

**The Granting of the Electronic
Communications Code by the Director
General of Telecommunications-**

A Statement issued by the Director General of
Telecommunications

10 October 2003

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Summary

S.1 This Statement follows a public consultation on the Director General of Telecommunications's ('the Director') proposals for the granting of the electronic communications code ('the Code'). Those proposals were set out in the document entitled *The granting of the Electronic Communications Code by Ofcom*, published on 2nd April 2003 and available at: <http://www.ofcom.gov.uk/publications/Infrastructure/2003/eleCode0303.htm> ('the consultation document').

S.2 On 25th July 2003, a new regulatory framework for electronic communications networks and services entered into force in the United Kingdom and brought the licensing of telecommunications systems to an end. The basis for the new regulatory framework is four new EC Communications Directives¹ ('the Directives'), which were implemented into national law through the Communications Act 2003 ('the Act').²

S.3 Under the previous regime, code powers were attached to individual licences and had to be applied for and granted at the same time as the licence.

S.4 However, under the new regime, persons wishing to benefit from the Code ('Code Applicants') have to apply for it on a stand-alone basis. This includes both electronic communications network providers and conduit system providers.

S.5 Under the Act, the power to grant and administer the Code has been transferred to the Director from the Secretary of State. However, the Secretary of State retains the power to make regulations containing restrictions and conditions to which grants of the code will be subject. The DTI has already consulted on the draft Electronic Communications Code (Conditions and Restrictions) Regulations³ 2003 ('the Regulations'). The Regulations have already been finalised and have been laid before Parliament on 3rd October 2003. The Regulations, once they come into force, will replace Schedule 4 to the individual licences granted under the Telecommunications Act 1984. Under the new regime, the power to enforce the restrictions and conditions will rest with the Director, and once they have assumed their functions, the Office of Communications ('OFCOM').

S.6 In the consultation document, the Director sought the views of interested parties on his proposals for the overall policy and procedure for the granting of the Code.

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 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' 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 Available at: www.hmso.gov.uk

³ DTI's consultation closed on 19 June 2003 and the document is available at: www.communicationsbill.gov.uk/pdf/Code_restrictions_and_conditions_5.pdf

The Director received 31 responses to that consultation. The names of the respondents are set out at Annex D of this Statement.

S.7 After considering the responses to that consultation, the Director sets out in this Statement the policy he would expect to follow in considering grants of the Code. The Director would expect to give reasons for any departure from this policy; however, the Director cannot fetter his discretion as to future regulatory action and each case must be dealt with on its merits. Any general change to the stated policy would be subject to consultation.

S.8 The Director's policy is as set out below and is based on the duty to have regard to the following statutory factors, along with his other general duties under the Act-

- the benefit of the network or conduit system to the public;
- the practicability of providing the network or conduit system without the Code;
- the need to encourage sharing of electronic communications apparatus; and
- whether the Code Applicant can meet liabilities including those arising as a result of his conduct in relation to the matters with which the Code deals;⁴
- also, in accordance with section 106(4)(b) of the Act, conduit system providers must prove that they are making available or proposing to make available, their system of conduits for use by providers of electronic communications networks for the purposes of the provision by them of their networks.

S.9 The Director has decided that-

- Applications for the code from all conduit system providers will not be treated differently from applications from electronic communications network providers.
- In relation to any additional matters the Director should take into account when considering to make a direction granting the Code, he will consider every application on its own merits and take into consideration all relevant issues, some of which may be unique to a particular application.
- The Director publishes today a notification under section 107(2) of the Act, which sets out the requirements with respect to the content of an application for a direction applying the Code and the manner in which such an application is to be made. The notification is available at Annex B of this Statement.
- The Director is of the view that the need for the Code should and would be self-evident from the Code Applicant's business plan and the specific circumstances in a given area. However, the Director may use his statutory powers under section 135 of the Act to obtain further information, if need be.
- Grants of the Code should be considered more favourably for those network operators who produce evidence of their ability and willingness to share infrastructure with other operators, although an inability or unwillingness should not by itself be regarded as a determining factor.

⁴ Section 107(4) of the Act

- The Director would at least expect to see letters from potential guarantors indicating a willingness to support the Code Applicant in making the necessary arrangements to put funds for liabilities in place before the exercise of code powers. In the case of companies which apply for code powers, the Director would expect to see letters signed by the Directors certifying that they will put funds for liabilities in place before exercising their code powers.
- There should not be a presumption against the grant of the Code to persons using parts of a network where only minor infrastructure links are needed. The Director intends to assess such applications on their merits having regard to the statutory factors and check whether the grant of the Code in these cases is justifiable.
- The Code should not normally be granted to those persons operating exclusively or mainly private networks.
- The Director will advertise code applications in the London, Edinburgh and Belfast Gazettes and in national newspapers. The proposed directions will be advertised in the Times and the Independent. Local advertising can be used in cases of geographically specific code applications. In addition, contact lists and e-mail notifications will be used. This advertising policy will be kept under review.
- A statutory register, which will be maintained by the Director and which will list the persons who are granted the Code as well as operators who were deemed to have the Code as at 25th July 2003, will be publicly available. The Director publishes today a notification under section 108(4) of the Communications Act, which sets out a) the times at which the register is for the time being available for public inspection and b) the fees that must be paid for, or in connection with, an inspection of the register. The notification is available at Annex C of this Statement.
- The Director publishes today a revised statement of charging principles for the purpose of fixing charges in accordance with sections 38 and 39 of the Communications Act 2003. These charging principles are related to- (a) persons providing a designated Electronic Communications Network or Electronic Communications Service or making available a designated Associated Facility, such designations being contained in a Notice of Designation published by the Director under sections 34 and 38 of the Act on 25th July 2003⁵ and (b) to persons to whom the Code applies. The revised charging principles are available at Annex A.
- Only those persons who hold code powers at the beginning of a charging year will be liable to pay a charge for the administration of the Code for that year. That charge will be calculated by estimating the Director's costs for the year for the administration of the Code and dividing it by the total number of persons having the Code at the beginning of the charging year, so that everyone pays the same amount. The Director considers that this simple system is most appropriate as at

⁵ Notice of Designation under section 34 and 38 of the Communications Act 2003, available at: http://www.oftel.gov.uk/ind_info/licensing/mods/2003/250703.htm

the present time it is unclear what resources will be required to administer the Code. Individual notifications of the charge will be given.

- The flat rate charge for the administration of the Code will be billed jointly with the general administrative charge for all network providers with a relevant turnover at or above the £5 million threshold. Therefore, in the case of network providers with relevant turnover of £5 million or above with code powers only one notification setting out the two separate charges (i.e. administrative charges for other networks and services functions and charge for the administration of the Code) will be sent.
 - For the first charging year, i.e. from 25th July 2003 to 31st March 2004, the charge for the administration of the Code will be paid only by persons who had code powers on 25th July 2003. Based on an estimate of the Director's costs for the first charging year, the charge for this year will be £3,000, which will be reduced pro-rata for 250 days, i.e. £2,055. The notifications of the charge for the administration of the Code for the first charging year will be given on an individual basis later this year.
 - In addition, for the first charging year only, for electronic communications network providers with code powers who reach the £5 million threshold, the Director will not notify the two separate charges in one notification. A separate notification will be sent to providers with a relevant turnover at or above the £5 million threshold for the purposes of the charge for the code administration.
 - A person who has been granted the Code in a particular charging year should bear the estimated costs of dealing with his code application. Once code powers are granted to a person, then the Director will notify that person of the one-off charge he is liable to pay in respect of those costs.
 - For the first charging year, based on the Director's estimated costs of dealing with successful code applications and in accordance with the charging principles at Annex A, the charge that each successful Code Applicant will be liable to pay is £10,000.
 - Everyone who holds code powers should cover the costs of unsuccessful code applications. Such estimated costs will be consolidated in the charge which will cover the estimated costs for administering the Code.
 - The power to limit the scope of the Code under section 106(5) of the Act will only be exercised where there is a clear need for limitations and it will be assessed on an individual basis.
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Chapter 1

Introduction and Background

- 1.1 Following a public consultation issued on 2nd April 2003⁶ ('the consultation document') the Director General of Telecommunications ('the Director') sought the views of interested parties on proposals to form the overall policy and procedure for the granting of the electronic communications code ('the Code'). After considering the responses to that consultation, the Director now sets out in this Statement the policy he intends to follow for the grant of the Code. The Director would expect to give reasons for any departure from this policy; however, the Director cannot fetter his discretion as to future regulatory action and each case must be dealt with on its merits. Any general change to the stated policy would be subject to consultation.
- 1.2 A new regulatory framework for electronic communications networks and services entered into force in the United Kingdom on 25 July 2003. The basis for the new regulatory framework is four new EC Communications Directives⁷ ('the Directives'), which were implemented into national law through the Communications Act 2003 ('the Act').⁸ Even though the Directives have a limited impact on the Code, they do place obligations on Member States regarding the procedure for granting it, i.e. it must be transparent, publicly available, applied without discrimination and without delay⁹. The power to grant the Code is contained in the Act.¹⁰
- 1.3 The Government has decided that a new regulatory body should be responsible for administering the new regime and as a result the Office of Communications ('OFCOM') has been established¹¹ to take over the responsibilities of five existing regulatory authorities¹². The Act makes specific provision to enable OFCOM's functions to be carried out by the Director or the Secretary of State for a

⁶ The Granting of the Electronic Communications Code; A Consultation issued by the Director General of Telecommunication, 2 April 2003, available at: www.ofcom.gov.uk/publications/Infrastructure/2003/eleCode0303.htm

⁷ 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' 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')

⁸ Available at: www.hmsso.gov.uk

⁹ Article 11 of the Framework Directive, 2002/21/EC

¹⁰ Section 106 of the Act

¹¹ Office of Communications Act 2002, available at: www.hmsso.gov.uk

¹² The five regulatory authorities are: the Office of Telecommunications (Ofcom), the Independent Television Commission (ITC), the Radio Authority, the Radiocommunications Agency (RA) and the Broadcasting Standards Commission (BSC).

transitional period prior to OFCOM becoming operational¹³. At present the Director is responsible for granting the Code. This Statement, therefore, refers to the Director rather than OFCOM.

1.4 The structure of this document is as follows:

- Chapter 1 provides an introduction to the transition from the old regime to the new regime;
- Chapter 2 sets out the Director's policy for the grant of the Code in accordance with the statutory criteria;
- Chapter 3 discusses the process for the grant of the Code and explains the Director's policy on administrative charges in relation to the Code;
- Annex A contains the revised charging principles for the purpose of fixing charges in accordance with sections 38 and 39 of the Communications Act 2003 as they relate to the Code. These charging principles are related to- (a) persons providing a designated Electronic Communications Network or Electronic Communications Service or making available a designated Associated Facility, such designations being contained in a Notice of Designation published by the Director under sections 34 and 38 of the Act on 25th July 2003¹⁴; and (b) persons to whom the Code applies;
- Annex B contains a notification under section 107(2) of the Act, which sets out the requirements with respect to the content of an application for a direction applying the Code and the manner in which such an application is to be made;
- Annex C contains a notification under section 108(4) of the Act, which sets out the times at which the register is for the time being available for public inspection, and the fees that must be paid for, or in connection with, an inspection of the register.
- Annex D includes a list of respondents to the consultation document; and
- Annex E contains a glossary of all terms used throughout the statement.

The transition from the old regime to the new regime

1.5 Under the old regulatory regime the Telecommunications Code in Schedule 2 to the Telecommunications Act 1984 ('the 1984 Act') was granted to an Applicant by the Secretary of State under section 10 of the 1984 Act if he satisfied one of two conditions:

¹³ Section 408 of the Act and Article 3(1) of the Communications Act 2003 (Commencement No1) Order 2003

¹⁴ Notice of Designation under section 34 and 38 of the Communications Act 2003, available at: http://www.ofcom.gov.uk/ind_info/licensing/mods/2003/250703.htm

- He was either in possession of a licence to run a public telecommunication system ('a PTO'); or
- It appeared to the Secretary of State that the running of the system, which the Applicant was authorised to run under the licence granted under clause 7 of the Act, would benefit the public and that it was not practicable for that system to be run without the application of the Telecommunications Code to that person.¹⁵

1.6 Persons in possession of the Telecommunications Code had a number of rights. In particular they:

- Benefited from some important exemptions from the Town and Country Planning regime. This was in the form of Permitted Development;¹⁶
- Had 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;
- Had the right to apply to the Court conferring a right, where agreement could not be reached with the owner of private land, to execute works on private land.

1.7 Up to 25th July 2003, there were 242 PTOs licensees of which 144 had code powers. However, when the corporate groups were consolidated the number of corporate organisations with code powers, as opposed to individual licensees, was less than 90. There were 6 non-PTO licensees with code powers. It was estimated that in practice no more than about 40 of the operators were actually using the Telecommunications Code.

1.8 Under the previous regime, any non-PTO with an individual licence was granted code powers if a case was made that the code powers were needed. There was a very strong presumption in favour of granting code powers to operators who requested them.

1.9 Code powers were therefore attached to the licence, which had to be applied for and granted at the same time as the licence. It was not possible to terminate the use of code powers without revocation of the licence nor was it possible to grant code powers after the licence had been granted.

1.10 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.

¹⁵ Section 10(2)(a) and (2)(b) of the 1984 Act

¹⁶ 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.

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- 1.11 Since all individual licences ceased on 24th July 2003 the link between licensing and code powers was broken. On 25th July 2003, a new regime was put in place. Under section 106 of the Act, persons wishing to benefit from the Code have to apply for it on a stand-alone basis ('Code Applicants'). This includes both network providers and conduit system providers. Apart from some minor changes to terminology and the extension of the Code to all forms of electronic communications the Code is largely the same as the former Telecommunications Code and remains in Schedule 2 of the 1984 Act as amended by Schedule 3 to the Act.
- 1.12 Under the Act, the power to grant and administer the Code has been transferred to the Director from the Secretary of State. However, the Secretary of State retains the power to make regulations containing restrictions and conditions to which grants of the Code will be subject. The restrictions and conditions will relate to 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. DTI has already consulted on the draft Electronic Communications Code (Conditions and Restrictions) Regulations¹⁷ 2003 ('the Regulations'). The Regulations have already been finalised and have been laid before Parliament on 3rd October 2003. The Regulations, once they come into force, will replace Schedule 4 to the individual licences granted under the 1984 Act. Under the new regime, the power to enforce the restrictions and conditions will rest with the Director, and once they have assumed their functions, OFCOM. Until the Regulations are in force, the Communications Act 2003 (Commencement No 1) Order 2003, Article 3(2) makes provision for the restrictions and conditions referred to in the Act to be treated as references to the exceptions and conditions in Schedule 4 to the old licences giving code powers. This only applies to persons deemed to have the Code as at 25th July 2003 under the Act.

¹⁷ DTI's consultation closed on 19 June 2003 and the document is available at:
www.communicationsbill.gov.uk/pdf/Code_restrictions_and_conditions_5.pdf

Chapter 2

The strategy for granting the Electronic Communications Code

2.1 As highlighted above, compliance with the Directives requires that the process for the granting of the Code is transparent and non-discriminatory. With the end of the licensing regime on 24th July 2003, network providers now operate under general authorisations and all providers of electronic communications networks and providers of conduit systems who fulfil the criteria in section 106(4) of the Act are able to apply for the Code. This means that potentially the number of persons 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 number of persons who are granted the Code. In the Director's view, it is essential therefore to try to 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.

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

- Under section 4 of the Act, the Director has a duty to act in accordance with the six European Community requirements the first of these is a requirement to promote competition in relation to the provision of electronic communications networks, electronic communications services and the provision and making available of services and facilities that are provided or made available in association with the provision of electronic communications networks or electronic communications services and to the supply of directories.¹⁸
- Many operators who need code powers already have them, since they are deemed to benefit from the Code under paragraph 17 of Schedule 18 to the Act on the coming into force of the new regime on 25th July 2003 ('the Existing Operators').
- To deny new market entrants access to code powers would be discriminatory and could impose barriers to market entry.

2.3 Within the framework of the Director's general policy on granting the Code comments were received on the following policy issues:

- The status of the Existing Operators on the coming into force of the new regime on 25th July 2003;
- The duration of code powers;

¹⁸ Section 4(3) of the Act

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- The scope of the Code in relation to conduit providers; and
 - The statutory factors the Director must take into account when considering the grant of the Code.

Existing Operators under the new regime

2.4 The consultation document highlighted that from 25th July 2003 the Existing Operators would be deemed to benefit from the Code, as their powers under their licences would fall away. In other words, their right to the Code is not going to be assessed *de novo* based on the factors the Director must have in mind when considering whether or not to grant the Code to new applicants.

2.5 Some consultees, especially local authorities, were concerned about the status of the Existing Operators and they suggested that the code powers the Existing Operators hold should be assessed or reassessed based on the criteria under the Act.

The Director's response:

2.6 The Director considers this issue to be outside the scope of the consultation document. Parliament decided that certain operators should be deemed to benefit from the Code.

2.7 However, it is anticipated that some of the Existing Operators who do not use their code powers at all may voluntarily surrender them. Since code powers are no longer attached to any licence, operators can always re-apply for the Code in the future.

2.8 Furthermore, all Existing Operators-along with new successful Code Applicants-will be subject to the Regulations, once they come into force. They will also be subject to the provisions of the Act related to the suspension of the application of the Code (section 113) and the modification and revocation of the application of the Code (section 115).

Duration of code powers

2.9 Under sections 110-114 of the Act, the power to enforce the Regulations, once they come into force, rests with the Director. Once the Code is granted, the Code Applicant is able to benefit from code powers in accordance with the terms of the direction granting the Code (section 107), unless the application of the Code is either suspended (section 113) or the direction is revoked (section 115).

2.10 Section 113 of the Act gives the Director the power to direct the suspension of the application of the Code to a person. He can do so, if he is satisfied that that person has been in repeated and serious contravention of the requirements to pay an administrative charge, that proceedings to recover any outstanding amounts have failed to secure complete compliance with section 38 or have no

reasonable prospect of securing compliance and that the imposition of penalties under section 41 of the Act has failed to secure compliance. The Director must also be satisfied that the suspension of the application of the Code is appropriate and proportionate to the seriousness of the repeated contraventions.

2.11 In addition, the Director has the power to give a further direction suspending the application of the Code to a provider, if that provider has been previously given a direction suspending or restricting his entitlement to provide an electronic communications network, or part of such a network under section 42, 100, 132 or 140 of the Act.

2.12 Similarly, if a provider has been in repeated and serious contravention of requirements imposed by virtue of any restrictions or conditions under section 109 of the Act, the Director can give a further direction suspending the Code in relation to- (a) the Code's application to parts of the provider's network which are not yet in existence; or (b) where the disapplication of the Code would not prevent the continued provision of the network.¹⁹

2.13 Suspension of the application of the Code will continue for as long as the suspension of entitlement to provide a network remains in force (in the case of suspensions under section 113(2) of the Act) or until withdrawn by the Director. Suspension means that the provider cannot exercise any right conferred on him by the Code but, unless the Director otherwise provides in a scheme made under section 117 of the Act, suspension does not have any other effect on agreements entered into or on actions taken under the Code. In other words, the suspension should not affect the rights of the operator to maintain service on the parts of its network unaffected by the suspension.

2.14 Under section 115 of the Act, the Director may, subject to public consultation, modify the terms on which the Code is applied in any person's case by way of a further direction under section 106 of the Act. For example, he may limit the application of the Code to particular places or particular networks or parts of networks or particular conduit systems or parts of conduit systems. Similarly, he may, subject to public consultation, direct the revocation of a direction applying the Code either on the application of the person to whom the Code applies. Or, where it appears to the Director that a person is not the provider of an electronic communications network or conduit system for the purposes of which the Code applies.

2.15 However, once the Code is granted however, unless a further application is made, the Director will not be able to review at a later stage the continuing availability of code powers against the statutory factors set out in section 107(4) of the Act.

2.16 The benefit of code powers either deemed under Schedule 18 of the Act or granted under the Act cannot be assigned.

¹⁹ Section 113(5) of the Act. See also: Explanatory Notes to the Communications Act 2003, available at: <http://www.legislation.hmso.gov.uk/acts/en/03en21-e.htm>

Scope of the Code in relation to conduit system providers

2.17 In contrast to the old Telecommunications Code, the Code applies to all electronic communications networks, including broadcasting. Further, as part of the Government's strategy to facilitate the rolling out of broadband, the Government has decided to allow persons who are not themselves electronic communications network providers, but who wish to provide conduit systems for use by electronic communications network providers, to apply for the Code. This means, for example, that local authorities and utility companies (e.g. those who are providing gas and water) could benefit from code powers. A prerequisite for the grant of the Code is that the conduit system is made available for use by providers of electronic communications networks for the provision of their networks²⁰.

2.18 In the consultation document, the Director put forward the proposal to treat differently applications of conduit system providers from applications of electronic communications network providers due to their role as 'infrastructure providers' and contemplated the possibility of a separate consultation document to deal with the development of policy and processes for conduit system providers, subject to the outcome of the consultation.

2.19 In addition, the Director underlined his preference that the terms of access to the conduits should, wherever possible, be achieved by private treaty. Regulatory intervention would only be employed in circumstances where such agreements cannot be reached.

2.20 Views were sought on the following question:

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

2.21 Most respondents argued that code powers should not be granted to conduit system providers, if they do not explicitly state and prove in their application their intention of making the conduit systems available for the use of electronic communications network providers.

2.22 Some of the consultees were of the view that applications from conduit system providers should be dealt with differently from electronic communications network providers' applications, since such providers will have more impact upon the environment - especially if radio masts were included as part of the conduit infrastructure- than other network providers. Conduits do not include masts. Under section 106(7) of the Act 'conduits' include tunnel, subways, tubes or pipes, a point further made under paragraph 2.33. In addition, it was argued that since conduit system providers depend on other parties to generate income on their investment, there is a greater risk that conduits will remain empty and in case of liquidation the asset value will be less than for conduits containing

²⁰ Section 106 (4) (b) of the Act

networks. Respondents suggested that there should be more stringent measures to ensure *a priori* that funds for liabilities were in place. Alternatively, higher financial indemnities should be required from conduit system providers to cover costs in case abandoned plant has to be removed, since any transference of liabilities to a new owner is unlikely.

Conduit system providers who are local authorities

- 2.23 The majority of the Operators and the Local Authorities underlined the necessity and importance of a different level of treatment of applications in the case of conduit system providers who are local authorities.
- 2.24 In principle, some Operators suggested that local authorities would have an advantage over network operators, as they are the Local Planning Authorities as well and will not be subject to the same rating system as the network providers. It was argued that even if specific conditions are laid down to ensure fair and reasonable access to the local authority infrastructure, they would not properly address the underlying danger of that infrastructure becoming a state-funded monopoly protected by the application of streetworks powers.
- 2.25 Respondents also suggested that since the Act allows conduit system providers including local authorities to apply for code powers, Oftel would need the power to intervene and impose price controls as and when required (in the same way that access fees for other essential facility infrastructures have previously been imposed under competition law) as local authorities as conduit system providers might set excessive access charges.
- 2.26 Some consultees suggested that the Director must take into account the following factors when considering local authorities' applications as conduit system providers:
- I. the likelihood of commercial infrastructure being deployed in a given area;
 - II. the nature and extent of any existing commercial provision; and
 - III. the likelihood of public sector intervention distorting the market.
- 2.27 Crown Castle argued that local authorities should not use statutory powers as a means of restricting and/or limiting any competing 3rd party telecommunication site development. In addition, due to the nature of their business they would be in a seriously disadvantaged position if they had to compete with the local authorities for the provision of conduit systems.
- 2.28 Some Advisory Committees, Operators and Local Authorities acknowledged the difference between conduit provision and the provision of electronic communications networks but argued in favour of a uniform method for assessing applications from all types of providers. Cambridgeshire County Council suggested that any type of potential conduit system provider must be subject to the same requirement of providing multi-use conduits so that neither local authorities nor single communications providers can monopolise the provision of broadband in a given community.
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2.29 Local Authorities contended that they should not be disadvantaged with regard to access to infrastructure (eg. preventing them from extending existing service provider arrangements into new and extended communities).

The best way forward according to consultees

2.30 Most of the consultees underlined that flexibility is the most appropriate approach, since the number and types of bodies that will become conduit system providers is uncertain. They agreed with Oftel that access to the infrastructure should be driven by market forces and that a rigid infrastructure sharing model is not necessary. MBG proposed that in the unlikely event that any sort of market power issues arises, the Director can consider his options at that time.

2.31 The Statutory Advisory Committees suggested that the Director should evaluate applications based on how granting the Code to them would help consumers and that any evaluation should take into account issues such as security, reliability, maintenance response time and consequential liabilities. They argued that if applications from certain types of potential conduit system providers are to be treated differently, then the Director must 'objectively justify' his assessment and he should review regularly the 'objectively justified' reasons for doing so.

2.32 The Director's response:

2.33 In relation to the points made in paragraphs 2.21 and 2.22, section 106(7) of the Act provides that a 'conduit' includes a tunnel, subway, tube or pipe. Radio masts would not seem to be envisaged by the definition of conduit infrastructure and therefore increased environmental risks do not appear to be an issue in relation to conduits. Furthermore, the Director, when exercising his powers under the Act in relation to the Code, takes into consideration his duty to have regard to the purposes for which National Parks are designated, under section 11A of the 1949 National Parks and Access to the Countryside Act, as amended by the section 62 of the 1995 Environment Act.

2.34 The Director agrees with the view expressed in paragraph 2.22 that adequate funds for liabilities should be in place before the exercise of code powers in the case of all Code Applicants. The issue of funds for liabilities, which constitutes one of the statutory factors the Director must take into account when granting the Code and forms part of the restrictions and conditions in the Regulations, is further discussed below.

2.35 As far as conduit system providers who are local authorities are concerned, the Director accepts that there is the potential for local authorities to have an advantage as conduit system providers in comparison to network providers but it is still early to draw any conclusion. Local authorities have to exercise their statutory functions in relation to streetworks fairly as part of their general public law duties.

2.36 Furthermore, in relation to the points made in paragraph 2.25 the Director believes that regulatory intervention and imposition of prices at this stage would

illustrate behaviour contravening the new regime. If there were problems in the future, they could be dealt with under section 73(3) of the Act, whereby the Director may set access-related conditions to secure the sharing of apparatus and the division of the costs incurred by those to whom the Code applies, in cases where there is no viable alternative.

2.37 The Director would take into account the factors set out in paragraph 2.26 in considering any code application as part of his duties under section 4 of the Act.

2.38 In response to Crown Castle's point, the Director's view is that he cannot *a priori* limit the scope of the code application in relation to local authorities as conduit system providers; however, these issues will be pertinent to code applications.

2.39 As far as the way forward is concerned, the Director is of the view that there should be a uniform method for assessing code applications from all types of providers. As far as prospective conduit system providers are concerned, they are subject to the same requirement of making available or proposing to make available the system of conduits for use by electronic communications network providers for the purposes of the provision by them of their networks.²¹

2.40 The Director believes that it is not necessary to treat applications from certain categories of conduit system providers differently from applications from electronic communications networks providers, subject to any additional or different information, which is required, e.g. the requirement for conduit system providers to show how they will make their system available for use by providers of electronic communications networks. If problems arise, the Director could rely upon his statutory powers in relation to the Code under section 73(3) of the Act and consider his options in the event that any significant market power (SMP) arises.

The statutory factors

2.41 Under the new regime when considering whether to grant the Code, the Director must have regard to the following statutory factors:²²

- The benefit of the network or conduit system to the public;
- The practicability of providing the network or conduit system without the Code;
- The need to encourage sharing of electronic communications apparatus;
- Whether the Code Applicant can meet liabilities arising as a consequence of the application of the Code in his case and his conduct in relation to the matters with which the Code deals.

2.42 In addition, the Director provided a table in Annex A of the consultation document, which listed the various types of Existing Operators as they are

²¹ Section 106(4)(b) of the Act

²² Section 107(4) of the Act

categorised under the old licensing regime. This illustrated how the Director might apply the criteria in these different cases.

2.43 Views were sought on the question:

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

2.44 Some of the respondents highlighted the fact that this table was based predominantly on up-to-date experience and urged the Director to keep it under review in order to be able to follow the changes in the electronic communications industry. They made the point that conduit system providers were not included in any of the categories. In addition, Leeds City Council suggested not only that a category of conduit system providers should be included but also that it should be subdivided into those who have a pure financial interest and those who are purely focused on the public interest (eg. Local authority regeneration programmes).

2.45 TAC suggested that the following category should be included:

‘An organisation who has a requirement to provide network interconnection in order to be able to provide an essential service without the primary of objective of deriving a profit from the provision of these connections’.

2.46 NewNet plc suggested that consideration should be given to persons currently without code powers who wish to grow their business by acquiring parts of built network infrastructure but who would definitely need code powers in order to be able to own and operate their own business.

2.47 Crown Castle was pleased to see new category 6, which resolved any planning and code powers anomalies but they thought that category 2 must be modified to enable companies like them, as service providers, to acquire a code power ranking order similar to that of their mobile operator customers. Crown Castle said this would allow them to respond to their customers’ requests to acquire, develop or modify shareable sites for their network rollouts.

2.48 Some respondents commented on the criteria for granting code powers analysed in the table. CCE recommended that Annex A should include an obligation on all categories of operators to maintain adequate records of their activities in a particular area for a period of 5 years after the event, since damage may not be immediately apparent. Derbyshire County Council, NSWHG and Nottingham City Council underlined that the requirement of funds for liabilities needed to apply consistently to all types of network operators, whilst Kirklees Metropolitan Council questioned the standards of evidence required for each type and whether the Director took proactive measures to deal with issues arising from works undertaken by certain types (i.e. Type 6-10).

The Director's response:

- 2.49 In relation to paragraph 2.45, the Director is not aware of any operator that would fall within the category suggested by TAC. In any event, such a requirement could not be imposed by the Director under the Act.
- 2.50 The issue raised by NewNet plc in paragraph 2.46 is further discussed under the question on whether there should be a presumption against the grant of the Code to persons using part of networks.
- 2.51 The Director's response to Crown Castle's point in paragraph 2.47 is that Category 2 of the table at Annex A is related only to networks owned by operators with no Universal Service obligation and used to provide services to the general public (retail services). It does not incorporate services provided at a wholesale level (e.g. provision of towers to other operators for the purposes of mobile telephony). Such cases are covered by other categories identified at Annex A.
- 2.52 Annex A of the consultation document was provided in order to illustrate how the Director might apply the statutory factors in different cases. The table was an indicative, non-exhaustive list of various types of operators, based on current experience, which is not to be used by the Director and no reference is to be made to it in the future. conduit system providers were not included in the table because the issue of interpreting and applying the statutory factors for the grant of the Code in their case was under consultation.
- 2.53 As far as funds for liabilities are concerned, this is an issue which is considered in the statement entitled '*Funds for liabilities*' and will be published shortly. The statement on funds for liabilities will be available at <http://www.oftel.gov.uk/publications/licensing/2003/funds1003.pdf>
- 2.54 Views were also sought on the following question:

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?

- 2.55 The Operator Group and Crown Castle requested clear guidelines that set out the material considerations that would determine the granting of code powers. Additional matters recommended by respondents that should be taken into consideration included:
- I. Environmental impact of the quantity of the new apparatus;
 - II. The qualifications and experience of key personnel of the applicant company;
 - III. The number of complaints submitted to OfTel as regards any previous code powers granted to the applicant (any kind of relevant precedent);
 - IV. The business case of the Code Applicant;
 - V. Requirement to provide multi-use conduits;
 - VI. Wide definition of the 'benefit to the public' and establishment of such benefit on regional/individual basis due to the divergent needs in each
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- region of the UK and the different level of penetration of the e-communications industry throughout the country;
- VII. The effects on road users in terms of safety and congestion;
 - VIII. A way to commit companies to good practice;
 - IX. Financial indemnities for a body to recover abandoned equipment and to audit compliance of the Code by the providers;
 - X. The benefits of established data communications businesses growing and offering more choice to consumers by acquiring network infrastructure;
 - XI. Evidence that disruption has been eliminated as far as possible and that where it will occur it will be acceptable to the highway authority;
 - XII. No cost to the public;
 - XIII. The Director must have a 'fall back' to meet the costs of the local authority if the provision by the operator fails or is not sufficient for any reason;
 - XIV. Possible limitations already mentioned in the consultation document, such as granting of code powers in specific geographic areas, presumption against the grant of code powers to private network operators and persons using parts of networks where minor infrastructure links are necessary.

The Director's response:

2.56 The Director is of the view that most of these issues (e.g. the business case of the Applicant, the number of complaints received by Ofcom, evidence that funds can be put in place before code powers are exercised) fall within the scope of the statutory factors and therefore would be taken into account when considering the grant of the Code. However, the Director will consider every application on its own merits and take into consideration all relevant issues, some of which may be unique to a particular application.

The benefit of the network to the public

2.57 As set out in the consultation document, 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. The Director is of the view that in cases where the grant of the Code can lead to highway disruptions, it will be to a large extent a matter of judgement for him to determine where the public interest lies. Thus, the Director considers that the following non-exhaustive factors will be relevant under this factor:

- 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;
 - Any disbenefit to the public, for example, due to long-term highway disruption and potential high risk to the health and safety of the public;
 - The fact that if any disruption is caused through the exercise of code powers it would likely be of short term duration;
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- The existence of alternative networks which could be used by the Code Applicant;
- The existing level of service provision in the area where the Code Applicant wishes to build infrastructure;
- Whether the infrastructure proposed to be built with code powers will be used to provide electronic communication services to the general public as opposed to a limited number of people.

Practicability of providing the network without the Code

2.58 The consultation document suggested that there were 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. However, the Director believes 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.

2.59 To the question:

Should the Regulator go as far as asking 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?

2.60 Some respondents argued against such a demonstration on behalf of the applicant as being too bureaucratic. However, Crown Castle suggested that it would not be unreasonable for applicants to provide illustrations of how code powers would assist the attainment of one or more criteria, so Oftel can form a judgement on the merits of the application and seek more information if necessary. In addition, Cambridge County Council argued that the market, intelligent procurement and public interest should determine whether the granting of code powers is justified. Others highlighted the fact that this is not the main point in the whole evaluating process, since, for example, the importance of the code powers to a Code Applicant should and would be self-evident from his detailed business plan and the specific circumstances in a given area. Derbyshire County Council and NSWHG and Nottingham City Council proposed that much more attention should be placed on the availability of means to develop a network (including any consideration on any already existing redundant capacity, even if it belongs to others who may be competitors) other than digging up the highway.

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- 2.61 TAC was in favour of requesting detailed estimates of the savings in time and cost as the last resort solution in case an applicant failed to meet the other criteria.
- 2.62 However, the majority of the consultees agreed that Code Applicants should be required to demonstrate such estimates as part of the whole procedure. SSE suggested that the need for the Code must be proved in an appropriate level of detail, which should be defined by the Director on an individual basis. NIACT recommended that the Director should not only take into account such estimates but also how the granting of code powers will benefit the consumer. NewNet plc suggested that such a demonstration would work in practice by individual assessment of each Code Applicant. Kirklees Metropolitan Council proposed an audit comparing the costs generated by any works on the highway (including those for compliance purposes and elimination of disruption) with the costs incurred by the operators who do not have code powers and end up in Court. The Highways Agency suggested that Oftel should give consideration to the possibility of publishing an environmental statement (including costs and alternative cable routes) when granting code powers.

The Director's response:

- 2.63 After considering the representations made in relation to this issue, the Director is of the view that the need for the Code can be assessed based on factors such as the extent of the network required, as the larger the network the more likely it is that code powers will be needed to build infrastructure.
- 2.64 In addition, the Director is of the view that the importance of the Code to a Code Applicant should and would be self-evident from his business plan and the specific circumstances in a given area. However, under section 135 of the Act, the Director may require the provision of an estimate of the savings in time and cost that code powers would bring, which will be defined on individual basis. Whether such information is required will be assessed in each case. The Director will keep this matter under review.

Need to encourage sharing of apparatus

- 2.65 The consultation document underlined the fact that the sharing of apparatus is a sensitive issue. In the UK, sharing has mainly been employed 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 sharing of infrastructure among a large number of operators can potentially put in danger the integrity, security and the quality of a network in circumstances where, for example, routine maintenance works are in progress. Consequently, the cost of sharing would in general outweigh the benefits and they believe that sharing should normally be a matter for commercial and technical agreement between operators.
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2.66 Oftel's policy²³ 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 Director to take a more interventionist approach. Further, the EC Framework Directive requires the Director 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.²⁴ 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.

2.67 Therefore, views were sought on the following question:

Has Oftel adopted the right approach to the sharing issue?

2.68 Some Local Authorities and Crown Castle suggested that the Director should be more proactive and interventionist in order to secure sharing especially mast and other antenna support sharing, since experience shows a general reluctance to share on behalf of operators and failure to consider site sharing at the appropriate stage in the network design process.

2.69 In particular, Kirklees Metropolitan Council proposed that the Director must force joint use, whilst the Highways Agency argued that there should be a presumption that electronic communications network providers share, if it is at all possible, and that they must provide an overwhelming case for any instances of not sharing. The South Ayrshire Council and Ofwat urged Oftel to make grants of the Code conditional on seeing evidence of a Code Applicant's willingness to share apparatus, where it would be relevant for the Code Applicant to provide evidence that it had explored sharing arrangements to network to network build, to the satisfaction of the Director. Derbyshire County Council, NSWHG and Nottingham City Council suggested that any possibility for sharing should be fully explored after granting the Code to a Code Applicant. Leeds City Council proposed that sharing of conduit systems should be imposed rather than simply encouraged.

2.70 On the other hand, even though MBG welcomed the principles of sharing infrastructure, they did not agree with the proposed policy. They suggested that Oftel must not look more favourably on applications where evidence was produced showing the Code Applicant's willingness to share infrastructure. MBG argued a simple declaration of willingness to share where practical and appropriate should be enough.

2.71 The majority of respondents acknowledged that sharing of infrastructure could not be mandatory for technical and even commercial reasons and some of them

²³ 'Duct and pole sharing – a guidance note on Oftel policy' 11th June 2002 available at www.oftel.gov.uk/publications/about_oftel/2002/manp1202.htm

²⁴ Article 12 of the EC Framework Directive, 2002/21/EC

even noted that a huge mast shared by several operators might not necessarily be preferable to several more discreet structures.

- 2.72 Advisory Committees agreed with Oftel's proposed approach. They said it should strike the right balance between the protection of areas of outstanding natural beauty or areas of low population density and the growth of the industry including the need to expand in areas where coverage is limited.
- 2.73 The Operator Group noted that sharing of infrastructure could aggravate disruption, when too many operators shared a trench. They also underlined the fact that there is currently a track record of co-operation among some operators in relation to sharing of apparatus. If the Director intended to further encourage sharing, it would be necessary to focus on operators with SMP and in particular on BT, as it owns a ubiquitous infrastructure.
- 2.74 Some of the Local Authorities and Operators, even though they favoured the proposed policy, commented that the grandfathering of existing code powers could sabotage potential sharing arrangements. A few respondents were against the continuation of the status quo of current code holders under the new regime and suggested that such holders should not only have to apply for renewed powers but also require their willingness to share on pre-agreed terms.

The Director's response:

- 2.75 After considering the representations, the Director considers that his proposed policy to encourage and facilitate sharing of apparatus, where possible, strikes the right balance between the Code Applicants' interests and other interested parties' concerns.
- 2.76 In order to encourage sharing on grants of the Code, the Director has included the following requirements in the Notification under section 107 (2) of the Act at Annex B-
- (a) Code Applicants who are conduit system providers will be asked to produce written evidence demonstrating that the conduit systems will be made available for use by electronic communications network providers. This is because the Director is only able to grant the Code to conduit system providers for the purposes of making available a system of conduits for use by the providers of electronic communications networks for the provision of their networks.²⁵ Nonetheless, it should be understood that where providers of conduit systems are granted code powers and conduit systems are assembled, there is no legal requirement on network operators to use them; and
 - (b) Code Applicants who are not conduit system providers and are able and willing to share electronic communication apparatus should provide evidence of that ability and willingness.

²⁵ Section 106(4)(b) of the Act

- 2.77 The Director may, as a matter of policy in relation to the Code, look more favourably on applications where evidence is produced showing the Code Applicant's ability and 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. Equally, the Director may look favourably on Code Applicants who are conduit system providers, in circumstances where they intend to make their infrastructure available to all electronic communications network providers for the provision of their services on non-discriminatory terms.
- 2.78 In addition, in the Notification under section 107(2) of the Act at Annex B the Director has also included a requirement to state, where applicable, what alternative arrangements to the Code have been sought.
- 2.79 Under section 73(3) of the Act, if providers of electronic communications networks and associated facilities with code powers put up barriers to sharing, then the Director has power to impose a condition to secure sharing of apparatus, where there are no viable alternative arrangements.

Whether the operator can meet liabilities arising including conduct in relation to the matters with which the Code deals

- 2.80 In the consultation document, the Director suggested that Code Applicants should produce evidence demonstrating an ability to put funds for liabilities in place before the exercise of code powers. This is concerned to ensure that adequate funds (i.e. through a bond or insurance policy) are in place to cover claims from Highways Authorities for the cost of removing apparatus where a company has gone into liquidation.
- 2.81 Views were sought on what evidence the Director should require in order to assess a Code Applicant's ability to fulfil its duty to have funds for liabilities in place before the exercise of code powers:

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?

- 2.82 Most respondents favoured the proposal that the Director should ask for evidence. Some of the consultees (especially Local Authorities) argued that the Director should insist on a bond or some form of instrument, which could guarantee the Code Applicant's ability to cover costs not only in respect of removal of apparatus but also of other works. They suggested that financial references would be necessary before the grant of powers but it would be more critical to have the option to withdraw the powers if funds were not put in place and that this action should definitely be taken if companies defaulted.
- 2.83 Other proposed forms of evidence were as follows:
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- I. Letters from potential guarantors indicating a willingness to support the Code Applicant in making the necessary arrangements;
 - II. Letters with a more binding power on the Code Applicants. For example, it may be possible to ensure that undertakings contained in such letters cannot be withdrawn at any time without prior intimation to the Director and in any event that the letter confirms for the avoidance of any doubt that 3rd parties such as local authorities can rely in full upon the eventual security document produced (bond/insurance policy);
 - III. Any kind of evidence that could satisfy the Director that funds can be put in place before code powers are exercised;
 - IV. Audit reports (general financial viability), liability insurance and possible indemnity funding arrangements;
 - V. Any form of guarantee especially when the Code Applicant is a new business or the same form of 'self-certification';
 - VI. Current balance sheet plus bank references;

2.84 A few respondents suggested that demonstration of adequate funds should not be a precondition for the granting of the Code but only for using the particular powers to carry out highway works.

The Director's response:

2.85 The requirement to have funds for liabilities in place was one of the conditions, which attached to the grant of the Telecommunications Code. This obligation was set out in Schedule 4 to the individual licences and it will also be a requirement under the Regulations once they come into force. As explained in paragraph 1.12 above, transitional arrangements are in place under the Communications Act 2003 (Commencement No1) Order 2003 regarding the exceptions and conditions in Schedule 4 to the old licences until the Regulations come into force.

2.86 The inclusion of a 'funds for liabilities' criterion allows the Director to look for evidence of an ability to put security in place before granting code powers. The Director is of the view 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. Most importantly, however, such an obligation would be inconsistent with the Regulation 16 of the Regulations, since where a person has not previously exercised any rights conferred by the Code and intends to exercise such rights for the first time, he needs to provide the Director with the certificate that sufficient funds for liabilities are in place two weeks before he exercises such rights to install any apparatus.

2.87 To avoid claims of discrimination all of the Existing Operators will have to ensure that they have such arrangements in place. This could be achieved through the enforcement by the Director of the funds for liability condition in the Regulations produced by the Secretary of State or, until they come into force, Condition 16 in Schedule 4 to the old licences, which has effect under the transitional arrangements described above. In the old licensing regime, the Director considered compliance with the condition by assessing the financial

instruments proposed by the licensee to provide financial cover. The Director has proposed to move to a system of self-certification²⁶ and this will be reflected in the Regulations, which will come into force shortly.

2.88 After taking into account the responses, the Director has decided that he would at least expect to see letters from potential guarantors indicating a willingness to support the Code Applicant in making the necessary arrangements. Where the Code Applicant is a company he would expect to see letters signed by the Directors certifying that they will put funds for liabilities in place before exercising their code powers.

Dealing with specific cases

A. Code powers for persons using parts of a network

2.89 Some Code Applicants that are network providers will operate without code powers for most of their network and will be able to provide most services using other operator's networks. This could be through leased lines, interconnection, some other form of access or simply by reselling the services provided by other operators.

2.90 In addition, 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 some degree of limitation is to be placed on the number of operators who are granted code powers, these part network operators could be refused code powers unless there were exceptional circumstances.

2.91 Therefore, views were sought on the following question:

Should there be a presumption against the grant of the 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?

2.92 Some Operators and Local Authorities disagreed with the existence of any negative presumption. They argued that a small network provider, although he might not need to use its code powers as often as a larger one, would still require code powers as they may be critical to the construction of an economically viable network in a certain geographic location. In addition, code powers could bring potential gains in areas promoting rural broadband rollout. Each case should be judged on its own merits, since commercial and practical constraints might require that minor infrastructure links are needed at localised areas (i.e. site-specific code powers granted according to a schedule of locations).

²⁶ 'Funds for Liabilities- the Way Forward' consultation paper dated 24th June 2002 available at www.oftel.gov.uk/publications/licensing/2002/funds0602.htm

2.93 The majority of the respondents supported such a presumption but thought that under no circumstances should there be an absolute ban. Only the Countryside Agency thought that this issue should be left to the Planning Authorities.

2.94 Most of the consultees suggested that Code Applicants should have the onus to convince the Director that it would not be practicable to provide a network without the Code and clearly define its intended use. An example would be where the Code Applicant has attempted unsuccessfully to reach arrangements with a relevant landowner. Other circumstances under which granting of code powers to such Code Applicants would be justifiable are:

- Rollout of broadband provision especially in regions that have little access;
- In cases of serious failure to provide public utility in any given area;
- Where there is no economic interest by providers in providing the service and where directly or indirectly it is in the interests of the general public.

The Director's response:

2.95 After taking into consideration the above comments, the Director thinks that there should not be a presumption against the grant of the Code to persons using part of networks where only minor infrastructure links are necessary. However, such Code Applicants should first exhaust any other alternative routes (e.g. via the planning system) and would bear the burden to convince the Director regarding their need for the Code and clearly define the purpose of building the network or the conduit systems.

2.96 The grant of the Code could be necessary and justifiable under the above-mentioned criteria, in cases such as the rural rollout of the broadband technology or the construction of an economically viable network in specific geographic areas. The Director intends to assess such applications on their merits against the statutory factors and check whether the grant of the Code in these cases is justifiable.

B. Code powers for private networks

2.97 In the consultation document, the Director said that it would not seem 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 a public telephone network. One of the matters the Director needs to consider is the benefit to the public of the electronic communications network. In addition, 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. Therefore, comments were sought on the question:

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?

- 2.98 A few respondents suggested that there should not be any presumption against the grant of code powers to operators of private networks, since the Code needs to be available to government departments, agencies and telecommunications companies providing and/or operating networks for the government or the Crown. In any case, the key point is whether any given private network is in the public interest (eg. Facilitating e-government initiatives, regeneration programmes, overcoming social exclusion) and therefore each application from a private network operator should be assessed on its individual merits.
- 2.99 However, the majority of the respondents supported such a presumption but thought that under no circumstances should there be an absolute ban. In fact, a negative presumption could encourage the sharing and use of existing infrastructure. In broad terms, granting of code powers to private network operators should be justifiable only if it is in the public interest (although overall benefit to consumers could not be easily established) and not to the detriment of the planning system. However, there might be cases that need to be considered individually, such as:
- I. If a part of a public network is a backhaul or distribution site service, enabling the public network. Such ancillary site operation should not fall under the excluded definition of private networks.
 - II. In case of serious failure to provide public utility in, say, isolated areas.
 - III. The size of the private network operator, i.e. a large utility.
 - IV. In case of commercial radio broadcasters that may need code powers to build infrastructure to serve their listeners.
 - V. In case individual Applicants strongly justify the need for code powers through their business case and clearly demonstrate that there will not be costs to the public.
- 2.100 Only a small minority argued that under no circumstances should code powers be granted to private network operators, since there is sufficient provision in section 50 of the New Roads and StreetWorks Act (NRSWA) 1991 to enable them to obtain licences to place apparatus in highways. Furthermore, it was argued that the additional disruption which would be caused by the placing of private networks on the public highway would raise concern to the highway authorities.

The Director's response:

- 2.101 The Director has considered all the above comments and is of the view that the Code should not normally be available to operators of exclusively or mainly private networks. Furthermore, section 50 of the New Roads and StreetWorks Act (NRSWA) 1991 provides for a viable way to obtain licences in order to place apparatus on highways. As a general principle, consideration of the public interest would not normally justify grants of code powers in such circumstances
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where alternative facilities are available. The Director will keep this issue under review in the light of working experience of the new regime.

2.102 Notwithstanding this position, the Code will be available to the Crown. It is also likely to be used by the Secretary of State for Defence and by Government departments, particularly in Northern Ireland. Under section 106 (3) (b) of the Act, 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. 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 discusses - (a) the process for the grant of the Code; (b) sets out the information that persons should provide on making an application for the Code; and (c) sets out the way the Director is going to collect a charge for the costs of processing code applications and administering the Code on daily basis. The Director will keep the procedure under review in the light of working experience of the new framework.

The Procedure and Information Required

3.2 Under sections 107(2) of the Act if the Director publishes a notification setting out his requirements with regard to the content and manner of an application for the Code, such an application must be made in accordance with those requirements. Such a notification is at Annex B of this Statement.

3.3 The Director is willing to receive code applications in electronic form and he will require the following information:

- In the case of a company, the company name, company number, address of the registered office and details of any subsidiaries, parents and affiliates;
- In the case of a partnership, contact name and address, name of partnership, address of principal place of business;
- In the case of an individual, the individual's name, address and contact details;
- Reasons for needing the Code;
- Description of the electronic communications network or conduit systems, which the person is intending to provide including the location;
- Details of the purposes for which the network 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 providers of systems of conduits only, written evidence that they are making available or proposing to make available their system of conduits for use by providers of electronic communications networks for the purposes of the provision by those providers of their networks (e.g. any available contracts, letters from providers of electronic communications networks confirming their intention of using that specific system of conduits for the provision of their networks);
- In the case of network operators who are willing to share infrastructure, evidence of their ability and willingness to share;
- Description of alternative arrangements to the Code which have been explored, where relevant;
- Details of measures taken or initiatives signed up to which would demonstrate responsible use by the Code Applicant of code powers;
- Evidence of an ability to put in place funds for liabilities before the exercise of code powers;

3.4 Once the Director has received all the relevant information, he will decide, subject to statutory consultation as required by section 107 of the Act, whether

to make a direction granting the Code in line with this Statement and based on the statutory factors, his general duties under the Act and any additional factors relevant to the particular application.

- 3.5 There is no statutory time limit within which he must come to a decision but Article 11 of the Framework Directive 2002/21/EC requires applications to be dealt with without delay. Under section 107 of the Act, the Director must publish a notification of his proposal and allow a minimum of one month for representations to be made. In addition, the notification is to be published in such manner as the Director considers appropriate for bringing the notification to the attention of the persons who in his opinion are likely to be affected by the grant of the Code.²⁷
- 3.6 Under the old licensing regime, DTI used to advertise licence applications in the London, Edinburgh and Belfast Gazettes and in national newspapers. The cost of advertising was quite high- as much as £15,000. Therefore, the Director, in an effort to seek alternative and cost-effective methods of notifying persons likely to be affected by the grant of the code, e.g. use of contact lists, notification through e-mails etc., asked interested parties to comment on the following question:

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?

- 3.7 All consultees acknowledged the high costs of the old notification method through advertising and welcomed the Director's proposal for more cost-effective ways of notification. Most of the Local Authorities and an operator (MBG) fully supported the use of contact lists in order to directly notify, i.e. through e-mail or post, those persons (e.g. local authorities, utility companies) likely to be affected by the grants of the Code or likely to have a strong interest in code applications.
- 3.8 In particular, South Ayrshire Council suggested that apart from e-mails, press releases would be useful, whilst Leeds City Council proposed a 'help line' website for general enquiries for the public and other interested parties (including a complaints procedure). Kirklees Metropolitan Council suggested that NSWHG (or HAUC) could work with the Director to keep these contact lists updated on an annual basis.
- 3.9 In addition, some Local Authorities (Derbyshire County Council, NSWHG, Nottingham City Council, Highways Agency) suggested that the use of the National Street Gazetteer (NSG) and Associated Street Data (ASD) would be the most obvious method of reaching parties likely to be affected by the grant of code powers nationwide. This method would also enable the geographical scope of the consultation to be limited in line with any geographical restriction placed on the use of the code powers. Currently, Highway Authorities maintain these details and any responsibility for the currency of this information also rests with them but the national database is available to authorised users from the NSG manager.

²⁷ Section 107(10) of the Act

3.10 On the other hand, some of the respondents were concerned with the sole use of contact lists, since such a narrow form of notification could lead to legal implications (e.g. possible failure to comply with the statutory requirement, allegations of lack of transparency). Therefore, they suggested that a certain minimum level of national, general advertising should be employed and extensive specifically targeted local advertising should be introduced under the new regime. In particular:

- Proposed directions must be advertised in the London, Edinburgh and Belfast Gazettes in order to cover the nation; however, local advertising can be devolved to the relevant local authorities in relation to applications focused on particular geographic areas, as this would allow local authorities to determine the best way to communicate the existence of the application.
- In relation to Northern Ireland, the Planning Services of NI suggested that applications should be published in the Belfast Telegraph, News Letter and Irish News in order to ensure that all sections of society are covered through this medium.

The Director's response:

3.11 The Director took into consideration all the responses and is of the view that the best way forward is to advertise code applications in the London, Edinburgh and Belfast Gazettes and in national newspapers in order to cover the nation. The proposed directions will be advertised in the Times and the Independent. Local advertising can be used in cases of geographically specific code applications, however it is not possible for the Director to devolve the responsibility of local advertising. The Director will determine in individual cases the local newspapers in which the geographically specific directions will be published. This approach is in full compliance with the statutory requirement of notification and mirrors the view expressed by persons most likely to be affected by the grant of code powers. However, the Director will keep the notification process under review in the light of working experience.

3.12 In addition, contact lists and e-mail notifications will be used, in line with the Director's policy in communicating news to the industry.

3.13 Finally, members of the public will be able to find out who has been granted code powers by viewing a statutory register which is to be maintained by the Director and which will list the persons who benefit from the Code. The register shall contain every direction granting the Code under the new regime, as well as a list of Existing Operators benefiting from the Code.²⁸ A notification under section 108(4) of the Communications Act, which sets out a) the times at which the register is for the time being available for public inspection and b) the fees that must be paid for, or in connection with, an inspection of the register is available at Annex C of this Statement.

²⁸ Section 108 of the Act

Charging for the Code

3.14 Under Article 13 of the Authorisation Directive 2002/20/EC, 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 land. However, the Act does not give the Director the power to impose fees for the grant of the code in order to promote the optimal use of public land.

3.15 Section 38 of the Act, however, allows charges to be imposed to recover the Director's costs in carrying out his functions. Oftel has already published a statement on the implementation of the Authorisation Directive's provisions on notification and fees for the period 25th July 2003-31st March 2004.²⁹

3.16 As far as the administrative charging is concerned, the Director has already published charging principles relating to charges for network and service providers and those making available associated facilities with a relevant turnover of £5million or more.³⁰

3.17 As far as the code is concerned, the Director suggested in the consultation document that persons who have been granted the Code should be subject to a one-off charge for dealing with their code applications and a separate charge for administering the Code on a daily basis and that these persons should be subject to such a charge regardless of turnover.³¹ The Director does not think it would be fair for existing providers of networks and services to carry the costs incurred in dealing with new grants of the Code and the administration of the Code on a day to day basis.

3.18 In the consultation document the Director asked the question:

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?

3.19 The Director had proposed such a charge on the basis that it would be fair to do so until he had a better idea of what resources were required to administer the Code. Most of the respondents agreed with the Director's proposals on the charging principles and the proposed flat rate fee covering the administrative costs of the Code and noted that this fee should be stable, modest and predictable from year to year.

²⁹ Implementation of the Authorisation Directive's provisions on notification and fees, Statement issued by the Director General of Telecommunications, 21st May 2003, available at: http://www.oftel.gov.uk/publications/eu_directives/2003/notfees0503.htm

³⁰ Statement of Charging Principles published by the Director General of Telecommunications for the purpose of fixing charges in accordance with sections 38 and 39 of the Communications Act 2003, published on 25th July 2003, available at: http://www.oftel.gov.uk/publications/eu_directives/2003/statement250703.htm

³¹ If persons are liable to pay charges only because they hold code powers, then the charge must be referable only to the costs of dealing with code applications and administering the code on a daily basis, Section 38(4)(e) of the Act

- 3.20 BT suggested that the flat rate fee could be rolled over with the general administrative charges for all providers with relevant turnover at or above the 5 million threshold.
- 3.21 Further comments were as follows:
- 3.22 West Dunbartonshire Council was of the view that Oftel should have the power to impose a top-up fee on each Code Applicant if it became apparent that the flat fee was insufficient to meet the costs incurred by the Director.
- 3.23 TAC, on the other hand, suggested that in principle the monitoring and policing of the Code should come from the core regulatory funding. However, if a different approach were taken, then they would like to discuss this issue in detail with Oftel in view of the unique situation of the Water Industry in relation to the Code.
- 3.24 Kirklees Metropolitan Council suggested that a consortium of operators should appoint an independent consultant to carry out duties, such as checking if there is any disruption, damage to the highway, problems with the siting of masts, funds for liabilities. In such a case, the costs will be largely recovered from the operators.
- 3.25 Although AT & T agreed that a small flat rate fee would seem the most appropriate method of recovering the Code's administrative costs, they suggested that until the Director had a better idea of what resources he would need to administer the Code, it might be more pragmatic to recover these costs through the standard administrative charge.
- 3.26 Finally, Scottish and Southern Energy (SSE) were against the flat rate fee. They proposed that the costs should be rolled up with the Director's other costs and recovered through the administrative charge. Nonetheless, they agreed with the Director's proposal that all persons who have been granted the Code should be subject to such a charge regardless of turnover.

The Director's response:

- 3.27 The Director took into consideration the responses received as well as issues of practicality in relation to the proposed charge and is of the view that for reasons of fairness and equal treatment, the charge for the administration of the Code on a daily basis should be a flat rate charge calculated on the basis of the charging principles at Annex A. This charge will cover the costs of the general management of all matters³² relating to the Code, including charging, and will also include the costs of unsuccessful code applications, an issue further discussed below.

³² For example, matters relating to the Code are: general administration and policies, provision of legal assistance, administering the statutory register under section 108 of the Act, consideration of notices served under the Code, policy, administration and enforcement of the funds for liabilities, dealing with Streetworks legislation etc.

- 3.28 The charge, which will be based upon an estimate of the Director's likely costs of administering the Code in each charging year in accordance with the charging principles in Annex A, will be individually notified to those liable to pay and will become due when notification is given. The notification will take the form of a letter addressed to persons with code powers and will state the charge and the time frame within which payment should be made.
- 3.29 Only those persons who hold code powers at the beginning of each charging year will be liable to pay the fixed charge for the administration of the Code. The Director has decided to add this criterion for reasons of practicality in administering the charging regime. The charge will therefore be calculated by taking the estimated amount of the Director's costs of administering the Code (including code charges) for the charging year and dividing it by the total number of persons who have code powers at the beginning of that year.
- 3.30 In addition, the Director is of the view that the flat rate charge should be billed jointly with the general administrative charge for all network providers with a relevant turnover at or above the £5 million threshold. Therefore, it is proposed that in future years network providers with relevant turnover of £5 million or above with code powers should receive only one notification setting out the two separate charges (i.e. administrative charge for other networks and services functions and the charge for the administration of the Code).
- 3.31 For the first charging year, i.e. 25 July 2003-31 March 2004, the flat rate charge will be paid only by persons who had code powers on 25th July 2003, when the new regime came into force. Based on an estimate of the Director's costs for the first charging year, the charge for this year will be £3,000. This charge will be apportioned to reflect the fact that the administrative charge is for a part of the year only. Therefore, the flat rate charge of £3,000 will be reduced pro-rata for 250 days, i.e. £2,055 ($£3,000 \times 250/365$). The notifications of the charge for the administration of the Code for the first charging year will be given on an individual basis later this year.
- 3.32 In addition, for the first charging year only, for network providers who reach the £5 million or above threshold, the Director will not notify the two separate charges in one notification. A separate notification will therefore be sent to providers with relevant turnover at or above the £5 million threshold for the purposes of the charge for the code administration.

The costs of processing the Code application

- 3.33 The costs of the processing of applications are likely to be 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. In the consultation document, the Director suggested two ways of recovering these costs, as set out below.
- 3.34 One way would be to recover the costs from just those persons who have been granted the Code in any particular charging year. The implication of raising
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a charge on this basis would be that only the Code Applicants who have been granted the Code would pay a single one off contribution towards the costs of dealing with their application. 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.

3.35 The other way to proceed would be to recover the 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.

3.36 Views were sought on the question:

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

3.37 The majority of respondents suggested that only those persons who have been granted the Code in any particular charging year should be charged for the costs of dealing with code applications.

3.38 This option is simpler for the Director in that he would only be required to deal with a smaller number of persons liable for the charge and will encourage potential Code Applicants to consider whether they really require code powers, although these costs are unlikely to constitute a critical part of the overall cost (i.e. general legal and accountancy fees) new entrants have to incur.

3.39 However, South Ayrshire Council suggested that only Code Applicants who had a turnover equal to or over the set threshold level should incur the costs of dealing with code applications. NewNet plc, on the other hand, proposed that all operators that currently have code powers plus all future Applicants should be charged for these costs. Leeds City Council proposed that there might be room for providing a discount to Code Applicants willing to share in order to stimulate such sharing of infrastructure.

The Director's response:

3.40 Based on the comments received, the Director is of the view that a person who has been granted the Code in a particular charging year should bear his estimated costs of dealing with their Code application. Once code powers are granted to a person, then the Director will notify that person of the one-off charge in respect of those costs. As detailed in the consultation document, the Director proposes that each Code Applicant should pay the same amount, as it is not practicable in the Director's view to give different estimates for different categories of Code Applicants. The notification will take the form of a letter

addressed to the successful Code Applicant setting out the charge which will be due, and the timeframe within which payment must be made.

- 3.41 For the first charging year, based on the Director's estimated costs³³ of dealing with successful code applications and in accordance with the charging principles in Annex A, the charge that successful Code Applicants will be liable to pay will be £10,000.

Flat rate fee v individual fee regarding costs for the administration of the Code and costs of processing code applications for successful Code Applicants

- 3.42 Although a few comments were received regarding this issue, Crown Castle, MBG and NewNet plc were in favour of a flat rate fee for all Applicants. NewNet plc suggested that this flat rate fee could be in three tiers for small, medium and large operators. The Operator Group argued in favour of charging actual expenses incurred to Code Applicants or at least setting different charges for those applications involving national advertising and those involving local advertising. Kirklees Metropolitan Council also suggested that separate charges should be produced but if this was not possible then some pro-rata system would be necessary.

The Director's response:

- 3.43 Under section 38 of the Act the Director must publish charging principles at the beginning of the charging year to enable the Director to secure, on the basis of such estimates of the likely costs as it is practicable for the Director to make, that the aggregate amount of the charges payable is sufficient to meet, but does not exceed, the annual cost to the Director of carrying out his functions. The charging principles are available at Annex A of this statement.
- 3.44 The Director must therefore estimate the costs that will be incurred in dealing with code applications and administering the Code, which will form the basis of the charge. Such an estimate forms part of the Director's budgeted costs set out in Oftel's Management Plan, which is published at the beginning of each charging year.³⁴
- 3.45 As set out above, persons with code powers at the beginning of a charging year will pay a flat rate charge to cover the estimated costs of administering the Code in a particular charging year. A flat rate one-off amount will be paid by successful Code Applicants in a charging year to cover the estimated costs of dealing with their code applications.

³³ Such costs include publication costs of a notice in the Times, the Independent and the Gazettes (London, Edinburgh and Belfast) and for instance, consideration of a Code application and of representations made on a proposed direction to grant the Code and formal notice to a successful Code Applicant, including any conditions, if any.

³⁴ Oftel management plan 2003-04, published on 1st April 2003, available at: http://www.oftel.gov.uk/publications/about_oftel/2003/manp_1_0303.htm

Costs incurred in dealing with unsuccessful code applications

3.46 Section 38 of the Act does not allow the Director 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 or from all those persons with code powers.

3.47 To the question:

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?

3.48 Some of the consultees suggested that unsuccessful Code Applicants should bear the costs of their code application, overlooking the limitations of the Act.

3.49 Nevertheless, a few respondents (e.g. SSE, West Dunbartonshire Council) proposed that these costs should be recovered only from persons who have been granted the Code in any particular year.

3.50 Kirklees Metropolitan Council suggested that these costs should be added to the pro-rata share, whilst WACT urged for a change to the legislation in order to allow charging *in advance* for an application fee irrespective of the outcome (successful or unsuccessful application), an option widely supported by the majority of the respondents.

3.51 Crown Castle and BT thought that these costs should be distributed as widely as possible and they should not be passed only to successful Code Applicants. BT said that they should be recovered as part of the Director's general administrative charges.

3.52 AT & T and the Operator Group suggested that these costs should be born out of a subvention from central government, although they noted that their preferred option would be an upfront charge from all Code Applicants. Nevertheless, AT & T thought that from the proposed options, the best one would be to recover these costs from successful Code Applicants in order to minimise the number of operators affected by unpredictable and open - ended annual costs.

The Director's response:

3.53 The Director is of the view that everyone who holds code powers should cover the costs of unsuccessful code applications. Such estimated costs will be consolidated in the flat rate charge, which will cover the estimated costs for administering the Code. The Director does not consider this option will create unpredictable and open-ended annual costs to the operators. In addition, the costs related to the Code, i.e. administrative costs, costs for dealing with code applications, costs of unsuccessful code applications, cannot be covered by a

regulatory fund or subvention from the central government, since there is no provision in the Act to recover these costs in such a manner.

Dealing with any Deficit or Surplus

- 3.54 Under section 38(10) of the Act, the Director has the power to carry forward any deficit or surplus 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. In other words, if the Director underestimates the costs of dealing with code applications, he will have to recover the deficit by increasing the cost estimate of dealing with code applications in the following year. Further, if the Director overestimates the costs the surplus may justify a reduction of the cost estimate for dealing with code applications in the following year.
- 3.55 In addition, the Director will fix the flat rate charge for the administration of the Code, based on an estimate of those costs, taking into account any deficit or surplus.

Limitations on the grant of the Code

- 3.56 Under the new regime, the application of the Code can be limited geographically by the direction applying the Code. Thus, the Director can decide that code powers are appropriate only in one geographical area, where for example the network provider has extensive network construction needs. On the other hand, the Director can decide that in another area the network provider intended to rely mostly on leased lines and interconnection and therefore the benefit of code powers will be unnecessary. Further, the Director will be able to limit the extent of the code powers to part of a network or conduit system depending on the circumstances.

- 3.57 Therefore, views were sought on the following question:

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?

- 3.58 The geographical limitation of code powers in the direction applying the Code was welcomed by all consultees. The majority of the respondents agreed with Oftel that the Director's powers in this respect should only be exercised in exceptional circumstances, where there is clear and justified need. Other respondents suggested that the Director should act as the final arbiter or he should just have a role checking and verifying the full and comprehensive details provided by the operator.
- 3.59 In terms of resources, some suggested that the Director should employ the appropriate number of staff or contract the exercise to a 3rd party, who would act
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on the Director's behalf, enabling the staff to make a balanced judgement based on their knowledge and reports by the 3rd party. West Dunbartonshire Council proposed that the Director should set principles whereby he indicated that the Code would apply without limitation and then he could exercise his discretion to determine if the Code is to be granted subject to limitation.

3.60 Others proposed specific circumstances under which the Director should be involved:

- When an operator's business depends on such determination;
- When the Code Applicant requests it and bases their case for being granted code powers in one specific geographic area (e.g. to enable limited applications of the Code, in order to enable provision of key regional or local networks to service any group of 200 or more members of the public, where there is local opposition which would otherwise prevent it from being provided);
- In considering with the Code Applicant any response from an interested party where, because a genuine concern is raised, it might be appropriate to grant limited code powers as opposed to refusing the application outright;
- To stimulate technological modernisation of new and innovative systems nationally, to enable economic growth and overcome 'social exclusion' in rural areas and in cases of regeneration programmes in socially deprived areas.

The Director's response:

3.61 After taking the above responses into consideration, the Director is of the view 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 granting the Code. Such an issue is likely to be raised under specific circumstances (e.g. concerns expressed by interested parties or on the applicant's request) and therefore assessed on an individual basis.

Annex A

Revised Statement of Charging Principles published by the Director General of Telecommunications on 10th October 2003 for the purpose of fixing charges in accordance with sections 38 and 39 of the Communications Act 2003

Explanatory Memorandum

Part 2 of Annex A sets out the Charging Principles levied on communications providers and those making available associated facilities with a turnover of £5million or more from relevant activities who are required to pay administrative charges in accordance with sections 38 and 39 of the Communications Act 2003.

The Charging Principles in Part 2 of Annex A replace the Charging Principles that were published by the Director General of Telecommunications ('the Director') on 25 July 2003 for the purposes of the administrative charges.

Part 3 of Annex A sets out for the first time the Charging Principles levied only on persons to whom the Electronic Communications Code ('the Code') applies in accordance with sections 38 and 39 of the Communications Act 2003. The Charging Principles in Part 3 explains the way charges will be fixed every charging year for covering the Director's costs in administering the Code and dealing with successful Code applications. Therefore, persons with code powers and prospective Code Applicants should take into account the Charging Principles in Part 3 of Annex A for the purposes of the code charges.

The turnover bands in Part 2 of Annex A are applicable only to persons liable to pay administrative charges for the provision of electronic communications networks, electronic communications services and associated facilities. They do not apply to persons with code powers and prospective Code Applicants who are liable to pay charges to cover the Director's costs in administering the Code and dealing with successful Code applications.

1. Definitions

1. For the purposes of interpreting these Charging Principles the following definitions shall apply:-

'Act' means the Communications Act 2003;

'Director' means the Director General of Telecommunications as appointed under section 1 of the Telecommunications Act 1984;

'Electronic Communications Code' has the same meaning as in section 106(1) of the Act;

'First Charging Year' means the period beginning with 25th July 2003 and ending on 31st March 2004;

'Relevant Activity' means any of the following:-

- a. the provision of Public Electronic Communications Services to end-users;
- b. the provision of Electronic Communications Networks, Electronic Communications Services and Network Access to Communications Providers; or
- c. the making available of Associated Facilities to Communications Providers;

'Relevant Person' means a person providing a designated Electronic Communications Network or Electronic Communications Service or making available a designated Associated Facility, such designations being contained in a Notice of Designation published by the Director under sections 38 and 34 of the Act on 25th July 2003 and

'Relevant Turnover' means-

- a. in the First Charging Year, the Turnover made by any Relevant Person in that Person's financial year ending in the period of 12 months ending on 24th July 2002;
- b. in the Second Charging Year, the Turnover made by any Relevant Person in that Person's financial year ending in the period of 12 months ending on 24th July 2003; or
- c. in any subsequent Charging Year, the Turnover made by any Relevant Person in that Person's financial year ending in the Charging Year immediately prior to the Charging Year before the Charging Year in question.

'Second Charging Year' means the period beginning with 1st April 2004 and ending on 31st March 2005.

'Turnover' means the turnover made from carrying on any Relevant Activity after the deduction of sales rebates, value added tax and other taxes directly related to turnover.

1.2 Except in so far as the context otherwise requires, words or expressions shall have the meaning assigned to them and otherwise any word or expression shall the same meaning as it has in the Act.

2. Charging Principles for Relevant Persons

2.1 For the purposes of section 38 of the Act in any Charging Year the Director shall fix the administrative charge to be paid by each Relevant Person in the manner set out below.

2.2 The administrative charge to be paid by each Relevant Person shall be a percentage of either:

- a. the lower figure of the turnover band determined by the Director to be applicable to each such person in accordance with sub paragraph 2.3; or
 - b. in any case where in accordance with sub paragraph 2.3 no turnover band has been determined to apply to any Relevant Person, that person's Relevant Turnover.
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2.3 The Director shall determine the turnover band applicable to each Relevant Person by reference to the turnover bands in sub paragraph 2.7 below and the amount of Relevant Turnover notified to the Director by that person, save that no such applicable turnover band shall be determined by the Director where the Relevant Person's turnover is £1,000,000,000 or more.

2.4 The Director shall determine the percentage referred to in sub paragraph 2.2 by carrying out the calculation described in sub paragraph 2.5 below.

2.5 The Director shall:

- a. take either the lower figure of the turnover band applicable to each person as determined in accordance with sub paragraph 2.3, or where in accordance with sub paragraph 2.3 no such turnover band applies, the total Relevant Turnover notified to the Director by that Relevant Person, and add all those amounts together;
- b. divide the total amount of the Director's estimated annual costs of carrying out his functions set out in Section 38(5) of the Act (save for the functions referred to in paragraph 3 below) by the sum resulting from the calculation in paragraph (a); and
- c. apply the quotient resulting from the calculation in paragraph (b) as the percentage.

2.6 The maximum percentage which may be applied by the Director under sub paragraph 2.2 shall be 0.08%.

2.7 The turnover bands for the purposes of fixing the administrative charges shall be as follows

Pounds (million)	To	Pounds (million)
5		Less than 10
10		Less than 25
25		Less than 50
50		Less than 75
75		Less than 100
100		Less than 150
150		Less than 200
200		Less than 300
300		Less than 400
400		Less than 500
500		Less than 600
600		Less than 750
750		Less than 1000

2.8 In the First Charging Year only the Director shall make an appropriate reduction to the amount of each administrative charge payable to reflect the shorter length of that year.

3. Charging Principles for persons to whom the Electronic Communications Code applies

3.1 For the purposes of section 38 of the Act in any Charging Year the Director shall fix the administrative charge to be paid by each person referred to in sub paragraphs 3.2 and 3.4 in the manner set out below.

3.2 Every person to whom the Electronic Communications Code applies on the first day of each Charging Year by virtue of a direction given under section 106 of the Act shall pay a charge calculated by taking the total amount of the Director's estimated costs of carrying out his functions listed in sub paragraph 3.3 below and dividing that amount by the total number of persons liable to pay a charge under this sub paragraph. In the case of the First Charging Year the Director shall make an appropriate reduction to the charge to reflect the shorter length of that Year.

3.3. The Director's functions referred to in sub paragraph 3.2 above are his functions under sections 108 to 119 of the Act and his functions under sections 38 – 43 of the Act insofar as they relate to administrative charges referred to in this paragraph.

3.4 Every person to whom a direction is given under section 106 of the Act in any particular Charging Year applying the Electronic Communications Code in that person's case shall pay a charge in that Year only which shall be calculated by estimating the costs in that Year of dealing with an application for the Electronic Communications Code under sections 106 and 107 of the Act.

4. All earlier statements of charging principles published under sections 38 and 39 of the Act are revoked. This statement shall come into force on the day it is published.

NEIL BUCKLEY

POLICY PROJECT DIRECTOR

**A person authorised under Paragraph 8 of Schedule 1 to the
Telecommunications Act 1984**

6 October 2003

Annex B

Notification under section 107(2) of the Communications Act 2003 published on 10th October 2003

Requirements with respect to the content of an application for a direction applying the Electronic Communications Code and the manner in which such an application is to be made

1. The Director-General of Telecommunications, in accordance with section 107(2) of the Act, hereby sets out the following requirements with respect to the content of an application for a direction applying the Electronic Communications Code under section 106 of the Act, and the manner in which such an application is to be made.

Content

2. The application must contain the following information-
 - i. In the case of a company, the company name, company number, address of the registered office and details of any subsidiaries, parents and affiliates;
 - ii. In the case of a partnership, contact name and address, name of partnership, address of principal place of business;
 - iii. In the case of an individual, the individual's name, address and contact details;
 - iv. A description of the Electronic Communications Network or system of Conduits which the Applicant intends to provide, including the location of that Network or system;
 - v. The person's reasons for wishing to obtain a direction applying the Electronic Communications Code to him, including an explanation of why it would not be practicable to him to provide the network or Conduit system without the Code;
 - vi. A description of the purposes for which the Electronic Communications Network (if applicable) is to be used, for example the type of Electronic Communications Service to be Provided over the Network and who is likely to benefit from that Service;
 - vii. In the case of Providers of systems of Conduits only, written evidence that they are making available or proposing to make available their system of Conduits for use by Providers of Electronic Communications Networks for the purposes of the provision by those Providers of their Networks (e.g. any available contracts, letters from Providers of Electronic Communications Networks confirming their intention of using that specific system of Conduits for the Provision of their Networks);
 - viii. Where the Applicant is able and willing to share Electronic Communications Apparatus, evidence of his ability and willingness to share such Apparatus;
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- ix. Where applicable, a description of alternative arrangements to the direction applying the Electronic Communications Code which have been sought;
- x. Where available, a description of any measures taken or initiatives signed up to which demonstrate responsible use by the Applicant of the Electronic Communications Code; and
- xi. Evidence of the Applicant's ability to put in place funds for meeting liabilities as defined in restrictions and conditions referred to in sections 109 to 117 of the Act prior to the exercise of rights conferred by the Electronic Communications Code.

Manner

- 3. In accordance with section 395(3) of the Act the Director is willing to receive applications for a direction under section 106 of the Act transmitted by means of an Electronic Communications Network.
- 4. Words or expressions used in this Notification shall have the same meaning as in the Act.
- 5. In this Notification 'the Act' means the Communications Act 2003.
- 6. This notification shall come into force on the day it is published.

NEIL BUCKLEY
POLICY PROJECT DIRECTOR

**A person authorised under Paragraph 8 of Schedule 1 to the
Telecommunications Act 1984**

6 October 2003

Annex C

Notification under section 108(4) of the Communications Act 2003 published on 10th October 2003

Availability of Register under section 108 of the Act

1. The Director, in accordance with section 108(4) of the Act, hereby sets out the times at which the register is for the time being available for public inspection, and the fees that must be paid for, or in connection with, an inspection of the register.

Public inspection of the register

2. The register shall be open to public inspection-

(a) between the hours of 10.00 a.m. and 4.00 a.m. on all days except:-

- (i) Saturdays;
- (ii) Sundays;
- (iii) Christmas Day;
- (iv) Maundy Thursday;
- (v) Good Friday;
- (vi) bank holidays; and
- (vii) the Friday before the last Monday in May, and

(b) between the hours of 10.00 a.m. and 12.00 noon on Maundy Thursday.

Fees payable for, or in connection with, an inspection of the register

3. No fee shall be payable for, or in connection with, an inspection of the register.

4. However, a fee shall be payable for supplying a copy of or extract from any part of the register, certified by the Director to be a true copy or extract. This fee shall be-

(a) £1 where the copy does not exceed ten pages, or for the first ten pages of a copy which exceeds ten pages; and

(b) 10 pence for every page of a copy after the tenth page.

Availability of the register in electronic form

5. The register shall be available and can be viewed in the *Industry Information* section of Of tel's web site (www.of tel.gov.uk), under classification *General Authorisation Regime*.

In this notification:

'Act' means the Communications Act 2003;

'bank holiday' means any day which is a bank holiday in England and Wales under section 1 of and Schedule 1 to the Banking and Financial Dealings Act 1971;

'Director' means the Director General of Telecommunications as appointed under section 1 of the Telecommunications Act 1984;

'Electronic Communications Code' has the same meaning as in section 106(1) of the Act;

'register' means the register of persons in whose case the Electronic Communications Code applies by virtue of a direction under section 106 of the Act which is established and maintained by the Director under section 108 of the Act.

This notification shall come into force on the day it is published.

NEIL BUCKLEY
POLICY PROJECT DIRECTOR

**A person authorised under Paragraph 8 of Schedule 1 to the
Telecommunications Act 1984**

6 October 2003

Annex D
List of respondents:

Advisory Committees:

1. Scottish Natural Heritage
2. Telecommunications Advicory Committee (TAC)
3. Consumer Communications for England (CCE)
4. Welsh Advisory Committee on Telecommunications (WACT)
5. Northern Ireland Advisory Committee on Telecommunications (NIACT)
6. Broadband Stakeholder Group (BSG)

Operators and Service Providers:

1. Scottish and Southern Energy plc (SSE)
2. Mobile Broadband Group (3, O2, Orange, Vodafone, T-Mobile)
3. NewNet plc
4. Operator Group (Thus plc, Your Communications, C & W, ntl, Kingston, Redstone, Fibernet, Tweedwind, COLT)
5. AT & T
6. BT
7. Crown Castle

Local Authorities- Devolved Administrations and Other Public Bodies:

1. Cambridgeshire County Council
 2. Kirklees Metropolitan Council
 3. Highways Agency
 4. The Countryside Agency
 5. Office of the Director General of Water Services (OFWAT)
 6. Glasgow City Council
 7. South Lanarkshire Council
 8. National Street Works Highways Group (NSWHG) and Nottingham City Council
 9. Council for National Parks (CNP)
 10. Planning Services for Northern Ireland
 11. Derbyshire County Council
 12. West Dunbartonshire Council
 13. Duchy of Cornwall
 14. Bath and North East Somerset
 15. South Ayrshire Council
 16. London Borough of Fulham and Hammersmith
 17. Scottish Executive (confidential)
 18. Leeds City Council
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Annex E

Glossary of terms used

Act: Communications Act 2003

Associated Facility: has been defined in section 32(3) of the Act 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 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; iii) supporting the provision of such services.

Conduit: has been defined in Schedule 3 to the Act to include a tunnel, subway, tube or pipe.

Electronic Communication Apparatus: has been defined in Schedule 3 to the Act 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) any apparatus (within the meaning of that Act) that is designed or adapted for a use which consists of or includes the sending or receiving of communications or other signals that are transmitted by means of an electronic communications network; c) any 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; and references to the installation of electronic communications apparatus are to be construed accordingly.

Electronic Communications Code: has been defined in section 106 (1) of the Act as the Code set out in Schedule 2 of the Telecommunications Act 1984 (c.12) as amended by Schedule 3 to the Act

Electronic Communications Network: has been defined in section 32(1) of the Act 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.

Electronic Communications Service: has been defined in section 32 (2) of the Act 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 content service.
