

**The granting of the
Electronic Communications Code by Oftel**

A consultation issued by the Director General of
Telecommunications

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Summary

S.1 This consultation paper concerns the granting of the electronic communications code ('the Code') after the 25 July 2003 when the implementation of four European Directives¹ will bring the current licensing regime to an end and introduce a light touch regulatory approach based on general authorisation. In the UK it is intended to implement the Directives via a new Communications Act (see below regarding the Communications Bill currently before Parliament). Other consultation documents concerning the implementation of the European Directives can be found at the Oftel website

www.oftel.gov.uk/publications/eu_directives/index.htm.

S.2 Licensing was a mechanism which restricted those who benefited from code powers and with the end of the licensing regime new policies and procedures need to be put in place to govern future grants of the Code.

S.3 The grant of code powers in the past has had an important role to play in the building of telecommunications infrastructure. It will continue to have an important role to play in the building out of electronic communications infrastructure, especially in the roll out of broadband and third generation networks.

S.4 The Code can be applied for by all the providers of Electronic Communications Networks, regardless of the size of the network. In addition the Communications Bill now before Parliament (the latest version is available at www.communicationsbill.gov.uk²) contains provisions to enable the providers of conduits systems to apply for the Code to build conduits for use by the providers of communications networks³. Granting code powers to everyone who applies could lead to unnecessary highway disruption and could cause problems with abandoned apparatus.

S.5 The purpose of this paper is to seek views on a policy position for dealing with applications for the Code by the Director General of Telecommunications ('the Director') in any interim regime and following the transfer of Oftel's functions to the Office of Communications ('Ofcom') which will replace Oftel and four other regulatory authorities.⁴

¹ Directive 2002/21 EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services ('Framework Directive')
Directive 2002/19 EC of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ('Access Directive')
Directive 2002/22 EC of 7 March 2002 on universal service and user's rights relating to electronic communications networks and services ('Universal Service Directive')
Directive 2002/20 EC of 7th March 2002 on the authorisation of electronic communication networks and services ('Authorisation Directive').

² The version of the Communications Bill, which is referred to throughout this document, incorporates amendments made in Committee in the House of Commons on 5 March 2003.

³ Clause 103(4) of the Communications Bill.

⁴ The four regulatory authorities are the Independent Television Commission, the Radio Authority, the Radiocommunications Agency and the Broadcasting Standards Commission.

S.6 Oftel's proposals are as follows:

- when applications for the Code are considered regard should be had to the matters set out in the table at Annex A;
 - generally grants of the Code should be considered more favourably for those network operators who are able and willing to share infrastructure with other operators, although an inability or an unwillingness to share should not by itself be regarded as a determining factor;
 - a person applying for the Code will have to produce evidence showing an ability to put in place satisfactory arrangements to ensure adequate funds will be available to cover liabilities arising through the exercise of code powers on the occurrence of an event such as that person, if a company, going into liquidation;
 - the Code should not normally be granted to those persons operating networks which are exclusively or predominantly private, since such persons do not have the obligations which normally arise from the operation of a public network;
 - those non network operators who qualify as Conduit system providers should be granted code powers only where they can demonstrate that they are providing Conduits which are for the primary purpose of making such facilities available to network operators for the provision of their networks; and
 - that only persons benefiting from the Code should be charged for the costs incurred in dealing with Code applications and administering the Code on a day to day basis.
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Chapter 1

Introduction and background

1.1 The following chapter describes briefly the current regulatory position in relation to grants of the Telecommunications Code under the Telecommunications Act 1984 ('the Act') and the background to the Telecommunications Code becoming the electronic communications code ('the Code'). Chapter 2 seeks views on Oftel's interpretation of the statutory criteria which Oftel is to have regard to in considering whether to grant the Code in a person's case. Chapter 3 contains proposals on the procedure for the grant of the Code including proposals on charging. The questions raised throughout the document are listed in Chapter 4. A glossary of defined terms is included at Annex B.

1.2 The power to grant the Code is contained in the Communications Bill (available at www.communicationsbill.gov.uk⁵). It is hoped that the Bill will receive Royal Assent by the 25 July 2003. However it is unlikely that the Office of Communications ('Ofcom') will then be ready to assume all of its duties on that date and there is likely to be an interim period in which the Director General of Telecommunications ('the Director') would be granting the Code. Therefore when describing the new regime the term 'the Regulator' has been used which should be read as referring to either Ofcom or the Director as the case may be.⁶

The Telecommunications Code

1.3 Under the current regulatory regime the Telecommunications Code is granted to an applicant by the Secretary of State under section 10 of the Act if he satisfies one of two conditions:

- he is either in possession of a licence to run a public telecommunication system ('a PTO'); or
- it appears to the Secretary of State that the running of the system, which the applicant is authorised to run, under an individual licence granted under the Act, will benefit the public and that it is not practicable for that system to be run without the application of the Telecommunications Code to that person.

1.4 Persons benefiting from the Telecommunications Code have a number of powers. In particular they:

⁵ References to the Communications Bill in this document are references to the version which incorporates amendments made in Committee in the House of Commons on the 5 March 2003.

⁶ In the event that the Communications Bill does not receive Royal Assent by 25 July 2003 the Government has acknowledged that implementation will need to occur by Statutory Instruments made under the European Communities Act 1972 for an interim period until the Bill enters into force.

- benefit from some important exemptions from the Town and Country Planning regime. This is in the form of Permitted Development;⁷
- have the power to carry out works in connection with the installation of apparatus in the streets without the need to obtain a street works licence under the New Roads and Street Works Act 1991; and
- have the right to apply to the Court conferring a right, where agreement cannot be reached with the landowner, to execute works on private land.

1.5 To date there are some 242 PTOs licensees of which 144 have code powers. However, when the corporate groups are consolidated the number of corporate organisations with code powers, as opposed to individual licensees, is less than 90. There are six non-PTO licensees with code powers. It is estimated that in practice no more than about 40 of the existing operators are actually using the Telecommunications Code.

1.6 On the empirical evidence to date any non-PTO with an individual licence was granted powers if a case was made that the powers were needed. There was a very strong presumption in favour of granting code powers to operators who requested them.

1.7 The grant of code powers is annexed to the licence held by the operator, following a period of statutory public consultation, and therefore it has to be applied for and granted at the same time as the licence. It is not possible to terminate the use of code powers without revocation of the licence nor is it possible to grant code powers after the licence has been granted. The two have to be granted together which is why many operators who have code powers do not use and indeed may not need them. As explained below this situation will change under the new regime.

1.8 An annual fee was payable in respect of the individual licences but there was no financial obligation attributable directly to the Telecommunications Code and therefore there was no incentive for operators to consider critically whether or not it was necessary for them to have code powers.

1.9 All individual licences will cease on 24 July 2003 and this will break the link between licensing and code powers. All network providers will be operating under general authorisations as indeed will the telecommunication system providers who benefit from the Telecommunications Code ('Existing Operators'). From 25 July 2003 persons wishing to benefit from the Code will have to apply for it ('Code Applicants') This includes network providers and conduit system providers. Measures will be put in place to apply the Code to existing operators in replacement of the Telecommunications Code.

⁷ See Part 24 of the Town and Country Planning, England and Wales (General Permitted Development) Order 1995. SI 1995/418 as amended. Planning (General Development)(Amendment) Order (Northern Ireland) 2003 SR No. 98. Town and Country Planning (General Permitted Development)(Scotland) Amendment (No. 2) Order 2001 SSI 2001/266.

The New European Directives and the Communications Bill

1.10 The basis for the new regulatory framework for the communications sector, as contained in the Communications Bill, is four European Directives⁸. The grant of the Code does not relate directly to the implementation of the Directives and apart from some minor changes to terminology and its extension to all forms of electronic communications the Code is the Telecommunications Code as amended by the Communications Act 2003. The EC Framework Directive is relevant to the extent that under it the process for the grant of the Code should be transparent and non-discriminatory.⁹ Further it provides for the national authority to encourage sharing of those facilities which an undertaking has a right to install under national legislation.¹⁰

1.11 Under the Communications Bill the power to grant the Code and administer it will be transferred to the Regulator from the Secretary of State. However the Secretary of State will retain the power to make regulations containing restrictions and conditions to which grants of the Code will be subject. The restrictions and conditions will concern the need to protect the environment and ensure that the highway is not obstructed or interfered with to any greater extent than is reasonably necessary. Draft regulations containing the restrictions and conditions will be published on the DTI website (www.dti.gov.uk) for consultation soon. The regulations replace Schedule 4 of the individual licences granted under the Act. Under the new regime the power to enforce the restrictions and conditions will rest with the Regulator. The regulations will apply automatically to existing operators as they will be deemed to have the benefit of the Code in replacement of the Telecommunications Code.

Scope of the Code and Conduit providers

1.12 The Telecommunications Code applies only to telecommunications system providers. The Code will apply to all electronic communication network providers, including broadcast transmission providers. It will not be restricted automatically to major network operators. In principle service providers with no more than minor networks will be eligible for code powers. Further as part of the Government's strategy to roll out broadband the Government has decided to allow persons who are not themselves electronic communications providers, but who wish to provide conduit systems for use by electronic communications networks, to apply for the

⁸ Directive 2002/21 EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services ('Framework Directive')

Directive 2002/19 EC of 7 March on access to and interconnection of electronic communications networks and associated facilities ('Access Directive')

Directive 2002/22 EC of 7 March 2002 on universal service and user's rights relating to electronic communications networks and services ('Universal Service Directive')

Directive 2002/20 EC of 7th March 2002 on the authorisation of electronic communication networks and services ('Authorisation Directive').

⁹ Framework Directive Article 11.

¹⁰ Framework Directive Article 12.

Code.¹¹ This means that local authorities and utility companies (ie providing gas and water) could benefit from code powers. A prerequisite to the grant of the Code is that the Conduit system is made available for the use by the providers of networks for the provision of those operator's networks.

1.13 It need not be necessary to deal with applications from different categories of Conduit system providers on the same basis as electronic communication network providers. Under the EC Framework Directive the Regulator is able to treat these persons differently as long as objectively justified. Views are sought for example on whether the Regulator should treat applications from local authorities differently from utility companies on the grounds that there may be different public interest issues to consider in the case of the former because of their role as Local Planning Authorities. Owing to this group's envisaged role as 'infrastructure providers' consideration may need to be given to ensuring that access to the conduits is granted to communication network providers on fair and reasonable terms. Views are sought specifically on this. Oftel would prefer that terms of access should be left to market forces but Oftel would welcome views on this.

1.14 Depending on the responses received Oftel may publish a separate consultation document to deal with the development of policy and processes for these conduit system providers with code powers, and Oftel will discuss with the DTI whether there is a need for any specific conditions and restrictions to be attached to the grant of the Code to conduit system providers. The Communications Bill enables a separate charging regime to be introduced to cover the costs of the administration of the Code in respect of these conduit system providers and this is discussed further in Chapter 3.

Is there any reason why the Regulator should deal with applications from certain categories of Conduit system providers differently from applications from communication network providers?

The statutory criteria

1.15 Under the new regime when considering whether to grant the Code, the Regulator is required to have regard, in particular, to the following statutory criteria.¹² These are discussed further in Chapter 3 and are as follows:

- the benefit of the network or Conduit system to the public;
- the practicability of providing the network or Conduit system without the Code;

¹¹ If the implementation of the EU Directives occurs by Statutory Instruments made under the European Communities Act 1972 then the Regulator will not have the power to grant the Code to Conduit system providers until the Communications Bill becomes law. This is because the extension of the Code to Conduit system providers has been a decision of the UK Government and does not derive from the implementation of the EU Directives.

¹² Clause 104(4) of the Communications Bill.

- the need to encourage sharing of electronic communications apparatus; and
- whether the Code applicant can meet liabilities arising including those arising as a consequence of his conduct in relation to the matters with which the Code deals.

Besides the statutory criteria are there any other matters which the Regulator should have regard to in considering whether to make a direction applying the Code?

Costs

1.16 The Regulator will be able to recover its costs in dealing with applications for the Code and administering the Code from persons to whom the Code has been granted. Any such charge cannot exceed the cost to the Regulator in dealing with grants of the Code and administering it once granted. Charging is discussed further in Chapter 3.

Existing Operators and duration of code powers

1.17 From 25 July 2003 existing operators will be deemed to benefit from the Code. Their right to the Code will not be assessed by reference to the factors which the Regulator will have to bear in mind when considering whether or not to grant the Code to code applicants.

1.18 Once the Code is granted the code applicant will be able to benefit from Code powers, in accordance with the terms of the direction granting the Code, unless the application of it is either suspended or the direction is revoked.¹³ Code powers cannot be transferred. The circumstances when the application of the Code can be suspended or the direction revoked are limited¹⁴ and once the Code is granted the Regulator will not be able to review the continuing availability of code powers against the statutory criteria at a later stage.

1.19 The purpose of this consultation is to seek views on: (1) Oftel's general strategy on the grant of the Code; and (2) the procedure for the grant of the Code. Oftel will need to have an overall policy and procedure in place at the same time as the new regime takes effect, that is to say by 25 July 2003. Oftel intends to publish a final statement setting out its policy on the grant of the Code following consideration of responses.

¹³ Clauses 110 and 112 of the Communications Bill.

¹⁴ One of the circumstances for the suspension of the Code is the persistent breach of any of the conditions or restrictions attaching to the grant of the Code.

Chapter 2

The Statutory Criteria

2.1 This chapter seeks views on how Oftel should interpret the statutory criteria¹⁵ which the Regulator is required to have regard to when considering applications for the Code. Comments made will help Oftel form its general strategy on how it should deal with applications for the Code in any interim regime. Such a strategy is likely to form the starting point for the formulation of detailed guidance on the interpretation of the statutory criteria.

2.2 This chapter is to be read in conjunction with the table at Annex A. This table includes the various types of existing operator as they are categorised under the existing licensing regime and it illustrates how the Regulator might apply the criteria in these different cases.

2.3 With the end of the existing licensing regime companies will be operating under general authorisations and all the providers of communication networks and conduits systems will be able to apply for the Code. This means that potentially the number of companies benefiting from code powers and permitted development could increase. Any general strategy formulated by Oftel needs to ensure that some limits are placed on the types of persons who may utilise the Code. Otherwise pressure from other interested parties on the basis that there are too many persons with such rights could see permitted development and other rights being eroded. It is necessary therefore to try and balance the need for the maximum utilisation of the Code to create communications infrastructure, which will benefit competition and the provision of services, with the concerns of those who will be affected by the exercise of code powers.

2.4 Oftel's general proposals on how it will apply the statutory criteria are outlined below.

2.5 The context for the formulation of the general strategy is as follows:

- the Regulator will not be able to impose a fee on the grant of the Code to promote the optimal use of public land;¹⁶
- under Clause 4 of the Communications Bill the Regulator will have a duty to act in accordance with the six European Community requirements the first of which is a requirement to promote competition;
- many of the existing operators who need code powers have them;

¹⁵ Clause 104 (4) of the Communications Bill.

¹⁶ Under Article 13 of the EC Authorisation Directive Member States may impose fees for the right to install facilities on, over or under public land which reflect the need to ensure the optimal use of the land. The UK Government has decided not to give the Regulator the power to impose such fees in the Communications Bill.

- to deny new market entrants access to code powers could harm competition by acting as a barrier to market entry; and
- the Regulator has to make a judgement about how much weight to attach to individual criteria having regard to its general duties.

2.6 The statutory criteria as set out in the Bill involves the Regulator considering the benefit of the network to the public, the need for the Code, the need to encourage sharing of apparatus, and whether adequate funds are in place to meet liabilities arising from the exercise of code powers. Some of the factors relevant to one criterion may also be relevant to another. Below is a discussion of each in turn.

The benefit of the network to the public

2.7 It is generally accepted that the building of alternative infrastructure is in the interests of the public because it is likely to improve access to services. Representations may be made, during the consultation on the grant of code powers to a particular person, that the grant will lead to highway disruption. In such circumstances it will to a large extent be a matter of judgement for the Regulator to determine where the public interest lies. The following factors will be relevant under this criterion:

- the content of the conditions and restrictions attaching to grants of the Code;
- any initiatives which the Code applicant may undertake on a voluntary or mandatory basis so as to avoid the adverse consequences arising from the exercise of code powers;
- the fact that if any disruption is caused through the exercise of code powers it would be of short term duration;
- the existence of alternative networks which could be used by the Code applicant; and
- the existing level of service provision in the area where the Code applicant wishes to build infrastructure.

Practicability of providing the network without the Code

2.8 Clearly there are practical advantages to being granted code powers i.e. the saving in time and cost by exempting the Code applicant from having to apply for planning permission or a New Street Works Licence. Ultimate power to apply to a Court for rights over private land undoubtedly strengthens the Code applicant's negotiating position when dealing with the owners of private land when access is being sought. Oftel's view however is that it would not be sufficient for the Code applicant to merely point out the practical advantages in having code powers. Rather the Code applicant should demonstrate that code powers are needed because without them it would not be practicable for him to provide the network or conduit system.

2.9 Relevant factors would include:

- whether the infrastructure proposed to be built with code powers will be used to provide communication services to the general public as opposed to a limited number of people; and
- the extent of the network because the larger it is the more likely code powers will be needed to build infrastructure.

Should the Regulator ask Code Applicants to demonstrate need by reference to detailed estimates of the savings in time and cost that the grant of the Code is likely to bring? If the answer is yes how would this work in practice?

Need to encourage sharing of apparatus

2.10 The sharing of apparatus is a sensitive issue. In the UK to date there has been little enthusiasm for sharing, except in the case of radio masts where planning problems make sharing desirable and sometimes necessary. There are benefits to sharing i.e. reduction of the cost of infrastructure build and reduction in the environmental impact of network construction. However operators are concerned that the cost of sharing would in general outweigh the benefits and that sharing should normally be a matter for commercial and technical agreement between operators.

2.11 Of tel's policy¹⁷ therefore has been to encourage sharing where it is practicable but not to intervene to require it. However increasing public sensitivity about the disruption caused by street works and the extension of the applicability of the Telecommunications Code to conduit system providers may require the Regulator to take a more interventionist approach. Further the EC Framework Directive requires the Regulator to encourage facility sharing where an undertaking has the right to install such facilities in, on, over or under public or private property or may take advantage of a procedure for the expropriation or use of property.¹⁸ The inclusion of this criterion does envisage that there will be a degree of reciprocity in grants of the Code. In other words as a quid pro quo for the privileges which attach to the Code there could be a corresponding obligation to share apparatus where appropriate.

2.12 If the providers of Electronic Communication Networks and associated facilities with code powers put up barriers to sharing then under the Communications Bill¹⁹ the Regulator will have the power to impose a condition to secure, where there are no viable alternative arrangements, the participation of such persons in arrangements:

¹⁷ *Duct and pole sharing – a guidance note on Of tel policy* 11 June 2002 available at www.of tel.gov.uk/publications/about_of tel/2002/manp1202.htm.

¹⁸ EU Framework Directive Article 12.

¹⁹ Clause 70(3) of the Communications Bill version 5 March 2003.

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- for sharing the use of the electronic communications apparatus; and
 - for apportioning the costs incurred in relation to the sharing.

2.13 In order to encourage sharing of apparatus, Oftel's view is that the Regulator should look more favourably on applications where evidence is produced showing the Code applicant's willingness to share infrastructure. This is particularly the case where strong representations have been received from third parties against the grant of the Code on the grounds of highway disruption or because of environmental impact. Oftel considers that it would be inappropriate to make grants of the Code conditional on seeing evidence of a Code applicant's willingness to share apparatus on the grounds that this could have an adverse effect on competition by discouraging new entrants to the market to build infrastructure. Code applicants who are Conduit providers will be asked to produce evidence demonstrating that the Conduit systems will be made available for use by communication network providers. This is because the Regulator is only able to grant the Code to conduit system providers for the purposes of making available a system of conduits for use by providers of electronic communications networks for the provision of their networks.²⁰

2.14 The Regulator could, as a precondition to any grant of the Code, require the Code applicant, where it is a network provider, to show that it has explored alternative sharing arrangements to network build.

Has Oftel adopted the right approach to the sharing of apparatus?

Whether the operator can meet liabilities arising including those arising as a consequence of his conduct in relation to the matters with which the Code deals

2.15 This criterion is concerned with ensuring that adequate funds (ie through a bond or insurance policy) are in place to cover claims from Highways Authorities for the cost of removing apparatus left redundant after the occurrence of an event such as the Code applicant going into liquidation. The requirement to have funds for liabilities in place is already one of the conditions which attach to the grant of the Telecommunications Code. This obligation is set out in Schedule 4 of the individual licences. The obligation will be included in the regulations being prepared by the DTI containing the conditions and restrictions attaching to the grant of the Code. The inclusion of a 'funds for liabilities' criterion here allows the Regulator to look for evidence of an ability to put funds for liabilities in place. Oftel's view is that it would be unrealistic to expect Code applicants to have funds for liabilities in place at the time of making the application because Code applicants may well not want to commit to infrastructure build until code powers have been granted. Oftel's view is that Code applicants should produce evidence demonstrating an ability to put funds for liabilities in place before the exercise of code powers.

²⁰ Clause 103 (4b) of the Communications Bill.

2.16 To avoid any discrimination all of the existing operators would have to have such arrangements in place. This would be achieved through the enforcement by the Regulator of the funds for liability condition in the regulations being prepared by the DTI. At present Oftel considers compliance with the condition by assessing the financial instruments which are being proposed by the licensee to provide financial cover. Oftel has proposed to move to a system of self-certification²¹ and this will be reflected in the regulations which the DTI will be publishing for consultation shortly.

2.17 Oftel is not seeking views on self-certification here, which has been the subject of two previous consultations. Views are sought on what evidence the Regulator should ask for to assess a Code applicant's ability to fulfil its duty to have funds for liabilities in place before the exercise of code powers. The Regulator would expect to see at least letters from potential guarantors indicating a willingness to support the Code applicant in making the necessary arrangements.

What evidence should the Regulator seek in order for the Applicant to be able to demonstrate an ability to put funds for liabilities in place before the exercise of code powers?

Making decisions in individual cases

2.18 The table at Annex A gives an indication of Oftel's response to applications for grants of the Code. At one end of the spectrum, a major network provider with universal service obligations would, using the criteria set out in the Communications Bill be eligible for the Code. By the same criteria a simple reseller such as an ISVR operator would not. The difficulty lies in the middle of the spectrum, complicated further by virtue of the fact that it is not a straight line which will lend itself readily to a graded scale which can be related to the statutory criteria. In considering applications there will be a number of variable and interrelated factors which will have to be considered.

Code powers for persons using parts of a network

2.19 Some Code applicants, where network providers, will be content to operate without code powers for most of their network and will be able to provide most services using other operator's networks. This would be through leased lines, interconnection, some other form of access or simply by reselling the services provided by other operators. Also where only minor infrastructure links are needed they may be able to negotiate rights over land by private treaty and be able to deal with minor planning applications without undue delay or inconvenience. They may also be able to utilise microwave links to complete a network. If therefore some degree of limitation is to be placed on the number of operators who are granted

²¹ *Funds for Liabilities- the Way Forward* consultation paper dated 24 June 2002 available at www.oftel.gov.uk/publications/licensing/2002/funds0602.htm.

code powers, these part network operators could be refused code powers unless there were exceptional circumstances.

Should there be a presumption against the grant of the Code to persons using parts of networks where only minor infrastructure links are needed?

What are the circumstances justifying the grant of the Code to such persons?

Private networks

2.20 It would not seem to Oftel to be appropriate to grant code powers to anyone who intends only to operate private networks, whether or not such a network is connected to the PSTN (Public Service Telephone Network). One of the matters to which Oftel is to have regard to is the benefit to the public of the communications network and therefore in most cases applications in relation to private networks would be unlikely to be successful. The EC Framework Directive recognises that a distinction can be drawn between public and private networks where the right to expropriate private property is involved.

2.21 The Code will be available to the Crown²². As now it is likely to be used by the Secretary of State for Defence and by Government departments, particularly in Northern Ireland.

2.22 It is unlikely that many of these private Government networks could or would be able to share facilities with other operators and in any case Government facilities are unlikely to be suitable for such sharing. A public interest criteria should be sufficient to enable a clear distinction to be drawn between private networks built and operated by the Crown and private networks constructed by individuals who are providing services to themselves or to a limited class of persons and not to the public at large.

Should there be a presumption against the granting of the Code for the purposes of providing a private network?

What are the circumstances justifying the grant of the Code to such persons?

²² No application for code powers will be required in such cases and the Secretary of State and Northern Ireland Government Departments will not be subject to the regulations made by the Secretary of State. However under the normal constitutional convention a Minister is expected to give an assurance on the floor of the House that the Government will comply insofar as possible with the regulations.

Chapter 3

The procedure for the grant of the Code

3.1 This Chapter sets out briefly the procedure for the grant of the Code and sets out proposals on (1) the information that persons should provide on Code applications and (2) how Oftel proposes to collect a charge for the costs of processing Code applications and administering the Code on a day to day basis.

The procedure

3.2 A person wishing to benefit from the Code will have to apply to the Regulator and provide it with such information as may be required by the Regulator, in a notification published by it, from time to time.

3.3 The Regulator is likely to require information under the following broad headings. More specific questions can be drawn up following the consideration of responses to Oftel's interpretation of the statutory criteria:

- company details;
- reasons for needing the Code;
- description of the infrastructure or system of Conduits which the person is intending to provide including the location;
- details of the purposes for which the infrastructure is to be used for i.e. the type of services which will be provided and details of who is likely to benefit;
- in the case of Conduit systems providers details of any networks which the Conduits would be used for. In the unlikely event that Code powers would be requested for the purposes of building Conduit systems with no communication network in mind – evidence would be requested of an intention to make the Conduits available for the use by the providers of such networks;
- in the case of network operators who are willing to share, evidence of their intention to share infrastructure;
- description of alternative arrangements which have been explored;
- details of measures taken or initiatives signed up to which would demonstrate responsible use by the Code Applicant of code powers; and
- evidence of an ability to put in place funds for liabilities before the exercise of code powers.

3.4 Once the Regulator has received all the relevant information it must have regard to the statutory criteria and decide whether to make a direction granting the Code. There is no statutory time limit within which it must come to a decision but on deciding to make a direction it must publish notification of its proposal and allow a minimum of one month for representations to be made. The notification is to be published in such manner as the Regulator considers appropriate for bringing the

notification to the attention of the persons who in their opinion are likely to be affected by the grant of the Code.

3.5 Under the current licensing regime the DTI advertises licence applications in The Times and Financial Times for national licences and in local newspapers for regional licences. The costs of advertising can be quite high- as much as £15,000. Oftel is investigating cheaper methods of notifying persons likely to be affected by grants of the Code. One option would be to have a list of contact details for those organisations and persons which the Regulator knows would always be interested in Code applications and whom the Regulator could notify directly ie through email.

How could the Regulator target its notification of an application for the Code to those persons likely to be affected by the grant of the Code?

3.6 The requirement to bring the Code application to the attention of those persons likely to be affected by the grant of Code powers suggests that the Regulator should attach greater weight to representations received from those persons who show themselves as being affected by the grant. Persons making such representations may be required to provide evidence to support their representations.

3.7 Members of the public will be able to find out who has been granted code powers, and the area in which code powers can be utilised by viewing a register which is to be maintained by the Regulator and which will list the persons who benefit from the Code. The register shall also contain every direction granting the Code under the new regime.

Charging for the Code

3.8 At present no fee is payable for the Telecommunications Code and therefore there is no financial cost to operators applying for code powers. Clause 35 of the Communications Bill allows charges to be imposed to recover the Regulator's costs in carrying out its functions. Oftel has recently finished consulting on its proposals for administrative charging for the period 25 July 2003-31 March 2004 (see document *Implementation of the Authorisation Directive's provision on notifications and fees* available at www.oftel.gov.uk/publications/licensing/2003/fees0203.htm).

3.9 In relation to recovering the costs of its functions more generally Oftel proposes that only network and service providers who have a relevant turnover of £5 million or more should be subject to administrative charging. In relation to the Code Oftel proposes that only those persons who have been granted the Code should be subject to a charge for dealing with Code applications and administering

the Code on a day to day basis and that these persons should be subject to such a charge regardless of turnover.²³

3.10 The reason for this is that Oftel does not think it would be fair for only those providers of networks and services who fall above the turnover threshold to carry the costs incurred in dealing with the grant of Code and the administration of the Code on a day to day basis. Further such charges could help dissuade those who do not need code powers to surrender them voluntarily.²⁴ Since the grant of code powers is no longer to be linked to the granting of a licence these operators can easily apply again should circumstances change.

3.11 The charge for the costs of administering the Code and dealing with Code applications would form part of the administrative charge levied on those network providers with turnovers over the threshold level.

Conduit system providers and network providers with turnovers below the threshold level

3.12 For those network providers who fall below the turnover threshold level and conduit system providers with code powers a charge would be levied to cover the costs of dealing with Code applications and administering the Code on a day to day basis.

Calculating the charge

Administering the Code on a day to day basis

3.13. The activities which the Regulator will be involved with, outside the grant of the Code, are enforcing the restrictions and conditions attaching to the grant of the Code and encouraging sharing arrangements where necessary. Oftel's view is that until the Regulator has a better idea of what resources it needs to administer the Code a relatively small flat rate charge should be levied on all those persons with code powers. The alternative would be to roll these costs up with the Regulator's other costs which it would seek to recover through the administrative charge levied on all those network and service providers with turnovers of £5 million or more.

Should the Regulator impose a relatively small flat rate fee on persons with code powers to recover the costs of dealing with the administration of the Code on a day to day basis from the beginning of the new regime?

²³ If persons are liable to charging by reason only of having code powers then the charge must be referable only to the costs of dealing with Code applications and administering the Code on a day to day basis see clause 35(4d) of the Communications Bill.

²⁴ Under Clause 112(2) of the Communications Bill the Regulator may revoke a direction applying the electronic communications code in a person's case if an application for the revocation has been made by that person.

The costs of processing the Code application

3.14 The costs of the processing of applications are likely to be more substantial (even if the costs of advertising can be reduced). They will include the costs of going through the application, dealing with responses, and making a reasoned decision. There are two ways in which the Regulator could go about collecting these costs, set out below:

3.15 One way would be to recover the estimated costs from just those persons who have been granted the Code in any particular charging year. The implication of raising a charge on this basis would be that the Code applicants who have been granted the Code in any particular charging year would pay a single one off contribution towards the costs of dealing with Code applications. Those who have been granted the Code in previous years would only pay for the estimated costs of administering the Code in the charging year. This may help to make potential Code applicants think more critically about whether they need to apply for code powers.

3.16 The other way to proceed would be to recover the estimated costs of dealing with Code applications from all of those persons who benefit from the Code, along with the costs of administering the Code on a day to day basis. The implications of this approach would be that firstly the costs would be distributed every year over a greater number of persons, and therefore unless anyone surrendered their code powers, the costs paid by each person will decrease over time. Secondly distributing the costs amongst all those persons with code powers would add to the costs being recovered for administering the Code on a day to day basis and it would help to make those persons think more critically about whether they need to keep the Code.

Who should be charged for the costs of dealing with Code applications?

Flat rate fee v individual fee

3.17 Under clause 35 of the Communications Bill the Regulator must publish charging principles at the beginning of the charging year to enable the Regulator to secure, on the basis of such estimates of the likely costs as it is practicable for the Regulator to make, its costs in carrying out its functions. The Regulator will have to try to estimate the costs that will be incurred in dealing with Code Applications and administering the Code and it is this estimate which will form the basis of the charge for the year. It will not be possible therefore, for example, to charge Code applicants specifically for the costs that have been incurred in processing their applications, nor would it be cost effective to do so. Instead, unless the Regulator estimates that different costs will be incurred for different categories of Code applicants, (which in Oftel's view would not be practicable to do) everyone will pay the same charge to cover the costs of administering the

Code in a particular charging year and, where applicable, an additional flat rate amount to cover the estimated costs of dealing with Code applications.²⁵

Costs incurred in dealing with unsuccessful code applications

3.18 Clause 35 of the Communications Bill does not allow the Regulator to recover the costs of dealing with unsuccessful Code applications from the relevant Code applicants. Instead such costs will either have to be recovered (as part of the estimate for dealing with Code applications during the year) from the successful Code applicants, as outlined in option one above, or from all those persons with Code powers – as outlined in option two.

How should the costs of unsuccessful Code applications be recovered? Should the same persons carrying the costs of dealing with successful applications carry the costs of dealing with unsuccessful Code applications? Or should these costs be distributed more widely?

Dealing with any deficit or surplus

3.19 Under clause 35(10) of the Bill the Regulator will have the power to carry forward any deficit or surplus in income into the following charging year. Such deficit or surplus is to be taken into account in calculating the estimated costs for the forthcoming year. This means that if the Regulator underestimates the costs of dealing with Code applications it will have to recover the deficit by increasing the estimate of its costs in the following year. Further if the Regulator overestimates the costs it will reduce the estimate of costs for the following year.

Limitations on the grant of the code

3.20 Under the proposed new arrangements it will be possible to limit the application of the Code geographically in the direction applying the Code. Thus the Regulator could decide that code powers were appropriate only in one geographical area, where for example the network provider had extensive network construction needs. On the other hand the Regulator could decide that in another area the network provider intended to rely mostly on leased lines and interconnection and therefore the benefit of code powers would be unnecessary. Further the Regulator, if it saw fit, will be able to limit the extent of the code powers to part of a network or conduit system.

3.21 It is not suggested that this is necessarily an appropriate way to proceed. Rather it demonstrates the flexibility which the proposed new statutory scheme will offer. Exercising these powers to limit the application of the Code, in particular, to parts of networks or conduit systems would increase unduly the administrative burden on the Regulator and constrain the way the Code was used. Oftel's view is

²⁵ For those persons granted the Code in a particular year the charge for administering the Code on a day to day basis would be apportioned to reflect the fact that the charge would be for a part of the year.

that the power to limit the Code should only be exercised where there is a clear need for limitations to be imposed and where the limitations could be used to meet objections raised in the consultation process on grants of the Code.

When would it be desirable for the Regulator to get involved in determining the extent of the need for code powers in relation to parts of networks or conduit systems in view of the significant demand on time and resources that such an exercise would impose?

Chapter 4

Questions to which specific responses are requested

4.1 Comments are welcome on all or any of the proposals made in this document. In particular responses are sought to the following questions.

The statutory criteria

4.2 Is there any reason why the Regulator should deal with applications from certain categories of conduit system providers differently from applications from communication network providers?

4.3 Do you agree with the views given in the table at Annex A?

4.4 Besides from the statutory criteria are there any other matters which the Regulator should have regard to in considering whether to make a direction granting the Code?

4.5 Should the Regulator ask Code applicants to demonstrate need for the Code by reference to detailed estimates of the savings in time and cost that the grant of the Code is likely to bring? If the answer is yes how would this work in practice?

4.6 Has Oftel adopted the right approach to the sharing of apparatus?

4.7 What evidence should the Regulator ask to see in order for the Code applicant to be able to demonstrate an ability to put funds for liabilities in place before the exercise of code powers?

4.8 Should there be a presumption against the grant of code powers to operators of private networks? What are the circumstances when the grant of code powers to providers of private networks would be justifiable?

4.9 Should there be a presumption against the grant of Code powers to persons using part of networks where only minor infrastructure links are needed? What are the circumstances when the grant of code powers to build minor infrastructure links would be justifiable?

The procedure for the grant of the Code and limitations on the grant of the Code

4.10 How could the Regulator target its notification of an application for Code powers to those persons likely to be affected by the grant of the Code?

4.11 Should the Regulator impose a relatively small flat rate fee on persons with code powers to recover the costs of dealing with the administration of the Code on a day to day basis from the beginning of the new regime?

4.12 Who should be charged for the costs of dealing with Code applications?

4.13 How should the costs of unsuccessful Code applications be recovered? Should the same persons carrying the costs of dealing with successful applications carry the costs of dealing with unsuccessful Code applications? Or should these costs be distributed more widely?

4.14 When would it be desirable for the Regulator to get involved in determining the extent of the need for Code powers in relation to parts of networks or conduit systems in view of the significant demand on time and resources that such an exercise would impose?

Chapter 5

Consultation process and timetable

How to make comments on the issues raised in this consultation document

5.1 Oftel is publishing this consultation document so that interested parties may be provided with the opportunity to comment on the issues which it addresses. The closing date for submitting comments is the 28 May 2003.

5.2 Where possible, comments should be made in writing and sent by e-mail to christina.spyrelli@oftel.gov.uk. 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:

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Further copies of this document

5.3 This document can be viewed in the *Publications* section of Oftel's website (www.oftel.gov.uk), under classification *Licensing & Enforcement Actions*. Paper copies and more accessible formats such as large print, Braille, disc and audio cassette can be made available on request. Please contact Oftel's Research and Information Unit by phoning 020 7634 8761 or by sending an e-mail to infocent@oftel.gov.uk.

Publication of comments

5.4 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 office. However, in the interests of transparency, respondents should avoid applying confidential markings wherever possible.

5.5 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 by phoning 020 7634 8761 or sending an e-mail to infocent@oftel.gov.uk.

e-mail notifications

5.6 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 web site at www.oftel.gov.uk, subscribers to the list receive an e-mail alert. To register, please go to the *What's New* section of the website and access the electronic form.

The consultation criteria

5.7 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:

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Annex A

Consideration of the Criteria for Granting Code Powers

The network operators listed below have been grouped according to the category they would have fallen into under the current licensing regime. The table is included to illustrate how Oftel proposes to deal with Code applications from different types of network provider and is not intended to serve as a list of categories to be used in the new regime.

Type of Network Operator	Commentary
1. Operators who are providing services to the general public with Universal Service obligations.	At present there are only 2 operators who are obliged to provide Universal Service. The legislation provides for others to apply for the right to provide such services. Without the Code there could be no guarantee that access could be obtained to residential premises, if necessary by compulsion. These factors would indicate a strong need for code powers and a public benefit in the provision of the network.
2. Operators who are providing services to the general public but who have no Universal Service obligations.	This must depend on the extent of the network i.e. whether they intend to self-provide the majority of the networks over which the services are to be provided. Evidence of an intention to build a large network will help to demonstrate a need for code powers. Evidence of a willingness to share infrastructure where appropriate will help to support Code applications, particularly where there are strong representations against the grant of the Code on the grounds of highway disruption or environmental impact.
3. Operators who are providing commercial communications services to a significant proportion of the business community.	Many of these operators will create their networks using leased lines and some form of indirect access to business premises. However to be able to provide a viable and commercially acceptable service they will need access to business premises through the highway (Streets) and over private land where someone other than the customer controls the access. Evidence of an intention to roll out significant infrastructure will help to demonstrate a need for code powers. As above a willingness to share facilities will go in the Code Applicant's favour, particularly where there are strong representations from third parties against the grant of the Code on the grounds of highway disruption or environmental impact.

<p>4. Operators who are providing extensive data networks.</p>	<p>Some of these will be similar in nature to the previous category, they are more likely to be people who intend to provide large national and international networks, possibly those who convey communications traffic in bulk on behalf of other operators. Evidence of a need to lay an international cable in tidal waters, access large areas of land to connect centres of population, and a need to link into the global public network for at least some of the route between coastal cable stations and their switches are likely to help demonstrate a need for Code powers. However other factors will need to be taken into account such as the existence of alternative networks, and the ability to put funds for liabilities into place.</p>
<p>5. International facilities operators who will need a link to get to the global public network</p>	<p>This category includes a few specialist operators who focus on international services and have only very limited domestic networks. Those who convey communications traffic in bulk on behalf of other operators are the best examples of these. The existence of a limited domestic network may make it difficult for the Code Applicant to demonstrate a need for code powers. However each case will have to be assessed on its merits and evidence of a need to construct infrastructure to link with the global public network will assist.</p>
<p>6. Broadcast transmission providers who are providing facilities to the broadcasters of radio and television programmes</p>	<p>This category of communications network provider does not currently benefit from the Telecommunications Code. They do however provide significant electronic communications networks and provide conveyance of signals to the broadcasting service providers who could not provide such services without such access to the networks. These factors will help demonstrate a need for code powers.</p>
<p>7. Specialist network providers, who will be unable to create suitable networks without the Code.</p>	<p>It is unlikely that there will be many of these type of providers. Generally such operators owe their existence to some sort of part privatisation where they have taken over responsibility for a communications system and are then providing additional services, sometimes to the public in order to make the scheme commercially viable. The primary purpose usually associated with the systems is providing safety or emergency cover and this will help to demonstrate that there is a practicable need for code powers and a public benefit of the network. However other factors would have to be considered such as funds for liabilities.</p>
<p>8. Public Call Box (PCB) operators.</p>	<p>At present there are only two licensed operators who provide such facilities as a specialist service. In the present declining PCB market further market entrants are unlikely to appear. Providing PCBs requires access to public land (Streets). Making full planning applications in each and every case where it was intended to install a PCB must decrease significantly the commercial viability of such installations. It is arguable there is a practicable need for Code powers however other factors would have to be taken into account such as public benefit and funds for liabilities.</p>

9. Satellite operators, both telecommunications & broadcasting.	None of these operators have been eligible for Code Powers hitherto unless they were a PTO in their own right. It may be difficult in some cases to refuse access to the Code to such operators particularly where they are providing extensive satellite links for broadcasting. Clear evidence of an intention to construct an extensive network necessary to provide the services the operator intends to provide, would help demonstrate a need for code powers.
10. Paging operators & mobile data operators.	Paging is in serious decline and is unlikely to attract any substantial investment for the construction of infrastructure. While mobile data is usually associated with paging there is potential for new and innovative services using broadband technology. The provision of data services by mobile links should obviate the need for last mile access. A small scale local service means it may be difficult for a grant of the Code to be justified however each case will need to be assessed on its merits –it will need to be shown that there is a clear public benefit and need for code powers.
11. ISR operators, value added service providers and resellers.	None of these providers need networks to provide such services and will be relying almost entirely on other operator’s networks. An issue will arise only where they wish to build small pieces of infrastructure to complete the product they are offering and might wish for example to have access to a building they themselves are occupying in order to connect to a switch. Again it may be difficult to justify a grant of the Code to these providers unless there was shown to be a clear public benefit and need for code powers.

Annex B

Glossary of terms used

Applicable Systems all or any of the telecommunication systems run by the individual licensee under the licence granted under Section 7 of the Telecommunications Act 1984.

Associated Facility has been defined in clause 29(3) of Communications Bill to mean a facility which is

- (a) 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 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; and
 - iii) supporting the provision of such services.

Conduits has been defined in Schedule 3 of the Communications Bill to include a tunnel, subway, tube or pipe.

Electronic Communication Apparatus has been defined in clause 148 of the Communications Bill to mean:

- (a) any apparatus (within the meaning of the Communications Act 2003) which is designed or adapted for use in connection with the provision of an electronic communications network;
- (b) apparatus not falling within paragraph (a) which is designed or adapted for use in connection with the provision of an electronic communications network;
- (c) line;
- (d) any conduit, structure or pole or other thing in, on, by or from which any electronic communications apparatus is or may be installed, supported, carried or suspended.

Electronic Communication Network has been defined in clause 29(1) of the Communications Bill 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.
-

ISR International Simple Resale.

ISVR International Simple Voice Resale.

PSTN Public Switched Telephone Network- the telecommunication networks of the major operators.

Telecommunication System is defined under Section 4 of the telecommunications Act 1984 as a system for the conveyance, through the agency of electric, magnetic, electro-magnetic, electro-chemical or electro-mechanical energy of:–

- (a) speech, music and other sounds;
- (b) visual images;
- (c) signals serving for the impartation (whether as between persons and persons, things and things or persons and things) of any matter otherwise than in the form of sounds or visual images or; and
- (d) signals serving for the actuation or control of machinery or apparatus.

Universal Service Is a concept derived from the EC Universal Service Directive. It means that basic telephone services should be available to everybody upon reasonably request and at an affordable price.
