

ELECTRONIC COMMUNICATIONS CODE

Digital Economy Bill: Proposed Code of Practice, Standard Terms of Agreement and Standard Notices

Response to the Ofcom Consultation

Code of Practice

Response to 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?

It should be noted that the comments set out below in response to Question 1 (as well as in relation to the three other questions posed by the Consultation) are written from the perspective of mobile (rather than fixed line) communications based upon the writer's professional experience as a telecoms infrastructure solicitor whose career within the industry covers almost 20 years through having held various senior legal positions, both In-House as well as in private practice.

The principle of a Code of Practice designed for use in relation to the new Electronic Communications Code (proposed in the Digital Economy Bill) ("the New Code") is welcomed. It is, however, considered that the scope of the current draft lacks sufficient detail. Excluding its two Annexes (which deal, respectively, with "*Requesting access for a survey*" and "*Key points for access arrangements*"), it only runs to 8 pages of text. This is in sharp contrast to the "*Code of Best Practice on Mobile Phone Network Development*" (the latest edition of which was published on 24 November 2016) produced by a Working Group consisting of industry representatives which deals with the planning law issues which runs to more than 60 pages of text.

Whilst it is recognised that a balance needs to be struck as to the appropriate length of any guidance (with the danger being that it will risk gathering dust on a book shelf if it is too long and cumbersome), it is submitted that further detailed practical guidance would be welcomed by both Landowners and Operators alike in relation to matters which can (and often do) arise in practice but which can (and often do) cause delays in the negotiation and conclusion of the relevant legal agreement concerning the siting of the apparatus.

The draft Code of Practice states (in Paragraph 4.9) that its scope does not extend to the financial aspects of the relationship between the Landowner and the Operator. It is submitted that this is a missed opportunity because the new regime introduced in Paragraph 23 of the New Code (which is based upon a "No Scheme" system) is likely to be one of (if not) the most contentious aspect(s) of the New

Code having regard not least to some of the written evidence which was submitted to the House of Commons Digital Economy Bill Committee. Whilst the New Code will introduce long-overdue improvements to the existing Code (found in Schedule 2 to the Telecommunications Act 1984 (as amended by Schedule 3 to the Communications Act 2003) (“the Existing Code”)), it is submitted that the scope of the draft Code of Practice should extend to setting out, as a minimum, some guiding principles as to how the negotiations for setting the level of the rent (or “*consideration*” as it is termed in the New Code) should be conducted.

A further comment upon the scope of the draft Code of Practice is that it does not provide any meaningful guidance upon formal dispute resolution procedures other than by stating (in Paragraph 4.55) that “[t]he ECC sets out formal dispute resolution procedures” and in Paragraph 4.56 “[n]evertheless, where disputes arise, the parties should seek to resolve them informally (i.e. without recourse to litigation) in the first instance. There may be occasions, though, where one party or the other may need to serve legal notices, while still continuing to pursue an informal resolution.” Whilst it is recognised that it is not possible to give definitive guidance upon informal dispute resolution due to the diverse range of disputes that can (and often do) arise in practice between the parties, it is submitted that, as a minimum, some general guiding principles could usefully be included in the draft Code of Practice. Failing to do provide more meaningful guidance is considered a missed opportunity.

Standard terms

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

General comments upon the draft document set out in Annex 6

Whilst it is accepted that Code agreements “*will, in practice, cover an extremely wide range of circumstances*” (Paragraph 3.8 of the Consultation document), it is submitted that transactions involving mobile infrastructure agreements nevertheless broadly fall into the following main groups:

- (a) a single Greenfield site;
- (b) a single Rooftop site; and
- (c) multi-sites (involving a portfolio of Greenfield and/ or Rooftop sites).

Categories (a) to (c) can be sub-divided further accordance to the nature of the base station (e.g. BSC, BTS and microcell).

Whilst there will be a certain degree of overlap in the standard terms that are used irrespective of which category the agreement falls into, there will be certain standard terms that may only be relevant in relation to one of the above categories (or sub-categories).

The writer would thus respectfully disagree with the provisional view of Ofcom (in Paragraph 3.7 of the Consultation document) that “*it is not necessary*” to have more than one set of standard terms “*and that the value (if any) of ... preparing more than one set of terms would be limited*”. In the writer's own professional experience through having negotiated a significant number of agreements over nearly 20 years, a lot of time can be wasted in the negotiations over terms which are not appropriate to the specific category (or sub-category). In other words, there is no such thing as a “*one size fits all approach*” when it comes to such standard terms. As a minimum, therefore, it is recommended that it is made expressly clear on the face of the proposed set of standard terms as to which terms are appropriate for use in relation to which category (or sub-category) of transaction.

Rather than being a collection of standard terms (which is the impression given in Paragraph 3.4 of the Consultation document), Annex 6 is instead a template agreement which has been drafted in the form of a statutory wayleave agreement (made pursuant to Paragraph 9 of the New Code) rather than as a formal lease

(which has instead tended to be the used with increasing frequency as the preferred model for documenting the legal relationship between the Landowner and the Code Operator). This alternative form of legal model is applauded because it dispenses with the need for the agreement to be registered (in England and Wales) at the Land Registry in accordance with the provisions of the Land Registration Act 2002 having regard to the provisions of Paragraph 10 of the New Code as clarified by Lord Ashton of Hyde (Parliamentary Under Secretary of State) in his letter dated 9 February 2017 addressed to peers during the Committee Stage of the Digital Economy Bill in the House of Lords. This is a welcome move especially given the high number of additional sites to house base stations which are anticipated will be needed to be deployed for the rollout of the next generation of mobile communications (known as 5G although the technical standards have still to be formally adopted). According to “*Next Generation Mobile Technologies: A 5G Strategy for the UK*” (DCMS and HM Treasury, March 2017, at page 21), analysis provided to the National Infrastructure Commission suggests that as many as 42,000 sites could be required to deliver 5G coverage to a geographical area equivalent to the size of the City of London whereas it is thought that there are around 40,000 sites which currently provide the entire UK with mobile network coverage. Requiring all these agreements to be drafted as formal leases and subsequently registered at the Land Registry is plainly impracticable for numerous reasons not least that it would risk unduly cluttering the Registers of Title maintained by the Land Registry.

Specific comments upon the draft document set out in Annex 6

The following specific comments are made upon the actual content of the draft document:

- The Company Registration Number (“CRN”) of the Code Operator (and, where applicable, that of the Grantor) should be specified in addition to the company name(s) and registered office(s) since, unlike company names and registered offices, CRNs never change and thus provide legal certainty.
- The definition of “*Land*” in Clause 1.1 needs to be more tightly drawn not least to cater for the different types of site (already mentioned above in response to Question 1).
- In relation to Clause 2.1(e), the parentheses should be closed around the reference to 2.3 and “, *the*” deleted immediately before the word “*upgrading*” for consistency of the syntax in Clause 2.1(c) and (f).
- The opening sentence of Clause 2.3 should also refer to Clause 2.1(c) in parentheses.

- Whilst the wording of the two conditions in Clause 2.3 (a) and (b) closely follows the corresponding wording in Paragraph 16 of the New Code, it is submitted that the parties should be given the opportunity to define what is meant by the terms “*adverse impact*” and “*adverse effect*” (in a similar way to defining what constitutes an “*emergency*” in Clause 4.1) otherwise there is a risk that they could end up in dispute over future sharing/upgrading arrangements which Paragraph 16 of the New Code is intended to avert.
- The payment obligation in Clause 3 does not make any provision for a periodic review (in the case where an annual payment is to be made by the Code Operator). This is unlikely to be accepted by the Grantor especially given that the agreement will probably endure for many years.
- The Grantor’s obligations set out in Clause 5.1 should be widened to enable the Code Operator to require third party apparatus to be switched off if the Operator can demonstrate to the Grantor’s reasonable satisfaction that it is causing interference to the Code Operator’s apparatus (and will remain switched off until the issue is rectified).
- The scope of the indemnity to be given by the Code Operator in Clause 8.1 is wider than that which is normally given according to current practice within the mobile telecoms industry. The proposed indemnity is not limited by reference to fault liability (e.g. negligence) nor by reference to direct loss nor does it seek to exclude liability for certain heads of damage (e.g. consequential and/or economic loss). Whilst it is noted that the Grantor is unable to compromise or settle third party claims without the express written consent of the Code Operator, it is more common (in the writer’s experience) for the Code Operator to be given sole conduct over any such proceedings. It should not be forgotten that a contractual indemnity is supplemental to remedies which exist under the general law and is directly linked to the scope of the insurance policy which the Code Operator will have in place. In other words, the former should not be wider than the latter otherwise the Code Operator will be assuming a contractual liability which is greater than its insurance cover. The Code Operator’s liability under the indemnity should be capped to mirror any limitation under the insurance and limitation of liability clauses (but to the extent permissible by law). The writer would also suggest that some form of corresponding indemnity is given by the Grantor to the Code Operator.
- The termination provisions in Clause 10 need further work not least for the following reasons:

- (a) it does not take account of Paragraph 30(3)(b) of the New Code which stipulates that a minimum period of 18 months' notice is required;
- (b) whilst the default provision of 30 days' notice may be appropriate if the Operator is shown to have failed to remedy a breach within 30 days of being notified of it, 30 days is wholly insufficient if the Grantor intends to redevelop all or part of the Land or any neighbouring land where, on average, it usually takes a minimum of 24 months for a Code Operator to be able to find a replacement site (not least because of the time it may take to secure planning permission);
- (c) Clause 10.1(a) uses the words "*material*" and "*substantial*" as alternatives whereas Paragraph 30(4)(a) of the New Code only refers to "*substantial*" breaches and so, for the sake of consistency, it is submitted that only the word "*substantial*" should be used; and
- (d) the wording of Clause 10.1(d) is derived from Paragraph 20 of the New Code but it fails to include the wording (found in Paragraph 20(4) of the New Code) which clarifies what is meant by "*public benefit*" (i.e. "*access to a choice of high quality electronic communications services*") and so it is submitted that the relevant statutory wording needs to be incorporated.
- Clause 17.1 needs to be changed to also cater for the agreement being granted in accordance with the laws of Scotland or Northern Ireland (rather than just the laws of England and Wales) since the New Code (as within the Existing Code) applies to all three legal jurisdictions within the United Kingdom.
 - Clause 17.2 similarly needs to be changed to also cater for the parties to the template Agreement agreeing to submit to the exclusive jurisdiction of the courts of England and Wales, Scotland or Northern Ireland (rather than just England or Scotland). In this respect, regard should be had to the provisions of Paragraphs 93 and 94 of the New Code which define what is meant by "*the court*" and "*other tribunals*", respectively, within each of the three legal jurisdictions which form part of the United Kingdom.
 - It is recommended that provision is made for all parties with an interest in the land (e.g. the freeholder and superior lessees) rather than just the occupier be joined as a formal party to the agreement having regard to the provisions of Paragraphs 10(4) and 12(3) of the New Code.

- It is also recommended that provision is made for an appropriate title warranty be given to thereby dispense with the Code Operator needing to have to carry out an investigation of title.
- It is also recommended that the agreement is executed as a formal deed.

Template notices

Response to 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?

Paragraphs 86 to 90 (rather than merely Paragraph 89) deal with notices under the New Code. Paragraph 87 concerns notices given by Code Operators. Paragraph 88 concerns notices given by others. Paragraph 89 places Ofcom under a statutory duty (by use of the imperative “*must*”) to “*prescribe the form of a notice to be given under each provision of this code that requires a notice to be given*”. Paragraph 90 sets out the procedures for the giving of such notices.

The writer notes that Ofcom has made a conscious decision not to draft template notices for the remaining 2 scenarios envisaged by the New Code. Before giving his reasons as to why he believes that Ofcom does need to prescribe templates for these two missing notices, the writer would also question Ofcom’s decision to draft a template notice to deal with the scenario covered by Paragraph 74(2) of the New Code for the reasons given in his response to Question 4 below (see item (24)).

Paragraph 3.15 of the Consultation document states that:

“there is likely to be limited (if any) value in Ofcom prescribing the form of a discretionary notice. In particular, we consider that there would be little value in Ofcom prescribing the form of notices under paragraphs 31(1) and 38(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. We are not therefore proposing to prescribe the form of any standard form notices under these specific paragraphs of the New Code.”

Whilst the new “light touch” regulatory approach taken by Ofcom is generally welcomed, it is submitted that its reasoning for not drafting prescribed templates for these two forms of statutory notices under the New Code is flawed.

The Counter-Notice which may be served by a Code Operator pursuant to Paragraph 31(1)(a) of the New Code (in accordance with the requirements of Paragraph 31(3)) is likely to be one of the most frequently used types of statutory notices if its predecessor (i.e. a Counter-Notice that is served by a Code Operator pursuant to Paragraph 21(3) of the Existing Code) is taken as the appropriate yardstick. The writer has professional experience of having drafted and served a high number of these statutory notices when employed In-House as a Senior Legal Adviser by one of the Mobile Network Operators. His experience of having

served such Counter-Notices (the purpose of which was to prevent the Landowner enforcing the removal of the apparatus without an appropriate Court Order) was that an inordinate amount of time was taken up in the negotiations between the parties regarding the validity of such Counter-Notices even though these had to be in a prescribed form approved by Ofcom (pursuant to Paragraph 24(1) of the Existing Code). In the writer's opinion, it is likely that such disputes over the validity of the form of Counter-Notice needing to be served pursuant to Paragraph 31(1)(a) of the New Code (in accordance with the requirements of Paragraph 31(3)) will be set to increase even further (and possibly generate satellite litigation) if Ofcom does not prescribe the new form of Counter-Notice.

The requirement for a Code Operator to disclose (pursuant to Paragraph 38(4) of the New Code) whether apparatus is on land pursuant to a Code right is a new statutory right benefitting Landowners under and by virtue of Paragraph 38(1) of the New Code (along with corresponding disclosure obligations to Landowners or occupiers concerning access rights pursuant to Paragraph 38(2) of the New Code) neither of which have a statutory predecessor in the Existing Code. Whilst it is accepted that the content of such notices given by Code Operators in response to the request for information is likely to be fact-specific (in the sense that no two base stations are identical such that the apparatus located at any given site will vary as too the means of access to it), all such notices will, as a minimum, be required to provide some basic details, namely:

- (a) the identity of the Code Operator (including its full company name, registration number and registered office);
- (b) a brief factual statement as to whether or not it has apparatus on site which has the benefit of rights granted pursuant to the New Code; and/or
- (c) a brief factual statement regarding access;
- (d) if the answer to (b) and/or (c) is "yes", a more detailed description of the same (which will be taken from the relevant provisions of the applicable written agreement which granted the said Code rights).

It is submitted that, if Ofcom does not use this opportunity to prescribe the form of these two missing notices required to be given by the Code Operator (having regard to the provisions of Part 15 of the New Code), then there is a risk that an inordinate amount of time could be spent by the parties arguing over whether a valid notice has been given by a Code Operator in such circumstances which would not be in anyone's best interests.

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

It is to be welcomed that Ofcom now has the power in the New Code to prescribe the forms of notice to be served by Landowners (and other parties) and not merely Code Operators (as is presently the case under the Existing Code).

The writer makes the following comments upon the scope or drafting of the template notices set out in Annex 7 (and in the same order in which they are set out therein):

(1) Paragraph 15(5) Notice (Assignor Version)

The comments which follow relate to the first version of the draft template notice (drafted on the basis that it will be served by the Assignor). See also further comments set out in (29) below which relate to the Assignee version of the same notice.

The heading of this draft template notice should make it clear that it is the Assignor version of the notice to differentiate it from the Assignee version which appears as the penultimate draft template notice (see comments in (29) below).

In Paragraph 2, reference should also be made to the actual date of the Agreement being assigned to provide legal certainty.

In Paragraphs 2 and 3, reference should also be made to the respective Company Registration Numbers (“CRNs”) of the Assignor, Assignee and the other party to the Agreement to be assigned (if that other party is a company).

(2) Paragraph 19(2) [and Paragraph 26(1)] Notice

In both alternate versions of Paragraph 2, reference should also be made to the Code Operator's CRN and registered office (as well as those of the person to whom the statutory notice is given, if applicable).

In Paragraph 5, reference to “*a direction*” should be to “*a direction made pursuant to Section 106 of the Communications Act 2003*”.

In Footnote 2 to Paragraph 13, reference to the Court having the power to make an Order as a matter of urgency should be to Paragraph 26(5) of the Code.

In Paragraph 16, if the Operator is attaching draft agreement(s) (see comments in relation to Annex 3 below), the wording will need to be amended accordingly.

On balance, it is considered that it would be advisable (wherever possible) to attach the draft(s) to this form of notice since it will help speed up the process of ensuring that appropriate agreement(s) is/are concluded sooner rather than later.

In the Supplementary Information at the end of the draft template notice, reference:

(a) in Paragraph 4 to Paragraphs 22 and 23 of the Code should also additionally refer to Paragraph 21 of the Code because this latter provision sets out the legal effect of an agreement imposed by Paragraph 19(2) of the Code; and

(b) in Paragraph 5 to Paragraph 83 should instead be to Part 14 of the Code.

In relation to Annex 3, there should be the ability for the Operator to attach a draft agreement relating to Temporary Code Rights (to be consistent with the drafting of Annex 2 which gives a corresponding option for an Operator to attach a draft agreement relating to the installation of new apparatus)

(3) Paragraph 25(3) Notice

In both alternate versions of Paragraph 2, reference should also be to the Code Operator's CRN and registered office (as well as those of the person to whom the statutory notice is given, if applicable).

In Paragraph 4, reference to “*a direction*” should be to “*a direction made pursuant to Section 106 of the Communications Act 2003*”.

In Footnote 2 to Paragraph 10, reference to the Court having the power to make an Order as a matter of urgency should be to Paragraph 25(5) of the Code.

In Paragraph 13, if the Operator is attaching a draft agreement in Annex 2, the wording will need to be amended accordingly. On balance, it is considered that it would be advisable (wherever possible) to attach the draft to this form of notice since it will help speed up the process of ensuring that the appropriate agreement is concluded sooner rather than later.

In the Supplementary Information at the end of the draft template notice, reference in Paragraph 2 to Paragraphs 22 and 23 of the Code should also additionally refer to Paragraph 21 of the Code because this latter provision sets out the legal effect of an agreement imposed by Paragraph 19(2) of the Code.

(4) Paragraph 30(1) Notice

In Paragraph 2, the CRN and registered office of the Operator (as well as the corresponding details of the Site Provider, if applicable) should be specified along with the date of the Agreement to provide legal certainty.

(5) Paragraph 32(1) Notice (Code Operator Version)

In Paragraph 2, the CRN and registered office of the Operator (as well as the corresponding details of the Site Provider, if applicable) should be specified to provide legal certainty.

In Paragraph 3, the date of the Agreement (and the parties to it) should be specified to provide legal certainty.

Paragraphs 5, 6 and 11 refer to “*Annex [X]*” but none is set out in the draft template. On balance, it is advisable to attach a draft of the new agreement in the said Annex since it will help speed up the process of ensuring that the appropriate agreement is concluded sooner rather than later.

Paragraph 7 has only partially transposed the effect of Paragraph 32(3) of the Code. It has not taken account of the additional requirement set out in Paragraph 32(3)(b) of the Code.

See (30) below in relation to comments in relation to the Site Provider version of this draft template notice.

(6) Paragraph 38(1) Notice

In Paragraph 2, the CRN and the registered office of the Operator (and the corresponding details of the Landowner, if applicable) should be specified for legal certainty.

Footnote 2 to Paragraph 5 refers to the Operator responding to the Landowner's Paragraph 38(1) Notice in a manner which complies with Paragraph 87 of the Code. It is submitted that (notwithstanding Paragraph 38(4)(a)(i) of the Code) this is somewhat confusing (not least because Ofcom has not set out a prescribed form of notice to be sent by an Operator in response: see the earlier comments in the response to Question 3). It would be better if reference to “*Paragraph 87 of the Code*” was changed to “*Part 15 of the Code*” since the revised wording provides greater flexibility and overcomes the need for Ofcom to prescribe a template draft notice needing to be served by an Operator in response.

(7) Paragraph 38(2) Notice

In Paragraph 2, the CRN and the registered office of the Operator (and the corresponding details of the Landowner, if applicable) should be specified for legal certainty.

Footnote 2 to Paragraph 5 refers to the Operator responding to the Landowner's Paragraph 38(1) Notice in a manner which complies with Paragraph 87 of the Code. It is submitted that (notwithstanding Paragraph 38(4)(a)(i) of the New Code) this is somewhat confusing (not least because Ofcom has not set out a prescribed form of notice to be sent by an Operator in response: see the earlier comments in the response to Question 3). It would be better if reference to “*Paragraph 87 of the Code*” was changed to “*Part 15 of the Code*” since the revised wording provides greater flexibility and overcomes the need for Ofcom to prescribe a template draft notice needing to be served by an Operator in response.

(8) Paragraph 39(2) Notice

In Paragraph 2, the CRN and the registered office of the Operator should be specified for legal certainty.

In Paragraph 3, the CRN and the registered office (if applicable) of the Landowner or Occupier) should be specified for legal certainty.

In Paragraph 9, reference should also be made to Paragraph 39(8) of the New Code given that it limits the circumstances in which a Court Order may be made. The following insertion is suggested (which largely follows the wording in Paragraph 39(8)) itself:

“The court may not make an order in relation to the apparatus if an application under paragraph 19(3) of the Code has been made by you in relation to the apparatus and has not been determined.”

(9) Paragraph 40(2) Notice

The title of the Notice should be extended to cover restoration of the land in addition to removal of the apparatus to reflect both limbs of Paragraph 40(2) of the Code which are cumulative rather than alternative.

In Paragraph 2, the CRN and the registered office of the Operator (and the corresponding details of the third party serving the notice, if applicable) should be specified for legal certainty.

Paragraph 5 (when read in conjunction with Note (d)) should be expanded to explain the range of other applications which the third party may make to the Court pursuant to Paragraph 43(3) of the New Code other than requiring the Operator to remove the apparatus or authorising the third party to sell the apparatus. The Court can also make the following orders upon an application by the third party:

(i) require the Operator to restore the land to its former condition prior to the Code right being exercised (Paragraph 43(1)(b) of the New Code);

(ii) enable the third party to recover the costs from the Operator of any action to remove or sell the apparatus (Paragraph 43(3)(c) of the New Code);

(iii) enable the third party to recover the costs from the Operator of restoring the land to its former condition before the apparatus was placed on, under or over the land (Paragraph 43(3)(d) of the New Code); and

(iv) enable the third party to retain the proceeds of sale of the apparatus to the extent that these do not exceed the costs of the third party incurred by them in connection with any of the orders made by the Court pursuant to Paragraph 43(3) of the New Code.

No provision is made in the draft template notice to deal with the alternative situation involving the third party requires the apparatus to be altered in consequence of street works as envisaged by Paragraph 41(1) of the Code.

The notes should be expanded to explain the circumstances in which restoration can be requested in the Paragraph 40(2) Notice.

(10) Paragraph 40(5) Counter-Notice

As noted in (9) above, the title of the Counter-Notice served pursuant to Paragraph 40(5) (which refers back to the Notice served pursuant to Paragraph 40(2)) should be extended to cover restoration of the land in addition to removal of the apparatus to reflect both limbs of Paragraph 40(2) of the New Code which are cumulative rather than alternative.

In Paragraph 2, the CRN and the registered office of the Operator (and the corresponding details of the third party serving the notice, if applicable) should be specified for legal certainty.

No provision is made in the alternative versions of Paragraph 3 of the draft template counter-notice to deal with the separate situation where the third party requires the apparatus to be altered in accordance with street works and the Operator requires the third party to reimburse the Operator in respect of any expenses incurred by the Operator in connection with making of any alteration: see Paragraph 41(3) and (4) of the New Code.

(11) Paragraph 42(5) Notice

In Paragraph 2, the CRN and the registered office of the Operator (and the corresponding details of the occupier/owner of the freehold estate/lessee serving the notice, if applicable) should be specified for legal certainty.

(12) Paragraph 48(1) Notice

In Paragraph 2, the CRN and the registered office of the Operator should be specified for legal certainty. The full name, registered office and CRN of the relevant Transport Undertaker should also be specified for the sake of completeness and legal certainty.

In Paragraph 3, further clarification should be given as to the meaning of “*non-emergency works*” (by reference to the definition given in Paragraph 48(5) of the New Code).

In Paragraph 4, reference to “*a Direction*” should be to “*a Direction made pursuant to Section 106 of the Communications Act 2003*”.

In Paragraph 5, in summarising the provisions of the conferral of transport rights under the New Code, reference should be to either Paragraphs 44 to 54 of the New Code (rather than to Paragraphs 47 to 54 of the New Code as currently stated in the draft template notice) or to Part 7 of the New Code.

An additional Paragraph 14 should be inserted to briefly explain the effect of Paragraph 54 of the New Code (which imposes criminal (rather than merely) liability) upon an Operator if it starts any works in contravention of any provision of Paragraphs 48, 49 or 50 of the New Code.

(13) Paragraph 49(2) Notice of Objection

In Paragraph 2, the CRN and the registered office of the Transport Undertaker should be specified for legal certainty. The full name, registered office and CRN of the relevant Operator should also be specified in the notice for the sake of completeness and legal certainty. Further clarification should be also given as to

the meaning of “*non-emergency works*” (by reference to the definition given in Paragraph 48(5) of the New Code).

In Paragraph 4, the drafting should be consistent with the drafting of the corresponding provision in Paragraph 12 of the Paragraph 48(1) Notice: see comments in (12) above.

(14) Paragraph 49(3) Arbitration Referral Notice (Objection to Proposed Non-Emergency Works)

In the alternative versions of Paragraph 2, the respective CRNs and registered offices of the Operator and the Transport Undertaker should be specified for legal certainty.

Paragraph 6 should be expanded to briefly explain the effect of Paragraph 54 of the New Code (which imposes criminal (rather than merely) liability) upon an Operator if it starts the Proposed Works (as detailed in the alternative versions of Paragraph 2) unless and until they are permitted in accordance with an arbitration award made pursuant to Paragraph 51 of the New Code.

(15) Paragraph 50(2) Notice

In Paragraph 2, the respective CRNs and registered offices of the Operator and the Transport Undertaker should be specified for legal certainty.

In Paragraph 5, in summarising the provisions of the conferral of transport rights under the New Code, reference should be to either Paragraphs 44 to 54 of the New Code (rather than to Paragraphs 47 to 54 of the New Code as currently stated in the draft template notice) or to Part 7 of the Code.

In Paragraph 10, reference to a compensation notice should link it to Paragraph 50(4) of the Code.

(16) Paragraph 50(4) Notice

In Paragraph 2, the respective CRNs and registered offices of the Operator and the Transport Undertaker should be specified for legal certainty.

In Paragraph 6, it should be made clear that a Transport Undertaker only has the right to serve a Paragraph 50(4) Notice requiring payment of compensation by the Operator carrying out emergency works if, but only if, the Transport Undertaker has given it within the requisite “*compensation notice period*” (as defined in Paragraph 50(9) of the New Code) in response to a Paragraph 50(2)

Notice originally served by an Operator. As currently drafted, the template notice does not clearly differentiate between the “*compensation notice period*” and the “*compensation agreement period*” (as defined in Paragraph 50(9) of the Code).

In Paragraph 9, it should be made clear that an Operator also has the right to refer the matter to arbitration pursuant to Paragraph 51 of the New Code: see Paragraph 50(7) of the New Code.

A definition of “*Emergency Works*” (by reference to Paragraph 50(9) of the New Code) should be inserted (similar to Note (b) in the draft template notice relating to Paragraph 50(2) of the New Code).

(17) Paragraph 50(7) Referral to Arbitration Notice (Disagreement About Amount of Compensation)

In the alternative versions of Paragraph 2, the respective CRNs and registered offices of the Operator and the Transport Undertaker should be specified for legal certainty.

A definition of "Emergency Works" (by reference to Paragraph 50(9) of the Code) should be inserted (similar to Note (b) in the draft template notice relating to Paragraph 50(2) of the New Code).

(18) Paragraph 52(1) Notice

In Paragraph 2, the CRN and registered office of the Operator should be specified for legal certainty.

In Paragraph 3, the CRN and registered office of the Transport Undertaker should be specified for legal certainty.

An additional Note (c) should be inserted at the end of the draft template notice to highlight the fact that, for the purposes of the New Code, “*alteration*” of any apparatus includes references to the moving, removal or replacement of the apparatus: see Paragraph 107(2) of the New Code.

(19) Paragraph 52(2) Counter-Notice

The heading of this notice should be changed to a Counter-Notice to be consistent with the wording used in Paragraph 52(2) of the New Code.

In Paragraph 2, the CRNs and registered offices of the Operator and Transport Undertaker should be specified for legal certainty.

It should be made clear on the face of the draft template notice that, for the purposes of the New Code, “*alteration*” has an extended meaning and includes references to the moving, removal or replacement of the apparatus: see Paragraph 107(2) of the New Code.

(20) Paragraph 53(7) Notice

In Paragraph 2, the CRN and registered office of the Operator should be specified for legal certainty.

A new Paragraph 5 should be inserted to give the name and address of the Occupier (and, in appropriate cases, the CRN and registered office of the Occupier) to provide legal certainty as well as to enable the Operator to contact the Occupier (if it wishes to obtain further clarification upon the contents of the Paragraph 53(7) Notice).

(21) Paragraph 66(1) Notice

In Paragraph 2, the CRN and registered office of the Undertaker should be specified for legal certainty.

In Paragraphs 3, 5, 6 and 7, further clarification (by way of an additional footnote) should be given as to the special meaning of “*alteration*” within the Code: see Paragraph 107(2) of the New Code. The CRN and registered office of the Operator should also be specified for legal certainty.

In Paragraphs 4 and 5 (and the Annex), further clarification needs to be provided as to the details of the proposed works which the Undertaker is legally required to provide to the Operator having regard to the provisions of Paragraph 67(2)(a) to (c) of the New Code.

In Note (c), reference to the Undertaker's potential criminal (as opposed to civil) liability should be to Paragraph 71 of the New Code which also extends such liability to an agent of an Undertaker.

(22) Paragraph 67(2) Counter-Notice

In Paragraph 2, the respective CRNs and registered offices of the Undertaker and the Operator should be specified for legal certainty. It should also be made clear (in the form of an additional footnote) that an Operator only has a period of 10

days (beginning with the day on which the Paragraph 66(1) Notice is given by the Undertaker) within which to give a Paragraph 67(2) Counter-Notice.

In the alternative versions of Paragraph 3 and 4, further clarification (by way of an additional footnote) should be given as to the special meaning of “*alteration*” within the Code: see Paragraph 107(2) of the New Code.

In the second version of Paragraph 4 (where the alteration of the apparatus is to be carried out by the Operator rather than by the Undertaker), reference should be made to the provisions of Paragraph 69 of the New Code since it contains a set of cumulative restrictions (found in Paragraph 69(1)(a) to (c)) which must be satisfied by the Operator before it can itself carry out the alteration.

(23) Paragraph 70(2) Notice

In Paragraph 2, the CRN and registered office of the Undertaker (as well as the corresponding details of the Operator including its full corporate name) should be specified for legal certainty.

In Paragraphs 3 to 6 (and Note (a)), further clarification (by way of an additional footnote or endnote) should be given as to the special meaning of “alteration” within the Code: see Paragraph 107(2).

(24) Paragraph 74(2) Notice

This form of template notice is different to any of the other prescribed forms of notice in the New Code in that, rather than being *given* (by an Operator or by another party), the legal requirement instead relates to *attaching* it (in a secure and durable manner), within a 3 day period following completion of the relevant installation, to every major item of apparatus installed or, if no major item of apparatus is installed, to the nearest major item of apparatus to which it is directly or indirectly connected.

This provision, although worded slightly differently, essentially replicates the existing obligation found in Paragraph 18(1) of the Existing Code.

No equivalent form of model notice is currently listed by Ofcom on its website as to the prescribed form of such a notice. Had there been a legal requirement to produce a Paragraph 18(1) Notice of the Existing Code in such detail as is now proposed by Ofcom (in connection with the replacement Paragraph 74(2) of the New Code) then one would have expected Ofcom to have produced an appropriate model notice (having regard to the provisions of Paragraph 24 of the Existing Code). The fact that it has not done so (even though Ofcom’s current list

of model notices was last updated as far back as 2 March 2005) lends further support to the submission that no such detailed form of notice is strictly required.

All that is required (in both versions of the Code) is for the relevant notice to (a) specify the name of the Operator and an address in the UK for the purposes of enabling any notice of objection to be given (under Paragraph 17(2) of the Existing Code or pursuant to Part 12 of the New Code) and (b) be "affixed" (in the Existing Code) or "attached" (in the new Code) "in a position where it is reasonably legible".

Further guidance was laid down by the Court of Appeal by Lord Justice Kennedy in Lloyd-Jones & Others v. T Mobile (UK) Ltd [2003] EWCA Civ 1162 (which was concerned with the corresponding provisions of the Existing Code). The writer would draw attention to the following dictum of Lord Justice Kennedy (at paragraph 14 of the judgment):

"The requirement of legibility means that the notice must be at such a height on the apparatus, not masked by part of the apparatus or other obstruction, and of such size that it can be read with reasonable comfort. It is reasonable to infer that the potential reader should not have to get on to the apparatus itself to read it, but there is nothing in Schedule 2 to suggest that he must be able to read it from land to which, as a member of the public, he has the right of access. To my mind that is not surprising because the reality is that even where, as in this case, there is no such land adjacent to the apparatus, those who want to see what the notice says can usually obtain permission from the adjacent owner to go close enough to read it. Even where that is not possible the information conveyed by the notice can easily be obtained in other ways, for example by reference to the permission".

The writer is also personally aware (because of his past dealings with Ofcom (and Oftel) when previously employed In-House as a Senior Legal Adviser with one of the Mobile Network Operators) that a pragmatic decision was taken by the regulator several years ago not to require the level of detail in the equivalent form of notice which is now being proposed. To fundamentally change industry practice (which, in the writer's own professional experience of such matters, has worked perfectly well for many years) would be to impose an additional administrative burden upon Operators which would be wholly disproportionate to any perceived benefit for those parties wishing to exercise a statutory right of objection to the siting of the apparatus having regard to the dictum of Lord Justice Kennedy in the Lloyd-Jones case cited above.

Bearing all of the above in mind, it is submitted that the current version of proposed draft notice should be dispensed with altogether thereby leaving it to the Operator itself with the discretion to choose the form and manner of displaying the information required by Paragraph 74(3) of the New Code.

(25) Paragraph 77(1) Notice of Objection (Apparatus Kept On, Under or Over Tidal Water or Lands)

In Paragraph 2, the CRN and registered office of the Operator (and, where appropriate, the corresponding details of the Objector(s)) should be specified for legal certainty.

In Paragraph 5, further clarification (by way of an additional footnote or endnote) should be given as to the special meaning of “*Occupier*” within the New Code: see Paragraph 104.

In the second version of Paragraph 6, further clarification (by way of an additional footnote or endnote) should be given as to the special meaning of “*alter*” within the Code: see Paragraph 107(2).

(26) Paragraph 77(1) Notice of Objection (Line Kept On or Over Land)

In Paragraph 2, the CRN and registered office of the Operator (and, where appropriate, the corresponding details of the Objector(s)) should be specified for legal certainty.

In Paragraph 5, further clarification (by way of an additional footnote or endnote) should be given as to the special meaning of “*Occupier*” within the New Code: see Paragraph 104.

In the second version of Paragraph 6, further clarification (by way of an additional footnote or endnote) should be given as to the special meaning of “*alter*” within the New Code: see Paragraph 107(2).

(27) Paragraph 81(3) Notice To Lop Tree or Vegetation to be Cut Back

In Paragraph 2, the CRN and registered office of the Operator (and, where appropriate, the corresponding details of the Occupier) should be specified for legal certainty. Further clarification (by way of an additional footnote or endnote) should be given as to the special meaning of “*Occupier*” within the New Code: see Paragraph 104.

(28) Paragraph 81(4) Counter-Notice Objecting to the Lopping of a Tree or Cutting Back of Vegetation

In Paragraph 2, the CRN and registered office of the Operator (and, where appropriate, the corresponding details of the Occupier should be specified for legal certainty. Further clarification (by way of an additional footnote or endnote) should be given as to the special meaning of “*Occupier*” within the Code: see Paragraph 104.

(29) Paragraph 15(5) Notice (Assignee Version)

Please refer to the comments which have already been made in (1) above in the context of the Assignor version of this notice.

(30) Paragraph 32(1) Notice (Site Provider Version)

See earlier comments in (5) above concerning the Code Operator version of this draft template notice which should be construed accordingly having regard to the change in identity of the party serving the notice.

David Redford-Crowe
Solicitor
26 April 2017