Your response

Question	Your response
Q1. Do you have any comments on our proposals relating to improving the clarity of the Code of Practice?	Confidential? – **N** Ofcom's efforts to increase the overall clarity of the Code of Practice (CoP) are welcome. This requirement derives from the scenarios in which the CoP will be used in practice: either by site providers when they are negotiating an agreement, or for the purposes of disputes between site providers and Code Operators. In the latter scenario, the site provider is highly likely to be significantly less well-resourced and experienced than the Code Operator. It should also be remembered that the SP is dealing in matters in the 'shadow' of litigation and therefore under pressure financially and mentally. For this reason, it is vital that the CoP has a clear and consistent use of readily accessible language, so that site providers are clear on what their obligations and rights are. The most significant issue for clarity in the draft CoP is the inconsistent or inappropriate use of 'should' and 'must' throughout the text. Given that non-specialists are highly unlikely to read the legal text of the Electronic Communications Code itself, it is vital that these terms are used consistently and accurately to avoid misunderstanding. 'Should' indicates that someone ought or is generally expected to do something, but not to the exclusion of other options. 'Must' indicates that it is a requirement, and may not be substituted for an alternative. However, these are not the ways that the terms are used in the CoP. In some instances, the two are used interchangeably. In others, the incorrect term is used. [redacted] Operators "should make every effort… including potentially engaging with the ADR process". As a result of this phrasing, a site

provider may not be clear whether a Code Operator is required to consider ADR, or whether they merely can have a reasonable expectation that the operator will consider it.

This is despite the relevant portion of the PSTI Act placing a legal obligation on Code Operators to consider the use of ADR: S69 of the PSTI Act gives that: "the operator must, if it is reasonably practicable to do so, consider the use of one or more alternative dispute resolution procedures". As such, the legislation is clear that considering the use of ADR is a requirement, not merely something that should "potentially" take place.

This is compounded by inconsistent use elsewhere. If the term 'should' can in the CoP apply to a legal obligation under the Electronic Communications Code, then it should not also be used when simply referring to best practice.

[redacted] "Operators should ensure that redundant sites and apparatus are decommissioned". This word is the same as that used in A 2.38, but refers to an entirely different kind of obligation, as this is not a hard-edged legal requirement. It is therefore difficult for site providers without detailed technical knowledge to distinguish between the different kinds of obligation described in the CoP based on the language used alone.

[redacted] the text states that "operators should adhere to any legal or regulatory requirements". From this reading, it is not clear whether the CoP is suggesting that adherence to legal requirements is merely a general expectation.

Moreover, in A 2.14, the CoP reads "All communications must be kept clear, concise and carried out in a timely manner". However, there is no legal obligation that communications be concise or clear. This statement is a recommendation of best practice, rather than a formal requirement. Subsequently, the word 'should' ought to be used so as to avoid confusion between this and actual legal obligations, such as the requirement to consider ADR. It would also add vital clarity if it could be set out as to what Ofcom would expect the Operator (and/or the parties) to have done before commencing proceedings.

These examples of the inconsistent use of language are important. Disputes between Code Operators and site providers will likely turn on

	the specific definition of words, and it is important that the digital infrastructure rollout is not hampered by difference of opinion over whether the word 'should' has identical or different meanings in different parts of the CoP. The overall treatment of the term 'general principle' within the document is also inconsistent. For example, in A 2.71, a 'general principle' is invoked relating to site decommissioning, but examples are given of exceptions to it. This is helpful for site providers, as it shows how the 'general principle' can be applied in practice. However, A 2.19 does not take this approach to describing a 'general principle'. This section covers under what conditions a site provider can be left out of pocket for reasonably incurred costs. Framing this as a 'general principle' leaves it significantly open to interpretation, especially without giving an example of the circumstance in which this principle may not be followed. Given that disputes around compensation for costs are likely to centre on whether the costs incurred were done so reasonably, it is important that there is as little ambiguity in this section as possible. The text should be revised, so that, in line with other sections, an example is given of how exceptions to this 'general principle' will work in practice. This is especially the case as the PSTI Act places a legal obligation on Ofcom to ensure that Code Operators have mechanisms to handle complaints that they receive for failing to adhere to the CoP itself. Subsequently, having readily comprehensible drafting is vital to ensuring that semantic disagreement or a lack of clarity does not damage cooperation between site providers and Code Operators.

Q2. Do you have any comments on our proposals relating to including legislative changes in the Code of Practice?	Confidential? – **N** In addition to the other changes which have been incorporated into the draft text, there should also be content on the legislative intent of the PSTI Act. This should clarify not only that its purpose was to grant Code Operators clearer rights of access to the locations that they need, but also to facilitate more collaborative negotiations between Code Operators and site providers.
Q3. Do you have any comments on our proposals relating to the definition of 'Site Provider' in the Code of Practice?	Confidential? – **N** It is not clear from the text of the draft CoP whether the definition of site provider includes intermediate interests. Ofcom should clarify whether they are intended to be included. In section A 2.10, 'site provider' is used incorrectly in the second sentence of the paragraph. It reads: "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 negotiating with the site provider". This should be replaced with "land owner".
Q4. Do you have any comments on our proposals relating to contact information in the Code of Practice?	Confidential? – **N** Section A 2.16 can be cut down to increase clarity. The words "of the site" in "… the Site Provider and any relevant Occupier of the site or of access routes to the site" should be removed. This is because the site provider, by definition, would include the site's occupier. The reference to occupier should therefore be related to the access routes only. In section A 2.17, the following sentence should be reworded: "It is the responsibility of the site provider… so they can be contacted". This should mirror language used in A2.16, clarifying that the site provider should ensure that the operator is provided with their up-to-date contact details, as well as those where relevant of third parties acting on the behalf of the site provider.
Q5. Do you have any comments on our proposals relating to professional fees in the Code of Practice?	Confidential? – **N** As described above, there is a lack of clarity with the section covering professional fees. Section A 2.19 can be significantly shortened. The first sentence, which reads "Where relevant… professional fees would be

	compensated" should be cut. The section should begin with the sentence starting "the general principle…" In addition, this should be qualified (as described in response to question 1) by giving at least one example of an exception to the 'general principle' set out in the text. This is to clarify what does and does not constitute a "reasonable and properly incurred professional fee". As stated above, disagreements in this area would likely arise from a difference of opinion regarding the interpretation of "reasonably and properly incurred" between site providers and Code Operators.
Q6. Do you have any comments on our proposals relating to responding to a request for access in the Code of Practice?	Confidential? – **N** To improve drafting, there are several changes that we would recommend be made to this section. These are: In section A 2.25, the final portion reads "Such an application to the court may have cost consequences for the site provider". The following text should be added to the end "which should explicitly be brought to the site provider's attention". In A 2.26, the exchange of the word "should" for "may" is inappropriate and should be reversed. This is because site providers should be able to have a reasonable expectation that Code Operators will identify various options for new sites once they have determined that one is required. By permitting Code Operators to only select one option, the CoP will result in greater animosity and less cooperation between site providers and Code Operators. In A 2.28, the new drafting of the CoP has removed the expectation that a site provider will be given at least seven days notice in advance of a visit to a site. This language should be reinstated, or at the very least some form of minimum expectation in terms of duration for notice should be set out in the drafting.

	In A 2.41, the language does not provide sufficient clarity on the terms used, which increases the likelihood of confusion or disputes. In the interests of cooperation, it should be a requirement that any Schedule of Condition prior to and following the works should be available to both parties. The current language suggests that the operator may withhold a record of the condition of the site. The phrases and words used are also undefined, for instance: • It is unclear what "where applicable" means in the context of this sentence – the CoP does not set out a test for applicability. • Saying that the record of the condition of the site will only be passed over when "reasonably requested" opens up scope for disagreement between site providers and operators. This record should be available without qualification. • The section should also make clear whose responsibility it is to prepare the record of the site's prior condition, which should be the Code Operator, and that the costs should be borne by the Code Operator. • There should also be a guarantee that the photographic record of the condition of the site should be mutually agreed as a true and proper representation of the site's condition. As such, best practice in the CoP should include the opportunity for the site provider and Code Operator or their representatives to review and agree the record. In schedule A, Section A 2.100 should have the following text inserted between "in advance" and "with the": "with the Code Operator to advise the Site Provider, or their agent, as to the party concerned and contact details".

	Section A 2.106 should have the following language added to the end "and this should be communicated to the Site Provider or their representatives, who should be offered the opportunity to be in attendance."
Q7. Do you have any comments on our proposals relating to electromagnetic fields exposure in the Code of Practice?	Confidential? – **N** We welcome the addition of this important area into the CoP and support a collaborative and transparent approach to it. This is an area where Site Providers have little technical knowledge as to the characteristics of the equipment being placed on their land / buildings or of the affects it may have on occupiers, visitors and contractors etc. They are reliant completely upon the Operator to provide information to them. In A 2.42, the name of the international body should be the International Commission on Non-ionizing Radiation Protection, not for. Language should be added to clarify that operators are responsible for the consideration and management of EMF risks. For instance, in A 2.44, the language reads "Operators and Site Providers should consider how they will cooperate with each other in order to manage any EMF risks". This should be reframed to clarify that the primary obligation is on operators, not site providers. In addition, language should clarify that the operator is responsible for the quality of the EMF assessment, and for ensuring that it is undertaken properly and signed off. There should also be the possibility for the site provider to audit or seek independent validation of the EMF assessment.
Q8. Do you have any comments on our proposals relating to the sharing and upgrading of apparatus in the Code of Practice?	Confidential? – **N** No
Q9. Do you have any comments on our proposals relating to ADR in the Code of Practice?	Confidential? – **N** Generally – in respect of ADR there is no explanation provided nor guidance signposted so a Site Provider can understand what it is,

	what the various procedures are and the differences between them. We would suggest that a separate guidance document is produced providing a clear overview of ADR. This will enable parties unfamiliar with ADR to make informed decisions and/or seek additional advice as required. We would recommend a number of changes to the text relating to ADR, to improve clarity and therefore the likely functioning of the regime. In A 2.87 (b) should be amended to remind the site provider to seek independent advice. In addition, the *Neighbours and Occupiers* section should include language ensuring that ADR is available should this group of stakeholders not be able to agree terms with the operator. The sentence making clear that the Operators may seek to exercise Code Rights should also be rephrased to clarify that informal, consensual agreements are preferable. In A 2.37, the phrase "including potentially engaging with an ADR process" should be replaced with "including considering using an ADR process". This would align with the legal requirement to consider ADR, rather than the less well-defined notion of "potentially engaging" with it. We are concerned that the phrasing of Paragraph A 2.88 may lead to confusion, as it states that "Operators… must make occupiers and site providers aware that ADR is available". However, ADR will not be available under all circumstances. This is because the obligation on operators is only to consider the use of ADR "if it is reasonably practicable to do so", meaning that there will be circumstances – explicitly envisaged by Parliament – in which ADR will not be available. This unclear phrasing could lead to significant confusion by site providers and cause disputes. For instance, a site provider could consider that an operator had failed to abide by the terms of the CoP if they did not inform them that ADR

	was available, even in scenarios where ADR would not be reasonably possible. This should be amended to clarify that Occupiers must only make occupiers and site providers aware that ADR is available "where reasonably practicable".
Q10. Do you have any overarching comments on our proposals for the Code of Practice (included in its entirety in Annex 2 above)?	Confidential? – **N** Our overall comment on the draft CoP is that the language is still inconsistently used, overly technical and therefore the lay person will likely find it difficult to understand. This, if not remedied, will result in confusion and possible disputes between operators and site providers. There are several further issues that do not comfortably fit into the questions elsewhere in this consultation. • Most substantively, there is no significant content relating to the handling by operators of complaints that the operator has failed to comply with the CoP. This is despite section 70 of the PSTI Act, which has not yet been commenced, placing an obligation on Ofcom to explicitly include content relating to this in the CoP. It is therefore not clear whether, when section 70 is commenced, this draft would comply with the legal requirements placed on Ofcom regarding its content. This is also unexpected, given that Ofcom has taken a different approach on provisions relating to ADR. Paragraph 3.15 of the consultation documents explains that the new draft CoP contains "proposals in anticipation of [portions of the PSTI Act] coming into effect". Subsequently, Ofcom may be required to re-consult on the CoP as well as draft further content before the CoP can come into effect as currently drafted.

	The impact on the telecoms infrastructure market of Ofcom being repeatedly delayed in its issuance of the CoP as a result of additional consultations is unclear. • While this issue has been repeatedly raised during the legislative and policymaking process, the fundamental flaw with the Code of Practice is that it does not have any teeth or consequences for failing to adhere to it. This should be remedied by setting out expectations for how Code Operators will behave if they are found to be in breach of the CoP's terms. • Section A 2.5 is insufficiently broad, and should have additional content after "site providers" reading "and other persons with an interest in land". This would prevent interested parties from being accidently excluded. • Section A 2.14 covering communication should include all parties that have an interest in land, particularly at the time of renewal. For instance, consider the situation where a Code Operator sought to renew a site, but a party had purchased the site but not registered their legal interest at the land registry. If the Code Operator is aware of the new party's interest, but commences proceedings without liaising with that party or putting them on notice, that is not currently clearly within the scope of the draft CoP. • Section A 2.18 should include an obligation on Code Operators to suggest that site providers seek independent legal advice in all correspondence. Site providers are generally far less well-informed and prepared than Code Operators. This means that they should be encouraged to seek advice to ensure that they are properly advised on the implications of their decisions and the legal framework

	in which they are operating. • Section A 2.50 (d) should be amended to ensure that there is a means for the site provider to get works on their site completed in a reasonable time. This should be by adding a new sentence after "at the Operator's cost" reading "If the repairs are not carried out in a reasonable time, the site provider may carry out the works and seek reasonable costs from the operator". • Section A 2.73 should have the word "installations" replaced with "infrastructure", as third party infrastructure are not standalone installations. • Section A 2.80 on repairs should include preventative and reactive maintenance. Repairs should not be qualified in the phrasing as needing to be "essential". Moreover, the language should be amended to ensure that there is a reasonable expectation that any repairs will be carried out in an appropriate timeframe. This could be 28 days, in line with the other timelines set out in notices. • There is no substantive content on fire safety in the CoP. This should be included given the number of rooftop installations on many residential buildings throughout the UK, as well as the recommendations following the Grenfell Tower inquiry.

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