

Response to the Consultation on the Electronic Communications Code:

Digital Economy Bill

Proposed Code of Practice, Standard Terms of Agreement and Standard Notices

This is a response on behalf of CMS Cameron McKenna Nabarro Olswang to the proposed Code of Practice (the Code of Practice) to accompany the new Electronic Communications Code (the New Code).

We are very pleased to have the opportunity to comment on the Code of Practice. As a firm, we represent and advise telecoms operators, landlords and landowners on telecoms issues, which is a growing part of our practice.

Code of practice

Q: Do you have any comments in relation to the scope or drafting of the Code of Practice as set out in Annexes 4 and 5:

Generally, we are very supportive of the Code of Practice. We agree that it is important to set out expectations for the conduct of the parties under the New Code. We also endorse the aim of the New Code that parties should treat each other professionally and with respect when dealing with each other under the New Code.

We particularly endorse the idea that it is central to the New Code that the parties maintain good communication, in order to facilitate good working relationships. In the past, our clients have found it difficult to establish and maintain effective lines of communication.

Having said that, we do consider that the Code of Practice is drafted more with the interests of operators in mind, rather than being balanced towards the interests of both landowners/landlords and operators.

We also feel that the inability to contract out (of both the Code of Practice and the New Code) will impact adversely on operators who need to get onto sites and increase network coverage.

Our view is that, as currently drafted, the procedure in the New Code for securing possession from an operator is long winded and could require two separate court orders: one as confirmation the Code agreement has ended and one for the actual removal of the equipment. Based on our experience, we consider that this process may take as long as 2 – 2.5 years. It may therefore be that case that, where a site is earmarked for redevelopment, landowners will be advised to resist allowing operators on site. Certainty is the key here. If a procedure can be put place (perhaps by pre-agreed court orders and agreements to surrender) to give the landlord the absolute ability to recover possession at the end of the term, landowners may be more minded to allow short term occupation (2-5 years) of sites that are earmarked for redevelopment.

These are our comments on specific paragraphs in the Consultation document and the Code of Practice:

Para 2.16 of the Introduction to the consultation document

We note that the Code of Practice is non-binding, but that the court may take account of compliance when assessing the parties' conduct and awarding costs. However, there is no guidance on how the court will take the Code of Practice into account when assessing conduct and costs. Unlike the Dilapidations Protocol, the Code of Practice is not incorporated into the Civil Procedure Rules (CPR) and our view is that it should be incorporated into the CPR to help the court decide the questions of conduct and costs and to encourage parties to abide by the Code of Practice.

Para 4.11 of the Code of Practice

It seems to us that neither the Code of Practice nor the New Code have considered the impact and needs of 5G microcells, which is the technology that the operators are currently working towards.

5G technology is much smaller and more mobile than the large mast sites which are currently in use. Our view is that the Code of Practice and the New Code should consider this technology.

Existing Code rights may not be suitable for a 5G microcell which is, for example, fixed to the underside of a bench in an outdoor common part of a development. We question whether security of tenure is needed for this technology, and whether a more flexible regime would be more suitable.

Para 4.13 of the Code of Practice

We consider that it would be helpful for operators to provide a point of contact or dedicated team for landowners to contact for the escalation of redevelopment/decommissioning issues.

Para 4.14 of the Code of Practice

We suggest that landowner could issue a rent authority letter, which would consider that it would be helpful for operators to provide a point of contact or dedicated team for landowners to contact for the escalation of redevelopment/decommissioning issues.

Para 4.23 of the Code of Practice

We support the proposal that the landowner should provide the operator with relevant information about the proposed site. However, it would be helpful if there was a provision for both parties to share the cost of the landlord providing this information.

Para 4.46-4.48 of the Code of Practice

We support the fact that the Code of Practice is addressing the issue of decommissioning sites which are no longer required.

In keeping with the overall objective of improving communication between the parties, we suggest that there should be an obligation for operators to inform landlords/landowners when they have decommissioned a site or when a site is no longer required.

Para 4.51 of the Code of Practice

The operator should not just allow the repair to be completed, but should also allow remedial repairs to be carried out without delay.

If an 18 month notice is served by a landowner it would be helpful if the operator is given a deadline to respond or engage with the process. The Code should try to prevent a situation where 18 months pass and it takes court proceedings to force an operator to engage.

With regard to redevelopment by the landowner, we would welcome some more wording committing the operator to respecting and acknowledging the landowner's right to use its own land (for example, redevelopment, construction, carrying out works).

We suggest that site visits could also be used at an early stage, to encourage the operator to explore practical solutions where landowners want to redevelop? Our experience is that getting the operator to engage in the process early on is difficult. If the operator sees the redevelopment plans and visits site early then it can instruct the relevant teams to explore practical solutions to keep coverage in place whilst redevelopment takes place – for example by moving smaller equipment and masts to scaffold or a nearby temporary site.

Standard terms

Q: Do you have any comments on the scope or drafting of the standard terms, as set out in Annex 6?

We consider that it is very helpful that OFCOM's consultation document includes draft Standard Terms for a Code Agreement ("Agreement").

While adoption of the Agreement is voluntary and the consultation acknowledges that it is a starting point

for negotiations, if the market considers that it achieves an acceptable balance between the landowner and the operator, it is likely to be used frequently.

Installation of electronic communications apparatus is often delayed by negotiations over operators' particular form of wayleave which causes frustration and has cost implications.

If operators are prepared to use the Agreement with or without variations, landowners and operators will become more familiar with the Agreement and this will hopefully speed up the installation process.

For this to succeed, the operators need to support the form of the Agreement and we assume that the draftsmen discussed its form with the operators. This very consultation will also elicit feedback from them.

We consider it very helpful that the Agreement has been designed for the New Code. There has been much discussion in the industry about how the drafting of wayleaves should take account of the New Code and especially its wide-ranging anti-avoidance provisions. It is very useful to see an example of an approach that the draftsmen consider does not fall foul of the anti-avoidance provisions.

We note the reference at paragraph 3.9 of the consultation to the City of London's Digital Infrastructure Standardised Wayleave. This document was the product of an extensive consultation and negotiations between property owners and operators. Whilst it was appreciated that particular forms of wayleave were appropriate for certain situations, there was wide-ranging support for standardising the document for the same reasons mentioned above in relation to the Agreement. Again its adoption is voluntary.

We believe that the City's standard and OFCOM's document seek to deal with different situations and are therefore not competitors. The City's document relates to a fixed line Broadband installation in a building. The Agreement is a wayleave for the installation of apparatus in land. This is perhaps reflected in a more straightforward set of provisions in the Agreement.

If both agreements can improve the efficiency of the installation of electronic communications apparatus, both will be welcome in the industry.

Specific observations on the draft Standard Terms for a Code Agreement

In terms of the form of the Agreement itself, we note that the draft is a starting point, but we have the following observations.

There is no mention of a tenant being party and this may be a helpful addition since this is regularly encountered.

We note that there are separate definitions of "Apparatus" and "Electronic Communications Apparatus" and that may confuse users of the document.

We consider that there may be objection to clause 2.1(h) because it generally allows for interference with or obstruction of means of access to the relevant land even if there is no apparatus there. It would be more balanced to add "where reasonably required".

It may be helpful for the Operator to be obliged to identifiably label the apparatus with the Operator's name.

In relation to clause 4.1(j) and the Operator's obligation to maintain public liability insurance, we note that there is no minimum amount of cover. Usually, the minimum amount of cover will be the same as any cap on liability under the indemnity provision (see clause 8.1).

With regard to the Grantor's obligations, operators will often want an assurance that the grantor has obtained the consent of a superior landlord, mortgagee or other required person. Alternatively, there may be a confirmation that the grantor does not require the consent of any person to enter into the agreement.

In the Indemnity clause 8, a choice is given between a limit of the relevant amount per annum or alternatively “in aggregate”. There may be some resistance from grantors to the in aggregate wording and we wonder whether it could say “in aggregate in any insurance year in respect of a claim etc”. We also would suggest that the Grantor should use reasonable endeavours to mitigate the liabilities for which it seeks indemnity.

We note the additional limits on liability of the Operator and Grantor in clauses 9.2 and 9.3 respectively and wonder whether there is an industry demand for these additional liability limits beyond the indemnity provision. If not, they may lead to delays in negotiating the Agreement.

With the termination provisions at clause 10, we note that the contractual arrangements are without prejudice to the Code provisions for the continuation of the Agreement. In note 29, the reference should be to the continuation of the agreement under paragraph 30 of the New Code. The grantor’s right to give 18 months’ notice to terminate is under paragraph 31 of the New Code. In terms of the termination provision itself, there could be additional termination events of the Operator ceasing to provide the electronic communications service to which the Agreement relates and the Operator ceasing to be a person to whom the New Code applies. Should there be a provision for what happens if the Operator abandons the apparatus?

In relation to the Notices provision clause 15, we wonder whether there should be a statement that the notice should be in any form required by the New Code. In clause 15.4, the reference should be to paragraph 91(2)(a) of the New Code.

We note the mediation provisions in clause 16. In addition, if mediation does not resolve the dispute, there could be arbitration provisions for disputes other than those related to the New Code.

Existing wayleave and Code agreements usually contain “lift and shift provisions” by which the grantor can request the operator to relocate the apparatus to another part of the grantor’s land. While such provisions took advantage of paragraph 20 of the Code in the Telecommunications Act 1984 (as amended), we wonder whether there is scope to include a lift and shift provision in the Agreement. The New Code does not specifically address lift and shift provisions, but they are regarded as very important by landowners to cater for example for development situations. Perhaps a lift and shift provision could be included, which would apply provided it is not in breach of the New Code.

It may be sensible to include a VAT provision, that payments are exclusive of VAT and there is an obligation to pay the VAT chargeable.

In Schedule 3, the reference should be to Schedule B of Annex 5 of the ECC Code of Practice.”

Template Notices

Q: Do you agree that Ofcom has identified all of the notices it is required to prepare under paragraph 89 of the New Code?

We have not identified any additional notices which we think Ofcom should have prepared. However, please see our comments below on the para 19(2) / para 26(1) notice.

Q: Do you have any comments on the scope or drafting of these notices as set out in Annex 7?

Most of the notices have the wrong paragraph numbering now that the New Code is in its final form. Presumably, this will be corrected before the Code of Practice is published.

We recommend that all prescribed notices have a section at the top of each notice setting out who the notice is from and who the notice is being sent to, together with addresses for service for future notices, or responses. A good example of where this information is missing is the para 38(1) notice (now 39(1)) which is a notice requesting disclosure regarding to code apparatus. The notice requires an operator to

respond to the landowner that has served the notice but the current draft does not state an address to send the response to.

The notice seeking agreement to the conferral of Code rights para 19(2) / para 26(1) (now re-numbered para 20(2) and 27(1)) is confusing as drafted. The notice deals with both Code rights being conferred on a new site and an operator's ability to seek to have Code rights conferred in respect of an existing site where the contractual term has ended and either a permanent or temporary agreement is required to safeguard the operator's network or system. It would be much clearer to have a separate notice for each scenario: one for Code rights on new sites and one for Code rights on existing sites and in each case for the operator to make clear whether the rights sought are temporary or permanent.

The para 19(2) / para 26(1) notice also allows the operator to seek additional rights that are NOT Code rights - see para 8 of the notice). The notice should make clear that the landowner cannot be compelled by a court or tribunal to have those additional rights conferred upon it and that agreement of those additional rights is entirely at the landowner's discretion. As drafted, that is not clear at all and someone with limited knowledge of the Code may think that such additional rights must be granted. The para 25(3) (now 271(1)) notice has a similar provision that needs to be clarified.

We are also concerned about the 28 day deadline in clause 9 of the para 19(2) / para 26(1) notice. The 28 days seems a short deadline for a landlord to comply, bearing in mind the consequences of missing the deadline are that the operator will be entitled to apply to court for an order if the deadline is missed.

The paragraph 38(1) notice specifies a deadline of three months for an operator to provide disclosure about whether apparatus is still on the land. We query where the three month deadline originated and whether this is a statutory deadline. We anticipate that this notice will be served when the landowner is preparing to sell the land and we would therefore recommend that the notice should be binding on successors in title.

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31 May 2017