

Group response to the Ofcom consultation on changes to ECC code of practice

1. We are a group of Communications Providers ('CPs') consisting of AllPointsFibre, CityFibre, Glide, Hyperoptic, and Virgin Media O2 ('our group' or 'we'). The members of our group are all active purchasers of Openreach's Physical Infrastructure Access ('PIA')¹ product and, since early 2018, we have been heavily involved in the negotiation of the 2019 PIA reference offer, amendments to it, and subsequent discussions concerning the ongoing evolution and improvement of the product.
2. We are writing in response to the proposed amendments to the Ofcom Code of Practice ('CoP') on the Electronic Communications Code (the 'Code') that Ofcom is currently consulting² on (the 'Consultation'). Please note that some of the members of the group will provide their own, separate responses to the Consultation.
3. We appreciate the opportunity to comment on the Consultation. While we agree that updates to the CoP are necessary following legislative changes introduced by the Product Security and Telecoms Infrastructure Act ('PSTIA'), we have a number of concerns about the proposed changes.
4. The amendments to the CoP should ensure that the document stays true to its intended purpose. As provided by paragraph 103(1) Schedule 3A Communications Act 2003, a crucial part of the CoP's purpose is to give suitable guidance to operators and landowners when negotiating Code agreements and accessing land, and that guidance should be provided in a way that reflects the changes brought about by PSTIA. Although the law is explicit that the CoP is voluntary, landowners and their agents regularly refer to and rely upon the current CoP as though its terms were mandatory.
5. Given the importance attached to the CoP, it is vital that any proposed amendments to it remain on-point and capture the purpose, intentions and objectives of the Code, *including* any changes made to the Code by the PSTIA. If the CoP fails to accurately reflect this, there is a significant risk that negotiations between landowners and CPs will be made more fraught and challenging, and that the policy intent behind the PSTIA changes of speeding up roll-out of ultrafast broadband throughout the UK will be frustrated.
6. Our key concerns are as follows:

¹ 1 Openreach's Physical Infrastructure Access, which allows other communications providers to use Openreach's established network of ducts and poles in order to provide competing services. The availability of this product has been mandated by regulatory remedy imposed by Ofcom through a sequence of Market Reviews — the most recent of which is the 2021 Wholesale Fixed Telecom Market Review

² Ofcom consultation on the Code of Practice to the Electronic Communications Code, published 12th September 2023, available at: https://www.ofcom.org.uk/__data/assets/pdf_file/0034/267892/Consultation-Electronic-Communications-Code-of-practice.pdf

6.1. Imbalanced Inputs to the CoP amendments

- 6.1.1. The proposed amendments to the CoP appear heavily based on input from a sub-group within the National Connectivity Alliance ('NCA'), and appear heavily skewed toward landowner interests, with limited input from fixed broadband providers. This has resulted in proposals that fail to properly and fairly balance both landowner and operator interests.
- 6.1.2. The revised CoP should reflect the scope and intent of the PSTIA's reforms to the Code, which are focused on accelerating broadband deployment. The nature and content of the current drafting could hinder the achievement of this goal, and Ofcom must therefore consider wider input from industry, including fixed broadband providers.

6.2. Focus on large scale wireless apparatus to the exclusion of sharing of Openreach apparatus under the PIA remedy

- 6.2.1. Changes related to infrastructure sharing and upgrading seem focused on wireless networks, (and particularly large-scale mobile apparatus such as masts), and do not properly reflect how fixed networks utilise existing infrastructure — especially in the context of CPs using PIA.
- 6.2.2. This focus on wireless infrastructure is especially pronounced in paragraphs A2.57 to A2.62 of the draft CoP, which appear to anticipate a specific sharing agreement, rather than the sharing of Openreach's telegraph poles under the PIA remedy. The drafting of the CoP ought to be amended to reflect this application of overhead sharing of poles, (not just large-scale mobile apparatus), and should not anticipate standalone infrastructure sharing agreements being used in every case.
- 6.2.3. In particular, paragraph A2.58 of the revised CoP inaccurately summarises the conditions in s58(4) PSTIA that apply when operators upgrade or share infrastructure. The conditions for flying wires in s60 PSTIA are clearly different from those in s58 — not least the presence of noticing requirements in the case of the latter but not the former. As a result, paragraph A2.58 of the revised CoP does not accurately reflect the content of the PSTIA and is likely to generate unnecessary friction and confusion in the context of using the PIA remedy to install apparatus on Openreach poles on private land.
- 6.2.4. Moreover, paragraphs A2.59 and A2.60 of the revised CoP appear to be written primarily for existing wireless operators to upgrade or share infrastructure (e.g., installing new antennae on existing masts). The content of these paragraphs unhelpfully anticipates and direct landowners and CPs toward further negotiations in connection with the conferral of additional rights beyond the 'minimum rights' the

CoP says the Code provides. This crucially misses the purpose of the sharing rights under s60 PSTIA, which is to allow CPs to share use of Openreach's poles without the need to secure their own wayleave, and to provide that no further rights are needed to secure the CP's proper use of that pole. Imposing additional burdens upon operators to consult and negotiate when simply adding wires to existing infrastructure could create unnecessary delays, ultimately frustrating the policy intent behind the PSTIA amendments. The proposed text in these paragraphs of the CoP is therefore unhelpful and confusing.

6.3. Proposals on Alternative Dispute Resolution ('ADR') appear inconsistent with the PSTIA's intent to encourage ADR over litigation

- 6.3.1. The PSTIA includes new provisions encouraging the use of ADR as a low-cost, faster alternative to resolving deadlocked negotiations between operators and landowners rather than litigation. This is focused on addressing the common problem of landowners (and their representatives) unfairly deadlocking negotiations, expecting the time and expense of escalating matters to court will be prohibitive, thereby forcing the operator to give up or accept unreasonable demands.
- 6.3.2. The PSTIA states that the operator or 'relevant person' (being the landowner or their representative) must 'if reasonably practicable' consider ADR to resolve disputes.
- 6.3.3. However, the draft CoP includes language that ADR 'may not always be appropriate' and states 'there may be occasions, though, where either party may need to serve legal notices, while still continuing to pursue an informal resolution.' It is unclear why these qualifications were included in the CoP, as they set an unhelpful tone and fly in the face of the direction set out in the PSTIA and the policy intent of Government.

6.4. Insisting on the publication of a policy on professional fees.

- 6.4.1. The draft CoP proposes that a CP must always provide at the outset of negotiations a written policy on the professional fees it will typically 'compensate' the landowner for. This does not reflect the way in which many negotiations proceed in practice—and the subject of professional fees incurred by the landowner will not be relevant in many instances, particularly where householders are being provided with ultrafast broadband.
- 6.4.2. Inserting such broad and sweeping provisions into the CoP (which will apply to all negotiations) is unnecessary and unhelpful. It arguably represents an attempt by those involved in the drafting process at the NCA to further their own interests by trying to ensure that fees for their services are always paid by CPs — regardless of the circumstances or the appropriateness of that approach.

6.5. Substituting references of 'landowner' and 'land occupier' for 'Site Provider'

- 6.5.1. The draft CoP has made the unhelpful and unnecessary substitution of references to 'landowner' and 'land occupier' for 'Site Provider'. The language used in the CoP should reflect that used in the Code, and not differ or contradict it.
- 6.5.2. In the Code, the term 'site provider' is used deliberately in a number of provisions but is not always used in the same way as a land 'occupier'. Site provider is a term typically used in connection with large scale wireless infrastructure and its use in relation to a homeowner being provided with communications services, for example, is awkward and unhelpful. This change to the CoP is likely to generate confusion and uncertainty and ought to be dropped. This was raised by fixed line CPs during the drafting process, but the point was ignored.

6.6. Application of Site Surveys in all cases

- 6.6.1. The new draft text in the CoP contains extensive detail on the topic of site surveys. The nature, scope and need for site surveys vary significantly depending on the context in which Code rights are being used and the apparatus and land/property involved. Fixing new wires to an existing telegraph pole or drawing them into an existing duct is a very different proposition compared to erecting or altering large wireless masts. Where PIA is being used (with new wires being installed on existing poles or within existing ducts), a form of site survey is often built into the process of using Openreach infrastructure meaning that a separate and dedicated survey is unlikely to be needed in many cases. It would be very helpful if the text of the CoP expressly noted that site surveys are not needed in addition to those already featured as part of the PIA process.

6.7. Electromagnetic Field ('EMF') exposure

- 6.7.1. The subject of EMF exposure has been given increased prominence and significance in the draft CoP. While we recognise it is an important subject, and one about which public feeling and concern can be strong, it should be noted that EMF concerns are simply not relevant to many forms of fixed-line communications apparatus. It would be very helpful if the language in the CoP noted this and ensured that the application of the EMF provisions were confined to apparatus where EMF issues were of genuine application.
7. For the reasons set out above, our group has serious concerns about the draft CoP being approved by Ofcom in its current form. We would urge Ofcom to engage with a broader group of stakeholders, especially fixed network operators, before finalising changes to the CoP, and for Ofcom to take into account the specific concerns raised in this response.

8. It is vital that the revised CoP balances the different (and at times competing) interests of CPs on the one hand and landowners on the other. The original CoP drafted in 2016 and 2017 adopted an effective collaborative process where the views of both groups were heard and properly reflected in the drafting. It is important that the revised CoP does not lose sight of the intention of the PSTIA reforms of facilitating faster fixed broadband rollout. As it stands, several proposals appear detrimental to achieving the efficient rollout of ultrafast broadband, which was the main policy rationale behind the PSTIA changes.

9. Our group would be very happy to explore with Ofcom any aspect of this response in more detail, and we stand ready to work with the NCA and the rest of industry to develop more balanced and appropriate amendments to the CoP than those which have been put forward so far.