government to designate areas where there is no planned build could help to resolve the 'hold-up' problem identified in our Future Telecoms Infrastructure Review and facilitate government support for areas where commercial deployment may not be feasible[18]

Since we carried out the Future Telecoms Infrastructure Review, which highlighted the potential "hold-up" problem, the government has taken steps to address this issue by extending its public subsidy programme from 10% to 20% of the hardest to reach areas of the country. Ofcom's Wholesale Fixed Telecoms Market Review has also identified hard to reach areas of the country ("Area 3") and tailored its approach in these areas.

[17] Current network coverage being information about the reach and capabilities of the network at present and planned build being the future reach and capabilities of the network. Also see recital 17 of the European Electronic Communications Code: *"Level 3 in the Nomenclature of Territorial Units for Statistics (NUTS) is unlikely to be a sufficiently small territorial unit in most circumstances".*

[18] "Hold-up" issues were identified in the Future Telecoms Infrastructure Review 2018. There may be a 'hold-up' problem in areas where competing with other providers may not be profitable, i.e. it is an area that is only commercial for a single network. In these areas the existing copper provider has little incentive to invest in gigabit-capable networks unless it faces losing customers to a rival gigabit-capable network. However, a rival network contemplating investment in these areas will anticipate that if it invests the incumbent will follow, with a headstart on existing infrastructure and customers. The incumbent, in turn, will be aware that this risk will be sufficient to deter new providers from entering the area. As a result, there is no investment.

Consultation question

Question 2. We propose that Ofcom must conduct an annual forecast of near and medium-term broadband network reach, which it will have to publish to the extent that it is non-confidential. What are the main benefits and risks this presents to accelerating the pace of commercial broadband network roll-out?

Summary of responses

Several respondents recognised existing transparency issues and the potential use of Article 22 in identifying areas not currently part of commercial build plans, mapping existing network coverage and informing the designation process to mitigate overbuild and extend broadband coverage.[19] Cisco and several other respondents supported Option 3, noting its use in stimulating network deployment and take-up of gigabit-capable services. One respondent noted it would support the government's digital infrastructure ambitions.

Another respondent highlighted particular transparency concerns within the business community and their service providers, that business users are underserved by fibre-based broadband, which is a cost-effective alternative to leased lines. It considered there to be a lack of publicly available information on this issue, whilst the little available evidence suggests that coverage in business areas is lagging behind residential areas. It considered that the most recent Ofcom Connected Nations report did not shed light on the issue, meaning the problem was not fully understood by policy makers.

Two respondents were critical of Option 3, arguing that the provision of network coverage and planned build data through the Connected Nations and the Open Market Review met the position set out under Option 3.[20] Both organisations considered that these existing arrangements struck the right balance between information provision and protecting commercial confidentiality - a new process was not needed. One respondent suggested that the government aggregating and publishing this existing data in line with commercial confidentiality would meet the policy aims of Option 3.

Another respondent went further, arguing that increased transparency of build plans would not promote investment. It considered that build information could be reverse engineered by competitors to gain a commercial advantage. Furthermore, it argued that currently, knowledge of plans can mean other undertakings change their plans to gain first mover advantage, or take mitigating measures which would undermine the proposed investment.

[19] Overbuilding is where a network builds in an area already served by another network. While this is broadly encouraged to create competition, it can create sustainability issues in hold-up or uncommercial areas. This is more acute if one of the networks present is the nationwide significant market provider, it is possible for this provider to use its wider market advantages to entrench itself at the cost of the alternative provider.

[20] The Connected Nations report, which Ofcom publishes annually and updates three times a year, is a high-level publication of postcode-level data on existing fixed and mobile network reach. The report is informed by a detailed survey completed by providers on current network characteristics. Ofcom shares some of this data with the government's BDUK programme, on a restricted basis, to support decision-making on public funded network roll-out. Ofcom also makes certain datasets available to local authorities on an ad-hoc basis, upon request. The Open Market Review is a precursor to a formal public consultation document on public intervention for telecoms. The results of the OMR will assist local bodies with understanding the broadband infrastructure already in place in their areas and where there are plans for investment in such infrastructure in the coming three years.

These issues would be exacerbated by increased public information about build plans.

One respondent also expressed concerns that increased transparency could incentivise certain providers to protect their existing assets and act in an anticompetitive manner, undermining the investment case for others. A respondent also raised concerns that the incumbent has high incentives to squeeze out competitors with high forecasts while generating profits on its copper network. It thought real time updates of premises built would be a more useful intervention.

Most respondents raised reservations around the anticipated burden of information requests, even those in strong support for Option 3. Respondents noted how data gathering can be costly and resource intensive for businesses. Several respondents urged the government to ensure data requests are coordinated with Ofcom and streamlined wherever possible, to minimise burden on industry.

Government response

We remain of the view that Ofcom should continue to complete the geographic survey of current network coverage given that it already undertakes the Connected Nations report, which we consider to be equivalent to the required survey, three times a year. As part of the survey, we also consider that Ofcom should conduct a forecast of near and medium-term planned builds which it will be required to publish to the extent that it is non-confidential. In practice, we anticipate Ofcom publishing an aggregated forecast of areas which are not currently in any operators' forecast. We note the concerns about a lack of information on business provision and that the latest Connected Nations reports have included more information on this issue, but would still welcome further information about how to improve transparency in this area.[21]

Currently, Openreach and CityFibre are the only undertakings publishing information on future build plans. Our policy will ensure the identification of areas that are not currently included in the investment plans of any network operators over the next three years. We think this additional transparency will help unlock additional investment in these areas. We acknowledge concerns about the potential for reverse engineering of any forecasts or using the information to behave anti-competitively.[22] We note that there is an existing framework to investigate and penalise anti-competitive behaviour through the Competition Act 1998.

We note the view of some stakeholders that the current information available publicly should be considered as sufficient to meet the government's aims, while further disclosure could have adverse impacts. We agree a balance has to be struck and therefore do not expect Ofcom to disclose disaggregated planned build forecasts which allow the plans of individual operators to be identified. We believe that there are positive benefits to be had in stimulating network deployment and mitigating overbuild from publicly identifying areas that are likely to not be built in.

We are conscious of the burden of information requests (voluntary or legal) on industry. We will ensure Ofcom shares the survey data with the government and the devolved

[21] December 2019 Connected Nations report (Page 4) included figures on superfast connectivity for residential premises versus business premises (95% versus 86%).
[22] By reverse engineering we mean undertakings having the incentive to use the forecast information and its own plans to identify which competitors are planning to build in which areas and use that analysis to gain a competitive advantage.

administrations. This will help make data sharing more efficient and likely reduce the number of requests the industry is subject to. Ofcom and the government are committed to working together to minimise industry burden.

Consultation question

Question 3. We propose that Ofcom must share with the government all information that it collects through the survey and forecast process of Article 22 of the European Electronic Communications Code. What should the government take into account when implementing this requirement?

Summary of responses

Respondents recognised the value of Ofcom sharing the data with the government to support market interventions in areas where there is no prospect of deployment in the near term. They argued that government access to the data would aid investment and take-up in new networks. The Scottish Government highlighted the importance of Ofcom sharing the build and forecast data with the devolved administrations in addition to the UK government to support their state aid programmes.

However, a number of respondents raised concerns about the government itself holding this data. Several respondents cautioned against sharing the data widely within the government, given its commercial sensitivity. A number of respondents were particularly opposed to local authorities having access to the data, due to a lack of common data handling practices. Broadband Stakeholder Group (BSG) were unconvinced of the necessity for Ofcom to share all information with the government and welcomed further discussion about what would be shared and how.

One respondent noted that Ofcom is more experienced at handling such information and has stringent protocols in place to respect confidentiality. They called for the information to be held by Ofcom and requested by the government on a case by case basis.

Two respondents noted existing information sharing agreements between industry, the government and Ofcom and suggested that these were sufficient to ensure government departments can access data they needed to make informed decisions, while protecting risks to the providers. They considered there was no need to re-invent the process by which information was shared.

One respondent argued that Ofcom should only share aggregated data, rather than individual operators' data, with the government, and that the government should only publish it to the extent that there is no opportunity for competitors to reverse engineer the information to gain an advantage.

Government response

We recognise industry concerns about the government holding and managing confidential data. The government would like to reassure industry that it will handle any confidential information appropriately. The government has collected information from operators, either itself or via Ofcom, to inform its state aid procurement processes for several years and therefore has experience of handling such information. Furthermore, bodies receiving confidential information, such as the government, will be required to protect the confidentiality of information.

Taking account of the data from Ofcom's surveys will be important for meeting the government's ambition for nationwide gigabit-capable networks, particularly to identifying harder to reach areas where there is not planned build.

Consultation questions

Question 4. We propose that the government has the power to designate areas where there is no planned coverage of gigabit-capable networks, and clarify deployment plans in these areas, per the process set out in Article 22 of the European Electronic Communications Code. To what extent do you agree that this will provide the right tools for the government to address problems associated with investment hold-up in areas where the business case for gigabit-capable network investment is uncertain?

Question 5. Article 29 of the European Electronic Communications Code would enable the relevant authority to impose penalties on providers that knowingly or grossly negligently provide misleading, erroneous or incomplete information when invited to declare an intention to deploy in a designated area, and do not provide objective justification for a change of plan. How do you think the prospect of penalties will affect how providers act when invited to declare their intentions?

Summary of responses

Question 4

Cisco and other respondents were all supportive of designation powers sitting with the government. Arguing it would help tackle 'hold-up' issues, avoid overbuild of infrastructure and incentivise network roll-out. A respondent argued that designation powers sitting with the government would help deliver the government's ambitions set out in the Future Telecoms Infrastructure Review.

Some respondents caveated their support. One respondent added that an effective penalty system would be needed to accompany Option 3 implementation of Article 22, in order to discourage disclosure of misleading or incomplete information. It argued that Option 3 transposition of Article 22 alone could result in anti-competitive behaviour.

Three cautioned that giving government designation powers could create disincentives for

investment, as providers could instead hold out for public subsidies in less commercial areas.

One respondent stressed the importance of government only using its designation powers in areas where there is no prospect or evidence that competition will emerge. It called for the power to only be used as a last resort and requested greater clarity on how the power would be used.

Some respondents raised concerns that giving the government the power to designate areas could politicise the process and compromise its objectivity. Sky and another respondent called for the designation powers to sit with Ofcom, as the independent regulator with sectoral expertise. The BSG mirrored these concerns, and called on the government to clarify how it would remain independent by using an objective criteria in the designation process. Cisco also thought that independent, evidence-based criteria when designating would be essential.

One respondent argued that the government has already adopted many of the features of Article 22 through the Open Market Review process. This was supported by Cisco who noted the synergies between state aid procurement process and Article 22 designation.

Question 5

A number of respondents stressed the importance of an effective penalty system to ensure that the transposition of Article 22 has the desired effect.

One respondent stressed the need for an effective penalty power to disincentivise operators using this process to deter competition. It presented evidence to support this claim. Another respondent also noted that strategic gaming, such as falsely declaring build plans or withholding announcements in order to gain a market advantage, could be prevented by the proposals. The respondent suggested that gaming had already happened in the UK and that these issues had also occurred in France.

Several respondents acknowledged that proportionate penalties may be appropriate where information provided by operators is deliberately incorrect and, in the case of one respondent supported the use of penalties. They called for any penalty system to be used in the most egregious cases only and warned against applying penalties to genuine errors by operators or objectively justifiable changes in build plans. They pointed out that build plans are inherently unpredictable and can be affected by reasons beyond the operators control, such as streetworks or local planning issues.

Some respondents called for the penalty system to be transparent, with clear reasons to be given on why decisions are made. They warned that penalising operators for genuine errors could undermine investment and lead to under-forecasting.

One respondent argued that the existing methods for publicising forecasting are appropriate models for forecasting conducted under the new European Electronic Communications Code power, and that requesting further details or longer timescales would increase the risk that forecasts are inaccurate. They called on the government to provide more information on how the penalties would be implemented.

Another respondent argued that the risk of penalties would discourage network deployment, as providers may be less inclined to invest in less certain areas, or take a more conservative approach to roll-out. They also warned that the risk of penalties may make providers less inclined to share certain information on roll-out.

A further respondent questioned whether penalties alone would be enough to tackle hold-up problems, as even the threat of overbuild is enough to undermine alternative investment. It argued that overstatement of build plans may take a long time to become apparent, by which time the first mover advantage is lost.

Government response

We have carefully considered the responses on the designation mechanism and associated penalties. We have decided not to implement the discretionary designation mechanism. In the short term, we think that our approach to transposition for Article 22 is a proportionate response to address immediate policy concerns in the market. It will allow Ofcom, government and devolved administrations to better understand network reach and planned extensions of these networks. It will also give industry a better understanding of where the unserved areas are likely to be in the future, unlocking additional commercial investment. If our concerns raised in the consultation persist following the transposition of Article 22, we will consider legislating further.

As at present, if there are concerns around undertakings breaching competition law or are abusing their dominance, we note that the Competition Act 1998 provides for the investigation of such concerns, and if necessary, enforcement action against anti-competitive behaviour.

Our decision

Therefore we are implementing some of the Option 2 proposals:

- We will maintain Ofcom's powers to undertake infrastructure surveys, introducing new requirements for it to conduct forecasts of network build
- To help minimise the burden on industry, we will ensure Ofcom can share confidential data from the survey with the government and the devolved administrations. This will allow these authorities to take into account the results of the geographical survey when undertaking the allocation of public funds for the deployment of electronic communications networks or for the design of national broadband plans

Section 3.3: Commitments procedure and co-investment commitments (Articles 79 and 76)

Where Ofcom identifies a competition concern in the market and intends to, or has already, imposed regulation, the operator with Significant Market Power (SMP) will sometimes offer commitments to the regulator. These are voluntary actions that the SMP provider commits to in order to address the competition concern identified by Ofcom. If Ofcom considers that these actions are sufficient to resolve the issue, Ofcom may accept the commitments and

choose not to impose any regulatory obligations in the relevant area. These commitments are not enforceable but the threat of regulation combined with potential reputational damage incentivises the SMP provider to keep its commitments.

Article 79 provides for Ofcom to make commitments proposed by a SMP provider in relation to network access enforceable as if the commitments were SMP regulations. This is a new provision and it is designed to incentivise enforceable alternatives to SMP regulation.

Article 76 and Annex IV sets out further criteria for assessing a specific type of commitment where there is a proposed co-investment between an SMP operator and other operators to deploy a very high capacity network. Co-investment arrangements typically allow operators to share parts of their networks and this could be an important means to reduce the costs of gigabit-capable broadband deployment. Such arrangements involving operators with SMP raise more complicated regulatory issues and this article sets the framework for Ofcom when considering and monitoring such arrangements.

In our consultation we set out the following options:

Option 1 (retain the status quo): not applicable for this article - this is a requirement of the Directive, rather than a discretionary option, which we will need to transpose into UK law.

Option 2 (transpose the minimum requirements): transposition of this provision in order to meet the requirements of Article 76, 79 and Annex IV. At its discretion, Ofcom would be able to consider additional criteria.

Option 3 (alternative approach to transposition): we are considering how the implementation of Article 76 can best support gigabit-capable broadband investment and efficient competition. This option would clarify that Ofcom has the power to publish guidance which would set out in advance how it intends to assess co-investment offers. Where Ofcom exercises its power to add additional criteria, we propose that it must consult on these criteria in draft.

Summary of responses

Sky, Cisco and the BSG supported Option 3 that required Ofcom to consult on any proposed additional conditions for a VHCN co-investment commitment. Cisco also considered that any additional conditions should be included in any general guidance Ofcom publishes on this matter. Broadly speaking Cisco thinks the Directive has more than sufficient provisions to protect UK competition and Ofcom should use the powers at 76 with caution.

Sky, Three and several others also supported Option 3, in particular the requirement for Ofcom to set out in advance how it intends to assess co-investment offers. Two respondents suggested some information they would like to see in this document - these points covered how Ofcom will review any risk-sharing arrangement, what forbearance would look like and how co-investment interlinks with the longer review period.

Verizon and another respondent supported the promotion of SMP co-investments for VHCNs, provided they do not interfere with the promotion of competition and suggested that full, market wide impact assessments form part of the decision making process. Two respondents were also concerned about competition and the potential that SMP co-investments could entrench BT's market position. A respondent suggested that such

co-investment commitments should involve a market assessment, including the potential impacts on investment when considering the forbearance applied to the co-investment.

Two respondents provided helpful international examples of when non-SMP co-investment has been successful.

One respondent also noted the importance of access to Openreach's duct and pole network and raised concerns about forbearance in that market in relation to Article 76.

Our Decision

In line with our overarching approach of a minimal transposition, we have decided to implement Option 2, a transposition to meet the minimum requirements, on the basis that it will provide Ofcom with the appropriate powers to manage commitment offers and allow industry to share risk with certain investments.

We acknowledge the desire in industry for as much certainty as possible, particularly around Article 76. In line with established practice, when receiving proposed commitments, Ofcom will be obliged to consult on its analysis, including a preliminary conclusion. It will then later publish a final decision which takes account of the respondents views.

Given Ofcom's wider objectives to promote sustainable competition and the requirement to conduct a market test as part of assessing commitments, we consider this should guard against any potential competition concerns. In line with existing regulatory principles around identifying SMP, we would expect that the analysis would take into account the importance of access to Openreach's ducts and poles.

Section 3.4: Other access articles raised by respondents

Our consultation document described the most significant changes that are needed to implement the parts of the European Electronic Communications Code not already contained in domestic legislation. However, we also provided the opportunity for respondents to comment on other parts of the Directive. In this Section we analyse those comments where relevant to access.

Article 61(3 and 5)

This provision introduces new powers for Ofcom to impose symmetric[23] wholesale access regulations on wiring in apartment blocks or other buildings that house multiple dwelling units where the replication of such network elements would be economically inefficient or physically impracticable, and therefore network competition cannot naturally occur in the building. It also requires a five yearly review of obligations imposed using Article 61.

Summary of responses

Several respondents urged that DCMS wait for BEREC guidance to ensure harmonisation with the EU.

[23] that is, on all operators, not just on those with Significant Market Power.

One respondent also noted the new, symmetric in-building wiring powers, calling for more information on how Ofcom might be able to use these powers to ensure a true level playing field. It considered that this was important in the context of "*the failures*" with the current Access to Telecoms Infrastructure (ATI) regulations.[24]

Another respondent also urged the government to review the implementation of Article 61 (5), extending market review to five years. It said this approach risks outdated regulation being in place for a longer period of time.

Government response

We note the concerns of respondents to ensure that our approach to in-building wiring regulation is aligned with BEREC guidance. Between the transposition deadline and the end of the transition period, Ofcom will be under an obligation to take account of BEREC's recommendations.[25] After the transition period, Ofcom will have discretion to take an approach that is best suited to the UK. Imposing these new obligations will require an Ofcom consultation, which will provide respondents the opportunity to provide views to Ofcom on what a UK approach looks like.

In terms of how releasing more information on how Ofcom would use these powers, we consider it a matter for Ofcom. Ofcom are required to consult before setting regulatory conditions and these would be no different. Such a consultation would provide industry with the information it required on how these powers would be used and imposed.

The Department for Digital, Culture, Media, and Sport recently published a Call for Evidence on the access to infrastructure regulations and we welcome views on these regulations by the deadline of 4 September 2020.[26]

Article 67

This requires Ofcom to undertake regular market reviews. These include market identification, a forward looking analysis of these markets and the imposition of remedies to resolve any competition concerns. The European Electronic Communications Code requires Ofcom to undertake these reviews at least every five years, compared to every three years in the current framework.

Summary of responses

Several respondents agreed that the longer market review period would provide more stability and certainty. Sky and a respondent noted the risk that regulation could become outdated. Sky, Verizon and others thought the ability for Ofcom to intervene with a new market assessment at its discretion addressed this concern. Verizon and another respondent felt this was particularly important for pro-investment deregulation. They also noted the importance of ensuring powers for Ofcom to impose reasonable notice periods on withdrawal of wholesale products to protect end-users.

[24] Introduced in 2016, the ATI Regulations provide for a number of rights for access seekers in relation to physical infrastructure and civil works. See the Regulations and Guidance from Ofcom.
[25] Through Art 4(4) of the BEREC Regulation 2018/1971/EU.
[26] DCMS, 2020. Review of the Access to Infrastructure Regulations - call for evidence.

Government response

We welcome comments that support the role of longer market review periods in providing regulatory certainty to incentivise investment. We acknowledge the concerns that significant market changes could cause some regulation to be outdated, which could have unintended consequences for the market. Our transposition approach will ensure that Ofcom has the power to intervene at such intervals as it considers appropriate and will provide powers so that it can impose reasonable notice periods on any withdrawn products.

Article 72

This expands Ofcom's powers around physical infrastructure, with a new power allowing them to impose such regulation irrespective of whether the assets that are affected by the obligation are part of the relevant market in accordance with the market analysis, provided that the obligation is necessary and proportionate to meet Ofcom's overall legislative objectives.

Summary of responses

One respondent raised concerns that Article 72 (2) of the Directive could allow Ofcom the power to impose regulation even in the markets where there is no finding of SMP. If this is the case it considers that Ofcom should use this power in limited and justified circumstances.

Another respondent noted that Article 69 requires Ofcom to impose a reference offer when imposing remedies using Article 72 and Article 73. Particularly in the context of Article 72, it considered there would be some circumstances where this would not be proportionate and that Ofcom should therefore be required to consider proportionality when imposing such a reference offer or that such an obligation should be discretionary.

Government response

In regard to comments on Article 72(2) (and Article 69), we note that Ofcom is already bound by section 47 of the communications act, which requires that any condition imposed is proportionate and justifiable. Therefore, Ofcom will be required to consider the proportionality of imposing regulations under 72 (2).

Article 81

This introduces new duties for undertakings designated with SMP and Ofcom around migrations from legacy to new networks, e.g. copper to gigabit switchover. It ensures that the timetable for migration is transparent and that comparable products are available on the new network to safeguard competition and end-users' rights.

Summary of responses

BSG considered that Article 81 will present complex challenges for industry and require strong leadership from Ofcom as the regulator. It highlighted the need that the final approach had to be smooth, user friendly and meet customers' needs.

One respondent raised the importance of protecting vulnerable consumers during the PSTN/landline switchover to voice over internet protocol technology. This is due to take

place ahead of the migration away from part copper to gigabit-capable broadband networks. It's view was that, where possible we should use the transposition to impose consumer protections. It highlighted the range of services this will impact - "*'process data quickly' credit and debit card reading machines (including the paypoint machines used by the poorest in society to pay for their heating), alarm systems and the "red cord" systems in the homes of the elderly and disabled*".

Another respondent supported the aim of Article 81, noting the challenges it would pose for government, Ofcom and industry. It highlighted the need for an efficient migration, ensuring migration was consistent with the objectives of stimulating network competition, protections for consumers and ensuring that entry level wholesale products on new networks are similarly priced to existing equivalents on the legacy networks.

Government response

We agree with respondents' comments on Article 81.

More widely, a number of phone companies are gradually moving their landline customers from the country's traditional telephone network - the "public switched telephone network" (PSTN) - to newer digital technology known as "voice over internet protocol", which carries calls over a broadband connection. Although this change is being led by broadband and phone companies, Ofcom are playing an important role in making sure that customers experience minimal disruption and are protected from harm.

Ofcom are consulting on their regulatory approach to allowing Openreach to retire BT's old copper network in due course and focus on maintaining and running its new full fibre network, rather than running two networks in parallel. As part of this, Ofcom have made some targeted regulatory changes to support Openreach's trial of copper migration in Salisbury and Mildenhall.[27]

From an European Electronic Communications Code perspective, we consider that Ofcom's regulatory approach to decommissioning BT's copper network will transpose the relevant mandatory requirements in line with our overall approach. The government is also committed to working closely with Ofcom and industry to ensure that there is a smooth transition to gigabit-capable broadband networks, which provides adequate protections for end-users and maintains services that support the most vulnerable.

Article 83

This article allows Ofcom to impose appropriate regulatory obligations on undertakings identified as having significant market power on a given retail market; where the market is not effectively competitive and the issues cannot be addressed using wholesale regulations.

Summary of responses

[27] Ofcom, 2019. *Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26. Volume 3: Non-pricing remedies.;* Ofcom, 2020. Statement: Promoting competition and investment in fibre networks – Measures to support Openreach's trial in Salisbury.

The BSG advocated the implementation of Article 83. In relation to Ofcom not applying retail control mechanisms under Paragraph 1 of Article 83 to geographical or retail markets where they are satisfied that there is effective competition.

Government response

We note that the BSG was in support of our proposed implementation approach to Article 83. We believe that the current provisions in relation to regulatory control of Retail Services, as set out in the Communications Act 2003 by virtue of sections 45 (7) & (8),implement this provision adequately.

Article 114

This article gives the UK the option to impose reasonable 'must carry' obligations for the transmission of radio and television channels. It also provides for related complementary services, in particular accessibility services to enable appropriate access for end-users. These can be applied to networks and services where a significant number of end-users use them as their principal means to receive radio and television channels.

Summary of responses

The BBC considered that Article 61 in combination with 114, would provide the scope update of existing access provisions that would allow Ofcom to impose must carry obligations in the broadcasting space. It considered this could help resolve potential commercial negotiation issues.

Government response

We have noted the concerns identified by the BBC. Article 114 of the Directive largely replicates Article 31 of the Universal Service Directive, which was implemented into UK law by way of the Communications Act 2003. Subsection 4, section 64 of the Communications Act 2003 extends the must carry requirement in the UK to 'every service which is an ancillary service by reference to the listed service including, but not limited to, a service enabling access for disabled end-users: no further legislative changes are required.

Section 3.5: Impact assessment on access provisions

As part of the public consultation process, we produced an assessment of the impact on the UK economy and businesses of implementing Articles: 3, 22, 61, 67, 73, 74, 76 and 79 in relation to electronic communications network. These were the access articles we considered to have the greatest impact on businesses. We asked several consultation questions to gather further data to inform our impact analysis. In this Section we address respondent's comments to these questions. The updated impact assessment is published alongside this document. In line with the consultation approach, the impact assessment considered three options for transposition:

- **Option 1:** Do nothing

- **Option 2:** Transpose verbatim and align with existing conventions where there is a choice (transposing the minimum requirements of the Directive for all consulted articles) - preferred option
- **Option 3:** Transpose to align with the Future Telecoms Infrastructure Review (alternative approach to transposition for all consulted articles)

Consultation question

Question 6. How much would it cost to businesses to familiarise themselves with the access provisions?

Summary of responses

A respondent set out that familiarisation requires legal, public policy and regulatory resources and that costs are dependent on the size of the operator. However, much of the cost will be pre-existing or 'sunk costs' for larger operators, who are used to engaging with telecoms regulation.

A respondent considered that familiarisation costs are likely to be low. However, it thought the cost of system integration is likely to be much higher than that estimated in the impact assessment. It also set out its view that estimates the cost of implementation for a single operator would likely be more than those estimated by DCMS for the entire communications sector. Another respondent did not foresee significant additional costs as it considered that the majority of the European Electronic Communications Code's access provisions are already implemented as part of existing legislation. It is worth noting that this respondent argued that an alternative transposition (Option 3) could result in significant increases, but did not specify the scale of these increases.

A respondent felt it was unable to specify the costs due to various implementation options and uncertainty on how the European Electronic Communications Code will be transposed.

The BSG made a comment specific to Article 22, arguing that Option 3 could potentially deliver larger positive net value but at a higher cost to businesses. It did not identify the size of this higher cost.

Government response

Respondents gave a range of answers to the question. Some believed the costs would be low or the costs were already 'sunk'. Others stated that the costs would be higher, especially if Option 3 was taken forward. We did not receive any estimates from respondents on what this cost may be. The familiarisation costs in the assessment will therefore be unchanged.

Consultation question

Question 7. How much would businesses save as a consequence of longer market review periods?

Summary of responses

Respondents were generally in favour of Article 67. Several respondents were all supportive of extending the review period to five years. They welcomed the move for bringing greater regulatory stability and certainty for the industry.

Two respondents raised some concern that regulations may become less effective over time, and called for the government to transpose Recital 177 of the European Electronic Communications Code to mitigate this. Recital 177 allows for Ofcom to conduct 'new analysis' during the market period where it sees fit. Sky also supported Ofcom having the power to take action on an interim basis, where significant developments materially distort or diminish competition.

A respondent noted that any marginal costs to industry in the short term would be greatly outweighed by the benefits of longer review periods.

A respondent welcomed the move but called on DCMS and Ofcom to provide certainty that the market will only be reviewed to a shorter time frame than 5 years in exceptional circumstances.

A respondent also welcomed the move but stressed the importance of extending some principles beyond the five year review periods.

A small number of respondents expressed a preference to retain the current market review period. A respondent argued that a longer review period is not appropriate for the telecoms industry. It argued that longer market review periods may lead to less effective regulations over time, more appeals against Ofcom's findings, and a greater risk of mid-period reopenings of the regulatory settlement. It also anticipates that any savings from less frequent reviews would be offset by more resource intensive reviews every five years.

A respondent noted advantages and disadvantages with longer market reviews. It argued that longer periods provide a longer trajectory for meaningful policy delivery but warned that some regulations may lose their effectiveness over time. It supported a system of mid-term market reviews, but did not specify a time length.

Government response

We agree with the majority of responses that noted the positive impact of moving to a five year review period, bringing greater regulatory stability and certainty for industry. Several respondents were keen for Ofcom to be able to intervene during the review period if necessary. We received no data on the savings to business from moving to a five year review period, as such the assessment will remain unchanged.

Consultation question

Question 8. How much does it cost for businesses to comply with the current network mapping requirements by Ofcom?

Summary of responses

A respondent thought that the costs will vary by operator. Larger operators will have established network mapping processes to and for these providers, costs will be largely 'sunk capital'. It helpfully offered to provide DCMS with more detail on its own mapping costs which we welcome.

Two respondents were unable to give an accurate estimation, suggesting Ofcom's data requests have not always been identical. They considered that Ofcom should standardise its data requests so that they can automate its data gathering processes - which would reduce costs of compliance.

A respondent estimated that responding to Ofcom's Connected Nations request requires 35 man hours, at a normal cost of business. It believes Ofcom's data requests at present are not excessive or unreasonable.

A respondent did not conduct a cost analysis, but argued that information requests for network mapping constitute a significant resource requirement. It thought that Ofcom's requests can be complex and difficult to respond to.

Government response

We appreciate the data that we received from one operator on mapping costs. This supports the assumptions made in our analysis. We agree that data requests should be streamlined where possible - please note our response to stakeholder feedback under question 2.

Consultation question

Question 9. How much would it cost to business to forecast their future network plans?

Summary of responses

A respondent argued that longer forecasts may be more error prone and may be more time intensive than estimated. Another respondent agreed with this, questioning the reliability of three year forecasts, given the variables that can result in significant change during that time.

A respondent considered there was no 'real cost' to forecasting network plans. It argued forecasts should be short term for small altnets, and at least three years for larger players as they can forecast more accurately and over a longer period of time. A respondent suggested that forecasting up to three years ahead should be viable for most scale operators.

A respondent did not conduct an analysis, but considered that even a basic forecast requirement would have material resource implications.

A respondent argued that the Option 2 costs would be outweighed by the benefits of avoiding overbuild and investing in less commercial areas. However, it thought that Option 3 transposition could lead to increased legal costs and risk.

Government response

We agree with the point that any costs would be outweighed by the benefits of the proposal. We received some data on mapping costs which were in line with our own estimates.

Question 10. What is your estimate on the number of premises in the hold-up areas?

Summary of responses

A respondent argued that the hold-up area is likely larger than expected. It considered public funding would make these areas more viable - albeit for a single operator. This was in contrast to another respondent which argued that the number of premises with hold-up issues are closer to zero, as Openreach will invest almost anywhere so long as it receives public subsidy (although the tradeoff was entrenching its monopoly into future networks). Considering this issue, it called for DCMS to address anti-competitive overbuilding to ensure a competitive market.

A respondent did not feel it could provide an answer due to the commercial sensitivity of that information, while another respondent did not have an estimate of the number of premises in hold-up areas.

Government response

Since the publication of the Consultation the government has committed to £5 billion to support the roll-out of gigabit-capable networks. We received no estimates of the size of the 'hold-up area'.

Question 11. What would be the size of the investment required to deploy fibre in the hold-up areas?

Summary of responses

A respondent suggested in its experience the cost per premises is usually £1,000 - £2,000.

A respondent did not feel it could provide an answer due to the commercial sensitivity of that information.

Two respondents considered they were unable to answer this question. A respondent provided a range of factors that made such an estimate challenging. These factors included scale of the operator, labour costs (impacted by EU exit) and uncertainty around duct and pole access, business rates, wayleave reform and cost of capital.

Government response

We appreciate the cost estimates provided by stakeholders. We note the reasons set out by other respondents for not being able to provide an estimate.

4. Radio spectrum

Radio spectrum ('spectrum') refers to the airwaves over which communication signals are transmitted. Spectrum is a critical national asset that the government wants to ensure is maximised for its economic and social value. Spectrum underpins mobile connectivity and is pivotal to developments in the digital economy, including 5G roll-out and new wireless services.

As set out in the consultation, the government's key objectives in relation to spectrum are:

- ensuring the efficient use of spectrum (including preventing under-utilisation)
- improving mobile coverage
- encouraging innovation and investment in new 5G services
- promoting competition in mobile markets

We consider that the provisions of the European Electronic Communications Code are broadly consistent with the Future Telecoms Infrastructure Review. The European Electronic Communications Code seeks to update measures and procedures for spectrum management while maintaining powers for member states (and the UK) to manage spectrum in line with their specific needs. It strengthens powers to support efficient and effective spectrum use, promoting competition, the timely roll-out of 5G services and the widespread availability of mobile connectivity.

Section 4.1: The role of the competent authority

The European Electronic Communications Code updates the current framework to give member states flexibility to assign certain spectrum management functions to a 'competent authority' other than the NRA, for example, a ministerial department or competition authority.

This explicit flexibility was not present in previous EU directives. It was introduced in the European Electronic Communications Code to recognise that the approach to spectrum management, including the relevant powers of the regulator or other authorities, is different across member states. Where functions are assigned to a competent authority other than the NRA, the NRA must provide technical and competition advice on those decisions.

In the UK, Ofcom is responsible for spectrum management under the Wireless Telegraphy Act 2006 and Communications Act 2003. These functions include, but are not limited to:

- making sufficient spectrum available for mobile services, including 5G - this includes clearance[28], negotiating with the government to make more spectrum available for civil use and awarding rights of use to companies
- studies to inform future requirements for spectrum (such as mobile data, the satellite and space science sectors and fixed wireless uses)
- ensuring unauthorised users of spectrum do not cause harm to consumers (such as causing interference that prevents citizens from making emergency calls)

[28] that is, finding the most efficient way to use existing spectrum to free up more for different purposes.

Consultation question

Question 12. Do you have views on the appropriate competent authority for different spectrum management functions?

Summary of responses

We received 11 responses to this question. The respondents were in agreement that Ofcom was the appropriate competent authority for spectrum management and tasks under the European Electronic Communications Code. A number of respondents also highlighted the importance of the government's role in setting the strategic direction of spectrum policy. For example, the BSG and another respondent stated that DCMS should set the strategic direction for spectrum policy. A joint response from the Energy Networks Association and the Joint Radio Company welcomed the government's recent Statement of Strategic Priorities, noting that Ofcom is the appropriate competent authority to undertake the different spectrum management functions subject to the appropriate direction from government.[29] TechUK and Energy Networks Association/Joint Radio Company both called for a joined up approach between Ofcom and the government to ensure sufficient focus on the interests of business. A respondent noted that the government and Ofcom will continue to need to work together to achieve certain policy outcomes, such as network investment.

Government response

We sought stakeholder views on this question given the European Electronic Communications Code introduces new flexibility to assign spectrum management functions. We note that respondents generally supported Ofcom as the appropriate competent authority for spectrum management functions, with a role for government in setting strategic direction. No change will be made to the responsibility for different spectrum management functions at this time.

Section 4.2: 'Use it or lose it' conditions (Article 47)

As outlined in the Future Telecoms Infrastructure Review and the Statement of Strategic Priorities. The introduction of a flexible, shared spectrum model and releasing additional spectrum are important steps toward realising the government's objectives for digital connectivity. The Review also detailed the government's objective to address barriers to entry into the spectrum market to ensure efficient utilisation of spectrum. Spectrum sharing practices are an opportunity to unlock opportunities for innovative new applications.

[29] DCMS, 2019. *Statement of Strategic Priorities*. The Statement of Strategic Priorities for telecommunications, the management of radio spectrum, and postal services, sets out the government's strategic priorities and desired outcomes in a number of areas, including gigabit-capable broadband deployment, 5G, spectrum management, the security and resilience of telecoms infrastructure, and furthering the interests of telecoms consumers.

Article 47 requires the competent authority to attach conditions to individual rights of use for spectrum to ensure the most effective and efficient use of spectrum. These conditions include the concept of 'use it or lose it' for spectrum. This creates a power where the regulator can specify a minimum level of use in the spectrum licence. This threshold can be met by third party use through trading or leasing access to the relevant spectrum. The regulator would be able to withdraw rights of use if this minimum threshold was not met. We consulted on the following options for this article:

- **Option 1 (retain the status quo):** the status quo is maintained and no changes are made to Ofcom's existing powers to impose licence conditions
- **Option 2 (preferred approach at consultation):** we would transpose the requirements of the article (and corresponding recital) so that spectrum licence enforcement conditions must include 'use it or lose it' conditions in future mobile spectrum licences only
- **Option 3 (alternative approach):** we would specify in legislation that spectrum licence enforcement conditions must include 'use it or lose it' conditions in all future radio spectrum band licences, to ensure efficient use of all spectrum bands

Consultation questions

13. Do you think that a 'use it or lose it' condition would promote spectrum trading, prevent under utilisation, enhance mobile coverage and/or mitigate barriers to entry?
14. In relation to any 'use it or lose it' condition, what do you consider would be the best measure of the 'level of use' of spectrum? Beyond 'level of use', what other conditions should be considered when designing a 'use it or lose it' condition?
15. Do you agree with our preferred approach for 'use it or lose it' to be applied to future mobile spectrum licences only? If no, please provide any supporting evidence.

Summary of responses

Stakeholders were broadly supportive of an increased focus on sharing, and targeting inefficient use of spectrum. However, the majority of respondents did not support mandatory 'use it or lose it' conditions.

Arqiva supported the government's preference for Option 2 to include 'use it or lose it' conditions in future mobile spectrum licences, noting that it would facilitate a dynamic, efficient market for spectrum. Energy Networks Association/Joint Radio Company were also supportive of such conditions, noting that national licences can lead to areas of unused spectrum. A respondent suggested such conditions should be included in a specific spectrum band to support network investment models, and that spectrum should be made available for a minimum seven year period to enable investment in wireless network infrastructure. Another respondent suggested that such conditions could have a transformative effect on mobile coverage in Scotland.

The BSG responded that there was not a clear consensus among its members. Some members considered it may be relevant for specific scenarios, but not for national spectrum licences subject to market-based spectrum awards and secondary trading. BSG also noted that Ofcom can already impose such conditions where appropriate.

Many respondents opposed mandating such conditions, citing possible negative consequences including adverse effects on incentives to invest in infrastructure or trade spectrum. Stakeholders, including TechUK, Telefonica, and Three also highlighted challenges associated with defining and enforcing the level of use, noting there may be legitimate reasons for spectrum to be unused. Instead, these respondents tended to support relying on the established trading and leasing framework and market-based incentives to maximise spectrum utilisation, noting that Ofcom already has discretionary powers to impose 'use it or lose it' conditions where necessary to address specific market failures. A number of respondents were supportive of Ofcom's 2019 spectrum sharing framework to facilitate efficient use.[30] Two respondents also argued Article 47 is an enabling provision and does not allow for mandating 'use it or lose it' conditions.

Government response

We have considered concerns raised by stakeholders around potential adverse impacts of mandating 'use it or lose' it conditions in spectrum licences. We have also noted challenges raised by stakeholders associated in particular with defining and enforcing the level of use.

Ensuring the efficient use of spectrum and preventing under-utilisation of spectrum, remains a key objective for the government in relation to spectrum, alongside improving mobile coverage to meet current demands, encouraging innovation and investment in new 5G services to meet future demands, and promoting competition in mobile markets.

Although we still consider that in some instances, 'use it or lose it' conditions could facilitate these objectives, we note potential risks associated with mandating that such conditions be included in all future mobile licences or all future spectrum licences. We also note that Ofcom has since introduced a new spectrum sharing framework, which includes a new way to access spectrum that is already licensed to mobile operators but which is not being used or planned for use in a particular area within the next three years.[31] This is effectively a 'demand-led' form of use it or lose it and should promote efficient use of mobile spectrum.

In light of these points, we have decided not to transpose the European Electronic Communications Code in line with our previously stated preferred approach. Instead, we will maintain Ofcom's broad powers to impose conditions on spectrum licences in line with its general duties. Reflecting the enhanced focus on level of use conditions in the European Electronic Communications Code, we will include a requirement for Ofcom to consider whether such conditions would promote efficient use of spectrum when designing

[30] In 2019, Ofcom implemented new rules to ensure that lack of access to the radio spectrum does not prevent innovation. It introduced a new licensing approach to provide localised access for different parties to the same spectrum bands. See Ofcom, 2019. *Statement: Enabling wireless innovation through local licensing.*
[31] Ofcom, 2019. *Statement: Enabling wireless innovation through local licensing.*

competitive awards. We think this strikes balance between the potential benefits of such conditions and the need for a case-by-case approach. We also expect Ofcom's new sharing framework to be kept under review and consider that enhanced reporting on spectrum utilisation could contribute to more efficient use of spectrum.

Section 4.3: Assignments for specific 5G bands (Article 54)

Article 54 allows for the use of at least 1 GHz of the 26 GHz band (24.25-27.5 GHz) and "sufficiently large blocks" of 3.4-3.8 GHz for 5G mobile services by 31 December 2020. This band will support the roll-out of 5G and create a harmonised 5G band. The article requires member states to make available (at least) 1 GHz within the 26 GHz band, subject to the absence of significant constraints and provided there is evidence of market demand. As we set out in the consultation, the government identified 26.5-27.5 GHz as the section of the band to be made available. This does not preclude other sections of the band from being made available. We consulted on the following options:

- **Option 1 (retain the status quo):** the status quo is maintained and no changes are made. Ofcom already has powers to release spectrum in the 26 GHz band
- **Option 2 (preferred approach):** allow the use of 26.5-27.5 GHz of the 26 GHz band for mobile, subject to market demand and the absence of significant constraints and the need to protect essential defence functions
- **Option 3 (alternative approach):** allow the use of 26.5-27.5 GHz of the 26 GHz band for mobile and subsequently make the rest of the 26 GHz band (24.25-26.5 GHz) available for mobile, subject to market demand, the absence of significant constraints and the need to protect essential defence functions

Consultation questions

16. If you hold licences in the 26 GHz spectrum band, what do you expect the cost of sharing by 2022 to be? (Please specify cost for both sharing or clearing.)
17. Is there a market demand for the 26 GHz band for 5G? (yes/no) If yes, please provide any supporting evidence and give an indication of timing.
18. What do you estimate the total value of making available the 26.5-27.5 GHz spectrum band for 5G services in the UK to be?
19. What do you estimate the total value of making available the whole 26 GHz spectrum band for 5G services in the UK to be?

Summary of responses

A limited number of responses commented on the cost of sharing or clearing the 26 GHz spectrum band. On demand for the 26 GHz band, and potential value of the band, a respondent stated that qualitatively there is a case for 26 GHz deployment, but it is unable to provide quantitative data because this is a nascent technology. BSG and others noted that as a pioneer 5G band, 26 GHz has an important role to play in the future of 5G, including for

example the delivery of mobile network capacity in locations of exceptionally high traffic density. TechUK responded that it is unclear how quickly market demand for 5G in the 26 GHz band will emerge and how widely that demand will be spread.

Respondents generally supported making the band available for 5G services subject to demand. A number of respondents (e.g. TechUK, BSG) noted that making the entire 26 GHz band available, rather than just 1 GHz, would deliver the greatest value to both operators and consumers. A respondent advocated auctioning the 26 GHz band in 2020 after the upcoming 700 MHz/3.6 GHz auction is completed. TechUK noted that in advance of significant market demand, UK-wide clearance would be disproportionate, adding that it is also important there is sufficient spectrum availability for fixed links going forward.

Some respondents including Three, noted that Ofcom had recently added the lower part of the band (24.25-26.5 GHz) to its spectrum sharing framework for indoor-only deployment. This exceeds the requirement to make 1 GHz of the band available. Three also noted that the government and Ofcom should also examine the 28 GHz band and the case for its harmonisation for 5G services at a European level.

Government response

Article 54 requires, among other things, that member states take all appropriate measures to allow the use of at least 1 GHz of the 26 GHz band (24.25-27.5 GHz) for wireless broadband services by 31 December 2020, where necessary in order to facilitate the roll-out of 5G, provided that there is clear evidence of market demand and no significant constraints for migration of existing users or band clearance.

We consulted on a preferred approach of allowing the use of the top of the band (26.5-27.5 GHz) to satisfy the requirements of the European Electronic Communications Code[32]. Subsequently, in its July 2019 Statement on shared access to spectrum supporting mobile technology,[33] Ofcom added the 24.25-26.5 GHz band ("the lower 26 GHz band") to its spectrum sharing framework for indoor use. Ofcom noted that this aligns with requirements to make spectrum at 26 GHz available by 31 December 2020. Ofcom also noted that it will continue to work with the Ministry of Defence on 26.5-27.5 GHz ("the upper 26 GHz band"). Ofcom outlined that it will consider how best to authorise other 5G uses across the full 26 GHz band (such as for outdoor high power mobile) in a way that optimises the use of the spectrum.

In light of Ofcom making the lower 26 GHz band available for indoor use, we have decided not to specify requirements for any part of the 26 GHz band to be made available for mobile services through transposition of the European Electronic Communications Code. However, in line with respondents who generally supported making the whole 26 GHz band available for 5G, we underline the importance of progressing work on this band in a timely manner, subject to market demand and the need to protect essential defence functions.

[32] Subject to market demand and the absence of significant constraints and the need to protect essential defence functions.
[33] Ofcom, 2019. *Statement: Enabling wireless innovation through local licensing.*

Section 4.4: Roaming (Articles 47(2), 52(2) and 61(4))

Roaming refers to the ability of end-users to use another provider's network when they do not have access to a signal in a given area on their own network. Roaming has the potential to improve consumer choice and solve the problem of "partial not-spots" (where one or more operators are present, but all four are not).

Articles 47(2), 52(2) and 61(4) each contain powers for the competent authority to, among other things, impose roaming obligations:

- Article 47(2) recognises that infrastructure and spectrum sharing can facilitate a more effective and efficient use of spectrum and support network deployment, especially in less densely populated areas - it gives competent authorities the power to provide for, among other things, commercial roaming access agreements when attaching conditions to rights of use for spectrum
- Article 52(2) allows for competent authorities to take appropriate measures when granting, amending or renewing spectrum rights of use in order to promote effective competition and avoid distortions of competition - these measures include, in justified circumstances, attaching conditions to the rights of use such as the provision of wholesale access and national or regional roaming
- Article 61(4) requires that competent authorities have the power to impose obligations to share passive (and where necessary, active) infrastructure or conclude localised roaming access agreements if directly necessary for the local provision of services, where there is no alternative means of access to end-users and market-driven deployment of infrastructure is subject to insurmountable economic or physical obstacles - these obligations can only be imposed where the possibility is provided for when granting the rights of use for radio spectrum

We consulted on the following options in the consultation:

- **Option 1 (retain the status quo):** the status quo is maintained - some powers already exist, however, Article 61(4) introduces new powers for competent authorities to impose access-related conditions
- **Option 2 (preferred approach):** we would transpose all European Electronic Communications Code powers for competent authorities to mandate or provide for the possibility of roaming, both in spectrum rights of use (Articles 47(2) and 52(2)) and access-related conditions (Article 61(4)) - in line with Article 47(2) and corresponding Recital 124, we will require that competent authorities consider providing for the possibility of roaming access agreements when attaching conditions to individual spectrum rights of use

Consultation question

20. Under what circumstances should roaming obligations be imposed to improve coverage or support network deployment?

Summary of responses

The majority of respondents to this question were opposed to the imposition of roaming obligations to improve coverage or support network deployment. Several respondents noted that mandating roaming would distort competition and reduce incentives for operators to invest and innovate in order to differentiate their services. Telefonica also noted that it would only provide coverage where an existing operator already is and so will not address "not-spots". Two respondents argued that roaming would deliver poor outcomes for consumers in terms of quality of service. A respondent noted that roaming arrangements should only be entered into on a voluntary basis. Three suggested that a roaming obligation would be the next-best option only if the SRN does not proceed.

TechUK noted that commercial roaming arrangements can lead to improved coverage in some circumstances but mandated roaming creates financial uncertainty and reduces incentives to invest. BSG noted that there was no clear consensus among its members. The Communications Consumer Panel noted that it has long-supported national roaming and its potential benefits for consumers. Arqiva highlighted the need for clarification on the role of wholesale-only undertakings in the context of Article 61 and the associated power for competent authorities to impose access conditions on wholesale undertakings. The Scottish Government was supportive of Ofcom having powers to impose roaming obligations. WIG noted that roaming should only be implemented as a last resort.

Government response

We appreciate stakeholder responses on the circumstances in which roaming obligations could be imposed to improve coverage or support network deployment. The government remains of the view that roaming could be a potential solution to future coverage problems. However, we note that since the consultation, we have concluded an agreement with the mobile network operators to deliver the Shared Rural Network programme by the end of 2025. Through this programme the government and industry will jointly invest £1 billion to increase 4G mobile coverage throughout the UK to 95% geographic coverage by the end of 2025.

We still intend to transpose the European Electronic Communications Code in line with minimum requirements to ensure that Ofcom has powers to impose such conditions, where appropriate, in spectrum rights of use (Articles 47 and 52) and subject to strict criteria as an access-related condition (Article 61(4)). However, we do not intend to require Ofcom to consider imposing such conditions, as previously stated in our preferred approach.

Section 4.5: Duration of rights (Article 49)

Article 49 is designed to ensure a minimum period of regulatory predictability of 20 years for harmonised spectrum for wireless broadband services, through a minimum duration of 15 years with rights of extension. The powers provided by this provision also allow member states to amend rights in objectively justified cases (in line with Article 18) or to extend rights based on a forward-looking assessment of the general criteria for an extension.

Article 49 aims to strike a balance between regulatory predictability and the need to encourage innovation and support different uses of spectrum. Member states can, where justified, deviate from the minimum duration requirements and extension procedures in specified cases, for example specific short-term projects and experimental use.

We consulted on the following options in the consultation:

- **Option 1 (preferred approach):** this would maintain the existing approach - under current UK legislation, Ofcom issues licences on an indefinite basis through its spectrum award process, with the exception of certain types of licences requiring shorter durations (in practice, existing arrangements are consistent with the requirements of regulatory predictability)
- **Option 2 (alternative approach):** we would expressly transpose the European Electronic Communications Code requirement for member states to grant individual rights of use for 'wireless broadband services' for a minimum duration of 15 years with rights of extension to ensure regulatory predictability for 20 years for harmonised spectrum

Consultation question

21. What is the impact of setting minimum durations for individual rights of use given anticipated UK market developments?

Summary of responses

We received five responses to this question. Three and others supported maintaining current arrangements. Three and another respondent noted that arrangements under current UK legislation already meet the requirements for regulatory predictability in the European Electronic Communications Code and therefore no change is required. A respondent supported the current approach of indefinite tradable licences, noting that a set licence term would create uncertainty and undermine incentives to invest towards the end of the licence term. A respondent also noted that, where set at an appropriate level, annual licence fees after the initial licence term should incentivise efficient use of spectrum.

Energy Networks Association/Joint Radio Company noted that the imposition of minimum terms could encourage competition by creating a mechanism for spectrum to be returned to market and redeployed. TechUK argued that this would be a retrograde step, instead advocating the current approach of indefinite licences with the ability to trade or lease.

Government response

In line with the majority of respondents to this question, we have decided to maintain our preferred approach as outlined in the consultation document to not specify minimum durations in UK legislation on the basis that, in practice, existing arrangements are consistent with the European Electronic Communications Code requirements of regulatory predictability.

Section 4.6: Impact assessment on spectrum provisions

As part of the public consultation process, we produced an assessment of the impact on the UK economy and businesses of implementing Articles 47 and 54 in relation to electronic communications networks as these were the spectrum articles we considered to have the greatest impact. This assessment was published alongside the consultation and we asked respondents a consultation question to help inform our analysis.

An updated detailed assessment of these articles will not be published alongside the consultation response for proportionately reasons as the direct impacts are expected to be very low. However, spectrum articles are included in the overarching impact assessment which is published alongside this document.

In relation to Article 47 as detailed in Section 4.2, the government will require Ofcom to consider whether implementing 'use it or lose it' conditions would promote efficient use of spectrum when designing competitive awards. This is in line with Ofcom's general duties already, and therefore we assess the only direct impact to be potentially some small administrative costs to the regulator. However, if and where Ofcom decide to impose such conditions, we assess this could lead to benefits of improved efficiency in use of spectrum and increased competition, and potentially some administrative costs (e.g. legal costs) for businesses. These are not direct impacts of the European Electronic Communications Code transposition. We would expect potential costs and benefits to form part of Ofcom's consideration for where conditions are imposed.

In relation to Article 54 as detailed in Section 4.3, Ofcom have made the lower 26 GHz band available for indoor use and we will not be specifying requirements for any part of the 26 GHz band to be made available for mobile services through transposition of the European Electronic Communications Code. We therefore assess there are no additional direct impacts.

22. How much would it cost to businesses to familiarise themselves with the spectrum provisions in the European Electronic Communications Code?

Summary of responses

We received two responses to this question. Two respondents expected these costs to not be material. A respondent explained that European Electronic Communications Code

spectrum articles generally reflect existing UK practice or are new provisions they are already familiar with.

Government response

Responses are in line with the assessment the government made on impacts at consultation, that they were small. We further expect familiarisation costs to have decreased since consultation given changes in the preferred options of Articles 47 and 54, as outlined above.

5. End-user rights

The European Electronic Communications Code provisions on 'end-user rights' expand the telecoms consumer protections set out in the current Universal Service Directive. It introduces new provisions to secure a higher level of consumer protection across member states and the UK. Some 'end-user rights' provisions apply to all users of communications services ('end-users') and others apply to different types of 'end-users' including 'consumers' (i.e. domestic users), microenterprises, small enterprises, and not-for-profit organisations.

Ofcom has a statutory duty under the Communications Act 2003 to further the interests of consumers, including specific powers to set 'General Conditions' that all providers of electronic communications networks and services must comply with.[34] A number of these conditions relate to consumer protection matters, including provisions on contracts, transparency and information requirements and equivalent access for disabled users of communication services which are based on the Universal Service Directive provisions.

Ofcom's existing power to set General Conditions will enable it to implement a significant number of provisions set out in the European Electronic Communications Code's end-user rights articles.[35] As such, in December 2019, Ofcom published its consultation with proposals to implement European Electronic Communications Code end-user rights provisions that are not already reflected in its General Conditions.[36]

Both the government and Ofcom recognise COVID-19 has brought significant challenges to communications providers including higher demand for their services and the need to prioritise support for vulnerable customers. Therefore, providers are likely to need additional time to make the necessary changes to their systems and processes to comply with the new rules being introduced from the Directive.[37] In light of this, on 7 May 2020, Ofcom stated that it will allow providers at least 12 months from the date of its statement to make the new rights available to customers. Ofcom's Autumn statement will set this out in more detail.

However, some of the new provisions in the European Electronic Communications Code will need to be implemented in legislation, and this needs to be in place by 21 December 2020. Therefore, in our consultation last year, we sought views on the implementation of end-user articles that may require legislative or other changes, as set out in the sections below.

Section 5.1: Non-discrimination (Article 99)

Article 99 obliges telecoms providers not to discriminate against end-users' access to telecoms services based on nationality, place of residence or place of establishment unless different treatment is objectively justified based on costs and risks. The article seeks to remove barriers for end-users in accessing telecoms services, such as mobile services and broadband on a cross-border basis across the EU, as noted in Recital 256 of the European Electronic Communications Code.

[34] Ofcom, *General Conditions of Entitlement.*
[35] Articles 98, 101-106, 108, 109, 111, 112 and 115 (a significant proportion of the provisions set out in the end-user rights elements are already reflected in Ofcom's General Conditions).
[36] Ofcom, 2019. *Consultation: Fair treatment and easier switching for broadband and mobile customers – Proposals to implement the new European Electronic Communications Code.*
[37] Ofcom's update dated 7 May 2020.

In practice, most fixed broadband and mobile consumers typically purchase services from communication providers based in their country of residence. As such, in general, we consider that the impact of this provision is not likely to be significant for UK consumers and industry. However, it may have some more relevance to:

- 'over-the-top' communication services that consumers are potentially more likely to purchase on a cross-border basis
- EU nationals visiting or working in the UK
- people living and working in Northern Ireland, given the close proximity to Ireland

In our consultation, we proposed to transpose Article 99 into UK law directly and for Ofcom to be given the powers to enforce this obligation, if necessary.

Consultation questions

23. Do you agree with our assessment that the requirements of this article are unlikely to have a significant impact on communication providers in practice? If you do not agree, could you set out the impact that it is likely to have, particularly the potential costs to communication providers of compliance, including whether differences in the costs/risks of providing cross-border access to networks/services would not be objectively justified?

24. Do you agree with our proposal to implement Article 99 directly into UK law and for Ofcom to be given the powers to enforce this obligation?

Summary of responses

There was strong support from all respondents for the government's assessment that the requirements of Article 99 are unlikely to have a significant impact on communication providers in practice.

A respondent agreed that the provisions would have limited practical impact. They said that requirements not to discriminate, unless different treatment was objectively justified based on risks and costs, was consistent with UK law. A respondent also argued that the applicability of non-discrimination should be reviewed depending on the terms of UK's exit from the EU, as this could impact on the costs of compliance with the article.

Cisco and another respondent both acknowledged that the requirements in Article 99 are unlikely to have a significant impact on communication providers. Three agreed and added that roaming providers are already accustomed to similar non-discrimination provisions through Regulation (EU) 2015/2120 (Roaming Regulation) and the Commission Implementing Regulation (EU) 2016/2286.

EchoStar Mobile supported the removal of barriers for end-users accessing cross-border services and highlighted that, in their view, it would be incredibly important for Internet of Things providers that cross-border services are made available throughout the EU.

All respondents agreed with our proposal to implement Article 99 directly and provide Ofcom with the powers to enforce its obligations.

Government response

Respondents agreed both with our assessment that the requirements of Article 99 are unlikely to have a significant impact on communication providers in practice and with our implementation proposals.

In the light of respondents' strong support of the government's assessment of the impact of this article and confirmation that most consumers purchase communications services in their home country, we consider it appropriate not to prioritise transposing Article 99 for the 21 December 2020 deadline.

Section 5.2: Certification of independent comparison tools (Article 103)

Paragraphs (2) and (3) of Article 103 of the European Electronic Communications Code require member states to ensure that consumers have free access to at least one independent comparison tool that enables them to compare and evaluate different broadband and phone services, both on price and quality of service. Article 103(3) sets out a number of criteria with which such a comparison tool must comply - this covers operational independence, accuracy and clarity of language.

In our consultation, we noted that Ofcom will need to amend its current price comparison voluntary accreditation scheme to meet the requirements of Article 103. In relation to ensuring that there is at least one independent comparison tool available for end-users based on the criteria Article 103, we noted that this would be met by the price comparison websites that would sign up to the amended voluntary scheme.

As highlighted in our consultation, we noted that there is a theoretical risk that no price comparison website would sign up, thus not fulfilling this requirement. We proposed that Ofcom have a backstop power to create their own tool meeting the requirements of Article 103, and sought views on this option.

Consultation question

25. Do you agree with the government's proposal for Ofcom to set up a comparison tool to comply with Article 103(2), which will not require new legislation, in the unlikely event that a single comparison could not sign-up to Ofcom's voluntary accreditation scheme, that will be amended to comply with Article 103(2)?

Summary of responses

Three and another respondent agreed with the backstop provision, but asked for further consultation on the details of the scheme to fully understand the demands on industry, the structure and governance of the tool and ensure it is unbiased and accurate. In addition Three felt that the extent of use of the tool needs to be considered in light of other provisions

which increased consumer's access to information in other formats, such as end-of contract and best-tariff advice notifications.

The BSG supported the proposal in principle but noted their concerns increasing the burden on businesses with ever more information requests. They argued that it would be better if current providers were instead allowed to meet the requirements themselves.

A respondent supported the proposal for Ofcom to set up a comparison tool in the unlikely event that one was needed. They also expressed more general concerns about the business model of most comparison sites (which depended on commissions and affected how a site presented information to consumers) and argued that to achieve accreditation they need to remove bias or, at a minimum, clearly identify any sponsored deals and explain why information has been presented in a particular way.

A respondent agreed that Ofcom could set up its own comparison tool but doubted this would solve a fundamental issue, as they see it, with comparison websites. It argued that communication providers differentiate their products in a myriad of ways but comparison websites only focus on price at the exclusion of other variables. It put forward the introduction of smart data as a way to enable customers to compare products and services between providers, based on what matters most to them. It also suggested that smart data should be delivered by industry rather than prescribed by the government in legislation.

The Communications Consumer Panel agreed with the proposal but noted that they have previously raised concerns about the Ofcom price comparison accreditation scheme being voluntary. They argued that this may mean some well-known comparators may attract consumers with advertising campaigns instead of fair and accessible, accredited processes.

A respondent proposed that Ofcom set up a comparison website but not as a matter of last resort. They argued that this would ensure objectivity inclusion of the whole market and not have any commercial objectives. It raised concerns that some comparison tools may not be completely transparent and whilst there is a requirement for tools to indicate where they lack a complete overview of the market, some consumers may be unaware of this and not choose the best deal for their needs. They also argued that they would like providers to be given the discretion to choose which third parties to provide information too.

Verizon did not have a view on the proposal but instead questioned the inclusion of larger enterprises. They argued that larger enterprises purchase services from a position of far greater power and thus can negotiate each single element and use a tendering process to compare offers. They agree that consumers, micro and small enterprises and not-for-profit organisations would benefit from a comparison tool but called on the government to explicitly clarify that the tool in Art. 103 is exclusively destined for consumers.

A respondent argued that business providers should be carved out of the comparison tool as its focus should be on consumer services.

Government response

Ofcom is responsible for taking forward transposition of this provision.

Ofcom has set out proposals to implement Article 103(1) transparency requirements, and Article 103(2) requirements for providers to share data with third parties in its European

Electronic Communications Code end-user rights consultation[38] (published in December 2019).

In relation to Article 103(2) requirements that telecoms end-users have access to at least one independent comparison tool, and that there is a voluntary accreditation scheme to certify tools that meet the requirements of this Article, Ofcom published, in December 2019, a separate consultation[39] document with proposals to update their current price comparison voluntary scheme that is in line with the European Electronic Communications Code requirements.

In this consultation, Ofcom stated that it would be satisfied that the consumer need would be met if an independent comparison tool existed in the market but did not choose to be certified, provided it would be eligible for certification if it so chose. In the unlikely event that no comparison tool existed that met the requirements of the European Electronic Communications Code, Ofcom said it would consider developing its own tool, although the regulator notes that there are currently seven members of its voluntary scheme and many more options in the wider market.

As stakeholders did not raise concerns with Ofcom having this backstop power, the government will proceed with its proposal that Ofcom is responsible for ensuring that consumers have access to at least one independent comparison tool, by potentially creating its own tool, in the unlikely event that none signed up to its amended voluntary scheme.

More broadly, European Electronic Communications Code proposals on the voluntary accreditation of price comparison websites complement a wider government and Ofcom strategy to improve information and data for consumers. In June 2019, the government published the Smart Data Review (SDR) consultation.[40] The SDR noted that Smart Data (i.e. data portability) has considerable potential benefit to better support consumers across markets, including in telecoms, and support the innovation of new data driven services.

The consultation proposed the development of an Open Communications initiative, that will require communications companies to provide consumers' data to third party providers at the consumer's request. The government proposed Ofcom, supported by legislation, takes forward the implementation of this initiative, and that Ofcom initially led work with stakeholders to explore the key issues. A response to the SDR consultation, and the comments made by stakeholders on smart data in this consultation, will be published by the government in due course.

Section 5.3: Bundled offers (Article 107)

Most consumers now purchase services as part of a bundle which includes a combination of communication and wider services, such as music and video streaming services. The European Electronic Communications Code recognises that different rules applying to

[38] Ofcom, 2019. *Consultation: Fair treatment and easier switching for broadband and mobile customers – Proposals to implement the new European Electronic Communications Code.*

[39] Ofcom, 2019. *Digital Comparison Tools for telephone, broadband and pay-TV.*

[40] BEIS, 2019. *Smart Data Putting consumers in control of their data and enabling innovation.*

different elements of a bundle could create difficulties for consumers in switching services and create a risk of contractual 'lock-in', hampering competition in the market.

To help address this, Article 107 gives consumers new and greater protection by mandating that, where services are provided in a bundle on their own, or with terminal equipment (such as mobile handsets, routers and modems), and where the bundle includes at least one 'internet access service' (such as fixed broadband) or a 'publicly available number-based interpersonal communications service' (such as fixed landline or mobile services), the following protections shall apply to *all* elements of that bundle:

- contract information requirements as set out in Article 102(3)
- transparency requirements as set out in Article 103(1)
- contract duration and termination requirements as set out in Article 105
- switching rules as set out in Article 106(1)

Additionally, where the consumer has the right to terminate one element of a bundle before the end of the contract term due to a lack of conformity with the contract or a failure to supply, the European Electronic Communications Code requires that the consumer must be able to cancel all elements of the bundle. Furthermore, Article 107(5) gives member states discretion to extend the new bundles protections in Article 107(1) to include other articles in the European Electronic Communications Code, that are not directly referenced in Article 107(1).

In our consultation, we proposed that Ofcom implements Article 107 through its General Conditions powers. We proposed to give Ofcom express powers to set General Conditions that apply to all the elements of a bundle, provided that the bundle includes at least one internet access service or a publicly available number-based interpersonal communications service, including the ability to exercise the discretionary powers set out in Article 107.

However, we noted that there is potential for other services to be in scope of these provisions which are subject to other regulated regimes, such as energy and banking, thereby causing potential 'regulatory clashes'. Our initial assessment was that such regulatory clashes are minimal at present, as most telecoms bundles include services that are within Ofcom's current remit. In the event that future bundling of services does include those subject to other regulated regimes, we proposed that Ofcom work with the regulator bilaterally to resolve any clashes. We sought views on this assessment of potential clashes and potential further solutions to address these.

Consultation question

26. Do you agree with the government's approach to implementing Article 107 by granting an express power to Ofcom to enable it to regulate communication bundles which include non-communication services?

Summary of responses

The BSG disagreed with the government's approach and instead proposed that the relevant regulator of the sector should have the mandate. They argued that an extension of regulations under existing General Conditions to the entirety of bundled offers would likely result in significant costs. Moreover, the BSG saw the ability to cancel an entire bundle (due to one section's failure to supply or lack of conformity) as a threat to future innovation in

products, offers and partnerships with non-communication businesses, thereby worsening the end user experience.

A respondent argued that empowering regulators to act on a cross sectoral basis is not the correct approach. It stated that each regulatory system is highly complex requiring specialised experience and cross sectoral regulation could not only prove burdensome for consumers and providers but also reduce market innovations. It noted that the way to stop consumers from being locked into bundles should be addressed by providers better informing consumers during the sales process.

One respondent, whilst not raising any general opposition, argued that new powers given to Ofcom should be limited to ensuring consumers are protected from “lock in” but do not constrain new initiatives.

A respondent did not agree with the government’s suggested approach and noted that Ofcom regulating non-communication services would confuse consumers and industry. It argued that Ofcom should not regulate aspects of the bundle where a competent regulator already exists and for other non-regulated services there are consumer protection laws in place, with enforcement lying with Trading Standards and/or the Competition and Markets Authority. It also called for clarity on the definition of what constitutes a bundle as they suggested the government, Ofcom and the European Electronic Communications Code all vary in their definition.

A respondent raised concerns that the government’s suggested approach would increase regulatory burden on industry and create uncertainty about the primacy of which regulator would lead on enforcement activities. It acknowledged the importance of providing protection for consumers purchasing bundles but they argued that the European Electronic Communications Code could adversely affect product innovation with the uncertainty caused by regulatory clash. One respondent was also concerned about the cancellation rights and stated that consumers would be better served with sectoral regulators and general consumer protections alongside clearer information throughout the sales journey.

Energy UK’s main concern was the complexity and regulatory burden that may be imposed on providers. They suggested that this could lead to increased costs for consumers or the removal of particular bundles from the market. They added that Article 107 could disrupt the development of the regulatory framework in other sectors.

Sky disagreed with the government’s proposed approach and argued a minimal copy-out of the article would be more appropriate. Sky added that the government’s approach would risk significant costs and impede innovation. They also stated that applying regulations such as gaining provider led switching to other services would result in unjustified costs unrelated to demonstrable consumer harm.

A respondent stated that the government should work with Ofcom to ensure that the article is transposed in a way that does not create a competitive disadvantage, and that where there is a regulatory clash, other sector specific rules should apply.

A respondent supported the government's approach and stated that bundles which include non-communication services can be an impediment to switching when said services are subject to different contractual obligations.

The Communications Consumer Panel supported the government's approach to grant Ofcom express powers and agreed that it would be the responsibility of the regulators to work together if a regulatory clash happened

Consultation question

27. Are there any other legislative changes that you think might be needed? If so, please specify these and provide any supporting information.

Summary of responses

Three argued that they were unable to answer this question due to a lack of information. They thought that the government needed to set out in greater detail the legislative changes and other measures that go beyond what is currently provided for in the Communications Act 2003. This detailed proposal should then be consulted on with stakeholders.

A respondent stated that number-independent interpersonal communications services are excluded from the scope of Article 107 but these services should be kept under review. The provider also argued that the government should not exercise the discretion allowed in Article 107(5) to apply the regulatory extension to other provisions in the European Electronic Communications Code.

A respondent recommended that bundles are defined per Recital 283, where services are purchased at the same time and the whole bundle is cheaper than individual services taken separately. They also suggested the switching obligations should only apply between equivalent bundles only.

Consultation question

28. Do you agree with the government's assessment that the potential for Article 107 to create 'regulatory clash' is limited at the current time? If not, please provide evidence and any views on how these could potentially be addressed.

Summary of responses

A respondent was concerned with the government's assessment that risk of regulatory clashes was limited and argued it should be monitored because of an increase in utility operators entering the market and bundling their services together. A respondent also argued that the regulation of bundles complicates gaining provider led switching as bundles may include non-telecoms services that require the end user to contact their current provider and raises another area of potential regulatory clash.

Three expressed concern around the possibility of regulatory clashes and urged the government to reduce the potential for confusion by taking a holistic approach in clarifying to consumers and providers which regulator and what rules apply. Three agreed that regulators should work bilaterally to resolve issues in the first instance but if the issue is not resolved then Ofcom should not be given extra powers to be the final decision maker. Rather, the regulator with the greatest expertise and historical oversight should resolve the issue. Three argued that a transparent framework for responsibility should be created and consulted on.

A respondent did not agree with the government's assessment of the limited potential for regulatory clashes. They mentioned several providers who already offer utilities bundled with communication services and argued that consumers would find it confusing if Ofcom started regulating other utilities.

The BSG argued that bundles including other utilities were not commonplace today but the threat of regulatory clash could impede a potentially natural commercial step. They also suggested that Ofcom should work closely with the other regulators through the UK Regulators' Network.

A respondent agreed with the government's position that the potential for regulatory clash is limited at present due to current market offerings. They suggested however that integrated bundles will become more common in the future and Ofcom should develop a memorandum of understanding with other regulators to set out adjudication practices.

A respondent said that the government had likely underestimated the potential for regulatory clash because of the growing number of providers who offer cross sector packages such as bill aggregation companies. They also raised the concern that additional regulatory constraints could reduce choice in the market.

A respondent stated they had not found any instances of regulatory clash and highlighted as evidence the role of the Financial Conduct Authority regulating consumer credit loans to purchase a mobile phone, as found in some bundles.

A respondent argued that the focus of regulatory clash insofar as Ofcom was concerned should be on over-the-top content services and apps instead of energy. As such, they believed there was minimal possibility of regulatory clash but where there are overlaps of regulatory obligations these should be kept under review and regulators should work together to resolve any issues.

A respondent disagreed with the government's assessment. They noted that there are several providers, who offer bundles across different markets. A respondent argued that the government should provide further details on how clashes will be preempted rather than managed as they occur. They also said that Ofcom and other regulators should proactively work together to decide how to operate if a clash happened as well as other areas where consumer detriment may occur.

Energy UK agreed that the potential for 'regulatory clash' is limited at the current time. However, they mentioned that they were not confident that measures had been put in place to resolve clashes when they occur. Energy UK suggested that the government works with

multiple regulators, including Ofgem and the Competition and Markets Authority amongst others, to create a consistent and proactive process wherein regulatory clashes can be avoided or resolved simply.

A respondent stated that the government's view on regulatory clashes being limited at the current time is potentially short-sighted. They argued that bundles are consistently evolving and a clear and consistent definition between the government and Ofcom of what constitutes a bundle is needed otherwise future innovations may lead to clashes. They also argued that bilateral resolution of clashes between regulators would lead to an inconsistent approach to disputes which could impact providers.

Sky disagreed with the assessment that the potential for clashes is currently limited. They noted that there are a number of bundles already in the market with services that fall under different regulatory regimes. Sky argued that there is a risk of an inconsistent application of regulation and this could be worsened if consumer protections in the different regulated sectors diverged in the future.

A respondent stated that there were very few bundles in the current market that offered non-telecoms services but further research should be carried out on where future clashes could arise. However, they argued that allowing regulators to resolve clashes bilaterally underestimated the complexity of the issue and the disparity between regulators in their approach to issues. A respondent suggested that a formal mechanism is created to resolve cases with agreed timing provisions, which would give industry time to react and implement any necessary changes.

Government response (questions 26, 27 and 28)

The government believes that its implementation approach, set out below, both limits the current risk of regulatory clash and ensures that existing consumer harms arising from bundles are minimised.

Although some respondents agreed with our assessment that the possibility of future regulatory clashes at the present time was minimal, a number were in disagreement.

The government acknowledges concerns around the seriousness and difficulty of the challenges should this be the case, and the differing viewpoints on how clashes might be negotiated.

In particular, the government notes concerns raised by stakeholders on the possibility of services subject to other regulated regimes, such as banking, being in scope of Ofcom powers.

We especially note the concerns around regulatory uncertainty, and the potential impacts on innovation, to the point where the bundles market might be stifled. This in turn has the potential to impede consumer choice and entail consumer harm. Even if new services are included, we note some of the potential consumer harms, including consumer confusion and the possibility of increased regulatory costs being passed on to consumers.

Modified implementation approach

In implementing the requirements of Article 107, the government wants to ensure that consumer harms caused by bundled services are addressed, both now and in the future. However, we recognise that this must be done in a way that - amongst other things - provides regulatory certainty, minimises the risk to innovation and therefore does not impact on consumer choice, whilst ensuring consumers continue to be protected.

In the light of stakeholder concerns, we are modifying our proposed implementation of Article 107.

We will instead take a more prescriptive approach to ensure industry, consumers and regulators are clearer on the scope and application of Article 107 to bundled services, and one that addresses current, known areas of consumer harm, whilst mitigating the risk of regulatory clashes.

Our modified approach is in line with the definition and scope of bundles, as set out in Recital 283 of the European Electronic Communications Code. To balance our policy objectives, our new approach is as follows:

1. For the purposes of granting powers to Ofcom to regulate bundles, to define bundles as existing where the elements of the bundle (comprised of services and/or terminal equipment) are provided or sold by the same provider under the same or a closely related or linked contract, and include at least an internet access service (e.g. fixed or mobile broadband) or a publicly available number-based interpersonal communications service (e.g. fixed landline or mobile services).

2. Ensure that only those services that are most relevant, and closely related to telecoms are included within the scope of the European Electronic Communications Code bundles provision and Ofcom's rules. In practice, our modified approach will capture most commonly included services in current telecoms bundles, such as digital services (e.g. music and video streaming services), Pay-TV services, and mobile handsets/routers (including those provided under credit agreements).

If the bundles market changes and other services that are not in scope of our implementation approach become more routinely included in bundles such that there is an increased risk of consumer harm (e.g the risk of contractual lock-in, or inability to switch by terminating the entire bundle), the government will look to legislate.

The government will make legislative changes to give Ofcom an express new power in line with the above modified approach.

Section 5.4: Articles 102-106, 115

We have received responses on a range of end-user rights focused articles listed. We consider this holistically below.

- Information requests for contracts (Article 102)
- Transparency, comparison of offers and publication of information (Article 103)
- Quality of service related to internet access services and publicly available interpersonal communications service (Article 104)
- Contract duration and termination (Article 105)
- Provider switching and number portability (Article 106)

- Provision of additional facilities (Article 115)

Summary of responses (Article 102)

A respondent noted their concern with Article 102(3) which they argue is impracticable, and impacts negatively on the telecoms industry. They, therefore, recommended the government take a proportionate approach to transposing and implementation of Article 102.

A telecoms provider noted their inputs to the European Commission and BEREC on helping to design a standard simplified consumer contact, supporting the government's approach to the template. However, this telecoms provider did note that they do not consider Article 102 has any scope in relation to usage volume limits and does not extend to the regulation of fair usage policies.

Summary of responses (Article 103)

A respondent noted that they think that business providers should be exempted from these provisions, and this tool should focus largely on the consumer.

Summary of responses (Article 104)

A respondent argued that businesses should be exempted from this provision.

Summary of responses (Article 105)

A respondent argued that under Article 105, where the starting point for selling to a business of up to 50 employees is a contract of 2 years length, the threshold is too short. Additionally the contract length of 2 years is too small. Another respondent supported these reservations regarding Article 105. A respondent also highlighted their concern regarding the scope of Article 105 in relation to contract termination and note that the existing obligation for providers to provide contract transparency is sufficient.

Summary of responses (Article 106)

A respondent outlined their thoughts on Article 106. They argued that the new provision of mandating gaining provider led switching is of critical importance and the approach that the European Electronic Communications Code has adopted would cause some complexities. Two respondents argued that the gaining provider led principle applies only to consumers, and should not be applied to large business contracts as the Directive sets out.

A respondent also agreed with the points above and urged the government to not go beyond the scope of Article 106. This respondent also warned of the impact of ancillary aspects of Article 106 which they contend will have cost and logistical complexities for providers across the telecoms industry.

Summary of responses (Article 115)

A respondent argued that the measure outlined in Recital 311 relating to Article 115 would be costly and complex for providers to implement. It recognised the benefit of consumers being able to retrieve email content when they switch provider, but urged the government to

be considerate of the level of complexity and burdens on industry that arise from implementing this provision.

Government response

Ofcom has statutory duties to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition.

They have specific powers in the Communications Act 2003 to set General Conditions in order to protect the interests of consumers. This includes powers to implement EU obligations that are specifically for the protection of end users.

It is these powers Ofcom are using to implement some European Electronic Communications Code articles. Ofcom, in their December 2019 consultation[41] set out their transposition proposals for Articles 102, 103 and 104.

Articles 105 and 106 are also set to be transposed by Ofcom using the same powers. This is with the exception of Article 105(5), and Article 105(6), where the government will need to ensure that compensation rules can be triggered in relation to Articles 105(5) and 107(2), where these are being implemented in national legislation and not through Ofcom's general conditions.

[41] Ofcom, 2019. *Digital Comparison Tools for telephone, broadband and pay-TV.*

6. Universal service

In our consultation, we explained that the principle of universal service, with obligations placed on designated providers to guarantee a decent level of service, is a longstanding feature of the UK telecoms framework, the nature of which has evolved along with technology. These existing universal service obligations (USOs) implementing the requirements and enabling provisions of the Universal Service Directive[42], include:

- from 2003, the provision, availability or supply of certain services at affordable prices that are uniform throughout the UK[43] - these include publicly available telephone services (i.e. fixed telephony) and special measures for consumers on low incomes or with special social needs
- from 2018, the provision of broadband connections and services to premises throughout the UK to meet a minimum specification, including affordability requirements[44]

The new provisions in the European Electronic Communications Code, which consolidates the Universal Service Directive with the other Directives in the EU telecoms framework into a single directive, reflect further advances in technology, and help ensure that the USO can be adapted to meet the specific national circumstances. These new provisions are set out in Articles 84 to 92:

- Article 84 on 'affordable universal service' outlines that all consumers shall have access, at an affordable price, to an "available adequate broadband internet access service" and to "voice communications services" at a fixed location. It also includes discretionary provisions enabling member states to extend affordable universal services to non-fixed (mobile), services where necessary to ensure full social and economic participation in society, and to extend the scope of the provisions to microenterprises, small and medium-sized enterprises and not-for-profit organisations.
- Article 85 on the 'provision of affordable universal service' significantly changes the current USO provisions. In particular, whilst the European Electronic Communications Code continues to require that member states consider affordability for people on low incomes and those with special social needs specifically, the article changes the approach to deciding which providers should be required to offer social tariffs to such consumers, if they are required. Where member states establish that retail prices are not affordable for these groups of consumers, Article 85 requires member states to ensure that support is provided to these consumers or to require all providers to offer them special tariff options or packages. Only in exceptional circumstances does Article 85 permit member states to impose the obligation to offer special tariffs on 'designated undertaking(s)' like BT and KCOM, the designated universal service providers. The European Electronic Communications Code provides examples of people with 'special social needs' who might be beneficiaries of

[42] European Commission, 2002. *Universal Service Directive*
[43] *The Electronic Communications (Universal Service) Order 2003*
[44] *The Electronic Communications (Universal Service) (Broadband) Order 2018*

those tariffs as older people, people with disabilities and those living in rural or isolated areas.

- Article 87 on the 'status of the existing universal service' allows member states to ensure that legacy USO services (such as public pay telephones) other than adequate broadband and voice communications services at a fixed location, and that are subject to universal service provisions in force on 20 December 2018, remain available or affordable. Article 87 also requires member states to complete a review of these obligations by 21 December 2021, and every three years thereafter, to facilitate the removal of legacy provisions where the services are no longer relevant.
- Article 92 on 'additional mandatory services' confirms that member states may make services in addition to those included in Article 84 publicly available, but notes that no compensation mechanism shall be imposed.
- The remaining articles that comprise the USO provisions feature only minor drafting changes: these are Article 86 ('Availability of universal service'), Article 88 ('Control of expenditure'), Articles 89 and 90 ('Cost' and 'Financing of universal service obligations' respectively), Article 91 ('Transparency') and Article 92 ('Additional mandatory services').

Summary of responses

For Article 85, we asked - do you agree that it should continue to be for Ofcom to consider affordability as part of the broadband USO and, if they identify an issue, to take the appropriate action, e.g. through the implementation of a special tariff?

Respondents unanimously supported Ofcom considering the issue of affordability as part of the broadband USO, but a range of views were given on appropriate actions to address any issues arising, and concerns were raised about the implementation of a social tariff in particular.

While one respondent agreed that Ofcom needs to monitor prices for affordability, it noted that Ofcom already collects the required information as part of its regular statutory information requests. The respondent suggested that Ofcom extends collection of this information to all retail operators, not just just the larger ones.

A respondent called upon Ofcom to continue providing evidence for its assessment of affordability, subject to consultation with industry and consumer bodies.

In terms of the proposed social tariff, it was argued that consideration should be given to the special tariffs that are already offered by providers before imposing any new financial burdens on them. For example, a respondent suggested that Ofcom should have full regard to services that are already available in the market and avoid imposing additional financial burdens on providers. A respondent argued that the aim should be to deliver affordable services through commercial means wherever possible.

Citizens' Advice argued that broadband is an essential service that all consumers should be able to access at a cost that reflects their needs and financial circumstances. However, they argue that existing arrangements are not sufficient for the needs of low income consumers. And take-up of existing special tariffs such as 'BT Basic' is low, around 10% of those claiming benefits - the response recognises the causes for this are likely to be complex.

Citizens' Advice argued that in addition to the social tariff, Ofcom should use its powers under Article 85 to ensure vulnerable or low-income customers pay a fair price. If a supplier knows a customer is, for example, on a means-tested benefit or is potentially vulnerable, they should be required to either: put that customer on to the best deal they have available internally; or provide that customer with a fair price, that reflects the cost of providing the service.

A respondent argued against the introduction of a social tariff for broadband, noting that the issue of how to ensure affordability in the broadband USO has already been extensively considered as part of Ofcom's implementation of the government legislation underpinning the USO.

A number of responses questioned which providers should be in scope of a social tariff. For example, three respondents argued that any provision of a new special tariff should not be imposed on non-Universal Service Providers, i.e. beyond BT and KCOM. Another said that it would not be comfortable with Ofcom requiring all providers to provide a social tariff which might not be aligned with their commercial strategy. And there were calls for any subsidies for individuals to be funded by the government.

The need for an open dialogue between Ofcom and government, specifically with Building Digital UK (BDUK) on the assessment on affordability was noted. A respondent argued Ofcom should coordinate with BDUK to ensure Universal Service Providers do not overbuild on areas benefiting from public subsidy. It argued that network operators benefitting from public subsidy must comply with similar affordability requirements as part of their open access obligations, cautioning that a misalignment between these processes could mean premises in rural areas becoming eligible for the USO requests despite publicly subsidised deployment. This could result in the Universal Service Provider overbuilding these networks in order to comply with the USO legislation.

A respondent highlighted the need for coordination of Ofcom's role under Article 85 to monitor and review retail pricing with the existing Broadband USO. The interaction between the USO and other public subsidy programmes under BDUK for example is considerable, and Ofcom must reflect on how their decisions on a pricing mechanism can best align with this. A respondent therefore encouraged Ofcom to have an open dialogue with BDUK on pricing given the role of BDUK in assessing pricing and adequate market rates. Such a discrepancy between the USO and BDUK schemes could seriously undermine the functionality of these public subsidy programmes and must be mitigated where possible.

In terms of mobile, Three argued that no justification had been made for a new provision for an affordable mobile tariff. It called for any mobile USO obligations to be backed by a full impact assessment to ensure an unfair burden is not placed on mobile providers. A respondent argued that an affordable mobile universal service, alongside the potential action on the affordability of the broadband USO, could have a serious cost impact.

Government response

Affordability of telecoms services is a key issue, and essential for achieving digital inclusion.

We note the concerns raised regarding the potential implications of a social tariff in particular, and should the need for a social tariff be established, we will work with Ofcom to factor these considerations into its design.

We also note the concerns about the need for BDUK to maintain a dialogue with Ofcom on issues of affordability.

We will bring forward legislation which will:

- **introduce an affordable mobile universal service should this be necessary and proportionate in the future:** we will amend the Communications Act 2003 to ensure that the position that universal service provisions can extend to mobile services is clear, as the widespread availability of mobile services is important for both social and economic reasons. While we will not implement the universal service provisions in this way at this stage, we reserve the right to do so. If we decide to exercise this power in the future, a public consultation and impact assessment would be carried out.

- **Require Ofcom to monitor the evolution and level of retail prices for fixed broadband and telephony, and, if considered necessary by the government, to provide advice on the affordability of USO services for consumers with low incomes and special social needs and potentially take action in relation to such services:** Ofcom will continue to monitor the evolution and level of retail prices for affordability. Additionally, following the transposition of Article 85, if an affordability issue for consumers with low incomes or special social needs is noted by Ofcom, then, if the Secretary of State for Digital, Culture, Media and Sport is in agreement, the Secretary of State may ask Ofcom to provide advice on the issue to the Secretary of State. Ofcom may conduct a specific review on the potential remedies. This review could propose actions to ensure that USO services are affordable for consumers with low incomes or special social needs, taking into account any existing commitments by communications providers. In relation to any affordability gaps for consumers with low incomes or special social needs, any such action recommended by Ofcom to the Secretary of State should be limited to the nature of a requirement on communications providers to offer special tariffs, including the level of such tariffs. The approach that we are taking ensures that any final decisions on the need for a social tariff for specific social groups, relative to other alternative forms of support considered by the government, are taken by the government

The Government is of the view that the requirement to review legacy USO services and the consequential new power to remove these services in Article 87 should be transposed into UK law in order to comply with the Directive for the duration of the Transition Period and subsequently sunsetted. The mandatory review and consequential power will not be executed and will be sunsetted with removal from UK law at the end of the Transition Period. This is on the basis that the UK will not be required to comply with EU deadlines that fall after the end of the Transition Period. UK law will preserve the existing legal requirement to ensure that legacy USO services remain affordable and available to end-users.

Regarding Article 92, whilst we understand that technology is continually evolving and new services can quickly become essential for consumers and businesses, there is no clear rationale for adopting a broad power without a clear objective in the near-term. Since no strong arguments for transposing this discretionary article were presented by respondents to the consultation we do not intend to transpose it at this time. However, this would not prevent the government from legislating in the future, should the need arise.

7. Approaches to other articles

In our consultation we asked a broader question for input on the provisions in the European Electronic Communications Code. In this section we address stakeholders responses on these issues and any additional areas not yet explored in the response document.

30. Do you have any concerns about any of the articles not explored in this consultation document? (Yes/No/Don't know) If yes, what are your concerns?

Section 7.1: Right of Appeal

Article 31 sets out that undertakings have the right to appeal against decisions of a NRA or other competent authority to an independent body.

Summary of responses

Several respondents suggested that Article 31 appears to restore the right of appeal on a full merits basis, rather than judicial review set out in the Digital Economy Act 2017. These stakeholders advocate an implementation of Article 31 that restores of a full merits basis procedure for the rights of appeal.

Government response

We note the concerns raised by stakeholders over Article 31 (Right of Appeal). It is the government's intention to ensure that the appeals process is an effective mechanism for industry to appeal against regulatory decisions. The government considers the current appeals process sufficiently robust as set out in the Digital Economy Act 2017 and the Communications Act 2003, and does not intend to make any further changes to it at this time.

Section 7.2: Security

Articles 40 (Security of networks and services) and 41 (Implementation and enforcement) ensure providers take appropriate and proportionate measures to manage security risks. These provisions update equivalent provisions in the Framework Directive which have been implemented in sections 105A-D of the Communications Act 2003.

The government is currently reviewing the legislative framework for the security and resilience of telecoms networks and services as part of the proposed telecommunications security bill. While the European Electronic Communications Code introduces some changes to strengthen the current legislative framework, these will not be included in the Statutory Instrument transposing the European Electronic Communications Code. Instead, the government intends to take forward the substance of these changes in new security legislation we will introduce in the Autumn.

Section 7.3: Deployment and operation of small-area wireless access points

Article 57 provides for the deployment of "small-area wireless access points" and limits the degree to which public authorities can regulate their deployment and operation. Existing planning laws already provide for the majority of provisions in this article and exempt small cell systems from planning permits. Small cell systems are potentially beneficial for the roll-out of 5G. We are exploring with the Ministry of Housing, Communities and Local Government and the devolved administrations (as planning is a devolved matter) whether any changes to planning legislation will be needed to transpose these provisions and, if so, what would be an appropriate legislative vehicle. Each administration will need to decide whether to consult on any changes Article 57 requires.

Section 7.4: Emergency communications

Article 109 provides for emergency communications and the single European emergency number. End-users must have access to the european emergency number '112' free of charge.

Summary of responses

Cisco urged for clarity over the transposition and implementation of Article 109 due to the significant scope the article gives member states.

Government response

We have noted the concerns Cisco have raised in relation to Article 109. Ofcom has sufficient powers under the Communications Act 2003 to impose such an obligation by way of general conditions and has proposed to do so.[45] Therefore, we do not need to make further legislative changes.

Section 7.5: Public warning systems

Article 110 introduces a new requirement that where major emergencies and disasters are developing or imminent, public warnings are transmitted by mobile operators to the end-users concerned. This warning can be transmitted using traditional number based systems or over mobile data (including using a mobile app), if it is equivalent in coverage and capacity to the number based systems.

As this requirement is only relevant to public warning systems that are in place, it does not need to be transposed. The government is considering the opportunities of a mobile alerting UK capability to support emergencies and civil contingencies preparedness.

[45]Ofcom, 2019. *Consultation: Fair treatment and easier switching for broadband and mobile customers – Proposals to implement the new European Electronic Communications Code.*

Section 7.6: Interoperability of car radio and consumer radio receivers and consumer digital television equipment

Digital radio is now very widely fitted in new cars, but there is still a small proportion of new cars where analogue radio is standard fit. In order to ensure that all consumers purchasing a new car can enjoy the many advantages of digital radio, Article 113 requires that all passenger vehicles with integrated radios first placed on the market after 21 December 2020 must be fitted with radios which are capable of receiving digital radio stations. Article 113 will be transposed through legislation managed by the Department for Transport, which recently consulted on this matter.[46]

[46]DFT, 2020. *Improving road vehicle standards enforcement.*

8. Remaining provisions

Two significant, additional factors have impacted our preparation for the transposition of the European Electronic Communications Code: the UK's exit from the EU and the COVID-19 pandemic.

Following the UK's exit from the European Union on 31 January 2020, the UK is in a transition period, which will end on December 31 2020. Our intention throughout this process has been to meet our legal and international obligations under the withdrawal agreement act to transpose the European Electronic Communications Code by the transposition deadline of 21 December 2020.

However, some articles in the European Electronic Communications Code have limited application to the UK during the short window of 10 days between the transposition deadline and the end of the transitional period, meaning that in practice the UK would be required to put into place preparatory steps for a substantive obligations that would only take effect after the end of the transition period. In these cases we consider that transposition is not a priority.

The COVID-19 pandemic has had a significant impact on the government, Ofcom and industry capacity to undertake business as usual activities. This is not unique to the UK, with many countries reprioritising work to deal with the pandemic. In the UK, the practical effect for the European Electronic Communications Code is that this will impact our ability to transpose requirements in full by 21 December 2020, as we have necessarily focused efforts on dealing with the response to the pandemic. We have sought, and will continue to seek, to make progress wherever possible within the timeframe, focusing efforts where they will have the greatest impact, such as supporting our plans for nationwide gigabit connectivity.

Section 8.1: General approach to new harmonisation provisions

Through the European Electronic Communications Code, new provisions have been introduced to ensure consistent remedies across the EU. This is typically done in one of several ways:

- introducing a requirement to notify the Commission when enacting regulation and justify any non alignment with the Commission's view
- requiring cooperation with the Commission and/or BEREC
- only being able to enact regulation on direction from the Commission
- having regard to specific, Union wide regulations that the Commision or BEREC set

A good example of this is Article 33. It introduces what is known as the 'double lock veto' provision, which could have ramifications for the UK's competence in domestic telecoms matters. The provision in question gives the Commission the power to, in some circumstances, require the withdrawal of corrective measures proposed by Ofcom for the UK telecoms market. We note two further articles with a more detailed explanation of our position below.

This is a well established European principle and similar requirements already exist in UK law. However, given the UK's exit from the EU and the short period of time such duties would impact the UK, we are not proposing to transpose these provisions. We think it is unlikely that these duties will come into effect between 21 December and 31 December 2020. While it would be possible to transpose these requirements then remove them at the end of the transition period, this seems an inefficient use of resources given the current constraints on the government and the limited period in which the substantive obligations under this provision have any practical effect.

In regard to the existing provisions in EU law, these will be dealt with at the end of the transition period in a corrections exercise using the powers from the European Union (Withdrawal) Act 2018.

Section 8.2: Transnational markets

Article 65 requires that on direction from the Commission, Ofcom must assess transnational markets in collaboration with its European equivalents. This requirement already exists in UK legislation. However, Article 65 introduces a new power for Ofcom to jointly identify a transnational market with European regulators, without direction from the Commission (but requiring notification to it).

We do not consider it appropriate to transpose this new addition. A transnational market including the UK has yet to be identified and is unlikely to be in the short term - so it is unlikely that the Commission would direct Ofcom to do so. Ofcom are also highly unlikely to find a transnational market during the transition period and need to notify the Commission (noting that its Wholesale Fixed Telecoms Market Review has already proposed a UK only market for 2021-2026). We think therefore that the substantive obligations in this provision are unlikely to have any practical effect until after the end of the transition period.

Finally, it is unlikely the new duty would come into effect during the ten day window between the transposition deadline and the end of the transition period on 31 December 2020.

Section 8.3: Termination rates

Ofcom currently conducts separate market reviews into wholesale fixed call origination and termination markets, and mobile call termination markets. In its reviews Ofcom has determined that each individual operator terminating calls holds significant market power on its network. The regulator imposes wholesale price caps accordingly.

Article 75 of the European Electronic Communications Code sets out the Commission's approach to setting a single, Union-wide maximum call termination rate for mobile services and for fixed services. The provisions set out are wholly new and move the powers for setting termination rates from NRAs to the Commission. The article also requires the Commission to consider the need to allow for a transitional period of no longer than 12 months in order to allow adjustments in member states where this is necessary on the basis of rates previously imposed.

Summary of responses

Verizon supported the new EU-wide price cap for termination rates introduced in the Code. It thought that differential rates are particularly damaging to global providers, and those with traffic coming from countries which have very low termination rates e.g. the US. It acknowledged that the UK does not currently allow this practice, but it should be considered in the context of EU Exit. We welcome Verizon's offer to provide further information on this issue.

A respondent sought clarity over the implementation of the article and how it would work after EU Exit.

Government response

The transition period ends on 31 December 2020 and it is the government's policy that it will not be extended. This provision will not have a substantive impact on the UK before the end of the transition period. We therefore consider it appropriate not to transpose this Article into UK law. However, this does not mean that Ofcom would not be able to have regard to the Commission's approach to setting termination rates, if it considers it to be an effective international example that would improve the quality of its regulatory regime.

Section 8.4: NIICS provisions (Definitions, Security, Interoperability and End-User Rights)

The European Electronic Communications Code broadens the scope of the legislative framework recasting electronic communication services to include number independent interpersonal communication services (NIICS). This is a move to 'level the playing field' between 'over-the-top' and traditional telco services (number based interpersonal communication services i.e. SMS and voice), applying regulation to voice over internet protocol, messaging and e-mail services.

NIICS services are principally subject to EU instigated interoperability powers, some consumer protections and light touch security regulation

Summary of responses

Cisco and BSG stated that while this was not covered as an article in the consultation, the new additions to Article 61 represented a significant departure from the current framework. It considered that this granted NRAs or a competent authority potentially wide-ranging powers. It welcomed clarity on which this authority would be granted the NIICS interoperability powers.

Government response

The government's approach is to extend Ofcom's information gathering powers to NIICS to help build a better understanding of the market and inform future policy. The government is not seeking to extend an interoperability power to cover these services through transposition of the Directive. This power is exercised by the EU where a threat to end-to-end connectivity is found in at least three member states and it is unlikely that the provision would be applicable during the 10 days between the transposition deadline and the end of the transition period.

The potentially wide-ranging and complex nature of the NIICS requires work involving several government departments, engagement across the communications industry and detailed analysis and policy work. As such, the government has not treated the application of the narrow band of consumer rights and light-touch security provisions to NIICS as critical for the 21 December 2020 deadline.

Section 8.5: National regulatory authority independence

Articles 6, 7 and 8 are relevant to Ofcom's independence from provider and political influence, they include that the national regulatory authority should exercise powers appropriately and transparently with access to necessary resources.

The government believes that these principles are appropriately established in domestic law and that limited introductions, including a three year minimum term for the Chair of Ofcom, will not have a practical impact during the transition period. In light of the COVID-19 circumstances, no further transposition of these articles is to be prioritised for the 21 December 2020 deadline.

8. ANNEX A: Summary of approach for remaining articles

As set out in the main document, each article that places a requirement on the UK in the European Electronic Communications Code falls into one of three categories:

- **Articles which we consulted on given their potential to support the UK's digital ambitions.** These are dealt with in the main body of this document by theme.
- **Incremental changes to the existing framework which have been transposed in a minimal way or already exist in UK legislation.** Where these have not been addressed in the main body of the text, the rationale for transposition can be found here
- **Deprioritised from the 21 December 2020 deadline.** The wider rationale for this approach can be found in Section 8 including specific justification for individual provisions.

For ease of reference we set out where each article falls below.

Category	**Article**
Articles which we consulted on given their potential to support the UK's digital ambitions	2, 3, 20, 22, 29, 40, 41, 47, 49, 52, 54, 57, 61 (4), 67, 76, 79, 85, 87, 92, 103, 107, 110.
Incremental changes to the existing framework which will be transposed in a minimal way or already exist in UK legislation	1, 2, 3, 4, 5, 6, 9, 10,11,12,13,14, 15, 16, 17,18, 19, 21,23, 24, 25, 26, 27, 28, 30, 31, 34, 35, 36, 37, 38, 39, 42, 43, 44, 45, 46, 48, 50, 51, 53, 55, 56, 58, 59, 60, 61, 62, 63, 64, 66, 68, 69, 70, 71, 72, 73, 74, 77, 78, 80, 81, 82, 83, 84, 86, 88, 89, 90, 91, 93, 94, 95, 96, 97, 98, 100, 101, 102, 104, 105, 106, 108, 109, 111, 112, 113, 114, 115, 116.
Deprioritised from the 21 December 2020 deadline	The application of Articles, 40, 41, 61 and consumer protection articles to number independent interpersonal communications services as well as Articles, 7, 8, 32, 33, 65, 75, 99.

Incremental changes to the existing framework which will be transposed in a minimal way or provisions that already exist in UK legislation

Art.	Provision	Rationale
1	**Scope and aim**	No transposition required - this sets out the aim of the Directive.
4	**Strategic planning and coordination of spectrum policy**	Covered by Communication Act 2003 sections 3, 4, 5, and 22, and by Wireless Telegraphy Act 2006 section 3.
5	**National regulatory authority/competent authority areas of responsibility**	This specifies competencies for Ofcom which are already within their remit.
6	**Legal and functional independence of national regulatory authorities and competent authorities**	Section 1 of the Office for Communications Act 2002.
9	**Regulatory capacity**	Ofcom has revenue raising powers, s28 and 38-43 in the Communications Act 2003.
10	**National regulatory authority body of european regulators for electronic communications participation**	This is covered by Ofcom's duties under section 3 of the Communications Act 2003.
11	**National authority co-operation**	Section393 Communications Act 2003 (which specifically references the Competition and Markets Authority and various Acts related to competition and consumer issues) and the Enterprise Act 2002 Part 9, which covers information sharing.
12	**General authorisation of electronic communications networks and services**	This article updates the general authorisation provisions which will require incremental changes in line with our general approach. As set out in section 8, we are not proposing to transpose the new provision exempting number independent interpersonal communications services from the general authorisation regime at this time.
13	**General authorisation conditions: radio spectrum, numbering resources and specific obligations**	This will require incremental changes in line with our general approach to the existing framework in the Communications Act 2003 and the Wireless Telegraphy Act 2006.
14	**Declaration to facilitate the exercise of rights to install facilities and rights of**	s.146 Communications Act 2003.

	interconnection	
15	**Minimum list of rights derived from the general authorisation**	Communications Act 2003 sections 4, 51, 58, 66, and 106 & 107, and the Electronic Communications and Wireless Telegraphy Regulations 2011 Regulation 3, Ofcom's General Conditions, Wireless Telegraphy Act 2006 section 8.
16	**Administrative charges**	This will require incremental changes in line with our general approach. Article 16 is largely covered by s.38 and s.39 of the Communications Act 2003.
17	**Accounting separation and financial reports**	This is already transposed in Section 77(3)(b) &(c) of Communications Act 2003.
18	**Amendment of rights and conditions**	This exists in Communications Act 2003 Section 48 and Wireless Telegraphy Act 2006.
19	**Restriction of withdrawal rights**	Covered by s. 45,47,48,48A, of the Wireless Telegraphy Act 2006.
21	**Information required with regard to the general authorisation, rights of use and specific obligations**	This provision is already extensively covered by existing UK legislation.
23	**Consultation and transparency mechanism**	The principle change relates to a specified minimum consultation period of 30 days. This was already covered in both the Communications Act 2003(e.g. s48A) and in the Wireless Telegraphy Act 2006 (e.g. s8C).
24	**Consultation of interested parties**	This provision exists in s. 16, 48, 49 and 403 of Communications Act 2003.
25	**Out of court dispute resolution**	This obligation is already met as the UK already has two existing relevant alternative dispute resolution schemes: the Ombudsman's Communication Service, and the Communication & Internet Services Adjudication Scheme (CISAS).
26	**Dispute resolution between undertakings**	Section 185(1) of the Communications Act 2003 already applies to such parties. Sections. 3, 186, 187, 188, 190 also apply.
27	**Resolution of cross-border disputes**	Overall, there are some significant changes to this article from the previous directive. We will transpose these in line with our general approach.
28	**Radio spectrum coordination among member states**	Covered by Communications Act 2003 sections 3, 4, 5 and 22, and by Wireless Telegraphy Act 2006

		section 3.
30	**Compliance with the conditions of the general authorisation or of rights of use for radio spectrum and for numbering resources and compliance with specific obligations**	Already met by numerous sections in the Wireless Telegraphy Act 2006 and the Communications Act 2003.
31	**Rights of appeal**	Already met by sections 192 to 196 of the Communications Act 2003, which allows affected parties to appeal to the Competition Appeals Tribunal.
34	**Implementing provisions**	This is addressed in Communications Act 2003 Section 4A.
35	**Peer review process and radio spectrum policy group**	Covered by section 22 of the Communications Act 2003.
36	**Harmonised assignment**	Covered by sections 8 and 14 of the Wireless Telegraphy Act 2006, and powers under s.2(2) of the European Communities Act 1972.
37	**Joint authorisation process to grant individual rights of use for radio spectrum**	Current UK legislation does not preclude joint authorisations. Ofcom's current powers under the Wireless Telegraphy Act 2006 are sufficient to allow for a joint authorisation process where appropriate.
38	**Harmonisation procedures**	Most of the provisions in the article are not obligations for the UK. UK applicable articles are addressed by Communications 2003 Section 4A (2) & (3)
39	**Standardisation**	Most of the Article is already transposed under the current legislation under s 4(9) of the CA 2003. The additional mandatory requirements under the European Electronic Communications Code applying to circumstances relating to end-to-end connectivity, facilitation of provider switching and portability of numbering and identifiers will be transposed in line with our general approach.
42	**Fees for rights of use for radio spectrum and the right to install facilities**	Covered by sections 3, 12, 13, 14, and 21-23 of the Wireless Telegraphy Act 2006, and sections 3 and 38 of the Communications Act 2003.
43	**Rights of way**	See Regulation 3 of the Electronic Communications and Wireless Telegraphy Regulations 2011, s106 of Communications Act 2003, s3 and para 1 and 17 of Schedule to Office

		of Communications Act 2002.
44	**Co-location and sharing of network elements and associated facilities for providers of electronic communications networks**	Communications Act 2003 sections 73, 107 and 109.
45	**Management of radio spectrum**	Communications Act 2003 sections 3, 4, 5, 7, and 22 and sections 2, 3, 8, 8B 9, 9ZA, and 14 in the Wireless Telegraphy Act 2006.
46	**Authorisation of the use of radio spectrum**	Mostly covered by sections 3, 8 and 9 of the Wireless Telegraphy Act 2006 and section 3 of the Communications Act 2003. A minor change required to reflect the enhanced focus on spectrum sharing when deciding on spectrum authorisation regimes. This aligns with the government's strategic priorities for spectrum management and will be done in line with our general approach to transposition.
48	**Granting of individual rights of use of radio spectrum**	Covered by sections 9, 14, 31 and Schedule 1 of the Wireless Telegraphy Act 2006.
50	**Renewal of rights**	Covered by Ofcom's general duties and sections 9, 12, 13, 14 and Schedule 1 of the Wireless Telegraphy Act 2006.
51	**Transfer or lease of individual rights of use for radio spectrum**	Article 51 extends the obligation for member states to allow undertakings to transfer or lease spectrum from specified harmonised bands to all individual rights of use, provided licence conditions are maintained and subject to certain exceptions. It also updates procedural requirements. These changes will be transposed broadly in line with our general approach and should promote trading and support government aims around more dynamic spectrum markets.
52	**Competition**	Covered by Communications Act 2003 sections 3 and 4, and Wireless Telegraphy Act 2006 sections 3, 9, 9ZA, 14, 29, 30, and Schedule 1.
53	**Coordinated timing of assignments**	Covered by Ofcom's general duties and sections 8 and 14 of the Wireless Telegraphy Act 2006, plus powers under s.2(2) of the European Communities Act 1972.
55	**Procedure for limiting the number of rights of use to be granted for radio spectrum**	Covered by Ofcom's general duties and sections 14, 29 and 122 and Schedule 1 of the Wireless Telegraphy Act 2006.

56	**Access to radio local area networks**	Ofcom can implement harmonisation decisions relating to use of spectrum for WiFi using powers under section 8(3) Wireless Telegraphy Act 2006.
58	**Technical regulations on electromagnetic fields**	The UK already complies with these regulations and proposed Ofcom general conditions covers this provision.
59	**General framework for access and interconnection**	In transposing both Article 3(1) and (2) Access Directive 2002, the government noted that they were achieved by abolishing the current regulatory regime and replacing it with a new regulatory regime. Nothing is therefore required in the Communications Act 2003.
60	**Rights and obligations of undertakings**	There is a new provision which provides for a neutral intermediary to conduct negotiations where appropriate. This will be transposed in line with our general approach.
61 (1-2) excl udin g 2c	**Powers and responsibilities of the national regulatory and other competent authorities with regard to access and interconnection**	These provisions are largely already addressed by Ofcom's existing powers. There are some incremental changes in the updated Article, which we will transpose in line with our general approach.
61 (3)	**National regulatory authority powers and responsibilities with regard to access and interconnection**	A new power - we will transpose this in line with our general approach.
62	**Conditional access systems and other facilities**	Art 62(1) is implemented by s.73(5) & 75(2) Communications Act 2003, the remainder of the article is covered by Section 76 of the act.
63	**Undertakings with significant market power**	This is met under existing legislation.
64	**Procedure for the identification and definition of markets**	Article 64.1/64.2 - Obligation does not fall on the UK. 64.3 - section 79 of the Communications Act 2003 covers this provision.
66	**Procedure for the identification of transnational demand**	Ofcom has a duty to take account of the Body of European Regulators for Electronic Communications directives/guidelines through Article 4(4) of Body of European Regulators for Electronic Communication Regulation 2018/1971.
68	**Imposition, amendment or withdrawal of obligations**	Met in s.45-47 of the Communications Act. Requires incremental updates to account for new powers.

69	**Obligation of transparency**	Article 69 is covered by Communications Act 2003 Section 87.
70	**Obligations of non-discrmination**	These measures are covered by Communications Act 2003 Sections 45 & 87.
71	**Obligation of accounting separation**	These measures are transposed by Communications Act 2003 Sections 45 & 87.
72	**Access to civil engineering**	Met under the existing network descriptions in the Communications Act 2003. The new power to impose this access, irrespective of whether the assets are part of the relevant market in accordance with the market analysis will be included in line with our general approach.
73 and 74	**Obligations of access to, and use of, specific network elements and associated facilities and price control; 74: Cost Accounting Obligations**	These provisions are largely already addressed by Ofcom's existing powers for SMP services conditions. There are some incremental changes in the updated articles which will be transposed in line with our general approach.
77	**Functional separation**	This is covered by Communications Act 2003 section 45 & 89.
80	**Wholesale-only undertakings**	This will be transposed in line with our general approach.
81	**Migration from legacy infrastructure**	Ofcom has already started this process and SMP regulation will transpose this requirement early next year.
82	**BEREC guidelines on very high capacity network**	Obligation is for the Body of European Regulators for Electronic Communications to produce guidelines on VHCNs, no specific obligation placed on the UK.
83	**Regulatory control of retail services**	Exists in Communications Act 2003 Sections 45 (7) &(8).
89	**Cost of universal service obligations**	Communications Act 2003 Section 70/71
91	**Transparency**	The UK already has measures to ensure transparency and so therefore transposition is not necessary.
93	**Numbering resources**	Introduces incremental updates which are already covered by Ofcom's powers.
94	**Procedure for granting of rights of use for numbering resources**	Ofcom's powers already cover these incremental updates.
95	**Fees for rights of use for numbering**	These measures are covered in Communications

	resources	Act 2003 section 58.1(g), (h), and 58.6.
96	**Missing children and child helpline hotlines**	This helpline is already in place and we consider this Article transposed by Communications Act 2003 sections 61, 63, and Ofcom's arrangements.
97	**Access to numbers and services**	This measure is transposed Section 57.1 of the Communications Act 2003 alongwith Ofcom's General Conditions.
98	**Exemption of certain microenterprises**	This provision is being transposed by Ofcom using their existing powers via the Communications Act 2003.
100	**Fundamental rights safeguard**	This is a statement of existing obligations and so therefore transposition is not necessary.
101	**Level of harmonisation**	This provision is being transposed by Ofcom using their existing powers via the Communications Act 2003.
102	**Information requests for contracts**	This provision is being transposed by Ofcom using their existing powers via the Communications Act 2003.
104	**Quality of service related to internet access services and publicly available interpersonal communication services**	This provision is being transposed by Ofcom using their existing powers via the Communications Act 2003
106	**Provider switching and number portability**	Ofcom is taking steps to implement this provision via their current powers.
108	**Availability of services**	Ofcom transposing through General Conditions.
109	**Emergency communications and the single European emergency number**	Ofcom transposing through General Conditions.
111	**Equivalent access and choice for end-users with disabilities**.	This provision is being transposed by Ofcom using their existing powers via the Communications Act 2003.
112	**Directory enquiry services**	This provision is being transposed by Ofcom using their existing powers via the Communications Act 2003.
114	**'Must carry' obligations**	This provision is sufficiently covered by Section 64 Communications Act 2003.
115	**Provision of additional facilities**	This provision is being transposed by Ofcom using existing powers via the Communications Act 2003.

116	**Adaptation of annexes**	This is a power for the EU Commission - therefore, no transposition is required into UK legislation.
117-127	**Final provisions**	These articles provide powers for the European Union to make delegated acts secondary to this Directive, and sets out how those powers are to be exercised. These do not apply to member states or the UK.

9. ANNEX B: List of non-confidential responses

- Arqiva
- BBC
- Broadband Stakeholder Group
- Cisco
- Citizens Advice
- Clarion Housing Group
- Communications Consumer Panel
- EchoStar Mobile
- Energy UK
- Energy Networks Association/Joint Radio Company
- Sky
- TechUK
- Telefonica (02)
- The Scottish Government - Paul Wheelhouse MSP, Minister for Energy, Connectivity and the Islands
- Hutchison 3G (Three)
- Verizon