

## SCHEDULES

### SCHEDULE 33

#### PROTECTIVE PROVISIONS

#### PART 3

##### ELECTRONIC COMMUNICATIONS CODE NETWORKS

- 32 (1) The following provisions of this Part have effect, unless otherwise agreed in writing between the nominated undertaker, or the Secretary of State as the case may be, and an operator of an electronic communications code network.
- (2) In this Part—
- “alternative apparatus” means apparatus provided in replacement of electronic communications apparatus in connection with the construction of the authorised works;
  - “the appropriate Ministers” means the Secretary of State for Transport and the Secretary of State for Culture Media and Sport acting jointly;
  - “the authorised works” means the works authorised by this Act;
  - “construction” includes installation (and “construct” is to be construed accordingly);
  - “electronic communications code” means the electronic communications code contained in Schedule 2 to the Telecommunications Act 1984;
  - “operator”, “electronic communications apparatus”, and “electronic communications code network” have the meanings given by paragraph 1(1) of Schedule 17 to the Communications Act 2003.
- 33 (1) Subject to sub-paragraph (2), paragraph 23 of the electronic communications code applies for the purposes of the authorised works.
- (2) Paragraphs 21 and 23 of the electronic communications code do not apply for the purposes of the authorised works—
- (a) insofar as such works are regulated by the New Roads and Street Works Act 1991 or any regulation made under that Act,
  - (b) where the nominated undertaker exercises a right under subsection (4)(b) of section 272 of the Town and Country Planning Act 1990 or under an order made under that section to remove electronic communications apparatus, or
  - (c) in respect of any matter regulated by sub-paragraphs (3) to (8) of paragraph 35.
- 34 The temporary stopping up or diversion of any highway under paragraph 6 of Schedule 4 does not affect any right of an operator under paragraph 9 of the electronic communications code in respect of any apparatus which at the time of the stopping up or diversion is in the highway.

- 35 (1) Where a highway is stopped up under paragraph 2 or 3 of Schedule 4, any operator of an electronic communications code network whose electronic communications apparatus is under, over, in, on, along or across that highway may exercise the same rights of access in order to inspect, maintain, adjust, repair or alter that apparatus as if this Act had not been passed, but this is subject to sub-paragraph (2).
- (2) Nothing in sub-paragraph (1) affects any right of the nominated undertaker or the operator to require removal of that apparatus under this Part or the power of the nominated undertaker to alter or remove apparatus in accordance with paragraph 23 of the electronic communications code.
- (3) The nominated undertaker must give not less than 28 days' notice of its intention to stop up any highway under paragraph 2 or 3 of Schedule 4 to any operator of an electronic communications code network whose apparatus is under, over, in, on, along or across the highway.
- (4) Where a notice under sub-paragraph (3) has been given, the operator, if it reasonably considers that it is necessary for the safe and efficient operation and maintenance of the apparatus, may, and if reasonably requested so to do by the nominated undertaker in the notice, must, as soon as reasonably practicable after the service of the notice—
- (a) remove the apparatus and place it or other apparatus provided in substitution for it in such other position as the operator may reasonably determine and have power to place it, or
  - (b) provide other apparatus in substitution for the existing apparatus and place it in such other position as described in paragraph (a).
- (5) Subject to the following provisions of this paragraph the nominated undertaker must pay to any operator of an electronic communications code network an amount equal to the cost reasonably incurred by the operator in or in connection with—
- (a) the execution of relocation works required in consequence of the stopping up of the highway, and
  - (b) the doing of any other work or thing rendered necessary by the execution of relocation works.
- (6) Sub-paragraph (7) applies where—
- (a) in the course of the execution of relocation works under sub-paragraph (4)—
    - (i) apparatus of better type, greater capacity or greater dimensions is placed in substitution for existing apparatus of worse type, smaller capacity or smaller dimensions, except where this has been solely due to using the nearest currently available type, capacity or dimension, or
    - (ii) apparatus (whether existing apparatus or apparatus substituted for existing apparatus) is placed at a depth greater than the depth at which existing apparatus was, and
  - (b) the placing of apparatus of that type or capacity or of those dimensions or the placing of apparatus at that depth, as the case may be, is not agreed by the nominated undertaker, or, in default of agreement, is not determined to be necessary in consequence of the construction of the authorised works in order to ensure the continued efficient operation of the electronic communications code network of the operator.
- (7) If the execution of the relocation works involves cost exceeding that which would have been involved if the apparatus placed had been of the existing type, capacity

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or dimensions, or at the existing depth, as the case may be, the amount which apart from this paragraph would be payable to the operator by virtue of sub-paragraph (5) is to be reduced by the amount of that excess.

- (8) For the purposes of sub-paragraphs (6) and (7)—
- (a) an extension of apparatus to a length greater than the length of existing apparatus is not to be treated as a placing of apparatus of greater dimensions than those of the existing apparatus except in a case where the apparatus as so extended provides more than an equivalent service, and
  - (b) where the provision of a joint in a cable is agreed, or is determined to be necessary, the consequential provision of a jointing chamber or of a manhole (in either case of such type, capacity and dimensions as is reasonably appropriate) is to be treated as if it also had been agreed or had been so determined.
- (9) The amount which apart from this sub-paragraph would be payable to an operator in respect of works by virtue of sub-paragraph (5) (and having regard, where it applies, to sub-paragraph (7)) must, if the works include the placing of apparatus provided in substitution for apparatus placed more than seven and a half years earlier so as to confer on the operator any financial benefit by deferment of the time for renewal of the apparatus in the ordinary course, be reduced by the amount which represents that benefit.
- (10) Sub-paragraphs (5) to (9) do not apply where the authorised works constitute major transport works or major highway works for the purpose of Part 3 of the New Roads and Street Works Act 1991 (including that provision as applied by paragraph 8 of Schedule 4 to this Act), but instead—
- (a) the allowable costs of any relocation works are to be determined in accordance with section 85 of that Act (sharing of costs of necessary measures) and any regulations for the time being having effect under that section, and
  - (b) the allowable costs are to be borne by the nominated undertaker and the operator in such proportions as may be prescribed by any such regulations.
- 36 (1) Where the nominated undertaker or the Secretary of State affords to an operator facilities and rights for the construction, maintenance, repair, renewal and inspection of alternative apparatus on land held or used, or intended for use, by the nominated undertaker for the purposes of its undertaking under this Act or held by the Secretary of State, those facilities and rights must be granted upon such terms and conditions as may be agreed between the nominated undertaker or, as the case may be, the Secretary of State, and the operator or, in default of agreement, determined in accordance with paragraph 39.
- (2) In determining such terms and conditions, a person making a determination under paragraph 39 must have regard to any template provisions issued by the appropriate Ministers and determined in accordance with sub-paragraph (3); and must—
- (a) give effect to all reasonable requirements of the nominated undertaker for ensuring the safety and efficient operation of the authorised works and for securing any subsequent alterations or adaptations of the alternative apparatus which may be required to prevent interference with any proposed works of the nominated undertaker or the use of the same; and
  - (b) have regard to the operator's ability to fulfil its service obligations.

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- (3) For the purposes of determining the matters under sub-paragraph (2) the appropriate Ministers must consult the operators to which paragraph 36 may apply on the form of the proposed template provisions, and any objections to the form of those provisions which have not been resolved within six months after this Act comes into force must be referred to an independent person acting as an expert appointed to make a final determination as to the form of the template provisions.
- (4) The independent person making a determination under sub-paragraph (3) is to be appointed by the President of the Royal Institution of Chartered Surveyors and in making that determination that person must have regard to the matters specified in sub-paragraph (2)(a) and (b).
- (5) If the facilities and rights to be afforded by the nominated undertaker or the Secretary of State in respect of any alternative apparatus, and the terms and conditions subject to which those facilities and rights are to be granted are more or less favourable on the whole to the operator than the facilities, rights, terms and conditions applying to the apparatus to be removed, compensation must be paid to or by the nominated undertaker or the Secretary of State to or by the operator in respect of the difference as is reasonable having regard to all the circumstances of the case.
- 37 (1) Sub-paragraph (2) applies where, by reason of the construction of the authorised works or any subsidence resulting from any of those works—
- (a) damage is caused to any electronic communications apparatus, other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of those works,
  - (b) damage is caused to property of the operator of an electronic communications code network, or
  - (c) there is any interruption in the supply of the service provided by the operator.
- (2) The nominated undertaker must—
- (a) bear and pay the cost reasonably incurred by the operator in making good such damage or restoring the supply,
  - (b) make reasonable compensation to the operator for loss sustained by it, and
  - (c) indemnify the operator against all claims, demands, proceedings, or damages which may be made or taken against, or recovered from, the operator, by reason of any such damage or interruption.

But this is subject to sub-paragraphs (3) to (5).

- (3) Sub-paragraph (2) does not apply in connection with any apparatus in respect of which the relations between the nominated undertaker and the operator are regulated by the provisions of Part 3 of the New Roads and Street Works Act 1991.
- (4) Nothing in sub-paragraph (2) is to impose any liability on the nominated undertaker with respect to any damage or interruption to the extent that it is attributable to the act, neglect or default of the operator, its officers, servants, contractors or agents.
- (5) The operator must give the nominated undertaker reasonable notice of any such claim or demand and no settlement or compromise of any such claim or demand is to be made without the consent of the nominated undertaker which, if it withholds such consent, is to have the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.

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- (6) This paragraph applies instead of paragraph 14 of Schedule 2 in relation to the exercise of the powers of paragraphs 2 to 6 of that Schedule.
- 38 In any case where Network Rail Infrastructure Limited (“Network Rail”) is the nominated undertaker the provisions of this Part have effect subject to any existing agreement between Network Rail and an operator relating to apparatus laid or erected on land belonging to Network Rail.
- 39 (1) Any dispute arising between the nominated undertaker and an operator under this Part is to be determined by arbitration if—
- (a) the parties agree, or
  - (b) the dispute relates to the amount of any sum payable under this Part,
- but is otherwise to be determined by a person appointed by the appropriate Ministers.
- (2) Any person appointed by the appropriate Ministers under sub-paragraph (1) must, in determining any dispute arising under this Part, have regard to such matters as may be specified by the appropriate Ministers on making the appointment.
- (3) The costs and fees of the person determining the dispute and the costs of the parties to the dispute are to be allocated between the parties as that person may direct.