
Electronic Communications Code

Statement

Digital Economy Act: Code of Practice, Standard Terms of Agreement and Standard Notices

STATEMENT

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About this document

In April 2017 the Digital Economy Bill received Royal Assent from both Houses of Parliament, and became the Digital Economy Act. Amongst other things, the Digital Economy Act reformed the 'electronic communications code' by introducing a range of measures to make it easier for network operators to rollout infrastructure (such as phone masts, exchanges and cabinets) on public and private land. The reforms to the electronic communications code in the Digital Economy Act are wide-ranging and are of particular significance for network operators, landowners and occupiers. They include new obligations on Ofcom to publish:

- a Code of Practice to accompany the changes to the electronic communications code;
- a number of template notices which must or may (depending on the circumstances in question) be used by Code operators and landowners/occupiers; and
- standard terms which may (but need not) be used by Code operators and landowners or occupiers when negotiating agreements to confer Code rights.

Ofcom prepared drafts of each of the documents referred to above and consulted on them, and is now publishing the final versions of these in addition to a statement.

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1. Executive Summary

- 1.1 The electronic communications code (“**the Code**”) confers certain rights on communications network operators to whom it has been applied (“**Code operators**”) to install and maintain electronic communications apparatus on public land. In addition, a Code operator may apply for a court order to install and maintain apparatus on private land, if it has been unable to reach agreement with the landowner.
- 1.2 In April 2017, the Digital Economy Bill received Royal Assent from both Houses of Parliament, becoming the Digital Economy Act (“**DEA**”). It brings in a new Code¹ which includes new obligations on Ofcom to publish:
- a Code of Practice (“**CoP**”) to accompany the new Code;
 - standard terms which may (but need not) be used by Code operators and landowners or occupiers when negotiating agreements to confer Code rights; and
 - a number of template notices which must or may (depending on the circumstances in question) be used by Code operators and landowners/occupiers.
- 1.3 We published a consultation on 24 March 2017 (“**the Consultation**”),² the purpose of which was to provide stakeholders with the opportunity to comment on drafts of each of the documents referred to above. We recognised that the then DEB may have been subject to further amendments before it was enacted, but considered it appropriate to consult at that stage to ensure we could comply with our statutory duties as soon as possible after the relevant provisions of the ensuing Act came into force.
- 1.4 Having taken account of stakeholder responses, we have decided that the manner in which we proposed in the Consultation to meet our respective obligations under paragraphs 90 (in respect of the notices), 103(1) (in respect of the Code of Practice), and 103(2) (in respect of the standard terms), remains appropriate although we have made a small number of changes to these documents where we considered appropriate in line with stakeholder comments.
- 1.5 We consider it may be prudent, depending on parties’ experience of using the documents we are publishing, for Ofcom to review the Code of Practice, the standard terms and the notices, if necessary after an appropriate period, to consider their effectiveness. We would envisage working with relevant parties in carrying out this exercise if we proceeded to do so. We consider it is likely that it would be appropriate to conduct such a review in accordance with our normal consultation principles. This would enable all parties who have used the notices, Code of Practice, and standard terms (or have decided not to use the standard terms) to engage with Ofcom and share their views.
- 1.6 Finally, stakeholders had previously questioned whether relationships between wholesale infrastructure providers (“**WIPs**”) and communications providers (“**CPs**”) were effectively

¹ See Schedule 1 of the DEA.

² https://www.ofcom.org.uk/data/assets/pdf_file/0031/99148/ecc-consultation.pdf. The formal consultation period closed on 2 June 2017.

governed by the Code or would fall within the scope of Ofcom's other regulatory powers. As set out in the Consultation, we confirm that certain of Ofcom's other statutory powers could enable us, in principle, to regulate the terms on which WIPs grant access to their infrastructure.

2. Introduction

Overview

- 2.1 The Code regulates the legal relationship between landowners/occupiers and Code Operators, conferring rights on certain providers of electronic communications networks and systems of conduits³ (designated by Ofcom as ‘Code Operators’) to install and maintain electronic communications apparatus (including masts, exchanges, cabinets and cables) on public land. The Code also enables operators to apply for a court order to install and maintain apparatus on private land, if they have been unable to reach agreement with the landowner/occupier.
- 2.2 In April 2017, the Digital Economy Bill received Royal Assent from both Houses of Parliament, becoming the Digital Economy Act. Amongst other things, the DEA brought in a new Code replacing the previous Code set out in Schedule 2 of the Telecommunications Act 1984. The new Code introduces a range of measures to make it easier for Code operators to roll out electronic communications apparatus.⁴
- 2.3 The reforms brought in by the new Code are wide-ranging and include, for example, significant changes to the way land is valued and an automatic right for Code operators to upgrade and share their telecommunications apparatus.
- 2.4 The new Code also includes obligations on Ofcom to publish:
- a Code of Practice to accompany the new Code;
 - a number of template notices which may or must (depending on the circumstances) be used by Code Operators and landowners/occupiers; and
 - standard terms which may (but need not) be used by Code Operators and landowners/occupiers when negotiating agreements to confer Code rights.
- 2.5 We published our consultation on 24 March 2017.⁵ The purpose of the Consultation was to provide interested parties with the opportunity, in accordance with paragraphs 90(3) and 103(4) of the new Code, to comment on drafts of each of these documents.
- 2.6 We recognised that the DEB had not yet received Royal Assent when the consultation began and that it may have been subject to further amendments during the course of the legislative process. However, we considered it appropriate to consult at that stage to enable us to

³ As a result of the DEA (see section 4), reference to “conduit” and “conduits” in section 106 of the Communications Act 2003 are changed to “infrastructure” (see paragraph 7 of the new Code for a definition of “infrastructure system”). Paragraph 3 of Schedule 3 of the DEA deals with any enactment passed or made before the day on which the new Code comes into force which refers to a conduit system or the provision of such a system (“enactment” is defined in paragraph 1 of Schedule 3 of the DEA).

⁴ This was achieved by repealing the current version of the Code (set out in Schedule 2 of the Telecommunications Act 1984) and inserting a new Code into a new Schedule 3A of the Communications Act 2003. The new version of the Code is currently set out in Schedule 1 of the DEA.

⁵ https://www.ofcom.org.uk/data/assets/pdf_file/0031/99148/ecc-consultation.pdf

comply with our statutory duties as soon as Schedule 1 of the DEA entered into force, or shortly thereafter.⁶

History of the Electronic Communications Code

- 2.7 The Code dates back to 1984 when it was brought in to regulate the provision of landline telephony under Schedule 2 of the Telecommunications Act. It was later amended by Schedule 3 of the Communications Act 2003,⁷ to enable it to support the infrastructure which delivers broadband, mobile internet, and cable TV.
- 2.8 The Law Commission conducted a review of the Code between 2011 and 2013, in response to a request from the Department for Culture, Media and Sport, (DCMS). Its review, which was published in February 2013,⁸ contained more than 15 pages of recommendations for reform.
- 2.9 Later in 2013, the Growth and Infrastructure Act⁹ introduced a series of temporary amendments (with a lifespan of 5 years) to the Code, primarily designed to accelerate the deployment of broadband infrastructure.
- 2.10 At the start of 2015, the Coalition Government tabled amendments to the Infrastructure Bill which, had they been enacted, would have included substantive reforms to the Code¹⁰ based on the Law Commission recommendations. These amendments were subsequently withdrawn in the face of stakeholder concerns, to allow further consultation and research to take place. DCMS subsequently published its own Consultation Document in February 2015. The formal consultation period ran for 9 weeks ending on 30 April 2015. Following this, DCMS undertook further consultation with all stakeholders, and commissioned independent economic research into the impact of a range of reform options in the market.
- 2.11 In May 2016, the Government announced that the Code would be reformed in the forthcoming Digital Economy Bill, “offering major reforms to the rights that communications providers have to access land.”¹¹

Our duties as set out in the Digital Economy Act

- 2.12 As explained above, the new Code set out in Schedule 1 of the DEA requires Ofcom to prepare and publish a number of documents.

⁶ Schedule 1 of the DEA will be brought into force on a date to be appointed by the Secretary of State by statutory instrument (section 118(6)).

⁷ [Communications Act 2003, Section 106, Schedule 3: Amendments of Schedule 2 of the Telecommunications Act 1984](#)

⁸ [The Law Commission, The Electronic Communications Code, 27 February 2013](#)

⁹ [Growth and Infrastructure Act 2013, section 9](#)

¹⁰ [Telecommunications, Written Answer, 6 January 2015](#)

¹¹ [DCMS, A New Electronic Communications Code, 17 May 2016, page 4](#)

Code of Practice

- 2.13 Paragraph 103(1) of the new Code requires Ofcom to prepare and publish a code of practice dealing with:
- a) the provision of information for the purposes of the new Code by operators to persons who occupy or have an interest in land;
 - b) the conduct of negotiations for the purposes of the new Code between operators and such persons;
 - c) the conduct of operators in relation to persons who occupy or have an interest in land adjoining land on, under or over which electronic communications apparatus is installed; and
 - d) such other matters relating to the operation of the new Code as Ofcom think appropriate.

Draft Code of Practice development process

- 2.14 Ofcom worked with a wide spectrum of stakeholders in developing its initial draft of the Code of Practice. This included representatives from the fixed and mobile operator community, communications infrastructure providers and representatives from the National Farmers Union (NFU), the Country Land & Business Association (CLA), the British Property Federation (BPF) and the Central Association of Agricultural Valuers (CAAV).
- 2.15 Throughout the process, Ofcom acted as a neutral facilitator with the objective of encouraging a balanced cross-section of representatives from different stakeholder groups to arrive at a consensus which reflected a broad range of interests and concerns.
- 2.16 On 28 July 2016 Ofcom held an initial scoping meeting with stakeholders setting out its approach to the Code of Practice drafting process, and invited different stakeholder communities to nominate representatives to serve on a Code of Practice Drafting Group. The membership of this group was subsequently confirmed in September 2016. It was composed of eight specialist practitioners, representing landowners, communications network operators and infrastructure providers.
- 2.17 Between September and December 2016 the Drafting Group prepared successive versions of the draft Code of Practice document, which was reviewed at monthly meetings hosted by Ofcom designed to capture additional input from a wider group of cross-sector stakeholders.
- 2.18 In parallel to the mainstream stakeholder engagement process, Ofcom prepared supporting templates for standard notices and standard terms (see Annex 6-7 in the Consultation document, the latter of which was based on material submitted by the wider stakeholder group referenced above).
- 2.19 In accordance with our pre-agreed schedule, the Drafting Group submitted a finalised version of the draft Code of Practice to Ofcom on the 16 December 2016. We reviewed their output and believed that, with some minor drafting amendments, it met the requirements

specified in paragraph 103(1) of the new Code. The draft Code of Practice and accompanying Schedules were set out in Annexes 4 and 5 to the Consultation.

Standard terms

- 2.20 Paragraph 103(2) of the new Code requires Ofcom to prepare and publish standard terms which may (but need not) be used in agreements under the new Code.
- 2.21 We therefore prepared a set of standard terms which could be used by parties seeking to reach agreement on the conferral of Code rights under the new Code.¹²
- 2.22 In order to assist in the preparation of these standard terms, we asked members of the Code of Practice Drafting Group if they would be willing to share copies of their template Code agreements with us. A number of members shared their agreements with us and we drew upon those in order to draft the standard terms on which we consulted.
- 2.23 We explained in the Consultation that, when preparing these standard terms, we were mindful of the views and recommendations of the Law Commission.¹³ In particular, the Law Commission explained, amongst other things, that standard terms would be useful on the basis that they could give a starting point for negotiations, but could be amended as necessary to meet particular circumstances. It considered that, at a most basic level, standard terms could assist parties, particularly landowners, to ensure that important terms are not forgotten.
- 2.24 We recognised that some parties may have considered it to be useful if Ofcom had prepared more than one set of standard terms. However, after careful consideration, our view was that this was not necessary and that the value (if any) of us preparing more than one set of terms would be limited.
- 2.25 We also noted that the DEA – or Digital Economy Bill as it was at the time of publication of the Consultation – does not require Ofcom to prepare more than one set of standard terms. Further, as the Law Commission recognised, Code agreements will, in practice, cover an extremely wide range of circumstances: the technology to be installed, the physical characteristics of the site and the preferred approach and sophistication of the parties to the agreement will often differ significantly. For Ofcom to prepare a variety of standard terms which suit each type of technology, site, operator and landowner/occupier would be a significant task and it was not clear to us that this would be of benefit to Code Operators and landowners/occupiers.
- 2.26 In this regard, we emphasised that the purpose of the standard terms was to provide parties with a starting point for their negotiations, rather than to provide a final set of terms for all parties. We anticipated that many experienced site providers and Code operators may prefer to use their own terms and that, for more complex transactions, parties are likely to seek independent legal advice in order to ensure that their Code agreement is properly

¹² See Annex 6 to the Consultation.

¹³ [The Law Commission, The Electronic Communications Code, 27 February 2013, pages 203 – 205.](#)

tailored to their specific circumstances. In addition we said we were also aware that there are other sources of standard terms and conditions that have been developed through consultation between interested parties. By way of example we referred to the multi-occupant office building wayleave agreement developed for the City of London.¹⁴

- 2.27 We received a large number of comments on payment, which are discussed later in the document in regards to Clause 3: Payment. Respondents were generally either concerned that the Standard Terms did not go far enough in setting expectations for payment and rent reviews, or were concerned that the Standard Terms appeared to presume that some payment would be paid in all circumstances. As stated later in the document, payment and compensation should be regarded as a matter for negotiation between parties. Parties would be free to vary their agreements, for example to review payments, without the need for a clause in the Standard Terms expressly providing for such a right, provided that such a variation complies with the requirements set out in paragraph 11 of the new Code. However, in line with a number of comments on many simple access arrangements, we would agree that zero payment may well be the norm for some types of access arrangements.

Template notices

- 2.28 Paragraph 90 of the new Code provides that Ofcom must “prescribe the form of a notice to be given under each provision of this code that requires a notice to be given”. Ofcom is therefore required to publish a number of template notices which must or may (depending on the circumstances) be used by Code operators and landowners/occupiers.¹⁵
- 2.29 We therefore prepared a number of template notices for use between Code Operators and other parties.¹⁶ We explained that, in a number of instances, the notices that we were prescribing were discretionary (i.e. they ‘may’ be given, but are not required to be given). However, we interpreted our proposed obligation under paragraph 90 of the new Code expansively and sought to provide drafts of standard notices, even where they were not strictly required by the new Code, in the belief that it would facilitate a smooth transition to the new Code regime.
- 2.30 We also noted that in a very limited number of cases, there was likely to be limited (if any) value in Ofcom prescribing the form of a discretionary notice. In particular, we considered that there would be little value in Ofcom prescribing the form of notices under paragraphs 32(1)¹⁷ and 39(4)¹⁸ of the new Code as the contents of any such notices would be highly fact-specific and we would expect Code Operators to be able to easily prepare these. We

¹⁴ City of London, [Digital Infrastructure Toolkit, standardised wayleave agreement](#), accessed 15 March 2017 – this document is reviewed and updated on a regular basis.

¹⁵ Where the form of a notice is prescribed by Ofcom, paragraphs 88(2) and 89(2) of the new Code require that, to be valid, notices given by Code operators and certain notices given by other parties must be in the prescribed form. However, paragraphs 89(5) and (6) envisage that certain other notices may be given, other than by an operator, in a form other than that prescribed by Ofcom (subject to the party giving the notice bearing the operator’s resulting costs, if any).

¹⁶ See Annex 7 to the Consultation.

¹⁷ i.e. a counter-notice from a Code Operator regarding the termination of a Code agreement.

¹⁸ i.e. a notice from a Code Operator disclosing whether apparatus is on land pursuant to a Code right.

therefore did not propose to prescribe the form of any standard form notices under these specific paragraphs of the new Code.

- 2.31 In preparing the standard notices set out in Annex 7 of the Consultation, we were mindful of the need to ensure that they were as clear and concise as possible. We were also mindful of paragraph 88(1) of the new Code, which requires Code Operators when giving notice to explain the effect of the notice, the provisions of the Code that are relevant to the notice, and the steps that may be taken by recipients in respect of the notice).

Responses to the Consultation

- 2.32 We received 34 responses to the Consultation¹⁹ from a broad range of stakeholders, of which 4 were confidential. In sections 3, 4 and 5, we discuss the points they raised, and provide our responses.

Keeping under review

- 2.33 We consider it may be prudent, depending on parties' experience of using the documents we are publishing, for Ofcom to review the Code of Practice, the standard terms and the notices, if necessary after an appropriate period, to consider their effectiveness. We would envisage working with relevant parties in carrying out this exercise if we proceeded to do so. We consider it is likely that it would be appropriate to conduct such a review in accordance with our normal consultation principles. This would enable all parties who have used the notices, Code of Practice, and standard terms (or have decided not to use the standard terms) to engage with Ofcom and share their views.

Regulating access to WIP infrastructure

- 2.34 As explained in the Consultation, during the development of the package of reforms to the Code that led to the amendments proposed in the DEB, stakeholders provided a range of inputs to DCMS and Ofcom with regard to whether the relationships between WIPs²⁰ and CPs (particularly mobile network operators (MNOs)) were effectively governed by the Code and, if not, what reforms to the Code might be necessary.
- 2.35 We recognised that industry stakeholders were seeking confirmation that, in the event that commercial negotiation and any subsequent arbitration fails, the terms on which WIPs grant access to their infrastructure can be regulated.
- 2.36 We remain of the view expressed in the Consultation that, whilst it is difficult to provide a view on this issue in the abstract, Ofcom has a number of statutory powers which could enable us, in principle, to regulate the terms on which WIPs grant access to their

¹⁹ The non-confidential responses are published on our website.

²⁰ WIPs are organisations that provide physical infrastructure (i.e. sites, masts, etc.) to MNOs to enable them to roll-out their networks. The largest independent WIPs are Arqiva and Wireless Infrastructure Group (WIG). The MNOs themselves act as WIPs when granting each other access to their respective masts.

infrastructure. For example, Ofcom has certain powers to regulate access to infrastructure under the following legislation:²¹

- regulation 3(4) of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003/2553;²²
- section 73 of the Communications Act 2003 (the “2003 Act”) (i.e. by imposing an access-related condition);
- section 87 of the 2003 Act (i.e. by imposing a significant market power (SMP) condition); and
- section 185 of the 2003 Act (i.e. by resolving a dispute relating to the provision of network access).

2.37 We note that, in the first instance, we would generally seek to resolve problems using the most appropriate and least intrusive approach, with recourse to more formalised regulatory interventions only where necessary.

²¹ Ofcom also has certain powers under general competition law to address abuse of dominance or anti-competitive agreements.

²² Regulation 3(4) specifies that a Code operator “where practicable, shall share the use of electronic communications apparatus”. Ofcom have powers under section 110 of the 2003 Act to enforce this requirement.

3. Stakeholders' comments on the Code of Practice and Ofcom's response

Introduction

- 3.1 This section considers comments made by stakeholders in relation to the Code of Practice. In sections 4 and 5 we consider responses we received in relation to the Standard Terms and the Template Notices respectively.
- 3.2 Annex 1 sets out a marked-up version of the Code of Practice showing the changes we have made following our assessment of stakeholder responses. To aid reference, the headings in this section in relation to the Code of Practice refer to paragraph numbering in the draft document that we consulted on as well as the corresponding paragraph numbers in the final Code of Practice which we are publishing alongside this document. However, for simplicity our summary and analysis of responses refers only to the paragraph numbering from the draft Code of Practice.

Stakeholder comments and Ofcom's response

Comments on the purpose of the Code of Practice (paragraphs 4.1 – 4.8 and more generally, paragraphs 1.1 – 1.5 in the final Code of Practice)

- 3.3 We noted a general theme from many stakeholder comments that the draft Code of Practice did not go far enough in particular areas or went too far in other respects. By contrast, two confidential stakeholders considered that the Code of Practice should state explicitly that it is not intended to impose any rights or obligations on either party beyond those detailed within the Digital Economy Act 2017 (the 'Act'), and that in any case of interpretation the Act will prevail. The Code of Practice is based on the core principle of agreement directly between parties.
- 3.4 A number of stakeholders (Thornton Estates Ltd, CLA and CAAV) also stated that there is a fundamental requirement for Ofcom to set out proper sanctions for failure to comply with the Code of Practice. CAAV suggested that written representation should be able to be made to Ofcom to assess such cases and issue directions where appropriate for one party to compensate another where aggrieved by relevant action.
- 3.5 One respondent (CMS Cameron McKenna) stated that there is no guidance on how the court will take the Code of Practice into account when assessing conduct and costs.
- 3.6 A confidential stakeholder and CAAV commented that the Code needed to refer more clearly to occupiers (e.g. tenants and licensees) since it will often be the occupier of land who is affected by the day to day rights of operators.
- 3.7 A confidential stakeholder referred to duct and pole access, noting that this was an extra angle to consider. They said that, at the time of wayleave to site active equipment (an SLU

cabinet or otherwise), they will seek a joint agreement to grant access to all of the BT ducting covered under the same title/landlord. They said this had a minimal impact on the landowner and saves subsequent requests for access as new premises are bought online.

- 3.8 Another confidential stakeholder stated that the CoP should include sections dealing with how operators should behave in the event of: site sharing, upgrading of apparatus and assignment. They stated that it would be in the interest of all parties for a section to be included within the CoP dealing with consultation with a landowner/occupier on additional burden and adverse minimal impact prior to any site sharing or upgrade plans an operator may have. This is because an operator is unlikely to be aware of what would constitute additional burden or adverse impact.
- 3.9 A further confidential stakeholder stated that another addition to the CoP should be notification to a landowner/occupier in the event that an operator assigns the agreement. This is covered to a degree in paragraph 4.13 of the CoP but this respondent considered it needed to be made clearer. They said that the Code does not have a requirement for an original operator to do this although operators would be likely to do so in order to avoid liability for any breaches of the assignee operator.
- 3.10 The same confidential stakeholder also stated that the Code of Practice makes it clear that the landowner's point of contact will now be the operator and said that it should be pointed out that the landowner/occupier has an agreement with the operator rather than the contractor.

Ofcom's response

- 3.11 As a general point it should be understood that the purpose of the Code of Practice is to set out expectations for the conduct of parties to agreements made under the new Code. It is also important to note that the Code of Practice does not represent a guide to the new Code nor does it replace or supplement its provisions by imposing any new rights or obligations on the respective parties. The Code of Practice is not binding and cannot change the balance that the law delivers under the Code. Instead it is designed to complement the new Code by suggesting best practice to facilitate positive and productive engagement between all parties across a range of issues, roles and responsibilities. Whilst the Code of Practice provides some examples of best practice these are not intended to be exhaustive.
- 3.12 Ofcom is given no enforcement role in the event of non-compliance and has no power to impose sanctions in this area. As noted above, the Code of Practice is non-binding, in the sense that there is no statutory obligation on operators or landowners to comply with its provisions. Furthermore it is for the courts rather than Ofcom to decide what weight they should attach to the Code of Practice when determining issues regarding the commercial relationship and conduct of the parties and awarding costs.
- 3.13 To ensure there can be no confusion about the purpose of the Code of Practice and its intended effect we have reviewed the language used and have replaced words such as 'will' and 'must', with the conditional form, such as "should" and "ought to".

- 3.14 We agree that it would be helpful to make it clearer that the Code of Practice covers occupiers as a whole, and not just landowners. This reflects Ofcom’s obligation in paragraph 103 of the new Code, which requires the Code of Practice to cover “operators” and “persons who occupy or have an interest in land”. We have amended paragraph 4.6 of the Code of Practice (paragraph 1.3 in the final Code of Practice) to explain that where the Code of Practice makes refers to landowners this should also be taken, where appropriate, to encompass occupiers as defined in the Code. We have also added the following sentence in paragraph 4.8: “Operators should take adequate steps to satisfy themselves that they are negotiating with a party who has a lawful right to grant the necessary agreement if not negotiation with the landowner.”.

Comments on ‘Scope’ (paras 4.9 – 4.11, paragraphs 1.6 – 1.8 in the final Code of Practice)

- 3.15 CAAV stated that for clarity that the second bullet point in paragraph 4.9 required a new second sub-bullet to read, ‘The installation of apparatus and facilities’.
- 3.16 Redford Crowe stated that it was a missed opportunity that the scope of the Code of Practice does not extend to the financial aspects of the relationship between the landowner and the operator and that this was a missed opportunity because the new regime introduced in paragraph 23 of the new Code (which is based upon a ‘No Scheme’ system) “is likely to be one of (if not) the most contentious aspect(s) of the new Code having regard not least to some of the written evidence which was submitted to the House of Commons Digital Economy Bill Committee.”
- 3.17 CMS Cameron McKenna stated that paragraph 4.11 did not consider the impact and needs of 5G microcells, in particular regarding smaller and more mobile technology. They considered that existing code rights may not be suitable for a 5G microcell, whether security of tenure is needed for some instances and whether a more flexible regime would be more suitable.

Ofcom’s response

- 3.18 We did not agree with the CAAV’s suggestion for a new sub-bullet. The sub-bullets in this paragraph each represent the main areas covered in subsequent sections of the Code of Practice, as reflected by the headings used.
- 3.19 As to Redford Crowe’s point about the financial aspects of the relationship between the landowner and the operator, these will differ according to particular circumstances and are a matter for the parties to negotiate.
- 3.20 We acknowledge that the Code of Practice does not specifically refer to 5G microcells. As CMS Cameron McKenna have recognised, the Code of Practice reflects the approach taken in the new Code. If parties wish to agree flexible arrangements that suit their particular context the general principles set out in the Code of Practice would continue to be relevant and applicable.

Comments on ‘Communication and contact information’ and ‘Keeping contact information up to date’ (paragraphs 4.12 - 4.14, paragraphs 1.9 – 1.11 in the final Code of Practice)

- 3.21 Batcheller Monkhouse suggested that “site information” should be added to “up-to-date contact information” in paragraph 4.13 as some landowners have many sites let to the same operator and the operator needs to ensure that the site name used by the operator matches that used by the owner. This would help to avoid any delay, for example in arranging emergency access. They also stated that that it would be helpful for operators to provide a point of contact or dedicated team for landowners to contact for the escalation of redevelopment/decommissioning issues.
- 3.22 Batcheller Monkhouse also considered that the operator should be obliged to create and keep up to date a system for ensuring that such information is passed on to the operator’s agents and contractors.
- 3.23 SSE explained that operators are rarely informed when occupiers or landowners change and therefore it was not within the operator’s control to ensure that occupiers and landowners have up to date contact details. They said that operators are likely only to become aware of changes when a payment is returned by the previous landowner. SSE asked for this to be recognised by including qualifying wording such as “so far as practicable” or “using reasonable endeavours”.
- 3.24 CMS Cameron McKenna suggested that the landowner could issue a rent authority letter, which they considered would be helpful for operators to provide a point of contact or a dedicated team for landowners to contact for the escalation of redevelopment/decommissioning issues.
- 3.25 A confidential operator respondent suggested that contact information should be provided in writing directly to the registered office or other notified address of the operator or by email.

Ofcom’s response

- 3.26 We agree that it could be helpful to include reference to ‘up to date site information’ as well as ‘contact information’ and to add a bullet to refer to “the escalation of redevelopment/decommissioning issues” and have amended paragraph 4.13 accordingly. However, we are wary that including qualifying wording could risk undermining the timely provision of important information to landowners.
- 3.27 We have additionally amended paragraph 4.14 to refer to providing contact information in writing directly to the registered office and the possibility of contact information being provided by email.

‘Professional advice’ (paragraphs 4.15 – 4.17 in the draft Code of Practice, paragraphs 1.12 – 1.13 in the final Code of Practice)

- 3.28 CAAV and Thornton Estates Ltd considered it important that the issue of professional advice is raised early in the Code of Practice so that the parties can decide whether they require such assistance or not. They considered that the Code of Practice should require that the party offering an agreement should be required to advise the other party to take the requisite advice. Scottish Land & Estates and Thornton Estates Ltd also stated that this section should be strengthened to encourage landowners to seek professional advice to ensure that both parties enter into the agreement with full knowledge and understanding of the resultant implications.
- 3.29 Virgin Media considered that Ofcom should encourage landowners and operators to always try to negotiate directly with each other, at least in the first instance, by imposing an obligation on the parties to engage directly with one another. They also said that Ofcom should be more definitive in outlining the circumstances in which a landowner may wish to seek professional advice and those in which it is unlikely to be required.
- 3.30 Strutt & Parker said that operators should be obliged to meet reasonable costs of the landowner’s legal and professional advice. However, Arqiva considered that the Draft Code of Practice went too far in suggesting that “An adviser’s fees are a matter to be agreed in advance as part of the adviser’s terms of engagement.” They considered this was unnecessary and confusing and should be removed. Virgin Media had similar concerns.
- 3.31 Arqiva said that paragraph 4.17 should be clarified so that it could not be interpreted to mean that either party is required to share confidential information.

Ofcom’s response

- 3.32 For the reasons we have already explained it is not the role of the Code of Practice to impose obligations on the parties. We have amended the language here as in other parts of the Code of Practice to make this clear. We agree with Arqiva’s comment that it is a matter for the landowner and operator to pay for their own professional advice in any manner or structure they see fit and have removed the former paragraph (paragraph 4.16).
- 3.33 In relation to Arqiva’s comment on paragraph 4.17, we have amended the wording to say: “In all cases, both operators and landowners should act in a consistent, fair and open manner with each other in relation to any proposed works.”

Comments on ‘New agreements for the installation of Apparatus’ (paragraph 4.18 – 4.19 in the draft Code of Practice, paragraph 1.14 -1.15 in the final Code of Practice)

- 3.34 CAAV and Thornton Estates Ltd considered that the reference to “customer demand” in the first bullet point in paragraph 4.18 should be deleted.

- 3.35 Arqiva wanted it to be made clearer that paragraph 4.19 relates to a “new” installation as opposed to existing apparatus and that a new agreement is not necessary when additional equipment is being added to an existing installation.
- 3.36 Strutt & Parker said that they would expect any new installation to require a site visit, if only to ensure that the landowner is fully aware of the extent of a proposal and can raise any concerns. Cell:cm said that the operator should be obliged to undertake a site visit if an owner requires one and to meet the full cost of doing so.
- 3.37 A confidential operator stakeholder pointed out that the minor installation identified (placement of a telegraph pole) may not automatically mean that a site visit is not required and that this question should be determined on a site-specific basis.

Ofcom’s response

- 3.38 We did not consider that “customer demand” was necessarily unhelpful as it could potentially capture other reasons not covered by the specific examples provided in the other bullet points.
- 3.39 For additional clarity we have inserted the words “on a new site” in paragraph 4.19 in response to the point raised by Arqiva, although we note that the heading for this section already refers to “new” agreements for the installation of Apparatus and believe it is generally clear from the context that this section does not apply to additional equipment added to an existing installation. We would also note that, whilst not requiring a new agreement, where the installation of additional equipment to an existing installation amounts to an upgrade the operator would first need to satisfy the test set out in paragraph 17 of the new Code.
- 3.40 After “For minor installations of apparatus (for example, the placement of a telegraph pole)” in paragraph 4.19 we have replaced the words “agreement can be reached on standard terms and conditions and without the need for a site visit” with “it may be possible to reach an agreement on standard terms and conditions and without the need for a site visit” to reflect the comment that this issue is a matter to be determined on a site-specific basis.
- 3.41 In response to remaining comments on these paragraphs, we note once again that it is not the purpose of the Code of Practice to impose new rights or obligations on parties.

Comments on ‘Stage 1: Site Survey’ (paragraph 4.20 – 4.23 in the draft Code of Practice, paragraphs 1.16 – 1.19 in the final Code of Practice)

- 3.42 Virgin Media considered that further clarification was needed in relation to site access in paragraph 4.21 to emphasise that landowners should speedily permit reasonable requests for access for site surveys. By contrast, Batcheller Monkhouse pointed out that the protocol for some sites required prior security clearance. Other stakeholders said the right to access should be strengthened in one way or another.
- 3.43 Community Fibre said that Ofcom should publish a standard template for a survey request in order to clarify the survey process and reflect the expectation that the survey request

should normally be responded to within 7 days. Scottish Land & Estates (alongside Thornton Estates Ltd, Strutt & Parker) felt that the reference to “a period of around 7 days” was rather weak and should be changed to “a period of no less than seven days”.

- 3.44 SSE was concerned about the risk of discouraging less formal but direct contact to request a visit as they said it is common for land agents to knock on doors to contact landowners. However, they agreed that formal offers for installation should be in writing.
- 3.45 MWBLAF and Pike considered that all types of public access to land should be mentioned in paragraph 4.23, and noted that the legal framework in Scotland for public access to land is substantially different.
- 3.46 CAAV and Thornton Estates Ltd considered the drafting of paragraph 4.23 could be improved and suggested revised wording to make it clear that the parties may choose to meet on site during the assessment process to discuss practicalities and that the operator may ask the landowner to provide certain relevant information. Batcheller Monkhouse considered that operators would find it helpful if the landowner were to explain whether or not there are any operational restrictions affecting access to, or works on, the site.
- 3.47 CMS Cameron McKenna considered it would be helpful if paragraph 4.23 included a provision for both parties to share the cost of the landlord providing relevant information about the proposed site. Strutt & Parker similarly considered it was not unreasonable to expect that operators should pay for information to be provided.

Ofcom’s response

- 3.48 Noting the respective comments from Virgin Media and from Batcheller Monkhouse on paragraph 4.21 we consider it would potentially be unhelpful for the Code or Practice to go into further details regarding the practicalities of site access as the facts and circumstances in each case are likely to differ.
- 3.49 In response to Community Fibre’s comments regarding a standard template for a site survey, we consider the parties would be best placed to agree on an appropriate survey process according to the particular circumstances, which we note are likely to differ from site to site. We have amended the wording ‘will’ to ‘should’ in relation to the operator requesting access is given within a reasonable period but do not consider it is appropriate for the Code of Practice to go further than suggesting that such a period should generally be around 7 days, as what is reasonable in any given case is likely to depend on the particular circumstances.
- 3.50 We have not amended paragraph 4.22 as we consider it best practice generally for access to be agreed in writing. However if there are circumstances in which the parties consider it appropriate and wish to establish a less formal mechanism for agreeing access, it is clearly open to them to do so. We do not consider it necessary for this to be expressly stated in the Code of Practice.
- 3.51 We acknowledge that there may be other rights of access that could arise and should not be overlooked. Accordingly, we have amended paragraph 4.23 to include a reference to “any other rights of public access on the site or adjacent to the site”. We think this should be broad enough also to cover any separate legal rights under Scottish law.

- 3.52 We have not accepted the revised wording suggested by CAAV and Thornton Estates as we consider the existing wording more strongly encourages landowners to provide relevant information on request.
- 3.53 In relation to the suggestions regarding payment of costs it should be noted that the financial aspects of the relationship between the landowner and the operator are expressly stated to be outside of the scope of the Code of Practice (see paragraph 4.9 in the consultation).

Comments on ‘Stage 2: Consultation and agreement’ (paragraphs 4.24 – 4.31 in the draft Code of Practice, paragraphs 1.20 – 1.27 in the final Code of Practice)

- 3.54 Virgin Media acknowledged that the examples given in paragraph 4.24 were far from exhaustive but nevertheless considered that it needed more explicitly to reflect the fact that there are significant differences between different technologies e.g. mobile and fixed line and the apparatus that each employ. They were concerned that there should not be a one-size-fits-all approach. Virgin Media added that the reference to “consultation” in the following paragraph should also be clarified as each of the examples given could require negotiations leading to different agreement terms.
- 3.55 SSE noted in relation to paragraph 4.26 that operators may in some circumstances wish to secure a site before going to the expense of applying for planning permission where it is necessary. They said this would avoid a landowner seeking to renegotiate once planning permission has been obtained.
- 3.56 Virgin Media noted that paragraph 4.27 referred only to “a single cabinet or pole” as examples of “standard apparatus” and did not provide further detail on what else this might cover. They suggested it should also include “a short length of cable” to reflect the language used earlier in the Code of Practice. Virgin Media also felt that it would be helpful to give examples of proposals that are less simple, such as mobile masts. Batcheller Monkhouse suggested this paragraph should also refer to the method of fixing apparatus to the landlord’s building, as well details of any alterations required to accommodate the apparatus.
- 3.57 RICS was concerned by the suggestion in paragraph 4.27 that a “simple written agreement” might be signed and returned and that this might not be appropriate in all scenarios. Strutt & Parker were also concerned about this and the reference to a “straight forward” proposal, which they thought would be open to loose interpretation by operators, and as such should be more closely defined. Scottish Land and Estates and Thornton Estates Ltd stated that a plan should be required for all proposals.
- 3.58 Cell:cm considered that an operator should have to provide a detailed notice of the implications for signing and returning such an agreement. Community Fibre suggested that the paragraph should include some guidance on reasonable charges. RICS and Thornton Estates Ltd were concerned to ensure that landlords were aware of the need to take appropriate professional advice.

- 3.59 CAAV and Thornton Estates Ltd suggested that paragraph 4.28 should be re-drafted to make clear that as part of the terms of any agreement the parties should agree access arrangements for construction, installation of apparatus, subsequent planned maintenance, upgrades and emergency maintenance to repair service-affecting faults. They also suggested referring to the matters concerning access in Annex B as “essential matters” and stated that this information should be shared with contractors “as necessary”.
- 3.60 CAAV and Thornton Estates Ltd both considered there was “considerable duplication” in paragraphs 4.29 and 4.31.
- 3.61 A confidential operator stakeholder noted that as well as “simple” cases it may also sometimes be possible for larger and more complex arrangements to be completed within a matter of weeks and suggested that this should be recognised in paragraph 4.30.
- 3.62 Arqiva felt that paragraph 4.31 should include some reference to reasonableness of behaviour, not just a reference to terms being agreed in a reasonable time; whilst Community Fibre asked for the reference to “a reasonable timeframe” to be replaced with “28 days” in line with the Code.

Ofcom’s response

- 3.63 We agree with Virgin Media that there are significant differences between different technologies and that there cannot exist a one-size-fits-all approach. However we consider this is already made sufficiently clear in 4.24, which recognises that types of apparatus can vary enormously. In relation to use of the word “consultation” we did not consider the meaning needed clarifying or that there was a particular need for the Code of Practice to suggest what such process might look like, particularly as this is likely to differ according to the circumstances of each particular situation.
- 3.64 In relation to comments about what may or may not constitute “standard apparatus” and the examples of documentation that might be appropriate for less simple agreements, the examples given are by no means exhaustive but we consider they are sufficient in the context of this paragraph. Further, in regard to the comments about references to a “simple written agreement” and a “straightforward” proposal, these are simply intended to underline the point that different approaches to reaching an agreement between parties may be appropriate, depending on the circumstances. We have clarified the language to make this clearer.
- 3.65 As for comments regarding the need to ensure landlords take appropriate legal advice, we consider this is a matter for landlords to take into account more generally, as reflected earlier in the Code of Practice.
- 3.66 In response to the two comments about duplication in paragraphs 4.29 and 4.31 these two paragraphs have a slightly different purpose from each other insofar as the former paragraph 4.29 sets out to recommend that the parties make an effort to reach voluntary agreement before having recourse to the courts and the latter further explains the Code provision relating to the involvement of the courts and reinforces the point that the Code of Practice is designed to help the parties avoid having to go to court.

- 3.67 We agree that it may sometimes be possible for larger and more complex agreements to be completed more quickly, which is why it is stated in 4.30 that such agreements “may” take longer, although for clarification we have added the word “generally” after “may”. As noted elsewhere, the Code of Practice is not intended to cover every possible eventuality.
- 3.68 We do not consider that it is necessary for paragraph 4.31 to include a reference to reasonableness of behaviour although we acknowledge the comment from Community Fibre highlights the need to clarify this paragraph to ensure it more closely reflects paragraph 20 of the Code. We have therefore deleted “within a reasonable timeframe” and inserted a reference to the circumstances described in paragraph 20(3) of the Code.
- 3.69 Finally, in relation to other specific comments on these paragraphs, we note again that it is not the purpose of the Code of Practice to place new rights or obligations on parties.

Comments on ‘Stage 3: Deployment Stage’ (paragraphs 4.32 – 4.33 in the draft Code of Practice, paragraphs 1.28 – 1.29 in the final Code of Practice)

- 3.70 Arqiva made a general comment that the Deployment Stage relates only to brand new structures/sites and that this should be made clear.
- 3.71 Arqiva also considered it would be better if paragraph 4.32 were to say that the operator should “keep disruption and inconvenience to a minimum” rather than “cause minimal disruption and inconvenience” as putting up a new mast will inevitably cause a level of disruption. SSE was concerned that the wording of this paragraph suggested an obligation to cause minimal disruption and inconvenience was being imposed on operators and that this should be limited to circumstances in which it is reasonably practicable.
- 3.72 Arqiva further stated that drawings should only be provided by exception, where the particular site circumstances necessitate greater control, otherwise there was a risk of undermining the Government’s objective to facilitate future rollout.
- 3.73 Batcheller Monkhouse considered that paragraph 4.32 should be amended so that the final bullet point refers additionally to procedures for safeguarding the landowner’s business and livelihood (as well as the landowner’s property). They said that including business and livelihood would ensure good and proper relationships are maintained between the two parties for the benefit of the public’s access to an electronic communications network. They also considered that a further point should be added to ensure that procedures are in place for ensuring that appropriate steps are taken to comply with the owner’s health and safety and that site-applicable access procedures are followed.
- 3.74 CAAV and Scottish Land & Estates both considered that the first bullet point in paragraph 4.32 should include reference to the operator making the contractor’s name and contact details available to the landowner. CAAV did not consider “livestock” in the final bullet point was necessarily a helpful example as the need to safeguard the landowner’s property might apply to anything from hedges alongside an access track to the lifts used to gain access to a rooftop site. Both they and Scottish Land & Estates said that the final bullet point should make reference to reinstatement commitments. Thornton Estates Ltd also made a similar point.

- 3.75 Strutt & Parker expressed concern about operators failing to comply with paragraph 4.33 and stated that the photographic record of condition cost should be met by the Code operator. They expressed the view that this was an area where sanctions are essential.

Ofcom's response

- 3.76 These paragraphs dealing with the Deployment stage are set within the context of the overall heading "New agreements for the installation of Apparatus", under which each of the three stages is considered. We believe we have already sufficiently addressed Arqiva's point about their scope in response to paragraph 4.19.
- 3.77 In relation to comments relating to the phrase "cause minimal disruption and inconvenience", we do not consider there is any substantive difference between this and the suggested amendment. However, we accept that this paragraph could be clearer that it is not setting any obligation on operators and that the words "will endeavour" were perhaps unhelpful in this regard. We have therefore revised this to say "should endeavour".
- 3.78 We did not accept Batcheller Monkhouse's suggestion that paragraph 4.32 should additionally refer to business and livelihood as we considered this risked being overly prescriptive. The detail of what is and is not included in an operator's notification is ultimately a matter for negotiation.
- 3.79 We agree that it would be helpful to suggest that the operator should make the contractor's name and contact details available to the landowner and have amended the first bullet point to refer to this. However, we did not consider it was necessary to remove "livestock" in favour of other possible examples or that it would be appropriate to go further than suggesting that the operator makes provision for safeguarding the landowner's property. The question of potential reinstatement of damage is a matter for contractual negotiations; financial aspects of the relationship between the landowner and the operator are beyond the scope of the Code of Practice.
- 3.80 For the same reason we have not accepted Strutt & Parker's comment in relation to 4.33. As we have explained, the Code of Practice does not impose new rights or obligations on parties.

'Neighbours and other occupiers' (paragraphs 4.33 – 4.36 in the draft Code of Practice, paragraphs 1.30 – 1.32 in the final Code of Practice)

- 3.81 We did not receive any comments on these paragraphs but, as elsewhere, we have changed "must" to "should" and "shall" to "ought" to clarify that these paragraphs are not imposing new obligations.

Comments on ‘The ongoing access to and operation, maintenance and upgrading of existing sites and apparatus’ (paragraphs 4.37 – 4.45 in the draft Code of Practice, paragraphs 1.33 – 1.41 in the final Code of Practice)

- 3.82 Thornton Estates Ltd stated that 4.37 would be more balanced if it recognised that 24/7 access is a point to be negotiated between the parties not demanded or there of right. Similarly, Strutt & Parker considered that access procedures needed to reflect the landowner’s primary use of the site.
- 3.83 Arqiva referred to the access “obligations” in paragraphs 4.38, 4.39 and 4.40, which they considered were particularly onerous for an operator. Arqiva submitted that the starting point should be that access is open at all times unless a restriction has been reasonably imposed in an agreement. They asked for the paragraph to acknowledge that it is in the public interest that operators are able to freely access a site to maintain and upgrade without conditions and restrictions unless the nature of the particular site makes that necessary.
- 3.84 CAAV and Thornton Estates Ltd suggested alternative drafting for paragraph 4.38. Amongst other things the alternative wording they proposed would ensure that the operator and the landowner “must address” the Operator’s rights of access to the site. Scottish Land & Estates similarly asked for the paragraph to be strengthened as they considered the words “where necessary” were insufficient to ensure that matters relating to access are agreed in advance.
- 3.85 Batcheller Monkhouse and Scottish Land & Estates both pointed out that the final sentence of paragraph 4.39 suggested that the operator should contact the landowner to explain when and why access was required for ‘historic events’ and that rather than saying “when and why access was required” it should say “when and why access is required”. This would ensure that in case of urgent access being required operators contact site providers before access is taken. Strutt & Parker said that emergency access should be preserved for genuine cases and Code Operators should be required to fully evidence the need for emergency access.
- 3.86 A confidential stakeholder stated that paragraph 4.39 implied that an Operator can override the measures agreed in an emergency. They considered that the Code of Practice should explicitly cater for the need to accommodate appropriate measures for special sites even in the event of emergency, otherwise there was a risk of these sites being withdrawn from the market.
- 3.87 Thornton Estates Ltd asked for a new paragraph to be inserted after paragraph 4.40 to state that an operator has powers under the Code to upgrade apparatus provided this has no adverse impact (or no more than a minimal adverse impact) on the appearance of the apparatus and imposes no additional burden on the landowner. They also suggested that Ofcom should set out guidelines as to what constitutes an emergency or service affecting fault.
- 3.88 A confidential operator stakeholder said that paragraph 4.41 should be amended so that it reads that Operators “might wish to inform” rather than being obliged to “notify”

landowners as soon as reasonably practicable following the physical sharing of the site commencing by the new sharing operator.

- 3.89 In relation to site sharing, Batcheller Monkhouse said that some operators may not be “physically sharing a site” to actually need access as they may also be using any apparatus on a site. In both these instances those operators who share or use a site should be notified to the owners. Other respondents (CAAV, Scottish Land & Estates and Thornton Estates Ltd) said it was important that the landowner is also provided with the relevant contact details of any other party who shares the site and CAAV suggested that the parties should agree arrangements for third party site sharers to gain physical access. Strutt & Parker considered that landowners should also be provided with information relating to the equipment installations, information regarding key terms of the site sharing arrangements, and confirmation that contractual obligations will also be met by the site sharer in relation to matters such as access, indemnities, insurances etc. By contrast, Arqiva considered that it was an unnecessary imposition on operators for this paragraph to say that operators should notify landowners of the names of sharers in circumstances when no additional consents are required under the Code and that this should be removed.
- 3.90 Batcheller Monkhouse stated that paragraph 4.42 should include an additional provision on the operator to take such additional steps to protect the owner’s property (including any pipes or services etc running under, on or over the property) and CAAV considered that the paragraph should be amended to require the operator to reimburse the owner and any occupier as soon as practically possible for all losses where this is outside the lease area. Scottish Land & Estates said that operators should return the land to its prior condition “in reasonable time”.
- 3.91 In relation to paragraph 4.43, Strutt & Parker said that operators should additionally seek to ensure that a permit is issued to a landlord for each individual attending site denoting the time of arrival, names of individuals, car registration plates and the nature of the work to be carried out.
- 3.92 A confidential stakeholder said it was concerned that paragraph 4.44, which referred to operators providing on request verification of which contractor was on site at any given point and why, could become unduly cumbersome. Both they and Arqiva considered that there should be a requirement that any such requests should be reasonable in order to prevent disproportionate costs from dealing with frequent requests. By contrast, Strutt & Parker asked for a permit system to deal with this issue.
- 3.93 We received several comments in relation to the reference in paragraph 4.45 to operators adhering to any legal or regulatory requirements for managing location specific risks. An operator said that it should be expressly stated that landowners should ensure that access is preserved specifically in line with the contractual terms of any new Code agreement which may contain site specific requirements. Batcheller Monkhouse stated that a reference should be added to ensure that for sensitive locations legal and regulatory requirements might also include arranging for any contractors to have been security cleared or vetted. Two respondents (Scottish Land & Estates and Thornton Estates Ltd) asked for a more general reference to biosecurity because of the risk of spreading disease or pathogens on

machinery etc. Strutt & Parker said that reference to the need for landowners to preserve the ability for operators to access their apparatus, particularly in the case of operational emergency, should be qualified.

- 3.94 CAAV pointed out that the reference to “national” legal or regulatory requirements was unhelpful. More generally, AP Wireless said that landowners should be under no obligation to incorporate communications apparatus in redeveloped property.

Ofcom’s response

- 3.95 A number of the comments we received on these paragraphs related to perceived obligations being imposed on one party or the other or asked for additional rights or obligations to be imposed. In relation to specific requests for additional safeguards or requirements, we consider these are for the parties to agree between themselves. As we have explained previously, the Code of Practice is non-binding and its purpose is to set out expectations for the conduct of parties to agreements made under the new Code not to replace or supplement its provisions by imposing any new rights or obligations on the respective parties. As elsewhere, where appropriate we have amended any wording that could have been misconstrued as imposing an obligation (e.g. by replacing “will” or “must” with “should”).
- 3.96 Specifically, in relation to paragraph 4.38 we have revised the reference to “matters to be covered in relation to access” being set out in Annex B so that it now reads “Annex B sets out key points for access arrangements”. This should make it clearer that Annex B is not intended to set out an exhaustive list of such matters. However, we consider that the words “where necessary” remain appropriate as they recognise that the facts and circumstances of each case will differ.
- 3.97 We agree with respondents who said that paragraph 4.39 could appear to suggest that operators only need to contact site providers after access is taken, and have amended the wording so that it is clear that contact should be made in advance to explain when and why access is required and that landowners should seek to cooperate with the restoration of service. However, it is vital that operators are able to obtain urgent access when necessary in order to restore emergency services.
- 3.98 We do not accept Thornton Estates Ltd’s suggestion that a new paragraph should be added to refer to circumstances in which upgrade powers may be exercised under the Code, as we consider the issue of agreeing upgrades to apparatus to be a matter for parties to negotiate.
- 3.99 We do not consider it necessary or appropriate to set out separate guidelines as to what constitutes an emergency or service affecting fault, particularly given the requirement on network and service providers under s.105A of the Communications Act to take technical and organisational measures to manage risks to the security of public electronic communications networks and services and Ofcom’s existing guidance on this requirement.²³ Network providers must also take all appropriate steps to protect, so far as

²³ https://www.ofcom.org.uk/data/assets/pdf_file/0021/51474/ofcom-guidance.pdf

possible, the availability of the provider's public electronic communications and Condition 3.1 of the General Conditions requires communications providers to take all necessary measures to maintain, to the greatest extent possible, uninterrupted access to emergency organisations.

- 3.100 In relation to comments about site sharing in paragraph 4.41, we acknowledge that some operators may not be “physically sharing a site” to actually need to access the site, and have therefore amended this to read “where operators are physically sharing a site or using any apparatus on a site”. We also consider it would be helpful for the landowner to be provided with relevant contact details of third party site sharers and have reflected this in the amended paragraph.
- 3.101 We do not consider it appropriate for paragraph 4.42 to be amended as requested by Batcheller Monkhouse, CAAV, Scottish Land & Estates and Strutt & Parker as the additional matters they suggested including would in our view risk unnecessarily complicating the Code of Practice and some would be beyond its scope.
- 3.102 We agree that it would be appropriate and in line with best practice for paragraph 4.44 to recommend that operators should “upon reasonable request” provide verification of which contractor was on site and why.
- 3.103 In relation to paragraph 4.45 we agree that the reference to “national” requirements was unhelpful particularly as there could be different requirements in the various nations of the UK. In relation to the suggestion that it should be expressly stated that landowners should ensure that access is preserved specifically in line with the contractual terms of any new Code agreement, we consider this would be a matter for the contractual terms themselves. Whilst we note the comment that legal and regulatory requirements might also include arranging for any contractors to have been security cleared or vetted, the examples given in this paragraph were not intended to be exhaustive. Further, we consider that the reference to “location specific risks” should be broad enough without the need to add a more general reference to “biosecurity”. Finally, we consider that qualifying the need for landowners to preserve the ability for operators to access their apparatus would risk restricting the operator’s ability to access their apparatus in the case of operational emergency.

**Comments on ‘Decommissioning sites that are no longer required’
(paragraphs 4.46 to 4.48 in the draft Code of Practice, paragraphs 1.42 – 1.44
in the final Code of Practice)**

- 3.104 CMS Cameron McKenna suggested that there should be an obligation in paragraph 4.46 for operators to inform landlords/landowners when they have decommissioned a site or when a site is no longer required. Strutt & Parker said that this paragraph should place an obligation on operators to remove apparatus, rather than simply having an option to refuse once the landowner makes the request for them to do so. By contrast, SSE said that there should be a caveat to the first sentence of the following paragraph (paragraph 4.47) so that it is clear there is no obligation to decommission a redundant site where there is a reasonable prospect of future use.

- 3.105 CAAV and Thornton Estates Ltd said that paragraph 4.48 should be amended in order to require the Operator to propose a date by when the apparatus will be made safe or removed. CAAV also suggested inserting a further paragraph to address the issue of third party apparatus which the operator may not be able to remove, to recommend that the operator should discuss the practicalities with the landowner as part of the decommissioning process.
- 3.106 Scottish Land & Estates said that the date for removing or making apparatus safe should be reasonable and negotiable rather than simply set by the operator. Strutt & Parker considered there should be an obligation on the operator to remove equipment unless there are exceptional circumstances.

Ofcom's response

- 3.107 Again, in the main, these comments related to perceived obligations being imposed on one party or the other or requested such obligations be included. For the same reasons as previously, we have not made the requested changes other to change "will" to "should" to make it clearer that obligations are not imposed under these paragraphs. We have also amended paragraph 4.48 which now states that the operator should respond either by explaining that the apparatus will still be needed or by "agreeing" (rather than "setting") a date by when the apparatus will be made safe.

Comments on 'Renewal of existing sites and the Code' (paragraphs 4.49 and 4.50 in the draft Code of Practice, paragraphs 1.45 – 1.46 in the final Code of Practice)

- 3.108 Two respondents (RICS and a confidential operator) commented that these paragraphs set an expectation that parties "will" seek to agree terms but that more qualified language should be used to reflect the reality that it may not be possible to agree terms for the continued use of the site before the existing agreement comes to an end, particularly as the parties' respective intentions for the site are not necessarily known at the time. The operator highlighted that in accordance with paragraph 30 of the new Code (as enacted) the new Code agreement will continue until it is formally terminated, therefore it was unnecessary for the Code of Practice to suggest a requirement to renew prior to the expiry of the existing agreement.
- 3.109 CAAV and Thornton Estates Ltd both said that the period allowed for renewal where there is no need to re-negotiate terms will not necessarily always be short, particularly if one party considers that the terms should be re-negotiated and the other does not. Scottish Land & Estates also felt that an amendment was needed to ensure both parties have adequate time to consider changes and that thereafter a yielding up provision should be included in the absence of a new agreement.

Ofcom's response

- 3.110 Again, we have clarified language where this was necessary to ensure these paragraphs cannot be read as imposing any obligations. In response to comments relating to new terms or the re-negotiation of existing terms, we have amended text to remove the sentence: "On many occasions, the existing terms may not need to be changed, and so the timeframe to agree new terms will be short.". The paragraph now states: "Parties should commence negotiations sufficiently far in advance of the expiry of an existing agreement to allow adequate time for terms to be agreed."

Comments on 'Repairs to a Landowner's property' (paragraph 4.51 of the draft Code of Practice, paragraph 1.47 in the final Code of Practice)

- 3.111 Arqiva commented that this paragraph should include an objective to avoid disruption to communication services rather than to keep this to a minimum as this is in the best interests of consumers. They also considered that ideally the parties should seek to secure a temporary service before any repairs are carried out.
- 3.112 CAAV and Thornton Estates Ltd both said that this paragraph should be strengthened to address concerns arising from the repeal of the provisions of paragraph 21 of the 2003 Act as landowners may not be able to carry out simple repairs to buildings (re-felting or replacement of roof etc) due to their agreements with operators. CMS Cameron McKenna made a similar point about ensuring the landowner can carry out remedial repairs without delay. They also stated that if an 18 month notice is served by a landowner it would be helpful if the operator is given a deadline to respond or engage with the process and that they would also welcome some more wording committing the operator to respecting and acknowledging the landowner's right to use its own land (for example, redevelopment, construction, carrying out works).
- 3.113 Openreach advised that the reference to moving equipment 'temporarily' was far too simplistic and has the propensity to disappoint both parties. Virgin Media was concerned about the absence of caveats to the landowner's right to request this and that landowners might see temporary removal as the first option for carrying out repairs rather than an option to be used only when other potential options are not available. Another confidential operator said that it should be expressly stated that, as part of the good faith negotiations, the parties will discuss the detail of the timings, duration and extent of the works.
- 3.114 By contrast, Strutt & Parker said that the paragraph needed strengthening to encourage the operator to use best endeavours and act in good faith so as to effect the removal of apparatus without incurring the landowner any unnecessary cost and to ensure the landowner is not preventing from being able to carry out essential repairs.

Ofcom's response

- 3.115 Taking account of the various comments we received, we have amended this paragraph so that it now reads: "From time to time, Landowners/Occupiers will have to carry out essential repairs to their property and where possible it may be necessary for apparatus to be moved

temporarily to effect such repairs. In such circumstances, the parties should negotiate in good faith so as to allow the works to be completed and to avoid, so far as possible, any resultant interruption to public communications services and to allow continuity of services. In relation to repairs to the Landowner's property, as part of the good faith negotiations, the parties should discuss the detail of the timings, duration and extent of the works."

- 3.116 We did not accept that the paragraph should be strengthened to address concerns arising from the repeal of the provisions of paragraph 21 of the 2003 as it is not the role of the Code of Practice to seek to replace or create new rights or obligations.

Comments on 'Redevelopment by the Landowner' (paragraphs 4.52 – 4.54 of the draft Code of Practice, paragraphs 1.48 – 1.50 of the final Code of Practice)

- 3.117 Arqiva said that paragraph 4.52 needed to reflect the fact that the redevelopment provisions apply "at the end of the contractual term of the code agreement" rather than during the course of the agreement, and suggested there should be an additional objective to "allow continuity of services" at the end of this paragraph.
- 3.118 CAAV and Thornton Estates Ltd both considered the drafting of paragraph 4.52 could be improved and suggested an alternative form of wording.
- 3.119 RICS and Scottish Land & Estates considered that the example of an applicable planning consent was not suitable and was at odds with current practice. Scottish Land & Estates explained that planning consent comes well after a genuine intention to redevelop and should therefore not be noted as an example of appropriate evidence.
- 3.120 SSE considered that the landowner should have to provide evidence of an intention to redevelop and that the operator should be able to assess the validity of the notice before moving its apparatus. Arqiva made a similar point as paragraph 4.53 appeared to suggest that the operator has to organise its departure from the site even if the landowner has not provided its genuine intention to redevelop. Additionally they said that if it appears to the operator that the landowner has a reasonable chance of satisfying the redevelopment grounds, the operator should be required to act in a timely manner to identify suitable alternative sites.
- 3.121 Arqiva also stated that paragraph 4.54 should include a provision entitling the operator to see evidence at an early stage that the landowner has considered incorporating the operator's apparatus within the landowner's property and that, in order to cause the least disruption to consumers, the landowner should be required to consider the reasonable representation of the operator regarding their continued presence on the landowner's property.
- 3.122 Cell:cm said that there should be an obligation on operators to meet the reasonable cost of any design change needed to include the apparatus in a development scheme.
- 3.123 Several respondents were concerned about the use of the word "viable" in relation to paragraph 4.54 stating that consideration should be given to incorporating the

communications apparatus within the landowner's property "if this is a viable option" (Scottish Land & Estates, Thornton Estates Ltd, and Strutt & Parker). They considered that this should be amended to "reasonable" to avoid conflict over what is "viable". Strutt & Parker also considered that this paragraph should state that landowners might give consideration to accommodating the Code operator's equipment within the new development but should be under no obligation to do so.

Ofcom's response

- 3.124 We believe that the point at which the opportunity arises for the site provider to indicate they intend to redevelop is clear given the reference to paragraphs 30-31 of the Code. We note the comment about the example of planning consent being unsuitable and have removed this.
- 3.125 With regard to comments on paragraph 4.53, we have replaced "plans to redevelop" with "intention to redevelop", to reflect the wording used in paragraph 31 of the Code. We also agree that it would be helpful to clarify that operators should act reasonably where there is a "genuine intention to redevelop".
- 3.126 We note the comments made by respondents about use of the word "viable" as well as Arqiva's comment about the importance of ensuring the least disruption to consumers. We have therefore amended paragraph 4.54 so that it now reads: "Where a Landowner is progressing a redevelopment opportunity consideration should be given to the possibility of incorporating the communications apparatus within the Landowner's property if this is a reasonable and practicable option".
- 3.127 We have rejected other comments as going further than appropriate given the scope and purpose of the Code of Practice and again note the importance of reflecting the balance that the Code attempts to strike. As we have said previously, the Code of Practice cannot set obligations and cannot change the balance that the law delivers under the Code.

Comments on 'Escalation procedures' (paragraphs 4.55 – 4.57 of the draft Code of Practice, paragraphs 1.51 – 1.53 of the final Code of Practice)

- 3.128 Redford Crowe commented that the draft Code of Practice provides no meaningful guidance on formal dispute resolution procedures other than by making reference to the Code and stating that where disputes arise parties should seek to resolve them informally in the first instance. He said that some formal guiding principles could usefully be included in the Code of Practice at a minimum and it was a missed opportunity not to do so.
- 3.129 Arqiva suggested that it would be sensible here to set out that the parties should seek to follow best practice conduct and protocols for the relevant dispute procedure being invoked in order to support the efficient management of those proceedings and to reduce the costs to both parties of resolving the dispute.

Ofcom's response

- 3.130 There are a diverse range of disputes that can arise and for this reason we consider it would be impractical for Ofcom to attempt to provide further guidance in addition to suggesting that operators and landowners should seek to resolve disputes informally in the first instance and that they should facilitate this process by taking practical steps such as making available contact details to each other and to relevant persons through whom matters of dispute can be raised.
- 3.131 We would point out that the standard terms we are publishing include a clause that would commit the parties to mediation as the form of alternative dispute resolution before recourse to any court proceedings.

Schedules to the Code of Practice

Comments on 'Schedule A – Requesting access for a survey' (paragraphs 4.58 and 4.59 in the draft Code of Practice, paragraphs 1.54 – 1.55 in the final Code of Practice)

- 3.132 Batcheller Monkhouse considered that paragraph 4.58 should additionally refer to the landowner being able to request the following information when contacted by an operator wishing to access land for the purpose of surveying its suitability for siting apparatus: the names of all people who will be attending on site; a description of the likely apparatus, where the apparatus is likely to be sited and what routes any cables are likely to follow; and information about access to the site for operational staff once the equipment has been installed and how often the operator is likely to need to require access to the site to undertake works.
- 3.133 CAAV considered that "potential landowner" would be more accurately described as "the landowner of a potential site". They also suggested that in the third bullet point (relating to requirements for initial survey), the question "what access is required?" should be changed to "what access is desired?".

Ofcom's response

- 3.134 We considered that there was no reason why further information beyond that listed in Schedule A should not be requested by a landowner but that it was not appropriate for the Code of Practice to attempt to identify more than the minimum information necessary in the interests of best practice.
- 3.135 We agree with CAAV that the potential landowner would be more appropriately described as "the Landowner of a potential site", and that "required" should be changed to "desired" to more accurately reflect the parties' respective positions at this stage of negotiations.

Comments on ‘Schedule B – Key points for access arrangements’ (paragraph 4.60 in the draft Code of Practice, paragraph 1.56 in the final Code of Practice)

- 3.136 Batcheller Monkhouse considered it would be appropriate for there to be a requirement that, prior to access arrangements being provided, the operator should explain what works are proposed and give the owner the ability to discuss these works with the operator before any works are undertaken - particularly if they are likely to have an impact on the property; a service that the landowner uses; or, the owner’s core business. They also considered there should be a requirement for the operator to pay compensation to the landowner if it is not possible to make good any damage. They further suggested that the reference to the landowner notifying the operator of any bio-security arrangements should be altered to “bio-security and any other appropriate security arrangements”.
- 3.137 CAAV said that the fourth bullet point which refers to an undertaking making good any damage to the landowner’s property should also refer to the landowner’s “business”. Arqiva and another operator considered that “undertaking” to make good could be misconstrued to impose a higher burden than intended here. They both suggested alternative wording to avoid this potential issue. Arqiva suggested that rather than an “undertaking” to make good there should be an “obligation” to make good as this can be dealt with in any written agreement. The confidential operator also suggested that access arrangements should include (amongst other items) the recovery of reasonable costs and asked that costs are expressly stated to only be appropriate where there is a requirement for formal supervision and that this should either be annualised or payable upon receipt of a later demand for payment (rather than the demand for access costs being a condition for access holding up an urgent requirement to fix a service affecting fault).

Ofcom’s response

- 3.138 For the same reasons as given in response to Batcheller Monkhouse’s comments on Schedule A we do not consider it appropriate to incorporate Batcheller Monkhouse’s additional suggestions for inclusion in Annex B. We are also conscious of the need to remain within the scope and purpose of the Code of Practice.
- 3.139 We agree with CAAV’s suggestion that the reference to biosecurity could be widened so as to include ‘and any other appropriate security arrangements’, in order to capture other such relevant issues and have made this change. We have also added a reference to the Scottish Outdoor Access Code so that the final bullet no longer refers only to the Countryside Code.
- 3.140 We do not consider that the word “undertaking” is overly complicated or likely to be misconstrued within the context and scope of this Code of Practice, particularly in view of the fact that the Code of Practice does not impose any rights or obligations on parties.
- 3.141 In relation to the comment relating to costs, as previously noted, it is not the purpose of the Code of Practice to address financial aspects of the relationship between the landowner and the operator, as expressly stated at the outset under “Scope”.

4. Stakeholders' comments on the Standard Terms and Ofcom's response

Introduction

- 4.1 In the Consultation we asked for comments on the drafting of the proposed Standard Terms. Below, we discuss the points raised by stakeholders, and provide our response. Annex 2 sets out a marked-up version of the Standard Terms showing the changes we have made following our assessment of stakeholder responses. The final Standard Terms are published alongside this document.

Stakeholder comments and Ofcom's response

Comments on the approach taken for drafting the standard terms

- 4.2 Three, RICS, MBNL, a confidential stakeholder and Arqiva were concerned that Ofcom had not chosen to draft different types of standard terms. They noted that the new Code covers a diverse range of communications infrastructure, and that adopting a 'one-size-fits-all' approach for the standard terms would not be appropriate. Three stated that the approach taken by Ofcom may lead to additional complexity and delay in negotiations. Arqiva, RICS, and EE proposed alternatives such as following a general 'heads of terms' or principles approach, signposting other standard terms created by other stakeholders, or unambiguous guidelines on the potential use of these documents.
- 4.3 A confidential stakeholder stated that a clear health warning should be included at the beginning of the document to make it clear that it may only be suitable for certain limited types of electronic communications apparatus and sites and that the parties may wish to negotiate more bespoke terms for more complex situations.
- 4.4 A confidential stakeholder stated that standard terms must make reference to the Code of Practice. They stated that any proposed heads of terms given to a Grantor should have a 'notices' section attached to the front of any standard terms to explain that the Code of Practice should be adhered to by all parties and should be read in conjunction with the heads of terms.

Ofcom's response

- 4.5 Paragraph 103(2) of the new Code requires Ofcom to "prepare and publish standard terms which may (but need not) be used in agreements under this code". In meeting this requirement we remain of the view that the views and recommendations of the Law Commission,²⁴ to which we referred in the Consultation, are relevant. The Law Commission explained, amongst other things, that standard terms would be useful on the basis that they

²⁴ The Law Commission, The Electronic Communications Code, 27 February 2013, pages 203 – 205

could provide a starting point for negotiations, but could be amended as necessary to meet particular circumstances. It considered that, at a most basic level, standard terms could assist parties, particularly landowners, to ensure that important terms are not forgotten.

4.6 As explained in the Consultation, we also anticipate that many experienced site providers and Code operators may prefer to use their own terms and that, for more complex transactions, parties are likely to seek independent legal advice in order to ensure that their Code agreement is properly tailored to their specific circumstances. In addition we are also aware that there are other sources of standard terms and conditions that have been developed through consultation between interested parties.²⁵

4.7 Consequently, after careful consideration of stakeholders' responses, we have decided that:

- creating standard 'heads of terms', as opposed to actual terms themselves, would not be sufficient for Ofcom to meet its requirement under paragraph 103(2) of the new Code;
- publishing more than one set of standard terms is not necessary in the sense that it is not required by the new Code;
- to prepare a variety of standard terms which suit each type of technology site, operator and landowner/occupier would be a significant task and stakeholders' responses were mixed in their respective views as to the benefit of carrying out such a task; and
- it would not be appropriate to seek some sort of compromise by preparing a limited number of additional standard terms since this would necessitate a judgment call on which standard terms to include, which would be a call we would not be in an informed position to take without further, and not insignificant, consultation with stakeholders.

Comments on 'Clause 1: Definitions and Interpretation'

4.8 Clarke Willmott stated in regards to the agreement that it does not make clear whether the definition of "land" is simply the area on which the apparatus will be sited or a larger area. They stated that if the latter then the restrictions on the site provider are potentially onerous. They stated that in their experience that (particularly with greenfield sites) site providers enter into an agreement in relation to a larger area of land/rooftop upon which the operator will install its equipment. EE also stated that "Land" is not particularly well-defined and it is not clear where there is a separation between land occupied by the operator and the land which is owned and retained by the landowner. Redford Crowe also stated that the definition of "Land" should cater for the different types of site. Three and MBNL stated that "Land" is not particularly well defined and it is not clear where there is a separation between land occupied by the Operator and the land which is owned and retained by the landowner.

4.9 Strutt & Parker and a confidential stakeholder stated that Section 1.1 should reference the new Code for its definitions.

²⁵ In the Consultation we referred to the multi-occupant office building wayleave agreement developed for the City of London

Statement: Electronic Communications Code

- 4.10 A confidential stakeholder stated that other terms used in the standard terms such as 'term' and 'payment' should also be referenced here.
- 4.11 EE stated that the definition of "Term" is such that the agreement runs indefinitely until it is terminated. As such EE said they suspected that many landowners will have a problem with that since they would usually want to grant the rights for a specific fixed term, with successive renewals thereafter.
- 4.12 A confidential stakeholder stated that contractual term is not defined as a fixed period of time; whereas this is an absolute requirement pursuant to paragraph 11 of the new Code.
- 4.13 A confidential stakeholder stated that the definition of Operator is confusing as it applies to both the contractual party and any person to whom a direction has been applied pursuant to Section 106 of the Communications Act 2003. This should be amended to either change the defined term "Operator" to "Code Operator" or change the definition of the contractual party to the "Grantee".
- 4.14 Virgin Media stated that in Clause 1 "Operator" is defined as "any person in whose case the Code is applied by a direction under section 106 of the Act. However, they stated that in the Parties section at the start of the wayleave agreement, the relevant CP has already been defined as "The Operator" which is then referred to in Recital B in terms that "The Code has been applied to the Operator by virtue of a direction under section 106 of the Communications Act 2003." Therefore, Virgin Media stated that the definition in Clause 1 seems redundant and indeed potentially confusing, particularly to landowners who do not engage legal advice, and should be deleted leaving the definition of "The Operator" to be the party to the wayleave agreement.
- 4.15 CAAV stated that Clause 1.2 that this phrase includes sub-contractors but not contractors, which seems to be an omission.

Ofcom's response

- 4.16 Regarding Clarke Willmott's, EE's, Redford Crowe's and Three's statements on definitions we have decided it is not necessary to provide further clarification on these terms as any further detail can be agreed between parties. Regarding Three and MBNL's comment, we do not consider it necessary to make changes to the definition of "Land" since this definition merely refers to what would be attached at Schedule 2 which would be for the parties to provide.
- 4.17 Regarding Strutt & Parker's comments on referencing the new Code for definitions we consider the definitions as they stand are sufficient to convey their intended meaning although for clarity we have referenced the meaning of "alteration" in paragraph 108(2) of the Code. Additionally, certain definitions such as 'Electronic Communications Apparatus' and 'Operator' already are referenced to the Act.
- 4.18 Regarding the confidential stakeholder's comment on defining other terms here, we consider the parties to the relevant agreement would be best placed to decide whether additional definitions were warranted, and if so how they should be defined. Consequently, we have decided it would not be necessary for Ofcom to define other terms.

- 4.19 Regarding the comments on the definition of “Term”, we have amended the definition of “Term” by adding the following at the end (which may, but need not, be used by the parties): “Term” means the period of time during which this Agreement is in force[, which shall be a period starting on [insert date] and ending on [insert date]]”.
- 4.20 Regarding the comments on the definition of “Operator”, we have deleted this definition from clause 1 since we agree this is covered in the Recitals.

Comments on ‘Clause 2: Rights of the Operator’

- 4.21 We received a number of comments on the rights of the Operator in clause 2.1, many of which expressed concern that the clause did not appear to provide for additional rights to be agreed. Arqiva stated that a Code Agreement does not only contain Code Rights but will necessarily include much broader terms which can be imposed by the Court in the absence of agreement. They stated that the provisions in this clause relate back to Code Rights and so the rights at 2.1 should provide for additional rights such as a temporary power supply and are not defined as Code Rights but rather as ‘Rights’ for that reason.
- 4.22 Thornton Estates Ltd stated that Clause 2 sets out the whole bundle of Code rights available not all of which may be appropriate. They stated that this should be made clear.
- 4.23 EE stated that in 2.1(c) that they would expect that the Agreement would contain a right to “remove” the Apparatus (in addition to the obligation to remove it in clause 10.4 of the Draft Standard Terms) as Paragraph 4.9 of the Code of Practice states that Landowners and Operators should be clear on the position relating to the decommissioning of sites that are no longer required. MBNL also said that the right to remove apparatus should be included.
- 4.24 Arqiva stated that there is no generic right for the Operator to access and use the Land in accordance with the provision of its network. They stated that there may be rights outside of those in clause 2.1(f) that the Operator requires (such as the provision of a power supply) that are not currently strictly covered. To avoid the potential for dispute, there should be an option to include additional rights. Three and Shoosmiths also stated that this general right needed restricting.
- 4.25 MBNL stated that Clause 2.1(f) sets out a general right to enter onto a landowner’s land, and does not specify nor provide for agreement of any particular access route. EE also stated that this general right and lack of specificity could cause problems in agreeing this with a landowner.
- 4.26 MBNL and EE stated that in Clause 2.1(g) the right to connect to a power supply does not differentiate between an independent supply and the right for the operator to take a spur off the landowner’s property, nor are there any provisions as to how any shared supply might be paid for. MBNL also stated they would expect a provision relating to the right to use a backup generator and a right to lay communication links.
- 4.27 A confidential stakeholder stated that clause 2.1(g) is particularly unclear as to whose power supply the Operator has a right to connect to and does not mention who will pay for this electricity. It is always preferable that an Operator obtains their own independent supply

and only connects to the Grantor's supply in the event this is not reasonably possible. More detail as to payment is required as well as an Operator's obligation to perhaps provide a sub-meter to ensure the correct amount is paid in the event the Operator cannot obtain their own independent supply. This clause should also include that it is up to the Operator to get any necessary permissions from the relevant utility company and initiate any wayleave type processes to which the Grantor is party. Consideration should also be given to situations where an electrical supply fails and a back-up generator is required to maintain an electronic communications service.

- 4.28 Strutt & Parker stated that the worded clause 2.1(h) gives the Code Operator the express right 'to interfere with or obstruct a means of access to or from the Land'.
- 4.29 Strutt & Parker stated that clause 2.1(i) showed poor drafting, in that 'any tree or vegetation' could be on third party owned land over which the landowner has no authority or power whatsoever. A confidential stakeholder stated this also.
- 4.30 Strutt & Parker stated that notifications should be provided for any access to site to upgrade the equipment. This should include a specification of the equipment to be upgraded and what the upgrade will entail, including any changes of frequencies to avoid any interference.
- 4.31 Arqiva stated, regarding Clause 2.2, that the starting position should be that upgrading (in its widest sense to be defined as including adding equipment, altering, adjusting, replacing, removing and upgrading apparatus) should be unrestricted.
- 4.32 A confidential stakeholder stated that Clause 2.2 should place an obligation on the Operator to notify in the situation of site sharing since this is best practice and could avoid issues in the future.
- 4.33 A confidential stakeholder stated that it would be preferable (for the avoidance of doubt) for a statement to be included that confirms that the primary purpose of the agreement is to grant the Code Right.
- 4.34 A confidential stakeholder stated that sharing Operators must have the ability to share the full set of "Code Rights" (and not, as referred to in clause 2.3, just the rights set out in clauses 2.1(e), 2.1(f) and 2.2) – this appears to limit the Code Right contained in the new Code. The agreement is drafted so as to allow the shared use of the Apparatus by multiple operators when in practical terms site sharing will require the shared use of the Land.
- 4.35 A confidential stakeholder stated that the general order of clauses is not user friendly. It would be clearer to have individual subject headings and deal with both Operator and Grantor rights and obligations under each rather than just have a long list of assorted clauses in a 'rights' or 'obligations' section.
- 4.36 A confidential stakeholder stated that clauses must be inserted dealing with Operator parking rights and any additional land required outside the demised area in order set down plant or machinery for carrying out maintenance. For example where a generator is required to be placed on other land not included in the agreement for a temporary period or where trees are lopped from outside of the Land in the agreement.

Ofcom's response

- 4.37 Clause 2.1 sets out the so-called “code rights” which themselves are set out in paragraph 3 (a) to (i) of the new Code. Clause 2.1 is not designed to prevent the parties from agreeing additional rights, nor provide further detail about the code rights or additional rights (including how they may be exercised) – but we consider any such rights or further detail would be a matter for negotiation between the respective parties reflecting the circumstances pertaining to the relevant agreement. We also consider it is not necessary to add the right to remove the apparatus in clause 2.1(c) since the right already exists by virtue of paragraph 108(2) which states that “[i]n this code, references to the alteration of any apparatus include references to the moving, removal or replacement of the apparatus”. However, we have added a reference to paragraph 108(2) in Clause 1.1.
- 4.38 Regarding stakeholders' comments on clause 2.3, this clause seeks to incorporate the tests that must be met under paragraph 17 of the new Code should the operator wish to share or upgrade the apparatus. Clause 2.3 is not intended to limit the rights a sharing operator would otherwise enjoy under the new Code. Nor does the reference to clauses 2.1(e), (f) and 2.2 mean that the operator would be precluded from seeking to ensure that the agreement allowed, where sharing were to occur, for the sharing operator to exercise additional rights. We consider this would be something for the parties to negotiate and agree on. In respect of the criteria set out in 2.3(a) and (b), these replicate the criteria set out in the new Code.²⁶ We also consider that what “minimal adverse impact” or “additional burden” would mean in practice would be case specific and as such we consider it would be something that the parties to the relevant agreement would be best placed to seek to determine. Consequently, in light of the above, we have not made any changes to the drafting of clause 2.3.

Comments on ‘Clause 3: Payment’

- 4.39 We received a number of comments on Section 3: Payment.
- 4.40 CAAV, Redford Crowe, a confidential stakeholder and Thornton Estates Ltd stated that there was no provision for a review of payment. Strutt & Parker stated that there should be no agreement without provision for a review of the payment due.
- 4.41 Virgin Media and Openreach were concerned that Clause 3 of the standard form of wayleave agreement presumes that some payment will be paid in all circumstances.
- 4.42 A confidential stakeholder stated that method of payment should be specified in clause 3 e.g. in advance or in arrears and the date on which payment is due.
- 4.43 A confidential stakeholder stated that this clause should have more detail as to the date/s on which payment/s will be made to the Grantor. There should also be a clause dealing with levels of interest to be charged in the event a payment is late and at what point a payment is deemed late and will attract interest charges. It would also be a relevant place to insert a

²⁶ See paragraph 17 of the new Code.

clause as regards an Operator paying the reasonable professional fees incurred by a Grantor in granting of the agreement and Code Rights.

Ofcom's response

- 4.44 Clause 3 is an example of a term which may (but need not) be used in an agreement under the new Code. Parties should not interpret clause 3 as presuming that some payment will be paid in all circumstances. We consider that the precise drafting of the term, including provision for review and amount, if indeed any, of payment and compensation should be regarded as a matter for negotiation between parties, and as such we have kept clause 3 unaltered. We note that parties would be free to vary their agreement, for example to review the payment, without the need for a clause expressly providing for such a right, provided such variation complies with the requirements set out in paragraph 11 of the new Code. Consequently, in light of the above, we have not made any changes to the drafting of clause 3.
- 4.45 We rejected Virgin Media's and Openreach's comments regarding the Standard Terms presuming some sort of payment will be paid in all circumstances, but would agree that zero payment may well be the norm for some types of access arrangements.

Comments on 'Clause 4: Operator's Obligations'

- 4.46 A confidential stakeholder asserted that the access rights stated at clause 4.1 are unduly onerous, inappropriate (for a cell site) and place an obligation on an Operator which is greater than that in the new Code. They stated that they appear to derive, as regards notice, from Transport Land Rights (Part 7 of the new Code). They stated in terms of the need to communicate all access requests to the Grantor, they are unnecessarily onerous. Access is generally required at all times and there should not be any requirement to notify the Grantor on every occasion that access is required or to retrospectively confirm this (and the reasons for access) in the event of an emergency. They said if there are site specific sensitivities requiring a different access procedure (such as prior notice for hospital sites, save in the case of emergency) then this can be negotiated between the parties, it is not helpful to have this stated as if this should be the starting point in the Draft Standard Terms.
- 4.47 EE stated that Clause 4.1(a) introduces a seven-day notice period for access which is neither provided for in the ECC nor the Code of Practice.
- 4.48 SSE stated that 4.1(a) & (b) should provide for reasonable prior notice rather than 7 days' notice. MBNL stated that this should be consensually agreed between parties.
- 4.49 CAAV stated that the words "or business" should be added to the end of the paragraph Clause 4.1(e).
- 4.50 SSE stated regarding 4.1(d) that reasonable precautions should be sufficient, "All" reasonable precautions is too high a standard for operational activities which by necessity create damage, disturbance, nuisance and inconvenience. They stated that nuisance and inconvenience should be deleted and replaced with disturbance.

- 4.51 SSE stated regarding 4.1(g) that requests should be reasonable and it is somewhat impractical to suggest that consents must be presented upon demand. The consents should be provided as soon as reasonably practicable after written demand because it will take time for these to be assembled.
- 4.52 A confidential stakeholder stated there are a number of provisions, clause 4.1(g) and (j) being examples, which go further than the new Code and require the Operator to provide information to the Grantor. If such provisions were to be used, such requests should be proportionate, should not represent a "fishing exercise" and should be limited in frequency to no more than once in any given year; all requests should be made in writing.
- 4.53 Strutt & Parker stated regarding clause 4(j) that operators should provide copies of any insurance or indemnity documentation.

Ofcom's response

- 4.54 In respect of clause 4 ("Operator's obligations"), we recognise that stakeholders had differing views on whether the obligations were onerous or not. However, we consider these views do not prevent the obligations as drafted from representing "standard terms which may (but need not) be used in agreements under [the new Code]", depending on what the parties might regard, and agree on, as necessary for their respective agreement. We also recognise that the obligations in clause 4 are not contained in the new Code nor provided for in the Code of Practice.²⁷ However, the purpose of the new Code is not to set out all the specific obligations that would be contained in agreements between code operators and landowners/occupiers. And the Code of Practice does not seek to cover all the standard terms, but instead sets out best practice principles in accordance with which Ofcom would expect parties to act. Consequently, having considered stakeholders' comments, we have decided to keep clause 4 unaltered – to the extent either party wishes to extend, amend or remove any of the obligations in this clause, such an exercise should be considered as part of the negotiating process engaged in to determine the relevant terms to be used in the particular agreement.

Comments on 'Clause 5: Grantor's Obligations'

- 4.55 A confidential stakeholder stated that this provision goes beyond the new Code and gives the Grantor the ability to disrupt the Operator's operation which is not acceptable. An Operator could not accept this clause.
- 4.56 A confidential stakeholder stated that word 'Grantor' to define the site provider is inadvisable for a number of reasons:
- Grantor will not be understood by a lay person as being the site provider or landowner / occupier.
 - Grantor is usually used with its counterpart, 'grantee' not Operator.

²⁷ E.g. clause 4.1(a) which provides that the operator will, save in the event of emergency, give the landowner/occupier not less than seven days' prior written notice of its intention to enter the land.

- It would be better to pair Operator with Landowner / Occupier or Site Provider.

Ofcom's response

- 4.57 Consistent with our decision in respect of clauses 2 (“Rights of the Operator”) and 4 (“Operator’s Obligations”), we remain of the view that the clause contains standard terms which may (but need not) be used in agreements under the new Code. We consider stakeholders may have misunderstood the purpose of clause 5.1(c) which would be to merely ensure that the code operator is always aware of any action the consequences of which, as the clause says, “would or might affect the continuous operation of the Apparatus”. Importantly, the clause is not designed to give landowners/occupiers the right to take action in order to affect the continuous operation of the apparatus.
- 4.58 To the extent parties consider the scope of the obligations in clause 5 should be extended or curtailed, or would need greater clarity, we would expect such an exercise should be considered as part of the negotiating process engaged in to determine the relevant terms to be used in the particular agreement. Consequently, having considered stakeholders’ comments, we have decided to keep clause 5 unaltered.

Comments on ‘Clause 6: Ownership of the apparatus’

- 4.59 Arqiva stated that this could be better drafted as the apparatus might also belong to sharers of the Operator particularly where the tenant is an infrastructure provider.
- 4.60 CAAV stated that this statement needs further explanation or definition, including linking it to what the Code says about apparatus. The question of what might happen if Code powers were lost should also be considered.

Ofcom's response

- 4.61 We consider clause 6 is consistent with paragraph 101 of the new Code and that it is a term which may (but need not) be used in agreements. We also consider that the parties to the particular agreement would be best placed to determine whether further explanation would be warranted to reflect the circumstances pertaining to that agreement. Consequently, we have decided to keep clause 6 unaltered.

Comments on ‘Clause 7: General’

- 4.62 Arqiva stated that the standard terms envisage that Code Agreements will not be leases. This is an inappropriate starting point as under law, whether or not an occupational agreement is a lease is a matter of fact not labelling and the distinction can be important.
- 4.63 CAAV stated that the question of whether any particular agreement is or is not a lease will depend on the particular circumstances of that agreement. A blanket statement such as this will not be given any weight by the courts.
- 4.64 EE stated that in Clause 7.3 should be removed from the standard terms. They stated that the Code should be viewed as a baseline for Operator-landlord agreements, with parties

looking to secure terms that will often go above and beyond rights set out in the legislation. They stated that Clause 7.3 could cause confusion in this regard as well as being unnecessary given that the Code (paragraph 100) will act as a backstop to new agreements but does not prevent the negotiation of broader rights.

Ofcom's response

- 4.65 We do not agree with stakeholder comments that it is inappropriate for the standard terms to state that no relationship of landlord and tenant is created (see clause 7.1). In accordance with paragraph 103(2) of the new Code, the purpose of the standard terms we are publishing is to provide parties with terms which may (but need not) be used in agreements under the new Code. We consider it would be a matter for the parties to decide separately if they wish to also enter into a relationship of landlord and tenant. We also do not share the view of certain stakeholders that clause 7.3²⁸ will cause confusion nor that it might prevent negotiation of broader rights beyond those provided for in the new Code. As the clause makes clear, its purpose is to provide clarity in the event that there is an inconsistency between the agreement and the new Code, by making clear that in such an instance the new Code takes precedence.

Comments on 'Clause 8: Indemnity for third party claims'

- 4.66 Clarke Willmott stated that the indemnity for third party claims contained at clause 8 is unlikely to be suitable for both greenfield and rooftop sites.
- 4.67 CMS Cameron McKenna stated that in clause 8, a choice is given between a limit of the relevant amount per annum or alternatively "in aggregate". They stated that there may be some resistance from grantors to the in aggregate wording and wondered whether it could say "in aggregate in any insurance year in respect of a claim etc". They also suggested that the Grantor should use reasonable endeavours to mitigate the liabilities for which it seeks indemnity.
- 4.68 Virgin Media stated that they would also expect to see inclusion of an obligation on the party receiving the indemnity to seek to mitigate its loss.
- 4.69 Redford Crowe stated that the Code operator's liability under the indemnity should be capped to mirror any limitation under the insurance and limitation of liability clauses (but to the extent permissible by law). He suggested that some form of corresponding indemnity is given by the Grantor to the Code operator. SSE stated that the indemnity should be limited to cases of negligence (it being unreasonable to penalise an operator where they have not done anything wrong).
- 4.70 A confidential stakeholder stated that this provision is unduly onerous and may result in short notices and significant litigation. They stated it is market standard for a grantor's break option to be no less than 12-18 months' notice and then only after a significant period of the contractual term has expired (usually at least half of the initial contractual period). Without

²⁸ "In the event of any inconsistency between this Agreement and any provision of the Code, the Code will prevail".

this level of certainty of term an operator would risk incurring significant capital costs in building and upgrading sites only to find the agreement terminated at short notice and then having to deal with the statutory termination process (and incurring costs in dealing with the same) on a large number of sites within their portfolio. Further, any (short notice) right for the grantor to terminate the Code Agreement during the contractual term would also significantly affect the consideration/compensation payable by the operator to the grantor – effectively limiting it to the length of the notice period. If the Draft Standard Terms document was to contain such a provision then it should highlight this as a note in the document, otherwise it could seriously mislead a grantor into thinking that it had such a right that would not affect the value paid to the grantor by the operator. They stated it is standard practice for an operator to be able to terminate an agreement if it loses its operating licence. There is no such provision in the Draft Standard Terms document.

Ofcom's response

- 4.71 We consider the scope of the indemnity, as well as the suitability of the indemnity for any site, should be matters for the parties to the particular agreement to negotiate and agree on. Consequently we have not made any changes to clause 8.

Comments on 'Clause 9: Limitation of Liability'

- 4.72 Arqiva stated that operators should not be liable for consequential or economic loss. The indemnity is sufficiently wide enough that the landowner should not benefit from this additional protection.
- 4.73 Clarke Willmott stated that there contains potential at clause 9.3 for the site provider to be liable to the operator. This is unusual and stated they would not expect to see this in current telecommunications leases/agreements.

Ofcom's response

- 4.74 We consider the precise extent to which each party would be liable to the other would be a matter for the parties to the particular agreement to negotiate and agree on. Consequently we have not made any changes to clause 9.

Comment on 'Clause 10: Termination'

- 4.75 Arqiva commented that it is inappropriate for landowners to have a rolling 28 day notice period, particularly in the event of redevelopment. SSE stated that this time frame was too short.
- 4.76 Redford Crowe stated that Clause 10 does not take account of Paragraph 30(3)(b) of the new Code which stipulates that a minimum period of 18 months' notice is required. He also stated that the default provision of 30 days' notice may be appropriate if the operator is shown to have failed to remedy a breach within 30 days of being notified of it, 30 days is wholly insufficient if the grantor intends to redevelop all or part of the Land or any neighbouring

land where, on average, it usually takes a minimum of 24 months for a Code operator to be able to find a replacement site.

- 4.77 A confidential stakeholder stated that Clause 10.1 is almost pointless in the sense that it requires two notices to be served and will not take effect until the Code notice under paragraph 31 takes effect. This may serve to confuse a Grantor as to the notice period required. A better option would be to simply state that termination will be in accordance with the Code. The option of a break clause ought to be inserted under this clause to allow parties to terminate mid-Term. A forfeiture clause ought to be inserted to protect the Grantor in the event an Operator is in serious breach of the agreement or becomes insolvent.
- 4.78 Mobile UK stated that there is no separate termination provision which could be triggered with immediate effect if the operator lost their operating licence or if the building was destroyed or damaged to such an extent that the site could no longer operate. EE also stated this.
- 4.79 Strutt & Parker stated regarding clause 10.1(c) that a methodology for compensation needs to be expressed.
- 4.80 EE stated that there is a right for the landowner to terminate the agreement if they intend to redevelop their land. EE stated that the Code envisages such provision to be exercisable at the end of the term or subsequent to it, but in the absence of a fixed term (or minimum fixed term), and per (Paragraph 11(1)(c) of the Code), such a provision is at odds with the Code and consequently should not form part of a draft Agreement.
- 4.81 Virgin Media stated that Paragraph 31(3) of the new Code specifies a period of 18 months' notice to be given in each of the circumstances for termination. Under clause 10.1, the draft standard terms include a significantly shorter period of 30 days' notice (albeit in square brackets). Inclusion of a timeframe in conflict with what the Code actually permits will only create substantial confusion and the potential for unnecessary litigation. Virgin Media, accordingly, stated that the time frame expressly used in the new Code should be used. Virgin Media also stated that 10.1 (d) – this clause is incomplete and should reference the full text of the corresponding right under Paragraph 21 of the Code with the Landowner having a right to terminate for redevelopment.
- 4.82 MBNL stated that as there is an absence of a fixed term (or minimum fixed term) the 10.1(c) provision is at odds with the Code and therefore should not be part of a draft Agreement.
- 4.83 EE stated that at clause 10.1(d), the proposed termination clause incorporates the public benefit test which the Court will use when it is deciding whether to grant an operator the rights or not. If it appears in an Agreement, in the manner proposed, it essentially means that the test, which would otherwise only be applied by the court either prior to deciding to order the grant of code rights (paragraphs 19/20 of the Code) or at the end of a contractual term (paragraph 31(4)(d) of the Code), would have to be applied continuously throughout the term of a negotiated agreement, which is not the intention of the Code.

- 4.84 CAAV stated in relation to Clause 10.3 (10.2 in the amended Standard Terms) that the open break clause should be amended by adding the words “provided that the provisions of clause 10.4 are met.”
- 4.85 CAAV also stated that regarding Clause 10.4 (10.3 in the amended Standard Terms) that apparatus should be removed before the termination of the agreement. After the agreement has been terminated, the parties will have no legal relationship. The apparatus and any activity by the Operator would be there by trespass.
- 4.86 Virgin Media stated regarding Clause 10.4 (10.3 in the amended Standard Terms) that it is not standard practice in all cases for Apparatus to be removed on termination where this would cause unnecessary disruption (having been agreed with the landowner). Virgin Media suggested the inclusion of the words “ or make safe” after the word “remove” in the third line of this clause in order to make it clear that removal may not always be appropriate.
- 4.87 Strutt & Parker stated regarding clause 10.4 that no timeframe is referenced and that this needs to be resolved.

Ofcom’s response

- 4.88 We consider there was some misunderstanding on the part of those stakeholders who raised concerns about clause 10.
- 4.89 Clause 10.1 is a clause that may (but need not) be used should the parties agree that the agreement should provide for the right of the landowner/occupier to bring that agreement to an end – this reflects what is provided for in the emphasised wording below of paragraph 31(3) of the new Code which states that the date on which the agreement is proposed to come to an end must fall:“(a) after the end of the period of 18 months beginning with the day on which the notice is given”; and“(b) after the time at which, apart from paragraph 30, the code right to which the agreement relates would have ceased to be exercisable or to bind the site provider or **at a time when, apart from that paragraph, the code agreement could have been brought to an end by the site provider**” (emphasis added).
- 4.90 Whilst clause 10.1 does provide for a right to terminate that could be exercised at any point, the footnote makes clear that the site provider must also give the requisite 18 months’ notice under paragraph 31. We also consider that allowing for the right to terminate to be exercisable only after a minimum period of time has elapsed, would be a matter for the parties to the particular agreement to negotiate and agree on.
- 4.91 We consider it would be for the parties to negotiate and agree on additional grounds for termination, such if the operator lost its operating licence or entitlement to operate a network or if the relevant building, structure or land was destroyed or damaged to such an extent that the site could no longer operate.
- 4.92 We do not agree that the right of the site provider, under paragraph 31(4)(c) of the new Code and included in clause 10.1(c), to terminate the agreement if they intend to redevelop their land, to be exercisable at the end of the term or subsequent to it, since as set out above, the conditions that must be met which allow for the grounds in paragraph 31(4) to apply

include “at a time when...the code agreement could have been brought to an end by the site provider” (under paragraph 31(3)(b)).

- 4.93 Finally, in respect of clause 10.4, we consider this remains a term that may (but need not) be used in an agreement and that any alternative to removing the apparatus (such as making it safe), should be a matter for the parties to the relevant agreement to negotiate and agree on.
- 4.94 Therefore, having considered stakeholders’ responses, we remain of the view that clause 10 contains terms that may (but need not) be used in agreements under the new Code and we have decided that it is not necessary to make any changes to it.

Comments on ‘Clause 11: Assignment’

- 4.95 The Scottish Government stated that Clause 11 refers to ‘assignment’. The Scots term is assignation.
- 4.96 Cell:cm stated that there should be a pre-notification of assignment intention by an operator, which would say the operator will be assigning the agreement to the relevant party.
- 4.97 A confidential stakeholder stated that a clause should be inserted making it an obligation of the assigning Operator to give notice to the Grantor of the date of assignment and the details of the assignee. Whilst there is no obligation within the new Code to do this, it is best practice and will mean a Grantor is aware for security purposes who has access to his land.

Ofcom’s response

- 4.98 We consider clause 11 is consistent with the provisions of paragraph 16²⁹ of the new Code. Having taken into account stakeholders’ comments, with the minor addition of “Assignation” to the title, we consider no further changes are necessary to ensure clause 16 remains a term that may (but need not) be used in agreements under the new Code.

Comments on ‘Clause 12: Contracts (rights of third parties) Act’

- 4.99 The Scottish Government stated that clause 12 refers to the Contracts (Rights of Third Parties) Act 1999, but that this does not extend to Scotland.

Ofcom’s response

- 4.100 Whilst we note that the Contracts (Rights of Third Parties) Act 1999 does not extend to Scotland, we consider this does not alter the status of clause 12 which remains a term that may be used in agreements under the new Code which do not take effect in the Scotland.

²⁹ Paragraph 16 deals with the assignment of code rights.

Comments on 'Clause 15: Notices'

- 4.101 CMS Cameron McKenna stated that there could be an additional statement that the notice should be in any form required by the new Code.
- 4.102 A confidential stakeholder stated that some notices under the Code must be in Ofcom's prescribed form and be served pursuant to the Code. Reference must be made to this since outlining a procedure without mentioning that in some situations a statutory notice applies may cause invalid notices to be served.

Ofcom's response

- 4.103 Having considered stakeholders' comments, to avoid ambiguity we have added the following footnote to the end of clause 15.1: "In addition, please also have regard to paragraphs 88 and 89 of the Code which apply to notices given by operators and by persons other than operators under paragraphs of the Code".

Comments on 'Clause 16: Mediation'

- 4.104 CAAV stated that the requirement to refer any dispute to mediation as drafted to be limiting as it does not guarantee an outcome. CMS Cameron McKenna stated that if mediation does not resolve the dispute, there could be arbitration provisions for disputes other than those related to the new Code. Thornton Estates Ltd suggested that in some cases third party expert determination could be appropriate.
- 4.105 Virgin Media stated that the mediation provisions in Clause 16 of the standard form of wayleave agreement envisage that a mediation must occur in respect of any disputes arising under the agreement, and that court proceedings cannot be commenced by either party until a mediation has taken place. They stated that they do not consider that compelling parties to use mediation in every case is in keeping with the objective of ensuring that digital infrastructure can be rolled out quickly and with little cost.
- 4.106 Arqiva stated that the requirement to seek mediation should not prevent serving of notices and making applications under the Code. In particular, the parties should not be prevented from serving a notice under paragraph 33 and an Operator should not be prevented from serving a counter notice or making an application to Court under paragraph 32 of the Code where a landowner seeks to terminate the agreement.

Ofcom's response

- 4.107 We consider it would be open to the parties to agree on alternative means of dispute resolution, however in our view, this would not prevent clause 16 as drafted from being a term that may be used in an agreement under the new Code. We also consider that whether parties should be obliged to first try some means of alternative dispute resolution before recourse to the courts, should be a matter for the parties to particular agreement to negotiate and agree on. Consequently, we have not made any changes to clause 16.

Comments on ‘Clause 17: Governing Law and Jurisdiction’

4.108 CAAV, Redford Crowe, and the Scottish Government stated that the first part of this clause refers only to England and Wales but the second part refers to the Scottish Sheriff Court. They stated that if intended for use throughout the UK the references need to reflect that – to allow for the laws of both Scotland and Northern Ireland to be invoked where appropriate and also including Northern Irish courts.

Ofcom’s response

4.109 We have amended clause 17.1 to make reference to all three jurisdictions of England and Wales, Scotland and Northern Ireland. “This agreement is covered by, and shall be construed in accordance with, the laws of England and Wales [England and Wales/Scotland/Northern Ireland]”.

4.110 We have also amended clause 17.2 to include reference to the county courts of Northern Ireland: “[Subject to clause 16] the parties agree to submit to the exclusive jurisdiction of the [courts of England/sheriff in Scotland/county courts of Northern Ireland]”.

4.111 Finally, we have added the following footnote at the end of the clause: “Please note paragraph 95 of the Code which provides the Secretary of State with the power to confer jurisdiction on tribunals other than the county court in England and Wales, the sheriff court in Scotland and a county court in Northern Ireland”.

5. Stakeholders' comments on the Notices and Ofcom's response

Introduction

- 5.1 In the Consultation we asked for comments on the drafting of the proposed template notices. Below, we discuss the points raised by stakeholders, and provide our response. We note that the paragraph numbering of the final Code has altered and that the stakeholder comments summarised in this section refer to the former paragraph numbering. The final template notices reflect the new numbering, as do Ofcom's responses in this section to the comments we received. The final template notices are published alongside this document.
- 5.2 Paragraph 90(1) of the new Code provides that Ofcom must "prescribe the form of a notice to be given under each provision of this code that requires a notice to be given". Paragraph 90(3) requires that Ofcom consult "operators and such other persons as [we] think appropriate" before prescribing a form of a notice. We explained in the Consultation that we decided to interpret our obligation under paragraph 90(1) expansively. To this effect we prepared both template notices that would be required to be given, to meet our obligation, and also those that would be discretionary (i.e. they 'may' be given).
- 5.3 We received a large number of comments from stakeholders, ranging from those of general application to detailed comments on individual notice templates. In considering stakeholders' comments, we have, in particular, assessed whether the drafting of the respective notices meets the requirements of the relevant provisions of the paragraphs in the new Code under which they are given (as well as the requirements of paragraph 88(1) where the notice is given by a code operator), both substantively and in respect of the clarity with which the requirements have been met. Where we have decided this is the case, we have, in general, refrained from incorporating alternative or additional drafting proposed by stakeholders unless we agreed that further clarity was required. In this respect, we believe it would be more appropriate to allow stakeholders to use the notices and then, depending on their experience of using them, it may be prudent for Ofcom to review them, if necessary after an appropriate period, to consider their effectiveness. The final template notices are published alongside this document. As we said earlier, we would envisage working with relevant parties in carrying out this exercise if we proceeded to do so.

Stakeholder comments and Ofcom's response

Comments on Ofcom producing further notices

- 5.4 Community Fibre and CAAV requested that Ofcom produce supplementary notices in addition to those that Ofcom is required to provide under paragraph 90(1) of the new Code. In their view, this should include an operator's counter notice to a hostile termination notice, and an operator's response to a request for information regarding Code rights.

- 5.5 Openreach considered that Ofcom had omitted to consult on the form of notice that would be needed by Code Operators should they wish to provide the relevant counter-notice under paragraph 32 of the new Code.
- 5.6 A confidential stakeholder stated that there is no reason why a standardised form for a response cannot be produced to ensure that the responses are consistent and that only necessary information is provided. This is particularly necessary given the penalty at paragraph 39(5) (as enacted) should the Operator fail to disclose the information sought.

Ofcom's response

- 5.7 Having had regard to our obligation under paragraph 90(1) of the new Code, we do not consider it necessary to prescribe additional forms of discretionary notices. In respect of the forms of notices under paragraphs 32(1) and 39(4), we remain of the view we expressed in the Consultation that there would be little value in doing so "as the contents of such notices would be highly fact-specific and we would expect code Operators to be able to easily prepare these". In respect of the additional notices referred to by Community Fibre and CAAV, in the absence of receiving evidence to suggest otherwise, we would also expect code Operators to be able to easily prepare these (in accordance with the requirements of paragraph 88(1) of the new Code).

Comments of general application

- 5.8 RICS, EE, CMS Cameron McKenna, Squire Patton Boggs, two confidential stakeholders and Three stated that it would be helpful if each of the prescribed notices had a clear section at the top which sets out who the notice is from, and to whom it is being sent (to assist parties regarding the sending of future notices).
- 5.9 Redford Crowe stated that in paragraph 2 of the notice templates given by code operators, the CRN and registered office of the operator (as well as the corresponding details of the Site Provider, if applicable) should be specified along with the date of the Agreement to provide legal certainty.
- 5.10 A confidential stakeholder stated that all notices should have a signature and date line at the bottom of the notice.
- 5.11 A number of stakeholders commented that the numbering of the relevant paragraphs of the new Code had changed since publication of the Consultation.

Ofcom's response

- 5.12 We consider the template notices are sufficiently clear in identifying the purpose for which they are being given, as well as the identity of the sender and of the recipient. We also consider it would be open for the sender of the notice to provide their signature alongside the date of the notice, as well as any additional identification such as its registered office, however we do not consider it necessary to include such a requirement as part of the prescribed form. Consequently we have decided it is not necessary to make these general changes to the template notices.

- 5.13 We recognise that the numbering has changed and we have reflected this in the final versions of the template notices.

Comments on the Assignment Notice under paragraph 16 of the new Code (formerly paragraph 15)

- 5.14 CAAV stated that the Assignment Notice should supply not only an address for the assignee – which should be in the United Kingdom – but also practical contact details, not just the formal legal address.
- 5.15 Arqiva stated that paragraph 4 states that from the date of the notice, the Operator will not be liable for any breach of the term of the Agreement. In its view clarity was needed around these provisions in the case of a guarantee being in place.
- 5.16 Redford Crowe stated in regards to paragraph 16(5) Notice (Assignor Version) that the heading of this draft template notice should make it clear that it is the Assignor version of the notice to differentiate it from the Assignee version which appears as the penultimate draft template notice. In paragraph 2, reference should also be made to the actual date of the Agreement being assigned to provide legal certainty. In paragraphs 2 and 3, reference should also be made to the respective Company Registration Numbers (“CRNs”) of the Assignor, Assignee and the other party to the Agreement to be assigned (if that other party is a company).

Ofcom’s response

- 5.17 Having had regard to the requirements of the provisions of paragraph 16, we consider the drafting of both template notices meets those requirements and is sufficiently clear and consequently we have decided it would not be necessary to make the changes proposed.

Comments on the Conferral Notice under paragraphs 20(2) and 27(1) (formerly paragraph 19(2) and 26(1)), and on the Interim Conferral Notice under paragraph 26(3), of the new Code (formerly paragraph 25(3))

- 5.18 CAAV stated that at the end of paragraph 3 there should be added “for the purposes of communications networks for the public.” CAAV also stated that paragraph 10 reads as being rather heavy-handed. It might be softened by an opening sentence to the effect of “We will seek to agree with you suitable terms for an agreement between us. However, if we are unable to reach an agreement, the Code allows us to apply to the court to impose an agreement.”
- 5.19 Redford Crowe stated that in both alternate versions of paragraph 2, reference should also be made to the Code Operator's CRN and registered office (as well as those of the person to whom the statutory notice is given, if applicable). In paragraph 5, reference to “a direction” should be to “a direction made pursuant to Section 106 of the Communications Act 2003”. In footnote 2 to paragraph 13 (paragraph 10 of the Interim Notice), reference to the Court having the power to make an Order as a matter of urgency should be to paragraph 26(5) of the Code. In paragraph 16 (paragraph 13 of the Interim Notice), if the Operator is attaching

draft agreement(s), the wording would need to be amended accordingly. They also considered that it would be advisable (wherever possible) to attach the draft(s) to this form of notice since it will help speed up the process of ensuring that appropriate agreement(s) is/are concluded sooner rather than later. In the Supplementary Information for both the Conferral and Interim Notices, reference:

- in paragraph 4 (paragraph 2 of the Supplementary Information for the Interim Notice) to paragraphs 23 and 24 of the new Code should also additionally refer to paragraph 22 of the new Code because this latter provision sets out the legal effect of an agreement imposed by paragraph 20(2) of the Code; and
- in paragraph 5 to paragraph 84 (under the new Code) should instead be to Part 14 of the new Code.

5.20 In relation to Annex 3, there should be the ability for the Operator to attach a draft agreement relating to Temporary Code Rights (to be consistent with the drafting of Annex 2 which gives a corresponding option for an Operator to attach a draft agreement relating to the installation of new apparatus).

5.21 A confidential stakeholder stated that they consider that it would be preferable to have separate notices under these provisions, one for new sites the other in respect of existing installations. This would allow greater clarity for all parties. They suggested that the second sentence of paragraph 4 of the Conferral Notice (paragraph 3 of the Interim Notice) is removed since this level of detail is not necessary and may not be known at the time of service of the notice (particularly in relation to a new site). As to the requirement to define/describe the Apparatus at Annex 1, they asked that this is limited to the "type" of Apparatus that the Operator proposes to deploy as opposed to a full specification, particularly where this relates to new sites. The equipment detail will form part of the new Code Agreement that is later released for signature when/if the Grantor agrees in principle to commit to the grant of the Code Rights sought by the Operator.

Ofcom's response

5.22 We have made some minor changes to correct the reference in the footnote in paragraph 13 of the Conferral Notice and paragraph 10 of the Interim Notice (which should be to paragraph 27(5) of the new Code) and to reflect the two other comments of Redford Crowe in respect of the Supplementary Information accompanying the Conferral Notice and the Interim Notice:

- paragraph 4 of the Supplementary Information to the Conferral Notice and paragraph 2 of the Supplementary Information to the Interim Notice will now read as follows:
 - “Paragraphs 23 and 24 of the Code contain further detail about the terms of the agreement that the court may impose. And paragraph 22 of the Code states that such an agreement takes effect for all purposes of the Code as an agreement under Part 2 of the Code between the operator and the relevant person”
- the last sentence of paragraph 5 of the Supplementary Information to the Conferral and Interim Notices will now read as follows:

- “Paragraphs 25 and Part 14 of the Code contain further details about this”.
- 5.23 We have added the following wording to paragraph 9 of the Conferral Notice to allow for the code operator to set out not just the temporary code right(s) sought in a notice under paragraph 27 of the new Code,³⁰ but also all of any other terms of the agreement that the operator seeks: “[As the electronic communications apparatus described in Annex 3 (the “**Existing Apparatus**”) is already installed on, under or over the Land, we are also seeking your agreement on a temporary basis to [confer/be bound by] the Code Rights set out at paragraph 7 above in respect of the Existing Apparatus (the “**Temporary Code Rights**”)] [And, in addition to the Temporary Code Rights, we are also seeking your agreement on a temporary basis to the additional terms set out in Annex 2]”.
- 5.24 We have also amended the first sentence of paragraph 16 of the Conferral Notice and of paragraph 13 to the Interim Notice respectively to the following:

“If you agree [to confer the Code Rights on us / to be bound by the Code Rights], [we will send you an agreement reflecting the terms set out in this notice and ask you to sign it] [we ask you to sign the agreement attached at Annex 2]”; and.

“If you agree [to confer the Code Rights on us/to be bound by the Code Rights] on the interim basis requested in this notice, [we will send you an agreement reflecting the terms set out in this notice and ask you to sign it] [we ask you to sign the agreement attached at Annex 2]”.
- 5.25 Otherwise, having had regard to the requirements of the provisions of paragraphs 20 to 27 of the new Code, we consider the drafting of the template notice meets those requirements and is sufficiently clear such that it is not necessary to make further changes.

Comments on Overflying Notice under paragraph 75 of the new Code (formerly paragraph 74)

- 5.26 CAAV stated that it would be helpful if the title made clear that this notice is for the operator to serve on a neighbour where there are overflying cables. Regarding paragraph 2, CAAV stated that as well as specifying that the cables are over 3m above the ground, this paragraph should also say that they are not within 2m of any building, in line with paragraph 75 of the new Code. Regarding paragraph 3 CAAV stated that the word “will” is unnecessary and should be deleted. The sentence should read “You have a right to object...” CAAV proposed that the notice should also refer to the fact that no Code rights apply where the cables are below 3m or within 2m of a building.

Ofcom’s response

- 5.27 Having had regard to the requirements of the provisions of paragraph 75, we consider the drafting of the template notice meets those requirements and is sufficiently clear and consequently we have decided it would not be necessary to make the changes proposed by CAAV.

³⁰ See paragraph 27(1)(a) and also paragraph 20(1)(a) of the new Code.

Comments on the notice for bringing an agreement to an end under paragraph 31(1) of the new Code (formerly paragraph 30(1))

- 5.28 Arqiva stated that in paragraph 2 at the point a notice under this paragraph is served, the Operator is in occupation so reference to the land “occupied by you” in reference to the landowner is incorrect. This should state that they are the person that has conferred rights under Part 2. Instead, this could state “you are the person who has conferred the code rights pursuant to paragraph 9 or their successor in title”. Arqiva stated regarding paragraph 5 that the wording of this paragraph should follow the legislation so it should state that “[I/we] propose that the Agreement be brought to an end on the following ground”.

Ofcom’s response

- 5.29 Paragraph 9 of the new Code makes clear that code rights “may only be conferred on an operator by an agreement between the occupier of the land and the operator”. We consider the drafting of the template notice in paragraph 2 – which states “These code rights relate to land occupied by [the site provider referred to in paragraph 31 of the new Code]” – is consistent with this and is therefore not incorrect. Having also considered the requirements of the provisions of paragraph 31, we have decided it would not be necessary to make the changes proposed by Arqiva.

Comments on the notice under Paragraph 33(1) (Code Operator Version) of the new Code (formerly paragraph 32(1))

- 5.30 Arqiva stated that Ofcom should be clear if it expects that the effect of a change in the terms in accordance with paragraph 33(1) amounts to a surrender and regrant.
- 5.31 Redford Crowe stated in Paragraph 2, the CRN and registered office of the Operator (as well as the corresponding details of the Site Provider, if applicable) should be specified to provide legal certainty. In Paragraph 3, the date of the Agreement (and the parties to it) should be specified to provide legal certainty. Paragraphs 5, 6 and 11 refer to “Annex [X]” but none is set out in the draft template. On balance, it is advisable to attach a draft of the new agreement in the said Annex since it will help speed up the process of ensuring that the appropriate agreement is concluded sooner rather than later. Paragraph 7 has only partially transposed the effect of Paragraph 32(3) [old version of the Code. New version paragraph is 33(3)] of the Code. It has not taken account of the additional requirement set out in Paragraph 32(3)(b) of the Code.

Ofcom’s response

- 5.32 We have added an annex marked “ANNEX [X]” but have not given any more detail as this will differ according to the circumstances in each of the paragraphs referred to. We accept that paragraph 7 only partially transposed the effect of paragraph 33(3) and have amended the paragraph accordingly. With respect to remaining comments, having had regard to the requirements of the provisions of paragraph 33, in particular paragraph 33(4) and (5), we consider the drafting of the template notice meets those requirements and is sufficiently

clear and consequently we have decided it would not be necessary to make the additional changes that have been suggested.

Comments on the notice under Paragraph 33(1) (Site Provider Version) of the new Code (formerly paragraph 32(1))

- 5.33 Redford Crowe stated that the notice should be amended so as it could be construed according to the identity of the party giving the notice.

Ofcom's response

- 5.34 Having had regard to the requirements of the provisions of paragraph 33, we consider the drafting of the template notice meets those requirements and is sufficiently clear and consequently we have decided it would not be necessary to make any changes. However, we have added an annex, marked "ANNEX [X]" for the same reasons as above in relation to the Code Operator Version.

Comments on the Disclosure notice under paragraph 39(1) and 39(2) of the new Code (formerly paragraph 38(1) and 38(2))

- 5.35 Arqiva stated that the notice states that the Operator has three months "beginning with the date on which this notice is given" to respond. What is not clear is when the notice is given, and that Ofcom should provide clarity around this i.e. whether this is the date that it is received in the ordinary course of post (and if so, this should be defined) or it is the date stated on the notice.
- 5.36 Redford Crowe stated that in Paragraph 2, the CRN and the registered office of the Operator (and the corresponding details of the Landowner, if applicable) should be specified for legal certainty. Footnote 2 to Paragraph 5 refers to the Operator responding to the Landowner's Paragraph 38(1) Notice in a manner which complies with Paragraph 87 of the Code. Redford Crowe submitted that (notwithstanding Paragraph 38(4)(a)(i) of the Code) this is somewhat confusing (not least because Ofcom has not set out a prescribed form of notice to be sent by an Operator in response: see the earlier comments in the response to Question 3). It would be better if reference to "Paragraph 87 of the Code" was changed to "Part 15 of the Code" since the revised wording provides greater flexibility and overcomes the need for Ofcom to prescribe a template draft notice needing to be served by an Operator in response.
- 5.37 Regarding Paragraph 38(2) Notice Redford Crowe stated in Paragraph 2, the CRN and the registered office of the Operator (and the corresponding details of the Landowner, if applicable) should be specified for legal certainty. Footnote 2 to Paragraph 5 refers to the Operator responding to the Landowner's Paragraph 38(1) Notice in a manner which complies with Paragraph 87 of the Code. It is submitted that (notwithstanding Paragraph 38(4)(a)(i) of the new Code) this is somewhat confusing (not least because Ofcom has not set out a prescribed form of notice to be sent by an Operator in response: see the earlier comments in the response to Question 3). It would be better if reference to "Paragraph 87 of the Code" was changed to "Part 15 of the Code" since the revised wording provides greater flexibility

and overcomes the need for Ofcom to prescribe a template draft notice needing to be served by an Operator in response.

- 5.38 A confidential stakeholder stated as the Grantor (or neighbouring landowner) will not necessarily have details of any new Code Agreement that may be in place (given that this is a request for information) it would be preferable if the notice could suggest that the Grantor (or neighbouring landowner) should, where possible, include a plan identifying the land in question, and, where applicable, state the relevant land registry title number to enable the Operator to identify the land in question. This could be incorporated at paragraph 3 of each of the notices.

Ofcom's response

- 5.39 Having had regard to the requirements of the provisions of paragraph 39, we consider the drafting of the template notice meets those requirements and is sufficiently clear and consequently we have decided it would not be necessary to make any changes. We consider the reference to paragraph 88 of the Code to be sufficiently clear. See also our earlier comments on Ofcom producing further notices. In response to the suggestion that the notice could suggest that a plan is included, we do not consider this is necessary to comply with the relevant requirements for this notice but acknowledge that it may nevertheless be helpful for such a plan to be included.

Comments on the removal of apparatus notices under paragraph 40(2) and paragraph 41(2) of the new Code (formerly paragraph 39(2) and paragraph 40(2))

- 5.40 Arqiva stated that some of the wording in the notice is unclear and so should be clarified. They proposed that the following paragraphs read as follows: "4. We are entitled to require the removal of the apparatus because [landowner states the condition under paragraph [37] [38] that it is relying on]. 5. The purpose of this notice is to inform you that [I/we] require you to remove that apparatus and to restore the Land to its condition before the apparatus was placed [on/under/over] it. We require you to complete these works on or before [Insert Date]."
- 5.41 Redford Crowe stated the title of the Notice Paragraph 40(2) Notice should be extended to cover restoration of the land in addition to removal of the apparatus to reflect both limbs of Paragraph 40(2) of the Code which are cumulative rather than alternative. In Paragraph 2, the CRN and the registered office of the Operator (and the corresponding details of the third party serving the notice, if applicable) should be specified for legal certainty. Paragraph 5 (when read in conjunction with Note (d)) should be expanded to explain the range of other applications which the third party may make to the Court pursuant to Paragraph 43(3) of the new Code other than requiring the Operator to remove the apparatus or authorising the third party to sell the apparatus. The Court can also make the following orders upon an application by the third party: (i) require the Operator to restore the land to its former condition prior to the Code right being exercised (Paragraph 43(1)(b) of the new Code); (ii) enable the third party to recover the costs from the Operator of any action to remove or sell

the apparatus (Paragraph 43(3)(c) of the new Code); (iii) enable the third party to recover the costs from the Operator of restoring the land to its former condition before the apparatus was placed on, under or over the land (Paragraph 43(3)(d) of the new Code); and (iv) enable the third party to retain the proceeds of sale of the apparatus to the extent that these do not exceed the costs of the third party incurred by them in connection with any of the orders made by the Court pursuant to Paragraph 43(3) of the new Code. No provision is made in the draft template notice to deal with the alternative situation involving a third party who requires the apparatus to be altered in consequence of street works as envisaged by Paragraph 41(1) of the Code. The notes should be expanded to explain the circumstances in which restoration can be requested in the Paragraph 40(2) Notice.

- 5.42 A confidential stakeholder stated that it would be preferable for paragraph 4 of the draft notice to be expanded to include details and evidence of the Grantor's grounds of entitlement to seek removal/restoration (pursuant to para 37 and para 38 of the new Code as enacted).
- 5.43 CAAV stated that it would be helpful if the titles to these notices made it clear as to which notice is to be served in which circumstances. It is not immediately apparent without careful scrutiny, which may mean that the wrong notice might be served.

Ofcom response

- 5.44 We have amended paragraph 4 of the notice under paragraph 40(2) of the Code to take account of suggestions that it would be helpful for the notice to specify the conditions being relied on under paragraph 37 or 38 of the Code. With respect to other comments, we have had regard to the requirements of the provisions of paragraphs 40 and 41 and consider the drafting of the template notices meets those requirements and is sufficiently clear and consequently we have decided it would not be necessary to make any changes.

Comments on the counter-notice under paragraph 41(5) of the new Code (formerly paragraph 40(5))

- 5.45 Redford Crowe stated that the title of the Counter-Notice served pursuant to Paragraph 40(5) (which refers back to the Notice served pursuant to Paragraph 40(2)) should be extended to cover restoration of the land in addition to removal of the apparatus to reflect both limbs of Paragraph 40(2) of the new Code which are cumulative rather than alternative. In Paragraph 2, the CRN and the registered office of the Operator (and the corresponding details of the third party serving the notice, if applicable) should be specified for legal certainty. No provision is made in the alternative versions of Paragraph 3 of the draft template counter-notice to deal with the separate situation where the third party requires the apparatus to be altered in accordance with street works and the Operator requires the third party to reimburse the Operator in respect of any expenses incurred by the Operator in connection with making of any alteration: see Paragraph 41(3) and (4) of the new Code.
- 5.46 Arqiva stated that paragraph 2 states that "On [insert date]", the Operator was given notice. Ofcom should clarify whether this is the date stated in the notice or the date that the notice

was received. Arqiva stated that in relation to paragraph 3, the Operator cannot state the reasons on which it thinks the landowner is not able to require the removal of the apparatus unless it knows the landowner's reasons for requesting removal in the first place. The Operator should only be required to provide reasons here where the landowner has stated the grounds under paragraph [37] [38] on which it is relying. Please see our response above in relation to the notice under paragraph 40(2) and paragraph 41(2).

Ofcom response

5.47 Having had regard to the requirements of the provisions of paragraph 41, we consider the drafting of the template notice meets those requirements and is sufficiently clear and consequently we have decided it would not be necessary to make any changes.

Comments on Paragraph 43(4) Notice (formerly paragraph 42(4))

5.48 A confidential stakeholder stated it would be preferable for details of the works that are required and evidence of the condition of the land in question to be included within and annexed to the notice (equivalent to a schedule of dilapidations).

Ofcom's response

5.49 Having had regard to the requirements of the provisions of paragraph 43, we consider the drafting of the template notice meets those requirements and is sufficiently clear and consequently we have decided it would not be necessary to make any changes. We note that this does not exclude the possibility of the matters referred to being annexed to the notice.

Comments on exercise of a transport land right notice under paragraph 49(1) Notice of the new Code (formerly paragraph 48(1))

5.50 Redford Crowe stated that in Paragraph 2, the CRN and the registered office of the Operator should be specified for legal certainty. The full name, registered office and CRN of the relevant Transport Undertaker should also be specified for the sake of completeness and legal certainty. In Paragraph 3, further clarification should be given as to the meaning of "non-emergency works" (by reference to the definition given in Paragraph 48(5) of the new Code). In Paragraph 4, reference to "a Direction" should be to "a Direction made pursuant to Section 106 of the Communications Act 2003". In Paragraph 5, in summarising the provisions of the conferral of transport rights under the new Code, reference should be to either Paragraphs 44 to 54 of the new Code (rather than to Paragraphs 47 to 54 of the new Code as currently stated in the draft template notice) or to Part 7 of the new Code. An additional Paragraph 14 should be inserted to briefly explain the effect of Paragraph 54 of the new Code (which imposes criminal (rather than merely) liability) upon an Operator if it starts any works in contravention of any provision of Paragraphs 48, 49 or 50 of the new Code.

Ofcom's response

- 5.51 Having had regard to the requirements of the provisions of paragraph 49, we consider the drafting of the template notice meets those requirements and is sufficiently clear and consequently we have decided it would not be necessary to make any changes other than to add a reference in paragraph 3 to the definition of "non-emergency works".

Comments on the notice of objection under paragraph 50(2) of the new Code (formerly paragraph 49(2))

- 5.52 Redford Crowe stated in Paragraph 2, the CRN and the registered office of the Transport Undertaker should be specified for legal certainty. The full name, registered office and CRN of the relevant Operator should also be specified in the notice for the sake of completeness and legal certainty. Further clarification should be also given as to the meaning of "non-emergency works" (by reference to the definition given in Paragraph 48(5) of the new Code). In Paragraph 4, the drafting should be consistent with the drafting of the corresponding provision in Paragraph 12 of the Paragraph 48(1) Notice.

Ofcom's response

- 5.53 Having had regard to the requirements of the provisions of paragraph 50, we consider the drafting of the template notice meets those requirements and is sufficiently clear and consequently we have decided it would not be necessary to make any changes, other than to add a reference in paragraph 10 to paragraph 51(4) of the Code.

Comments on the Arbitration Referral Notice (Objection to Proposed Non Emergency Works) under paragraph 50(3) of the new Code (formerly paragraph 49(3))

- 5.54 Redford Crowe stated in the alternative versions of Paragraph 2, the respective CRNs and registered offices of the Operator and the Transport Undertaker should be specified for legal certainty. Paragraph 6 should be expanded to briefly explain the effect of Paragraph 54 of the new Code (which imposes criminal (rather than merely) liability) upon an Operator if it starts the Proposed Works (as detailed in the alternative versions of Paragraph 2) unless and until they are permitted in accordance with an arbitration award made pursuant to Paragraph 51 of the new Code.

Ofcom's response

- 5.55 Having had regard to the requirements of the provisions of paragraph 50, we consider the drafting of the template notice meets those requirements and is sufficiently clear and consequently we have decided it would not be necessary to make any changes.

Comments on exercise of a transport land right notice under paragraph 51(2) of the new Code (formerly paragraph 50(2))

5.56 Redford Crowe stated in Paragraph 2, the respective CRNs and registered offices of the Operator and the Transport Undertaker should be specified for legal certainty. In Paragraph 5, in summarising the provisions of the conferral of transport rights under the new Code, reference should be to either Paragraphs 44 to 54 of the new Code (rather than to Paragraphs 47 to 54 of the new Code as currently stated in the draft template notice) or to Part 7 of the Code. In Paragraph 10, reference to a compensation notice should link it to Paragraph 50(4) of the Code.

Ofcom's response

5.57 Having had regard to the requirements of the provisions of paragraph 51, we consider the drafting of the template notice meets those requirements and is sufficiently clear and consequently we have decided it would not be necessary to make any changes, other than to add a reference in paragraph 10 to paragraph 50(4) of the Code.

Comments on the payment of compensation for loss or damage sustained in consequence of the carrying out of emergency works notice under paragraph 51(4) of the new Code (formerly paragraph 50(4))

5.58 Redford Crowe stated in Paragraph 2, the respective CRNs and registered offices of the Operator and the Transport Undertaker should be specified for legal certainty. In Paragraph 6, it should be made clear that a Transport Undertaker only has the right to serve a Paragraph 50(4) Notice requiring payment of compensation by the Operator carrying out emergency works if, but only if, the Transport Undertaker has given it within the requisite "compensation notice period" (as defined in Paragraph 50(9) of the new Code) in response to a Paragraph 50(2) Notice originally served by an Operator. As currently drafted, the template notice does not clearly differentiate between the "compensation notice period" and the "compensation agreement period" (as defined in Paragraph 50(9) of the Code). In Paragraph 9, it should be made clear that an Operator also has the right to refer the matter to arbitration pursuant to Paragraph 51 of the new Code: see Paragraph 50(7) of the new Code. A definition of "Emergency Works" (by reference to Paragraph 50(9) of the new Code) should be inserted (similar to Note (b) in the draft template notice relating to Paragraph 50(2) of the new Code).

Ofcom's response

5.59 Having had regard to the requirements of the provisions of paragraph 51, we consider the drafting of the template notice meets those requirements and is sufficiently clear, particularly taking into account the notes for completing the notice (which reflect the provisions of paragraph 51(7) of the Code and the significance of the compensation notice period). Other than to add a reference in paragraph 2 to the definition of emergency works in paragraph 51(9) of the Code we have decided it would not be necessary to make any

changes. We note that paragraph 7 of the notice already reflects the right of the both parties to refer the matter to arbitration pursuant to paragraph 52 of the Code.

Comments on the referral to arbitration notice under paragraph 51(7) of the new Code (formerly paragraph 50(7))

5.60 Redford Crowe stated in the alternative versions of Paragraph 2, the respective CRNs and registered offices of the Operator and the Transport Undertaker should be specified for legal certainty. A definition of "Emergency Works" (by reference to Paragraph 50(9) of the Code) should be inserted (similar to Note (b) in the draft template notice relating to Paragraph 50(2) of the new Code).

Ofcom's response

5.61 Having had regard to the requirements of the provisions of paragraph 51, we consider the drafting of the template notice meets those requirements and is sufficiently clear and consequently we have decided it would not be necessary to make any changes, other than to add a reference in paragraph 2 to the definition of emergency works in paragraph 51(9) of the Code.

Comments on the alteration of electronic communications apparatus notice under paragraph 53(1) of the new Code (formerly paragraph 52(1))

5.62 Redford Crowe stated in Paragraph 2, the CRN and registered office of the Operator should be specified for legal certainty. In Paragraph 3, the CRN and registered office of the Transport Undertaker should be specified for legal certainty. An additional Note (c) should be inserted at the end of the draft template notice to highlight the fact that, for the purposes of the new Code, "alteration" of any apparatus includes references to the moving, removal or replacement of the apparatus: see Paragraph 107(2) of the new Code.

Ofcom's response

5.63 Having had regard to the requirements of the provisions of paragraph 53, we consider the drafting of the template notice meets those requirements and is sufficiently clear and consequently we have decided it would not be necessary to make any changes. We have added a new note (c) to highlight the meaning of "alteration" as set out in paragraph 108(2) of the Code.

Comments on the counter-notice under paragraph 53(2) of the new Code (formerly paragraph 52(2))

5.64 Redford Crowe stated the heading of this notice should be changed to a Counter-Notice to be consistent with the wording used in Paragraph 52(2) of the new Code. In Paragraph 2, the CRNs and registered offices of the Operator and Transport Undertaker should be specified for legal certainty. It should be made clear on the face of the draft template notice that, for the purposes of the new Code, "alteration" has an extended meaning and includes

references to the moving, removal or replacement of the apparatus: see Paragraph 107(2) of the new Code.

Ofcom's response

- 5.65 Having had regard to the requirements of the provisions of paragraph 53, we consider the drafting of the template notice meets those requirements and is sufficiently clear and consequently we have decided it would not be necessary to make any changes, particularly in light of the reference to paragraph 108(2) that we have now included in the notice under paragraph 53(1) to which this counter-notice is given. Comments on the termination of transport land rights notice under paragraph 54(7) of the new Code (formerly paragraph 53(7)).
- 5.66 Redford Crowe stated in Paragraph 2, the CRN and registered office of the Operator should be specified for legal certainty. A new Paragraph 5 should be inserted to give the name and address of the Occupier (and, in appropriate cases, the CRN and registered office of the Occupier) to provide legal certainty as well as to enable the Operator to contact the Occupier (if it wishes to obtain further clarification upon the contents of the Paragraph 53(7) Notice).

Ofcom's response

- 5.67 Having had regard to the requirements of the provisions of paragraph 54, we consider the drafting of the template notice meets those requirements and is sufficiently clear and consequently we have decided it would not be necessary to make any changes.

Comments on the non-emergency undertaker's works notice under paragraph 67(1) of the new Code (formerly paragraph 66(1))

- 5.68 Redford Crowe stated in Paragraph 2, the CRN and registered office of the Undertaker should be specified for legal certainty. In Paragraphs 3, 5, 6 and 7, further clarification (by way of an additional footnote) should be given as to the special meaning of "alteration" within the Code: see Paragraph 107(2) of the new Code. The CRN and registered office of the Operator should also be specified for legal certainty. In Paragraphs 4 and 5 (and the Annex), further clarification needs to be provided as to the details of the proposed works which the Undertaker is legally required to provide to the Operator having regard to the provisions of Paragraph 67(2)(a) to (c) of the new Code. In Note (c), reference to the Undertaker's potential criminal (as opposed to civil) liability should be to Paragraph 71 of the new Code which also extends such liability to an agent of an Undertaker.

Ofcom's response

- 5.69 Having had regard to the requirements of the provisions of paragraph 67, we consider the drafting of the template notice meets those requirements and is sufficiently clear although we have added a reference in the notes for completing the notice to the meaning of "alteration" in paragraph 108(2) of the Code and to paragraph 72 of the Code in relation to the criminal liability under that paragraph. Other than these minor amendments we have decided it would not be necessary to make any changes.

Comments on the counter-notice under paragraph 68(2) of the new Code (formerly paragraph 67(2))

5.70 Redford Crowe stated in Paragraph 2, the respective CRNs and registered offices of the Undertaker and the Operator should be specified for legal certainty. It should also be made clear (in the form of an additional footnote) that an Operator only has a period of 10 days (beginning with the day on which the Paragraph 66(1) Notice is given by the Undertaker) within which to give a Paragraph 67(2) Counter-Notice. In the alternative versions of Paragraph 3 and 4, further clarification (by way of an additional footnote) should be given as to the special meaning of “alteration” within the Code: see Paragraph 107(2) of the new Code. In the second version of Paragraph 4 (where the alteration of the apparatus is to be carried out by the Operator rather than by the Undertaker), reference should be made to the provisions of Paragraph 69 of the new Code since it contains a set of cumulative restrictions (found in Paragraph 69(1)(a) to (c)) which must be satisfied by the Operator before it can itself carry out the alteration.

Ofcom’s response

5.71 Having had regard to the requirements of the provisions of paragraph 68, we consider the drafting of the template notice meets those requirements and is sufficiently clear and consequently we have decided it would not be necessary to make any changes, particularly in light of the reference to paragraph 108(2) that we have now included in the notice under paragraph 53(1) to which this counter-notice is given. We also note that the notice under paragraph 67(1) already sets out the operator’s options in paragraph 6 with regard to giving a counter-notice, including the timeframe within which such counter-notice must be given.

Comments on carrying out of emergency undertaker’s works notice under paragraph 71(2) of the new Code (formerly paragraph 70(2))

5.72 Redford Crowe stated in Paragraph 2, the CRN and registered office of the Undertaker (as well as the corresponding details of the Operator including its full corporate name) should be specified for legal certainty. In Paragraphs 3 to 6 (and Note (a)), further clarification (by way of an additional footnote or endnote) should be given as to the special meaning of “alteration” within the Code: see Paragraph 108(2).

Ofcom’s response

5.73 Having had regard to the requirements of the provisions of paragraph 71, we consider the drafting of the template notice meets those requirements and is sufficiently clear and consequently we have decided it would not be necessary to make any changes, although we have added a reference in the notes for completing the notice to the meaning of “alteration” in paragraph 108(2) of the Code.

Comments on the notice of objection to apparatus kept on, under or over tidal waters or lands under paragraph 78(1) and 77(1) of the new Code (formerly paragraph 77(1) and 76(1))

5.74 Redford Crowe stated in Paragraph 2, the CRN and registered office of the Operator (and, where appropriate, the corresponding details of the Objector(s)) should be specified for legal certainty. In Paragraph 5, further clarification (by way of an additional footnote or endnote) should be given as to the special meaning of “Occupier” within the new Code: see Paragraph 104. In the second version of Paragraph 6, further clarification (by way of an additional footnote or endnote) should be given as to the special meaning of “alter” within the Code: see Paragraph 108(2).

Ofcom’s response

5.75 Having had regard to the requirements of the provisions of paragraphs 77 to 81, we consider the drafting of the template notice meets those requirements and is sufficiently clear and consequently we have decided it would not be necessary to make any changes, although we have added a reference in the notes for completing the notice to the meaning of “alteration” in paragraph 108(2) of the Code.

Comments on the notice of objection to a line kept on or over land under paragraph 78(1) and 77(3) of the new Code (formerly paragraphs 77(1) and 76(3))

5.76 Redford Crowe stated in Paragraph 2, the CRN and registered office of the Operator (and, where appropriate, the corresponding details of the Objector(s)) should be specified for legal certainty. In Paragraph 5, further clarification (by way of an additional footnote or endnote) should be given as to the special meaning of “Occupier” within the new Code: see Paragraph 104. In the second version of Paragraph 6, further clarification (by way of an additional footnote or endnote) should be given as to the special meaning of “alter” within the new Code: see Paragraph 108(2).

Ofcom’s response

5.77 Having had regard to the requirements of the provisions of paragraphs 77 to 81, we consider the drafting of the template notice meets those requirements and is sufficiently clear and consequently we have decided it would not be necessary to make any changes, although we have added a reference in the notes for completing the notice to the meaning of “alteration” in paragraph 108(2) of the Code. For consistency, we have made the same change to the notice of objection to electronic communications apparatus kept on or over land under paragraph 78(1) and 77(5).

Comments on the notice requiring a tree to lopped / vegetation to be cut back under paragraph 82(3) of the new Code (formerly paragraph 81(3))

5.78 Redford Crowe stated in Paragraph 2, the CRN and registered office of the Operator (and, where appropriate, the corresponding details of the Occupier should be specified for legal certainty. Further clarification (by way of an additional footnote or endnote) should be given as to the special meaning of “Occupier” within the new Code: see Paragraph 105.

Ofcom’s response

5.79 Having had regard to the requirements of the provisions of paragraph 82, we consider the drafting of the template notice meets those requirements and is sufficiently clear and consequently we have decided it would not be necessary to make any changes.

Comments on the counter-notice under paragraph 82(4) of the new Code (formerly paragraph 81(4))

5.80 Redford Crowe stated in Paragraph 2, the CRN and registered office of the Operator (and, where appropriate, the corresponding details of the Occupier should be specified for legal certainty. Further clarification (by way of an additional footnote or endnote) should be given as to the special meaning of “Occupier” within the Code: see Paragraph 105.

Ofcom’s response

5.81 Having had regard to the requirements of the provisions of paragraph 82, we consider the drafting of the template notice meets those requirements and is sufficiently clear and consequently we have decided it would not be necessary to make any changes.

A1. Draft Code of Practice showing amendments

Introduction

- A1.1 Electronic communications services (such as landlines, mobile phones and internet services) are now regarded as essential services. In order that these services can be provided where they are needed, The Electronic Communications Code ('ECC Code') provides a statutory basis whereby communications providers (known in this context as 'Operators') can place their Apparatus² on land or buildings owned by another person or organisation.
- A1.2 In view of the ever increasing and critical needs of local communities (and the UK economy as a whole) to have access to 21st century communications networks, such as high speed broadband connection or a 4G mobile connection (and 5G in due course), the ECC Code has been reformed under the ~~{Digital Economy Act 2017}~~ so as to make it more straightforward for Operators to gain access to the locations they need, to improve coverage, capability and capacity.

Purpose of the Code of Practice

- A1.3 The purpose of this Code of Practice, which has also been established under the [Digital Economy Act], is to set out expectations for the conduct of the parties to any agreement made under the ECC Code. It is not a guide to the ECC Code or the Code regulations, but it is intended to complement them and to make it simple for Operators, ~~and Landowners~~ and Occupiers³ to come to agreement over a range of issues relating to the occupation of a site. References to landowners should also be taken, where appropriate, to encompass Occupiers as defined in the Code. Agreements under the ECC Code are binding and so Landowners may wish to consider seeking independent professional advice before entering into such an agreement (see below).
- A1.4 'Site' in this Code of Practice is used in a broad sense⁴ as any place to install Apparatus, such as under or on top of open land, the rooftop of a building, a tunnel or a lamp-post.
- A1.5 All parties to whom this Code of Practice applies should treat each other professionally and with respect, remembering always that the goal is to improve and maintain essential communications services for all. Operators should take adequate steps to satisfy themselves that they are negotiating with a party who has a lawful right to grant the necessary

¹ An Operator is an organisation which has been granted Code Powers by Ofcom, for example, a communications provider that is providing a landline, broadband, cable or mobile network, or a person who provides infrastructure which supports such a network. A list of those with Code Powers is maintained by Ofcom.

² 'Apparatus' is a broad term and refers to what is defined in the ECC Code as electronic communications apparatus; it includes such items as antennae for mobile signals, masts, cabinets, cables, ducts and telegraph poles.

³ ~~The meaning of 'Landowner', 'Operator', and 'Occupier' is as defined in the Code. The person with the lawful right to enter into an agreement with an Operator~~

⁴ 'Site' is equivalent to the term 'Land' in the ECC Code, as set out in paragraph 108.

agreement if not negotiating with the Landowner. Landowners and Operators must respect the needs and legitimate concerns of Occupiers of land when rights under the CodeECC are exercised. Operators will-ought to be responsible for the behaviour and conduct of any contractors that they instruct to carry out work on their behalf.

Scope

A1.6 This Code of Practice:

- Provides a reference framework to support Landowners and Operators to establish, develop and maintain effective working relationships, to the benefit of users of all communications services;
- Sets out what Landowners and Operators should expect from each other in the context of:
 - Establishing new agreements for the installation of apparatus;
 - The ongoing access to and operation, maintenance and upgrading of existing sites and apparatus;
 - The decommissioning of sites that are no longer required;
 - The redevelopment of sites;
- Provides a framework for site provision, whereby the commercial process of coming to an agreement, and of maintaining an agreement, can take account of all the practical requirements of both parties;
- Sets out clear lines of communication through which disputed matters can be escalated;
- Does **not** address the financial aspects of the relationship between the Landowner and the Operator

A1.7 While the Code of Practice sets out some clear principles and expectations about how Landowners and Operators should behave towards each other, it should be noted that there are some special regimes in place (e.g. transport land, public maintainable highway and tidal waters), where different specific considerations may apply.

A1.8 The Code of Practice covers a wide range of scenarios, from the construction of a full mobile mast to the installation of just one telegraph pole or a very small length of cable and it should be noted that not all the procedural elements will-should be required in each and every case.

Communication and contact information

A1.9 Central to the purpose of this Code of Practice is the maintenance of good communications between the parties in order to facilitate good working relationships.

Keeping contact information up to date

A1.10 The Operator should ensure that the Landowner and any relevant Occupier of the site or of access routes to the site have **up-to-date site and contact information** available to them, so that the Landowner can easily assess which point of contact to use in all the circumstances which may arise, such as:

- In the event of an emergency
- For routine estate or management issues
- To change or confirm access arrangements
- For escalation of redevelopment/decommissioning issues

A1.11 In turn, the Landowner and Occupier should provide email address/contact details in writing directly to the registered office of the Operator, and ensure the Operator is notified of any changes so that the Operator knows which point of contact to use in all the circumstances which may arise. ~~ensure that the Operator is provided with current contact information (and is notified of any changes to phone numbers e-mail addresses etc.) so that the Operator knows which point of contact to use in all the circumstances which may arise.~~

Professional advice

A1.12 Landowners and Operators may choose to negotiate directly with each other. Alternatively, the parties may wish to seek professional advice from a suitably qualified and experienced person such as a surveyor or valuer. This could also include taking legal advice before concluding an agreement⁵.

~~A1.13 An adviser's fees are a matter to be agreed in advance as part of the adviser's terms of engagement.~~

~~A1.14~~ A1.13 In all cases, both Operators and Landowners ~~will~~ should act in a consistent, fair and open manner with each other in relation to any proposed works.

New agreements for the installation of Apparatus

~~A1.15~~ A1.14 Additional Apparatus can be required for a number of reasons, such as:

- Customer demand
- To provide coverage to new areas
- To provide additional network capacity
- To provide new services
- To replace obsolete sites or sites that are being redeveloped

~~A1.16~~ A1.15 Where new apparatus needs to be deployed on a new site, the Operators will follow a sequence of steps, depending on the nature of the apparatus to be installed. For minor installations of apparatus (for example, the placement of a telegraph pole), it may be possible to reach an agreement ~~can be reached~~ on standard terms and conditions and without the need for a site visit. For more complex situations (such as a new mobile mast), a site visit may be required to assess the suitability of the location and to find out other background information.

⁵ A list of such advisers can be provided by professional bodies such as Central Association of Agricultural Valuers, Law Society, Law Society for Scotland, Royal Institution of Chartered Surveyors and Scottish Agricultural Arbiters and Valuers Association

Stage 1: Site Survey

[A1.17](#)[A1.16](#) Once it has been determined that new Apparatus is required in a given area, the Operator will-should identify various options for new sites and survey possible solutions based on technical and planning considerations.

[A1.18](#)[A1.17](#) Although access to maps, satellite imagery, building plans etc. can enable much of the site feasibility to be conducted remotely, direct access to a potential site and the ability to discuss practical matters with Landowners may be required.

[A1.19](#)[A1.18](#) Where access is necessary, the Operator should request such access in writing, covering the matters set out in Annex A, where relevant. The Operator will-should generally request that access is given within a reasonable period (e.g. this may be a period of around 7 days). The access request will-should set out the nature of the visit and a basic outline of the proposed installation/s.

[A1.20](#)[A1.19](#) To ensure the site survey is productive, the parties may choose to meet on site. At the appropriate moment in the assessment process, the Landowner, on the Operator's request, should seek to provide relevant information such as:

- Who owns/occupies the site;
- The current use of the site;
- Whether there are any multiple occupancy management arrangements in place
- Any planned change or intended change in ownership, occupation or use;
- Any proposals there may be to change the use of or develop the land, including whether there are any existing planning permissions in place;
- Details of known pipes, drains, cables or structures...etc;
- Whether there is/are any harmful materials, liquids, vegetation, sites of special scientific interest, protected flora, fauna, listed buildings, archaeological considerations or public rights of way on or adjacent to the site
- [Any other rights of public access on the site or adjacent to the site](#)

Stage 2: Consultation and agreement

[A1.21](#)[A1.20](#) The type of apparatus that can be deployed on, over or under a site can vary enormously. It could include, for example:

- A telegraph pole being placed in a field;
- A cable being laid in an existing duct in a shopping centre;
- An antenna system for mobile coverage being installed on the roof of an office block;
- A lattice tower being erected in a wood

[A1.22](#)[A1.21](#) Each of these examples could require different consultation processes.

[A1.23](#)[A1.22](#) When a suitable location has been identified for the installation of apparatus, the Operator will-should proceed to secure any necessary consents for the site, in accordance

with relevant regulations, consulting with the Local Planning Authority, and other parties, where required, and any applicable guidelines or codes of practice⁶.

~~A1.24~~A1.23 Where a proposal is straightforward, with standard apparatus, such as a single cabinet or pole, it may be appropriate for the Operator ~~may to~~ send the Landowner a simple written agreement with a request to sign it and return. Where the proposal is less simple, it may be appropriate for the Operator ~~may to~~ send a summary of the proposed terms of an agreement for the Landowner to consider and review. In such cases the documentation ~~may~~ might include, for example, a plan showing the proposed design, access routes and cable routes; loading calculations for rooftop sites; and proposals for electricity provision.

~~A1.25~~A1.24 Before concluding an agreement, the Landowner and Operator should agree access arrangements for construction, installation, subsequent planned maintenance, upgrades and emergency maintenance to repair service affecting faults. The key points for topics to be covered in the access arrangements are ~~set out~~covered in **Annex B**.

~~A1.26~~A1.25 Although the ~~ECC Code~~ provides a mechanism for the court to impose terms of occupation on the Landowner and the Operator, the parties should make every effort to reach voluntary agreement first.

~~A1.27~~A1.26 Whilst some agreements should be expected to be completed within a matter of weeks, and some simple cases ~~may even~~might potentially be signed on site during the survey stage, agreements for larger or more complex arrangements may generally take longer, but in all cases the parties should endeavour to respond promptly to correspondence from the other side and aim to complete the process as swiftly as possible.

~~A1.28~~A1.27 In the absence of terms being agreed between the parties in the circumstances described in paragraph 20(3) of the Code,~~within a reasonable time frame,~~ the ~~ECC Code~~ provides for a process whereby a court can impose the terms of occupation and/or the conferring of code rights pursuant to paragraph 19 of the ~~ECC Code~~. It must be emphasised, though, that one of the principal purposes of this Code of Practice is to establish a voluntary process, which avoids recourse to the courts.

Stage 3: Deployment stage

~~A1.29~~A1.28 When the Operator is carrying out works on a Landowner's property it ~~will~~should endeavour to cause minimal disruption and inconvenience. The ~~O~~perator should notify the Landowner of the following:

- Contact details for the Operator, the name and contact details of the contractor managing the scheme and also the person to whom the Landowner can escalate any matters of concern

⁶ For example: Code of Best Practice on Mobile Network Development in England, <http://www.mobileuk.org/codes-of-practice.html>

- Drawings detailing the apparatus to be deployed with an accompanying written description of the works
- Any requirement to be able to have access across other land (whether belonging to the Landowner or a third party)
- Timing of the work, including the estimated start date and duration of the works
- Working times
- Procedures for safeguarding the Landowner's property (e.g. livestock)

~~A1.30~~A1.29 Where applicable, the Operator ~~will~~should retain a dated photographic record of the condition of the site prior to the commencement of works and on completion of the works.

Neighbours and other occupiers

~~A1.31~~A1.30 Persons with an interest in land adjoining a proposed site may need to be consulted in accordance with national regulations, guidelines and any applicable Codes of Practice⁷.

~~A1.32~~A1.31 Operators ~~must~~should also negotiate access arrangements with the owner and/or occupier of land adjoining a site, where use of that land is required for either constructing and/or maintaining the site (using ~~ECC Code~~ powers, if no agreement can be reached).

~~A1.33~~A1.32 Any requirement for access by the Operator with respect to such adjoining land ~~shall~~ought to cover the matters set out in Annex B (i.e. the same considerations as for the Landowner, where applicable).

The ongoing access to and operation, maintenance and upgrading of existing sites and apparatus

~~A1.34~~A1.33 All electronic communications sites are an integral part of a wider network. Individual sites variously provide coverage, capacity and functionality to that wider network and Operators require access to their apparatus in order to be able to maintain a quality of service to their customers. In the case of service affecting faults, access ~~will~~should be required as soon as possible.

~~A1.35~~A1.34 As set out in Stage 2 Consultation Phase, any agreements between the Operator and the Landowner ~~must~~should set out how to access sites for operational needs. ~~Annex B sets out key points for access arrangements. The matters to be covered in relation to access are set out in Annex B.~~ Where necessary, Operators and Landowners should meet, prior to entering into a contract, to discuss preferred access routes and processes and agree clear expectations as to what ~~will~~should happen when access is required.

⁷ For example: Cabinet and pole siting Code of Practice, and The Code of Best Practice on Mobile Network Development in England, <http://www.mobileuk.org/codes-of-practice.html>

~~A1.36~~A1.35 In the case of emergencies, such as where there is a service-affecting fault or the Apparatus is malfunctioning, Operators need to access the Apparatus without delay, in order to resolve the issue and maintain service for customers, including the ability to make calls to the emergency services. Wherever possible, Operators ~~will~~should contact the Landowner to explain when and why access ~~is~~was required and Landowners ~~will~~should seek to cooperate with the restoration of service.

~~A1.37~~A1.36 Access for routine maintenance should be organised so that Operators can give sufficient notice in accordance with the access arrangements agreed with the Landowner.

~~A1.38~~A1.37 Where Operators are physically sharing a site or using any apparatus on a site, and no additional consents are required under the ECC Code, the Operators ~~will~~should nevertheless notify Landowners of the name and contact details of other sharers and users, so that the Landowner, for security purposes, can know who is in lawful occupation of the site.

~~A1.39~~A1.38 Where access may be required to other parts of the land owned by the Landowner, such as where an area of land is required to use a crane or cherry picker, the access arrangements should cover such scenarios and provide that the Operator ~~will~~should return the land to the condition it was in prior to the land being used or accessed.

~~A1.40~~A1.39 Operators ~~will~~should seek to ensure that anyone accessing a site on their behalf:

- Carries photographic identification
- Can explain why they are there and for whom they are working
- Can advise Landowners who to contact within the Operator for more information or to comment on any visit

~~A1.41~~A1.40 Operators ~~shall~~should, upon reasonable request, provide verification of which contractor was on site at any given point in time and confirmation of why they were there – e.g. To inspect, maintain and effect an emergency repair or physical upgrade etc.

~~A1.42~~A1.41 Operators ~~will~~should adhere to any national legal or regulatory requirements for managing location specific risks. This might include notifiable diseases (such as Foot and Mouth, Avian Flu etc.). For sites at sensitive locations, it might include arranging accompanied access to secure areas. Operators ~~will~~should comply with any reasonable procedures implemented by Landowners for these purposes. Landowners ~~will~~should, so far as is possible, preserve the ability for Operators to access their apparatus, particularly in the case of operational emergency.

Decommissioning sites that are no longer required

~~A1.43~~A1.42 The ECC Code makes provision for Landowners to request the removal of apparatus, if it is not being used and there is no prospect of it being so.

~~A1.44~~A1.43 As a general principle, Operators ~~will~~should ensure that redundant sites are decommissioned within a reasonable period after use ceases. However, in the case of apparatus below ground (such as ducts for cables), it may be preferable to the parties for the Apparatus to be made safe and left in place. Operators should discuss decommissioning proposals with Landowners in order to agree the way to proceed.

~~A1.45~~A1.44 When requested to remove redundant apparatus by a Landowner, the Operator ~~will~~should, within a reasonable time, respond, either by explaining that the apparatus will still be needed or by setting-agreeing a date by when the apparatus will be made safe or removed, and the site reinstated, if relevant.

Other

Renewal of existing sites and the ECC Code

~~A1.46~~A1.45 When an existing site agreement is due to expire, the parties ~~will~~should seek to agree terms for the continued use of the site before the existing agreement comes to an end.

~~A1.47~~A1.46 Parties should commence negotiations sufficiently far in advance of the expiry of an existing agreement to allow adequate time for terms to be agreed. ~~On many occasions, the existing terms may not need to be changed, and so the timeframe to agree new terms will be short.~~

Repairs to a Landowner's property

~~A1.48~~A1.47 From time to time, Landowners/Occupiers will have to carry out essential repairs to their property and where possible it may be necessary for apparatus to be moved temporarily to effect such repairs. In such circumstances, the parties ~~will~~should negotiate in good faith so as to allow the works to be completed, and to avoid, so far as possible, so that any resultant interruption to public communications services and to allow continuity of services is kept to a minimum. In relation to repairs to the Landowner's property, as part of the good faith negotiations, the parties should discuss the detail of the timings, duration and extent of the works.

Redevelopment by the Landowner

~~A1.49~~A1.48 The ECC Code makes ~~for~~ provision for Landowners to redevelop their property (Paragraphs 30-31), requiring that the Landowner should give 18 months' notice of the intention to redevelop. Paragraphs 30-31 of the ECC Code are intended for use by Landowners who genuinely intend to redevelop their property ~~(as evidenced, for example, by an applicable planning consent)~~. Landowners are encouraged to give Operators as much prior notice as possible, in order that adequate time can be afforded to allow the Operator to identify alternative suitable sites.

~~A1.50~~A1.49 Operators may request to see evidence of the Landowner's intention plans to redevelop but they should act reasonably at all times, so as not to hinder the Landowner's progress where there is a genuine intention to redevelop. For example, Operators should act in a timely manner to locate suitable new sites with the principal aim that communications services in a locality can be maintained, with the minimum of disruption to the users.

~~A1.51~~A1.50 Where a Landowner is progressing a redevelopment opportunity, consideration should be given to the possibility of incorporating the communications apparatus within the Landowner's property if this is a reasonable and practicable~~viable~~ option.

Escalation procedures

~~A1.52~~A1.51 The ECC Code sets out formal dispute resolution procedures.

~~A1.53~~A1.52 Nevertheless, where disputes arise, the parties should seek to resolve them informally (i.e. without recourse to litigation) in the first instance. There may be occasions, though, where one party or the other may need to serve legal notices, while still continuing to pursue an informal resolution.

~~A1.54~~A1.53 To facilitate this process, Operators and Landowners ~~will~~should make available to each other, and, where applicable, those with an interest in adjoining land, contact details for the relevant person, through whom matters of dispute can be raised. Those matters may include failure to abide by the Code of Practice.

Schedules to the Code of Practice

Schedule A – Requesting access for a survey

~~A1.55~~A1.54 An Operator wishing to access land for the purpose of surveying its suitability for siting electronic communications apparatus should contact the a potential Landowner of a potential site and provide the following information:

- Identity of operator, points of contact for operator and any agent
- Areas of search for possible installation of apparatus
- Requirements for initial survey:
 - What access is ~~required~~desired?
 - With what apparatus?
 - Over what timescale?
- Description of likely apparatus and any ancillary links required, for example power connections
- Confirmation of whether planning consent would be required
- Likely impact of apparatus on the site and/or adjoining land, for example line of sight requirements, possible interference with existing equipment etc.
- Type of agreement sort (e.g. temporary or long-term)
- Proposed timescale for construction/installation
- The letter may also include information about what action an Operator might take, in the event that the Landowner fails to respond

~~A1.56~~A1.55 In some instances, though, when an Operator is surveying at a neighbouring property, and it becomes apparent that the Apparatus would be better suited on an adjoining property, it may possible to agree with the Landowner to complete a survey immediately and then follow-up in writing once the survey has been completed.

Schedule B – Key points for access arrangements

[A1.57A1.56](#) Access arrangements should cover the following points, where appropriate⁸:

- Contact details (including in emergencies) for:
 - The Operator
 - The Landowner
 - Any Occupier of the land, if different from the Landowner
- Description of access arrangements (including any out of hours or weekend factors (e.g. for business premises that are closed at the weekend))
- Recovery of reasonable costs (e.g. if a supervisor is necessary at sensitive locations)
- An undertaking from the Operator to make good any damage to the Landowner’s property
- Notifying the Operator of any site-specific considerations, for example:
 - Requirements for supervision at sensitive or hazardous sites
 - Bio-security [and any other appropriate security](#) arrangements
 - Any relevant environmental schemes (where care has been taken not to contravene the rules of the scheme)
- Parking and access routes across land or through buildings for construction and maintenance personnel, vehicles, equipment and apparatus
- [Adherence to the Countryside Code, or the Scottish Outdoor Access Code](#) where relevant
- [Adherence to the Scottish Outdoor Access Code](#) where relevant

⁸ Note: for many fixed line installations, this will be covered [by](#) an Operators standard wayleave

A2. Draft Standard Terms showing amendments

[Name of Grantor]

and

[Name of Operator]

CODE AGREEMENT

relating to the installation of electronic communications apparatus at [address]

This Agreement is made on [Insert date] between:

- (1) [Insert name], whose [address/registered office] is at [Insert address] (the “Grantor”); and where applicable, whose Company Registration Number is [insert CRN]; and
- (2) [Insert name], whose registered office is at [Insert address] (the “Operator”), and whose Company Registration Number is [insert CRN].

RECITALS

- a) The Code (as defined in clause 1) facilitates the deployment of electronic communications apparatus by persons in whose case it is applied.
- b) The Code has been applied to the Operator by virtue of a direction under section 106 of the Communications Act 2003.
- c) The Grantor is the occupier of certain land.
- d) This Agreement is an agreement pursuant to paragraph 9 of Part 2 of the Code. It sets out the contractual basis upon which the Grantor is willing to confer code rights in respect of that land on the Operator.

IT IS AGREED AS FOLLOWS:

1. DEFINITIONS AND INTERPRETATION

1.1. In this Agreement, the following words shall have the following meanings:

“Act” means the Communications Act 2003;

“alter” and “alteration” shall be construed in accordance with paragraph 108(2) of the Code;

“Apparatus” means the Electronic Communications Apparatus described in Schedule 1, and shall be deemed to include any future alterations to or upgrades of the Apparatus that are made in accordance with this Agreement and/or pursuant to the Code;

“Code” means the electronic communications code set out at Schedule 3A to the Act;

“Code Rights” means the rights set out at clause [2.1];

“Electronic Communications Apparatus” shall have the meaning ascribed to that term in paragraph 5 of the Code;

“Land” means the land at [insert address] [and marked on the plan attached at Schedule 2];

“Operator” means any person in whose case the Code is applied by a direction under section 106 of the Act; and

“Term” means the period of time during which this Agreement is in force, which shall be a period starting on [insert date] and ending on [insert date].

1.2 In this Agreement, unless expressly stated otherwise:

- a) a reference to either party includes that party's employees, agents, contractors and sub-contractors;
- b) a reference to any statute or statutory provision includes that statute or statutory provision as amended, re-enacted, consolidated or replaced;
- c) a reference to a clause or schedule is to the relevant clause or schedule of this Agreement;
- d) words importing the singular shall include the plural, and vice versa.

2. RIGHTS OF THE OPERATOR

2.1. In consideration of the covenants set out at clause [4] of this Agreement [and payment of the sum set out at clause [3]], the Grantor hereby agrees that the Operator shall have the right for the Term:

- a) to install the Apparatus on, under or over the Land;
- b) to keep installed the Apparatus which is on, under or over the Land;
- c) to inspect, maintain, adjust, alter, repair, operate or (subject to clause [2.3]) upgrade the Apparatus which is on, under or over the Land;
- d) to carry out any works on the Land for or in connection with the installation of the Apparatus on, under or over the Land [or the installation of Electronic Communications Apparatus elsewhere];
- e) to carry out any works on the Land for or in connection with the maintenance, adjustment, alteration, repair, operation or (subject to clause [2.3], the upgrading of the Apparatus which is on, under or over the Land [or any Electronic Communications Apparatus elsewhere];
- f) to enter the Land to inspect, maintain, adjust, alter, repair, operate or (subject to clause [2.3]) upgrade the Apparatus which is on, under or over the Land [or any Electronic Communications Apparatus elsewhere];
- g) to connect the Apparatus to a power supply;
- h) to interfere with or obstruct a means of access to or from the Land (whether or not the Apparatus is on, under or over the Land);
- i) to lop or cut back, or require another person to lop or cut back, any tree or vegetation that interferes or will or may interfere with [any Electronic Communications Apparatus/the Apparatus],

(together, the “**Code Rights**”).

2.2. Subject to clause [2.3], the Operator may also share the use of the Apparatus with another Operator, and carry out any works to the Apparatus to enable that sharing to take place.

2.3. The Operator may only upgrade or share the Apparatus (and exercise the associated rights set out in clauses [2.1(e), 2.1(f) and 2.2]) if:

- a) any changes to the Apparatus as a result of the upgrading or sharing have no adverse impact, or no more than a minimal adverse impact, on its appearance;
- b) the upgrading or sharing does not impose any additional burden on the Grantor, including:
 - i) anything that has an additional adverse effect on the Grantor's enjoyment of the Land; or
 - ii) anything that causes additional loss, damage or expense to the Grantor.

2.4. The right of entry set out in clause [2.1(f)] may be exercised by the Operator with or without workmen, vehicles (where appropriate), plant equipment or machinery.

3. PAYMENT

The Operator agrees that it will pay to the Grantor, in respect of this Agreement, the sum of [Insert amount] pounds (£[Insert amount]) [per annum / for the Term].

4. OPERATOR'S OBLIGATIONS

4.1. The Operator covenants with the Grantor that it will:

- a) save in the event of an [emergency¹], give the Grantor not less than seven days' prior written notice of its intention to enter the Land;
- b) in the event of an [emergency], seek to contact the Grantor (which may be by electronic or verbal communication) as soon as reasonably practicable to inform him:
 - i. that the Operator intends to enter the Land, or has entered the Land;
 - ii. why entry is or was required; and
 - iii. when entry took place or is intended to take place.
- c) otherwise exercise its right to enter the land in accordance with the access arrangements set out in Schedule [3] to this Agreement;
- d) exercise its Code Rights in a proper and workmanlike manner taking all reasonable precautions to avoid obstructions to, or interference with, the use of the Land or any adjoining land and so as to cause as little damage, nuisance and inconvenience as possible to the Grantor and any occupiers of any adjoining land;
- e) do as little physical damage as is reasonably practicable in exercising its Code Rights and, as soon as reasonably practicable, make good to the reasonable satisfaction of the Grantor all resulting damage caused to the Land or any adjoining land;

¹ The parties may wish to define what constitutes an "emergency".

- f) exercise its Code Rights and use and operate the Apparatus in accordance with all applicable legislation;
- g) obtain and maintain in force any necessary consents for the installation and retention of the Apparatus, provide evidence of any such consents upon demand to the Grantor and carry out all works in accordance with such consents;
- h) maintain and keep the Apparatus in good repair and condition and so as not to be a danger to the Grantor, its employees or property, or the occupiers or any adjoining land;
- i) pay all rates or other charges that may be levied in respect of the Apparatus or the exercise of its Code Rights; and
- j) maintain insurance with a reputable insurance company against any liability to the public or other third party liability in connection with any injury, death, loss or damage to any persons or property belonging to any third party arising out of the exercise by the Operator of the rights granted under this Agreement, and provide details of such insurance and evidence that it is in force to the Grantor upon reasonable request.

5. THE GRANTOR'S OBLIGATIONS

5.1. The Grantor agrees that it will:

- a) not build or place anything on the Land, or permit any third party to do the same, that makes it more difficult for the Operator to access the Apparatus, or which might interfere with the Apparatus, without the Operator's express written consent (which should not be unreasonably withheld);
- b) not cause damage to or interfere with the Apparatus or its operation and not permit any third party to do the same; and
- c) give reasonable prior written notice to the Operator of any action that it intends to take that would or might affect the continuous operation of the Apparatus, including (but not limited to) causing an interruption to any power supply to which the Apparatus is connected.

6. OWNERSHIP OF THE APPARATUS

The Apparatus shall remain the absolute property of the Operator at all times.

7. GENERAL

7.1. It is agreed that no relationship of landlord and tenant is created by this Agreement between the Grantor and the Operator.

7.2. This Agreement will not apply to any part of the Land which is or (from the date of such adoption) becomes adopted as highway maintainable at the public expense.

7.3. In the event of any inconsistency between this Agreement and any provision of the Code, the Code will prevail.

8. INDEMNITY FOR THIRD PARTY CLAIMS

8.1. The Operator will indemnify the Grantor up to a maximum of [£1 million / £3 million / £5 million] [per annum / in aggregate in respect of a claim or series of claims arising from the same incident] against any third party actions, claims, costs, proceedings or demands (“Third Party Claim”) arising as a result of any act or omission by the Operator in exercising its rights under this Agreement, except to the extent that the Grantor’s acts or omissions have caused or contributed to any such Third Party Claim and provided that:

- a) the Grantor shall as soon as reasonably practicable give notice in writing to the Operator of any Third Party Claim brought, made or threatened against the Grantor;
- b) the Grantor shall not compromise or settle such Third Party Claim without the express written consent of the Operator (which shall not be unreasonably withheld or delayed);
- c) the Grantor shall permit the Operator to defend any Third Party Claim in the name of the Grantor at the expense of the Operator.

9. LIMITATION OF LIABILITY

9.1. Nothing in this Agreement limits or excludes the liability of either party:

- a) for death or personal injury resulting from its negligence;
- b) for any damage or liability incurred as a result of fraud or fraudulent misrepresentation by that party; or
- c) where or to the extent that it is otherwise prohibited by law.

9.2. Subject to clause [9.1], the Operator’s liability under this Agreement to the Grantor shall be limited to the sum of [Insert amount] pounds (£[Insert amount]) [per annum/in aggregate]. This limitation of liability shall not apply to the indemnity granted under clause [8.1].

9.3. Subject to clause [9.1], the Grantor’s liability under this Agreement to the Operator shall be limited to the sum of [Insert amount] pounds (£[Insert amount]) [per annum/in aggregate in respect of a claim or series of claims arising from the same incident].

10. TERMINATION

The Grantor may terminate this Agreement² by giving the Operator [thirty (30)] days’ notice in writing if:

- a) the Operator is in [material/substantial] breach of any of its obligations under this Agreement and:
 - i. the breach is incapable of remedy; or

² Please note that, if the Grantor exercises any of these termination rights, the agreement will nevertheless continue under paragraph 29 of the Code, unless the Grantor also gives 18 months’ notice to terminate under paragraph 30 of the Code.

- ii. the Operator has failed to remedy the breach within [thirty (30)] days after the Grantor notifies the Operator of the breach;
- b) the Operator has persistently delayed making payments due to the Grantor under the terms of this Agreement;
- c) the Grantor intends to redevelop all or part of the Land or any neighbouring land, and could not reasonably do so unless this Agreement comes to an end; or
- d) both:
 - i. the prejudice caused to the Grantor by the continuation of the Agreement is incapable of being adequately compensated by money; and
 - ii. the public benefit likely to result from the continuation of the Agreement does not outweigh the prejudice to the Grantor.

10.3. The Operator may terminate this Agreement by giving the Grantor [x days / months] notice in writing.

10.4. On termination of this Agreement (except where the Agreement continues in accordance with paragraph 29(2) of the Code), the Operator will as soon as reasonably practicable remove the Apparatus from the Land and make good any damage to the Land caused by its removal to the reasonable satisfaction of the Grantor.

11. ASSIGNMENT/ASSIGNATION

11.1. The Operator may assign this Agreement to another Operator who will be bound by its terms with effect from the date of the assignment.

11.2. The Operator will not be liable for any breach of this Agreement occurring on or after the date of the assignment if:

- a) the Grantor is given written notice of the name of the Operator assignee and its address for the purposes of clause [15.2]; and
- b) that notice was given prior to the breach occurring.

12. CONTRACTS (RIGHTS OF THIRD PARTIES) ACT

Unless expressly stated, nothing in this Agreement will create any rights in favour of any person pursuant to the Contracts (Rights of Third Parties) Act 1999.

13. ENTIRE AGREEMENT

This Agreement is the entire agreement between the Grantor and the Operator relating to the Apparatus at the Land.

14. SEVERANCE

Each provision of this Agreement will be construed as a separate provision and if one or more of them is considered illegal, invalid or unenforceable then that provision will be

deemed deleted but the enforceability of the remainder of this Agreement will not be affected.

15. NOTICES

15.1. Any notice given under this Agreement must be in writing and signed by or on behalf of the person giving it.³

15.2. Any such notice will be deemed to have been given if it is personally delivered or sent by registered, recorded or first class post, and (in each case) addressed:

a) to the Grantor at

[insert address]

[marked for the attention of [insert name]]

b) to the Operator at:

[insert address]

[marked for the attention of [insert name]]

15.3. Following the execution of this Agreement, either party may amend its address for the purposes of clause [15.2] by notice to the other party.

15.4. Each party agrees that the address set out in clause [15.2] (as it may be subsequently amended under clause [15.3]) will also constitute their address for service for the purposes of paragraph 87(2)(a) of the Code.

16. MEDIATION

16.1. If any dispute arises in connection with this agreement, the parties may agree to enter into mediation in good faith to settle such a dispute and will do so in accordance with the [Centre for Effective Dispute Resolution (“CEDR”) Model Mediation Procedure]. To initiate the mediation a party must give notice in writing (“ADR notice”) to the other party to the dispute, referring the dispute to mediation. A copy of the referral should be sent to [CEDR]. Unless otherwise agreed between the parties, the mediator will be nominated by [CEDR] within [14] days of notice of the dispute.

16.2. Unless otherwise agreed, the mediation will start not later than [28] days after the date of the ADR notice. [The commencement of a mediation will not prevent the parties commencing or continuing court proceedings]

16.3. [No party may commence any court proceedings in relation to any dispute arising out of this agreement until it has attempted to settle the dispute by mediation and either the mediation has terminated or the other party has failed to participate in the mediation, provided that the right to issue proceedings is not prejudiced by a delay].

17. GOVERNING LAW AND JURISDICTION

³ In addition, please also have regard to paragraphs 88 and 89 of the Code which apply to notices given by operators and by persons other than operators under paragraphs of the Code.

17.1. This agreement is governed by, and shall be construed in accordance with, the laws of England and Wales/Scotland/Northern Ireland~~and Wales~~.

17.2. [Subject to clause 16] the parties agree to submit to the exclusive jurisdiction of the [courts of England/sheriff in Scotland/county courts of Northern Ireland] as regards any disputes or claims arising out of this Agreement.⁴

Signed for and on behalf of [Grantor] by:

_____ Signature

_____ Name

_____ Date

Signed for an on behalf of [Operator] by:

_____ Signature

_____ Name

_____ Date

⁴ Please note paragraph 95 of the Code which provides the Secretary of State with the power to confer jurisdiction on tribunals other than the county court in England and Wales, the sheriff court in Scotland and a county court in Northern Ireland.

**SCHEDULE 1
THE APPARATUS**

[Insert description of the electronic communications apparatus to be installed]

**[SCHEDULE 2
THE LAND]**

[Insert plan showing location of the Land]

SCHEDULE [3]
ACCESS ARRANGEMENTS

[To be agreed between the parties – see Schedule B of the ECC Code of Practice]