

Designation and Relevant
Activity Guidelines for the
purposes of administrative
charging

Final statement

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Section 1

Summary

- 1.1 This Statement accompanies the withdrawal and making today of a designation pursuant to section 34 and 38 of the Communications Act 2003 (the “Act”) (the “designation”)¹ and publication of guidelines entitled “The definition of “relevant activity” for the purposes of administrative charges” (the “guidelines”).²
- 1.2 The designation and the guidelines are reproduced at Annex 1 and Annex 2 respectively of this final statement for ease of reference.
- 1.3 Publication follows public consultations by the Office of Communications (“Ofcom”) on the designation under section 38(11) and section 34(1) of the Act. At the same time, Ofcom also consulted publicly on the guidelines.
- 1.4 Ofcom has also consulted with the Secretary of State on the withdrawal and making of the designation as required under section 38(11) and 34(2) of the Act.

¹ www.ofcom.org.uk/consult/condocs/designation/statement/statement.pdf

² www.ofcom.org.uk/consult/condocs/designation/statement/guidelines.pdf

Section 2

Background

Legal framework

- 2.1 Under section 38 of the Act, only those providers of electronic communications networks, services or associated facilities of a description that have been designated shall pay administrative charges to Ofcom.
- 2.2 Section 34 of the Act applies to the making and withdrawal of a designation for the purposes of section 38 of the Act.
- 2.3 Section 34(1) says that before making or withdrawing a designation, Ofcom must consult such of the persons who, in their opinion are likely to be affected by it as they think fit. Ofcom must also consult the Secretary of State under section 34(2).

History

- 2.4 The Director General of Telecommunications (the “Director General”) made a designation on 25 July 2003 (the “Ofcom designation”).³ The Director General also published guidelines “The definition of “relevant activity” for the purposes of administrative charges” on 29 July 2003 (the “Ofcom guidelines”).⁴
- 2.5 Ofcom relied on the Ofcom designation in the Statement of Charging Principles dated 31 March 2004 for the charging year 2004/5.
- 2.6 On 6 December 2004, Ofcom consulted on the draft statement of charging principles that Ofcom would apply in order to set annual administrative charges and licence fees pursuant to the Act for the charging year 2005/6 (the “December consultation”).⁵ It included consultation on a draft designation pursuant to sections 34 and 38 of the Act. Ofcom said:

*“In accordance with good administrative practice, Ofcom intends to publish a fresh designation which will relate to the charging year 2005/6 and will cover subsequent charging years. Ofcom proposes that the Designation reflects the nature of the designation originally published by the Director General of Telecommunications in 2003 and relied upon by Ofcom in the Statement of Charging Principles published in March 2004.”*⁶
- 2.7 Ofcom proposed that during each charging year (a twelve month period ending 31 March), the electronic communications network, electronic communications service or associated facility which is designated for the purposes of section 38

³ http://www.ofcom.org.uk/static/archive/oftel/ind_info/licensing/mods/2003/250703.htm

⁴ http://www.ofcom.org.uk/licensing_numbering/tele_gen_auth/g_a_regime/admin_chrg/relev_acti_vity.pdf

⁵ <http://www.ofcom.org.uk/consult/condocs/socp/>

⁶ Paragraph 6.27.

of the Act is any electronic communications network, electronic communications service or associated facility where the person providing that network or service, or making available that associated facility had a turnover from relevant activities of £5 million or more in the last but one calendar year prior to the charging year in question.

2.8 'Relevant Activity' was proposed to mean any of the following:

- a) *the provision of Public Electronic Communications Services to End-Users;*
- b) *the provision of Electronic Communications Networks, Electronic Communications Services and Network Access to Communications Providers; or*
- c) *the making available of Associated Facilities to Communications Providers.”*⁷

2.9 In the context of the December consultation, Ofcom also took the opportunity to propose amendments to the Oftel Guidelines, primarily to clarify how it would interpret public electronic communication services to end-users.⁸ Without fettering its discretion, Ofcom proposed normally to expect to follow the guidelines in determining what is a relevant activity for the purposes of administrative charges.⁹

2.10 Having considered all the responses to the 3 December 2004 consultation on the draft designation and the draft guidelines, Ofcom consulted again on the draft designation and draft guidelines on 8 February 2004 (the “February Consultation”).¹⁰

2.11 The February consultation was primarily to propose amendments to the definition of “relevant activity” in the designation and to propose amendments to the draft guidelines in light of its proposed new designation.

2.12 Ofcom received no responses to the February consultation. On 3 March 2005, Ofcom consulted with the Secretary of State. The Secretary of State had no comments on Ofcom’s proposals.

2.13 Ofcom is now publishing the designation and guidelines in accordance with its proposals in the February consultation. The reasons for the February consultation proposals which are now being adopted were set out in that consultation with a regulatory impact assessment. They are also set out in the next chapter for ease of reference. The designation and guidelines can be found on Ofcom’s website at www.ofcom.org.uk/consult/condocs/designation/statement/. They are also reproduced as in Annex 1 and Annex 2 to this final statement.

⁷ Paragraph 8.3.

⁸ Section 9.

⁹ Paragraph 1.33.

¹⁰ <http://www.ofcom.org.uk/consult/condocs/designation/designation.pdf>

Section 3

Definition of “Relevant Activity”

- 3.1 In response to the December consultation, one respondent expressed concern over the approach proposed by Ofcom to the interpretation of the phrase “public electronic communications services” in the definition of “relevant activity” in the draft designation.
- 3.2 The respondent was of the view that “public electronic communications services” should be given the same meaning that it has in section 151 of the Act. Section 151 of the Act defines “public electronic communications services” as any electronic communications service that is provided so as to be available to members of the public.
- 3.3 The respondent said this would mean “public electronic communications services” would not include negotiated arrangements made on a bespoke basis with individual companies with highly specific and specialised needs as these are not public services. This was contrary to Ofcom’s proposed amendments to the Oftel Guidelines.
- 3.4 In support for its view, the respondent noted that Ofcom had recognised that some services made available to closed user customer groups such as prison inmates or tenants of a single landlord would not constitute public services. The respondent said that the distinction between that and bespoke arrangements agreed by a company with select customers was unclear.

Ofcom response

- 3.5 Ofcom agreed in the February consultation that there was scope for confusion about the distinction between on the one hand;
 - 3.5.1 the supply of services to groups that are defined by a characteristic such as occupancy of a prison, or status as tenants of a single landlord; and
 - 3.5.2 on the other hand, the supply of services to, for example, individual large business customers with highly specialised needs.
- 3.6 Ofcom recognised that the scope for confusion could be increased further where the demand characteristics of individual large business customers may be affected by the existence of other regulation (such as a licensing regime) that may limit the ability of other persons to require services similar to those business customers.
- 3.7 Ofcom considered that a number of potential disadvantages would flow from a lack of clarity about who is included within the designation.
- 3.8 The first disadvantage arose from the potential for inconsistencies in the treatment of the supply of services to customers in the business market. Ofcom did not consider that it would be appropriate to exclude from the scope of

“relevant activity” the supply of services to business customers that have highly specific or specialised needs. Business requirements for electronic communications services can be highly complex and varied. It would not be feasible to draw a clear boundary around those services which are so widely available as to be available to members of “the public” and those (if any) which are, like the provision of services to inmates of a prison, available only to a closed group. Ofcom also considered that to attempt to draw a boundary in the range of services to business customers would also be inappropriate. There is significant economic activity in the supply of bespoke business services, and there is significant regulatory activity in association with this. Ofcom said it would be inappropriate, and potentially unfair, to exclude from the designation the supply of services to business customers that are highly specialised, while including within the designation other, more standard, less bespoke services to business customers.

- 3.9 The second disadvantage arose from the potential for a lack of clarity in the designation to occasion additional confusion, uncertainty and cost to suppliers of services as its meaning and application is disputed.

Ofcom proposal and regulatory impact assessment

- 3.10 Ofcom’s proposed therefore to amend the draft designation. Ofcom proposed to redefine “relevant activity” by reference to the provision of electronic communication services to third parties instead of by reference to public electronic communication services to end-users. Ofcom considered whether, as an alternative, the requisite clarity could be achieved by amending the Oftel Guidelines to make it clear that Ofcom would interpret “members of the public” widely, and that this included the supply of bespoke services to business customers. However, Ofcom was of the view that uncertainty would remain around the boundary between closed groups, such as prison inmates, and business customers with highly specialised needs, particularly where these may be conditioned by regulation.
- 3.11 Ofcom therefore proposed to amend the designation as described. Ofcom’s assessment of the impact of this designation was as follows:

Benefits:

- 3.12 The benefits will comprise:
- 3.12.1 ensuring that the supply of services to all business customers, including those with highly specialised needs, is treated alike for the purposes of Ofcom’s administrative charges; and
- 3.12.2 removing a point of uncertainty in the administrative charging regime, which causes some confusion and cost.

Costs:

- 3.13 The costs will comprise an extension in the scope of the administrative charging regime for electronic communications services, to encompass the supply of all electronic communications services to third parties even if these are not available to members of the public. Thus, for example, the supply of payphone services to inmates of a prison would now be included where previously those services may (depending on the exact commercial arrangements) not have been included.
- 3.14 This proposal does therefore comprise, in principle, an extension of the requirement to pay administrative charges to Ofcom. However, Ofcom considered that the practical significance of this extension should be limited given that the obligation to pay administrative charges to Ofcom only arises where Relevant Turnover exceeds £5 million. Ofcom considered that the great bulk of suppliers of electronic communication services to third parties who are not members of the public are likely to have Relevant Turnover of less than £5 million. This should, for example, be the case with club owners, or residential or business landlords, who provide payphones to their customers.
- 3.15 Ofcom considered that this proposal should not have a material effect on the suppliers of bespoke services to large business organisations as these fall within the scope of the designation currently in force. The effect on these persons is therefore to create additional clarity, rather than a change in status vis-à-vis the designation.

Other changes

- 3.16 Ofcom proposed to withdraw the Oftel designation and to replace this with a new designation. Ofcom therefore added some wording to the draft designation to make it clear that the Oftel designation is withdrawn.
- 3.17 The draft designation referred to a “total turnover” from relevant activities of £5 million or more. This should be a reference to “Relevant Turnover” and Ofcom made the necessary change to the new draft designation to reflect this.
- 3.18 Ofcom also replaced the reference to “relevant activities” in the draft designation with “Relevant Activities” in order to be clear that this is a defined term within the meaning of the designation.

Annex 1

Notice of Designation under Section 38 and 34 of the Communications Act 2003

1. The Office of Communications (“Ofcom”) in accordance with section 38 and section 34 of the Communications Act 2003 ('the Act') hereby gives notice of withdrawal of a designation and the making of a new designation, set out below, that it has made by way of publication of the notice on 31 March 2005 for the purposes of section 38 of the Communications Act 2003 (Fixing of charges).
2. The withdrawal of a designation and the making of a new designation follows “Ofcom Response to Consultation on Draft Statement of Charging Principles” dated 6th December 2004 and the Further consultation on the Notice of Designation and Relevant Activity Guidelines for the purposes of administrative charging dated 8 February 2005 and the consultation with the Secretary of State for Trade and Industry.

Designation for the purposes of section 38 of the Act

Definitions

3. For the purpose of interpreting this Designation the following definitions shall apply:-

‘Act’ means the Communications Act 2003;

‘Charging Year’ means a twelve month period ending 31 March;

‘Relevant Activity’ means any of the following:

- a. the provision of Electronic Communications Services to third parties;
- b. the provision of Electronic Communications Networks, Electronic Communications Services and Network Access to Communications Providers; or
- c. the making available of Associated Facilities to Communications Providers

‘Relevant Turnover’ means turnover made from carrying on any Relevant Activity after the deduction of sales rebates, value added tax and other taxes directly related to turnover.

4. Except in so far as the context otherwise requires, words or expressions shall have the meaning assigned to them and otherwise any word or expression shall have the same meaning as it has in the Act.

Withdrawal of a Designation

5. The designation made by the Office of Telecommunications dated 25 July 2003 is hereby withdrawn.

Designation

6. During each Charging Year, the Electronic Communications Network, Electronic Communications Service or Associated Facility which is designated for the purposes of section 38 of the Act is any Electronic Communications Network, Electronic Communications Service or Associated Facility where the person providing that Network or Service, or making available that Associated Facility had a Relevant Turnover from Relevant Activities of £5 million or more in the last but one calendar year prior to the charging year in question. (For example, if the relevant Charging Year commences on 1 April 2007, the relevant turnover will be for the calendar year of 2005).

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Annex 2

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 Directive¹¹. 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.

11 Article 2 Framework Directive

Should Ofcom choose to depart from this Guidance in respect of any future 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 signals¹². 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

12 Section 32(6)

a communications provider is where a provider operates and maintains a network 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** means¹³:
 - 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** means¹⁴:
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** means¹⁵ so much of any service as consists in one or both of the following:-

13 Section 32(1) of the Act

14 Section 32(2) of the Act

15 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**¹⁶ includes references to the transmission or routing of signals or of parts of signals and to the broadcasting of signals for general reception.
- **Signals** includes¹⁷:
 - 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** means¹⁸ 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** means¹⁹:
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 Act²⁰ 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

16 Section 32(8) of the Act

17 Section 32(10) of the Act

18 Section 32(3) of the Act

19 Section 405 of the Act

20 Section 151(3) of the Act

by another), to make use of anything mentioned in section c) below

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.