

Numbering Team
Ofcom
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17th December 2016

Dear Sirs

Proposal to apply Code Powers to CTIL

OFCOM are proposing to apply the electronic communications code to the joint venture company established by Vodafone Limited (“Vodafone”) and Telefonica UK Limited (“Telefonica”).

If approval is granted, Cornerstone Telecommunications Infrastructure Limited (CTIL) will be empowered to exercise sweeping compulsory powers without proper regulation. OFCOM has limited powers to police the use of such powers once they have been granted. The manner in which the legislative framework has been set up means that individual landowners are forced to deal with Code issues matters through the law courts; OFCOM has extremely limited powers to intervene. It is therefore particularly incumbent on OFCOM to ensure that it properly considers the grant of such powers. It is abundantly clear in this case that they would fail in that duty if they were to grant such powers to CTIL.

As OFCOM state:-

2.4 The only purposes for which the Code may be applied in a person’s case by a direction are:

2.4.1 the purposes of the provision of an electronic communications network; or

2.4.2 the purposes of the provision of a system of conduits which he is making available, or proposing to make available, for use by providers of electronic communications networks for the purposes of the provision by them of their networks.

We respectfully point out that at 1.7 OFCOM confirm that CTIL was created as a joint venture in order to manage the **passive infrastructure** on Vodafone and Telefonica’s mast sites. CTIL crucially confirm that ‘passive infrastructure’ is “...anything that doesn’t relate to the transmission of a signal”

OFCOM’s own explanation of the General Conditions makes it clear that CTIL is not the provider of electronic communications services:-

In simple terms, an Electronic Communications Network is a transmission system for conveying messages (“Signals”) of any kind. An Electronic Communications Service is a service, the principal feature of which is the conveyance of messages by means of an Electronic Communications Network - however the definition of an Electronic Communications Service excludes services which are Content Services (ie the

provision of material, such as information or entertainment, which is to be conveyed by the Electronic Communications Service).

*The General Conditions of Entitlement draw no distinctions based on ownership of the network; the provider of a network or a service may own the underlying network or facilities but may rent some or all of them. Who is the actual provider of an Electronic Communications Network for the purposes of any of the General Conditions is usually fairly clear, and where more than one organisation might be considered to be involved in the provision of the network, responsibility for complying with any given condition would depend on which of those organisations had control over the facilities to which the condition relates. **The provider of an Electronic Communications Service is generally the organisation with a contractual relationship with the end user or, in the case of wholesale services, with the reseller or other intermediary for the provision of such services.** Please note that systemless resellers of Electronic Communications Services are subject to the General Conditions of Entitlement; these conditions do not only apply to providers of services which are reliant on the provider's own infrastructure.*

Vodafone and Telefonica operate mobile networks in the United Kingdom and, as operators in the context of Section 106 of the 2003 Act, have been granted Code Powers. That protection extends to support apparatus which may or may not be provided by a third party such as CTIL.

By OFCOM's own measures the relevant considerations in making a decision should be:

2.13.1 the benefit to the public of the electronic communications network or conduit system by reference to which the Code is to be applied to that person;

As set out above and by their own admission CTIL does not operate an electronic communications system. It is therefore not entitled to the protection of the Code. It is therefore strange that OFCOM should even consider such a proposal in such circumstances given that the grant of such powers when exercised against a landowner would force the landowner into a legal action before the Courts to refute the exercise of Code Powers.

Given any site where CTIL has an interest would be protected by the Code Powers granted to Vodafone & Telefonica there is no public interest in granting such an application.

Additionally, if it were to grant Code Powers to CTIL, OFCOM will have substantially increased costs to any landlord serving notice in respect of a Beacon site in that additional professional & legal costs will be incurred in serving notice and dealing with CTIL as a Code Operator as well as Vodafone and Telefonica

2.13.2 the practicability of the provision of that network or system without the application of the Code;

Vodafone and Telefonica would be entitled to the protection of the Code and therefore the failure to grant of Code rights to CTIL would not affect network integrity.

The grant of Code Powers to a body which would be unable to obtain rights through the Courts under paragraph 5 in that it is not the operator may significantly impact on due process and lead to unnecessary litigation.

2.13.3 the need to encourage the sharing of the use of electronic communications apparatus;

Vodafone and Telefonica already share sites so this provision would not be affected by the refusal of this application.

2.13.4 whether the person in whose case it is proposed to apply the Code will be able to meet liabilities arising as a consequence of the application of the Code in that person's case and any conduct of that person in relation to the matters with which the Code deals.

OFCOM should consider whether CTIL can meet the liability imposed by paragraph 22 of the existing Code over the whole of its portfolio not just the ability of the operator to meet liabilities towards OFCOM. We note that their recent accounts suggest that CTIL are making a loss and do not appear to have ring-fenced funds in respect of such contingent liability

The grant of a licence is effectively a grant of a right to exercise Code Powers. Such a grant to override the property interests of landowners should not be undertaken lightly or without due consideration to the interests of landowners over whom such powers may be exercised.

By granting rights to compulsory powers to such a body OFCOM exposes landowners to significant costs in challenging any application of the Code.

In terms of section 106 (4) and (5) CTIL is neither a Code Operator in terms of the 2003 Act nor the operator of conduits. Approval of such an application to such a body may be *ultra vires*.

It would be wrong of OFCOM to prejudge the will of Parliament by presuming the outcome of the current legislative process by granting rights to an infrastructure provider.

This proposal should therefore be rejected.

Yours faithfully