

02 June 2017

Electronic Communications Code – Consultation

Introduction

The Royal Institution of Chartered Surveyors (RICS) is pleased to respond to the above consultation. RICS is the leading organisation of its kind in the world for professionals in property, construction, land and related environmental issues. We accredit over 118,000 professionals (FRICS, MRICS, AssocRICS and trainees) and any individual or firm registered with RICS is subject to our quality assurance.

We regulate and promote the work of these property professionals throughout 146 countries and are governed by a Royal Charter, approved by Parliament and monitored by the Privy Council, which requires us to act in the wider public interest.

Since 1868, RICS has been committed to setting and upholding the highest standards of excellence and integrity – providing impartial, authoritative advice on key issues affecting businesses and society. RICS is a regulator of both its individual members and firms enabling it to maintain the highest standards and providing the basis for unparalleled client confidence in the sector.

Consultation response

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?

We welcome the introduction of a Code of Practice that seeks to set out expectations for the conduct of the parties involved in negotiating agreements made under the Electronic Communications Code.

It is noted however, that the document does not in essence advocate anything that is not currently happening in this area nor does it offer any innovation, in this respect the 'status quo' is therefore maintained which in such a fast moving and vital area for our economy is disappointing. We note that the perspective of the document appears to be very 'traditional' thus not considering the needs or requirements of dense urban or non-traditional locations or technologies.

Reference is made to certain matters, such as fees, which we believe are a matter for the respective parties and not something that goes towards behavior or conduct, and any reference should be removed. If comment were required, perhaps it would be better to focus on activities where the requirement of 'action' is placed upon the respective parties by the action or activities of the other. Ultimately however, it should be borne in mind that the outcome may be to the benefit of both.

We unequivocally support the suggestion that parties should be represented by appropriately qualified professional advisors. We would therefore respectfully counsel caution at 4.27 where it is suggested that a 'simple written agreement' might be signed and returned. This might indeed be appropriate for a simple service wayleave to provide electronic communication services solely to a tenant/occupier of a building with no wider impact on the remainder of the operator's electronic communications network, and provided the owner is clearly notified of the implications of granting code rights over its property. But of course the scope of the Code of Practice goes much further than that, and the landlord population are likely to feel quite unsettled by the suggestion that other types of agreement might simply be signed and returned without further advice from a qualified professional.

Expectations appear to have been set in certain areas that in practice are not easily achievable or indeed practical, such as 4.51 where reference is made to a request that equipment 'be moved temporarily', this is far too simplistic and therefore has the propensity to disappoint both parties. Similarly, 4.49 & 4.50 sets an expectation that parties 'will seek to agree terms for the continued use of the site before the existing agreement comes to an end', but the reality is that with the volumes of agreements being dealt with within the sector that may not be possible so more qualified language would more appropriate in setting expectations on both sides.

There are also references made to requirements that are potentially at odds with current practice such as 4.52 where an intention to redevelop is suggested to be evidenced by a planning consent.

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

This is a particularly challenging area and we do not believe that a 'one size fits all' approach is the right way to deal with this. Electronic communication requirements vary considerably in terms of installation type, technology to be deployed, purpose, connectivity and site location.

The current approach does not address all these factors and indeed appears quite prescriptive which we would suggest is not in the interests of a technology sector that is evolving rapidly and needs to challenge some historic conventions.

We would suggest that the approach should look to set out some broad principles for the parties to consider or 'Heads of Terms' that would be common to all electronic communications infrastructure, but leave the detail to the parties especially the drafting given that the differing types of apparatus, and indeed the location where it is to be installed necessitates some considerable variations in the drafting that is required to document them.

In particular, the current document omits a number of crucial matters such as communication links, rent review, site sharing, potential interference and therefore does not address the areas crucial to ensure the roll out of modern electronic communications infrastructure.

We also note that clause 16 envisages that all disputes be initially referred to mediation, we would suggest that due to the specialist nature and intrinsic link to land, that disputes should be referred to an appropriate body to provide advice and assistance as to the optimum solution in the circumstances, such as the RICS Dispute Resolution Service.

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

We believe that there have been a comprehensive set of draft notices prepared.

The only two notices which they have not drafted are those under paragraph 31(1) [operator's counter notice to a hostile termination notice] and paragraph 38(4) [operator's response to a request for information regarding code rights]. However, Ofcom has noted that there is little value in preparing prescribed forms for these counter notices as the operators are able to prepare their own notices, and the information contained within those particular counter notices may vary.

In that respect, we find it interesting to note that Ofcom have nevertheless gone on to prepare prescribed counter notices for use by operators in other situations (for example the counter notice under paragraph 52(2), being the operator's objections to a transport operator's alterations requirements).

We are not clear why it was felt that was necessary, unless it was to ensure that all of the prescribed information was included in the response.

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

We think it might be helpful if all the prescribed notices had a clear section at the top of each notice which sets out who the notice is from and to whom it is being sent (and these addresses being addresses for service for future notices).

Whilst some of the notices require information to be provided in the main body of the notice, some don't require it at all and certainly don't set out the sender's details, which for notices that require a counter-notice or response to be served, means the recipient doesn't always know where to send a response.

We acknowledge that the new Act sets out statutory provisions for where notices should be served (see Para 91), but that paragraph isn't failsafe and experience advises that the address of the parties can change from time to time. Incorporating the above suggestion into each notice would allow a way of resolving this issue.

Two paragraphs in particular in the new Code require a response from the recipient but the draft Notice doesn't currently state where the response needs to be sent -

- Notice requesting disclosure regarding to Code Apparatus (Para 38(1) as stated in the draft Notice but now renumbered 39(1) under the new Act),
- Notice requiring removal of Code Apparatus (initial request) (Para 39(2) now re-numbered 40(2)) also requires the Operator to respond within 28 days but it is not clear where the Operator should reply to.

We would also suggest that all the references to the Schedule should be checked as we believe that some Paragraphs have been re-numbered from the Bill in the new Act, but the draft Notices don't currently reflect that.

We look forward to seeing the results of the consultation and if we can be of any further assistance, please contact James Kavanagh, Director RICS Land Group jkavanagh@rics.org or Sophie Hall, RICS Parliamentary Affairs Officer sophiehall@rics.org.

Yours sincerely,

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