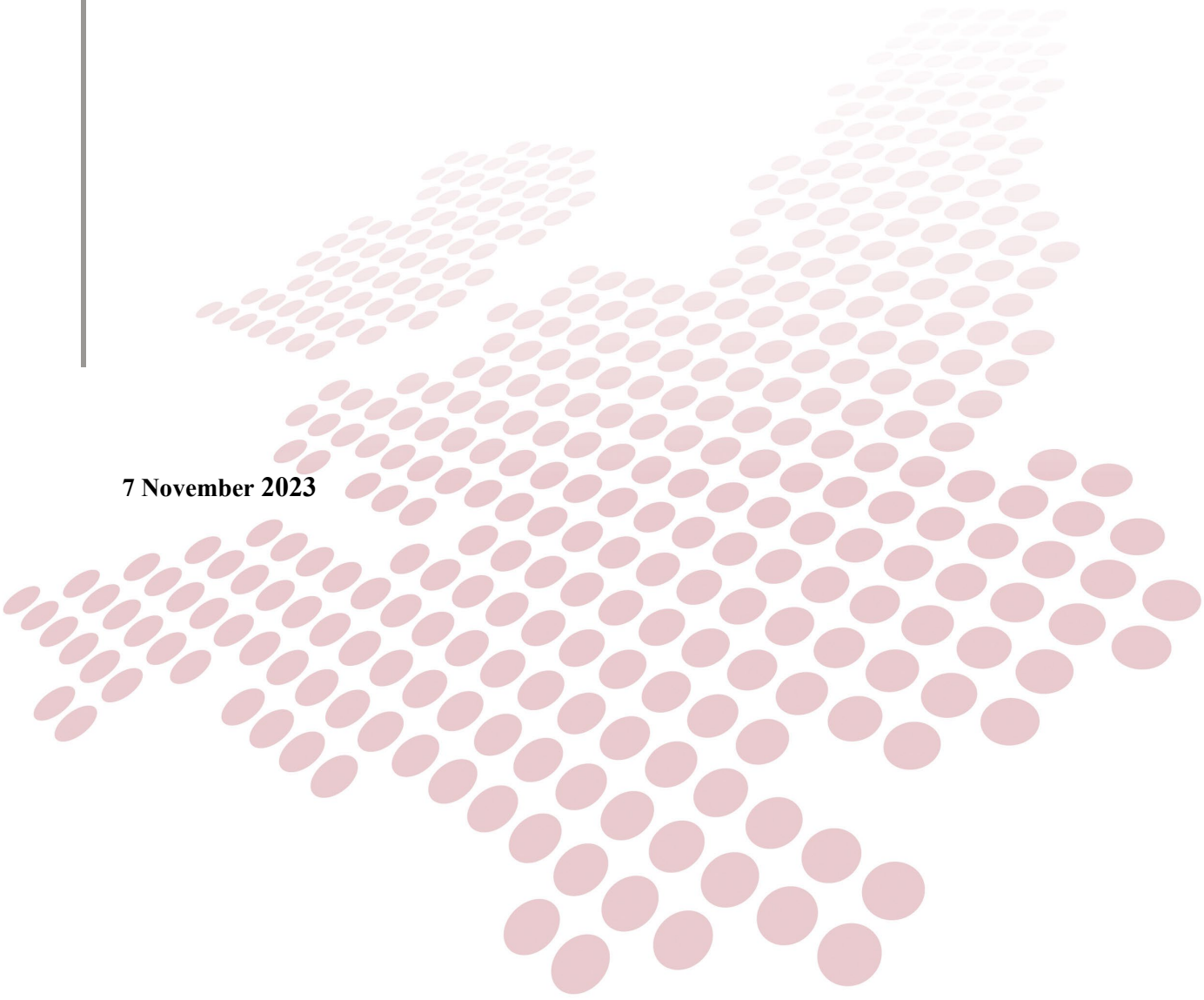
Electronic Communications Code of Practice
UKCTA Response to the Consultation



7 November 2023

Introduction

1. This submission is made by the UK Competitive Telecommunications Association (UKCTA). UKCTA is a trade association promoting the interests of fixed line telecommunications companies competing against BT as well as each other, in the residential and business markets. Its role is to develop and promote the interest of its members to Ofcom and the Government. Details of membership can be found at www.ukcta.org.uk. Its members serve millions of UK consumers.

2. This submission is made in response to Ofcom's consultation (the "Consultation") on proposed changes to the Code of Practice (the "CoP") for the Electronic Communications Code (the "Code").

3. Whilst UCKTA agrees that amendments to the CoP are necessary, particularly in consideration of the amendments introduced by the Product Security and Telecoms Infrastructure Act 2022 ("PSTIA"), we have several concerns regarding the current drafting of the proposed changes.

4. Overall, we do not consider that the proposed amendments to the CoP are consistent with Government's intentions nor policy rationales behind the Code, as amended. We also consider that, within its proposed amendments to the CoP, Ofcom has failed to have appropriate regard to how the exercise of Code rights often works in practice.

5. Whilst we understand the CoP is intended to be voluntary guidance only, the reality is that many landowners and their representatives will refer to and rely upon the CoP as if its terms are mandatory. This emphasises the importance of ensuring that the CoP stays true to its intended purpose, as provided under paragraph 103 Schedule 3A Communications Act 2003.

Imbalanced CoP Inputs

6. UKCTA considers that the current proposed amendments to the CoP are too heavily influenced by and skewed toward landowner interests, to the detriment of operators' interests.

7. UKCTA believes this imbalance is at least in part the result of Ofcom relying too heavily upon the input of the National Connectivity Alliance ("NCA") in drafting the amendments to the CoP, whereas input from operators has been limited and/or not afforded the same weight.

8. Ofcom can address this imbalance between landowner and operator interests by considering wider input from industry (such as this submission). This will ensure the revised CoP accurately reflects the scope and intent of the reforms to the Code introduced by the PSTIA, which are ultimately focused on promoting and accelerating the deployment of fast broadband connections nationwide.

Sharing and Upgrading Apparatus

9. The proposed amendments to the CoP regarding the sharing and upgrading of apparatus fail to take proper account of fixed networks utilising existing infrastructure, such as in the case of providers using the Physical Infrastructure Access ("PIA") remedy for access to Openreach infrastructure. The draft code of practice predominately focuses on wireless networks (and in particular large-scale mobile apparatus e.g., masts). While it is vital that wireless networks are considered, in doing so fixed networks should not be overlooked.

10. For example, paragraphs A2.57 – A2.62 of the draft revised CoP, which relate to the rights of sharing and upgrading overground apparatus, appear to anticipate operators negotiating specific agreements for the exercise of these rights. In the case of operators utilising the PIA remedy to share poles (for example), such bespoke standalone agreements are unlikely to be necessary. The drafting of the CoP should therefore be amended to reflect this reality.

11. This issue is most apparent in paragraphs A2.59 and A2.60 of the draft revised CoP, which unhelpfully directs landowners and operators toward further negotiations for the conferral of "more extensive" rights beyond the "minimum rights" the CoP states are provided under the Code. This clearly misinterprets government's intentions behind s.60 PSTIA, which is to enable providers to upgrade and share flying lines without the need to secure their own, separate wayleave. The current drafting of the CoP therefore frustrates the policy rationale of the PSTIA and is likely to create unnecessary delays by imposing additional negotiation requirements.

12. Furthermore, paragraph A2.58 of the draft revised CoP inaccurately summarises the conditions of s.58(4) PSTIA, that apply when operators share or upgrade infrastructure under subsisting agreements. These conditions are clearly different to those conditions relating to flying lines under s.60 PSTIA (e.g., there

is no noticing requirement under s.60). The discrepancies between the CoP and the provisions of the PSTIA may result in confusion in the exercise of Code rights.

Alternative Dispute Resolution ("ADR") Proposals

13. The PSTIA includes provisions encouraging the use of ADR as a lower cost, faster alternative to resolving Code disputes between landowners and operators compared to litigation.

14. Litigation can be prohibitively expensive and time-consuming for operators to pursue, and landowners will often rely on this fact to deadlock negotiations with operator, in the hope they will accept their unreasonable demands or abandon projects altogether.

15. Under s.69 PSTIA, an operator or "relevant person" (i.e., the landowner or their representative) must if "reasonably practicable" consider using ADR to reach an agreement with the other side. Unhelpfully however, the draft revised CoP provides that "there may be occasions, though where either party may need to serve legal notices, while still continuing to pursue an informal resolution" (paragraph A2.91).

16. It is unclear why this qualification in the CoP is necessary, as it unhelpfully directs operators and landowners back to the use of litigation. This is clearly inconsistent with the policy intentions behind the PSTIA and should be removed.

Publication of Professional fees

17. The draft CoP proposes that during negotiations, operators must provide landowners with a written policy of the "professional fees" that will be compensated to the landowner.

18. The inclusion of this requirement does not reflect the realities of how many negotiations proceed in practice. In many instances, compensation for professional fees paid by the landowner will not be relevant nor appropriate (e.g., landowners investing in the installation of ultrafast fibre broadband for households).

19. The current drafting is therefore too generalised; introducing broad and sweeping provisions into the CoP that will apply (unnecessarily) to all negotiations. This is a clear example of the drafting of the revised CoP being too heavily skewed in the interests of landowners, as influenced by the NCA, as noted above.

References to "Site Provider"

20. The draft CoP has unhelpfully and unnecessarily substituted references to "landowner" and "land occupier" for "Site Provider".

21. To prevent confusion, the language used in the CoP should reflect that used in Code. For example, whilst the term "site provider" is used (deliberately) in several provisions within the Code, it is not always used in the same context as a "occupier". Rather, the term "site provider" is typically used in connection with large scale wireless infrastructure, and its use in relation to homeowners, for example, is unhelpful.

22. In the interest of clarity, this change in terminology should be dropped from the revised CoP.

Requirements for Site Surveys

23. The draft revised CoP contains extensive detail regarding the use of "Site Surveys" (i.e., paragraphs A2.26 – A2.30 and Schedule A).

24. The nature, scope and need for a site survey varies significantly depending on (a) the Code rights being used, (b) the nature of the apparatus and (c) the land/property involved. For example, in many cases of providers using the PIA remedy, site surveys may be already "built in" to the process involved in accessing Openreach infrastructure, and therefore a separate, dedicated site survey is unlikely to be necessary.

25. In consideration of above, it would be helpful if the drafting of the CoP would further acknowledge the varied nature and requirements of site surveys. It would also be helpful if the CoP would expressly recognise that further site surveys may not be required in addition to those already featured as part of the PIA process.

Electromagnetic Field ("EMF") Exposure

26. EMF exposure compliance is now very prominent in the draft revised CoP. Whilst UCKTA recognises the importance of EMF exposure compliance, and appreciates public perceptions toward this issue, it is worth noting that this is not relevant to many fixed-line communications.

27. As such, we suggest that the drafting of the CoP be amended to ensure that the provision relating EMF exposure compliance provisions are confined to genuine applications of EMF.

Conclusion

28. UCKTA encourages Ofcom to consider the points set out above and engage more widely with industry prior to finalising any changes to the CoP.

29. As noted above, whilst we understand the CoP is intended to be voluntary guidance only, the reality is that many landowners and their representatives will refer to and rely upon the CoP as if its terms are mandatory. It is therefore vital that the CoP strikes the correct balance between the interests of operators and landowners.

30. We refer Ofcom to consider how the original CoP was drafted in 2016 and 2017. This was an effective, collaborative process in which the views of both operators and landowners were taken into account and reflected in the drafting.

31. It is also essential that the revisions to the CoP do not lose sight of government's intentions behind the introduction of the PSTIA. As it stands, several of the draft revisions to the CoP appear detrimental to the objectives of the PSTIA.

32. UCKTA is happy to engage with Ofcom further on this issue and would welcome the opportunity for wider industry engagement.

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