

Update on policy concerning information gathering for the purposes of section 145 of the Communications Act 2003 and section 32 of the Wireless Telegraphy Act 2006

Recent legislative changes

The Electronic Communications and Wireless Telegraphy Regulations 2011 have introduced changes to Ofcom's information gathering powers under the Communications Act 2003 (the "2003 Act") and Wireless Telegraphy Act 2006 (the "2006 Act"). These changes are summarised below.

Pursuant to section 135(1) of the 2003 Act, Ofcom may require certain persons to provide all such information as Ofcom considers necessary for the purpose of carrying out its functions under Chapter 1 of Part 2 of that Act. The new section 135(3A) clarifies that such information may include:

- information concerning future network and service developments that could have an impact on wholesale services; and
- accounting data relating to retail markets that are associated with wholesale markets, where a market power determination has been made in the wholesale markets.

Section 135(3) provides examples of specific purposes for which Ofcom may require information. This section has been amended to include the following purposes:

- assessing the security of a public electronic communications network or a public electronic communications service, when investigating a complaint or compliance;
- assessing the availability of a public electronic communications network, when investigating a complaint or compliance; and
- identifying electronic communications apparatus that is suitable for shared use.

Pursuant to section 32 of the 2006 Act, Ofcom may require certain persons to provide statistical information relating to radio spectrum. The new section 32A of that Act ensures that Ofcom may also require certain persons to provide all such information as Ofcom considers necessary for the purpose of carrying out its radio spectrum functions, including to ascertain whether any wireless telegraphy licences have been breached.

Our general policy on information gathering

On 10 March 2005, we published a statement of our general policy with respect to the exercise of our information gathering powers and the uses to which we propose to put

information obtained under those powers for the purposes of section 145 of the 2003 Act and section 32 of the 2006 Act, respectively, (the “Policy Statement”).¹

The Policy Statement explains, in particular, that:

- We normally seek all the information that we need to investigate a potential breach of a condition of entitlement using our statutory powers under sections 135 and 136 of the 2003 Act.
- In the case of other types of information, we seek in general to request information first on an informal basis, without recourse to our statutory powers. However, we will consider using statutory powers if we believe it is appropriate to do so.
- Any demand for information under statutory powers will be sent in the form of a notice to the person from whom the information is being requested. The notice will contain details of the information required, the reasons for requesting that information and the purpose that the information is required for. It will also set out the date by which the information must be provided.
- Where timescales allow and it is appropriate to do so, we will send a draft of the information notice to the person holding the relevant information for comment. Following receipt of comments we will then confirm or amend the information request. We would not normally agree to any subsequent changes to the final request, including the deadline to the final request.
- As regards the uses to which we put the information obtained, our statutory demands for information will explain the purpose for which the information is obtained and, where we wish to use that information for a different purpose, we will notify the party concerned. Statistical information obtained under the 2006 Act will normally be used to inform and support the management of radio spectrum.

We have considered whether it is appropriate to revise the Policy Statement specifically to deal with these recent legislative changes. We have reached the view that our general policy as set out in that Statement remains appropriate in relation to these changes, particularly to ensure a consistent approach to information gathering. We will therefore apply the Policy Statement to these recent legislative changes accordingly.

This update on the application of the Policy Statement to the new powers under section 32A of the 2006 Act also represents a statement of policy for the purposes of section 34 of that Act. We will therefore have regard to the Policy Statement (to be read in light of this update) when exercising these powers. Where appropriate, we may deviate from this general policy and will set out our reasons for doing so. We may also revise this general policy from time to time.

Other notes

We are mindful that some stakeholders during the Government’s consultation on the implementation of the revised EU framework raised questions relating to information gathering for the purpose of identifying whether apparatus is suitable for shared use. As set out in our recent statement on implementing the revised EU Framework², we currently have no firm proposals to develop specific guidelines on infrastructure sharing. We currently

¹ Available at http://stakeholders.ofcom.org.uk/consultations/info_gathering/

² http://stakeholders.ofcom.org.uk/binaries/telecoms/inter/implementing-the-revised/short_statement.pdf

expect in the first instance to perform a facilitating role between the owner of the infrastructure and the provider that is seeking access. In circumstances where no commercial agreement can be reached in relation to a specific request for access, we will consider exercising our revised infrastructure sharing powers and therefore we may need to use our new information gathering powers for this purpose.

As regards the new powers under section 32A of the 2006 Act, we anticipate at present that one illustrative purpose for which they may be used concerns transmitter location information. Such information may assist us with our duties to consider the extent to which the electromagnetic spectrum is available for use, or further use, for wireless telegraphy throughout the UK by having more information to help our understanding of issues, such as congestion.

In considering disputes between communications providers under section 185 of the 2003 Act, Ofcom has separate information gathering powers under section 191 of the 2003 Act. Ofcom's general practice in exercising those powers is set out in separate guidelines as may apply from time to time.³

³ Today, Ofcom has published its guidelines for the handling of regulatory disputes explaining (among other things) that it will not formally consult on a draft information request.