

SERVING NOTICES UNDER THE NEW CODE

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Notices – General Checklist to avoid pitfalls

- Who must give the notice?
- To whom must the notice be given?
- If notice is to be given by or to an agent is that agent authorised to give or receive notices?
- What are the required contents and form of the notice?
- When must the notice be given?
- How can or should the notice be given – what means of service and at what address?

Key notices given by operators under the New Code

- Notice given to a relevant person seeking the conferral of code rights or an agreement by non-occupiers to be bound by code rights (para 20(2)). Such notice may also seek interim or temporary rights whether or not a permanent right is sought (paras. 26(3), 27(1)) – CTIL Ltd v The University of London [2018] UKUT 0356 (LC).
- Counter-notice in response to termination notice given by site provider (para. 32(1)(a)) or notice by a third party seeking removal of apparatus (para. 41(5))
- Notice requiring a modification of a code agreement – para. 33(1)
- Notice to landowner/ occupier in response to request for disclosure: para.39(4)
- Notices under the special regimes

Key notices given by others under the New Code

- Notice by a site provider who is a party to a code agreement to bring a code agreement to an end under para. 31(1)
- Notice requiring a modification of a code agreement – para. 33(1)
- Notice by landowner (or landowner or occupier of neighbouring land) requiring an operator to disclose existence of code rights and ownership of apparatus – para. 39(1)
- Notice by landowner (or landowner or occupier of neighbouring land) to operator to remove its apparatus and or restore land – para. 40(2)
- Notice by third party requiring removal of apparatus – para. 41
- Notices of objection to conferral/binding of code rights by relevant person under para. 20(3)(b)
- Notices under the special regimes

To whom? Identity of recipient of notice

- It is critical to consider the proper identities of both the giver and the recipient of the notice in relation to each statutory provision. This will require detailed consideration of the provisions of the Code in question including the statutory definitions in each case
- By way of example, para. 20(1) notice by an operator seeking conferral of code rights must be served on “*the relevant person*”. This means “*the occupier*” where the conferral of code rights is sought and any relevant third party with an interest in land where the operator seeks to bind that third party to an existing code agreement: See CTIL Ltd v Compton Beauchamp Estates Ltd [2019] UKUT 0107 (LC) where the UT held that it had no jurisdiction to impose an agreement granting code rights on a person who was not the occupier.
- Notice under para 40(2) requiring removal of apparatus must be given to the *operator who owns the apparatus in question*

By whom? Identity of giver of notice

- Para. 31 notice terminating a code agreement must be given by “*a site provider who is a party to a code agreement*”. Para. 10(3) deems an occupier’s successor in title who is bound by a code right under para. 10(2)(a) to be “*a party to a code agreement*”. Persons who are otherwise bound by code rights are however not treated as being parties to the code agreement for these purposes
- Notice to require removal of apparatus under paras. 37, 40 must be given by “landowner”, namely “*a person with an interest in land*” who fulfils the conditions therein
- Notice to require removal of apparatus under paras. 38, 40 must be given by “*landowner or occupier of neighbouring land*” who fulfils the conditions therein

Identifying correct recipient – useful provisions

- Paragraph 39 enables a landowner (or landowner or occupier of neighbouring land) by notice to require an operator to disclose whether it owns or enjoys code rights over apparatus situated on the land in question. In the event the operator fails to comply it will have to bear any costs incurred by the landowner or occupier in attempting to enforce removal of the apparatus under para. 40 even if it is subsequently established that the operators owns or uses the apparatus for the purposes of its network and has the benefit of code rights entitling it to retain its apparatus.
- Paragraph 91 provides for substituted service in the event that it is not practicable to find out after reasonable enquiries the name and address of a person who is the occupier or the owner of an interest in land. Service can be effected by a notice addressed to “the occupier” or “the owner” (which identifies the land and where appropriate the interest of the owner) by delivering it to a person on the land or in the absence of such person by affixing it or a copy to a conspicuous object on the land.

Contents of Notices - Examples

- It is also critical to consider the provision of the Code under which the notice is to be given to ensure that that contents of the notice comply with the statutory requirements in each case. If not, the notice may well be held to be invalid. By way of examples:
- Para. 20(2) requires the operator's notice to set out the code rights, and all of the other terms of the agreement that the operator seeks. The tribunal cannot impose code rights not sought in the notice (query whether an application can subsequently be made for fewer rights or for code rights on different terms): CTIL Ltd v Compton Beauchamp Estates Ltd [2019] UKUT 1017 (LC), CTIL Ltd v Keast [2019] UKUT 116 (LC). Careful consideration will need to be given at the outset to the code rights and other terms sought.
- If interim rights or temporary rights are sought, the para. 20(2) notice must also specify that an agreement is sought on an interim or temporary basis

Contents of Notices –More examples

- A notice bringing a code agreement to an end under para. 31 must specify the date on which the site provider proposes to bring the code agreement to an end and state the ground on which the site provider proposes to do so
- There are detailed requirements as to the contents of a notice to modify terms in paragraph 33 that must be complied with
- A notice by a landowner or occupier under para. 40 requiring removal of apparatus must specify the period (which must be reasonable) within which the operator must complete the works
- The same requirement applies to a notice under para. 41 given by a third party. A counter-notice given by an operator under paragraph 41(5) must either state that that the third party is not entitled to require removal of the apparatus or specify the steps which the operator proposes to take for the purpose of securing a right as against the third party to keep the apparatus on the land

Timing of Notices

- A number of provisions of the New Code require a notice to be given within a certain time of receipt of an earlier notice. Examples include:
 - Para. 32(1) – Counter notice opposing termination of code rights etc. to be given within 3 months of service of notice under para. 31. Failure to do so will result in the code agreement coming to an end in accordance with the initial notice.
 - Para. 41(5) – Operator’s Counter Notice in response to notice given by third party seeking removal of apparatus to be given within 28 days of service of notice under para. 41(2). Failure to do so will enable the third party to enforce its right to seek removal
- It will be necessary to consider the time of service of both the initiating notice as well as the counter-notice.

Part 15 of the New Code – Specific Provisions as to Notices

- Part 15 of the New Code (paras. 88 to 91) details specific requirements as to notices given under it
- Para. 88 deals with notices given by operators
- Para. 89 deals with notices given by others
- Para. 90 provides for prescription of notices by OFCOM
- Para. 91 deals with procedures for giving notice

Notices given by operators – Para. 88

- Under para. 88(2), where OFCOM have prescribed the form of notice which may or must be given by an operator, a notice must be in that form.
- Even where a form of notice has not been prescribed by OFCOM, a notice given under the code by an operator must (a) explain the effect of the notice; (b) explain which provisions of the code are relevant to the notice; and (c) explain the steps that may be taken by the recipient in respect of the notice (para. 88(1)).
- Notice given by an operator must comply with the requirements of para. 88 and failure to do so will invalidate the notice although para. 88(4) provides that this does not prevent the recipient from relying on the notice if that person chooses to do so.

Notices given by others – Para. 89

- There are four types of notices given by “others” that must be in the form prescribed by OFCOM, namely notices under paras 31(1) (termination of code agreement), para. 33(1) (modification of code agreement), 39(1) (notice seeking disclosure) and 40(2) (notice seeking removal of apparatus)
- Failure to use the prescribed form in those cases will invalidate the notice (para. 89(3)) although the operator can rely on the notice if it chooses to do so (para. 89(4))
- In the case of other types of notice a failure to use a form prescribed by OFCOM will not invalidate a notice given by a person other than an operator but may render the giver of the notice liable to bear the costs incurred by the operator by reason of the notice not being in the correct form if the notice was given in response to an operator’s notice which drew the recipient attention to the form prescribed by OFCOM. Therefore it is good practice to use a prescribed form in all cases where there is one

Prescription of notices by OFCOM – Para 90

- OFCOM is required to prescribe a form of notice under each provision of the code that “requires” a notice to be given. OFCOM have interpreted this broadly and produced a suite of prescribed forms that can be found online - <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/policy/electronic-comm-code/notices>
- There is no prescribed form of notice in respect of either a counter-notice from a code operator regarding the termination of a code agreement (para. 32(1)) or a notice from a code operator disclosing whether apparatus is on land pursuant to a code right (para. 39(4)).

Service of Notices – Para 91

- Service is governed by s.394 of the Communications Act 2003 (“CA 2003”) which takes effect subject to para. 91 of the New Code.
- Under s.394 service of a notice may be given to any person by (i) delivering it to him; (ii) leaving it at his proper address; or (iii) sending it by post to him at that address. This is a permissive, not mandatory provision. It does not exclude actual service by other means. A similar provision in the Party Wall etc. Act 1996 was held to be permissive, not exhaustive in *Goulandris v Knight* [2018] 1 WLR 3345, and did not exclude actual service by email.
- Note however that under para. 91(1) a notice given under the New Code must not be sent by post unless it is sent by a registered post service or by recorded delivery.
- A notice can be delivered by email but only if the server of the notice has first cleared that means of communication with the intended recipient: see s.395 CA 2003

Address for Service

- If a party has given the person giving the notice an address for service under the New Code then its “proper address” is that address: para. 90(2).
- Otherwise, “proper address” is the address given under s.394 of the CA 2003:
 - (a) in the case of body corporate, the address of the registered or principal office of the body;
 - (b) in the case of a firm, unincorporated body or association, the address of the principal office of the partnership, body or association;
 - (c) in the case of a person to whom the notification or other document is given or sent in reliance on any of subsections (4) to (6), the proper address of the body corporate, firm or (as the case may be) other body or association in question; and
 - (d) in any other case, the last known address of the person in question.

Deemed service

- S.7 of the Interpretation Act 1978 applies (when read in conjunction with para. 91) to deem service to have been effected by registered post/ recorded delivery if properly addressed, pre-paid and posted.
- Furthermore, unless the contrary is proved, service is deemed to have been effected at the time the letter would be delivered in the ordinary course of that post. In WX Investments Ltd v Begg [2002] 1 WLR 2849 it was held that a similar deeming provision in s.196 LPA 1925 required an assumption to be made that a recipient was available on the presumed date of delivery. Patten J declined to apply an earlier contrary decision of Scott J in Stephenson v Orca Properties [1989] 44 EG 81. However, evidence that the notice was not in fact actually delivered until a later date due to the absence of a recipient at an earlier time could rebut the presumption as to the timing of service under s.7 of the IA 1978
- If service is effected by ordinary post, there will be no deemed service under this provision because the Code does not authorise service by ordinary post

Service – Interesting questions

- Potential arguments to be made where service goes wrong but best not to go there in the first place
- Query whether a notice that was served by ordinary post and in fact received would be effective service?
- Query whether a notice served by email that was in fact received by the recipient would be effective service even if the recipient had not consented to accept service by email in advance? Electronic service was held to be permissible means of effecting service at common law in UKI (Kingsway) Ltd v Westminster City Council [2018] UKSC 67.
- To what extent can service be effected indirectly applying UKI? What causal nexus would suffice between the acts of the giver of the notice and its subsequent receipt? Passing on by receptionist there held to be “*reasonably expected of a responsible employee in that position*” and a natural consequence of the council’s actions.

Validity of notices – Interesting questions

- To what extent, if any, would deviations from a prescribed form invalidate the notice?
- The express provisions in the New Code to the effect that failing to use the prescribed form will invalidate some notices (with no savings provisions) will make any such argument difficult, applying test in Osman v Natt [2015] 1 WLR 1536, given that the proper approach is to determine the legislator's intention as to the consequences of non-compliance as an ordinary issue of statutory interpretation.
- Fill out prescribed forms electronically to avoid erroneous deviations.
- Some mistakes might be saved by Mannai applying the reasonable recipient test (e.g. an obvious and non-misleading misdescription of a party)

Thank you for listening

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