

## **Draft guidelines for the interconnection of public electronic communications networks**

A consultation issued by the Director General of  
Telecommunications

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## Summary

S1 This consultation document concerns certain aspects arising from the implementation of the Access Directive (Directive 2002/19/EC). It replaces the Interconnection Directive (Directive 97/33/EC) with a new regulatory framework for the interconnection of public electronic communications networks. It entered into force on 24 April 2002 and is required to be fully implemented by 25 July 2003.

S2 These draft Guidelines offer guidance on who will be entitled to interconnection rights and obligations under the new Access Directive, how public electronic communications networks (PECNs) may be identified and also considers the advantages of developing a list to replace the existing 'Annex II' list.

S3 These Guidelines will only apply after the final version is published, having been consulted on, and will only apply to interconnection under the new regulatory regime. The Director would normally expect to follow these Guidelines if he were required to determine whether a given provider has interconnection rights and obligations under the new regime. However he may not fetter his discretion and these Guidelines will not be binding on him or on Ofcom in the future.

S4 The Director welcomes general comments from stakeholders on these draft Guidelines by Monday 16 December 2002. Particular questions are also raised in the body of the Guidelines. Chapter 9 explains how to comment on these Guidelines.

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## Chapter 1

### Introduction

1.1 Directive 2002/19/EC on access to, and interconnection of, electronic communication networks and associated facilities (the Access Directive) was adopted on 7 March 2002 and entered into force on 24 April 2002. The Access Directive harmonises the way in which Member States will regulate access to, and interconnection of, electronic communications networks (ECNs) and associated facilities. Its purpose is to establish a regulatory framework for the relationships between providers of networks and services that results in:

- sustainable competition
- interoperability of electronic communications services, and
- consumer benefits.

1.2 It is required to be implemented by Member States by 24 July 2003 to enter into force on 25 July 2003. Along with the other Directives of the new EU package which together create a new regulatory regime, it is proposed to implement in the UK by a new Communications Act. A draft Communications Bill (posted at [www.communicationsbill.gov.uk](http://www.communicationsbill.gov.uk)) was published on 7 May 2002.

1.3 The DTI has stated (in paragraph 6.2 of the consultation document accompanying the draft Bill) that it may not be practical to rely solely on the Communications Bill to bring the new legal framework into force by 25 July 2003 as is required by the Directives. It may therefore be necessary for the UK to implement the Directives, to some degree, via Regulations made under the European Communities Act 1972. The Government has said that it will make its intentions known about this as soon as possible. The DTI also stated (at paragraph 2.3.2 of the same consultation document) that Oftel would be consulting on much of the detail of the proposed regulatory regime in relation to electronic communications networks and services.

1.4 The new regime provides for the imposition of general conditions and specific conditions. Oftel is already consulting on the general conditions that will apply to all communications providers from 25 July 2003 (posted at [www.oftel.gov.uk/publications/licensing/2002/enti0502.htm](http://www.oftel.gov.uk/publications/licensing/2002/enti0502.htm) ).

1.5 Oftel has also consulted on how specific SMP obligations should be imposed under the Access Directive (the 'Access Guidelines'), (posted at [www.oftel.gov.uk/publications/ind\\_guidelines/acce0902.htm](http://www.oftel.gov.uk/publications/ind_guidelines/acce0902.htm)).

1.6 The purpose of these 'Interconnection' Guidelines is to provide guidance on who will be entitled to interconnection rights and obligations under the new regime that will replace the existing "Annex II" interconnection rules (under Annex II of the Interconnection Directive) from 25 July 2003. Under the Directive, interconnection

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is implemented between public network operators and involves the linking of public electronic communications networks (PECNs) This guidance seeks to assist in the identification of such networks (and thus those that may interconnect).

Additionally, Chapter 7 of these Guidelines considers a possible replacement to the existing "Annex II" list.

1.7 The Director cannot fetter his discretion as to any future decision. Accordingly, these Guidelines will not be binding upon him or Ofcom in the future. However, the Director would normally expect to follow these Guidelines should he be required to determine any issue concerning who has the right to interconnect under the new regime. Should the Director choose to depart from these Guidelines in respect of any future decision he would set out his reasons for doing so. These Guidelines may be subject to revision from time to time.

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## Chapter 2

### Interconnection

2.1 Interconnection is a specific type of access that entails the physical or logical linking of PECNs used by one or more providers in order to enable the customers of one provider to be able to communicate with customers of another provider, or to access services provided by another provider. The draft Communications Bill<sup>1</sup> defines interconnection as:

*... the linking (whether directly or indirectly by physical or logical means, or by a combination of physical and logical means) of **one public electronic communications network to another** for the purpose of enabling the persons using one of them to be able -*

- (a) to communicate with users of the other one; or*
- (b) to make use of services provided by means of the other one (whether by the provider of that network or by another person).*

2.2 The general obligation to negotiate interconnection is set out in the draft general conditions of entitlement. Draft general condition 1 (General access and interconnection obligations) obliges providers of PECNs to negotiate interconnection agreements with each other. It also imposes restrictions on the use or passing on of confidential information obtained by providers in the course of such negotiations. Interconnection therefore entails reciprocal obligations. The provider of a PECN has the right to negotiate interconnection with other PECN providers. In turn, such providers must enter into such negotiations when requested to by other such providers.

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<sup>1</sup> Clause 109(1)

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## Chapter 3

### Public electronic communications networks (PECNs)

3.1 As interconnection is the linking of PECNs, Oftel considers that it would be useful to set out guidance on the criteria by which such networks may be identified. There are two tests which assist identification of a PECN. These are encapsulated by the questions:

- is an electronic communications network provided?
- are publicly available services provided over that electronic communications network?

3.2 The following chapters examine the ideas of electronic communications networks, electronic communications services and public availability more closely.

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## Chapter 4

### Electronic communications network (ECN)

4.1 The draft Communications Bill<sup>2</sup> defines an ECN as:

- (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.*

4.2 The draft Bill<sup>3</sup> also makes it clear that:

*... references to the provision of an electronic communications network include references to its establishment, maintenance or operation ...*

Thus, "provision" is not the same as ownership. The communications provider must be able to exercise sufficient control over an ECN so as to be able to offer electronic communication services over it. This accords with Recital 3 of the Access Directive where it is explained that "*an operator may own the underlying network or facilities or may rent some or all of them*". There is therefore no requirement for a communications provider to enjoy exclusive rights over the elements that combine to form an ECN.

4.3 Under the definition of ECN in the draft Bill, the presence of a transmission system is a prerequisite. Other resources that 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.

4.4 The term "transmission system" is itself undefined. It may be inferred that a transmission system requires the conveyance of signals between the following elements: a transmitter, a medium and a receiver. However the draft Bill makes it clear that a transmission system may consist of no more than the transmitter element<sup>4</sup>. A transmission system may cross the public/private network boundary in so far as either the receiver or the transmitter may be private network equipment.

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<sup>2</sup> Clause 22(1)

<sup>3</sup> Clause 22(4)(a)

<sup>4</sup> Clause 22(6)

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This is the case where a telephone call originates or terminates on terminal equipment incorporated within a private network and the terminal equipment acts, respectively, as either a transmitter or a receiver.

4.5 It would theoretically be possible to have a transmission system that is, in its entirety, located behind a network termination point (NTP) and such a private network might notionally constitute an ECN. However, by its very nature, publicly available services would not be provided over it. Thus the second limb of the test would not be met and such an ECN would not be capable of being interconnected. This point is reinforced by Recital 6 of the Universal Service Directive which explains that "*the network termination point represents a boundary for regulatory purposes between the regulatory framework for ECNs and services and the regulation of telecommunications terminal equipment*". In other words, private networks fall outside the regulatory framework for ECNs.

4.6 In practical terms, for there to be an ECN there needs to be some physical infrastructure, ie a network node. Clearly where a provider is operating two network nodes what connects them will count as a transmission system. Thus the communications provider will be providing an ECN. However it would not be desirable to limit the status of an ECN, and hence the rights and obligations of interconnection, to multiple node networks.

4.7 As there is no obligation for the provider of an ECN to own the elements that constitute its network (as discussed in paragraph 4.2 above), the Director currently considers that a provider with a single network node who is willing to obtain transmission infrastructure that builds towards a ECN will fall within the definition of ECN. For example, where provider A seeks interconnection from provider B, the links between provider A's node and provider B's node will constitute provider A's transmission system. This will be the case even where the actual link is leased from provider B or another provider.

4.8 Such an approach avoids some of the ambiguities that would arise if the elements comprising an ECN had to be assembled in advance of interconnection being applied for. Such a requirement would unduly favour communications providers with multiple node networks. Another consideration is that the provision of an ECN is not limited to providers who have been granted code powers, since code powers, while conferring powers of acquisition of rights over public and private property, are by no means the prerequisite to the building of a network. Such rights can and often are acquired by private treaty. Following the enactment of the Communications Bill, the code to be known as the electronic communications code will extend to all ECNs.

4.9 Furthermore, the approach proposed eliminates potentially fruitless aspects of debate about what constitutes transmission: namely questions such as the minimum distance between transmitter and receiver or whether transmission take place between two nodes within a single set of premises.

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4.10 An insistence on the prior provision of a transmission system aggravates the risk that considerations other than those of efficiency and technical and economic viability might influence the way in which providers build their networks simply in order to meet regulatory requirements. For example, by linking separate premises purely in order to establish the presence of a transmission system, and hence of an ECN.

4.11 Finally, as a practical consideration any narrower definition of transmission would appear to result in the exclusion of many Number Translation Services (NTS). Operators currently offering such services have been included in Annex II under the existing regime (which applies until 24 July 2003). This would be a perverse implementation of a Directive that is intended to enhance the existing arrangements for sustainable competition and the interoperability of services.

***Question 1: Do stakeholders agree that the main tests of whether a PECN is provided are whether an ECN is provided and whether publicly available services are provided over that network?***

***Question 2: Do stakeholders agree with the Guidelines' understanding of what constitutes an ECN and in particular, with what is to be understood by providing a transmission system?***

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## Chapter 5

### Electronic communications services (ECS)

5.1 Once the provision of an ECN has been established, the second test to be met is whether publicly available services are provided over it. This is in order to determine whether the ECN is in fact a public electronic communications network (PECN)<sup>5</sup>. The draft Bill<sup>6</sup> defines a PECN as:

*... means an electronic communications network provided wholly or mainly for the purpose of making electronic communications services available to members of the public.*

5.2 Two strands can be teased out of this definition: firstly, the ECN must be provided primarily for the making available of electronic communication services (ECS) and, secondly, the availability of those services to members of the public.

5.3 The draft Bill<sup>7</sup> defines an ECS as:

*... any 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.*

5.4 The term "conveyance" is not defined in the draft Communications Bill, but "signal" is<sup>8</sup>, as:

*(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 any apparatus.*

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<sup>5</sup> Thus a provider of a PECN falls within the definition of "public communications provider" defined in Clause 109(1) of the draft Bill.

<sup>6</sup> Clause 109(1)

<sup>7</sup> Clause 22(2)

<sup>8</sup> Clause 22(10)

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5.5 It is important to note that an ECS must have as its principal feature the conveyance of signals rather than the provision of what is comprised in the signals, ie content. The draft Bill defines “a content service” as<sup>9</sup>:

*... so much of any service as consists in one or both of the following -*

*(a) the provision of material with a view to its being comprised in signals conveyed by means of an electronic communication network;*

*(b) the exercise of editorial control over the contents of signals conveyed by means of such a network.*

5.6 Additionally, information society services, other than those that consist wholly or mainly in the conveyance of signals, are by definition not ECSs. Information society services have been defined in 98/34/EC (as amended by 98/48/EC) as:

*any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.*

*For the purposes of this definition:*

*"at a distance" means that the service is provided without the parties being simultaneously present,*

*"by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,*

*"at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request.*

5.7 A feature of information society services is that their provision is triggered by an individual request, for example, internet banking or on-line betting services. In either case, 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.

**Question 3: Do stakeholders agree with the guidelines' understanding of what constitutes an electronic communication service?**

**Question 4: Do stakeholders agree with the distinction the Guidelines draw between conveyance and the provision of contents?**

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<sup>9</sup> Clause 22(7)

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## Chapter 6

### Public availability

6.1 The second strand of the draft Bill's definition of a PECN is the availability of electronic communications services *to members of the public*. Oftel's understanding has been that a publicly available service is one that is theoretically available to anyone who is both willing to pay for it and to abide by the applicable terms and conditions. There is no imposed upper limit on the set of potential customers. This distinguishes it from a bespoke service restricted to a limited group of individual and identifiable customers.

6.2 However, it is conceivable that a service available to members of the public may only have one customer because others have not chosen to take the service up. However, other customers would not be prevented from taking up the service. By contrast, a service may not be available to members of the public even though it has several customers - say, in the case of a landlord providing services to tenants on a single set of served premises. It would not appear that services have to be nationally available to be "available to members of the public". Indeed there are a number of providers within the UK limited to a regional customer base and such services are considered to be available to the public.

6.3 The reason the example of the landlord-tenant service is not available to members of the public is not because it is geographically restricted. Rather it is because admittance to the set of potential customers is not generally open to anyone. Instead, it depends on the existence of a prior relationship between provider and customer. A more extreme example of a service that is not available to members of the public while being provided for remuneration is the provision of a payphone service within the confines of a prison.

6.4 Oftel recognises that there may be ambiguous cases where it will not be immediately apparent whether or not a given service is available to members of the public. In such cases, the way in which the service is marketed will be indicative.

***Question 5: Do stakeholders agree with the guidelines' understanding of what constitutes a publicly available service.***

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## Chapter 7

### Replacing the 'Annex II' list

7.1 A key practical issue is whether a register should be maintained under the new regime which is analogous to the Annex II list (namely a list of communications providers of PECNs). On balance, the case for maintaining such a list is stronger than the case for not doing so. The following considerations support this conclusion:

- it is invidious to place the obligation of determining whether a given provider provides a PECN on another provider, such as BT;
- in the absence of a list, a provider may be required to disclose commercially confidential information to competitors in order to establish PECN status;
- the publication of a list is transparent and offers regulatory certainty;
- the availability of a list avoids a potential cause of delay in reaching interconnection agreements;
- the regulator may be asked to resolve any dispute on more finely balanced applications in any case.

7.2 The case against maintaining a list is that it seems to contradict the spirit of the new regulatory framework, in which providers will not be required to seek prior authorisation to offer services to the public. Other things being equal, the lowest degree of involvement by the regulator is desirable.

7.3 Because the question of whether a list of PECNs should be maintained is left open by the new Directives, this is an area in which Ofcom will have some flexibility.

The views of the industry are particularly sought on the desirability or otherwise of a list of PECNs being maintained.

7.4 If a list were to be considered useful it would be maintained, probably by Ofcom, on a voluntary basis with industry agreement. It would not form part of the notification regime under the draft Bill<sup>10</sup>. Inclusion on such a list would not be mandatory but open to those providers that wished to demonstrate their PECN status when undertaking interconnection negotiations. It would however be entirely legitimate for a PECN not to seek inclusion on the list. In contrast to the current 'Annex II' list, no fees would be associated with inclusion on the list.

***Question 6: Do stakeholders agree that the maintenance of a list of PECNs is desirable?***

***Question 7: Do stakeholders agree with the suggestion that if a list were considered to be desirable, it should be developed on a voluntary basis***

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<sup>10</sup> Clause 23

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***Question 8: By whom should any list be maintained? Are stakeholders content with the idea of a list maintained by Ofcom?***

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## Chapter 8

### Regulatory Impact Assessment

#### Risks

8.1 It is important to note that the Guidelines are not in themselves a legal measure that is implementing the new Access and Interconnection regulatory regime. What they offer is Oftel's understanding of how the Communications Bill term 'Public Electronic Communications Network' is to be interpreted and by inference, which communications providers will acquire interconnection rights and obligations.

8.2 Accordingly the main risk to which they are exposed is that they have incorrectly interpreted the requirements of the Access and Interconnection Directive and the language of the Communications Bill. Such a misunderstanding would be misleading to the industry and create potentially unjustified fears or expectations. However their status as draft Guidelines subject to a consultation process should result in a final version from which any significant errors will have been ironed out and points of controversy over interpretation can be highlighted.

8.3 The principal risk associated with a new interconnection regime is that it might destabilise existing wholesale markets. However, Oftel believes that these Guidelines represent a measured and proportionate interpretation of what is required by the Directive, within the constraints it imposes.

#### Benefits

8.4 The chief benefit of the Guidelines is the clarity they offer as to which communications providers will have interconnection rights and obligations under the new regulatory regime. This should create an environment in which most providers will have a greater degree of certainty about how the new Directive will impact on them.

8.5 The new voluntary list, proposed as a replacement for the Annex II list, will be simpler and will lighten the regulatory burden on providers wishing to be included on it. It will not carry forward the four categories of the Annex II list and will not involve the payment of fees. This will be particularly advantageous to smaller providers and new entrants.

8.6 The benefits to consumers of an effective interconnection regime are the benefits that flow from effective competition and a wider choice of communications providers.

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**Costs**

8.7 There are no immediately identifiable additional costs associated with the new interconnection regime. For PECN providers the process of obtaining interconnection products should become easier because getting a listing on the proposed, voluntary list will be simpler than the current Annex II procedures.

**Securing compliance**

8.8 Oftel's experience is that securing and maintaining a wholesale market for interconnect products has not given rise to problems of non-compliance. The enforcement tools provided by the draft Communications Bill appear to give Ofcom a range of options to address non-compliant behaviour.

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## Chapter 9

### How to make comments on the questions raised in this consultation document

9.1 Oftel is publishing this consultation document so that interested parties may comment on the issues which it addresses. The closing date for submitting comments is Monday 16 December 2002

9.2 Where possible, comments should be made in writing and sent by e-mail to [frank.phillips@oftel.gov.uk](mailto:frank.phillips@oftel.gov.uk). 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 discuss alternatives with the Oftel manager named below:

Frank Phillips  
Oftel  
50 Ludgate Hill  
London  
EC4M 7JJ  
Tel: 020 7634 8871  
Fax: 020 7634 8893  
e-mail: [frank.phillips@oftel.gov.uk](mailto:frank.phillips@oftel.gov.uk)

#### Further copies of this document

9.3 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](mailto:infocent@oftel.gov.uk).

#### Publication of comments made by stakeholders

9.4 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.

9.5 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 three).

#### e-mail notifications

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9.6 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](http://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.

#### **The consultation criteria**

9.7 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

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50 Ludgate Hill

London EC4M 7JJ.

e-mail: [rob.jex@oftel.gov.uk](mailto:rob.jex@oftel.gov.uk)

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9.8 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.

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

9.10 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.

9.11 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.

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

9.13 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.

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

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