**Shoosmiths LLP's OFCOM Consultation Response –**

**Digital Economy Bill: Proposed Code of Practice, Standard terms of Agreement and Standard Notices**

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?**

i) The main body of the proposed Code of Practice appears a sensible approach encouraging all parties to act sensibly and openly in their conduct with each other but it is noted that the Code has very limited legal weight. The Code of Practice emphasises that one of its principal purposes is to establish a voluntary process (Para 4.31), however where written agreement cannot be reached, the parties can and will have to, under the new Telecoms Code, seek resolution through the Court/Tribunal. Presently, in the event of non-compliance with the Code of Practice prior to recourse to legal proceedings, it appears the only sanctions for non-compliance with the Code of Practice (will be limited to potential adverse cost consequences which will only bite if matters proceed through to a final determination at Court/Tribunal), as such it is difficult to see how the voluntary process can be actively encouraged.

ii) The obligation on both parties to "*negotiate in good faith*" (Para 4.51) may imply that a Landowner has an additional hurdle to overcome which goes beyond the specific terms of any contractual obligations which may have already been agreed to by an Operator. If the Lease of a Mast has a contractual obligation on the Operator to remove or move its apparatus automatically upon a certain notice for works being served by the Landowner and a relevant notice period expiring), then the Landowner should not be hamstrung by the Code of Practice.

The second sentence at Para 4.51 should be amended to remove the "*negotiation in good faith*" requirement and to emphasise that Operators are not to unduly inhibit the Landowner's essential works. We would suggest that the wording should instead read something along the lines of "*In such circumstances, in the absence of any specific contractual obligations which may exist, the parties are encouraged to explore options to enable the works to be completed (such as, for example, considering whether an alternative mast site or location may be available temporarily) so that both the Landowner is not unduly prevented or delayed from carrying out its essential works to the property and so that any resultant interruption to public communication services is kept to a minimum*".

iii) In Para 4.54, where a Landowner is progressing a redevelopment opportunity, it states that "...consideration should be given to incorporating the communications apparatus within the Landowner's property if this is a viable option". There may well be cases where a Landowner simply would not want any electronic communications apparatus on their land after a redevelopment has taken place, even if it would strictly be possible or practicable to incorporate it into a proposed scheme, for example where the existence of such apparatus could have an adverse effect on the investment or re-sale value of the site to the Landowner or inhibit the success of future residential plot sales.

Paragraph 21(5) of Schedule 3A (the new Code) makes it clear that the Court may not make an order under Paragraph 20 (conferring code rights) if it is satisfied that the landowner "*intends to redevelop all or part of the land to which the code right would relate, or any neighbouring land, and could not reasonably do so if the order were made*" – i.e. the Landowner could not redevelop with the existing electronic communications apparatus remaining. The new statutory test does not oblige a Landowner to have to consider whether such apparatus can be incorporated in a new scheme and therefore Para 4.54 of the Code

of Practice as drafted appears to be seeking to impose an additional obligation on a Landowner contrary to the 2017 Act.

It is suggested that para 4.54 should be amended to read "*Where a Landowner is progressing a redevelopment opportunity, the Landowner is encouraged, but in no way obliged, to consider whether it would be both viable and desirable to incorporate the communications apparatus within the Landowner's property*"

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

i) Having reviewed the draft form of Agreement, it is noted that this is a very basic form of Code Agreement which will not be appropriate for green field mast sites, roof tops or multi-site providers. This should be made clear on the face of the Agreement.

ii) Recitals – It should be added that the primary purpose of the Agreement is to confer Code Rights (so that in the event of an Agreement having the potential to be caught by the provisions of the Landlord and Tenant Act 1954, it is clear that the Code applies and the 1954 Act does not).

iii) Clause 2.1 lists ALL the potential Code Rights which an Operator can seek to have conferred upon it – some or all of these may not be necessary or required or sought by a Code Operator and thus the Agreement should make it clear that some can be struck through if not required.

iv) Clause 2.1(f) and Clause 2.4 do not place any restrictions on the time or manner within which the Operator can have access to the Land (on shared sites or sensitive sites there may be security protocols in place) so the drafting so reflect this possibility.

v) Clause 2.1(g) does not clarify whether the Operator's right to connect the Apparatus to a power supply is limited to the Operator installing and providing that power supply at its own cost or to an existing power supply to be provided by the Operator (with electricity costs to be recharged to the Operator) so the drafting so be amended to reflect this important point.

vi) Clause 2.1(h) does not expressly place any restrictions on the extent to which the Operator can interfere with or obstruct a means of access to or from the Land – i.e. upon first giving reasonable written notice to the Landowner save in the case of an emergency. In addition such access may also not be in the Landowner's control in the first place. Clause 4.1 does however deal with this in more detail. It would be helpful to cross refer to Clause 4.1 in Clause 2.1(h).

vii) Clause 2.3 reflects the wording in Paragraphs 16(2)-(4) of the new Code and that Paragraph states that any conditions placed on the Operator will be void if it prevents or limits the upgrading or sharing where the conditions at (a) and (b) of Clause 2.3 re met, however it is questionable whether a requirement that the Operator notify the Landowner after the event of the changes to the Apparatus would fall foul of this restriction in the Code and some form of notification would be helpful so that a Landowner can keep track of the changes and the extent of the Apparatus on a site – for example when considering the maximum load restrictions on a lattice tower. An accumulation of Apparatus may over time create a "burden" which previously did not exist so a Landowner should be entitled to be able to keep track of incremental changes.

viii) Clause 3 should specify when the payment(s) should fall due and whether they fall due in advance or in arrears.

ix) Clause 4.1(j) – The insurance provision needs to specify an agreed level of cover and clarify that loss or damage suffered by any third party includes loss and damage suffered by the Landowner.

x) Clause 5.1(a) – Often a Landowner will want a "lift and shift" provision to enable it to carry out works to its Land that would potentially interfere with the Operator's Apparatus or access to that Apparatus.

xi) Clause 5.1(a) – The Operator's consent should also not be unreasonably withheld or delayed.

xii) Clause 5.1(c) – It would be better to specify a specific minimum notice period rather than say "reasonable prior written notice" as this leaves it open to the Operator to argue that the notice period was not reasonable and could give rise to unnecessary disputes. Elsewhere (clause 4.1(a)) the Operator has to give not less than 7 days' prior notice so a similar minimum period would be sensible although Operators may resist this on the basis they need more notice to make contingency plans.

xiii) Clause 6 – The issue of what happens if the Operator abandons the Apparatus after decommissioning a site and fails to remove it is not covered off by the draft Agreement.

xiv) Clause 7.1 – This is only appropriate for certain agreements - for example Apparatus which is to be laid underground. In a lot of cases the Operator will be taking a roof top site or erecting a lattice tower or creating a compound within which to locate its Apparatus and in those scenarios the relationship of Landlord and Tenant will almost certainly be required as the Operator will have legal possession and control of an area of land or building which can and should be demised to it.

xv) Clause 8.1 – The level of indemnity provision may need to exceed £5 million.

xvi) Clause 15.4 – The reference to paragraph 87(2)(a) of the Code appears incorrect. Based on the version of the Code published on 8 Feb 2017, there is no paragraph 87(2)(a) and instead the correct reference should be paragraph 90(2) of the Code.

**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.

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

Firstly, we note that all the Paragraph numbering for the Notices need checking as some paragraphs have changed since the Act received royal assent.

Secondly, it would be sensible for all Code Notices and Counter-Notices to have a clear section at the top of each notice which reads like the example shown below rather than some of this information being included in the body of some Notices and not at all in others. Including in the body of a paragraph in a Notice makes it more likely to be missed and not completed. Our proposal would be similar to the prescribed forms utilised in the Landlord & tenant Act 1954.

*To: Operator/Landowner (as appropriate)*
*Of: Address for Service*

*From: Operator/Landowner (as appropriate)*
*Of: Address for Service*

For example, **Notice requesting disclosure regarding Code Apparatus (Para 38(1)) (No.6 above)** requires an Operator to give information to a Landowner about Code Apparatus on

their site within a 3 month period but does not specify where that information should be sent to.

Similarly **Notice requiring removal of Code Apparatus (initial request) (Para 39(2)) (No.8 above)** requires the Operator to confirm within 28 days of receipt of the Notice whether they will remove their Code Apparatus by the date which the Landowner has specified but does not specify where that confirmation or counter-notice refusing should be sent to.

Comments on specific notices as follows:-

**Notice seeking agreement to the Conferral of Code Rights**

This notice is very lengthy at first glance and confusing because it covers both seeking to have Code rights conferred on an Operator in respect of a new site and also the ability to seek to have Code rights conferred on an Operator in respect of an existing site where the contractual term of an existing Code agreement has expired and either a permanent or a temporary agreement is required to safeguard the Operator's network or system.

It is accepted that Para 20(2) covers off both existing and new mast sites and para 27(1) requires any temporary rights to be requested in the same notice as any para 20(2) notice but it would be helpful if two separate notices could be drafted – one Para 20(2) notice for new sites and another similar one for existing sites. Alternatively clear headings in the draft notice separating these different requests would be helpful and make the notice more user friendly.

The Notice also permits an Operator to seek additional rights which are NOT Code Rights as listed in Annex 2 of the Notice and referred to in Para 8. It is important that Para 8 of the Notice makes it clear that the Landowner cannot be compelled by the Court to have those additional rights conferred upon it.

Similarly, the **Notice seeking agreement to the Conferral of Interim Code Rights (Para 25(3))** also permits an Operator to seek additional rights which are NOT Code Rights as listed in Annex 2 of the Notice and referred to in Para 7 and a similar clarification would be welcome.

**Notice to terminate Code Agreement**

This notice will be used frequently by Landowners seeking to terminate existing Code Agreements (and requires at least 18 months' notice to be given and for the termination date which is specified to be no earlier than contractual expiry). This is explained in note b of the explanatory notes.

However the notice requires a counter-notice from an Operator to be served if they don't want the Code agreement to be terminated but the Notice does not require the Landowner to specify at the bottom of the Notice, their address for service and this should be included.

Whilst Paragraph 90 of the new Code makes it clear that if one party notifies the other of an address for service that is the correct address for service of Code Notices – it seems sensible to oblige a Landowner to include an address for service in their Notice. The Notice does confirm at paragraph 2 the land/site to which the Notice relates but that site address may well not be where a Landowner would want any counter-notice to be served (for example a registered office address or another operational address may be preferable rather than a mast site where the recipient does not ordinarily receive post).