

Ofcom's consultation on the Electronic Communications Code - Code of Practice

Response from BT Group

Overview

We welcome Ofcom's consultation on the Code of Practice and the opportunity to respond. For the purposes of this consultation, we are responding on behalf of EE Limited ("EE") – part of BT Group. It should be noted that EE has had prior sight of MBNL's substantive response to this consultation. Given EE is a 50% shareholder of MBNL, EE agrees the content of MBNL's response and will adopt MBNL's answers to questions 1 – 10 of the consultation.

EE adds the following in respect of questions 5, 7 & 9.

Response to Question 5

Do you have any comments on our proposals relating to professional fees in the Code of Practice?

In addition to MBNL's comments in respect of Paragraph A2.19, EE considers "the general principle is that a site provider should not be left out of pocket" could create an expectation amongst Site Providers that all categories of fees should be capable of reimbursement by an Operator. Despite the inclusion of the wording "reasonably and properly incurred" later in the same paragraph, the wording does not make clear that costs incurred in resisting or challenging Code rights (particularly by way of litigation) will remain subject to the normal rules of costs recovery. Nor does the paragraph make clear that a refusal to respond or engage in ADR could affect the recoverability of such fees.

EE would be happy to endorse the wording formulated by the National Connectivity Alliance:

"Potential Site Providers should be advised that they are responsible, in the first instance, for meeting their professional representatives' reasonable costs (per RICS guidance). Operators will reimburse a site provider for their reasonably and properly incurred professional costs within pre-agreed parameters."

Response to Question 7

Do you have any comments on our proposals relating to electromagnetic fields exposure in the Code of Practice?

EE adopts the MBNL response and reiterates the core premise that the responsibility for EMF compliance remains with the Operator. Whilst it is acknowledged that a Site Provider will have legitimate interest in understanding exclusion zones applicable to the host premises, it could become counterproductive to conflate the provision of relevant information with the policing of EMF compliance, which is matter for OFCOM and the HSE. To enable the parties to concentrate their efforts on the terms of a site agreement, this section of the Code of Practice should be limited to the sharing of relevant information and the provision of certificates of compliance.

Response to Question 9

Do you have any comments on our proposals relating to ADR in the Code of Practice?

EE welcomes the introduction of ADR made by the Product Security and Telecommunications Infrastructure Act 2022 (“the PTSI Act”) together with the corresponding references in the proposed Code of Practice.

To further the aims of the PTSI Act and the intention of Section 69, it is considered the instructive language featured in paragraphs A2.86 – A2.92 should extend, where appropriate, to Site Providers just as it does Operators. Whilst it is acknowledged that the onus sits with the Operator (by way of Code notices) to ensure a Site Provider is aware of the availability of ADR, this revision to the Code of Practice has the opportunity to inform Site Providers that they, in turn, are required to consider and respond to offers to participate in ADR in a timely manner. Indeed, Site Providers may also make the offer of ADR.

The above aim may be achieved by amending paragraph A2.89 to create an equal reference to both Operator and Site Provider whilst also extending the warning on the costs consequences of refusing to engage in ADR to also include an unreasonable failure to respond to an offer of ADR. It is now well established in case law that silence in the face of an offer to engage in ADR can amount to a refusal.

The above recommendation is made with sole intention of promoting balance in the reference and approach to ADR within the Code of Practice. It is also to promote the offer and use of ADR during the currency of a Code notice.

For further information or to discuss in more detail, 
