

# Access To Land: Consultation On Changes To The Electronic Communications Code

## Response from Mobile UK

March 2020

### Introduction

1. Mobile UK, the trade body for the UK's mobile network operators EE/BT, O2, Three and Vodafone, welcomes the opportunity to respond to the Government's consultation on making changes to the Electronic Communications Code ('ECC').

### Summary Of Main Points

2. Mobile UK is a member of the Speed Up Britain (SUB) steering group. As such, we wish to be associated with SUB's technical responses to the questions posed in the consultation document.
3. The ECC is a fundamental piece of legislation that underpins all that the UK hopes to achieve through its digital infrastructure in terms of social inclusion, innovation, and economic growth.
4. The 2017 reforms were necessary, potentially beneficial and have had some impact. But the Code is not working as intended. Consequently, the rate at which code agreements are currently being struck is only a small fraction of that which is required to support the rollout and deliver on the Government's policy objectives.
5. Targeted legislative adjustments in some key areas will remedy the position: more clarity on upgrade and sharing rights and removal of inconsistency between different regimes for obtaining replacement code agreements on expiry of old leases. The regime should ensure both parties come to the table to negotiate terms in good faith.

### Mobile UK's Response

***The ECC is a fundamental piece of legislation that underpins all that the UK hopes to achieve through its digital infrastructure in terms of social inclusion, innovation, and economic growth.***

6. The changes to the ECC introduced in 2017 were a necessary and welcome reform and reflect the new reality that mobile connectivity is now regarded as an essential service for all.
7. The 2017 reforms placed digital infrastructure on a more equal footing to other essential services such as power and water, thus maximising resources for network investment and removing the premiums rentals that were driven by the demand for telecoms services, particularly mobile.
8. Since 2017, the Covid-19 pandemic has transformed the adoption of digital services – fixed and mobile – making it even more important for the ECC to work effectively.

9. For example, in August 2020, Mobile UK, in association with the British Chambers of Commerce, conducted a survey<sup>1</sup> in which they found:
  - Nearly 80 per cent of respondents expect to either maintain or increase their lockdown levels of mobile-network usage over the next 12 months.
  - Over two-thirds of firms have increased the usage of activities that utilise mobile networks.
  - 59 per cent of firms agreed that enhanced mobile coverage and data capacity would support their business to restart operations.
10. In a similar vein, the Institute of Directors' research<sup>2</sup> found that 74% of businesses would retain increased home working after the Covid-19 pandemic. ONS research also pointed out that home working can relieve strain on transport infrastructure during the commute, reduce pollution, etc.
11. There are also some more subtle effects. If work is no longer linked to an office, employers can recruit from anywhere in the country, and conversely, individuals are not limited to the pool of jobs in their neighbourhood. This has the potential to mitigate income disparities across the country. As the Prime Minister has put it, "previously left-behind towns can become homeworking hubs<sup>3</sup>". The possibility of working from home can also be particularly beneficial for those with disabilities, for whom the journey to a place of work may be burdensome or even impossible.
12. During the pandemic, mobile operators reconfigured their networks to cope with new demand patterns (as customers worked from home), continued to build out 5G and made a start on the Shared Rural Network programme.
13. As we emerge from lockdown restrictions, the UK's mobile operators will look to step up again investment in network rollout that will deliver enhanced economic growth across the country.
14. Data has been shared directly with the Government by the SUB members, which clearly shows the direct impact of the ECC not working as intended in terms of the difficulty in reaching code agreements and its effect on rollout and upgrades.
15. On the broader economic impact, the Government's entire strategy on 5G is predicated on it being a leader in 5G. Its estimate is that over ten years, an extra £173 billion of GDP<sup>4</sup> will be gained from executing a bold strategy for 5G – investing in research and development, investing in testbeds and applications (such as healthcare, factory automation and connected and autonomous cars).
16. The mobile operators must be able to build their networks at the required rate to grasp the 5G opportunity and build a strong Post-Covid economic recovery.

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<sup>1</sup> <https://www.mobileuk.org/news/bcc-and-mobile-uk-remove-barriers-to-improved-mobile-coverage-and-level-up-remote-working>

<sup>2</sup> <https://www.iod.com/news-campaigns/press-office/details/Home-working-here-to-stay-new-IoD-figures-suggest>

<sup>3</sup> HM Treasury, National Infrastructure Strategy, November 2020

<sup>4</sup> FCCG: UK strategy and plan for 5G & Digitisation - driving economic growth and productivity, page 3

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17. The 2017 reform was a complex project, and it has achieved much in resetting the role that digital services now play in our economy and society more widely. Lands Tribunal decisions have, for the most part, underpinned the Government’s policy intent on valuation, land charges have fallen, and this will undoubtedly be beneficial to consumers over the long term.

18. In other respects, the reforms have been less successful. The ECC would benefit from the targeted amendment in five critical areas, each of which currently causes significant delay in completing ECC agreements. Our suggestions are set out in full detail in the SUB technical response but are summarised below:

**a) Remove the financial disincentives to site providers from concluding renewal agreements:** Site providers continue to receive current rent under the existing contract while a new Code agreement is in discussion. These rents are typically significantly higher than those secured under the Code methodology. This acts as a disincentive to site providers to renew and often prolongs the renewal process. This delay prevents operators from achieving the financial benefits of the Code (which are critical to operators’ ability to re-invest in their networks) and is also forcing operators to pursue costly court proceedings to secure renewals.

The solution is to amend the Code so that interim rents can be agreed upon while negotiations are ongoing and can be backdated when agreements are finalised.

**b) Remove the inconsistencies between the different legislative regimes:** Certain tribunal decisions have created a multi-tier system for dealing with renewal agreements. One determined that a lease protected under the 1954 Act must be renewed under the 1954 Act regime and by the County Court<sup>5</sup>, rather than a Tribunal under the purpose-built mechanism provided by the Code. Another suggests that operators may be stuck perpetually in holdover under old Code agreements because they fail to reach the requirements for termination and grant of a new Code agreement under Part 5 of the Code<sup>6</sup>. With sites split roughly 50/50 between 1954 Act protected leases and Code leases, this has created a two-tier system for renewals. This result significantly increases the burden on operators in seeking to transition from old expired agreements to agreements regulated under the new Code regime.

This two-tier system is time-consuming, unclear for site providers and operators, and results in unnecessary legal fees for all parties. The solution is to provide for:

- A single system to be adopted across all mobile infrastructure sites.
- Operators being able to seek Code rights using Part 4 (paragraph 20) of the Code, which would have the effect of ending their 1954 Act rights.
- A presumption under paragraph 33 of the Code that the party should be

<sup>5</sup> Cornerstone V Ashloch, October 2019

<sup>6</sup> EE Ltd and Hutchison 3G Ltd v Duncan and ors

granted an order (on terms to be agreed or imposed) unless the party receiving the notice can establish that a different order should be made. In the case of a request to terminate and a new agreement take effect (para 33(d)), the Landowner should only be able to counter the order for replacement with a request for termination under paragraph 31. This would bring the procedure in line with the 1954 Act in England and Wales and make it clear there is a right to renew in Scotland.

- A provision for operator termination once the agreement has expired within paragraph 31 of the Code to make it clear that an operator can terminate and vacate the site.

**c) Ensure operators can use code rights to upgrade existing sites:** In light of tribunal decisions that have placed considerable ambiguity around operators' ability to secure additional in-term rights, there is significant risk that operators already on site have no statutory ability to secure critical additional rights during the term of an existing agreement under the Code. This poses a significant problem for the thousands of agreements that have several years left on their contractual terms. The Code must be amended to clarify that new Code rights can be added to subsisting agreements.

Unless there is reform, there is likely to be considerable difficulty securing the rollout of 5G or effective site sharing, with particular impact upon the Government's Shared Rural Network programme, at such sites.

**d) Clarify the Code's intention for the sharing and upgrading of sites:** Regular upgrading of electronic communications apparatus to new generations of technology is essential, while greater sharing and consolidation of networks among operators allows for the more effective use of sites and a reduction in infrastructure footprint and cost base.

Paragraph 17 of the Code (which does not apply to subsisting agreements) provides automatic statutory rights for operators to upgrade or share electronic communications apparatus, subject to two restrictive conditions. If these conditions are not met, the operator must seek the consent of the site provider. 5G upgrades often require installing different antennas to those that are typically installed at existing sites.

However, due to ambiguous text in the Code, site providers believe they can restrict operators' rights to share and/or upgrade equipment. This, despite the clear stance adopted by the Law Commission that broader rights could be sought by agreement or from the tribunal if terms or payment could not be agreed between the parties.

The solution is to remove the ambiguity within the legislation to clarify that operators may obtain rights under the Code to share and upgrade apparatus and the communications site to a greater extent than is permitted by paragraph 17.

**e) Give equal importance to the conclusion of new site and renewal agreements:** Securing a renewal agreement is expected to be simpler and quicker than securing an agreement for a new site, as the mobile equipment is already in place. However, in practice, it is taking significantly longer. Provisions in the Code, and a decision by the Ministry of Justice, means that applications relating to new sites are prioritised at the

expense of vital renewal agreements.

The result is that operators' route to upgrading sites to facilitate 5G, securing effective sharing arrangements, and generally enjoy the full complement of Code rights can take in excess of 18 months when litigation is involved (presuming the absence of any appeals thereafter). The solution is to:

- More closely align the procedure for renewals under the Code with the equivalent mechanism provided for by the Landlord and Tenant Act 1954, which allows for proceedings to be commenced two months after the service of the statutory notice.
- Amend the Electronic Communications and Wireless Telegraphy Regulations 2011 so that the tribunal is obliged to resolve renewals within six months of the commencement of litigation.

## Conclusion

19. In conclusion, the UK faces a mammoth task in staging an economic recovery in the aftermath of Covid-19. Investment in digital infrastructure will provide the cornerstone of such a recovery, particularly in response to changes in working habits and lifestyles brought on by the pandemic. Mobile operators have demonstrated their commitment to improvement to both 4G and 5G coverage. What is now needed is an effective Code to enable rollout at the required pace.