



Ofcom consultation on the implementation of the Electronic Communications Code

Part 1: Proposed Code of Practice

Response from Mobile UK

Non-confidential

1. Mobile UK welcomes the opportunity to respond to Ofcom's consultation on the Code of Practice which Ofcom is required to publish in relation to the operation of the Electronic Communications Code (ECC).
2. The ECC has been reformed by the Government in recognition of the central importance that electronic communications networks now have for the social and economic welfare of the United Kingdom and the need for considerable further investment by providers to deliver the geographic footprint and capacity to meet rising demand. A reformed ECC is intended to promote such investment.
3. The accompanying Code of Practice is designed first and foremost to encourage behaviours among all the relevant stakeholders that will allow the parties to agree on a range of issues relating to the occupation of a site where apparatus is to be installed. The Code of Practice cannot place obligations on the parties (landowner or occupier) that go beyond what the ECC requires.
4. The Draft Code, under the auspices of Ofcom, was created by a broad range of specialists in the field that balanced the interests of the relevant stakeholders – remembering always that the priority is to help improve connectivity in the UK, both in installing more apparatus but also keeping services in continuous operation. The outcome of these discussions are broadly balanced and proportionate and, in its current form, the Code of Practice will do much to ease the task of network rollout, upgrade and maintenance, whilst balancing the reasonable needs and expectations of Landowners.
5. There are a number of points of detail that Mobile UK wishes to emphasise briefly, as part of this response.

Language

6. A key objective in drafting the Code of Practice was to use language that was non-technical and accessible to a broad range of people. Furthermore, it was also important that the

document was well-balanced in tone – emphasising the importance of improving connectivity in the UK, in line with consumer (both domestic and business) expectations, while signalling points of detail for non-specialists, for example the advisability of seeking professional advice, where appropriate.

7. By and large, Mobile UK believes the draft Code achieves that clarity of language and balance in tone. We strongly encourage Ofcom to retain these aspects in the final version.
8. **Moreover, Mobile UK is acutely aware that an apparently innocuous request for change in wording can have a significant and material impact upon requirements. Were OFCOM minded to effect any changes, we would request that the implications of any changes are discussed within the drafting group before any changes are incorporated.**

Financial arrangements

9. The Code of Practice does not deal with the financial arrangements between the respective parties. It highlights, at relevant points, financial arrangements that have to be settled – for example: professional fees, the costs of relocating equipment while a landowner carries out repairs to their own property and recovery of reasonable costs for supervision. But the Code does not seek to steer the parties one way or the other as to who should cover such costs.
10. This is the correct approach, as there can be many variables and contexts in which such agreements come about. It is beyond the remit of the Code of Practice to pre-determine such matters.
11. The Code of Practice must not create a perception that there are numerous opportunities to generate fees which can be recovered from Operators. There currently exist situations where Landlords' Agents and Solicitors seek considerable fee costs for documenting what should be fairly straightforward and uncontentious matters.

Notifications of sharing

12. Subject to any requirements to obtain consents that have been negotiated between the parties, the ECC provides that code operators can 'share' sites – i.e. place the physical equipment of other providers on a given site.
13. The Code of Practice could be clearer by emphasising that, in this context, sharing means placing physical apparatus on the site in question.
14. The ECC does not require it, but the Code of Practice nevertheless states that occupiers should notify landowners of such sharing, so that landowners can be aware, for security purposes, who is entitled to be on the site. This we consider to be a reasonable measure but must emphasise that this goes beyond the requirements set out in the Code. In agreeing to such notification it should remain clear that this is was reflective of a security requirement of the site provider wanting to know who was on site and has no wider implication.

Notification of upgrades

15. During the initial stakeholder drafting, there was some discussion as to whether upgrades to apparatus should be notified to landowners in advance of installation, so that they can assess whether there is any adverse visual impact or additional burden on them. In the end, the drafting group, assessing the overall balance of the rights and obligations falling on the respective parties, came to a consensus against such an approach.
16. This was the right outcome. First, the ECC has avoided requiring prior notification, so that network improvement can occur without unnecessary delay and bureaucracy. The great majority of network upgrades have no or minimal impact on the appearance of a site, nor place any additional burden on the landowner, and so it is also perfectly logical that there is no notification requirement unless there is visual impact or extra burden on landlords (for example, if the landowner's power supply has to be upgraded). In such an event, it is likely to be very obvious to both parties as to the likely impact of an upgrade and the appropriate consents can be obtained.
17. Reversing the burden of proof, as it were, would have a negative effect on the speed and efficiency with which code operators can deploy network and would not be proportionate or in line with the ECC. Moreover, it is imperative that the Code of Practice is not used as a mechanism that creates a broader burden and incumbrance upon the Operators than the Code itself provides for.

Review

18. Mobile UK is confident that, as presented, the Code of Practice will make a good contribution to shaping the behaviours of all the parties in the network deployment value chain.
19. The Government has reviewed the ECC for a number of reasons, such as the opacity of the current version, the need to make certain policy changes but most of all in recognition of the greatly increased reliance that customers place on electronic communications networks since the ECC was first published and the need for further investment by providers.
20. Mobile UK supports the version that Ofcom has published for consultation. It represents a consensus among a broad church of stakeholders who have long experience in the communications sector. Should Ofcom consider any further changes, such changes should be discussed among the stakeholder group that helped with the drafting before any document is finalised. Furthermore, in such a dynamic sector, it will be necessary for Ofcom to keep the Code of Practice under review, to reflect any emerging or unintended consequences arising. Mobile UK stands ready to participate in such a process in due course.

Part 2: Draft Standard Terms

Summary

21. In outline, Mobile UK's members universally agree that, rather than provide a complete pro-forma agreement, a better approach to discharging its obligations under section 103(2) of the Digital Economy Act would be to publish some guiding principles and a pro-forma of the key terms that should be covered in agreements, but without pre-judging the outcome of the negotiations between the parties.
22. Mobile UK recognises that there is no compulsion to use the agreement that Ofcom has provided. However, the variety of installations in which a mobile operator is involved are so many and varied that any complete standard agreement is very likely to be unsuitable on very many occasions. Thus, if the landowner were to use a standard agreement as a starting point, it is more likely to delay the process of coming to agreement, rather than speed it up, which is one of the main points of having a standard agreement in the first place.

Specific comments on the draft standard terms

23. With respect to the draft standard terms provided, Mobile UK would like to make some specific observations.
24. **The term of the agreement:** in its current form, the draft standard terms agreement is set in perpetuity. We do not believe that landowners will favour this approach and nor do we believe that it is helpful for occupiers either to dispense with an initial term.
25. The problem that could arise without an initial minimum term is that a landowner could decide to redevelop its land very early in the contract and, in a worse case scenario, an operator would be faced with an 18 month period in which to amortise its investment in a new site. This adds considerably to the risk of investing in a new site and thus could work counter to the Government's objective of encouraging investment in mobile infrastructure
26. There are a few other areas where the draft terms could be very much improved:
 - a) **Definition of land** - it is not clear where there is a separation between land occupied by the Operator and the land which is retained by the landowner but not occupied by the operator.

This would be problematic where an Operator would need, for health and safety and other reasons, to fence the site off and control rights of access by third parties, including the landowner, and any other occupiers of the adjoining land.
 - b) **Access routes: (Clause 2.1(f))** confers a general right to enter the landowner's land; it does not specify nor provide for agreement of any particular access route. This is unusual, and could cause problems if the landowner wants to restrict (as we would expect) those areas which the Operator can access. Certainty is also helpful for the Operator. On Greenfield sites, in particular, an Operator would usually expect a specific access route to be stipulated.
 - c) **Connection to a power supply: (Clause 2.1(g))** is a general right to connect the Apparatus to a power supply. It does not differentiate between an independent supply and the right for the Operator to tap

into the landowner's supply, nor are there any provisions as to how any shared supply might be paid for. This will be problematic on those sites where a shared supply is used.

Back-up power: We would further expect a provision relating to the right to use a backup power generator and the right to lay communication links.

- d) **Notice before access: (Clause 4.1(a))** introduces a seven day notice period for access which is neither provided for in the Electronic Communications Code nor the Code of Practice.

Practical arrangements for access to a Site should be agreed consensually between the parties and the terms should not provide for a 7 day notice period as the default position.

- e) **Notice before action by the landowner: Clause 5.1(c)** allows the landowner to give '*reasonable prior written notice to the Operator of any action it intends to take that would or might affect the continuous operation of the Apparatus*', and this includes interrupting the power supply.

Mobile UK is very concerned about the freedom that this clause potentially confers on the landowner to disrupt continuous service to the end user.

The clause must contain some controls or caveats to protect the Operator's service.

- f) **Rights of termination** - there is no separate termination provision which could be triggered with immediate effect if the Operator lost their operating licence or if the building was destroyed or damaged to such an extent that the site could no longer operate.