Consultation: Electronic Communications Code of Practice

Cellnex UK Response

November 2023

Overview of Cellnex UK

Cellnex Group

This response is submitted by Cellnex UK (link), part of Cellnex Group (link) which:

- Supports over 420 million mobile connections across Europe
- Operates >70,000 mobile sites today, which will grow to >130,000 by 2030
- Is Europe's leading neutral host mobile infrastructure provider, covering 12 countries: Austria, Denmark, France, Ireland, Italy, Netherlands, Poland, Portugal, Spain, Sweden, Switzerland and the UK
- Provides mobile infrastructure services, private and mission-critical networks, distributed antenna systems and small cells, and smart/IoT and innovative services
- Operates sixteen mission critical networks in Spain for emergency bodies to ensure public safety
- Has deployed forty private networks across Europe for enterprise applications
- Had an annual turnover of €3.5bn in 2022
- Is listed on the main sustainability indices, and evaluated by highly reputable international analysts such as CDP, Sustainalytics, FTSE4Good, MSCI and Standard Ethics

Cellnex UK

We are the trusted partner of all the major UK mobile network operators, hundreds of private businesses, the emergency services, as well as the UK Government, specifically Cellnex UK:

- Is the UK's leading independent wireless connectivity infrastructure company
- Operates >9,000 mobile sites today, which will grow to >13,000 by 2031
- Has deployed over 1,000 small cells to date
- Is a provider of private networks in campus and indoor environments
- Is an indoor mobile coverage provider, most notably in the Etihad stadium in Manchester
- Is deploying contiguous mobile coverage and capacity along the 81km Brighton to London Mainline and three major stations
- Has won three DCMS 5G competitions, working collaboratively with universities and start-ups to deliver 5G innovation
- Employs around 300 people across four major UK locations – Reading, Manchester, Scotland and Leamington Spa
- Has invested £6.1bn in the UK since 2016

Basis of Response

We have reviewed and commented on this consultation on the basis of Cellnex as a code *Operator*, more specifically as an organisation that provides a system of infrastructure.

Important Note: We have aligned our response to the Ofcom's approach of using the word *Operator* and *Site Provider* but as per our response to Question 3 we note that Ofcom should not be seeking to re-define or change the meaning of these terms which are defined in legislations and also being interpreted by the courts on an ongoing basis.

1. Do you have any comments on our proposals relating to improving the clarity of the Code of Practice?

Cellnex UK believes that it would be helpful to draw out upfront, for all Code of Practice ("COP") users, that the wider context of the code and COP is to deliver the public good in a connected world where excellent communication links are vital for people's daily lives and the economy. As a result we suggest Ofcom adds wording to this effect A2.4:

"The Code was subject……..to roll out electronic communications apparatus, *which is ultimately for the benefit of the public interest in ensuring a choice of high quality electronic communications services*"

2. Do you have any comments on our proposals relating to including legislative changes in the Code of Practice?

Please refer to our response to Question 8 regarding *Sharing and Upgrading* where we highlight the need to acknowledge (i) the code right to upgrade and (ii) the introduction of a new code right for the main *Operator* to share apparatus.

3. Do you have any comments on our proposals relating to the definition of 'Site Provider' in the Code of Practice?

The concept of occupier is one that has been interpreted by the Supreme Court in terms of *Operators* in occupation not being the occupier. It is also likely it will be further interpreted by the courts in respect of who constitutes the occupier and who are the other parties that might be bound by code rights.

The COP should not seek to deviate from any guidance or commentary provided by legislation and/or the courts.

Ofcom should make it clear that the use of terminology such as *Site Provider*, occupier and landowner does not seek to interpret the meaning of the legislation or impose obligations that deviate from it.

4. Do you have any comments on our proposals relating to contact information in the Code of Practice?

Cellnex UK does not have any comments on Ofcom's proposals.

5. Do you have any comments on our proposals relating to professional fees in the Code of Practice?

Cellnex UK proposes that further content is added into this section of the COP to address some of the root cause of disagreements over fees.

We have experienced advisors fees which are dramatically in excess of market norms, creating a 'ransom situation' at the point an agreement is to be concluded; we also note some professional advisors refuse to commence negotiations until an unlimited fee undertaking is given.

Operators are unlikely to have a written policy in relation to fees but the principal of paying a reasonable contribution to fees, where a *Site Provider* would otherwise be out of pocket, is supported by Cellnex UK.

However, the amount of fees being charged by *Site Provider's* advisors should be commensurate with what they would pay if funding the activity themselves, and not dissimilar to what *Operators* themselves are paying. As a result we think it would be more appropriate to refer to an *Operators* 'approach to fees' rather than 'fee policy' within A2.19.

We also believe it would be helpful to include references to what would be considered a reasonable or unreasonable contribution towards a *Site Providers*' fees, notably:

- it is unreasonable to require an *Operator* to pay fees which are not commensurate with what would be expected to be paid in the market for a similar transaction if the *Site Provider* was funding the work itself, and what the *Operator* is likely to pay for its own fees;
- it should be assumed that the professional advisers have a reasonable level of experience in telecommunications, i.e. the *Operator* should not be funding 'training' time for an inexperienced solicitor or agent;
- *Operators* should not be paying costs on disputed points of law and, where the law is settled, *Operators* should not be paying to reargue those points; see *EE Ltd and Hutchison 3G UK Ltd V The Mayor and Burgess of the London Borough of Islington;*
- It may be helpful for the National Connectivity Alliance ("NCA") to conduct a review, which could be updated from time to time, of the rates being charged for negotiating code agreements and publish this; showing the average and possible range of fees being charged for standard transactions by both *Operators* and *Site Providers*.

Ofcom via the COP should:

(i) Refer to an 'approach to fees' rather than a 'fees policy'

(ii) Provide guidance on fee values that are reasonable, ideally via reference to an NCA market review

(iii) Include within the COP principles which are unlikely to be reasonable (see above)

6. Do you have any comments on our proposals relating to responding to a request for access in the Code of Practice?

Our comments in this section focus solely on the appropriateness of Alternative Dispute Resolution ("ADR") for new agreements for the installation of apparatus on new sites or existing sites. We have not made any comments on the other areas regarding request for access that Ofcom has detailed.

6.1. Alternative Dispute Resolution for New Agreements for the Installation of Apparatus

Any stipulation necessitating *Operators* to consider ADR at a point where a *Site Provider* has failed to respond to repeated requests for access (A2.25) is a significant concern to Cellnex.

While we strongly support the deployment of ADR – in particular 'principal to principal' discussions regarding terms for the longer term occupation – *Site Providers* should, by default, be responding swiftly and in accordance with specified statutory timescales to requests for access where plans exist for a new installation.

For example, a request to access for a survey to establish whether a site is suitable for new deployment should be a simple procedure and not subject to delays. A requirement for formal ADR would significantly slow down the process towards improving or restoring public services.

The code specifies a 28 day period for notice for new rights and, in the case of urgent requirement, permits the *Operator* to apply to the court for resolution before 28 days. A requirement to request, arrange and conduct ADR, after a *Site Provider* has failed to respond to requests for access for survey, is in conflict with this statutory provision that reflects the need to avoid delay in new deployment.

For longer term rights ADR should be considered by both parties, in particular constructive negotiations between principals that enable both parties to discuss their key objectives for the agreement. However, these negotiations should be encouraged as soon as the *Operator* first approaches the *Site Provider* for new rights, during the statutory period provided for negotiations and not at the point the *Operator* is forced to issue proceedings because the *Site Provider* has failed to respond to repeated requests for access or is specifying unreasonable terms.

We are genuinely concerned that the specific signpost to ADR as best practice under such circumstances will lead to delay and unnecessary escalation of costs.

Ofcom should remove the requirement for ADR where the "Site Provider fails to respond to repeated requests for access". This is not appropriate behaviour from a *Site Provider* and such behaviour should not give rise to a requirement for *Operators* to seek ADR at a point at which they are already suffering delay and frustration. ADR is already being offered in the form of negotiation in those repeated requests for access.

Ofcom should add the following additional words in para A2.37 : "Although the Code provides a mechanism …..an ADR process within the statutory period provided by the Code or after an application has been made to the court where it has been necessary for the *Operator* to do so."

Ofcom via the COP should:

(i) explain that ADR is supported as a means of reaching agreement on long term rights but is not appropriate where the *Operator* is seeking access to survey whether a site is capable of hosting new electronic communications apparatus;

(ii) encourage the use of ADR during the statutory period provided for negotiations in the code, in particular the use of 'principal to principal' discussions where disputes arise between advisors;

Ofcom should also implement the specific amendments noted above, or introduce similar wording to this effect.

7. Do you have any comments on our proposals relating to electromagnetic fields exposure in the Code of Practice?

We have two specific comments regarding electromagnetic fields ("EMF") exposure.

We note upfront that accountability for EMF compliance lies with licensees (e.g. mobile network operators, Airwave, private mobile) under the Wireless Telegraphy Act or other relevant legislation and associated regulations; these may or may not be *Operators* at an individual site level (i.e. Cellnex UK is an *Operator* under the code, but not a licence holder).

7.1. Paragraph A2.43

This section should be used to reassure *Site Providers* that the obligation for public EMF safety is the responsibly of the radiating party (e.g. the licensee) via legislation and regulation; with accountability for provision of information to enable worker EMF safety lying with the *Operator*.

As a result of the above the COP should clearly state that *Site Providers* do not need to undertake their own assessment of public EMF safety and that *Operators* and/or licensees do not need to provide public EMF compliance documentation to them.

7.2. Paragraph A2.44

It is important that there is cooperation between the *Site Provider* and *Operator* to ensure both parties can meet their relevant health and safety obligations. This may include situations where the *Site Provider* undertakes activities within proximity of the *Operator's* installation and associated worker ICNIRP exclusion zones.

However, Cellnex UK does not agree with the current drafting of this section of the COP. This paragraph infers that there may be a requirement for a *Site Provider* to undertake an EMF assessment to understand and meet health and safety requirements. Responsibility for EMF compliance is not for the *Site Provider* to check through independent assessment; this was confirmed in the case of *On Tower UK Limited v AP Wireless II (UK) Ltd [2022].*

The COP should reassure *Site Providers* that exclusion zones do not pose any risk to their use of their premises, provided they pay attention to sign posted instructions or matters raised to them by *Operators*. Where a *Site Provider* is concerned that a non-regular activity might involve entry into an exclusion zone, the *Operator* should provide sufficient information for the *Site Provider* to be able to undertake their activity safely.

Accordingly, paragraph A2.44 should be reworded to remove reference to *Site Providers* carrying out their own EMF assessment.

Likewise, *Site Providers* should not be encouraged to seek records to check *Operator* and/or licensee compliance. Instead the COP should note that the information that an *Operator* should provide should only be what is reasonably necessary for the *Site Provider* to undertake its own activities safely from the premises.

Ofcom should reword paragraph A2.44 to:

(i) remove reference to *Site Providers* carrying out their own EMF assessments; and

(ii) remove reference to *Site Providers* accessing records to check on *Operator* compliance

(iii) include a requirement for *Operators* to provide reasonable information to *Site Providers* to allow them to use their premises safely

8. Do you have any comments on our proposals relating to the sharing and upgrading of apparatus in the Code of Practice?

Cellnex has significant concerns about the proposed wording in this section; we urge Ofcom to revisit this section to promote the importance of legal rights for the benefit of citizens and the digital economy.

Sharing of communications sites and infrastructure is an important policy foundation of the Communications Act 2003 and other legislation; sharing reduces the impact of a proliferation of sites in the environment and increases choice for consumers.

Part 1, Paragraph 113 of the National Planning Policy Framework states "use of existing masts, buildings and other structures for new electronic communications capability (including wireless) should be encouraged". Likewise, the upgrading of apparatus on communications sites, while an expensive undertaking for *Operators*, results in enhanced services for the public.

This context is missing from this section of the COP, which focuses too heavily in the minimum rights (provided by paragaph 17 of the code) and may give the impression that it is normal to limit these rights, when the opposite is the case on electronic communications sites. Important case law and recent revisions to the code legislation as a result of the Product Security and Telecommunications Infrastructure Act 2022 (see below) confirm much wider rights to upgrade and share are encouraged by the courts as normal practice so that *Operators* and infrastructure providers can respond to technology advances and coverage demands as they arise.

8.1. Paragraph A2.58

This provision should be removed or moved later in the section to explain that whatever *Operators* and *Site Providers* agree, basic minimum rights can never be excluded.

8.2 Paragraph A2.59

This paragraph should be removed or amended. It repeats the emphasis that *Site Providers* should be thinking about these rights from the perspective of the bare minimum, which is unlikely to provide sufficient flexibility for an *Operator* on an electronic communications site. It also fails to state that code rights in paragraph 3 of the code (which were enhanced by Section 57 the Product Security and Telecommunications Infrastructure Act 2022) include rights to upgrade and share that are not limited by the position in paragraph 17.

For infrastructure providers, like Cellnex UK, whose statutory purpose is to provide an infrastructure system for other providers of electronic communications networks, this starting point is too restrictive and does not reflect the settled law on the subject, see for example:

- *On Tower UK Limited v J H & F W Green Limited [2020]*
- *On Tower UK Limited v J H & F W Green Limited [2021] EWCA Civ 1858*
- *On Tower UK Limited v AP Wireless II (UK) Ltd [2022]*

The Upper Tribunal and the Court of Appeal has made it clear that the provisions contained in paragraph 17 of the code, and in particular sub-paragraphs (2) and (3) are the floor rather than the ceiling, and there are often legitimate reasons for unrestricted rights to share and upgrade a site to be permitted. It should be possible to assess the impact of having other sharers exercising the rights in the agreement at the outset, to avoid dispute at a later date.

8.2. Paragraph A2.60

The statement:

"if an *Operator* wishes to secure more extensive rights, it is for them to explain why."

Should be replaced with:

"It is usual for *Operators* and infrastructure providers managing mast or rooftop sites to require flexible rights that enable them to upgrade apparatus as better technology becomes available and/or share the site with additional *Operators* where they have a network requirement that will bring increased choice or better services to a local area. If the *Site Provider* has genuine concerns

(i.e. due to particular sensitivities specific to the site) about the number of *Operators* that might access a site or the amount of apparatus that might be installed on a site, these should be raised with the *Operator* during negotiations so that concerns can be addressed. Then, if appropriate, the *Operator* will take into account any burdens caused to the *Site Provider* when agreeing special terms or compensation."

8.3. Paragraph A2.65

The *Operator* does not have an obligation to ensure 'upgrading and sharing has no adverse impact on the land or does not impose any burden' unless the agreement it is entering into limits the rights in this way. Burden may be inevitable and is addressed through the consideration and compensation granted to the landlord under paragraph 24 and 25 of the code; this statement should be removed.

8.4. Paragraph A2.67

This relates to Paragraph 74 of the code which talks about apparatus on and over land so this should be moved out of this section which covers underground works.

8.5. Paragraph A2.68

This proposed provision should be removed. Such notification is not required under the code and would be void as a term relating to sharing under paragraph 17 of the code.

If a *Site Provider* needs to understand specifically who is on site at a particular time for a particular reason then it can serve a notice under paragraph 39 of the code. Otherwise, this creates an unreasonable and unnecessary administrative burden on an *Operator* who may operate thousands of sites. If there is a sensitive site scenario then, if appropriate, *Operators* will consider including special terms within the agreement if raised at negotiation stage.

Ofcom needs to rewrite this section and shift the focus away from minimum sharing and upgrade rights to flexible rights that help deliver better quality and choice of electronic communications services for the public during the term of the code agreement; as detailed in legislation and supported by case law.

Ofcom should also implement the specific amendments noted above, or introduce similar wording to this effect.

9. Do you have any comments on our proposals relating to ADR in the Code of Practice?

We note upfront that the code encourages consensual negotiations and provides for an appropriate period for agreement to be reached before legal action can commence to impose rights. These periods reflect the importance of the rights needed, providing a shorter period for new rights, 6 months for a renewal or modification and 18 months for a termination. ADR should always be considered as a way of resolving disagreement within this framework, however, the COP should not seek to change this nor add process steps regarding ADR.

ADR can take multiple forms, including negotiations and we always seek to engage in meaningful discussions often over several months to reach consensual agreement. It is common place for negotiations to take place with the *Site Provider's* agent, with the *Operator* contributing to their reasonable fees. However, where agreement cannot be reached, principal to principal discussions are often the best way to aid understanding between the parties on their respective concerns and requirements and to reach compromise that allows a positive ongoing relationship; we note that this can be resisted by some agents.

9.1 Paragraph A2.86

The reference to "Alternative Dispute Resolution Schemes" suggests a formal ADR procedure is required to be undertaken prior to asking for court intervention. Cellnex believes this wording goes too far and the COP should state "alternative dispute resolution, which can and should commence with meaningful discussions between agents and/or principals".

Formal ADR procedures such as mediation or expert determination can be very useful to find compromise where there are practical issues, however, they can involve fairly significant costs. Where there are legal issues in dispute, the Tribunal is the correct forum. Mandating formal ADR prior to this adds costs for both parties and delays the improvement of connectivity so should not be encouraged.

The diagram in this section suggests that ADR is different to negotiations (first box) and that formal ADR procedures should follow those negotiations (second box) prior to use of Tribunal. The first and second boxes should be combined to include negotiations as a form of ADR and so that formal ADR is considered only where there is genuine chance of resolution being achieved avoiding further court escalation.

The third box should say "Where the parties have not been able to reach agreement on terms or resolution of a dispute within a reasonable period the ultimate recourse is to the Tribunal"

The COP should highlight that it is important that ADR is not used in a way that creates delay. The *Site Provider* should engage early in negotiations so it becomes clear which terms may need further discussions. Formal ADR procedures should not be called for by the *Site Provider* late in the negotiation period to avoid a court application being made when there has been failure to engage properly or obvious deadlock on certain terms. However, it should also be noted in the COP that the ability of parties to engage in ADR continues even after proceedings have been issued.

9.2 Paragraph A2.88

This section should include a note encouraging parties to consider ADR at an early stage rather than at the point the statutory time period has elapsed and either party may have a legitimate need to issue proceedings.

Ofcom should add the following

"*Operators* are required to consider ADR, if it is reasonably practicable to do so, before making an application to the courts and must make occupiers and *Site Providers* aware that ADR is available. Negotiations are a form of ADR, along with more formal ADR procedures which may in some circumstances be considered helpful to aid a consensual agreement during the period provided for reaching agreement under the Code."

9.2 Paragraph A2.91

This paragraph suggests that notices should be served only after attempts to negotiate have failed. This conflicts with the code which provides that an *Operator* should serve a statutory notice when requesting code rights; service of the notice explains the statutory effect of the code rights to the *Site Provider* and does not need to be a precursor to litigation.

This is particularly important in the case of renewal or modification of an expired agreement. A six month period is afforded by the code in which to conduct those negotiations, this period commences when the statutory notice is served, and it is inappropriate to delay service of the notice. In the same way as a *Site Provider* should not be expected to delay service of a paragraph 31 termination notice while it engages in negotiation.

This paragraph should make it clear that ADR is available at any time even after proceedings have started, hence it should be amended to read:

"It is usual practice for *Operators* to serve legal notices early in discussions with a *Site Provider*. This is so it is clear to the site provider the statutory framework in which those discussions are taking place and does not inevitably lead onto formal proceedings. There may be occasions, though, where either party may need to issue legal ~~notices~~ proceedings to avoid further delay, while still continuing to pursue an informal resolution."

9.2 Paragraph A2.92

This paragraph refers only to formal ADR procedures which will incur cost for a *Site Provider* and might ultimately increase the cost of the agreement and delay resolution if deployed at the wrong time or in the wrong circumstance. We would suggest the following additions:

"There are a range of ADR solutions available, the most important of which is collaborative negotiations between the parties. Where an agent is acting for an *Operator* or a *Site Provider,* resolutions can often be found by the *Site Provider* and *Operator* speaking directly in principal to principal discussions or an all parties meeting to understand better what is driving their position, once agents have identified a limited number of points in dispute. More formal ADR procedures include independent expert determination, mediation and early neutral evaluation, which may be considered useful in some circumstances but are unlikely to assist where there is a legal point in dispute. The type of ADR most suitable will depend upon the nature of the dispute, amongst other factors. In considering whether ADR is appropriate both parties should take into account that having a formal ADR procedure followed by court determination on points of law is likely to increase costs."

Ofcom should change the emphasis in this section away from formal ADR procedures and encourage early principal to principal discussions to ensure mutual understanding of needs and priorities.

Ofcom should also implement the specific amendments noted above, or introduce similar wording to this effect.

10. Do you have any overarching comments on our proposals for the Code of Practice (included in its entirety in Annex 2 above)?

Cellnex UK is supportive of a COP that details standardised ways of working and enables effective interaction between *Site Providers* and *Operators.* We also note that the COP must be congruent with the public policy rationale of increasing public benefit from electronic communication networks and associated legislation that has been passed to this effect and any subsequent interpretation by the courts.

As noted in our responses to specific questions we are concerned that as drafted elements of the COP may introduce additional process steps, and associated potential delays/timescales that are not aligned with the legal rights conferred by legislation and as a result would be counter to public policy.

We strongly encourage Ofcom to address this by updating its drafting before finalising the COP.