Your response

Question	Your response
Q1. Do you have any comments on our proposals relating to improving the clarity of the Code of Practice?	Confidential? – N Three UK welcomes the opportunity to respond to this consultation. The Electronic Communications Code (ECC) Code of Practice (CoP) is a framework that, despite not itself having statutory footing, has the potential to act as a clear and useful framework to inform negotiations and litigation processes between Code Operators and Site Providers. Arguably though, the current CoP's lack of effectiveness is best reflected by the fact that it is rarely used or referred to by interested parties. A clearer and more precise CoP could therefore assist in reducing the length of time that negotiations and disputes take to resolve and the costs they incur for those involved. ---------- We welcome the intention of these changes, which we understand to be updating the CoP to reflect new legislation and improving the overall clarity of the document. However, there are areas where we believe these changes do not achieve the stated aim of improving the document's clarity. We find this to especially be the case in instances where the CoP is defining its own role or defining the roles of relevant parties (namely Code Operators and Site Providers). Below we give a brief overview of these two concerns with an illustrative example. **1. The CoP being unclear about its own role** The CoP is not a statutory document and any changes to its wording do not need the approval of the UK Parliament. It should therefore be clear in the CoP itself that it is a framework to provide guidance and best practice for Code Operators and Site Providers. It does not directly regulate either negotiations between these parties or legal disputes. As

evidenced below, wording added as part of this redrafting process has undermined the clarity of this point.

> **A2.5 a)** – it is stated here that the CoP's purpose is to '**regulate**' the process for negotiations between Code Operators and Site Providers. This, in our view, is not an accurate reflection of the role or legal standing of the CoP. It is a document to '**provide guidance**' to operators and site providers for negotiations. The word 'regulate' suggests the CoP has statutory footing.

We expand on this point with further evidence later in this submission, for example in response to the question about ADR. The CoP uses imperative language in the section on ADR that gives the impression that its content is legally enforceable. More detail on this point can be found in our answer to Question 9 below.

2. The CoP being unclear about the responsibilities of relevant parties

The CoP as worded in its draft amended form does not, in our view, clearly or accurately reflect the role and responsibilities of Code Operators and Site Providers during negotiations and builds.

The CoP places significant emphasis on the responsibilities of Operators to communicate, inform and even (as discussed in a section below) cover the full costs of fees in relation to mechanisms such as ADRs. Contrastingly, it puts few responsibilities on Site Providers in terms of how they conduct themselves and communicate.

We believe that this document should be reviewed and amendments made to ensure that responsibilities are adequately reflected on *both sides* of Code negotiations in a way that is clear and unambiguous.

> **A2.14** – the term '**in any event**' is arguably open to misinterpretation. As worded, a Site Provider could claim that it is the Code Operator's responsibility to communicate every individual change in its plans, regardless of how minor or inconsequential to the overall acquisition and build. We would recommend removing 'in any event' from this passage. Additionally, the CoP should cover the responsibilities of the Site Providers to clearly communicate major updates to Code Operators. For example, factors that directly impact access to the

	site. As worded it puts all communication responsibilities on Code Operators, with the only communication responsibility on Site Providers relating to up-to-date contact details. The roles and responsibilities of relevant parties are also not made clear in relation to fees, electromagnetic fields or ADR. All of these points are discussed in answers below.
Q2. Do you have any comments on our proposals relating to including legislative changes in the Code of Practice?	Confidential? – N We have no comments in response to this question.
Q3. Do you have any comments on our proposals relating to the definition of 'Site Provider' in the Code of Practice?	Confidential? – N We agree with the definition of Site Provider as being the landowner or occupier. The most important point to bear in mind when defining the Site Provider is to ensure that the definition does not encompass third parties who may act on the landowner or tenant's behalf. The Site provider must always be the landowner or the tenant him or herself. The document's definition meets this criteria in our view.
Q4. Do you have any comments on our proposals relating to contact information in the Code of Practice?	Confidential? – N We endorse the sentiment that the provision of contact information and clear communication between parties is extremely important. We do, however, have two comments on this section below. 1. **Address ambiguity around obligations** With reference to our answer to Question 1, we think the wording 'in any event' should be removed from **A2.14** because it creates potential ambiguity about the extent of Operators' obligations to communicate with Site Providers. 2. **Explicitly recognise representative like MBNL and CTIL**

	The Code should also recognise bodies such as MBNL, which acts on behalf of Three UK and EE in negotiations. In most cases, it is a business like MBNL that will answer any questions or concerns that a Site provider has, so to say that it *must* be the Operator contact details provided will in many cases just add a layer of bureaucracy, as the Operator will pass the query on anyway. Businesses like MBNL and CTIL that act on behalf of multiple Operators should therefore have equal weighting to the Operators themselves with regard to contact information.
Q5. Do you have any comments on our proposals relating to professional fees in the Code of Practice?	Confidential? – N **1. Fees policy** With reference to **A2.19**, it is not practical for a Code Operator to maintain a published fees policy. To suggest that Operators should do so misunderstands the nature of maintaining an estate and entering multiple negotiations across the country. As the tribunal has previously decided, it is right and appropriate for Operators to set fees on a site-by-site basis, given the different costs and challenges associated with any given site. The updated CoP should remove the reference to providing Site Providers with a fees policy. **2. The 'general principle' that a Site Provider should not be 'left out of pocket'** Paragraph **A2.19** also makes the case that there should be a general principle that Site Providers are never left out of pocket. In making this point, it suggests that the Operator is responsible for communicating when 'reasonably and properly incurred professional fees would be compensated'. This is a misleading representation of what Site Providers can and should expect in negotiations with Code Operators. Nor is it appropriate for the CoP to propose principles by which parties will agree the reimbursement of fees. This wording is likely to create disputes rather than

help resolve them. Rather than use language that has the potential to cause dispute, this part of the CoP should emphasise the need for both parties, including Site Providers, to act responsibly with regard to fees.

A Site Provider should be reimbursed for its reasonable legal and valuation expenses in accordance with paragraph 84(2)(a) of the Code but the application of this principle is highly contingent on the context and circumstances. To apply a 'general principle' in this area is simply not appropriate.

We note the comments of Judge Rodger KC in CTIL v St Martins Property Investments Ltd & Ors, which provide examples of professional fees for which Operators should not 'be expected to write a cheque'.

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:

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

These statements make it clear that, contrary to there being a general principle, any entitlement to be reimbursed for professional fees will:

a. apply only to transactional fees and not litigation fees;
b. apply only to fees incurred upon negotiating a renewal or acquisition;
c. be unlikely ever to apply if a Site Provider attempts to renegotiate the terms of an unexpired Code agreement; or
d. d. be unlikely ever to apply if a Site Provider seeks to exercise its rights under paragraphs 33(1)(a) or (b) of the Code.

Q6. Do you have any comments on our proposals relating to responding to a request for access in the Code of Practice?	Confidential? – N We agree with the overall sentiment of the changes in this area but do have some comments for your consideration. **1. Add explicit guidance for basic visual surveys** It would be useful for the Code of Practice to include guidance stating that formal contracts are not required for basic visual surveys. Where groundbreaking or similar work needs to take place, it is of course the case that access permissions should be formally agreed. However, where surveys are basic and non-intrusive, attaching a contractual process to site access only serves as a delay for all parties. The use of unnecessary contracts for non-intrusive surveys is a particularly acute issue for brownfield and rooftop sites. It would be extremely useful for the CoP to make it explicitly clear that legal processes are not always required for Code Operators to access these sites. **2. Remove the reference to ADR in this section** Paragraph **A2.25** references ADR in relation to site access. We think that this is unhelpful and confusing as there is no such obligation (pursuant to paragraph 26 of the Code) for Operators to consider ADR in this context. This paragraph also suggests that Operators should consider ADR where a Site Provider 'fails to respond to repeated requests for access'. This is not a scenario where it would be practical or reasonable to consider such a recourse. **3. Do not exceed the remit of the CoP** As discussed in our responses to previous questions, there are several instances in the updated CoP where the document oversteps the scope of its own responsibilities.

	There are additions to the guidance on site access that we believe do this. For example, **A2.50 b)** says 'The Operator should ensure that its Apparatus is maintained in a good state of repair'. This is not an appropriate obligation to put in a document that has the purpose of providing guidance for inter-party relationships and engagement. The condition of equipment is an issue that will be addressed as a separate contractual matter between parties.
Q7. Do you have any comments on our proposals relating to electromagnetic fields exposure in the Code of Practice?	Confidential? – N This section is excessively complex and creates unnecessary ambiguity as to what responsibilities sit with Code Operators and what responsibilities sit with Site Providers with regard to EMF exposure and safety. The new wording also contradicts tribunal decisions that have established precedent in this area. The section should be redrafted to simply and clearly make the following points: • Code Operators have duties under their operating licence to comply with emissions guidelines; • Site Providers may also, in specific circumstances, be subject to separate statutory obligations with regard to the health and safety of workers; • Site Providers should comply with Operators' reasonable requests when seeking to discharge their EMF obligations and • In the limited circumstances where Site Providers are subject to statutory obligations, Operators should comply with Site Provider's reasonable requests to share relevant information, which will typically be limited to providing details of occupational exclusion zones and ICNIRP certificates of compliance. Some of our core concerns with the current wording are discussed below. **1. Improve clarity around duties and responsibilities**

There are several instances in this section where the duties and responsibilities of Code Operators and Site Providers are either unclear or are in opposition to established precedent.

A2.44 a) makes reference to Site Providers carrying out their own EMF assessments. This blurs boundaries that have been clearly established in *The Control of Electromagnetic Fields at Work Regulations 2016* and the *Management of Health and Safety at Work Regulations 1999*. It is the Code Operator's responsibility to carry out EMF assessments and this should be clear in the CoP.

Similarly, **A2.43** uses the phrase 'who create risks' in a way that risks confusing Site Providers about their obligations. This wording should be removed.

2. **Remove paragraph suggesting Site Providers should oversee Code Operator's EMF compliance**

A2.44 b) should be removed entirely. It gives the impression that Site Providers are required to police the compliance of Operator's in carrying out and acting on EMF assessments. Compliance in this area is regulated by Ofcom and the Health and Safety Executive.

In suggesting otherwise, this paragraph increases the chances of disagreement between Code Operators and Site Providers and adds a cost burden that would otherwise be invested in their networks.

The Upper Tribunal has provided clear guidance in this area with which the current drafting of 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). But that is [the Operator's] responsibility. It is unnecessary to make it also the responsibility of the Site Provider…

	[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 there is no reason why [the Site Provider] should be obliged or entitled to check or manage that 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.' **3. Remove reference to 'public' EMF limits** We are concerned by the reference in **A2.42** to 'public' EMF limits. Site Providers have no EMF-related liability to the public so reference to public limits within the Code of Practice should be removed.
Q8. Do you have any comments on our proposals relating to the sharing and upgrading of apparatus in the Code of Practice?	Confidential? – N We propose the removal of **A2.58** to **A2.61**, inclusive. **A2.57** to **A2.60** purport to provide a paraphrased statement of the law, which, as discussed previously, is not appropriate for a CoP. They also contradict guidance provided by the Upper Tribunal and Court of Appeal, which stated: *'…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****.'* **A2.61** neither reflects previous court commentary nor the provisions of the Code. Rights to upgrade and share will typically be contractual in nature. This paragraph risks encouraging the reopening of contractual negotiations when an Operator seeks to rely upon those existing contractual rights. This risks

	delays, unnecessary cost and potential litigation, all of which undermine the relationships that this CoP is intended to encourage and the core principles of the Code.
Q9. Do you have any comments on our proposals relating to ADR in the Code of Practice?	Confidential? – Y / N **1. Do not inappropriately use the CoP to enforce ADR in all circumstances** The updated CoP puts a strong emphasis on the need for Code Operators to offer ADR. This is another instance where we believe it oversteps its remit in *enforcing* practices rather than offering best practice guidance. **A2.87**'s use of the qualifying 'in certain cases' does not sufficiently mitigate the use of imperative language such as 'an operator's notice must' and (in A2.88) 'operators are required'. We do, in the vast majority of cases, offer ADR to Site Providers where disputes arise. However, ADR is not the most appropriate first recourse in all cases. For example, where the site provider is non-responsive rather than in dispute with the Code Operator. We are concerned that the wording of the updated CoP tends towards enforcement of ADR, something that steps beyond its appropriate remit. The imperative language in this section should be removed and replaced by language that makes it clear that ADR is preferable in many instances but not obligatory. In addition, it should be made equally clear that ADR is not a one size fits all solution that will be the best recourse in any and all disputes. **2. Address the imbalance in responsibilities between Code Operators and Site Providers** We also note that the framing of the relevant section – 'Resolving Disputes' – is heavily weighted in its emphasis on the responsibilities on Code Operators. Throughout the section, this gives the impression that full responsibility for initiating ADR and for bearing the costs of

	ADR is on Code Operators and not Site Providers. It is standard practice that both parties pay their respective costs in relation to ADR. **A2.88**, for example, suggests that it is incumbent only on Operators to consider ADR, which could implicitly suggest to Site Providers that the full costs of ADR are also on Code Operators. The following **A2.89**, in its reference to awarding costs following a refusal to engage in ADR, further suggests that Site Providers will incur costs only by *not* engaging in ADR (again suggesting that costs of doing so lie only with Code Operators). This section should make clearer that, while it is largely incumbent on Code Operators to provide information on ADR, *both* parties must pay their own fees and costs in relation to any ADR that does then take place.
Q10. Do you have any overarching comments on our proposals for the Code of Practice (included in its entirety in Annex 2 above)?	Confidential? – N Referring to our answer to Question 1 and comments made throughout this response, our key concerns with the CoP's updated wording are: • It exceeds its own remit in suggesting it should 'regulate' relationships between Code Operators and Site Providers rather than offer best practice guidance. • It blurs the responsibilities of Code Operators and Site Providers in important areas like professional fees, EMF compliance and ADR. This heightens the risk of litigation rather than limits it.

Please complete this form in full and return to ECCCOP@ofcom.org.uk.