

OFCOM CONSULTATION - ELECTRONIC COMMUNICATIONS CODE

DIGITAL ECONOMY BILL: PROPOSED CODE OF PRACTICE, STANDARD TERMS OF AGREEMENT AND STANDARD NOTICES

The Electronic Communications Code as amended by the Digital Economy Act 2017 (ECC) requires Ofcom to produce:

- a code of practice to accompany the changes to the ECC;
- a number of template notices which must be used by Code operators and site providers/occupiers (not covered in this note); and
- standard terms which may (but need not) be used by Code operators and site providers or occupiers when negotiating agreements to confer Code rights.

Clarke Willmott LLP is a firm of solicitors that acts exclusively for site providers in relation to the provision of and disputes regarding agreements for the installation of telecommunications equipment. We are responding to the Ofcom Consultation on the Electronic Communications Code and in particular on the proposed standard terms of agreement between Code operators and site providers.

Response to Consultation

Ofcom has decided to produce for consultation just one set of standard terms that may be used (there is no compulsion) and it is not in the form of a tenancy. It is an agreement granting code rights as defined in the ECC and might best be described as a personal, contractual right, although as the Code permits, other operators would be able to share the site and the agreement would be assignable to another party.

As a matter of common law, it is not possible to assign the burden of an agreement but paragraph 15(3) of the ECC provides that if an operator assigns a code agreement the assignee is from the date of the assignment bound by its terms.

There are a lot of gaps in the standard agreement for use at a green field site and whilst Ofcom decided to produce only one set of standard terms, it falls even further short of what may be needed for a rooftop agreement granting code rights in a multi-let building.

Some of the items to note about the standard terms include:

- 1.1 There is no distinction between the code rights and no limits on their use e.g. how the operator might connect to a power supply.
- 1.2 The agreement allows assignment without prior consent in accordance with part 3 of the ECC but does not include provision for the site provider to seek an AGA which is permitted by paragraph 16(6) – 16(9) of the ECC. Ofcom may wish to consider producing a standard form AGA with the standard form agreement.
- 1.3 The agreement does not make clear whether the definition of "land" is simply the area on which the apparatus will be sited or a larger area. If the latter then the restrictions on the site provider are potentially onerous. It is our experience that (particularly with greenfield sites)

site providers enter into an agreement in relation to a larger area of land/rooftop upon which the operator will install its equipment.

- 1.4 The indemnity for third party claims contained at clause 8 is unlikely to be suitable for both greenfield and rooftop sites. In particular the value of the indemnity will differ – in our experience the indemnity in relation to rooftop sites should be much greater than in relation to greenfield sites.
 - 1.5 The agreement contains potential at clause 9.3 for the site provider to be liable to the operator. This is unusual and we would not expect to see this in current telecommunications leases/agreements. We would advise our clients against this
 - 1.6 The agreement contains terms for bringing the agreement to an end when the operator is in default. This is entirely superficial as a minimum of 18 months notice must be given under the ECC in all cases.
 - 1.7 There is no provision for rent review. This should be included.
 - 1.8 There is no requirement for the operator to:
 - 1.8.1 comply with any title requirements;
 - 1.8.2 pay costs if the operator is in default, for example legal and surveyors costs;
 - 1.8.3 seek consent to any signage;
 - 1.8.4 keep the site in good repair or clean and tidy;
 - 1.8.5 (on vacating the site) leave the site in accordance with the terms of the agreement (such as they are);
 - 1.8.6 prevent encroachment or acquisition of rights;
 - 1.8.7 operate the equipment in accordance with ICNIRP requirements;
 - 1.8.8 deal with interference with pre-existing equipment;
 - 1.8.9 grant reservations or access to the site provider;
 - 1.8.10 contain an entire agreement clause;
 - 1.8.11 include a no-warranty provision as to use to protect the site provider;
 - 1.8.12 make any contribution to shared facilities;
 - 1.8.13 seek compliance with landlord's insurer's requirements.
- We would expect any agreement to include these provisions.
- 1.9 In relation to rooftop leases, there are no provisions to deal with out of hours access, car parking on site, repair of the roof etc. Such detail must be recorded in the agreement – rooftop

access usually requires the provision of keys or dealing with security arrangements which can be at a significant cost to the site provider, particularly at short notice.

- 1.10 The agreement proposes to prohibit court proceedings unless mediation has been attempted. This seems somewhat unrealistic in circumstances where currently the County Court has exclusive jurisdiction to deal with ECC matters (until a specialist tribunal is set up

In relation to the proposed prescribed notices, we make the following points:

- 1 It would be helpful if *all* of the prescribed notices had a clear section at the top of each notice which sets out who the notice is from and who it is being sent to (and these addresses being addresses for service for future notices), i.e. in the format:-

To: Operator/Landowner (name and co.no.) as appropriate

Of: [address] Please quote formal Address for Service

From: Operator/Landowner (name and co.no.) as appropriate

Of: [address] Please quote formal Address for Service

Whilst some of the notices require this information to be provided in the main body of the notice, some do not require it at all and do not set out the sender's details, which is unhelpful where notices require a counter-notice or response to be served.

The EEC sets out statutory provisions for where notices should be served but Para 91 does refer to the "proper address of a person" being the address that was given to the other party for service. Often agreements refer to registered office addresses (which may be fine in some instances and thus will be the correct address to use) but these often change later down the line from that originally stated in an agreement and for landowners they may not have a registered office address at all, so it would be beneficial for the sender's name and address for service to be included in the prescribed notices.

For example, the Notice requiring removal of Code Apparatus (initial request) requires the Operator to respond within 28 days but it is not clear where the Operator should reply to. This proposed format above would also enable solicitors to put their address for service if necessary.

- 2 In relation to the proposed notice seeking agreement to the conferral of rights under the ECC, this notice is very lengthy and somewhat confusing. It aims to cover both rights being conferred on a new site *and* an Operator's ability to seek to have rights conferred in respect of an existing site where the contractual term has expired and either a permanent or temporary agreement is required to safeguard the Operator's network or system.

Separate notices for these different circumstances are likely to be clearer, i.e. a separate notice seeking agreement to the confer rights on a new site and a separate notice seeking agreement to the confer rights on an existing site and in each case for it to be made clear whether the rights sought are permanent or temporary.

Alternatively, at the very least the draft Notice should clearly label with separate headings and/or explanatory notes the difference between the two paragraphs marked paragraph 2 and also the difference with temporary rights under paragraph 3 of the Notice.

- 3 The notice seeking agreement to the conferral of rights under the ECC permits the Operator to seek additional rights to which the operator is not entitled under the ECC (referred to in paragraph 8). Similarly, the notice seeking agreement to the conferral of interim code rights also permits the operator to seek additional rights which are not Code Rights.

It would be helpful in these notices to make it clear that the site provider cannot be compelled by the Court/Tribunal to have those additional rights conferred upon it and should the site provider wish to agree to these additional rights that is entirely at the site provider's discretion.

Clarke Willmott LLP

2 June 2017