



Department  
for Culture  
Media & Sport

# A New Electronic Communications Code

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## Ministerial foreword – a Code for the 21<sup>st</sup> Century



The Electronic Communications Code regulates the relationship between electronic communications network operators and site providers in the UK. It underpins agreements to host and maintain communications apparatus on land and property.

The Government wants to reform the Code to put in place modern regulation which fully supports the rollout of digital communications infrastructure. This infrastructure is vitally important to citizens right across the UK, as digital communications become an ever more essential part of the economic and social fabric of this country.

Reforms are necessary to reflect the vast changes that have taken place in digital communications since the Code was first established in 1984. This sector has changed dramatically - both in terms of the development of new technologies and the demand for services. Networks are utterly different from those that existed more than 30 years ago. The new Code is designed to take account of these developments, and pave the way for future technological evolution in the coming decades. It will provide a robust platform to enable long-term investment and development of digital communications infrastructure in the 21<sup>st</sup> Century.

The Government acknowledges that there has been a profound shift over the last decade in the way citizens approach and access digital communications. What was once seen as a luxury is now a basic need, and people expect to have access to fast broadband at home, irrespective of where they live, and use their mobile devices anywhere they go.

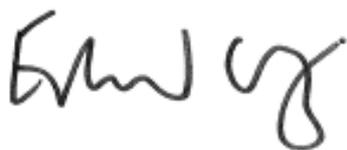
The telecommunications industry has presided over an enormous investment in network expansion and upgrades in recent years. To take the example of broadband, the average broadband speed is now 8 times faster than in 2008 and superfast coverage has grown from 45% in 2010 to 90% today. A similar transformation is underway in mobile, with an increase in UK data subscriptions from 33 million in 2011 to nearly 84 million in 2015, and 4G coverage now reaching 90% of all UK premises since it was launched towards the end of 2012. But despite these strides the need for more extensive coverage, better connectivity and faster services will continue to grow.

The new Code will vastly improve on the existing Code. It will make major reforms to the rights that communications providers have to access land - moving to a “no scheme” basis of valuation regime. This will ensure property owners will be fairly compensated for use of their land, but also explicitly acknowledge the economic value for all of society created from investment in digital infrastructure. In this respect, it will put digital communications infrastructure on a similar regime to utilities like electricity and water. This will help deliver the coverage that is needed, even in hard to reach areas.

The other reforms this Government is putting forward will also make it easier for communications providers to deploy and maintain their infrastructure. New rights to upgrade and share will allow future generations of technology to be quickly rolled out as they become commercially viable. There will also be administrative changes to court processes to allow for improved dispute resolution, ensuring that disagreements between communications providers and landowners do not hold up investment and create uncertainty.

These changes are just some of the highlights of the new Code. The overall package of reforms being put forward strikes the right balance of interests between site providers, communications providers and, most importantly, the public interest in ensuring communications services meet the needs of UK citizens in the digital era. The whole of the UK will benefit from the long-term reforms put in place by the new Code as investment in digital communications infrastructure is made easier, leading to a more sustainable, robust and technologically advanced physical network.

The reform of the Electronic Communications Code, therefore, forms a key pillar of the Government’s digital strategy. It builds on our reforms to the planning regime to support the mobile industry in their rapid rollout of 4G technology and helps the industry to meet their legally binding obligations to improve coverage across the UK. Moreover, this reform sits alongside and complements our commitment to deliver a universal service obligation for broadband, and the enormous progress we have made on the deployment of superfast broadband. Together, these policies demonstrate our unwavering commitment to a world class digital infrastructure that supports the UK as the world’s leading digital economy.



**Ed Vaizey**

**Minister of State for Culture and the Digital Economy**

## Executive summary

- i. There is overwhelming appetite for reform of the Electronic Communications Code. The current legislation has been in place for more than 30 years and has not kept pace with the evolution of digital communications technology and the demand for digital communications services. It is vital that the Government acts now to make changes that enable not just the efficient functioning of the land market for digital infrastructure, but also supports and sustains development of world class digital communications networks in the UK.
- ii. Following extensive consultation and wider engagement with stakeholders, the earlier work of the Law Commission, and development of an independent evidence base, the Government has decided to radically overhaul the Code. The new regime will be implemented through primary legislation as soon as possible, and marks a step change in the regulatory environment in which telecommunications companies operate. These changes will lead to better outcomes for those citizens that use both fixed and mobile digital communications, through increased investment and in-turn improved coverage and connectivity for all.
- iii. In this context the precise scope of the revised Code and what reforms it will introduce is critical. The Code provides for a series of rights which will be binding on site providers - there has been considerable debate on the definition of land within the Code, and in particular whether “apparatus” should be regulated under the new Code.
- iv. The Government received a number of responses on this issue, and there were strongly opposing views on all sides, suggesting the legal position under the current Code to be ambiguous. However, the original purpose of the Code was to allow access to land so that communications infrastructure could be installed rather than to allow access to the infrastructure itself. That rationale has not changed, and Government does not want to increase regulation and risk disruption of market incentives for investment in passive infrastructure. There is an existing and well understood legal framework in place to provide for access to apparatus in cases where there is significant market power and / or anti-competitive behaviour. As the UK’s independent regulator for telecommunications, Ofcom is responsible for ensuring effective competition in telecommunications markets. Given this, the Government will exclude apparatus from the scope of land within the Code and avoid “gold-plated” regulation.
- v. Recognising the ever more central role of digital communications in maintaining the UK’s economic competitiveness and helping people connect to each other, the new Code will make major changes to the way land is valued. There will be a

shift to a “no scheme” regime for valuing land. This will continue to ensure that landlords get fair payment for their land, but also explicitly acknowledges the economic and social value to all of society created from investment in digital infrastructure.

- vi. In this respect, communications providers in both fixed and mobile markets will have similar rights to utilities companies, reducing their rental expenditure and creating greater incentives for investment, including in areas where costs have previously been prohibitive. This will, of course, be a major change and we expect the communications providers to work closely with landowners to ensure a smooth transition to the new, more efficient and equitable system that puts the needs of UK consumers first.
- vii. There are a number of other areas in which the Code will make substantial reforms. Operators will have new automatic rights to upgrade and share. This will ensure that new technologies can be deployed efficiently as they come to the market, with communications providers safe in the knowledge that they cannot be charged extra for changes where there is minimal adverse visual impact or burden on site providers.
- viii. The new Code will also enshrine reassignment of Code rights. This means that as infrastructure assets are sold and acquired by communications providers, under infrastructure sharing arrangements for example, there will be no option for landlords to negotiate new terms for existing contracts. This change will support efficient use of assets across the communications sector.
- ix. There will be also be a policy to prevent “contracting out” of the Code. This will ensure that the Code underpins commercial negotiations at all times.
- x. After careful consideration Government has decided that Code rights will continue to apply to land when it is bought and sold, without any requirement to register those rights. New legislation will accordingly make similar provision to the Government’s understanding of paragraph 2(7) of the existing Code. We consider that the current arrangements in this area are sufficient, have worked effectively for more than 30 years, and do not require reform.
- xi. To enable smooth implementation of these long term reforms, the Government would like to see all stakeholder groups in the industry work together with Ofcom in the development of a robust Code of Practice.
- xii. The Government has also decided that the new Code rights will only apply to contracts signed after the law has come into effect, and will not apply to existing contracts retrospectively. Government intends to make transitional arrangements that will make clear how and when existing agreements transition to the provisions

of the new Code. This will enable a steady move to the new legal framework over the next 10 to 15 years as existing contracts come up for renewal, while simultaneously creating an incentive for new investment. The Government will keep the whole sector under close review as communications companies and landlords work together to implement the reforms.

- xiii. Building on these new policies, the new Code will also make a raft of practical administrative changes to support the smooth functioning of the legal framework. In addition to clearer, modernised drafting of the legislation itself, reforms will be made to ensure that disagreements between landlords and communications providers are resolved as effectively as possible.
- xiv. By moving the dispute resolution procedure from the ordinary courts to the specialist Tribunals, the speed at which Code rights can be enforced will increase. This will benefit all parties as disputes are resolved more swiftly and helps remove a barrier to investment.
- xv. To promote greater efficiency, the new Code will also contain provisions that allow fast interim access to sites for communications providers in appropriate circumstances. This will enable operators to access sites more quickly, even while valuation is still being resolved. Government does, however, have a clear policy to only introduce new powers of entry in exceptional circumstances. Having reviewed the evidence very carefully, it was decided that at present criminal penalties for denial of access and associated stronger powers of entry are not warranted.
- xvi. Taken together, this is a bold and ambitious set of reforms fit for a modern digital communications infrastructure in the 21<sup>st</sup> Century. Substantial adjustments will need to be made by all parts of the communications and land owning industries. The Government's assessment, approved by the independent Regulatory Policy Committee, and published alongside this document, conservatively estimates that the communications sector is likely to see benefits of £1 billion over a 20 year period, creating an environment significantly more conducive to investment.
- xvii. The new Code is a long term reform that will be the regulatory bedrock for the rapid and deep roll out of digital communications technologies for the foreseeable future. The new Code will radically reshape the legislative framework that underpins the communications sector, and will support the provision of world class infrastructure at the heart of the Government's digital strategy.

## Introduction

1. The Electronic Communications Code was enacted in the Telecommunications Act 1984 to provide a statutory basis for telephone companies to place landline telephone equipment on land. Prior to the Code, landline telephone equipment could generally only be placed on land with consent, and the Code focused on underpinning consensual commercial relationships with regulation.
2. Recognising changes in technology, the Code was extended in the Communications Act 2003 to encompass all electronic communications and not just telephony. It currently applies to the infrastructure networks which support fixed broadband connections to premises, mobile broadband, voice and text services, and cable television, as well as landlines. It has provided the legal framework for the rollout and maintenance of physical networks that support the provision of these electronic communications services across the UK.
3. The current Code, despite minor updates made in 2003, is over 30 years old and no longer fit to meet the needs of digital technology in the 21<sup>st</sup> Century. It has been criticised by both Code operators and site providers as outdated and lacking the clarity to properly and efficiently inform their commercial agreements. Moreover, many stakeholders have viewed the Code as an anachronism in a world where digital technologies are central to the economy and society. The Government agrees that reform is needed to increase and incentivise investment which will allow both greater coverage and better quality of service for consumers.
4. A new, modernised Code will vastly improve on the existing legislation, increasing clarity and bringing forward new policies that will support the provision of digital communications infrastructure across the UK. The legislative changes to Code reform will be taken forward in a Bill in Parliament at the earliest possible opportunity.
5. The Government has invested considerable time and effort in assembling a comprehensive evidence base on which the reforms brought forward in the new Code are based. There was a detailed public consultation which ran from 26 February 2015 to 30 April 2015 under the 2010-2015 Conservative and Liberal Democrat Coalition Government and generated 153 separate responses from a wide range of stakeholders. The consultation document is available on the gov.uk website:

<https://www.gov.uk/government/consultations/consultation-on-reforming-the-electronic-communications-code>

6. This consultation built on the Law Commission's extensive public consultation and review 2012-2013, which made a number of recommendations for improvements to the Code. The Law Commission's review is also available on the gov.uk website:

<http://www.lawcom.gov.uk/project/electronic-communications-code/>

7. In addition, between December 2015 and April 2016 DCMS also commissioned independent advice from telecommunication industry specialists Analysys Mason. They undertook a comprehensive quantitative and qualitative analysis as part of an evidence driven policy process focussed on the potential impact of Code reforms. Their final report is published alongside this document. DCMS had also previously commissioned independent advice from economic consultants Nordicity. They developed research that modelled the economic impacts of alternative regulatory regimes for wayleaves. Findings from this work were published in January 2014 and can be found on the gov.uk website:

<https://www.gov.uk/government/publications/modelling-the-economic-impacts-of-alternative-wayleave-regimes-the-nordicity-report>

8. This report sets out the Government's detailed response to its consultation on proposed measures to reform the Code, taking all of the evidence that has been accumulated through review, consultation and expert advice. The document summarises the views of stakeholders in each of the main areas where there has been strong interest or conflicting views. In each of these areas the document then sets out the Government's position, and the policies that will be taken forward through primary legislation. The Government's Impact Assessment, setting out the cumulative effect of the package of reforms put forward, is published alongside this document.

## **Stakeholder engagement**

9. The consultation invited representations from all stakeholders across the entire scope of the Code. The consultation document also highlighted specific technical areas that had been previously raised by stakeholders and which warranted more detailed consideration. These key areas are set out below, and considered in turn.
  - The definition of land and ownership of property: to provide an appropriate definition that takes into account the nature of the Code, its users, and provides legal certainty;
  - How consideration is to be determined: how the court is to adjudicate the level of payment that is to be made by Code operators when Code rights are imposed;

- Upgrading and sharing apparatus: to provide appropriate powers to upgrade and share to support network improvement and growth, taking into account the interests of all stakeholders;
- Contracting out of the revised Code: whether or not it should be possible for either party to unilaterally exclude themselves from some or all of the provisions in the Code through commercial arrangements;
- The role of land registration: how purchasers of land can find out if their acquisition is subject to Code rights, and whether Code rights should be subject to land registration;
- Transitional arrangements and retrospectivity: what provisions may be needed to ensure a clear and smooth transition to the revised Code, and how existing arrangements will be dealt with.

10. The consultation document also included draft legislation, accompanying explanatory notes, and impact assessment for a draft revised Code.

11. The consultation closed on 30 April 2015. It generated 153 responses from a wide range of respondents from the telecommunications industry, land and property owners, legal and valuation practitioners, public sector organisations such as agencies and Devolved Administrations, local authorities, consumer groups, academic organisations and individuals. The breakdown of responses by sector is as follows:

- 16 from the communications industry, representing mobile network operators, fixed line operators, wholesale infrastructure providers, and overarching membership organisations;
- 72 from land and property owners and representative organisations;
- 33 from legal and valuation practitioners who work with the Code;
- 16 from public sector organisations, including Agencies and local authorities;
- 4 from consumer groups;
- 4 from academic organisations and individuals;
- 8 from members of the public.

12. As part of the consultation process, DCMS officials held meetings with a range of stakeholders, particularly within the communications and landowner industries. DCMS also worked closely with other parts of Government and the wider public sector, as well as the Devolved Administrations. In addition, the Government sought independent expert advice on the impacts of potential reform from telecommunications consultants Analysys Mason.

13. Summaries of the key points made by stakeholders in relation to reform of the Code, and the Government's subsequent decisions on policy direction in these areas, are covered under the specific headings below.

## **Stakeholder views and the Government's position**

### ***The definition of land and ownership of property***

14. The February 2015 consultation focused on the “definition of land” contained in the Code. This is a fundamental concept for the Code, and underpins how the revised Code will work in practice. The Code provides for a series of rights which will bind site providers, so there has been considerable discussion around creating greater clarity within the revised Code on the definition of land and what exactly land encompasses.
15. A significant number of respondents cited the general principles of land law, as clarified by the Interpretation Act 1978, in that “land” includes earth together with buildings and fixed apparatus or structures in or over land. Several respondents questioned whether there was any need for the Code to provide a separate definition of land. Many felt that the definition set out under the general principles was clear and well understood by the industry. Others argued that the treatment of land under the Code departed from the general principles of land law and the Code therefore needed an explicit definition.
16. However, views diverged significantly when it came to discussion of whether under the general principles specific telecommunications apparatus should be defined as land. The debate here tended to centre on how far specific pieces of apparatus could be considered affixed to the land and, therefore, part of the land.
17. Government received a series of views each considering the different types of apparatus used. Some argued that underground conduits and ducting could be considered fixed apparatus and therefore land by virtue of the fact that they run through the ground. Others argued that cabinets for example which merely sit on land could not be considered fixed.
18. On the question of whether masts and poles could be considered annexed to the land, the views were mixed and the issue was debated on how easily either item could be removed. Several respondents agreed with the principle that a general definition that would deal with all apparatus would be difficult to establish and each case would have to be dealt with on its own merits.
19. The practical importance of discussions regarding what is considered land under the Code is highlighted in the debate on whether the Code provides for access to apparatus owned by independent infrastructure providers. This is an area where there has been ambiguity and the consultation confirmed that there did not seem to be a clear industry consensus. Both independent infrastructure providers and mobile network operators made very strong but opposing assertions - the former

arguing that apparatus is excluded from the current Code and should not be included in the new Code, and the latter holding entirely the opposite view.

20. A second issue of practical importance that arose was whether the general definition of land was appropriate with regard to the ownership of telecommunications apparatus. Many felt that it was important for the Code to make clear that apparatus remained the property of an Operator unless there was explicit agreement between both parties otherwise. Respondents felt this was necessary to ensure that operators could protect their property and site providers could require removal at the end of an agreement.

### **GOVERNMENT RESPONSE: DEFINITION OF LAND**

The Government has carefully considered all the views expressed on the issue of how land should be defined in the new Code, noting that key stakeholder groups have diametrically opposed views.

Since this consultation was issued over a year ago, stakeholders have had an opportunity to work together and put forward an industry led solution or compromise on this issue. However, no solution has been brought forward and put to the Government.

The Government has fully considered the consultation responses alongside further representations made after this consultation had closed, and worked to develop our evidence base. There are three key points of consideration:

- The Government recognises that there are a range of opinions regarding the definition of land under the existing Code. It also recognises that there are a range of interests in the definition of land that will be used in the new Code. It further notes that the courts have not had the opportunity to decide on the specific issue of whether the current Code provides for compulsory access to apparatus.
- The Government considers that the original purpose of the Code was to provide a legislative framework to enable access to land for the siting of communications infrastructure, not to enable access to the infrastructure itself. The basic rationale for the Code has not changed, and we do not want to disrupt market incentives for investment in passive infrastructure by establishing a legal framework to allow compulsory access and thereby subject the market to further regulation.
- The Government is clear that a legislative framework already exists for gaining access to communications infrastructure, should the market fail to provide this on a competitive basis. The EU Access Directive, implemented in the UK by the Communications Act 2003, provides a basis for regulated

access to electronic communications infrastructure, including in cases of significant market power. It is monitored and enforced by Ofcom; and no case relating to third party provision of passive infrastructure has to date been brought to the regulator.

Given this, we are not including apparatus within the definition of land in the new Code.

### ***How consideration is determined***

21. The Code underpins consensual agreements between Code operators and site providers by allowing the courts to impose Code rights where agreement cannot be reached. Code rights refer to a specified list of rights relevant to the installation and maintenance of apparatus on, over and under land. The Code also provides a mechanism for the valuation of, and payment for, these rights. This includes both simple compensation and the determination of consideration (or what price should be paid for these rights). Where parties cannot privately agree on the value of consideration they can apply to the courts for a decision.
22. The Law Commission considered the two payments that the Code provides for in its review. The draft Code the Government published with the consultation in February 2015 was broadly based on the Law Commission's final recommendations. The Government invited stakeholders to share their views on these changes, but also as an open consultation on Code reform generally, and subsequently received a range of responses about the basis for valuation. Many highlighted the inadequacy of the existing definition and the tendency towards unhelpful practices including the issue of "ransom rents". Views diverged on the extent of these practices and whether they amounted to a market failure.
23. The application of "market value", as put forward in the draft legislation set out alongside the Government's February 2015 consultation, received mixed views from respondents. Most legal and specialist practitioners saw the definition of "market value" set out in paragraph 23 as generally workable and helpful. Other stakeholders shared this view and argued that it was typical for valuers to be required to take a number of assumptions into account, for example in relation to rent reviews. More fundamentally, some were of the view that market value must include the two valuation assumptions, given that the policy intention of the revised Code was to allow operators to benefit from new automatic rights without paying additional rent.
24. This support for the application of "market value" was not universally held. Some expressed concern about the two new valuation assumptions put forward. Some

stakeholders opposed the proposed changes on a purely practical basis, for example, that exclusion of new automatic rights to assign, upgrade and share from valuation ran contrary to existing market practice. Other respondents focused on the argument that valuation should reflect the true value of the agreement and not exclude payment for any rights that are part of the agreement.

25. More broadly, some felt it was important not to make any changes to existing valuation procedures as they currently worked well in practice. Two respondents went even further to say that provisions from the Landlord and Tenant Act 1954 are “tried and tested” and, therefore, there is no reason why this could not be adopted by the revised Code. Some respondents from legal and specialist groups also suggested that the Code use the Royal Institution of Chartered Surveyors (RICS) Red Book definition of “market value”, as well as fully engaging the views of professional valuers.

26. However, some respondents felt that the provisions set out at paragraph 23 of the revised draft did not go far enough. Some asserted that the current market for “site rents” was distorted through a lack of supply-side competition in the provision of sites and this led to significantly inflated costs and the potential for charging “ransom rents”. In this context some respondents made a strong case that a move to a purely compensation based regime, or to valuation based on compulsory purchase principles was key to achieving greater investment and connectivity.

27. Reflecting on this position, several other respondents expressed concern about the disruptive impact that this could have on the market, and highlighted a risk of site providers withdrawing their property from the market. Some asserted that for the market to function site providers would have to continue to be paid at current market rates.

#### **GOVERNMENT RESPONSE: HOW CONSIDERATION IS TO BE DETERMINED**

The Law Commission considered the basis for valuation as part of their Review published in 2013 and ultimately recommended limited changes primarily to tackle the issue of “ransom rents”.

Following the DCMS public consultation in February 2015, the Government considered further the issue of payment of consideration and how it is assessed. We have heard several key representations about the significant improvements in network connectivity and coverage across the UK that could be achieved through reform of valuation under the Code, and have placed these into context alongside the other points that have been made to come to a balanced view.

We consider that it is right that site providers should continue to receive fair payment for the use of their land and that this should be in addition to simple compensation for any damage or loss of value to the land. However, the nature of digital communications has changed significantly since the Code was established as part of the Telecommunications Act 1984. Given the priority that this Government attaches to digital communications and long-term investment in UK infrastructure, and the ever more vital role that digital communications play in economic growth, productivity gains, and social interaction, we consider that reform must now go further.

It is quite clear that the cost for “rents” in the telecommunications industry are significantly higher than those enjoyed by utilities and providers of essential services. Government is also clear that site providers should get fair value for the use of their land, but considers that this should not, as a matter of principle, include a share of the economic value created by very high public demand for services that the operator provides.

The Government is therefore proposing that the revised code should limit the value of consideration by changing the basis of valuation to a “no scheme” rule that reflects the underlying value of the land. This is a rate that is more relevant to the nature of modern digital communications infrastructure rollout, and will work to encourage greater investment and improved network coverage.

### ***Upgrading and sharing apparatus***

28. Government considers that, given the rapidly evolving nature of the telecommunications technology, regular upgrading of electronic communications apparatus is essential. Upgrading to new generations of technology as fast as possible helps to maximise economic and social benefits from new digital services. In addition, greater sharing and consolidation of networks allows operators to make more effective use of sites across their portfolio, reducing their infrastructure footprint and cost base without impairing network provision.
29. The consultation sought views on three new automatic rights; to upgrade, share and assign Code rights.
30. Views on the introduction of automatic rights to upgrade, share and assign code rights were mixed. Many were supportive in principle of the new rights. However, it is important to note that not all respondents shared this view, and site providers in particular were very concerned about new rights that they would not be paid for and activity on their sites they would not have control over.

31. Some stakeholders were in favour of allowing sharing and upgrading, due to the potential positive impact on network investment and coverage. However, some of those in favour argued that the power as drafted in the legislation accompanying the Government's February 2015 consultation was not broad enough to have real impact because of some of the restrictive conditions.
32. Some called for greater flexibility for the right to be used in different ways on different sites. For example, on a greenfield site only occupied by one operator, there could be more flexible rights to make alterations to a site. This contrasts with rooftop sites, for instance, where rights might need to be limited to take account of the potential burden on a property owner from effects like extra loading. Further, some respondents felt that there should be no payment or consent for "like for like" changes. They went on to say that even upgrades that go beyond this restriction should be allowed without consent as long as there was adequate compensation for any burden caused. Some queried whether the new rights to upgrade and share aligned with responsibilities under the planning regime.
33. Of the respondents who supported automatic rights in principle, several expressed concern over the phrase "exclusive possession". The consensus was that this label was unnecessary and more appropriate to land than apparatus. Many queried the use of this term, whilst another suggested that for clarity the term "possession" should be extended to also include "use and occupation". Others argued that it created confusion over who could exercise the right and how. Equally, some respondents felt that the term "exclusive possession" did not accurately reflect how ownership worked in the market, with some apparatus "beneficially owned" by operators unilaterally or jointly.
34. As an extension of this point, some respondents queried other conditions set out to frame this Code right in the draft legislation published alongside the February 2015 consultation. Terms like "inconvenience", "additional burden" and "minimal adverse visual impact" were challenged as "ambiguous" and "subjective" with some suggesting greater clarity was required on exactly what they referred to.
35. Of those respondents who objected to automatic rights, many were concerned about the potential loss of earnings from sites and the loss of knowledge and / or control over access to their property. They suggested there could be a compound effect as automatic rights for sharing allow for more operators to be on a site. Any increase in requests for site access could create a greater burden on the site provider. As such most of those opposing these rights felt site providers should be adequately compensated for the inconvenience.

## GOVERNMENT RESPONSE:UPGRADING AND SHARING APPARATUS

The existing Code, while highlighting the importance of enabling sharing, does not provide operators with any automatic power to share or upgrade apparatus. The Government agrees with the Law Commission's conclusion that in principle there are some circumstances where it is appropriate for Code operators to upgrade and share apparatus in a way that is unlimited by contractual agreements.

Government will provide an automatic right for operators to upgrade and share apparatus without prior agreement or payment to site providers where there is minimal adverse visual impact. This change will play an important role in enabling operators to quickly update their networks when new technology becomes available, and help facilitate more efficient use of infrastructure through greater sharing. Both of these impacts are likely to have a positive influence on investment, and ultimately lead to a better outcomes for the consumer over time.

We have, however, considered all of the responses to our consultation and propose to make some adjustments to the provisions relating to upgrading and sharing as set out in the draft legislation that was published alongside the February 2015 consultation.

Firstly, the reference to "exclusive possession" will be removed from this Code right. We accept concerns about the practical application of this condition and how it might restrict sharing. Instead, the new revised provision will make clear that any operator on a site with Code rights will be able to exercise this automatic right.

Second, in order to address concerns about terms that could be perceived as too broad and subjective, the Government will remove the reference to "inconvenience" in the new power. Our assessment is that the remaining conditions including "adverse visual impact" and "additional burden" are required to provide adequate protection for site providers when operators exercise this new Code right.

### ***Contracting out of the revised Code***

36. The Code underpins consensual agreements negotiated freely between operators and site owners. Where agreement cannot be reached the Code gives these parties recourse to the court. Under the current Code there is some evidence that parties have sometimes attempted to "contract out" of the Code. This could involve a site provider seeking to be released from certain duties under the Code in order to have greater flexibility in the use of their land for example. However, this practice has the potential to undermine the effectiveness of the Code.

37. Views here were mixed. Some respondents felt that the new Code must expressly prohibit contracting out of its provisions as its purpose is to offer a clear structure that protects network equipment and infrastructure on land. This would also prevent “contracting out” becoming used more widely as a response to other reforms that benefit operators being brought forward in the new Code. They pointed out that while contracting out might be legitimate where it was freely agreed by both parties, in the reality of commercial negotiation operators were sometimes forced to relinquish their rights under the Code. In these cases the value of the Code was reduced in practice, and had a knock-on effect on the ability of the operator to maintain parts of their network, and reduced incentives for further investment.
38. Others played down this issue, and argued that where the two parties consensually agreed to relinquish rights that there should be no restriction for them to do so. Indeed, some expressed concern about the introduction of restrictions on contracting out and highlighted that the potential interference with their right to contract freely. Some suggested that having the flexibility to contract out could open up more sites to operators at cheaper rates if they chose to give up certain Code rights. Some went as far as to say that some site providers would only consider providing their sites to the market if there was the flexibility to contract out.
39. Specific issues with the prohibition of contracting out were raised in relation to the needs of the site provider. Of primary concern were rights for the operator to remain on a site after being served with a notice to quit. Some respondents were concerned that this restricted the ability of site providers to use their property flexibly.

#### **GOVERNMENT RESPONSE: CONTRACTING OUT OF THE REVISED CODE**

We have given careful consideration to all the views expressed by stakeholders on this issue. We recognise that there is a divergence of views as to whether there should be measures in the reformed Code on the ability to contract out. We also recognise that the existing Code is unclear on the flexibility to contract out.

The Government is bringing forward a new Code that makes significant policy changes in important areas in order to support investment in network growth and sustainability, and equip the UK with the best possible digital communications infrastructure. Given this, on balance, the Government considers that any attempts by one or more parties to gain advantage by circumventing the new Code’s provisions must be prohibited if the Code is to be truly effective. We will therefore make provision in the revised Code to prohibit the ability to contract out and stop parties making private agreements capable of excluding Code provisions.

### ***The role of land registration***

40. Protection of Code rights, particularly in ensuring that they bind successors in title to land is crucial to ensure the effective functioning of the Code. Also important is the principle that a purchaser of an interest in land, and others with a prospective interest in land (such as a mortgagee), should be able to discover what burdens and other rights (including Code rights), the land is subject to.
41. Paragraph 2(4) of the existing Code provides for Code rights to be binding on successors in title of the person who agreed to be bound, and to be binding on persons whose interests were derived from a bound interest. That the new Code will replicate these principles was uncontroversial, but there was some debate about the role of land registration in this context.
42. Paragraph 2(7) of the existing Code provides that such rights are not subject to land registration legislation. The Law Commission (in paragraph 2.115 of their report) considered that the meaning of paragraph 2(7) of the existing Code was not clear. In the Government's view, the intended meaning is that Code rights are binding on a purchaser in the same way as an interest in land, but without any additional requirement for land registration so that a failure to register would not prevent the code right binding a successor in title.
43. The Law Commission recommended the revised Code should, for England and Wales, make no special provision for registration of Code rights when they are included in leases, but otherwise (if Code rights were contained in an agreement other than a lease), the Code should provide that the rights will bind as if they were property rights, and that such interests should be "overriding interests" for the purposes of land registration.
44. The Government sought views on the understanding of what effect these recommendations would have, including in two particular areas:
- Code rights in a lease (subject to registration) which was not registered would not be binding on a successor in title;
  - Code rights in an agreement other than a lease would not need to be registered but would be binding on a successor in title as "overriding interests".
45. There were a wide range of views on this issue, and there was no consensus on the question of how Code rights should interact with land registration. Some respondents considered that the principles set out in paragraph 10 of the draft legislation accompanying the Government's February 2015 consultation were sufficient without the need for additional registration. Indeed, concerns were also expressed about any new duty to require registration of Code rights on land

because of the potential administrative burden it would place on operators. Many expressed concerns about the extremely large number of wayleaves already in place and the scale of the exercise to register them.

46. However, other stakeholders took a different view, and felt that to have Code rights that were binding without the additional requirement for registration would undermine the Land Registration Act 2002, and further that the approach should be consistent as Code rights can impact on valuation and redevelopment plans.
47. Views varied on the matter of whether Code rights should be treated as “overriding interests” and the potential disparity between the treatment of rights in leases and other agreements, and there was no clear consensus. Some felt that all Code rights should be treated as overriding interests regardless of the type of agreement, while others noted that Code rights as part of a lease should be excluded. Several others, however, were keen to see Government bring forward changes that created consistency and limited confusion, and some felt alignment with existing Land Registration Act 2002 was a helpful way to achieve this.

#### **GOVERNMENT RESPONSE: LAND REGISTRATION**

The Government gave careful consideration to all the views expressed. We consider that Code rights should be binding on successors without any requirement to register those rights. New legislation will accordingly make similar provision to the Government’s understanding (see above) of paragraph 2(7) of the existing code. We consider that the current arrangements in this area are sufficient, have worked effectively for more than 30 years, and do not require reform.

#### ***Retrospectivity and transition***

48. When it is brought into force, the new Code will repeal the existing Code. There is therefore a question as to whether the new Code will only apply to new contracts, or whether (and if so how) it should apply retrospectively to all agreements regardless of whether they were made under the old Code.
49. There were a range of views in this area, but there were some common themes that were shared across respondents. The majority felt that the revised Code should only apply to new contracts. Many taking this position argued that retrospective application would interfere with the right to contract freely, undermining the negotiations between the parties which took place before the existing Code agreements were completed. Others, while objecting to the

application of the new Code to existing agreements, were nonetheless keen to see existing contracts transition to the new Code at the earliest opportunity.

50. Of those who felt there should be some retrospective effect, many highlighted difficulties with the current Code that the new Code could address. They argued that retrospective application was needed for reforms to have full and immediate impact to address ongoing difficulties with the existing Code. In making this point, the standard length of contracts was highlighted, usually ranging between 10 and 15 years, but longer in some cases.

51. Some respondents who argued the case for retrospective application suggested that it could be limited to particular provisions of the new Code. Two particular suggestions came through strongly. The first was provisions for termination and modification of agreements and the rights to require removal which would clarify a complicated and problematic area of the current Code. The second was around new rights to upgrade and share which it was argued would be particularly important if the policy is to be truly effective for modernising the UK networks straight away.

#### **GOVERNMENT RESPONSE: RETROSPECTIVITY AND TRANSITION**

The Government has considered carefully the issue of retrospective application of new Code rights. While the responses to the consultation provide a clear set of contrasting views on retrospective application, the Government does not believe that the retrospective application of the new “no scheme” basis valuation can be justified given the significant impact and change this policy entails. The incentive to invest in new sites will be preserved, but savings on existing sites will be achieved over a much longer time period as existing contracts of different lengths come up for renewal.

In terms of a more limited retrospective application, the debate tended to focus around the new Code right to automatically upgrade and share. On this issue, Government received limited evidence from stakeholders on the impact that retrospective application would have on delivering real public benefit. This issue was looked at in more detail by Analysys Mason, who concluded the impact on cost savings is limited, and the consequent effect on investment and coverage is likely to be relatively small.

We have, therefore, concluded that the revised Code should only apply to new agreements. Government has not been sufficiently convinced that the public benefits of retrospective application are such that they outweigh interference with carefully negotiated arrangements made under the existing Code. We believe that

it is not practicable or appropriate for the revised Code to override existing arrangements because this would lead to uncertainty and disruption to the agreements which parties have sought to secure.

As new Code arrangements are made and the existing agreements come to an end, the existing Code will eventually become obsolete, over time. This will ensure for a steady phasing in of new Code rights, while preserving better investment incentives on new sites from day one. Government will however, bring forward a clear and robust set of transitional provisions to set out how and when existing agreements transition to the new Code. This will include how and when new administrative arrangements under the new Code such as the move from the ordinary courts, to specialist Tribunals, will apply to existing agreements.

## Next steps

52. The Government intends to take this ambitious package of reforms forward through primary legislation at the earliest possible opportunity, so that citizens can start to benefit from the increased investment in the UK's digital infrastructure that these reforms encourage.
53. Telecommunications is a reserved matter and the new Code will apply across the whole of the UK. The Government recognises, however, that the changes being made will have some impact on devolved matters such as land law and the judiciary. The Government will continue to work with the Devolved Administrations to ensure that proper consideration is given to the interaction of the Code in devolved areas of competence.
54. The Government will also support Ofcom as they work with stakeholders to establish a robust and clear Code of Practice that will help ensure a smooth transition to, and ongoing application of, the new Code.