

OFCOM proposed annual work plan 2019-2020

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Brexit

The departure of the United Kingdom from the European Union is presently uncertain, but is scheduled for 23:00 GMT on 29 March 2019. The position of OFCOM is purportedly set out in sections 3.13 and 3.14 of the work plan, including the following less than helpful statement:

We will work to ensure that legislation is proportionate, appropriate, reflects the challenges facing the sector and meets consumers' needs.

Equally ambiguous is:

4.40 Where appropriate, Ofcom will continue to participate in European regulatory networks ...

The work plan is silent on this issue, except in 4.37 where ERGA is mentioned.

Article 7 of the [Withdrawal Agreement](#) removes the United Kingdom from membership of committees implementing EU legislation and policies, while individual legal instruments creating those bodies and groups specify membership as comprising representatives of Member States. Clearly a no-deal or sovereign Brexit would have a similar effect. Thus it would appear that OFCOM will cease to be able to represent the United Kingdom in the various European Regulatory Networks (ERNs) in which it has previously expended considerable efforts and funds:

- BEREC
- COCOM
- ERGA
- RSC
- RSPG

An exception would be the [Independent Regulators Group](#) (IRG), which is not an EU body.

It has been suggested that OFCOM would seek to continue as an observer. However, that status has been limited to access and candidate countries aspiring to implement EU legislation and to enter the single market.

It is far from obvious that HMG, as presently constituted, would wish OFCOM to participate in the ERNs, since the principal purposes of those bodies includes completion of the single market, from which the United Kingdom will have intentionally removed itself. Without explicit direction from the Secretary of State it is difficult to see a justification for planning to participate in the ERNs.

Article 13(1) of the [Withdrawal Agreement](#) requires coordination between the Republic of Ireland and Northern Ireland in many areas, including telecommunications. OFCOM

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appears to have made no provision for this, which might include international mobile roaming.

Brexit has significant effects on the international work of OFCOM that are not made clear in the work plan, potentially freeing up considerable resources. Additionally, there is no mention of participation in the OECD, which may be an oversight.

Independence of OFCOM

Under nearly all circumstances OFCOM proclaims its independence.

However, in section 4.40 it refers to acting “under ministerial direction”, which is hard to reconcile with its independence and neutrality from HMG. In order to maintain its independence this activity is, presumably, conducted by separate units, with ‘Chinese walls’ to the rest of the organisation, with clearly disclosed inputs and outputs.

Speak for England

The late Tam Dalyell repeatedly asked what became known as the West Lothian Question.^{2,3} It has never been satisfactorily answered, the current attempt having the designation EVEL.

As the result of somewhat convoluted and almost unique arrangements for OFCOM it appears to have found itself in the reverse position, in that rather than having board members voting on issues otherwise devolved, it potentially has members from three of the four ‘nations’ of the United Kingdom. It is unclear from the work plan what activities OFCOM is undertaking to ensure that it is gathering opinions and voices from the full extent of England.

Reserved matters

A further peculiarity of the arrangements with the devolved legislatures is that most of the work is in areas expressly reserved from them, thus ministers in the three devolved administrations cannot act and the three legislatures cannot enact in areas of telecommunications and Internet access. There is a consequential risk that OFCOM is spending public money in support of activities that are *ultra vires*.

In section 5.10 it is stated that OFCOM is working with Scottish Ministers and MSPs. It is unclear whether it has registered as a lobbyist or whether the documents are published.

² Vernon Bogdanor (2010) “The West Lothian Question” *Parliamentary Affairs*, 63 (1) 156–172, <https://doi.org/10.1093/pa/gsp044>

³ House of Commons (2011) “The West Lothian Question” SN/PC/02586 <http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-02586.pdf>