

**Frequently asked questions (FAQs) by
Internet service providers about the new
regulatory framework**

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Introduction

These Frequently Asked Questions (FAQs) are intended to answer the most common questions asked by Internet service providers (ISPs) about the new regulatory framework that entered into force on 25 July 2003. The list of FAQs is open-ended – where Oftel answers further questions from ISPs that may be of wider interest, it will add them to the list.

The answers are intended to be as helpful and informative as possible but they need to be read with the understanding that the examples covered represent typical cases – these FAQs cannot be taken as applying to all instances where a particular set of circumstances needs to be taken into account. Please also read the disclaimer at the end of this document.

About the new regulatory framework

The introduction of the new regulatory framework recognises the need to co-ordinate the regulation of different forms of communication that are converging. The new framework gathers together different types of communication under the new regulatory concept of 'electronic communications'.

In the past, communications providers have fallen into distinct categories, such as operators, airtime providers and ISPs. The new framework recognises just two fundamental types of providers – providers of electronic communications networks (PECNs) and providers of electronic communications services (PECSs) – as well as providers of associated facilities. Providers may offer just one or a combination of these activities, but for the purposes of the new framework they will all be known as (electronic) communications providers.

The key feature of an electronic communications network (ECN) is that it is a transmission system for the conveyance of signals. This definition includes the networks used to carry dial-up and broadband Internet traffic and to provide end users with Internet access. The key feature of an electronic communications service (ECS) is that it is a service consisting in the conveyance of signals. This includes Internet access services provided by ISPs.

An important point to note is that the provision of an ECS does not extend to the provision of content services or most information society services, for example web hosting, parental controls and exclusive content. However, providing the underlying transmission over which a content or information society service is conveyed may well involve the provision of an ECS. For a more extended analysis of these terms see *Oftel's Guidelines for the interconnection of public electronic communications networks*,
www.oftel.gov.uk/publications/eu_directives/2003/intercon0503.htm.

Given this starting point of 'technological neutrality', the publication of these FAQs in no way implies that ISPs, by their nature, should be subject to different treatment to other electronic communications service providers. However, given the overriding aim of 'proportionate regulation', and the fact that the ISP market is often more competitive than traditional telecoms markets, it is likely that ISPs will continue to be subject to lighter obligations all round.

Indeed, despite the big change in regulation in *law*, Oftel expects that in *practice* (at least in the foreseeable future) the obligations on ISPs will change very little. Much of what is being proposed by way of the general conditions already applies to ISPs by way of the Telecommunications Services Licence (TSL) – the class licence under which ISPs currently operate within the Telecommunications Act (the T Act).

The purpose of these FAQs is to identify the potential impact of the new framework on ISPs and their services and to answer in general terms some of the key questions ISPs are asking the regulator. Please also read the disclaimer at the end of this document.

1. What does the new framework consist of?

1.1. The purpose of the new regulatory regime is to establish a harmonised framework for the regulation of communications across Europe. It consists of five new European Directives that are binding on Member States.

1.2 The new package of Directives consists of:

- the Framework Directive;
- the Authorisation Directive;
- the Universal Service Directive;
- the Directive on Privacy and Electronic Communications¹; and
- the Access and Interconnection Directive.

See

http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/index_en.htm.

1.3 The new Directives required, on their implementation date of 25 July 2003, the repeal of the licensing regime for telecommunications systems in the UK under the Telecommunications Act 1984. The requirement to obtain a licence prior to operating a telecommunications system has been replaced by a general authorisation to provide electronic communications networks and services that

¹ The PEC must be implemented by 31 October 2003. It will be implemented in the UK by new Regulations introduced under the European Communities Act 1972, replacing the Telecommunications (Data Protection and Privacy) Regulations 1999.

applies to all providers of networks and services. There is no requirement, however, to apply for a general authorisation – a provider is simply entitled to provide a network or service as long as it complies with any applicable conditions.

1.4 Under the new Directives, each national regulatory authority (NRA) has the power to set various types of conditions with which providers will have to comply. Previously, anyone running telecommunications systems were subject to obligations set out in licence conditions. These licence conditions have now been replaced by a combination of general conditions applicable to all communications providers (or all communications providers of a particular type) and specific conditions to be set and applied to individual communications providers.

1.5 The types of general and specific conditions, which may be imposed on communications providers, are strictly limited by the terms of the new Directives. On 22 July 2003, the Director General for Telecommunications (the Director) set the new General Conditions to apply from 25 July 2003, setting out the requirements that will apply to electronic communications networks and services. The Director's final policy statement on the General Conditions can be found at www.oftel.gov.uk/publications/eu_directives/2003/cond_final0703.pdf. The new arrangements will provide a much more streamlined and flexible regime for current and new operators and service providers.

1.6 The Communications Act received Royal Assent on 17 July 2003, implementing the new EC Directives on 25 July 2003 – see www.communicationsbill.gov.uk. The new General Conditions were set by the Director under powers contained in the Communications Act.

1.7 Despite that fact that the Communications Act creates, and assigns functions to, Ofcom as the new communications regulator for the UK, the Director will continue to be the NRA under the new regime for an interim period from 25 July 2003 until such time as the new functions are transferred to Ofcom later this year. Hence, in these FAQs, references to Ofcom should be read as references to the Director for the present time.

2. What are the main provisions of the Communications Act?

2.1 The main provisions of the Communications Act provide for the transfer of functions to Ofcom from the five organisations that currently regulate the communications sector². The Act also sets out the regulatory structure for all communications services, including provisions for the establishment of the Ofcom Content Board, the regulatory structure for independent television and radio services, and the regulation of media ownership and control. As such, the scope of the Act is wider than the scope of the Directives, although it does establish a new framework for the regulation of electronic communications networks and services to replace the current licensing system for telecommunications.

² Office of Telecommunications (OfTel), Independent Television Commission (ITC), Broadcasting Standards Commission (BSC), Radiocommunications Agency (RA), and Radio Authority.

2.2 The main functions of Ofcom will be:

- to further customer interests;
- to promote competition in the provision of communications services and facilities;
- to encourage optimal use of the radio spectrum;
- to secure that a wide range of electronic communications services are available throughout the UK;
- to secure that a wide range of TV and radio services are available in the UK, comprising high quality services of broad appeal;
- to maintain media plurality;
- to protect the public from any offensive or potentially harmful effects of broadcast media; and
- to safeguard people from being unfairly treated in programmes contained in television and radio services.

3. Will ISPs need to notify Ofcom about their intention to offer services?

3.1 It is a requirement under the new Authorisation Directive that providers of electronic communications networks and services are no longer required to obtain a licence or permission from the NRA before they can offer those networks or services. They may be required to submit a notification of their intention to offer networks or services, but that is all.

3.2 The Communications Act enables Ofcom to designate certain classes of networks, services or associated facilities as requiring notification. Having given notification, a provider may lawfully make networks or services available – and does not require a formal response from Ofcom. Only a very limited amount of information would be required in the notification – information about the person giving the notification, a short description of what is intended to be provided and when, and details of persons in the UK who can be contacted in case of an emergency.

3.3 Oftel has consulted on its proposals for notification arrangements and has concluded that no communication providers will be designated as being required to notify in advance of providing networks or services, at least initially. See *Implementation of the Authorisation Directive's provisions on notifications and fees*, 21 May 2003, www.ofcom.gov.uk/publications/eu_directives/2003/notfees0503.htm4.

4. Will ISPs be required to pay administrative fees?

4.1 Under the Communications Act, Ofcom will be able to require providers of designated electronic communications networks, electronic communications services and associated facilities to pay a yearly administrative charge. The charge will meet the annual cost to Ofcom of carrying out its functions and will

replace the licence fees currently payable. This change from the current regime may mean that some ISPs are subject to fees for the first time.

4.2 The Act does not specify the basis on which charges are to be levied and before levying any charges Ofcom must publish a statement of the charging principles that will be applied in fixing charges. It is anticipated that there will be some time after 25 July 2003 prior to the full transfer of all functions from Oftel to Ofcom. Oftel has consulted on proposals in relation to the collection of fees for the periods up to 24 July 2003 and from 25 July until the establishment of Ofcom. It will be up to Ofcom to publish a statement of the charging principles to apply after that date.

4.3 Oftel's view is that only those companies with a relevant turnover of £5 million or more should be subject to the charge. See *Implementation of the Authorisation Directive's provisions on notifications and fees*, 21 May 2003, www.oftel.gov.uk/publications/eu_directives/2003/notfees0503.htm.

4.4 The 'relevant turnover' only relates to the provision of an electronic communications network or service, or associated facility. It would not, for example, include other types of service provided by an ISP such as content. As is current practice in the levying of licence fees, the costs of administration would be apportioned between companies according to relevant turnover.

5. Will ISPs be required to negotiate interconnection?

5.1 Most ISPs (except Virtual ISPs – VISPs) will fall within the definition of a provider of a public electronic communications network and be subject to General Condition 1 on general access and interconnection obligations. It requires public communications network providers to negotiate interconnection with such other communications providers in any part of the European Community. Oftel believes that this will be to the benefit of all ISPs.

5.2 Internet interconnection is organised in the UK through the London Internet Exchange (LINX) or another similar Network Access Point (NAP). NAPs provide a physical facility where ISPs can connect to each other to exchange Internet traffic. LINX provides a physical interconnection for its members to exchange Internet traffic through co-operative peering agreements. In general, any disputes over Internet interconnection arrangements are currently resolved through commercial negotiations and, if these arrangements continue to work well, it is unlikely that this condition would have any widespread effect on the ISP community in the UK.

5.3 For more information on interconnection in the new regime see Oftel's *Guidelines for the interconnection of public electronic communications networks*, www.oftel.gov.uk/publications/eu_directives/2003/intercon0503.htm.

6. Will ISPs be required to comply with general conditions proposed by OfTel relating to consumer protection issues?

6.1 There are a number of conditions requiring compliance by all public communications service providers that relate to consumer protection or information issues. These conditions do not just apply to significant market power (SMP) providers. Instead they require an assessment of the level of necessary consumer protection (see *OfTel's Draft consumer protection policy review statement*, www.oftel.gov.uk/publications/about_oftel/2002/cppr1202.htm). Because these are consumer protection issues, they concern all consumers and all communications providers that serve them. This includes ISPs and their residential and small business customers.

Will ISPs be required to offer contracts?

6.2 Yes. Under the new regulations, all providers of public electronic communications services must offer to enter into a contract at the request of a consumer. As set out under General Condition 9, the contract must include the following information:

- the name and address of the Communications Provider;
- the services provided, and the service quality levels offered, including the time for initial connection;
- the types of maintenance services offered;
- details of prices and tariffs, and how up-to-date information on all applicable tariffs and maintenance charges may be obtained;
- the duration of the contract, the conditions for renewal and termination of services and of the contract, including the end-user's right to terminate the contract without penalty if the provider modifies the contract to the detriment of the end-user;
- any compensation and the refund arrangements which apply if contracted quality service levels are not met; and
- how dispute resolution procedures can be initiated.

6.3 In practice, this means that all ISPs will be required to offer consumers a contract with minimum terms, if the consumer requests it. This is likely to have little effect on larger ISPs, but may affect some smaller service providers whose current procedures are more informal.

6.4 The intention behind this condition is to establish a minimum set of terms that should be included in a contract between a consumer and a communications provider. OfTel sees this as a key consumer right that is not related to a communications provider's size. This obligation is also required to be implemented in the UK by virtue of Article 20 of the Universal Service Directive (USD).

Will ISPs need to publish information on their quality of service?

6.5 Under the new regulations, NRAs will be able to direct that providers of public electronic communications services publish information on their quality of service (General Condition 21) following a consultation. This will not cover any communications providers who have been in operation for 18 months or less. This is to reduce the regulatory burden on recent new entrants.

6.6 If Ofcom chose to ask an ISP to provide it with information on its quality of service, the request would relate only to the public electronic communications services offered by the ISP. It would not apply to other types of services (eg web hosting, content) that do not define it as a provider of an electronic communications service.

6.7 At present, there are two Oftel-endorsed quality of service publications:

- the mobile networks call success rate survey – www.oftel.gov.uk/publications/research/2002/call_survey/index1202.htm; and
- the fixed operators' Comparable Performance Indicators – www.cpi.org.uk/.

It should be noted that both of these initiatives are voluntary and Oftel has not used its powers to enforce quality of service publication.

6.8 Oftel intends to continue this programme of work, and envisages that Ofcom would only use its ability to request further information for other services where that programme was insufficient for some reason. Without fettering the NRA's discretion, Oftel does not believe it likely that the current initiative will be extended to ISPs and Internet services and a cursory review of available information indicates that there is already some quality of service information available to consumers and users about ISP services.

Will ISPs be required to comply with codes of practice?

6.9 All providers of public electronic communications services to residential and small business customers will be required to produce a basic code of practice under General Condition 14.

6.10 This basic code of practice should set out the ISP's relationship with its customer in easy-to-understand language. Copies of the code will have to be provided on request and free of charge to any customer.

6.11 In addition, it is intended that those same communications providers should establish their own codes of practice dealing specifically with customer complaint handling. However, groups of ISPs could develop a common code of practice for complaints that they would all agree to follow, rather than each have individual codes of practice. However, if an ISP does not have a code of practice for

complaints, or is not signed up to another code of practice, they will be in breach of the general conditions.

6.12 On 18 February 2003, Oftel published guidance on how it plans to assess codes of practice procedures for compliance with the Communications Act. See www.oftel.gov.uk/publications/ind_guidelines/2003/cop0203.htm. The deadline for submitting codes of practice for approval has been extended to 30 September 2003.

Will ISPs be required to comply with a dispute procedure scheme?

6.13 Yes. Article 34 of the USD requires Ofcom to ensure that all consumers of electronic communication services have recourse to an out-of-court settlement procedure that is transparent, simple, inexpensive, fair and prompt. Out-of-court settlement procedures are sometimes also known as alternative dispute resolution and are referred to in the Communications Act as “dispute procedures”.

6.14 The requirement for providers of public electronic communications services to provide and comply with a Dispute Procedure Scheme for the resolution of disputes between itself and its residential and small business customers in relation to the provision of electronic communications services, is set out in General Condition 14.

6.15 The Office of the Telecommunications Ombudsman (otelo) – established in June 2002 by an industry working group in consultation with consumer bodies – is Oftel's, Ofcom's and the Government's preferred solution for dispute procedures. A current list of communications providers who have signed up to the Scheme is available at www.otelo.org.uk/website/html/content.php?ID=13.

6.16 If an ISP decides not to join otelo it is still obliged to have – or belong to – a dispute procedure scheme that is approved by Oftel (and later Ofcom). Not having or belonging to an approved dispute procedure scheme will be a breach of the General Conditions.

6.17 Oftel published guidance on the criteria that will be used to review and approve dispute procedure schemes on 4 August 2003 (see www.oftel.gov.uk/publications/eu_directives/2003/disputeprocedure0803.htm). The deadline for submitting applications for approval of dispute procedure schemes is 30 September 2003.

7. Will ISPs be required to offer itemised billing?

7.1 No. Only providers of publicly available telephone services will be required to provide itemised bills in certain circumstances (see General Condition 12). However all providers of public electronic communications services will be required to provide accurate bills to consumers (see General Condition 11). The

provision of accurate bills will include all types of Internet access packages offered by ISPs, for example unmetered and 'pay-as-you-go'.

7.2 Oftel does not propose at this stage to require any ISP to gain approval under the Oftel Metering and Billing Direction, www.oftel.gov.uk/publications/eu_directives/2003/meter0703.pdf. Any such proposal would require an amendment to the general conditions and be subject to consultation.

8. Can ISPs keep and use information about their subscribers?

8.1 The Directive on Privacy and Electronic Communications concerns the processing of personal data and the protection of privacy in the electronic communications sector.

8.2 The Directive allows providers of public communications networks or publicly available electronic communications services to retain traffic data for law enforcement purposes once it is no longer required for billing or other essential management purposes.

8.3 However, it places restrictions on the ability of providers to retain data for their own purposes, beyond billing, interconnection payments and dispute resolution. Any further processing of data, for instance the marketing of Internet services or the provision of value added services, may only be allowed if the consumer has agreed in advance to this.

8.4 In practice, providers may process traffic data relating to consumers in order to detect technical failure or errors in the transmission of communications. Providers can also process traffic data necessary for billing purposes in order to detect and stop fraud consisting of unpaid use of the service. This could be without the consent of the consumer.

8.5 Whilst the Directive merely sets out the general goals, it is a matter for the UK to implement these as practical regulation. DTI consulted on the implementation of the Directive earlier this year (the closing date for comments was 19 June 2003). Information about the consultation is available on the DTI website at: www.dti.gov.uk/industries/ecomunications/directive_on_privacy_electronic_communications_200258ec.html.

9. Will ISPs be required to offer minimum data speeds?

9.1 The obligation to provide minimum data rates is a Universal Service Obligation (USO) and therefore only falls on designated universal service providers. Only BT and Kingston have been designated as universal service providers in the UK.

9.2 The Universal Service Directive (USD) does not specify any minimum rate in terms of Internet access. Instead, it talks about 'functional Internet access'. It is

therefore up to each member state to decide how it intends to ensure that this is provided.

9.3 On 22 July 2003, Oftel published a statement on the Designation of BT and Kingston as universal service providers, and the specific universal service conditions. This sets out Oftel's view that it is reasonable to expect a single narrowband connection on a public telephone network to support data transmission at a minimum speed of 28.8 kbps. See www.oftel.gov.uk/publications/eu_directives/2003/uso0703.pdf

9.3 As ISPs are not likely to be designated as universal service providers, provision of 'functional Internet access' is a matter more for network providers rather than ISPs.

10. Will the wholesale products ISPs buy be affected?

10.1 Under the new framework, a market will be effectively competitive where no operator in that market possesses dominance or significant market power (SMP). The position can be held alone or jointly.

10.2 The introduction of the new Directives requires Member States to carry out reviews of competition in communications markets as soon as possible, in order to ensure that regulation remains proportionate in the light of changing market conditions. What conditions are imposed on providers in a given market will depend on whether there is significant market power and what the market reviews conclude.

10.3 Oftel is consulting on levels of competition in wholesale communications markets, including broadband and narrowband Internet, and any proposed SMP conditions, throughout 2003. The SMP conditions proposed in these reviews are likely to be relevant to ISPs to the extent that they will impact the wholesale products that are available to them, for example NTS and FRIACO. More information about the market reviews can be found at www.oftel.gov.uk/ind_info/eu_directives/eu_mr/index.htm.

11. Will Ofcom regulate Internet naming and addressing?

11.1 No. Regulation of Internet naming and addressing (eg the domain names system) has been specifically excluded from the new regulations. Recital 20 of the Framework Directive's preamble states that its provisions do not establish any new areas of responsibility for the national regulatory authorities in the field of Internet naming and addressing.

11.2 It is therefore likely that the key functions associated with the Internet domain name system,

- acting as the registry for .uk, managing the central database and setting and enforcing domain name registration policy; and
- running the Domain Name Server for .uk and the relevant second level domains, translating domain names into IP numbers

will continue to be performed by an independent organisation. Nominet UK currently has responsibility for these functions in the UK – see www.nominet.org.uk.

12. Will Ofcom regulate content available over the Internet?

12.1 As well as setting out the regulation of networks and services that deliver communications services, the Act also outlines the extent to which Ofcom will regulate electronic content.

12.2 Content provided over the Internet is specifically excluded by the Act from direct regulation. However Ofcom will have a statutory duty to promote public awareness that Internet content is unregulated, and how users can regulate and control access to it themselves.

12.3 The Act requires Ofcom to establish and maintain a Content Board who will represent the interests of consumers in relation to Ofcom's work on the content of anything broadcast or transmitted by means of all electronic communications networks, including the Internet.

12.4 Ofcom will have a function to promote broadcasting and Internet media literacy and to conduct and publish research into content regulation and to take account of findings in its work.

Other guidance on various aspects of the new regulatory framework, published by Ofcom is available at www.ofcom.gov.uk/publications/eu_directives/index.htm.

Disclaimer

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