



Ofcom Response to Law Commission
consultation on the Electronic Communications
Code

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Introduction

Ofcom welcomes the opportunity to respond to the Law Commission's consultation on the Electronic Communications Code. Ofcom is the independent regulator and competition authority for the UK communications industries. Our principal duty under section 3(1) of the Communications Act 2003 is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition. In performing these duties Ofcom must also have regard to the desirability of encouraging the availability and use of high speed data transfer services throughout the United Kingdom.

Under Section 106 of the Communications Act 2003 Ofcom is also responsible for applying Code powers to providers of electronic communications networks and providers of conduit systems available for use by providers of electronic communications networks.

We have not responded to every question but have instead focussed our responses on two areas which we consider most relevant to our duties.

Regulation 16

Regulation 16(1)(b) of the Electronic Communications Code requires Code Operators to provide Ofcom with a certificate on 1st April each year which needs to state, among other things, that sufficient funds have been put in place to meet any specified liabilities that arise from them exercising their right to undertake work in publicly maintained streets and roads. In effect this bond is to cover the costs incurred by local authorities for any damage caused by the installation of electronic communications apparatus or its removal, if for example a Code Operator went into administration. The certificate needs to be accompanied by copies of any insurance policy, bond, guarantee or other instrument which will provide for the funds. We can see the rationale for affected public bodies (including highway authorities and local authorities) having some ability to be compensated in the event of the failure of a communications provider, if they are to incur expense to deal with any street works or telecoms equipment that is above ground. One of Ofcom's roles in carrying out its duties is to take enforcement action when a provider has not complied with the requirement of demonstrating that it has adequate funds in place.

We are aware of one occasion when Ofcom has had to take enforcement action to ensure that funds were put in place to meet any potential liabilities when a Code Operator has failed to do so. However Ofcom is not in a position to verify the adequacy of any funds that are put in place which may put some limitations on how effective this approach is. It is also worth noting that we are not aware of any occasion when funds have been called upon.

Ofcom has also been advised by a number of communications providers that they have had difficulty securing certain types of security (e.g. insurance policies) and some providers have said that the cost of provision of certain types of security can be high.

If the Law Commission is looking to reform this area then our view is that proportionality should be a key consideration. Therefore if it is still deemed that some form of funds for liabilities are still required, then an assessment should be made on the most appropriate system based on the level of risk for public bodies. Any changes to regulation 16 should also consider the impact on smaller operators. The current system places a disproportionate requirement on smaller companies who may find it more difficult to comply with the current requirements.

Financial awards under the Code

In Ofcom's view there is definitely scope to improve the operation of the Code with respect to obtaining private wayleaves. We would agree with the Law Commission's view that a lack of certainty hinders the operation of the Code, particularly in relation to consideration. This uncertainty constrains network deployments which involve the construction of new infrastructure across private property, delays their completion and/or increases the cost of doing so considerably.

The case law arising from the Mercury Communications Ltd v London and India Dock Investments Ltd judgement and the handful of other precedents means that it can be very difficult for interested parties to come to an agreement about what would be a reasonable consideration. This difficulty is amplified as there is little public information on wayleave charges in the telecommunications industry for operators to obtain a sufficient range of appropriate comparables to assess the true going rate.

The current process of escalation of failed negotiations to the courts also adds cost and delay (particularly if subsequent appeals are factored in), and introduces a further layer of uncertainty because of the lack of specialist knowledge. The establishment of both a more explicit framework for determining the level of consideration and an arbitration process that is more predictable and draws on appropriate expertise would be a considerable step forward.

Any such reforms that bring greater clarity to the process and provide the operator and landowner with a better framework for reaching agreement would assist in saving time and money for all parties. Given the key role that new telecoms infrastructure delivering "superfast broadband" and 4G mobile services will play in delivering benefits to telecoms consumers and citizens as well as stimulating and enabling economic growth, this should result in wider public benefit to individuals and businesses across the UK.