Submission under Schedule 8 paragraph 39(5) of EU Withdrawal Act 2018

Contents

INTRODUCTION

I.1 This challenge is made under Schedule 8, paragraph 39(5) of the European Union Withdrawal Act 2018[1] (with revisions) concerning the failure of the UK government to enact the European Electronic Communications Code (EECC) (Directive (EU) 2018/1972) public health protection provisions, being made against,

'*administrative action … other than Acts of Parliament or the Common law*',

relating to the transposition of provisions of the EU directive,

'*that occurred before exit day* (31st December 2020)',

and is made,

'*against either administrative action or domestic legislation … (where) … courts, tribunals and other public authorities will be able to dis-apply legislation or quash conduct in the event of a successful challenge* (explanatory note 211 of the EUWA 2018, paragraph 4.1.3, below)',

allowed within a three year time period, ending on 31st December 2023 (paragraphs 4.1.2 to 4.1.8 below, summarise the legal basis of the challenge).

I.2 The remedies sought (Section 5, below) fall clearly within the remits of the Department of Levelling Up, Housing and Communities (DLUHC) and the Department of Health and Social Care (DoH) as the public authorities possessed with the jurisdiction to,

'*disapply legislation or quash in the event of a successful challenge*',

through requisite jurisdiction on the **Remedies 1 to 21** listed, and justified in Section 5 of this submission, issued in accordance with the judicial review pre-action protocol, with **Remedy 12** requiring the participation of the Department of Digital, Culture, Media and Sport (DDCMS) on related matters to the transposition of the EECC on the 21st December 2020.

I.3 A co-ordinated response to this Schedule 8 paragraph 39(5) challenge from the DLUHC and the DoH is required by the 10th October 2023, in compliance with the judicial review pre-action protocol to secure the effective transposition of EECC public health protection provision, in accordance with **all Remedies**, to conclude the challenge without resort to legal action via judicial review.

I.4 The questions stated in paragraph 3.1.5 of the submission concerning:

'*The transposition of the 2014 directive,*

[1] https://www.legislation.gov.uk/ukpga/2018/16/contents/enacted

'*Measures to reduce the cost of deploying high speed electronic communications networks*',

and the,

'European Electronic Communications Code (EECC)',

being paragraph 2.7-type directives, (as argued in paragraphs 2.5.4 to 2.5.14), raise vital questions as to:

1. whether post-IP completion day challenges to the validity of the transposition of an instrument/or a provision of an instrument of the directives remain viable,

and,

2. whether remedies remain available based upon 'general principles' of European law to bring into effect direct rights concerning EECC public health protection provisions',

should be answered in the affirmative.

I.5 The direct rights asserted in this Schedule 8 paragraph 39(5) submission in paragraph 4.2.12 concern:

'*1. citizen rights to public health protection applied through the EECC 'procedural standard' in a telecommunication services specific environmental impact assessment (as affirmed in EECC Recital 46 as being specific to such services), that must be conducted prior to a general authorisation/planning permission being granted for the siting of a new mast/antennas by a LPA, or through the facilitation of small cell deployments by a LA,*

and,

2. the right of citizens in the circumstances described in 1. above, and as described in the DLA Piper statement issued on behalf of PHE (paragraph 1.7.4 and 1.7.7, above), by having their written objections raising legitimate interests in such circumstances, and the evidence they submit on the adverse health effects/environmental effects of proposed developments being properly taken into account before requests for LPA/LA authorisations/permission for applications/contractual arrangements, are determined.'

I.6 The UK government's '*How to Implement European Directives Effectively*' as applicable on the transposition of the EECC states that,

'*in practice most Directives leave no discretion as to whether to implement by way of legislation or other binding provision* (paragraph 2.7)'.

defined in the submission as paragraph 2.7-type directives with the EECC being of this defined type, includes cautionary warnings (paragraph 3 and 4 reported in paragraph 2.5.10, below), that the legal position of citizens in respect to their rights under a transposed directive, must be made,

'*sufficiently precise and clear so that people can determine the full extent of their rights* (paragraph 2.28, bullet point 3)',

and,

'*where the Directive's requirements are applied by administrative authorities, in order to avoid breaching the rule on sub-delegation* (paragraph 2.28, bullet point 4)'.

I.7 Both of these precautionary requirements are breached in respect to the sub-delegation of UK public health protection obligations to local planning authorities (LPAs)/local authorities (LAs) as primary regulators of involuntary public exposure to radio-frequency radiation (RFR), whilst EECC Recital 110 asserts the overarching,

'*need to ensure that citizens are not exposed to electromagnetic fields at a level harmful to public health is imperative*'.

I.8 **Remedies 5 and 6** are expected to be brought into immediate effect.

I.9 Matt Warman, as the former Secretary of State for Digital, Culture, Media and Sport (DDCMS) confirmed that the transposition of the EECC would have no effect on the status of LPAs where they are considered competent authorities under EU directive 2014/61/EC (paragraph 2.1.4, below), therefore the straightforward interpretation of his statement made to Wera Hobhouse MP on the 22nd June 2021, justifies **Remedy 5** to be brought into effect immediately.

I.10 **Remedy 6** should similarly be brought into immediate effect through LPA discretionary powers under the Town and Country Environmental Impact Assessment 2017 Regulations (England), and through parallel devolved powers legislation across the UK.

I.11 **Remedy 14** requires that LPA/LA EECC competent authority status is affirmed definitively in a Departmental response to this Schedule 8, paragraph 39(5) EUWA 2018 submission.

I.12 **Remedies 15 and 16** require:

i) National Planning Policy Framework (NPPF) deficiencies concerning telecommunication service policies to be rectified through a DLUHC commitment presented in response to this Schedule 8, paragraph 39(5) EUWA 2018 submission that the case *R (on the application of Delena Wells) v Secretary of State for Transport, Local Government and the Regions* (2004), is as a matter of fact a comparable *'of a kind'* case to the case made in this letter before claim (Remedy 15),

and,

ii) Departmental acceptance that the deficiencies are constitutionally significant (Remedy 16), irrespective of the changing status of EU Retained law over the past four years.

I.13 Where LPAs/LAs status as EECC competent authorities applies, is where EECC Recital 105 and 106 public health protection provisions interconnect with the 2014 directive on:

'*measures to reduce the cost of deploying high speed electronic communications networks*' (2014/61/EC).

I.14 The twin directives create LPA specific material planning considerations concerning the reconciliation of environmental/public health considerations in question, in relation to the '*in situ*' siting of new masts/antennas, and similar public health considerations concerning LA contracting involvement for any proposed '*in situ'* small cell deployment within localities.

I.15 The remaining **Remedies** are advocated to secure the full transposition of the EECC public health protection provisions into UK law beyond the immediate enactment of **Remedies 5, 6, 14, 15, and 16**, through a joint DLUHC and DoH programme of actions required to resolve this Schedule 8, paragraph 39(5) challenge under the jurisdiction granted to public authorities (as described in note 211 of the explanatory note to the EUWA 2018, above) to resolve this challenge effectively, and completely.

I.16 **Remedies 1 to 21** can be apportioned:

as primary to the DLUHC in the cases of **Remedies 1, 2, 4, 6, 9, 10, 12, 15 and 17**,

as primary to the DoH in the case of **Remedy 3**, and,

are jointly relevant to the DLUHC/DoH in the cases of **Remedies 5, 7, 8, 11, 13, 14, 16, 18, 19, 20 and 21**.

SECTION 1 The legal significance of public health protection provision – European directives as EU retained law

1.1 Background

1.1.1 The *'European Electronic Communications Code'* (EECC),[2]

and the interconnected directive,

'on measures to reduce the cost of deploying high-speed electronic communications networks' (the 2014 directive)[3]

are international agreements requiring participating nation states to manage the use of the radio spectrum through functions performed by national competent authorities (Ofcom in the UK), and other assigned competent authorities including local planning authorities/local authorities (LPAs/LAs). The competent authorities act within the EECC as a legal framework to regulate new telecommunication technologies as they are developed and made operational across Europe.

EECC Article 5.1 titled 'National regulatory and other competent authorities', reads,

'Member States shall ensure that each of the tasks laid down in the Directive is undertaken by a competent authority. Within the scope of this Directive, the ***national regulatory authorities*** *shall be responsible at least for the following tasks …* (including) *… (c) carrying out radio spectrum management decisions or, where the tasks are assigned to other competent authorities providing advice regarding market-shaping and competition elements of national processes related to the* ***rights of use*** *for radio spectrum for electronic communication networks and services'.*

The DLUHC and the DoH are '*national regulatory authorities*' sub-delegating obligations to LPAs/LAs on the EECC transposition, with Ofcom assignment of the status of an EECC 'national regulatory authority' on transposition.

'Rights of use' for radio spectrum for electronic communication networks and services are achieved in accordance with EECC Article 2(22)

'general authorisation' means a legal framework established by a Member State ensuring rights for the provision of electronic communications networks or services and laying down sector-specific obligations that may apply to all or to specific types of electronic communications networks and services, ***in accordance with this Directive'.***

1.1.2 The third sentence of paragraph 2 of the UK National Planning Policy Framework (NPPF),[4]

'planning policies and decisions must also reflect relevant international obligations and statutory requirements',

is relevant to how the twin directives are brought into effect.

1.1.3 The long-term purpose of the EECC is,

'ultimately to ensure that electronic communications are governed only by competition law' (EECC Recital 29),

as a,

'legal framework (that) *ensures freedom to provide communication networks and services',*

subject to conditions laid down in the directive,

'in particular measures regarding public policy, public security and public health' (EECC Recital 5).

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1972

[3] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0061

[4] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005759/NPPF_July_2021.pdf

1.1.4 Constitutional restriction impacting on the implementation of the directives during the UK's transition towards exit from the European Union varied in accordance with four sets of arrangements that accomplished the transition:

i) on transposition of the EECC on the 21st December 2020, and during the ten day period up to the 31st December 2020 (being 'exit day'),

ii) between 'exit day' and the Implementation Period (IP) completion (being the 31st January 2021),

iii) after IP completion day,

and,

iv) subsequently, through the effect of the EU Retained law (Revocation and Reform) Act 2023.

1.2 EECC spectrum management

1.2.1 Spectrum management is achieved through participating nations (in the case of the UK), and remaining EU Member States (as other participating nation states),

'when granting rights of use for radio spectrum … or rights to install facilities the ***competent authorities*** *should inform the undertakings* (and telecommunications companies are classed as 'undertakings') *to which they grant such rights of the relevant conditions'*,

and by doing so the competent authorities are enacting EECC functions on behalf of the UK as a participating nation state being,

'able to lay down such conditions for the use of the spectrum in individual rights of use or as in the general authorisation' (EECC Recital 45).

1.2.2 Clearly, LPAs /LAs are granting rights to undertakings to install facilities as planning permissions or permits through conditional or unconditional general authorisations, and by doing so are exercising their competency.

1.3 General authorisations are 'preferenced'

1.3.1 'G*eneral authorisations*' allow as defined in EECC Article 2(22) (paragraph 1.1.1, above), include planning permissions, or permits, allowing undertakings to construct civil works (where LAs are financially involved) or planned civil works (undertaken on their own behalf), are preferenced to serve the purposes of EECC Recital 5, as general authorisations that,

'contain only conditions which are specific to the electronic communications sector … for instance, competent authorities should be able to inform undertakings about the applicable environmental and town-and-country planning requirements' (EECC Recital 46),

as the autonomy of competent authorities is protected through EECC Recital 34 and Article 6.2, whilst the 2014 directive affirms,

'the right of each competent authority to be involved and maintain its decision making prerogatives in accordance with the subsidiarity principle' (Recital 26 of the 2014 directive).

1.3.2 EECC Recital 106,

'where mobile operators are required to share towers or masts for environmental reasons, such mandated sharing could lead to a reduction in the maximum transmitted power levels allowed for each operator for reasons of public health, and this in turn could require operators to install more transmission sites to ensure national coverage. ***Competent authorities should seek to reconcile the environmental and public health considerations in question, taking due account of the precautionary approach set out in Council Recommendation 1999/519/EC'***,

provides the foundation for the enactment of LPAs public health protection obligations through a telecommunication services specific form of environmental impact assessment (EIA) to be undertaken prior to the LPA granting or refusing a general authorisation for the siting and use of a proposed new mast or antennas.

1.3.3 The Body of European Regulators for Electronic Communications (BEREC) which assists the European Commission (EC) and the National Regulatory Authorities (NRAs) in implementing the EU regulatory framework for electronic communications confirm in an,

'opinion on the national implementation and functioning of the general authorisation, and on their impact on the functioning of the internal market, pursuant to article 122, paragraph 3 EECC' (December 2021), that,

'general authorisation represents a cornerstone of the EU electronic communications legislation' ('Legislative Background', paragraph 1),

with the EECC,

'further strengthening the system' ('Legislative background', paragraph 6).[5]

1.3.4 Public health protection provisions designed into the EECC are therefore part of an essential *'general authorisation'* system operating through UK planning procedures for granting or refusing telecommunication companies access to, and their use of the radio spectrum in specific localities as a form of spectrum management that applies to the siting of radio mast/antennas and small cell deployment *'in situ'* (the latter, being through EECC Recital 105).

1.3.5 The words *'in situ'*, denote the importance of location-specific decision making through development control procedures operated by LPAs/LAs.

1.3.6 Material planning considerations, as and when necessary in accordance with UK planning law, policy and procedure, have to be addressed to determine whether new mast/antennas siting is appropriate given the uses made of buildings or land in the immediate vicinity of proposed planned civil works/developments.

1.3.7 Small cell *'in situ'* deployment is regulated as civil works through non-statutory decision making by LAs (EECC Recital 105).

1.3.8 These spectrum management provisions are specific to telecommunication companies (paragraph 1.3.1, as above), and are enacted by LPAs/LAs as competent authorities through the application of their planning powers and planning procedures, and in the case of small cell deployment through LA contracting and permitted development rights facilitated through General Development Planning Order (GDPO) procedure.

1.4 The status of LPAs under the EECC

1.4.1 The status of local planning authorities (LPAs) in relation to the functions they perform re: planned civil works under the EECC, and the connected functions performed in accordance with the 2014 Directive are highlighted in the June 2021 question raised by Wera Hobhouse MP, and the answer given to that question by Matt Warman, the then Under Secretary of State at the DDCMS (see also paragraph 2.1.3 and 2.1.4, below).[6]

1.4.2 However, the EECC status of LPAs as competent authorities for the purposes of granting or refusing general authorisations for mast/antennas siting (ie: planning permission or permits) was assigned directly:

[5] https://www.berec.europa.eu/en/document-categories/berec/opinions/berec-opinion-on-the-national-implementation-and-functioning-of-the-general-authorisation-and-on-their-impact-on-the-functioning-of-the-internal-market-pursuant-to-article-122-paragraph-3-eecc

[6] https://www.theyworkforyou.com/wrans/?id=2021-06-14.15347.h

*'the tasks assigned to competent authorities **by this Directive** contribute to the fulfilment of broader policies in the areas of culture, employment, the environment, social cohesion and town and country planning'* (EECC Recital 22).

1.4.3 That assignment should have been consolidated by the UK Government to ensure that the public health protection provisions designed into the EECC that are enacted under the jurisdiction of LPAs when making *'in situ'* decisions on new mast/antennas siting is effective. The assignment is an essential component of efficient spectrum management for the ranges of technologies covered by the terms of the EECC as the relevant technologies are rolled-out across the UK.

1.4.4 Arguably, the assignment has direct effect.

1.5 EU Council Recommendation 1999/519/EU

1.5.1 The spectrum management functions of LPAs/LAs are central to the operation of the EECC as demonstrated by the interconnections between EECC Recitals 106, 110, and Article 45.2(h) - all refer to the **EU Council Recommendations 1999/519/EC**.

1.5.2 Only EECC Recital 139 does so additionally, on another town-and-country planning issue.

1.5.3 EECC Recital 105 concerning small cell deployment refers to LAs as EECC competent authorities, stating that,

'improving facility sharing can lower the environmental cost of deploying electronic communications infrastructure and serve public health, public security and meet town and country planning objectives',

which ties EECC Recitals 105 and 106, to the 2014 directive.

1.5.4 EECC Article 45 in its totality, establishes the core spectrum management requirements for the development and operation of telecommunication systems.

1.5.5 Spectrum management is underpinned by EECC Recital 110 asserting that the need,

*'to ensure that citizens are not exposed to electronic fields at a level harmful to public health is **imperative**'.*

1.5.6 This imperative cannot be met casually, as it requires the UK government and all UK EECC competent authorities to apply European Council Recommendations 1999/519/EC to new and emerging technologies, with a requirement to keep abreast of contemporary knowledge and guidance from a vaguely specified public health source ie: by the Recommendations using the phrase *'such as'* the International Commission on Non-Ionising Radiation (ICNIRP), and through the joint enactment of appropriate precautionary approaches to public safety.

1.5.7 The ICNIRP guidelines are not an emissions standard. Most cogently, any guidelines regarding emissions are recommended as a component part of European Council procedures, with those procedures requiring application through the transposition of the EECC into UK domestic law as a binding procedural standard.

1.5.8 The LPAs receive a telecommunication company applicant's self-certified statement to affirm that a mast/antennas requiring the authorisation for its proposed siting, as being,

'designed to be in full compliance with the requirements of the radio frequency public exposure guidelines of the International Commission on Non-Ionising Radiation (ICNIRP, March 2020) *as expressed in European Council Recommendation 1999/519/EC of 12 July 1999 'on the limitation of exposure of the general public to electromagnetic fields (0Hz to 300 GHz)'*.

1.5.9 The guidelines are brought into use through the **procedural standards** agreed as *EU Council Recommendation 1999/519/EC* paragraph 4, being that,

*'it is imperative to protect members of the general public within the Community against **established** adverse health effects that may result as a consequence of exposure to electromagnetic fields',*

and paragraph 19, being that,

*'Member States should take note of progress made in scientific knowledge and technology with respect to non-ionising radiation protection, taking into account the aspect of precaution, and should provide for regular scrutiny and review with an assessment being made at regular intervals in the light of guidance issued by competent international organisations, **such as** the International Commission on Non-Ionising Radiation Protection* (ICNIRP)*'.*

1.6. Legal accountability: Guidelines and Standards

1.6.1 The World Health Organisation (WHO) *'Framework for Developing Health-Based EMF Standards'* (2006),[7]

published criteria for electro-magnetic frequency (EMF) standards setting, aimed at establishing,

'exposure limits and other control mechanisms that provide the same or similar level of health protection for all people

(paragraph 2, page 5)'.

On the *'Practicality of Standards'*, the WHO state categorically that,

*'Governments should provide the legal framework that provides the departments with the mandate to develop and implement EMF standards that are **mindful of the health implications, including uncertain ones**. The standards should be relevant, effective and workable. It should be recognised that the standard does not operate in isolation from the national legal framework, and in particular from other **occupational, health, safety and environmental laws*** (paragraph 5.1, page 27)*',*

and that,

*'exposure standards have **no value in protecting public health if they are not complied with*** (paragraph 5.2, page 27)*'.*

1.6.2 The WHO asserted that,

'National authorities should only establish standards if there is a strategy for cost-effectively determining if the standards are being met and if an appropriately qualified and experienced person or authority has been identified and resourced to conduct compliance monitoring (paragraph 5.2 page 27)'.

1.6.3 The WHO *'South Africa -National Report"* (June 2022)[8] explains that the WHO framework was a response to,

*"**parties** employing the strategy of creating a false sense of public safety through the mixed and inappropriate use of words, guidelines and standards'* (page 30)'.

and re-emphasised the 2006 distinction drawn by the WHO between EMF standards and guidelines,

'*to help grow and guide municipal, industry and public engagements*',

explaining that,

"how the use of the words guidelines and standards has substantially different implications for public health and EMF radiation protection enforcement:

*1) **Guidelines are voluntary instruments of instructions and recommendations that are not legally mandated and therefore have no legal standing,***

[7] https://www.who.int/publications/i/item/9241594330

[8] https://figshare.com/articles/conference_contribution/World_Health_Organization_-International_EMF_Project-International_Advisory_Committee_IAC_11th_anniversary_of_the_International_Optical_Radiation_and_26th_anniversary_of_EMF_Project_meeting_South_Africa_National_Report_2022/20012759

*2) **Standards are the mandatory, compulsory and legally binding instruments, i.e., laws, acts, regulations, ordinances and decrees. They require procedures and systems to exist** in order to ensure compliance with mandatory standards, i.e., an agency is mandated to check compliance through calculations and measurements in the workplace, residence and other vulnerable areas.*

In summary, a standard has mandatory and legally binding instruments, monitoring and enforcement systems. Identified were municipalities advertising having a "standard" in the form of a Telecommunications bylaw however, the municipalities purposefully do not meet the criteria to qualify as a standard but instead as a guideline'(page 31).

1.6.4 After confirming that the WHO in 2006 accepted that,

'*there is to be no internationally mandated EMF radiation standard but recommends that countries adopt their health-based EMF radiation standard from the large selection of international guidelines published, based on their tolerance of risk value toward accrued benefits to health (page 31)'*,

the WHO *'South Africa -National Report'* states that,

'*it could be argued that EMF radiation protection and interpretation would fall into existing legislation in South Africa with there being no national EMF radiation exposure safety standard in the country. The argument is based on the false sense of safety associated with the lack of a standard and consequently lack of surveillance of EMF exposure to the public. Because it cannot be denied that there is the potential of harm from exposure to EMF radiation, legally binding exposure standards have been established in many countries worldwide (page 31)*'.

1.7 Can LPAs/LAs immunise themselves from taking into account contrary and contradictory evidence on what constitutes an established adverse health effect of radio-magnetic radiation (RFR)?

1.7.1 Similarly, the UK does not operate a legally binding EMF exposure standard. However the European Council Recommendations 1999/519/EC does provide the UK with a,

'*health-based EMF radiation standard from the large selection of international guidelines published, based on their tolerance of risk value toward accrued benefits to health'* (paragraph 1.6.4, above),

set within the EECC as a legal framework underpinned by a procedural standard (paragraph 1.5.7 & 1.5.9, above) for the effective management of the radio spectrum rather than a legally binding exposure standard. The procedural standard requires public health to be made imperative through the decision making of competent authorities, by which the standard is made effective through functions that authorities perform by granting or refusing EECC general authorisations.

1.7.2 The vital issue is how that procedural standard is applied to conform with the requirement identified by the WHO to ensure that it,

'does not operate in isolation from the national legal framework, and in particular from other occupational, health, safety and environmental laws'. (paragraph 1.6.1 above).

1.7.3 This brings into focus the pressing question as to whether LPAs/LAs can immunize themselves from taking properly into account any evidence of adverse health effects when making '*in situ*' decisions on mast/antennas siting or small cell deployment. The non-exclusive status of ICNIRP guidance and the required autonomy of LPAs/LAs as EECC competent authorities makes it necessary that evidence of adverse health effects brought forward legitimately for consideration by LPAs/LAs, has to be addressed by those authorities when they are exercising their jurisdiction.

1.7.4 This is particularly the case, as DLA Piper (Solicitors) on behalf of Public Health England (PHE) stated specifically in response to a letter before claim issued on a potential 2019 judicial review case concerning PHE's reliance on ICNIRP guidelines that,

'the Guidance is not maintained and revised by PHE for the explicit purpose of any other body undertaking any other statutory function. If in any other context regard is had to the Guidance that is entirely a matter for the discretion of the relevant body and it must determine what weight to place on the Guidance given the clear indication as to the sources from which the advice and recommendations in the Guidance are derived. Equally, that body must determine what other evidence from your clients or other members of the public or interested parties to consider in making any decision (letter dated 8th August 2019)'.

1.7.5 Public objections to proposed masts/antennas may be the only means through which LPAs/LAs are notified of evidence of harm, injury and nuisance caused by exposure to RFR, or of *'in situ'* specific public health /environmental protection requirements drawn from valid science.

1.7.6 LPAs/LAs are obliged to reconcile the public health consequences of mast/antennas siting and small cell deployment, determining which adverse health effects are **established.**

1.7.7 As claimed by DLA Piper,

'that is entirely a matter for the discretion of the relevant body',

which reinforces the procedural requirement for LPA/LA competency extending to determining how, if and when an adverse health effect is established when exercising their discretion.

1.7.8 Whilst the WHO warn that health protection standards are bound by,

'occupational, health, safety and environmental laws'.

1.7.9 EECC Article 6.2 required the UK as a Member State to,

'ensure that national regulatory and other competent authorities exercise their powers impartially, transparently and in a timely manner. Member States shall ensure that they have adequate technical, financial and human resources to carry out the tasks assigned to them'.

1.7.10 LPA/LA appraisal of *'established adverse health effects'* of mast/antennas siting and small cell deployment in accordance with the European Council Recommendation 1999/519/EC (paragraph 4, see paragraph 1.5.9, above), when applied to the incompatible and unacceptable use material planning consideration *'in situ'*, may result in three outcomes:

i) incompatible and unacceptable use **may not be evidenced** through established adverse health effects,

ii) incompatible and unacceptable use **may be validated** by established adverse health effects,

or,

iii) compatibility and acceptability **may not be evidenced sufficiently** concerning established adverse health effects.

1.7.11 Outcomes ii) and iii), may prove to be legitimate reasons for refusing authorisations for mast/antennas siting and small cell deployment.

1.7.12 The UK NPPF[3] at paragraph 118 states that,

'local planning authorities must determine applications on planning grounds only. They should not seek to prevent competition between different operators, question the need for an electronic communications system, or set health safeguards different from ICNIRP guidelines for public exposure'.

1.7.13 The first sentence of the paragraph is entirely compatible with planning law, which requires all material planning considerations to be taken into account unless exceptions are sanctioned through legislation.

1.7.14 However, the intended restriction on any attempt by LPAs to '*set health safeguards different from … ICNIRP… guidelines for public exposure*' is deeply problematic given:

i) EECC public health provisions require LPAs/LAs to reconcile environmental and public health effects in accordance with EC Recommendations 1999/519/EC as a procedural standard which does not mandate compliance with ICNIRP guidelines (paragraph 1.7.1, above).

ii) the DLA Piper (paragraph 1.7.4, above) weighting process that,

'*the relevant body*',

should engage with the,

'*sources from which the advice and the recommendations in the Guidance (PHE Guidance based on ICNIRP guidelines) are derived. Equally, that body must determine what other evidence … from … members of the public or interested parties to consider in making any decision*',

can be accomplished straightforwardly in compliance with planning law, without the LPA/LA setting health safeguards for public exposure

and,

iii) PHE policy[9] (paragraph 1.8.4, below) itself, refers to planning policy as a regulatory area, yet planning policy must be formulated and construed in ways that remain compliant with planning law and procedure.

1.7.15 LPAs/LAs as EECC competent authorities undertaking tasks/functions under EECC Recitals 105 and 106 by applying the procedural standard set to protect public health (paragraphs 1.5.7 to 1.5.9, above), require telecommunication service specific environmental impact assessments (EIAs) (paragraphs 1.8.8, 4.1.9 and 4.2.11, below) to be undertaken prior to mast/antennas siting and small cell deployment decision making. LPA/LA reconciliation of the 'environmental and public health considerations in question' lead inevitably to one of the three options (paragraph 1.7.10, above) available on legitimate planning grounds, without overstepping the restriction NPPF paragraph 118 attempts to place on LPA/LA decision making.

1.7.16 EECC *'considerations in question*' reconciled during LPA/LA decision making are additional material planning considerations that must be determined *'in situ*' by the LPA/LA alongside material planning considerations that apply conventionally. On the transposition of the EECC, specific EECC Recital 105 and 106 derived material planning considerations should have been made subject to paragraph 2 of the NPPF (paragraph 1.1.2, above), and under the ultimate scrutiny of UK courts **(Remedy 4 and 5**, below).

1.7.17 Appendix A1.2 on '*Mendip DC's EECC competent authority status applied in rejecting a 5G mast on public health grounds*', and Appendix A2.1 to A2.10 on the '*Prevention of avoidable harm, injury and nuisance*' (summarised in paragraph 1.8.9, below), illustrate the importance of LPA/LA assessment of '*in situ*' public health and environmental implications of mast/antennas siting and small cell deployment.

1.8 LPAs/LAs are primary regulators of involuntary public exposure to radio frequency radiation (RFR)

1.8.1 EECC Article 45.2(h) requires a participating nation state (in the case of the UK) and EU Member States to,

'promote the harmonisation of use of the radio spectrum … in so doing, they shall act in accordance with … (a) to (g) …'

(which are a series of obligations falling upon Ofcom as the UK national regulatory authority. Additionally, LPAs/LAs under their autonomous powers are required to grant or refuse general authorisations as EECC competent authorities, on behalf of the UK as a participating nation state through sub-delegation (paragraphs 2.5.1 to 2.5.14 below, through consistent decision making across the UK)

… *by,*

(h) pursuing consistency and predictability throughout the Union regarding the way the use of radio spectrum is authorised in protecting public health taking into account Recommendation 1999/519/EC'.

1.8.2 Further, EECC Article 44 permits intervention by LPA/LAs through their planning powers and competency,

'where an operator has exercised rights under national law to install facilities on, over or under public or private property, or has taken advantage of a procedure for the expropriation or use of property, competent authorities may impose co-location and sharing of network elements and associated facilities installed on that basis, in order to protect the environment, public health, public security or to meet town and country planning objectives',

tying LPA/LA competent authority obligations for civil works and planned civil works in Directive 2014[2] (Recitals 26, 28 and Article 7.3), through EECC Recital 105 and EECC 106 respectively, in order to protect the ...

'environment, public health … or to meet town and country objectives',

through UK planning law and procedures, including under Schedule 2, Part 16, Class A of the Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended).

1.8.3 The requirement to make public health imperative (in accordance with EECC Recital 110) through LPA regulation for site specific authorisations of access to spectrum use (taking into account Recommendation 1999/519/EC), engages planning law and public health protection obligations which pre-date the transposition of the EECC in late December 2020.

1.8.4 PHE's *'Mobile phone base stations: radio waves and health'* [9] affirmed that,

'control of exposures occurs through product safety legislation, health and safety legislation and planning policy. These regulatory areas all consider the international guidelines (paragraph 4)*',*

being an August 2021 update of the guidance that DLA Piper referred to their 8th August 2019 response (paragraph 1.7.4, as above), to a letter before claim issued in a prospective judicial review.

1.8.5 These obligations should have been consolidated before the EECC was transposed, as EECC Recitals 21, 22 and 34, and Article 6.2, demonstrate.

1.8.6 LPAs are regulating involuntary public exposure to RFR through the exercise of their exclusive jurisdiction, and by doing so are fulfilling, through sub-delegation from the Secretary of State for Health (SoSfH), the UK obligation to make public health protection imperative by granting or refusing *'general authorisations'* for new radio mast/antennas siting. LPAs are therefore primary regulators of involuntary public exposure to RFR, as a direct effect of EECC public health protection provisions assigned through EECC Recital 22.

1.8.7 This relationship is explained as requiring utmost caution in the*' How to transpose EU Directives guidance'* that was in operation when the EECC was transposed (paragraph 2.5.10, below).

1.8.8 That primary regulation is achieved through the functions LPAs perform under EECC Recital 106, through a form of environmental impact assessment (EIA) that is required specifically to,

'reconcile the environmental and public health considerations in question, taking due account of the precautionary approach set out in Council Recommendation 1999/519/EC'.

[9] https://www.gov.uk/government/publications/mobile-phone-base-stations-radio-waves-and-health

1.8.9 As demonstrated in Appendix 2, below, LPAs/LAs will not be able to perform as effective EECC competent authorities screening against avoidable harm, injury, and nuisance with public health being made imperative (in compliance with EECC Recital 110) through a telecommunications specific EIA (as required to meet EECC Recital 105 and 106 requirements), unless they are:

A2.1 informed about exclusion zones, and provided with exclusion zone diagrams

A2.2 made competent to assess exclusion zone diagrams and determine full compliance with ICNIRP

A2.3 fully cognisant of risks to pregnant women and her foetus, (especially within an occupational exclusion zone)

A2.4 able to risk assess for microwave hearing

A2.5 able to assess simultaneous exposure from nearby masts and identify interference '*hotspots'*

A2.6 provided with full specifications for 5G infrastructure

A2.7 able to risk assess against health protection claims made by telecommunication applicants/contracting companies

A2.8 are informed about the proportion of *'in situ'* 5G studies within the body of RFR research

A2.9 LPAs/LAs are informed that there is a section of the population not protected by ICNIRP exposure guidelines, ie those with metal and medical implants

and,

A2.10 acknowledge the existence of people with Electrohypersensitivity (EHS) disability.

SECTION 2. How telecoms directives were transposed into UK law

2.1 Local planning authorities/local authorities regulatory public health responsibilities

2.1.1 Authorisation granting or refusing the installation or upgrading of wireless electronic telecommunications systems by LPAs/LAs is regulatory of involuntary public exposure to RFR, as confirmed by PHE including *'planning policy'* as being a *'regulatory area'* that considers *'the international guidelines*' (paragraphs 1.8.4, above).

2.1.2 Local authorities as EECC competent authorities for the purposes of Recital 105, also have regulatory obligations for the control of RFR exposures through small cell deployment (paragraph 1.5.3, above).

2.1.3 In the parliamentary written question Wera Hobhouse MP (paragraph 1.4.1 above) asked,

'the Secretary of State for Digital, Culture, Media and Sport, with reference to the Answer of 17 November 2020 to Question 114987, whether local planning authorities that were made competent authorities under EU Directive 2014/61/EC (Directive 2014) *retain that status under EU Directive 2018/1972/EC* (the EECC)'.

2.1.4 Matt Warman, then DDCMS Parliamentary Under-Secretary response (22nd June 2021) was,

'the European Electronic Communications Code Directive updated the EU telecommunications regulatory framework, and was transposed into UK law via the Electronic Communications and Wireless Telegraphy (Amendment) (European Electronic Communications Code and EU Exit) Regulations 2020.

Whilst the Directive gave member states flexibility to assign certain functions to competent authorities, under prior EU and domestic law, Ofcom is retained as the designated telecoms national regulatory authority in the UK.

Local planning authorities were not made competent authorities through EU Directive 2014/61/EC, as the government was already content that the functions in question relating to planned civil works were already in place. The transposition of the EECC would have no effect on the status of local planning authorities ***where they are considered*** *competent authorities under EU Directive 2014/61/EC.'*[5]

2.2 Ambiguity concerning the status of LPAs/LAs, where and when certainty is essential

2.2.1 Matt Warman's response generates ambiguity as to,

'where they (LPAs) *are considered competent authorities',*

1) for the performance of the interconnected functions that link the twin directives as EU Retained law post 'exit day (31st December 2020),

and,

2) concerning which body/bodies are responsible for ensuring that the functions undertaken by LPAs/LAs under the EECC as sub-delegated obligations are performed effectively (paragraph 2.5.10, below).

2.2.2 How LPAs/LAs act in respect to EU Retained law must nonetheless be definitive, when their decisions impact significantly on public health and welfare.

2.2.3 It remains likely, in retrospect, that the UK government transposed the EECC under the assumption that LPA/LA functions concerning civil works/planned civil works under EECC Recital 105 and 106 were *'already in place',* repeating the process that Matt Warman describes that brought into effect the 2014 Directive (paragraph 2.1.3, above).

2.2.4 EECC Recital 22 pre-empted,

'member states flexibility to assign certain functions to competent authorities',

contrary to Matt Warman's statement (paragraph 2.1.4, as above), as the Recital affirms that,

'the tasks assigned to competent authorities by this Directive contribute to the fulfilment of broader policies in the areas of culture, employment, the environment, social cohesion and town and country planning',
(as quoted previously in paragraph 1.4.2, above), and that direct assignment is reinforced through EECC Article 5(1) (paragraph 1.1.1, above), and through EECC Article 44 (paragraph 1.8.2, above).

2.2.5 That direct assignment of LPAs/LA competent authority status is wholly consistent with PHE's August 2021 assertion that public health protection regulatory measures for the *'control of exposures'* (ie: the involuntary public exposure to RFR), is achieved through *'planning policy'* as a *'regulatory area'* where the ICNIRP guidelines are under consideration within the functions that LPAs are obliged to perform in ways that are consistent with planning policy, planning procedures, as confined by domestic planning law.

2.2.6 Planning policy and public health policy are subsidiary to relevant domestic law, and those policies should serve to clarify and reinforce the importance of consistency within and across the *'regulatory area'* sub-devolved to LPAs/LAs.

2.2.7 The NPPF (as highlighted in paragraph 1.1.2, above) requires that,

'planning policies and decisions must also reflect relevant international obligations and statutory requirements'
(paragraph 2),

because international obligations created by agreements such as the EECC and interconnected domestic law have primary significance, whilst government policy is secondary and should be consistent with the legal obligations of the UK government particularly when those obligations are exercised through the sub-delegation of functions to independent statutory bodies such as LPAs/LAs (paragraph 2.5.10, below).

2.2.8 Very obviously, planning law requires *'considerations'* arising from international agreements, statutory obligations that impact upon the decision making of LPAs, as well as relevant NPPF policies and other governmental policies/regulatory requirements, to be made material *'in situ'* when planning applications for mast siting are determined. Material planning considerations can be multi-faceted and conflicting, where such considerations require reconciliation through a structured system of assessment ie: an Environmental Impact Assessment (EIA), which as far as possible objectifies the processes that are required to accomplish evidence based decision-making.

2.2.9 An EECC Recital 106 environmental impact assessment (EIA), with the LPA seeking '*to reconcile the environmental considerations in question'*, is specific to telecommunication service provision as confirmed in EECC Recital 46 (paragraph 1.3.1, above).

2.3 Failure prior to EECC transposition

2.3.1 The status of LPAs/LAs as EECC competent authorities and the significance of *'general authorisations'* granted or refused in response to mast/antennas siting applications, or for small cell deployments, both *'in situ'*, required definitive action by the UK government prior to EECC transposition, through EECC Recital 21 where,

'national regulatory and other competent authorities should have a harmonised set of objectives and principles to underpin their work',

and through EECC Recital 121 where,

'in order to ensure predictability and preserve legal certainty and investment stability, Member States should establish in advance, appropriate criteria to determine compliance with the objective of efficient use of radio spectrum by holders of the rights when implementing the conditions attached to individual rights of use and general authorisations'.

2.3.2 The UK as an EU Member State on the transposition of the EECC, should have set relevant objectives and criteria related to the functions performed by LPAs on mast/antennas siting, and for LAs engaged in small cell deployment as required to comply with EECC Recitals 21 and 121.

2.3.3 Compliance with these twin Recitals required the prior identification of LPAs/LAs as EECC competent authorities, as well as collaboration between UK national government bodies in setting objectives and criteria concerning the sub-delegation of the public health protection functions that LPAs/LAs are required to perform as EECC competent authorities (paragraph 2.5.10, below).

2.3.4 At the very least the sub-delegation of EECC public health protection provision required to enact the Recital 110,

'need to ensure that citizens are not exposed to electromagnetic fields at a level harmful to public health is imperative',

should be pursued,

'having particular regard to the precautionary approach taken in Recommendation 1999/519/EC',

through evidence based decision-making *'in situ'*, because in essence, development control procedures operated by LPAs are precautionary.

2.3.5 Preparations for the granting or refusal of general authorisations for planned civil works (masts/antennas), or for civil works (small cell deployment), should have been made the subject-matter of overt cross-departmental policy to support the sub-delegated facilitation and the empowerment of LPAs/LAs to enable them to perform their required EECC competencies.

2.3.6 As observed by Lord Hoffman in paragraph 32 of his judgment in *Tesco Stores Limited v Secretary of State for the Environment [1995] 1 WLR 759*[10],

'a development will often give rise to what are commonly called external costs, that is to say, consequences involving loss or expenditure by other persons or the community at large. Obvious examples are the factory causing pollution, the office building causing parking problems, the fast food restaurant causing litter in the streets. Under the laissez- faire system which existed before the introduction of modern planning control by the Town and Country Planning Act 1947, the public had for the most part to bear such external costs as best it could. The law of torts (particularly nuisance and public nuisance) and the Public Health Acts could provide a remedy for only the most flagrant cases of unneighbourly behaviour',

highlighting the precautionary functions of LPAs.

2.4 UK policy on the transposition of EU directives

2.4.1 The UK had two years to prepare for the transposition of the EECC after it was agreed on the 11th December 2018, during which time the UK government's *'How to Implement European Directives Effectively'*[11] guidance applied, after having been introduced in February 2018. The guidance remained in use until it was withdrawn in January 2021.

2.4.2 The guidance was binding on officials.

2.4.3 It was applied with the stated intention,

'to achieve the best possible outcome for the UK by ensuring the UK systematically transposes so that ***burdens*** *are minimised and UK businesses are not put at a disadvantage relative to their European competitors* (paragraph 1.2)'.

2.4.4 The primary principles being to,

1) ensure that (save in exceptional circumstances) the UK does not go beyond the minimum requirements of the measure which is being transposed (paragraph 1.3),

and,

2) wherever possible, seek to implement EU policy and legal obligations through the use of alternatives to regulation.

2.4.5 The EECC is designed to enact multiple *'measures'* within a *'legal framework'* (as a "Code" is collection of legal instruments) for ensuring,

'freedom to provide communication networks and services' (EECC Recital 5),

and there is no reason to doubt that the public health protection provision designed to regulate involuntary public exposure to RFR is an essential component of the EECC Article 45 measures/instruments that secure the efficient management of the radio spectrum.

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[10] https://www.casemine.com/judgement/uk/5a8ff70160d03e7f57ea58a1

[11] https://www.gov.uk/government/publications/implementing-eu-directives-into-uk-law

2.4.6 The guidance doesn't draw any distinction between a 'measure' and an 'instrument', so presumably public health protection is a provision of a **'measure or instrument'.**

2.4.7 The enactment of this public health protection provision by LPAs/LAs is therefore a prerequisite to effective spectrum management as specified in EECC Article 45, including Article 45.1 and 45.2(h).

2.4.8 EECC Article 45.1 being:

'taking due account of the fact that radio spectrum is a public good that has an important social, cultural and economic value, Member States shall ensure the effective management of radio spectrum for electronic communications networks and services in their territory in accordance with Articles 3 and 4. They shall ensure that ***the allocation of, the issuing of general authorisations in respect of, and the granting of individual rights of use for radio spectrum for electronic communications networks and services by competent authorities are based on objective, transparent, pro-competitive, non-discriminatory and proportionate criteria***'.

2.4.9 EECC Article 45.2 being:

'Member States shall promote the harmonisation of use of radio spectrum by electronic communications networks and services across the Union, consistent with the need to ensure effective and efficient use thereof and in pursuit of benefits for the consumer such as competition, economies of scale and interoperability of networks and services. In so doing, they shall act in accordance with Article 4 of this Directive and with Decision No 676/2002/EC, inter alia … (applying a wide range of measures/provisions listed as 45.2(a) to (g)...

… and specifically …) *by:*

(h) pursuing consistency and predictability throughout the Union regarding the way the use of radio spectrum is authorised in protecting public health taking into account Recommendation 1999/519/EC' (summarised in paragraph 1.7.1, above).

2.4.10 LPAs/LAs are therefore acting on behalf of the UK as an EECC participating nation state, and formerly as an EU Member State, as described in the Government's *'How to Implement European Directives Effectively'*, as *'administrative authorities'*, acting through *'sub-delegation'*.

2.5 LPAs/LAs act under the sub-delegation of powers held by the Secretary of State for Health (SoSfH)

2.5.1 Most importantly, sub-delegation subsumes the responsibilities and the obligations of the SoSfH under Section 2A of the National Health Service Act 2006, that serves to control public exposure to RFR through '*areas of regulation*' intended by the SoSfH to be achieved through '*planning policy*' (paragraphs 1.7.4 and 2.1.1, as above).

2.5.2 The involvement and the oversight of the SoSfH in how UK *'planning policy'*, in its proper depth and complexity, should have been developed and applied during the period December 2018 to December 2020, and then made subject to an on-going review of the quality and the effectiveness of that regulatory area as an essential component of EECC spectrum management, is a necessary sub-delegation responsibility of the SoSfH.

2.5.3 *'Planning policy*' itself should have been developed prior to the transposition of the EECC to clarify and reinforce the importance of consistency within the elements of the public health protection '*regulatory area*' that LPAs/LAs are required to perform as EECC competent authorities. That sub-delegation should have been brought into effect '*in situ*' as LPAs/LAs determine mast/antennas siting applications, and small cell deployment proposals as a necessary pre-requisite to making public health imperative to the operation of the EECC regulation of telecommunication development.

2.5.4 The UK government transposition guidance assumes that alternatives to regulation (primary principle 2, at paragraph 2.4.4, above) may exist when,

'a Directive specifies the objectives to be achieved, while leaving the 'form and methods' to the discretion of each Member State' (paragraph 2.6 of the Government guidance on transposition, at page 12),

yet the guidance also reveals that,

'in practice, most Directives leave no discretion as to whether to implement by way of legislation or other binding provision' (paragraph 2.7 of the Government guidance on transposition, at page 12).

2.5.5 EECC Recitals 21 and 121 (paragraph 2.3.1, above) are the converse of a paragraph 2.6-type directive, as the form and methods of the public health protection procedural standard that LPAs/LAs are required to enact is specified, whilst the objectives that LPAs/LAs are required to pursue are a matter for the UK Government to define. The EECC is a paragraph 2.7-type directive as it places very different obligations on the participating nation state to set objectives and criteria that are operational (needing enactment by competent authorities and compliance by telecommunication companies) within the EECC as a legal framework.

2.5.6 The requirement to set these operational objectives/criteria limits the discretion available to the UK as a participating nation state regarding the *'form and methods'* available for the effective implementation of EECC public health protection provisions that require guidelines being applied through the procedural standards set for compliance through the European Council Recommendations 1999/519/EC.

2.5.7 Public health protection provisions are tied unambiguously to the EECC Recital 110,

'need to ensure that citizens are not exposed to electromagnetic fields at a level harmful to public health is imperative',

and arguably, only one imperative need can exist within the EECC as a legal framework.

2.5.8 The procedural standard, the guidance applied though the procedural standard, and the public health protection provision to which the procedural standard and the guidelines are crucial parts, the obligations of LPAs/LAs as EECC competent authorities, and the citizen rights that EECC public health protection provisions secure, would all have to be legislated **against** to remove the jurisdictional effects and impact of the EECC public health protection provisions across the UK, if the government intended to remove its obligations to comply with the regulatory effects of the EECC on these public health management procedures and processes.

2.5.9 The transposition guidance makes it clear that provisions enacted (or that should have been enacted) through EU directives, create citizen rights, such as the right to be protected from involuntary public exposure to RFR, and the right to participate in regulatory decisions taken by EECC competent authorities. Citizen rights in relation to the planning policy regulatory area are defined through planning law and planning procedures that LPAs/LAs are obliged to apply straightforwardly (paragraph 4.2.12 below).

2.5.10 Officials are warned in the Government's transposition guidance that,

'they should consult lawyers and take particular care…',

in these two cases:

'3. where a provision of a Directive is intended to create rights for individuals, the legal position needs to be sufficiently precise and clear so that people can determine the full extent of their rights;'

and,

'4. where the Directive's requirements are applied by administrative authorities, in order to avoid breaching the rule on sub-delegation. The rule on sub-delegation is a common law presumption that when Parliament gives a power to a specified person, that person should not delegate the exercise of the power to anyone else',

alongside two other case scenarios.

2.5.11 Case 3-type and case 4-type cases surely apply when LPAs/LAs as EECC competent authorities undertake public health protection functions on behalf of the SoSfH, as the rights of citizens to gain public health protection and to participate in decision making by LPAs/LAs as EECC competent authorities are jeopardised by those rights not being made clear and precise. Yet, case 3-type circumstances require the Government to transpose the twin telecommunications directives to make the legal position on the rights of citizens derived from EU directives clear and precise, as they take effect in UK domestic law.

2.5.12 In case 4-type circumstances where LPAs/LAs as sub-delegated administrative authorities have public health protection obligations under the EECC, there is abundant case evidence that LPAs/LAs deny their EECC competent authority status, or remain ambivalent as to whether or not their consideration of the public health consequences of the siting of masts/antennas requiring planning permission/prior approval is discharged by their acceptance of the applicant's issue of a certificate of compliance with ICNIRP guidelines (Appendix A1.1 (Solihull Metropolitan Borough Council), A1.2 (Mendip District Council), and A1.3 (Bath and North East Somerset Council), below). And, it is unclear whether they should seek to reconcile the public health and environmental considerations concerning the siting of mast/antennas as specified in EECC Recital 106, or in Recital 105 for small cell deployment projects, by engaging in the type of analysis described by DLA Piper (Solicitors) on behalf of PHE in its August 2019 response (paragraph 1.7.4, above).

2.5.13 Case 4-type sub-delegation takes place when LPAs/LAs perform functions related to the UK making public health imperative through the exercise of prerogative powers held by them uniquely, and in accordance with the principle of subsidiarity (ie: decisions made as close to citizens as possible) on the siting of masts/antennas and small cell deployments under EECC Recitals 105, 106, 110 and Article 45.2(h).

2.5.14 The sub-delegation has to be sustained through UK statutory law (consistent with the *'common law presumption'* mentioned in the case 4-type sub-delegation warning), through the effective implementation of EU directives (as highlighted in paragraph 2.5.10, above). Presumably, the options for sub-delegation are as explained in paragraph 2.7 of the Government's transposition guidance,

'by way of legislation or other binding provision' (paragraph 2.5.4 , as above),

further reinforcing the conclusion that the EECC is, as a matter of fact, a paragraph 2.7-type directive.

2.6 The '*Smarter Regulation to Grow the Economy'* policy and the EU Retained law (Revocation and Reform), Act 2023, present further threats to EECC public health protection provision

2.6.1 The UK Government in its May 2023 *'Smarter Regulation to Grow the Economy'* proposals[12], under the section heading, *' Ensuring regulation is a last resort, not a first choice'* (page 8), being a May 2023 policy

[12] https://www.gov.uk/government/publications/smarter-regulation-to-grow-the-economy/smarter-regulation-to-grow-the-economy

document issued by the Department for Business, Enterprise and Regulatory Reform, is part of a long-standing government strategy that seeks to,

'end the default expectation of government departments that regulation is a first choice. Instead we will require departments to evidence a thorough consideration of non-regulatory options before any regulatory solution to a policy issue becomes a serious possibility, and before launching any consultation where regulation is a lead option',

which is reliant on the assumption that,

'alternatives to regulation, such as standards and guidance, are often more flexible and quicker to introduce. They are also easier to adjust or remove when no longer working effectively – for example, to keep pace with changing technologies (paragraph 2.1)',

which is now facilitated through the EU Retained law (Revocation and Reform)Act 2023, as below.

2.6.2 Under clause 15 of the Act 2023 *'Power to update',* **a relevant national authority** is granted prerogative and persisting powers with no time restriction on their use, being:

'(1) A relevant national authority may by regulations make such modifications of any secondary retained EU law, or of any provision made by virtue of section 11, 12 or 14, as the relevant national authority considers appropriate to take account of:

(a) changes in technology, or

(b) developments in scientific understanding'.

2.6.3 The EECC public heath protection provisions are applied as a *'procedural standard'* requiring competent authorities to make decisions on spectrum management from an understanding of the impact of changing technologies and science **concerning all established adverse health effects.**

2.6.4 The UK government's failure to enact the EECC public health protection provisions is a black-hole (a *lacuna* in legal terminology) that the UK government created by enacting the *'minimal requirements'* and the *'alternatives to regulation'* primary principles 1) and 2), above (paragraph 2.4.4). Yet, the flawed transposition of EECC public health protection provisions remains open to a Schedule 8 paragraph 39(5) EU Withdrawal Act 2018 rectification challenge.

2.6.5 The transposition guidance reports that,

'there are limits in EU law to the situations and alternative methods that can be used instead of regulation' (paragraph 2.8).

2.6.6 These limits are demonstrated in the case *R* (on the application of Delena Wells) *v Secretary of State for Transport, Local Government and the Regions (2004)*[13], which sets a European Court of Justice (CJEU) (see paragraph 3.1.3, and Section 4.2 *"Of a kind' comparability'*, below), precedent in circumstances anticipated in explanatory note 97 of EUWA 2018,

'when a Member State has not properly implemented a directive, that directive can confirm rights on individuals that national courts must protect' (see paragraph 3.3.5 below).

2.6.7 Cases such as *Wells* have interpretive effect through the Schedule 8 paragraph 39(5) of the EUWA 2018 (revised) provision within the three year deadline period that ends on the 31st December 2023, being a safeguard against a denial of rights requiring transposition into domestic law accruing from EU directives

[13] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62002CJ0201

(such as the EECC), where the interpretive effect of CJEU past rulings can be applied and enforced. In the *Wells* case, the CJEU interpretive effect was applied and enforced by the UK Administrative Court in a planning law case *'of a kind'* comparable with impinged upon rights excluded by the UK government's failure to properly bring into effect EECC public health protection provisions that are dependent upon by LPAs/LAs acting as EECC competent authorities.

2.6.8 A denied right can be brought into UK domestic law to apply directly, under Schedule 8 paragraph 39(5) of the EUWA 2018 (revised), with court intervention being a last resort.

2.6.9 This Schedule 8 paragraph 39(5) challenge arises from the intent of the UK government to apply,

'alternatives to regulation … to keep pace changing technologies',
in the absence of the UK bringing properly into effect the EECC public heath provision for regulating involuntary public exposure to RFR through LPAs/LAs as EECC competent authorities.

2.6.10 Direct rights under public health protection provision will avert the threat posed by the *'ensuring regulation is a last resort not the first choice'* policy (paragraph 2.6.1, above).

2.6.11 LPAs/LAs as EECC competent authorities should have been equipped to apply standards and guidelines specified in the European Council Recommendations 1999/519/EC as an essential provision for regulating access to, and the use of the radio spectrum *'in situ'* through UK domestic planning policy, planning procedures and planning law.

2.6.12 The EECC as a legal framework for *'keeping pace'* with new telecommunication technologies and its imperative public health protection consequences and requirements, are at risk on the assumption that alternative standards and guidelines might be applied in future to avoid regulatory obligations that the UK has failed to acknowledge and enact over the past five years.

2.6.13 The EECC sets a procedural standard for public protection against RFR exposure.

2.6.14 Guidance, whether UK government guidance, or the ICNIRP guidance issued with the provisos that accompany it, are superseded by the EECC **procedural standard** created by Recommendations 1999/519/EC within the framework described in EECC Recital 5,

'this Directive creates a legal framework to ensure freedom to provide electronic communications networks and services, subject only to the conditions laid down in this Directive and to any restrictions in accordance with …(relevant constitutional limitations impacted upon as a consequence of the UK leaving the EU) *…, in particular measures regarding public policy, … and public health …* (paragraph 1.1.3 above)'.

2.6.15 Therefore, the assigned functions of LPAs/LAs under EECC Recitals 22, 106, 110 and Article 45.2(h) activate considerations that are material to the exercise of their autonomous jurisdiction as EECC competent authorities. Evidence of adverse health and environmental effects falls to LPAs/LPAs to establish, in accordance with the procedural standard as required under the terms of the EECC re: radio spectrum management and use.

2.7 Telecommunication specific differences between guidance and standards

2.7.1 As highlighted in paragraph 1.6.1 to 1.6.4 above, the WHO affirm that,

'the use of the words guidelines and standards has substantially different implications for public health and EMF radiation protection enforcement:

1) guidelines are voluntary instruments of instructions and recommendations that are not legally mandated and therefore have no legal standing,

whilst,

2) standards are the mandatory, compulsory and legally binding instruments, i.e., laws, acts, regulations, ordinances and decrees.

2.7.2 The problem of government sub-delegation without policies enacted to facilitate/reinforce that sub-delegation, is that citizen rights are destined not to be,

'sufficiently precise and clear so that people can determine the full extent of their rights' (paragraph 2.5.10 above),

as demonstrated by Matt Warman's ambiguity as to,

'where they (LPAs) *are considered competent authorities'* (paragraph 2.2.1, above),

and the cause of this failure is hinted at in the transposition under the case 3 warning that the '*legal position*' … has to be … '*sufficiently precise and clear so that people can determine the full extent of their rights*' has to survive the transposition (paragraph 2.5.10 above).

SECTION 3. Pre/post Brexit law impacting upon citizen rights

3.1 The anticipated effects of UK Withdrawal from the European Union

3.1.1 Evidence presented to the House of Lords Select Committee on the Constitution, Session 2017–19 **European Union (Withdrawal) Bill** by the Department for Exiting the European Union (DfEEU)[14]) reported that,

'crucially, none of the powers in the Bill are available where Government simply wishes to make a policy change because it did not like the underlying law. The power in Clause 7 in particular is intrinsically limited. To be exercised there must be a deficiency in retained EU law and this deficiency must be caused by withdrawal. There are a number of things which might be done as an appropriate correction to resolve any given deficiency but this remains a fundamental limit on the use of the power and ensures that the Government may only use it for the purpose envisaged by Parliament. This restriction ensures that it will be for Parliament, and where appropriate the devolved parliaments, to legislate for policy changes after the UK's withdrawal from the EU in the normal process' (section on 'Constraints and limitations on the powers')' (paragraph 3-written evidence EUW0036)

and that Clause 4 of the Bill,

'deliberately acts as a broad 'sweeper' provision. It ensures that, as a starting point, all existing rights which are available in domestic law immediately before exit day as a result of section 2(1) of the ECA will continue to be available in our domestic law after we exit the EU (section on *'clause 4'*, paragraph 1) … (and) … *this will include directly effective rights and obligations within the EU treaties themselves … as with any other element of retained EU law, these rights may require amendment in order to function clearly and effectively in domestic law after our exit. The Government will consider how these rights can be given effect to in the context of our exit from the EU on a* ***case-by-case basis*** *ahead of exit day'* (section on *'clause 4'*, paragraph 2).

3.1.2 Further,

'this clause also ensures that, where prior to exit day a court has recognised that a particular provision of an EU directive has direct effect, that effect will continue in domestic law after exit. This is distinct from the preservation of existing domestic legislation under clause 2 of the Bill. Clause 4 will continue to make available recognised directly effective rights in directives irrespective of clause 2. Any overlap should not result in any practical difficulties, as it would only arise in circumstances where domestic legislation fully implements the directly effective right. ***This is no different to the present situation, where domestic legislation may follow from a judgment which establishes that a provision of a directive has direct effect'*** (section on *'clause 4'*, paragraph 4).

3.1.3 A comparable judgment of direct effect was made by the UK Administrative Court on the case *R* (on the application of Delena Wells) *v Secretary of State for Transport, Local Government and the Regions (2004)*[13], after referral to the CJEU on a question amongst others, as to whether,

[14] https://committees.parliament.uk/writtenevidence/81773/pdf/

'it is open to individual citizens to challenge the State's failure to require Environmental Impact Assessment (EIA)?'

3.1.4 The CJEU ruled conclusively (paragraph 65) that,

'it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment'.

3.1.5 The transposition of the 2014 directive,

'Measures to reduce the cost of deploying high speed electronic electronic communications networks',

and the,

'European Electronic Communications Code (EECC)',

being paragraph 2.7-type directives, (as argued in paragraphs 2.5.4 to 2.5.14 above), raise vital questions as to:

1. whether post-IP completion day challenges to the validity of the transposition of an instrument/or a provision of an instrument of the directives remain viable,

and,

2. whether remedies remain available based upon *'general principles'* of European law to bring into effect direct rights concerning EECC public health protection provisions.

3.2 Schedule 8 paragraph 39(5) EUWA challenges

3.2.1 Paragraph 39(1) of Schedule 8 to the EUWA 2018 (amended) states that subject to some qualifications, section 5(4) and paragraphs 1 to 4 of Schedule 1 to the EUWA 2018,

'apply in relation to anything occurring before IP completion day (as well as anything occurring on or after IP completion day)',

contrary to Schedule 1 paragraph 1(1) of the EUWA 2018 stating that,

'there is no right in domestic law on or after IP completion day to challenge any retained EU law on the basis that, immediately before IP completion day, an EU instrument was invalid'.

3.2.2 However, Schedule 8 paragraph 39(5) of the Act (as revised) dis-applies Schedule 1 paragraph 3 of the EUWA 2018, as it,

'does not apply in relation to any proceedings begun within the period of three years beginning with IP completion day (ie: 31st December 2023) *so far as—*

(b) the challenge is not for the dis-application or quashing of—

(i) an Act of Parliament or a rule of law which is not an enactment,

or,

(ii) any enactment, or anything else, not falling within sub-paragraph (i) which, as a result of anything falling within that sub-paragraph, could not have been different or which gives effect to, or enforces, anything falling within that sub-paragraph'.

3.2.3 Paragraph 3 of Schedule 1 of the EUWA 2018 (amended) would otherwise exclude the time limited Schedule 8 paragraph 39(5) challenge concerning accrued EU law rights, as under Schedule 1 paragraph 3(1) and (2):

'(1) There is no right of action in domestic law on or after IP completion day based on a failure to comply with any of the general principles of EU law.

(2) No court or tribunal or other public authority may, on or after IP completion day —

(a) dis-apply or quash any enactment or other rule of law, or

(b) quash any conduct or otherwise decide that it is unlawful,

because it is incompatible with any of the general principles of EU law'.

3.2.4 A Schedule 8 paragraph 39(5) challenge within 3 years of IP completion day is therefore an opportunity to challenge,

'any enactment' … 'other rule of law' … or *'any conduct'* concerning the flawed enactment of a directive that may be, '*incompatible with any principle of EU law'.*

3.2.5 This provision proved to be different from the situation reported by the DfEEU on clause 4 of the EUWA 2018 in paragraph 4 of their evidence to the House of Lords Select Committee on the Constitution (paragraph 3.1.1 and 3.1.2, as above), as a Schedule 8 paragraph 39(5) imposes a time limit on proceedings that could lead to a judgment establishing that the provisions of a directive have direct effect.

3.2.6 *'Of a kind'* comparable cases pre-IP completion date were not made subject to a time limitation on proceedings whilst a challenged directive remained in force.

3.2.7 Additionally, challengeable *'conduct'* under the original Schedule 8 paragraph 39(5) of the EUWA 2018, related to,

'something that occurred before exit day and may be made against either administrative action or domestic legislation other than Acts of Parliament or the common law',

where the prior conduct of a public authority can be quashed by that public authority, or another public authority being most probably, a relevant Department of State or Minister. As note 211 of the Explanatory Notes (EUWA 2018) reports,

'courts, tribunals and other public authorities will be able to dis-apply legislation or quash conduct in event of a successful challenge'.

3.2.8 The European Union (Withdrawal Agreement) Act (EUWAA) 2020 amended the deadline for a Schedule 8 paragraph 39(5) challenge, thus:

'paragraph 3 of Schedule 1 does not apply in relation to any proceedings begun within the period of three years beginning with completion day',

as confirmed in explanatory note 581, *'Part 2: Specific Consequential Provision'*[15]

3.2.9 The transposition of the EECC on the 21st December 2020 was ten days in advance of exit day, making the transposition a new activity that took place before 'exit day'. Any, and all facts/breaches concerning the transposition of the EECC were therefore a consequence of the activity that brought about that transposition.

3.3 Ambiguity concerning how to define *'of a kind'* decisions

3.3.1 Consistent with the transitional arrangements brought into effect as the UK left the European Union (paragraph 1.1.4, above), the transposition of the EECC into UK law on 21st December 2020 being a new activity that took place before '*exit day*', remains challengeable in respect to '*facts/breaches before exit day*', as described in Jack Williams' *'Accrued EU law rights: a guide for the perplexed'* (January 2022)[16].

[15] https://www.legislation.gov.uk/ukpga/2020/1/notes/division/74/index.htm

[16] https://eurelationslaw.com/blog/accrued-eu-law-rights-a-guide-for-the-perplexed

3.3.2 Williams reports on *'governing law'* being the European Communications Act (ECA) 1972, the Interpretation Act 1978, and the European Union (Withdrawal) Act (EUWA) 2018, explaining that,

'by virtue of section 16 of the Interpretation Act 1978, rights which have accrued under a repealed statute remain enforceable thereafter unless the contrary intention appears in the repealing Act (paragraph 2, sentence 1)',

however,

'whilst the EUWA 2018 repealed the ECA 1972 from exit day onwards, there is no general provision in the EUWA 2018 which provides that all accrued EU rights which applied to activity prior to exit day do not remain enforceable after exit day (paragraph 2, sentence 1)',

and,

'there is also no suggestion that the repeal of the ECA 1972 in section 1 is intended to apply retrospectively (paragraph 2, sentence 3)',

and additionally,

'this general position is affirmed by the provision of express, narrow exceptions that we are about to explore which do evince the "contrary intention" for the purposes of the Interpretation Act 1978 (paragraph 2, sentence 4)*'.*

3.3.3 Williams concludes that,

'therefore, the provisions of the ECA 1972 in force at the time of the relevant facts/breaches in question prior to exit day remain applicable to the situation and enforceable after the transition period – subject, of course, to any applicable limitation period (generally six years for breach of statutory duty) (paragraph 2, sentence 6)',

thereby Schedule 8 paragraph 39(5) of the EU(W)A 2018 (as revised) dis-applies Schedule 1 paragraph 3 of the EUWA 2018, (as stated in paragraph 3.2.2, above) with an *'applicable limitation period'*, as Schedule 1 paragraph 3 of the EUWA 2018,

'does not apply in relation to any proceedings begun within the period of three years beginning with IP completion day (ie: 31st December 2023)',

under the exclusions drawn under Schedule 8 paragraph 39(5) b)(i), and (ii) of the EUWA 2018.

3.3.4 In his *'Directives under the Withdrawal Act: what does "of a kind" mean? '* [17] (June 2020),

Williams reveals ambiguity concerning the meaning of section 4(2)(b) EUWA 2018 *"of a kind"* rights conferred by EU directives (paragraphs 2 and 4 abbreviated) – such rights:

1) *may be 'of a kind recognised in a case decided before 31 December 2020' prior to the end of the transition i.e. is it sufficiently clear and precise and intended to confer rights of individuals etc. (being a 'conceptual definition' that might take properly into account the functions served by public authorities that contribute essentially to the regulation required through the domestic implementation of the directive)*,

or,

2) *is 'of a kind' of directive provision which has, as a matter of fact, actually been recognised by the courts prior to the end of the transition period as having direct effect (being an 'empirical definition').*

3.3.5 He continues,

[17] https://eurelationslaw.com/blog/directives-under-the-withdrawal-act-what-does-of-a-kind-mean

'sub-section (1) does not apply to any rights, powers, liabilities, obligations, restrictions, remedies or procedures so far as they … (b) arise under an EU directive… (paragraph 3)',

but,

'importantly, however, section 4(2)(b) of the 2018 Act does not end with the quotation above. It continues:

…and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before [the end of the transition period] (whether or not as an essential part of the decision in the case) (paragraph 6).

The starting position … is thus significantly modified …

The net effect is that Directive provisions which are "of a kind" recognised by the CJEU or a domestic court before the end of the transition period will still flow down the section 4(1) conduit pipe into domestic law (as "retained EU law") after the transition period (paragraph 7)'.

3.3.6 Williams goes deeper:

'the question becomes: what does 'of a kind' mean? (paragraph 8)

In order to answer this, it is worth quoting extensively paragraphs 97 and 98 of the Explanatory Notes to the 2018 Act (emphasis added):

'97. … the section excludes directly effective rights arising under an EU directive (including as extended to the EEA by the EEA agreement). The CJEU has however held that in certain circumstances, when a member state has not properly implemented a directive, that directive can confer rights on individuals that the national courts must protect. Where rights arising under directly effective provisions of directives have been recognised by a UK or EU court or tribunal before exit day, rights of that kind will be retained in domestic law.

98. The reference in subsection (2)(b) to rights 'of a kind' is intended to ensure that rights are retained if they are of a similar kind to those so recognised. So rights arising under a particular directive that have been recognised by a court before exit day as having direct effect, could be relied upon by other individuals who are not parties to that case, in circumstances which the directive is intended to address. Rights arising from any directly effective provisions of directives that have not been recognised prior to exit day (to the extent these might exist) will not be converted by this section (subject to the transitional etc provision in Schedule 8, Paragraph 38) (paragraph 9)'.

3.3.7 Williams concludes that,

'It appears that the drafter of the Explanatory Notes at least has this second, ***empirical interpretation*** *in mind – the last sentence of paragraph 98 could not be clearer. If that is right, however, it would result in some odd consequences…* (being)...

First, *where a provision of a Directive so obviously meets the requirements of the direct effect test, it is unlikely to have been litigated. That means that there will not be a finding for that Directive provision by a court prior to the end of transition period.*

There is no sustainable rationale, in my view, for that provision not being retained, such that it can be relied upon directly if not properly implemented in domestic law. The lack of a case is one of (mis)fortune, rather than reason.

Second, *Directives which the UK has transposed inadequately will be incapable of giving rise to directly effective rights unless there is a precise case on point. That would be so even though, had the UK properly fulfilled its EU obligations at the time it was Member State, the right would have been implemented and would continue to form part of domestic law pursuant to section 2 of the 2018 Act.*

The UK would essentially be benefiting from its own unlawful act.

Third, *the second interpretation also effectively 'reads out' the phrase "of a kind"; the effect of section 4(2)(b) would, I think, be the same as the second interpretation contends for with or without the phrase remaining.*

But it must mean something.

I cannot do better than the words of the first sentence of paragraph

98: "The reference in subsection (2)(b) to rights 'of a kind' is intended to ensure that rights are retained if they are of a similar kind to those so recognised" (emphasis added).

That would avoid the previous two consequences.

It will be interesting to see how the courts will interpret this provision in due course if faced with a directive provision which

(i) meets the directly effective test;

(ii) has not been subject to a court ruling;

and,

(iii) the UK has transposed inadequately or inaccurately prior to the end of the transition period'.

3.3.8 The dilemma that this Schedule 8 paragraph 39(5) submission is intended to remedy, is framed by the likelihood that LPA/LAs functions concerning civil works/planned civil works under EECC Recitals 105 and 106 were assumed by the UK government as *'already in place'* (paragraph 2.3.3 above), leading to Matt Warman's 22nd June 2021 statement that,

'the EECC would have no effect on the status of LPAs where they are considered competent authorities under EU Directive 2014/61/EC (paragraphs 2.2.1 and 2.7.1, above)'.

3.3.9 Consequently, citizen rights under the EECC health protection provisions flow directly from their assigned status being,

'of a kind recognised in case decided before 31st December 2020',

comparable to the direct rights established in the *Wells* case (at paragraph 4.1.7, below), which are sufficiently clear and precise when examined by,

'courts, tribunals and other public authorities (paragraph 4.1.3 below)*',*

applying the *'conceptual definition'* of the meaning *'of a kind'* rights, taking into account the consolidated functions of LPAs/LAs as EECC competent authorities which create the direct rights (paragraph 4.2.12, below) that this challenge is intended to protect.

SECTION 4. Unresolved ambiguity regarding '*of a kind*' legal decisions on the preserved status of rights concerning the public health protection provisions of telecommunications directives

4.1 This Schedule 8 paragraph 39(5) EUWA 2018 challenge

4.1.1 This Schedule 8 paragraph 39(5) EUWA 2018 challenge makes proceedings within the 31st December 2023 deadline a remedy of last resort. Court proceedings can be averted by appropriate action by a public authority in accordance with the EUWA 2018 (as revised), applying powers described therein.

4.1.2 This challenge is made against,

'administrative action … other than Acts of Parliament or the Common law'.

4.1.3 The explanatory note 211 published with the EUWA 2018 stated,

'any challenge must relate to something that occurred before ***exit day*** *and may be made against either administrative action or domestic legislation* (sentence two) … (and) *… courts, tribunals and other* ***public authorities*** *will be able to dis-apply legislation or quash conduct in the event of a successful challenge* (sentence three)*'.*

4.1.4 This challenge is made on the assumption that the direct rights relating to the EECC public health protection provision that should have been brought into effect on the transposition of the EECC will be

installed through administrative action, government policy measures and possibly through secondary legislation thereby averting legal proceedings.

4.1.5 The challenge is made in accordance with the pre-action protocol for judicial review.

4.1.6 The 'exit day' deadline set in the explanatory note should be read as 'IP completion day' (paragraph 3.26 and 3.2.7 above) to match the European Union (Withdrawal Agreement)Act 2020 revision of the EUWA 2018, that extended the qualifying Schedule 8 paragraph 39(5) challenges to,

'something that occurred before IP completion day',

to include therefore, the transposition of the EECC as an activity made the subject of this qualifying challenge.

4.1.7 The quashing of conduct (ie: the conduct that resulted in the failure of the UK government to enact EECC public health protection provision through the appropriate sub-delegation to LPAs/LAs), requires the public authority/authorities responsible for addressing and remedying this Schedule 8 paragraph 39(5) challenge, to adopt the multiple remedies listed in Section 5, below, after accepting the direct comparability between the principles of European law applied by the UK Administrative Court in *R* (on the application of Delena Wells) *v Secretary of State for Transport, Local Government and the Regions* (2004)[13], as a case *'of a kind'* that can be resolved by applying the same principles to the deficient installation of EECC direct rights that citizens are entitled to (paragraph 4.2.12) as claimed in this submission.

4.1.8 This would be achieved by the relevant public authority/authorities acknowledging that the EECC public health protection provision is a directive provision,

'recognised in a case decided before 31 December 2020, prior to the end of the transition',

and is,

'sufficiently clear and precise (being a 'conceptual definition' that might take properly into account the functions served by public authorities that contribute essentially to the regulation required through the domestic implementation of the directive) (paragraph 3.3.9, above)'.

4.1.9 Comparability will be established through the *'conceptual definition'* route of giving the term *'of a kind'* meaning, not the *'empirical definition'* route (paragraphs 3.3.3 to 3.3.6, above). *'Of a kind'* comparability is further established with regard to the environmental impact assessment functions that LPAs as EECC competent authorities for the purposes of fulfilling functions described in the case made in this submission (paragraphs 2.2.8 and 2.2.9), which parallel the environmental impact assessment competent authority functions requiring enactment by Mineral Planning Authorities (MPAs) in the *Wells* case (paragraph 4.2.16, below).

4.1.10 The *Wells* case precedent with regard to,

'functions served by public authorities that contribute essentially to the regulation required through the domestic implementation of the directive',

is comparable with the *'of a kind'* functions that LPAs/LAs perform as EECC competent authorities for the purposes enacting EECC public health protection provisions through their exclusive UK domestic planning law powers that are applied concerning planned civil works/contracting activity for civil works (ie small cell deployment, paragraphs 1.5.3 and 1.8.2, above).

4.1.11 The primary arguments for the *Wells* case being *'of a kind'* that brings into effect the *'conceptual definition'* of the meaning and significance of the use of the term *'of a kind'* in section 4(2)(b) of the EUWA 2018 (paragraph 3.3.4, above), are as follows:

1) '*Of a kind*' comparability,

2) The 1930 Farnworth case created a common law precedent for the control and management of harm, injury and nuisance arising from infrastructure projects,

and,

3) LPAs/LAs are required to undertake specialist and distinct EECC environmental impact assessments under the public health provisions of the directive, as their direct effect is imperative to the implementation of the EECC as a binding legal framework for spectrum management and use.

4.2 *'Of a kind'* comparability

4.2.1 The UK government transposition guidance assumes that alternatives to regulation may exist when,

'a Directive specifies the objectives to be achieved, while leaving 'the form and methods' to the discretion to each Member State' (paragraphs 2.6 of the Government guidance on transposition, at page 12),

yet the guidance admits that,

'*in practice Directives leave no discretion as to whether to implement by way of legislation or by way of other binding provision*' *(paragraph 2.7 of the Government guidance on transposition at page 12)*.

4.2.2 The EECC is a paragraph 2.7-type Directive (as stated in paragraphs 2.5.4 to paragraph 2.5.14, above) placing obligations on participating nation states to set objectives and criteria that are operational (ie. needing enactment by competent authorities and compliance by telecommunication companies) within the EECC as a legal framework.

4.2.3 The CJEU in the *Wells* case ruled (paragraph 64) that,

'it is clear from settled case-law that under the principle of cooperation in good faith laid down in Article 10 EC the Member States are required to nullify the unlawful consequences of a breach of Community law (referring to relevant case law). *Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned* (referring to relevant case law)'.

4.2.4 The *'principle of cooperation in good faith'* (*Wells* case, paragraph 34 refers),

alongside:

'the principle that Community law should be applied uniformly'(*Wells* case, paragraph 37 refers),

'the principle of equality'(*Wells* case, paragraph 37 refers),

'the principle of legal certainty'(*Wells* case, paragraphs 54, 56 and 59 refers),

'the principle of procedural autonomy'(*Wells* case, paragraphs 65 and 67 refers),

'the principle of equivalence'(*Wells* case, paragraph 67 refers),

and,

'the principle of effectiveness'(*Wells* case, paragraph 67 refers),

all applied on 21st December 2020, and the EECC transposition was bound by the '*principle of cooperation in good faith'* which was maintained beyond 'IP completion date' through Schedule 8, paragraph 39(5) provision of the EUWA 2018 (as revised). Making this principle, as expounded by the CJEU in the *Wells* case, applicable as obligatory in respect to the spheres of competency retained by,

'courts, tribunals and other public authorities asked to dis-apply legislation or quash conduct in the event of a successful challenge',

on the grounds and evidence issued in this legitimate challenge made within the 31st December 2023 deadline.

4.2.5 The Schedule 8, paragraph 39(5) provision provides a safeguard supporting the uniform implementation of EU legal mechanisms including the EECC, ensuring that participating nation states are not disadvantaged relative to the UK and each other, and that burdens are minimised uniformly during the period 31st December 2020 to 31st December 2023 and beyond, as EECC spectrum management provisions take effect.

4.2.6 The provision allows the *'principle of co-operation in good faith'* to be applied retrospectively to protect citizen rights that may otherwise be jeopardised.

4.2.7 In the case of *von Colson*[18] (1984), the CJEU held that since a directive was,

"binding' as to the result to be achieved (Ruling 15)',

it bound all the authorities of a Member State including the courts, which therefore had a duty to give effect to it (Ruling 26). And, they (all the authorities including the courts) must interpret national law accordingly, and if it conflicts with Community law the interpretation must be that national law is set aside (Ruling 28). Directives that are directly effective are enforceable as such only against national authorities, the principle being that the state may not take advantage of its own failure to implement Community law.

4.2.8 All seven principles (listed in paragraph 4.2.4, above) were applicable when the UK transposed the EECC, and it is reasonable to assume that the principles applied make the *Wells* case a comparable *'of a kind'* case to the case argued in this submission. Being an '*of a kind*' case concerning the substance and the status of the case argued in this submission, all seven principles should be applied to address and resolve this dispute concerning direct effect citizen rights under the public health protection provisions of the EECC, in accordance with the *'principle of co-operation in good faith*'.

4.2.9 Schedule 8, paragraph 39(5) of the EUWA 2018 (as stated in paragraph 3.2.4 above) grants an exceptional opportunity to challenge,

'any enactment' … 'other rule of law' … or *'any conduct'* concerning the flawed enactment of a directive that may be, '*incompatible with* ***any principle of EU law***',

as paragraph 3 of Schedule 1 of the EUWA 2018 (amended) is dis-applied.

4.2.10 The *Wells* case (paragraph 67) confirms that,

'the ***detailed procedural rules applicable*** *are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness)* (… referring to relevant case law).

4.2.11 The *'detailed procedural rules applicable'* in Wells, are equivalent to the *'procedural standard'* defined as critical to EECC public health protection provision within the UK domestic legal order. Both forms of environmental impact assessments require enactment by LPAs/LAs as EECC competent authorities in this case, and by Mineral Planning Authorities (MPAs/LAs) as competent authorities under directive 85/337 in the *Wells* case, and arguably the *'principle of equivalence'* binds the comparability of the *Wells* case and the case asserted in this submission.

[18] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61983CJ0014

4.2.12 The *'principle of effectiveness'*,

applies equally in both cases. In the case of the EECC, citizen rights are *'not rendered impossible in practice or excessively difficult to exercise'*, as they concern,

1. citizen rights to public health protection applied through the EECC *'procedural standard'* in a telecommunication services specific environmental impact assessment (as affirmed in EECC Recital 46 as being specific to such services), that must be conducted prior to a general authorisation/planning permission being granted for the siting of a new mast/antennas by a LPA, or through the facilitation of small cell deployments by a LA,

and,

2. the right of citizens in the circumstances described in 1. above, and as described in the DLA Piper statement issued on behalf of PHE (paragraph 1.7.4 and 1.7.7, above), by having their written objections raising legitimate interests in such circumstances, and the evidence they submit on the adverse health effects/environmental effects of proposed developments being properly taken into account before requests for LPA/LA authorisations/permission for applications/contractual arrangements, are determined.

4.2.13 The CJEU in the *Wells* case ruled specifically that,

'under Article 2(1) of Directive 85/337 projects likely to have significant effects on the environment … , as referred to in Article 4 of the directive read in conjunction with Annexes I and II thereto, must be made subject to an ***assessment with regard to such effects before consent is given'*** (paragraph 42).

4.2.14 And that,

'the Court has consistently held that, in light of both the principle that Community law should be applied uniformly and the principle of equality, the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope is normally to be given throughout the Community an autonomous and uniform interpretation which must take into account the context of the provision and the purpose of the legislation in question (… referring to relevant case law …)(paragraph 37)'.

4.2.15 The context of the EECC public health protection provision and the purposes of the legislation in question, are detailed in this submission sufficiently for the DLUHC/DoH to take properly into account the functions served by LPAs/LAs that contribute essentially to the regulation required through the domestic implementation of the EECC. The *'principle of cooperation in good faith'*, and particularly but not exclusively, the *'principle of equivalence'* and the *'principle of effectiveness'* can be applied necessarily, and directly, in response to this Schedule 8 paragraph 39(5) challenge being a form of alternative dispute resolution (ADR) procedure.

4.2.16 In the *Wells* case, the UK as an EU Member State was obliged to,

'nullify the unlawful consequences of a breach of Community law' (paragraph 4.2.3),

accepting as stated in paragraph 65 of the judgment that,

'it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment (… referring to relevant case law ...). *Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337'.*

4.2.17 The UK Government argued in the *Wells* case that *'the principle of legal certainty'* (paragraphs 54, 56, 59 and 60 of the judgment refer) warranted its rejection of the action requested by Delena Wells concerning the disputed requirement for environmental impact assessment to be undertaken, which she sought by bringing her case to UK

Administrative Court. Her stance was supported by the CJEU demonstrating that this principle, contrary to the UK Government's claim, was satisfied by the action the CJEU ruled was required as,

'the final stage of the planning consent procedure was not completed when the claimant in the main proceedings submitted her request to the Secretary of State. It cannot therefore be contended that revocation of the consent would have been contrary to the principle of legal certainty' (paragraph 60).

4.2.18 The *'principle of legal certainty'* has not been applied adequately by the UK government in the context of the EECC public health protection to ensure that as advised in its transposition guidance (paragraph 2.5.10, above),

'the legal position needs to be sufficiently precise and clear so that people can determine the full extent of their rights',

as demonstrated in paragraphs 2.5.12 and 2.7.1 above.

4.3 The 1930 *Farnworth* case created a common law precedent for the control and management of harm, injury and nuisance arising from infrastructure projects

4.3.1 The *Manchester Corporation v Farnworth* (1930) (AC 171), concerned how nuisance arising from the construction and operation of an electrical power plant required a defined form of environmental impact assessment applied in accordance with a *'criterion of inevitability'*, instituted as a common law foundation for distinguishing between 'inevitable nuisances' and 'avoidable nuisances' threatened, or created in that case by an electrical power generation plant as an urban development project.

4.3.2 Lord Dunedin ruled that,

*'when Parliament has authorised a certain thing to be made or done in a **certain place**, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or the doing so authorised. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of the **situation** and of expense'*.

4.3.3 *'A certain thing … made or done'* being: the construction and operation of an electrical power plant in the *Farnworth* case; the resumption of quarrying in the *Wells* case; and the siting of masts/antennas and small cell deployments by LPAs/LAs in the case argued in this submission – all require *'in situ'* appraisal of proposed developments using fit-for-purpose environmental impact assessments, prior to a local authority authorising such developments.

4.3.4 Hence, the environmental impact assessment (being a procedural rule) being required in the *Wells* case, and the EECC Recital 106 reconciliation of environmental and public health considerations applying Recommendation 1999/519 EC (as a procedural standard) requiring application *'in situ'* in the circumstances argued in this submission to protect against injury, harm and nuisance through involuntary public exposure to RFR, are equivalent provisions, and arguably the *'principle of equivalence'* binds the provisions as *'of a kind'* in respect to Section 4(2)(b) of the EUWA 2018 (paragraph 3.3.5, below).

4.3.5 Indemnity for inevitable injury (which the responsible public body making the decision would want to attain) would be reliant upon their compliance with the relevant procedural rule/standard through their *'in situ'* decision making. The procedural rule/standard would have to be authorised by Parliament being *'a certain thing to be made and done in a certain place'*, for which in the *Farnworth* case required a Bill of Parliament allowing the authority to construct the electrical power plant.

4.3.6 In the *Wells* case and in the case presented in this submission, Parliamentary authorisation was/is required in accordance with EU law being brought into direct effect through UK planning law.

4.3.7 In both cases the relevant procedural rule/procedural standard designed into EU law to protect against injury, harm and nuisance across the EU, had to be brought into effect in the UK through domestic planning law reliably, completely, and lawfully making any nuisance resulting from an authorised and inevitable *'making or doing of a certain thing in a certain place'* releasing that public authority from liability for having caused any nuisance of an avoidable kind.

4.3.8 Compliance with the relevant procedural rule/procedural standard is all that the authorities can do to prevent non-inevitable injury regarding,

'what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of the ***situation*** *and of expense',*

and as demonstrated by Lord Dunedin in *Farnworth* (1930), and Lord Hoffman in *Tesco Stores Limited* (1995) (paragraph 2.3.6, above). English common law remedies to avert avoidable nuisance, and development control brought into being through the statutory,

'introduction of modern planning control by the Town and Country Planning Act 1947',

(with measures brought into place through the Environmental Protection Act 1990), remain first resort mechanisms for protecting the public from an incompatible and unacceptable use of land and buildings, eliminated as far as possible by the application of precautionary procedures applied by the authorities acting autonomously in the public interest.

4.4 LPAs/LAs are required to undertake specialist and distinct EECC environmental impact assessments under the public health provisions of the directive, as their direct effect is imperative to the implementation of the EECC as a binding legal framework for spectrum management and use

4.4.1 LPAs having to,

'reconcile the environmental and public health considerations (of radio mast/antennas siting planning proposals) … *taking due account of the precautionary approach set out in Council Recommendations 1999/519/EC* (EECC Recital 106)',

where those considerations are, or may be related to material planning considerations under domestic planning law, justify *'of a kind'* comparability, through specialist and distinct environmental impact assessments prepared before general authorisations are granted or refused (paragraphs 1.3.1 and 1.3.2, above) containing,

'only conditions which are specific to the electronic communications sector …' (EECC Recital 46),

whilst the principles of Community law applied by the CJEU in the *Wells* case need to be applied similarly to resolve this Schedule 8, paragraph 39(5) submission by confirming that the EECC related public health protection provisions have direct effect through the required EECC competent authority status of LPAs/LAs.

4.4.2 LPAs as competent authorities are required to complete Recital 106 reconciliation of *'environmental and public health considerations'* in accordance with the procedural standard set out in Council Recommendations 1999/519/EC, primarily in relation to mast sharing, as part of EECC public health provisions which parallels the *Wells* requirement that it is,

'necessary (for LPAs as competent authorities) *to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment'* (paragraphs 1.5.6 to 1.5.9, above).

SECTION 5 Remedies required within the scope of the DLUHC and the DoH under Schedule 8 paragraph 39(5) EUWA 2018 powers

5.1 Remedies required within the scope of DLUHC and DoH powers

5.1.1 Remedies sought through the Schedule 8, paragraph 39(5) challenge are set within the interconnected subject areas:

5.2 the importance of government policy reflecting international agreements

5.3 the assignment of competent authority status to LPAs/LAs being made effective regarding public health protection

5.4 the requirement to end ambiguity regarding the status of LPAs/LAs as EECC competent authorities

5.5 the importance of government policy being subsidiary to relevant domestic law

and,

5.6 government sub-delegation of powers and authority to LPAs/LAs must be managed carefully, overtly, and through sustained monitoring

with explanatory paragraphs justifying further the listed remedies which either the DLUHC or the DoH are required to enact directly, or both Departments are required to enact jointly.

5.2 The importance of government policy reflecting international agreements

5.2.1 The DLUHC/DoH are required to ensure that government policy reinforces enacted international agreements, in this case the EECC, through EECC Recitals 105, 106, 110 and Article 45.2(h), applied by LPAs/LAs as EECC competent authorities regulating the environmental and public health consequences of mast siting and small cell deployment ie: the public health provision that the UK is required to enact as an EECC participating nation state (paragraphs 1.3.2 and 1.5.3, above).

5.2.2 NPPF and DoH policy guidelines (issued by UKHSA or PHE on behalf of the SoSfH), must clarify and specify how LPAs/LAs enact their EECC competent authority obligations in accordance with UK national government objectives and criteria in accordance with EECC Recitals 21 and 121, being the context for how EECC originating citizen rights (as specified in paragraph 4.2.12, above), are met through the competent authority decision making of LPAs/LAs in accordance with planning law, and the relevant and contingent Articles of the Human Rights Act 1998.

5.2.3 This requires:

Remedy 1: NPPF paragraph 2, sentence 3 (paragraph 1.1.2, above) to be applied specifically to the telecommunication services policies incorporated within a revised NPPF to ensure that the status of LPAs/LAs as EECC competent authorities is properly acknowledged, and that the obligations of LPAs/LAs as EECC competent authorities when making decisions on mast siting and small cell deployment includes respecting that citizen rights

(paragraph 4.2.12, above) are contingent upon the functions that LPAs/LAs perform as regulators of involuntary public exposure to RFR and related environmental exposures (paragraphs 4.4.1 and 4.4.2, above).

Remedy 2: the DLUHC to complete the process of transposing the public health/environmental provisions of the EECC, and doing so in accordance with case 4-type sub-delegation of the EECC as a paragraph 2.7-type directive in accordance with the UK government transposition guidance 2018 (paragraphs 2.5.13 and 2.5.14, above).

5.2.4 The transposition of the EECC public health provisions in accordance with case 4-type sub-delegation of a paragraph 2.7-type directive in accordance with the UK government transposition guidance 2018, requires the DoH to ensure that LPAs/LAs as EECC competent authorities are equipped to apply the European Council Recommendations 1999/519/EC as a procedural standard to fulfil their sub-delegated public health competent obligations under EECC Recitals 105, 106, 110 and Article 45.2(h) (paragraph 1.8.5, above),
'*impartially, transparently and in a timely manner*',
having,

'adequate technical, financial and human resources … (sufficient) *… to carry out the tasks assigned to them'*,

under EECC Articles 6.1 and 6.2 (paragraphs 1.7.9 and 1.8.5, above).

5.2.5 Compliance with EECC Articles 3, 4, 5 and 6 in respect to public health tasks that LPAs/LAs are required to perform as regulators of involuntary public exposure to RFR and related environmental exposures has to be accomplished by the DoH/DLUHC to ensure that all unfulfilled UK government obligations that incorporate those tasks are enacted through LPA/LA functions (paragraph 1.1.1 above, refers to EECC Article 5.1 specifically).

5.2.6 Further requirements are:

Remedy 3: the SoSfH must acknowledge that UK has no alternative RFR public exposure standard (paragraph 1.7.1), operating outside, or beyond the EECC as a legal framework.

Remedy 4: the DLUHC must acknowledge that the status of NPPF policy in planning law is clarified in the case

R (on the application of Wright) v Resilient Energy Severndale Ltd and Forest of Dean District Council [2019] UKSC 53[19],

'the statutory concept of a "material consideration" as interpreted by the courts does not vary according to government guidance and policy statements (paragraphs 45 to 49). *On the other hand, a change in national policy can affect the issue of whether a decision satisfies the third limb of the Newbury test, by making it clear that a reasonable local planning authority can properly consider that a particular condition is justified in terms of planning policy* (paragraph 53)',

with the judgment confirming (paragraph 45) that,

'*the meaning of the term "material consideration" in section 70(2) of the 1990 Act and section 38(6) of the 2004 Act is not in doubt and updating the established meaning of the term is neither required nor appropriate. To say that the meaning of the term changes according to what is said by Ministers in policy statements would undermine the position, as explained above, that what qualifies as a "material consideration" is a question of law on which the courts have*

[19] https://www.supremecourt.uk/cases/docs/uksc-2018-0007-judgment.pdf

already provided authoritative rulings. The interpretation given to that statutory term by the courts provides a clear meaning which is principled and stable over time'.

Consequently, it is incorrect for PHE to state (paragraph 1.8.4, above) that,

'control of exposures occurs through … (other mechanisms, and) *… planning policy',*

as LPAs are required to take properly into account all relevant material planning considerations concerning mast/antennas siting, including considerations related to their regulation of involuntary public exposure to RFR and related environmental exposures, as stated in paragraph 2.2.5 above,

'ICNIRP guidelines are under consideration within the functions that LPAs are obliged to perform in ways that are consistent with planning policy, planning procedures, as confined by domestic law',

when planning applications for new mast/antennas siting are determined, as demonstrated in the *Wright* case.

5.2.7 LPAs/LAs are required to take into account all material considerations, including material planning considerations arising from EECC public health/environmental provisions.

5.2.8 The distinction between government policy and domestic law as interpreted by the Judiciary, is a constitutional fact arising from the separation of powers exercised by Parliament, by the Executive through policy provisions, and by the Judiciary, whereby the primacy of legislation enacting the will of Parliament is protected from interference through non-compliant policy measures pursued by, or on behalf of Government Ministers.

5.2.9 And,

Remedy 5: Matt Warman's,

'the transposition of the EECC would have no effect on the status of local planning authorities where they are considered competent authorities under EU directive 2014/61/EC (paragraph 2.1.4, above)*',*

could be interpreted straightforwardly as meaning that LPA/LA EECC competent authority status applies *'where'* town planning functions need to be performed under EECC spectrum management, and consequently those functions generate specific EECC related material planning considerations that LPAs/LAs are obliged to take properly into account alongside other material planning considerations that UK planning law requires LPAs/LAs to consider when an application for a new mast/antennas or contractual arrangements for small cell siting arise.

In such cases, LPAs/LAs would be the only competent authorities that can address and determine the significance of EECC generated material planning considerations *'in situ',* making any doubt about the EECC competent authority status of LPAs/LAs a sterile issue.

The DLUHC/DoH will have to determine whether Matt Warman's,

'where they are considered competent authorities',

is where LPA/LA public health protection obligations are crucial to the efficient spectrum management in accordance with EECC Article 45.2(h). And if so, the required public health protection provision operated by LPAs/LAs must be brought into effect immediately.
Remedy 6: The immediate enactment of LPA/LA EECC competent authority status,

'*where' town planning functions need to be performed under EECC spectrum management, and consequently those functions generate specific EECC related material planning considerations that LPAs/LAs are obliged to take properly into account alongside other material planning considerations that UK planning law requires LPAs/LAs to consider when an application for a new mast/antennas or contractual arrangements for small cell siting arise* (Remedy 5, above)',

can be accomplished by the DLUHC accepting that the precedent set by the ruling in the *Wells* case (paragraph 4.2.16, above), that,

'*it is for the competent authorities of a Member State* (the UK now being an EECC participating nation state) *to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment*',

can be enacted by LPAs/LAs under the Town and Country Planning (Environmental Impact Assessment) 2017 Regulations (England) and its equivalent devolved powers in Scotland, Wales and Northern Ireland, as follows in the case of England:

1. The applicant's ICNIRP certificate issued with a planning application could be declared by the applicant as an '*environmental statement*', or alternatively a crucial component of an '*environmental statement*', which alongside the linked components of an EIA application, listed under Regulation 18(3)(a) to (f) would warrant a local planning authority screening opinion under Regulation 5(2)(b), to include under Regulation 4(2),

'*direct and indirect significant effects of the proposed development*',

on,

(a) population and human health,

(b) biodiversity, with particular attention to species and habitats,

and,

(e) the interaction between (a) and (b), and other listed factors.

2. An applicant's ICNIRP certificate is, or is a crucial component of, an '*environmental statement*' because it purports to be conclusive on the adverse health effects of involuntary exposure to RFR.

3. In an assessment of the material planning consideration '*incompatible and unacceptable use of a site*' for the positioning of new masts, the applicant's ICNIRP certificate is evidence of compatible use. That evidence must be offset by evidence of incompatibility of use of the proposed siting of the mast, because adverse health effects would impact upon the users of land or buildings within the locality within which the proposed mast is intended to be sited, and/or adverse effects on biodiversity, species, and habitats.

4. A decision under Regulation 5(2)(b) which enables the LPA to pursue the option of making a, *'screening opinion to the effect that the development is EIA development*', should enable the LPA to perform effectively the functions required under EECC Recital 106 which reads,

'*where mobile operators are required to share towers or masts for environmental reasons, such mandated sharing could lead to a reduction in the maximum transmitted power levels allowed for each operator for reasons of public health, and this in turn could require operators to install more transmission sites to ensure national coverage. Competent authorities should seek to reconcile the environmental and public health considerations in question, taking due account of the precautionary approach set out in Council Recommendation 1999/519/EC*',

requiring that EIA processes would be completed prior to the LPA seeking to '*reconcile the environmental and public health considerations in question*' by determining a mast application on siting grounds.

5. A screening assessment under Regulation 5(4) requires a LPA to decide whether Schedule 2 development is EIA development, taking into account, (a) any information provided by the applicant, which would include the applicant's ICNIRP certificate.

6. Even if the LPA determine that the proposed development is not an EIA development under Regulation 5(b), it should,

'*state any features of the proposed development and measures envisaged to avoid, or prevent what might otherwise have been significant adverse effects on the environment*',

to include undoubtedly, evidence-based risks to public health that telecommunication companies are obliged to address under their International Standards Organisation (ISO) Quality, Health & Safety, and Environmental procedures.

7. Masts/antennas and small cell systems are infrastructure projects that fall into the, '*urban development projects*', classification under Section 10(b) of Schedule 2 of the 2017 Regulations under, '*applicable thresholds and criteria*', as '*projects that includes more than 1 hectare of urban development …*',

because:

1. a mast is a component in a network of masts and other transmitter or receivers,

and,

2. involuntary RFR exposures from mast/antennas and small cell deployments, and the consequent risks of cumulative harm, injury and nuisance are likely to extend beyond the one hectare of urban space impacted upon by their siting/deployment.

5.3 The assignment of competent authority status to LPAs/LAs being made effective regarding public health protection

5.3.1 LPAs/LAs as EECC competent authorities must be resourced in accordance with EECC Article 6.2, with appropriate expertise and guidance to contribute sufficiently to the efficient and effective management of the radio spectrum by applying European Council Recommendations 1999/519/EC as required under EECC public health protection provisions. LPAs/LAs are required to identify established adverse health effects of RFR, whilst taking properly into account evidence drawn from sources made available through UK planning processes and procedures including public consultations, in accordance with relevant EC Recommendations applied as a binding procedural standard (paragraph 1.5.9, above).

5.3.2 LPA/LA evidence-based decision making on the required reconciliation of the environmental and public health effects of new mast siting and small cell deployment proposals, must be progressed with the full inclusion of public health protection provisions taking direct effect through the completion of the EECC transposition.

5.3.3 This requires:

Remedy 7: the DLUHC/DoH to acknowledge that LPAs/LAs EECC competent authority status is made direct by EECC Recital 22 (paragraph 1.4.2, above),

Remedy 8: recognition that no other *'in situ'* mechanism is enshrined in law for the protection of public health from involuntary public exposure to RFR, and that such a mechanism cannot be removed by action or inaction in default of the transposition of the EECC public health provisions by the UK government (paragraph 2.5.8, above),

Remedy 9: acknowledgement of the reality that LPAs/LAs multi-factorial decision-making occurs where new circumstances/considerations demand cognisant, attuned, and responsive decision-making to balance policy, procedural requirements and compliance with legal obligations applied within their properly authorised jurisdiction,

and,

Remedy 10: acknowledgment that public/citizen direct rights are interconnected with LPA/LA decisions-making on how material planning considerations are determined, and such rights are reinforced through appropriate Articles of the HRA 1998.

5.4 The requirement to end ambiguity regarding the status of LPAs/LAs as EECC competent authorities

5.4.1 The principle of legal certainty demands that the types of uncertainty exposed in this submission are eliminated (being: paragraph 2.5.8 asserting that jurisdictional obligations would have to be legislated against to dissolve their effect; the paragraph 2.1.4 Matt Warman statement; the paragraph 2.3.3 and 3.3.8 dilemmas; and, the argument that the EECC is a paragraph 2.7-type directive where the cautionary paragraphs 3 and 4 of paragraphs 2.5.10; above, apply).

5.4.2 This requires:

Remedy 11: collaboration between DLUHC/DoH to achieve a competent enactment of EECC Recitals 21 and 121,

Remedy 12: that the conduct of the DDCMS in preparing the 22nd June 2021 response by Matt Warman to Wera Hobhouse MP (paragraph 2.1.4, above), and concerning the DLUHC handling of the four questions on the competent authority status of LPA/LAs referred by Solihull MBC (appendix 1, section A1.1, particularly paragraph A1.1.2) must be investigated as significant to this required remedy,

Remedy 13: that the procedural requirements demonstrated by the DLA Piper statement of the 8th August 2019 made on behalf of PHE (paragraph 1.7.4, above) concerning how objections and evidence issued by the public re: mast siting/small cell deployment proposals must be taken properly into account by LPAs/LAs when they act as EECC competent authorities. Consequently, the rights of the public (as outlined in paragraph 4.2.12, above), must warrant an affirmed status to make EECC Recital 110 effective through the DLUHC/DoH collaboration required to achieve a competent enactment of EECC Recitals 21 and 121 (paragraph 5.2.2, above),

and,

Remedy 14: recognition that no progress is possible on the efficient management of the spectrum until LPA/LA EECC competent authority status is confirmed, and that status should be affirmed definitively in a Departmental response to this Schedule 8, paragraph 39(5) EUWA 2018 submission.

5.5 The importance of government policy being subsidiary to relevant domestic law

5.5.1 NPPF policies on telecommunication services fail to acknowledge the public health obligations of LPAs/LAs as EECC competent authorities.

5.5.2 To the contrary, NPPF current policies undermine those obligations (paragraphs 1.7.12 to 1.7.13, above).

5.5.3 The options available to LPAs determining requests for EECC general authorisations need to make the *'in situ'* consequences of telecommunications proposals paramount (paragraph 1.7.10 and 1.7.11, above) by regulating public exposure to RFR through development control decisions on mast/antennas siting, and through the actions of LAs on small cell deployment.

5.5.4 This NPPF deficiency demands immediate rectification.

5.5.5 This requires DLUHC:

Remedy 15: acceptance that the case *R* (on the application of Delena Wells) *v Secretary of State for Transport, Local Government and the Regions* (2004) is a comparable *'of a kind'* case to the case made in this Schedule 8, paragraph 35(9) submission, where the relevant principles of European law that led to the decision on the flawed transposition of the relevant directive in the *Wells* case (paragraph 4.2.3 to 4.2.6, above), that include the *'principle of legal certainty'* (used as a defence to justify inaction by the UK government in the *Wells* case), concerned direct citizen rights that were under contention (paragraph 4.2.7 and 4.2.18, above), which parallel the direct rights under contention in the case presented in this submission,

and,

Remedy 16: acceptance that the deficiency is constitutionally significant, irrespective of the changing status of EU Retained law over the past four years (paragraphs 1.7.4 and 2.1.3 point ii, 1.8.3, and Remedy 4, above).

5.6 Government sub-delegation of powers and authority to LPAs/LAs must be managed carefully, overtly, and through sustained monitoring

5.6.1 EECC Recital 106 acknowledgment that the,

'mandated sharing could lead to a reduction in the maximum transmitted power levels allowed for each operator for reasons of public health',

which,

'in turn could require operators to install more transmission sites to ensure national coverage',

and the,

'reconciliation of environmental and public health considerations, taking into due account of the precautionary approach set in European Council Recommendations 1999/519/EC',

requires that *'in situ'* considerations are made imperative/paramount re: the adverse health effects of public and environmental exposure to RFR, to prevent avoidable harm, injury and nuisance.

5.6.2 LPAs/LAs must consequently, possess a developed cognisance, attunement, and responsiveness to dynamics in the deployment of wireless technologies, and to act to ensure that urban spaces (and non-urban land) are used and protected from the polluting impacts of RFR exposure.

5.6.3 This requires the DLUHC/DoH to ensure that:

Remedy 17: the warnings in the transposition guidance (paragraph 2.5.10, above) are applied to ensure that citizen rights under the tasks/functions (paragraph 4.2.12, above) that are necessarily performed through LPA/LA exclusive obligations as EECC competent authorities, are protected,

and to acknowledge that,

Remedy 18: LPA/LA cognisance, attunement and responsiveness (Remedy 9, above) is pre-requisite to public exposure risk assessment/management where on-going changes in science and technology with regard to how urban spaces are used in a regulatory area (paragraphs 1.8.4 to 1.8.8, above) that should have the capacity to distinguish between *'inevitable nuisance'* and *'avoidable nuisance'* (paragraph 4.3.2 to 4.3.3) to make public health imperative through the EECC competence that LPAs/LAs exercise.

5.6.4 LPAs/LAs under European Council Recommendations 1999/519/EC are required to identify established health effects as a foundation for granting or refusing general authorisations/contracts for small cell deployment, within their competency.

5.6.5 The challenges this presents currently, are described and illustrated in Appendix 2, below.

5.6.6 The DLUHC and the DoH jointly are required to apply EECC Recitals 21 and 121 (paragraph 1.8.5, and paragraphs 2.3.1 to 2.3.3, above, and Remedy 11, above) to bring accountability into place for the tasks and the functions performed by LPAs/LAs on behalf of the UK Government as an EECC participating nation state. This regulatory area requires conscious collaboration and overlapping regulatory co-ordination over significant spans of time through competent UK Government oversight. The tasks and functions of LPAs/LAs as EECC competent authorities for which they are independently accountable, must then be specified in a revised NPPF and revised PHE/UKHSA policy guidance.

Remedy 19: that careful attention is given to avoiding confusion (paragraph 2.5.1 above, and Appendix A2.1, A 2.2, and A2.3, below), over the accountability of sub-delegated competent authorities for any failure to exercise their respective jurisdictions to meet the rights of citizens (paragraph 4.2.12, above) impacted upon by their regulatory interventions.

Remedy 20: that the EECC Recital 106,

'reconciliation of environmental and public health considerations, taking into due account of the precautionary approach set in Council Recommendations 1999/519/EC',

are met by LPAs generating telecommunications service specific environmental impact assessments (EIAs) (paragraphs 4.4.1 and 4.4.2, above) to objectify this required reconciliation through *'in situ'* decision making by LPAs/LAs. The LPAs/LAs will need to be equipped with the required cognisance, attunement, and responsiveness to enable them to complete telecommunication service specific EIAs (linking to the required Remedy 3, above).

Remedy 21: LAs EECC Recital 105 competent authority status regarding small cell deployment through their effective performance of tasks/functions concerning:

'*improving facility sharing* … (which may) … *lower the environmental cost of deploying electronic communications infrastructure and serve public health … and meet town and country planning objectives*' … (the pursuit of those objectives through) ... '*an appropriate period of public consultation, during which all interested parties should be given the opportunity to state their views, in the specific areas where such general interest reasons impose such sharing*' … (imposing) ...*'the sharing of network elements and associated facilities*' … (when necessary to secure) ...'*a better coordination of civil works on environmental or other public policy grounds*',

and that EECC public health protection provisions (paragraphs 1.81 to 1.8.9, above) are fully enacted through LA decision making on the development/implementation of civil works contracts with telecommunications companies for small cell deployment, by LA compliance with the EECC public health provisions enacting European Council Recommendations 1999/519/EC as a procedural standard applicable to small cell deployment through LA contracting activities.

APPENDIX 1: Conflicting and contradictory positions taken by LPAs Solihull MBC, Mendip DC and Bath and North East Somerset (BANES) Council on their EECC competent authority status

As background to this Schedule 8 paragraph 39(5) EUWA 2018 submission, for the purpose of verifying the claim that,

'LPAs/LAs deny their EECC competent authority status, or remain ambivalent as to whether or not their consideration of the public health consequences of the siting of masts/antennas requiring planning permission/prior approval is discharged by their acceptance of the applicant's issue of a certificate of compliance with ICNIRP guidelines' ,

(paragraph 2.5.12, above) of DLA Piper's formulation of how PHE Guidance should have been applied, on the proviso that,

'in any other context regard is had to the Guidance that is entirely a matter for the discretion of the relevant body and it must determine what weight to place on the Guidance given the clear indication as to the sources from which the advice and recommendations in the Guidance are derived. Equally, that body must determine what other evidence from your clients or other members of the public or interested parties to consider in making any decision (letter dated 8th August 2019)'.

The following evidence is relevant:

1) Solihull MBCs attempt to gain clarification of its EECC competent authority status from the DLUHC/UKHSA and the DDCMS

2) Mendip DCs EECC competent authority status applied in rejecting a 5Gmast on public health grounds and,

3) Bath and North East Somerset Council denial of its EECC competent authority status alongside Ofcoms' denial of its EECC competent authority obligations.

A1.1 Solihull MBCs attempt to gain clarification of its EECC competent authority status from the DLUHC/UKHSA and the DDCMS (6th January 2022 to 24th August 2022)

A1.1.1 After extensive questioning, a Solihull resident reported to the Solihull MBC Chief Executive and the Chief Planning Officer on the 16th August 2022, that the CPO's email of the 22 July 2022 (paragraph A1.1.4, below),

"takes us back to the position you presented to me on the 17th December 2021, where after quoting NPPF paragraphs 117 and 118, you conclude that,

*'the guidance in the NPPF is **reflective** of planning legislation regarding the delivery of such equipment and **clearly sets out** what a Local Planning Authority can have regard to when determining such a submission'.*

Your point of clarity, six months on, that,

*'for the avoidance of doubt Para 118 of the NPPF specifically states "**Local planning authorities must determine applications on planning grounds only. They should not** seek to prevent competition between different operators, question the need for an electronic communications system, or **set health safeguards different from the International Commission guidelines for public exposure**" (my emphasis). To therefore divert from this position would risk making a decision that specifically differed to the requirements of national planning policy and would therefore be at significant risk of appeal or legal challenge and a cost award being made against the Council',*

belies the fact that we have been awaiting clarity from the DLUHC on the legal obligations of SMBC as to how radio frequency radiation (RFR) involuntary exposure must now be regulated through planning policy, given SMBC's competent authority status under the European Electronic Communications Code (EECC).

That competency has to be applied in accordance with extant planning law, and through planning procedures including (by necessity) public consultations that enable objectors to seek to protect their legitimate interests and their rights as citizens.

NPPF policy is one of many material planning considerations that has to be taken into account as decisions are made by LPAs on radio mast siting. No NPPF policy can be conclusive in itself.

Solihull MBC must therefore take reasonable steps, on its own behalf, to ensure that its presumed compliance with extant NPPF policy alone, does not undermine the enactment of its legal obligations flowing from the functions that the MBC is obliged to undertake under EU Retained law on radio mast sharing by Telecom companies.

Telecoms companies will seek access to the radio spectrum in locations where such use can create incompatible or unacceptable siting of radio masts using land or building, and such use may pose verifiable risks of injury, harm and nuisance to the public".

A1.1.2 The Solihull resident responded to the CPO on the 30th May concerning questions on Solihull MBCs EECC competent authority status first raised on 6th January 2022, after being notified on the 24th March that the questions below, would be referred by Solihull MBC to the DLUHC and the UKHSA:

'Thank you for your email of May 24th below confirming that you will follow-up on your email of 24th March regarding the questions raised with the DLUHC, these being:

1) *What are the origins of LPAs status as competent authorities under the EECC as EU Retained Law?*
2) *How does the EECC impact upon LPAs now, and how will it do so in the future?*
3) *How are LPAs required to accommodate Recitals 106 and 110 and the obligations created under Article 45.2(h) within the planning processes and procedures that they are obliged to enact to remain compliant with UK planning law?*

and,

4) What other obligations do LPAs as competent authorities have in respect to other LPA-relevant EECC Recitals and Articles (beyond the ones listed in question 3, above)?

These questions warrant definitive and urgent answers.

Your previous email (24th March) confirms that you copied the questions to Dr Jenny Harries, Chief Executive of the UKHSA, and it is therefore surprising that the UKHSA response quoted in your 24th May email does not mention the questions.

It is likely that UKHSA require clarity through DLUHC's answers to the four questions to enable your Public Health colleagues to establish the role that they may need to perform in relation to the EECC competent authority functions that Solihull MBC are likely to be required to enact on radio mast siting decisions whether or not the proposed masts are intended to be 5G enabled.

The UKHSA response is therefore off-issue and premature.

Meanwhile radio mast siting decisions by prior approval or full approval are not placed on hold whilst the DLUHC prepare answers to the four questions. Delay surely risks decisions being made in ignorance of the legal status of Solihull MBC, and by other LPAs placed in the same predicament given that the EECC was transposed into UK law in December 2020, and subsequently it has taken effect as EU Retained Law.

UKHSA's response on ICNIRP compliance does not take into account the expectation placed upon LPAs under EECC Recital 106 to reconcile the public health and environmental effects of Radio-frequency Radiation (RfR) exposure, nor the requirement under EECC Recital 110 to make public health imperative as radio mast siting decisions are being made.

Achieving these requirements as EECC Recital 34 states, requires competent authorities to be,

'in possession of all the necessary resources, in terms of staffing, expertise, and financial means, for the performance of their tasks'.

I do not therefore understand why the four questions are difficult for the DLUHC to answer, and I am now wondering whether you can assure me that answers will be forthcoming within the next fortnight'.

A1.1.3 The Solihull CPO responded on the 10th June stating that,

'I can confirm that the questions were included in my initial letter. I also wanted to confirm that I have chased a response with DLUHC and also raised with the DDCMS.

I am unable to commit to a timeframe within which answers will be forthcoming as the questions are now with government departments. I will continue to chase as appropriate and will provide responses as and when I receive them. For the reasons previously outlined in my earlier emails and until such time as any response from government suggests otherwise, it remains my view that any planning proposals should continue to be determine in accordance with our adopted local plan and the NPPF as a material planning consideration'.

A1.1.4 The Solihull CPO had stated in his 22nd July email that he was,

'mindful that DLUHC are currently reviewing the NPPF with a view to an updated version being published for consultation later this year. I am mindful that with the current uncertainty around the prime minister and cabinet positions that this may well change and/or be delayed. If and when published this may of course change the NPPFs position in relation to telecommunications and the ICNIRP position, but until that happens I do not see that we have any planning justification or direction to divert from our current approach' .

A1.1.5 And on 24th August 2022, having received no responses to the four questions originally raised on the 6th January, as reiterated on the 30th May (paragraph A1.1.2, above) from the DLUHC, UKHSA nor the DDCMS, the Solihull CPO reported that,

'I do fully understand your concern and frustrations with this situation, but at this time I can only work with my team to determine prior notifications and planning applications for telecommunications equipment that have regard to material planning matters. In that respect I fear we are going round in circles and I am afraid that my position on this remains unchanged from previous correspondence. It is my view that in determining proposals for new masts we do assess and determine these in a robust and consistent way. This includes challenging the applicant on the location of the proposed mast and having full consideration to the impacts it may have on local amenity etc.

I do not believe there is anything further I can add on this from a planning perspective unless and until such time as national planning legislation and/or guidance changes.

I note your reference below to the wider legal position and public health and I will continue to discuss this matter with colleagues in this respect'.

A1.1.6 The critical question 3.,

'how are LPAs required to accommodate EECC Recitals 106 and 110 and the obligations created under Article 45.2(h) within the planning processes and procedures that they are obliged to enact to remain compliant with UK planning law?'

remained unanswered by all involved authorities, despite the probability that LPAs/LAs *'having regard to material planning matters'* required by the EECC Recital 105 and 106 *'reconciliation of environmental and public health effects'* of relevant telecommunications equipment qualify as material planning considerations.

A1.2 Mendip DCs EECC competent authority status applied in rejecting a 5G mast on public health grounds (December 2021 to April 2022)

A1.2.1 The Mendip DC Head of Planning provided responses to the four questions raised by a Councillor on behalf of a Mendip resident (20th December 2021, a year after the UK transposition of the EECC), being the same questions raised by the Solihull resident (on 6th January 2022), as follows:

'What are the origins of LPAs' status as competent authorities under the EECC as EU retained law?

Answer 1.
1.The Electronic Communications and Wireless Telegraphy (Amendment) (European Electronic Communications Code and EU Exit) Regulations 2020 were made in exercise of the powers conferred by s8(1) of the European Union (Withdrawal) Act 2018 in order to enable retained EU law to operate effectively after the withdrawal of the UK from the European Union.

2. They incorporate into UK domestic law Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code ('the EECC Directive').

How does the EECC impact upon LPAs now, and how will it do so in the future?

Answer 2.
1. In so far as LPAs are 'competent authorities' responsible for giving effect to the EECC in the exercise of their regulatory functions in respect of town and country planning, they are required to do so. However, the vast majority of the provisions of the EECC do not concern this function.

2. Now we have left the EU, it is open to the government to change the application of the EECC if it so desires.

How are LPAs required to accommodate Recitals 106 and 110 and the obligations created under Article 45.2(h) within the planning processes and procedures that they are obliged to enact to remain compliant with UK planning law?

Answer 3.

1. Recital 106 requires competent authorities to reconcile the needs of multiple phone operators for potentially multiple transmission site with environmental and public health considerations. LPAs do so by applying the policy in chapter 10 of the NPPF.

2. Recital 110 concerns the exposure of citizens to electromagnetic fields at harmful levels and requires consistency of approach across the EU. LPAs do so by applying the standards of the ICNIRP as required by ¶118 of the NPPF.

3. Article 45.2(h) places an obligation on "Member States" not "competent authorities". Further, it concerns the "Management of radio spectrum" and the "granting of individual rights of use" by competent authorities. This is not relevant to a LPA's function.

What other obligations do LPAs as competent authorities have in respect to other LPA-relevant EECC Recitals and Articles (beyond the ones listed in question 3, above)?

Answer 4.
'1. LPAs are not the only competent authorities affected by the EECC. The requirements of the EECC are also exercised by the national government and other bodies. Recital 21 requires a set of "harmonised set of objectives and principles to under pin their work".

2. Competent authorities act "within the limits of their competence" (Recital 7). In the case of LPAs, the limit is their responsibilities for town and country planning.

2.1 Any party subject to a decision of a competent authority should have the right of appeal to an independent body[1] (Recital 76).

2.2 Competent authorities are required to act in a way that is reasonable and proportionate (Article 3.1); it is in the interests of citizens to have access to modern telecommunications as well as protection (Article 3.2).

2.3 Competent authorities should promote regularity predictability (Article 3.4). This is achieved in the planning sphere by consistently applying the policy in chapter 10 of the NPPF.'

A1.2.2 The Mendip DC Chief Executive added,

'In light of the above, and with specific regard to the consideration of applications for telecommunications masts, as an LPA we would comments as follows:

We acknowledge that there are objections on the grounds of the potential adverse effects on public health of 5G masts. The NPPF advises as follows (with emphasis added):

92."Planning policies and decisions should aim to achieve healthy, inclusive and safe places…".

*116. "Local planning authorities **should not impose a ban** on new electronic communications development in certain areas…".*

*118. Local planning authorities must determine applications on planning grounds only. **They should not** seek to prevent competition between different operators, question the need for an electronic communications system, or **set health safeguards different from the International Commission guidelines for public exposure**.',*

and she reported that,

'we would require the applicant to provide a certificate to confirm that the proposal has been designed to comply with the guidelines and standards published by the International Commission on Non-Ionizing Radiation Protection (ICNIRP).

Once received we would then conclude that there is no reasonable scientific doubt about public health impacts in the context of a planning decision concerning 5G masts /equipment so long as the requirements of the standards of the ICNIRP are applied in accordance with ¶118 of the NPPF ie by the submission of the certificate. Therefore there would be no reason to refuse an application on the basis of the 'precautionary principle'. For this reason, the potential effect on health would not be a determining issue in such cases'.

A1.2.3 The Mendip DC response to question 3, above, assumes that:

i) ICNIRP guidelines provide a standard, contrary to the distinctions drawn between RFR public exposure guidelines and standards explained in sections 1.5, 1.6 and 1.7, above.

ii) LPA decision making on mast siting is not a spectrum management task/function, contrary to the conclusion drawn in paragraph A1.2.2, above,

and,

iii) planning permissions are not EECC general authorisations that grant telecommunication applicants individual rights of use of the radio spectrum, contrary to the conclusion drawn in section 1, paragraph 1.3.4, above.

A1.2.4 The application for the new 5G mast was determined at the Mendip DC Planning Board meeting held on the 16th March 2022, and the minutes of the meeting record the determination, as below:

'2021/1952/FUL Communication Station At Junction With Manor Road, Grove Lane, Frome, Somerset

The Officer Report stated that this application was for the installation of a 20m monopole, 12 antenna and 3 equipment cabinets. Also, the removal of an existing 17.5m monopole, 2 equipment cabinets and development ancillary thereto.

It had been referred to the Planning Board because the Officer recommendation was contrary to those of the Town Council and there had been a significant number of representations. It said that the site already supported a 4G mast and was within an industrial/commercial area.

Ward Councillor Collins had said that as it was the first 5G mast application within Frome, it should go to the Planning Board and he had raised various concerns during the consultation period including the lack of proof of safety.

Carlton Langford (Case Officer), reported that Frome Town Council had objected to the application as their council policy meant they were unable to support the rollout of 5G. There had been 185 letters of objection received from local people at the time the main report was submitted to the agenda. The reasons for objection included the following:

- *Visual impact*
- *Adverse impact on the environment and wildlife.*
- *Various health reasons as to why the mast and equipment should not be allowed.*
- *Documented health implications associated with the rollout of 5G.*
- *Insufficient information surrounding the health risks associated with 5G.*
- *5G should not be allowed in Frome.*
- *5G not needed in Frome, 4G sufficient.*
- *The site is located close to schools.*
- *Close to a care home for the elderly.*
- *Concerns regarding electromagnetic fields (EMF) surrounding 5G equipment.*
- *Indications show that children are among the most susceptible to EMF emissions.*
- *Highway safety concerns*

The Report added that there had been a petition with at least 115 signatures objecting to the proposal for the similar reasons as above, but also that 2 letters of support had been received.

The Officer Report advised that public health controls surrounding radio waves including 5G technology were set out by the International Commission on Non-Ionizing Radiation Protection (ICNIRP) and gave some background to their guidelines and research.

The report provided a summary of the findings saying it was possible that there may be a small increase in overall exposure to radio waves when 5G is added to an existing network or in a new area. However, the overall exposure was expected to remain low relative to guidelines and, as such, there should be no consequences for public health. Public Health England was committed to monitoring the evidence applicable to this and other radio technologies, and to revising its advice, should that be necessary.

The Chair then invited the first of the public speakers to address the Board.

The first to speak was Dr Erica Mallery Blythe.

She said she had a background with the NHS and had done much research into the health effects of radio frequency radiation. She gave details on 5 little known facts about radio frequency radiation. These were:

1. The safety limits by the ICNIRP are set many orders of magnitude too high for legitimate biological protection. They were set in the 1990s and are now obsolete.

2. Radio frequency radiation has now been shown to cause serious biological effects below these limits and include increased cancer risks and other serious health issues. Experts want RFR to be reclassified as a group 1 carcinogenic which would put it in the same bracket as tobacco, asbestos, and x-ray.

3. Some individuals are more vulnerable to this type of radiation than others. These include in particular children, but also the elderly, pregnant and infirm. Also people with electromagnetic hypersensitivity can be disabled by their severe EMF exposures with symptoms such as headache, sleep disturbance, dizziness and palpitations. Dr Mallery Blythe said that there were at least 2 local residents who suffered from electromagnetic hypersensitivity.

4. Animals and plants could be affected by a similar mechanism, and the ecosystem is already struggling.

5. It is very important that people give fully informed consent and Dr Mallery Blythe would ask how well you feel informed about the scientific and medical evidence.

She concluded that safer, more reliable access would be provided by fibre internet.

Mr Peter Harris was then invited to speak.

He said that all the major political parties within the country supported the rollout of 5G as fast as possible. He added that as part of the mobile operator's licence, they must continue to provide improved coverage and capacity. The increase in height of the pole of 2.5m was required to support the 5G installation. The nearest residents would be 200m away to the northeast and so should not be affected by the installation at all. The proposal did comfortably meet all of the ICNIRP standards, it was in line with the local and national policies. He concluded that the pandemic had shown how critically important mobile technology was and that the rollout of 5G enhanced this significantly.

As Ward Councillor, Shane Collins was then invited to speak.

He said that this was the first of many 5G applications within Mendip. Under UK and EU law, a strategic environmental assessment should have been carried out before the implementation of 5G, but it hasn't.

Councillor Collins spoke about the growing evidence regarding the negative effects on health from radio frequency radiation. He also referenced an increased risk of cancer for people living in proximity to a cellphone transmitter station. He pointed out that Lloyds of London would not insure wireless technologies and that 5G was effective only over short distances and could not pass through trees. Therefore, bases and antennae would have to be located more frequently and trees cut down. The applicant had not shown the exclusion zone for the mast on the application and there were buildings and residents located nearby. He asked the Planning Board to take note of the number of objections to the mast and asked that they consider the lack of proof of safety of 5G technology.

In the discussion that followed the Team Leader – Development Management clarified that the Strategic Environmental Impact Assessment that had been referred to by one of the speakers was not required to be submitted to inform the decision on the planning application, as this application did not fall into any of the categories within the relevant regulations (ref: the Town and Country Planning (Environmental Impact Assessment) Regulations 2017

Many Members raised their concerns about the safety aspect of locating the mast close to houses and schools. The Planning Officer confirmed that the legislation allowed for masts to be erected in residential areas and there were many sites throughout the country where this had happened.

One Member said she was concerned to hear from the first speaker that the safety guidelines were based on out-of-date tests and were now obsolete and said further research was needed before approving the erection of 5G masts close to homes and schools. These concerns were shared by many Members who also felt the safety of 5G was not yet proven.

On the other hand, Councillor Hewitt-Cooper said that there was no evidence to suggest there would be any danger with the location of the mast and proposed to approve the application in line with the Officer's recommendation.

As a former physics teacher, one Member then spoke in detail about the science behind 5G technology. He concluded that there was no suggested mechanism by which radiation from a 5G mast could cause the harm suggested.

Following this, Councillor Mike Pullin seconded Councillor Hewitt-Coopers proposal to approve the application.

Further discussions about health and safety of the mast ensued. The Team Leader – Development Management said that the applicant had submitted the correct process by providing an (ICNIRP) certificate.

Another Member said that despite the worries and concerns for safety, that the scientific evidence should be followed.

A vote was then taken to approve in line with Officers Recommendation, as proposed by Councillor Hewitt Cooper and seconded by Councillor Pullin.

There were 6 votes in favour and 7 votes against and the motion to approve was not carried.'

On the final vote:-

'Councillor Laura Waters then proposed to refuse the application contrary to Officers Recommendation due to concerns on the impact to public health for all ages and lack of backed up evidence of the impact to health. This was seconded by Councillor Lindsay MacDougall.

There were 7 votes for the proposal and 6 votes against, therefore the motion to refuse was carried. RESOLVED Refused contrary to Officer Recommendation due to concerns on the impact to public health for all ages and lack of backed up evidence of the impact to health'.

A1.2.5 The Mendip Planning Board decision was a decision made by the LPA as an EECC competent authority in accordance with option iii) concerning the material planning consideration incompatible and unacceptable use of the site proposed for the mast (ie the material planning consideration was a siting issue), and because the 'compatibility and acceptability' of the proposed siting was not evidenced sufficiently concerning adverse health effects (paragraphs 1.7.10 and 1.7.11, above).

A1.2.6 The refusal was contrary to the position presented by the Head of Planning prior to the decision. (paragraph 1.2.2, above).

A1.3 Bath and North East Somerset Council denial of its EECC competent authority status alongside Ofcom's denial of its EECC competent authority obligations (6th April to 7th May 2021)

A1.3.1 Bath and North East Somerset Council (BANES) formally reported to the potential litigant, on the 6th April 2021 that,

'the Council notes at the outset that it is not a competent authority for the purposes of the European Electronics Communications code 2018, nor is it in a position to make any assessments in relation to it.'

and as a consequence of this denial, the potential litigant (represented by Neil McDougall, name withheld) wrote to Martin Fenton, Ofcom Head of Spectrum Management on the 12th April 2021, further explaining his and his family's predicament:

'Dear Mr Fenton,

Further to my e-mail of 24th March (as below) and your subsequent conversation with Mr McDougall on Friday 9th April and follow-on e-mails, I feel I need to restate the urgency of this matter and perhaps state simply our expectations. The bottom line for us is, it cannot be OK for a Spectrum user to install equipment that will render our house and/or garden unfit for our use. The exclusion zone drawings contained in 'Attachment 1 Summary of ICNIRP_Issues' clearly show our house and/or garden will be inside public exclusion zones.

Whether this plan is for 4G and our garden is uninhabitable or for 5G and our whole house is, this plan leaves us unsafe and unprotected.

With this serious and urgent concern in mind, here are our immediate expectations:-

Expectation 1. *To get a definitive judgment by Ofcom on the question of whether EE/H3G's use of the proposed Gasex Building located antennae for 4G or 5G EMF transmissions will breach Ofcom's EMF licensing conditions given that the red area/zone labelled 'worker only access (max. 8hr continuous exposure)' on the ICNIRP Site Plan clearly intrudes into, and across my property (see: site plan 2, and as labelled '4G zone' on site plan 3, and as shown and labelled as '4G zone', and extending over, and beyond my boundary on the corresponding elevation drawing. All as presented in sequence, in attachment 1).*

Expectation 2. *If the investigation proves the antennae currently being installed on the Gasex Building for 4G and in future 5G EMF transmissions, if brought into use, will be non-compliant with Ofcom EMF licence conditions described in the Ofcom Guidance on EMF Compliance and Enforcement, then Ofcom should notify me and also the Harlequin Group (the agent acting for EE/H3G being Martin Brown MRTPI, Senior Planning Manager, The Harlequin Group m.brown@harlequin-group.com) immediately.*

Expectation 3. *That Ofcom acts fully in compliance with its obligations as the UK National level competent authority appointed under the EECC 2018, and if necessary in default of any other agencies (including BANES Council, and EE/H3G, or its agent) who may have neglected to act fully in accordance with Recitals 5, 106, and 110 of the EECC 2018. After remedying default under the Recitals (as extracted in Attachment 3), Ofcom can then act fully in accordance with its obligations under Article 45.2(h) of the EECC 2018 (as extracted in Attachment 3).*

URGENCY. *Ofcom should act on this statement with the utmost urgency (following-up as it does the evidence issued as attachment 1 and 2 of my 12.08 pm email of the 24 March 2021, attached again here), as the failure of the BANES Council and spectrum users to fulfil their obligations under the Recitals of the EECC 2018, and other related breaches of BANES Council's obligations to regulate RFR exposures are poised to be the subject of legal action.*

Immediate and urgent action by Ofcom to investigate my evidence issued on 24 March 2021 should meet my legitimate expectations as stated above, and represent an Alternative Dispute Resolution Procedure (ADR) under Ofcom's 'Guidance on EMF Compliance and Enforcement' procedure and the EECC 2018.

Ofcom is requested to confirm the required investigation immediately, by phone call or e-mail, so that we know if Ofcom will adopt the ADR or not. This request is made not only due to the above but also because of the enormous stress and worry it is causing me and my family.

Many thanks

(name withheld)'

Summary of Attachments:

'Attachment 1 Summary of ICNIRP Issues' shows a summary of the problem and its evolution over the last two months.

'Attachment 2 ProX5 Report 3S v1' is from EE's design team's system and shows their ICNIRP data and diagrams (based on 4G, which would look a lot worse in the 5G case of course, and they ARE installing 4 Antennae in the 5G frequency range).

'Attachment 3 Statement for Ofcom' detailing the request, expectations and urgency.

A1.3.2 Previously on the 24th March, the potential litigant had written:

'*My name is (name withheld) and I am from Radstock in Somerset. I am reporting what I see as, and am advised is, a serious violation of EMF Compliance on a current EE upgrade to a mobile base station right next to my house, and I include the relevant evidence of my complaint in the attachments. This matter is an extreme case due to the proximity and elevation of my property, and time is short if I am going to be able to affect the outcome, and so I request your urgent attention to it.*

Please note the following:

i) I have issued a 'letter before claim' re: a possible judicial review which seeks the formal referral of my evidence, by BANES Council, to Ofcom to gain its recommendations regarding public health protection re: the application so that BANES Council can determine the application properly in accordance with planning law.

ii) Ofcom 'Guidance on EMF Compliance and Enforcement' issued on 1st March 2021 on the restrictions that apply to limit zones for 'occupational exposed individuals' not to encroach into my property will be breached if EE activate the proposed antennae,

and,

iii) Ofcom is the 'competent authority' under the European Electronic Communications Code 2018 as confirmed in Ofcom's 'Implementation of measures to require compliance with international guidelines for limiting exposure to electromagnetic fields (EMF)' issued on 1st March 2021 footnote 7, page 10, and consequently Ofcom is empowered/obliged to act on this matter.

I would like to emphasise that I am registering the matter with Ofcom, and would appreciate 'phone advice/assurance' on this matter, and that BANES Council will be pressed further to confirm that they will make an urgent formal referral to Ofcom re: this matter.

Can you please confirm with some urgency to whom that formal referral should be made, so that I can pass that information through to Mr Godfrey at BANES as soon as possible.

The attachment 'Attachment 1 Summary of ICNIRP Issues' shows a summary of the problem and its evolution over the last two months.

The attachment 'Attachment 2 ProX5 Report 3S v1' is from EE's design team's system and shows their ICNIRP data and diagrams.

Thank you in anticipation and I look forward to hearing from you shortly.

(name and address withheld) '

A1.3.3 Mr Fenton's 12th April reply read:

From: Martin Fenton <Martin.Fenton@ofcom.org.uk>
Date: Mon, 12 Apr 2021 at 16:44
Subject: EMF Query
To: (name withheld)

Dear (name withheld),

Thank you for your email and apologies for the delay in replying.

It may be helpful for me to explain Ofcom's role in relation to the issues you have raised:
As a statutory body created by the Office of Communications Act 2002, Ofcom is legally independent of and not part of Government. Ofcom's role, duties and remit were set by Parliament and we can only act within the powers given to us by Parliament (for example, the powers given to us in the Communications Act 2003 and the Wireless Telegraphy Act 2006). Consistent with these powers, Ofcom authorises and manages the use of radio spectrum in the UK through the issue of licences and/or by setting conditions for spectrum use on a licence-exempt basis.

The European Electronic Communications Code (EECC) required EU Member States (i.e. the UK Government) to take the necessary steps to implement the various provisions of the EECC into domestic law.

Footnote 7 of our March 1st Update document referred to Article 45 of the EECC. Article 45 provides high level objectives for Member States that are relevant to how "competent authorities" carry out their spectrum management functions including references in Articles 45(2)(h) and 45(4) to taking into account Council Recommendation 1999/519/EC (which is based on the ICNIRP Guidelines). Whilst Government has confirmed Ofcom is the "competent authority" referenced in the EECC, the EECC places no obligations on Ofcom.

As noted above, Ofcom's powers are set out in domestic legislation and Government determined that no specific changes were necessary to the UK's domestic legislation in order to implement Articles 45(2)(h) or 45(4) of the EECC. Ofcom already has powers under section 9ZA(1) and (2)(b) of the Wireless Telegraphy Act 2006 to impose licence conditions for the protection of the public from EMF.

Consistent with our existing powers, and as explained in our March 1st Update document, we are currently going through a process to vary the vast majority of spectrum licences to include a new EMF condition. Subject to our final decision in this ongoing process, the new EMF condition will come into force around mid-May 2021 and require

licensees to ensure they comply with the ICNIRP general public limits. In cases where we identify any non-compliance, we will be able to require licensees to take action to remedy this.

Ofcom does not have any role in relation to the planning approval process and is not involved in reviewing ICNIRP assessments used in planning decisions. We note that planning decisions also concern proposals for new or changes to existing mobile sites and therefore proposed EMF exposure levels, rather than current EMF exposure levels which are the subject of our proposed EMF licence condition.

As explained above, we are not currently in a position where we could take action against a licensee in the event we determine the ICNIRP general public limits have been breached. However, this will change once we have varied the majority of spectrum licences as expected in mid-May. In the meantime, given the specific circumstances of this case, we will raise your concerns and enquire about this situation with EE.

Kind regards,
Martin Fenton
Director of Spectrum Analysis
Mobile: 07802 336961

A1.3.4 Potential litigant's 14th April 2021 reply to Mr Fenton, read:

From: (name withheld)
Sent: 14 April 2021 18:37
To: Martin Fenton <Martin.Fenton@ofcom.org.uk>
Cc: mcdougall1 <mcdougall1@protonmail.com>
Subject: EXTERNAL:Urgent CASE Number 01222143

Dear Mr Fenton,

Concerning your 12th April 16.44 email.

Whilst appreciating that you have notified EE of the 'specific circumstances of this case' recognising that it would be useful if EE contact me directly and urgently, Ofcom need to engage a dispute resolution procedure as suggested below.

Meanwhile I remain unconvinced by your statement made in your bullet point 3 that,

'Whilst the Government has confirmed Ofcom is the 'competent authority' referenced in the EECC, the EECC places no obligations on Ofcom'.

BANES Council are similarly claiming that the EECC places no obligation on it when regulating EMF exposures through planning policy. As BANES Council are making that claim in response to potential legal proceedings, the foundations for your claim (as above) are important.

The footnote 7 that you refer to in your bullet point 3, in the context of paragraph 3.18 'Conclusions on EMF and Health' of the 1st March update document linked in your email, needs to be considered in full:

'Conclusions on EMF and health
3.18 As explained in Annex A1 of our October 2020 Statement, we have powers under section 9ZA(1) and (2)(b) of the 2006 Act to impose licence conditions for the protection of the public from electromagnetic fields, both in new licences and by varying existing licences. These powers are also consistent with Ofcom's role as the 'competent authority' – as determined by the UK Government – for ensuring the UK complies with its obligations under the European Electronic Communications Code (EECC).7

footnote 7: Government has confirmed Ofcom is the "competent authority" for ensuring the UK complies with its obligations under the EECC (see pages 31-32 of Government response to the public consultation on implementing the European Electronic Communications Code). Recitals 106 and 110 and Articles 45(2)(h) and 45(4) EECC suggest the competent authority should take into account Council Recommendation 1999/519/EC. The restrictions in this Recommendation are based on the ICNIRP general public limits and our decision to formally incorporate the ICNIRP general public limits into spectrum authorisations is therefore consistent with the EECC'.

Paragraph 3.18 and the footnote, imply clearly that Ofcom has been appointed by the UK Government to ensure that UK agencies collaborate to ensure UK compliance with the terms of the EECC, as brought into UK law in late December 2020.

Surely, this places major obligations on Ofcom beyond taking into account Council Recommendations 1999/519/EC. As Recital 106 is identified in the footnote, the status and the identity of the 'competent authority/authorities' that is/are responsible for seeking to,

'reconcile the environmental public health considerations in question, taking due account of the precautionary approach set out in Council Recommendation 1999/519/EC',

as required to enact the Recital is crucial to my specific circumstances, and UK obligations under the EECC.

It is reasonable to assume that BANES Council as a Local Planning Authority (LPA), is the 'competent authority' that is obliged in planning law to reconcile environmental and public health considerations under its EMF exposure regulatory obligations in accordance with Rectal 106, and that the EECC does oblige Ofcom to ensure that UK agencies comply with relevant EECC Recitals.

Otherwise, Ofcom's obligations under Article 45 of the EECC could not be performed effectively.

As highlighted in Expectation 3 (presented in my 16.20 pm email of the 12th April, and justified in attachment 3 of the email), Ofcom as the 'competent authority' for ensuring the UK complies with its obligations under the EECC, must enact default interventions if other agencies fail to comply with their obligations, statutory or otherwise, when the EECC requires action by other 'competent authorities' whose competency is required to complement Ofcom's competencies.

In the 'specific circumstances' I reported to Ofcom on 24th March, Ofcom must now apply a Dispute Resolution Procedure (possibly using its Dispute Resolution Guidelines https://www.ofcom.org.uk/__data/assets/pdf_file/0020/71624/guidelines.pdf),
and confirm that it is so doing under Annex 2 2 Ofcom's statutory duties and regulatory principles under Sections 3 and 4 of the 2003 Communications Act 2003.

Simply, the 'specific circumstances' of my case might require Ofcom's intervention to ensure that BANES Council acknowledge and enact their obligations under the EECC Recitals 5, 106 and 110, and are given information by EE (or its agents), and by Ofcom to ensure that BANES Council can properly fulfil those obligations in accordance with its competence as an LPA.

Please confirm within 24 hours that Ofcom will now initiate a Dispute Resolution Procedure under the EECC to resolve the 'specific circumstances' that led to my 24th March submission of evidence that requires investigation and dispute resolution, taking into full account the three expectations presented in my 16.20 pm email of the 12th April.

Thank you

(name withheld) '

A1.3.5 Mr Fenton 15th April reply read:

'On Thursday, 15 April 2021 17:35, Martin Fenton <Martin.Fenton@ofcom.org.uk> wrote:

Dear (name withheld),

Thank you for your email – we are considering the points you make and will get back to you with our response shortly. In any event, we will continue our engagement with EE and I will let you know where that takes us as soon as I can. Martin Fenton'

A1.3.6 Mr McDougall's 15th April email to Melanie Dawes, Ofcom's Chief Executive read:

From: mcdougall1 <mcdougall1@protonmail.com>
Date: On Friday, April 16th, 2021 at 13:52
Subject: Ofcom's role and responsibilities under the European Electronic Communications Code (EECC) 2018 - Urgent case number 01222143
To: melanie.dawes@ofcom.org.uk <melanie.dawes@ofcom.org.uk>
CC: martin.ballantyre@ofcom.org.uk <martin.ballantyre@ofcom.org.uk>, melissa.tatton@ofcom.org.uk <melissa.tatton@ofcom.org.uk>, martin.fenton@ofcom.org.uk <martin.fenton@ofcom.org.uk>

Melanie Dawes
Chief Executive,
Ofcom

Dear Melanie Dawes

Ofcom's role and responsibilities under the European Electronic Communications Code (EECC) 2018- Urgent case number 01222143

Discussion and exchanges of emails with Martin Fenton, Ofcom Director of Spectrum Analysis, during the last week have revealed deep confusion over the role and responsibilities of Ofcom, that align with the failure of Local Planning Authorities (LPA's) to acknowledge or enact their role in the operation of the EECC 2018.

Below and attached are copies of emails and evidence issued by (name withheld) whose welfare, and the welfare of his family, are jeopardised by a proposed upgrade of EE antennas on a building adjacent to his family home.

The dispute, which I am supporting (name withheld) in an attempt to resolve without resort to legal action, raises vital issues regarding the implementation of the EECC 2018, particularly the relationship between Ofcom as the UK national level 'competent authority' appointed by the UK government (as reported in paragraph 3.18 of Ofcoms 'Conclusions on EMF and Health' and quoted in (name withheld) email to Mr Fenton dated 14th April 2021), and the role of LPA's as' competent authorities' under Recital 106 of the EECC, which requires in specific circumstances (which apply in (name withheld) case),

'competent authorities should reconcile the environmental and public health considerations in question, taking due account of the precautionary approach set out in Council Recommendation 1999/519/EC'.

This Recital clearly applies to LPAs in the first instance in determining planning applications for mast/antennas. In a second instance, the EECC may require Ofcom as a national level competent authority with obligations under Article 45 of the EECC, alongside other national level competent authorities to collaborate effectively with LPAs enacting their independent competency under Recitals 5, 106 and 110 of the EECC on public health grounds. LPAs alongside all other involved agencies, and Telecoms companies, need to be properly informed of their individual and mutual obligations under the EECC.

If the roles of authorities are not clarified and properly exercised, Ofcom's ability to coordinate the UK enactment of the EECC will be compromised.

When I first raised (name withheld) case with Ofcom Spectrum Management Team on the 23rd March 2021, it was made clear to me that Ofcom's legal advisors needed to be involved in establishing how Mr Parrett's situation should be resolved given the transposition of the EECC into UK law on 21st December 2020.

It appears that the EECC transposition has not brought into effect the safeguards that the public health elements of the Code are designed to provide.

As we are seeking an outcome to this problematic circumstance through Alternative Dispute Resolution (ADR) Procedure and as (name withheld) predicament exposes major policy and legal issues, we thought it appropriate to alert you as Ofcom's Chief Executive, and your colleagues Martin Ballantyre, and Melissa Tatton as potential involved parties of the background to (name withheld) concerns,

We assume that Ofcom will engage a ADR procedure to resolve this dispute, and we will notify Bath and North East Somerset (BANES) Council accordingly. We do however, need confirmation of Ofcom's offer of access to ADR by 12.00 on Tuesday 20th April 2021.

If we do not gain that confirmation from Mr Fenton before then, will you please provide that confirmation to me directly by e-mail.

Thank you,

Neil McDougall

copied to:
Martin Ballantyre, General Counsel and Legal Group Director
Melissa Tatton, Group Director for Corporate
Martin Fenton, Director Spectrum Analysis

A1.3.7 The potential litigant's 19th April email to Mr Fenton read:

'Sent:19 April 2021 16:54
To: Martin Fenton <Martin.Fenton@ofcom.org.uk>
Cc: mcdougall1 <mcdougall1@protonmail.com>
Subject: EXTERNAL:Urgent CASE Number 01222143

Dear Mr Fenton,

The first numbered point in bullet-point one of your 16th April response to my email of 14th April (below) reads,

I) Government has confirmed Ofcom is the "competent authority" referenced in the EECC (i.e. that it is Ofcom that is required to comply with the domestic legislation which implements the relevant provisions of the EECC)

EECC Recitals underpin the Articles that the EECC brings into European and UK law.

Recital 106 requires competent authorities to

'reconcile the environmental and public health considerations in question',

when mobile operators share towers or masts.

Local Planning Authorities (LPAs) are surely competent authorities for the purpose of Recital 106, and LPAs and Ofcom are required to act in accordance with Recital 110 recognising and acting in compliance with the

'need to ensure that citizens are not exposed to electromagnetic fields at a level harmful to public health is imperative'.

Recital 110 obligations apply irrespective of domestic legislation, and Ofcom is not a singular 'competent authority' referenced in the EECC.

Paragraph 1 of Article 1 of the EECC explains that the Directive EU 2018/1972

'establishes a harmonised framework for the regulation of electronic communications networks … it lays down tasks of national regulatory authorities and, where applicable, of other competent authorities, and establishes a set of procedures to ensure that the harmonised application of the regulatory framework …'.

Ofcom is the UK national regulatory authority. Articles 3, 4, 5 and 6 make reference to the dual roles and obligations of national regulatory authorities and other competent authorities. Article 3 concludes,

'Member states (including the UK as a signatory) shall ensure that the national regulatory and other competent authorities act impartially, objectively, transparently and in a non-discriminatory and proportionate manner'.

Surely, this obliges Ofcom and LPAs (and other authorities) to apply Recital 110 by making the public health provisions of the EECC 'imperative'.

The second numbered point in bullet-point one,

ii) 'our proposals to vary spectrum licences to require licensees to comply with ICNIRP guidelines is consistent with the UK obligations set out in the EECC',

are subject to:

Recital 106 requires 'taking due account of the precautionary approach set out in Council Recommendation 1999/519/EC',

Recital 110 requires 'having particular regard to the precautionary approach taken in Recommendation 1999/519/EC',

and

Article 45.2(h) requires the pursuit of 'consistency and predictability throughout the Union regarding the way the use of radio spectrum is authorised in protecting public health taking into account Recommendation 1999/519/EC'.

Solicitors acting for Public Health England explained (letter dated the 8th August 2019) how PHE guidance based on ICNIRP Guidelines should be taken into account in decision making,

'the guideline does not suggest that there is no risk of health effects from such radio waves but that such effects are unlikely below the recommended guideline levels. Further, the Guidance also states in the same section,

'with some of the larger and more powerful base stations, there can be regions around the antennas within which the Guideline levels can be exceeded. Operators identify the extent of any such regions and prevent access to them by the public (note: this is the same text that appears in the paragraph 5 of the current PHE 'Mobile phone base stations: radio waves and health' published in September 2020).

It follows, for the avoidance of doubt, that the conclusion from the Guidance is not that there is no risk of any potential adverse health affects from such masts, but that the risk is within acceptable tolerances where exposure levels are kept within the internationally accepted guideline levels or the public are ring-fenced and protected from those areas where the levels may been exceeded'.

PHE solicitors explained that,

'The guidance is not maintained and revised by PHE for the explicit purpose of any other body undertaking any other statutory function. IF in any context regard is had to the Guidance that is entirely a matter for the discretion of the relevant body and it must determine what weight to place on the Guidance given the clear indication as to the sources from which the advice and recommendations in the Guidance are derived. Equally, that body must determine what other evidence from … members of the public or interested parties to consider in making any decision'.

Making ICNIRP compliance a condition of spectrum users licencing, is only 'consistent with the UK obligations set out in the EECC' if it takes properly into account the consequences of relying on ICNIRP Guidance.

'In protecting public health taking into account Recommendation 1999/519/EC' (as required under Article 45.2(h) of the EECC), Ofcom would have to take into account contrary evidence, guidance, and argument. Ofcom would have to remain accountable for so doing. The policy will change the duty of care/liability that Ofcom must accept for the public health consequences of licencing decisions, and subsequent enforcement actions.

The point made in bullet-point two that:

'the Dispute Resolution Guidelines you refer to do not apply to complaints from individual consumers',

wrongly classifies me as a 'consumer', so paragraph 1.4 of the Guidance does not apply.

Under Section 51 of the Communications Act 2003 Act, 'Matters to which general conditions may relate', it is explained that,

'(1) Subject to sections 52 to 64, the only conditions that may be set under section 45 as general conditions are conditions falling within one or more of the following paragraphs

… including …

(f) conditions making such provision as OFCOM consider appropriate for securing the protection of public health by the prevention or avoidance of the exposure of individuals to electro-magnetic fields created in connection with the operation of electronic communications networks;

(g) conditions requiring compliance with relevant international standards'.

Given my status in respect to Section 51(f) of the Act, the effects of the EECC, and the 'specific circumstances' I reported to Ofcom on 24th March, when I asked in my 14th April email that Ofcom must now apply a Dispute Resolution Procedure (possibly using its Dispute Resolution Guidelines

https://www.ofcom.org.uk/__data/assets/pdf_file/0020/71624/guidelines.pdf),

and confirm that it is so doing under Annex 2 2 Ofcom's statutory duties and regulatory principles under Sections 3 and 4 of the 2003 Communications Act 2003, I was expecting that Ofcom establish a specific Alternative Dispute Resolution (ADR) Procedure to suit the circumstances that now prevail.

Can you confirm by 12.00pm tomorrow (Tuesday) that Ofcom will offer an appropriate ADR procedure that will secure a substantial investigation of my concerns and propose a remedy that meet my and my families needs under Section 51 (h) of the 2003 Act?.

The bottom line is, my family are members of the public who are now being told that we and our property will be subject to exposure levels not fit for the public. That has to be a serious problem and deserves a serious and full investigation and I'm just asking for it to be done properly through your ADR Procedure. Please help.

Many Thanks
(name withheld)'

A1.3.8 Mr Fenton's April 20th reply read:

'Sent: 20 April 2021 18:16
To: (name withheld)
Cc: mcdougall1 <mcdougall1@protonmail.com>
Subject: RE: EXTERNAL:Urgent CASE Number 01222143

Dear (name withheld),

We do understand your concern, and wish to provide you with reassurance on this matter.

As explained, Ofcom's Dispute Resolution Guidelines and procedures do not apply to your situation and we will therefore not be able to provide access to an ADR procedure.

Even though these Guidelines do not apply to your situation, we have raised your situation with EE. My understanding from them is that the upgrade to the site has not yet taken place. We will update you as soon as we have further information to share.

We would encourage you to bear with us while we discuss this with EE. In the meantime, there is nothing further we can add to what we have already said.

Kind regards

Martin Fenton'

A1.3.9 And, Mr Fenton further reported on the 7th May that:

From: Martin Fenton <Martin.Fenton@ofcom.org.uk>
Date: On Friday, May 7th, 2021 at 17:26
Subject: RE: EXTERNAL:Urgent CASE Number 01222143
To: (name withheld)
CC: mcdougall1 <mcdougall1@protonmail.com>

Dear (name withheld),

We have now had opportunity to discuss your case with MBNL who are responsible for the mast upgrade. We understand from them that the upgrade is not planned to take place until mid-2022.

They have confirmed that the vertical separation distance above the highest point of your garden is greater than 3 metres. NBML have explained that while the elevation diagram that you highlight on page 4 of your "Attachment 1 Summary of ICNIRP_Issues" document may appear to show the exclusion zone entering your garden at ground level, this is not actually the case. They have highlighted that a different projection (shown on page 10/13 of their ProX5 report) shows that there is actually vertical separation between the exclusion zone and your garden.

MBNL have also explained that, in calculating these exclusion zones, they have used worst case assumptions. For example, in taking account of other operators on the same site, they have assumed that these are operating on all owned frequency bands at maximum power. This means that in reality the vertical separation distance above the highest point of your garden is likely to be higher than what MBNL's worst case assumptions suggest. We are aware that using worst case assumptions is the standard procedure of mobile operators in these matters.

Based on the available information from MBNL, the planned upgrade appears to be compliant with the relevant levels in the ICNIRP Guidelines for the protection of the general public.

However, we recognise your concern about this matter and recognise that, while the planned upgrade appears to be compliant based on the available information, it is still the case that this mobile mast is in relatively close proximity to your property. On this occasion therefore, with your permission, we are willing to undertake (free of charge)

electromagnetic field (EMF) level measurements at your property to understand the current EMF levels in your garden, and we would then share the results of these measurements with you. We could then undertake further measurements once the planned upgrade goes live. This would allow us to understand the before and after EMF levels around your property and confirm that these are compliant with the ICNIRP Guidelines.

If you agree to this, I will arrange for a member of our measurement team to be in touch to arrange a suitable date for the first set of measurements.

Kind regards

Martin Fenton'

APPENDIX 2: Prevention of avoidable harm, injury, and nuisance

As background to this Schedule 8 paragraph 39(5) EUWA 2018 submission, for the purpose of verifying the claims that,

'public objections to proposed masts/antennas may be the only means through which LPAs/LAs are notified of evidence of harm, injury and nuisance caused by exposure to RFR, or of 'in situ' specific public health /environmental protection requirements drawn from valid science' (paragraph 1.7.5, above),

and that,

'EECC Article 45.2(h) requires a participating nation state (in the case of the UK) and EU Member States to,

'promote the harmonisation of use of the radio spectrum … in so doing, they shall act in accordance with … (a) to (g) …'

(where (a) to (g) are a series of obligations falling upon Ofcom as the UK national regulatory authority. Additionally, LPAs/LAs under their autonomous powers are required to grant or refuse general authorisations as EECC competent authorities, on behalf of the UK as a participating nation state)

… by, (h) pursuing consistency and predictability throughout the Union regarding the way the use of radio spectrum is authorised in protecting public health taking into account Recommendation 1999/519/EC' (paragraph 1.8.1, above),

to prevent avoidable harm, injury, and nuisance with public health being made imperative when decisions on the siting of masts/antennas/small cell deployment in compliance with EECC Recital 110 (paragraph 1.8.9, above) are made, this appendix presents specific evidence.

To perform as effective EECC competent authorities, LPAs/LAs:

A2.1 need to be informed about exclusion zones, and provided with exclusion zone diagrams

and,

A2.2 exclusion zone diagrams need to illustrate the public exclusion zones extending into adjacent buildings

Further, LPAs/LAs:

A2.3 need to be fully cognisant of risks to pregnant women and the foetus ((especially within an occupational exclusion zone)

A2.4 need to risk assess for microwave hearing

A2.5 need to assess simultaneous exposure from nearby masts, and identify interference 'hotspots'

A2.6 need to be provided with full specifications for 5G infrastructure

A2.7 need to risk assess against health protection claims made by telecommunication applicants/contracting companies

A2.8 need to be informed about the proportion of *'in situ'* 5G studies within the body of RFR research

A2.9 need to be informed that there is a section of the population not protected by ICNIRP exposure guidelines, ie those with metal and medical implants

and,

A2.10 need to acknowledge the existence of people with Electrohypersensitivity (EHS) disability.

A2.1 LPAs/LAs need to be informed about exclusion zones, and provided with exclusion zone diagrams

A2.1.1 Public health imperatives and the prevention of avoidable harm, injury, and nuisance will not be achieved unless LPAs/LAs are informed about exclusion zones and provided with exclusion zone diagrams, otherwise they will be unable to complete a risk assessment of the health impacts of mast/antennas siting and small cell deployment.

A2.1.2 A judicial review challenge was necessary to protect children at a school after objectors information about a possible public zone breach was presented and ignored, as a LPA made a decision concerning the siting of a mast.

A2.1.3 Brighton and Hove City Council (BHCC) conceded they did not assess the proximity of a school for application BGH2021/01639.

A2.1.4 The LPA were in possession of anticipated exclusion zones deduced from an equivalent installation submitted by objectors, but were not in possession of exclusion zone diagrams for the mast at the height originally proposed, nor the lower height mast subsequently proposed by the intended operator. The LPA would therefore not be able to assess the zones of exposure levels reaching the adjacent school, even if they had been issued with a second ICNIRP compliance certificate for the lowered height of the proposed mast.

A2.1.5 The LPA decision to approve the mast was quashed for the following reasons:

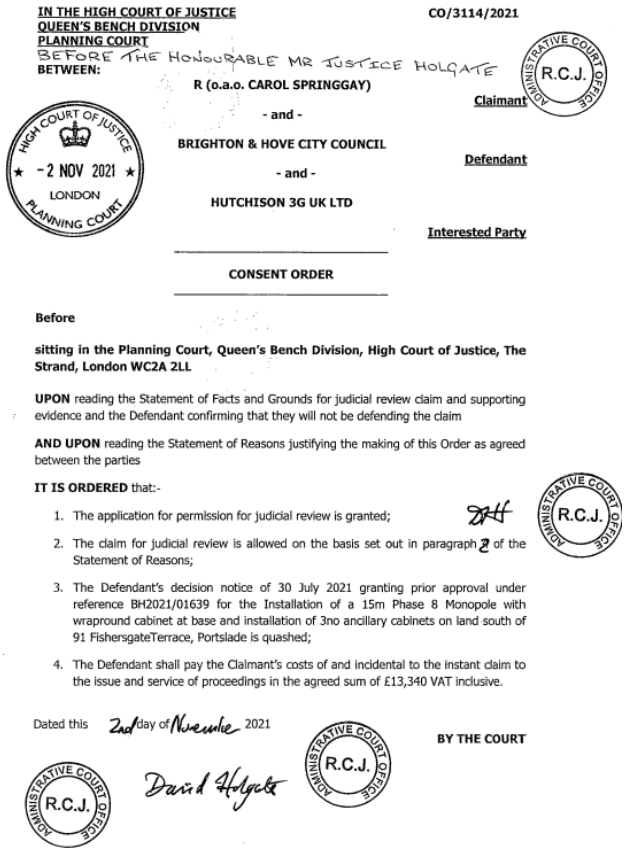
'(i) the Council unlawfully determined that the highway safety implications of the cabinets and the concerns expressed by the Council's highways team were not a relevant consideration;

(ii) the Council failed to address the health impacts of this particular proposal and to obtain adequate evidence of the assessment of the proximity to the school and the amended proposal;

and,

(iii) the Council failed to consider whether the facility could be sited on an existing building or structure, the Interested Party having failed to provide any evidence on that matter',

A2.1.6 The concession order quashed the approval as follows:



IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

CO/3114/2021

BEFORE THE HONOURABLE MR JUSTICE HOLGATE

BETWEEN:

R (o.a.o. CAROL SPRINGGAY)

Claimant

- and -

BRIGHTON & HOVE CITY COUNCIL

Defendant

- and -

HUTCHISON 3G UK LTD

Interested Party

CONSENT ORDER

Before

sitting in the Planning Court, Queen's Bench Division, High Court of Justice, The Strand, London WC2A 2LL

UPON reading the Statement of Facts and Grounds for judicial review claim and supporting evidence and the Defendant confirming that they will not be defending the claim

AND UPON reading the Statement of Reasons justifying the making of this Order as agreed between the parties

IT IS ORDERED that:-

1. The application for permission for judicial review is granted;
2. The claim for judicial review is allowed on the basis set out in paragraph 2 of the Statement of Reasons;
3. The Defendant's decision notice of 30 July 2021 granting prior approval under reference BH2021/01639 for the Installation of a 15m Phase 8 Monopole with wraparound cabinet at base and installation of 3no ancillary cabinets on land south of 91 FishersgateTerrace, Portslade is quashed;
4. The Defendant shall pay the Claimant's costs of and incidental to the instant claim to the issue and service of proceedings in the agreed sum of £13,340 VAT inclusive.

Dated this 2nd day of November 2021

BY THE COURT

David Holgate

HIGH COURT OF JUSTICE - 2 NOV 2021 - LONDON - PLANNING COURT

ADMINISTRATIVE COURT OFFICE R.C.J.

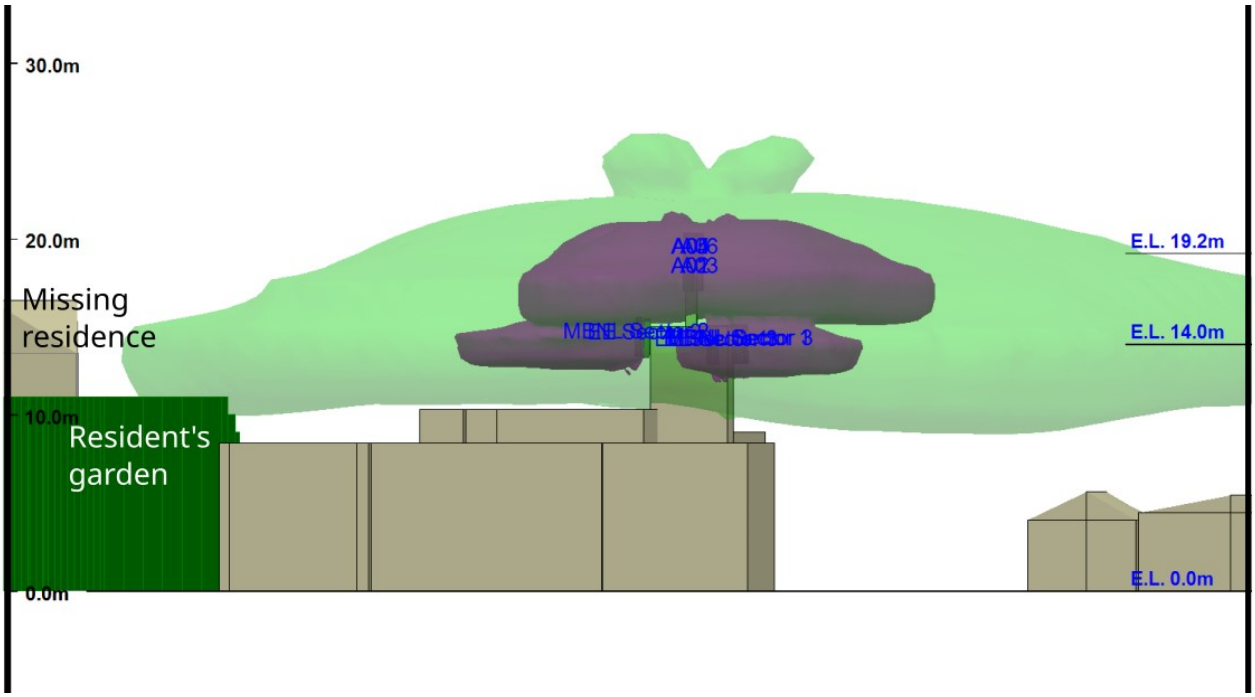
A2.2 Exclusion zone diagrams need to illustrate the public exclusion zones extending into adjacent buildings

A2.2.1 Public health imperatives and the prevention of avoidable harm, injury, and nuisance will not be achieved unless LPAs/LAs are provided with exclusion zone diagrams illustrating the public exclusion zones that extend into adjacent buildings rather than relying on the assumed validity of the ICNIRP compliance certificate which may fail to acknowledge a breached exclusion zone which a LPA/LA risk assessment should identify.

A2.2.2 BANES approved planning application 20/04924/FUL for a 5G mast with a house inside the public exclusion zone (see Appendix A1.3).

A2.2.3 The need for the proposal was justified on the basis that the masts/antennas would provide 5G coverage.

A2.2.4 The public exclusion zone was recalculated for 4G emissions when requested directly by the occupant of the engulfed residence. The diagram of the recalculated public exclusion zone in green below, was supplied to the resident who forwarded it to the LPA, but the diagrams were not posted on the planning portal. It is evident from this that even with the recalculation the public zone, it enters the garden of the resident's property.



A2.3 LPAs/LAs need to be fully cognisant of risks to pregnant women and the foetus ((especially within an occupational exclusion zone)

A2.3.1 LPAs need to be fully cognisant of the risk to pregnant women and be fully aware that ICNIRP exposure guidelines recommend that pregnant women are always outside of public exclusion zones. The foetus has to be

protected from all risk of harm, and proposed installations must be risk assessed accordingly.

A2.3.2 Ofcom's definition of 'worker' and compliance guidance, effectively allows telecommunication company applicants to design public zones into buildings, if it is deemed that only 'workers' as defined by Ofcom will occupy that space.

A2.3.3 Ofcom's *'Guidance on EMF Compliance and Enforcement'* - May 2021[20], states in paragraphs 4.4 and 4.5 that:

"4.4 Workers should already be protected from EMF exposure under pre-existing health and safety legislation5 – which falls under the remit of the Health and Safety Executive and the Department for Transport – including the following legislation specifically relating to EMF (as amended from time to time): The Control of Electromagnetic Fields at Work
Regulations 2016,6 The Control of Electromagnetic Fields at Work Regulations (Northern Ireland) 2016 and The Merchant Shipping (Health and Safety at Work) Electromagnetic Fields Regulations 2016.

4.5 All workers (regardless of whether or not they work in the radiocommunications industry) are occupationally-exposed individuals and are not members of the general public whilst they are working. This means that ***if a spectrum user has determined that the only individuals that may potentially be exposed to EMF in breach of the general public EMF limits are workers, the EMF condition will not require spectrum users to take any additional steps to comply with the general public EMF limits****. Where workers are exposed to EMF, their employer – whether a site owner, other licensee or otherwise – should already be taking appropriate steps to mitigate the risk of their exposure to EMF in accordance with pre-existing health and safety legislation."*

A2.3.4 However, ICNIRP's definition of those who can be exposed to occupational limits is at odds with Ofcom's definitions as stated in the '*Guidance on EMF Compliance and Enforcement*', above.

A2.3.5 ICNIRP specifies a pregnant women is always subject to public exposure limits, must be protected from occupational exposures, and must reside outside a public exclusion zone.

A2.3.6 ICNIRP 2020 guidelines state that:

'the guidelines differentiate between occupationally-exposed individuals and members of the general public.

Occupationally-exposed individuals are defined as adults who are exposed under controlled conditions associated with their occupational duties, trained to be aware of potential radiofrequency EMF risks and to employ appropriate harm-mitigation measures, ***and who have the sensory, and behavioral capacity for such awareness and harm-mitigation response.*** *An occupationally-exposed worker must also be subject to an appropriate health and safety program that provides the above information and protection. The general public is defined as individuals of all ages and of differing health statuses, which includes more vulnerable groups or individuals, and who may have no knowledge of or control over their exposure to EMFs. These differences suggest the need to include more stringent restrictions for the general public, as members of the general public would not be suitably trained to mitigate harm, or may not have the capacity to do so.*

Occupationally-exposed individuals are not deemed to be at greater risk than the general public, providing that appropriate screening and training is provided to account for all known risks. ***Note that a fetus is here defined as a member of the general public, regardless of exposure scenario, and is subject to the general public restriction'.***[21]

A2.3.7 LPAs/LAs need to screen against harm, injury and nuisance to pregnant women and the foetus, and thus be fully cognisant of the fact that she should never be exposed to occupational levels.

[20] https://www.ofcom.org.uk/__data/assets/pdf_file/0025/214459/guidance-emf-compliance-enforcement.pdf

[21] https://www.icnirp.org/cms/upload/publications/ICNIRPrfgdl2020.pdf

A2.3.8 LPAs/LAs should accept that potentially exposed individuals have differing ability to understand the risks and ensure that those who do not have the capacity to protect themselves, are not exposed to occupational levels as laid out by ICNIRP.

A2.4 LPAs/LAs must risk assess for microwave hearing/auditory effects

A2.4.1 LPAs do not risk assess for microwave hearing/auditory effects.

A2.4.2 The LPAs are not provided with information about the auditory effect limits as outlined in 1998 ICNIRP Guidleines(P,509) Table 4 basic Restrictions for time varying elecgtric and magnetic fields for frequencies up to 10GHz – see below.

Table 4. Basic restrictions for time varying electric and magnetic fields for frequencies up to 10 GHz.[a]

Exposure characteristics	Frequency range	Current density for head and trunk (mA m^{-2}) (rms)	Whole-body average SAR (W kg^{-1})	Localized SAR (head and trunk) (W kg^{-1})	Localized SAR (limbs) (W kg^{-1})
Occupational exposure	up to 1 Hz	40	—	—	—
	1–4 Hz	40/*f*	—	—	—
	4 Hz–1 kHz	10	—	—	—
	1–100 kHz	*f*/100	—	—	—
	100 kHz–10 MHz	*f*/100	0.4	10	20
	10 MHz–10 GHz	—	0.4	10	20
General public exposure	up to 1 Hz	8	—	—	—
	1–4 Hz	8/*f*	—	—	—
	4 Hz–1 kHz	2	—	—	—
	1–100 kHz	*f*/500	—	—	—
	100 kHz–10 MHz	*f*/500	0.08	2	4
	10 MHz–10 GHz	—	0.08	2	4

[a] Note:
1. *f* is the frequency in hertz.
2. Because of electrical inhomogeneity of the body, current densities should be averaged over a cross-section of 1 cm^2 perpendicular to the current direction.
3. For frequencies up to 100 kHz, peak current density values can be obtained by multiplying the rms value by $\sqrt{2}$ (~1.414). For pulses of duration t_p the equivalent frequency to apply in the basic restrictions should be calculated as $f = 1/(2t_p)$.
4. For frequencies up to 100 kHz and for pulsed magnetic fields, the maximum current density associated with the pulses can be calculated from the rise/fall times and the maximum rate of change of magnetic flux density. The induced current density can then be compared with the appropriate basic restriction.
5. All SAR values are to be averaged over any 6-min period.
6. Localized SAR averaging mass is any 10 g of contiguous tissue; the maximum SAR so obtained should be the value used for the estimation of exposure.
7. **For pulses of duration t_p the equivalent frequency to apply in the basic restrictions should be calculated as $f = 1/(2t_p)$. Additionally, for pulsed exposures in the frequency range 0.3 to 10 GHz and for localized exposure of the head, in order to limit or avoid auditory effects caused by thermoelastic expansion, an additional basic restriction is recommended. This is that the SA should not exceed 10 mJ kg^{-1} for workers and 2mJ kg^{-1} for the general public, averaged over 10 g tissue.**

They are unable to assess whether the operation of the proposed equipment is likely to breach the public auditory exposure limit (2mj/kg-1) set in both the European Council 1999/519/EC Recommendations and the ICNIRP 1t998 guideline. A compliance certificate is not complete unless this exposure limit is complied with. To date this is not being evidenced with any mast application. It is important that this type of public exposure is included in risk assessments as breaches of exposures to higher occupational sensory exposure limit (of 10mJ/kg-1), have been reported by Ofcom in public spaces (see Tables at paragraph A2.4.7, below).

A2.4.3 ICNIRP compliance certificates issued by telecommunications company applicants seeking requests for the authorisation of planned civil works/civil works for masts/antennas or small cell deployment do not reference compliance to the auditory/sensory limit. The LPAs/LAs are not informed what exposure levels result in 2mJ/kg-1 which is the public auditory limit defined in, ANNEX II, Table 1, Point 8 of the European Council 1999/519/EC Recommendations, and Table 4, Footnote 7 of in the ICNIRP 1998 guideline. LPAs/LAs are not provided with pre-application exposure levels in the locality subject to the proposed mast/small cell deployment. LPAs/LAs are

thus ill-equipped to assess the risks from any additional exposures, in particular with regard to microwave hearing/auditory effects.

Annex II, Table 1, Point 8 contains 'Auditory Effect Limits'

4. For frequencies up to 100 kHz, peak current density values can be obtained by multiplying the rms value by √2 (~1,414). For pulses of duration t_p the equivalent frequency to apply in the basic restrictions should be calculated as $f = 1/(2t_p)$.
5. For frequencies up to 100 kHz and for pulsed magnetic fields, the maximum current density associated with the pulses can be calculated from the rise/fall times and the maximum rate of change of magnetic flux density. The induced current density can then be compared with the appropriate basic restriction.
6. All SAR values are to be averaged over any six-minute period.
7. Localised SAR averaging mass is any 10g of contiguous tissue; the maximum SAR so obtained should be the value used for the estimation of exposure. These 10g of tissue are intended to be a mass of contiguous tissue with nearly homogeneous electrical properties. In specifying a contiguous mass of tissue, it is recognised that this concept can be used in computational dosimetry but may present difficulties for direct physical measurements. A simple geometry such as cubic tissue mass can be used provided that the calculated dosimetric quantities have conservative values relative to the exposure guidelines.
8. For pulses of duration t_p the equivalent frequency to apply in the basic restrictions should be calculated as $f = 1/(2t_p)$. Additionally, for pulsed exposures, in the frequency range 0,3 to 10 GHz and for localised exposure of the head, in order to limit and avoid auditory effects caused by thermoelastic expansion, an additional basic restriction is recommended. This is that the SA should not exceed 2mJ kg^{-1} averaged over 10 g of tissue.

A2.4.4 ICNIRP compliance certificates declare compliance with ICNIRP as expressed in European Council 1999/519/EU Recommendations, as in this example from planning application 21/1952/FUL (Mendip) demonstrates - see the three lines of print at bottom of the certificate:

Select: Three UK Limited, Star House, 20 Grenfell Road Maidenhead, SL6 1EH Phone: +44 (0)1628 765000

Select: Please select

Declaration of Conformity with ICNIRP Public Exposure Guidelines

Declares that the proposed equipment and installation as detailed in the attached planning / General Permitted Development Order application at:

Cell No: 79014

Cell Name: Grove Lane

Address: GROVE LANE
MARSTON TRADING ESTATE
FROME
SOMERSET
BA11 4BN

Drawing Number(s): 723000_MDP008_79014_BA0169_M001_H3G_GA_A

is designed to be in full compliance with the requirements of the radio frequency public exposure guidelines of the International Commission on Non-Ionizing Radiation Protection[1] as expressed in EU Council Recommendation 1999/519/EC of 12 July 1999 "on the limitation of exposure of the general public to electromagnetic fields (0 Hz to 300 GHz)".

A2.4.5 According to an expert's calculations, the public auditory exposure limit equates to approximately 50mw/m2, which equates to 0.5% of basic restriction limit (10 W/m^2). 50mW/m2 is approximately 4.34 V/m - - public exposure levels exceeding this limit have been recorded in some public locations.

A2.4.6 The expert *'Deduced Auditory Exposure Limit'* is as follows:

'Auditory Effect Limit Page 506 of 1998 ICNIRP guidelines advises that people with normal hearing can experience 'microwave hearing' and retinal damage from non-thermal levels of pulsed microwave signal exposure. On page 509 a basic restriction reference limit of 2mJ/kg-1 is documented. Page 506 also contains information about the signal energy levels required to cause a specific energy absorption (SA).

Signal Energy and SA extrapolation

When a 2.45Ghz signal with energy of 400mJ/m^2 generates an SA of 16mJ/kg-1 and a signal of 100mJ/m2 causes an SA of 4mJ/kg-1, by extrapolation we can say a signal of 250mJ/m^2 will generate an SA of 10mJ/kg-1, and a signal of 50mJ/m^2 results in an SA of 2mJ/kg-1.

See below:
When 400(mJ)=16 (SA) and 100(mJ)=4(SA), we can estimate the following: 400=16, 300=12, 200=8, 100=4, ergo 50(mJ)=2(SA) and 250(mJ)=10(SA)

Unit conversion – energy (mJ) to power/density (mW/m^2)

When converting units of measurement, a wireless signal travelling through free space with an energy of 1 millijoule per metre per second is said to have a power/density of 1mW/m^2.

Therefore from a power/density perspective, and using ICNIRPs' example, pulsed signals using 2.45Ghz spectrum with a power/density of circa 250mW/m^2 and 50mW/m2 will respectively generate SAs' of 10mJ/kg-1 and 2mJ/kg-1. 50mW/m2 equates to 4.34 V/m'.

A2.4.7 Readings above 50mW/m2 have been measured by Ofcom in Hatfield and Canary Wharf. Ofcom are failing their role as national regulator and as a competent authority under the EECC, by not reporting and mitigating these breaches. The on-street exposure levels in Hatfield breach the occupational auditory exposure limit, and this limit requires mitigation under the Control of Magnetic Fields at Work Regulations 2016.[22]

OFCOM EMF Survey February 2020 Canary Wharf Link London E14 04/02/2020

Location	Total (% of ICNIRP BASIC)	Sensory Occupational BREACH CEMFAW 2016	Auditory Public Breach (1998 ICNIRP & 1999/519/EU
1	.75494	-	X 1.5
2	.3610	-	-
3	1.49	-	Nearly x 3

OFCOM EMF Survey February 2020 Charing Cross Link London E14 05/02/2020

Location	Total (% of ICNIRP BASIC)	Sensory Occupational BREACH CEMFAW 2016	Auditory Public Breach (1998 ICNIRP & 1999/519/EU
1	.0263	-	-
2	.597	-	X 1
3	.029	-	-

OFCOM EMF Survey - Hatfield January 2022 Link

Location	Total (% of	Sensory	Auditory

[22] https://www.legislation.gov.uk/uksi/2016/588/pdfs/uksi_20160588_en.pdf

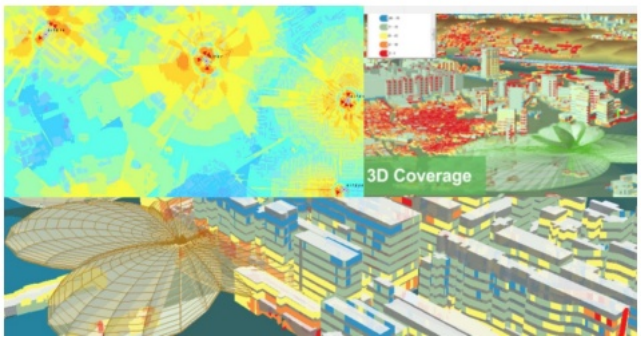
	ICNIRP BASIC)	Occupational BREACH CEMFAW 2016	Public Breach (1998 ICNIRP & 1999/519/EU
1	1.517	-	Over x 3
2	.5849	-	x1
3	7.6960	Over x 3	Over x15
4	5.1790	Over x 2	Over x10
5	.9951	-	Nearly double

A2.5 LPAs/LAs need to assess simultaneous exposure from nearby masts, and identify interference 'hotspots'

A2.5.1 LPAs fail to assess simultaneous exposure from nearby masts, and fail to identify 'hotspots'.

A2.5.2 LPAs are not currently provided information about hotspots by telecommunication companies involved in developing networks of masts, antennas and small cell deployments. James Lech from the International Advisory Committee (IAC) to the International EMF Project (the IAC is the steering committee to the WHO IEMF project) recommends that three D modelling of exposures are made available to LPAs/LAs[23] (page 34).

A2.5.3 An example of a simulation of exposure across a 3D terrain is included within the South Africa National Report of the 26th International EMF Project meeting in Geneva, Switzerland June 2022 (see page 34/44).



A2.5.4 James Lech, advises that technical data is required in a form that better enables public authorities tasked with determining mast siting applications to assess the need for coverage, and to identify exposure levels and *'localised hotspots'*. He states that localised hotspots can disrupt biological functions,

'the data and these visuals are required in order to accurately evaluate and ascertain areas of signal coverage but very important too what exposure levels of radiation could be permitted and/or the occurrence of localized hotspots that will disrupt the biological functions and order.

Note, evaluators of the images must take note of the figures, data and manner to which the graphic color coding is configured. Altering the visual grading of the data demonstrates increased likelihood of misinterpretation of the data by the user. This also includes if the user is viewing the data on a screen that is setup in an Energy-flux vs Photon-flux model. Without such information, the Committee, ICASA, researchers or City Health Officials when responding to a complaint are investigating an area similar to searching for a "needle in an enormous haystack. The information and simulation models allow efficient use of resources and rapid response time to said complaints.' (see page 34)

[23] https://figshare.com/articles/conference_contribution/World_Health_Organization_-_International_EMF_Project-International_Advisory_Committee_IAC_11th_anniversary_of_the_International_Optical_Radiation_and_26th_anniversary_of_EMF_Project_meeting_South_Africa_National_Report_2022/20012759

A2.5.5 The report includes an example where the mitigation of a hotspot resulted in improved plant growth within an apartment in Amsterdam (see page 10/44), so LPAs/LAs need to be cognisant that RF hotspots can cause less than optimal growth (being adverse 'environmental effects'), and include this in their risk assessment,

'RF transmitters and localised hotspots:
Intervention: redundant, and poorly positioned/configured WiFi transmitters are disconnected. Filtering mesh installed for residents in line-of site to cellular transmitter with high reflective zone parameters.
Outcome: micro-algae oxygen bars and indoor plants are growing more optimally and responding better to the Photon-flux model interventions.'

A2.5.6 If these 3D representations were provided by telecommunication company applicants/contactors it would be clearer to the LPA/LAs whether overlapping exposure has been accounted for in site-specific exclusion zones. In the absence of exclusion diagrams, and simulations of their impact/effects, LPA/LAs will remain unable to assess '*in situ*' risks objectively, nor definitively.

A2.5.7 Ofcom compliance guidance points out that the telecommunication companies should be able to show what steps they have taken to ensure compliance, including what if any assumptions they have made about overlapping and simultaneous transmissions, but this information about overlapping and simultaneous transmissions is rarely, if ever made available to LPAs/LAs, nor the public.

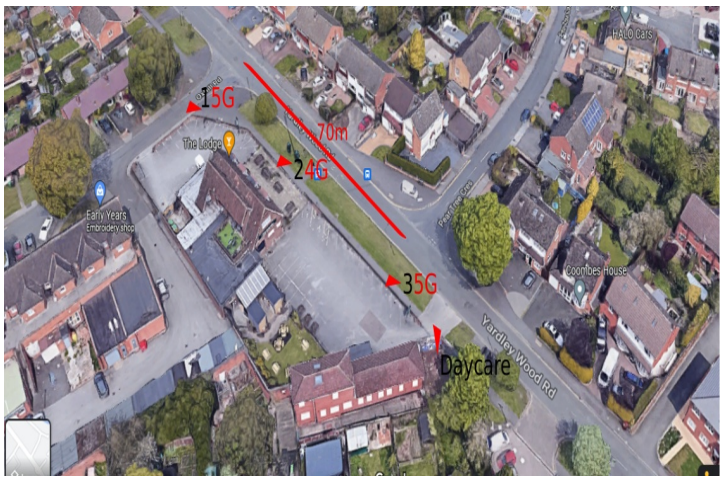
A2.5.8 Ofcom's May 2021[19] guidance states that:

'12.8 Spectrum users should have appropriate processes in place that will enable them to produce the type of evidence identified above in relation to each site on which they have radio equipment.

and that:

12.9 Spectrum users should also have appropriate processes in place that will enable them to:
a) Explain why they considered the steps they have taken to ensure compliance with the ICNIRP general public limits were appropriate for a particular site <u>including any assumptions they have made in relation to overlapping target coverage areas and simultaneous transmissions.'</u>

A2.5.9 Application PL/2022/1293/PN (Solihull MBC) is an example. The proposal was approved without the cumulative, simultaneous and overlapping transmission from an adjacent mast within 38m being evidenced.



A2.5.10 Application 23/02316/Y (Bristol CC) is another example of a proposed 5G mast in very close proximity to an existing mast, being just 22m from an existing 4G mast. The application contained no reference as to the existence of the pre-existing 4G mast, it was not drawn on the site plans or described in the site-specific

information document. Objectors informed the case officer and requested that the presence of the mast be included in risk reconciliation, both visually and in terms of health impacts. The LPA is unable to assess the health impact of the proposal when there is ambiguity about simultaneous emissions. It is highly likely that the 23/02316/Y applicant has not accounted for the pre-existing 4G mast, and that the proposal is not ICNIRP compliant despite the application having a signed ICNIRP certificate. As the exclusion zone for a 5G mast ranges from 17-50m it would overlap with the exclusion zone of the 4G mast, bringing the two masts into such close proximity where their dual operation is likely to create interference, with unknown public health consequences.

A2.6 LPAs/LA need to be provided with full specifications for 5G infrastructure

A2.6.1 LPAs/LAs are not informed about the specific 5G frequency and carrier frequency of proposed 5G infrastructure.

A2.6.2 James Lech (paragraph A2.5.2 above) states that LPAs/LAs being in receipt of a full dataset including the, frequency, transmitting power, network communications technology including *'modulation scheme and bit rate'* supports *'the balancing of advancing technologies with maintaining a balance on exposure to radiation to the public and environment'*.[23]

A2.6.3 The dataset being:-

1.1. Location XY coordinates.
1.2. Digital Terrain Model (DTM).
1.3. Building layer – shapes with heights.
1.4. Vegetation layer – shapes with heights.
1.5. Land use classification.
1.6. Height of the antenna above ground.
1.7. Antenna direction – azimuth and tilt.
1.8. Antenna model/radiation pattern.
1.9. Transmitting power.
1.10. Frequency/frequency band.
1.11. Bandwidth.
1.12. Network/communication technology.
1.13. Signal analysis extent or location of interest.

A2.6.4 The WHO 'South Africa -National Report' offers the following analogy:

'*We shall use the simple example of traffic law and by laws. Every vehicle within the municipality must be registered and be licensed. The operating of said vehicles requires the operator to have a license that must be renewed and updated regularly. Different zones have different operating requirements such as speed, emissions, weight class, noise etc…. There is a monitoring system through cameras, traffic inspector officials, and the public. Finally, there is enforcement in place through fines, inspections, confiscation and court appearances. Furthermore, outside parties can obtain access to verifying the operations of the standard and contribute to efficacy, enhancement and progressive development.*'

and as stated in section 1 paragraph **1.6.3, above,**

'…the municipalities purposefully do not meet the criteria to qualify as a standard but instead as a guideline'.

A2.6.5 The sole application of the ICNIRP guideline when LPAs/LAs issue general authorisations, together with Ofcom overseeing compliance with ICNIRP guidelin**es, ca**nnot be considered applying a standard, as neither the public nor the LPAs/LAs have access to the full dataset of specifications of 5G infrastructu**re;.** Neither the public nor the LPAs/LAs are able to verify ICNIRP compliance. As "third parties" they are not informed or enabled to identify 'hotspots', and are therefore not empowered to suggest alterations to configurations to mitigate adverse public health/environmental effects arising from them. (see Appendix A2.5, above).

A2.6.6 LPAs/LAs are not in receipt of this full dataset relevant to the '*in situ*' circumstances related to 5G mast antennas and small cell deployment proposals, and are unable to assess the relevance of 2021 and 2022 scientific reviews provided within comments to applications such as Karipidis et al, and Weller et al.

A2.6.7 In 2021 Karipidis et al, reviewed scientific studies of frequencies above 6GHz,
'*5G mobile networks and health-a state-of-the-science review of the research into low-level RF fields above 6 GHz*'[24]

A2.6.8 Weller et al. responded with an evaluation of the review in 2022[25], highlighting the missing consideration of modulation and carrier waves in the 5G research reviewed by Karipidis, as well as reporting significant problems pertinent to LPA/LA risk reconciliation and the application of precaution, stating that,

'examination of the Karipidis 5G health review reveals many errors in classification and analysis. Some are minor, and although indicating a lack of diligence, they have no substantial implications for the outcomes identified in the papers reviewed. Of much greater concern are the number of misstatements, misclassifications, and exclusions of important findings from sound research',

and that,

'not withstanding the fact that no studies have investigated specific 5G frequencies and modulations, does the Karipidis review stand up to scrutiny in providing assurances of safety (no evidence of harm) that industry is suggesting?

The analysis herein reveals that it does not'.

A2.6.9 This evidence was contrary to the argument made in the '*Mobile UK Briefing Note: 5G and Health*' issued frequently with mast applications being that,

'therefore, existing health risk assessments are valid independently of the wireless technology for the whole frequency range'.

A2.6.10 LPAs/LAs need to be informed of modulation, pulsation and transmission characteristics. These characteristics are part of the definition of 5G, and are required for the functioning of 5G, and are significant when assessing the risk to health and the environment from 5G infrastructure.

A2.6.11 Professor Lin reports in May 2023 '*RF Health Safety Limits and Recommendations [Health Matters]*'[26]

'*ICNIRP deleted its 1998 provision of pulse exposure limits from the revised 2020 guidelines. Consequently, there are no longer specific restrictions on pulse modulations of any kind in ICNIRP 2020. Note that time-averaged SAR over a 6-min period is inadequate to account for the unique characteristics of pulse modulations or to capture the effects of pulse-modulated exposures ….It is well known that the outcomes of experimental studies are affected by differences in RF parameters and exposure conditions'.*

A2.6.12 The International Commission on the Biological Effects of Electromagnetic Fields (ICBE-EMF) October 2022 paper '*Scientific evidence invalidates health assumptions underlying the FCC and ICNIRP exposure limit determinations for radiofrequency radiation: implications for 5G*'[27] states,

'the outcome of experimental studies can be affected by differences in exposure conditions, including the frequency, modulation, polarization, stray electromagnetic fields, local SAR, duration of exposure, and analytical methods.'

[24] https://www.nature.com/articles/s41370-021-00297-6
[25] https://www.nature.com/articles/s41370-022-00497-8
[26] https://ieeexplore.ieee.org/document/10121536?denied=
[27] https://icbe-emf.org/wp-content/uploads/2022/10/ICBE-EMF-paper-12940_2022_900_OnlinePDF_Patched-1.pdf

and,

'the impact of pulsed radiation on biological activities at the molecular or cellular levels is not taken into consideration with time-averaged dosimetry'.

A2.6.13 Where radiation is likely to affect CEMFAW Regulations risk assessments and LPAs/LAs are contemplating approval, a condition needs to attached to the approval to ensure that employers occupying adjacent buildings are informed of the full dataset of the proposal.

A2.7 LPAs/LAs need to risk assess against health protection claims made by telecommunications applicants/contracting companies

A2.7.1 A telecommunications company actively involved in 5G rollout across England and Wales consistently issue argument/evidence to LPAs in applications for the siting of new 5G activated masts/antennas claiming, for example, 2022/2710/PNT, Swansea, document *'Site specific supplementary information document 'SSSI and planning statement for SWS25402 street works'*[28]

states that,

'the very nature of installing new 5G mast infrastructure within … an urban setting requires a highly considered balance between the need to extend practical coverage reach with that of increasing risk of visual amenity intrusion',

arguing that,

'there is an acute need for a new base station to provide effective service coverage'.

A2.7.2 The telecommunication company applicant's focus on the aesthetics of the proposed mast, rather than the health impacts of involuntary public exposure to RFR and the impacts of exposure on biodiversity, species, and habitats, and is supported with *'technical information'* example *'5G health and network - briefing – copy'*[28] issued with application 2022/2710/PNT.

The applicant makes six primary claims:

Claim 1

'Although a substantial amount of research has been conducted in this area, there is no convincing evidence that RF field exposure below guideline levels causes effects in adults or children (United Kingdom Health Protection Agency (2012)', (Document '5G health and network - briefing – copy'[28]*).*

Claim 2

'*After reviewing the evidence,* ICNIRP *set guidelines to avoid excessive heating of the body and established the impact of exposure which can have detrimental effects. The ICNIRP guidelines apply to frequencies up to 300 GHz and cover exposures arising from new 5G base stations as well as from older technologies.'(Document '5G health and network - briefing – copy'*[28]*)*

Claim 3

'There have been many independent scientific reviews, and these have consistently concluded that the international guidelines are protective of all persons, including children' (Document '5G health and network - briefing – copy'[28]).

Claim 4

Re: 5G Networks '*Based on the transition from previous wireless technologies, we can expect that the overall exposure levels will remain relatively constant and well within the international exposure guidelines.' (Document '5G health and network - briefing – copy'*[28]*).*

[28] *https://property.swansea.gov.uk/online-applications/applicationDetails.do?activeTab=documents&keyVal=RLDZFDEVI0S00*

Claim 5

'the ICNIRP (International Commission on Non-Ionizing Radiation Protection) aims to protect people and the environment against adverse effects of non-ionizing radiation'. (Document 'SSSI and planning statement for SWS25402 street works'[28])

Claim 6

'the exposure guidelines in the UK have been developed by .. the ICNIRP … following a comprehensive assessment of all the peer-reviewed scientific literature, including thermal and non-thermal effects. The guidelines are based on evaluations of biological effects that have been established to have health consequences. The WHO recommends that countries adopt the ICNIRP guidelines'. (Document '5G health and network - briefing – copy'[28]).

A2.7.3 The six claims can be evaluated against contrary argument and evidence cited from the International Commission on the Biological Effects of Electro-frequency Radiation (ICBE-EMF) October 2022 Report '*Scientific evidence invalidates health assumptions underlying the FCC and ICNIRP exposure limit determinations for radiofrequency radiation: implications for 5G*'[27].

A2.7.4 **Claim 1** ***'Although a substantial amount of research has been conducted in this area, there is no convincing evidence that RF field exposure below guideline levels causes effects in adults or children (United Kingdom Health Protection Agency (2012)'.***

The ICBE-EMF asserts:

'adverse effects observed at exposures below the assumed threshold SAR include non-thermal induction of reactive oxygen species, DNA damage, cardiomyopathy, carcinogenicity, sperm damage, and neurological effects, including electromagnetic hypersensitivity. Also, multiple human studies have found statistically significant associations between RFR exposure and increased brain and thyroid cancer risk',

and reports that,

'more than 120 studies have demonstrated oxidative effects associated with exposure to low intensity RFR (Additional file 1: Appendix 1). DNA damage that has been reported in studies of RFR was most likely caused by induction of oxidative stress, which is a key characteristic of human carcinogens [88], rather than by direct ionization (Assumption 2). The generation of reactive oxygen species has also been linked to DNA damage and the carcinogenicity of UVA radiation [87] and asbestos[228]'.

A2.7.5 **Claim 2** ***'After reviewing the evidence,*** **ICNIRP** ***set guidelines to avoid excessive heating of the body and established the impact of exposure which can have detrimental effects. The ICNIRP guidelines apply to frequencies up to 300 GHz and cover exposures arising from new 5G base stations as well as from older technologies.'***

ICBE-EMF asserts to the contrary detailing four flawed assumptions being made by ICNIRP in section A of the report, '*A. Effects of RF radiation at exposures below the putative threshold SAR of 4 W/kg' under the heading: 'Assumptions underlying exposure limits for RF radiation and the scientific evidence demonstrating that these assumptions are not valid',*

as follows:

'Assumption 1) There is a threshold exposure for any adverse health effect caused by RF radiation; in the frequency range of 100 kHz to 6 GHz it is a whole-body exposure that exceeds an SAR of 4 W/kg. Any biological effect of RF radiation above the threshold exposure is due to tissue heating',

evidencing in relation to neurological, effects that:

'*many studies have reported changes in brain electrical activities in human subjects, measured by electroencephalography (EEG), including sleep disturbance from single exposures to cell phone RF radiation. This is not surprising since the nervous system transmits messages based on electrical signals generated by nerve cells'.*

'Assumption 2) RF radiation is incapable of causing DNA damage other than by heating; there is no mechanism for non-thermal DNA damage.'

evidencing that:

*'…**Numerous studies have been published on mutagenic effects of low intensity RF-EMFs, especially studies that identified increases in levels of a specific marker of oxidative DNA damage and a risk factor for cancer, 8-hydroxy-2'-deoxyguanosine (8-OHdG) [58, 60, 78–84]**. For example, the level of 8-OHdG in human spermatozoa was increased significantly after in vitro exposure for 16 hr. to 1.8 GHz at a power level of 2.8 W/kg and correlated with levels of ROS generation [58]. Likewise, exposure of quail embryos in ovo to GSM-modulated 900 MHz of 0.25 μW/cm 2 for 1.5, 5, or 10 days was sufficient to produce a significant, two-threefold, increase in 8-OHdG levels in embryonic cells [79]. Umbilical cord blood and placenta tissue samples obtained after delivery from women who used mobile phones during pregnancy had significantly higher levels of oxidative stress parameters, including 8-OHdG and malondialdehyde, compared to cord blood and placental tissue from women who did not use mobile phones during pregnancy [85]. **In addition, DNA damage, analysed by the comet assay, was increased significantly in cord blood lymphocytes obtained from women who used mobile phones during pregnancy compared to cord blood lymphocytes obtained from women who did not use mobile phones…**'.*

'Assumption 3) Two to seven exposures to RF radiation for up to 1 hour duration are sufficient to exclude adverse effects for any duration of exposure including chronic exposures,',

evidencing that:

*'… the acute behavioral exposure studies that served as the basis for exposure limits to RF radiation established by the FCC and ICNIRP are inadequate to identify and characterize adverse effects of RF radiation after longer exposure durations. **Neither the exposure limits established in the 1990s by the FCC [4] or by ICNIRP [9], nor those reaffirmed more recently by these groups [3, 5] address health risks associated with long-term exposure to RF radiation**…..'*

and,

'Assumption 4) No additional effects would occur from RF radiation with co-exposure to other environmental agents',

evidencing that:

'*Exposure limits based on exposure to only RF radiation will result in an underestimation of the true risk and inadequate protection of human health under conditions in which co-exposures to other toxic agents lead to synergistic adverse effects [104]*'.

A2.7.6 Claim 3 *'There have been many independent scientific reviews, and these have consistently concluded that the international guidelines are protective of all persons, including children' .*

First on **Claim 3**, the ICBE-EMF analysis addressing the flawed ICNIRP **Assumption 8)** that, *'there are no differences among individuals in their sensitivity to RF radiation-induced health effects'*, in section '*D. Individual variations in exposure and sensitivity to RF-EMF'*, presents to the contrary that,

'all life is "electrosensitive" to some degree as physiological processes are dependent on both subtle and substantial electromagnetic interactions at every level, from the molecular to the systemic. Responses to multiple types of electromagnetic exposure reveal that there is a far broader range of EMF sensitivity than previously assumed, and subgroups of extremely hypersensitive subjects exist (citing multiple sources of evidence). Given the adverse health effects noted in Assumption #1, including cardiomyopathy, carcinogenicity and neurological effects, the acute, conscious symptoms manifesting in some individuals should not be unexpected. The term currently and most frequently used within the medical profession to describe those who are acutely, symptomatically sensitive to non-ionizing radiation exposures is Electromagnetic Hypersensitivity (EHS)',

and that,

'EHS is a multisystem, physical response characterized by awareness and/or symptoms triggered by EMF exposures. Common symptoms include (but are not limited to) headaches, dizziness, sleep disturbance, heart palpitations, tinnitus, skin rashes, visual disturbance, sensory disturbance, and mood disturbance (citing evidence). *These symptoms are reported in response to even extremely low intensity (orders of magnitude below current safety levels) EMFs of multiple*

types (in terms of frequency, intensity and waveforms). Commonly noticed triggers of frequent and persistent EHS symptoms are pulse-modulated RF emissions, modulated at extremely low frequencies. Common triggering sources include mobile phones, DECT cordless landlines, Wi-Fi/Bluetooth-enabled computers, Wi-Fi routers, smart meters, base station antennas, and household electrical items. EMF avoidance/mitigation is found to be the most effective way to reduce symptoms (citing evidence)' …

and that,

'… while recognizing that some vulnerable groups may be more susceptible to effects of NIR exposure, ICNIRP (citing evidence) acknowledged that their guidelines may not safely accommodate these sensitive subgroups: "Different groups in a population may have differences in their ability to tolerate a particular NIR [Non-Ionizing Radiation] exposure. ***For example, children, the elderly, and some chronically ill people might have a lower tolerance for one or more forms of NIR exposure than the rest of the population …'.***

A2.7.7 Second on **Claim 3** the ICBE-EMF further report that,

'in 2020, ICNIRP also noted that biological effects are not easily discernible from adverse health effects, and that their guidelines … are not intended to protect against biological effects as such (when compensatory mechanisms are overwhelmed or exhausted), unless there is also an associated adverse health effect. ***However, it is not always easy to draw a clear distinction between biological and adverse health effects, and indeed this can vary depending on individual susceptibility to specific situations*** … (giving examples, hedged with the 'proviso' that) … *such perceptions may sometimes lead to discomfort and annoyance. ICNIRP does not consider discomfort and annoyance to be adverse health effects by themselves, but, in some cases, annoyance may lead to adverse health effects by compromising well-being.* ***The exposure circumstances under which discomfort and annoyance occur vary between individuals'****,*

and the ICBE-EMF assert that,

'trivializing "discomfort" which is the pre-cursor to pain is not in keeping with WHO recommendations quoted by the same ICNIRP document: "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." Discomfort is a sign that an organism is experiencing something which is compromising optimal health and although in some cases this can be trivial and reversible, in other cases it may not be reversed. ***There is an extremely broad range of both pain tolerance and also of pain perception among humans****, and to achieve meaningful preventative health care, "discomfort" must be taken seriously and mitigated whenever possible. This is especially true in this case where symptoms such as headaches are being reported in response to mobile phone exposures at the same time as increased brain tumour risk is noted from those same exposures (see Assumption 6)'*,

and that,

'in reality, people with EHS are reporting far more serious health disruption than "discomfort" or "annoyance" and in some cases these symptoms are disabling (citing evidence)*'.*

A2.7.7 Third on **Claim 3** regarding the telecommunications company's answer to the question: *'are children at greater risk'* states that,

'there have been many independent scientific reviews, and these have consistently concluded that the international guidelines are protective of all persons, <u>including children</u>',

and that,

'although a substantial amount of research has been conducted in this area, there is no convincing evidence that RF field exposure below guideline levels causes effects in adults <u>or children</u> (United Kingdom Health Protection Agency (2012))'.

This observation is contradicted by the ICBE-EMF conclusion that,

'since EMF penetration into human tissues can be in the order of a few centimetres, depending on the wavelength, the inner tissues in the brain clearly will receive a significantly higher dose in the smaller heads of children compared to adults … the thinner dimensions of children's skulls also contribute to this difference (citing evidence), resulting in a psSAR around 2-fold higher in children's brains (citing multiple sources of evidence) compared to adults … additionally, tissues of young mammals have higher conductivity and electrical permittivity than those of mature animals (citing evidence). This also contributes to greater EMF penetration and absorption … (and) … finally, it is

important to note that simulations of tissue dosimetry consider only the physical parameters of the tissues; they do not consider biological processes occurring in living tissues. While children are growing, developing organs and multi-organ systems are more susceptible to adverse effects of environmental agents … and … finite-difference time-domain (FDTD) simulations do not address differences in organ or system susceptibility for exposures occurring during child development',

drawn from the ICBE-EMF analysis addressing another flawed ICNIRP **Assumption 7),** being that, *'there are no differences among individuals, including children, in the absorption of RF-EMF and susceptibility to this radiation',* in section *'D. Individual variations in exposure and sensitivity to RF-EMF'.*

Further the ICBE-EMF explain that,

'differences between children and adults regarding the absorption of radiofrequency electromagnetic fields when mobile phones are operated close to the head have been demonstrated and widely documented (citing multiple sources of evidence). *The main factors accounting for these dissimilar absorption rates include differences in anatomy, tissue dielectric properties, and physiology. Through finite-difference time-domain (FDTD) simulations, employing detailed computational anthropomorphic models, it is possible to find differences relating to anatomy and to dimensions of the head'.*

Davis et al, subsequently published (February 2023) a peer reviewed scientific paper focussing specifically on '*Wireless technologies, non-ionizing electromagnetic fields and children: Identifying and reducing health risks'* [29] which included:

'Cell tower emission and ambient limits

As shown in fig 7 numerous countries such as India, Israel, Greece, China,[256] Russia and eastern European countries have RFR limits for cell tower network emissions that are much stricter than the limits of the US/FCC (although there is not always documented reliable monitoring or enforcement in every country). Australia, Japan, Italy and Switzerland have limits for areas such as schools and apartment buildings and areas where people spend several hours a day. Several governments, such as France, Israel, Greece and Switzerland have RFR measurement programs in place along with easy access to the data. For example, in France, the National Frequency Agency ANFR "Observatoire des Ondes"[257] posts online the RFR measurements taken numerous times a day in various major cities. Countries such as Greece and Israel have policies in place that specifically restrict the placement of cell towers near "sensitive areas" defined generally as schools and/or homes and hospitals and provide for online access to real-time radiation levels. Greece further restricts exposure to a stronger limit within 300 m of sensitive areas. Chile's "Antenna Law"[258] has established mitigation measures in areas with dense infrastructure and ***prohibits towers near "sensitive areas" defined as institutions serving children, the elderly, and the medically compromised.*** *Again, monitoring and enforcement are not reliably determined in many instances'.*

A2.7.8 Fourth on **Claim 3** the applicants offer comment on cancer causation in the *'5G health and network - briefing* – copy' as follows:

'Are RF signals a possible human carcinogen, and what does that mean?

In May 2011 a working group of the International Agency for Research on Cancer (IARC) classified RF electromagnetic fields as possibly carcinogenic to humans (Group 2B). The WHO explains that this is a category used when a causal association is considered credible, but when chance, bias or confounding cannot be ruled out with reasonable confidence…'

whereas ICBE-EMF states in their 'Abstract',

'Also, multiple human studies have found statistically significant associations between RFR exposure and increased brain and thyroid cancer risk',

and under the flawed ICNIRP *'Assumption 5) Health effects are dependent only on the time-averaged SAR value; carrier wave modulations, frequency, or pulsing do not matter except as they influence the SAR'.*

concluding:

[29] https://www.sciencedirect.com/science/article/pii/S1538544223000238?via%3Dihub

"Clearly selection and recall biases do not explain the elevated brain tumor risk associated with the use of mobile phones. Thus, epidemiological evidence contradicts the opinions of the FCC and ICNIRP on brain tumor risk from RF radiation"

ICBE-EMFsection *'Cardiomyopathy and carcinogenicity' reports:*

'A 3-day external peer-review of the NTP studies confirmed there was "clear evidence of carcinogenic activity" in male rats for heart schwannomas, and "some evidence of carcinogenic activity" for brain gliomas and adrenal gland tumors with exposure to either GSM- or CDMA-modulated RF radiation [21]. In addition, a lifetime study by the Ramazzini Institute reported a significant increase in heart schwannomas in male rats exposed 19 hour/day to 1800 MHz GSM-modulated RFR at a field strength of 50 V/m, equivalent to a whole-body SAR of 0.1 W/kg[22]. The incidence of heart Schwann cell hyperplasia was also increased in that exposure group. These findings are consistent with results from the NTP study and demonstrate that the proliferative effect of modulated RFR in heart Schwann cells is a reproducible finding that can occur at doses far below the assumed whole-body threshold SAR of 4 W/kg'

and

'ICNIRP [23] dismissed the evidence of carcinogenicity for RFR that was provided in the studies by the NTP [18] and the Ramazzini Institute [22] based on their ear-lier critique of those studies [24]. However, that critique demonstrated an unfortunate lack of understanding together with a misrepresentation of the design, conduct, and interpretation of experimental carcinogenicity studies in animal models [25], as well as a lack of appreciation for the remarkable concordance between the tumor responses observed in experimental animals with those identified in cancer epidemiology studies of mobile phone users described under Assumption #6. Neither heating effects nor thermal stress was likely causal of the adverse health effects observed in the NTP [18] study, since there was no tissue damage observed in a 28-day study at the same SARs, there was no significant effect on body weight during the 2-year study, and there were no exposure-related clinical observations that would indicate thermal or metabolic stress. Furthermore, a preliminary thermal pilot study demonstrated that body temperatures did not increase by more than 1 O C at the exposure levels used in the chronic studies [26], and there is no evidence that a small change in body temperature associated with the RFR exposures in the NTP study can cause the types of carcinogenic effects that were observed. The similar findings of GSM-modulated RFR on Schwann cells by the Ramazzini Institute [22] at much lower whole-body SARs confirm these effects to be independent of tissue heating.'

A2.7.9 **Claim 4** ***'Based on the transition from previous wireless technologies, we can expect that the overall exposure levels will remain relatively constant and well within the international exposure guidelines'***

Regarding 5G, and Claim 4 *'..., we can expect that the overall exposure levels will remain relatively constant and well within the international exposure guidelines…',*

ICBE-EMF provides contradictory statements in Section G *'5G (5th generation wireless)'* on the flawed ICNIRP *'Assumption 14) No health effects data are needed for exposures to 5G; safety is assumed because penetration is limited to the skin ('minimal body penetration')'*:

'Because millimeter waves do not penetrate solid structures such as building materials, hills, foliage, etc., and travel only short distances (a few hundred meters), denser networks of base-stations with massive Multiple Input/Multiple Output (MIMO) transmitters and receivers in millions of small cell towers are being installed on structures such as utility poles. ***These features can lead to much closer proximity between humans and radiation-emitting antennas, and thereby change individual peak and average exposures to RFR.'***

and,

'For a 5G frequency of 26 GHz, EMF absorption is very superficial, which means that for typical human skin, more than 86% of the incident power is absorbed within the first millimeter. The skin penetration depth was computed as 1 mm based on the electrical conductivity of the skin and its electrical permittivity [5, 207]. ***This is expected to bring the SAR in this tissue well above the recommended limits*** *([208], and Additional file 2: Appendix 2).'*

and,

'Although MMW are almost completely absorbed within 1–2 mm in biologically equivalent tissues, their effects may penetrate deeper in a live human body possibly by affecting signal transduction pathways. It is often claimed that because of its shallow penetration, exposure to high frequency 5G radiation is safe, and that the only effect is tissue heating[210]. ***However, this view ignores the deeper penetration of the ELF components of modulated***

RF signals, which are rated on the basis of heat alone, as well as the effects of short bursts of heat from pulsed signals *[211, 212]'*,

and,

'Because of its minimal penetration, exposure to 5G radiation results in higher energy intensity on the skin and other directly-exposed body parts, such as the eye cornea or lens. However, the skin, which is the largest organ in the human body, provides important functions such as acting as a protective physical and immunological barrier against mechanical injury, infection by pathogenic microorganisms, and entry of toxic substances. In addition, skin cancers, including basal cell carcinomas and squamous cell carcinomas, are the most prevalent human cancers, while melanomas are highly metastatic and increasing in prevalence. Although the high incidence of skin cancers are largely attributed to exposure to ultraviolet light, no studies have been reported on the effects of 5G radiation on (i) the skin's ability to provide protection from pathogenic microorganisms, (ii) the possible exacerbation of other skin diseases, (iii) promotion of sunlight-induced skin cancers, or (iv) initiation of skin cancer by itself'.

A2.7.10 **Claim 5 that, '*the ICNIRP (International Commission on Non-Ionizing Radiation Protection) aims to protect people and the environment against adverse effects of non-ionising radiation*'**

ICNIRP guidelines do not purport to secure environmental protection.

The ICBE-EMF conclude that,

'the lack of consideration of chronic low-level RF radiation exposure on wildlife could result in dangerously disruptive effects on fragile ecosystems and on the behaviour and survival of species that have long existed in Earth's natural environment',

after addressing the flawed ICNIRP **Assumption 13)**, being that, *'there is no concern for environmental effects of RF radiation or for effects on wildlife or household pets'*, in section *'F. Environmental exposure to RF radiation'*,

the ICBE-EMF report that,

'while background levels of RF-EMF are increasing in the environment, including rural remote areas (citing evidence), *neither the US Federal Communications Commission (FCC) nor the ICNIRP take into consideration effects of this radiation on wildlife. The constant movement of most wildlife species in and out of varying artificial EMF can result in high exposures near communication structures, especially for flying species such as birds and insects. There is a substantial amount of scientific literature on the disrupting effects of RFR on wildlife* (citing multiple sources of evidence)'.

A2.7.11 **Claim 6 '*the exposure guidelines in the UK have been developed by .. the ICNIRP ... following a comprehensive assessment of all the peer-reviewed scientific literature, including thermal and non-thermal effects. The guidelines are based on evaluations of biological effects that have been established to have health consequences. The WHO recommends that countries adopt the ICNIRP guidelines*'**

ICBE-EMF contrasts the claim in the 'Abstract' that the US Federal Communication Commission (FCC) and ICNIRP,

'exposure limits, which are based on false suppositions, do not adequately protect workers, children, hypersensitive individuals, and the general population from short-term or long-term RFR exposures. Thus, urgently needed are health protective exposure limits for humans and the environment. These limits must be based on scientific evidence rather than on erroneous assumptions, especially given the increasing worldwide exposures of people and the environment to RFR, including novel forms of radiation from 5G telecommunications for which there are no adequate health effects studies',

and concludes that:

'there are too many uncertainties with exposure to 5G to support an assumption of safety without adequate health effects data. There are no adequate studies on health effects from short-term or long-term exposures to 5G radiation in animal models or in humans' ,

and raises questions:

Will exposure to 5G radiation:

(i) compromise the skin's ability to provide protection from pathogenic microorganisms?

(ii) will it exacerbate the development of skin diseases?

(iii) will it increase the risk of sunlight-induced skin cancers?

(iv) will it increase the risk of damage to the lens or cornea?

(v) will it increase the risk of testicular damage?

(vi) will it exert deeper tissue effects either indirectly following effects on superficial structures or more directly due to deeper penetration of the ELF components of modulated RF signals? '

stating that:

'The assumption that 5G is safe at the power density limits recommended by ICNIRP (50 W/m2 and 10 W/ m2 averaged over 6 min for occupational and 30 min for public exposures, respectively) because of its minimal penetration into the body does not justify the dismissal of the need for health effects studies prior to implementing 5G networks.'

A2.7.12 Paragraph 19 of the European Council Recommendations 1999/519/EC specifically affords the LPAs/LAs the opportunity to include guidance from competent international organisations (paragraph 2.4.10, above),

'Member States should take note of progress made in scientific knowledge and technology with respect to non-ionising radiation protection, taking into account the aspect of precaution, and should provide for regular scrutiny and review with an assessment being made at regular intervals in the light of guidance issued by ***competent international organisations****, <u>such as</u> the International Commission on Non-Ionising Radiation Protection (ICNIRP)'.*

Thus, ICNIRP guidelines are not mandated for exclusive application.

A2.8 LPAs/LAs need to be informed about the proportion of *'in situ'* 5G studies within the body of RFR research

A2.8.1 The LPAs/LAs are not informed that of the

39,000 publications on electromagnetic fields,

587 concern papers on 5G,

of which,

20 were medical/biological studies (as of September 4, 2023),

but only,

5 studies tested exposures with 5G modulation (reference below).

2.8.2 Joel Moskowitz, Director Center for Family and Community Health School of Public Health, University of California, Berkeley, and Commissioner, International Commission for Biological effects of Electromagnetic Fields (ICBE-EMF), reports[30]:

'to date, little research has been published on the biological or health effects of 5G. According to EMF-Portal, an archive that contains more than 39,000 publications on electromagnetic fields, of the 587 papers published on "5G," only 20 were medical/biological studies (as of September 4, 2023). The 20 studies reported evidence of oxidative stress and adverse effects on the neuroendocrine system, the cardiovascular system, sleep quality, sperm quality, bone quality, gene expression, and sensorimotor responses. Most studies used animal models and short-term exposures to microwave radiation (especially continuous wave 3.5 GHz).

[30] https://www.saferemr.com/2017/09/5g-wireless-technology-is-5g-harmful-to.html

However, only five of the 20 studies actually tested the effects of 5G. The biologic and health effects associated with exposure to 5G radiation depend on more than just the carrier frequency. Although these 20 studies employed carrier frequencies used in 5G (e.g., 3.5 GHz, 27-28 GHz), only five studies tested exposures with 5G modulation. Moreover, only four of these studies had other 5G components (e.g., beamforming, massive MIMO) that are likely to affect the nature and extent of biological or health effects from exposure.

The five studies are Canovi et al., 2023; Hardell and Nilsson, 2023; Chu et al., 2023; Pustake et al., 2022; Perov et al., 2022.

Two 5G studies examined the effects of exposure to a 5G cell tower:

1) Hardell and Nilsson (2023)[31] *reported a case study in which a man and woman developed electromagnetic hypersensitivity (EHS) with neurological symptoms, headache, fatigue, insomnia, tinnitus, skin disorders, and blood pressure variability) after a 5G antenna was added to a 3G/4G cell tower on the roof of their apartment building. In addition, Nilsson and Hardell (2023) published a case study of two men who developed EHS after a 5G antenna was added to 3G/4G cell tower on the roof of their office.*

2) Perov et al. (2022) exposed male rats for four months to a 5G base station that transmitted at 3.6 GHz, 28 GHz, and 36 GHz

'the results suggest that exposure to multifrequency electromagnetic field simulating the effects of 5G systems affected functional activity of the hypothalamus-pituitary-adrenal axis and was stressful in nature.'[32]

A2.8.3 Additionally, Lennart Hardell and Tarmo Koppel in 2018 published, '*Electromagnetic hypersensitivity close to mobile phone base stations– a case study in Stockholm, Sweden*'[33] relating to 4G base station exposure.

'a previously healthy worker developed symptoms assigned to electromagnetic hypersensitivity (EHS) after moving to an office with exposure to high levels of anthropogenic electromagnetic fields (EMFs). These symptoms consisted of e.g. headache, arthralgia, tinnitus, dizziness, memory loss, fatigue, insomnia, transitory cardiovascular abnormalities, and skin lesions. Most of the symptoms were alleviated after 2 weeks sick leave. The highest radiofrequency (RF) field level at the working place was 1.72 V/m (7,852 $\mu W/m^2$). Maximum value for extremely low frequency electromagnetic field (ELF-EMF) from electric power at 50 Hz was measured to 285 nT (mean 241 nT). For electric train ELF-EMF at 16.7 Hz was measured to 383 nT (mean 76 nT). Exposure to EMFs at the working place could be the cause for developing EHS related symptoms. The association was strengthened by the symptom reduction outside the working place'.

A2.8.4 These studies are significant to LPA/LA risk reconciliation of base station emissions.

A2.8.5 The 2023 studies which utilise the 5G carrier waves, pulsed modulation and frequency post-date the ICNIRP 2020 guideline. LPA/LA decision making needs to take account of recent science (paragraph 1.5.9, above).

A2.9 LPAs/LAs need to be informed that there is a section of the population not protected by ICNIRP exposure guidelines, ie those with metal and medical implants

[31] https://www.anncaserep.com/abstract.php?aid=9589

[32] *Status of the Neuroendocrine System in Animals Chronically Exposed to Electromagnetic Fields of 5G Mobile Network Base Stations"(*Perov et al. 2023 https://pubmed.ncbi.nlm.nih.gov/36598666/ *)(Abstract page 1).*

[33] Electromagnetic hypersensitivity close to mobile phone base stations – a case study in Stockholm, Sweden https://www.degruyter.com/document/doi/10.1515/reveh-2021-0169/html

A2.9.1 The level of risk to people with metal implants and medical implants is beyond the scope of the ICNIRP guidelines. LPAs/LAs cannot screen to prevent avoidable harm, injury and nuisance arising from exposures to people with metal implants/medical devices because the level of risk is impossible to determine.

A2.9.2 The ICNIRP 2020 Statement of Principles, ICNIRP states:

'Indirect effects - Most health effects considered in non-ionizing radiation protection are direct effects. However, health effects can also arise from indirect pathways. For instance they may occur from an electric discharge arising from metallic objects charged by exposure to some types of non-ionizing radiation; these types of indirect effects are considered by ICNIRP. Other types are not, for example, heating of metallic objects in the body, such as prostheses, or an influence on the operation of medical devices such as pacemakers. ***The latter electromagnetic interference effects are of a technical nature and do not fall within the remit of ICNIRP'***[34]

A2.9.3 The ICNIRP 2020[35] guidelines states:-

'… However, some exposure scenarios are defined as outside the scope of these guidelines. Medical procedures may utilize EMFs, and metallic implants may alter or perturb EMFs in the body, which in turn can affect the body both directly (via direct interaction between field and tissue)…considers such exposure managed by qualified medical practitioners(i.e., to patients, carers and comforters, including, where relevant, fetuses), as well as the utilization of conducting materials for medical procedures, ***as beyond the scope of these guidelines*** *…'*

A2.9.4 ICNIRP 1998[36] states this:

'… Interference with pacemakers may occur at levels below the recommended reference levels. Advice on avoiding these problems is beyond the scope of the present document but is available elsewhere (UNEP/WHO/IRPA 1993)… '

A2.10 need to acknowledge the existence of people with Electrohypersensitivity (EHS) disability

A2.10.1 An increasing number of individuals are being disabled by their reaction to non-ionising radiation (NIR) below ICNIRP guideline exposure levels as evidenced in Magda Havas', '*Electrohypersensitivity (EHS) is an Environmentally-Induced Disability that Requires Immediate Attention' (2019)*[37]

'Each day the number of EHS sufferers increases: according to new estimates, between 3% and 5% of the population are electro-sensitive, meaning that some 13 million Europeans may suffer from this syndrome',

Some of those cases have been recognised legally here in the UK, for example:

- an Education Health Care Plan (EHCP) was awarded (July 2022) for a child on the basis of Electromagnetic Hypersensitivity (EHS) in August 2022 in the Upper Tribunal Court[38],

- a 59 year old social worker was awarded an 'early ill health retirement' for disabling 'Electromagnetic Hypersensitivity (EHS) in 15th June 2022. Claimant successfully wins Appeal for Universal Credit on the grounds of Electromagnetic Hypersensitivity (EHS),

and,

- a claimant was granted Universal Credit on the grounds of Electromagnetic Hypersensitivity (EHS) in January 2020.

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34 https://www.icnirp.org/cms/upload/publications/ICNIRPprinciples2020.pdf

35 https://www.icnirp.org/cms/upload/publications/ICNIRPrfgdl2020.pdf

36 https://www.icnirp.org/cms/upload/publications/ICNIRPemfgdl.pdf

37 http://www.e-discoverypublication.com/wp-content/uploads/2019/03/JSD18020-final.pdf

38 https://assets.publishing.service.gov.uk/media/62f3997ed3bf7f5c11330ea3/ua-2022-000328-hs__002_.pdf

Havas (2019 paper, above) reports that,

'The European Union (2009) Parliamentary Resolution (2008/2211(INI)) Point 28, "Calls on Member States to follow the example of Sweden and to recognise persons that suffer from electrohypersensitivity as being disabled so as to grant them adequate protections as well as equal opportunities.'

and that according to the World Health Organization,

'a disability is an impairment that may be cognitive, developmental, intellectual, mental, physical, sensory or some combination of these. It substantially affects a person's life activities and may be present from birth or occur during a person's lifetime. The EHS symptoms mentioned above include sensory disturbances, physical disturbances, cognitive impairment, and also intellectual, mental and developmental problems that are covered under the definition of disabilities',

and that,

'Sweden recognized persons with EHS as functionally impaired in 2000 [7]. In Sweden, accommodations are made for those with EHS'.

The screening for avoidable harm, injury, and nuisance needs to acknowledge and seek to accommodate the needs of people with EHS disability.