

Ofcom consultation on changes to ECC code of practice


Introduction

1. CityFibre is concerned that Ofcom's proposals for amending the Ofcom Code of Practice ("the CoP") concerning agreements for access to private land under the electronic communications code ("the ECC") are not consistent with the changes put in place in the Product Security and Telecoms Infrastructure Act 2022 ("the PSTI Act"). The consultation which Ofcom issued on 12 September 2003¹ ("the Consultation") fails to recognise that the changes made by the PSTI Act were specifically designed to accelerate deployment of fixed telecoms infrastructure and takes no account of their impact on fixed line operators. As a result, the proposals which Ofcom is now putting forward will unwind the benefits of that Act in two ways:
 - the section on upgrading and sharing sets an expectation of commercial negotiations despite the fact that the PSTI Act specifically sought to remove the need for negotiations where fixed networks are making use of Ofcom's PIA remedy;
 - the proposals fail to take account of the importance of alternative dispute resolution ("ADR") under the provisions of the PSTI Act which were designed to speed up deployment of fibre networks, particularly in multiple dwelling units ("MDUs").
2. Whilst the CoP is voluntary, it acts as a guide to what represents best practice for operators and landlords. It is therefore important that Ofcom's revisions to the CoP are consistent with the legislative aims of the PSTI Act and do not create additional grounds for confusion, delay and poor practice in the exercise of the legal rights conferred on operators and landowners in the ECC.

Sharing and upgrading apparatus

3. The Consultation proposes to include a new section in the CoP relating to the sharing and upgrading of apparatus. It appears that Ofcom considers this is necessary for two reasons: (a) because this has been a contentious area between site providers and (b) as a result of sections 57 to 59 of the PSTI Act.¹ The Consultation goes on to set out entirely new sections of the CoP entitled "*Sharing and Upgrading of Overground Apparatus*" and "*Sharing and Upgrading of Underground Apparatus between Operators*" to give effect to its position.
4. The new sections of the CoP, whilst purporting to implement the provisions of the PSTI Act, fail to set out the automatic rights to share apparatus without the need for new wayleave agreements which that Act conferred on fixed operators. In doing so, the new sections of the

¹ https://www.ofcom.org.uk/data/assets/pdf_file/0034/267892/Consultation-Electronic-Communications-Code-of-practice.pdf



Alternative Dispute Resolution

11. Section 69 of the PSTI Act amends the ECC to make alternative dispute resolution (“ADR”) the preferred method for resolving deadlocked negotiations between operators and landowners over a wayleave negotiation as a low-cost and faster alternative to Tribunal proceedings.
12. Paragraph 20 of the ECC is amended by the PSTI Act to require an operator to inform a landowner of the availability of ADR and the consequences of refusing to engage in ADR and imposes an obligation on operators to consider the use of ADR. Paragraphs 32 and 33 of the ECC are amended in a similar way. Significantly, section 60(5) of the PSTI Act makes an important change to paragraph 96 of the ECC which requires the Tribunal to take account of “*any unreasonable refusal by a party to engage in alternative dispute resolution*” when awarding costs.
13. The PSTI Act is therefore clear on the importance of ADR and that this is to be encouraged, going so far as to incentivise its use through adverse costs orders. Ofcom’s drafting creates an expectation contrary to Government’s intention. In the section of the draft CoP entitled “*Resolving Disputes*”, at paragraph A2.91, Ofcom has inserted a provision that ADR ‘may not always be appropriate’ and that ‘there may be occasions, though, where either party may need to serve legal notices, while still continuing to pursue an informal resolution’.
14. This language suggests that there may be circumstances in which ADR will not be available as a means to resolve discussions. It is not clear why Ofcom included these qualifications which run counter to the objectives of the PSTI Act. Ofcom should delete paragraph A2.91 of the revised CoP to avoid any misunderstanding of the importance of ADR in proceedings under the ECC.³

Other aspects of the draft CoP

15. A number of other changes in the draft CoP go beyond what is necessary to update the CoP to take into account the legislative changes in the PSTI Act and are unhelpful in light of the Government’s position.
 16. **Definition of Site Provider:** The draft suggests substituting the undefined term “Site Provider” for the language used in the Act, Landowners and Occupiers. CityFibre does not consider that this change is necessary for the purpose of reflecting the terms of the legislation and to the extent that it creates confusion between the definitions adopted in legislation and the CoP it is unhelpful.
 17. **Professional fees:** Ofcom is proposing to include a new paragraph 1.16 in the CoP which would require operators to state at the outset of any Code agreement negotiations their policy on fees. It is entirely unclear as to what the rationale for such a change is. Operators will take different approaches according to the needs of a particular negotiation and are therefore unlikely to have a set position. Much will depend upon the value which an operator’s attributes to the exercise of ECC rights on a given piece of land. In any event, requiring anyone participating in a negotiation to disclose their “hand” at the outset is unjustifiable and Ofcom should not make this change to the CoP.
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18. **Electromagnetic Field (“EMF”) exposure:** The revised CoP must make clear that the provisions related to EMF exposure apply solely to deployment of wireless technologies which are those having technical characteristics likely to lead to concerns about EMF exposure. Those deploying fixed broadband infrastructure where concerns about EMF exposure are non-existent should not be faced with an additional regulatory burden and Ofcom should make this clear in the final CoP.