

The definition of “relevant activity” for the purposes of administrative charging

Guidelines issued by Ofcom

Summary

- 1.1 This Guidance is intended to help those persons liable to pay administrative charges under section 38 of the Communications Act 2003 (“the Act”) to establish their gross turnover from relevant activities for the purposes of administrative charging.
- 1.2 It is hoped that operators will be able, with the help of this Guidance, to provide the information specified in any general demand for information more quickly. A number of activities they carry out will clearly fall under the definition of ‘relevant activity’ in the charging principles, without the need to refer to the Guidance.

Chapter 1

The Definition of Relevant Activity

- 1.3 In the charging principles the term ‘relevant activity’ means:-
 - a) the provision of electronic communication services to third parties;
 - b) the provision of electronic communication networks, electronic communication services and network access to communication providers;
or
 - c) the making available of associated facilities to communication providers.
- 1.4 The following section sets out Ofcom’s Guidance on the interpretation of this definition. The words and expressions used in the definition of ‘relevant activity’ have the same meaning as they have in the Act and they are included in Part D of this Section. They derive from but are not identical to the definitions contained in the EC Framework Directive¹. Where appropriate, reference is made to this Directive for guidance on interpretation.

Guidance on the definition of relevant activity.

- 1.5 The purpose of this Guidance is to assist those persons liable to pay fees to estimate their gross turnover from relevant activities for the purposes of administrative charging. Ofcom cannot fetter its discretion as to any future decision. Accordingly, this Guidance will not be binding upon Ofcom in the future. However, Ofcom would normally expect to follow this Guidance in determining what is a relevant activity for the purposes of the administrative charging regime. Should Ofcom choose to depart from this Guidance in respect of any future

1 Article 2 Framework Directive

decision it would set out its reasons for doing so. This Guidance may be subject to revision from time to time.

- 1.6 For the avoidance of doubt, the guidelines are specific to determining what is a Relevant Activity for the purposes of administrative charging under the Act.

Part A

What does the provision of ECSs to third parties mean?

What is an ECS?

- 1.7 The definition of ECS in the Act is very broad. A service will be an ECS where:

- following removal of the content aspect of the service; then
- the service has as its principal feature the conveyance of signals by means of an ECN.

This would include, for example, telephone calls. Where however, the principal feature of the service is what is *comprised* in the signals as opposed to the *conveyance* of signals, then it will constitute a content service and not an ECS.

- 1.8 Ofcom recognises that a broad range of services fall within the definition of ECS and that in some cases it may not be easy to decide whether an ECS is being provided. One method of viewing the range of ECSs is to classify them as either basic, advanced or enhanced services (value-added services) depending on the level of additional network resources and associated facilities that they require as well as whether there is any interaction, manipulation, or storage of content. The terms 'basic', 'advanced' and 'enhanced' services do not derive from the Act or from any of the EC Directives and are used here purely to help provide a framework for identifying activities which are ECSs.

Basic services

- 1.9 Where services are provided over an ECN without the support of databases or servers they can be regarded as basic services. Such services would include, but are not limited to, straightforward conveyance services such as: telephone calls; telex; IP conveyance using a 4 digit IP address; leased lines; video conferencing; ATM; frame relay; X25 data; radio and television transmission.

Advanced services

- 1.10 Where services are provided over an ECN but require the support of an associated facility they can be regarded as advanced services. Such services would include IP conveyance supported by the domain name system, non-geographic number services supported by IN translation databases, instant messaging supported by a 'presence' database, mobile telephony supported by home location registers, television transmissions supported by conditional access systems and electronic programme guides.

Enhanced services

- 1.11 Where services are provided over an ECN but either they interact with content, manipulate content or store content with the support of an associated facility such services can be regarded as enhanced or value-added services. In all of these cases even though the service does involve doing something with 'content' the service is still an ECS as it consists wholly or mainly in the conveyance of signals as opposed to the provision of a content service. Examples of such enhanced services include telephone calls completed through interactive voice response boxes, TV transmission with MPEG compression supported by compression systems, 3-way conference calls supported by conference bridges, e-mail supported by e-mail servers and voice mail supported by voice mail servers.
- 1.12 Although the boundary lines between the suggested hierarchy of services is not always clear cut, any overlap will not impact on the question of whether an activity is a relevant one for the purposes of administrative charging.
- 1.13 The following diagram attempts to illustrate more clearly the features of basic, advanced and enhanced services.

	Electronic Communication Networks	Associated Facilities	Output
Basic Services	Provided over an ECN	None needed	Conveyance of signals e.g. telephone calls
Advanced Services	Provided over an ECN	Certain elements of the service require the support of associated facilities	Conveyance of signals e.g. mobile calls
Enhanced Services	Provided over an ECN	Certain elements of the service require the support of associated facilities	Conveyance of signals and either interaction with content, manipulation of content or storage of content e.g. email.

- 1.14 These principles are in line with the definition of ECS in the EC Framework Directive, which states that information society services are not ECSs unless they consist wholly or mainly in the conveyance of signals. Taking examples such as internet banking or on-line betting, in both cases the key characteristic lies more in the provision of information than in the conveyance of signals which is a purely incidental aspect of the service. However, even where a service does not consist mainly in the conveyance of signals the expectation will be that there is an underlying conveyance service associated with it that is an ECS and which will be caught. In many cases, for example home shopping, the provider of the content service will be different from the provider of the ECS.

What is the provision of an ECS to third parties?

- 1.15 Provision of an ECS to a third party would include provision to business customers, of a wide variety of types where they are provided with electronic communication services.
- 1.16 It would also include the provision of electronic communications services to groups such as members of a prison or tenants of a landlord. However, such services would only be caught if the Relevant Turnover from them exceeds the threshold in the designation, currently £5m.

Part B

The provision of ECNs, ECSs, and network access to communications Providers

What does the provision of ECNs to communication providers mean? What is an ECN?

- 1.17 The definition of ECN in the Act is very broad. All that is required for an ECN to be viewed as an ECN by Ofcom is a 'transmission system'. This term is itself undefined. Although it may be inferred that a transmission system requires the conveyance of signals between the following elements: a transmitter, a medium and a receiver, the Act makes it clear that a transmission system may consist of no more than a transmitter used for the conveyance of signals². Other resources which permit the conveyance of signals, such as apparatus used for switching or routing of signals, or stored data are not central to the definition although if they are present they will form part of the ECN.
- 1.18 Section 32(4) of the Act makes it clear that references to the 'provision of an ECN' include references to its establishment, maintenance or operation. Thus provision is not the same as ownership. There is no requirement for a communications provider to enjoy exclusive rights over the elements that combine to form the ECN.
- 1.19 There are many similarities between the definition of an ECN and the definition of 'telecommunication system' in section 4 of the Telecommunications Act 1984. Therefore it is highly likely that telecommunication systems which have been run under licences will be viewed as ECNs. The main difference between the old licensing regime and the new regime is that under the old licensing regime only one person could be authorised to run a system. Under the new regime a system that was being run by one licensee could form part of several persons' ECN. Furthermore, instead of regulating the running of the system, as was the case under licensing, it is the provision of the ECNs, ECSs and the making available of AFs that will be regulated under the new regime.
- 1.20 Communications providers are the providers of ECSs and ECNs and therefore would not include members of the public. An example of the provision of an ECN to a communications provider is where a provider operates and maintains a network

² Section 32(6)

on behalf of another communications provider i.e. the outsourcing of network provision. Another example is the grant of property rights which cannot be withdrawn (indefeasible rights of use) i.e. in international sub-marine cables.

What does the provision of electronic communication services to communication providers mean?

1.21 The meaning of an ECS has already been considered above. Examples of the provision of ECSs to communication providers would include the wholesale provision of any of the services mentioned above, to other communication providers as opposed to members of the public. It would also include the provision of an ECS to enable access to another ECS or ECN or the provision of an ECS to enable the interconnection of Public ECNs.

What does provision of network access to communication providers mean?

1.22 Section 151(3) of the Act sets out the definition of 'network access'. The term is all embracing and encompasses the interconnection of Public ECNs, and any services, facilities or arrangements which are not interconnection but which enable a Communications Provider, for the purpose of providing an ECS (whether his own or someone else's,) to make use of, for example any ECN or ECS provided by another Communications Provider.

Examples include:

- the provision of access to specified network elements and/ or facilities, including unbundled access to the local loop;
- the provision of specified services on a wholesale basis for resale by third parties;
- the provision of access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services;
- the provision of access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services; and
- the provision of interconnection services to networks or network facilities.

Part C

The making available of Associated Facilities to communication providers

What are Associated Facilities?

1.23 The definition of AFs in the Act catches all those AFs which are made available to enable the provision of an ECN or ECS or to support the provision of other services, such as any form of information society services or content services, e.g. broadcast television, which are provided by means of a network or service. A defining characteristic is that the AF is provided to make the provision of the ECN

or ECS possible. In relation to 'other services' provided by means of an ECN or ECS an AF is caught if it makes possible or supports the provision of those other services. Therefore the definition catches AFs which are essential in the provision of an ECN or ECS and AFs which enable or support the provision of 'other services' provided by means of that network or service. Examples include telephone calls completed through interactive voice response boxes, TV transmission with MPEG compression supported by compression systems and e-mail supported by e-mail servers.

1.24 It is important to note that the AFs caught in this part of the definition of relevant activity do not include AFs, which are provided by the same person providing the ECS, which the AF supports or enables.

1.25 As has already been stated references to the 'provision of an ECN' is a reference to the network's establishment, maintenance or operation. Therefore this section could include the provision of a wide range of facilities including ducts, buildings masts and poles.

Part D

Annex to the definition of 'relevant activity' for the purposes of administrative charging

Definitions of the terms used in the definition of 'relevant activity'

1.26 These definitions have been taken from the Communications Act 2003 (the 'Act'):

- **Electronic communications network** means³:
 - a) a transmission system for the conveyance by the use of electrical, magnetic or electro-magnetic energy, of signals of any description; and
 - b) such of the following as are used, by the person providing the system and in association with it, for the conveyance of the signals:
 - i. apparatus comprised in the system;
 - ii. apparatus used for the switching or routing of the signals; and
 - iii. software and stored data.
- **Electronic communications service** means⁴:
a service consisting in, or having as its principal feature, the conveyance by means of an electronic communications network of signals, except in so far as it is a content service.
- **Content service** means⁵ so much of any service as consists in one or both of the following:-

³ Section 32(1) of the Act

⁴ Section 32(2) of the Act

⁵ Section 32(7) of the Act

- a) the provision of material with a view to its being comprised in signals conveyed by a means of an electronic communications network;
 - b) the exercise of editorial control over the contents of signals conveyed by means of such a network
- **Conveyance of signals**⁶ includes references to the transmission or routing of signals or of parts of signals and to the broadcasting of signals for general reception.
- **Signals** includes⁷:
 - a) anything comprising speech, music, sounds, visual images or communications or data of any description; and
 - b) signals serving for the impartation of anything between persons, between a person and a thing or between things, or for the actuation or control of apparatus.
- **Associated facility** means⁸ a facility which:
 - a) is available for use in association with the use of an electronic communications network or electronic communications service (whether or not one provided by the person making the facility available;); and
 - b) is so available for the purpose of
 - i. making the provision of that network or service possible;
 - ii. making possible the provision of other services provided by means of that network or service; or
 - iii. supporting the provision of such other services.
- **Communication provider** means⁹:
a person who (within the meaning of section 32(4) of the Communications Act) provides an electronic communications network or an electronic communications service
- References to **Network Access** in Chapter 1 of the Communications Act¹⁰ are references to:
 - a) interconnection of public electronic communication networks; or
 - b) any services, facilities or arrangements which
 - i. are not comprised in interconnection; but
 - ii. are services, facilities or arrangements by means of which a communications provider or person making available associated facilities is able, for the purposes of the provision of an electronic communications service (whether by him or by another), to make use of anything mentioned in section c) below

6 Section 32(8) of the Act

7 Section 32(10) of the Act

8 Section 32(3) of the Act

9 Section 405 of the Act

10 Section 151(3) of the Act

and references to providing network access include references to providing any such services, making available any such facilities or entering into any such arrangements.

c) The things referred in ii) above are

1. any electronic communications network or electronic communications service provided by another communications provider
2. any apparatus comprised in such a network or used for the purposes of such a network or service
3. any facilities made available by another that are associated facilities by reference to any network or service (whether one provided by that provider or by another); and
4. any other services or facilities which are provided or made available by another person and are capable of being used for the provision of an electronic communications service.