Response on behalf of MBNL

Electronic Communications Code
Code of Practice
Consultation

November 2023

CONTENTS

A. Introduction

1. MBNL is a network-sharing joint venture, established by **EE Ltd** and **Hutchinson 3G (UK) Ltd** in 2007. By collaborating with a wide range of valued Site Providers, our extensive portfolio of mobile infrastructure spans 2G, 3G, 4G and 5G services and comprises more than 20,000 sites across the UK. Our mission is to ensure that we deliver award-winning network performance to our shareholders so that they can continue to provide outstanding services to their millions of customers.

2. We agree with Ofcom's assessment that the Code of Practice as currently drafted requires modernisation and welcome this opportunity to respond to consultation. Whilst we have provided responses to most questions posed by the consultation paper, we are particularly concerned by the issues raised by questions 5 and 7, which we consider require close attention by Ofcom.

B. Substantive response

Question 1

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

3. Whilst we welcome the modernisation of the Code of Practice, we do not believe that it consistently achieves its aim of providing clear guidance. It can be lengthy and overly complicated, which might render it inaccessible to those who are unfamiliar with the Code landscape and create confusion, which would undermine efforts to bring negotiating parties closer together.

4. By way of example, please see our responses hereinafter at paragraphs 12 and 19 to 25.

Question 4

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

Paragraph A2.14

5. We endorse the sentiment in the first sentence of this paragraph.

6. We believe that the second sentence, commencing '*In any event*', should be removed:

    a. the first sentence adequately addresses the same principles of open and timely communication;

    b. sharing information concerning site access, upgrading and sharing etc is typically governed by the contract between the parties, as are general notification obligations. If also addressed in the Code of Practice, it risks undermining or confusing those contractual obligations; and

c. the inclusion of '*in any event*' can be interpreted onerously and if read literally would expect more of an Operator than could reasonably be required. The proposed wording would require an Operator to inform a Site Provider of *any* plans at *any* time that are relevant to the site, many of which will be of no interest to the Site Provider and achieve little more than creating resourcing and financial burden for the Operator, whilst impeding its ability to deal timeously with its apparatus in accordance with its contractual rights.

Question 5

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

Paragraph A2.18

7. We do not agree that the wording '*such as… an agreement*' or footnote 14 should be deleted:

   a. this Code of Practice will be a point of reference to many Site Providers who will have never previously hosted electronic communications apparatus or engaged with the Code. They will be unfamiliar with the legal and practical landscape and will likewise be unfamiliar with potential sources of advice. This is particularly true of activities associated with achieving the government's shared rural network requirements;

   b. whilst we appreciate why OFCOM might feel uneasy directing parties to specific organisations, virtually all Site Provider advisors are members of one or other of the listed organisations and we cannot identify any disadvantages *to a Site Provider* in providing them with guidance as to potential sources of advice. Rather, it is in their best interests that they *are* provided with that starting point, after which they are best placed to decide whether or not to expand their search for professional support; and

   c. it is not only Site Providers that stand to benefit from the re-instatement of this wording. Operators and the courts would also benefit, as informed and appropriate advice can be invaluable for narrowing issues in dispute, reducing time spent on negotiations and the volume of matters that are referred to the

tribunal. This expedites the rollout of crucial telecommunications networks and reduces the associated cost for all involved.

Paragraph A2.19

8. For the reasons below, we propose that paragraph A2.19 should be reworded as follows[1]:

> '*Potential Site Providers should be advised that they are responsible, in the first instance, for meeting their professional representatives' reasonable costs (per RICS guidance). Operators will reimburse a site provider for their reasonably and properly incurred professional costs within pre-agreed parameters.*'

'*fees policy*'

9. Due to the variety of issues and circumstances that are encountered across an electronic communications estate, we could not practicably maintain a published fees policy. Instead, we adopt the tribunal's guidance and agree parameters with Site Providers at the outset of negotiations on a site-by-site basis.

'*The general principle is that a Site Provider should not be left out of pocket*'

10. Whilst we agree in principle that, in the correct circumstances, a Site Provider should be reimbursed for its reasonable legal and valuation expenses[2] in accordance with paragraph 84(2)(a) of the Code, that principle is very much dependant on the *circumstances*. Paragraph A2.19 purports to identify a "general principle" in the absence of any of those *circumstances*:

    a. we note the comments of Judge Rodger KC in *CTIL v St Martins Property Investments Ltd & Ors*[3], which provide examples of professional fees for which Operators should not '*be expected to write a cheque*'[4]; and

[1] Adopted form the NCA's *Best Practice Statement for Site Access* (December 2022), at paragraph 2.9
https://www.ncalliance.org.uk/documents
[2] Which is very different to the statement "out of pocket", which is too colloquial and ambiguous to be of any useful assistance
[3] [2021] UKUT 262, at [28] – [35]
[4] See [30]

b. we also note the comments of Judge Rodger KC in *EE Ltd & Hutchison 3G UK Ltd v The Mayor and Burgesses of the London Borough of Islington*[5]:

> '*We accept… that the recoverable fees are <u>those incurred in seeking to agree</u> terms for a code agreement, <u>and do not include costs incurred in resisting the imposition of the agreement in principle, or in attempting to compromise the reference…</u>*'

11. From the above, it is clear there is no such thing as a "general principle".

Question 6

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

<u>Paragraph A2.25</u>

12. We propose the removal of this paragraph:

a. insofar as this paragraph of the Code of Practice refers to requests for *access*, it is presumably intended only to address requests pursuant to paragraph 26 of the Code. There is, however, no obligation for an Operator to consider ADR prior to making an application pursuant to paragraph 26;

b. it is doubtful whether it would ever be reasonably practicable to consider offering ADR to a Site Provider who '*fails to respond to repeated requests for access*'. The reference to ADR in this context is therefore likely to cause further confusion;

c. '*After which, the Operator may apply…*': this wording has caused confusion as to whether an Operator might be expected to consider ADR prior to serving a notice, as opposed to prior to applying for a court order. This source of ambiguity could be resolved by removing the reference to notices.; and

[5] [2019] UKUT 0053, at [122], emphasis added

d. the draft Code of Practice contains a discreet section that deals with ADR. Repeating guidance on the topic elsewhere within the draft creates duplication without providing additional guidance.

Paragraph A2.29

13. We propose the addition of a further bullet point:

> '*any building plans, asbestos survey reports, roof covering warranties, details of any residual risks or building risk assessment, structural drawings, fire risk assessments and certificates (where available) of their building which would assist Operators in determining the viability of the site from a technical and structural perspective*'[6]

14. Having this information made available at the earliest opportunity can be invaluable to Operators' site selection exercise, saving time, burden and money for all involved by ruling out unsuitable potential sites and reducing the need for intrusive surveys.

Paragraph A2.50b)

15. Absent of further context, this passage does not seem to add any material guidance to the Code of Practice and we propose that it is removed.

16. Whilst we do not disagree with the principle underpinning this paragraph, it is a matter that does not naturally sit in a code of best practice that is designed to support inter-party relationships and engagement. Separately, it is a matter that will almost certainly be addressed contractually between the parties.

Paragraph A2.50d)

17. We propose that this paragraph is removed.

18. This paragraph addresses an issue that is often not straightforward and is typically a matter for the parties to agree and regulate via various provisions in their site

[6] Adopted from the NCA's *Best Practice Statement for Site Access* (December 2022), at paragraph 3.10, amended to include the word '*building*' in the first item so as to give context. https://assets-global.website-files.com/6405fcfde3c3d12470bc6355/651af3cc26c800939d5b7c9e_NCA-ACCESS-Best-Practice-Statement-v1-October-update.pdf

agreement. Treatment of this topic in the Code of Practice risks undermining or confusing those contractual arrangements.

Question 7

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

19. The current wording is complex and risks confusing parties' obligations and responsibilities. We propose that paragraphs A2.42 to A2.44 are replaced by the wording previously proposed by the NCA or otherwise by Mobile UK's separate response to this consultation.

Paragraph A2.42

20. Reference to "EMF licence conditions", "general public EMF limits", power transmission levels and Ofcom's *Guidance on EMF Compliance and Enforcement* does not directly go to any points of engagement between the parties and we are concerned that this level of complexity will, firstly, render this paragraph inaccessible to those who are unfamiliar with the concept of EMF compliance and, secondly, cause confusion as to obligations of compliance and enforcement.

21. Separately, we are concerned by the reference to *public* EMF limits. Site Providers have no EMF-related liability to the public[7] and therefore reference to public limits within the Code of Practice is likely to cause further confusion.

Paragraph A2.43

22. We are concerned by the inclusion of the words '*who create risks*'. This wording is inconsistent with duties such as those that arise out of *The Control of Electromagnetic Fields at Work Regulations 2016* and the *Management of Health and Safety at Work Regulations 1999*. The inclusion of this wording is likely to confuse some Site Providers as to their statutory obligations, whilst blurring the boundaries between the discreet obligations of Operators and Site Providers.

[7] See fn. 10, below

Paragraph A2.44a)

23. We agree in principle with the appropriate sharing of relevant information[8], when it is reasonably required. It has been common practice within the industry for Operators to share such information to assist Site Providers[9]. This paragraph, which refers to Site Providers unnecessarily conducting their own EMF assessments, therefore risks causing confusion as to discharging statutory obligations and might encourage costs to be incurred unnecessarily.

Paragraph A2.44b)

24. This paragraph wrongly creates the impression that Site Providers are required or otherwise have reason to "police" Operators' compliance. An Operator's compliance with its licence conditions is a matter for the Operator and is appropriately regulated by Ofcom and the HSE; a Site Provider has no legitimate interest in requiring an Operator to demonstrate compliance with its licence conditions. To suggest otherwise in the Code of Practice would not only create confusion and considerable scope for disagreement between Operators and Site Providers, but also significant operational and resourcing burdens for Operators, diverting critical investment away from their networks.

25. This is a matter that the Upper Tribunal has previously considered and on which it has provided unequivocal guidance, with which the current drafting of paragraph A2.44b) is inconsistent:

> '*[110] We accept, of course, that the ICNRP exclusion zones are of potential concern to the superior landlord and to any other neighbours whose buildings or activities may in the future fall within them (none do at present). <u>But that is [the Operator's] responsibility. It is unnecessary to make it also the responsibility of the Site Provider</u>…*
>
> *[112] We take the view that [the Operator's] responsibilities in the agreed clause to abide by legislation and regulations, including the requirements of ICNRP, are sufficient. For the reasons already given <u>there is no reason why [the Site Provider] should be obliged or entitled to check or manage that</u>*

[8] Which we believe should be limited in appropriate circumstances to sharing occupational exclusion zone plans and an ICNIRP compliance certificate

[9] It is significant that Site Providers are entitled to rely upon this information when discharging their own obligations: *Electromagnetic Fields At Work*, HSE (2016), at paragraph 37

compliance or to take on responsibility for ensuring compliance. That would simply be a duplication of [the Operator's] own work and responsibility. [The Site Provider] is not under any duties to the public or to the superior landlord that require it to do this, and is not at risk of criminal liability unless the Tribunal's order puts it in a position to control what [the Operator's] does.'[10]

Question 8

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

26. As a matter of principle, we agree with the sentiment in paragraphs A2.57 and A2.62. However, we propose the removal of paragraphs A2.58 to A2.61:

    a. paragraphs A2.58 to A2.60 provide a paraphrased statement of the law that is not true to the guidance provided by the Upper Tribunal and the Court of Appeal[11], particularly as regards those words that have been underlined hereinafter:

        '*…while the minimum level of upgrading and sharing in paragraph 17 is a useful starting point there is no need for the Operator to produce any particularly compelling evidence for wider or unlimited rights, and such rights should not be regarded as unusual*'.

    It is inherently problematic that the summary within paragraphs A2.58 to A2.60 provides only a partial summary of a far bigger issue by omitting the crucial sentiment of the underlined words above.

[10] *On Tower UK Ltd v AP Wireless II (UK) Ltd [2022] UKUT 152*, at [110] and [112], emphasis added. Separately, the tribunal dealt with civil and criminal liabilities, with the same outcome, at paragraphs [2], [51], [57] and [58]

[11] *On Tower UK Limited v AP Wireless II (UK) Ltd* [2022] UKUT 152, at [115], referencing *On Tower UK Ltd v J H & F W Green Ltd* [2020] UKUT 0348, at [25]. See also [2021] EWCA Civ 1858 (Dale Park, Court of Appeal decision), at [54] to [66]

b. should the guidance of the courts change in the future, this aspect of the Code of Practice would stand to become more inaccurate, providing further scope for confusion and debate during negotiations; and

c. paragraph A2.61 neither reflects previous court commentary nor the provisions of the Code. Typically, rights to upgrade and share will be contractual in nature, having been negotiated by the parties or otherwise imposed by a court. This paragraph therefore risks encouraging contractual negotiations to be reopened at the point in time when an Operator seeks to rely upon them, risking delays, unnecessary cost and potential litigation.

Question 9

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

27. MBNL is a keen proponent of ADR and strongly endorses those aspects of reforming the Code that concern ADR and efforts in the Code of Practice to improve understanding of ADR and the benefits that it provides.

28. Save as to agree with Ofcom's decision not to advocate in favour of any particular form of ADR or to comment upon issues of funding, we have no substantive comments on this aspect of the Code of Practice.