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Dear Dan,

Three's Response to *Electronic Communications Code Digital Economy Bill: Proposed Code of Practice, Standard Terms of Agreement and Standard Notices*.

This is Three's (Hutchison 3G UK Ltd) response to Ofcom's consultation on its *Proposed Code of Practice, Standard Terms of Agreement and Standard Notices* relating to Electronic Communications Code (ECC), recently reformed in the Digital Economy Act.

Three is the UK's challenger mobile operator. Through market-leading propositions such as 4G at-no-extra-cost and Feel At Home, we have enabled our customers to make the most of their mobile data services. On average, our customers use over 6GB of data per month, and 36% of all the UK's mobile data traffic is carried across our network. We are therefore uniquely placed to comment on the regulatory environment required to efficiently build and maintain the mobile infrastructure needed to meet growing consumer demand.

Three has long believed that reform of the ECC was necessary to enable operators to build out high-capacity and reliable networks. Therefore, we supported Government throughout the process of ECC reform. The final version of the reform, contained in the Digital Economy Act, represents a fair deal for both operators and landlords.

The Digital Economy Act directed Ofcom to co-ordinate the creation of a Code of Practice and certain Standard Notices to complement the legislation. Three has worked closely with Ofcom to help produce the draft Code of Practice within this consultation. The draft Code sets out the expectations for the conduct of the parties to

any agreement made under the ECC, and we believe that it will be effective in driving best practice and behaviours. We also support the approach to Standard Notices, although we have suggested some minor amendments in our response below.

However, we are extremely concerned regarding Ofcom's draft Standard Terms of Agreement. As noted by Ofcom in the consultation, the ECC covers a diverse range of communications infrastructure. This means that a one-size-fits-all approach, as attempted in the draft Standard Terms of Agreement, simply does not work. As it is not a legislative requirement on Ofcom to publish Standard Terms, Three urges Ofcom to not to pursue this work stream. The Standard Terms as drafted will undermine the objective of ECC reforms, as they will create an additional layer of complexity and confusion, ultimately slowing down the negotiating process.

It is to note that mobile telecommunications operators already have an established network of mast sites with existing terms in place with our landowners. Overall, such existing occupational terms are not contentious with landowners and suit our industry needs. We do not believe there is a need for the proposed Standard Terms by Ofcom to be adopted for the mobile telecoms industry.

Three has expanded on this point below and has also responded to the other questions in the consultation.

Draft Standard Terms of Agreement.

Three does not support Ofcom publishing a Standard Terms of Agreement applicable to mobile. To provide high quality and capacity networks, operators – both fixed and mobile – need to deploy a diverse range of telecommunications equipment. The type of sites where this equipment is deployed also varies widely – from a greenfield site on a rural farm, to a rooftop site on an inner city building. As noted by Ofcom, there is no one-size-fits-all approach that would capture all these different types of equipment and sites.

We are therefore surprised that Ofcom have attempted to create a Standard Term, which would apply to both fixed and mobile, and across different sites and equipment types. For example, the Standard Terms included in this consultation appears to be drafted with fixed in mind, despite also being proposed for mobile. It does not capture the ongoing access requirements needed for mobile operators to install, upgrade and maintain equipment.

While it may be appropriate to publish a set of Standard Terms for fixed infrastructure, it is our belief that the range of site and equipment types, as well as access requirements, would make such an approach impossible for mobile. It is also worth noting that such a set of Standard Terms would have to be regularly revisited for

mobile, to take into account new technology, particularly during the next decade as operators begin to develop and rollout 5G technology.

The Code of Practice states that the Standard Terms document "may be (but need not) be used" when negotiating agreements to confer Code rights. However, the publication of Standard Terms by Ofcom would *de facto* be used by landowners as the basis of discussions. It is also likely to be taken into account in any legal consideration. Rather than speed up the negotiating process, the publication of unsuitable Standard Terms will entrench discussions between different parties. This will cause delays and uncertainty in rollout, ultimately impacting on the quality of service consumers receive.

Three therefore does not support the creation of Standard Terms of Agreement for mobile infrastructure. Instead, we would recommend that Ofcom proposes some key terms that the parties might want to use within their agreements rather than producing a draft legal agreement as a starting point for use in all instances. Three would be happy to support Ofcom in drafting these key terms.

Further Comments

As outlined above, Three does not believe it is appropriate or workable to publish Standard Terms of Agreement that covers mobile infrastructure. Below we have highlighted some issues with the current drafting that would cause significant problems for operators, to illustrate this point.

If Ofcom does decide to progress these Standard Terms, despite industry opposition, below is a list of the key issues that would need to be addressed as a matter of urgency. We have not suggested drafting amendments to the Standard Terms nor drafting to cover the additional clauses that operators may require in order to cover the usual rights and provisions that standardly feature across all of our site agreements.

Definition of "Land" – Land is not particularly 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 greenfield macro sites, where for health and safety and security concerns, 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.

Definition of "Term" - is such that the agreement runs indefinitely until it is terminated. This is 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.

Clause 2.1(c) – We would expect that the Agreement would contain a right to "remove" the Apparatus as Para 4.9 of the draft Code of Practice states that

Landowners and Operators should be clear on the position relating to the decommissioning of sites that are no longer required.

Clause 2.1(f) – This is a general right to enter onto the landowner's land and does not specify 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 of access route is also helpful for the operator. On greenfield sites we would expect a specific access route to be stipulated to help minimise potential problems or concerns.

Clause 2.1(g) – This is a general right to connect the apparatus to a power supply. It does not differentiate between an independent supply and the right for an operator to tap into 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 also require further provision relating to the right to use a backup power generator and the right to lay communication links.

Clause 5.1(c) – This 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.

This must contain caveats or controls to protect the operator, otherwise this cause disruption to the continued operation of the apparatus and ultimately impact our ability to provide a reliable service to their customers.

At clause 8.1 (indemnity) - Only in the appropriate circumstances would we agree to indemnify a landowner for breach and if so, only where there is an agreed liability cap of up to a maximum of £1 million in respect of a claim or series of claims arising from the same incident. We would not agree that it could be set on a per annum basis. Finally this limitation of liability would apply to the indemnity and also any liability under the agreement rather than as envisaged by clause 9.2.

At clause 10.1(c) (Termination) – This creates a right for the landowner to terminate the agreement if they intend to redevelop their land. The Code envisaged such provision to be exercisable only at the end of the Term or subsequent to it. However the absence of a fixed term (see above, point 2) means that as drafted, the break right would become exercisable at any point. Operators will have no certainty of occupation or the ability to provide a continuous service.

Operators and Infrastructure Providers would find it difficult to justify investment into existing and or new sites with such limited certainty as to the period over which they

would be able to amortise their investment. Such a clause goes beyond the remit of the Code and should not be included in any draft terms proposed by Ofcom.

The above are the most pressing concerns with the current draft Standard Terms of Agreement. There are many more, which will need to be considered by Ofcom and stakeholders if it is decided to continue with a Standard Terms applicable for mobile operators.

Draft Code of Practice.

We note that the scope of the draft Code is limited to the relationship between operators and landowners. It does not govern the relationship between MNO and Wholesale Infrastructure Providers (WIPs). As the mobile industry highlighted during the ECC policy discussions with Government, the decision to exclude WIPs from the ECC risked undermining the policy objectives.

There is currently no compulsion for WIPs to pass on the benefits of ECC reform to operators, meaning that they will not flow down as additional investment to deliver better coverage for consumers. Ofcom states in this consultation that they have existing powers that govern this relationship; however, this remains a matter of legal debate, creating doubt and uncertainty for the mobile industry. The mobile industry will be carefully monitoring the impact of the reforms on the market, especially in relation to WIPs. If evidence is brought forward that suggests there is a competitive distortion being created, it is vital that Ofcom looks to bring forward appropriate remedies quickly.

In terms of the draft Code of Practice in this consultation, Three has worked closely with Ofcom and other stakeholders on the final text. We agree that the text of the draft Code of Practice represents a fair balance of roles and responsibilities between landowners and operators, and believe that it will drive best practice and behaviour, and support its publication. We urge Ofcom not to make any additional changes to the document. If changes are considered, it is crucial that these are shared with the drafting group at the earliest possible stage. Even minor tweaks could have a significant impact on the meaning of the Code, including the potential for unforeseen consequences.

Three also supports the submission of Mobile UK and the detailed comments on this matter.

Draft Standard Notices.

We agree that Ofcom have on the whole prepared a comprehensive set of draft notices.

However, we would like Ofcom to also provide a standard notice for the notices required 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).

Ofcom has argued 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. However, we note that Ofcom have provided draft notices to be used in similar circumstances - for example the counter notice under paragraph 52(2), being the operator's objections to a transport operator's alterations requirements. Therefore, to ensure consistency of approach, it would be sensible to draft the notices required under paragraph 31(1) and paragraph 38(4).

It would also be helpful if each of the prescribed notices had a section at the top, which clearly sets out who the notice is from and who it is being sent to – as well as the address to service future notices. Whilst some of the notices require this information to be provided in the main body, some do not require it at all and certainly do not set out the sender’s details for notices that require a counter-notice or response to be served.

This means that the recipient will not always know where to send a response, especially as the original agreement often refers to a registered office addresses which may not always be the most appropriate location. Introducing this additional information at the top of all notices will help ensure that all notices are served to the most appropriate address, reducing the risk of delays or communication going awry.

We hope that the above comments are useful. I would of course to be happy to discuss in greater depth, or respond to any questions you may have.

Yours sincerely

Simon Miller
Head of Government and Regulatory Engagement.