

**Oftel's draft statement of policy on
information gathering under section 142 of the
Communications Act 2003**

Consultation document issued by the Director
General of Telecommunications

24 April 2003

Responses to be received by 20 June 2003

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Summary

S1 This statement invites comments on Oftel's draft statement of policy on information gathering under section 142 of the Communications Act 2003 ("the Act").

S2. Essentially the draft statement of policy (Annex 1) follows a similar policy to recent Oftel statements that have referred to information gathering (see paragraph 2.1). In summary it is intended that Oftel will seek all the information it needs to investigate a complaint, a dispute, or own initiative investigation of a breach of condition, using its formal powers under the Act. For other types of information requests under the Act eg for statistical purposes and for market reviews, Oftel hopes that these will be provided on a voluntary basis, but Oftel will use formal powers if necessary.

S3 It is intended to publish a final statement of policy by 25 July 2003. This statement will be reviewed prior to powers under the Act being vested in Ofcom, which will be towards the end of 2003.

Chapter 1

Introduction

1.1 Section numbers of the Act as referred to in this consultation document and in

the draft statement (as shown in Annex 1 and Annex 2) are based on the section numbers in the version of the Bill dated 5 March 2003. This version of the Bill can be found on the DTI / DCMS Communications Bill website (<http://www.communicationsbill.gov.uk>)

1.2 Ofcom will not be in a position to assume its duties under the Act until late 2003

and therefore it is anticipated at this stage that a commencement order will be passed under Section 401 of the Act conferring Ofcom's powers under Chapter 1 of Part 2 of the Act on the Director General of Telecommunications.

1.3 The Act will give Oftel wide powers to request information for the purpose of carrying out its functions under Chapter 1 of Part 2 of the Act, with respect to electronic communications networks and services. These powers are consistent with EC Directives [the Framework Directive (2002/21/EC), the Access Directive (2002/19/EC), the Authorisation Directive (2002/20/EC), and the Universal Service Directive (2002/22/EC)]. Failure to comply with an information requirement or providing false information, could result in financial penalties being imposed by Oftel and/or criminal proceedings.

1.4 Section 142 of the Act will place a duty on Oftel to publish and keep up-to-date a statement of policy on how it will exercise its information-gathering powers under section 132 and 133 and how it will use any information obtained in exercise of those powers. When exercising its information-gathering powers under sections 132 to 141, Oftel must have regard to this published policy statement.

1.5 A draft statement of policy under section 142 and a summary of the legal provisions are shown in Annex 1 and Annex 2 respectively.

1.6 It remains the Government's firm intention that the EC Directives on Electronic Communications Networks and Services should be implemented by the 25 July 2003 by the provisions in the Communications Bill. However, as a contingency measure the Government is current consulting on draft interim regulations to be made under the European Communities Act 1972 (http://www.communicationsbill.gov.uk/pdf/Implementation_Con_Doc.pdf). In relation to information gathering provisions the draft Electronic Communication (Networks and Services) Regulations 2003 broadly mirror the corresponding provisions under the Act. It is therefore Oftel's intention that the proposed statement of policy on information gathering will still apply on 25 July 2003, even if the EC Directives are implemented by interim regulations.

Chapter 2

Of tel's proposed policy

2.1 Of tel has made previous statements of policy in respect of information gathering in recent published statements:

- Conclusions from a review of Of tel's regular industry data collection (dated 23 July 2002) http://www.of tel.gov.uk/publications/market_info/2002/info0702.htm
- Data gathering for EU market reviews (19 September 2002) http://www.of tel.gov.uk/publications/eu_directives/2002/data0902.htm
- Dispute resolution under the new EU Directives (28 February 2003) http://www.of tel.gov.uk/publications/eu_directives/2003/eud0203.htm

2.2 In the first two statements it was acknowledged that a wide range of information is provided to Of tel by the telecoms industry on a voluntary basis, which allows Of tel to maintain a complete statistical overview of UK telecoms markets. However, the statement on data gathering for EU market reviews stated that Of tel hopes that information will be provided on a voluntary basis, but will consider using formal powers if necessary. It was also stated that Of tel is conscious of the need to ensure that the process of requesting information minimises the burden placed on those from whom information is requested and that Of tel would seek to avoid unnecessary duplication of information requests.

2.3 In the statement on dispute resolution under the new EC Directives it was stated that to meet new deadlines Of tel will need to use its formal information gathering powers more frequently. As a general rule Of tel will seek all information that it needs to resolve a dispute using its formal powers. The statement also stated that Of tel would be setting similar challenging deadlines for investigating complaints and own-initiative investigations.

2.4 The draft statement of policy on information gathering under section 142 of the Act therefore cross-refers to the recent Of tel statements above. In conclusion it is intended that Of tel will seek all the information it needs to investigate a complaint, a dispute, or own initiative investigation of a breach of condition, using its formal powers under the Act. For other types of information requests under the Act, Of tel hopes that these will be provided on a voluntary basis, but Of tel will use formal powers if necessary.

2.5 The draft statement refers to Of tel's standard practice to give a short period of time for comments on a draft information request when formal powers are used. In addition reference is made to section 135 of the Act that requires formal information requests to be proportionate, describe the information required, and to state reasons why the information is required.

2.6 Oftel's overriding concern is that all its policy and compliance decisions are firmly based on evidence. The draft statement also reiterates that, in order to minimise the burden on stakeholders and to ensure speed of decision making, Oftel will use the full range of data available in reaching decisions and will usually not duplicate requests for data already held for another purpose, unless there is an overriding legal obligation on it so to do. Where Oftel intends to rely on data gathered for one purpose in relation to another purpose, it will specify this in writing to the relevant stakeholder(s).

Chapter 3

Consultation

3.1 Oftel is publishing this consultation document so that interested parties may comment on the draft statement of policy on information gathering (Annex 1). The closing date for submitting comments is 20 June 2003 at 12 noon.

3.2 It is regretted that this is a shorter deadline than the usual 12 week period allowed for consultations, but this is necessary in order to publish a final statement by 25 July 2003.

3.3 Where possible, comments should be made in writing and sent by e-mail to michael.knowles@oftel.gov.uk

3.4 However, copies may also be posted or faxed to the address below. If any interested parties are unable to respond in one of these ways, they should contact

Michael Knowles
Oftel
50 Ludgate Hill
London
EC4M 7JJ
Tel: 020 7634 8938
Fax: 020 7634 8949
e-mail: michael.knowles@oftel.gov.uk

Further copies of this document

3.5 This document can be viewed in the Publications section of Oftel's website at

Paper copies and alternative formats such as large print, Braille, disc and audio cassette can be made available on request. Please contact Oftel's Research and Information Unit by phoning 020 7634 8761 or by sending an e-mail to infocent@oftel.gov.uk.

Publication of comments made by stakeholders

3.6 On this occasion, Oftel is not programming a formal period during which interested parties may comment on the responses made by others. Nevertheless, in the interests of transparency, comments will be published, except where respondents indicate that a response, or part of it, is confidential. Respondents are therefore asked to separate out any confidential material into a confidential annex which is clearly identified as containing confidential material. Oftel will take steps to protect the confidentiality of all such material from the moment that it is received

at Oftel's offices. However, in the interests of transparency, respondents should avoid applying confidential markings wherever possible.

3.7 Non confidential responses can be viewed on Oftel's website in the Publications section under Responses to Oftel consultations. Comments can also be viewed at Oftel's Research and Information Unit. Appointments must be made in advance (see contact details in paragraph 3.3).

e-mail notifications

3.8 Oftel has a free e-mail based mailing list to help people stay informed about the work that Oftel is doing. Each time an Oftel document is published and placed on Oftel's website at www.oftel.gov.uk, subscribers to the list receive an e-mail alert. To register, please go to the What's New section of the website and access the electronic form.

Next steps

3.9 Following the completion of the consultation exercise, Oftel will publish a statement setting out its conclusions and will publish a final statement of policy on information gathering by 25 July 2003.

The consultation criteria

3.10 Oftel considers that this document meets the Cabinet Office code of practice on written consultation documents. The code is reproduced below for convenience. If you have any comments or complaints about this consultation process please contact:

Oftel co-ordinator for the code of practice:

Robert Jex
Oftel
50 Ludgate Hill
London EC4M 7JJ.
e-mail: rob.jex@oftel.gov.uk
Tel: 020 7634 5350
Fax: 020 7634 8940

3.11 Timing of consultation should be built into the planning process for a policy (including legislation) or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.

3.12 It should be clear who is being consulted, about what questions, in what timescale and for what purpose.

3.13 A consultation document should be as simple and concise as possible. It should include a summary, in two main pages at most, of the main questions it seeks views on. It should make it as easy as possible for readers to respond, make contact or complain.

3.14 Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others), and effectively drawn to the attention of all interested groups and individuals.

3.15 Sufficient time should be allowed for considered responses from all groups with an interest. 12 weeks should be the standard minimum period for consultation.

3.16 Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed, and reasons for decisions finally taken.

3.17 Departments should monitor and evaluate consultations, designating a consultation co-ordinator who will ensure that all the lessons are disseminated.

ANNEX 1

OFTEL'S DRAFT STATEMENT OF POLICY ON INFORMATION GATHERING UNDER SECTION 142 OF THE COMMUNICATIONS ACT 2003

Introduction

A1.1 By virtue of [details of Commencement Order], the powers granted to Ofcom under Part 2 of the Communications Act 2003 (the "Act") have been conferred upon the Director General of Telecommunications (the "Director") for a transitional period until such time as those provisions are commenced for Ofcom.

A1.2 The Act gives Oftel wide powers to request information for the purpose of carrying out its functions under Chapter 1 of Part 2 of the Act (eg to investigate breaches of conditions and to carry out market reviews) with respect to electronic communications networks and services. Failure to comply with an information requirement or providing false information, may result in financial penalties being imposed by Oftel and/or criminal proceedings.

A1.3 Section 142 of the Act places a duty on Oftel to publish and keep up-to-date a statement of policy on how it will exercise its information-gathering powers under section 132 and 133 and how it will use any information obtained in exercise of those powers. When exercising its information gathering powers under sections 132 to 141, Oftel must have regard to this published policy statement.

A1.4 The purpose of this statement is to set out Oftel's statement of policy on the exercise of information-gathering powers under section 132 and 133 of the Act.

A1.5 A summary of the legal provisions is included in Annex 2. Neither this statement, nor Annex 2, is intended to include a definitive interpretation of the law; therefore reference should also be made to the text of the Act.

A1.6 This statement follows similar policy on information gathering in Oftel's previous statements on its regular market information data collection process (dated 23 July 2002)¹, data gathering for EU market reviews (dated 19 September 2002)², and on dispute resolution under the new EU Directives (dated

¹ Conclusions from a review of Oftel's regular industry data collection (dated 23 July 2002)
http://www.oftel.gov.uk/publications/market_info/2002/info0702.htm

² Data gathering for EU market reviews (19 September 2002)
http://www.oftel.gov.uk/publications/eu_directives/2002/data0902.htm

28 February 2003)³.

Oftel's Policy

1.7 In carrying out its functions under Chapter I of Part 2 of the Act Oftel needs a solid evidence base upon which to base its decisions. In order to meet new deadlines Oftel will need to exercise its formal information gathering powers more frequently. It is intended that, for casework, Oftel will seek all the information that it needs to investigate a complaint or own initiative investigation of a breach of condition, using its formal powers under section 132 and 133. For disputes formal powers will be used under section 188.

A1.8 For other types of information requirements under the Act eg for statistical purposes or to carry out a market review, Oftel hopes that information will be provided on a voluntary basis and in particular that suppliers will continue to contribute to its regular market information programme. Oftel believes that there are benefits to suppliers in terms of efficient and accurate decision making if a regularly updated and comprehensive database is maintained. However, for these other types of information requirements Oftel will use formal powers if necessary.

A1.9 If formal powers are used Oftel's standard practice is – and continues to be – to send a draft of the information request and offer five working days for comment on the relevance of the information sought, other relevant data which may be available and the practicality of providing the information in the given timescale. Oftel will then generally confirm or amend the information request within two working days and would not normally expect to agree to an extension to the deadline specified in the final request.

A1.10 As set out in section 134(3), any formal demands made by Oftel must be proportionate to the use to which it intends to put the information, and must describe the information required and state the reasons why it is required. Unless the demand is for the purpose of determining who is liable to a charge under section 35 (in which case other appropriate methods may be used) any demand must be set out in a notice and be served on the person from whom the information is requested.

A1.11 Oftel holds a significant amount of in-house information and collects a wide range of data on various aspects of the industry. Wherever possible, Oftel will draw from existing information sources, however, despite this comprehensive evidence base there will remain specific areas where it is necessary to collect additional data.

³ Dispute resolution under the new EU Directives (28 February 2003)
http://www.oftel.gov.uk/publications/eu_directives/2003/eud0203.htm

A1.12 The uses to which Oftel proposes to put information obtained under section 132 and 133, derives from the types of information requirements permitted under those sections (as set out in paragraphs A2.2 and A2.3 below).

A1.13 However, Oftel is conscious of the need to minimise the burden on stakeholders and to ensure speed of decision-making. Oftel will therefore use the full range of data available to it in reaching decisions and will usually not duplicate requests for data already held for another purpose, unless there is an overriding legal obligation on it so to do. Where Oftel intends to rely on data gathered for one purpose in relation to another purpose, it will specify this in writing to the relevant stakeholder(s).

Annex 2

Summary of the legal provisions

Persons covered by an information requirement⁴

A2.1 Oftel may require information, subject to limitations below, from the following persons -

- (a) a communications provider;
- (b) a person who has been a communication provider;
- (c) a person who makes, or has made, any associated facilities available to others;
- (d) a person, other than a communications provider, to whom a universal service condition applies or has applied;
- (e) a person who supplies electronic communications apparatus; and
- (f) a person not falling within the preceding paragraphs who appears to Oftel to have information required by them for the purpose of carrying out their functions under Chapter I of Part 2 of the Act.

Catagories of information requirements⁵

A2.2 Oftel may request information for any one or more of the following purposes -

- (a) investigating possible breaches of conditions or other requirements imposed under Chapter 1 of Part 2 of the Act, or of the code, or of a transitional scheme after the cessation of the application of the electronic communications code;
- (b) ascertaining or verifying the amount of any administrative charge payable under section 35, or of any financial contribution towards the cost of complying with universal service obligations;
- (c) ascertaining whether a condition set under section 42 continues to be effective;
- (d) designating a universal service provider under section 63;

⁴ Section 132(2)

⁵ Section 132(3)

- (e) carrying out a review under sections 63 or 67⁶;
- (f) identifying markets and carrying out market analyses for the purposes of Chapter 1 of Part 2 of the Act;
- (g) assessing whether any network access question has arisen which gives rise to a duty under section 102⁷ and considering any matter while exercising that duty; and
- (h) statistical purposes connected with Oftel's functions under Chapter 1 of Part 2 of the Act.

A2.3 Oftel may also require communications providers and persons making available associated facilities to provide Oftel with information necessary to enable Oftel⁸:

- (a) to carry out comparative overviews of the quality and price of public electronic communications services;
- (b) for related statistical purposes.

Limitations on information requirements⁹

A2.4 Oftel may not use their powers to request information relating to a potential breach of a general condition unless Oftel's investigation is in response to a complaint; they have reason to believe that a breach has occurred; they have decided to investigate to see whether the condition is being complied with; or the condition concerns sharing the burden of providing a universal service.

A2.5 Any demands made by Oftel must be proportionate to the use to which it intends to put the information, and must describe the information required and state the reasons why it is required. Unless the demand is for the purpose of determining who is liable to a charge under section 35 (in which case other appropriate methods may be used) any demand must be set out in a notice and be served on the person from whom the information is requested.

⁶ Section 63 – Designation of universal service providers. Section 64 – Subject-matter of universal service conditions. Section 65 – Tariffs etc. for universal services. Section 66 – Directories and directory enquiry facilities. Section 67 – Review of compliance costs.

⁷ Section 102 allows Oftel to exercise their powers under Chapter 1 of Part 2 of the Act, to set, modify or revoke (a) access-related conditions authorised by section 70(2) or (4); and (b) SMP services conditions authorised by section 84.

⁸ Section 133

⁹ Section 134

Notification of contravention of information requests¹⁰

A2.6 Where Ofcom has reasonable grounds to believe that a person is or has been in breach of any requirement under section 132 or 133, they may notify that person accordingly, and allow him a specified period of time (usually one month) in which to make representations to Ofcom, and to take steps to comply with the notified requirement.

Penalties for the contravention of information requirement

A2.7 Where a notified provider has not complied with a requirement notified under section 135, has not remedied the consequences of the notified contravention and no proceedings for an offence under section 141 have been brought, Ofcom may impose a penalty. In deciding on the amount of a financial penalty, Ofcom are required to consider whether the penalty is appropriate and proportionate, and to take account of any representations made by the person concerned and any steps taken by him to comply with the condition or restriction in question. The maximum fine that may be imposed under this section is £50,000. Secretary of State may by order amend this provision so as to substitute a different maximum penalty.

Suspending service provision for information contraventions

A2.8 Section 137 gives Ofcom a power to suspend or restrict a person's entitlement to provide electronic communications networks, electronic communications services and/or associated facilities where Ofcom is satisfied that that person is in serious and repeated breach of any requirements imposed on him under section 132 or 133, that the requirements are not requirements imposed for the purposes connected with the carrying out of Ofcom's functions in relation to SMP apparatus conditions and that an attempt by the imposition of penalties under section 136 or the bringing of proceedings for an offence under section 141, to secure compliance has failed. The suspension or restriction must be appropriate and proportionate to the seriousness of the repeated contraventions.

A2.9 A direction by Ofcom under section 137 may suspend entitlement generally or in relation to particular networks, services or facilities and may take effect indefinitely or for a fixed period. Where Ofcom exercise these powers, it must allow the person in question to make representations to it and, if appropriate, Ofcom may revoke the suspension or restriction. A direction may also include, where appropriate, conditions to protect the customers of the contravening provider, including the payment of compensation.

Suspending apparatus supply for information contraventions

¹⁰ Section 135

A2.10 Section 138 gives Oftel a power to suspend or restrict a person from supplying electronic communications apparatus where Oftel is satisfied that that the person is in serious and repeated breach of any requirement of Oftel to provide information for the purpose of section 132, and that an attempt, by the imposition of penalties under section 136 or the bringing of proceedings for an offence under section 141, to secure compliance has failed. The suspension or restriction must be appropriate or proportionate to the seriousness of the repeated contraventions.

A2.11 A direction by Oftel under section 138 may require a person to cease supplying electronic communications apparatus generally or in relation to particular electronic communications apparatus. The direction may take effect indefinitely or for a fixed period. A direction may also include, where appropriate, conditions to protect the customers of the contravening supplier, including the payment of compensation. When Oftel exercise these powers, it must allow the person in question to make representations to it and, if appropriate, Oftel may revoke the suspension or restriction.

Procedure for directions suspending service provision/apparatus supply for information contraventions

A.2.12 Under section 139, unless the case is urgent, before exercising its powers under sections 137 and 138, Oftel must notify a contravening provider or supplier of the proposed direction, allow him at least one month to make representations and consider each representation made by him. The meaning of an urgent case is set out in section 139(4) and (5). Such a case arises where there is a serious threat to public safety, public health or national security or a serious economic or operational problem that makes it inappropriate to give a contravening provider or supplier time to make representations.

A2.13 If a case is urgent, Oftel may give a direction without consulting the contravening provider or supplier. However, as soon as practicable after giving a direction in an urgent case, Oftel must provide the relevant contravening provider or supplier with an opportunity to make representations and to propose steps to remedy the contravention.

Enforcement of directions suspending service provision/apparatus supply for information contraventions

A2.13 Under section 140 it is an offence for any person to provide an electronic communications network, an electronic communications service or an associated facility while he is subject to a direction issued under section 137 suspending his entitlement to do so or where he does so in contravention of any restriction specified in the direction. It is also an offence for any person to supply electronic

communications apparatus while he is subject to a direction issued under section 138 suspending his entitlement to do so or where he does so in contravention of any restriction specified in the direction. A person found guilty of either offence will be liable to a fine.

Offences in connection with information requirements

A2.14 Under section 141 it is an offence for any person to fail to provide information in response to a demand from Oftel under section 132 or 133 and any such person shall be liable to a fine. However, *subsection (2)* makes provision for a defence where it is not possible for the recipient of a notice to provide the information within the period specified by Oftel but the recipient has taken all reasonable steps to provide the information after that period. No proceedings for this offence may be brought in respect of failures for which Oftel has imposed a financial penalty under section 136.

A2.15 It is also an offence intentionally or recklessly to provide Oftel with any false information in response to a request under section 132 or 133 and a person guilty of this offence is liable to a fine and/or imprisonment.

Oftel's power to require information in connection with dispute

A2.16 Section 188 gives Oftel powers to require parties to disputes and other persons to provide them with information that enables Oftel to:

- (a) decide whether it should handle a dispute;
- (b) determine whether it needs to consult the regulatory authorities of other EU Member States; and
- (c) consider and determine a dispute.

A2.17 Information requested by Oftel must be provided within the period specified by Oftel. Requests for information under section 188 may be enforced by Oftel using the procedure set out in clauses 135 to 141 (paragraphs A2.6 to A2.15 above).

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