



Department  
for Culture  
Media & Sport

# Reforming the Electronic Communications Code

Consultation Document

26 February 2015



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# Ministerial Foreword

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Access to electronic communications is increasingly seen as an essential service rather than a luxury. Digital services play a central role in our economy and society, enabling both citizens and businesses to thrive.

The growth in consumer demand for digital services relies on a sustainable and robust network of infrastructure – from fibre-optic cables and copper wire to wireless antennae and masts. In order for this infrastructure to be rolled-out, it needs a modern, clear, and relevant legal framework.

My aim is to reform the current Electronic Communications Code in ways that will promote network connectivity, expand coverage and take into account the legitimate interests of all parties. Beyond this, through enabling the rollout of infrastructure, Code reform will provide more consumers across the country with a range of high-quality digital services.

Code reform is vital. We need a Code that works for the 21st century and that supports the provision of electronic communications services well into the future. And I want to make sure that we hear the views of as many people as possible on what that Code should look like.

A handwritten signature in black ink, appearing to read 'S. Javid', with a small flourish at the end.

**Rt Hon Sajid Javid MP**  
Secretary of State for Culture, Media and Sport

# Scope of the consultation

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1. This is a public consultation. We particularly seek views from those who use and are affected by the Electronic Communications Code.
2. The consultation period will run for 9 weeks from 26 February to 30 April 2015.
3. Please respond before the closing date. There is a summary of questions at page 25.
4. Please send responses to [ECCconsultation@culture.gov.uk](mailto:ECCconsultation@culture.gov.uk). Responses sent to any other inbox will not be taken into consideration. If you do not have access to email, please respond to:

Electronic Communications Code consultation  
Telecoms team  
Department for Culture, Media & Sport,  
100 Parliament Street  
London, SW1A 2BQ

5. This consultation is intended to be an entirely written exercise but we reserve the right to follow up any responses to seek further information.
6. Please contact the Electronic Communications Code team on 020 7211 6000 (or [ECCconsultation@culture.gov.uk](mailto:ECCconsultation@culture.gov.uk)) if you require any other format e.g. Braille, Large Font or Audio.
7. For enquiries about the handling of this consultation please contact the Department for Culture, Media & Sport Correspondence Team at the above address or email [enquiries@culture.gov.uk](mailto:enquiries@culture.gov.uk) heading your communication 'Electronic Communications Code consultation'.
8. Copies of responses may be published after the consultation closing date on the Department's website: [www.gov.uk/government/organisations/department-for-culture-media-sport](http://www.gov.uk/government/organisations/department-for-culture-media-sport)
9. Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with access to information regimes (these are primarily the Freedom of Information Act 2000 ('FOIA'), the Data Protection Act 1998 ('DPA') and the Environmental Information Regulations 2004).
10. If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard

the information you have provided as confidential. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

11. The Department will process your personal data in accordance with the DPA, and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.
12. This consultation follows the Government's Consultation Principles 2013 which is available at: <https://www.gov.uk/government/publications/consultation-principles-guidance>

# Introduction

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14. This consultation is about the Electronic Communications Code (“the Code”). It is likely to be of particular interest to electronic communication network operators and those who provide sites for electronic communications apparatus.
15. The Code regulates the relationship between electronic communications network operators (known as “Code operators”) and site providers. It provides the legal framework for the rollout and maintenance of the physical networks of apparatus that support the provision of electronic communications services throughout the United Kingdom.
16. Since the enactment of the Code in 1984, the telecommunications sector has changed almost beyond recognition. Now, more than 100 entities are Code operators – reflecting the proliferation of digital services, the huge growth in customer demand, and the wide-ranging and increasingly important role that telecommunications plays in all areas of our economy and society.
17. The existing Code is out-of-date, and lacks the clarity to inform the agreements between Code operators and site providers that enable and sustain networks. The Code is an important piece of legislation, and it is crucial that it is effective for all stakeholders who are affected by it.
18. The existing Code extends to the whole of the UK, and the new Code will be similarly applicable. In relation to Scotland, telecommunications is a reserved matter under paragraph C10 of Part II of Schedule 5 to the Scotland Act 1998. In relation to Northern Ireland, telecommunications is a reserved matter under paragraph 29 of Schedule 3 to the Northern Ireland Act 1998.
19. In 2011, the Government asked the Law Commission for England and Wales to carry out a review and make recommendations to Government on reforming the Code. Following an extensive consultation with a wide range of stakeholders, the Law Commission published its report in February 2013 – featuring a series of balanced recommendations for Code reform<sup>1</sup>.
20. On 18 December 2014, Government announced its intention to table a revised Code as an amendment to the then Infrastructure Bill (now the Infrastructure Act 2015) – substantially based on the Law Commission’s recommendations. This was tabled on 8 January 2015. Following representations from stakeholders on specific technical

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<sup>1</sup> The Law Commission consultation can be found at this link: <http://lawcommission.justice.gov.uk/areas/electronic-communications-code.htm>

issues related to its practical application, it was withdrawn from the Bill on 26 January 2015 and the decision was taken to consult further, in particular on the issues raised by stakeholders.

21. Government's key objective remains to provide a modern and robust legal framework for the rollout of electronic communications apparatus. In order to develop a Code that ensures connectivity, expands mobile coverage, and takes into account the interests of all parties, it is important to seek further views from those who use, rely on and are affected by the Code.
22. This Consultation therefore invites submissions on all areas within the scope of the Code. However, we invite specific responses on the following areas:
  - a. **The definition of land and ownership of property:** to provide an appropriate definition that takes into account the nature of the Code and its users and provides legal certainty.
  - b. **How consideration is to be determined:** how the court is to assess the level of payment that is to be made by Code operators when Code Rights are imposed.
  - c. **Upgrading and sharing apparatus:** to provide appropriate powers to upgrade and share which are effective in supporting network connectivity and coverage expansion and take into account the interests of all stakeholders.
  - d. **Contracting out of the revised Code:** whether or not it should be possible to contract out of the Code.
  - e. **The role of land registration:** how purchasers of land are able to find out if the land is subject to Code rights, whether any Code rights should be subject to land registration and, if so, what the consequences should be of failing to register them should be.
  - f. **Transitional arrangements, savings and retrospectivity:** what provisions may be required to ensure a clear transition to the revised Code and how existing arrangements will be dealt with.
23. This consultation asks a broad range of questions on these themes. There is no obligation to answer all the questions and respondents are free to answer only those on which they have a view. Equally, respondents may provide views on other areas of the revised Code that go beyond the questions or areas set out below.
24. In particular, given developments in electronic communications will continue at a fast pace, we would also welcome any views on whether, in the context of the revised Code overall, the provisions are sufficient to allow for innovations in how apparatus could be shared or re-used in the future.
25. This consultation has a number of accompanying documents. A draft Bill that introduces a revised Code into the Communications Act 2003 is at Annex 1. Draft

Explanatory Notes explaining the provisions can be found at Annex 2. Annex 3 contains origin and destination tables showing where topics in the existing Code appear in the revised Code and vice versa. The impact assessment for the revised Code can be found at Annex 4.

# Consultation

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26. The revised Code must strike the right balance between all parties involved. This approach is essential if Government is to provide a legal framework that enables the effective delivery of network and coverage expansion and thus the provision of high-quality communications services for consumers.
27. The Law Commission undertook an extensive consultation on the existing Code and produced a comprehensive set of recommendations on which the draft Bill is based. After the Code was tabled as an amendment to the Infrastructure Bill, several stakeholders highlighted specific areas of concern that warrant further consideration. These areas are explored in more detail in the following sections.
- **The definition of land and ownership of property**
  - **How consideration is to be determined**
  - **Upgrading and sharing apparatus**
  - **Contracting out of the revised Code**
  - **The role of land registration**
  - **Transitional arrangements, savings and retrospectivity**
28. The Electronic Communications Code is a complex legal framework that must take account of the interests of all parties. The draft revised Code provides a starting point for new legislation but further engagement with all stakeholders is sought to further inform the Government's vision for a robust and effective reformed Code. As such this is **an open consultation** and the Government invites any representation that falls within the scope of the Code. The Government is particularly keen to receive robust evidence to support any submissions.
29. The Government recognises that it will be important to ensure that Code complements and aligns with planning legislation. However, Government wishes to emphasise that this consultation is focused on Code reform, not the separate planning regime.
30. However, the Secretary of State for Culture, Media and Sport is committed to working with Ministers across Government to review how reforms to the planning system might be taken forward. Our intention is that this review proposed for England (only) will include an assessment of the planning improvements introduced in 2013 to promote greater connectivity, the effectiveness of the 2013 Mobile Code of Practice <sup>2</sup> and any evidence provided by interested parties.

<sup>2</sup> The 2013 Mobile Code of Practice can be found at this link: (<https://www.gov.uk/government/publications/code-of-best-practice-on-mobile-phone-network-development>)

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

31. The meaning of land for the purposes of the Code is a fundamental concept. It underpins how the revised Code will work in practice.
32. Government has received several representations from stakeholders about the definition of land; the main concern being the treatment of apparatus and whether when affixed to land it could be classed as land itself. This has important implications for all of the electronic communications industry.
33. In its Report (at paragraphs 2.55 to 2.57), the Law Commission considered that land did not need to be defined in the revised Code. It also noted at paragraph 2.57 that it believed the policy of the existing Code was to ensure that the ownership of apparatus did not change despite its being attached to the land. The recommendation at paragraph 2.80 gives effect to that policy.
34. In the revised Code, in addition to clarifying in paragraph 97 that ownership of property is not affected by installations on or under or affixed to land (in line with the Law Commission's recommendation), the revised Code also provides that land itself does not include apparatus in the definition of land in paragraph 103.
35. When the revised Code was introduced in the then Infrastructure Bill, Government received a range of representations on how different definitions of land would impact in practice. What is clear from these representations is that clarity on the definition of land has important consequences for industry and this issue needs further consideration and engagement with key stakeholders.
36. Government's policy objective is clear; to provide a revised Code that improves network connectivity and coverage. We understand that it is essential to deliver the right outcome in this key area to achieve this objective. Accordingly we welcome responses on this important issue, including to the following questions.

#### *Consultation questions*

**Q.1:** What is your understanding of the meaning of "land" in the existing Code?

**Q.2:** Assuming there was no definition of land and no provision about the ownership of property in the revised Code and that general principles of land law apply:

- a. Which, if any, of the following apparatus are likely to become part of the land on general land law principles?
    - i. Masts
    - ii. Poles
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- iii. Cabinets
- iv. Underground conduits and ducting
- b. Does the statutory regime of the revised Code (which makes provision for rights to install apparatus on land, and have it removed from land and specifies the purpose for which such apparatus is installed on land) affect your answer in (a)?

**Q.3:** Should the revised Code be explicit or say nothing about the definition of land and the ownership of property? Please give reasons.

**Q.4:** If you think the Code should be explicit, should the definition of land be defined as:

- a) not including electronic communications apparatus?
- b) including electronic communications apparatus?
- c) including some electronic communications apparatus (e.g. masts) but not other apparatus (e.g. cables or conduits)?
- d) including the electronic communications apparatus of infrastructure providers (those whose activities fall within the ambit of paragraph 4(b) of the revised Code – i.e. those who provide infrastructure systems), but as not including the apparatus of other Code operators (those whose activities fall within paragraph 4(a) of the revised Code – i.e. those who operate networks)?

In responding to the above points, please provide reasons. Please also include in your responses any views or evidence on the impact of the definition on network deployment, the market, competition and/or legality (e.g. compliance with the EU regulatory regime).

### **How consideration is to be determined**

37. The Code underpins what are consensual agreements between Code operators and site providers. The Code also provides for the court to impose Code rights where agreement cannot be reached. At Part 4, the revised Code sets out the procedure and test that the court must apply before conferring a Code right and provides for the court to set terms that it considers appropriate when it imposes an agreement. These terms must include the payment of consideration by the Code operator to the site provider (paragraph 22(3)).
38. Consideration (payment for Code rights as opposed to compensation for loss or damage associated with the exercise of those rights) and the basis on which it should be assessed has been a key issue in developing a revised Code. The provisions under the existing Code are unclear and make it difficult to ascertain a market or a fair value in many cases, and it is clear that they require reform.
39. There are differing views on how the basis for valuation should be reformed. Some highlight the high cost of rolling out communications infrastructure and have compared costs to those paid by water and electricity providers, which tend to be lower and regulated. A key driver for these concerns is the view that site providers can often

‘exploit’ a unique site position to secure rental values significantly above market rates, referred to as ‘ransom rents’.

40. There are two key considerations to be taken into account when considering whether the basis for valuation should be reformed; whether there is clear justification for significantly restructuring the valuation regime and what can be done, if anything, to tackle the issue of ‘ransom rents’.
41. The Law Commission explored these issues as part of its Report. While they found instances of inflated rents, they felt a functioning market existed and while consideration should remain a key part of the valuation regime, the basis on which consideration is assessed did require some reform.
42. In its Report, the Law Commission recommended (at paragraph 5.83) that a revised Code should attempt to define market value consistent with the Royal Institution of Chartered Surveyors (RICS) “Red Book”<sup>3</sup>, that this definition should be modified to make clear that unique sites are to be valued on the basis that they are not unique and to ensure that consideration does not amount to the ransom value (or profit share) that might be extracted from a special purchaser. It also recommended that the definition of market value should embody the assumption that the Code operator does not have to pay for additional rights to upgrade or share apparatus (provided certain conditions are met) or to assign Code rights.
43. The Government also commissioned its own analysis on the economic impact of the existing and alternative regimes for assessing consideration, “Modelling the Impact of Alternative Wayleave Regimes”<sup>4</sup>. This analysis modelled and compared the existing regime; the regime recommended by the Law Commission, the regime found in the energy sector, and the regime found in the water sector.
44. The analysis suggested that the adoption of alternative valuation regimes is likely to result in a reduction in deployment costs for communication operators. However it also found that these costs represent only a portion of the total cost of deploying and operating new infrastructure and that the impact of reductions in these costs is much smaller relative to operators’ total infrastructure costs.
45. In the light of the evidence from the Law Commission’s consultation together with the economic analysis of the benefits of other valuation models, Government decided to proceed with a twin approach: to adopt the Law Commission’s recommended approach for reforming the way consideration is assessed, and further to include in the

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<sup>3</sup> RICS Valuation - Professional Standards, <http://www.rics.org/uk/knowledge/professional-guidance/redbook>

<sup>4</sup> Modelling the Impact of Alternative Wayleave Regimes published on 9 January 2014, can be found at the following link: <https://www.gov.uk/government/publications/modelling-the-economic-impacts-of-alternative-wayleave-regimes-the-nordicity-report>

revised Code a mechanism for moving to a 'no scheme' valuation - whereby the rights are valued on the basis of their value to the site provider - should Government find that such an approach is justified by a clear evidence base.

46. Paragraph 23 of the revised Code sets out how the level of consideration payable by a Code operator is to be determined by the court. It seeks to give effect to the Law Commission's recommendation.
47. This paragraph determines that the amount payable by the Code operator must represent market value (paragraph 23(1)) and defines market value in paragraphs 23(2) and (3). Paragraph 23(4) introduces the Law Commission's two assumptions by which they recommended that market value should be modified under the revised Code. Paragraph 23(5) describes the terms that could be imposed for the timing of the payment(s) of consideration.
48. It is important to note that the draft Code does not specifically name the 'Red Book' (RICS Valuation – Professional Standards) that was identified by the Law Commission as an appropriate definition of market value. The drafting was intended to embody these standards without naming the standards specifically, so as to ensure the relevance of the Code in the future.
49. Paragraph 24 of the revised Code provides the Government with the flexibility to introduce a 'no scheme' basis for assessing consideration. Code operators, under the existing Code, can apply to the court to have Code rights imposed on a site provider by order. This will continue to be the case. Under the existing Code, the court is still required to make an order as to consideration payable (as well as compensation).
50. Consideration is currently based on a 'scheme basis' i.e. valuation is tied to its future use – hosting telecommunications apparatus, rather than its use by the site provider. The power in paragraph 24 would allow Government to make the transition to a 'no scheme' basis, i.e. tying valuation to a site's existing use or value to the site provider.
51. This regulation making power may only be used after consultation. The intention is that the power would only be exercised when there was evidence to support a move to a 'no scheme' basis. Any regulations will be subject the affirmative Parliamentary procedure allowing for scrutiny in Parliament.

### *Consultation questions*

**Q.5:** Does paragraph 23 of the revised Code meet the aim of providing a clear and workable definition of market value? Please provide evidence to justify your answer.

**Q.6:** Some stakeholders have argued that that provisions that do not allow the new automatic rights (to assign code rights or to, share and upgrade apparatus) to be included in the basis for valuation are unworkable in practice. What evidence can you provide that either supports or challenges this view?

**Q.7:** Does paragraph 23 of the revised Code prevent or reduce the scope for charging above market value for Code rights? Please provide evidence to justify your answer.

## Upgrading and sharing electronic communications apparatus

52. The upgrading and sharing of electronic communications apparatus is important to ensure the provision of strong and sustainable networks. By enabling an operator to upgrade their apparatus, customers are able to benefit from technological advances and wider service developments. The sharing of apparatus can also allow operators to make effective use of sites across their portfolio – reducing their infrastructure footprint without impairing network provision.

53. The existing Code, while highlighting the importance of enabling sharing,<sup>5</sup> does not provide operators with any general or automatic power to share or upgrade apparatus. Under the existing Code, site providers can sometimes restrict the ability of operators to upgrade or share apparatus in Code agreements by requiring prior consent and payment for any upgrading or sharing. Agreements can also prohibit outright any upgrading and sharing. This may mean a need to agree new terms or payment for even the smallest changes. This can sometimes lead to protracted negotiations that delay key maintenance for a communications network, which is an unsatisfactory outcome.

54. Government understands that upgrading and sharing are complex areas. In practice there are a multitude of agreements that allow both, each with their own implications and consequences for site providers. Providing an automatic and *general* power to upgrade or share in all circumstances would therefore be difficult. Further, it would prevent site providers from receiving appropriate consideration when changes led to an increased burden, or the need for adequate management of serious consequences – including those involving service provision and health and safety.

55. Government accepts, however, that there are occasions where upgrades may have a minimal burden – or even reduce the burden - that current apparatus places on site providers. Equally, there are circumstances where sharing apparatus sometimes poses no additional burden on site providers, but may provide consumers with greater connectivity and coverage.

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<sup>5</sup> The existing Code sets this out at paragraph 29, and in Regulation 3(4) of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003

56. This position reflects the Law Commission's analysis, which discussed instances where the sharing and upgrading of apparatus is within a physical structure of which the Code operator has exclusive possession, which cannot be seen from the outside of that structure and which places no additional burden on the site provider. Under these circumstances, it recommends, the site provider should not be able to require further payment from an operator (see the recommendations at paragraph 3.51 of the Report).
57. Government agrees with the Law Commission in principle that there are circumstances where it is appropriate for the Code operators to upgrade and share apparatus and that contractual agreements should not be able to limit or restrict this.
58. Paragraph 16 of the revised Code therefore provides a power for operators to share and upgrade their apparatus, as long as certain conditions are met. This power cannot be limited by agreement, and any Code agreement will be void to the extent it prevents or limits, or imposes conditions (including as to payment) in relation to such sharing or upgrading. In that sense, paragraph 16 provides an automatic right to operators – it does not need to be conferred by agreement or granted by the court. Similarly, operators are able to exercise this right without paying further consideration and without requiring the consent of the site provider.
59. The power of operators to share and upgrade needs to be balanced with protection for site owners from burdensome changes. Paragraph 16 therefore sets out that the power to upgrade and share can only be exercised if the conditions at sub-paragraphs (2) to (4) are met. These conditions mean that an operator is only able to upgrade and share if they have exclusive possession of the apparatus, if the upgrading and sharing has no more than a minimal adverse impact on the apparatus' appearance, and if the upgrading and sharing imposes no additional burden on the site provider.
60. The revised Code does not require that the upgrading or sharing must be within a physical structure nor that it cannot be seen from outside that structure, as such it broadens the scope of the Law Commissions original recommendation. Government made these changes to provide a limited but effective power to upgrade and share for all operators, to ensure the sustainability of their networks, while recognising that site providers should not be subject to additional burdens.
61. Paragraph 16(5) provides that an additional burden includes anything that has an additional adverse effect on the site provider's enjoyment of the land, or that causes additional damage, expense or inconvenience to the site provider. In light of this, what constitutes an 'additional burden' will vary depending on the circumstances and context of any agreement, and the environment in which the apparatus is installed.
62. Paragraph 16(6) provides that any Code agreement will be void insofar as it prevents, limits, or requires payment for the automatic limited power to upgrade and share. In addition, the valuation of Code rights cannot price in the power to upgrade and share –

as provided for in the revised Code at paragraph 23(4)(b). Government's intention here is to ensure that there is no attempt to curtail this new power beyond the provisions set out at paragraph 16.

63. It is important to note that paragraph 16 only relates to upgrading and sharing. While there is no Code right (in Part 1) to share apparatus as such, the right to install and operate apparatus can be conferred on more than one operator so that more than one operator has access to the apparatus.
64. Operators will also still have access to broader Code rights to upgrade either through agreement or as ordered by the court. Rights that go beyond the automatic power to upgrade and share (i.e. upgrading and sharing that does not meet the conditions of paragraph 16) may of course require the operator to pay further consideration. This would need to be agreed between a site provider and operator, or assessed by the court.
65. Code operators may also need planning permission for changes to apparatus as a result of upgrade and sharing. While Code reform needs to complement and align with planning legislation, Government wishes to emphasise that this consultation is focused on Code reform, not the separate planning regime. However, the Secretary of State for Culture, Media and Sport is committed to working with Ministers across Government to review how reforms to the planning system might be taken forward.

### *Consultation questions*

**Q.8:** Do you consider that the proposed automatic power to upgrade and share apparatus will have a positive effect on network sustainability?

**Q.9:** Are the conditions that must be met in order for the power to share or upgrade to be exercised (in paragraph 16(2)-(4) of the revised Code) appropriate to balance interests of site providers and operators, and the need to ensure network sustainability? In particular:

- a) Is the 'exclusive possession' requirement necessary or does it place inappropriate restrictions on the ability to share and upgrade?
- b) Is it appropriate to allow upgrading and sharing provided there is minimal adverse impact on the appearance of the apparatus?
- c) Is it appropriate to allow upgrading and sharing provided there is no additional burden on the site provider? Is the meaning of "additional burden" clear and appropriate?
- d) Should there be fewer, additional or no conditions attached to the exercise of the power to upgrade and share?

Please give reasons and provide your views on the practical implications of the imposition of conditions.

**Q.10:** Are there any other issues that arise from the exercise of the power to share or upgrade?

## Contracting out of the revised Code

66. For the most part, the Code underpins what are consensual agreements negotiated freely between parties. Where agreement cannot be reached parties have recourse to the court. Once parties have agreement on Code rights, however, the usefulness and legitimacy of the Code for all stakeholders is premised on ensuring that particular provisions of the Code cannot be ignored or circumvented – that parties cannot simply contract out when it is advantageous for them to do so.

67. Paragraph 27(2) of the existing Code prevents parties contracting out of the principal rights conferred by the Code. The Law Commission discussed contracting out in paragraphs 6.46-6.51 and 6.93 of its Report. It did not recommend that it should be possible to contract out of the rights conferred by the Code.

68. The revised Code seeks to address the concern that allowing parties to bypass Code provisions may create a practice where this becomes the default position, leading to a situation where the Code would essentially become voluntary.

69. As a result, the revised Code, in paragraph 96, clearly sets out the provisions that parties cannot contract out of when agreeing to the conferral of Code rights. This paragraph ensures that the revised Code will be the foundation that enables infrastructure rollout. The Government is interested to receive representations as to whether this premise is the right one, or whether a different approach to the issue of contracting out is necessary in order to best enable efficient and effective apparatus rollout.

70. In particular, paragraph 96(1) provides that the operator and landowner have complete freedom to agree the terms they wish but that freedom is subject to 96(2) – the parties cannot agree to disapply the minimum rights and liabilities in:

- Paragraphs 61(2) to 61(5) (exercise of tidal water right: Crown land);
- Paragraph 95 (relationship between this Code and existing law);
- Part 3 (assignment of Code rights, and upgrading and sharing of apparatus);
- Part 4 (power of the court to impose agreement);
- Part 5 (termination and modification of agreements); and
- Part 6 (rights to require removal of electronic communications apparatus).

71. In the revised Code, Code rights are conferred by an agreement meeting the requirements of Part 2. Parts 3 to 6 of the Code are then intended to govern the relationship between site providers and operators under such agreements. To maintain the balance between the varying interests that the Code seeks to achieve, the revised Code prevents parties from contracting out of these key governing provisions.

72. Agreement is required in order for tidal water rights to be exercised in relation to Crown tidal water and land under Part 9 of the revised Code. The revised Code provides in paragraphs 61(2)-(5) that such an agreement will only be enforceable to the extent that the consideration does not exceed market value of the tidal water right. The revised Code prevents parties from contracting out of this important provision.
73. The revised Code also restricts the contracting out of the requirement in paragraph 95 that prevents the Code authorising the contravention of any law passed or made before the revised Code comes into force.
74. The remaining provisions of the Code deal with situations where agreement for the exercise of rights is not required, and no specific additional provisions restricting contracting out are provided for.
75. Government has received differing views from stakeholders on this issue. It has received representations highlighting the difficulties of securing sites if operators cannot offer to contract out of Code provisions, and that some site providers are reluctant to sign a Code agreement because of concerns about provisions that protect an operator's network once an agreement comes to an end. More widely, several stakeholders have highlighted that some operators and site providers are not familiar with – or do not completely understand - how the Code should work.
76. Government is keen to understand how the contracting out provisions will work in practice, and how they might impact on the ability to secure sites and enable network rollout.

### *Consultation questions*

- Q.11:** Are the provisions referred to in paragraph 96(2) in relation to which there can be no contracting out sufficient? If not why not?
- Q.12:** Should there be exceptions to the no contracting out principle? If so, what are these and why?
- Q.13:** If there are exceptions, should these be subject to criteria or regulated in some way (for example by a requirement for the court to approve the arrangements)?

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

77. Protection of Code rights – in particular ensuring that they bind successors in title to land – is crucial to ensure the effective functioning of the Code. Equally 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. Land registration is one of the

principal mechanisms for enabling purchasers to find out such information in order to protect their positions and for binding successors in title.

78. 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. Paragraph 2(7) of the existing Code goes on to provide that such rights are not subject to land registration legislation. The existing Code makes no distinction as to the form of agreement in which the Code rights were granted, i.e. whether the rights were set out in a lease or in an agreement other than a lease. While the Law Commission (Report at paragraph 2.115) thought 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.
79. The approach taken in the revised Code is to set out in paragraph 10 when Code rights are binding on successors in title or others with an interest in land, without any need for the additional registration of rights. Paragraph 10 makes no distinction between Code rights contained in leases and those in agreements that are not leases. Paragraph 10 seeks to do what paragraph 2(4) of the existing Code did (or sought to do) – namely provide that Code rights in effect bind the land as if they were an interest in the land.
80. The Law Commission's original proposal in paragraph 8.33 of its consultation paper (The Electronic Communications Code (2012) Law Commission Consultation Paper No 205<sup>6</sup>) was that Code rights which are otherwise registrable should be registered in accordance with the applicable land registration legislation (which is different around the United Kingdom), but that the provisions of the revised Code should prevail over the land registration legislation. In other words a failure to register should not prevent the Code right being binding on a purchaser.
81. The Law Commission Report addressed these matters in paragraphs 2.82 to 2.133 of its Report. It recommended the revised Code should (for England and Wales) make no special provision for registration of Code rights when these are included in leases, but that 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. The Government's understanding of the effect of these recommendations is that:
- a. Code rights in a lease (subject to registration) which was not registered would not be binding on a successor in title;

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<sup>6</sup> The Law Commission consultation can be found at this link:  
[http://lawcommission.justice.gov.uk/docs/cp205\\_electronic\\_communications\\_code.pdf](http://lawcommission.justice.gov.uk/docs/cp205_electronic_communications_code.pdf)

- b. 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*;

82. A further factor to consider is that the rules of land registration are different in Scotland and Northern Ireland.

83. The revised Code says nothing on the registration of leases, the intention being that the usual rules on the registration of leases apply. The draft Bill therefore provides in Schedule 2 for consequential amendments that will mean that Code rights, other than those conferred in a lease, are overriding interests (in England and Wales).

84. The relationship between the principles in paragraph 10 of the revised Code and land registration legislation, the question of whether or not Code rights should be registered under land registration legislation (and the consequences if they are not) remains complex. Therefore this issue merits further consultation.

### *Consultation questions*

**Q.14:** Are the principles set out in paragraph 10 of the revised Code sufficient to ensure that Code rights bind the land as against a successor in title as if the Code rights were interests in the land, without the need for registration?

**Q.15:** If you consider that paragraph 10 is sufficient, is it necessary to provide that some Code rights should be treated as overriding interests, given that overriding interests are not registered? Does it matter if Code rights in leases and agreements other than leases are treated differently?

**Q.16:** Should the binding nature of Code rights on successor in title and others who acquire an interest in the land depend on whether the Code rights are registered under applicable land registration legislation?

**Q.17:** If your view is that Code rights should be subject to land registration legislation, what should be the consequences of a failure to register a lease containing Code rights (assuming it is required to be registered under the general law) against a successor in title?

**Q.18:** If there is no requirement to register Code rights under applicable land registration legislation, what will be the impact on the successors in title, i.e. purchasers of land, given Code rights will not appear on title documents?

**Q.19:** Are there other ways to protect purchasers of land apart from registration of Code rights under land registration legislation, for example by including questions about Code rights and electronic communications apparatus in standard form inquiries before the transaction is completed?

**Q.20:** In Scotland, if the Code right is not in a registrable lease, should the Code right nonetheless be registrable in the property register?

## Transitional arrangements, savings and retrospectivity

85. When the revised Code is brought into force, it will repeal the existing Code. So the question arises as to how arrangements made under the existing Code will be dealt with in light of the revised Code. No specific provision is made in the draft Bill for dealing with the transition from the existing Code to the revised Code. In the usual way, it is anticipated that detailed transitional arrangements will be included in regulations when the revised Code is brought into force. A power has been taken in clause 3(4) of the draft Bill to allow for this. The Government wishes to seek views on what transitional arrangements might be appropriate and whether they should be left to secondary legislation or included on the face of the draft Bill.
86. The Law Commission said little on the issue of transitional arrangements but what it said is useful to repeat:
- 1.43 We are conscious that the introduction of the revised Code will need to be managed with care and considerable thought given to transitional provisions. We do not think that it would be practicable or appropriate simply to apply the revised Code to existing arrangements. This would result in retrospective application, affecting rights which had already arisen. In some cases, there would be disruption to carefully-negotiated agreements by which the parties have sought to strike a balance within the context of the existing Code.*
- 1.44 We think that it is inevitable, therefore, that for some time after the introduction of the revised Code, parties and their advisers will need to be aware of the relevance of the 2003 Code to historic agreements. As new arrangements are formed and old ones renewed under the revised Code, the 2003 Code will eventually become obsolete.*
87. The Government takes the general view that the revised Code will only apply to new agreements and that it will not be applied retrospectively to interfere with carefully negotiated arrangements made under the existing Code. The operation of the existing Code will be saved so that it continues to apply to existing Code agreements.
88. The retrospective application of legislation has the potential to interfere with existing rights or cause unfairness. There is therefore a strong presumption against it and its use should be exceptional. There may however, be circumstances which are exceptional and where it is appropriate for specific provisions in the revised Code to apply to existing arrangements.
89. So for example, this might be the case where the application of provisions in the revised Code does not affect the balance struck by the parties in coming to an agreement under the existing Code. This might include, for example, the right to object in Part 12 of the revised Code and the new dispute resolution procedures in Part 16.
90. Likewise, where arrangements do not require agreement, for example, the exercise of transport land rights, street work rights and tidal water and land rights, it would also

seem appropriate for the provisions of the revised Code to apply in relation to apparatus installed in exercise of those rights under the existing Code. Where there have been no substantive changes made in the revised Code to existing provisions, it would also seem appropriate for the revised Code to apply, e.g. undertaker's works.

91. Where, however, provisions of the revised Code might have impacted upon the position reached by parties under the existing Code, in order to avoid affecting the balance struck in existing agreements, it would seem appropriate for the parties to agree to the application of such provisions through the termination of current agreements and the entry into new ones.
92. The Government understands that there are differing views amongst stakeholders on where the power to upgrade and share apparatus might fit within the principles outlined above.
93. There is also the issue of the transition of existing apparatus from the existing to the revised Code once existing Code agreements are terminated. Again, the issue is whether provisions of the existing Code should continue to apply pending the ability of the operator to proceed to agree, or have the court impose, Code rights under the revised Code, or whether specific transitional provision should be made relating to that transitional period. The principles outlined above, as to the impact on the balance that was previously struck by the parties (which would have taken account of mechanisms under the existing Code) are equally relevant in this context. One approach may be to make clear that the steps for securing a right under paragraph 21 of the existing Code (that applies where Code rights cease, which would occur on the termination of an existing Code agreement) include a reference to securing such rights under the revised Code.
94. The Government is seeking consultees' views on the application of the revised Code to agreements made under the existing Code and on the transitional provisions that should apply in the move from the existing Code to the revised Code. We also seek consultees' views on whether such provisions should be included on the face of the draft Bill or left to secondary legislation to be made when the revised Code is brought into force.

### *Consultation questions*

**Q.21:** Should any provisions of the existing Code continue to apply to existing Code agreements or apparatus installed under the existing Code once the revised Code comes into force? If so, which ones and why?

**Q.22:** Should any provisions of the revised Code continue to be applied to existing Code agreements or apparatus installed under the existing Code once the revised Code comes into force? If so, which ones and why?

**Q.23:** Should the agreement of the parties be required in order for the provisions of the

revised Code to apply to existing Code agreements or apparatus installed under the existing Code once the revised Code comes into force? If so, which provisions should require such agreement and why?

**Q.24:** Should the provisions of the existing Code continue to apply (notwithstanding an existing Code agreement coming to an end) pending new Code agreements (or a court order for such rights) being sought under the revised Code once it comes into force?

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# Summary of consultation questions

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95. When responding to the consultation, please follow the guidance on page 5 to ensure that your response will be taken into consideration.

## The definition of land and ownership of property

**Q.1:** What is your understanding of the meaning of “land” in the existing Code?

**Q.2:** Assuming there was no definition of land and no provision about the ownership of property in the revised Code and that general principles of land law apply:

- a. Which, if any, of the following fixtures are likely to become part of the land on general land law principles?
  - i. Masts
  - ii. Poles
  - iii. Cabinets
  - iv. Underground conduits and ducting
- b. Does the statutory regime of the revised Code (which makes provision for rights to install apparatus on land, and have it removed from land and specifies the purpose for which such apparatus is installed on land) affect your answer in (a)?

**Q.3:** Should the revised Code be explicit or say nothing about the definition of land and the ownership of property? Please give reasons.

**Q.4:** If you think the Code should be explicit, should the definition of land be defined as:

- a) not including electronic communications apparatus?
- b) including electronic communications apparatus?
- c) including some electronic communications apparatus (e.g. masts) but not other apparatus (e.g. cables or conduits)?
- d) including the electronic communications apparatus of infrastructure providers (those whose activities fall within the ambit of paragraph 4(b) of the revised Code – i.e. those who provide infrastructure systems), but as not including the apparatus of other Code operators (those whose activities fall within paragraph 4(a) of the revised Code – i.e. those who operate networks)?

In responding to the above points, please provide reasons. Please also include in your responses any views or evidence on the impact of the definition on network deployment, the market, competition and/or legality (e.g. compliance with the EU regulatory regime).

## How consideration is to be determined

**Q.5:** Does paragraph 23 of the revised Code meet the aim of providing a clear and workable definition of market value? Please provide evidence to justify your answer.

**Q.6:** Some stakeholders have argued that that provisions that do not allow the new automatic rights (to assign code rights or to, share and upgrade apparatus) to be included in the basis for valuation are unworkable in practice. What evidence can you provide that either supports or challenges this view?

**Q.7:** Does paragraph 23 of the revised Code prevent or reduce the scope for charging above market value for Code rights? Please provide evidence to justify your answer.

### **Upgrading and sharing electronic communications apparatus**

**Q.8:** Do you consider that the proposed automatic power to upgrade and share apparatus will have a positive effect on network sustainability?

**Q.9:** Are the conditions that must be met in order for the power to share or upgrade to be exercised (in paragraph 16(2)-(4) of the revised Code) appropriate to balance interests of site providers and operators, and the need to ensure network sustainability? In particular:

- a) Is the 'exclusive possession' requirement necessary or does it place inappropriate restrictions on the ability to share and upgrade?
- b) Is it appropriate to allow upgrading and sharing provided there is minimal adverse impact on the appearance of the apparatus?
- c) Is it appropriate to allow upgrading and sharing provided there is no additional burden on the site provider? Is the meaning of "additional burden" clear and appropriate?
- d) Should there be fewer, additional or no conditions attached to the exercise of the power to upgrade and share?

Please give reasons and provide your views on the practical implications of the imposition of conditions.

**Q.10:** Are there any other issues that arise from the exercise of the power to share or upgrade?

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

**Q.11:** Are the provisions referred to in paragraph 96(2) in relation to which there can be no contracting out sufficient? If not why not?

**Q.12:** Should there be exceptions to the no contracting out principle? If so, what are these and why?

**Q.13:** If there are exceptions, should these be subject to criteria or regulated in some way (for example by a requirement for the court to approve the arrangements)?

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

**Q.14:** Are the principles set out in paragraph 10 of the revised Code sufficient to ensure that Code rights bind the land as against a successor in title as if the Code rights were interests in the land, without the need for registration?

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#### **Transitional arrangements, savings and retrospectivity**

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