



Communications Act 2003

2003 CHAPTER 21

PART 2

NETWORKS, SERVICES AND THE RADIO SPECTRUM

CHAPTER 1

ELECTRONIC COMMUNICATIONS NETWORKS AND SERVICES

SMP services conditions: subject-matter

87 Conditions about network access etc.

- (1) Where OFCOM have made a determination that a person to whom this section applies (“the dominant provider”) has significant market power in an identified services market, they shall—
 - (a) set such SMP conditions authorised by this section as they consider it appropriate to apply to that person in respect of the relevant network or relevant facilities; and
 - (b) apply those conditions to that person.
- (2) This section applies to—
 - (a) a person who provides a public electronic communications network; and
 - (b) a person who makes available facilities that are associated facilities by reference to such a network.
- (3) This section authorises SMP conditions requiring the dominant provider to give such entitlements as OFCOM may from time to time direct as respects—
 - (a) the provision of network access to the relevant network;
 - (b) the use of the relevant network; and
 - (c) the availability of the relevant facilities.

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[^{F1}(3A) The assets as respects which entitlements may be given under subsection (3) include, in the case of assets which are not active, any which, although forming part of the relevant network or the relevant facilities, do not form part of the services market to which the determination relates.]

(4) In determining what conditions authorised by subsection (3) to set in a particular case, OFCOM must take into account, in particular, the following factors—

- (a) the technical and economic viability [^{F2}(including the viability of other network access products, whether provided by the dominant provider or another person)] , having regard to the state of market development, of installing and using facilities that would make the proposed network access unnecessary;
- (b) the feasibility of the provision of the proposed network access;
- [^{F3}(ba) any technological developments that, in OFCOM’s opinion, are likely to affect the design and management of the relevant network or (as the case may be) the relevant facilities;
- (bb) the need to ensure that the provision of the proposed network access does not have the effect of favouring one form of technology over another in relation to the design and management of electronic communications networks;]
- (c) the investment made by the person initially providing or making available the network or other facility in respect of which an entitlement to network access is proposed [^{F4}(taking account of any public investment made)];
- (d) the need to secure effective competition [^{F5}(including, where it appears to OFCOM to be appropriate, economically efficient infrastructure based competition)] in the long term [^{F6}and to support innovative business models that support sustainable competition]; [^{F7}and]
- (e) any rights to intellectual property that are relevant to the proposal; ^{F8} ...
- ^{F8}(f)

(5) The conditions authorised by subsection (3) may include provision—

- (a) for securing fairness and reasonableness in the way in which requests for network access are made and responded to; and
- (b) for securing that the obligations contained in the conditions are complied with within the periods and at the times required by or under the conditions.

[^{F9}(5A) The SMP conditions authorised by this section also include a condition which—

- (a) is of a technical or operational nature; and
- (b) appears to OFCOM to be appropriate for securing the proper operation of an electronic communications network in compliance with a condition under subsection (3).

(5B) A condition falling within subsection (5A) may provide that compliance with the condition is not required unless a person on whom an entitlement is or may be conferred in pursuance of a requirement imposed by a condition under subsection (3) fulfils such technical or operational requirements as may be specified by OFCOM.

(5C) It shall be the duty of OFCOM, when setting a condition falling within subsection (5A), to ensure that it contains all such provision as they consider appropriate for the purpose of taking account of the relevant international standards.]

(6) The SMP conditions authorised by this section also include one or more of the following—

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- (a) a condition requiring the dominant provider not to discriminate unduly against particular persons, or against a particular description of persons, in relation to matters connected with network access to the relevant network or with the availability of the relevant facilities;
 - (b) a condition requiring the dominant provider to publish, in such manner as OFCOM may from time to time direct, all such information as they may direct for the purpose of securing transparency in relation to such matters;
 - (c) a condition requiring the dominant provider to publish, in such manner as OFCOM may from time to time direct, the terms and conditions on which he is willing to enter into an access contract;
 - (d) a condition requiring the terms and conditions on which the dominant provider is willing to enter into an access contract to include such terms and conditions as may be specified or described in the condition;
 - (e) a condition requiring the dominant provider to make such modifications as OFCOM may direct of any offer by that provider which sets out the terms and conditions on which he is willing to enter into an access contract.
- (7) The SMP conditions authorised by this section also include conditions requiring the dominant provider to maintain a separation for accounting purposes between such different matters relating—
- (a) to network access to the relevant network, or
 - (b) to the availability of the relevant facilities,
- as OFCOM may from time to time direct.
- (8) The SMP conditions authorised by subsection (7) include conditions imposing requirements about the accounting methods to be used in maintaining the separation.
- (9) The SMP conditions authorised by this section also include (subject to section 88) conditions imposing on the dominant provider—
- (a) such price controls as OFCOM may direct in relation to matters connected with the provision of network access to the relevant network, or with the availability of the relevant facilities;
 - (b) such rules as they may make in relation to those matters about the recovery of costs and cost orientation;
 - (c) such rules as they may make for those purposes about the use of cost accounting systems; and
 - (d) obligations to adjust prices in accordance with such directions given by OFCOM as they may consider appropriate.
- (10) The SMP conditions authorised by subsection (9) include conditions requiring the application of presumptions in the fixing and determination of costs and charges for the purposes of the price controls, rules and obligations imposed by virtue of that subsection.
- (11) Where OFCOM set a condition authorised by this section which imposes rules on the dominant provider about the use of cost accounting systems, it shall be their duty also to set, and to apply to him, an SMP condition which imposes on him an obligation—
- (a) to make arrangements for a description to be made available to the public of the cost accounting system used in pursuance of that condition; and
 - (b) to include in that description details of—
 - (i) the main categories under which costs are brought into account for the purposes of that system; and

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(ii) the rules applied for the purposes of that system with respect to the allocation of costs.

(12) In this section—

“access contract” means—

- (a) a contract for the provision by a person to whom this section applies to another person of network access to the relevant network; or
- (b) a contract under which the relevant facilities are made available by a person to whom this section applies to another person;

“the relevant facilities”, in relation to a person to whom this section applies, means the associated facilities made available by that person in relation to a public electronic communications network; and

“the relevant network”, in relation to such a person, means the public electronic communications network provided by him.

Textual Amendments

- F1** S. 87(3A) inserted (21.12.2020) by [The Electronic Communications and Wireless Telegraphy \(Amendment\) \(European Electronic Communications Code and EU Exit\) Regulations 2020 \(S.I. 2020/1419\)](#), reg. 1(2), **Sch. 1 para. 41(2)**
- F2** Words in s. 87(4)(a) inserted (26.5.2011) by [The Electronic Communications and Wireless Telegraphy Regulations 2011 \(S.I. 2011/1210\)](#), reg. 1(2), **Sch. 1 para. 49(a)** (with Sch. 3 para. 2)
- F3** S. 87(4)(ba)(bb) inserted (21.12.2020) by [The Electronic Communications and Wireless Telegraphy \(Amendment\) \(European Electronic Communications Code and EU Exit\) Regulations 2020 \(S.I. 2020/1419\)](#), reg. 1(2), **Sch. 1 para. 41(3)(a)**
- F4** Words in s. 87(4)(c) inserted (26.5.2011) by [The Electronic Communications and Wireless Telegraphy Regulations 2011 \(S.I. 2011/1210\)](#), reg. 1(2), **Sch. 1 para. 49(b)** (with Sch. 3 para. 2)
- F5** Words in s. 87(4)(d) inserted (26.5.2011) by [The Electronic Communications and Wireless Telegraphy Regulations 2011 \(S.I. 2011/1210\)](#), reg. 1(2), **Sch. 1 para. 49(c)** (with Sch. 3 para. 2)
- F6** Words in s. 87(4)(d) inserted (21.12.2020) by [The Electronic Communications and Wireless Telegraphy \(Amendment\) \(European Electronic Communications Code and EU Exit\) Regulations 2020 \(S.I. 2020/1419\)](#), reg. 1(2), **Sch. 1 para. 41(3)(b)**
- F7** Word in s. 87(4)(d) inserted (31.12.2020) by [The Electronic Communications and Wireless Telegraphy \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(S.I. 2019/246\)](#), reg. 1(2), **Sch. 1 para. 32(a)**; 2020 c. 1, Sch. 5 para. 1(1)
- F8** S. 87(4)(f) and word omitted (31.12.2020) by virtue of [The Electronic Communications and Wireless Telegraphy \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(S.I. 2019/246\)](#), reg. 1(2), **Sch. 1 para. 32(b)**; 2020 c. 1, Sch. 5 para. 1(1)
- F9** S. 87(5A)-(5C) inserted (26.5.2011) by [The Electronic Communications and Wireless Telegraphy Regulations 2011 \(S.I. 2011/1210\)](#), reg. 1(2), **Sch. 1 para. 49(d)** (with Sch. 3 para. 2)

Commencement Information

- I1** S. 87 in force at 25.7.2003 for specified purposes by [S.I. 2003/1900](#), arts. 1(2), 2(1), **Sch. 1** (with art. 3) (as amended by [S.I. 2003/3142](#), art. 1(3))
- I2** S. 87 in force at 29.12.2003 in so far as not already in force by [S.I. 2003/3142](#), **art. 3(2)** (with art. 11)

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Changes and effects yet to be applied to :

- specified provision(s) amendment to earlier commencing SI 2003/1900, art. 3(2) by [S.I. 2003/3142 art. 1\(3\)](#)
- specified provision(s) amendment to earlier commencing SI 2003/3142 by [S.I. 2004/1492 art. 2](#)
- specified provision(s) amendment to earlier commencing SI 2003/3142 by [S.I. 2004/697 art. 2](#)
- specified provision(s) amendment to earlier commencing SI 2003/3142 art. 4 Sch. 2 by [S.I. 2004/545 art. 2](#)

Changes and effects yet to be applied to the whole Act associated Parts and Chapters:

Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 124Q(7)(a) words substituted by [2013 c. 22 Sch. 9 para. 52](#)
- s. 148A and cross-heading inserted by [2022 c. 46 s. 73\(2\)](#)
- s. 368E(5)(d)(e) inserted by [2017 c. 30 s. 94\(3\)](#)
- s. 402(2A)(za)(zb) inserted by [2022 c. 46 Sch. para. 2](#)
- Sch. 3A para. 21(6) inserted by [2022 c. 46 Sch. para. 3\(5\)\(b\)](#)
- Sch. 3A para. 37(3)(aza) inserted by [2022 c. 46 Sch. para. 3\(9\)](#)
- Sch. 3A para. 84(1)(aza) inserted by [2022 c. 46 Sch. para. 3\(10\)](#)
- Sch. 3A para. 103(1)(ca) inserted by [2022 c. 46 s. 70](#)
- Sch. 3A para. 119A inserted by [2022 c. 46 s. 72](#)
- Sch. 3A Pt. 4ZA inserted by [2022 c. 46 s. 67\(1\)](#)