



Ofcom consultation

Electronic Communications Code of practice

Virgin Media O2 response

December 2023

Non-confidential Response

Introduction

1. Virgin Media O2 (“**VMO2**”) welcomes the opportunity to respond to Ofcom’s consultation on the Electronic Communications Code – Code of Practice¹ (“**the consultation**”).
2. We support the stated purpose of the consultation, namely to update the Code of Practice (“**CoP**”) to reflect recent legislative changes, and to seek to provide greater clarity.
3. It is important that the CoP continues to be accurate and relevant to all stakeholders and therefore it is necessary to reflect the changes introduced by the Product Security and Telecoms Infrastructure Act (“**PSTIA**”). Failure to do so would limit the usefulness and relevance of the CoP if it were to become misaligned with the legislative backdrop and the consequent changes in how stakeholders operationally interact with one and other.
4. However, in our response we will note concerns about how Ofcom has sought to reflect these legislative changes in the proposed updates to the CoP.
5. Furthermore, while we support the principle of seeking to amend the CoP to provide greater clarity to all stakeholders, it is important that these changes do not change or skew the intent of the original text that is proposed to be replaced.
6. It is also important that proposed changes do not reinterpret or undermine the stated purpose of the CoP, as a voluntary framework for parties to engage under.
7. In our view, a number of the proposed changes in pursuit of clarity have skewed the intent of the CoP, and have evolved the text beyond a framework for engagement and instead begin to read as a prescriptive guide or instruction. In many cases this added specificity is in relation to obligations or expectations on Communications Providers (“**CPs**”).
8. Perversely, in some cases we believe the proposed changes risk introducing confusion or complexity. This is especially true where more rigid descriptions of possible activities of have been proposed, which may set misleading expectations about how stakeholders may interact across the broad range of scenarios covered by the CoP.
9. Unfortunately, we also have extensive experience of non-cooperative Site Providers seeking to utilise the CoP against its stated purpose: not as a framework for positive and constructive engagement between parties, but as a checklist of possible obligations the CP ought to satisfy before substantive discussion can proceed.² We are therefore concerned that a number of the proposed changes are likely to exacerbate this existing friction in how the CoP is applied in practice with the result of higher costs and a slower rate of network rollout.
10. As a result, it is important that underlying spirit of the CoP is preserved. It is meant to act as a framework to facilitate negotiations between CPs and landowners, to enable rollout of communications networks to the benefit of end users and wider society.

¹ https://www.ofcom.org.uk/data/assets/pdf_file/0034/267892/Consultation-Electronic-Communications-Code-of-practice.pdf

² We would be happy to engage with Ofcom further to illustrate this concern further.

11. We are concerned that the compounding and cumulative impact of some of the proposed changes risk undermining the spirit and the purpose of the CoP.
12. It is already the case under the pre-existing CoP that interactions between stakeholders can at times become fractious and laborious. It is often the case that efforts to frustrate or impede agreement and subsequent rollout is achieved by vexatious reference to CoP wording. We are therefore concerned that a number of the proposed changes will only exacerbate this issue.
13. As a result, we believe Ofcom needs to be cautious in amending the CoP and consistent with the views expressed in the joint Towerhouse response, would encourage Ofcom to engage with a broader set of stakeholders before finalising any changes to the text.

Consultation question responses

Consultation Question 1: Do you have any comments on our proposals relating to improving the clarity of the Code of Practice?

In principle we would be supportive of efforts to improve the clarity of the CoP by simplifying the language and consolidating the text. However, we are concerned that efforts to improve the clarity of the CoP have instead distorted the original intent of the text and gone beyond the stated purpose of the CoP.

Throughout our response we note examples of this, and as a result we are concerned that if the proposed changes were to be introduced, they would lead to more complexity and greater impediments to network rollout.

Consultation Question 2: Do you have any comments on our proposals relating to including legislative changes in the Code of Practice?

No comment.

Consultation Question 3: Do you have any comments on our proposals relating to the definition of 'Site Provider' in the Code of Practice?

We do not support the proposed change. In our view it would be most appropriate, and clearest, to continue to use the existing language of landowner and land occupier already in the Code.

The use of Site Provider in specific parts of the Code should not be adopted more broadly as it is likely to complicate the interpretation of the CoP, given this term is used in the Code primarily for the case of large-scale wireless infrastructure applications.

In addition, while the proposed change is intended to simplify the CoP, there are cases (such as A2.16) where Site Provider and Occupier still both need to be used, which seems to complicate the text further.

Consultation Question 4: Do you have any comments on our proposals relating to contact information in the Code of Practice?

While we are supportive of the intent of the proposed changes in relation to contact information, we are again concerned that the updated text unhelpfully skews the balance of the CoP in a way that places more obligations and expectations on the Operator in a way that may be misused by landowners that seek to frustrate the process.

In particular we do not believe the addition of "*In any event, the Operator should ensure it communicates and keeps the Site Provider informed of its plans.*" is either helpful or necessary. It seems to imply some additional obligation on the Operator that could be misconstrued as placing an additional onus on the Operator that the original text did not.

Consultation Question 5: Do you have any comments on our proposals relating to professional fees in the Code of Practice?

We do not agree with the proposed wording on professional fees in the Code of Practice. Whilst professional advice may be necessary in the case of some telecoms infrastructure rollout this is not the case across all sectors – for example in wayleaves for single dwelling units there are many instances where third party professional advice is not needed given the simplicity of the installation proposed.

Accordingly, we are concerned that the proposed wording in relation to professional fees risks being overly prescriptive, skews expectations as compared to the pre-existing text, risks being confusing or misleading to stakeholders, and may be exploited by some stakeholders seeking to undermine good faith engagement.

The proposed wording appears to set an unrealistic expectation about a CP setting out formal (and perhaps lengthy) ‘policy’ documentation, which may be presumed to include extensive details regarding fees, mechanics, and compensation methodologies, for example. Given the wide range and bespoke circumstances of activities covered by the CoP this is not practicable. As a result, a Site Provider acting in good faith may be confused why such weighty documentation has not been shared, or may overlook more succinct and straightforward information provided as part of introductory communications.

As a result, we are concerned the proposed text does not help to bring clarity to the CoP and instead may unintentionally have the opposite effect.

We are also concerned that such language could be intentionally misconstrued and misused by stakeholders seeking to frustrate communications between parties.

For example, stakeholder may try to interpret the proposed text in an expansive way and seek to apply their own expectations or interpretation of what they might expect to constitute a ‘policy’.

Or alternatively, such an actor may insist on extensive explanation from the CP to expound on their interpretation and/or justification of “Where relevant, [...]”, as it relates to the specific scenario under discussion, and therefore the approach a CP has followed with respect to professional fees.

We also believe it is important that the CoP continues to remain true to its stated scope and purpose. In A2.11.e the CoP confirms that the document sets out expectations between parties which “Does **not** address the financial aspects of the relationship between the Landowner Site Provider and the Operator”.

In our view the proposed text, goes far beyond pre-existing text on the topic. It sets inappropriate obligations about what CPs “should” do and elaborates on what and how this should be done.

Instead, we support the alternative proposal put forward in Mobile UK’s submission to the consultation on this topic.

Consultation Question 6: Do you have any comments on our proposals relating to responding to a request for access in the Code of Practice?

We are supportive of the proposals and we believe the Code of Practice should provide much needed clarity on the timeframes by which a Site Provider is to respond to access requests in keeping with the code legislative principles – 14 days for informal requests and 28 days for formal requests. Furthermore if they object or have concerns they need to respond and communicate the same with the Operator so that consensual terms are able to be agreed, thereby avoid matters escalating to the upper tribunal.

Consultation Question 7: Do you have any comments on our proposals relating to electromagnetic fields exposure in the Code of Practice?

We do not support Ofcom's proposed changes with respect to EMF and believe it is inappropriate to seek to include this topic in the CoP.

In our view, the proposed wording will, at best, raise the risk of confusion for many Site Providers, and at worst, could raise material concerns that the Site Provider is somehow taking on obligations from the CPs' own compliance with EMF regulations.

In the case of the latter, this could not only cause undue alarm, but may also introduce incremental delays in the process as well make parties more reluctant to engage if it creates unwarranted concern about their own responsibilities and legal obligations.

We support the proposed approach to amendments made by Mobile UK in regard to this topic.

Consultation Question 8: Do you have any comments on our proposals relating to the sharing and upgrading of apparatus in the Code of Practice?

Sharing and upgrading of apparatus is set out in the Code with a number of subsequent case law clarifying the provisions in the context of a myriad of different electronic communications apparatus – so the principles do not apply uniformly to underground cables as they do to mobile mast sites. Furthermore the Code of Practice is clear in its introduction that it is not seeking to provide legal advice or steer on legal issues accordingly we do not feel it is appropriate for the code of practice to be commenting on this complex and developing area of law.

Consultation Question 9: Do you have any comments on our proposals relating to ADR in the Code of Practice?

We are concerned that Ofcom's proposed CoP text relating to alternative dispute resolution ("ADR") does not fully reflect the spirit and intent of the legislative changes introduced by the PSTIA.

The proposed changes state that alternative dispute resolution 'may not always be appropriate' for resolving deadlocked negotiations between operators and landowners. It also notes 'there may be occasions, though, where either party may need to serve legal notices, while still continuing to pursue an informal resolution.' While both qualifications are accurate, the rationale for including these caveats is not entirely clear, as they do appear to be in tension with the policy intent of the PSTIA.

The PSTIA introduces provisions to actively promote ADR as a faster, more cost-effective alternative to litigation for addressing stalled negotiations. These provisions aim to tackle the (not uncommon) issue of Site Providers unfairly blocking talks, perhaps with the expectation that the prohibitive time and expense of going to court will force operators to abandon plans or accept unreasonable demands.

Specifically, the PSTIA requires the operator or 'relevant person' (the landowner or representative) to 'if reasonably practicable' consider ADR to resolve disputes. But the qualifying language in the Code of Practice sets out explicit qualifiers that work against the intent of the PSTIA. This approach seems to contrast with examples we have noted elsewhere in our response, where the proposed changes seek to be more explicit about the CP's assumed obligations and where the elaboration is to be more specific about what Site Providers should expect from CPs (rather than, as in this case, seeking to provide examples why exceptions might apply).

As a result, we support the similar concerns raised in responses by both Mobile UK and Towerhouse. We believe this is illustrative of our concerns expressed throughout our response that when taken together the draft proposals have skewed the CoP in ways which are not conducive to facilitating positive and constructive engagement between parties in a way that will support speeding up network rollout to end users.

Consultation Question 10: Do you have any overarching comments on our proposals for the Code of Practice (included in its entirety in Annex 2 above)?

VMO2 does not have any further overarching comments beyond those already set out in the introduction and responses above, except to note our willingness to continue to engage further with Ofcom to ensure that updates to the CoP can be made in a balanced way that reflect the recent legislative changes and provide greater clarity.