CPA consultation answers

These are the answers by the Compulsory Purchase Association (CPA). Members of the CPA are professional people, and many do Code work for either operators and/or site providers. Our main concern is to ensure that legislation is clear, certain and practical. We do not put forward policy choices as between, say as here, the interests of operators and site providers.

Annex A

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

Whilst we agree with the assessment of the main problems relating to negotiations, and the completion of new agreements, this assessment fails to recognise and underlying and fundamental doctrinal conflict in the Code. Whilst premised on the pursuit of consensual agreements consistent with a doctrine of freedom of contract, the ultimate sanction for a failure to agree is the compulsory conferment of, in substance, statutory rights exercisable over private property. The compulsory conferment of statutory rights is given the 'fig leaf' label of the conferment of an 'agreement'. It is the tension between these two conflicting doctrines that underlies the problems identified in Chapter Two. The doctrine underlying the compulsory conferment of statutory rights gains additional support in the Code in the provisions relating to the definition of the 'consideration'. As the statutory valuation regime relating to the definition of 'consideration' is not directed to producing a price or consideration that is likely to be arrived at consistent with the doctrine of the freedom of contract, this inevitably produces tensions between operators and site providers, which manifests themselves in the matters identified in Chapter Two.

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?

Answer

As this question is premised on the Government's intention not to revisit the statutory valuation regime, the only legislative or non-legislative changes that might support faster and more collaborative negotiations must be those that contain financial or other sanctions.

In answering this, please note that we do not intend to revisit the statutory valuation regime.

Obtaining and using code agreements
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

Yes.

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

We suggest that it might be difficult to distinguish between categories of compliance failure, unless very clear rules are laid down. Further, what might be regarded as a minor or technical breach to one party, operator or site provider, could be a major breach to another party, depending on the consequences of any compliance failure.

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

If the Ofcom Code of Practice is reviewed to provide more specific guidelines, those guidelines should include a clear timetable for the relevant and appropriate steps to be taken, with appropriate sanctions.

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

A number of cases decided by the Upper Tribunal (Lands Chamber) indicate that the Tribunal itself has been prepared to impose sanctions where, for example, there has been a failure by one party or the other to engage adequately or at all in any of the appropriate steps leading to an agreement about the terms of a Code agreement. There seems, therefore, no need to introduce a further category of sanctions in respect of those cases that go before the Tribunal. In respect of any statutory process that does not result in a particular matter being referred to the Tribunal, any Code of Practice should itself set out a sanction for non-compliance with some timetable step.

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

The court probably has sufficient current jurisdiction to take into account failure to comply with the Ofcom Code of Practice during the negotiation stage, in those cases where a reference comes before it. That is because the court has a wide discretion in relation to its power to award costs.

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

This question appears to be muddled, as it refers back to a process during the negotiation stage, and yet asks a question relating to compliance with the terms of an agreement. If the question is relating to the latter position, then to the extent that any agreement is either a lease or some other form of contract, its enforcement, or breach of its terms would fall within the jurisdiction of a court.

Obtaining and using Code agreements
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

Whilst we agree that mediation is always a sensible course of action to pursue, it does depend upon the consensual agreement of both parties to refer a dispute to a mediator, and then to put into effect any outcome. It is the experience of CPA members that mediation can be an effective means of resolving disputes about valuation (i.e. consideration and compensation) and we would advocate it being encouraged as a means of parties disputing valuation disputes, as an alternative to referring such disputes to the Upper Tribunal. We agree that arbitration, for which there could be statutory provision, is a sensible course of action where there are technical disputes about the management of a Code agreement. That is because technical problems may arise from time to time, for example the need for a site provider to carry out works to a roof, which might otherwise be inhibited by the presence of apparatus, or otherwise. We agree that ADR may assist in resolving disagreements, but this question is confusing as to whether it is addressing the obtaining of agreements, or addressing difficulties once an agreement has been made. None-the-less, any form of ADR is likely to be cheaper than a reference to the Upper Tribunal.

If so:

Question 5(a)

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

Answer

If this question is addressed to difficulties in making an agreement, then ADR, such as by mediation, would be appropriate subject to a recognition that mediation is dependent upon the consensual agreement of the parties. One principal difficulty in the use of any type of ADR is the cost of the mediator or arbitrator, and of the costs of the parties in any proceedings before either, whether the procedure is by written representations only, or by hearing in person. Such processes are likely only to be appropriate in relation to high value sites, or where high value property is affected. Mediation or arbitration would not be cost effective in relation to the siting of apparatus in most rural examples, and this difficulty would be to the detriment of such site providers.

If this question is alternatively or additionally referring to disputes that might arise after an agreement has been entered into, then the considerations above would be equally relevant although arbitration would probably be preferable because an arbitrator's award is capable of being binding on the parties.

Question 5(b)

Which type or types of ADR (e.g. mediation, arbitration, other)[32] do you think could be best suited for each of these situations?

Answer

See the answer to q 5(a) above

Question 6

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

Answer

This question has five sub-questions to it.

● Who should pay the costs of ADR?

Answer

As the ultimate doctrine underlying the Code is a compulsory conferment of a Code agreement, that is the compulsory conferment of rights, the normal rule that applies to the analogous circumstances of compulsory acquisition of land or rights should apply. Namely, that subject to requirements of reasonableness of behaviour of the parties, the expropriator of rights, that is operators, should pay the costs of ADR as the process has been imposed on the site provider.

● Should both parties have to consent to its use?

Answer

As to mediation, this exercise cannot succeed in any way unless it is consensual. Mediation is not a legal process that imposes an agreement on one party or the other, or both, but it is a process to which both parties consent to, and then hope to arrive at some consensual outcome. Therefore it is necessary that both parties should consent to mediation. The position of arbitration is different in that an arbitrator's award is binding and enforceable. If arbitration is not provided for as a clause in a Code agreement, or provided for in the Code itself in relation to the negotiations for an agreement, or otherwise, then both parties would have to consent to its use.

● Do you envisage any procedural issues and how could these best be solved?

Answer

Unless any requirement to engage in any form of ADR is an express requirement of either the Code or the Ofcom Code of Practice, the problems of delay, and difficulties of engagement will remain.

● 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?

Answer

We agree with this save only that the current statutory timetable before the court on an application for a new Code agreement may be insufficient to allow an exercise of ADR.

● 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

There is no doubt that the Tribunal currently has adequate discretion in its award of costs to take into account any refusal or failure to engage with ADR in circumstances where otherwise it would have been reasonable to proceed with such an exercise.

Obtaining and using Code agreements

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

We make no comment as to whether there should be a fast track application to the court being made available. But, if a fast track application right is introduced, we believe that this will increase the tension between the two doctrines identified in our answer to Question 1 above, namely the doctrine of freedom of contract, and the doctrine of the compulsory conferment of rights over private property. In effect, a fast track procedure would give much more emphasis to the second of these doctrines, and this would require adequate provisions to safeguard site providers.

If so:

Question 7(a)

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

Answer

We make no comment on this question.

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

We make no comment.

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

No comment.

Question 7(d)

Do you think any additional remedies would need to be available to the court in the situations you describe?

Answer

No comment.

Question 7(e)

How can we ensure that any fast track procedures give priority to the most appropriate cases?

Answer

No comment.

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Obtaining and using Code agreements

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

We repeat our answer to Question 1 above, as to the underlying reasons for failure to respond to requests for Code rights, but otherwise make no comment.

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 Telecommunications Infrastructure (Leasehold Property) Bill?

Answer

If it is recognised that the Code contains two conflicting doctrines, then it becomes more logical to adopt the acquisition of rights through a process similar to section 159 of the Water Industry Act 1959, where rights may be exercised after a due notice. However, we do not believe that this would be practical, or politically acceptable, particularly if such rights were to be exercisable in respect of the placing of apparatus on or near buildings.

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?[33]

Answer

No further comment.

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?

Answer

No further comment.

Question 10(b)

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

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

If any process of a streamlined application to secure Code rights is put in place, that process must contain provisions to consider the necessary balance between the public interest and the private rights of occupiers and landowners and it is hard to see how any such process could be fairly pursued in less than 3 months.

Obtaining and using Code agreements

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:

d. the person who owns or has control over the land; or

e. the person who granted the rights allowing that operator to be in occupation; or

f. Someone else, and if so, whose agreement should be required for any new or renewal agreement?

Answer

No comment.

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

No comment

Obtaining and using Code agreements

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

No comments.

If so:

Question 13(a)

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

Answer

No comments.

Question 13(b)

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

Answer

No comments.

Question 14

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

c. Could Alternative Dispute Resolution provide a route for dealing with compliance issues?

d. Should there be scope for Code agreements to include financial penalties for non compliance?

Answer

We have already addressed this question in our answers to Questions ... above.

Obtaining and using Code agreements

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

Whilst the mutuality inherent in this question is noted, a retrospective, and ultimately statutorily enforced, variation to an agreement, without the consent of both parties, is doctrinally inconsistent with the freedom to contract, and falls very firmly within the doctrine of the statutory acquisition of rights over private property. This will give rise to further tensions between operators and site providers, and will cause the very problems of delays and lack of cooperation that this Consultation exercise is seeking to address. There is a presumption that statutes are not intended to have retroactive effect. Whilst this question does not put forward any appropriate test, it is not clear what test a site provider

would have to satisfy to achieve some variation, but presumably the ultimate test is that in Code paragraph 21.

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

The answer to Q15 above is repeated.

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

In cases where an operator requires an additional right, the operator should still be expected to satisfy the prejudice tests in Code para 21.

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

No comment.

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

If the purpose behind Q.15 is mutuality of a right to seek a variation of an agreement, any test based on that in Code paragraph 21 would not be consistent with mutuality of entitlement to seek a variation, except possibility in those cases where a site provider has a planning permission for development.

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

This seems to be a policy matter whether to retain the existing valuation regime or not. There could be serious inconsistencies if part of an agreement is subject to one regime, and another part subject to another

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

No comment. The CPA declines to answer all of the next group of questions as these concern policy considerations, as between operators and site providers, and as the CPA has members who work for both groups.

Question 17

Do you think the current conditions relating to the paragraph 17 automatic rights should be amended?

Answer

No comment.

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

No comment.

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

No comment.

Rights to upgrade and share apparatus

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:

(d) If the court is imposing a new agreement and such rights are requested?

(e) If the court is imposing a renewal agreement and such rights are requested?

(f) 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

The CPA makes the following general comments about this group of questions. Our evidence is that where operator A has Code paragraph 3 rights to instal and keep installed apparatus on a mast, operator A can derive considerable extra value by granting sharing to one or more Code operators, say B, C and D. That extra value is market driven by supply and demand, and other operators such B, C and/or D will pay the market price to enable a share of the use of the apparatus. By reason of the statutory valuation regime in Code paragraph 24, and the interpretation put upon it by the Upper Tribunal in *Vodafone v Hanover*, the consideration assessed under Code paragraph 24 is not the market value of the mast site; in most cases it will be a much lower sum. Part of the policy rationale for this measure was to lower costs, and to remove financial disincentives to the roll out of electronic communications. But costs are not lowered where site masts are shared and sharers

are paying market rates to operator A to share. Operator A gains from the market rates paid by sharers, but the underlying policy behind the statutory valuation regime is not followed through to the price paid by sharers. The sum effect is that lowering the price paid to site providers does not the lower costs of rolling out electronic communications in sharing situations; all that has, and will happen, is that the value of a mast site has passed from the site provider to operator A, the operator with the Code rights to keep installed a mast. There will be no overall saving of costs.

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

No comment.

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

No comment.

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

No comment.

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

No comment.

Rights to upgrade and share apparatus

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?

Answer

No comment.

*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).*

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

No comment.

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

No comment.

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

No comment.

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

No comment.

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

Yes.

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

No comment.

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

No comment.

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

No comment.

If so:

Question 28(a)

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

Answer

No comment.

Question 28(b)

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

Answer

No comment.

Question 29

Do you think operators and site providers should be able to seek interim orders in relation to renewal agreements?

Answer

No comment.

If so:

Question 29(a)

What should the interim agreements cover (Code rights, pricing, etc)?

Answer

No comment.

Question 29(b)

Are any safeguards necessary to prevent abuse of the process?

Answer

No comment.

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

We do not agree that the 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. That is because it would have the effect of retrospectively altering the terms of an agreement that is continuing.

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

No comment.