

Regulatory framework

Overview of Ofcom's role and activities

1. Ofcom is the regulator for the UK communications industries, with responsibilities across television, radio, telecommunications and wireless communications services.¹ Ofcom's remit covers aspects of the provision of both content and infrastructure in the communications sector as well as management of the radio spectrum over which services are provided.

2. On 29 December 2003, Ofcom inherited the duties that had previously been the responsibility of five regulatory bodies:
 - The *Broadcasting Standards Commission* was responsible for standards and fairness in all UK broadcasting—radio and television, terrestrial and satellite.
 - The *Independent Television Commission* licensed commercial television companies and regulated their performance in terms of programme content, advertising, sponsorship and technical performance.
 - The *Office of Telecommunications (OfTel)* regulated the UK telecommunications industry, ensuring quality, choice and value for money in telephone services.
 - The *Radio Authority* licensed and regulated all commercial radio services on both analogue and digital platforms. It took an active role in the development of policies which affect the commercial radio industry and its listeners.
 - The *Radiocommunications Agency* managed the civil radio spectrum in the UK and represented UK interests in international discussions.

¹Ofcom was established as a body corporate by the Office of Communications Act 2002.

Legislative background

3. The EU Regulatory Framework for the regulation of electronic communications (comprising five key EC Electronic Communications Directives²) was implemented in the UK primarily by the Communications Act 2003 (the Communications Act). Under the Communications Act, Ofcom has powers to investigate complaints about breaches of conditions imposed to give effect to the EU Directives and a duty to resolve disputes relating to those conditions.
4. As sectoral regulator for the communications sector, Ofcom also has concurrent powers under the Competition Act 1998 to deal with anti-competitive behaviour in broadcasting, spectrum and telecommunications. Ofcom has the power to apply Article 81 and Article 82 of the EC Treaty in addition to the Chapter I and Chapter II prohibitions of the Competition Act.
5. The Wireless Telegraphy Act 2006 has brought together into a single statute the legislation under which Ofcom manages the radio spectrum. This replaced six separate Acts of Parliament.

Statutory duties

6. Under the Communications Act 2003:
 - 3(1) It shall be the principal duty of Ofcom, in carrying out their functions—
 - (a) to further the interests of citizens in relation to communications matters; and

²Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services; Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities; Directive 2002/20/EC on the authorization of electronic communications networks and services; Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services; and Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector.

(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

7. Ofcom's specific duties fall into six areas:
- (a) ensuring the optimal use of the electromagnetic spectrum;
 - (b) ensuring that a wide range of electronic communications services—including high-speed data services—is available throughout the UK;
 - (c) ensuring a wide range of television and radio services of high quality and wide appeal;
 - (d) maintaining plurality in the provision of broadcasting;
 - (e) applying adequate protection for audiences against offensive or harmful material; and
 - (f) applying adequate protection for audiences against unfairness or the infringement of privacy.

Broadcasting

8. Ofcom is responsible for licensing UK television and radio services on analogue and digital terrestrial, cable and satellite.
9. The Ofcom Broadcasting Code sets down rules which television and radio broadcasters must follow. Among other things, the Code sets standards to protect the under-18s whilst allowing broadcasters an appropriate degree of creative freedom.
10. Ofcom is required to maintain and strengthen the UK's tradition of high-quality public service broadcasting. Ofcom also oversees quotas intended to ensure a broad range

of television programmes from independent producers and from the nations and regions of the UK.³

Regulation of broadcast transmission

Historical background

11. Before their respective networks were sold, the IBA⁴ and the BBC made shared use of transmission sites across the UK. No annual fees were paid, but each party shared build costs.

12. In 1991 the IBA's network was sold. National Transcommunications Limited (Nat Trans, the predecessor to ntl:broadcast and Arqiva) was granted a licence to operate the network under the Telecommunications Act 1984. This included obligations to share its sites with other transmission operators. The licence gave the Director General of Telecommunications (OfTel) the power to resolve any pricing disputes in relation to site sharing. It also regulated the price of bundled transmission services (ie comprising access to both Nat Trans and BBC transmission sites and the provision of MTS) provided to the commercial television broadcasters, these were subject to a Retail Price Index ('RPI'-X) annual adjustment mechanism.

13. Nat Trans and the BBC entered into a Site Sharing Agreement, dated 10 September 1991, which was submitted to and endorsed by OfTel. The agreement established a formal contractual relationship and charging mechanism between the parties for the shared use of transmission sites by each other.

³For more details, see page 30 of section B to the 2006/07 Ofcom Annual report (Appendix 2).

⁴The Independent Broadcasting Authority, a successor to the ITA.

14. In 1996 Oftel carried out a price control review of Nat Trans's charges for the provision of bundled transmission services to the commercial television companies, and altered the RPI-X adjustment mechanism going forward.
15. In 1997 the BBC network was sold. Crown Castle (the predecessor to NGW) was granted a licence to operate the network under the Telecommunications Act 1984. This included obligations to share its sites with other transmission operators (with Oftel having the power to resolve any pricing disputes in relation to site sharing) and to observe a regulated price for provision of bundled transmission services (ie comprising access to both Nat Trans and BBC transmission sites and the provision of MTS) to the BBC for television, network radio and regional broadcasting, subject to an RPI-X annual adjustment.
16. In 1998 Nat Trans and Crown Castle established a digital site sharing agreement and ratecard, which was filed with Oftel. The ratecard established pricing for the shared use of new low power DTT equipment at the parties' transmission sites.

The current regulatory regime (and bearing on existing contracts)

17. In accordance with the EU Framework for electronic communications networks and services, Ofcom completed a review of the market⁵ for Broadcast Transmission Services⁶ in 2005.⁷ In summary, the review determined that National Grid Wireless and Arqiva (then Crown Castle and ntl:broadcast respectively) each had significant market power (SMP) in the provision of Network Access (NA) to their respective networks for the delivery of broadcast content to end users on a national, regional or

⁵'Market 18' as set out in Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC.

⁶*Broadcasting Transmission Services: a review of the market Final statement* (April 2005). See: www.ofcom.org.uk/consult/condocs/bcast_trans_serv/final/.

⁷Pending the outcome of the review Nat Trans' and Crown Castle's Telecommunications Act licences ceased to have effect, save for licence conditions requiring them to provide reciprocal site access to each other, and the respective price control obligations, which were continued on a temporary basis.

metropolitan basis and imposed remedies to address that. Ofcom's review did not make any finding in relation to the provision of MTS.

18. In summary the parties were required:
 - (a) to provide NA to their respective masts and sites which has been reasonably requested on fair and reasonable terms;
 - (b) not to discriminate unduly in provision of NA;
 - (c) to provide NA to their respective masts and sites on cost-oriented terms; and
 - (d) to publish a reference offer for the provision of NA.

19. Arqiva and NGW published the first versions of their reference offers (the Reference Offers) in December 2005. Updated versions of the Reference Offers were subsequently published over 2006 following issues raised by interested parties relating to proposed charges and guidance issued by Ofcom.

20. The reference offers for the provision of NA for television broadcasting transmission (Television Reference Offers) were each prepared on the basis of the specification for DSO determined by Digital UK.⁸ Each sets out an overall price for such NA as is necessary to the relevant party's sites under the DSO plan for the current six multiplexes. Separate prices are set out for the PSB multiplexes and the commercial multiplexes accordingly, to reflect the different numbers of sites required and the extent to which costs are shared.⁹

⁸Digital UK is an independent, non-profit organization which works with multiplex operators, equipment manufacturers, installers, retailers, rental companies and consumer groups to coordinate the technical rollout of digital television across the UK. Digital UK was set up at the request of the Government. It is owned by the public service broadcasters (BBC, ITV, Channel 4, Five, S4C and Teletext), and multiplex operators SDN and National Grid Wireless.

⁹The Television Reference Offers are specific to the six multiplexes involved in the DSO project. Any future request for access in order to provide, for example, an additional multiplex, would require publication of a revised reference offer for the specific access required. To the extent that any such project affected the costs of network access for the remainder of the DSO revised reference offers for the existing multiplexes would also be required.

21. Responsibility for the preparation of compliant reference offers rests with Arqiva and NGW. To facilitate the parties' efforts to prepare their reference offers, various rounds of guidance on the preparation of reference offers were provided to the parties by Ofcom in 2005 and 2006.
22. The Television Reference Offers are designed to deliver a pre-tax real rate of return of 7.71 per cent on relevant existing assets and future capital expenditure.
23. The Television Reference Offers make provision for a review of capital expenditure incurred to be carried out at the end of the DSO process (scheduled for 2014). The Television Reference Offers also indicate that the parties will use reasonable endeavours to negotiate a 'gain-share' mechanism during commercial negotiations.
24. The Reference Offers for radio are more descriptive and broadly set out the basis on which charges will be calculated on request for any given network specification.
25. Final versions of the Reference Offers are available from the parties' websites:¹⁰
 - (a) NGW Reference Offer for Network Access for Television Multiplex Services to existing TV Sites developed and operated by NGW dated 29 September 2006;
 - (b) NGW Reference Offer for Network Access for Regional, National and Metropolitan Radio Services to existing Radio Sites developed and operated by NGW dated 28 December 2005;
 - (c) Arqiva Reference Offer for the Provision of Network Access dated 29 September 2006; and
 - (d) Arqiva Reference Offer for the Provision of Network Access for Regional, National and Metropolitan Radio Services dated 31 January 2007.

¹⁰www.arqiva.com/ and www.nationalgridwireless.com/.

26. The Reference Offers remain subject to Ofcom oversight pursuant to the obligations imposed on Arqiva and NGW in 2005. In particular, the parties are required:
- (a) to make such modifications to the Reference Offers and related documents as Ofcom may direct from time to time; and
 - (b) to comply with such directions as Ofcom may make from time to time under certain of the relevant conditions.
27. Separately Ofcom also has certain statutory powers under sections 185 to 191 of the Communications Act 2003 to determine disputes in relation to network access.

Network Access Agreements for television transmission

28. Following the awards of MTS/NA contracts the parties subsequently agreed network access agreements with each other as necessary in respect of each multiplex.¹¹ Those network access agreements contain additional details of the technical and commercial arrangements between the parties, including in relation to the post-DSO review and the gain-share mechanism.
29. Ofcom gave further guidance to the parties on the terms of the network access agreements on 20 April 2007 in relation to a number of issues that the parties were unable to resolve through negotiation. These included gain-share provisions, reporting and transparency requirements in relation to the review mechanism, provisions for expert determination and liquidated damages.
30. Network access agreements for the provision of access by NGW to Arqiva in respect of Multiplex 1 and Multiplex B and for the provision of access by Arqiva to NGW in respect of Multiplex C and Multiplex D were entered into on 17 July 2007. Network

¹¹There are six Network Access Agreements between the parties in relation to television broadcasting transmission, ie Arqiva will provide network access to NGW in respect of commercial multiplexes C and D; NGW will provide network access to Arqiva in respect of PSB multiplexes 1, 2 and B and commercial multiplex A.

access agreements for the provision of access by NGW to Arqiva in respect of Multiplex 2 and Multiplex A were entered into on 7 September 2007. The agreements contain provisions for review of the actual costs incurred under the contracts following DSO (or on such other date as directed by Ofcom). In summary, differences between the forecast costs and the actual costs would be shared between the parties to the network access agreements.

MTS contracts

31. Although Ofcom's regulatory regime affects only the provision of NA, it remains that NA is only purchased through the MTS provider.
32. Arqiva has agreed MTS/NA contracts with Digital 3 and 4 Limited (7 August 2007), SDN (27 July 2007) and the BBC (15 September 2006).
33. [REDACTED].
34. [REDACTED].