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By email: ecc.consultation@ofcom.org.uk

Dear Sirs,

Response to Ofcom Consultation – Digital Economy Bill – Proposed Code of Practice, Standard Terms of Agreement and Standard Notices

Strutt & Parker have been involved in the Telecommunications Industry since the initial roll out of sites in the 1980's, always acting solely on behalf of land and building owners. Due to the large number of transactions we are involved in, we have been able to publish a regular Telecommunications Survey depicting trends and movements in the market. Our latest Telecommunications Survey was published in September 2016 and is based on over 6,000 transactions and we currently have in excess of 500 ongoing instructions. Our clients include schools, local authorities, universities, churches, charities, corporate bodies, landowners, farmers, fire authorities and police authorities to name but a few, ranging from small greenfield installations in remote rural locations through to commercial rooftops in the centre of London.

This gives us an enviable stance of having the ability to liaise with the widest array of building and land owners who support current networks. We understand the frustrations currently experienced by Landlords and the implications that the proposal will have in practical scenarios.

The Code of Practice

We consider that the Code of Practice requires amendment to deal with the following key issues:

a) Appropriate sanctions for failure to comply

In the consultation process for the Digital Economy Bill (DEB), we repeatedly heard from Department for Culture, Media & Sport (DCMS) that the reason that the Code Operators had failed to deliver to the target set by the government had been to a greater extent due to the poor behaviour of Landlords, this is despite over c55,000 sites having been built in the UK and more agreements being reached consensually on a daily basis.

We have also heard suggestions that Code Operators are routinely held to ransom and that the Code Operators have otherwise made best endeavours to roll out better networks. However, we see little, if any, evidence of any of this and despite our requests, DCMS were unable to cite any circumstances where Code Operators had

sought to acquire a site but where a Landowner behaved poorly. In our experience, Landowners simply want to be treated fairly and reasonably and in a professional manner, but all too often, this does not happen.

There is a fundamental requirement, therefore, for Ofcom to set out proper sanctions for failure to comply with the Code of Practice and for clear guidance to be provided for recourse when necessary. Failure to provide appropriate sanctions will undermine the Code of Practice to the point that it becomes entirely meaningless and there will continue to be a lack of regulation of conduct within the industry. The Code of Practice has to work for both the Code Operator and the Landowner.

The Electronic Communications Code obliges the Code Operators to use best endeavours to agree consensual terms for any agreement. This aspect of the Code should be reinforced by the Code of Practice. In reality, we very often face substantial delays when dealing with Code Operators and their agents who can often require continual chasing in order to make any progress in negotiations whatsoever. It is surely for the Code of Practice to ensure that such behaviour can give rights to some recourse.

We suggest that sanctions include some ability to make written representations to Ofcom who can then assess such cases and issue direction where appropriate for action by one party or another and to compensate Landowners who may be aggrieved by the action of a Code Operator.

We have concerns over the intentions of the Code of Practice. In the world of Mobile Telecommunications there are ultimately two main companies, Cornerstone Telecommunications Infrastructure Limited (CTIL) encompassing Vodafone & Telefonica, Mobile Broadband Network Limited (MBNL) encompassing EE & H3G. Whilst we acknowledge there are other users in the market such as Arqiva who are infrastructure providers, the Operators will remain the same. There is therefore a significant imbalance between the financial strength and intellectual capability of the Operators owning tens of thousands of sites, compared to the vast majority of individual Landlords who will only own a single site.

It has been demonstrably evident that the sheer quantum of the sites that the Operators have access to has led to a variance in quality of their relationships with their Landlords. Each party will have entered into a consensual agreement with the best intentions to uphold the agreement. Through outsourcing to multiple agents, the relationship has been diluted with many Landlords questioning who is on their sites and who their point of contact will be.

It is absolutely imperative that with greater rights come greater responsibilities for the Operators. If Code Rights are going to be exercisable over land and buildings, then the Landlords shouldering this burden must have the ability to hold each Code Operator accountable. The Code of Practice must therefore specify any sanctions for non-compliance by Code Operators and address a Landowner's right to defend their property without fear of incurring high levels of cost and with no other recourse on their Tenants.

b) Notification for Upgrades

The Electronic Communications Code permits Code Operators to conduct works to upgrade sites without requiring the consent of the Landlord in certain circumstances. Whilst this is inequitable at best, the Code fails to impose any obligation to notify a Landlord as to the carrying out of such works. If a Code Operator proposes to carry out works to the site, unless the land owner is notified in advance, the Landowner cannot confirm whether or not such upgrades are likely to have an adverse impact or impose an additional burden, which in itself would be sufficient grounds for the Landowner to refuse for such works to be carried out at the site.

Clearly, the provisos relating to the Code Operators ability to upgrade automatically require there to be some notification in practice and yet this important obligation is missing. The Code of Practice should therefore require that notification is provided along with a reasonable timeframe to allow for a Landowner to be able to understand the full implications of the proposed works and to make appropriate representations.

The Code of Practice must also seek to impose clear timescales for any new agreement or removal of an installation/equipment at the end of the term. It is a source of frustration for Landlords that when agreements come to an end, there is little contact from their Tenant. Whilst the site remains fully operational, it is unlikely that an Operator will seek to regularise a position unless the Landlord is proactive in their negotiations.

c) Landowner's Legal and Professional Costs

Again, we reiterate the imbalance between the negotiating strength of multi-national companies comprised within the Code Operators against the vast majority of Landowners affected by the Electronic Communications Code. We believe that the implications of the Code are not well known by the vast majority of Landowners. Given such serious implications and a permanent impact on property, which can be suffered by private Landowners following any dealings with a Code Operator, it is imperative that Code Operators be required to make Landowners aware of the need to be properly advised and to fully understand those implications. Code Operators should routinely advise Landowners and indeed recommend that they should take legal and professional advice.

Given also that discussions and dealings in relation to the Code are invariably only required so as to accommodate equipment installed by Code Operators or to satisfy some other requirement of the Code Operator, we believe the Code of Practice should go further and require Code Operators to confirm at an early stage that they will meet Landowners' reasonable legal and professional costs incurred in the necessary dealings associated with any approach made. In short, it is entirely inequitable that any Landowner should be forced to incur costs associated in hosting a Code Operator or accommodating any associated requirements or even be at risk of incurring costs.

d) Draft Code of Practice General Comments

Communication and Contact Information
4.13 We are pleased to see that there is a requirement for the Code Operator to provide up to date contact information, we trust that this will relate to all beneficial occupants of the site so that there can be no ambiguity as to whom is permitted to access the site

Professional Advice
4.15 – 4.17 - As previously stated, it is imperative that Landowners are advised to take legal and professional advice at an early stage. Furthermore, the paragraphs should be amended so as not to simply refer to the advisors' fees being a matter of the Terms of Engagement (clause 4.16). The current wording suggests that this is simply a matter for the Landowner to agree terms with their advisor and that there is no recourse for recharging such costs to the Code Operator. This clause should stipulate that the Code Operator is obliged to meet reasonable costs and to confirm as much in advance of any dealings with a Landowner whom they are approaching with a view to acquiring significant rights which are both valuable to the Code Operator and which can impact significantly on the Landowners property.

Foot note 24 arising at paragraph 4.15 lists a number of professional bodies who can list a suitably qualified and experienced person. However, within all of those organisations, there will be a minority of members who are properly and suitably qualified and experienced in relation to telecommunications leases and the Code. As specialists in this market, with a dedicated team of professionals and having been involved in the industry since its inception in the 1980's we would suggest that the majority of professionals would not be suitable or qualified to deal with such matters. We would recommend that each of these bodies, if they are to be referred to, should provide a shortlist of actual specialists or specialist firms who will be best placed to advise a Landowner and who may be a better match against the specialist legal teams and agencies employed by the Code Operators.

The Operators employ specialist agents who work solely in the telecoms industry, which itself is well established. To ensure, therefore, that any landlord is able to enter in to a fair and reasonable agreement, professional representation from an equally specialist agent is a must.

New Agreements for the installation of Apparatus

4.19 We would expect that any new installation will require a site visit, if only to ensure that the Landowner is fully aware of the extent of any proposal and can raise any concerns in an ample timeframe.

Stage 1 – Site Survey
4.21 We would regard a site survey to be essential in every case.

4.22 The notice period should be a minimum of 7 days, not simply "around 7 days".

4.23 The paragraph refers to occupiers on sites. It is imperative that the Code Operators ensure that they are dealing with a party who has a lawful right to grant any necessary rights or agreements. There are many obligations placed upon the Landowner and as such there needs to be a facility for a Landlord or their representative to cover the costs of any investigations. Clearly any site acquisition agents will be paid by the Operators for their efforts so it is not unreasonable to expect the same to be applied to those providing the information required.

Stage 2 – Consultation & Agreement

4.27 & 4.30 We are concerned that reference to "Straight forward" (4.27) and "Simple" (4.30) will be open to extremely loose interpretation by the Operators. Such words should be more defined. Otherwise there is a strong likelihood that all agreements will be classed as such wherever full consideration needs to be given to any scheme of works.

Stage 3: Deployment Stage

4.32 This is a key area where sanctions are clearly essential. What is to happen when the Operator fails to comply with this paragraph?

4.33 Given that the Photographic Record of Condition is required to ensure that reinstatement takes place or that compensation is provided, this should be procured by the Landowner and retained by the Landowner, but the cost of the Record of Condition should be met by the Code Operator. After all, the record is only required as a result of the Code Operators' proposed works. The Code Operator may also wish to retain a copy, so as to be able to defend themselves against any spurious claims.

4.37 Access procedures will need to reflect the Landowner's primary use of the site.

4.39 The paragraph refers to emergencies. However, all too often we find that access requests are seemingly for routine maintenance but made under the claim of there being some "emergency" and upon little or no notice at all. The provisions for emergency access should be preserved for genuine cases and Code Operators should be required to fully evidence the need for emergency access. This will be impractical to implement where a site may be subject to a primary use such as a firing range, school, hospital, or a site with high levels of security clearance etc.

4.41 The obligations to inform Landowners should go beyond the names of other sharers. It should be extended to include the provision of information relating to the equipment installations, information regarding key terms of the site sharing

arrangement as well as confirmation that contractual obligations will also be met by the site sharer in relation to matters such as access, indemnities, insurances etc. From a security perspective this is absolutely paramount to ensure the safety and integrity of each site.

4.43 A permit should be issued to a Landlord for each individual attending site, denoting the time of arrival, names of individuals, car registration plates and the nature of the work to be carried out.

4.44 It is imperative that this information is provided in advance, not only to provide the Landowner with notification of who will be on their land or building but also to enable a Landowner to challenge any person on site who should not be present. A permit system as above would deal with this issue.

4.45 The last sentence of this paragraph is entirely flawed unless the word "reasonably" is placed before the word "possible". Arguably, anything is "possible" but if, for instance, there is some blockage caused by some third party, it should not be beholden on the Landowner to open up that access simply because it is within the realms of possibility that the Landowner could do so. Any costs which are incurred by a Landowner must be covered by the Code Operator.

Decommissioning sites that are no longer required

4.46 Not only is this a usual requirement of yielding up, there are usually planning conditions related to this issue. This is also a health and safety issue – who is liable should the equipment not be maintained and causes injury to an individual? The Operators must be obliged to remove, rather than simply having an option to refuse once the Landowner makes the request.

4.48 It should not be for the Landlord to have to chase the decommission of a site once an agreement ends. There must be obligation on the Operator to remove, unless there are exceptional circumstances.

Other

4.49 A timeframe is required for occupation following expiry. Thereafter, a yielding up provision should be included in the absence of a new agreement.

4.51 If the Landowner has a requirement to carry out essential repairs to that property, the Code Operator whose apparatus may need to be moved temporarily, should make best endeavours and act in good faith so as to effect the removal of the apparatus without incurring the Landowner in any unnecessary cost. This paragraph requires strengthening in order to give effect to that principle. In the absence of this, many Landowners will be deterred from granting any rights to a Code Operator from the outset. Consideration and priority must be given to the primary use of the building and the integrity of the

building. Any hindrance caused to essential building repairs must be prevented and not permitted under the Code of Practice.

4.52 Any requirement for a Landlord to obtain planning consent before then serving notice upon a Tenant/Code Operator, will invariably delay developments disposals and possibly prevent much needed development from taking place altogether. Code Operators should therefore accept that a notice given upon an expression of an intention to redevelop should be sufficient, rather than demanding copies of planning consents which have not yet been obtained.

4.54 The implications of obliging a Landowner to incorporate the communications apparatus within a re-development are, in reality, highly complex. This clause gives rise to huge potential of conflict as to what is "viable" and we consider that the word "reasonable" may be more appropriate. We disagree that any obligation should be placed upon a Landowner in this regard and it should be for the Code Operator to provide proposals and appropriate incentive rather than to oblige a Landowner to incur more cost in demonstrating whether or not the apparatus 'could' or 'should' be incorporated into any new development. Rather than simply striking this paragraph out, we believe that the clause should state that Landowners might give consideration to accommodating the Code Operators equipment within the new development but should be under no obligation to do so. The Code Operators should consider the new installation as a completely separate and as an entirely new project rather than presuming to have any absolute right to be considered within the new development scheme.

Draft Standard Terms

We are concerned that there should be any suggestion of Standard Terms when in reality the requirements of Code Operators and Landowners are so different and when sites vary to such a great degree. More particularly, to provide what is referred to as a 'Standard Agreement', which is so brief and inadequate, serves to set an expected standard of agreement which is well below the level which suitably knowledgeable and qualified legal and professional advisors would ever recommend to Landowners.

Furthermore, the Standard Agreement appears to heavily favour Code Operators. It appears to assume that Code Operators already have rights, but which are actually only obtainable by agreement between the parties unless the Operator can demonstrate to a court that their demand is reasonable. It also ignores the fact that provisos exist before such rights can be obtained. To assume that such rights exist and to include them in a standard agreement is wholly incorrect.

If this were to be a balanced proposal, then the Standard Agreement should contain a multitude of options available to the parties and allowing a choice of paragraphs which the parties can discuss. By a process of deletion of unnecessary paragraphs or wording, the parties may then end up at a suitable agreement.

It is completely inappropriate for Ofcom to remove a Landowner's ability to negotiate by allowing a committee to set out their view of what a Code Agreement might look like. Any Landowner who may wish to pursue different terms will undoubtedly have "Ofcom's Standard Agreement" quoted back at them. Experienced professionals will also have their own templates, which will have been agreed in the market place with Code Operators for many years.

We regularly utilise differing agreements between Greenfield sites, Rooftop sites and Site Shares on existing structures. This proposed document does not and could not cater for these differing scenarios.

Specifically, we have issues with the following:

1.1 "Apparatus" – This suggests that Apparatus is unlimited and yet the parties may agree that the wording should be more limited. Whilst the Electronic Communications Code might grant rights to Code Operators, there are provisos in this regard and the rights are by no means automatic. It is therefore wrong to roll out a standard document that makes this an automatic provision in favour of the Code Operators.

2.1(h) As worded, this clause gives the Code Operator the express right "to interfere with or obstruct a means of access to or from the Land". Clearly this is not right.

2.1(i) This is poor drafting – "any tree or vegetation" could be on third party owned land over which the Landowner has no authority or power whatsoever. In any event, there is no provision for compensation in relation to losses of trees.

2.3 Notifications should be provided for any access to site to upgrade the equipment. This should include a specification of the equipment to be upgraded and what the upgrade will entail, including any changes of frequencies to avoid any interference.

3 Payments – there should be no agreement without provision for a review of the payment due. The Code Agreement could continue long after the initial expiry date.

4(j) Operators should provide copies of any insurance or indemnity documentation

7.3 Any ambiguity should be ruled out and an agreement should specify the roles of each party. Otherwise each new agreement will need to confirm that the Landowner or their representatives are aware of the Code and have discussed matters, to ensure that the Landlord is fully aware of a 'default' position should there be any ambiguity.

8 Indemnity for Third Party Claims – this clause does not go anywhere near far enough and does not provide a proper and full indemnity for a Landowner. Code Operators wishing to access and use a Landowner's property should be willing to grant a complete indemnity for all costs, actions, suits, demands, liabilities and

claims etc. arising out of the occupation of, or the use of, the Landowner's property. It should also not be the case that a Landowner has to prove that the Code Operator has been directly negligent in order to make a claim against them. We are fully aware that Code Operators carry insurance generally way in excess of £5 million and a figure of £10 million or £20 million should be quoted here instead. More importantly, why should a Code Operator cap their indemnity to a Landlord in any event? This indemnity cap is not seen in the wider commercial market and should not be included in such agreements going forward.

10 If the parties wish to agree a mutual break then they should be able to do so. The proposed wording it too one-sided. Many Landowners would be deterred from entering into such an agreement without the ability to terminate the agreement. The Code Operator is still protected by the Code in such circumstances.

10.1(c) A methodology for compensation needs to be expressed, should a Landlord be prevented from completing any scheme.

10.3 If this is an immediate break provision for the Tenant, then the Landlord should have an opportunity to discuss an equivalent right to terminate notwithstanding the Code.

10.4 No timeframe is referenced therefore this needs to be resolved.

16 Standard practice in the Telecoms industry is for referrals to arbitration. We do not see any current leases referring matters to CEDR and this might not be anything like the most appropriate route for dispute resolution.

We would reiterate that we have grave issues and concerns in relation to the wording in almost every paragraph of the proposed Draft Agreement. Whilst we have highlighted certain clauses above, the fact that we have not mentioned other clauses does not mean in any way that we would agree them to be satisfactory or adequate. We whole-heartedly disagree with the concept of a standardised agreement, particularly one which is not well balanced.

We trust that our comments will be considered carefully by the Consultation Team. We will be happy to provide clarification or further information if required.

Yours faithfully

pp **Robert Paul BSc (Hons) FRICS**
Partner