Annex 3

Consultation Questions:

Code of Practice:

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?**

   We fully support the aims of the Code of Practice to set out the expected behaviours of the parties and to encourage consensual agreement to be reached where possible. The draft Code of Practice to a very large extent achieves the correct balance in tone and we strongly encourage Ofcom to retain these aspects in the final version.

   Ofcom may, through the consultation process, be encouraged to make apparently small changes to the draft Code of Practice. We are of the view that apparently innocuous changes in wording can have a significant and material impact upon the intentions and the subsequent requirements. Were Ofcom inclined to affect any changes, we would request the implications of any changes are discussed within the drafting group before any changes are incorporated.

   We believe the Code of Practice deliberately avoided the potentially contentious issue of the financial arrangements between the respective parties. It highlights, at relevant points, financial arrangements that have to be settled. The Code does not seek to steer the parties one way or the other as to who should cover such costs and to what extent. We believe this approach is an important one as it does not present a view that encourages agents and solicitors to believe the Operators will meet any and all such costs. It is our experience that relatively straightforward and uncontentious consents and approvals have given rise to an expectation of disproportionate fee entitlement. This is evidenced by the considerable disparity of fees paid for essentially the same consents.

   In our opinion, the correct approach is to leave the parties to determine any contribution to the others' fees being paid, as there can be many variables and contexts in which such agreements come about. It is beyond the remit of the Code of Practice to pre-determine such matters. Operators are keen the Code of Practice does not create a perception that there is a market for fees which can be recovered from Operators in every instance.

   The Code of Practice states that the Standard Terms document "*may be (but need not) be used*" when negotiating agreements to confer Code rights.

   We do not believe the Standard Terms, as drafted, provide for a workable Code Agreement, especially for network sites for the mobile sector. Moreover, we believe that such are the variance of type of Agreement likely to be required, that a "one size fits all" approach will fail to meet any particular requirement. Our concerns are enhanced because Ofcom have advocated that the Standard Terms "may be used", and there will therefore be a basic presumption that this document is capable of being used, which we do not think to be the case. Our main concern being that Grantors might be reluctant to agree to variations to such a document on the basis that if Ofcom have drafted it so it must be fit for purpose.

   Paragraph 102(2) of the Code requires Ofcom to prepare and publish standard terms which may (but need not) be used in agreements under this Code. Our interpretation of this requirement is that it requires Ofcom to prepare and publish some standard clauses and not, as it has done, a standard agreement. To this end, it may be more appropriate for Ofcom to prepare some Standard Heads of Terms and possibly some model form Clauses that the parties may or may not incorporate into Agreements, rather than to

produce a full Agreement which fails to meet either the Operational requirements of Code Systems Operators or, we would suggest, those of Grantors.

We believe great caution needs to be exercised by Ofcom, were it to remain intent in producing a standard agreement rather than some standard clauses which could be incorporated into an agreement.

As it is Ofcom's intent that the Standard Terms are issued for guidance, and the parties are free to negotiate alternate terms, we would recommend that any specific terms offered by Ofcom are marked "for guidance purposes" (or similar) to avoid any erroneous belief by Grantors that Ofcom require any standard terms to be used without any amendments.

In practicable terms we do not believe these Standard Terms to be workable, principally because a 'one size fits all' approach to a Code Agreement is considered impracticable. Instead, we would recommend the provision of a draft set of Standard Heads of Terms, as appended, as being the terms parties should agree on for the consensual agreement to be recorded in an appropriate form of Agreement.

We make the following observations on Section 3:

3.7 – We do not believe a 'one size fits all' approach to all sites is a practical objective. The considerations for mobile operators and fixed line operators are often very different. Moreover, the considerations for different types of mobile installation, for example a Distributed Antenna System (DAS) installation would give rise to a different set of considerations and provisions than would a small microcell.

3.8 – Given Ofcom's comments in this paragraph, we would recommend that Ofcom propose some Heads of Terms that the parties might want to use rather than producing a draft legal agreement as a starting point for use in all instances.

We are concerned that, by producing a draft legal agreement, rather than speeding up the contracting process it may actually create delay. The parties potentially may become entrenched in debating the suitability or otherwise of the Standard Terms.

The Electronic Communications Code provides that code operators can share sites i.e. place the physical equipment of other operators on a given site. The Code of Practice could be clearer by emphasising that, in this context, sharing means placing physical apparatus on the site in question, or the shared physical use of equipment.

Whilst the Electronic Communications Code does not require it, the Code of Practice nevertheless states that Operators should notify landowners of any such sharing. This is so that landowners can be aware, for security purposes, who is entitled to be on the site. Whilst we consider this to be a reasonable measure, we must emphasise this goes beyond the requirements set out in the Code. In agreeing to such notification it should remain clear this notification is as a response to the security requirement of the landowners wanting to know who was on site and has no wider implication. It should also be made clear that it is now common practice for "virtual networks" to be operated through the services of another Operator and it would be totally impracticable for every grantor to be notified of such arrangements. Careful use of language needs to be adopted in this area to ensure no unintended interpretation.

In the early stages of stakeholder drafting, there was some discussion as to whether Operators should notify landowners of any upgrades to apparatus on Site in advance of their installation. The expectation on the part of Landowners was that they could make an assessment as to whether there was any adverse visual impact or additional burden on them. In the end, the drafting group, assessing the overall balance of the rights and obligations falling on the respective parties, came to a consensus against such an approach.

We confirm our belief that this was the right outcome. First, the Electronic Communications Code has avoided requiring prior notification, so that network improvement can occur without unnecessary delay and bureaucracy. The great majority of network upgrades have no or minimal impact on the apearance of a site, nor do they place any additional burden on the landowner, and so it is also perfectly logical that there is no notification requirement.

We are aware this remains a matter of contention with Landlord representatives, who may perceive it as a means through which they can assert greater control. It is our view that the very exercise of such control has, in the past, needlessly added delay, cost and burden on the Operator's upgrade programs and has inevitably resulted in delayed rollout of new and improved service to the Consumers of network services. We firmly believe the Code of Practice cannot create a broader burden and incumbrance upon the operators than the Code itself provides for.

Standard Terms

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

We would draw your attention to our comments made earlier in our response and to the fact we do not believe Ofcom are under an obligation to create a Standard Form Agreement and, even if they were, this Standard Form Agreement is not workable and fails to meet the needs of the myriad of different applications that would be required of it and fails to meet the needs of either the Operator or the Grantor.

a) **Definition of "Land"** - it is not sufficiently well defined and it is not clear where there is a separation between land occupied by the Operator and the land which is owned and retained by the landowner.

   This would be of concern in relation to an Operator's greenfield macro sites in particular where the Operator would want to fence the site off and control rights of access by third parties including the landowner and any other occupiers of the residual land.

   As a consequence of the drafting, the rights granted over 'Land' may be better suited to the installation of fixed line apparatus rather than mobile telecoms.

b) **Definition of "Term"** - is such that the agreement runs indefinitely until it is terminated. This may be suitable for fixed line apparatus. However, we suspect many landowners will have concerns with granting what amounts to an "in perpetuity" agreement for a mobile telecoms installation. It is more normal for such mobile telecoms installations to be granted the rights for a specific fixed term, with successive renewals thereafter. This provides landowners with the comfort of feeling they have more control over their land/assets.

   Perhaps more importantly, this drafting is also at odds with Paragraph 11(1) (c) of the Electronic Communication Code which states that an Agreement must state for how long the code right is exercisable.

   Additionally, Operators require some certainty over occupation in order to amortise the considerable cost of investment. Therefore, Operators are likely to want to see some certainty as to the minimum period of occupation before entering into or renewing an agreement.

c) **Clause 2.1(c)** – We would expect the Agreement would contain a right to "remove" the Apparatus as Para 4.9 of the Code of Practice states that Landowners and Operators should be clear on the position relating to the decommissioning of sites no longer required.

d) **Clause 2.1(f)** is a general right to enter onto the landowner's land; it does not specify nor provide for agreement of any particular access route. This is unusual, and could cause problems if the landowner wants to restrict (as we would expect) those areas which the Operator can access. Certainty is also helpful for the Operator. On Greenfield sites we would usually expect a specific access route to be stipulated.

e) **Clause 2.1(g)** is a general right to connect the Apparatus to a power supply. It does not differentiate between an independent supply and the right for the Operator to take a spur off the landowner's supply, nor are there any provisions as to how any shared supply might be paid for. This will be problematic on those sites where a shared supply is used.

We would further expect a provision relating to the right to use a backup power generator and the right to lay communication links.

f) **Clause 4.1(a)** introduces a seven day notice period for access which is neither provided for in the Electronic Communications Code nor the Code of Practice.

Practical arrangements for access to a Site should be agreed consensually between the parties and the terms should not provide for a 7 day notice period as the default position, not least because 7 days notice is unworkable for Operators.

g) **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.

This is derogation from grant and could be highly disruptive to the Operator. If considered to be necessary, we would expect it to contain caveats or controls to protect the Operator. By giving the landowner a clear right to take such action, we are concerned this may cause disruption to the continued operation of the Apparatus.

h) At **clause 10.1(c) (Termination) -** there is a right for the landowner to terminate the agreement if they intend to redevelop their land. We believe the Code envisages such provision to be exercisable at the end of the Term or subsequent to it. However, the absence of a fixed term (or minimum fixed term) per point 2 above and per Paragraph 11(1) (c) of the Electronic Communication Code, means such a provision is at odds with the Code and consequently should not form part of a draft Agreement.

As the Agreement is currently drafted without a Term, the effect of this break right, as drafted, is to make it exercisable at any point. Operators will therefore have no certainty of occupation. Operators and Infrastructure providers would find it difficult to justify investment into existing and or new sites as the period over which they would be able to definitively amortise their investment would be too short. We believe such a clause goes beyond the remit of the Code and should not be included in any draft terms proposed by Ofcom.

Further, there is no separate termination provision which could be triggered with immediate effect if the Operator lost their operating licence or if the building was destroyed or damaged to such an extent that the site could no longer operate.

Further, at clause **10.1 (d)** of the draft Standard Terms, the proposed termination clause incorporates the public benefit test which the Court will use when it is deciding whether to grant an Operator the rights, or not.

If it appears in an Agreement, in the manner Ofcom proposes, it essentially means that a test, which should only really be applied either at the outset or at the end of a contractual term (clause 31 (4) (d) of the Code), could be applied continuously throughout the term which is not the intention of the Code.

This would place an onerous burden on the Operator to rebut the Grantor's assertion that the Grantor cannot be compensated by money and the public benefit is outweighed by the prejudice the Grantor suffers at any point during the term.

A good deal of technical evidence, and the input of expert witnesses, would be necessary to rebut those assertions adequately. This process may work in the context of a trial relating to the initial grant of the rights, or the renewal of the rights at the end of a fairly long contractual term, where we would be given months to prepare evidence. The application of the test certainly doesn't work when the Operator only has thirty days from service of a notice to prepare their case.

In any event, regardless of when the break at 10.1 (c) and 10 (1) (d) can be relied upon (at the end of a fixed term, or more worryingly during it), it seems nonsensical to impose a ground for termination in a draft agreement, which mirrors the ground for termination in the Act. That is because, technically, the Parties would have to debate whether the ground applies twice: Firstly, in the thirty day termination period of the Agreement and once again in the far longer period under the Act.

Template Notices

3. Do you agree that Ofcom has identified all of the notices it is required to prepare under paragraph 89 of the New Code?

We agree with Ofcom's statement that they have on the whole prepared a comprehensive set of draft notices.

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

The only two notices which we would like to see additionally drafted are those under paragraph 31(1) (operator's counter notice to a hostile termination notice) and paragraph 38(4) (operator's response to a request for information regarding code rights). However, we note that Ofcom has noted that there is little value in preparing prescribed forms for these counter notices as the operators are able to prepare their own notices, and the information contained within those particular counter notices may vary.

In that respect we note that Ofcom have nevertheless gone on to prepare prescribed counter notices for use by operators in other situations (for example the counter notice under paragraph 52(2), being the operator's objections to a transport operator's alterations requirements). We are therefore not clear why they felt that was necessary, unless it was to ensure that all of the prescribed information was included in the response.

Part 15 (Paragraphs 86 to 90) of the new Code contains fairly detailed provisions relating to the preparation and service of notices. In particular, Paragraph 87 states that, even where the form of notice is not prescribed by Ofcom, any notice given under the code by the operator must explain:

a. the effect of the notice;

b. which provisions of the Code are relevant to the notice; and

c. the steps that may be taken by the recipient in respect of the notice.

It is expressly provided that operators must use the notices (if any) prescribed by Ofcom, and in respect of any other notices (where there is no prescribed format) operator's notice must comply with paragraph 87(1) above, failing which the notice will be invalid. However, it is always open to the recipient to accept the validity of the notice.

The Code takes a slightly different approach in the context of notices given by parties other than the operators. In the context of other parties' notices given under paragraphs 30(1), 32(1), 38(1) or 39(2) that notice must be in the form prescribed by Ofcom (albeit that an operator can choose to accept an invalid notice). However, other notices served by parties other than operators not served in the prescribed form may still be valid, albeit the party serving the notice could face cost penalties.

There are further provisions (Paragraph 90) requiring service by a registered post service or by Recorded Delivery and detailing how notices should be addressed.

It would be helpful if all the prescribed notices had a clear section at the top of each notice which sets out who the notice is from and who it is being sent to (and these addresses being addresses for service for future notices), i.e. in the format:-

To: Operator/Landowner (name and co.no.) as appropriate

Of: [address] Please quote formal Address for Service

From: Operator/Landowner (name and co.no.) as appropriate

Of: [address] Please quote formal Address for Service

Whilst some of the notices require this information to be provided in the main body of the notice, some don't require it at all and certainly don't set out the sender's details, which for notices that require a counter-notice or response to be served, means the recipient doesn't always know where to send a response.

Whilst the new Act sets out statutory provisions for where notices should be served, see Para 91, this does refer to the "proper address of a person" being the address that was given to the other party for service.

As we know, often agreements refer to registered office addresses (which may be fine in some instances and thus will be the correct address to use) but these often change later down the line from that originally stated in an agreement and for landowners they may not have a registered office address at all, so it would be beneficial for the sender's name and address for service to be included so the recipient knows exactly where to send a response if one is required otherwise there is a risk a Landowner could be served at a site where they do not ordinarily receive and process post.