

Openreach response to Ofcom's consultation on:

*“Electronic Communications Code  
Digital Economy Bill: Proposed Code of Practice,  
Standard Terms of Agreement and Standard Notices”*

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## Foreword

On 24 March 2017, Ofcom published its consultation on the “Electronic Communications Code Digital Economy Bill: Proposed Code of Practice, Standard Terms of Agreement and Standard Notices”. This submission is provided by Openreach, a line of business within British Telecommunications plc (“BT”), in response to Ofcom’s proposals.

# 1 **Executive Summary**

1. Openreach welcomes the opportunity to respond to the Electronic Communications Code; Proposed Code of Practice, Standard Terms of Agreement and Standard Notices consultation. We support the aims of the document to promote network connectivity, expand coverage and take into account the legitimate interests of all other parties.

## 2 Main Response

### Overview

2. Openreach is committed to rolling-out superfast Broadband as effectively as possible. We believe that the new Electronic Communications Code (ECC) will be a positive step forward in supporting the deployment, upgrading, sharing and maintenance of apparatus which provides digital infrastructure, if it results in quicker and cost-effective agreements between Operators and site providers. We therefore welcomed the Code of Practice and Standard Terms provisions of the new ECC as we saw them as a way of encouraging greater dialogue and certainty.
3. The New Code will provide modern regulation to fully support the rollout of digital communications infrastructure. Significant changes have taken place within the communication industry since the original code was introduced in 1984, and updated in 2003. The New Code will take in to account the development of new technologies and increased demand for digital services which should pave the way for future technological evolution. We plan to use these new rights appropriately and responsibly, whilst recognising that positive and robust relationships with site providers will remain essential to the effective functioning and expansion of our network. However, there are a number of changes in these draft document(s), particularly the Standard terms, that we would like you to take account of and have set these out in our response.
4. Whilst the consultation document suggests that Ofcom may be able to draw powers from the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 and the Communications Act 2003, it does not provide a level of detail that provides us with full confidence that Ofcom is both able and willing to intervene in this market if necessary. We would therefore welcome a more detailed explanation as to when Ofcom would intervene and the process it would follow in assessing concerns. We believe this is a necessary step in ensuring commercial negotiations have a suitably robust regulatory backstop.
5. We set out our responses to each of Ofcom's questions below in Section 3.

### 3 Responses to questions in Ofcom’s consultation document: “*Electronic Communications Code Digital Economy Bill: Proposed Code of Practice, Standard Terms of Agreement and Standard Notices*”

#### Code of Practice

Question 1: 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?

6. Openreach largely supports the draft Code of Practice and views it as a helpful document which will promote effective Code Operator-landowner relationships and sets out best practice for the behaviour of both sides before and during agreements.
7. We support the voluntary nature of the Code of Practice and believe an additional section should be added to the introduction making this status clear. We think it would be helpful to confirm that the Code of Practice is non-binding and voluntary and does not form part of any contractual arrangement between Operators and landowners, although tribunals may take into account parties’ compliance when assessing cases brought before them.
8. We also note the fact that this Code of Practice was the product of extensive and successful discussion and negotiation between a large number of stakeholders, including Operators, infrastructure providers and landowners. We would therefore argue that no further major changes are either necessary or desirable – it must be a document that can command the support of all sides and the negotiation process and outcome demonstrated this to be the case.
9. We also believe that stakeholders should review the effectiveness of this Code of Practice and think it will be helpful for Ofcom to facilitate such a review.

Question 2. Do you have any comments on the scope or drafting of the standard terms, as set out in Annex 6?

10. Although Ofcom has produced a draft set of standard terms, we believe that these fail to capture all of the issues we encounter in our day to day negotiations with landowners. Our main point is that a single set of standard terms is likely to have very limited use in practice, principally due to the very different requirements for fixed and mobile sites, and the requirements of individual sites themselves. Indeed, it may well be counter-productive and lengthen the negotiation timeframe as our default position will be to use our own standard wayleaves.
11. We also have a number of major concerns, set out below, with the drafting of the standard terms in the consultation document itself, and believe they need to be changed before we will be able to use this agreement.

#### **Clauses Requiring Amendments**

- *3 PAYMENT The Code Operator agrees that it will pay to the Grantor, in respect of this Agreement, the sum of [Insert amount] pounds (£[Insert amount]) [per annum].*

- Openreach View: In some cases payment consideration will not be appropriate such as new sites, Landlords or for own / Tenants service. Perhaps consider rewording to:
  - *The Code Operator may agree that it will pay to the Grantor, in respect of this Agreement, the sum of [Insert amount] pounds [Lump Sum] or (£[Insert amount]) [per annum].*
- (Note – under certain circumstances no payment will be applicable for example own service, Landlord tenant service, new housing sites and will be removed by the Operator as applicable.)***
- 10.2 The Grantor may terminate this Agreement by giving the Code Operator thirty (30) days' notice in writing if:
  - Openreach View: This is slightly misleading. It would be advisable to have a notes section on this clause to explain the rights of both the grantor and the operator under para 29, 30 & 31 so that there is no confusion. Simply cancelling this agreement the grantor is only notifying the Operator but it is not a formal notice to remove their equipment. It should also be made clear that the agreement T&C are still applicable until the end of the 18 months or as directed by a court order.
  - 10.3 The Code Operator may terminate this Agreement by giving the Grantor [days] notice in writing.
  - Openreach View: within our organisation 3 months' notice would be sufficient.
  - 15.2. *Any such notice will be deemed to have been given if it is personally delivered or sent by registered, recorded or first class post, and (in each case) addressed*
  - Openreach View: it would be appropriate to make a clear distinction between a notification to terminate the wayleave agreement, which needs to be done formally and in line with the Code and where the Operator is "informing" the grantor of key information or changes e.g. emergencies only a phone call or email communication would be acceptable.
  - Perhaps include in section 15 - a new comment 15.5 "where access is urgently required by the operator such notice maybe either be in email or phone call"

Question 3. Do you agree that Ofcom has identified all of the notices it is required to prepare under paragraph 89 of the New Code?

12. Not all notices have been identified at this stage. No Standard notice has been provided for Operator's counter-notice under para 31(3):
- (3) *The counter-notice must state –*
- (a) *that the operator does not want the existing code agreement to come to an end,*
  - (b) *that the operator wants the site provider to agree to confer or be otherwise bound by the existing code right on new terms, or*
  - (c) *that the operator wants the site provider to agree to confer or be otherwise bound by a new code right in place of the existing code right.*
13. There is a formal notice under para 73(b) to affix a notice to overhead apparatus and there are 3 objection forms Grantors can use to object under 77(1):

- a) • Tidal waters objection
- b) • Objection to a line
- c) • Objection to apparatus

This is new in the past objections were not in a formal OFCOM format. However although there is a formal notice to object within the first 12 months and a right to get the matter upheld by a court there does not appear to be any formal counter notice for the Operator to reply. Is this correct?

Question 4. Do you have any comments on the scope or drafting of these notices as set out in Annex 7?

14. On the whole the scope and drafting is fine, however we would suggest some amendments to the notice "REQUIRING A CHANGE TO THE TERMS OF AN AGREEMENT UNDER THE ELECTRONIC COMMUNICATIONS CODE" Paragraph 32(1) of Part 5.

Clause 2 states; The purpose of this notice is to require a change to the terms of an agreement between you, [Insert name of site provider] and [us], [Insert name of Code operator] under Part 2 of the Code. We are seeking your agreement to this change. However, as either party can use para 32. Could the wording to be amended so as not to limit "you" and "us".

Clause 11 States: *If you agree to the change requested above, we will send you [a modified version of the Agreement reflecting the terms set out in this notice / a new agreement reflecting the terms set out in Annex [X] together with a notice of confirmation that you agree to termination of the Agreement]. We will ask you to sign [this/these documents]. You would be entitled to seek independent legal advice in relation to [this/these] document[s]. Can we suggest that this final sentence is removed and this is covered off in clause 10 of this notice?*

15. It would be helpful if all the prescribed notices had a clear section at the top stating what the notice is, as well as being numbered and captured by documentation control which will ensure that any future amendments are easily identified.