

## **Guidelines for the interconnection of public electronic communications networks**

**A statement issued by the Director General of  
Telecommunications**

23 May 2003

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## Summary

S1 This Statement offers guidance on certain issues arising from the implementation of the Access Directive (Directive 2002/19/EC). The Access Directive, which will replace the Interconnection Directive (Directive 97/33/EC), introduces 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. There is a table highlighting the main changes between the old and new regulatory frameworks for access and interconnection in paragraph 1.7 of the Guidelines.

S2 These Guidelines offer guidance on who will be entitled to interconnection rights and obligations under the new Access Directive, and how public electronic communications networks (PECNs) may be identified. The Guidelines set out two tests that a PECN must meet:

- is an electronic communications network (ECN) provided?
- is it provided wholly or mainly for the purpose of making electronic communications services (ECS) available to members of the public?

Accordingly, there are sections which offer guidance on the concepts of ECNs, ECSs and public availability.

S3 Additionally, the Guidelines propose the development of a list to replace the existing 'Annex II' list of operators which attract rights and obligations under the EC Interconnection Directive. Inclusion on the list does not imply any right to different terms and conditions for wholesale access than other providers. The list is intended to provide clarity over who has rights and obligations to negotiate interconnection under condition 1 of the General Conditions of Entitlement. It will also provide clarity over which providers must be offered non-discriminatory terms and conditions for interconnection supplied by providers required to offer interconnection on non-discriminatory terms under remedies imposed following from market reviews.

S4 These Guidelines will only apply to interconnection under the new regulatory framework. 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 framework. However he may not fetter his discretion and these Guidelines will not be binding on him or on Ofcom in the future.

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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 regulate access to, and interconnection of, electronic communications networks (ECNs) and associated facilities<sup>1</sup>. 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. The Communications Bill (posted at [www.communicationsbill.gov.uk](http://www.communicationsbill.gov.uk)) was introduced to the House of Commons on 19 November 2002. (References to the Communications Bill in this document are references to the Bill as introduced into the House of Lords on 5 March 2003.). The Bill may be subject to change as it proceeds through Parliament).

1.3 The DTI stated (in paragraph 6.2 of the consultation document accompanying the original draft Bill) that it may not be practicable 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

1.4 The new framework provides for the imposition of general and specific conditions. Oftel has already consulted 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)). Its response to that

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<sup>1</sup> An associated facility is defined in clause 29(3) of the Bill as 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.

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consultation has now been published and is posted at [www.communicationsbill.gov.uk/pdf/Implementation\\_Con\\_Doc\\_AnnexB.pdf](http://www.communicationsbill.gov.uk/pdf/Implementation_Con_Doc_AnnexB.pdf)

1.5 It should be emphasised that this document is about interconnection, a special form of wholesale access which links PECNs. It does not address wider issues of wholesale access that may be used by other providers of ECNs and ECSs. Guidance on these issues is available in the Access Guidelines which set out how Ofcom intends to apply those provisions of the Access Directive which relate to the imposition of access obligations on operators found to have Significant Market Power (SMP) (posted at [www.ofcom.gov.uk/publications/ind\\_guidelines/acce0902.htm](http://www.ofcom.gov.uk/publications/ind_guidelines/acce0902.htm)).

1.6 The purpose of these Guidelines is to provide guidance on who will be subject 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, 97/33/EC) from 25 July 2003. Under the new Directive, interconnection 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 sets out proposals for a replacement to the existing 'Annex II' list.

1.7 The main differences between the old and new regulatory frameworks for access and interconnection are outlined in the following table.

<b>Issue</b>	<b>Existing framework: Interconnection Directive (97/33/EC)</b>	<b>New framework: Access and Interconnection Directive (2002/19/EC)</b>
<i>What services are subject to interconnect regulation?</i>	Network services (ie basic conveyance services, excluding Value Added services)	All Electronic Communications Services
<i>Which operators have rights and obligations to negotiate interconnection?</i>	Annex II operators	All providers of Public Electronic Communications Networks
<i>Which service providers can request 'Access'?</i>	Systems-based service providers	All providers of Electronic Communications Services
<i>What types of 'Access' are available to other service providers?</i>	Special Network Access from SMP operators (art 4.2); also art 16 of the RVTD (98/10/EC)	Extensive range of access to networks, services and associated facilities including the examples in art 12
<i>How is colocation and facility sharing regulated?</i>	Availability encouraged, may be mandated after consultation	Available to all providers of Public Electronic Communications Networks, regulated as 'Access'
<i>Which operators have obligations to supply interconnection and access to meet reasonable demands?</i>	SMP operators	SMP operators

*N.B. This table offers a schematic outline of the main differences between the old and new access and interconnection frameworks but cannot substitute for the complete text of the cited Directives.*

1.8 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 Communications Bill<sup>2</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. Condition 1 (General access and interconnection obligations) obliges UK providers of PECNs to negotiate interconnection agreements with providers of PECNs anywhere in the European Community. 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, a PECN provider must enter into similar negotiations when requested to by other such providers.

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<sup>2</sup> Clause 148(2)

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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. In brief, these are:

- **is an electronic communications network provided?**
- **is it provided wholly or mainly for the purpose of making electronic communications services available to members of the public?**

3.2 The following chapters examine the concepts 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 Communications Bill<sup>3</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 Bill<sup>4</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 to the extent that electronic communication services are offered 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 It should also be noted in this context that reading the Bill's definition of 'provision' back into the Framework Directive's Article 2(d) definition of a public communication network gives us '*an electronic communications network used wholly or mainly for the provision [= establishment, maintenance, operation] of publicly available electronic communications services*'. The inference is that 'provision' will normally involve some positive action on the part of the provider. At the very least, the provider should be able to demonstrate that the primary purpose in providing the network was to provide ECS to members of the public. If this were not the case it could lead to the misunderstanding that any network over which public ECS are conveyed, such as a private office or residential system, is a PECN.

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<sup>3</sup> Clause 29(1)

<sup>4</sup> Clause 29(4)(a)

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4.4 Under the definition of ECN in the 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.

4.5 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 Bill makes it clear that a transmission system may consist of no more than a transmitter used for the conveyance of signals<sup>5</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. 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.

4.6 In theory, it is possible to conceive of a transmission system that is, in its entirety, located behind a network termination point (NTP) and such a private network would notionally constitute an ECN. An example is a metropolitan area network (MAN) serving the academic community in a given locality. However, by its very nature, publicly available services would not be provided over such a network. Thus the second limb of the test would not be met and such an ECN would not be capable of being interconnected under the Directive. This point is underlined by Article 2(e) of the Universal Service Directive where the NTP is defined as '*the physical point at which a subscriber is provided with access to a public communications network*'. The point is further 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.

4.7 In practical terms, for there to be an ECN there needs to be elements of physical infrastructure such as 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.

4.8 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

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<sup>5</sup> Clause 29(6)

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transmission system. This will be the case irrespective of whether the actual link is self-provided, leased from provider B or from another provider altogether, C.

4.9 This 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.

4.10 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 can be deemed to occur between two nodes within a single set of premises.

4.11 An insistence on the prior provision of a transmission system incurs 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 to establish the presence of a transmission system, and hence of an ECN.

4.12 Any narrower definition of transmission would lead to the exclusion of many non-geographic number services which are providing electronic communications services. Operators currently offering such services have been included in Annex II under the existing regime. 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.

4.13 Finally, it is worth noting that the provider of an ECN may not necessarily be the provider of the ECS which are made available to members of the public over that network. The Framework Directive's Article 2(a) definition of an ECN includes '*networks used for radio and television broadcasting, and cable television networks*'. In many cases the providers of such broadcasting networks will not themselves be providing ECS directly to the public but they are still ECNs because services are made publicly available over the networks they provide.

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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 it is used wholly or mainly for the provision of publicly available services. This is in order to determine whether the ECN is in fact a public electronic communications network (PECN)<sup>6</sup>. The Bill<sup>7</sup> defines a PECN as:

*... 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 Bill<sup>8</sup> defines an ECS as:

*... 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.*

5.4 The term 'conveyance' is not defined in the Communications Bill, but 'signal' is<sup>9</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.*

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 Bill defines 'a content service' as<sup>10</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 communications network;*

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<sup>6</sup> Thus a provider of a PECN falls within the definition of 'public communications provider' defined in Clause 148(1)

<sup>7</sup> Clause 148(1)

<sup>8</sup> Clause 29(2)

<sup>9</sup> Clause 29(10)

<sup>10</sup> Clause 29(7)

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

5.6 Additionally, as the definition of ECS in the Framework Directive (2002/21/EC) makes clear, information society services, other than those that consist wholly or mainly in the conveyance of signals, are 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. It is worth noting that the Communications Bill does not directly reference information society services. This is because the normal rules set out in the Bill apply. Where they consist wholly or mainly in the conveyance of signals they fall within the definition of ECS; otherwise they do not.

5.8 Where an information society service is provided that does not consist wholly or mainly in the conveyance of signals, the expectation is that there will be an underlying conveyance service associated with it that is an ECS. Recital 10 to the Framework Directive points out that:

*... Most of these activities [ie information society services] are not covered by the scope of this Directive because they do not consist wholly or mainly in the conveyance of signals on ECNs. Voice telephony and electronic mail conveyance services are covered by this Directive. The same undertaking, for example an Internet service provider, can offer both an ECS, such as access to the Internet, and services not covered under this Directive, such as the provision of web-based content.*

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The value of this approach is that it enables a complex package of to be broken down into its constituent elements. A number of the responses to the consultation suggested that the implications of this way of proceeding are not fully appreciated. To illustrate this approach the following model may be helpful.

5.9 One way of looking at the range of ECS is to see them as falling into a hierarchy of services that can be grouped in order of ascending complexity by drawing on additional network resources and associated facilities: basic network services, advanced services, and enhanced or value-added services.

- **Basic network services** are those that are provided over an ECN without the support of data bases or servers that can be regarded, in this context, as associated facilities. They provide basic conveyance services, such as: telephone calls, telex, leased lines, IP conveyance using the four byte IP numerical address, ATM, frame relay, radio and television transmission. (NB - neither this list nor those that follow are intended to be exhaustive).
- **Advanced services** are provided over an ECN but require the support of an associated facility. They include IP conveyance supported by domain name servers (DNS), non-geographic number services supported by IN translation databases, instant messaging supported by a 'presence' database', mobile telephony supported by home location registers (HLR), TV broadcasting supported by conditional access services and gateways to digital TV broadcasting supported by electronic programme guides (EPGs) and application program interfaces (APIs). Notwithstanding the support provided by an associated facility, the ensuing output of advanced services culminates in straightforward conveyance.
- **Enhanced services** are also provided over an ECN with the support of an associated facility. The enhancement to the basic service is dependent on one of three distinct types of process:

- (a) interaction with content;
- (b) manipulation of content;
- (c) storage of content.

Examples are:

- (a) call establishment through interactive voice response (IVR) systems;
- (b) TV transmission with MPEG compression, 3-way conference calls;
- (c) e-mail, voice mail.

The associated facilities supporting this range of services include e-mail storage servers and conference bridges.

5.10 Although the boundary lines between the suggested hierarchy of services is not always clear-cut, any resulting fuzziness does not have significant regulatory implications. As the diagram below indicates – basic, advanced and enhanced services are all forms of ECS. Where they are made available to members of the

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public, an ECN used wholly or mainly for the conveyance of such services is a PECN.

		Content	Information Society Services
		Meta-Content (ie content that points to other content)	
Electronic Communications Services	Associated Facilities	Enhanced/Value-added Services	
		Advanced Services	
	Electronic Communication Networks	Basic Network Services	

*The diagram illustrates the hierarchy of services that rest on an underlying basic network service consisting of signals conveyed over ECNs. Examples of meta-content services are web-based search engines, information on programming content accessible through EPGs (although the gateway function of an EPG is an associated facility), and the directory information drawn upon by a directory enquiry facility. The content, meta-content and information society services located in the box are not regulated as ECS.*

5.11 In the case of broadcasting, there is plainly a central element that falls within the Bill's definition of a content service (see paragraph 5.5 above). However it is clear that the contents material is comprised in signals that are conveyed over an ECN and that such conveyance involves the provision of an ECS. For the purpose of these Guidelines it is clear that an ECN over which signals that transmit publicly available broadcasting services are conveyed is a PECN, and that the provider of that network acquires interconnection rights and obligations.

## Chapter 6

### Public availability

6.1 The second strand of the 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 available to anyone who is both willing to pay for it and to abide by the applicable terms and conditions. The provider will not have imposed an upper limit on the class of potential customers other than those that arise from technical or capacity constraints. A publicly available service is distinguishable 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. This excludes the case where a service is not being made available in good faith, for example by being deliberately over-priced or because the terms and conditions are framed so as to be generally unacceptable. 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. Services do not 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. It is also to be understood that the term *members of the public* requires a broad interpretation – it is not to be read as residential or small business customers. A service that because of its scale, such as a virtual private network service, is only likely to attract corporate customers is still considered to be available to members of 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 Another example of a service not being made genuinely available to members of the public is where it is primarily targeted at members of the provider's Group (ie parent and subsidiary undertakings). Although existing definitions of the term 'service provider' will not be carried into the new framework Oftel is minded to consider that where a provider earns a substantial proportion of its revenue from members of its Group the services it provides are not genuinely publicly available. A substantial proportion had been understood to be in the order of 80 per cent. However where it is possible, by means of a physical or logical separation, to partition a network into discrete units, one of which provides services to members

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of the provider's Group and one of which provides services to members of the public, the part that provides services to members of the public will attract interconnection rights and obligations.

6.5 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 may be indicative.

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## Chapter 7

### Replacing the 'Annex II' list

7.1 All respondents to the consultation on these Guidelines were in favour of a register being maintained under the new framework analogous to the existing Annex II list (namely a list of communications providers of PECNs). To recap the reasons for maintaining such a list were that:

- 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; and
- the availability of a list avoids a potential cause of delay in reaching interconnection agreements.

**There was also unanimity that Oftel/Ofcom should be the body that maintains such a list.**

7.2 Oftel will shortly publish its proposals for the procedural arrangements that will be set in place to establish such a list. However it must be emphasised that the list will have no binding regulatory force but will be maintained on a voluntary basis only for as long as the industry and Oftel/Ofcom thinks it serves a purpose. The procedures adopted in compiling the list will not impose a need to obtain prior authorisation and as such will not effect the general authorisation to provide ECN and ECS. Furthermore, national regulatory authorities may not impose obligations on providers seeking access or interconnection that are not related to the actual access and interconnection services provided or sought.

7.3 Inclusion on such a list cannot therefore be made mandatory and it is open to any provider to negotiate interconnection without appearing on the list. Conversely, it will not be appearance on the list that itself confers a right to interconnection – such a right follows from the general conditions of entitlement and the definitions adopted by the Communications Act. However the list will indicate that on the basis of the information supplied Ofcom has taken an initial view that a given provider is providing a PECN.

7.4 It must also be emphasised that inclusion on the PECN list does not imply any right to different terms and conditions for wholesale access than other providers. Inclusion on the list simply provides clarity over who has rights and obligations to negotiate interconnection under condition 1 of the General Conditions of Entitlement; it further provides clarity over which providers must be offered non-discriminatory terms and conditions for interconnection supplied by providers required to supply interconnection on non-discriminatory terms under remedies imposed following from market reviews.

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## Annex A

### Analysis of responses to the consultation

#### Introduction

A.1 The public consultation on the draft *Guidelines for the interconnection of public electronic communication networks* commenced on 13 September 2002 and concluded on 16 December 2002. Twelve responses were received, of which one was confidential. The non-confidential responses are available at [www.oftel.gov.uk/publications/responses/2002/intg0902/index.htm](http://www.oftel.gov.uk/publications/responses/2002/intg0902/index.htm)

A.2 Non-confidential responses were received from:

- AOL (UK) Ltd
- British Telecommunications plc
- Centrica
- CCE (Communications for England) & CfB (Communications for Business) advisory committees, jointly
- Easynet
- Mobile Broadband Group (comprising 3, O2, Orange, Vodafone, T-Mobile)
- NIACT (Northern Ireland Advisory Committee for Telecommunications)
- ntl
- Operators' Group (comprising Energis, Colt, Fibernet, AT&T, Hutchison 3G, Thus, ntl, Kingston Communications, Cable & Wireless Communications, Worldcom, Tweedwind Ltd)
- Brian Powell
- Telewest Communications plc

A.3 In this annex OfTel summarises the non-confidential responses raised and offers its view on the points made.

***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?***

A.4 Most responses felt that the two tests were adequate but wished to make the second test more stringent with a requirement that the ECN be used wholly or mainly for the provision of publicly available electronic communications services, reflecting the Bill definition. The Guidelines now reflect this more accurate description in paragraph 3.1.

A.5 The Operators' Group and ntl wanted the Guidelines to be more explicit about the meaning of '*mainly*' in the phrase '*wholly or mainly*'. '*Wholly or mainly*' is a term frequently used in legislation and there is no immediately apparent substitute

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which would offer the clarification sought, say, in percentage terms. It will be for the Courts to decide its application on the basis of the facts of a particular case.

A.6 ntl expressed a wish that network integrity be built into the Guidelines and that any requesting PECN will need to be able to meet the *Guidelines on the essential requirements for network security and integrity and criteria for restriction of access to the network* (available at [www.oftel.gov.uk/publications/ind\\_guidelines/guid1002.htm](http://www.oftel.gov.uk/publications/ind_guidelines/guid1002.htm)). Oftel's view is that as communications providers will be subject to a general condition on the proper and effective functioning of the network there will already be in place a set of procedures to secure network security and integrity that will be proportionate, objective and non-discriminatory. *The Guidelines on the essential requirements* include criteria for the restriction of access. However it would be disproportionate and an obstacle to insist on an onerous a priori security audit in the absence of an identified problem.

A.7 Telewest raises the issue of whether what it terms 'intermediate suppliers' are PECNs where services are indirectly but not directly available to the public. However, PECN status is not dependent on having a direct contractual relationship with the users of the services which are provided over the network in question, provided those services are publicly available.

***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?***

A.8 There was general agreement with the Guidelines about what it means to provide a transmission system.

A.9 Easynet wished for greater clarity over the status of the various providers in a situation where provider A interconnects to provider B using network infrastructure provided by provider C. Oftel's view is that in such a scenario both provider A and provider C are providing a PECN, as long as it is primarily used for the conveyance of publicly available services.

A.10 Easynet also sought clarification about the status of number translation operators. Oftel's view is that a number translation service is one component of a non-geographic number service, which is an ECS.

A.11 The Operators' Group and ntl want the term '*transmission system*' to be defined more closely. In particular they seek a closer linkage between the provision of a PECN and the public availability of the services provided over it. Their example is a DSL Internet access provider which qualifies for interconnection on the basis that a PECN is being provided but which should be denied interconnection for its internal voice network, over which publicly available services are not provided.

A.12 Oftel's view is that where it is feasible to segregate a network, by means of physical or logical separation, into discrete parts one of which is used to provide services to the public and one of which is not, the part that provides publicly

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available services attracts interconnection rights and obligations. Where partition has not been implemented, the necessary judgement will be whether the network, taken as a whole, is used wholly or mainly for the provision of publicly available services. However this judgement will be formed on the basis of the Bill definition of interconnection<sup>11</sup> which identifies the purposes of interconnection as enabling persons using one PECN to communicate with persons using another, interconnected, PECN; or, to make use of services provided by means of another PECN. Providers seeking interconnection will need to be able to show this. In passing, the practice of PECN providers to use their networks by self-providing internal communications represents a good example of the application of the 'wholly or mainly' test.

A.13 By contrast, Easynet made the point that once interconnection criteria had been met a provider would be entitled to interconnect to all types of services provided by BT. Oftel think this is correct but needs to be qualified by the recognition that BT may not have significant market power across all services. Where a provider does not have SMP in a specified market interconnection will need to be negotiated in the normal way.

A.14 AOL was concerned that provision of a single network node exposes the provider to the interconnection rights and obligations that flow from providing a PECN. It proposes that a provider of a single network node should be entitled to seek interconnection from other providers but not be obliged to negotiate with other providers seeking interconnection with it. Oftel cannot accept this proposal because it would create an asymmetrical relationship between providers seeking interconnection and those from whom interconnection is sought. Hitherto a balance has been struck between the rights and obligations of interconnection. Moreover, Oftel does not consider an obligation to negotiate interconnection to be unduly onerous.

A.15 Telewest strongly disputes the logic that an ECN has to be based on one or more network nodes. However where an ECS is being provided and signals are being conveyed there will of necessity be a transmission system.

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

A.16 Most responses agreed with what the draft said but wanted more explanation as to how Oftel will interpret the Bill definition of an ECS. In particular, how will it decide whether '*the principal feature*' of a service is '*the conveyance by means of an electronic communications network of signals, except in so far as it is a content service*'. The Operators' Group and ntl argue that the 'principal feature' test would be a determining factor as to whether a given service is to be regulated under the Communications Act or whether, as an information society service, falls within the scope of the Electronic Commerce Regulations<sup>12</sup>.

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<sup>11</sup> Clause 148(2)

<sup>12</sup> The Electronic Commerce (EC Directive) Regulations 2002 (S.I. 2002 No.2013)

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A.17 Oftel believes that this is partially true. However, the simple opposition between electronic communications and information society services is potentially misleading as there are content services which are not information society services. Recital 18 of the Electronic Commerce Directive (2000/31/EC) provides a helpful analysis of the concept of information society services. Television and radio broadcasting are concluded not to be information society services, by contrast to video-on-demand, because they are not provided at individual request.

A.18 Recital 10 of the Framework Directive excludes information society services from the scope of the directive (except where they consist wholly or mainly in the conveyance of signals on ECNs) and hence from the new framework for electronic communications. However the Recital uses the example of an Internet Service Provider to illustrate the point that the same undertaking may offer access to the Internet, which makes it an ECS provider, and provide web-based content, which is not an ECS. On this basis, a provider who offers access to the Internet provides a service of which a primary feature is the conveyance of signals.

A.19 BT asks for further examples of services that are not ECS and proposes a list which includes the provision of television and radio programmes by broadcasters, internet services consisting wholly or mainly in the provision of content, services related to e-mail where the service consists in the provision of a server to store e-mails, premium rate services, value-added telephone services and conference services where the service consists mainly in the provision of a conference bridge.

A.20 It is not feasible for the Guidelines to itemise every service that Oftel believes is not an ECS. Static categorizations of a priori service descriptions are liable to be overturned by the fluidity of the electronic communications environment. However the Guidelines' elaboration of a hierarchy of ECS and their differentiation from information society, meta-content and content services offers a way of distinguishing between ECS and non-ECS.

A.21 In addition, it is Oftel's view that the contents element of services such as premium rate services (PRS) or location services, where location data is processed beyond what is required for the transmission of an electronic communication, are not ECS.

A.22 In the case of broadcasting, it is apparent that the content service is a central element. However it is also apparent that the signals in which the content material is comprised are conveyed over an ECN (networks used for radio and television broadcasting are specifically included in the Framework Directive definition of an ECN) and that the conveyance of signals over such a network is an ECS. For the purposes of these Guidelines it is sufficient to recognise that providers of broadcasting networks over which transmissions are available to members of the public will attract interconnection right and obligations.

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A.24 Telewest maintains that the mandatory notion of conveyance underpinning an ECS is redundant - however these Guidelines are constrained by Bill definitions of ECN and ECS.

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

A.25 Many of the issues this question raises are covered in the analysis of the responses to Q3.

Easynet questioned whether number translation services such as dial-up internet are information society services. Oftel's view is that number translation is one component of a non-geographic number service which is not an information society service.

A.26 ntl questioned the authority of the statement at paragraph 5.6 that 'information society services, other than those that consist wholly or mainly in the conveyance of signals, are by definition not ECSs'. This is derived from the Framework Directive definition of an ECS. The Bill definition of ECS does not reference information society services but this is because where a service meets the test of having the conveyance of signals over an ECN as its principal feature it is an ECS irrespective of whether or not it is also an information society service. This is consistent with the statement made.

A.27 The Operator's Group proposes a list of services that it thinks are not ECS. Oftel's view is that offered in response to BT's input at paragraph A.20 above.

***Q5: Do stakeholders agree with the guidelines' understanding of what constitutes a publicly available service?***

A.28 BT expressed some concerns about the draft's understanding of public availability which have been addressed by amendments to Chapter 6. It is now made more explicit that an ECS must be made available in good faith (ie it must not be priced so as to deliberately deter subscribers) and that it will not be publicly available if a substantial proportion of the income it generates is derived from members of the provider's Group.

A.29 BT has also requested that where a provider obtains general interconnection rights on the basis of plans to provide public electronic communications services, repeated failure to implement the plans within a reasonable period may cause those interconnection rights to be considered as having lapsed. The Guidelines do not include this condition because it is more pertinent to the management of a future interconnection regime than with setting criteria to identify providers of PECNs. But it is certainly a consideration to be taken into account where a provider refuses to maintain interconnection arrangements.

A.30 Centrica seeks confirmation that services provided via cable networks or fixed-line broadband access are publicly available even though they may not be

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available, because of technical or capacity constraints, to the public in its entirety. Oftel agrees that the requirement for a service to be available to *members of the public* does not imply universal availability. It also argues that the Guidelines should set quantitative requirements, in terms of the area served and the number of potential customers, for a service to qualify as publicly available. However this is inappropriate to the Guidelines as the difference between an ECN and a PECN is qualitative, not quantitative. It is arguable that the provider of a Common Base Station in the context of Private Mobile Radio services is providing a PECN, even though its effective range may be limited to a few kilometres.

A.31 ntl has concerns as to whether services provided to large corporations, government and universities are considered to be available to members of the public. Oftel's view is that they are not because, as in a landlord and tenant relationship, the class of potential customers is finite in consequence of a prior set of relationships.

A.32 Easynet seeks clarification that constraints on the upper limit of customers that arise from the technical or capacity constraints of a service do not disqualify that service from being publicly available. Chapter 6.1 of the Guidelines has been amended to clarify this point.

A.33 CCE and CfB thought that consideration of how a service is marketed would be indicative of whether or not the service is available to members of the public was an unsatisfactory yardstick, on the grounds that some providers may deliberately restrict the size of their customer base to avoid the costs of expansion and opt for a minimal marketing strategy but nevertheless would still be obliged to accept any customer within their served area who can meet their standard contractual terms. This is a reasonable point; in a complex case no one test is likely to provide a categorical answer and it is recognised that marketing is just one of the factors that needs to be taken into account.

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

A.37 There was unanimity that the maintenance of a list of PECNs was desirable; in fact most responses said it was essential. BT, expecting to be the object of most requests to interconnect, said that the uncertainty of not having a list is likely to result in unproductive delays and disputes and this was echoed by other providers. CfB/CCE thinks that the maintenance of a list is essential to ensuring consumer confidence in the new regime.

***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?***

A.38 Some responses favoured a mandatory list and thought it could be derived from the notification process. However the notification requirements are intentionally designed to avoid becoming a form of a priori authorisation and Oftel

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has already consulted on its intention not to designate any networks or services as requiring to be notified, at least for the present (see [www.oftel.gov.uk/publications/licensing/2003/fees0203.htm](http://www.oftel.gov.uk/publications/licensing/2003/fees0203.htm)). A Statement has now been published at [www.oftel.gov.uk/publications/eu\\_directives/2003/notfees0503](http://www.oftel.gov.uk/publications/eu_directives/2003/notfees0503). The information supplied under notification requirements cannot be subject to scrutiny so any list developed from it would have to be taken on trust. In addition Article 3.3 of the Authorisation Directive places severe limitations on the type of information which can be required for such notifications. By contrast where providers voluntarily supply information, there is no constraint on a more detailed examination.

A.39 Some responses argue for a mandatory list without opt-in or opt-out provisions. However the new framework does not offer scope to national regulatory authorities (NRAs) to require compliance with administrative measures on providers seeking interconnection. A PECN is entitled to interconnection by dint of its status, not because its name appears on a list maintained by the NRA. A provider's unwillingness to be enrolled on the list does not offer grounds for denying interconnection to that provider. The list has no legal standing but will have indicative value.

***Q8: By whom should any list be maintained. Are stakeholders content with the idea of a list maintained by Ofcom?***

A.40 There was unanimous support for a PECN list to be maintained and published by Oftel/Ofcom. Oftel will follow the publication of these Guidelines by more detailed proposals for the compilation and maintenance of a PECN list.

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