Mobile UK and Mobile Infrastructure Forum joint consultation response

Ofcom's consultation on proposed Code of Practice for the Electronic Communications Code

November 2023

Introduction

1. Mobile UK and the Mobile Infrastructure Forum (MIF)] welcome the opportunity to respond to Ofcom's consultation on its proposed Code of Practice for the Electronic Communications Code.

2. We welcome Ofcom's stated objective that the Code of Practice is designed to complement the Code by suggesting best practice and encouraging positive engagement between the parties. It is essential that the telecoms industry is able to build the infrastructure that the UK requires for the future.

3. In our response below, we have set out some concerns where either Ofcom has strayed beyond its stated objective or where the provisions will cause confusion and even be a barrier to constructive engagement.

4. We have focused on four sections:
   - Professional advice
   - Electro Magnetic Fields – EMF Compliance
   - Sharing and Upgrades
   - Alternative Dispute Resolution

Professional Advice

5. With respect to Professional advice, Ofcom has proposed for Section 2.19 the following:
   "Where relevant, the Operator should provide information to the Site Provider on its fees policy to include the detail of when and under what circumstances Site Providers reasonably and properly incurred professional fees would be compensated. The general principle is that a Site Provider should not be left out of pocket for its reasonably and properly incurred costs."

6. We would like to propose an alternative formulation, which is extracted from the Access Best Practice Guidance developed and approved by the stakeholders of the National Connectivity Alliance[1]:
   "*Potential Site Providers should be advised that they are responsible, in the first instance, for meeting their professional representatives' reasonable costs (per RICS guidance). Where relevant and appropriate, depending on the nature of the application, Operators will reimburse a site provider for their reasonably and properly incurred professional costs within pre-agreed parameters.*"

7. The reasons for suggesting this are: a) the word 'policy' might be taken to imply a weighty formal document, when, in practice, the operators' approach to professional fees is not structured as a 'policy' as such but is generally covered in an introductory letter to prospective site providers; b) This language has been agreed by the NCA stakeholders and is in line with industry practice.

8. While there may be disputes over the amount of fees and over which have been 'properly incurred', the principles are quite well established (and complemented by, from time to time, extra guidance from case law[2]).

Electromagnetic Fields

9. Since the the first ECC Code of Practice was published, Ofcom has introduced a licence condition which requires operators to comply with public exclusion limits set out in the ICNIRP guidelines. Before that, ICNIRP compliance was executed on the basis of self-certification.
10. The self-certification has worked very satisfactorily since the inception of the industry and the licensing compliance regime is also operating satisfactorily.
11. Site providers have had no involvement in or have any liability for the MNOs' RF emissions to the general public and so we very strongly suggests that the new text introduced relating to licence compliance be removed from the Code of Practice. Operators have a responsibility to demonstrate compliance to Ofcombut it can only risk confusion, unnecessary work and complexity to suggest that operators should also have to demonstrate compliance with the public limits to stakeholders, including Site Providers.
12. The whole point of the Ofcom licensing regime is to instill public confidence (including site providers') in the management of EMF. It is a serious mis-step to include this element in the Code of Practice.
13. There is no need or demand for EMF to be covered in this way. There is a very significant risk that this language in the Code of Practice would create an

[1] https://www.ncalliance.org.uk/documents

[2] For example: EELtd and Hutchison 3G Ltd. V The Mayor and Burgess of the London Borough of Islington

expectation for an independent EMF compliance statement to be required on every occasion, which would be very disproportionate, considering this has never been issue and it is, in any event, now a licence condition.

Electromagnetic fields (EMF) exposure Compliance

~~**A2.42** Most wireless telegraphy licences issued by Ofcom include a condition17 requiring licensees to ensure compliance with the limits in Guidelines issued by ICNIRP (the International Commission for Non-Ionizing Radiation Protection) on exposure to electromagnetic fields (EMF) for the protection of the general public (the "EMF licence condition"). Ofcom refers to these limits as the "general public EMF limits". The EMF licence condition applies to licensees whose radio equipment is currently authorised to transmit at powers higher than 10 Watts EIRP or 6.1 Watts ERP. Operators that are subject to the EMF licence condition will generally be required to comply with the general public EMF limits and hold appropriate EMF records demonstrating their compliance taking into account Ofcom's Guidance on EMF Compliance and Enforcement.~~

14. With respect to the limits which apply to workers, it has been common industry practice for operators to share the information (within 'landowner packs'),which site providers need to discharge their health and safety obligations to their own workers, who may, for example, be going onto rooftops to undertake maintenance of the site provider's equipment/premises.
15. We therefore do not see there is any need for this topic to be addressed in the Code of Practice (it was not in the draft provided by the NCA). However, if Ofcom is minded to include something, this should focus on the steps that a Site Provider, as an employer, has to take in order discharge their health and safety obligations in relation to EMF. We would suggest the following changes:

A2.43 *Health and safety law in the UK places ~~separate~~ duties on all employers to manage ~~persons (including Operators and Site Providers) who create~~ risks relating to work and the workplace including any risks related to EMF exposure. The Health and Safety Executive (HSE) has published guidance on the requirements on employers to protect workers from EMF[3]. Ofcom's EMF Update includes examples of the types of workers that may be exposed to EMF (see paragraphs 4.41 – 4.54)*

A2.44 *With respect to sites in the radio access network that emit radio frequency (RF) signals, when negotiating a code Agreement for a site, the Operator and Site Provider should consider how they will cooperate with each other and provide such information as is necessary in order to manage any EMF risks (including compliance with relevant health and safety regulation)*

~~b) Operators should, as soon as practicable, comply with any reasonable request to provide a Site Provider with EMF records that demonstrate the Operator's compliance with any EMF licence condition that may apply to it.~~

[3] https://www.hse.gov.uk/radiation/nonionising/emf.htm

16. As set out above, the deletions are intended to avoid any confusion or suggestion that the Site Provider is in any way responsible for the Operator's compliance with EMF regulations, the Ofcom licence condition, or has any need to carry out EMF assessments. It is very important to remember that this issue has been managed quite straightforwardly for nearly 40 years in the UK without this guidance. If Ofcom is minded to include it at all, it should be kept as simple as possible.

Sharing and upgrading

17. The NCA Code of Practice Working Group submitted a [nearly] agreed update to the Code, which we trust was a constructive contribution to the process. This section, however, was not agreed by the stakeholders.

18. In particular, at A2.58, The draft Code of Practice states "The Code provides Operators with a right to upgrade and share their apparatus *so long as those changes have no adverse impact or no more than a minimal adverse impact on the appearance of the apparatus* and imposes no additional burden on the site provider."

19. This statement, though, does not appear to be in line with **Cornerstone v London & Quadrant Housing,** where the Upper Tribunal confirmed that *depending upon the type of apparatus and circumstances*, para 17 conditions "..is intended to reflect the lowest common denominator for sharing and upgrading, a floor rather than a ceiling".

20. Furthermore at paragraph 70 of this judgement the Upper Tribunal said "…the Law Commission took the view that an exception should be made for clearly identifiable cases where upgrading and sharing have no physical implications at all such as the addition of a fibre in a duct where which can be achieved without impact on the land".

21. Another example could be where an Operator is seeking to install additional equipment *within a building* (that is used for code purposes). Given this could have no physical implication (ie no visual impact whatsoever) then this wide statement that *any code right to upgrade or site share* is subject to the paragraph 17 conditions is not correct.

22. Overall this section is in conflict with the disclaimer in A2.2 that *"the Code of Practice does not represent a guide to the ECC".* We recommend this section is heavily amended, in line with the purpose of the Code of Practice - that is to focus on the expected behaviours of the various parties to facilitate positive and productive engagement.

Alternative Dispute Resolution

23. The Code, as Ofcom records, sets out formal dispute resolution procedures, including the requirement that "*the operator must, if it is reasonably practicable to do so, consider the use of one or more alternative dispute resolution procedures to reach agreement with the relevant person.*"

24. Indeed, it is routine for operators to consider ADR and it is frequently offered, if thought possible to yield a good result. However, it is unusual, even rare, for site providers to agree to ADR.

25. Our concern, therefore, is that this section could be gamed by some site providers simply to cause delay in Code rights being acquired. It should be made very clear that the obligation is to 'consider'. Operators are incentivised to behave appropriately, being fully aware that courts may take into account engagement (or lack of) in ADR when awarding costs.