Department for Digital, Culture Media & Sport

Access to land: consultation on changes to the Electronic Communications Code

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Ministerial Foreword

The government is committed to making the United Kingdom a global leader in digital connectivity. Levelling up means not just building roads and railways, but also ensuring that reliable, long-lasting gigabit capable connections are made widely available across the UK. The COVID-19 pandemic has highlighted how important it is - now more than ever - to have those robust networks in place. Digital connectivity has been a lifeline, keeping society functioning this past year.

In order to achieve our goal we must focus on maintaining and upgrading our digital infrastructure, which will be a key factor in driving our economic recovery.

I am pleased to say that we are already making progress with our ambition:

- 36.6% UK premises are currently benefiting from gigabit-capable broadband, which is up from 6% in 2018,
- 91% of the UK landmass is covered by a good 4G signal from at least one operator, which is up from 80% in 2017;
- 69% of the country is covered by all four main operators, which is up from 49% in 2017.

But I fully understand that we are not there yet; there is more work to be done to ensure that everyone across the UK has access to good digital connectivity and the benefits that come with it. It is essential that telecommunications operators can keep pace with the growing demand for internet bandwidth and mobile data from local businesses, residents and those who visit our communities. To achieve this we need a supportive legislative framework, which makes the roll-out of digital infrastructure smoother, allowing us to meet our ambition of achieving nationwide gigabit-capable connectivity as soon as possible.

The legal framework underpinning rights to install and maintain electronic communications infrastructure on private and public land is contained in the Electronic Communications Code (the Code), which is part of the Communications Act 2003. The reforms we made to the Code in 2017 were intended to support faster and easier deployment, as well as encouraging industry investment in our digital networks. These changes strived to balance the need for digital infrastructure with the rights and interests of landowners and other site providers.

Since the 2017 reforms came into effect, the government has listened to feedback from many different stakeholders about the impact they have had. Based on that feedback, we recognise that updates may be needed if the aim and ambition of the 2017 reforms is to be realised fully.

The government is committed to ensuring that the Code is fit for purpose in order to deliver our digital connectivity targets. The potential economic and social benefits of fast and reliable connectivity can only be realised if we have confidence in the effectiveness of the underpinning legislation. I look forward to receiving your views on our proposals and the questions we have set out which will help inform any decisions we make about further changes to the Code.

Matt Warman MP
Parliamentary Under Secretary of State
Minister for Digital Infrastructure

Executive summary

The Government has ambitious plans to achieve nationwide rollout of future proof, gigabit-capable broadband and 5G networks as soon as possible to unlock the huge economic and social benefits that this will bring. As we emerge from the Covid-19 pandemic, ensuring the whole country has access to world-class digital infrastructure will be critical to our economic recovery.

We are working with industry to target a minimum of 85% gigabit-capable coverage by 2025 and to get as close to 100% as possible. We are also aiming to ensure that 95% of the UK's geographic landmass has 4G coverage from at least one mobile network operator by 2025 and that the majority of the UK population has 5G coverage by 2027.

Government is making significant progress, through the implementation of the recommendations made in our Future Telecoms Infrastructure Review published in 2018. However, in order to accelerate this work, it is important that we deliver the changes that are needed to speed up commercial and public investment in gigabit-capable networks.

The Electronic Communications Code

The Electronic Communications Code ("the Code") is the legal framework underpinning rights to install and keep electronic communications apparatus on public and private land, and to carry out other activities needed to provide electronic communications networks. The purpose of the Code is to provide a regulatory framework that supports and encourages the efficient and cost-effective installation and maintenance of robust digital communications networks. At the same time, the Code aims to ensure that an appropriate balance is achieved between the public interest in these networks and the private rights of individual landowners and occupiers.

The Code was substantially reformed in 2017. Those reforms specifically recognised the increasing importance of access to fast and reliable digital services for society and the economy. Since the 2017 reforms came into force, we have received regular reports that they are not having their intended effect. From the feedback we have received, it seems clear that further change may be needed to support our digital networks and ensuring that the aims of the 2017 reforms are realised.

Consultation proposals

Based on discussions with stakeholders we have identified three main problem areas. These are:

- Issues relating to obtaining and using Code agreements;
- Rights to upgrade and share; and
- Difficulties specifically relating to the renewal of expired agreements.

This consultation looks at each of these areas, but it does not set out detailed proposals for legislative reform, and instead sets out a range of potential means to address them. It outlines what Government believes are the key issues impacting the effectiveness of the Code, and the potential changes needed to make the Code work effectively for both

landowners and operators. We are seeking feedback to inform our decisions on the scale and scope of any alterations to the Code.

Issues relating to obtaining and using Code agreements

Code rights can only be used if an agreement allowing this has been made between a Code operator and the occupier of the land that the rights relate to, or has been imposed by a court. Code rights can only be exercised in accordance with the terms of the agreement and there are occasions where an operator or a site provider may need to enforce the terms of a Code agreement. Once completed, there is no provision under the Code for either party to apply to the Court for new or different terms, until the end of the agreed period.

However, failures to make agreements quickly make it difficult to provide homes and businesses with mobile coverage and gigabit capable connections quickly. Completed agreements are not flexible enough to accommodate changes in circumstances. Protracted and difficult negotiations can have negative impacts not only for the parties involved, but also on digital networks. The longer it takes for agreements to be completed, the longer it takes for sites to be upgraded and for new rollout to take place.

We therefore have proposed changes to support faster and more collaborative negotiations, help ensure best practice guidance is adhered to and encourage greater dialogue, provide efficient ways for disagreements to be dealt with, address failures to respond to requests for Code rights and ensure that completed agreements can operate effectively.

Rights to upgrade and share apparatus

Upgrading and sharing apparatus has significant benefits for connectivity. It can reduce costs and increase the number of service providers in given areas. The 2017 reforms introduced automatic rights[1] permitting operators to upgrade their own apparatus and share use of it with other operators, if two conditions are met. These automatic rights apply to all agreements completed after December 2017.

Disagreements about the automatic rights to upgrade and share are undermining relationships between occupiers, site providers and Code operators, and prolonging negotiations. The lack of certainty about the current legislation means upgrading and sharing is not happening as often or as quickly as it could. In addition, the strict limitation of the automatic rights to upgrade and share to agreements completed after December 2017 is limiting the use of pre-existing networks.

We think changes are needed that clarify the position on rights to upgrade and share, enabling more collaborative negotiations and reducing friction. This consultation therefore proposes to:

- Revisit the automatic rights to upgrade and share: reviewing when they should be available and how they might be clarified;
- Clarify the position where operators are seeking rights to upgrade and share that do not meet the conditions for the automatic rights;
- Consider the benefits of introducing limited retrospective rights to share and / or

[1] These rights are contained in paragraph 17 of the Code. They are referred to as automatic rights because where the conditions are satisfied, the operator does not need to obtain the site provider's consent, or make additional payments.

upgrade apparatus installed *prior to the 2017 reforms*, and whether this can be achieved in a way that adequately protects the rights of site providers and operators.

Expired agreements

Code agreements are for a defined period of time. Part 5 of the Code provides that once an agreement has expired, the operator can continue to exercise the Code rights, and the site provider continues to be bound by them, until the agreement is either terminated or renewed. However, Part 5 does not apply to all expired agreements. There is a reported lack of clarity and consistency about when Part 5 does and does not apply and what should happen in cases where Part 5 does not apply. Additionally, provisions relating to renewal disputes mean it takes longer for these cases to be listed and heard than it does for new agreements and there is a perception that the current legislation does not encourage prompt negotiations for renewal agreements.

This consultation sets out that greater certainty is needed for operators and site providers about what will happen when their agreements come to an end. We also believe it would be beneficial for there to be greater consistency in the way that disagreements about the renewal of Code rights are dealt with. And we consider that the legislative framework should encourage prompt and collaborative negotiations for renewal agreements, with appropriate measures available for cases where an agreement cannot be reached.

The closing date for responses is 24 March 2021.

Section 1 - General information

This consultation seeks your views on whether changes to the Electronic Communications Code are needed to ensure that the UK has sufficiently robust electronic communications networks to deliver the coverage and connectivity consumers and businesses need.

The geographical scope of this consultation is the UK.

This is a public consultation. We particularly seek views from landowners and other individuals who have already agreed, or may in the future agree, for electronic communications apparatus to be installed on property they own or occupy, as well as the electronic communications industry (network operators, and internet service providers), business and residential consumers, and representative organisations.

The consultation period will run for **8** weeks from 27 January 2021 to 24 March 2021.

Responses and any additional material you wish to be considered should be submitted to code-consultation@dcms.gov.uk. Annex A includes further information on submitting responses to this consultation.

Responses or material sent to any other email addresses will not be taken into consideration.

If you cannot reply online or via email please respond by post:

Electronic Communications Code Reforms Consultation
Digital Infrastructure Directorate
Department for Digital, Culture, Media & Sport
100 Parliament Street
London
SW1A 2BQ

For enquiries about the consultation (handling) process only please email enquiries@dcms.gov.uk, heading your communication 'Electronic Communications Code Reforms Consultation'.

This consultation is intended to be an entirely written exercise. Please contact the enquiries mailbox if you require any other format, e.g. braille or large font.

Copies of the responses will be published after the closing date on the Department's website: https://www.gov.uk/government/organisations/department-for-digital-culture-media-sport

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018 (DPA) and the Environmental Information Regulations 2004 (EIR)). 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.

The department will process the information you have provided in accordance with the DPA, and in the majority of cases, this will mean that your personal information will not be disclosed to third parties.

This consultation follows the Government's Consultation Principles 2018 which are available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles__1_.pdf

Glossary / Key Terms used in this consultation

The Code: the legislative framework contained in the reformed Electronic Communications Code, Schedule 3A to the Communications Act 2003. The Code came fully into force on 28 December 2017.

The "old" Code: the legislative framework in place prior to implementation of the 2017 reforms. This was contained in Schedule 2 to the Telecommunications Act 1984.

The 2003 Regulations: the Electronic Communications (Conditions and Restrictions) Regulations 2003.

Code agreements: for the purposes of this consultation, a Code agreement means any agreement conferring Code rights[2].

- "Old" Code agreement: any agreement conferring Code rights that was completed before 28 December 2017 (when the Code reforms came into effect);
- "New" Code agreement: any agreement conferring Code rights that was completed after 28 December 2017.

Code operator: Code operators ("operators") exercise Code rights under the Electronic Communications Code. Operators can include providers of electronic communications networks and providers of infrastructure systems. The operator must normally have been granted operator status by Ofcom under section 106 of the Communications Act 2003. In certain circumstances, the operator may be the Secretary of State or a Northern Ireland Department.

Code rights: the specific rights set out in paragraph 3 of the Code. They include rights to install and keep electronic communications apparatus on, under or over land and to carry out a range of supplementary activities associated with the use of that apparatus for digital communications purposes. Code rights can only be used for their designated "statutory purpose", which is the provision of the operator's network or infrastructure system.

Compensation: If a court decides to impose a Code agreement, paragraph 25 of the Code gives it powers to make an order for the operator to pay compensation to any person bound by a Code right. Compensation will be due for loss or damage that has been sustained or will be sustained by that person as a result of the exercise of the Code rights.

Consideration: 'consideration' means the price that a Code operator is required to pay any person bound by a Code right in exchange for the Code rights. If a court decides to impose a Code agreement, paragraph 24 prescribes how the consideration due is to be calculated.

Court: the court or tribunal with jurisdiction to resolve disputes arising under the Code. This

[2] *This is a broader definition than that contained in the Code, which solely defines a "Code agreement" as any agreement to which Part 5 of the Code applies. We use the wider definition provided above throughout this consultation for ease of reference.*

will normally be the Upper Tribunal in England and Wales and the Lands Tribunal for Scotland in Scotland. For ease of reference, we use the term "the court" throughout this document except where we need to distinguish between different courts and tribunals.

Electronic communications apparatus (ECA): ECA is specifically defined in paragraph 5 of the Code. In summary, the definition includes anything (including structures) that have been designed or adapted[3] for use in connection with the provision of an electronic communications network or to send and receive signals or electronic communications transmissions. This is a broad definition, reflecting the diversity of electronic communications apparatus.

Electronic communications network: electronic communications networks are defined in the Communications Act 2003 as "transmission systems for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description, including apparatus and software used in operating that system." The Code is "technology neutral" - it draws no distinction between fixed and mobile networks and their respective infrastructure systems.

Infrastructure system: a system of infrastructure used for the provision of electronic communications networks.

Land: the Code defines land by exception. It "does not include electronic communications apparatus" (paragraph 108). This means in effect that operators cannot use the Code to exercise rights in relation to each others' apparatus. Beyond that, land should be taken as having its ordinary legal meaning, so includes not only the land itself, but most buildings and structures on that land.

Landowner: the Code defines a landowner as any person with an interest in land.

Lease: the Code defines a lease non-exclusively as including in England, Wales and Northern Ireland a leasehold tenancy or an agreement to grant such a tenancy, and in Scotland any sub-lease or agreement to grant a sub-lease. Beyond that, 'lease' should be taken as having its ordinary legal meaning.

Licence: is not defined in the Code and should be taken as having its ordinary legal meaning.

Ofcom: the independent regulator and competition authority for the UK's communications industries, responsible for applying the Code to operators. Ofcom are required to publish (i) a code of practice relating to use of the Code, and (ii) standard terms that can be used in agreements conferring Code rights. The Ofcom Code of Practice can be accessed here: Code of Practice concerning agreements for access to private land. The standard terms can

[3] *The explanatory notes accompanying the Code explain that "whether a particular structure or thing has been adapted to a point at which it can properly be considered as electronic communications apparatus is a question of fact, which will depend on the specific circumstances, including what the parties have agreed, the nature of the installation and the extent of the adaptation".*

be accessed here: Electronic Communications Code: Standard Terms.

Occupier: paragraph 9 of the Code states that Code rights can only be conferred by an agreement between the **occupier** of land and the operator seeking the Code rights. An "occupier" is defined in the Code as "the occupier of the land for the time being". This will often, but not always, be the owner of the land.

The Code makes specific provision for situations where land is unoccupied. In these cases, the person treated as the "occupier" will be any person with powers of management or control over the land, or if there is no such person, every person with an interest in the land which would be prejudicially affected by the exercise of Code rights.

For consistency, we use the term "occupier" throughout this document to refer to the person (or persons) whose agreement must be (and has not yet been) obtained before Code rights can be exercised, or on whom a court can impose an agreement.

Site provider: an occupier of land (see the separate definition of an occupier) who has granted Code rights, had Code rights imposed by them, or is bound by Code rights.

Chapter 1 - introduction

Overview

The Electronic Communications Code ("the Code") is the legal framework underpinning rights to install and keep electronic communications apparatus on public and private land, and to carry out other activities needed to provide electronic communications networks.

This consultation asks whether changes to the Code are needed to ensure that the UK has sufficiently robust electronic communications networks to deliver the coverage and connectivity consumers and businesses need.

Delivering gigabit broadband and 5G to the UK

1.1. World class digital infrastructure is the key to unlocking the UK's enormous digital potential. Digital infrastructure is now even more at the heart of our daily lives. The Covid-19 pandemic has fundamentally changed the way many of us live and work online and has shown that good connectivity is essential for allowing people to contact their friends and family, get medical treatment and educate their children.

1.2. The Government is working with industry to target a minimum of 85% gigabit capable national coverage by 2025, and will seek to accelerate rollout further to get as close to 100% as possible. We are also aiming to ensure that 95% of the UK's landmass has 4G coverage from at least one mobile network operator by the end of 2025 and that the majority of the UK population has access to a 5G signal by 2027. Delivering on these ambitions is critical to ensuring that anyone, anywhere in the UK can start and grow a digital business, develop new technologies and drive forward innovative research.

1.3. We have made significant progress to date: 37.17%[4] of UK premises have access to gigabit-capable broadband, up from just 6% in 2018, and network operators report that over 100 towns and cities now have access to 5G networks. We've invested record levels of funding and removed barriers to the deployment of fixed and mobile broadband.

1.4. We want to go further, so that all parts of the UK can enjoy the benefits of upgraded digital infrastructure. Through our rollout of the £5bn UK Gigabit Programme, we will connect the hardest to reach homes and businesses with gigabit-capable broadband, and we will deliver 95% 4G geographic coverage by the end of 2025 through our £1 billion Shared Rural Network deal with mobile network operators.

1.5. In order to achieve these ambitions, it is critical that fixed and mobile network operators are able to deploy, install and maintain their apparatus on public and private land as easily and as cheaply as possible. However, while we strongly believe robust digital networks are in the wider public interest, we recognise any statutory regime must maintain an appropriate balance between that public interest and private property rights.

[4] https://labs.thinkbroadband.com/local/

The Electronic Communications Code

1.6. The Electronic Communications Code ("the Code") is the legal framework underpinning rights to install and keep electronic communications apparatus on public and private land, and to carry out other activities needed to provide digital communications networks.

1.7. Code rights are normally created by an agreement between a Code operator and an occupier of relevant land, with the terms of that agreement negotiated between the parties to achieve a mutually acceptable outcome. However, if a Code operator and an occupier are unable to reach an agreement consensually, a court may impose an agreement granting Code rights in certain circumstances.

1.8. A court can only impose an agreement between an operator and an occupier of land, if an application asking them to do this is made in accordance with the statutory requirements. The imposition of an agreement is not automatic. The Code requires a court to apply a two-limbed test in deciding whether an agreement should be imposed. This means that an agreement can only be imposed if the court considers:

- *That the prejudice caused to the relevant person by the order is capable of being adequately compensated by money;* ***and***
- *That the public benefit likely to result from the making of the order outweighs the prejudice to the relevant person.*

1.9. In deciding whether the "public benefit" condition is met, a court must specifically take into account the public interest in access to a choice of high quality electronic communications services. If a court decides it is appropriate for an agreement to be imposed, the framework of the Code sets out the kind of terms that must be included, and - in particular - how a court should decide the appropriate financial terms. This is referred to in this document as the statutory valuation framework.

1.10. **Agreements granting Code rights do not give operators unlimited powers.** Whether an agreement is negotiated by an occupier and a Code operator, or imposed by a court, the Code rights contained in it are **only** exercisable in accordance with the terms of the agreement.

Why do we need an Electronic Communications Code?

1.11. The purpose of the Electronic Communications Code is to provide a regulatory framework that supports and encourages the efficient and cost-effective installation and maintenance of robust digital communications networks. At the same time, the Code aims to ensure that an appropriate balance is achieved between the public interest in these networks and the private rights of individual landowners and occupiers.

Background to the 2017 reforms

1.12. The Code was substantially reformed in 2017. Those reforms specifically recognised the increasing importance of access to fast and reliable digital services for society and the economy. The 2017 reforms therefore specifically aimed to make network deployment faster, more efficient and more cost effective, by:

- introducing a new statutory framework for the **valuation of land** accessed through "Code rights". This was intended to significantly reduce the amounts that operators would be required to pay site providers, making network deployment more cost effective and thereby encouraging investment;
- introducing limited **automatic rights to upgrade and share** installed apparatus. These rights removed the need for operators to have to seek site provider agreement or to make additional payments if upgrading installed apparatus, or sharing use of it with another operator, would have little impact on the site provider; and
- providing the mechanism for the transfer of the **jurisdiction for the resolution of Code disputes** from the county courts in England and Wales to the Lands Chamber of the Upper Tribunal (the Upper Tribunal), to allow faster and more cost effective resolution of disagreements. Complementary changes were made in respect of the adjudication of such disagreements in Scotland and Northern Ireland.

1.13. The reformed Code came fully into effect on 28 December 2017. Throughout this document:

- an "old Code" agreement means an agreement to confer Code rights completed before 28 December 2017; and
- A "new Code" agreement means an agreement to confer Code rights completed on or after 28 December 2017.

1.14. These terms have no statutory meaning and are used in this document for illustrative purposes.

Purpose of this consultation

1.15. DCMS has informally engaged with a wide range of stakeholders on issues relating to the Electronic Communications Code since the 2017 reforms came into effect. These stakeholders have included Code operators, local authorities, site providers, representative groups, professional bodies and others with an interest in the area. We have received substantial anecdotal evidence relating to the issues discussed in this document, which suggests further changes to the Code may be needed, including changes to ensure the legislative framework is as clear as possible, especially where different interpretations of specific provisions are leading to substantial disagreement and delays in negotiations.

1.16. We recognise it is crucial that we have the fullest possible understanding of the issues, the risks and benefits of change, and the views of a wide range of stakeholders. The purpose of this consultation is to provide all stakeholders with the opportunity to provide further feedback and evidence to enable a comprehensive assessment of the scale, scope and impact of any changes to be made.

1.17. Any subsequent changes to the Code will be focused on supporting our digital networks and ensuring that the aims of the 2017 reforms are realised. We do not propose to look at the wider structure and function of the Code. The Government is clear that the best, most efficient, most cost-effective means for operators to access land is via a negotiated agreement with the owner of that land. The Code provides that, where such agreements cannot be concluded, either party can apply to a court

to decide whether an agreement should be imposed, and if so, what its terms should be.

1.18. Based on discussions with stakeholders we have identified three main problem areas. These are:

- Issues relating to negotiations and the operation of completed agreements. These issues include failures to respond to requests from operators; failures to negotiate constructively and collaboratively; failures to comply with the Ofcom Code of Practice and / or the terms of concluded agreements; and the need for faster and cheaper dispute resolution;
- Rights to upgrade and share. Landowners, occupiers and operators all report that the current law in relation to these rights are not sufficiently clear to achieve their intended purpose; and
- Difficulties specifically relating to the renewal of expired agreements, due to a lack of clarity in the legislation, issues with the notice and procedural requirements, and problems with dispute resolution.

1.19. This consultation looks at each of these areas, but it does not set out detailed proposals for legislative reform, and instead sets out a range of potential means to address them. It outlines what Government believes are the key issues impacting the effectiveness of the Code and, at a high level, what we want to achieve and what changes we believe are needed to make the Code work effectively for both landowners and operators. We are seeking feedback on the changes we are considering to inform our decisions on the scale and scope of any alterations to the Code.

1.20. Optimising the use of digital networks means ensuring the right regulatory framework is in place to encourage and enable operators to access and use each other's passive infrastructure (and that of other utility providers) in appropriate circumstances. The broad proposals in this consultation have therefore also been informed by submissions received in response to the recent call for evidence relating to the Communications (Access to Infrastructure) Regulations 2016[5].

1.21. The response to this consultation will set out the Government's proposals for any legislative reform.

Who we want to hear from

1.22. The Government is keen to encourage as many responses as possible from different stakeholders to ensure we receive views from all relevant parties. We would be particularly interested to hear from network operators and trade bodies representing the telecoms industry as well as site providers, occupiers and owners of land and buildings who may become site providers in the future, their agents and landowners' representative bodies. We would also encourage members of the public to submit responses.

[5] The call for evidence can be found at: https://www.gov.uk/government/publications/review-of-the-access-to-infrastructure-regulations-call-for-evidence/review-of-the-access-to-infrastructure-regulations-call-for-evidence .

Territorial extent

1.23. Telecommunications policy is reserved and the Code applies and extends across the UK. As with the 2017 reforms, we will work closely with the Devolved Administrations to develop the finalised policy.

Next steps

1.24. Following the publication of this response, the Government will consider the responses received and provide a consultation response outlining the final policy position and any proposed legislative changes.

Chapter Two: Obtaining and using Code agreements
Overview

The current position: key points

- Code rights can only be used if an agreement allowing this has been:
    - Completed between a Code operator and the occupier of the land that the rights relate to; or
    - Imposed by a court.
- Code rights can only be exercised in accordance with the terms of the agreement.
- There are occasions where an operator or a site provider may need to enforce the terms of a Code agreement. The Code makes general provision for this.
- Once completed, there is no provision under the Code for either party to apply to the Court for new or different terms, until the end of the agreed period.

The problem

- Failures to make agreements quickly make it difficult to provide homes and businesses with mobile coverage and gigabit capable connections quickly.
- Completed agreements are not flexible enough to accommodate changes in circumstances.

Why we think changes are needed and what they should achieve

Protracted negotiations can have negative impacts not only for the parties involved, but also on digital networks. For the negotiating parties, the process can be not only time consuming, but also costly and worrying. In relation to network deployment, the longer it takes for agreements to be completed, the longer it takes for sites to be upgraded or for new rollout to take place.

In a report for the think tank Centre for Policy Studies, Jackman and King (2020) surveyed industry evidence about the pace of negotiations.[6] Their data suggests:

- 80% of negotiations take more than 6 months to be completed;
- The average time for agreements to be completed is 11 months; and
- Nearly a third of current negotiations stall.

We believe changes are needed to:

- support faster and more collaborative negotiations, help ensure best practice guidance is adhered to and encourage greater dialogue;
- provide efficient ways for disagreements to be dealt with;
- address failures to respond to requests for Code rights;
- ensure that completed agreements can operate effectively.

[6] *Jackman, A. and King, N. (2020),*
Upwardly Mobile: How the UK can gain the full benefits of the 5G revolution, Centre for Policy Studies

Obtaining and using Code agreements

Introduction

2.1. The Code regulates agreements between Code operators and occupiers of land for electronic communications apparatus to be installed and kept on public and private land.

2.2. It is a fundamental premise of the Code that operators and potential site providers will make reasonable efforts to reach mutually acceptable agreements. If network deployment is to happen quickly and cost effectively, it is important that cases are only referred to a court where this cannot be achieved.

2.3. The Government has therefore always been clear that good working relationships between Code operators and site providers are critical for the Code to function as an enabler of our digital communications networks and services. This applies not only at the negotiation stage of an agreement, but throughout its duration.

2.4. The Government made substantial changes to the Code in 2017, which were intended to support faster and cheaper deployment. Amongst other measures, the 2017 reforms included changes to the statutory valuation framework underpinning the financial terms of Code agreements. These changes were meant to encourage greater investment in digital networks, by reducing operator costs over time. This, in turn, meant that site providers would receive lower amounts for letting their land be used and we recognised that this could affect site provider willingness to agree or renew Code rights.

2.5. As well as changing the statutory valuation framework, the 2017 reforms transferred the jurisdiction for dealing with the Code to the Lands Chamber of the Upper Tribunal in respect of England and Wales (and equivalent fora in respect of Scotland)[7]. The intention of this was to enable faster and more cost effective dispute resolution in cases where the parties are unable to reach a mutually acceptable agreement.

2.6. Since the 2017 reforms came into effect, we have engaged extensively with site providers, operators and representative organisations to understand the impact those reforms have had. Based on feedback we have received from these groups, we believe there are a number of areas where changes to the law are needed in relation to the completion and operation of Code agreements.

[7] *To date, the jurisdiction for Code disputes has not been transferred from the county courts in Northern Ireland, due to the absence of a legislative assembly in NI when the 2017 reforms were introduced. This will be taken forward separately and does not form part of this consultation.*

Obtaining and using Code agreements: the issues

2.7. In the following sections, we discuss a range of issues relating to negotiations and barriers to the effective operation of concluded agreements. The issues considered are:

1. Negotiations: lack of engagement and collaboration (from operators, occupiers or site providers);
2. Non-responsive or unidentifiable occupiers;
3. A need for greater clarity about who needs to agree Code rights can be granted;
4. Failures to comply with agreed terms (by operators and site providers);
5. Difficulties obtaining new or additional rights where circumstances change.

2.8. We do not want to undermine or reduce the rights of existing or potential site providers to refuse or object to operator requests for new or renewed Code rights, but we do consider that measures are needed that will:

- Encourage both parties to engage meaningfully and collaboratively in negotiations for Code agreements;
- Directly address the issue of non-responsive or unidentifiable site providers;
- Ensure that the capacity to confer Code rights rests with the most appropriate party (or parties); and
- Provide faster and more efficient ways for disagreements and cases of non-compliance with agreements and Code of Practice to be dealt with.

2.9. We are seeking stakeholder views and suggestions on:

- Whether they consider that changes along the lines of those outlined in our policy proposals are needed; and if so
- What scope and form these changes should have to achieve their intended objectives.

Obtaining and using agreements

Issue 1: negotiations: lack of engagement and collaboration

The current position

- Code rights can only be exercised if they are agreed between an occupier of land and a Code operator, or if they have been imposed by a court.
- Operators are expected to make reasonable efforts to engage collaboratively before making an application to a court[8].
- An application to a court can only be made **after** an operator has issued a statutory notice to the occupier setting out the Code rights they want and the terms they are proposing.
- An application to a court can then be made if an agreement is not reached within 28 days **or sooner** if the occupier confirms in writing that they do not agree to the request.

Discussion

2.10. Code operators, occupiers, site providers and representative organisations report finding engagement and negotiation with each other difficult. Reported problems include a lack of willingness to negotiate in meaningful ways, or unhelpful communications that undermine trust and collaboration. The Ofcom Code of Practice, which was developed by Ofcom in collaboration with operators, site providers and professional organisations sets out the standards of behaviour that parties to a negotiation for Code rights are expected to adopt. However, we regularly receive reports that these standards are not complied with.

2.11. A lack of engagement and other poor negotiating behaviours by either party can slow down the process for agreements to be reached and, in some cases, prevent agreements being concluded at all. If this happens, the operator must decide whether to look for an alternative site or take the matter to a court. Litigation in these circumstances can take time and be costly. In addition, resolution through the court and tribunal system is less likely to promote good working relationships between the parties moving forwards.

2.12. We recognise that the 2017 Code reforms had an impact on site providers' willingness to agree or renew Code rights. In particular, some stakeholders have expressed the view that changes to the Code's valuation provisions, and the reductions in the amounts paid to site providers that those reforms were intended to deliver, have made entering these agreements significantly less attractive for site providers.

[8] This is emphasised in the Ofcom Code of Practice (see paragraph 1.27).

2.13. The Government's policy position on this valuation regime has not changed. We still believe that underpinning negotiations with the valuation model (i.e. that set out in paragraph 24 of the Code) is appropriate for the installation and maintenance of digital communications infrastructure systems. **We do not intend to revisit the valuation framework contained in the Electronic Communications Code.**

2.14. We do not think that disagreements about financial terms are the **only** reason that negotiations are not progressing as smoothly as they could be. Other issues have been brought to our attention, including: non collaborative behaviour or poor communications by operators, occupiers and professional representatives; a lack of trust between negotiating parties; and concerns about ensuring both parties adhere to the terms of a completed agreement.

2.15. We think changes are needed that will encourage more collaborative negotiation and offer ways for disagreements to be dealt with quickly and cheaply.

2.16. We are considering the following options:

1. A statutory process for monitoring raising complaints about non compliance with the Ofcom Code of Practice;
2. The introduction of an Alternative Dispute Resolution[9] Scheme;
3. Fast track court procedures.

Negotiations: lack of engagement and collaboration

Consultation Questions

Question 1
Do you agree with the assessment of the main problems relating to negotiations for and the completion of new agreements set out in Chapter Two?

Question 2
Do you have any suggestions of other legislative or non-legislative changes that might support faster and more collaborative negotiations other than those discussed in Chapter Two? **In answering this, please note that we do not intend to revisit the statutory valuation regime.**

Question 3
Do you think there should be a statutory process available to look at cases where an operator has failed to comply with the Ofcom Code of Practice?

[9] *Common forms of ADR include: **mediation**, where an independent third party helps the disputing parties to come to a mutually acceptable outcome; or **arbitration**, where an independent third party considers the facts and takes a decision that's often binding on one or both parties.*

If such a process was introduced:

Question 3(a)
Do you think that the process should deal with **any** failure to comply, or exclude minor or technical breaches, or focus on a specific range of issues?

Question 3 (b)
Do you think the Ofcom Code of Practice would need to be reviewed to provide more specific guidelines? If so, what might these helpfully include?

Question 3(c)
What remedies do you think should be available under any statutory process? For example: should these be limited to putting right the failure to comply, or should financial penalties be available in some circumstances?

Question 4
Do you think the court should have specific jurisdiction to take into account failures to comply with the Ofcom Code of Practice during the negotiation stage? For example, in awarding costs or providing some other remedy?

If the court had this jurisdiction:

Question 4(a)
What should be the purpose of such a process? Should the court's main aim be to ensure that parties comply with the terms of agreements? Or should it aim to punish breaches already made and to deter future breaches?

Question 5
Do you think Alternative Dispute Resolution (ADR) would assist in resolving disagreements where e.g. the disputes points are not related to legal interpretation?

If so:

Question 5(a)
What sort of situations do you think might be suitable for bringing to ADR?

Question 5(b)
Which type or types of ADR (e.g. mediation, arbitration, other)[10] do you think could be best suited for each of these situations?

[10] ***Mediation*** *is where an independent third party helps the disputing parties to come to a mutually acceptable outcome.* ***Arbitration*** *is where an independent third party considers the facts and takes a decision that's often binding on one or both parties*

Question 6
If an ADR scheme was introduced do you have any comments on how ADR should work in practice? For example:

- Who should pay the costs of ADR?
- Should both parties have to consent to its use?
- Do you envisage any procedural issues and how could these best be solved?
- Do you think parties should be required to consider / attempt some form of ADR before bringing a case before the court, or before being allowed to continue with it, if the court thinks that ADR should be attempted first?
- Do you think the court should have powers to take into account any refusal or failure to engage with ADR. For example, in awarding costs?

Question 7
Do you think there are situations where a fast track application to a court should be available, bearing in mind the implications of this in terms of judicial resources and the listing of other cases?

If so:

Question 7(a)
In what situations do you think a fast-track procedure should be available and why?

Question 7(b)
Should such cases be dealt with by the Upper Tribunal or by a different court/tribunal, for example, the First-tier Tribunal?

Question 7(c)
What time limits would be required for a fast track procedure to address difficulties with the current timescales for hearings and how do we ensure these provide sufficient opportunity for each party to respond?

Question 7(d)
Do you think any additional remedies would need to be available to the court in the situations you describe?

Question 7(e)
How can we ensure that any fast track procedures give priority to the most appropriate cases?

All consultation questions are collated in Annex A

Obtaining and using Code agreements

Issue Two: non responsive or unidentifiable occupiers

The current position

- Code rights can only be granted if they are agreed by the occupier(s).
- If an occupier fails to respond to a statutory notice requesting Code rights within 28 days, the operator can make an application to a court for an agreement to be imposed.

Discussion

2.17. Negotiation and engagement is only possible if the party whose agreement is required can be identified and engages with the process. Operators report they are often unable to start negotiations because their requests for Code rights and statutory notices are unanswered. There are also some occasions where operators report that they are simply unable to identify whose agreement must be obtained.[11] In both these scenarios, the operator must either ask a court to impose an agreement or find an alternative site / deployment route.

2.18. The Government has introduced the Telecommunications Infrastructure (Leasehold Property) Bill[12], which addresses an aspect of this issue, i.e. in relation to operators who request the agreement of Code rights in relation to land but where the landowner repeatedly fails to respond to that request.

2.19. It should be noted that the provisions of that Bill apply in respect to leasehold property where there is a request for a connection from a tenant, which is followed by repeated requests to the occupier of the common parts of the building for Code rights in respect of those parts.

2.20. Once it enters fully into force, that legislation will create a process which it is hoped will be quicker and cheaper than that currently provided for in the Code. It will allow operators to apply to a court to obtain interim Code rights to access land in situations where the landowner repeatedly fails to respond to requests for access.

2.21. Throughout the passage of that Bill, we have continued to listen to industry stakeholders' and Parliamentarians' concerns, and we are confident that the Bill will materially contribute to the problem of repeatedly unresponsive landlords. But that is not a reason not to go further.

[11] *This may be for several reasons: examples could include if there are several layers of ownership, mixed ownership or the land is unregistered.*

[12] https://services.parliament.uk/Bills/2019-21/telecommunicationsinfrastructureleaseholdproperty.html

2.22. The issue of unresponsive landowners is a particular problem for fixed network providers. Operators will only stay in an area for the time it takes for them to deploy their network and high build costs mean they cannot wait for unresponsive site providers. In these situations, the operator will need to decide whether to use an alternative route (re-routing) or remove the properties it was attempting to reach from its network build plans (de-scoping). From our discussions with fixed line operators, we understand that the cost of re-routing a network is substantial.

2.23. Fixed line re-routing also means that households and business premises can be left behind. It is unlikely that fixed line operators will return to an area to connect these properties that have been bypassed, due to the prohibitive additional costs involved. Those that do choose to return may need to pass on these additional costs to consumers through higher fees.

2.24. We strongly believe that occupiers and landowners should have every opportunity to discuss requests for Code rights, to understand what is involved, and to negotiate mutually acceptable terms.

2.25. But at the same time, we are concerned that the legislation as it stands - even once the Telecommunications Infrastructure (Leasehold Property) Bill is implemented fully [13] - does not in itself do enough to encourage occupiers and landowners to engage in good time with operators. We believe that the public need for digital communications is such that, in some circumstances, operators should be permitted to acquire Code rights where there has been a repeated failure to engage from an occupier or landowner.

2.26. We are therefore considering introducing an alternative procedure for Code rights to be obtained if an operator can demonstrate that reasonable efforts have been made to secure an agreement, but the occupier or landowner has failed to respond to repeated requests. The aim would be to create a faster and more cost effective process that could reduce or prevent connectivity gaps arising due to failures to respond.

Non responsive or unidentifiable occupiers

Consultation Questions

Question 8
Do you think our assessment of the impact of non- responsive occupiers and landowners on network deployment is accurate? Please provide any available evidence demonstrating the impact of failures to respond on the pace, scale and cost of deployment as well as any other impacts.

[13] *Noting that the procedure being introduced through the Telecommunications Infrastructure (Leasehold Property) Bill will only apply in the scenarios outlined, and will not have wider application to other cases where an occupier fails to respond.*

Question 9
Do you think there are any other ways that we can encourage unresponsive occupiers and landowners to engage with requests for Code rights (further to those already included in the Telecommunications Infrastructure (Leasehold Property) Bill?

Question 10
Do you think there should be a streamlined process for operators to secure Code rights in cases where an occupier (or other relevant party) fails to respond to a request for these rights?[14]

If so:

Question 10(a)
Do you think this kind of streamlined process should be administered by the Upper Tribunal or by a different court?

Question 10(b)
What sort of timescales do you think would be appropriate for this kind of process?

Question 10(c)
What kind of measures and safeguards do you think such a process would need to include in order to maintain a balance between the public interest in network deployment, and the private rights of occupiers and landowners? (for example, - how many times, and at what intervals, should the operator have to request the rights before they can access the procedure; how long should the occupier have to respond etc).

All consultation questions are collated in Annex A

[14] This would be separate to the process contained in the Telecoms Infrastructure (Leasehold Property) Bill currently before Parliament, which is targeted at situations where tenants are unable to secure requested services due to non responsive landlords.

Obtaining and using Code agreements

Issue 3: who can agree to grant Code rights

The current position

- As explained in the glossary, Code rights are normally conferred by an agreement between the **occupier** of land and the operator seeking the Code rights. An "occupier" in this context means "*the occupier of the land for the time being*".
- The Code makes separate, specific provision for situations where land is unoccupied.

Discussion

2.27. The current law provides that it is normally the person (or persons) physically present on the relevant land who is able to grant Code rights. Since the 2017 reforms came fully into force, we have been made aware that this can create difficulties where **an operator** is in occupation of the land.

2.28. For example:

1. An operator (Operator A) remains in occupation of land under an expired Code agreement and is making payments to a site provider. A different operator (Operator B) wants to acquire use of the site and Operator A is willing to terminate their rights to remain on the land providing Operator B secures Code rights. Under the current law, Operator B would need to make an agreement with Operator A as the occupier of the land for the time being, rather than with the landowner[15];
2. An operator is in occupation of land under an expired old Code agreement. They have a right to remain on the land (due - for example - to an implied tenancy or a tenancy at will). The operator cannot seek a renewal of the expired agreement because they do not have continuing Code rights or a subsisting agreement. However, they cannot seek a new Code agreement either, because they are in occupation of the site[16].

2.29. We recognise that there may be what can be described as "work arounds" to the above situations. For example, in scenario one, Operator A might make an agreement with Operator B and seek the site provider's agreement to be bound. But we think this creates an unnecessary layer of complexity and does not address the underlying point. Our view is that these situations are analogous to the renewal

[15] See e.g. *Cornerstone v Compton Beauchamp [2019] EWCA Civ 1755 Case No C3/2019/ 1330* https://www.bailii.org/ew/cases/EWCA/Civ/2019/1755.html

[16] See e.g. *Arqiva v AP Wireless [2020] UKUT 195 (LC) UTLC Case No TCR/324/2019* https://www.bailii.org/uk/cases/UKUT/LC/2020/195.html

process, where Part 5 of the Code removes the reference to the "occupier," permitting a renewal agreement to be made between the operator and the site provider. Where an operator is already occupying land under an expired or ongoing Code agreement we consider that it is appropriate that the site provider is the person able to to grant new rights or renew the agreement.

2.30. We are therefore considering making changes to the definition of an occupier or changing who is able to confer Code rights where an operator is in occupation of a site.

Who can agree to grant Code rights?

Consultation Questions

Question 11
Do you agree that if a Code operator is in occupation of land, it should be:

a. the person who owns or has control over the land; or
b. the person who granted the rights allowing that operator to be in occupation; or
c. Someone else, and if so, whose agreement should be required for any new or renewal agreement?

Question 12
Are there any other situations where you think it may be appropriate for someone other than (or in addition to) the occupier of land to be able grant Code rights?

All consultation questions are collated in Annex A

Obtaining and using Code agreements

Issue 4: enforcing Code agreements and terms

The current position

The Code makes general provision for the enforcement of Code agreements and the rights they contain. This gives a court or tribunal[17] authority to enforce that agreement. There are, however, no detailed procedures for the enforcement of Code agreements or rights.

Discussion

2.31. The successful provision of electronic communications networks does not end with the completion of an agreement granting Code rights. Operators must be able to exercise their rights in accordance with the agreed terms. At the same time, if occupiers and site providers do not feel confident that operators will adhere strictly to any terms agreed, negotiations are likely to be more protracted and difficult.

2.32. Paragraph 93 of the Code provides that Code agreements and rights can be enforced by the tribunal or another court of competent jurisdiction. This means that, for example, an operator who is refused access to a site may seek an injunction to secure access. Under paragraph 31 of the Code itself, a site provider who believes an operator is in breach of the agreement can ask for the agreement to be terminated.

2.33. Ideally, operators and site providers will have sufficiently good working relationships for enforcement procedures to be unnecessary. However, we do think it is important that both parties have the ability to enforce their rights through accessible and efficient procedures. At the same time, traditional enforcement remedies - like an injunction to secure access or the right to terminate an agreement - may be disproportionate for smaller breaches.

2.34. From our informal discussions with stakeholders, particularly site providers, we understand there are concerns about compliance with Code agreements. We are keen to understand whether concerns like this may be having a material impact on negotiations / willingness to enter into agreements. We also want to know whether site providers and operators are confident about the remedies available if problems do arise. If not, we want to understand whether there are alternative ways that compliance with the terms of Code agreements might be encouraged or that could provide fast and accessible remedies where problems arise.

[17] See paragraph 93: an agreement and any right conferred by the Code may be enforced by any court of competent jurisdiction, any court which for the time being has power to impose an agreement under the code and, in the case of an agreement imposed by a court or tribunal, the court or tribunal which imposed the agreement.

Enforcing Code agreements and terms

Consultation Questions

Question 13
Are you aware of, or have you experienced, any difficulties relating to compliance with the terms of a Code agreement?

If so:

Question 13(a)
Was paragraph 93 - or any other provision - of the Code the cause of those difficulties?

Question 13(b)
How were those difficulties dealt with and was the outcome satisfactory?

Question 14
Are there other ways that you think we can encourage compliance with the terms of Code agreements? For example:

a. Could Alternative Dispute Resolution provide a route for dealing with compliance issues?
b. Should there be scope for Code agreements to include financial penalties for non compliance?

We are not providing a specific proposal on this point, but would welcome responses to the consultation questions

All consultation questions are collated in Annex A

Obtaining and using Code agreements

Issue 5: modifying agreements

The current position

- Changes can be made to the terms of a Code agreement **at any time** through a voluntary agreement between the parties, or in accordance with any contractual terms permitting such changes.
- However, a court does not have jurisdiction to impose any changes to the rights or terms contained in a Code agreement until that agreement expires.
- This means that if the parties cannot agree on changes to the terms of an agreement, neither party can ask a court to deal with the disagreement and decide whether to impose those changes until the agreement expires.

Discussion

2.35. The rights and terms needed for a Code agreement to function effectively should be agreed - or imposed - during the initial negotiations. While we realise that circumstances can change for either or both parties during the course of an agreement it is open to the site provider and operator to mutually agree to make alterations to the terms of their agreement.

2.36. However, if one party wishes to do this and the other does not, a court currently has no jurisdiction to impose changes to the existing terms. We think this is the correct position in most cases. Agreements should provide both parties with as much certainty as possible. We do not think, for example, that it should be possible for either party to re-open an agreement merely to secure more favourable financial terms.

2.37. However, there may be situations where one of the parties has a genuine need to secure an additional right, or a variation in the original terms due to a change in circumstances since the original agreement was concluded. If this happens, and the parties are unable to agree on changes to the existing agreement, there is no route available for the matter to be assessed independently. We think this has the potential to create real difficulties, for example, if an operator needs an additional right to optimise the use of an existing site, or if an unexpected change in circumstances means a site provider is genuinely unable to comply with the original terms.

2.38. We remain of the view that *concluded* agreements should not normally be re-opened and that, in particular, parties should not be able to revisit concluded agreements purely in order to secure more favourable terms in relation to their existing rights.[18]

[18] Paragraph 497 of the Explanatory Notes for the Code provisions sets out this view: Agreements for Code rights are final so that once agreed (see Part 2), it is not possible for either party to re-open the agreement. For example if an operator agrees to pay £5,000 for a (consensual) Code agreement, the operator (or landowner)

However, we think it **may** be appropriate that a court should have jurisdiction to decide whether to impose modified rights or terms in certain circumstances. We recognise that any changes to this effect would need careful development. We do not want to create a position where agreements are being regularly revisited without good cause. We would welcome feedback from stakeholders not only on the circumstances in which it may be appropriate for a court to impose modified or new rights or terms, but on how we can ensure that the potential for this is subject to sufficient safeguards and limitations.

2.39. Introducing changes to this effect could help provider site providers and operators with assurance that agreements *can* be adapted if needed, while maintaining sufficient certainty that existing terms cannot be revisited without good cause. An appropriate balance between the respective rights of each party could be maintained by requiring the court to take into account a public benefit test similar to that in paragraph 21 of the Code[19] in deciding whether any modified rights or terms should be imposed.

2.40. We are considering amendments to the legislation that make clear that a party can seek modified terms or additional rights before an agreement expires in some situations.

Modifying agreements

Consultation Questions

Question 15
Do you think that operators and site providers should be able to ask a court to impose new, additional or modified rights or terms after an agreement has been concluded, but before it expires?

If this was permitted:

Question 15(a)
Do you think the circumstances in which this option is available to site providers and operators should be limited to maintain an appropriate balance between the need for certainty and allowing a degree of flexibility? For example: should this option only be available where an operator needs an additional right to those contained in the original agreement.

Question 15(b)
In deciding whether to impose additional, new or modified rights or terms, should a court apply a similar test to the one in paragraph 21, as used in relation to requests for new Code agreements? How (if at all) should this test be modified in this context?

cannot then apply to the court to get a better price or improve the accompanying terms that relate to the Code right that has been agreed.

[19] This is the test applied by a court in deciding whether an agreement conferring Code rights should be imposed.

Question 15(c)
Should a court take other, or additional factors into account in deciding whether to grant any new or additional Code right sought by a party?

Question 15(d)
If a court were to decide to impose a new or additional Code right, should the terms be based on the existing Code framework, or should additional / other factors be taken into account?

Question 15(e)
If a court were to decide to impose new or additional Code rights, should the calculation of any consideration or compensation payable be based on the existing provisions, or on a different basis?

All consultation questions are collated in Annex A

Chapter Three: Rights to upgrade and share apparatus
Overview

The current position

- The 2017 reforms introduced **automatic rights**[20] permitting operators to upgrade their own apparatus, and share use of it with other operators, if two conditions are met. These conditions are set out below.
- These automatic rights apply to all agreements completed after December 2017. The parties cannot "contract out" of them, and site providers are not able to charge additional amounts in relation to them.
- Rights to **upgrade** apparatus are also included as one of the specific Code rights listed in paragraph 3 of the Code. If the site provider and operator cannot reach an agreement on rights to upgrade that are less restrictive than paragraph 17 allows, a court has jurisdiction to impose additional rights to upgrade, subject to such terms as it thinks are appropriate.
- Rights to **share** apparatus are **not** included as a specific Code right, but a court has held that they also have jurisdiction to impose rights to share that are less restrictive than paragraph 17 allows[21].

The problem

- Our understanding from engagement with a range of stakeholders is that disagreements about rights to upgrade and share are undermining relationships between occupiers, site providers and Code operators, and prolonging negotiations;
- According to stakeholder feedback, the lack of certainty about the legislation means upgrading and sharing is not happening as often or as quickly as it could;
- The automatic rights to upgrade and share are limited to agreements completed after December 2017, limiting the use of pre-existing networks.

Why we think changes are needed and what they should achieve

Upgrading and sharing apparatus has significant benefits for connectivity. It can:

- reduce the cost of deployment, freeing up funds for further investment;
- increase the number of service providers in given areas, providing greater competition and consumer choice; and
- reduce the overall amount of apparatus installations needed: for mobile networks, this might mean significantly fewer masts; for fixed networks, this would mean a substantial reduction in the disruption caused by streetworks etc. when

[20] These rights are contained in paragraph 17 of the Code. They are referred to as automatic rights because where the conditions are satisfied, the operator does not need to obtain the site provider's consent, or make additional payments.
[21] Cornerstone v London and Quadrant Housing Trust [2020] UKUT 0282 (LC)

underground ducts are installed.

But:

- we understand that the lack of certainty about rights to upgrade and share may be having a negative impact on stakeholder relationships; and
- the current legislative framework may not support efficient upgrading and sharing and the positive impacts they can deliver in the most efficient way.

We think changes are needed that clarify the position on rights to upgrade and share, enabling more collaborative negotiations and reducing friction. Any such clarifications should continue to aim to strike an appropriate balance between the benefits of upgrading and sharing for digital coverage and connectivity, and the impact that these activities may have on individual site providers.

Policy proposals

1. Revisit the automatic rights to upgrade and share: reviewing when they should be available and how they might be clarified;
2. Clarify the position where operators are seeking rights to upgrade and share that do not meet the conditions for the automatic rights;
3. Consider the benefits of introducing limited retrospective rights to share and / or upgrade apparatus installed *prior to the coming into force of the 2017 reforms*, and whether this can be achieved in a way that adequately protects the rights of site providers and operators.

Rights to upgrade and share apparatus

Introduction

3.1. Operator rights to upgrade and share their apparatus can play a significant part in extending network coverage, improving capacity and providing access to 5G services.

3.2. The importance and potential benefits of apparatus sharing are reflected in the Access to Infrastructure Regulations, which have recently been the subject of a call for evidence.

Access to Infrastructure
The Communications (Access to Infrastructure) Regulations 2016 ('ATI Regulations') provide a framework for telecoms operators to request information about and access to the physical infrastructure (e.g. duct, poles and other passive infrastructure) of other telecoms, utility and transport operators. The ATI Regulations also establish a dispute resolution mechanism administered by Ofcom. The Government committed to reviewing the effectiveness of the ATI Regulations in its Future Telecoms Infrastructure Review, and published a call for evidence in June 2020[22]. The responses identified a number of potential improvements to the regime, including in relation to the length of time in which operators must respond to requests for information and access, and the role of Ofcom in enforcing the Regulations. The Government is considering the next steps of the review; if legislation is needed, it will be made when Parliamentary time allows.

3.3. Upgrading apparatus allows operators to use their existing installations to accommodate new services (e.g. by installing small items of additional equipment onto 4G masts to deliver 5G). Upgrading existing apparatus is more cost efficient than finding and building new sites and can enhance the consumer experience, creating improved capacity and providing access to new technologies.

3.4. Apparatus sharing has a wide range of benefits. Sharing means more operators providing coverage in a given area, offering consumers a greater choice of service provider. It reduces the number of sites needed to achieve multi-operator coverage, which can minimise the visual impact of mobile installations and disruption caused when cables and ducts and installed underground[23]. Finally, sharing apparatus reduces industry costs, freeing up capital that can be reinvested in further network

[22] https://www.gov.uk/government/publications/review-of-the-access-to-infrastructure-regulations-call-for-evidence/review-of-the-access-to-infrastructure-regulations-call-for-evidence

[23] Paragraph 113 of the 2012 National Planning Policy Framework specifically encourages sharing to keep sites and apparatus to the minimum needed.

development. The overall benefits of apparatus sharing are so extensive that operators have a legal duty to do this whenever this is practicable.[24]

3.5. As digital demand and the importance of securing maximum geographical coverage increases, the benefits of operators being able to upgrade and share their apparatus quickly and efficiently become even more significant. The 2017 reforms of the Code specifically recognised this, providing operators with automatic rights to upgrade and share their apparatus in certain circumstances. However, since the 2017 reforms came into effect, a number of problems have emerged that are not only limiting the extent and pace of upgrading and sharing, but which we understand may also be having a negative impact on stakeholder relationships.

3.6. From the feedback we have received, we believe that:

- A lack of certainty about the legal position on rights to upgrade and share may be having a negative impact on stakeholder relationships; and
- Specific issues with the current legislation mean it does not support and encourage the efficient upgrading and sharing of apparatus to the extent we consider it needs to.

Rights to upgrade and share: the issues

3.7. In the following sections, we discuss three specific problems relating to upgrading and sharing under the Code:

1. The automatic rights to upgrade and share apparatus;
2. Upgrading and sharing that may have more than a minimal adverse impact or impose an additional burden on the site provider, and therefore would not be permitted under paragraph 17; and
3. Upgrading and sharing apparatus installed before the 2017 reforms.

3.8. We are seeking stakeholder views on the impact of changes in these areas to ensure we understand the implications for all parties, and decide on the most appropriate and proportionate solutions. We are mindful of the fact that occupiers and site providers have specific concerns about upgrading and sharing, and the extent to which operators doing this may impact on their control over their land.

3.9. Any changes will aim to continue to strike a satisfactory balance between the need for greater upgrading and sharing and the interests of occupiers and site providers. To achieve this balance, we will also consider whether any changes to existing provisions should be accompanied by additional measures, such as the introduction of statutory notice requirements before upgrading and sharing takes place.

[24] Regulation 3(4) of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003

Rights to upgrade and share apparatus

Issue 1: the automatic rights to upgrade and share apparatus

The current position

Paragraph 17 of the Code provides that when an agreement is in place - whether this has been reached through negotiation or imposed by a court - operators have automatic rights to upgrade their apparatus and share the use of it with other operators, providing two conditions are satisfied. These conditions are:

1. That the upgrading or sharing has *no adverse impact or no more than a minimal adverse impact* on the appearance of the apparatus; and
2. That the upgrading or sharing *imposes no additional burden* on the site provider.

The legislation does not define "adverse impact", but specifies that an "additional burden" will include anything:

- that has an adverse impact on the site provider's enjoyment of the land (i.e. additional to any adverse impact created by the basic agreement itself); and
- causing the site provider additional loss, damage or expense.

If these conditions are met, the operator can upgrade or share use of their apparatus without needing to obtain the site provider's consent, or having to make additional payments.

Discussion

3.10. Stakeholders have commented that the conditions under which the automatic rights to upgrade and share can be exercised make it difficult to know how and when they can be used in practice. For example: we have been told of a perception in the market that it is not clear whether an automatic right to upgrade can include the installation of **additional** equipment, or is strictly limited to adapting already installed apparatus. Although rights to install are a distinct right under the Code, the installation of additional equipment may be an issue in cases where upgrading or sharing apparatus requires further equipment to be added to the existing installation, and the details of that installation were specified in the original agreement.

3.11. The policy rationale underpinning the introduction of automatic rights to upgrade and share was that operators should be able to carry out these important activities quickly and easily where any impact on a site provider would be so low that it would not add to the burden or impact resulting from the underlying agreement itself. The prescribed conditions which must be met for the automatic rights to be used aim to achieve this. However, the feedback we have received is that the meaning of these

conditions is simply not clear enough for the automatic rights to be used in practice.

3.12. We therefore believe we should revisit the conditions relating to the automatic rights to upgrade and share. We still think these rights should only be available in the type of circumstances outlined above, but we think greater clarity is needed about their intended scope and the circumstances in which they are available. Any changes in this area should make sure that conditions relating to the automatic rights create an acceptable balance between the public benefits of upgrading and sharing and any impacts on site providers.

3.13. A clear example of where automatic rights to upgrade and share apparatus is unlikely to have an adverse impact beyond that arising from the original agreement relates to the use of underground ducts. The activity needed to upgrade and share in these circumstances takes place solely at the points of entry and exit. The impact on the land owner from an additional fibre line being added to an existing duct would be likely to be between minimal to none. However, the likely benefits of an automatic right to share apparatus in such circumstances could be significant. The Future Telecoms Infrastructure Review cited evidence that civil works - in particular installing ducts and poles - comprises around 70% of the costs of deploying fibre networks. These civil works have knock-on impacts for traffic disruption and to the wider economy.

3.14. It is more difficult to identify cases where upgrading and sharing of *mobile apparatus* will have no additional, or more than a minimal, adverse impact on the site provider. Indeed, we understand there is a general perception that the automatic rights to upgrade and share - as they stand - are effectively unusable by mobile operators.

3.15. In practice, we think there are likely to be a range of situations where minor upgrades to, and the limited sharing of, apparatus will have very little impact on a site provider's enjoyment of the land. For example, where an operator may need to install a small additional piece of equipment on already installed apparatus. We think that automatic rights should also be available in these situations. In considering changing the conditions attached to the automatic rights to upgrade and share, we must take into account the importance of upgrading and sharing for mobile operators, in achieving 5G coverage and in closing "partial not-spots". But we are also mindful of the fact that occupiers and site providers have specific concerns about automatic rights to upgrade and share, and the extent to which they may impact on their control over their land.

3.16. In summary, the underlying policy rationale and intention of the automatic rights to upgrade and share is unchanged. *Our objective now is to frame conditions that will provide sufficient clarity and certainty to allow appropriate automatic upgrading and sharing to happen in practice, while making clear to the parties concerned what is, and is not, permitted.*

3.17. We are therefore considering revisiting the wording of the automatic right conditions to make clearer what is and is not permitted.

The automatic rights to upgrade and share apparatus

Consultation Questions

Question 16
In what circumstances do you think automatic rights to upgrade and share should be available?

Question 17
Do you think the current conditions relating to the paragraph 17 automatic rights should be amended?

If so:

Question 17(a)
What changes could we make to paragraph 17 that would make the practical application of the automatic rights clearer for operators and site providers?

Question 17(b)
Are there any additional measures we could include to protect the interests and address the concerns of site providers in relation to the automatic rights to upgrade and share? (For example: the introduction of notice requirements, or specific confirmation that automatic rights to upgrade and share are subject to the original terms of the agreement as they relate to notice / access requirements).

All consultation questions are collated in Annex A

Rights to upgrade and share apparatus

Issue Two: upgrading and sharing rights that *may* create more that a minimal adverse impact or impose an additional burden on the operator and would therefore not be permitted under paragraph 17

The current position

- Parties can negotiate rights to upgrade and share apparatus that are less restrictive than paragraph 17 allows (e.g. that *do* have an adverse impact on the appearance of apparatus or which create an additional burden on one party to the agreement), subject to any terms agreed.
- In two recent cases, the Upper Tribunal has proceeded on the basis that it has jurisdiction to impose upgrading and sharing rights that are not subject to the restrictions in paragraph 17 when imposing a new agreement.
- It should be noted that Code operators have a statutory duty to share their apparatus where practicable[25].

In reading this chapter, it should be noted that we are consulting on changes to the paragraph 17 conditions (see Chapter 3, Issue 1). Changes proposed in this section will potentially apply in relation to upgrading and sharing rights that do not satisfy any ***revised*** *paragraph 17 conditions.*

Discussion

3.18. We understand that, following implementation of the 2017 reforms, there was some disagreement between operators and site providers about whether a court has **any** jurisdiction to impose rights to upgrade and share that would not be permitted under paragraph 17. The basis of this argument being that, because paragraph 17 provides **specific** rights to upgrade and share, different upgrading and sharing rights cannot be imposed.

3.19. In two recent determinations[26], the Upper Tribunal has proceeded on the basis that, when imposing a new agreement, they **do** have jurisdiction to impose upgrading and sharing rights that are not subject to paragraph 17 conditions. However, due to reported ongoing confusion about upgrading and sharing rights, we think it is important that we consider whether legislative changes are needed to clarify the matter beyond doubt and reduce the risk of unnecessary disagreements and litigation on this point.

3.20. It has always been our intention that rights to upgrade and share which would not be permitted under paragraph 17 should be available to operators seeking new

[25] Regulation 3(4) of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003
[26] See e.g. Cornerstone v University of the Arts London [2020] UKUT 248 (LC) at para 188 and Cornerstone v London and Quadrant Housing Trust [2020] UKUT 0282 (LC) at para 78.

agreements, either through negotiation, or via the court if it considers such rights should be imposed. However, we believe any upgrading and sharing rights (beyond those provided for in paragraph 17) should be based on terms that are either agreed by the parties, or imposed by a court.

3.21. To avoid any residual scope for confusion, to make clear the importance that the Government attaches to operators being able to upgrade and share their apparatus, and to help inform future negotiations for upgrading and sharing rights beyond those contained in paragraph 17, we think it is important to clarify the position.

3.22. We want to make clear that a court **does** have jurisdiction to impose rights to upgrade and share beyond those contained in paragraph 17 and we think this jurisdiction should apply where the court is imposing either a new agreement or a renewal agreement. If changes are introduced that permit a court to impose modified or additional terms **before** an agreement expires (see Chapter 2, Issue 5), we think this should include jurisdiction to impose upgrading and sharing rights beyond those contained in paragraph 17, subject to any test introduced for the imposition of modified terms during the course of an agreement.

3.23. In addition to the above, we think it may be appropriate that a court is required to take some specific factors into account when considering whether to impose additional upgrading and sharing rights. For example: the specific public benefits of sharing in relation to the reduction in installation and building work this involves; the benefits of *improved* coverage and connectivity that upgrading can provide; and the possibility that additional consideration and compensation should be proportionate to any **additional** impact or burden on the site provider.

3.24. We are therefore considering making clear how and when a court can impose rights to upgrade and share that are separate to the automatic rights permitted under paragraph 17 and that *may* have an adverse impact or impose an additional burden on the site provider, subject to any such terms as the court considers appropriate.

Upgrading and sharing not permitted under paragraph 17

Consultation Questions

Question 18
Do you think that a court should be able to impose rights that allow more extensive upgrading and sharing than is permitted under the automatic rights in paragraph 17 in any, or all, of the following situations:

(a) If the court is imposing a new agreement and such rights are requested?
(b) If the court is imposing a renewal agreement and such rights are requested?
(c) If the court is asked to grant new or modified rights to upgrade and share apparatus during the term of a completed agreement? (noting that this would only be relevant if changes permitting modification of an agreement prior to expiry is introduced, and would be subject to any safeguards put in place for such

modifications).

Question 19
Do you think the court's jurisdiction to impose these rights needs to be expressly stated in the legislation, given that the Upper Tribunal has already held that this is possible?

Question 20
Do you think the court should be required to take specific factors into account in deciding whether it is appropriate to allow upgrading and sharing rights which are more extensive than those allowed by paragraph 17?

Question 21
Do you think the court should be required to take any specific factors into account in deciding what the terms relating to upgrading and sharing rights should be?

Question 22
What additional factors (if any) should be included in the situations described at questions 20 and 21 to strike an appropriate balance between the importance of upgrading and sharing and the potential impacts on the site provider?

All consultation questions are collated in Annex A

Rights to upgrade and share apparatus

Issue 3: upgrading and sharing apparatus installed before the 2017 reforms

The current position

The automatic rights to upgrade and share contained in paragraph 17 do not apply to 'old' Code agreements.

Discussion

3.25. In relation to agreements completed before the 2017 reforms, the court has no jurisdiction to impose rights to upgrade and share if these are not agreed between the parties. Chapter Two discusses whether operators should be able to ask the court to impose any new or additional rights (which might include rights to upgrade and share) if circumstances change after an agreement has been completed and these rights become necessary.

3.26. However, in this section, we specifically consider whether operators should be given **any specific automatic rights to upgrade and share** apparatus installed under an agreement reached *before* the 2017 reforms came into effect[27]. This would mean that, **subject to prescribed conditions**, operators would have **limited rights** to upgrade and share such apparatus without having to negotiate the right to do so, or having to ask for the right to be imposed. In considering this, we are particularly mindful of site provider interests.

Retrospective legislation

We recognise that this proposal, if implemented, would affect contracts which had already been entered into, and that this retrospective application may have particular impacts. At this point, our aim is solely to understand the overall impacts and benefits of retrospectivity in relation to upgrading and sharing rights. We wish to assure all stakeholders that we are only considering retrospective measures in the strictly limited scenarios outlined below and that, even in relation to these, we will only proceed further with this if we believe it is in the public interest to do so. Any proposals involving retrospective measures would be subject to scrutiny by Parliament.

3.27. An automatic right to upgrade and share apparatus would be particularly significant in relation to fixed networks, where we estimate that up to 80% of fixed line networks were installed prior to 2017.

[27] *It is important to note throughout this chapter that we are also considering changes to clarify the conditions under which automatic rights to upgrade and share are permitted.*

Fixed networks and sharing

Duct and Pole Access (DPA) is the process of allowing telecoms operators to place their network connections (such as fibre cables) in or on existing underground ducts and telegraph poles owned by another provider. In practical terms, DPA allows an operator to install/extend their networks quickly by reducing the need for civil engineering (such as street works) which allows the installation of cables to take place faster and more efficiently.

Passive Infrastructure Access (PIA) are products offered by Openreach which allow other operators to use their network of ducts and poles.

3.28. As we explained in our discussion of the automatic rights to upgrade and share apparatus, the impact on site providers of operators sharing underground, fixed line apparatus is negligible. In spite of this, we understand that *fixed line operators* are rarely sharing the use of pre-2017 networks, because of the prohibitive time and costs involved in seeking an agreement with every site provider under whose land a duct may pass.

3.29. The lack of a retrospective right to upgrade apparatus installed prior to 2017 is also an issue for *mobile operators* as they prepare their networks for 5G. There are currently 40,000 mobile sites across the UK, a significant proportion of which will need to be upgraded to 5G. For example, we understand that one operator intends initially to add 5G equipment to 6,000 of their 14,000 sites and that another operator intends its initial 5G deployment to be based entirely on upgrading existing 4G sites.

3.30. When the 2017 reforms were introduced, the Government decided that the automatic rights to upgrade and share should **not** be applied retrospectively. This decision was based on:

- limited evidence at the time from stakeholders on the public benefit impact of retrospective application; and
- a report by Analysys Mason[28], which concluded the impact on cost savings would be limited, and the consequent effect on investment and coverage would be relatively small.

3.31. Since then, more information has become available about the extent of upgrading needed for 5G readiness, and the scope of those upgrades is clearer. In addition, Ofcom has introduced a specific regulatory remedy to address 'significant market power' (SMP) identified in the fixed-line market which is based on the operator with SMP sharing access to their network with other providers. These changes in the potential costs and benefits of the policy mean it is worth reconsidering the decision.

28 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/523787/Analysys_Mason_-_Financial_impact_of_ECC_changes_-_Final_report__3_.pdf

3.32. It is not clear how many agreements completed prior to 2017 included rights to upgrade and/or share apparatus, but even where such rights exist, they may have been agreed on terms which involve substantial additional payments to the site provider. Where they do not exist, rights to upgrade and share must be negotiated and agreed before this can be done, with no possibility to apply to the court if agreement cannot be reached.

3.33. *Automatic rights to upgrade and share fixed line networks installed prior to 2017 could not only speed up and reduce the cost of deployment for other operators, widening consumer choice. It could also increase infrastructure competition and allow more services to be provided to more people.*

3.34. There are almost 14,000 mobile agreements still in place that were concluded before 2017. Introducing an automatic right to upgrade or share apparatus in these cases could make it significantly easier for operators to adapt their 4G networks to 5G. We are concerned that, without this, it is possible for site providers to refuse, or seek disproportionate prices, for rights to carry out what may be very minor changes with no impact on them. This could leave areas behind.

3.35. However, we consider that it is critical in these situations that the rights of site providers are adequately protected and that these rights are only available where **these activities would have no, or very little, impact on a site provider**. We therefore consider that we should revisit the case for introducing retrospective rights to upgrade and share apparatus installed on sites with agreements dating from before the 2017 changes, subject to specific conditions and restrictions.

3.36. We are considering:

- applying the paragraph 17 automatic upgrading and sharing rights to Code agreements concluded before the 2017 reforms *noting that the conditions relating to the automatic rights may change*; or
- creating a separate and distinct automatic right to upgrade and / or share apparatus for Code agreements concluded before the 2017 reforms, which could be subject to different and stricter conditions.

Upgrading and sharing apparatus installed before the 2017 reforms

Consultation Questions

Question 23

What would be the specific impacts of creating an automatic right to upgrade and share apparatus in relation to agreements completed before 28 December 2017? *Please provide details of **all impacts** including those on site providers, on coverage and connectivity, and on wider public considerations (such as reducing any disruption from unnecessary works or the impact on the environment of additional installations).*

Question 24
Do you think operators should have **any** automatic rights to upgrade and share apparatus relating to agreements completed before the 2017 reforms came into effect, where there is a strong case that this would be in the wider public interest and there would be no, or very little, impact on the site provider?

If these rights were introduced:

Question 24(a)
Do you think they should be subject to the same conditions as the paragraph 17 automatic rights, or should a different and more stringent set of conditions apply to protect site provider interests?If you think different conditions should apply, what might those conditions be?

Question 24(b)
Are there any other measures we could introduce that would secure the benefits of upgrading and sharing apparatus installed under pre-December 2017 agreements, while protecting the interests of site providers?

All consultation questions are collated in Annex A

Chapter Four: Expired agreements
Overview

The current position

- Code agreements are for a defined period of time. When that period ends, we refer to the agreement as “expired”.
- Part 5 of the Code provides that once an agreement has expired, the operator can continue to exercise the Code rights, and the site provider continues to be bound by them, until the agreement is either terminated or renewed;
- Part 5 sets out the notice requirements and the dispute resolution procedures that apply in each of these scenarios.

The problem

- Part 5 of the Code provides a clear framework for the renewal or termination of expired agreements.
- However, Part 5 **does not apply to all expired agreements.**
- There is a reported lack of clarity and consistency about:
    - When Part 5 does and does not apply; and
    - What should happen in cases where Part 5 does **not** apply.
- Provisions relating to renewal disputes mean it takes longer for these cases to be listed and heard than it does for new agreements.
- There is a perception that the legislation as it stands does not encourage prompt negotiations for renewal agreements.

Why we think changes are needed and what they should achieve

We think there should be greater certainty for operators and site providers about what will happen when their agreements come to an end. We also think there should be consistency in the way that disagreements about the renewal of Code rights are dealt with.

We think the legislative framework should encourage prompt and collaborative negotiations for renewal agreements, with appropriate measures available for cases where an agreement cannot be reached.

Expired Agreements

Introduction

4.1. Code agreements must be for a defined period. These periods are often substantial. Once the end of that period is reached, the Code recognises that - in most cases - the operator will want to continue using the site. However, the Code also recognises that there may be situations where the site provider needs to terminate the agreement.

4.2. The Code therefore provides that once an agreement expires, the operator can continue to exercise the Code rights that were contained in that agreement unless and until:

- A new agreement is completed, which may include modified terms; or
- The site provider asks for the agreement to be terminated and for the operator to vacate the site.

4.3. In both of these situations, the Code allows the parties to apply to the court for a decision if they are unable to agree on the modified terms, or if the site provider wants to terminate the agreement, but the operator wants to continue it, and sets out the relevant notice and procedural requirements.

4.4. However, since the 2017 reforms came into effect, a number of difficulties relating to the renewal of expired agreements have been brought to our attention and we understand that it is taking a disproportionate amount of time for renewal agreements to be completed, when compared with the average time that it takes for an entirely new agreement to be reached.

4.5. The remainder of this chapter looks at three specific issues relating to the renewal of expired agreements and at changes we think are needed. These issues are:

1. The different routes to renewal;
2. The timescales for disputes relating to renewals; and
3. The need for interim arrangements during renewal negotiations.

Expired agreements

Issue one: the different routes to renewal

The current position

- Part 5 of the Code provides that once an agreement has expired, the operator can continue to exercise the Code rights, and the site provider continues to be bound by them, unless either:
    - The site provider asks for the agreement to be terminated in specific circumstances; or
    - The site provider or the operator asks for the agreement to be "renewed", with modified terms.
- Part 5 sets out the notice requirements and the dispute resolution procedures that apply in each of these scenarios.
- Part 5 does not apply to all expired agreements.

Discussion

4.6. Code agreements must state how long they are intended to last. Part 5 of the Code sets out a clear framework of the available options for operators and site providers once the period of the agreement ends. In this situation, although the *agreement* has ended, the operator continues to have, and the site provider continues to be bound by, the Code rights that were contained in that agreement until (i) the agreement is formally terminated[29] or (ii) the parties agree that the expired agreement should be replaced by a modified agreement - that is, an agreement with different terms.[30]

4.7. We think this framework provides clarity and certainty for both parties about their rights and options once a Code agreement ends. However, at present, Part 5 of the Code does not apply to all agreements. Paragraph 29 of the Code excludes certain types of leases. In addition, we understand that there are differing views on when an agreement should be treated as expired and capable of renewal under Part 5 where, for example, a formal, written agreement has lapsed and given way to an informal arrangement.

4.8. We think these combined elements have created a situation where there is a lack of clarity within the industry about when, how and whether agreements end and can be replaced. This applies particularly to agreements that were completed before the 2017 reforms, where the Transitional Provisions dealing with the transfer of "old" Code agreements to the "new" Code adds a further layer of complexity.

[29] *Following the procedure outlined in paragraph 31 of the Code and assuming any subsequent counter-request is unsuccessful*

[30] *Following the procedure outlined in paragraph 33 of the Code and noting that if the parties cannot agree on the modified terms of the renewal agreement, the court may be asked to impose a modified agreement*

4.9. In light of what we have heard from stakeholders so far, we do not consider that the present position reflects fully the policy intention at the time the 2017 reforms were introduced. At that point, we made it clear that we did not think the new reforms should have retrospective effect. By this, we meant that the new rights and protections created by the Code reforms should not be automatically transferred onto existing agreements. However, we intended to create a "steady phasing in of new Code rights" through transitional arrangements that would make clear "how and when new agreements transition to the new Code"[31]. However, it is possible that the current position might benefit from some simplification in order to fully realise our original policy intention.

4.10. We consider that there may be merit in there being a clearer and more consistent approach to dealing with cases where the original term of the agreement has expired, and no new formal arrangements have been put in place yet. We consider that a potential way of achieving this would be if the provisions of Part 5 were to apply in *all* cases so that, unless new terms have been agreed:

- the operator's rights should continue to be exercisable in accordance with the expired agreement; and
- the site provider should remain entitled to payment in accordance with the terms of that agreement.

4.11. We think that either party should be able to seek a modified agreement in accordance with the Part 5 provisions, and that the site provider should also be able to ask for the agreement to be terminated if they wish to do so and one of the qualifying criteria applies.

4.12. We take this view because we think there needs to be greater clarity and certainty for operators and site providers about their respective positions when an agreement ends (or has ended). We also think that the framework and dispute resolution procedure underpinning negotiations for **all** Code agreements should be the same, and should be the framework contained in the Code. That framework was specifically designed to support the fast and efficient deployment of digital communications networks, while maintaining an appropriate balance with the rights and interests of individual site providers. Ensuring that that is the framework applied to all future agreements will help ensure that the intended benefits of the 2017 reforms are realised.

Expired agreements: the different routes to renewal

Consultation Questions

Question 25

[31] A New Electronic Communications Code: May 2016 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/523788/Electronic_Communications_Code_160516_CLEAN_NO_WATERMARK.pdf

Do you agree that the Part 5 provisions should apply to all agreements once the original term of the agreements expires or has expired? Is there any reason why they shouldn't?

If Part 5 provisions are applied to all expired agreements:

Question 25(a)
Do you think any special provisions should be included for agreements that were previously subject to different statutory regimes to ensure that any protections are preserved (where these do not conflict with the framework of the Code)?

Question 26
Do you think there are any circumstances in which it would be more appropriate for an operator to use the Part 4 (new agreement) process to obtain a new agreement, rather than the Part 5 (renewal agreement) process?

All consultation questions are collated in Annex A

Expired agreements

Issue two: timescales for disputes relating to renewals

The current position

Paragraph 31 of the Code provides that a site provider wishing to terminate a Code agreement can do so by serving a notice on the operator in certain circumstances and in accordance with the prescribed procedural requirements. If the operator does not want the agreement to end they can serve a counter notice, and - if the parties cannot agree - apply to the court, asking it to decide whether the agreement should be terminated.

Similarly, paragraph 33 of the Code provides that, once an agreement has expired, the site provider or the operator may issue a notice on the other party asking for the agreement to be renewed on different terms. The date from which the requested modifications can take effect must be no sooner than six months after the date the notice is issued. Either party can apply to the court asking for a modified agreement to be imposed if they have been unable to reach an agreement within six months of the notice being issued.

Regulation 3 of the Electronic Communications and Wireless Telegraphy Regulations 2011 requires applications to the court relating to **new** agreements to be heard within six months of the date they are made. However, there is no comparable provision in relation to applications that relate to the **termination or renewal** of an agreement.

Discussion

4.13. Since the courts have held that Regulation 3 of the Electronic Communications and Wireless Telegraphy Regulations only applies to new agreements, stakeholders report that it is taking significantly longer for disputes relating to renewal agreements to be listed and heard.

4.14. This can have implications for either party wanting to obtain an agreement on modified terms, and on site providers who are applying for the agreement to be terminated.

4.15. We are concerned that this creates difficulties for operators and site providers, who face a significant period of uncertainty if they are unable to reach an agreement in relation to termination or renewal. This may have substantial impacts on either or both parties.

4.16. We are therefore considering introducing a requirement for *all* disputes relating to the Electronic Communications Code to be heard and decided on within six months of the date that the application to a court is made.

Timescales for disputes relating to renewals

Consultation Questions

Question 27
Do you think that there should be a statutory requirement for disputes relating to the modification of an expired agreement to be heard within six months of the date the application is made?

Question 28
Do you think that there should be a statutory requirement for disputes relating to the termination of a Code agreement to be heard within six months of the date the application is made?

If so:

Question 28(a)
What would be the benefits of a statutory time limit in relation to these disputes being introduced?

Question 28(b)
What might be the drawback of a statutory time limit in relation to these disputes?

All consultation questions are collated in Annex A

Expired agreements

Issue three: interim arrangements for renewal negotiations

The current position

- When an agreement expires, the operator can continue to exercise their Code rights until a new agreement is completed or the agreement is terminated.
- The Code rights remain exercisable in accordance with the terms of the existing Code agreement unless and until changes to those terms are agreed or imposed.
- If either party wants to seek the renewal of an expired agreement on different terms, they can request this by serving a notice on the other party setting out the proposed new terms and the date from which they would like these new terms to take effect.
- If the parties are unable to reach an agreement on the modified terms requested, either party can apply to the court to decide whether a modified agreement should be imposed.
- The agreement remains in place on its previous terms until a modified agreement is reached or imposed.

Discussion

4.17. It is common for either or both parties to seek changes to the terms of an agreement at the renewal stage. This enables the agreement to reflect changes in the parties' requirements, including financial arrangements. If the parties are unable to agree on modified terms then where an agreement is renewable under the Code, they can apply to a court for a modified agreement to be imposed.

4.18. When an agreement lapses, the previous terms remain in place until new terms are either agreed between the parties, or until a modified agreement is imposed by a court. If an application to the court proves necessary, the Code permits a **site provider** to apply to a court for an interim order specifying the amount that the operator should pay them until the application is dealt with. However, there is no comparable provision available to operators, or any other measure permitting either party to ask for modified rights to be imposed on an interim basis. This is in contrast to the position for new agreements, where an operator may apply to a court to impose Code rights on an interim basis.

4.19. The purpose of an interim rights process in relation to new agreements is to avoid unnecessary delays where an agreement is likely to be imposed, but the terms of that agreement require more detailed discussion and assessment between the parties or by a court. The fundamental position is different in relation to renewals. In these cases, apparatus is installed, the operator can continue to exercise their rights and the site provider remains entitled to payments in accordance with the previously agreed terms unless and until a modified agreement is reached or imposed.

4.20. However, where the proposed terms of a renewal agreement are less attractive to one of the parties than the terms of their existing agreement, it has been suggested that the current legislation actively encourages that party to delay the negotiations for the renewal agreement for as long as possible.

4.21. We think the legislative framework should encourage both parties to negotiate constructively to reach mutually acceptable outcomes as quickly and efficiently as possible. Negotiation delays have cost and time implications for both parties and may harm future working relationships. We think the Code should not encourage either party to stall or delay negotiations and must make provision for cases where this happens to be dealt with appropriately.

4.22. To address this, we are therefore considering:

- Introducing a procedure permitting either party to request an interim order in relation to a request for a renewal agreement; and
- Where a renewal agreement is subsequently imposed, permitting the court to backdate the financial terms of that agreement to the date that the request for an interim order was made.

Interim arrangements for renewal negotiations

Consultation Questions

Question 29
Do you think operators and site providers should be able to seek interim orders in relation to renewal agreements?

If so:

Question 29(a)
What should the interim agreements cover (Code rights, pricing, etc)?

Question 29(b)
Are any safeguards necessary to prevent abuse of the process?

Question 30
Do you think a court should be able to backdate the financial terms of a renewal agreement to the date that a request for an interim order is made?

Question 31
Are there any other ways you think we can help ensure that negotiations for renewals are dealt with in a timely and collaborative manner?

All consultation questions are collated in Annex A

Consultation questions

The following questions seek views on the issues raised in this document and on the changes we are considering.

The questions are set out in order of the chapters and topics covered.

Responses should be provided in writing and submitted to:
code-consultation@dcms.gov.uk

It would be helpful if, throughout your replies, respondents indicate which question(s) you are answering and provide reasons for your response.

Evidence or data that supports or explains impacts should be provided wherever possible.

Obtaining and using code agreements

General questions

Question 1
Do you agree with the assessment of the main problems relating to negotiations for and the completion of new agreements set out in Chapter Two?

Question 2
Do you have any suggestions of other legislative or non-legislative changes that might support faster and more collaborative negotiations other than those discussed in Chapter Two? **In answering this, please note that we do not intend to revisit the statutory valuation regime.**

Obtaining and using code agreements

Compliance with the Ofcom Code of Practice

Question 3
Do you think there should be a statutory process available to look at cases where an operator has failed to comply with the Ofcom Code of Practice?

If such a process was introduced:

Question 3(a)
Do you think that the process should deal with **any** failure to comply, or exclude minor or technical breaches, or focus on a specific range of issues?

Question 3 (b)
Do you think the Ofcom Code of Practice would need to be reviewed to provide more specific guidelines? If so, what might these helpfully include?

Question 3(c)
What remedies do you think should be available under any statutory process? For example: should these be limited to putting right the failure to comply, or should financial penalties be available in some circumstances?

Question 4
Do you think the court should have specific jurisdiction to take into account failures to comply with the Ofcom Code of Practice during the negotiation stage? For example, in awarding costs or providing some other remedy?

If the court had this jurisdiction:

Question 4(a)
What should be the purpose of such a process? Should the court's main aim be to ensure that parties comply with the terms of agreements? Or should it aim to punish breaches already made and to deter future breaches?

Obtaining and using Code agreements

Alternative Dispute Resolution

Question 5
Do you think Alternative Dispute Resolution (ADR) would assist in resolving disagreements where e.g. the disputes points are not related to legal interpretation?

If so:

Question 5(a)
What sort of situations do you think might be suitable for bringing to ADR?

Question 5(b)
Which type or types of ADR (e.g. mediation, arbitration, other)[32] do you think could be best suited for each of these situations?

Question 6
If an ADR scheme was introduced do you have any comments on how ADR should work in practice? For example:

- Who should pay the costs of ADR?
- Should both parties have to consent to its use?
- Do you envisage any procedural issues and how could these best be solved?
- Do you think parties should be required to consider / attempt some form of ADR before bringing a case before the court, or before being allowed to continue with it, if the court thinks that ADR should be attempted first?
- Do you think the court should have powers to take into account any refusal or failure to engage with ADR. For example, in awarding costs?

[32] ***Mediation*** *is where an independent third party helps the disputing parties to come to a mutually acceptable outcome.* ***Arbitration*** *is where an independent third party considers the facts and takes a decision that's often binding on one or both parties*

Obtaining and using Code agreements

Fast track judicial process

Question 7
Do you think there are situations where a fast track application to a court should be available, bearing in mind the implications of this in terms of judicial resources and the listing of other cases?

If so:

Question 7(a)
In what situations do you think a fast-track procedure should be available and why?

Question 7(b)
Should such cases be dealt with by the Upper Tribunal or by a different court/tribunal, for example, the First-tier Tribunal?

Question 7(c)
What time limits would be required for a fast track procedure to address difficulties with the current timescales for hearings and how do we ensure these provide sufficient opportunity for each party to respond?

Question 7(d)
Do you think any additional remedies would need to be available to the court in the situations you describe?

Question 7(e)
How can we ensure that any fast track procedures give priority to the most appropriate cases?

Obtaining and using Code agreements

Failures to respond to requests for Code rights

Question 8
Do you think our assessment of the impact of non- responsive occupiers and landowners on network deployment is accurate? Please provide any available evidence demonstrating the impact of failures to respond on the pace, scale and cost of deployment as well as any other impacts.

Question 9
Do you think there are any other ways that we can encourage unresponsive occupiers and landowners to engage with requests for Code rights (further to those already included in the Telecommunications Infrastructure (Leasehold Property) Bill?

Question 10
Do you think there should be a streamlined process for operators to secure Code rights in cases where an occupier (or other relevant party) fails to respond to a request for these rights?[33]

If so:

Question 10(a)
Do you think this kind of streamlined process should be administered by the Upper Tribunal or by a different court?

Question 10(b)
What sort of timescales do you think would be appropriate for this kind of process?

Question 10(c)
What kind of measures and safeguards do you think such a process would need to include in order to maintain a balance between the public interest in network deployment, and the private rights of occupiers and landowners? (for example, - how many times, and at what intervals, should the operator have to request the rights before they can access the procedure; how long should the occupier have to respond etc).

[33] This would be separate to the process contained in the Telecoms Infrastructure (Leasehold Property) Bill currently before Parliament, which is targeted at situations where tenants are unable to secure requested services due to non responsive landlords.

Obtaining and using Code agreements

Who confers Code rights where an operator is in occupation of a site.

Question 11

Do you agree that if a Code operator is in occupation of land, it should be:

d. the person who owns or has control over the land; or
e. the person who granted the rights allowing that operator to be in occupation; or
f. Someone else, and if so, whose agreement should be required for any new or renewal agreement?

Question 12

Are there any other situations where you think it may be appropriate for someone other than (or in addition to) the occupier of land to be able grant Code rights?

Obtaining and using Code agreements

Compliance with agreements

Question 13
Are you aware of, or have you experienced, any difficulties relating to compliance with the terms of a Code agreement?

If so:

Question 13(a)
Was paragraph 93 - or any other provision - of the Code the cause of those difficulties?

Question 13(b)
How were those difficulties dealt with and was the outcome satisfactory?

Question 14
Are there other ways that you think we can encourage compliance with the terms of Code agreements? For example:

c. Could Alternative Dispute Resolution provide a route for dealing with compliance issues?
d. Should there be scope for Code agreements to include financial penalties for non compliance?

Obtaining and using Code agreements

Modifying agreements

Question 15
Do you think that operators and site providers should be able to ask a court to impose new, additional or modified rights or terms after an agreement has been concluded, but before it expires?

If this was permitted:

Question 15(a)
Do you think the circumstances in which this option is available to site providers and operators should be limited to maintain an appropriate balance between the need for certainty and allowing a degree of flexibility? For example: should this option only be available where an operator needs an additional right to those contained in the original agreement.

Question 15(b)
In deciding whether to impose additional, new or modified rights or terms, should a court apply a similar test to the one in paragraph 21, as used in relation to requests for new Code agreements? How (if at all) should this test be modified in this context?

Question 15(c)
Should a court take other, or additional factors into account in deciding whether to grant any new or additional Code right sought by a party?

Question 15(d)
If a court were to decide to impose a new or additional Code right, should the terms be based on the existing Code framework, or should additional / other factors be taken into account?

Question 15(e)
If a court were to decide to impose new or additional Code rights, should the calculation of any consideration or compensation payable be based on the existing provisions, or on a different basis?

Rights to upgrade and share apparatus

The automatic right conditions

Question 16
In what circumstances do you think automatic rights to upgrade and share should be available?

Question 17
Do you think the current conditions relating to the paragraph 17 automatic rights should be amended?

If so:

Question 17(a)
What changes could we make to paragraph 17 that would make the practical application of the automatic rights clearer for operators and site providers?

Question 17(b)
Are there any additional measures we could include to protect the interests and address the concerns of site providers in relation to the automatic rights to upgrade and share? (For example: the introduction of notice requirements, or specific confirmation that automatic rights to upgrade and share are subject to the original terms of the agreement as they relate to notice / access requirements).

Rights to upgrade and share apparatus

Rights to upgrade and share separate to the automatic rights

Question 18
Do you think that a court should be able to impose rights that allow more extensive upgrading and sharing than is permitted under the automatic rights in paragraph 17 in any, or all, of the following situations:

(d) If the court is imposing a new agreement and such rights are requested?
(e) If the court is imposing a renewal agreement and such rights are requested?
(f) If the court is asked to grant new or modified rights to upgrade and share apparatus during the term of a completed agreement? (noting that this would only be relevant if changes permitting modification of an agreement prior to expiry is introduced, and would be subject to any safeguards put in place for such modifications).

Question 19
Do you think the court's jurisdiction to impose these rights needs to be expressly stated in the legislation, given that the Upper Tribunal has already held that this is possible?

Question 20
Do you think the court should be required to take specific factors into account in deciding whether it is appropriate to allow upgrading and sharing rights which are more extensive than those allowed by paragraph 17?

Question 21
Do you think the court should be required to take any specific factors into account in deciding what the terms relating to upgrading and sharing rights should be?

Question 22
What additional factors (if any) should be included in the situations described at questions 20 and 21 to strike an appropriate balance between the importance of upgrading and sharing and the potential impacts on the site provider?

Rights to upgrade and share apparatus

Retrospective rights to upgrade and share

Question 23
What would be the specific impacts of creating an automatic right to upgrade and share apparatus in relation to agreements completed before 28 December 2017? *Please provide details of **all impacts** including those on site providers, on coverage and connectivity, and on wider public considerations (such as reducing any disruption from unnecessary works or the impact on the environment of additional installations).*

Question 24
Do you think operators should have **any** automatic rights to upgrade and share apparatus relating to agreements completed before the 2017 reforms came into effect, where there is a strong case that this would be in the wider public interest and there would be no, or very little, impact on the site provider?

If these rights were introduced:

Question 24(a)
Do you think they should be subject to the same conditions as the paragraph 17 automatic rights, or should a different and more stringent set of conditions apply to protect site provider interests?If you think different conditions should apply, what might those conditions be?

Question 24(b)
Are there any other measures we could introduce that would secure the benefits of upgrading and sharing apparatus installed under pre-December 2017 agreements, while protecting the interests of site providers?

Expired agreements

Question 25
Do you agree that the Part 5 provisions should apply to all agreements once the original term of the agreements expires or has expired? Is there any reason why they shouldn't?

If Part 5 provisions are applied to all expired agreements:

Question 25(a)
Do you think any special provisions should be included for agreements that were previously subject to different statutory regimes to ensure that any protections are preserved (where these do not conflict with the framework of the Code)?

Question 26
Do you think there are any circumstances in which it would be more appropriate for an operator to use the Part 4 (new agreement) process to obtain a new agreement, rather than the Part 5 (renewal agreement) process?

Question 27
Do you think that there should be a statutory requirement for disputes relating to the modification of an expired agreement to be heard within six months of the date the application is made?

Question 28
Do you think that there should be a statutory requirement for disputes relating to the termination of a Code agreement to be heard within six months of the date the application is made?

If so:

Question 28(a)
What would be the benefits of a statutory time limit in relation to these disputes being introduced?

Question 28(b)
What might be the drawback of a statutory time limit in relation to these disputes?

Question 29
Do you think operators and site providers should be able to seek interim orders in relation to renewal agreements?

If so:

Question 29(a)

What should the interim agreements cover (Code rights, pricing, etc)?

Question 29(b)
Are any safeguards necessary to prevent abuse of the process?

Question 30
Do you think a court should be able to backdate the financial terms of a renewal agreement to the date that a request for an interim order is made?

Question 31
Are there any other ways you think we can help ensure that negotiations for renewals are dealt with in a timely and collaborative manner?