

**Oftel's statement of policy on information
gathering under Section 145 of The
Communications Act 2003**

25 July 2003

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Summary

S.1 This document includes at Annex 1 Oftel's statement of policy on information gathering under section 145 of the Communications Act 2003 ('the Act').

S.2 Essentially the statement of policy cross-refers to recent Oftel statements that have referred to policy on information gathering. 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 consider using formal powers if necessary.

S.3 Ofcom may from time to time revise the statement as it thinks fit.

Chapter 1

Introduction

1.1 The Communications Act came into effect on 25 July 2003.

1.2 Ofcom will not be in a position to assume its duties under the Act until late 2003. By virtue of the Communications Act 2003 (Commencement No. 1) Order 2003¹ 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.

1.3 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, with respect to electronic communications networks and services. Failure to comply with an information requirement or providing false information, could result in financial penalties being imposed by Oftel and/or criminal proceedings. The Act also places restrictions on the exercise of these powers which includes, that requests must be proportionate to the uses to which the information is to be put, and persons to whom requests are made must be given a reasonable period to provide the information.

1.4 Section 145 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 135 and 136 and how it will use any information obtained in exercise of those powers. When exercising its information gathering powers under sections 135 to 144, Oftel must have regard to this published policy statement.

¹ SI 2003/1900 (C.77)

Chapter 2

Comments on draft statement and the Director's response

2.1 Oftel issued a draft statement for consultation on 24 April 2003 (see www.oftel.gov.uk/publications/about_oftel/2003/info0403.htm), with a deadline of 20 June 2003. Comments were received from NIACT and BT. NIACT's short response was supportive of the draft statement. BT's comments are set out below along with the Director's responses.

BT's comment

2.2 Paragraph A1.2 in the introductory section of the policy statement gives a high-level summary of Oftel's powers to request information and of the penalties which may be imposed for non-compliance. In BT's view, to give a balanced picture of the relevant sections of the Bill, this paragraph should also refer to the principal restrictions to the exercise of these powers ie that requests must only be made in defined circumstances, requests must be proportionate to the uses to which the information is to be put, and persons to whom requests are made must be given a reasonable period to provide the information.

The Director's response

2.3 Paragraph A1.2 has been amended accordingly.

BT's comment

2.4 In paragraphs A1.7 and A1.8 of the statement, Oftel states that it will use formal powers to investigate complaints, carry out own-initiative investigations, or in relation to disputes, and that other types of information request will be made initially on a voluntary basis.

2.5 Two of the other categories of information which Oftel will be empowered to request are information required to ascertain or verify a) the amount of any administrative charge payable by a provider and b) any financial contributions towards the cost of the universal service obligation. In BT's view, it would not be appropriate to rely on informal means in order to obtain information for these purposes. Indeed, Oftel has stated in its May 2003 document "Implementation of the Authorisation Directive's provisions on notifications and fees" that it will use formal powers under Clause 132 [now section 135] to obtain the information needed to calculate administrative fees under the new framework. It is particularly important that Oftel should be able to insist on and enforce the provision of information for this purpose so that it can ensure that administrative charges are set on a proportionate and non-discriminatory basis. We therefore suggest that paragraphs A1.7 and A1.8 of the statement be amended accordingly.

The Director's response

2.6 The use of formal powers mentioned in the May 2003 document (see www.oftel.gov.uk/publications/eu_directives/2003/notfees0503.htm), is necessary at this stage, in view of the particular need to quickly ascertain and verify administrative charges during the transition to the new regime. Different circumstances should apply in future years. Therefore, there is no need to amend paragraphs A1.7 and A1.8.

BT's comment

2.7 BT considers it essential that Oftel's decision-making in market reviews is based on comprehensive information. Without complete, high quality market information, Oftel will be unable to assess accurately the effectiveness of competition in the markets under review, and this could lead to the making of unjustified Significant Market Power designations and the imposition of inappropriate remedies. Similar considerations apply to reviews of Universal Service designations and obligations. In view of these risks, we believe the policy should state explicitly that Oftel will move speedily to the use of formal powers when the voluntary approach fails to deliver promptly information needed for market analysis or universal service reviews.

The Director's response

2.8 The Director believes that the current wording of paragraph A1.8 is sufficient.

BT's comment

2.9 Paragraph A1.9 describes the standard process Oftel will follow when using formal powers: a draft information request will be sent out, and recipients will be given five working days to comment on the relevance of the information sought, the availability of other relevant information, and the practicality of providing the information in the given timescale.

2.10 BT believes that Oftel should also seek and take into account comments on the proportionality of the information request. Not only does Clause 134 of the Bill [now section 137 of the Act] require that any information request be proportionate to the use to which the information will be put; in addition, Oftel will have a general duty under the Bill to have regard to the principles of good regulation, one of which is proportionality.

The Director's response

2.11 The wording of paragraph A1.9 has been amended to include the words “in particular”, and therefore makes it clear that comments can be made on a draft information request on matters other than those set out in the paragraph, including comments on proportionality.

BT's comment

2.12 The final sentence of paragraph A1.9 states that having received any comments from recipients of information requests, “Of tel will then generally confirm or amend the information request within two working days and would not normally expect to agree to an extension of the deadline specified in the final request”.

2.13 In our view, the sentence quoted above is ambiguous, and may be interpreted to indicate inflexibility regarding response times. We believe this is unintentional, particularly as Clause 132 of the Bill [now section 135 of the Act] requires that persons required to provide information must be given a reasonable period to respond.

The Director's response

2.14 The wording of paragraph A1.9 has been changed to “...Following receipt of comments Of tel will then confirm or amend the information request, generally within two working days. Of tel would not normally agree to any subsequent changes to the final request, including the deadline to the final request”.

BT's comment

2.15 BT agrees that wherever possible, Of tel should use information already in its possession in order to minimise the burden on stakeholders and ensure that decisions can be taken within appropriate timescales. However, we would like to note that in some cases, there may be a danger of using information which is out-of-date or for purposes significantly different from those for which it was originally collected. We suggest that before relying on such information, it may be appropriate for Of tel to confirm with stakeholders whether it is relevant in the context in which it is to be used.

The Director's response

2.16 The wording of paragraph A.11 has been changed to include “...If Of tel already holds information then before relying on such information, where appropriate, Of tel will confirm with the source of the information that the information is still up to date and is relevant in the context in which it is to be used”.

BT's comment

2.17 Annex 2 paraphrases the relevant clauses of the Bill. We believe a more transparent approach would be to reproduce the clauses themselves and to give any necessary explanation in the form of a commentary. At the least, we suggest that the headings in Annex 2 should be expanded to refer to the clauses to which the following text refers. This would make it easier for stakeholders to understand and verify Ofcom's interpretation of the legal provisions.

The Director's response

2.18 Annex 2 has been amended to include headings which relate to the relevant section under the Act.

Chapter 3

Conclusion

3.1 The final statement under section 145 of the Act and a summary of the legal provisions are shown in Annex 1 and Annex 2 respectively.

Annex 1

Oftel's statement of policy on information gathering under Section 145 of The Communications Act 2003

Introduction

A1.1 By virtue of the Communications Act 2003 (Commencement No. 1) Order 2003 (SI 2003/1900 (C.77)), 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. The Act also places restrictions on the exercise of these powers which includes, that requests must be proportionate to the uses to which the information is to be put, and persons to whom requests are made must be given a reasonable period to provide the information.

A1.3 Section 145 of the Act places a duty on Oftel to publish and keep up-to-date a policy statement on how it will exercise its information gathering powers under section 135 and 136 and how it will use any information obtained in exercise of those powers. When exercising its powers under sections 135 to 144, Oftel must have regard to this published policy statement.

A1.4 This statement sets out Oftel's statement of policy on the exercise of Information gathering powers under sections 135 and 136 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 In addition to this statement reference should also be made to Oftel's previous statements on its regular market information data collection process (*Conclusions from a review of Oftel's regular industry data collection*, 23 July 2002, www.oftel.gov.uk/publications/market_info/2002/info0702.htm), data gathering for EU market reviews (*Data gathering for EU market reviews*, 19 September 2002, www.oftel.gov.uk/publications/eu_directives/2002/data0902.htm), and on dispute resolution under the new EU Directives (*Dispute resolution under the new EU Directives*, 28 February 2003,

www.oftel.gov.uk/publications/eu_directives/2003/eud0203.htm).

Oftel's policy

A1.7 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. As a general rule, 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 135 and 136. For disputes formal powers will generally be used under section 191.

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 consider using 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, in particular 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. Following receipt of comments Oftel will then confirm or amend the information request, generally within two working days. Oftel would not normally agree to any subsequent changes to the final request, including the deadline to the final request.

A1.10 As set out in section 137(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 38 (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. If Oftel already holds information then before relying on such information, where appropriate, Oftel will confirm with the source of the information that the information is still up to date and is relevant in the context in which it is to be used.

A1.12 The uses to which Oftel proposes to put information obtained under

section 135 and 136, derives from the types of information requirements permitted under those sections (as set out in paragraphs A2.2 and A2.3 below). However, Oftel is conscious of the need to ensure that the process of requesting information minimises the burden placed on those from whom information is requested. Oftel will seek to avoid unnecessary duplication of effort, by relying, as far as possible, on its existing information sources.

Annex 2

Summary of the legal provisions

PERSONS COVERED BY AN INFORMATION REQUIREMENT

SECTION 135(2)

A2.1 Under this section 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.

CATEGORIES OF INFORMATION REQUIREMENTS

SECTION 135(3)

A2.2 Under this section Oftel may request information for any one or more of the following purposes, including –

- (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 38, or of any financial contribution towards the cost of complying with universal service obligations;
 - (c) ascertaining whether a condition set under section 45 continues to be effective;
 - (d) designating a universal service provider under section 66;
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- (e) carrying out a review under sections 66 or 70²;
- (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 105³ 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.

SECTION 136

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

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

LIMITATIONS ON INFORMATION REQUIREMENTS

SECTION 137

A2.4 Under this section 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 38 (in which case other appropriate methods may be used) any demand must be set out in a notice and

² Section 66 – Designation of universal service providers. Section 67 – Subject matter of universal service conditions. Section 68 – Tariffs etc. for universal services. Section 69 – Directories and directory enquiry facilities. Section 70 – Review of compliance costs.

³ Section 105 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 73(2) or (4); and (b) SMP services conditions authorised by section 87.

be served on the person from whom the information is requested.

NOTIFICATION OF CONTRAVENTION OF INFORMATION REQUESTS

SECTION 138

A2.6 Where Oftel has reasonable grounds to believe that a person is or has been in breach of any requirement under section 135 or 136, they may notify that person accordingly, and allow him a specified period of time (usually one month) in which to make representations to Oftel, and to take steps to comply with the notified requirement.

PENALTIES FOR CONTRAVENTION OF INFORMATION REQUIREMENT

SECTION 139

A2.7 Under this section where a notified provider has not complied with a requirement notified under section 138, has not remedied the consequences of the notified contravention and no proceedings for an offence under section 144 have been brought, Oftel may impose a penalty. In deciding on the amount of a financial penalty, Oftel 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

SECTION 140

A2.8 This section gives Oftel a power to suspend or restrict a person's entitlement to provide electronic communications networks, electronic communications services and/or associated facilities where Oftel is satisfied that that person is in serious and repeated breach of any requirements imposed on him under section 135 or 136, that the requirements are not requirements imposed for the purposes connected with the carrying out of Oftel's functions in relation to SMP apparatus conditions and that an attempt by the imposition of penalties under section 139 or the bringing of proceedings for an offence under section 144, 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 Oftel under section 140 may suspend entitlement generally or in relation to particular networks, services or facilities and may take effect indefinitely or for a fixed period. Where 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. 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

SECTION 141

A2.10 This section 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 135, and that an attempt, by the imposition of penalties under section 139 or the bringing of proceedings for an offence under section 144, 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 141 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

SECTION 142

A.2.12 Under this section , unless the case is urgent, before exercising its powers under sections 14037 and 141, 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 142(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

SECTION 143

A2.13 Under this section 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 140 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 141 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

SECTION 144

A2.14 Under section 144 it is an offence for any person to fail to provide information in response to a demand from Oftel under section 135 or 136- 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 139.

A2.15 It is also an offence intentionally or recklessly to provide Oftel with any false information in response to a request under section 135 or 136 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

SECTION 191

A2.16 This section 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.
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A2.17 Information requested by Oftel must be provided within the period specified by Oftel. Requests for information under section 191 may be enforced by Oftel using the procedure set out in clauses 138 to 144 (paragraphs A2.6 to A2.15 above).
