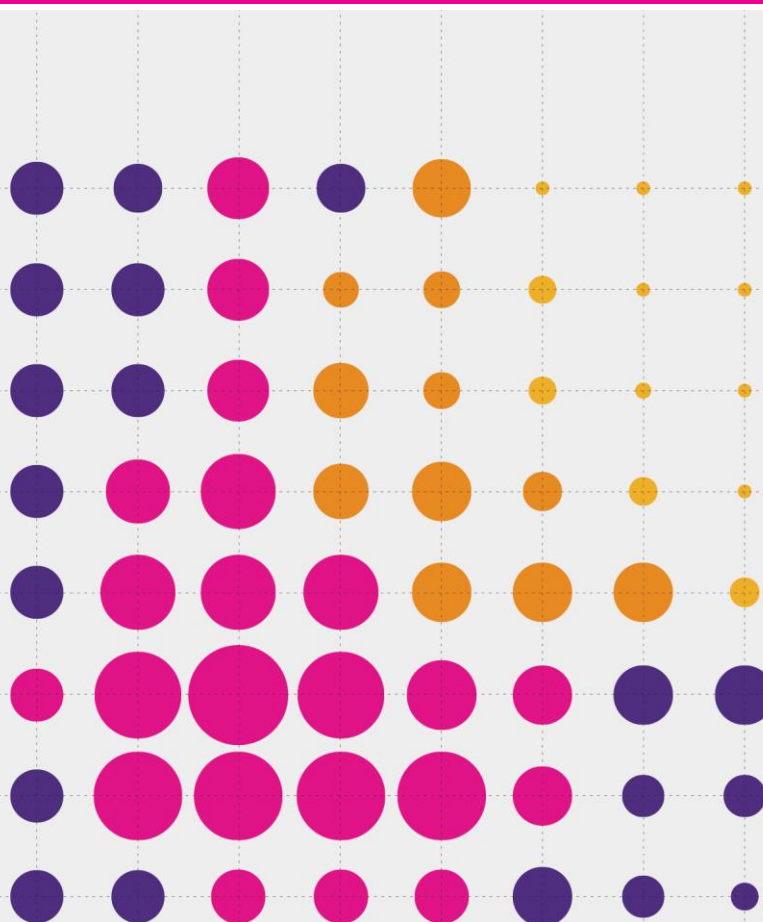




Regulation in competitive electronic communications markets, and regulatory checks and balances: A report for UKCTA

November 2024

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About Plum

Plum is a leading independent consulting firm, focused on the telecoms, media, technology, and adjacent sectors.

We apply consulting experience, industry knowledge, rigorous analysis, and our clients' perspective to address challenges and opportunities across regulatory, policy, commercial, and technology domains.



About this document

This study and report for the UK Competitive Telecoms Association (UKCTA) analyses regulation in competitive electronic communications markets, and changes to the system of regulatory checks and balances in recent years.

The report has been prepared for UKCTA by Plum Consulting. Whilst UKCTA members broadly support the analysis and conclusions presented, they each have individual positions and viewpoints on the issues covered, and it should not be assumed that every UKCTA member agrees individually with every point covered in the study and report.

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Introduction

Last year was the twentieth anniversary of the Communications Act 2003 (the Act). The Act was a milestone in the development of the telecommunications and media industries. It established a single converged regulator, combining the functions of five pre-existing authorities covering regulation of telecommunications, broadcasting (television and radio) and radio spectrum. In the intervening years, Ofcom has had a number of further functions added to its remit.

The most recent significant addition to Ofcom's portfolio – online harms – illustrates how much has changed in the two decades since Ofcom came into existence. In that time we have seen innovation and investment to create new digital services and capabilities which have transformed our experiences of electronic communications and entertainment. Communications infrastructure and technology provides businesses, individuals, families and communities with capabilities to communicate and consume all manner of content at home, at work and on the move.

These developments have been transformative and do not end now. We may be just at the start of a journey on which more and more transactions and experiences will migrate from the physical to the digital world. Development of digital services in the coming decade has the potential to deliver more innovative use cases of great benefit in important sectors like healthcare and education, as well as further transforming media and entertainment.

The electronic communications sector is vital to these developments which depend not just on innovation in new use cases and services to deliver them, but also further deep investment in the infrastructure over which they will be delivered. Continued investment in the upgrading of infrastructure, including replacement of the legacy copper network with direct fibre connections, is very important to the UK's digital economy, and hence also to the UK's competitiveness globally. The UK market and regulatory framework have generally delivered good outcomes for UK consumers and business users.

There have been key landmarks in the development of the market since the Communications Act 2003, and we now face two further potential milestones in the near term. These are:

- The Government's plans to develop and consult on a Statement of Strategic Priorities (SSP) for the electronic communications sector;¹ and
- the telecoms access review (TAR) which will establish much of the framework for regulation of fixed wholesale access services in the period 2026 – 2031.²

Whilst the TAR is key to the sector in the coming period, it is not a central feature of this report because UKCTA members will be contributing to the review individually, and wholesale regulation is not an area in which they currently want to take a collective position.

The prospects for industry and consumers in the coming years are not only about wholesale markets. There are other factors which will play a part in determining whether the industry thrives and regulation is successful. The prospective SSP is a good opportunity for the new government take a look at these.

We examine two such factors in this study:

¹ Details of the SSP have not been published, we expect the Government to consult on it early in 2025. The last SSP was completed in 2019. Under the Digital Economy Act 2017, a SSP may not be amended sooner than five years after its completion, except in certain specified circumstances.

² Work on the review is underway. Ofcom announced this work in its draft workplan for 2024/5, and TAR launch document published in March 2024.

1. Regulation of competitive electronic communications markets. This covers both retail markets serving residential and individual consumers, and markets serving businesses. Across these sectors, the number and scope of regulatory rules has grown in recent years. We ask whether this is appropriate.
2. Changes in Ofcom's duties and responsibilities which mean it has vires across a wide range of sectors, and activities within those sectors. Ofcom's remit has grown in the years since 2003, perhaps a testament to its effectiveness and success, At the same time, the mechanisms for and methods of scrutiny of regulatory decisions – the checks and balances which are essential to an effective system of regulation – have also changed. We explain how Ofcom's remit has grown at the same time as opportunities for scrutiny of and challenges to its decisions have reduced.

The remainder of this report is set out as follows:

- The next section contains a summary of our findings and recommendations
- In Section 1 we present our analysis of regulation in competitive electronic communications markets.
- In Section 2 we look at Ofcom's duties, scope of work, and the framework for regulatory checks and balances.
- Section 3 contains recommendations to reflect the analysis and findings of our study.

Summary of key findings

In this study we describe important changes to the regulatory landscape since the Communications Act 2003. Some of these changes are key drivers for the prospects of the electronic communications sector, and therefore also of users of electronic communications services. In fact, this affects us all because electronic communications and the services and capabilities it supports have become more embedded in our everyday lives, and increasingly important to social cohesion and economic success over the time period we studied.

The electronic communications sector has undoubtedly delivered significant value to the UK economy, and good outcomes for consumers, and it continues to do so. Looking at fixed connectivity and services, which is the core focus of UKCTA³ and its members, availability of superfast broadband connectivity is now near ubiquitous, available to 97% of UK premises, and consumers report high levels of satisfaction.

However, deep investment is needed to maintain and improve on this performance. Status quo is not an option for the sector because it is responsible for the infrastructure which will provide the high performance, resilient and reliable connectivity to power new capabilities and help drive the UK economy. To this end, the industry continues to invest heavily and build aggressively to roll out gigabit capable broadband across the country.

Regulation has to adapt as markets change. Ofcom has successfully adjusted its approach over the years to adapt to changing market circumstances. In this report, we track the evolution of regulation since the early days of market liberalisation. At that time, regulatory intervention was needed to protect consumers and safeguard nascent competition in markets dominated by a vertically integrated incumbent provider with significant market power (SMP) up and down value chain (i.e. in retail, wholesale, and access markets). The scope and focus of regulation was then adjusted over time as competition was established and became stronger. At the same time, electronic communications has become intrinsically linked to a broader digital ecosystem of which it is a key part. Regulation must recognise this, and be flexible to adjust as markets in the sector change or are affected by external factors in adjacent or related markets.

Overall, regulation of the UK electronic communications sector is a success story. Competitive market entry, investment and innovation in the sector have delivered good outcomes to consumers and other stakeholders. Competition in some parts of the market is now very well established. Ofcom found most retail markets across the UK to be effectively competitive and removed SMP regulation from them in 2009.

Regulation in competitive markets

Despite the removal of SMP regulation from retail markets fifteen years ago, the number of other regulatory requirements applicable to them has increased since then.. Many of the more recent rules introduce new consumer facing requirements. Consumer protection is important and can be a necessary feature of regulation, even in competitive markets. On the other hand, there are risks to over-regulation in competitive markets. Our study analyses some of these risks, for example:

- Risks associated with unnecessary regulation. We note that competition is the best method of achieving good outcomes for consumers, and that the risk of regulatory failure (i.e. where regulation fails to achieve its goal, or is counterproductive) is accentuated in competitive markets.

³ UKCTA's mission is to foster a more competitive fixed telecommunications market in the UK, based on a regulatory framework that treats all competitors in this field equally and fairly.

- Consumer protection measures in the electronic communications regulatory framework exist alongside comprehensive cross-sectoral safeguards, including those provided by the Consumer Rights Act 2015, caution is therefore needed to avoid unnecessary duplication or overlap.⁴
- The increasing complexity of regulatory compliance requirements creates costs for providers. There is a risk that these are not captured in assessments of the costs and benefits of intervention; for example, it is difficult to include accurate counterfactual evidence to assess the opportunity costs of regulatory intervention. Our study demonstrates that compliance costs and other costs associated with regulation of competitive markets have grown in recent years.
- Many rules designed to protect consumers are also applied to services for small business customers. The case for these interventions is supported by evidence which is heavily weighted towards residential consumers, raising questions about whether they are suitable for small businesses. Furthermore, compliance of these rules by providers and enforcement of them by Ofcom are particularly complex in business markets, raising questions about practicability.

Ofcom's scope of work and the framework for regulatory checks and balances

Changes to the regulatory landscape in recent years also mean that opportunities for scrutiny of and challenge to regulatory decisions have changed. Notable developments are:

- Changes in to the appeals regime for regulatory decisions in the electronic communications sector under the Digital Economy Act 2017 (DEA) altering it from merits based to judicial review principles; and
- removal of oversight of regulatory decisions in the sector by the European Commission (EC) following withdrawal of the UK from the European Union (EU).

The number of appeals of regulatory decisions has reduced dramatically since the DEA. Some commentators have suggested that this has resulted in less transparent decision making by Ofcom (as the scope of possible grounds for appeal is reduced). We note that the previous government consulted on a recommendation to improve transparency of regulatory decisions as part of its "smarter regulation" initiative.

Our analysis also looks at the evolution of Ofcom's powers and duties. Ofcom's role has expanded significantly in the period since it was established. Inevitably these changes have been reflected in Ofcom's work plan over the years. Of course this is entirely necessary and appropriate to reflect the changed scope of operation and focus for the regulator. It is important though also to ensure that the addition of new functions does not dilute effectiveness of the pre-existing ones. Strong focus on the sector will be needed in the coming period as Ofcom and stakeholders address issues in the TAR ahead of the next regulatory period 2026 – 2031.

Recommendations

It is healthy to take a look at the effectiveness of regulation every now and again, particularly as circumstances and external factors change. The Government's plan for a SSP is a good opportunity to evaluate some of the issues identified in this study, but it should not be the only one. We make two recommendations to help the regulatory framework keep pace with the market. These recommendations are summarised here and explained in more detail in the remainder of the report.

⁴ <https://www.legislation.gov.uk/ukpga/2015/15/contents/enacted>

Recommendation 1: Review of regulation in competitive markets

This expansion of regulation in markets for which the principal driver of benefits is competition may, on its own, be a signal that a review is appropriate. We believe such a review would be prudent, and should take account of the following factors:

- The importance of regulation in upstream markets which are still characterised by SMP and should be an area of strategic focus for Ofcom as the TAR is launched;
- the Government's strong emphasis on growth;
- the dangers of regulation in competitive markets;
- the existence of cross-sectoral consumer protection rules;
- the balance of evidence between residential consumers and business customers in the implementation of consumer protection measures;
- the opportunity costs of regulation, taking account of the benefits of innovation which may be affected by the need for regulated companies to focus resource on regulatory requirements;
- the complexity of compliance requirements;
- the relative impact of interventions on smaller providers;
- the need to be satisfied that regulatory rules are and continue to be effective and proportionate, with greater emphasis on ex-post evaluation of interventions, and periodic review to test whether they remain appropriate;
- the advantages of principles and outcomes focussed regulation which would mitigate the risk of prescriptive rules quickly becoming obsolete, and incentivise regulated firms to deliver efficient solutions, hence also reducing friction in the regulatory process; and
- the relevance of the EECC, and opportunities to improve consumer outcomes through adjustments to the UK approach after UK withdrawal from the EU.

Recommendation 2: Improving the transparency of decisions

We recommend a review to explore improvements to the transparency of regulatory decision making. This may include looking at the transparency of evidence produced to support regulatory decisions, and the potential for greater use of ex-post evaluation of interventions and monitoring of outcomes. The objective should be to improve confidence following recent changes to the landscape for scrutiny of and challenge to Ofcom decisions, notably the DEA changes to the appeal regime.

1 Regulation in competitive electronic communications markets

In this section we examine rules which apply to all electronic communications providers in consumer and business customer facing markets. These markets are recognised as competitive and hence the need for regulation beyond protections for consumers provided by cross-sectoral rules should be minimal. In fact though, the scope of regulation in these markets has grown since they were identified as competitive by Ofcom.

We look at the context within which this has happened, covering sector performance, outcomes for consumers, and the regulatory framework within which Ofcom makes decisions about regulation in competitive markets.

We then consider the consequences of regulation in competitive markets, and assess whether complex requirements for compliance with regulatory rules are effective and proportionate, and whether they create opportunity costs by diverting industry resources away from innovations which could deliver greater benefits to consumers. We also evaluate the status quo with reference to the Government's fresh emphasis on economic growth.⁵

First we take a look at how the sector is performing.

1.1 How the sector is performing

The electronic communications sector continues to grow and progress significantly as a result of investment, innovation and a regulatory framework which has generally enabled competition to thrive and deliver benefits to consumers.

Competitive provision has been a feature of the UK market since it was liberalised.⁶ Retail markets today are vibrantly competitive with residential and business customers having a variety of providers to choose from. These providers offer a very broad range of products and services, from business connectivity to packages of services providing communications, media and entertainment services to homes and individuals.

The sector is performing well. We show this with reference to data on the supply side, indicating investment in and delivery of high quality connectivity to meet modern needs, and on the demand side showing high and stable levels of consumer satisfaction in broadband services.

1.1.1 Connectivity and investment

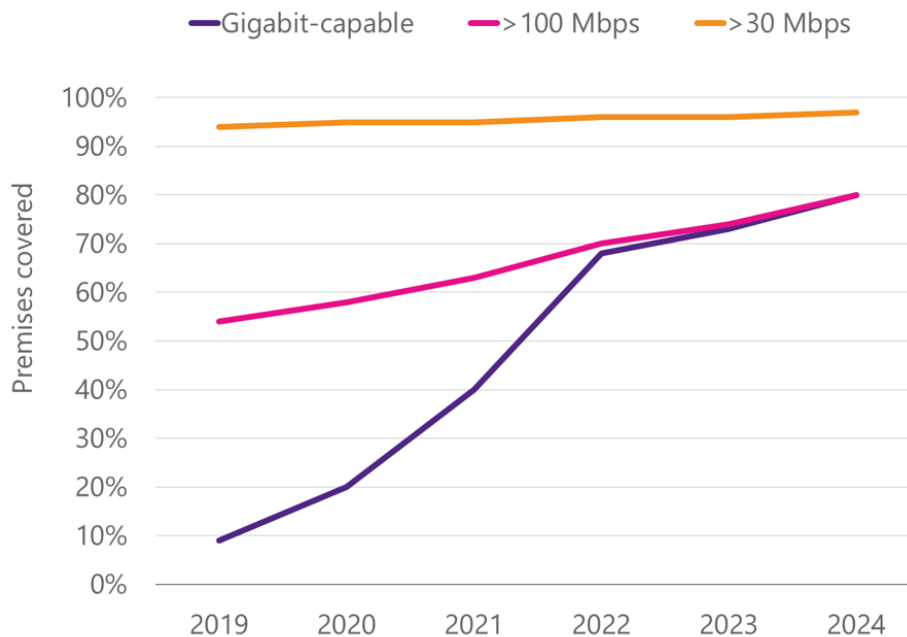
Ofcom data show that broadband connectivity of at least 30 Mbps (often described as "superfast") is available to 97% of premises, providing good quality performance supporting multiple devices in a residential environment (e.g. for streaming, gaming, web browsing).

The market continues to evolve. Perhaps most notably, there has been a marked increase in the availability of gigabit-capable connectivity. According to the latest available data, 80% of UK premises now have access to gigabit-capable networks, and 61% have access to direct fibre (or fibre to the premises (FTTP)) connectivity delivering high quality, high reliability, and ultrafast speed performance.

⁵ See for example, government announcements on growth made in July 2024 <https://www.gov.uk/government/news/chancellor-unveils-a-new-era-for-economic-growth>

⁶ BT was privatised, and competitive Public Telephone Operator licences became active in 1984.

Figure 1.1: Network availability in the UK



Source: Ofcom

In 2023, take-up of superfast connectivity was 75% of premises where it is available.⁷ FTTP has lower take-up (which is unsurprising as it is a more recent technology deployment): consumers and business users have taken up FTTP connections at 28% of premises where it is available.⁸

The availability of high speed connectivity is impressive, but keeping momentum in improving coverage to deliver high quality, high performance and resilience through the continued roll out of fibre requires further deep investment. Over 100 different providers are involved in rolling out gigabit capable broadband in the UK, investing in aggregate around £35 billion to do so.⁹ Alongside this, the previous government committed £5 billion of public funding for the “Project Gigabit” scheme to fund connectivity in hard to reach locations.¹⁰

1.1.2 Customer experience

Most consumers are happy with their services. Ofcom data show that 82% of broadband customers were satisfied with their service overall in 2022 (the latest data available),¹¹ and the sector has performed consistently at that level since Ofcom started its *Comparing Customer Service* report in 2017. This compares favourably with available customer satisfaction indicators from other regulated sectors – for example, Ofgem reported 69% satisfaction with energy suppliers in 2023,¹² and Ofwat reported 76% satisfaction with customer service for 2022/3.¹³

⁷ https://www.ofcom.org.uk/_data/assets/pdf_file/0022/273721/connected-nations-2023-uk.pdf. Equivalent date for 2024 is not yet available.

⁸ *Ibid*

⁹ <https://www.gov.uk/government/publications/project-gigabit-progress-update-september-2023/project-gigabit-progress-update-september-2023>

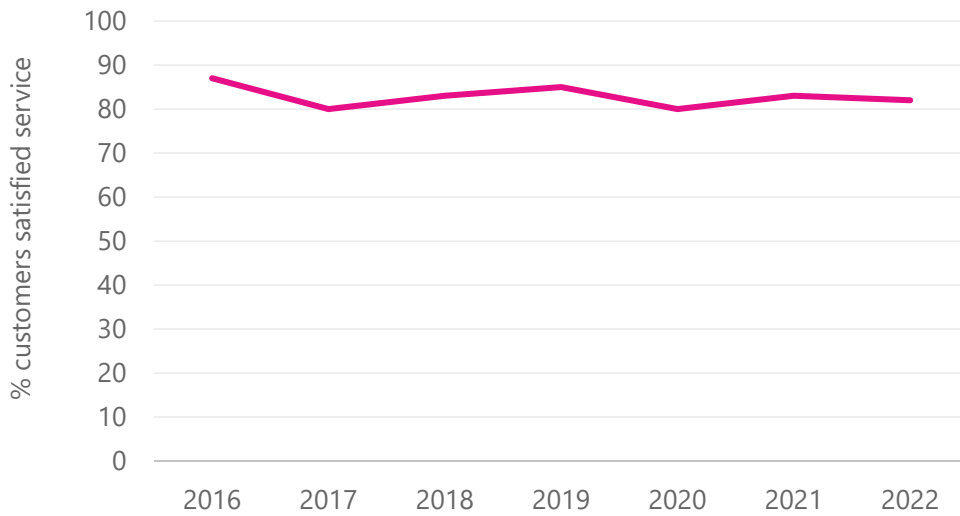
¹⁰ <https://www.gov.uk/guidance/project-gigabit-uk-gigabit-programme>

¹¹ https://www.ofcom.org.uk/_data/assets/pdf_file/0014/261500/comparing-customer-service-report-2023.pdf. Ofcom has announced that this report and data will now be published biannually, the next report is scheduled for 2025.

¹² <https://www.ofgem.gov.uk/publications/energy-consumer-satisfaction-survey-august-september-2023>

¹³ <https://www.ofwat.gov.uk/wp-content/uploads/2023/09/Water-Company-Performance-Report-2022-23.pdf>

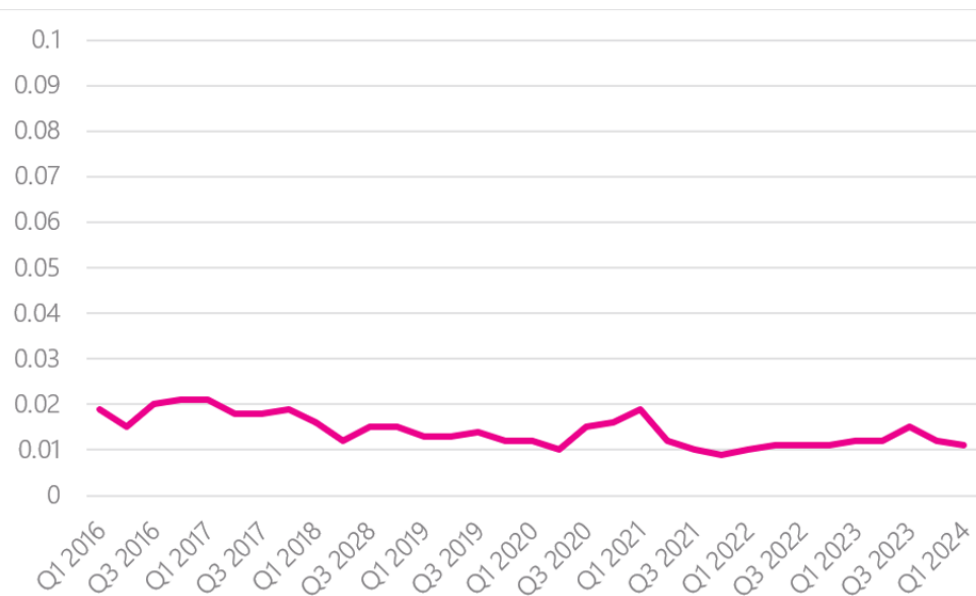
Figure 1.2: Overall percentage of customers satisfied with broadband service 2016 - 2022



Source: Ofcom

Meanwhile, average complaints to Ofcom about broadband providers have been steadily low at around or below 0.02% of customers.

Figure 1.3: Average percentage of complaints to Ofcom about broadband providers 2016 - 2024



Source: Ofcom

Having examined the strong performance of the sector across these metrics, we now describe the regulatory framework within which Ofcom regulates it.

1.2 Evolution of regulation, and the relationship between access, wholesale and retail markets

UK electronic communications markets are regulated by Ofcom under a framework to establish rules which broadly fit into three categories, as follows:

- Requirements on entities holding significant market power (SMP) in a market.
- Requirements to deliver universal service arrangements.
- Requirements set out in the General Conditions of Entitlement (General Conditions) which apply to all electronic communications providers.

This study is mainly concerned with the third category. We examine the status and impact of regulation in markets where no SMP has been identified, i.e. markets which are competitive.

To support our analysis, it is helpful to understand how the regulatory framework deals with competition problems in electronic communications markets, and the mechanisms in place to support competition and withdraw regulation when it is established and effective.

1.2.1 The European Electronic Communications Code (EECC)

The framework summarised above is a well-established system. It derives from the European Union's framework for regulation of electronic communications services (currently the European Electronic Communications Code (EECC)). The EECC was transposed into UK law in 2020,¹⁴ and it is important to understand that therefore the European regulatory framework is largely still applicable in the UK after the UK has left the European Union.¹⁵

The European framework has evolved over time to reflect the increasing competitiveness of electronic communications markets. The origins of this approach date back to the liberalisation of markets at the end of the last century. At that time, vertically integrated fixed network and service providers were typically dominant up and down the value chain, i.e. in access markets, wholesale markets, and in retail markets. This early phase of liberalisation required regulation in markets at each of these levels to prevent foreclosure by incumbents. Over time, as regulation supported the business cases and confidence needed for challengers to enter the markets, regulation could withdraw where competition was established.

This approach to competition regulation is well suited to the evolution of electronic communications markets, providing the opportunity and means for regulators to:

- establish whether SMP exists in well-defined markets;
- identify whether remedies are needed to safeguard nascent competition and protect consumers where SMP is found; and
- implement appropriate and proportionate remedies.

The approach works well if it is implemented correctly. For this to happen, it is essential that regulators make appropriate adjustments as markets change. Competitive dynamics in each layer of the electronic communications value chain are different meaning that different types of regulation are likely to be needed over

¹⁴ <https://www.gov.uk/guidance/the-telecoms-regulatory-framework-in-the-uk#now-that-the-uk-has-left-the-eu>

¹⁵ The Government's approach to implementation of the EECC is set out here

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902879/Government_response_EECC.pdf

time. For example, entry costs are lower in retail markets which means that, provided regulation is effective in supporting appropriate conditions for market entry, retail markets are likely to become competitive before upstream access and wholesale markets.

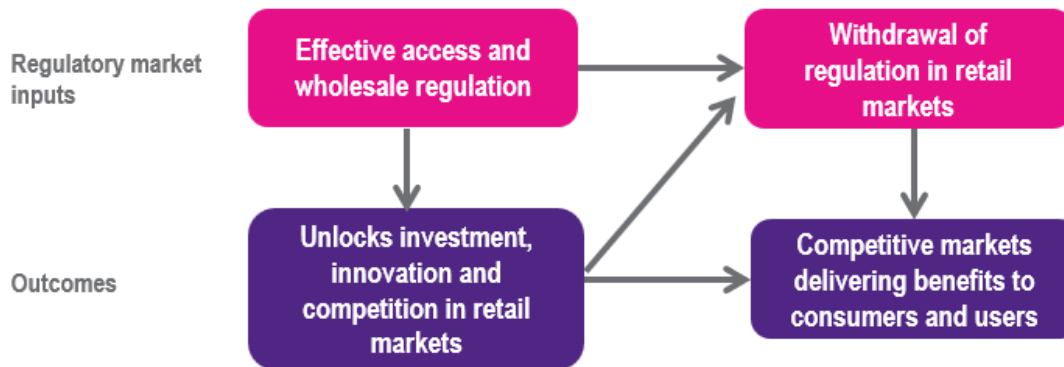
This structure is shown in simplified form in Figure 1.4.

Figure 1.4: Simplified characteristics of the fixed network value chain and layers of regulation

Access	Network and wholesale	Retail
<p>Characteristics</p> <ul style="list-style-type: none"> High entry costs Long investment cycle “Last mile” connectivity <p>Regulatory approach</p> <ul style="list-style-type: none"> Equivalence Transparency Investment incentives 	<p>Characteristics</p> <p>Dependent on access</p> <p>Regulatory approach</p> <ul style="list-style-type: none"> Withdrawal of regulation as markets have become competitive Access to upstream regulated access facilities and services 	<p>Characteristics</p> <ul style="list-style-type: none"> Relatively low costs of entry Service innovation Challenger providers Dependent on wholesale services and access <p>Regulatory approach</p> <p>Withdrawal of regulation as markets have become competitive</p>

The regulatory framework is designed to address issues arising in this structure, and to reflect changes as markets develop. Typically this means that, as retail markets become more competitive, regulation can withdraw, as shown in Figure 1.5.

Figure 1.5: Withdrawal of retail regulation where upstream access and wholesale regulation facilitates competition



This evolution can clearly be seen in the European framework which, over time, has been reviewed and adjusted to reflect changes in markets. A feature of the framework is the identification of markets by the European Commission which are “susceptible to ex-ante regulation”¹⁶, i.e. markets which are likely to need to be regulated as a result of structural characteristics leading to the relative likelihood of SMP and consequent need for remedies. For example, as explained above and illustrated in Figure 1.4, access markets have higher barriers to entry than retail markets, hence they are more susceptible to incumbent SMP and ex-ante regulation. The Commission publishes a list of susceptible markets, and issues guidance on this system to Member States and National Regulatory Authorities.¹⁷

¹⁶ Ex-ante regulation means prospective or forward-looking regulatory measures and tools that are imposed on individual firms or groups of firms in a market, in order to prevent certain behaviour from taking place.

¹⁷ <https://digital-strategy.ec.europa.eu/en/news/commission-updated-recommendation-relevant-markets>

Figure 1.6 shows how the list of susceptible markets has changed as the framework has developed, clearly demonstrating how the need for regulation has reduced in retail markets as competition developed and intensified.

Figure 1.6: Evolution of markets susceptible to *ex-ante* regulation under the European regulatory framework

European framework evolution	Susceptible markets
2002 ¹⁸	<p>Retail (7 markets)</p> <p>Access to the public fixed telephone network for residential customers Access to the public fixed telephone network for non-residential customers Publicly available local and/or national fixed telephone services for residential customers Publicly available international fixed telephone services for residential customers Publicly available local and/or national fixed telephone services for non-residential customers Publicly available international fixed telephone services for non-residential customers The minimum set of leased lines (defined in the framework)</p> <p>Access and wholesale (11 markets)</p> <p>Call origination on the public telephone network provided at a fixed location Call termination on individual public telephone networks provided at a fixed location Transit services in the fixed public telephone network Wholesale unbundled access to metallic loops and sub-loops Wholesale broadband access Wholesale terminating segments of leased lines Wholesale trunk segments of leased lines Access and call origination on public mobile telephone networks Voice call termination on individual mobile networks The wholesale national market for international roaming on public mobile networks Broadcasting transmission services, to deliver broadcast content to end users</p>
2009 ¹⁹	No change
2014 ²⁰	<p>Access and wholesale (4 markets)</p> <p>Wholesale call termination on individual public telephone networks provided at a fixed location Wholesale voice call termination on individual mobile networks Wholesale local access and wholesale central access at a fixed location for mass market product Wholesale high-quality access provided at a fixed location</p>
2020 ²¹	<p>Access and wholesale (2 markets)</p> <p>Wholesale local access provided at a fixed location Wholesale dedicated capacity</p>

Changes to the list of susceptible markets is a good indicator of the scope of *ex-ante* regulation in Europe and the UK.²² We can see that:

- this scope has reduced significantly; and
- retail markets have been absent from the list since 2014.

¹⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003H0311>

¹⁹ https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32009L0140#ntr14-L_2009337EN.01003701-E0014

²⁰ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014H0710>

²¹ <https://digital-strategy.ec.europa.eu/en/news/commission-updated-recommendation-relevant-markets>

²² It should be noted that this does not mean there can be no regulation outside of the susceptible markets. The framework sets out the criteria which national authorities must test in order to justify the application of *ex-ante* SMP regulation in other markets.

1.2.2 UK application of the framework

The European framework is highly significant in the development of electronic communications markets in the UK. This was obviously so while the UK was a member of the European Union, but is also the case after UK withdrawal.

Markets currently subject to ex-ante regulation resulting from findings of SMP in the UK reflect the evolution described above, i.e. they are markets for the provision of infrastructure and wholesale services, upstream of retail consumer markets (note that these designations were made prior to 2020 and so align to the 2014 European framework summarised in Fig 1.6).

Figure 1.7: Markets in which SMP is currently identified in the UK²³

Fixed network markets in which SMP is currently identified in the UK

Physical infrastructure
Wholesale Local Access
Leased Lines
Wholesale Call Termination

SMP was a feature of retail markets in the UK early in the liberalisation cycle. As competition became established and grew stronger, supported by effective regulation in wholesale and access market, fixed retail markets in most of the UK were found to be competitive (i.e. no SMP) in 2009 (with the exception of ISDN, a service which was subsequently deregulated and is now being withdrawn), and this has not changed since.^{24,25}

1.3 Regulation in UK competitive fixed electronic communications markets

Despite the success of competition in the UK leading to findings of no SMP in retail markets, regulatory rules applicable to retail fixed markets have proliferated in the UK in recent years.

Many new requirements have been introduced with the intention of adding layers of protection for consumers in electronic communications markets. A number were included in implementation of the EECC to UK markets.²⁶ However, EECC implementation is not a mechanistic exercise – Ofcom, as other national regulatory authorities, had discretion as to how requirements are met. So a robust examination of new requirements to ensure they are needed and will be effective and proportionate is still essential before they become regulatory requirements.

1.3.1 The need for consumer protection measures

Consumer protection is a legitimate and laudable objective, and it is right that regulators focus on it (indeed, ensuring markets work well for consumers is often a principal regulatory duty and objective, and this is the case for Ofcom²⁷).

²³ <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/telecoms-competition-regulation/narrowband-broadband-fixed>

²⁴ https://webarchive.nationalarchives.gov.uk/ukgwa/20160705041507/http://stakeholders.ofcom.org.uk/consultations/retail_markets/?a=0

²⁵ This finding did not apply to markets in Hull where KCOM was found still to have SMP in fixed narrowband markets in 2009. In 2013, Ofcom decided to rely on ex-post competition law to regulate retail markets in Hull, i.e. no ex-ante remedies were imposed, see https://www.ofcom.org.uk/_data/assets/pdf_file/0014/50720/final_statement.pdf

²⁶ <https://www.ofcom.org.uk/consultations-and-statements/category-1/proposals-to-implement-new-eecc>

²⁷ Section 3 of the Communications Act 2003 establishes that 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
(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.
<https://www.legislation.gov.uk/ukpga/2003/21/section/3>

Also, consumers can face challenges in electronic communications markets as they can in others, even where these markets are competitive. They should be able to fully understand the options available to them in the market, make choices, and switch between services and providers without difficulty. There are provisions and requirements to support this in the General Conditions of Entitlement,²⁸ i.e. specific consumer empowerment rules for the sector operating alongside and in addition to cross-sectoral consumer law.

However, regulators should exercise caution in applying regulations in competitive markets. This is because:

- competition is generally the best driver of good consumer outcomes, including in regulated markets; and
- a robust and comprehensive framework to protect consumers across markets in all sectors in the UK economy exists outside of the electronic communications specific rules.

These points are explained in further detail below.

Competition is the best driver of good consumer outcomes, and regulation in competitive markets can be risky

According to the first fundamental theorem of welfare economics, competitive markets in an economic equilibrium should result in the most efficient allocation of resources. In this context, “efficient” refers to the maximisation of aggregate consumer and producer surplus (note, however, this does tell us anything about how those benefits are distributed across society).

In general, competitive markets are regarded as the best way of delivering good outcomes to consumers. Numerous studies have found that, within a given market, greater competition tends to result in greater product availability,²⁹ greater product diversity, improvements in various measures of service quality,^{30,31,32} and lower prices.^{33,34,35}

This is also true of communications markets. Competitive communications market structures are associated with increased adoption and better telecommunication sector performance in other indicators, such as revenues, investment and sector employment.³⁶ For instance, some studies have found that ISPs compete on service quality, and greater market competition prompts better quality of service.^{37,38} A study of the US broadband market found that greater competition leads to higher speeds and lower prices.³⁹ A study of EU broadband markets found that competition leads to higher take-up of broadband services.⁴⁰

This is not to say that competition is a panacea. There are certain market features that can inhibit the ability of the market to deliver an efficient allocation of resources. For example:

²⁸ <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/telecoms-competition-regulation/general-conditions-of-entitlement>. Part C contains the consumer protection requirements.

²⁹ <https://www.econstor.eu/bitstream/10419/92486/1/623186772.pdf>

³⁰ For example, <https://dash.harvard.edu/handle/1/13851737>

³¹ <https://www.sciencedirect.com/science/article/abs/pii/S2212012214000021>

³² <https://core.ac.uk/download/pdf/222963485.pdf>

³³ <https://www.aeaweb.org/articles?id=10.1257/app.20150310>

³⁴ <https://www.sciencedirect.com/science/article/abs/pii/S0165057285900295>

³⁵ <https://www.sciencedirect.com/science/article/abs/pii/S0967070X23002573>

³⁶ Agiakloglou, C., and Polemis, M. (2018), “The Impact of Structural Reforms on Telecommunications Performance”, *Journal of Industry, Competition and Trade*, 18:2, 209-222.

³⁷ <https://www.sciencedirect.com/science/article/pii/S0166531623000457>

³⁸ (2015) *Quality Competition in the Broadband Service Provision Industry*

³⁹ <https://papers.ssrn.com/sol3/papers.cfm?abid=1684236>

⁴⁰ <https://www.sciencedirect.com/science/article/abs/pii/S0308596117300083>

- **Externalities.** Externalities refer to a situation where a private production or consumption decision creates benefits or costs for a third party (or wider society). An example is that of a polluting factory, which, without regulation, has little incentive to consider the social and environmental costs of its activity (a *negative* externality). In telecommunications markets there are *positive* externalities: adoption of telecommunications services leads to network effects and economic⁴¹⁴² and social benefits.⁴³⁴⁴
- **Imperfect information.** A lack of information can mean that producers and consumers do not make utility-maximising decisions. For example, consumers may not understand the terminology used in communications markets or the benefits they may derive from taking up a service. In such a case they may purchase a service which does not meet their needs, or refrain from purchasing at all. This would result in the competitive market not performing as well as it could.

The presence of these features may warrant intervention by governments or regulators. For example, the existence of positive externalities generally implies that the service in question is under-produced or under-consumed relative to the socially desirable level, which could merit intervention to improve supply and take-up. The problem of imperfect information could be ameliorated through guidelines on appropriate messaging for marketing, or by providing consumers with impartial advice and information.

While intervention in the market may help to correct these issues, it is important to also be aware of the potential risks and downsides that could accompany intervention. Any regulatory intervention incurs compliance costs for the regulated entities, which could translate into higher communications prices for consumers and a detrimental impact on take-up (which could involve a reduction in the positive externalities discussed previously).

In addition, a greater level of regulatory intervention in the market will raise the risks of *regulatory failure*. While there is no single universally accepted definition of the term,⁴⁵ from a public interest perspective it can be taken to refer to a situation in which a regulation which aimed to overcome a market failure or protect the public fails to achieve that goal.⁴⁶ From a public interest perspective, there are various ways in which this can happen:⁴⁷

- **Failure in the design of regulation.** This can occur when regulators do not design appropriate regulations to address the issue at hand. For example, a regulator may introduce an inappropriate regulation based on flawed information about the scale of a particular problem.
- **Implementation failures.** These failures can occur when the regulatory authority lacks the resource or power to enforce regulation, or when the implementation of regulation is overly burdensome or coercive.
- **Inefficiency.** This type of failure occurs when the costs of regulation outweigh the benefits. Regulators may fail to consider all of the direct and indirect costs of regulation when designing interventions, which can lead to inefficient regulation.
- **Unintended consequences.** Regulation may have unintended negative consequences which were not considered or forecast when the regulator proposed them. For example, Ofcom's prohibition of inflation indexed price changes⁴⁸ could lead to a cautious approach by regulated firms who would no longer

⁴¹ Carol Corrado and Kirsten Jäger (2014), "Communication Networks, ICT and Productivity Growth in Europe", The Conference Board EPWP#14-04, <https://www.conference-board.org/publications/publicationdetail.cfm?publicationid=2963>

⁴² <https://www.econstor.eu/bitstream/10419/200406/1/166943575X.pdf>

⁴³ <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1040&context=sppworkingpapers>

⁴⁴ <https://www.tandfonline.com/doi/abs/10.1080/0144929X.2013.830334>

⁴⁵ <https://onlinelibrary.wiley.com/doi/pdf/10.1111/rego.12459>

⁴⁶ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4050156&download=yes

⁴⁷ *Ibid.*

⁴⁸ <https://www.ofcom.org.uk/phones-and-broadband/bills-and-charges/ofcom-bans-mid-contract-price-rises-linked-to-inflation/>

have the ability to mitigate the risk of higher than forecast inflation, and may therefore increase prices to offset this risk.

In regard to the UK's communications markets, as explained in this report, the retail market for fixed broadband is deemed effectively competitive, which has obviated the need for retail price regulation. Other forms of intervention may be warranted to address the issues of externalities and informational problems as discussed above. However, it should be noted that firms operating in competitive markets – including communications markets – compete on more dimensions than price alone. This can include competing on customer service levels, overall service quality, innovative products and services, or product diversity.

In designing regulatory interventions, regulators should be cognisant of these aspects of the competitive marketplace. They should also be aware of the risk of regulatory failures outlined above, as well as the overall costs of regulatory compliance faced by regulated firms. Any regulatory interventions should have a solid base of evidence about the extent of the market failure to be addressed and a clear logic of how the intervention will address that failure.

A comprehensive cross-sectoral framework for consumer protection exists in the UK

Sector specific consumer protection rules in the electronic communications sector exist alongside a framework of safeguards, enshrined in primary and secondary legislation, including:

- The Consumer Rights Act 2015;⁴⁹
- the Consumer Protection from Unfair Trading Regulations 2008;⁵⁰ and
- the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.⁵¹

Purchasers and consumers of goods and services, including consumers of electronic communications, are protected under this framework, including in relation to contracts they enter into. These protections, inter-alia, require clear information to be provided about services and providers of services as well as information on pricing and complaints handling.

Consumer protection rules are principally enforced across most sectors by the Competition and Markets Authority (CMA) and Trading Standards Services (TSS).

Ofcom has an important role under these rules to ensure consumers of electronic communications services are properly protected. Cross-sectoral consumer protection operates through comprehensive arrangements for concurrent enforcement between the CMA and sector-specific regulators, in this case Ofcom.⁵²

The consumer protection requirements discussed in this report (see Section 1.3.2) are imposed ex-ante by Ofcom in addition to cross-the sectoral rules, meaning that in some areas, overlapping protections exist in both cross-sectoral and electronic communications specific. This is the case, for example, for contract information requirements.

⁴⁹ <https://www.legislation.gov.uk/ukpga/2015/15/contents/enacted>

⁵⁰ <https://www.legislation.gov.uk/ukdsi/2008/9780110811574/contents>

⁵¹ <https://www.legislation.gov.uk/uksi/2013/3134/contents/made>

⁵² To ensure operation of concurrent powers coordinated, the CMA and Ofcom have a Memorandum or Understanding (MoU) establishing transparent arrangements for the handling of cases in the electronic communications sector - https://www.ofcom.org.uk/_data/assets/pdf_file/0028/83755/cma_and_ofcom_mou_on_use_of_concurrent_consumer_powers_webversion1.pdf

1.3.2 The proliferation of sector specific consumer protection requirements

In the last few years, significant new requirements have been added to the regulation of competitive retail markets, as shown in Figure 1.8.

Figure 1.8: Proliferation of regulation in competitive markets

Year	Implementation of retail markets regulation	Retail markets regulation removed
2016	N/A	In its 2016/17 review of the General Conditions, Ofcom stated <i>"We have actively considered opportunities for deregulation, but we have come to the view that most of the consumer protection conditions are not good candidates for significant deregulation"</i> . ⁵³
2017	N/A	
2018	Requirements on transparency of complaint handling processes	
2019	New mobile switching requirements.	N/A
2020	Introducing end of contract notifications and provision of annual best tariff information	N/A
2021	Rules on unlocking mobile devices Accessible format for bills Requirements on contract duration Publication of information Customer usage notification requirements Information sharing with price comparison tools Requirements on non-conterminous linked contacts Availability of services during network breakdown	N/A
2022	Rights to contract exit Pre-contract information and contract summary Changes to video relay requirements	N/A
2023	Process requirements for broadband switching and number portability	N/A
2024	Prohibition of inflation indexed price increases in contracts	N/A

These regulatory rules are enshrined in the General Conditions and apply to all providers of electronic communications services to both residential consumers and business customers.

This proliferation creates risks. As explained above, competition is likely to deliver the best outcomes to consumers and markets, and hence regulation imposed to deal with factors like externalities and imperfect information should be kept to a minimum. Furthermore, provisions to deal with these factors are included in cross-sectoral consumer protection arrangements for which Ofcom has concurrent powers of enforcement with the CMA. However, we note that Ofcom appears reluctant to exercise its concurrent powers to enforce cross-sectoral consumer protection provisions, preferring to implement ex-ante and sector specific rules as described in this section. Generally, regulators should exercise caution in creating new regulatory rules where existing protections are in place.

⁵³ https://www.ofcom.org.uk/_data/assets/pdf_file/0026/106397/Statement-and-Consultation-Review-of-the-General-Conditions-of-Entitlement.pdf, see para. 2.11.

In the case of consumer protection rules contained in the General Conditions, there are also questions about their broad application, including for some of the rules, their application to services for business customers.

1.3.3 Application of consumer protection rules to small businesses

A feature of the electronic communications regulatory landscape which warrants a fresh look is the application of consumer protection rules to services provided to small and micro businesses (business-to-business services).

Many business users are protected in the same way as residential consumers, i.e. the consumer protection requirements discussed in this report apply to services provided to them. All of the Consumer Protection Conditions (General Conditions C1 – C8) apply variously to some small business customers also.

This sort of protection is not needed and not suitable for large business and enterprise customers whose purchasing behaviour is very different to that of residential consumers, and who approach decisions in a different way.⁵⁴ Consumer protection provisions intended to help consumers navigate contracts or switching decisions therefore are not needed for these customers.

At the other end of the scale, the smallest businesses, e.g. sole traders, are more likely to make choices in a similar way to residential consumers. In fact, many sole traders have their offices at home and use home connectivity for business purposes. In this sense, their purchasing behaviour is indistinguishable to that of residential consumers.

The behaviours and hence needs of some small businesses which do not use residential services are more difficult to identify. Consumer protection provisions in the General Conditions of Entitlement apply to businesses identified by Ofcom as “Microenterprise and Small Enterprise Customers” where this is defined as *“Microenterprise or Small Enterprise Customer”, in relation to a Communications Provider which provides services to the public, means a Customer of that provider acting in the course of business which is carried out by that Customer, and for which not more than 10 individuals work (whether as employees or volunteers or otherwise), but who is not himself a Communications Provider”*.

This threshold identifies business services which are subject to the bulk of consumer protection provisions contained in General Conditions C1 – C8.

There are a number of difficulties in applying these conditions to businesses. Here we explore:

- The appropriate fit of consumer protection remedies to business customers; and
- practical difficulties for enforcement and compliance.

The consumer protection requirements contained in the General Conditions were primarily conceived and designed to address perceived issues in consumer markets. Ofcom’s assessment and research work is therefore focussed on residential consumers, with assumptions made about the need to also target such remedies on business users.

This is illustrated in Figure 1.9 which identifies the research samples used by Ofcom in support of requirements for two key consumer protection requirements, changes to switching processes, and introduction of end of contract notifications (ECNs).

⁵⁴ For example, larger businesses typically have procurement teams working on their relationships with suppliers, and resources to conduct due diligence on contracts. They also have bespoke requirements, and consumer services and solutions tailored to their needs.

Figure 1.9: Ofcom research sources for consumer protection interventions

Intervention	Research source	Research target
Changes to switching processes	Technology tracker	To track ownership of, attitudes towards, and the behaviour of UK consumers with respect to residential telecommunications, broadcasting and the internet ⁵⁵
	Core switching tracker	Measuring participation levels, switching incidence and ease of switching in each market. Research base drawn from a sample of residential addresses across the UK ⁵⁶
	Switching experience tracker	Complementary to the core switching tracker, provides extra levels of detail around the motivations to switch, difficulties faced when switching and reasons for deciding to remain with the existing provider ⁵⁷
End of contract notifications (ECNs)	Bespoke quantitative research	Exploring knowledge of minimum contract period end dates across the triple play, dual play, standalone pay TV and mobile markets ⁵⁸
	Bespoke qualitative research	To explore and understand consumer needs and attitudes towards ECNs ⁵⁹
	Consumer engagement with communications services	Attitudinal and behavioural insights of consumers ⁶⁰
	Consumer engagement with communications services	Understanding why some consumers may face difficulties engaging in communications markets, in home and online survey ⁶¹
	SME experience of communications service	Examining business customer experience of communications services, switching behaviour, usage and satisfaction ⁶²

We can see that Ofcom's research to support changes to switching processes was solely targeted at residential consumers. In the case of ECNs, four consumer surveys were used, two of which were bespoke to Ofcom's ECNs proposal. The business customer research used here was a general survey, not focussed on the particular proposal.

These two examples show that research evidence for consumer protection work is typically weighted towards residential consumers. The evidence supporting extension of these interventions to business customers appears to be given a lower priority, raising questions about whether the targeting of remedies to some small business customers (other than those which use residential services) is robust.

Where small businesses use residential services, clearly consumer protection measures will apply to them by default. However, where businesses with up to ten employees purchase other services to meet their more bespoke requirements, measures designed to protect residential consumers are unlikely to be well targeted, and may be irrelevant. For example, switching and porting requirements in General Condition C7 result from the design of a solution for residential markets. This study and report does not take a view on whether these process changes are appropriate for residential consumers, but we observe that they unlikely to be well suited

⁵⁵ https://www.ofcom.org.uk/_data/assets/pdf_file/0024/262518/technology-tracker-technical-report-2023.pdf

⁵⁶ https://www.ofcom.org.uk/_data/assets/pdf_file/0014/270302/Switching-Tracker-2023-Technical-report.pdf

⁵⁷ https://www.ofcom.org.uk/_data/assets/pdf_file/0033/247785/Switching-Experience-Tracker-2022-Technical-Report.pdf

⁵⁸ https://www.ofcom.org.uk/_data/assets/pdf_file/0024/74715/end-of-contract-notification-research.pdf

⁵⁹ https://www.ofcom.org.uk/_data/assets/pdf_file/0020/117074/Qualitative-end-of-contract-notification-research-July-2018.pdf

⁶⁰ https://www.ofcom.org.uk/_data/assets/pdf_file/0022/113458/Engagement-Qualitative-Research-Report-2017.pdf

⁶¹ https://www.ofcom.org.uk/_data/assets/pdf_file/0022/117076/Consumer-engagement-quantitative-research-2018-slide-pack.pdf

⁶² https://www.ofcom.org.uk/_data/assets/pdf_file/0019/117163/Consultation-end-of-contract-notifications.pdf

to switching business users with more complex and sometimes bespoke needs - for example requiring processing of multiple lines, or delivery of out of hours solutions.

The definition of small businesses in the General Conditions is also problematic from the point of view of compliance and enforcement. The business population is dynamic, with new businesses being established and firms increasing and decreasing their employee base all the time.⁶³ This means it is difficult for providers to identify the business customers to which consumer protection rules apply, for example because they do not monitor the number of employees working for a customer. By the same token they are also difficult to monitor and enforce by Ofcom.

1.4 The rising costs of regulatory compliance

In considering the effectiveness and proportionality of regulation, it is necessary to take account of the costs to businesses of implementing and complying with regulatory requirements.

The proliferation of regulation in competitive markets shown above has resulted in increased costs to providers having to implement and then comply with new rules. This is not necessarily a concern. As noted, regulation has a legitimate role even in competitive markets. On the other hand, regulators should take care to ensure that regulation does not produce higher costs overall, keeping in mind that costs of regulation which are not offset and exceeded by benefits are ultimately borne by consumers. For this reason, robust and transparent evaluation of regulatory proposals is essential before decisions are taken. This is discussed further in Section 2 where we examine the framework for scrutiny and challenge of regulatory decisions.

Cost benefit analysis (CBA) or impact assessment of regulatory proposals is a key feature of the framework, and is needed to demonstrate and satisfy stakeholders that the benefits of intervention outweigh the costs. Establishing the relative costs and benefits of regulation is a complex task, sometimes requiring estimates where empirical data are not available, and forecasts to assess future costs and benefits. In addition, there are many types of direct and indirect costs and benefits which are difficult to capture. For example, it is very challenging to establish counterfactual evidence with any accuracy (i.e. assessing what would happen if the intervention were not made). Whilst regulatory CBAs usually include examination of different scenarios, it is unusual and would be very difficult for them to identify innovation which could have been delivered if regulatory implementation and compliance costs were not incurred. This can be described as the opportunity cost of regulation, and it is difficult to capture in a CBA.

From Section 1.3.2 and Figure 1.8 above we can see that the cost of implementing and complying with the General Conditions is likely to have risen simply by virtue of their being a greater number of rules being in place. In addition, whilst electronic communications providers therefore face increased burdens of regulation across the scope of regulation discussed in this paper, they also face increased implementation and compliance costs in other areas of regulation, including:

- The Telecommunications Security Act 2021^{64,65} which introduced requirements for providers to identify and reduce the risks of security compromises now and in preparation for future scenarios, including in relation to "high risk vendors", and gave Ofcom new powers of enforcement.

⁶³ For example, the number of micro-businesses (1-9 employees) in the UK grew by 27% between 2000 and 2021, see <https://www.gov.uk/government/statistics/business-population-estimates-2021/business-population-estimates-for-the-uk-and-regions-2021-statistical-release.html#trends-in-the-business-population>.

⁶⁴ <https://www.legislation.gov.uk/ukpga/2021/31/enacted>

⁶⁵ In the Better Regulation Annual Report for 2021-23, the previous Government identified direct costs to business of the Telecommunications Security Act as >£2.3 billion over 5 years <https://assets.publishing.service.gov.uk/media/63d280cfe90e071ba62d851f/better-regulation-annual-report-2021-to-2022.pdf>

- Requirements of the new Digital Markets Consumer and Competition Digital Act.⁶⁶
- Requirements or expectations outside of formal regulation, for example for provision of social tariffs through which providers offer price discounts to eligible customers but with no corresponding reductions in the pricing of wholesale input services.⁶⁷

Also, there are potential new requirements which may be added to this, including:

- The previous government's "Open Communications" initiative which will potentially create new requirements for broadband and mobile providers to provide data. There was consultation on these proposals in in September 2023.⁶⁸

Discussions with stakeholders confirm that regulation imposes significant and growing costs on industry. Information provided by UKCTA members indicate that the cost of compliance with regulatory requirements in the General Conditions has risen very significantly over the last five years (2019 – 2024), with estimates of cost and manpower increases ranging between 20% and 50%.

As workloads are increasing, there is also a limit on the finite resources available to manage these growing compliance burdens. There is an expanding range of subject areas which regulatory teams need to manage. At the same time, there may be increased costs and difficulties in recruiting skilled compliance staff.

We also consider the relative costs of regulation depending on the size of the operator implementing regulatory requirements. Some costs of implementation and compliance are more sensitive to scale than others. For example, the costs of system changes required to implement regulatory requirements are likely to be proportionately greater for smaller than larger operators. As an illustrative example, the cost to deliver the one-touch switching (OTS) required process changes, whilst significant for a large provider, may be the largest item of systems development expenditure for a smaller one. The evidence suggests that the costs of regulation are significant even for the largest operators in the sector; in a recent report, Sky reported that one day a week of its technology resources are deployed on regulatory requirements, and suggested there is an opportunity cost to this in the delivery of benefits elsewhere.⁶⁹

Where implementation and compliance costs are rising as shown above, it is important for regulators to ensure that interventions remain effective and proportionate taking full account of costs and benefits, including opportunity costs in relation to foregone innovation. The previous government signalled an approach consistent with this in its new draft Statutory Guidelines on the Growth Duty, published in April 2024⁷⁰ which stated, inter alia:⁷¹

"When a regulator runs a quick process with minimal inputs and compliance burdens for a business, that frees up businesses to use the time and money they would otherwise spend with the regulator instead to put to more productive uses, leading to lower operating costs, driving profits and investments. With less time and money on regulatory compliance, businesses can redirect resources toward more productive activities such as innovation, expansion and job creation. Lower compliance costs can potentially lead to

⁶⁶ <https://www.legislation.gov.uk/ukpga/2024/13/contents>

⁶⁷ Social tariffs are provided by broadband and mobile providers through an arrangement agreed with the Government and Ofcom <https://www.gov.uk/government/news/low-cost-broadband-and-mobile-phone-tariffs>

⁶⁸ <https://www.gov.uk/government/consultations/open-communications-a-smart-data-scheme-for-the-uk-telecoms-market>

⁶⁹ This assessment was made across all regulatory requirements and so not limited to the General Conditions, see page 33 of the report <https://assets.contentstack.io/v3/assets/blt0c2476c7b6b194dd/blt05f3b7ed3feb052d/650aea5dd251aa34e318baeb/Economic-Impact-Report-2022-Web.pdf>

⁷⁰ At the time of publication of this report, the draft Guidelines were subject to parliamentary approval.

⁷¹ See page 27 of the draft Guidelines <https://assets.publishing.service.gov.uk/media/65f31f7efa18510011011765/draft-growth-duty-statutory-guidance.pdf>

more competitive pricing and improved product or service quality, benefiting consumers and driving increased demand."

1.5 Principles based regulation in dynamic markets

In this report we have described how the scope of regulation in the General Conditions has grown in recent years, and that there are risks in this, including that the opportunity costs of regulation are insufficiently understood and may lead to loss of consumer welfare.

This indicates that a review of the approach to regulation in competitive markets may now be appropriate. This is supported by consideration of the potential advantages of more principles based regulation in dynamic markets.

Markets are not static, and hence the case for regulatory intervention can alter over time. The setting of remedies via the General Conditions is not time constrained, i.e. these rules are not set for a specified time period in the same way that SMP remedies usually are. It is therefore appropriate from time to time to review some remedies in the General Conditions to see if they are still needed.

This need to keep rules under review is particularly important in dynamic markets where change can happen fast with attendant risks that the remedies become obsolete, or even damaging to the market. A way to mitigate this risk would be to focus regulation on principles and desired outcomes in cases where there is a need to intervene. This approach would establish the outcomes the regulator requires the market to deliver, leaving the methods of delivery to regulated companies.⁷² Because electronic communications is a fast paced market, this seems an appropriate approach to regulatory remedies. It would have a number of advantages, including:

- Desired outcomes (e.g. ease of consumer switching, clear information about contracts) are less likely to change than prescriptive rules setting out in detail how a remedy should be delivered;
- giving regulated companies discretion about how outcomes are delivered enables and incentivises them to design the best solutions for delivery;
- allowing this discretion mitigates the risk that mandating "one size fits all" systems to deliver regulatory reform will be more costly for some operators than others (e.g. fixed costs can usually be more easily absorbed by larger than smaller operators);
- this discretion is also likely to reduce resistance and challenge to regulatory decisions, and hence speed up the regulatory process;
- outcomes are easier to measure and monitor than implementation of the systems and processes to deliver them; and
- outcomes are less likely than prescriptive methods of implementation to become obsolete.

Many of the requirements set out in the General Conditions discussed in this report include detailed implementation specifications. It would be appropriate to review these to establish whether they continue to be necessary, including whether moving to a more principles and outcomes based approach may be more effective and future proof.

⁷² For discussion of principles based regulation, see for example this article by Ofcom Economics Director Tania Van Den Brande <https://www.ofcom.org.uk/news-centre/2021/rules-versus-principles-based-regulation>

2 Ofcom's scope of work, and the framework for regulatory checks and balances

In this section we examine changes to the regulatory landscape, and consider how they have also resulted in the level of scrutiny of, and ability to challenge regulatory decisions. Two changes to the landscape are important here:

- To Ofcom's remit and scope of work; and
- to systems for scrutiny of and challenge to regulatory decisions.

These changes are described and analysed in this section.

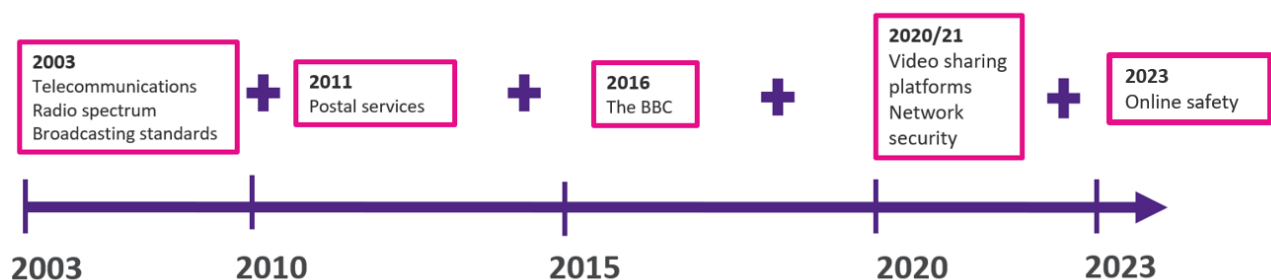
2.1 Ofcom's remit and scope of work

2023 was the twentieth anniversary of the Communications Act and hence the setting of Ofcom's powers and duties. As noted in the Introduction, it inherited a number of responsibilities from the pre-existing regulators responsible for telecommunications, broadcasting and spectrum.

In the years since, Ofcom's remit has grown further. Landmarks in this journey were the addition of regulation of postal services in 2011, and of the BBC in 2016. In 2023, with the passing of the Online Safety Act, Ofcom took on the regulation of online content. This is perhaps the most significant development as it created a new role for Ofcom regulating a sector for which there was no pre-existing framework. Ofcom will also inherit the regulatory functions of the Phone-paid Services Authority (PSA) in 2025, thereby adding direct regulation of premium rate services to its portfolio.

The evolution of Ofcom's remit and scope of work is illustrated in Figure 2.1.

Figure 2.1: Expansion of Ofcom's remit 2003 - 2023



Inevitably these changes have been reflected in Ofcom's work plan over the years. This is of course entirely necessary and appropriate to reflect the changed scope of operation and focus for the regulator. However, it is important also to ensure that the addition of new functions does not dilute effectiveness of the pre-existing ones. With the critical importance of electronic communications infrastructure and services to the wellbeing of individuals, the cohesion of society, and the success of our economy, it is also important that Ofcom retains a strong focus on the sector alongside its other responsibilities.

2024 sees the start of an important regulatory cycle with the start of work on the TAR which will establish a significant part of the regulatory framework for electronic communications between 2026 and 2031. Ofcom will need clear focus on the challenges this presents to achieve good outcomes.

2.2 Regulatory checks and balances

An important component of any well-functioning regulatory system is that there be appropriate checks and balances on regulatory decisions. The regulatory process is complex, requiring evaluation of evidence, consideration of options, and decision making in situations where evidence is likely to be finely balanced. Scrutiny and challenge are therefore essential features of any regulatory framework if it is to be effective in delivering good outcomes.

Effective regulation includes some fundamental features to enable such scrutiny and challenge. A multi-layered framework is in place for this in the UK electronic communications sector, which includes:

- Powers and duties established in statute. Ofcom's general duties are set out in Section 3 of the Communications Act 2003⁷³ which includes the requirement for the application of "*principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed*".⁷⁴
- Transparency of the regulator's approach to delivery of its statutory duties.⁷⁵
- Transparency of regulatory planning, with regulator work plans published in draft for consultation before being finalised taking account of stakeholder views.⁷⁶
- Transparency of process, analysis and decision-making, hence regulatory processes are conducted through public consultation with full disclosure of evidence, analysis and views expressed by stakeholders.
- Transparent regulatory principles which set out how Ofcom will approach its activities.⁷⁷
- Accountability to parliament.⁷⁸
- Internal governance structures and processes.⁷⁹
- A system of appeal.

All of these factors are important to the ability of stakeholders to hold the regulator to account.

The level of scrutiny applied to Ofcom has changed significantly in recent years, including:

- Removal of oversight of the EEC by the European Commission. Under the EEC, the Commission has a role to monitor compliance in European Union Member States, and can open infraction investigations and proceedings against Member States for non-compliance. Since the UK is no longer a member of the European Union, Commission scrutiny of Ofcom decisions has been removed.
- Changes to the appeals regime for regulatory decisions in the electronic communications sector.

⁷³ <https://www.legislation.gov.uk/ukpga/2003/21/section/3>

⁷⁴ *Ibid*, see paragraph (3)

⁷⁵ Ofcom's regulatory principles are set out here <https://www.ofcom.org.uk/about-ofcom/policies-and-guidelines>. These explain Ofcom's approach to regulation at a very high level.

⁷⁶ See annual consultation on Ofcom's plan of work here <https://www.ofcom.org.uk/about-ofcom/annual-reports-and-plans>

⁷⁷ <https://www.ofcom.org.uk/about-ofcom/policies-and-guidelines>

⁷⁸ Ofcom is accountable to Parliament and its Annual Reports can be found here <https://www.ofcom.org.uk/about-ofcom/annual-reports-and-plans/annual-report-22-23>

⁷⁹ Details of Ofcom governance can be found here <https://www.ofcom.org.uk/about-ofcom/how-ofcom-is-run>

The latter change in particular has resulted in a paradigm shift of the landscape for regulatory scrutiny, and this is discussed below.

2.2.1 Changes to the appeals standard

The framework for appeals of regulatory decisions in the electronic communications sector was changed by the Digital Economy Act 2017 (DEA).⁸⁰ This was a very significant alteration of the equilibrium between Ofcom's ability to create and enforce regulatory rules, and the ability of sector stakeholders to challenge these in cases where they believe an unfair or incorrect decision has been taken.

The most far reaching change was to the standard of appeal to be used by the appellate body, in this case the Competition Appeals Tribunal (CAT). The DEA moved the appeals standard from merits based to "having regard to judicial review principles".⁸¹ In effect, this means that the regulatory appeals system for electronic communications moved from being one in which the appellate body could examine and test the merits of a regulatory decision to one which is close to judicial review where decisions can only be tested for errors of law.

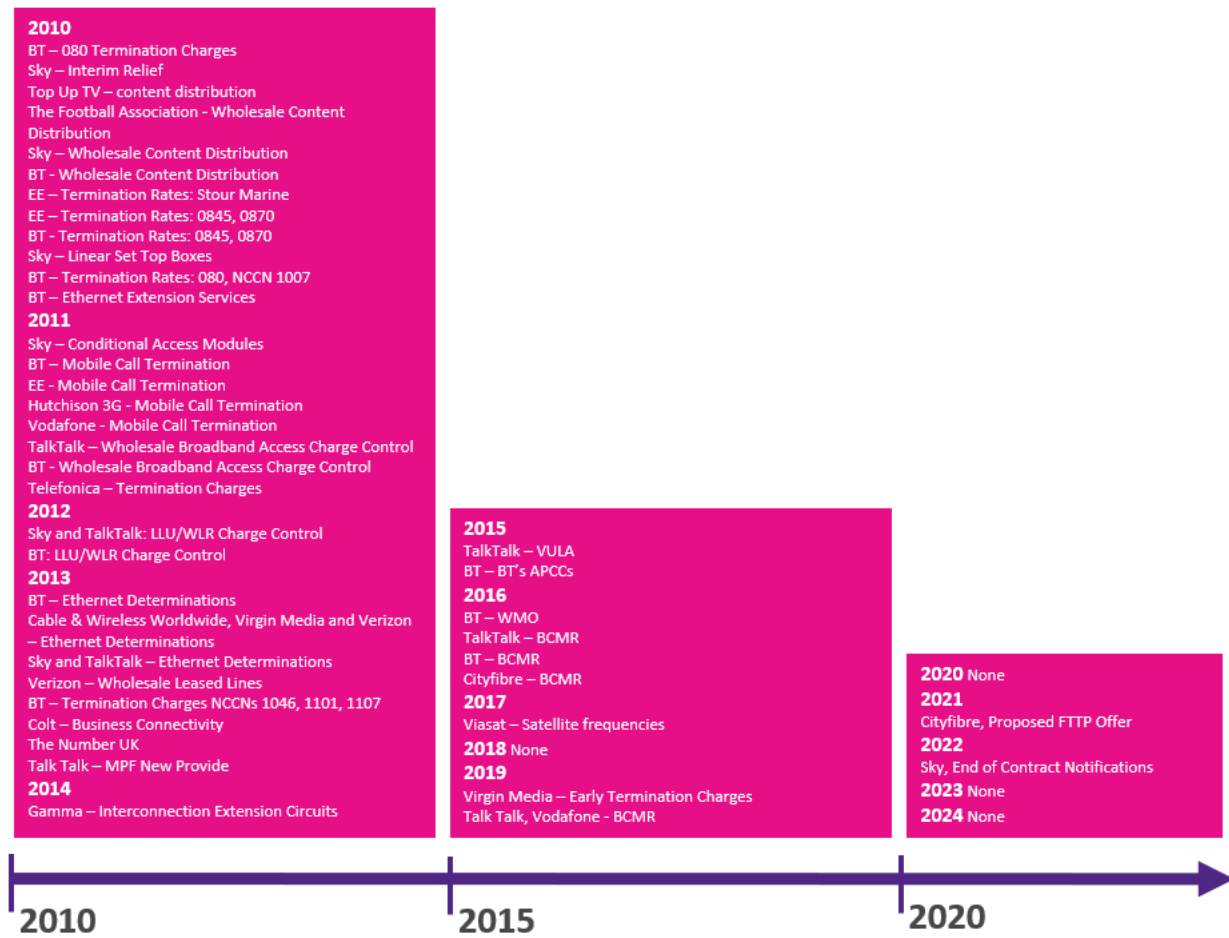
This is a very different test and has changed the appeals landscape significantly. It is likely also to have changed the incentives and appetite for prospective appellants to challenge Ofcom decisions.

In Figure 2.2. we list appeals to the CAT of Ofcom decisions in electronic communications markets. This shows clearly a steep reduction in the number and frequency of appeals since the changes to the appeals regime in 2017.

⁸⁰ <https://www.legislation.gov.uk/ukpga/2017/30/contents/enacted>. See Section 87 for changes to the appeals standard.

⁸¹ *Ibid.*

Figure 2.2: Appeals of Ofcom decisions under the Communications Act 2003 to the Competition Appeals Tribunal 2010 - 2024⁸²



The reduced number of appeals

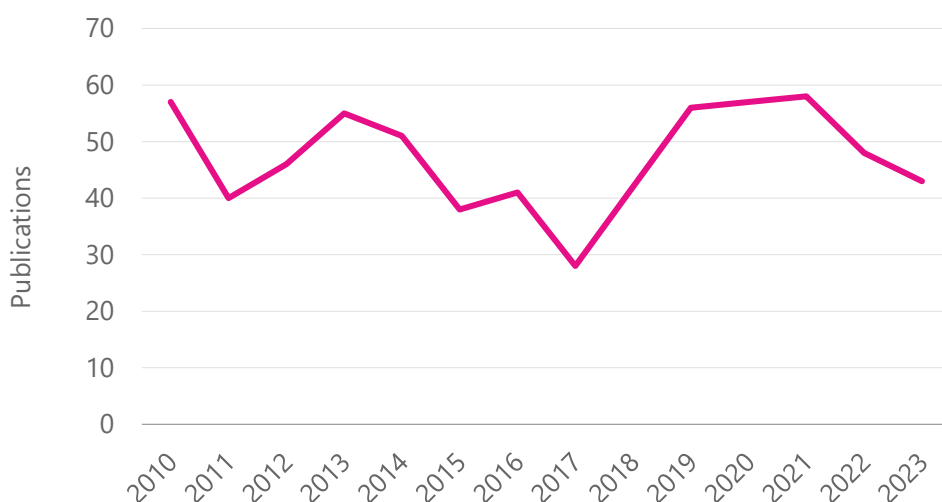
It is possible that this slowing down of appeals is the result of the changes to the appeals regime described above. In that case, it would be reasonable to conclude that incentives and appetite to appeal were reduced by the changes.

However, other factors may also explain the change in numbers. For example, the number of appealable regulatory decisions may also have reduced and/or industry may have been more supportive of decisions which were taken. We have assessed both these possible reasons for the lower number of appeals.

Figure 2.3 shows Ofcom’s activity as indicated by consultations and decisions under the Communications Act and Wireless Telegraphy Act 2006 2010 – 2023.

⁸² https://www.catribunal.org.uk/cases?form_build_id=form-LYw3uTtiqpaiHsKDBp-SRE8zlk4sWfj_pOR1YO_k2r0&form_id=elasticsearch_cases_search_form&query=&respondent_type%5BOffice%20of%20Communications%20%5D=Office%20of%20Communications%20&start_year=2010&end_year=2024&op=Search&page=2. Note, this does not include appeals of Ofcom decisions in other markets it regulates such as Post and Pay TV.

Figure 2.3: Volume of Ofcom consultation documents and statements under the Communications Act and Wireless Telegraphy Act⁸³



This shows a spread in the level of activity as measured by publications in the period we are considering, and quite a high volume of documents in the period 2018 – 2023, after changes to the appeal standard were made. However, this is a crude quantitative-only assessment of Ofcom's output and does not take account of the subject matter covered in these publications. Some publications cover narrow technical processes (e.g. application of code powers) and are therefore less likely to be appealed than policy based decisions which can have significant impacts across a broader range of stakeholders. We note that the volume of publications has not reduced, but do not draw any firm conclusions from this.

We also analysed a sample of responses to Ofcom consultations to assess whether stakeholder attitudes to Ofcom proposals have changed in a way which may have contributed to the reduced volume of appeals. We did this by selecting three regulatory decisions taking in the period before changes to the appeals framework, and three after. We then identified whether stakeholder responses to Ofcom proposals and decisions were broadly supportive, opposing, mixed or neutral. This analysis is shown in Figure 2.4.

Figure 2.4: Responses to Ofcom consultations before and after responses to the appeal standard

Ofcom decisions	Responses supporting decision (%)	Responses opposing decision (%)	Mixed or neutral responses (%)
Before change to the appeals standard <i>Openreach QoS, LLU and WLR Charge Controls 2015</i> <i>BCMR Leased Lines Charge Control 2015</i> <i>Framework for Spectrum Sharing 2015</i> Sample analysed: 43 responses	16	21	63
After change to the appeals standard <i>End of Contract and Best Tariff Notices 2019</i> <i>BT Regulatory Financial Reporting 2020</i> <i>Meeting Future Demand for Mobile Data 2022</i> Sample analysed: 57 responses	16	23	61

⁸³ Compiled from listings of regulatory consultations and decisions on Ofcom's website.

Like the analysis of Ofcom output, this is not a definitive indicator of the likelihood of appeals. We acknowledge that the allocation of responses into three broad categories does not capture the complexities and nuances which feature in many responses to the regulator and, as with the output analysis, we have not taken a view as to whether any of these decisions were more less "appealable". However, the data do not indicate any shift in the pattern of responses which indicates stronger support for Ofcom proposals and decisions and consequently a lower likelihood of challenge if the appeals regime were not changed.

It is reasonable to conclude from this analysis that the willingness of stakeholders to appeal regulatory decisions with which they disagree is reduced as a result of the DEA changes to the appeals framework, and that this has reduced the intensity of one of the most important avenues for scrutiny and challenge of decisions by Ofcom. We note also that, as part of the last government's smarter regulation initiative, stakeholders commented that the reason they have not appealed Ofcom decisions is not because they agree with them but because, in cases where they disagreed, they decided the risks and costs of appeal were too high.⁸⁴

A possible consequence of the change to the appeals standard is that regulatory decisions have become less transparent. It is true that, under the current appeals standard, less detailed information needs to be provided in regulatory decisions to withstand the risk of appeal. This is because, under the current framework, the CAT is unlikely to examine the merits of decisions on the evidence, and is more focussed on application of the law. Some stakeholders have said they would welcome more information on how Ofcom decisions are taken indicating a general desire for more transparent evidence, separate to any consideration of appeal. In their consultation on "smarter regulation", the previous Government responded with a proposal to explore improvements to the transparency of decision making.⁸⁵

Improved transparency would be likely to increase confidence in decision making, and this may be appropriate as the landscape for scrutiny and challenge of regulatory decisions has changed significantly since 2017 in the ways we describe in this section. In particular a review could usefully take account of the previous Government's principles set out in its approach to better regulation, which are:⁸⁶

- *"Adopting a greater emphasis on proportionality;*
- *ensuring that we are making the best use of alternatives to regulation by introducing an earlier scrutiny point at which departments will be asked to justify their decision to regulate;*
- *improving how we evaluate regulation, including post-implementation reviews; and*
- *improving how we measure the overall impact of regulation."*

We discuss this further in our recommendations in Section 3.

⁸⁴ <https://assets.publishing.service.gov.uk/media/655dee93d03a8d000d07fe75/strengthening-the-economic-regulation-of-the-energy-water-and-telecoms-sectors.pdf>, see page 65.

⁸⁵ *Ibid.*

⁸⁶ Better Regulation Annual Report 2021-22 <https://assets.publishing.service.gov.uk/media/63d280cfe90e071ba62d851f/better-regulation-annual-report-2021-to-2022.pdf>

3 Recommendations

In this section we make two recommendations to reflect the analysis and findings of this study.

These recommendations are intended as constructive contributions to debate about the UK regulatory framework for electronic communications. It is healthy to take a step back and look at the effectiveness of current arrangements, particularly as circumstances and external factors change. The Government's current plan for a SSP in the electronic communications sector and strong emphasis on growth is a good opportunity to evaluate some of the issues identified in this study, but it should not be the only one. Whether as part of the SSP or ongoing evaluation of remedies, we offer these recommendations to help ensure the regulatory framework and its application are keeping pace with the market.

Recommendation 1: Review of regulation in competitive electronic communications markets

As identified in our analysis, there has been proliferation of regulatory rules in electronic communications markets which were found to be competitive (i.e. with no SMP) fifteen years ago. This expansion of regulation in markets for which the principal driver of benefits is competition may, on its own, be a signal that the efficacy of this needs checking.

The Government's planned SSP for the electronic communications sector presents an opportunity to ensure that regulation in competitive markets remains effective, proportionate, and consistent with the Government's objective for economic growth. The SSP should recognise the key position of the sector and its importance in delivery of broader positive economic and social outcomes. It is an opportunity to take a fresh look at regulation in competitive markets, including a number of factors discussed in this report, including:

The importance of regulation in upstream markets. The main focus of regulation should be markets in which the continuing existence of SMP creates risks to consumers and competition. As described in the report, the scope of Ofcom's duties has expanded and it is important that this does not dilute focus on SMP in the electronic communications sector. This should be a priority for Ofcom, particularly as work starts on the imminent TAR.

The Government's emphasis on growth. Regulation in competitive markets should be re-examined to ensure it does not conflict with the Government's strong focus on economic growth.

The dangers of regulation in competitive markets. Competition is the best mechanism to deliver benefits to consumers. The regulator must be particularly careful of regulatory failure when considering interventions in competitive markets.

Cross-sectoral consumer protection. Consumer protection regulation should only be imposed where it is (a) needed, and (b) does not already exist in the cross-sectoral consumer protection framework.

The balance of evidence between residential consumers and business customers in the implementation of consumer protection measures. Consumer protection measures which also apply to business customers are typically established based on evidence heavily weighted towards residential consumer research and behaviour. This means they are unlikely to be suitable for business customer protection except where very small businesses use residential services.

The opportunity costs of intervention. Establishing the costs and benefits of regulatory interventions is inherently difficult and relies on forecasts and assumptions for forward looking assessments. It is important to

capture and consider the counterfactual benefits of non-intervention, e.g. in customer facing innovation which may be constrained by requirements to prioritise systems developments to comply with regulation.

The complexity of compliance requirements. The growth of regulation in competitive markets has resulted in increasingly complex and costly compliance requirements. Consideration should be given to the cumulative effects of this.

The impact of interventions on smaller providers. By their nature, the General Conditions contain rules which apply to all providers irrespective of size. Ofcom should take account of this dynamic, and particularly the impact on smaller operators of interventions principally designed to be implemented by larger companies.

The need to be satisfied that interventions are and continue to be effective and proportionate. Markets are dynamic and so should regulation be. Regulatory rules should not be imposed at a moment in time and assumed to continue to be needed when things change. The system should include monitoring of outcomes, and ex-post evaluation, and regulators should be prepared to remove regulation when it is no longer needed.

The advantages of principles and outcomes focussed regulation. In dynamic markets like electronic communications where changes happen often and fast, there are attendant risks that regulatory remedies become obsolete, or even damaging to the market. A way to mitigate these risks would be to focus regulation on principles and desired outcomes in cases where there is a need to intervene. This approach would establish the outcomes the regulator requires the market to deliver, leaving the methods of delivery to regulated companies.

The EECC. Whilst the EECC remains enshrined in the UK framework and is an important component in Ofcom's approach to consumer protection, it is appropriate four years after the UK left the EU to consider whether adjustments can be made to the UK's implementation to check whether it remains the most effective and proportionate approach to improving consumer outcomes.

Recommendation 2: Improvements to the transparency of decisions

As identified in the report, a number of factors have contributed to changes in the system for scrutiny of and challenge to regulatory decisions. The most significant of these is the DEA change to the appeals standard, but UK withdrawal from the EU and hence removal of the EC from the UK regulatory governance framework is also material.

Stakeholders have expressed a wish for improved transparency in regulation and, in its consultation document on smarter regulation, the previous government made a proposal to explore improvements to the transparency of decision making. This would potentially be an important step to build confidence making following the significant changes to scrutiny and governance discussed in the report. This may include looking at the transparency of evidence produced to support regulatory decisions, and the potential for greater use of ex-post evaluation of interventions and monitoring of outcomes.

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