



BRIEFING PAPER

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Reforming the Electronic Communications Code

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Summary

The Electronic Communications Code, which facilitates the installation and maintenance of electronic communications networks, has long been considered in need of reform. The Coalition Government launched a consultation aimed at reforming the Code in February 2015. The Conservative Government announced that it planned on presenting a revised Code before the new Parliament (2015-20) in its first session.

The Code enables electronic communication network providers to install and maintain electronic communication networks by giving network operators certain rights. Under the Code, telephone operators are permitted to construct infrastructure on public land and have rights to install equipment on private land. With regards to private land, the Code requires that operators contact the land owner before installing equipment but also provides that when permission is not given by the land owner an operator can apply to the County Court to allow them to undertake the work.

In 2013 the Law Commission published a review examining the Code, which contained over fifteen pages of recommendations to reform it. These included setting a clear definition of code rights and on how a revised Code should define “electronic communications apparatus”. The Commission also recommended that any attempt at reforming the Code should start again with a “clean sheet of paper”.

Temporary amendments (lasting five years) were made to the Code in 2013 as part of the *Growth and Infrastructure Act*. These amendments were not primarily intended to reform the Code but were designed to promote economic growth by speeding up the deployment of broadband infrastructure.

In early 2015 the Coalition Government tabled an amendment to the *Infrastructure Bill* (now the *Infrastructure Act 2015*) which would have substantially reformed the Code along the lines of the Law Commission’s recommendations. The amendment was later dropped amid criticism from stakeholders.

A nine-week consultation on reforms to the Code then followed, and closed on 30 April 2015. The previous Government’s objective was “to provide a modern and robust legal framework for the rollout of electronic communications apparatus”.

In the Queen’s Speech on 18 May 2016 the Government indicated it would bring forward a [Digital Economy Bill that will contain reform of the Electronic Communications Code](#). The Government estimates that changes to the Electronic Communications Code will result in more than £1 billion of savings for the communications sector over a 20-year period.

1. The Electronic Communications Code

The Electronic Communications Code is set out in Schedule 2 to the *Telecommunications Act 1984* as amended by [Schedule 3 to the Communications Act 2003](#). The Code facilitates the installation and maintenance of electronic communications networks. It does so by giving network operators certain rights. Under the Code, telecommunication operators are permitted to construct infrastructure on public land (e.g. streets) and have rights to install equipment on private land. With regards to private land, the Code requires that operators contact the land owner before installing equipment but also provides that when permission is not given by the land owner an operator can apply to the County Court (or the Sheriff in Scotland) to allow them to undertake the work.

The idea behind these powers is that communications networks can be constructed without landowners being able to demand huge sums from communications operators for allowing telephone wires to cross their land or allowing apparatus to be placed on it. Rights under the Code are far reaching, and it underpins the physical networks of apparatus that support and provide electronic communications across the UK.¹

The Code was initially enacted in 1984 to regulate landline telephone provision.² The term Electronic Communications Code comes from the [Communications Act 2003 Section 106](#) (previously it was termed the telecommunications code), which amended Schedule 2 of the *Telecommunications Act 1984* to reflect the changes in technology and the need to support the infrastructure networks which support broadband, mobile internet, landlines and cable television.

The Code has long been considered overly complicated and in need of reform. In the words of Mr Justice Lewison in *Geo Networks Ltd v The Bridgewater Canal Company Ltd*:

The Code is not one of Parliament's better drafting efforts. In my view it must rank as one of the least coherent and thought-through pieces of legislation on the statute book.³

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Mr Justice Lewison

¹ The Law Commission, [The Electronic Communications Code](#), 27 February 2013, p1

² The Law Commission, [The Electronic Communications Code](#), 27 February 2013, p69

³ *Geo Networks Ltd v The Bridgewater Canal Company Ltd* [2010] EWHC 548 (Ch), [2010] 1 WLR 2576 at [7].

2. The Law Commission's review of the Code, 2011-13

The Law Commission carried out a review of the Electronic Communications Code between 2011 and 2013, following a request from the Department for Culture, Media and Sport. The Law Commission noted from the outset that the Code (as amended in 2003) was in need of reform for three reasons.

- 1 It is “complex and extremely difficult to understand”.
- 2 They considered it out dated, and based on several nineteenth and early twentieth century statutes dealing with telephone wayleaves (a licence, or permission, to do something or keep something on land).
- 3 The Commission felt that there is evidence suggesting that the Code is actually making the rollout of electronic communications more difficult. They argued that:

The 2003 Code seeks to regulate the effects of agreements to confer specified rights, and to back this up with a system for compulsion where agreements cannot be reached. Yet it lacks clarity on several important matters, such as who is bound by rights conferred on Code Operators, how to assess the level of payments for the grant of rights, and how the termination of those rights is to be enforced. This, together with the absence of efficient dispute resolution, considerably hampers its usefulness to both Code Operators and landowners. In addition, it is not clear that it strikes the right balance between those parties.⁴

The Law Commission began their review in September 2011, and received a wide-range of responses to its consultation paper, including from landowners, operators and lawyers. The Commission's final report was published on 28 February 2013. This report contained over fifteen pages of recommendations, including setting a clear definition of “Code Rights” and a definition “electronic communications apparatus” which was technologically neutral – that is, it should make no reference to different types of equipment or to different electronic communications services.⁵ The report's key recommendations were:

- The revised Code should be drafted afresh; amendment of the current text will only add to its complexity and to legal difficulties.
- The revised Code should be technology-neutral, providing a legal framework that is as appropriate to the laying of cables as to the siting of masts.
- Landowners should continue to be paid a market price for the right to use land, but the revised Code should provide a

⁴ The Law Commission, [The Electronic Communications Code](#), 27 February 2013, pp3-4

⁵ The Law Commission, [The Electronic Communications Code](#), 27 February 2013, pp207-222

definition of market value that is familiar to valuers and conforms to their professional standards.

- Where a network operator wants to put equipment on land against the owner's wishes, the legal test for the compulsory siting of equipment should be clear and compatible with human rights.
- Operators should have limited automatic rights to share and upgrade their equipment, and should be able to assign rights to other operators.
- There should be clear provisions about what happens to apparatus after an agreement with a landowner has expired; rights under the Code to keep apparatus installed require protection so as to ensure the continuity of networks, but where those rights have terminated, landowners should have clear rights to remove equipment.
- Disputes arising under the Code should be heard within the tribunal system rather than in the County Court. It will be possible for the tribunal to grant interim access to land on terms that protect the landowner pending agreement or a final order.⁶

The Law Commission argued that any attempt at reforming the Code should start again with "a clean sheet of paper", rather than seeking to amend the 2003 Code.

The 2010-15 Coalition Government did not issue a response to the Law Commission's report; this was later criticised by the Opposition.⁷

⁶ Law Commission, [The Electronic Communications Code: A Summary](#), February 2013, para 7

⁷ [Public Bill Committee 15 January 2015 c356](#)

3. Recent attempts at reforming the Code

3.1 *Growth and Infrastructure Act 2013*

There have been several recent attempts to reform or alter the Electronic Communications Code. In 2013 changes to the Code were made through section 9 of the *Growth and Infrastructure Act*. The amendments introduced by this, however, were not primarily an attempt to reform the Code itself. Instead, they were designed to foster economic growth by helping to speed up the deployment of broadband infrastructure. Specifically, the amendments allowed for the widespread deployment of broadband street cabinets and new overhead lines.

Section 9 of the *Growth and Infrastructure Act* added “the need to promote economic growth” to the list of considerations to which the Secretary of State must have regard when exercising the power (under Section 109 [1] of the *Communications Act 2003*) to impose conditions and restrictions on the application of the electronic communications code.⁸ Secondary legislation was then introduced (*The Electronic Communications Code (Conditions and Restrictions) (Amendment) Regulations SI 1403/2013*) to amend the Code to allow “a more permissive regime” for installation of above ground fixed-line broadband electronic communications apparatus.⁹ This secondary legislation also removed the requirement for prior approval by planning authorities for broadband cabinets and poles in protected areas.¹⁰ In order for these changes to take effect, complementary secondary legislation was also required to amend the *Town and Country Planning (General Permitted Development) Order 1995*.¹¹

These amendments to the Code were given a sunset clause of five years, and will expire in April 2018.

During the passage of the *Growth and Infrastructure Bill* there was a good deal of concern about the impact these provisions might have on National Parks and areas of natural beauty. Concerns were raised on this at Second Reading and Committee Stage in the Commons, and during scrutiny in the House of Lords.¹² During Second Reading in the Commons, the then Minister of State for Business, Innovation and Skills,

The changes to the Code introduced by the *Growth and Infrastructure Act 2013* were not primarily an attempt at reforming the Code. Instead they were designed to speed up the deployment of broadband infrastructure.

⁸ Section 9, [Growth and Infrastructure Act 2013](#)

⁹ [The Electronic Communications Code \(Conditions and Restrictions\) \(Amendment\) Regulations 2013](#); Explanatory Note, [The Electronic Communications Code \(Conditions and Restrictions\) \(Amendment\) Regulations 2013, \(SI 1403\)](#)

¹⁰ Explanatory Memorandum, [The Electronic Communications Code \(Conditions and Restrictions\) \(Amendment\) Regulations 2013](#)

¹¹ [Town and Country Planning \(General Permitted Development\) \(Amendment\) \(England\) Order 2013 \(SI 1101\)](#)

¹² [Public Bill Committee 13 November 2012 O37](#); [Public Bill Committee 20 November 2012 O215, O257](#); [Public Bill Committee 20 November 2012 OQ386-387](#); [Public Bill Committee 29 November 2012 cc325-346](#); [Public Bill Committee 29 November 2012 cc349-359](#); [HC Debate 17 December 2012 c597](#); [HL Debate 30 January 2013 cc1549-1578](#).

Michael Fallon, tried to reassure those concerned that providers would still have to notify local authorities of their plans.

Let me reassure those who have concerns about the possible impact of this provision on our national parks and other protected areas that, under proposals on which we will shortly be consulting, providers will still have to notify local authorities of their plans. They will be encouraged to engage with local authorities and communities as a matter of best practice, and they will have to sign up to a code of practice on the siting of this infrastructure, to ensure that that is handled sensitively.¹³

3.2 *Infrastructure Bill 2014*

Although the Government did not issue a response to the Law Commission's report on the Electronic Communications Code, in early 2015 the Department for Culture, Media and Sport did indicate that they were intending to reform the Code in line with the Commission's recommendations. On 6 January 2015 the Minister of State for Digital Industries, Ed Vaizey MP, told the House:

DCMS plans to reform the Electronic Communications Code in line with the recommendations set out by the Law Commission in its report of February 2013. In this report, the Law Commission concluded that the existing market based approach to valuation was on the whole, functioning, but recommended some small modifications to improve the valuation regime. Government accepts this recommendation and will implement this reform. However, Government will also take a Power in the legislation, to allow the Secretary of State to make further changes to the wayleave valuation regime, if necessary following consultation, at a later date following full consultation. Government intends to lay amendments to the Infrastructure Bill.¹⁴

An amendment to the *Infrastructure Bill* (now the *Infrastructure Act 2015*) which amended the Code was tabled by the 2010-15 Coalition Government during the Bill's Committee Stage on 8 January 2015.¹⁵ The then Minister of State, Department for Transport, the Rt Hon John Hayes, told the Public Bill Committee that the new clause was designed to reform and update the Code by implementing the recommendations of the Law Commission:

The amendments we are making to the code are the reasonable balance sought by the Opposition between the interests of mobile phone operators and the landowners on whose land they must put their masts to get the better coverage that I believe is necessary.

[...]

The current lack of clarity, given that the code has not been substantively amended since 1984, has led to countless complaints from all kinds of sources and a demand for action. To that end, the Law Commission looked at matters, and its February 2013 report suggested a wholesale rewrite of the provisions designed to improve procedures and the clarity of the drafting.

In early 2015 DCMS indicated that they were intending to reform the Code in line with the Law Commission's recommendation.

An amendment to the *Infrastructure Bill* was tabled by the Government which was designed to reform and update the Code by implementing the recommendations of the Law Commission.

¹³ [HC Deb 5 November 2012 c691](#)

¹⁴ [Telecommunications: Written question - 218396](#)

¹⁵ *Infrastructure Bill*, [Notice of Amendments](#), 8 January 2015, pp115-172

9 Reforming the Electronic Communications Code

The changes before the Committee are designed to implement substantially the Law Commission's report.¹⁶

The Opposition was in agreement that reform of the Code was necessary. However, they opposed the Government's amendment because, as stated by Richard Burden MP, they felt it was an "ineffective and rushed reform that will increase ambiguity, confusion and litigation".¹⁷ Richard Burden argued that the Government's new clause failed to provide clarity on the issue of facilitating upgrades and site sharing – "one of the key reasons for reform in the first place".¹⁸ Andrew Miller MP also referred to an email he had received from the Wireless Infrastructure Group (WIG) which argued that the drafting of the revised Code left unnecessary uncertainty. The WIG were particularly concerned

that an unintended consequence of these complex amendments on a complex sector could be to inadvertently interfere in the vital commercial relationships between Code Operators [electronic communications network operators who have had the Electronic Communications Code applied to them by Ofcom under section 106 of the Communications Act]. The purpose of the Code is to govern the rights of Code Operators in their dealings with landowners yet the lack of clarity in the text could lead to confusion in the relationship between Code Operators including between wholesalers and network operators. This could discourage wholesale infrastructure providers from bringing further investment to the sector.¹⁹

What also emerged during Committee Stage was concern that the timing of this amendment had meant that it could not receive proper scrutiny. Commenting on the new clause during the Committee Stage, Richard Burden criticised the Government for tabling what he termed an "extremely technical" amendment after the Bill had already been scrutinised in the House of Lords and had a second reading in the Commons:

amendments were not tabled until we got back after the Christmas recess. They ran to around 60 pages. All that was added to yet more clauses, now defined as infrastructure measures, that were never mentioned when the Bill was introduced in the other place. They were never mentioned on Second Reading in this place, and mentioned only once we were well into the Committee stage. As we now know, one measure even necessitated changing the long title of the Bill— the very thing that is meant to define what the Bill is about.²⁰

In response to these objections the then Minister, John Hayes MP, conceded that "it would have been better had these measures been introduced earlier and there had been more time to consider them".²¹ However, the Minister argued that the Government had been determined to seize the initiative and use "the first appropriate

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Concern emerged during Committee Stage that the late tabling of the amendment meant that it could not receive proper scrutiny.

¹⁶ [PBC 15 January 2015, c347](#)

¹⁷ [PBC 15 January 2015 c362](#)

¹⁸ [PBC 15 January 2015, c360](#)

¹⁹ [PBC 15 January 2015 c366](#)

²⁰ [PBC 15 January 2015 c356](#)

²¹ [PBC 15 January 2015 c375](#)

legislative vehicle to make the widening of access to mobile phones and improvements to coverage a priority".²²

A division was called during Committee Stage which the Government won by 8 votes to 6, and the amendment was added to the bill.²³

3.3 Wider Criticism of the Coalition Government's attempt at reforming the Code

The Central Association of Agricultural Valuers (CAAV), a specialist professional body representing 2600 members in diverse agricultural and rural work, and the National Farmers' Union of England and Wales (NFU), both submitted written evidence to the Public Bill Committee in response to the tabling of the Government's amendment to the *Infrastructure Bill*. Both expressed concern about Paragraph 23 (4) (b) of the new clause, which required the parties (or their valuers) to disregard the statutory limitations which the revised Code would apply to agreements in permitting assignment or the sharing or upgrading of equipment. According to CAAV,

The effect of this is that valuers will be asked to assess the consideration payable for a site on terms which cannot exist in practice because they are not permitted under the Code. This is akin to asking for a semidetached house to be valued as if it were a detached house, but in a world where no detached houses exist. The valuer would have no more direct evidence of such new agreements than he would if asked to value a horse by reference to the sale price of unicorns.²⁴

The NFU were similarly critical of paragraph 23 4 (b), and argued that its implication would mean that no rent would have to be paid for assignment or site sharing.²⁵

Both the NFU and CAAV were also concerned by paragraph 24, which would have given the Secretary of State the power to amend paragraph 23. The NFU felt that this paragraph should not be included and were "strongly against the Secretary of State being given this power".²⁶ CAAV also stated in their written evidence that this paragraph provided "a reserve power to change the basic approach to valuation removing reference to the use for which the land is wanted, as prejudicial to the basic mechanism of the Code". They therefore recommended that the paragraph should not be enacted.²⁷

The Country Landowners Association was also highly critical of the lack of industry consultation and the attempt to introduce such detailed legislation at such a late stage. They also exposed "significant flaws in the way the code would work" and expressed "strong opposition to the concept of Ministers intervening to ensure mobile phone companies

²² [PBC 15 January 2015 c376](#)

²³ [PBC 15 January 2015 c382](#)

²⁴ PBC, [Infrastructure Bill Written Evidence](#), p96

²⁵ PBC, [Infrastructure Bill Written Evidence](#), p104

²⁶ PBC, [Infrastructure Bill Written Evidence](#), p104

²⁷ PBC, [Infrastructure Bill Written Evidence](#), p96

could impose terms, including rents and wayleave payments, on landowners for access to their land".²⁸

3.4 Government withdrawal of the amendment to the *Infrastructure Bill*

Following criticism of the amendment during Committee Stage, and feedback received from stakeholders on technical issues related to the application of the proposed revisions, the Coalition Government formally withdrew the amendment to the *Infrastructure Bill* on 26 January 2015.²⁹

Following criticism of the amendment to the *Infrastructure Bill* during Committee Stage, the Government formally withdrew the amendment.

²⁸ CLA, [Landowners welcome withdrawal of flawed electronic communications code](#), January 2015

²⁹ DCMS, [Reforming the Electronic Communications Code: Consultation Document](#), 26 February 2015 [accessed 18 March 2015], para 20

4. Proposals for reform 2015-

On July 2015, the Conservative Government published [Fixing the foundations: Creating a more prosperous nation](#)³⁰, described as “a comprehensive plan [...] to reverse the UK’s long-term productivity problem and secure rising living standards and a better quality of life for our citizens.”³¹ Chapter 7 of this plan sets out how the Government plans to deliver “world-class digital infrastructure in every part of the UK” including introducing legislation in the first session of the (2015-20) Parliament to reform the Electronic Communications Code.³²

4.1 Consultation Response and *Digital Economy Bill*

After withdrawing the amendment to the *Infrastructure Bill 2014* the Coalition Government subsequently took the decision to consult further on reforming the Code. A consultation was launched on 26 February 2015, which ran for 9 weeks, and closed on 30 April 2015. Submissions were invited on all areas of the Code.

On 17 May 2016 the Government [published its response to the consultation](#)³³ issued under the previous Government setting out the proposals for reform of the Code it intends to take forward. In the Queen’s Speech on 18 May 2016 the Government indicated it would bring forward a [Digital Economy Bill that will contain these reforms of the Electronic Communications Code](#).³⁴

In the Queen’s Speech on 18 May 2016 the Government indicated it would bring forward a Digital Economy Bill that will contain reform of the Electronic Communications Code.

4.2 New proposals

The new Code proposed by the Government implements many of the recommendations of the Law Commission’s review of the Code, while some of the proposed reforms go further than the recommendations. The Minister of State for Culture and the Digital Economy, Ed Vaizey MP, stated that the new Code will improve on the existing Code and help deliver mobile coverage in hard to reach areas:

The new Code will vastly improve on the existing Code. It will make major reforms to the rights that communications providers have to access land – moving to a “no scheme” basis of valuation regime. This will ensure property owners will be fairly compensated for use of their land, but also explicitly acknowledge the economic value for all of society created from investment in digital infrastructure. In this respect, it will put digital communications infrastructure on a similar regime to utilities like electricity and water. This will help deliver the coverage that is needed, even in hard to reach areas.³⁵

³⁰ HM Treasury, [Fixing the foundations: Creating a more prosperous nation](#), (10 July 2015)

³¹ HM Treasury, BIS, [“Productivity plan launched”](#), (10 July 2015)

³² HM Treasury, [Fixing the foundations: Creating a more prosperous nation](#), (10 July 2015)

³³ DCMS, [A New Electronic Communications Code](#), 17 May 2016

³⁴ HM Government, [The Queen’s Speech 2016](#), (18 May 2016)

³⁵ DCMS, [A New Electronic Communications Code](#), 17 May 2016, p4

Wayleave valuations

A wayleave is an agreement whereby a landowner grants a communications provider a licence to access and maintain equipment on private land. This is generally in return for a rental payment. The Government proposes to change the valuation of this rent to a system based on compulsory purchase principles as it is for other utilities such as Electricity. This means the value of the land will be assessed based on its value to the landowner, not on its value to the network operator as it is under the current code. An independent analysis commissioned by DCMS concluded that this would result in a reduction of wayleave costs for network operators of 40%.³⁶

This proposal goes beyond the recommendation of the Law Commission which proposed minor changes to the valuation regime to prevent excessive “ransom rents”. The Government states that the reform “is necessary to reduce the cost to network operators of rolling out infrastructure”.³⁷

Upgrading and sharing infrastructure

The new Code will provide an automatic right for network operators to upgrade and share apparatus without prior agreement or payment to landowners where there is minimal adverse visual impact as recommended by the Law Commission. The Government states that this will allow operators to quickly update their networks when new technology becomes available.³⁸

The new Code will provide an automatic right for network operators to upgrade and share apparatus without prior agreement as recommended by the Law Commission.

Dispute Resolution

The Law Commission recommended that the forum for Code disputes should be the Lands Chamber of the Upper Tribunal rather than the current range of bodies that deal with disputes because it has the necessary expertise to ensure effective dispute resolution. This recommendation has been accepted and is included in the new Code.

Other Reforms

The new Code will also include other minor reforms that clarify how it interacts with other existing legislation, allow the assignment of Code rights from one operator to another in the event of mergers or acquisitions and prevent contracting out of Code rights.

The new Code will only apply to new agreements between operators and landowners. As agreements are often for as long as 20 years the changes and any associated cost saving for network operators is likely to take place gradually as agreements are renewed over the next 10-20 years. The Government will bring forward a series of transitional provisions, setting out how and when agreements under the old code will be subject to the new dispute resolution procedures.³⁹

³⁶ Nordicity, [Modelling the Economic Impacts of Alternative Wayleave Regimes](#), (October 2013)

³⁷ DCMS, [Electronic Communications Code Impact Assessment](#), 12 May 2016, p6

³⁸ DCMS, [A New Electronic Communications Code](#), May 2016, p17

³⁹ DCMS, [A New Electronic Communications Code](#), May 2016

4.3 Response to Proposals

The Government's proposals for reform [have been welcomed by communication providers](#) Virgin Media, O₂ and Vodafone.⁴⁰

Lawyer Alicia Foo, who specialises in electronic communication property disputes, has stated that the new proposals could have a positive effect on rural connectivity:

[The proposals] recognise that the provision of electronic communications is as important to that of utilities such as water or gas.

No doubt there will be some disgruntled landowners across the UK who will see existing profitable income sources significantly reduced by these measures. However, as we strive to adapt to an era in which connectivity is deemed a critical aspect of day-to-day life the revamped code could hopefully be transformational for those living in remote parts of the UK.⁴¹

The President of the Country Land and Business Association (CLA), a membership organisation for rural landowners, has criticised the Government's proposals stating that the proposals are poorly thought through:

Ministers have announced a massive concession to mobile industry dressed up as a measure necessary for consumers. Reform of the Electronic Communications Code is needed, but these last minute changes are poorly thought through, against Law Commission recommendations, and remove fairness from the system. These major concessions, valued by the Government's own economic analysis at more than a £1 billion in benefit to the mobile operators, come with not one single additional commitment to actually deliver for consumers.⁴²

⁴⁰ Mobile Today, [Networks react to mobile mast reforms](#), 18 May 2016

⁴¹ Out-law.com, [New Electronic Communications Code can transform rural connectivity, says expert](#) [accessed on 24 May 2016]

⁴² [Ross Murrery, CLA President, 17 May 2016](#)

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