



Administrative charges for the electronic communications code

A change to Ofcom's charging principles

Consultation

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Section 1

The electronic communications code

- 1.1 The electronic communications code (the “Code”) is set out at schedule 2 to the Telecommunications 1984 as amended by schedule 3 to the Communications Act 2003 (the “Act”). The Code applies to persons to whom the Code has been applied pursuant to a direction given by Ofcom under section 106 of the Act (“Code operators”). Persons benefiting from the Code have certain rights and these include:
- certain exemptions from the Town and Country Planning regime which takes the form of Permitted Development¹ ;
 - the power to carry out street works without needing to obtain a specific street works licence to do so under the New Road and Street Works Act 1991; and
 - the right to apply to the Court to seek a right where agreement cannot be reached with the owner of that land to execute work on that land.
- 1.2 In essence, the Code is designed to ensure that Code operators can deploy their networks rapidly, maintain them, and repair them as and when they need to do so without needing to seek specific authorisations. In the absence of the powers that Code operators benefit from, the ability for them to maintain their networks would be diminished and this would be of detriment to anyone using communications services of any description.
- 1.3 There are presently one hundred and forty Code operators, the vast majority of which retained their Code powers by virtue of paragraph 17 of Schedule 18 to the Act under which persons who benefited from Code powers under the licensing regime (that is, prior to 25 July 2005) kept them under the authorisation regime. Schedule 18 applies the Code to these operators by virtue of a deemed direction from Ofcom. The remaining Code operators applied to Ofcom since 25 July 2005 under Section 107(1) of the Act and were granted powers by Ofcom under Section 106(3).

¹ 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.

Section 2

An amendment to the charging principles

Ofcom's role and duties in relation to the Code

2.1 Ofcom's role and duties in relation to its operation of the Code are set out in Section 106 to 119 of the Act. In summary, Ofcom's role and main duties under each of these sections are as follows:

- Sections 106 and 107 – communications providers who wish to run an electronic communications network or provide a system of conduits can apply to Ofcom for Code powers. Ofcom has to consider any such applications and publish a notification explaining what its intentions are (that is, whether or not it intends to grant the Code) and then publish a direction applying the Code if appropriate;
- Section 108 – Ofcom has to maintain a register of persons in whose case the Code applies;
- Sections 109 to 114 – these set out Ofcom's enforcement powers and restrictions that it may apply in relation to the Code (e.g. suspension of the Code);
- Section 115 – this states that Ofcom may revoke the Code in any person's case on receipt of an application for the revocation of the Code;
- Section 116 – this states that Code operators ceasing to run an electronic communications network or system of conduits are required to inform Ofcom that this is the case;
- Section 117 – this states that Ofcom may put in place transitional schemes in the event of suspension, revocation or modification of the Code;
- Section 118 – this states that Schedule 4 to the Act (which provides for the compulsory acquisition of land) shall have effect. Ofcom's role is wide ranging and includes the power to consent to the compulsory purchase of land; and
- Section 119 – this states that Ofcom may grant assistance in relation to Code proceedings on receipt of an application for such assistance.

2.2 Ofcom also has an important duty in relation to The Electronic Communications Code (Conditions and Restrictions) Regulations 2003 (the "Regulations"). Regulation 16 of the Regulations requires Code operators to put in place sufficient funds to meet any liabilities and provide Ofcom with a certificate and insurance policy, bond, guarantee or other instrument. Ofcom may direct Code operators to take steps where it is not satisfied that they have not discharged their duty under Regulation 16. This has involved, amongst other things, Ofcom considering complaints from authorities where concerns have arisen that Code operators have not adequately met the requirements under Regulation 16.

2.3 Additionally, Ofcom has engaged with stakeholders and the Department for Transport in relation to proposed secondary legislation in relation to the Traffic Management Act 2004.

Statutory framework for the imposition of charges in relation to Ofcom's administration of the Code

- 2.4 Paragraphs 2.1 to 2.3 provide a summary of Ofcom's main role and duties under the Act and the Regulations in relation to the Code. The Act also states that Ofcom may set an administrative charge in relation to the Code and this charge covers the majority of Ofcom's costs in carrying out the functions set out in paragraphs 2.1 to 2.3. However, the costs to Ofcom in relation to carrying out its functions under Sections 106 and 107 of the Act (considering new applications) are covered by its fees for granting Code powers.
- 2.5 Section 38(1)(d) states that:
- "A person who, at any time in a charging year, is a person to whom this section applies shall, in respect of the application of the electronic communications code in his case, pay to OFCOM the administrative charge (if any) that is fixed by them for the case that is applicable to him."
- 2.6 Section 38(4)(a) requires that:
- "on a year by year basis, the aggregate amount of the charges payable to OFCOM is sufficient to meet, but does not exceed, the annual cost to OFCOM of carrying out the functions mentioned in subsection (5)". These functions include the functions under sections 106 to 119 referred to above.
- 2.7 Pursuant to section 38(4)(b), the cost of carrying out those functions must be met by the imposition of charges that are:
- "objectively justifiable and proportionate to the matters in respect of which they are imposed".

Ofcom's charging principles and the costs of administering the Code

- 2.8 Ofcom monitors its costs and from time to time carries out reviews to ensure that its charges remain justifiable and proportionate. Ofcom has recently undertaken a discrete exercise in relation to the costs that it has incurred in relation to the Code for the financial year 2005/06 and estimated the additional costs that it expects to incur in the remainder of the financial year. The outcome of this exercise is set out below.
- 2.9 Ofcom's charges for administering the Code are applied retrospectively. Therefore, the charge for administering the Code for the financial year 2004/05 was published in the document entitled *Ofcom's Tariff Table 2005/06*. Other charges are based on a forward-looking estimate of costs.
- 2.10 In terms of the Code, the basis of the charge for 2004/05 remained unchanged from that established for the previous year. The charges for 2003/04 and, therefore, the charges for 2004/05 were set to take account of the additional costs and resources involved in establishing new working practices to administer the Code. The Act established many new duties in relation to the Code which were not previously carried out by Ofcom's predecessor. As Ofcom's working practices in relation to the Code have now been established, it has carried out a review of the costs that it has incurred so far for administration of the Code in the financial year 2005/06 and estimated the additional costs that it expects to incur for the remainder of the financial year.

Ofcom's costs for administering the Code in 2005/06

- 2.11 There are two conclusions that Ofcom has drawn from this exercise. First, Ofcom's costs for 2005/06 are going to be lower than the costs that were estimated for the preceding year and, as such, we intend to set a charge for the administrative fee which will reflect these lower costs. The fee is likely to be ~£1000 per Code operator. The final fee will be set out in Ofcom's Tariff Table for 2006/07.

A proposed change to Ofcom's charging principles in relation to the Code

- 2.12 The second conclusion, and the reason for publishing this document, is that Ofcom proposes to make a minor change to its charging principles in relation to the fees for administration of the Code. The proposed change and the reasoning for it are set out in the following paragraphs.
- 2.13 At present, Ofcom's costs for administering the Code are divided equally by the number of Code operators. The manner in which these costs were to be recovered was established in the statement entitled *The Granting of the Electronic Communications Code*, which was published on 10 October 2003. Ofcom considers that, in general, this remains an equitable and reasonable way for it to recover the costs that it incurs in any given year in administering the Code. It should be noted that Ofcom's costs for the activities that it carries out in relation to the Code (see paragraph 2.1) are not driven or attributable in any meaningful sense to individual Code operators. Instead, the costs that Ofcom incurs are driven on a day-to-day basis by developments in Government policy (such as the proposed changes in relation to the Traffic Management Act 2004), consumer queries or requests for assistance, or other internal policy matters that may be affected by or relate to the Code. This was a major reason for a flat fee being set in the first place.
- 2.14 However, under the present charging system, some companies pay for several authorisations. This is because each Code operator is required to pay the administrative fee and, for historic reasons, some companies maintain more than one set of Code powers. For instance, each cable franchisee benefited from Code powers and these individual sets of Code powers have been maintained despite consolidation within the industry. It does not appear appropriate to charge in this manner and, as a result, going forward Ofcom proposes to charge for administration of the Code once per company rather than continuing with the present practice which requires companies to pay the charge for each set of Code powers that they maintain. This will not result in a consequential change to the register of persons benefiting from the Code. In other words, each operator referred to on Ofcom's register of Code operators (for which see http://www.ofcom.org.uk/telecoms/ioi/e_c_c/cp_reg) will continue to be referred to on that register. Ofcom anticipates, in any case, that the register will reduce as a result of further consolidation within the industry.
- 2.15 If Ofcom had not assessed the costs that it had incurred in administering the Code for 2005/06, the proposed change to Ofcom's charging principles in relation to the Code would have resulted in most Code operators paying more than they would under the present charging regime (that is, Ofcom's total costs would be divided by fewer Code operators and therefore the average charge would increase). But Ofcom has assessed the costs that it has incurred in 2005/06 and estimated the costs that it will incur for the rest of the financial year. This exercise has led Ofcom to come to the conclusion that the outturn will undoubtedly result in each Code operator paying less than for 2004/05.

Consultation

- 2.16 Comments on Ofcom's proposal to amend its charging principles in relation to the Code are welcome. These should be made by **25 January 2006**. Ofcom normally allows ten weeks for consultation. However, on this occasion, Ofcom has decided that this consultation need not extend to ten weeks because this could delay implementation of Ofcom's proposed new charging principles in relation to the Code and Ofcom does not consider, in any case, that its proposals are complicated and, therefore, merit a long consultation period.

Annex 1

Responding to this consultation

How to respond

Ofcom invites written views and comments on the issues raised in this document, to be made by **5pm on 25 January 2006**.

Ofcom strongly prefers to receive responses as e-mail attachments, in Microsoft Word format, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 2), among other things to indicate whether or not there are confidentiality issues. The cover sheet can be downloaded from the 'Consultations' section of our website.

Please can you send your response to first. Michael.Galvin@ofcom.org.uk

Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.

Michael Galvin
Competition Group
4th Floor
Riverside House
2A Southwark Bridge Road
London SE1 9HA

Tel: 020 7783 4158
Fax: 020 7783 4109

Note that we do not need a hard copy in addition to an electronic version. Also note that Ofcom will not routinely acknowledge receipt of responses.

It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 3. It would also help if you can explain why you hold your views, and how Ofcom's proposals would impact on you.

Confidentiality

Ofcom thinks it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt (when respondents confirm on their response cover sheet that this is acceptable).

All comments will be treated as non-confidential unless respondents specify that part or all of the response is confidential and should not be disclosed. Please place any confidential parts of a response in a separate annex, so that non-confidential parts may be published along with the respondent's identity.

Ofcom reserves its power to disclose any information it receives where this is required to carry out its legal requirements. Ofcom will exercise due regard to the confidentiality of information supplied.

Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use, to meet its legal requirements. Ofcom's approach on intellectual property rights is explained further on its website, at www.ofcom.org.uk/about_ofcom/gov_accountability/disclaimer.

Next steps

Ofcom intends to publish its Tariff Table for 2006/07 on or before 31 March 2006. Subject to responses, it is Ofcom's intention to reflect the changes proposed to its charging principles in setting the administrative charge for the electronic communications code for the financial year 2005/06

Please note that you can register to get automatic notifications of when Ofcom documents are published, at http://www.ofcom.org.uk/static/subscribe/select_list.htm.

Ofcom's consultation processes

Ofcom is keen to make responding to consultations easy, and has published some consultation principles (See Annex 2) which it seeks to follow, including on the length of consultations.

If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk. We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, whose views are less likely to be obtained in a formal consultation.

If you would like to discuss these issues, or Ofcom's consultation processes more generally, you can alternatively contact Vicki Nash, Director for Scotland, who is Ofcom's Consultation Champion:

Vicki Nash
Ofcom (Scotland)
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW
Tel: 0141 229 7401
Fax: 0141 229 7433
E-mail: vicki.nash@ofcom.org.uk

Annex 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will normally allow ten weeks for responses to consultations on issues of general interest.

A2.6 There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

After the consultation

A2.8 We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 3

Consultation response cover sheet

- A3.1 In the interests of transparency, we will publish all consultation responses in full on our website, www.ofcom.org.uk, unless a respondent specifies that all or part of their response is confidential. We will also refer to the contents of a response when explaining our decision, without disclosing the specific information that you wish to remain confidential.
- A3.2 We have produced a cover sheet for responses (see below) and would be very grateful if you could send one with your response. This will speed up our processing of responses, and help to maintain confidentiality by allowing you to state very clearly what you don't want to be published. We will keep your completed cover sheets confidential.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their cover sheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses in the form of a Microsoft Word attachment to an email. Our website therefore includes an electronic copy of this cover sheet, which you can download from the 'Consultations' section of our website.
- A3.5 Please put any confidential parts of your response in a separate annex to your response, so that they are clearly identified. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

What do you want Ofcom to keep confidential?

Nothing

☐

Name/contact details/job title

☐

Whole response

☐

Organisation

☐

Part of the response

☐

If there is no separate annex, which parts?

If you want part of your response, your name or your organisation to be confidential, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. It can be published in full on Ofcom's website, unless otherwise specified on this cover sheet, and I authorise Ofcom to make use of the information in this response to meet its legal requirements. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

☐

Name

Signed (if hard copy)

