Consultation Response

Changes to the Electronic Communications Code

Response by the Royal Institution of Chartered Surveyors (RICS).

RICS®

Obtaining and using code agreements

General questions

Question 1
Do you agree with the assessment of the main problems relating to negotiations for and the completion of new agreements set out in Chapter Two?
Answer to Question 1 We agree The assessment is accurate. However, the empirical evidence referred to (Jackman and King (2020)) does not always accord with RICS members' experience. Before addressing potential changes or solutions, it may be useful to consider the reasons for the distrust and antagonism discovered by the research and described in the awards of the Upper Tribunal. These mostly relate to the deployment of mobile phone base stations on existing buildings or land. Where the development relates to fibre system installation, there are less opportunities for disagreements to occur. **Factors relating to Operators and their actions** • When the terms of the new Code were published, the Operators or companies acting for them, understood that they had been provided with a powerful position to start negotiating Code Rights. In practice this meant that offers of consideration and compensation combined were often at nominal levels (e.g. ref. Judgement in TCR 266 2019) and represented a departure from those historically realised. • At a process level, remote project management of contractors and consultants engaging with Site Providers, against a back-drop of high pressure to achieve deployment of apparatus on time and on budget, with daily changing priorities, allows little room for a considered, bespoke approach to mounting telecom apparatus on unique buildings. • The design of installations could sometimes be considered unsympathetic to the buildings on which the apparatus is to be located. It appears that, in some cases, the design solutions are standardised and located for ease and uniformity of design, rather than taking account of individual sites or site provider concerns.

- Rarely is there considered sufficient co-operation in either direction between Operator's design consultants and the owners/operators of buildings on which apparatus is being installed. It would be rare for the designer working for the Operator to share or update the Health & Safety File, as contemplated by Construction (Design and Management) Regulations 2015. Better co-operation between Operators and Site Providers on this point would be in both parties' interests. Designers might be encouraged to take a more proactive engagement with Site Providers to approach towards integrate the telecom apparatus into existing buildings.
- Installation works can cause disturbance to the occupiers of the building, who have no contractual relationship with the Operator concerned. Perhaps unaware of this disturbance, since often they would not know to engage with tenants or who to speak to, Operators can compound the disturbance.

  As the Upper Tribunal's decisions have been published and deals are being done, it is clear that Operators and their agents have learned lessons from the early days of the new Code. Greater understanding of Site Providers' concerns has resulted in more new agreements being completed, consensually.

Factors relating to Site Providers and their actions

- While each Site Providers' position will be unique, dealing with the consequences of a tenant on their land comes at a cost. Many such Site Providers would not be interested in the time, cost or energy involved in taking on a tenant unless it was worth their while. The figure at which it becomes attractive to host an Operator for such inducement is often likely to exceed the existing or reasonable alternative use value, as outlined by the new Code in a no scheme valuation. This is perhaps understandable when referenced against the historic rental levels. Requests to occupy properties from Operators under the new Code's valuation basis therefore appears to be an affront to their rights as owners of such properties and such applications are therefore resisted, as a matter of principle.
- The burdens on Site Providers from hosting telecom apparatus were initially underestimated by Operators. Recent Upper Tribunal decisions (ref: TCR-52-2020, TCR-52-2020 & TCR-402-2019) have partially addressed this.
- Very few Site Providers have the knowledge or experience to respond to correspondence and legal documentation. They can, therefore, be expected to appoint specialist agents to act on their behalf. Until the

publication of the draft new Code, those agents had developed businesses based on negotiating agreements with consideration often in the £10s of thousands. When it was realised that the rent/rental equivalent was to be reduced to nominal levels plus payment for benefits and burdens, this represented a significant threat to their income stream.

- Site Providers would not be willing to appoint agents, to receive less in income than the fees cost, even if, in most cases, the fees may be re-claimed from the Operator. More pertinently, the Site Provider may not appoint such an agent if the agent was not going to be able to achieve anything more than a nominal rent. This has led Site Providers' agents to try to recover income, often under spurious heads of claim (e.g. ref Judgement in TCR-28-2018).
- Also, it remains human nature that, if it is perceived that an aggressive approach is made by the other side, it is almost bound to lead to an aggressive or intransigent response.
- Added to the points above is the not unreasonable concept that the Operators agreed the higher rents in an open market, under the old Code; nothing has changed from a Site Provider's perspective, creating a perception that the Operators are improving their profit margins at the expense of Site Providers' income.

Question 2

Do you have any suggestions of other legislative or non-legislative changes that might support faster and more collaborative negotiations other than those discussed in Chapter Two? In answering this, please note that we do not intend to revisit the statutory valuation regime.

Answer to Question 2

Yes

We agree that the measures outlined in Chapter 2, namely: -

1. A statutory process for monitoring raising complaints about non-compliance with the Ofcom Code of Practice;
2. The introduction of an Alternative Dispute Resolution Scheme;
3. Fast track court procedures.

are likely to meet the objective of achieving faster and cheaper deployment of optimised networks.

We are concerned that enforcing compliance with the Ofcom Code of Practice through statutory control may give rise to further difficulties, perhaps similar to those that the new Code has unexpectedly uncovered and defeat the objective of creating the legislative change proposed. This is explained further in answer to Question 3 *et seq*.

We concur that an Alternative Dispute Resolution Scheme would support the Government's objective and provide details of a potential scheme in answer to Question 5 *et seq*., below

We concur that a fast track court procedure would assist in limiting the costs and delays in a significant proportion of disputes taken to litigation and provide further details in answer to Question 7 *et seq*.

Additional Legislative changes

We consider a range of other potential changes to legislation in answer to the questions below.

Non-Legislative changes

Many of the issues causing disputes, hindering the faster and cheaper deployment of optimised networks, exposed by the cases heard by the Upper Tribunal have related to the approach and behaviour of the parties. Each party clearly has belief in the merit of their case, sufficient to litigate, with the inherent cost and stress involved. Some of the decisions handed down by the Upper Tribunal have shown that belief in those merits has been misplaced. It is, therefore, considered that a Government publication, explaining the purpose of the new Code, providing context and showing the appreciation of the issues important to both sides has been taken into account when preparing the legislation, together with the over-arching public interest, would assist in creating understanding for all parties.

Compliance with the Ofcom Code of Practice

Question 3 Do you think there should be a statutory process available to look at cases where an operator has failed to comply with the Ofcom Code of Practice?
Answer to Question 3 No A Code of Practice is an outline for best practice for generic situations. A statutory process would form a prescriptive formula to be applied ubiquitously. As guidance it already may be considered by the Upper Tribunal or County Court in assessing the level of costs that should be awarded in the event of a claim. Bringing the matter under statutory control will give rise to further complications in interpretation, requiring legal representation, adding cost and delay to the process.
If such a process was introduced: Question 3(a) Do you think that the process should deal with **any** failure to comply, or exclude minor or technical breaches, or focus on a specific range of issues?
Answer to Question 3(a) No The consequences of failure to comply should be at the discretion of the Judge in addressing the claim for costs, if submitted, based on the circumstances of each case.

Question 3 (b) Do you think the Ofcom Code of Practice would need to be reviewed to provide more specific guidelines? If so, what might these helpfully include?
Answer to Question 3(b) The RICS produced a professional statement in November 2019, setting out good practice for RICS Members and firms regulated by the RICS. We understand the Ofcom Code of Practice is being looked at again, to see if elements of the guidance outlined could be adopted to contribute to the objectives of the Ofcom Code of Practice. Several RICS members are engaging in this review.
Question 3(c) What remedies do you think should be available under any statutory process? For example: should these be limited to putting right the failure to comply, or should financial penalties be available in some circumstances?
Answer to Question 3(c) The issue of compliance should be regulated at the discretion of the Judge considering an application for costs.
Question 4 Do you think the court should have specific jurisdiction to take into account failures to comply with the Ofcom Code of Practice during the negotiation stage? For example, in awarding costs or providing some other remedy?
Answer to Question 4 Yes The Upper Tribunal has demonstrated that it takes account of a range of published and publicly available documents, when considering the issues before it, including, for example, the Law Commission Report on the initial consultation

on Code reform, in 2015. The Ofcom Code of Practice is one such document that may guide the Upper Tribunal in its deliberation and findings.

If the court had this jurisdiction:

Question 4(a)

What should be the purpose of such a process? Should the court's main aim be to ensure that parties comply with the terms of agreements? Or should it aim to punish breaches already made and to deter future breaches?

Answer to Question 4(a)

The aim of the Judiciary is to interpret and uphold the law. Breaches of contract or statute should be corrected. Whether the parties to a dispute departed from compliance through mistake or malice will be identifiable by the Court, from evidence. That evidence should provide a basis for the award of costs. Either party that fails to comply with the Code of Practice should expect to risk indemnity cost awards.

Alternative Dispute Resolution

Question 5

Do you think Alternative Dispute Resolution (ADR) would assist in resolving disagreements where e.g. the disputes points are not related to legal interpretation?

Answer to Question 5

Yes

The RICS has recognised the benefits that ADR could bring to resolving disputes on telecom property matters. It has taken an initiative on ADR in this area and has produced a discussion paper on ADR in the telecom sector, currently at a draft stage, including an outline of the process/mechanism and potential costs.

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An RICS workshop, where representatives of Operators (both fixed line and mobile), Site Providers, Wireless Infrastructure Providers, lawyers and others were well represented, recently concluded that the kind of service offered, if it proved credible, would be particularly useful in resolving disputes and avoiding the cost and risks of litigation. The types of ADR that emerged from the workshop suggest that the RICS proposal will be modified to provide three service types: - facilitation; adjudication; and determination. Further, a distinct service to deal with fixed line installations, relating to the issue of wayleaves, could resolve a high volume of disputes involving low value issues.

The RICS believes that an effective ADR system could make a significant contribution to resolving many disputes. The cost of the Court system means many issues do not get addressed. This can force a settlement, if not agreement; these unresolved issues cause resentment, leading to polarised attitudes from both sides.

If so:

Question 5(a)

What sort of situations do you think might be suitable for bringing to ADR?

Answer to Question 5(a)

The range of issues brought before the Upper Tribunal has been wider than originally expected. Trying to pre-judge hypothetical situations is not thought to be useful. As described in the RICS ADR discussion paper, it is expected that ADR could be used on all issues save for those deciding points of law.

Question 5(b)
Which type or types of ADR (e.g. mediation, arbitration, other) do you think could be best suited for each of these situations?
Answer to Question 5(b) The attached proposal outlines two types of ADR, as described below: - The proposal provides for an **independent evaluation** process for high value and/or complex disputes. This process helps parties to achieve a negotiated settlement by providing non-binding evaluation on matters in dispute and, if required, recommendations for settlement. For low value disputes and/or disputes about simple, relatively uncomplicated, issues, an **independent determination** could be more appropriate. It is particularly useful where parties are keen to achieve a quick, binding, impartial decision. What constitutes a low value or simple dispute is not defined in the discussion paper. It is proposed that parties can themselves conclude whether disputes lend themselves to the process of expert determination. It is noted, however, that the court system is not practicable or realistic when considering the value and type of many disputes. It is recognised that the lack of a reasonable means of obtaining 'justice' is a significant contributing factor to the frustrations both parties feel, leading to the polarisation of positions. Each of these descriptions are intended to be sufficiently flexible to accommodate either party's requirements. RICS members attending the recent workshop could see merit in a **mediation** service designed to facilitate the negotiations. The expectation was that the mediator would have expert knowledge of the telecom property sector, rather than being purely expert in the mediation process, so that each party's arguments could be tested and guided from an impartial standpoint, based on a full understanding of relevant statute and case law.

Another option for higher value disputes may be arbitration. Although this remedy was available under the old Code, it was seldom used. It is, however, significantly cheaper and faster than following the Tribunal process.

Question 6

If an ADR scheme was introduced do you have any comments on how ADR should work in practice? For example:

- Who should pay the costs of ADR?
- Should both parties have to consent to its use?
- Do you envisage any procedural issues and how could these best be solved?
- Do you think parties should be required to consider / attempt some form of ADR before bringing a case before the court, or before being allowed to continue with it, if the court thinks that ADR should be attempted first?
- Do you think the court should have powers to take into account any refusal or failure to engage with ADR. For example, in awarding costs?

Answer to Question 6

Some of the issues outlined are addressed directly by the RICS ADR discussion paper. As it is a draft document, at this stage, the remaining points, or others that emerge from this consultation process could be considered and answered by the final version.

The objective is to provide a flexible service that will meet the needs of the parties, for a reasonable price. The parties themselves should decide whether it should be binding or non-binding, facilitative or determinative. Since the optimal outcome is agreement reached through consensus, to leave control of the process to the parties will assist in building trust in the system and thereby enhance the potential for take-up.

Fast track judicial process

Question 7
Do you think there are situations where a fast track application to a court should be available, bearing in mind the implications of this in terms of judicial resources and the listing of other cases?
Answer to Question 7 Yes While ADR might provide an opportunity for resolving disputes more quickly and cheaply, we still consider a fast track facility through a court to be a useful addition for resolving disputes. More recent cases that have come before the Upper Tribunal have had many elements of dispute agreed before the Hearing commenced, narrowing the issues and making the dispute more simple. If there was an ability for a shorter, cheaper alternative, such as a reference to the First Tier Tribunal, it is expected that many cases may find it easier to allow the litigation to proceed and therefore reach a settlement than 'gambling' on winning the case in the Upper Tribunal. (It is anticipated that the First Tier would be considering issues following the precedents set by the Upper Tribunal). The RICS is however, unable to comment on the implications of this suggestion in terms of resource requirements and timescales, in competition with other cases. We see no reason for departing from the Upper Tribunal Practice Directions or the Electronic Communications and Wireless Telegraphy Regulations 2011,

suggesting that all matters should be decided within 6 months of the reference (notwithstanding the Upper Tribunal's indication that they would distinguish between deciding new code agreement issues and ones relating to sites where rights already exist (ref TCR-68-2018 19/10/2018 paragraph 10).

If so:

Question 7(a)

In what situations do you think a fast-track procedure should be available and why?

Answer to Question 7(a)

The First Tier Tribunal would be expected to consider matters that appear to be more straight forward, perhaps where the Upper Tribunal has already considered the substantive issue, creating a precedent.

Question 7(b)

Should such cases be dealt with by the Upper Tribunal or by a different court/tribunal, for example, the First-tier Tribunal?

Answer to Question 7(b)

Ref Question 7 above. We consider the First Tier Tribunal could play a significant role in deciding disputes of relatively low significance.

Question 7(c)

What time limits would be required for a fast track procedure to address difficulties with the current timescales for hearings and how do we ensure these provide sufficient opportunity for each party to respond?
Answer to Question 7(c) Ref Question 7 above. For proper consideration of the complex issues that have been shown to arise and allow for the preparation of cases, the existing requirements for all cases to be determined within 6 months remains appropriate.
Question 7(d) Do you think any additional remedies would need to be available to the court in the situations you describe?
Answer to Question 7(d) The function of the Court is to decide a dispute between two parties. It cannot and should not resolve the issue producing an independent answer of its own making. It already has the ability to determine the terms of an Agreement, determine consideration and compensation issues and award costs, where an application is made. It has proved adept at how to indicate when an issue has been decided and should be used as a precedent (e.g. ref Judgement in TCR-402-2019 para.109)
Question 7(e) How can we ensure that any fast track procedures give priority to the most appropriate cases?

Answer to Question 7(e)

Ref Question 7 above. For the parties involved, particularly the Site Provider, their own case is always the most important. The question, therefore, is whether the public interest of an 'important' case having priority over a less important case should take precedence over the private interest of having a case heard. Given the possibility of a precedent being set by a relatively minor case and the consequences of resolving disputes elsewhere, it is impossible to judge, at the outset, what might be a more important or less important case. We therefore think it inappropriate to try to make alterations to the case scheduling system based on the perceived importance of cases.

(Upper Tribunal Judge Elizabeth Cooke made it clear at the RICS Telecoms Forum Conference 2019 that resource was not a constraint.)

Failures to respond to requests for Code rights

Question 8

Do you think our assessment of the impact of non- responsive occupiers and landowners on network deployment is accurate? Please provide any available evidence demonstrating the impact of failures to respond on the pace, scale and cost of deployment as well as any other impacts.

Answer to Question 8

The RICS has no direct experience of applying for Code Rights and cannot therefore provide direct evidence, as requested. However, it is understood that delays incurred through lack of engagement with unknown or unresponsive occupiers and landowners is a problem, as much for Operators trying to deploy their apparatus generally as connecting a lessee in occupation of unconnected

premises, addressed by the Telecommunications Infrastructure (Leasehold Property) Bill.

The issue can be identified in two parts: -

1. Unregistered land; and
2. Registered land where there is a complex trail of ownership

1. Unregistered Land

The difficulties arising from being unable to find the owner of unregistered land are well known and understood. They have been addressed elsewhere, for other purposes. The requirement to register land upon certain events continues to reduce the problem. The need to know who is the owner of unregistered land for the purposes for requesting Code Rights contributes to the pressure for land to become registered. Until those pressures from the telecom sector and all other sectors reaches the point where it becomes a statutory requirement for all land to be registered, this issue will remain. In the meantime, establishing who to contact, to request Code Rights on or across unregistered land, is a skill developed by lawyers and surveyors experienced in such matters. Operators may have to search for consultants with such skills and and/or persevere with searches to use their statutory powers.

2. Registered land under complex ownership

Registered land may have been registered under a complex web of company ownership, including offshore, precisely to make it difficult to establish contact with someone authorised to make decisions about the property. That has been partially addressed by the statutory requirement for companies to identify a responsible person but, again, this issue is wider than issues relating to the telecom industry and the need to exercise Code Rights. This need should be recognised as contributing to the debate for public accountability and the right for privacy.

To address the lack of response from a known owner of land would require new statutory rights to compel engagement. Telecommunications is recognised as a utility of national importance and, although compulsory purchase powers are available, they have not been authorised and are not exercisable in practice to acquire individual sites. If this issue were regarded as sufficiently important, enfolding the telecom sector within the family of other statutory utility sectors would be a logical step. It is not thought that such a point has yet been reached.

It can appear to an Operator that a potential Site Provider is being deliberately non-responsive with a view to frustrating an application. However, there can be many justifiable reasons for such lack of response. What is deliberate or justified in any particular case will be difficult to judge as the determinative evidence is likely to rely the state of mind of a person. This issue is directly relevant to the Government's objective to remove issues blocking telecommunication development and is too important to leave unaddressed, however, difficult. Where there is clear evidence that Site Providers, experienced in telecom property matters or their similarly experienced appointed agents, have failed to respond to proper correspondence, it may be left to the court to consider the imposition of an indemnity or punitive cost award. In other cases, where perhaps a lack of understanding or competing priorities have resulted in the lack of response, the balance should generally fall in favour of the Site Provider. Site Providers in this category are the targets for the educational approach, outlined in the answer to Question 2 above.

Question 9

Do you think there are any other ways that we can encourage unresponsive occupiers and landowners to engage with requests for Code rights (further to those already included in the?

Answer to Question 9

Ref Answer to Question 8. Further regulation may be provided relating to the registration of land and requiring companies to appoint a specific person to be contactable and accountable, as part of contributing to wider issues.

The position could be addressed by amending the Telecommunications Infrastructure (Leasehold Property) Bill, perhaps by extending the definition of 'premises' under Clauses 27B (i) and (ii), to include premises that are not subject to a lease and adding "requirement for an Operator to provide a service" to the request for service. It is recognised that this would change the objective and character of the current Bill significantly, which may make this suggestion inappropriate.

As part of any marketing, publicity and educational work carried out by the Department of Media, Community and Sport, explaining the benefit of telecommunications to the local community individuals could be encouraged to engage with Operators and others and recognised for their contribution to the provision of optimised telecommunication networks, for everyone's benefit.

Question 10

Do you think there should be a streamlined process for operators to secure Code rights in cases where an occupier (or other relevant party) fails to respond to a request for these rights?

Answer to Question 10

Yes

Ref Answer to Question 9. Amending the Telecommunications Infrastructure (Leasehold Property) Bill, as suggested, would provide a streamlined process for all premises, rather than just Leasehold premises.

If so:

Question 10(a)

Do you think this kind of streamlined process should be administered by the Upper Tribunal or by a different court? Where there is a lack of response then the First Tier Tribunal could be utilised to make an order e.g. for an Access to Survey

Answer to Question 10(a)

Such a process should come under the same jurisdiction as all other Code matters (i.e. whichever Court, Tribunal, ADR or other process is deemed appropriate by the party concerned.)

Question 10(b)

What sort of timescales do you think would be appropriate for this kind of process?

Answer to Question 10(b)

Ref Answer to Question 9. The timescales outlined in the Telecommunications Infrastructure (Leasehold Property) Bill appear to be appropriate.

Question 10(c)

What kind of measures and safeguards do you think such a process would need to include in order to maintain a balance between the public interest in network deployment, and the private rights of occupiers and landowners? (for example, - how many times, and at what intervals, should the operator have to request the rights before they can access the procedure; how long should the occupier have to respond etc).

Answer to Question 10(c)

Ref Answer to Question 9. The measures outlined in the Telecommunications Infrastructure (Leasehold Property) Bill appear to be appropriate. We are concerned that there may be consequences for tenants/occupiers of premises, where the Landlord/freeholder, whom the Operator has tried to contact, is absent and has failed to respond. To have an Operator arrive on site with a Court order for access without any warning is considered inappropriate. It is difficult to capture a requirement to work hard to find the correct contact in legislation. We have reviewed the requirements for an Authority wanting to contact a person under s.14 of the Local Government and Miscellaneous Provisions Act 1974. While the tasks outlined by subsections (b), (c) and (d) are relevant we do not consider such a prescriptive approach would be appropriate. These tasks may be too onerous or not sufficient to achieve the required objective, depending upon the circumstances. We suggest that an Operator will have to demonstrate to the Court that they have not only tried to contact the Landlord/freeholder but also tried to contact the occupier in such circumstances, before an order can be issued. The Courts may then use their discretion to decide what lengths of investigation would be appropriate in relation to the individual circumstances of each site, before issuing an order.

Who confers Code rights where an operator is in occupation of a site.

Question 11
Do you agree that if a Code operator is in occupation of land, it should be: a. the person who owns or has control over the land; or b. the person who granted the rights allowing that operator to be in occupation; or c. Someone else, and if so, whose agreement should be required for any new or renewal agreement?
Answer to Question 11
We consider that it is the person who owns or has control over the land or whose agreement would be required for any new or renewal agreement. Reference to an Occupier has caused problems in managing sites and references to the Court, as well as posing interpretation issues for the Court, in making judgements. Given the Government's objective to simplify and accelerate digital network developments, the new Code's adoption of the defined 'Occupier' appears to have had unintended consequences. The cases considered by the Upper Tribunal has shown that circumstances can prevent Operators from obtaining Code Rights on land. The reference to an Occupier has partially frustrated the objective of the new Code. Redefining the person who may confer Code Rights is regarded as an essential element of this legislative review.
Question 12
Are there any other situations where you think it may be appropriate for someone other than (or in addition to) the occupier of land to be able grant Code rights?
Answer to Question 12

It is only the owner or someone with a controlling interest who should be able to grant Code Rights. However, others with an interest in the land should have that interest taken into account when considering the terms and conditions that might apply under an Agreement imposed by the Court.

Compliance with agreements

Question 13

Are you aware of, or have you experienced, any difficulties relating to compliance with the terms of a Code agreement?

Answer to Question 13

The RICS, as an organisation, has no direct experience in negotiating Agreements and is therefore unable to answer this question

If so:

Question 13(a)

Was paragraph 93 - or any other provision - of the Code the cause of those difficulties?

Answer to Question 13(a)

The RICS, as an organisation, has no direct experience in negotiating Agreements and is therefore unable to answer this question

Question 13(b)

How were those difficulties dealt with and was the outcome satisfactory?

Answer to Question 13(b)

The RICS, as an organisation, has no direct experience in negotiating Agreements and is therefore unable to answer this question

Question 14

Are there other ways that you think we can encourage compliance with the terms of Code agreements? For example:

a. Could Alternative Dispute Resolution provide a route for dealing with compliance issues?
b. Should there be scope for Code agreements to include financial penalties for non compliance?

Answer to Question 14

a) We consider that ADR would provide a useful means of resolving disagreements over compliance, without having to resort to a confrontational approach. The RICS initiative to provide such an ADR service, is outlined in answer to Question 5.
b) We consider that including penalty clauses within Code Agreements would be inappropriate and give rise to further issues of contention, mistrust and cause further delay as a result. The remedy, when a non-compliance occurs, is to correct the non-compliance. If the Site Provider has suffered loss as a result of the non-compliance, he/she may use the obligation to pay compensation for losses by agreement or by Court Order under paragraphs 24, 25 or 85 of the new Code. This would require an adjustment to allow Agreements other than those imposed by the Court to benefit from the use of paragraph 25.

Modifying agreements

Question 15
Do you think that operators and site providers should be able to ask a court to impose new, additional or modified rights or terms after an agreement has been concluded, but before it expires?
Answer to Question 15 Yes Circumstances change; technologies change. It is in the interests of both parties that the terms of an Agreement might be revised, during its term and, in the event that agreement between the parties cannot be reached, imposed by a court. For example, an Operator might want to deploy new technology apparatus but is precluded by restrictive covenants within the existing agreement with years still to run. The parties should be free to negotiate for a variation in the rights but, in default of such agreement, to be able to make reference to a court. The benefit of certainty is also recognised. The tests described in paragraph 21 of the new Code should be considered before making any changes. If an agreement cannot be reached between the parties, the costs involved with a reference to a court, together with guidance from the OFCOM Code of Practice and the potential for an award of indemnity costs would deter frivolous attempts to amend an Agreement or to refuse such amendment.
If this was permitted:

Question 15(a)
Do you think the circumstances in which this option is available to site providers and operators should be limited to maintain an appropriate balance between the need for certainty and allowing a degree of flexibility? For example: should this option only be available where an operator needs an additional right to those contained in the original agreement.
Answer to Question 15(a)
No Ref Question 15. It should be for the Court to decide whether the hurdle of amending an Agreement has been passed, in the public interest. Their discretion should not be fettered on this topic.
Question 15(b)
In deciding whether to impose additional, new or modified rights or terms, should a court apply a similar test to the one in paragraph 21, as used in relation to requests for new Code agreements? How (if at all) should this test be modified in this context?
Answer to Question 15(b)
Yes The Operator's argument is that all agreements should be capable of being revised if circumstances require it. The obvious example is that Government requirements required Huawei equipment to be removed. Under the terms of some Agreements, changing the Huawei antennas for an alternative vendors

equipment could put the Operator in breach. Subject to the Court considering the effect of the required change and amending the terms for consideration and compensation, the Operator should be able to amend the Agreement, by negotiation if possible but by reference to the Court, who should make an Order for the amendment, if need be.

The Site Provider's argument is that both parties entered into the Agreement freely. If the terms did not allow for changes to the apparatus it would have been for good reasons. Agreements should not be opened to review terms.

Site Providers also have an interest in maintaining the terms of the Agreement for commercial purposes. If the market rents can be shown to be falling, they may become exposed to a request to alter the terms to reduce the rent payable. We agree that it would be inappropriate for an Operator to request a Court order for a reduction in rent alone (ref paragraph 2.36 of the consultation text.)

We do think that circumstances may arise where it would be appropriate for an Agreement to be amended, mid-term and that, in the absence of an agreed settlement, the Court should be able to order an appropriate amendment.

In those circumstances, the Court should apply a similar test to the one in paragraph 21 of the new Code. However, it should not be bound by the final restriction of paragraph 21(5). If the Site Provider has intentions to re-develop the site, he should do so using Part 5 of the new Code. The Court should not have to consider the potential redevelopment of the site when modifying an Agreement, whether originally agreed between the parties or imposed. (If an Operator were to persist in requiring an amendment during the course of a Part 5 application to terminate from a Site Provider, they would potentially risk indemnity costs being awarded against them).

Question 15(c) Should a court take other, or additional factors into account in deciding whether to grant any new or additional Code right sought by a party?
Answer to Question 15(c) No It should be left to the Court's discretion, once all factors, as described above, have been taken into account.
Question 15(d) If a court were to decide to impose a new or additional Code right, should the terms be based on the existing Code framework, or should additional / other factors be taken into account?
Answer to Question 15(d) It should be left to a court's discretion, once all factors, as described above, have been taken into account
Question 15(e) If a court were to decide to impose new or additional Code rights, should the calculation of any consideration or compensation payable be based on the existing provisions, or on a different basis?
Answer to Question 15(d)

This would depend upon the circumstances. The general principle should reflect that the terms were settled by agreement (or imposed by a Court). The consequences of the new or additional Code rights should reflect the basis on which the original rights had been granted (i.e. based on the existing provisions). However, there are reasonably foreseeable circumstances where this approach may appear inequitable. The requirement for any additional consideration or compensation payable should reflect the existing payments and any additional benefit or burden not already accounted for within the existing payments.

Rights to upgrade and share apparatus

The automatic right conditions

Question 16

In what circumstances do you think automatic rights to upgrade and share should be available?

Answer to Question 16

The ability to manage apparatus on any particular site is so crucial to the efficient management of Operators' networks (collectively) that the unfettered ability to upgrade or share Code Rights should be the default position. This accords with the objective of the new Code, in the public interest. Interpreting paragraph 17 of the new Code has challenged Operators, Site Providers and the courts. Only where there are significant detrimental consequences for a particular Site Provider or others affected by the apparatus, should this right be restricted (e.g. ref Judgement TCR-52-2020). Ensuring that the intended Code Rights to share or upgrade are a floor, reflecting the least that an Operator might expect to be able to do (as contemplated by that decision - para. 69 *et seq*.) would reduce the potential for disputes.

Question 17
Do you think the current conditions relating to the paragraph 17 automatic rights should be amended?
Answer to Question 17 Yes Reference to "no adverse impact, or no more than a minimal adverse impact, on its appearance" is a subjective judgement that is open to different interpretations. While this describes an appropriate objective, it should be qualified by reference to other, existing, standards or further guidance. We believe that the appropriate determiner of whether the appearance is acceptable should be the planning regime. We consider it appropriate that the test as to the right to upgrade and increase apparatus, whether or not that is as a result of sharing, should be aligned to development granted either by planning consent or statutory planning consent (permitted development rights, which vary in each jurisdiction). This will provide objectivity and improve certainty to interpretation. We consider the public interest is to protect the community and the environment, rather than private interests. We believe that the adverse impact test will be met by reference to the planning regime. We believe there is merit in alignment of legislative elements.

How this would work: -

If planning consent or statutory planning consent has been granted, the adverse impact test will have been deemed to have been passed automatically.

That leaves the 'additional burden' test. This should be qualified by the paragraph 21 (of the new Code) tests. This may give rise to a requirement to pay compensation (under paragraph 25 of the new Code). For example, if a new Operator uses Code Rights, as a Sharer, there may be additional costs arising from additional access being taken to maintain the second network system.

If so:

Question 17(a)

What changes could we make to paragraph 17 that would make the practical application of the automatic rights clearer for operators and site providers?

Answer to Question 17(a)

We suggest that paragraph 17(2) of the new Code might be amended to read: -

(2) Any changes as a result of the upgrading or sharing of the electronic communications apparatus to which the agreement relates should not exceed the limits on apparatus granted by planning consent or statutory planning consent.

Further paragraphs 17 (3) & (4) become redundant and should be deleted and paragraph 17(1) should be amended to reflect the deletion of 17(3)

Question 17(b)
Are there any additional measures we could include to protect the interests and address the concerns of site providers in relation to the automatic rights to upgrade and share? (For example: the introduction of notice requirements, or specific confirmation that automatic rights to upgrade and share are subject to the original terms of the agreement as they relate to notice / access requirements).
Answer to Question 17(b)
Continuing with the analogy of alignment of legislative requirements, should the Operator wish to exercise these rights, it would be appropriate to provide a minimum of 28 days' Notice to the Site Provider of his intention to do so, in parallel to the obligation to serve such Notice on the Local Planning Authority under Reg 5 of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003. It would be wholly appropriate for the Site Provider to be provided with the details of the legal entities with a right of access and occupation of his property. Operators should have an obligation to keep the Site Provider informed of all parties with such legal rights.

Rights to upgrade and share separate to the automatic rights

Question 18
Do you think that a court should be able to impose rights that allow more extensive upgrading and sharing than is permitted under the automatic rights in paragraph 17 in any, or all, of the following situations: a. If the court is imposing a new agreement and such rights are requested? b. If the court is imposing a renewal agreement and such rights are requested?

c. If the court is asked to grant new or modified rights to upgrade and share apparatus during the term of a completed agreement? (noting that this would only be relevant if changes permitting modification of an agreement prior to expiry is introduced, and would be subject to any safeguards put in place for such modifications).

Answer to Question 18

Ref Question 16 above.

a. Yes
b. Yes
c. Yes

(assuming that the terms for the additional rights awarded are subject to paragraphs 23 and 25 of the new Code in relation to any marginal financial consequences)

Question 19

Do you think the court's jurisdiction to impose these rights needs to be expressly stated in the legislation, given that the Upper Tribunal has already held that this is possible?

Answer to Question 19

Ref Question 16 above

No

Paragraph 23 of the new Code provides the Court with the right to impose whatever term they deem appropriate, subject to the conditions and directions contained within that section. This is the provision that has been upheld by the Tribunal, clarifying the point. There is no need to expand on this matter further.

Question 20
Do you think the court should be required to take specific factors into account in deciding whether it is appropriate to allow upgrading and sharing rights which are more extensive than those allowed by paragraph 17?
Answer to Question 20
Yes Depending upon site specific factors, these rights could be removed or amended by agreement, through ADR or by the Court, in the same way that permitted development rights can be removed by an Article 4 Direction.
Question 21
Do you think the court should be required to take any specific factors into account in deciding what the terms relating to upgrading and sharing rights should be?
Answer to Question 21
Ref Question 17 above. Aligning with development granted either by planning consent or statutory planning consent should be the default position. In the event that agreement cannot be reached between the parties, the Court, in its discretion, may consider it appropriate to amend these for reasons relating to site specific circumstances. In relation to the adverse impact test, the factors to be taken into account should relate to the effects of the proposed upgrade/share on the community or the environment.

In relation to the additional burden test, the factors should relate to whether the additional burden is capable of being adequately compensated by money. In which case, compensation should be paid, under the terms of paragraph 25 of the new Code. If they are incapable of being ameliorated by money, outweighing the balance in favour of the public interest (ref paragraph 21 test) they should not be granted.

Question 22

What additional factors (if any) should be included in the situations described at questions 20 and 21 to strike an appropriate balance between the importance of upgrading and sharing and the potential impacts on the site provider?

Answer to Question 22

These factors have already been considered, in relation to the effects on the community and the environment, in preparing the terms of the planning legislation and limiting the rights it contains. The level of 'automatic' upgrading, sharing or adding equipment is controlled by the objective criteria of the planning law. For example, the number of sharers accessing the property may be limited (ref TCR-52-2020 & TCR-402-2019). This will be achieved either by negotiation or through submission to the Court, who would make the appropriate Order.

Retrospective rights to upgrade and share

Question 23

What would be the specific impacts of creating an automatic right to upgrade and share apparatus in relation to agreements completed before 28 December 2017? *Please provide details of* ***all impacts*** *including those on site providers, on coverage and connectivity, and on wider public considerations (such as reducing any disruption from unnecessary works or the impact on the environment of additional installations).*

Answer to Question 23

- Site Providers may feel resentment that consensual agreements will be amended by statute, reducing their ability to charge additional rent for additional equipment or payaway rent for incoming sharers.
- Coverage and connectivity will be enhanced in a timely manner, unless the Site Provider's resentment gives rise to challenges, causing delays.
- Operators would not be held to ransom for consent to add items of equipment, such as remote radio units, or apparatus that updates the capacity and functionality of the site within the network but has a negligible effect on the site or the Site Provider.
- There may be a deleterious impact on the appearance of sites: - working within the limits set by planning law (GPDO) may still have a significant effect on the appearance of some sites.
- The ability to upgrade or share a site may reduce the need for creating a new, alternative site nearby, reducing the proliferation of sites. (While a seemingly obvious point this is likely to have less meaning when the densification of sites required for 5G networks starts to develop in a significant way).

Question 24

Do you think operators should have **any** automatic rights to upgrade and share apparatus relating to agreements completed before the 2017 reforms came into effect, where there is a strong case that this would be in the wider public interest and there would be no, or very little, impact on the site provider?

Answer to Question 24

No, in respect of automatic rights (but should be able to use other elements of the Code to obtain the necessary rights)

Many existing Agreements (Leases or Licences) allow for unlimited apparatus/upgrades or provide that they may take place with the consent of the Site Provider, where that consent cannot be unreasonably withheld or delayed. If an automatic Code Right to upgrade were to apply, it would be more likely to cause the Site Provider to raise questions over any compensation that would follow from the exercise of those rights and increase both references to the Court and cause further delay and cost.

For those Agreements where the rights are wholly dependent upon the Site Provider's consent, if the Operator is unable to obtain the necessary rights by agreement, they should have recourse to an application for interim rights under the new Code until the subsisting Agreement comes to an end and is replaced with a new Agreement, under the terms of the new Code, with all of the benefits and burdens that that entails. Alternatively, the Operator should be able to apply for a variation to the terms of any subsisting agreement via a modification under paragraph 33 of the new Code. (Currently, Para 33 only relates to agreements entered into after the new Code was introduced.)

If these rights were introduced:

Question 24(a)

Do you think they should be subject to the same conditions as the paragraph 17 automatic rights, or should a different and more stringent set of conditions apply to protect site provider interests? If you think different conditions should apply, what might those conditions be?

Answer to Question 24(a)

Ref Question 24. We do not think that these rights should be introduced.

If, however, some rights were to be introduced, we consider that they should be more restricted than our suggestion for amending paragraph 17 would provide. To do otherwise would be a significant departure from an existing contract, which, as outlined by the consultation, is not a step to be taken lightly (ref paragraph 3.25 of the Consultation *et seq*.)

Question 24(b)

Are there any other measures we could introduce that would secure the benefits of upgrading and sharing apparatus installed under pre-December 2017 agreements, while protecting the interests of site providers?

Answer to Question 24(b)

Ref Question 24. We do not think that these rights should be introduced.

We think other measures would be unnecessary. If an Operator cannot agree the rights to upgrade or share to meet network requirements, the new Code should allow the Operator to apply for either interim or temporary rights, or for the

Agreement to be modified, subject to appropriate tests and controls. These should be sufficient to provide for network modifications, in the public interest.

Expired agreements

Question 25

Do you agree that the Part 5 provisions should apply to all agreements once the original term of the agreements expires or has expired? Is there any reason why they shouldn't?

Answer to Question 25

Yes

The current provision for two statutory regimes often makes the path to agreement unclear. This causes delay and cost, as legal opinion may have to be sought. There is advantage in bringing all renewals under the new Code regime. This would require the exclusion of agreements which are subject to Part 2 of the Landlord and Tenant Act 1954 (security of tenure for business, professional and other tenant) to be removed (delete paragraph 29 2 (b)?).

If Part 5 provisions are applied to all expired agreements:

Question 25(a)

Do you think any special provisions should be included for agreements that were previously subject to different statutory regimes to ensure that any protections are preserved (where these do not conflict with the framework of the Code)?

Answer to Question 25(a)

We consider that there is advantage in bringing all renewals under Part 5 (save that agreements under Para 29(a) (those with '54 Act protection where their primary purpose is not to grant code rights should continue to be excluded from Part 5).

To maintain simplicity and clarity, there is an advantage in minimising any departures from the standard provisions. Given the stated desire to leave the valuation provisions under Part 4 untouched, there seems little requirement to make a special case for any particular type of renewal provision.

Question 26

Do you think there are any circumstances in which it would be more appropriate for an operator to use the Part 4 (new agreement) process to obtain a new agreement, rather than the Part 5 (renewal agreement) process?

Answer to Question 26

It is reasonably foreseeable that an Operator may wish to terminate an Agreement and request a new one for apparatus on the same site. How often that may occur is likely to depend on the final outcome of the review of Part 5. The closer the provisions of Part 5 are to Part 2, the less likely this will occur. Part 5 should create a process that is quicker and easier for both parties to finalise a new agreement, as they already have an existing relationship and both should be aware of the particular concerns or objectives of the other. However, it remains important that Operators have the flexibility to call upon Part 4, should the need for enhancing or preserving the network arise.

Question 27
Do you think that there should be a statutory requirement for disputes relating to the modification of an expired agreement to be heard within six months of the date the application is made?
Answer to Question 27 Yes A deadline, consistent with other parts of the new Code, would be a helpful means of ensuring that renewals were completed in a reasonably timely manner. A means of having disputes resolved, without matters being allowed to drift, as they often currently do, would ensure both parties can be relieved of the uncertainty and stress of an open-ended litigation path.
Question 28
Do you think that there should be a statutory requirement for disputes relating to the termination of a Code agreement to be heard within six months of the date the application is made?
Answer to Question 28 Yes This should be 6 months from issuing proceedings, subject to answers in 28a and 28b below, for similar reasons to those outlined in Question 27.
If so:

Question 28(a)

What would be the benefits of a statutory time limit in relation to these disputes being introduced?

Answer to Question 28(a)

As outlined above, a deadline for concluding proceedings would ensure that negotiations proceed apace and, in the event that they cannot be successfully concluded, matters will be resolved without protracted discussion between parties and their representatives. This will minimise professional time, costs and delay, as well as the stress of impending litigation.

Question 28(b)

What might be the drawback of a statutory time limit in relation to these disputes?

Answer to Question 28(b)

It may mean that cases that are potentially resolvable between the parties are brought before the Court. There will come a point during the six months when it could be considered more efficient to put resources into the preparation for litigation than the negotiations; being fully prepared for the litigation process takes time and effort. If it is thought that it may be needed, then it may mean that either abortive costs are incurred, if a settlement is subsequently reached or it may deter parties from continuing with negotiations, if their case is fully prepared.

However, if the Tribunal were directed to allow a deferral, should both parties agree, it is considered that this option would be taken up too frequently and the statutory time limit would be at risk of becoming useless.

Question 29
Do you think operators and site providers should be able to seek interim orders in relation to renewal agreements?
Answer to Question 29 Yes For the same reasons that it is regarded as appropriate to issue interim or temporary rights for new Agreements, even though they, too, are subject to statutory time periods within the process for a Court to order an Agreement to be completed, it would be appropriate to allow interim orders, if required, in relation to renewal Agreements Such orders could have significant benefits to Operators seeking to roll out upgrades, technologies and services, enhancing their networks to the public benefit. In addition, such interim orders would limit the use of tactics used by Site Providers to protect their interests by extending the period during which higher consideration is paid (under the old Code terms) but which frustrates the earlier deployment of network enhancements. Further, such orders have an important role in allowing Operators to extend rights to retain a site while they are finding and building an alternative, where, for example, a site is being removed for re-development. It will permit the Operator to provide continuity of service, to the public benefit.
If so:

Question 29(a) What should the interim agreements cover (Code rights, pricing, etc)?
Answer to Question 29(a) Interim (or temporary) rights for renewals should not differ from those available under paragraphs 26 or 27 of the new Code. In the interests of simplicity and consistency, there should be no additional restriction on interim rights where there is an existing Agreement, if that Agreement does not provide for an Operator or Site Provider's requirements.
Question 29(b) Are any safeguards necessary to prevent abuse of the process?
Answer to Question 29 (b) The same safeguards should apply to the interim (or temporary) rights as are outlined in paragraph 20 of the new Code. There should be no reason to apply additional safeguards in relation to renewal Agreements.
Question 30 Do you think a court should be able to backdate the financial terms of a renewal agreement to the date that a request for an interim order is made?
Answer to Question 30 Yes but only to the date of the expiry of a notice or the issuing of proceedings.

(NB. This aligns with the Landlord & Tenant Act 1954 provisions, which allow an interim rent review to be applied for at any time but which will take effect from the date the s.25 Notice expires.)

This will remove any incentive to delay a renewal in order to maintain historic site payments for as long as possible. Then it will be for the parties to agree, or the Court to order, any payments for consideration or compensation based on the effect of the interim or temporary rights granted.

Question 31

Are there any other ways you think we can help ensure that negotiations for renewals are dealt with in a timely and collaborative manner?

Answer to Question 31

There is no other aspect that has not already been addressed or excluded, that we consider would make a material difference to assisting such negotiations.