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By email: ecc.consultation@ofcom.org.uk

Dear Sirs,

Response to Ofcom Consultation
Digital Economy Bill
Proposed Code of Practice, Standard Terms of Agreement and Standard Notices

I am actively involved in rights for electronic communications apparatus and recognised by the Law Society as an expert on such agreements. I was the Arbitrator in the *Bridgewater Canal* case[1] which involved deciding on an interpretation of the current Electronic Communications Code. I have carefully considered the Proposed Code of Practice, Standard Terms of Agreement and Standard Notices and welcome the clarity such a publication can bring to Code issues. I have however some reservations about the current draft.

Time will be needed for the industry to understand the new Code and the final Code of Practice and notices before the new Code is introduced such is the retroactive measures that are imposed on existing agreements by the new Code.

On a general comment I note Ofcom state at 1.6 that:-

> *After the consultation closes we will review all submitted responses and publish finalised versions of the Code of Practice and accompanying standard terms and conditions in a final statement which will be published as soon as possible following the entry into force of the relevant provisions of the DEB*

[1] *Geo Networks Ltd –v- Bridgewater Canal Company* [2010] EWHC 548 (Ch), in the first instance, overturned my award. This decision was overturned and my award upheld by the Appeal Court [2010] EWCA Civ 1348. Leave to appeal to the Supreme Court was subsequently refused.

As is made clear by the Code at Part 15 that notices are valid only if in the form set out by Ofcom.

The Code is not well known, even to those affected by it or dealing with properties affected by such rights. While we acknowledge that ignorance of the law is no defence we consider that widespread publicity of the existence of the Code of Practice and the required format for notices will be important before the Code comes into force to ensure smooth implementation of the Code. This will give Site Providers and their legal advisors adequate notice of the steps that will have to be taken in respect of such apparatus.

The application of a notice procedure is a significant departure from the Code provisions in existence at the time such agreements were agreed and therefore is retrospective. If this is not done I believe there is significant risk that Site Providers may fall foul of the Code through a technicality. If this occurs it is likely to bring the new Code into disrepute as having been brought into play without adequate explanation and publicity. This would be unfortunate and may have an adverse effect on the granting of new agreements.

The Code of Practice

The draft Code of Practice fails to address two fundamental issues:

- sanctions for any failure to comply with the Code of Practice and
- prior notification for upgrades

a) Sanctions for failure to comply

The main weakness of the Code of Practice as presently drafted is the lack of sanctions for any failure to observe it. There is a substantial imbalance of power within the telecommunications sector. In the mast sector there are now only two main tenants (CTIL and MBNL) occupying thousands of sites each and in the fibre sector where Vodafone and SSET have a virtual duopoly of fibre on electricity pylons. On the other hand, there are thousands of individual landlords, most of whom will own only a single site. OFCOM in discussions have suggested that this would be addressed in the Code of Practice; it has not been.

As currently drafted, there is nothing in the Code of Practice cover breaches of the Code of Practice. From my experience of other areas where there are Codes of Practice in place (many prepared by the organisations themselves – such as the Electricity Supply Industry and Scottish Water) I have found that such organisations find adherence to such Codes of Practice inconvenient and so chose to ignore them.

I have just had an instance where it has taken over two years to achieve settlement of a lease because of delays imposed by the operator's solicitor. In another instance BT have been knowingly operating electronic communications apparatus without a written agreement while refusing to negotiate a reasonable proposal on behalf of the landowner. While the new Code will assist with that particular point by providing timescales for renegotiation, similar problems of failing to respond may arise in relation to other issues.

At present the only response to such site providers concerns was a suggestion by Lord Ashton during a debate on the Digital Economy Bill that failure to observe the Code of Practice could be taken into account by the courts in the event of a dispute:

...I understand the desire to ensure that Ofcom's code of practice effects real change in behaviour within industry. It will have weight. Indeed, failure to abide by it could be taken into account by a court or tribunal in the event of a dispute.[2]

That suggests that the parties have to resort to potentially costly formal dispute resolution procedures to deal with a Code of Practice breach, which is unlikely to be a proportional remedy.

The proposed Code of Practice does not address the issue of many contractors have been altogether ignorant of such Codes of Practice because their appointment does not require observation of it as part of the contract. In terms of the Water industry there is a remedy for claimants affected to complain with powers for Ofwat to fine such undertakers and award modest sums of compensation to claimants for breaches of the Code of Practice by contractors. Whilst far from ideal in that the sums awarded are typically only a few hundred pounds, at least there is some way to hold undertakers to account and Ofwat notes such breaches.

I strongly believe that some form of sanction is necessary against any party to a Code agreement that fails to observe the Code of Practice. At its most basic, this sanction could be by way of written representations to Ofcom, who would adjudicate cases and issue a direction where necessary with the ability to fine wrongdoers and compensate the aggrieved party.

In the past Ofcom have declined to intervene in such disputes on grounds that that Ofcom's function in applying the Code does not include any role of policing the licences they issue[3]. A more proactive approach is now necessary.

b) Notification for upgrades

The EC Code permits an operator to carry out works to upgrade a site provided that the upgrade:

- has no more than a minimal adverse impact on the appearance of the site and
- does not impose an additional burden on the other parties to the agreement.

The new EC Code does not require the operator to give prior notification of such upgrades to the other parties before undertaking the works.

We believe this to be a significant omission. In practical terms, if the operator does not tell the landowner what upgrades are proposed, the landowner is unable to let the operator know if those upgrades are likely to have an adverse impact or impose an additional burden.

The consequence of this if an operator carries out the works without giving any prior notification to the landowner, and the works have an adverse impact or impose an additional burden then the landowner may then require the operator to remove them (as they will have no consent under the EC Code), which would put the operator to additional and unnecessary expenditure.

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[2] *Lords Hansard, 31st January 2017, column 1183*
[3] Eg complaint reference PEW/00055/06/12

I strongly fee that it would be of practical benefit to operators to know beforehand whether any upgrade works are likely to give rise to such an issue.

I therefore consider that a new paragraph should be inserted after 4.40 to read:

> ***Upgrades***
> *An Operator has powers under the ECC to upgrade the apparatus provided that the upgrade*
>
> - *has no adverse impact (or no more than a minimal adverse impact) on the appearance of the apparatus and*
> - *imposes no additional burden on the Landowner.*
>
> *Unless the proposed works will clearly have no more than a minimal adverse impact, the Operator should notify the Landowner of the proposed upgrade in advance, in order for the parties to assess whether the upgrade is likely to have any of these effects. The Operator should then allow a reasonable period for the Landowner to make any comments on the proposals. Where the Landowner is concerned that the upgrade will have more than a minimal impact on appearance or impose an additional burden, he should inform the Operator, who should consider those concerns and seek to resolve them before the upgrade is carried out.*

Other comments on the draft Code of Practice

Using the numbering in the draft I have the following other comments:-

4.6 The Code of Practice refers to Landowners but the Code enables an operator to deal with occupiers. An operator can create an agreement binding on the landowner to his significant detriment.

I consider that the Code of Practice should provide that operators should take adequate steps to satisfy themselves that they are negotiating with a party who has a lawful right to grant the necessary agreement if not negotiating with the landowner.

4.8 For the reasons outlined above I welcome this important point being established at the outset. The person on site who is most likely to encounter the landowner or occupier will often be a contractor and while contractors act under the operator's direction, only the operator has Code Powers, so it is important that the responsibility for the exercise of those powers is seen to remain with the operator.

4.15 – 4.17 I consider it important that the issue of professional advice is raised early in the Code of Practice so that the parties can decide whether they require such assistance or not. These paragraphs cover the essential points of suitable qualifications or experience and responsibility for fees.

In my experience operators often use surveyors to create legally binding agreements under the Code. Surveyors are not bound to advise parties that there may be legal ramifications in signing agreements as would be the case if a lawyer was used (even members of the RICS).

The Code of Practice should therefore require parties to advise the other to take the requisite advice (however simple the agreement). It is then up to them if they chose not to do so.

4.18 The first bullet point of "*customer demand*" should be deleted; it is unneccessary. New apparatus may be required for the other four reasons listed, each of which may be dictated by customer demand, but the apparatus itself is not installed directly as a result of customer demand.

4.22 We consider that the reference to 7 days should read "*this should not be less than 7 days*".

4.23 The drafting of this paragraph appears clumsy. I suggest better wording would be:

> *The parties may choose to meet on site during the assessment process to discuss practicalities and the Operator may ask the Landowner to provide certain relevant information, such as.....*

This paragraph should also be read in conjunction with my comments at 4.6 above. The approach may not be to the landowner but the important aspect to be established is who is the landowner and what legal rights there are to confer agreement.

4.27 This should be read in conjunction with comments on 4.6 above. Because the wording of the Code is likely to create rights beyond the terms of any agreement proffered any approach should include a warning that professional advice should be sought.

4.28 This paragraph would read better as follows:

> *As part of the terms of any agreement, the parties should agree access arrangements for construction, installation of apparatus, subsequent planned maintenance, upgrades and emergency maintenance to repair service-affecting faults. The essential matters which the parties should consider in relation to access are set out in Annex B.*

4.29 and 4.31 There is some duplication in paragraphs 4.29 and 4.31. We suggest that 4.29 is deleted and 4.31 amended to:

> *The parties should make every effort to reach an agreement by negotiation, but where they are unable to do so (or to do so within a reasonable period of time), the ECC provides that a court can impose terms or confer code rights on the parties. It must be emphasised, though, that one of the principal purposes of this Code of Practice is to establish a voluntary process which avoids recourse to the courts.*

This is a serious point and one that merits further amplification.

The observations of the Court of Appeal in *St Leger-Davey v First Secretary of State*[4] stress how sparingly such powers should be exercised. Before the Planning Inspector in that case counsel for the Appellant (the successful Respondent in the Court of Appeal) had observed that he knew of no case where the paragraph 5 powers had been used by a 'code system operator'[5]. This was not challenged before the Court of Appeal *per* Pill LJ at paragraph 27:-

> *The principle that resort to the County Court should not readily or routinely be contemplated is in my judgement a sound one.*

This seems to endorse the approach that the agreement should be voluntarily sought in the first instance and is further reinforced by OFCOM's draft Code of Practice which states:-

> *Although the ECC provides a mechanism for the court to impose terms of occupation on the Landowner and the Operator, the parties should make every effort to reach voluntary agreement first.*

There would seem no reason to regard "*every effort"* as having a meaning different from "*best effort"*[6]*.* If parties have failed in this regard this is likely to be a matter that may have a bearing on any Courts expenses.

As was said by Lord Ashton, Parliamentary Under Secretary of State for DCMS in introducing amendments to the draft Bill in the house of Lords[7]:-

> *The legal framework underpins consensual agreements. Code rights cannot be exercised unless they are agreed with the site provider or imposed by the courts.*

Despite this focus on agreement, the rights enabled by the 2017 Code have the potential to become more far-reaching and durable than might be anticipated by an owner or occupier of land at the time when they are granted[8].

4.32 In the final bullet point, the example given in respect of landowner's property is "livestock".

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[4] [2004] EWCA Civ 1612

[5] Paragraph 45 of the inspector's decision recorded at paragraph 14 of the Court of Appeal decision. Paragraph 5 of the 2003 Code is the right to obtain an agreement against the landowner's wishes.

[6] If a party promises "best efforts", everything that can be done should be done, but not to the point of that party bankrupting itself. Although the "best efforts" qualifier must be set against the context and purpose of the contract in which it is found, the phrase "no stone unturned" exemplifies the "best efforts" standard. The phrase "best efforts" was considered at length by Justice Dorgan of the British Columbia Supreme Court in *Atmospheric Diving Systems Inc.-v- International Hard Suits Inc (1984) 89 BCLR (2nd) 356 (SC).* In summary, the principles extracted from the cases on the issue of "best efforts" are:

1. "Best efforts" imposes a higher obligation than a "reasonable effort".
2. "Best efforts" means taking, in good faith, all reasonable steps to achieve the objective, carrying the process to its logical conclusion and leaving no stone unturned.
3. "Best efforts" includes doing everything known to be usual, necessary and proper for ensuring the success of the endeavour.
4. The meaning of "best efforts" is, however, not boundless. It must be approached in the light of the particular contract, the parties to it and the contract's overall purpose as reflected in its language.
5. While "best efforts" of the defendant must be subject to such overriding obligations as honesty and fair dealing, it is not necessary for the plaintiff to prove that the defendant acted in bad faith.
6. Evidence of "inevitable failure" is relevant to the issue of causation of damage but not to the issues of liability. The onus to show that failure was inevitable regardless of whether the defendant made "best efforts" rests on the defendant.
7. Evidence that the defendant, had it acted diligently, could have satisfied the "best efforts" test is relevant evidence that the defendant did not use its best efforts

[7] Lords Hansard, 22nd February 2017, col 361

[8] Because of the restrictions upon removal and rights to assign, upgrade etc under the Code

This is necessarily a helpful example being too proscriptive – the need to safeguard the landowner's property might apply to anything from hedges alongside an access track to the lifts used to gain access to a rooftop site.

It would be more helpful to include a reference to the need for the operator to have to reinstate any damage caused during the deployment stage, so we suggest that the following:

> *Procedures for safeguarding the Landowner's property, including reinstatement measures where damage occurs.*

4.37 We appreciate that operators may wish 24 / 7 access in respect of service-affecting faults because of the nature of their contracts with end-users and potential exposure to penalties. Such demands are however having a serious effect on the availability of sites because of the impact such access may have on a potential landowner's core business. The Code of Practice would be more balanced if it recognised that 24 / 7 access is a point to be negotiated between the parties not demanded or there of right.

4.38 This paragraph would read better as follows:

> *As set out in Stage 2 Consultation Phase, any agreement between the Operator and the Landowner must address the Operator's rights of access to the site. The essential matters which the parties should consider in relation to access are set out in Annex B. Prior to entering into an agreement, Operators and Landowners should discuss preferred access routes and processes, both for routine visits and in cases of emergency, so that there are clear expectations as to what will happen when access is required.*

4.40 It has been my experience that many operators have inadequate data base systems to enable contractors to identify and adhere to access protocols so operators are unwilling to accept access restrictions.

For example I recently had reason to check an operators site access notes on their database because a contractor appeared on site without giving the required notice and had to be sent away. The data base entry simply stated -

> *24 hour access. DO NOT PARK ON ACCESS TRACK as this is in constant use. RBS 2102 key required.*

The lease clearly required that notice be given and access agreed with the landowner save in emergency. Quite why the requirements set out in the lease were not reflected in the database is a mystery but illustrates the need for operators to ensure that they information they hold adequately reflects the agreement.

Such misinformation, or an inadequate database (in that I understand H3G's database is unable to record access restrictions), leads to programmed maintenance being classified as 'emergency' to enable contractors to demand access on the argument that denial of access has the potential to lead to a service affecting fault.

Ofcom should set out guidelines as to what constitutes an emergency or service affecting fault.

Ofcom should ensure that operators have adequate facilities to avoid such issues.

4.41 This paragraph requires the operator to provide the landowner with the name of any other party who shares the site. The operator should also be required to provide to the landowner the relevant contact details for any such third party. If such third party site sharers are likely to require physical access to the site then provision will need to be made for this between the parties. We therefore suggest the following addition to this paragraph:

> *Where third party sharers are likely to require physical access to the site themselves, the parties will need to provide for this in the agreed access arrangements.*

4.45 This paragraph refers only to notifiable diseases. A more general term would be preferable such as '*bio security measures*' because of the risk of spreading disease or pathogens on machinery etc.

4.48 We suggest that this paragraph is amended as follows:

> *When requested to remove redundant apparatus by a Landowner, the Operator will respond within a reasonable time, either explaining why the apparatus will still be needed or to propose a date by when the apparatus will be made safe or removed (and the site reinstated, if relevant).*

A further paragraph should be inserted to address the issue of third party apparatus which the operator may not be able to remove. We suggest the following wording:

> *The operator will not usually be able to remove third party apparatus, such as electricity cables, from the site. Where such apparatus is present, the operator should discuss the practicalities with the landowner as part of the decommissioning process.*

4.50 The second sentence of this paragraph suggests that, where there is no need to re-negotiate terms on the renewal of an agreement, the period allowed for renewal will be short.

If one party considers that the terms should be re-negotiated and the other does not, that might mean that the period of time needed to discuss the issues might not necessarily be short, whether or not any changes to the terms are eventually agreed.

I consider that the second sentence should be deleted.

4.51 The repeal of the provisions of paragraph 21 of the 2003 Code and the lack of an adequate substitute means that a landowner may not be able to carry out simple repairs to buildings (re-felting or replacement of roof etc).

This is leading to many landowners being unwilling to enter into agreements for electronic communications apparatus on their properties.

This paragraph should be strengthened to address such concerns.

Furthermore the Code of Practice should make it clear that operators should not seek to claim loss of revenue as part of this. I understand that the average streetworks site on the urban fringe can generate revenue of £60,000 pa and city centre rooftop sites many times this. Landowners are unlikely to consider granting rights to operators if they know that they are going to have to compensate operators such figures which are way in excess of the potential revenue stream from the rights granted.

4.52 The drafting of this paragraph appears rather clumsy. It could be re-written as follows:

> *Where a Landowner has a genuine intention to redevelop their property, paragraphs 30-31 of the ECC allow the Landowner to serve notice on the Operator requesting them to leave the site and giving at least 18 months' notice. Landowners may need to provide evidence that the intention to redevelop is genuine and should seek to give as much prior notice to the Operators as possible, in order that the Operator has adequate time to try to find an alternative site for the apparatus.*

4.54 The wording of this provision may have the consequence that a landowner may not be able to obtain an order from a Court for vacant possession in that a failure to agree terms for incorporating equipment into the proposed redevelopment may be considered unreasonable in terms of paragraph 31 (4) (c).

My concern relates to the word 'viable'; incorporating the equipment into a redevelopment may be viable even if it had considerable cost implications for the Site Provider or reduced the value of the resultant development.

I consider it should be replaced by the word 'reasonable';

Draft Standard Terms

We are concerned that the draft standard terms included in the consultation document are very basic and presumably intended to cover only the most simple situations.

There are no caveats published to guide parties on their appropriate use.

These terms will clearly not be suitable for many situations, including the installation of apparatus on rooftops or for freestanding tower sites, and this fact needs to be made abundantly clear on the face of the document. This is particularly so in that there is no general advice regarding the potential impact of such agreements and the fact that, as a consequence of the new Code, they cannot be readily terminated.

It is extremely important that OFCOM make it clear that these terms are a matter of negotiation and not binding on the parties. BT for instance agreed a standard wayleave with the CLA / NFU and refuse to countenance changes to this albeit it does not adequately protect a landowner's interest. The comments of the Competition Authority in the shortform arbitration at the behest of the CLA regarding rate recommendations for rural broadband needs to be considered.

Clause 2.1 This sets out the whole bundle of Code rights available not all of which may be appropriate. This should be made clear.

Take for example a pole with a microwave dish on the edge of a forest. The wording of this agreement, however innocuous, would seem to enable the operator to cut down trees to facilitate the lines of sight without payment of compensation for the loss.

This could be alieviated by including a general compensation (not just reinstatement) provision at 4.1.

Clause 3 Given that agreements under this Code can continue in force long after their term date provision for rent review should be made.

It is my understanding that LIDI[9] is good authority for annual payments in situations such as this where there is an ongoing relationship being imposed. I note however that in *Brookfield*[10] the judge ordered a one off payment based on witness evidence of this being the norm and given the circumstances (see for instance p13 A of original County Court judgement).

I cannot speak to the evidence given in *Brookfield* but it is my experience that annual payments are the basis for the vast majority of telecoms agreements (including a considerable number with SSET) because of the ongoing relationship between the parties. For this reason I consider that this should be the basis for any agreement ordered.

The commercial purpose of rent review provisions in leases is well known and recognised. The general purpose of a provision for rent review is to enable the landlord to obtain from time to time the market rental which the premises would command if let on the same terms on the open market at the review dates to reflect the changes in the value of money and real increases in the value of the property or level of interference arising during the period that the agreement is in force.

In the proposed agreement an operator would be under no obligation to review that sum.

Absent a specified mechanism and disputes procedure in the agreement, in order to achieve any change in rental, a landowner would have to recourse to the provisions of paragraph 33 – a review provision would alleviate that need.

Any landlord would therefore face considerable costs in order to obtain a realistic value. This is clearly not in the interests of the parties and would result in the loss of valuable Court time. By refusing incorporation of a review mechanism or appropriate arbitration provision, operators are able to control the rates they offer because of the potential costs incurred in terminating the agreement. That is clearly unsatisfactory given the likely period that any such statutory agreement will apply.

[9] *Mercury Communications Limited -v- London & India Dock Investments Limited (1993) 69 P & CR 135, 144).*
[10] *CableTel Surrey & Hampshire Ltd -v- Brookwood Cemetery [2002] EWCA Civ 720*

In my view it is entirely reasonable to expect that any terms awarded in terms of in terms of the Code would contain appropriate review provisions for the protection of the landowner's interest.

Analysis of my database of over 5,000 telecoms radio mast agreements reveals reviews periods are fairly evenly balanced between three year and five year review patterns. Of the 68 agreements I negotiated last year all were on the basis of three year reviews.

Analysis of my database also reveals that, in respect of new lettings for telecoms sites over the period 2012 – 2016, OMV/RPI reviews were the usual means of review. All the agreements I agreed last year were on this basis.

I consider a suitable provision in this respect to be:-

The Annual Payment shall be reviewed at the expiry of each successive period of three years throughout the duration of this wayleave.

The basis of review shall be the open market value of the rights which are the subject of this agreement or the sum passing increased in line with any increase in Retail Price Index over the preceding three years.

The parties shall seek to agree the reviewed amount of the Annual Payment. In the event that the parties fail to agree on the amount of the revised Annual Payment the same shall be determined by arbitration.

In no circumstances shall the amount of the Annual Payment payable following review thereof be less than the amount payable immediately prior to such review. Irrespective of the date on which the review process is completed for any period of review, the reviewed Annual Payment shall be payable from the first day of the triennium to which the particular review relates. For the avoidance of all doubt, time is not to be of the essence in respect of the review of the Annual Payment.

Clause 10. Termination – we consider this clause to be confusing as it implies that a landowner can bring the agreement to an end in a much shorter timeframe than that permitted by the EC Code. The footnote goes some way to explain this but the overall clause is unsatisfactory.

Clause 16. Mediation – We support the principle of a range of dispute resolution options being available to the parties to an agreement. I consider however that the requirement to refer <u>any</u> dispute to mediation as drafted to be limiting. In some cases it may be more appropriate to use third party expert determination or arbitration.

It may be better to redraft this retaining only the present para 16.3 but making reference to alternative dispute resolution.

Clause 17. Governing Law – I trust that 17.1 will be amended to allow for Scots Law to govern agreements in that legal jurisdiction.

Other issues not covered include:-

Interest

There is no provision for interest or protection for the landowner in the event of non payment. I do not consider this to be reasonable.

Any forfeiture provisions could in effect be overridden by the statutory provisions of the Code.

I therefore consider that a suitable provision in this respect, in line with agreements reached elsewhere, would be:-

> *Interest will be payable in respect of late payment at 6% over the base rate of the Bank of England calculated on a daily basis and compounded monthly.*

Draft Template Notices

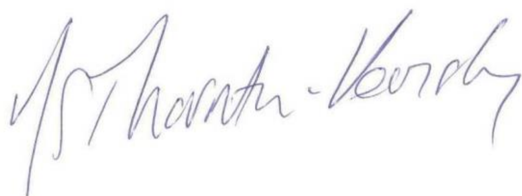
I wish to reinforce my concerns about wide publicity regarding the new requirements of the 2017 Code. Ofcom should ensure that publicity is given to the existence of such forms within the legal and surveying professions prior to the new Code coming into being.

I consider that the draft templates should be in a letter style to make it clear on initial reading the operator exercising the right and to whom it is addressed and for what site rather than the present style.

Presumably references will be to the Digital Economy Act 2017 not to Schedule 3A of the 2003 Act.

We trust that the responses given above are helpful and would be pleased to discuss matters further with officials if required.

Yours faithfully,



I S Thornton-Kemsley TD MRICS FAAV ACIArb