Virgin Media's submission to Ofcom's consultation on its draft Code of Practice supporting the reformed Electronic Communications Code

Summary

Virgin Media welcomes Ofcom's prompt production of its Consultation Document on the draft Code of Practice, standard terms and conditions and standard notices. Given both the need for the New Code and the length of time that it has taken for the New Code to be implemented, Virgin Media considers that it is vital that the New Code should be operational as soon as possible. Virgin Media is also grateful for the opportunity it has had to participate in the cross-industry drafting process that Ofcom has coordinated.

The Government's intent when reforming the Electronic Communications Code was clear. The existing Electronic Communications Code presented a significant barrier to investment in fixed and mobile communications networks – a central priority for Government and Ofcom. The imbalance in negotiating power between landowners and Communications Providers (CPs), the absence of effective constraints on the cost of access, and the lack of practical redress in the event of disputes (all of which have led to landowners seeking "*ransom*" rents for the installation of a CP's network infrastructure) were identified by Government as problems that the new Electronic Communications Code would address.

> "The new Code will vastly improve on the existing Code. It will make major reforms to the rights that communications providers have to access land – moving to a "no scheme" basis of valuation regime. This will ensure property owners will be fairly compensated for use of their land, but also explicitly acknowledge the economic value for all of society created from investment in digital infrastructure. In this respect, it will put digital communications infrastructure on a similar regime to utilities like electricity and water. This will help deliver the coverage that is needed, even in hard to reach areas."[1] (*Fixing the foundations: Creating a more prosperous nation*, July 2015)
>
> "The Bill will bring billions of pounds of benefits to industry. The new electronic communications code recognises that digital connectivity is as important as a connection to water or electricity supplies. Providing new rights to install communications infrastructure will herald a revolution in rural connectivity, bringing the digital economy to all parts of our nation." (Culture Secretary Karen Bradley MP, House of Commons Debate 13th Sept 16)
>
> "We are reforming the electronic communications code in the Bill to help operators to extend their networks, making mast-sharing easier and infrastructure deployment cheaper...The new code, in recognition of not only the need for communications but the clear importance of digital communications to the economy, seeks to limit the cost of

[1] http://researchbriefings.files.parliament.uk/documents/CBP-7203/CBP-7203.pdf

deployment. Paragraph 23 introduces a "no scheme" basis of evaluation to ensure that land is assessed not at the value to the operator but at the value to the landowner" (Digital Economy Minister Matthew Hancock MP, House of Commons debate 28th Nov 2016)

The rollout of digital communications infrastructure in the UK

To reflect Government's clear intent – to speed up and reduce the cost of the rollout of digital communications infrastructure – Virgin Media believes the following principles should be reflected in Ofcom's Code of Practice, standard terms for wayleave agreements, and forms of notices that can be served under the new Code:

1. The parties should be free to negotiate the agreement which suits them without the risk of certain terms coming to be regarded as essential pre-requisites to any agreement. Whilst clearly Ofcom has a duty under paragraph 103(2) of the New Code to publish standard terms and conditions, care must be taken not to predispose negotiations in particular directions which might artificially create distortions. The inclusion of a standard payment term in the standard agreement needs to be modified so as to highlight to landowners that consideration will not be payable in all circumstances. For example, many landlords gain a benefit to their property by permitting their tenants to connect to state of the art fixed line broadband. Accordingly, the benefit which they gain more than compensates them for no, or very limited, consideration in respect of the wayleave which they grant and does not sterilise the use of the property, as in the case of mobile masts. The fact that consideration will not always be payable and the distinction between fixed broadband and mobile apparatus should be highlighted explicitly in the Code of Practice. Extreme care must be taken not to distort commercial negotiations through any implication within the standard agreement that consideration must always be paid.

2. There is a significant economic and societal value to the continued availability and expansion of ultrafast digital infrastructure across the UK. Therefore, costs to CPs associated with gaining a wayleave agreement should be reduced to the extent possible and the Code of Practice should not inadvertently introduce costs for CPs.

3. The process by which CPs negotiate with landowners and, where necessary, notify landowners of their intention to apply to court for a wayleave agreement (and vice versa for landowners seeking orders) should be clear and streamlined, minimising confusion and costs for landowners and CPs alike. This will be crucial to establishing a successful regime under the new Code.

4. Once wayleave agreements have been granted, CPs should have recourse to an efficient method for resolving any disputes, for example to deal with a situation where a landowner is unwilling to provide access pursuant to the wayleave agreement. Speedy resolution of any such disputes should be the upmost priority in cases where a negotiated outcome is not possible. It is important that the Code of Practice and standard terms do not inadvertently

create process hurdles, not envisaged by the new Code, which slow the pace of CPs' recourse to the courts.

There are a number of ways in which the draft Code of Practice, standard terms and notices fall short of these principles as currently drafted. Virgin Media outlines below recommended amendments that Ofcom could make to ensure that the Code of Practice and standard terms supports the twin objectives of speedier and more cost efficient deployment of digital communications infrastructure across the UK.

[redacted]

Responses to Ofcom's 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?

Whilst the Code of Practice has been developed by a group consisting of valuation experts, national landowner interests and CPs, each with a mature understanding of complex access arrangements, this document will also be used and relied upon by landowners with less extensive knowledge of the new Code.

Virgin Media has a general concern that the Code of Practice is not as "user friendly" as it might be for the non-institutional landowner community, who are unlikely to have the resources to obtain an intimate understanding of the constraints of the new Code and will likely be very dependent on the Code of Practice to understand what their rights and obligations are. In some ways it may inadvertently confuse or mislead the landowner into misunderstanding the processes and in

particular their obligations under them. Lack of simple clarity could cause delay and/or create unnecessary process, which would slow deployment and increase the likelihood of legal disputes.

It is therefore imperative that the Code of Practice is as clear and effective as possible, to minimise the extent to which Virgin Media (and other CPs) needs to pursue legal action. The recommendations presented below will help ensure that the Code of Practice is a workable document.

The specific sections of the Code of Practice that are of particular concern are:

Paragraphs 4.15 – 4.17 - Professional Advice

Ofcom begins this section of the Code of Practice with the statement that "Landowners and Operators **may** choose to negotiate directly with each other" (emphasis added). Rather than the use of the word "may", Virgin Media considers that Ofcom should encourage landowners and CPs to always try to negotiate directly with each other, at least in the first instance, by imposing an obligation on the parties to engage directly with one another. This reinforces the principle established by Ofcom in paragraph 4.12 regarding the centrality to the objectives of the creation of good working relationships between the parties. In the vast majority of cases it should be possible for the parties to reach agreement without the need for professional advice, thereby reducing time and costs for both landowners and CPs: this should be the central message in the Code of Practice.

As drafted, however, the Code of Practice provides no assistance to a landowner as to the circumstances where professional advice might be needed and could be construed as suggesting that obtaining professional advice is normal in all circumstances. This inference appears to be, to a degree, reinforced by paragraph 4.16 directly discussing the issue of agreeing advisor's fees. Ofcom should be more definitive in outlining the circumstances in which a landowner may wish to seek professional advice and those in which it is unlikely to be required. Ofcom could list the types of issue that may warrant professional advice, for instance, complex requests involving multiple visits to the property per annum, or those involving above ground infrastructure such as a mobile mast. In contrast, a simple agreement to install cable infrastructure below the ground without complex access requirements could (and in many cases, should) be agreed without enlisting a professional advisor. Written in this way, the Code of Practice has the potential to be of more practical use to the landowner community.

Paragraph 4.16 suggests that such advisor's fees are to be agreed in advance but offers little or no guidance as to who is responsible for those costs or as to what is reasonable in terms of the quantum of those fees. The risk is that this paragraph is taken as meaning the CP should always be responsible for the fees of any advisor to the landowner and, thus, encourage landowners automatically to employ professional advisors, even though the circumstances of the case may not require this. Further, there is a very real risk that disputes over professional fees may be used by landowners as a tactic to leverage better terms from CPs. Therefore, in addition to making clear that there is no norm that the CP should pay the fees of the landlord's professional advisor, Ofcom should stipulate in the Code of Practice that landowners should incur only reasonable costs and not use this as means to gain wayleave agreement payments by the back door. Indeed, under

residential landlord and tenant law landowners are subject to legislation protecting tenants from the imposition of unreasonable fees for granting consent to a tenant's application[2]. A recent landlord and tenant case confirmed that the courts are establishing the point that consents cannot be used by unscrupulous landlords to profit from a process[3] - a principle that should be reinforced by Ofcom in the Code of Practice.

Finally on these paragraphs, referral to a professional advisor can lead to significant delay in reaching an agreement. The Code of Practice should also set a firm expectation that, if professional advice is to be used, it should be sought and provided expeditiously. In the event that landowners use the seeking of professional advice to delay the granting of a wayleave agreement, it is a matter that is likely to be highly relevant to any subsequent court proceedings and the costs of such proceedings. The Code of Practice should remind landowners of this.

Paragraphs 4.21 -4.23

Virgin Media welcomes Ofcom's specific reference to the potential need for initial on-site surveys. Virgin Media's experience is that these are often necessary. The critical issue, however, is that some landowners simply ignore Virgin Media's request for access.

Ofcom's Code of Practice needs, therefore, to firmly emphasise that landowners should speedily permit reasonable requests for access for site surveys and that if such requests are ignored, it is likely to lead to serious cost consequences in any future court proceedings that may prove necessary. At present there are clear requirements imposed on the CP as to how to request site access in these paragraphs and in Schedule A in Annex 5, but no corresponding requirement on the landowner as to its requirement to respond so such requests promptly and to allow speedy access. (Incidentally, paragraph 4.22 refers to "Annex" A rather than "Schedule" A).

Paragraphs 4.24 and 4.25 – Consultation and Agreement

Virgin Media acknowledges that Ofcom has made clear that the list set out in paragraph 4.24 includes examples of the apparatus that may be deployed under the new Code and is far from exhaustive. Virgin Media also appreciates that a lengthy, more detailed list may unnecessarily complicate the document. However, Virgin Media believes that Ofcom should be more explicit in the first sentence of paragraph 4.24, reiterating the language of paragraph 4.11, about the fact that there are significant differences between different technologies e.g. mobile and fixed line CPs, and what their apparatus consists of such that there cannot exist a one-size-fits-all approach.

In paragraph 4.25 Ofcom refers to "different consultation processes". However, Ofcom does not provide any guidance on what each of these processes may look like or what is meant by reference to "consultation". Virgin Media interprets Ofcom's meaning as referring to the negotiation of an agreement – this should be clarified with language to that effect i.e. "Each of these examples could require negotiations leading to different agreement terms". It should also be flagged that consideration will not always be payable by a CP for wayleave access.

[2] Commonhold and Leasehold Reform Act 2002 inter alia
[3] West India Quay v East Tower (2016) EWHC 2438(ch))

As set out at the outset of this response document, the processes that need to be undertaken in order to obtain a wayleave should be clear and streamlined minimising confusion and costs for landowners and CPs alike and avoiding any undue delay.

Paragraph 4.27 - Consultation and Agreement

Virgin Media welcomes Ofcom's recognition that there are circumstances in which a simple written wayleave agreement is sufficient. However, the Code of Practice only refers to "a single cabinet or pole" as examples of "standard apparatus" and does not provide further detail on what else might fall within the definition of "standard apparatus". Virgin Media suggests that in order to follow the logic and reflect the language used within paragraph 4.11, the list of "standard apparatus" should refer also to "a short length of cable". Ofcom could also include some examples of proposals that are less simple in order to guide the reader e.g. mobile masts.

Paragraph 4.51 – Repairs to a Landowner's property

Virgin Media is concerned about the absence of caveats to the landowner's right to request that equipment '*be moved temporarily*' to allow effect essential repairs to the property. Whilst this is balanced against a requirement to ensure that any disruption to communications services is minimised, Virgin Media is concerned, for example, that landowners may see temporary removal as the first option for carrying out repairs rather than an option to be used only when other potential options are not available. Accordingly Virgin Media would welcome some consideration of the circumstances in which this right would be exercisable by the landowner.

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

Virgin Media participated in the drafting of the Central London Forward standardised wayleave agreement and is now using that template wherever possible for new connections across London. In general, Ofcom's replication of large parts of that template for its standard form wayleave agreement is therefore a welcome and sensible approach. However, Virgin Media remains concerned that the standard agreement should not become seen as the de facto agreement to be used in all cases. As explained above, the freedom to negotiate commercial agreements is very important and the standard terms must not become a regulatory straight-jacket, in particular in relation to consideration. Virgin Media has identified a number of specific areas in which the standard terms would benefit from greater clarity or specificity.

Clause 1 – Definitions and Interpretation

In Clause 1 "Operator" is defined as "any person in whose case the Code is applied by a direction under section 106 of the Act. However, in the Parties section at the start of the wayleave agreement, the relevant CP has already been defined as "The Operator" which is then referred to in Recital B in terms that "The Code has been applied to the Operator by virtue of a direction under section 106 of the Communications Act 2003." Therefore, the definition in Clause 1 seems redundant and indeed

potentially confusing, particularly to landowners who do not engage legal advice, and should be deleted leaving the definition of "The Operator" to be the party to the wayleave agreement.

Clause 2 – Rights of the Operator

In the section on the rights being granted at 2.1(c), (e) and (f) it states that the Operator can *"inspect, maintain, adjust, alter, repair, operate **or** upgrade the Apparatus" (emphasis added).* The word "or" needs to be changed to "and" since the exercise of those rights is not mutually exclusive.

The wording of clause 2.3 is not clear. In particular, the wording in brackets "(and exercise the associated rights as set out in clauses 2.1(e), 2.1(f) and 2.2)" is confusing. Is it intended that the Operator can only exercise the associated rights in respect of the upgraded or shared equipment if the test in sub clauses (a) and (b) is passed? Whilst the wording of sub-paragraphs (a) and (b) reflects the wording of the new Code, it is not yet clear what "minimal adverse impact" and "additional burden" actually mean in practice, and neither is defined in the new Code.

Clause 3 – Payment

Virgin Media is concerned that Clause 3 of the standard form of wayleave agreement presumes that some payment will be paid in all circumstances (and we note that Section 11 of the new Code which sets out the requirements for code agreements does not include a requirement for consideration). Many wayleave agreements are agreed and installations carried out without any payment being made and it is entirely possible that a CP and landowner will agree a wayleave agreement with no fees attached. As already mentioned above, the landowner may well gain a significant benefit from the new communications apparatus and it is in its interests to agree a wayleave without any consideration payment by the CP. Indeed, it is Virgin Media's policy to seek wayleave agreements on a no fees basis. The standard form of wayleave agreement should acknowledge this with a specific statement that the fees may be nil – Ofcom's inclusion of parenthesis is insufficient to indicate to landowners that this clause may not be included in all wayleave agreements.

Virgin Media would suggest amended language as follows: "[The Operator agrees that it will pay to the Grantor, in respect of this Agreement, the sum of [*insert amount*] pounds (£[*insert amount*]) [per annum / for the Term]] OR [The Grantor and Operator agree that no fee is payable in respect of this Agreement]". Virgin Media also suggests that Ofcom includes a footnote referring the reader to paragraph 4.11 of the Code of Conduct to highlight that differences in technology may result in different commercial Agreement terms, and re-iterating that consideration will not always be payable.

Clause 5 – the Grantor's Obligations

Clause 5.1(c) allows the landowner to give '*reasonable prior written notice to the Operator of any action it intends to take that would or might affect the continuous operation of the Apparatus*', and this includes interrupting the power supply. It doesn't contain any caveats or controls to protect the Operator. In practice, wayleave agreements are generally negotiated on the basis that the landowner will not do anything which might interfere with the operation of the Apparatus once in

place as this has the potential to affect the critical services received by all customers of the Operator. Virgin Media consider that clause 5.1(c) should therefore be deleted. Please see our comments on clause 10 below where we have suggested the inclusion of "lift and shift" rights to allow Landowners to relocate apparatus where necessary.

Clauses 8 &9 – Indemnity for Third Party Claims and Limitation of Liability

Clause 8 of the standard form of wayleave agreement includes an indemnity which is drafted more widely than those which are currently standard within wayleave agreements. Clause 9 sets out liability provisions which include indirect losses and consequential and economic loss, all of which are typically excluded and should not form part of any standard form of wayleave agreement. Virgin Media would also expect to see inclusion of an obligation on the party receiving the indemnity to seek to mitigate its loss.

Clause 10 - Termination

Paragraph 31(3) of the new Code specifies a period of 18 months' notice to be given in each of the circumstances for termination. Under clause 10.1, the draft standard terms include a significantly shorter period of 30 days' notice (albeit in square brackets). Inclusion of a timeframe in conflict with what the Code actually permits will only create substantial confusion and the potential for unnecessary litigation. Virgin Media, accordingly, submits that the time frame expressly used in the new Code should be used.

At **clause 10.1(c)** there is a right for the landowner to terminate the agreement if they intend to redevelop their land. There is no corresponding obligation on them to seek to relocate the Apparatus of the type we usually see in a lift and shift provision similar to clause 7 in the City of London standardised Wayleave Agreement. This obligation is normally included in any agreement so that Ofcom's current wording is considerably less favourable to the Operator than we would expect to see in a clause of this nature.

10.1 (d) – this clause is incomplete and should reference the full text of the corresponding right under Paragraph 21 of the Code with the Landowner having a right to terminate for redevelopment

10.2 – there is a numbering error in the draft and there is no sub-clause 10.2.

10.4 – it is not standard practice in all cases for Apparatus to be removed on termination where this would cause unnecessary disruption (having been agreed with the landowner), Virgin Media suggest the inclusion of the words " or make safe" after the word "remove" in the third line of this clause in order to make it clear that removal may not always be appropriate.

In addition, there is no provision for the reimbursement of any rental payments paid in advance in respect of the period following the date of termination. Given that the standard wayleave agreement envisages that any rent would be paid annually in advance, Virgin Media would recommend that, on those sites where a rent is being paid, such a provision should appear in the draft.

Clause 16 - Mediation

Virgin Media notes that the mediation provisions in Clause 16 of the standard form of wayleave agreement envisage that a mediation ***must*** occur in respect of any disputes arising under the agreement, and that court proceedings cannot be commenced by either party until a mediation has taken place.

Virgin Media does not consider that compelling parties to spend time and cost on mediation in every case is in keeping with the objective of ensuring that digital infrastructure can be rolled out quickly and with little cost. It will simply create an additional procedural hurdle which may prove to be a complete waste of time and money. Such procedural obstacles are precisely what the new Code was designed to avoid.

There will of course be circumstances where alternative dispute resolution is appropriate, but this will not always be the case (for example if the parties want a test case ruling on the meaning of parts of the new Code). To that end, whilst the agreement should encourage the parties to consider mediation, it should not compel it in every case. In view of this, any wording that is included in the standard wayleave agreement should not prevent parties from seeking immediate recourse from the courts.

The wording in clause 16 should therefore be amended so as to encourage the parties to meet to discuss any disputes on an informal basis and/or to consider whether mediation is appropriate, but this should not be a requirement, and a restriction on commencing court proceedings until such steps have been taken should not be included.

In this respect Virgin Media would specifically point to the Government's comments in Parliament during the passage of the Bill, where it was clear that emphasis was placed on there being an effective court process under the new Code. Parties to wayleave agreements should not be hindered in using this process where disputes arise:

"It is essential that that is all underpinned by an efficient and expert forum for dispute resolution. Specialist expertise here is important. Ensuring effective broadband and mobile coverage is critical and the code provides a modern and rigorous legal foundation for the roll-out of apparatus" (Digital Economy Minister Matthew Hancock MP, House of Commons Debate, 28th Nov 2016)

"This places the court in the position of adjudicator of code disputes. In arriving at their decisions the courts will of course consider the conduct of parties, both generally and in relation to what has been set out in an industry code of practice. So whether a party has complied with the code of practice

will ultimately be subject to the scrutiny of the court…An additional layer of adjudication by a person other than the court is not necessary and would be a costly and burdensome duplication"
(Parliamentary Under Secretary of State, Lord Ashton of Hyde, Report Stage of DEB, 22nd Feb 17):

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?

Yes

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

The new Code does not envisage that separate notices for interim access would be required in addition to a Paragraph 20(2) notice. Virgin Media therefore sees separate Paragraph 26(3) notices for interim access as unnecessary (as Ofcom appears to in respect of temporary code rights under Paragraph 27 which it has combined within the Paragraph 20(2) notice). The Code of Practice appears to envisage that two separate notices will need to be served – one to notify the relevant party that a wayleave agreement is required, and a second to request interim access pursuant to the same premise. This could lead to confusion and grounds for an occupier to assert that two sets of court proceedings are necessary which would cause additional cost and time being spent, and potentially result in there being issues with bringing the two matters together into one court action. The draft Code of Practice should be amended to clarify that one consolidated notice under Paragraphs 20(2) and 26(3) will be sufficient to advise an occupier that a Code Agreement is being sought and that an application for interim access will also be made.

June 2017