



Arqiva submission to Ofcom consultation on the Electronic Communications Code, Digital Economy Bill: Proposed Code of Practice, Standard Terms of Agreement and Standard Notices

Arqiva is pleased to respond to Ofcom's consultation on the Proposed Code of Practice, Standard Terms of Agreement and Standard Notices for the new Electronic Communications Code.

Arqiva participated in the working group that developed the draft Code of Practice. Based on that experience our overall view on the Code of Practice is that while there is much that is sensible there are a number of changes that are required in order to make it effective in practice. Those changes are included in the detailed response below.

With the standard terms of agreement our view is that, as proposed, they do not achieve the government's stated policy goals. While Ofcom states that the terms are not obligatory they could be used as a benchmark by the Lands Tribunal and may make negotiations between operators and landowners more difficult. Given that, Ofcom should be looking to provide clear guidance on what is required to encourage future enhancements of communications services.

We believe that Ofcom would more effectively fulfil their legislative obligations in the Code by setting out more general heads of terms or principles to guide parties when they negotiate agreements.

The Electronic Communications Code legislation requires Ofcom to prescribe the form of notice to be given under each provision of the Code. It is not clear from the consultation why Ofcom has determined it is not required to do that where it considers the notices to be fact specific. That does not appear to be an option open to it under the legislation. Equally it is not clear how Ofcom has determined which notices are fact specific and which are not.

Finally, in relation to the draft notices that Ofcom has produced we believe that there are a number of changes that should be made to allow these notices to work in practice.

Our detailed response to the questions in the consultation are as below.

About Arqiva

Arqiva is a communications infrastructure and media services company, operating at the heart of the broadcast and mobile communications industry. Arqiva provides much of the infrastructure behind television, radio, mobile and other wireless communications in the UK and we are at the forefront of network solutions and services in an increasingly digital world.

Arqiva operates more than 1,450 transmission sites for radio, providing coverage to 90% of the population for terrestrial broadcasting in the UK. We are a shareholder and operator for both commercial national DAB radio multiplexes and service provider for the BBC national DAB radio multiplex. We also work with independent radio groups, such as Bauer Media and Global Radio.

Our wholly owned subsidiaries, Now Digital Ltd and Now Digital (Southern) Ltd, operate 23 DAB digital radio multiplexes. These multiplexes cover a number of regions of the UK, predominantly in the Midlands and the south of England.

Arqiva is a founder member and shareholder of DRUK, Freeview, Youview and Digital UK. Freeview is the largest TV platform in the UK delivering over 60 digital TV channels, including 15 HD channels, and 24 radio stations free to the UK public. Arqiva owns and operates the networks for all of the Freeview multiplex licence holders and is the licence holder for four of the DTT multiplexes,

Our major customers include the BBC, Bauer Media, Global Radio, ITV, Channel 4, Five, BSkyB, UKTV, Sony, AMC, Ideal World, QVC, Russia Today, Al Jazeera Networks, BT and the four UK mobile operators.

Arqiva is owned by a consortium of infrastructure investors and has its headquarters in Hampshire, with major UK offices in London, Buckinghamshire and Yorkshire and operational centres in Greater Manchester, West Midlands and Scotland.

Responses to questions

Question 1. Do you have any comments in relation to the scope or drafting of the Code of Practice as set out in Annexes 4 and 5?

Professional Advice

Paragraph 4.16 is unnecessary and confusing. It is a matter for the Landowner and Operator to pay for their own professional advice in any manner or structure they see fit. It is not for the CoP to determine when these fees should be agreed and so this paragraph should be removed.

Paragraph 4.17 – The word ‘open’ should not be interpreted to mean that either party is required to share confidential information. This should be made clear.

New Agreements for the Installation of Apparatus

Paragraph 4.19 – It should be clearer that this paragraph relates to a ‘new’ installation as opposed to existing apparatus (perhaps by including the words “on a new site” after the word “deployed on the first line). It should be made clear that a new agreement is not necessary when additional equipment is being added to an existing installation.

Consultation and Agreement

Paragraph 4.31 – If a landowner (or an Operator) is looking to secure unreasonable terms then the other party should not be prevented from using the Court procedure. There should be some reference to reasonableness of behaviour in this paragraph – not just a reference to terms being agreed in a reasonable time.

Deployment Stage

For the avoidance of doubt, the Deployment Stage relates to brand new structures/sites. It does not relate to new equipment on existing sites and this should be made clear in the Code of Practice.

Paragraph 4.32 - It would be better to say ‘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.

The Code states that when the Operator is deploying kit on site, the Operator should provide the landlord with “drawings detailing the apparatus to be deployed with an

accompanying written description of the works". If the landowner and the Operator have agreed within the heads of terms that the Operator should have unlimited equipment rights then this provision is at odds with that. Positions that seek to limit or control the amount of future equipment on site should not be the default position as it runs counter to the Government's objective to facilitate future rollout. This provision should be rewritten to state that drawings will only be provided by exception, where the particular site circumstances necessitate greater control.

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

Paragraph 4.38 – Access – These obligations are particularly onerous for an Operator and could lead to delays getting on site whilst the information is collated. On the basis that Operators are looking to maintain a network, the starting point should be that access is open at all times and fact-specific scenarios should allow for restrictions. In a modern digital world Operators should only be required to contact the landlord where the situation dictates that. The requirement to notify and give notice runs contrary with the policy to facilitate future rollout programmes and maintaining services. There should be a statement to the effect that: "Where reasonable, the parties recognise it is in the public interest to provide Operators the ability to freely access a site to maintain and upgrade without conditions and restrictions and parties will seek to only impose access restrictions where the nature of the particular site makes that necessary".

It follows then in clause 4.39 and 4.40 that these principles should only apply in those cases where an access restriction has been reasonably imposed in an agreement.

Paragraph 4.41 – "Where Operators are physically sharing a site, and no additional consents are required under the ECC, the Operators will nevertheless notify Landowners of the name of other sharers, so that the Landowner, for security purposes, can know who is in lawful occupation of the site." In many cases this is an unnecessary imposition on the Operators. On self-contained sites there is no need for the landowner to be notified of what the operator tenant is doing on site, with which operators except in particular cases. Therefore this provision should be removed.

Paragraph 4.44 – This paragraph should include a requirement that any request for information should be reasonable otherwise the frequency that landowners could be asking for this information could lead to disproportionate costs.

Repairs to a landowner's property

Paragraph 4.51 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. Ideally the parties should seek to secure a temporary service before any repairs are carried out. This is particularly important in the case of broadcast and emergency services.

Redevelopment by the Landlord

Paragraph 4.52 – It should be made clear that the redevelopment provisions apply “at the end of the contractual term of the code agreement”. They are not available during the course of the agreement. There should be an additional objective to “allow continuity of services” to be included at the end of this clause.

Paragraph 4.53 – There needs to be more clarity around this clause. It seems to suggest that the Operator has to organise its departure from the site even if the landlord has not proved its genuine intention to redevelop. The paragraph should specify that the landowner should be required to serve on the Operator sufficient evidence documenting its intention to redevelop at the same time as following the procedures under the new Code. If it appears to the Operator that the Landowner has a reasonable chance of satisfying the redevelopment grounds, the Operator shall act in a timely manner to identify suitable alternative sites.

Paragraph 4.54 – This paragraph 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. The landowner should be required to consider the reasonable representation of the Operator regarding their continued presence on the landowner's property (e.g. if we have a greenfield site and the landlord plans to build a block of flats, could they be accommodated on the roof of those flats?). This would lead to the least disruption to existing consumers.

Escalation procedures

It would be sensible to set out here that the parties should seek to follow best practice conduct and protocols for the relevant dispute procedure being invoked. This would support the efficient management of those proceedings and to reduce the costs to both parties of resolving the dispute.

Schedules A & B

Schedule B – 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. Undertaking might imply a separate personal promise to be accountable for costs such as a solicitor undertaking.

The “Schedules” are referred to as “Annexes” in the Code of Practice, that needs to be made consistent in the final version.

Question 2. Do you have any comments on the scope or drafting of the standard terms, as set out in Annex 6?

For the purposes of question 2, we have discussed below the key issues with the current draft Code Agreement as set out in Annex 6 of the Consultation. We have also included an Annex to this response to deal with specific points on clauses within or missing from the Ofcom’s current draft Code Agreement.

The Government’s publication “A New Electronic Communications Code” which accompanied the draft Bill in May 2016, explained that the new Code forms the regulatory bedrock for the rapid and deep roll out of digital communications technologies for the foreseeable future and will support the provision of world class infrastructure. Arqiva’s view is that the standard terms do not secure these fundamental policy changes that the government has stated are its goals. While we note that the Consultation states that the terms need not be used when negotiating, it is reasonable to expect that landowners are likely to use this as their negotiating guide and the Tribunal may look to standard terms as a starting point when dispute arises over terms. We take the view that the standard terms should be clear in encouraging a new generation of agreements that facilitate future enhancement in communications services. That is not the case as it stands

As the variety of contractual arrangements is likely to be diverse, Ofcom should consider approaching their obligation in paragraph 103(2) of the Code by adopting an approach of setting out general heads of terms or overarching principles that should guide parties in commencing negotiations around a Code Agreement.

As an infrastructure provider, on many sites Arqiva does not operate its own active electronic communications apparatus. It provides the site and passive infrastructure that enable multiple operators to utilise the site. The importance of this industry has been recognised on multiple occasions in the development of the legislation. However, we do not think that the draft standard terms are suitable for operators who act as infrastructure providers and, as Ofcom seeks to encourage sharing of sites between all operators, we

take the view that any standard terms should reflect the broad scenario where sites are or can be occupied by multiple operators and for multiple services.

Clause 2.2/2.3

A key issue to be addressed in future electronic communication agreements is the need to have flexibility for new infrastructure rollout. Indeed, DCMS has confirmed that the New Code should allow future generations of technology to be quickly rolled out and should facilitate more efficient use of infrastructure through greater sharing.

As an infrastructure provider, Arqiva's standard terms provide for open upgrade and sharing rights in return for a fair fee. This benefits all parties and the wider public. Ofcom's proposed standard terms are in conflict with that principle by only allowing sharing and upgrades where conditions are met that mirror the conditions for automatic sharing in paragraph 17 of the New Code. While the principles in paragraph 17 are welcomed they are not certain enough for parties to operate in the real world. Operators need the ability to roll out new infrastructure without fear of dispute with the landowner and we would suggest that many landowners will seek to argue that the conditions are not met in order to restrict and profit from future rollout. In addition, paragraph 17 only deals with upgrade and sharing that should not be subject to any condition including payment of money. As written, Ofcom's draft implies that wider sharing and upgrading is not encouraged by the Government or permitted by the Code. This suggestion could lead to a misinterpretation of the legislation and policy.

Government considers that, given the rapidly evolving nature of the telecommunications technology, regular upgrading of electronic communications apparatus is essential. DCMS has said in their recent publication "Next Generation Mobile Technologies: A 5G Strategy for the UK" that "the speed of technological progress in the mobile market means that we need a flexible regulatory framework that keeps pace with developments". Our view is 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. This would facilitate roll out on the basis that in most instances a landowner will not be affected detrimentally by additional apparatus on an existing site. It is clear from the way that parliament framed the legislation that they, and DCMS, must have taken this view in order to conclude that the new Code will facilitate future rollout. The adverse visual impact that landowners will suffer will be the initial installation of the base infrastructure (e.g. the tower/mast). Therefore any alterations / additions that are made after this (e.g. antennas added to masts) will not have a detrimental impact. The standard terms could include a secondary option that allows for a restriction on equipment rights, such as

'consent not to be unreasonably withheld or delayed' or in return for a further fee, where the nature of the site dictates that the landlord will be unduly affected by additional equipment. However in most instances altering, upgrading and swapping out existing equipment should be expressly allowed and not left to the interpretation of the parties as to whether the conditions are met in each circumstance.

Definition of Apparatus

Government policy considers that regular upgrading of electronic communications apparatus is essential. This is at odds with the apparatus permitted to be on site being set out in a schedule at the start of the agreement. As DCMS has said in its publication on the roll-out of 5G, "we are focused on creating the best conditions for the market to develop and deploy 5G as rapidly and efficiently as possible." Having barriers, such as this list, to upgrade apparatus on site is at odds with Government's objective. We would suggest that a schedule of apparatus is only required where the specific nature of the site dictates that, such as apparatus being directly installed onto a landowner structure where loading is an issue. There can be no justifiable reason to restrict the amount of apparatus within a private compound or on an operator's mast save that the landowner may need to be additionally compensated for the consequences of that should the conditions of paragraph 17 not be met.

Sharing

In relation to sharing, Ofcom has a duty to encourage sharing of infrastructure and sites but the standard terms do not deliver that. These terms perceive that the only sharing that will be allowed on a site will be sharing that meets the conditions of paragraph 17. The role of Infrastructure Providers in providing access to sites for all operators is recognised in the legislation in the statutory purposes. We take the view that sharing does not need to be restricted in model terms because any prejudice to the Landowner will be adequately dealt with by a restriction on equipment levels as discussed above where that is reasonable and appropriate.

Again, as DCMS has said on its strategy for the roll-out of 5G:

"the Government agrees with the NIC that infrastructure sharing, in compliance with competition rules, can be an effective and economically efficient way of delivering telecoms infrastructure, especially in areas where it is uneconomic to deploy competing infrastructure networks. Increasingly, independent infrastructure providers will play an important role in the deployment of 5G infrastructure,

alongside both national mobile and fixed operators. We will work with Ofcom to identify and tackle unnecessary barriers to infrastructure sharing and will explore the potential for a clearer and more robust framework to allow companies to share infrastructure, while preserving investment incentives.”

Access

The standard terms start from a position that an Operator should seek to give seven days’ notice to access the site (except in the case of an emergency). Many of Arqiva’s existing sites are self-contained sites with multiple sharers and free access to a locked compound. It would hinder efficient operating of such sites, and the digital industry that they support, if notice and administration is required as standard where it is not reasonably required. It is appropriate to start from a position that notice to access is only required where the particular nature of the site makes that necessary. In all other cases it is in everyone’s interest to limit unnecessary administration and red-tape to permit open rights to come and go to the sites to maintain and upgrade services.

Under almost all circumstances it is dangerous for a landowner to enter land on which apparatus is installed without supervision. The landowner should not be permitted access to the land without giving reasonable notice (and other reasonable conditions) to the Operator and without being supervised. The landowner should also be required to ensure the Operator has access to keys or access codes required for access. It should be expressly stated that landowners should not obstruct or interfere with the access etc. In our experience some landowners seek to block access in order to place pressure on operations and procure an advantage in negotiations. Operators are often driven by a consumer driven, commercial need for speed (to get services back on line or to upgrade), which can make seeking redress via a Court process impractical. Where a landowner has genuine cause for dispute with an operator, this should be sought through dispute resolution and not via blocking access which directly impacts on public services by preventing repair or upgrade. Ofcom should include a statement to that effect in either the standard terms or in the Code of Practice.

Term

Contrary to common market practice, the standard terms are not for a fixed term but rather the agreement will run until it is terminated in accordance with clause 10. This is at odds with paragraph 33(1) of the New Code which allows parties to require changes to the term of an agreement after it expires. In Ofcom’s current drafting, once a Code Agreement is in

place it may be terminated by either party but, as there is no fixed term, it will not expire. Ofcom should rewrite the provision to ensure that it does not impinge on the right of the operator or landowner to require the agreement to be modified or renewed.

As explained below in relation to clause 10, the lack of a minimum term is likely to have a negative effect on investment potential. Critical infrastructure is almost always required for the long term and an agreement that enables a rolling break with no minimum term does not deliver that.

We discuss below the form of agreement and the impact of stating that the Code Agreement is not a lease. A lack of fixed term does prevent an agreement from being a lease.

Clause 10 – Termination

It is inappropriate for landowners to have a rolling 28 day notice period, particularly in the event of redevelopment. Notwithstanding that, it is acknowledged that a further notice period of 18 months will be required once the contractual term is brought to an end; there are fundamental issues with this.

It seems likely that there may be a dispute over whether the conditions for break have been triggered by the Landlord. The conditions are not absolute – for example: was any breach substantial, was any delay in payment persistent, does the landlord meet the intention test for redevelopment? In that instance the parties may need to refer to the court for a decision. It is not clear whether this would be a matter for the Lands Tribunal or the County Court as the interpretation of clause 10 appears to be a contractual (rather than Code) matter. If the Landlord is successful in demonstrating that the contractual term of the agreement has been terminated, a further notice will need to be served under paragraph 31 to bring the security of tenure under paragraph 30 to an end. The Operator will then be in the position for a second time to challenge the ground for breach, potentially in a different dispute forum with a different outcome.

Particularly in the case of redevelopment, it is not fair or reasonable to permit the landowner to terminate occupation early on in the lease where a minimum term has been agreed between the parties in negotiations and rent has been paid for that minimum term. This could discourage investment in electronic communications services due to uncertainty of length of occupation. Where an Operator is investing money in an electronic communications site it needs a minimum term in order to recoup that investment. It is not reasonable that a landowner can terminate an agreement for redevelopment early on in the term. In the case of mid-term tenant breach, it would seem more appropriate to seek

alternative remedies such as damages than to bring the agreement to an end mid-term where breaches can be resolved. It is generally the case where a large corporation is involved (such as an Operator) that the breach is capable of remedy and therefore, there should be no reason for the agreement to end. This does not minimise the landowner's ability to have the site removed at the end of the term if the Operator's behaviour during the term has not been satisfactory. The standard terms should not provide for a landowner break as standard. This is something to be negotiated between the parties at the time the rent is agreed. Paragraph 31 is there to bring occupation to an end at the end of the contractual term. It is a change in policy for this to extend this right to termination and any point during the contractually agreed term.

Clause 10.4 – Following a successful termination of the paragraph 30(2) rights of occupation by a landowner (referred to as 29(2) in the draft agreement), the landowner is required to serve a notice under paragraph 37 of the legislation. Therefore the obligation to remove equipment should also be stated to be subject to any order under paragraph 37 of the ECC.

Question 3. Do you agree that Ofcom has identified all of the notices it is required to prepare under paragraph 89 of the New Code?

In paragraph 90(1) of the Code Ofcom is required to prescribe the form of a notice to be given under *each* provision of the Code that requires a notice to be given. It is not clear that Ofcom is given any flexibility in the legislation on this point.

In the specific case of the form of notices under paragraphs 31(1) [now 32(1)] and 38(4) [now 39(4)] Ofcom states that it considers that "prescribing the form of notices under paragraphs 31(1) [now 32(1)] and 38(4) [now 39(4)] 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". There are two issues with this:

- Firstly, as noted above, there is no exemption in the legislation for Ofcom to not provide forms of notices that it either considers to be fact-specific or where Ofcom expects Code Operators to be able to easily prepare these notices
- Secondly Ofcom does not explain why it considers these notices different to other notices that are also, to an extent, fact specific, such as a notice under paragraph 20. Ofcom should provide its rationale for this.

Ofcom should reconsider its approach to the legislation and provide forms of all of the notices under *each* provision of the Code that requires a notice to be given

Question 4. Do you have any comments on the scope or drafting of these notices as set out in Annex 7?

Assignment of an Agreement under the ECC (Assignor) - Paragraph 16(5) (paragraph 5(5) in the draft)

There are a variety of situations that need to be thought about here that are set out in paragraph 16, including:

- An agreement that does not contain a requirement for an assignor to give a guarantee as permitted by paragraph 16(2);
- An agreement that does require an assignor to give a guarantee where reasonable and it is not reasonable for a guarantee to be given;
- An agreement that does require an assignor to give a guarantee where reasonable and it is reasonable for a guarantee to be given;
- An absolute requirement within an agreement for an assignor to give a guarantee.

The notice does not envisage the above scenarios. It is in the interests of both parties to have a process by which any guarantee or potential guarantee is dealt with in conjunction with the notice. Ofcom should provide more detail around how this process should work in order to allow a smooth functioning of the regime to allow the policy objectives of the Code to be met.

Seeking agreement to the conferral of rights under the ECC – Paragraph 20(2) of the New Code (paragraph 19(2) in the draft)

Ofcom should include a further alternative paragraph 2 to cover interim rights rather than taking the approach of including a separate notice for interim rights. The form of notices is almost identical and paragraph 26(3) and paragraph 27(1) require the operator to give a notice under paragraph 19(2). Therefore, having a separate notice for interim code rights

does not accord with the New Code and creates unnecessary complexity and inconsistency.

Paragraph 2: The reference to the term “occupied by you” does not cover all circumstances. For example:

- the presence of paragraph 27 implies that the Operator may already be in occupation; or
- the land may be unoccupied pursuant to paragraph 105(6).

This paragraph should be reworded to refer to an “occupier” and state that this is an “occupier” pursuant to paragraph 105 of the New Code.

Paragraph 7: It would be more effective if it were to state here that the Operator requires rights or additional rights under paragraph 3 of the New Code as further detailed in the attached heads of terms / agreement (and it should be at the discretion of the Operator as to whether it wishes to serve a draft agreement or draft heads of terms at this stage. The actual agreement may not include the same wording as set out in paragraph 7 and could lead to ambiguity and potential conflict.

Bringing an Agreement under the ECC to an end – Paragraph 31(1) of the New Code (paragraph 30(1) in the draft)

Paragraph 2: At the point at which 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”.

Paragraph 5: 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”.

The landowner should be under an obligation to provide more detail around the provision that they are relying on to terminate the agreement. For example:

- a) What are the purported breaches?

- b) What payments have been persistently late in being paid and does the landowner have any evidence of the same?
- c) What evidence does the landowner have to show an intention to redevelop?
- d) Why does the landowner think that the Operator has failed to meet the test under paragraph 21 (referred to as 20 in the draft)?

The landowner only has 3 months in which to make a decision as to whether to serve a counter notice under this provision and without more detail from the landowner it might struggle to respond correctly. There should be a separate section or annex in which the landowner has to include more detail over the grounds.

Notes:

There should be guidance around what is meant by “in the ordinary course of post”. Whilst there is guidance from case law in relation to other legislation, Ofcom should set this out, particularly as service is at the date it would be delivered in the ordinary course of post.

Requiring a change to the terms of an agreement under the ECC (Site Provider and Operator version) – Paragraph 33(1) (paragraph 32 (1) in the draft)

The current version of the Code Agreement does not include a fixed term. If there is not to be a fixed term then paragraph 33(1) will never apply as a party can only ask for a change in the terms once the Code Agreement has expired. It would only apply if one party terminated the Agreement and then requested a new one but we cannot see a scenario in which this would occur.

Paragraph 11 – One of the options here is to send “a modified version of the Agreement reflecting the terms set out in this notice”. This would surely still amount to a new Agreement. One of the options should be a similar to a deed of variation.

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. This could have tax implications under the Stamp Duty Land Tax regime if this is the case.

Requesting disclosure of whether apparatus is on land pursuant to the ECC – Paragraph 39(1) and 39(2) (paragraph 38(1) and 38(2) in the draft)

The notice states that the Operator has 3 months “beginning with the date on which this notice is given” to respond. What is not clear is when the notice is given. 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.

Requiring the removal of apparatus installed under the electronic communications code (by a landowner or third party) – Paragraph 40(2) and paragraph 41(2) (paragraph 39(2) and paragraph 40(2) in the draft)

These notices do not require the landowner to state the condition on which the landowner has the right to request the removal of the apparatus. For transparency, the Operator should have the right to know on what grounds the landowner believes it is entitled to have the equipment removed and state the relevant provision in paragraph 37 that applies. The Operator will not know how to respond to the form of notice if it does not know on what grounds the landowner is stating that the apparatus should be removed.

Some of the wording in the notice is unclear and so should be clarified. We propose 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].”

Counter- notice regarding the removal of apparatus installed under the ECC Paragraph 41(5) (paragraph 40(5) in the draft)

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.

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).

**Assignment of an agreement under the ECC – Assignee - (paragraph 16(5))
(paragraph 15(5) in draft)**

Please see our comments in relation to the Assignor version of this notice and the guarantee provisions. 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. There needs clarity around these provisions in the case of a guarantee being in place.

Annex – further response to Question 2

Clause 2.1

There is no generic right for the Operator to access and use the Land in accordance with the provision of its network. 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, they should be an option to include additional rights;

Rights other than Code Rights – 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. 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;

Operators should have the right to erect signage. Certain signage will be required by law so there should be a right to erect this without consent. Other signage should be permitted with consent (not to be unreasonably withheld or delayed). We might need additional signage on our sites (e.g. directions to contractors, operators) so operators should have a right to erect this.

Clause 5

For consistency, this clause should be entitled “Grantor’s Obligations” not “The Grantor’s Obligations”

There should be an obligation on the landowner to grant wayleaves to statutory undertakers, public electricity supply authorities, and public electronic communications operators for the installation of conduits where necessary to maintain the effective running of communications networks. Operators may be obliged to contribute towards the reasonable and proper legal costs of the landowner in entering into such wayleaves. This is important as there are more than likely to be wayleaves required throughout the life of a Code Agreement and the Code Right to connect to a supply is not enough on its own to deliver the necessary service;

There should be a restriction on landowners granting third party rights which interfere with the apparatus on site. Operators cannot afford to invest in sites where interference can be caused.

Clause 6

The apparatus might also belong to sharers of the Operator particularly where the tenant is an infrastructure provider. We have included wording within our mark-up at Annex 2, which better reflects the wording in paragraph 101 of the Code.

Clause 7.1

The standard terms envisage that Code Agreements will not be leases. This is an inappropriate starting point. Under law, whether or not an occupational agreement is a lease is a matter of fact not labelling and the distinction can be important. A leasehold interest, where the tenant has exclusive possession is subject to other statutory principles under the wide body of landlord and tenant legislation to which the Tribunal may need to refer in any dispute. An interest over land also gives rise to a tax liability under Stamp Duty Land Tax, whereas a personal interest does not.

Clause 9

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. It is standard for utility companies (for example, BT) to ask for this exclusion. It might hamper roll out and undermine the willingness of infrastructure providers to roll out a network. It undermines Ofcom's intentions for the new Code.

Clause 11

Paragraph 16 of the New Code provides that assignment to another Operator cannot be restricted or charged for but that does not imply that other types of alienation should be prohibited. There may be good reason why other forms of alienation are required, in the

normal course of business and, in particular, a right to sublet to statutory undertakers/ electricity providers as a matter of course. Other alienation should be permitted with consent not to be unreasonably withheld or delayed as a minimum but this should be open to agreement between the parties.

Clause 16.3 Mediation

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;

This is at odds with the landowner's right to require redevelopment where the Operators could find themselves forced into Court proceedings.

General Points

Infrastructure providers should not be responsible for the removal of apparatus by the other operators that it shares the site with. There should be a requirement for the contracting Operator to use reasonable endeavours to procure the removal of the apparatus but a blanket requirement goes too far;

There may be circumstances where a rent cesser is required and is reasonable e.g. if damage is caused to the apparatus by the default or negligence of the landowner or an act outside of the Operator's control. It should be for the parties to agree on a site by site basis when this should apply as the requirements for this may depend on the location of the site.