

Speed Up Britain Response to Call for Written Evidence by the Public Bill Committee for the Product Security and Telecommunications Infrastructure Bill

About Speed Up Britain

Speed Up Britain is a cross-industry organisation campaigning for better mobile connectivity throughout the UK.

Speed Up Britain was founded by Cellnex, Cornerstone, MBNL and Mobile UK. These organisations are committed to delivering the infrastructure necessary to meet the demand for future mobile connectivity but are bounded by blockages in the current system of securing access agreements under the Electronic Communications Code 2017. The campaign is also supported by Atlas Towers Group, Britannia Towers, Wireless Infrastructure Group, Digital Mobile Spectrum Limited (DMSL), and Ulstercom.

Executive Summary

Speed Up Britain strongly welcomed the Government's publication of the Product Security and Telecommunications Infrastructure Bill and its intent to accelerate mobile infrastructure rollout through reform of the Electronic Communications Code. However, there are a small number of drafting issues with the Bill that will not rectify the deficiencies with the Code if not addressed.

These concerns:

- The definition of "occupier"
- Acquiring Code rights during the term of an agreement
- Expired "old code" agreements

This response sets out our concerns regarding the proposed changes to the Bill to address these remaining issues and deliver on industry and Government's shared intentions to accelerate the delivery of improved mobile connectivity.

Background

The pandemic has highlighted the importance of digital connectivity in every aspect of our lives, helping us stay connected with work, family and friends, maintaining access to essential services and keeping businesses running. Therefore, extending and enhancing connectivity across the UK, particularly in rural areas, is crucial.

Greater digital connectivity should be at the heart of the Government's economic recovery plans; urgent action is needed to meet connectivity demands now and build network resilience for the future. To achieve the Government's ambition to level up all regions of the UK and build a digital economy fit for the future, targets on 4G and 5G must be met. If 5G coverage reaches an additional quarter of the population than the Government's current target of 51%, it will produce GDP gains of £41.7 billion by 2027.

Without action, there is a real risk that the industry will be unable to meet the Government's stated deadlines of delivering the Shared Rural Network by 2026 and the roll out of 5G to the majority of the population, by 2027. If the delays to the delivery of 5G infrastructure caused by issues with the Code continue at their current rate, by 2027 over 11 million households and businesses could be missing out on vital digital connectivity.

The Electronic Communications Code regulates the relationship between mobile infrastructure providers and providers of sites that host the equipment needed for the mobile networks we all use. When the Code was introduced in December 2017, one objective was to create the right balance between the public need for digital communications, the considerable investment requirements of operators and landowner rights. This meant bringing rental valuations more closely aligned to the utilities such as water, electricity and gas. Since 2017, operators have completed hundreds of amicable new arrangements across the UK, at fair rental levels, helping accelerate the Government's efforts in achieving its connectivity goals.

However, progress in many cases is being stalled by lengthy legal negotiations leading to significant delays to vital upgrades of existing telecom sites. This is slowing down the UK to build better mobile networks.

As such, the Code is not working as intended. This presents a significant threat to the Government's digital strategy that is intended to bring huge economic benefits to the country.

It is against this backdrop that Speed Up Britain has been campaigning for targeted reform of the Code to accelerate the deployment of next generation digital connectivity.

We also wish to use this response to provide clarity and facts on some of the issues surrounding the debate on Code reform, notably: rental valuations, consensual agreements, and the purpose of reform.

While media reports have led with claims of 90% rent reductions following the introduction of the Code in 2017, the average rental reduction since the Code was introduced has in fact been 63%. The Code was introduced because exorbitant rents had made building and upgrading mobile networks uneconomic not least because Operators under existing restrictive agreements were often being held to ransom by Landlords and their agents keen to exploit their unequal bargaining position. Rents had to be brought down and Operators rights enhanced to enable the industry to rollout mobile networks to the greatest number of people as soon and as economically as possible.

Similarly, while a small sample of displeased landlords have received media attention, the majority of agreements have been renewed consensually. Since December 2017, nearly 900 agreements have been renewed. 83.5% of these were completed on a consensual basis, without any legal proceedings being issued. 16% were completed after proceedings were initiated, but settled before a full tribunal was heard. Just 0.5% of renewal agreements have resulted from a court-imposed agreement following a full trial. Whilst the renewal agreements have not progressed as fast as the industry would like, or the UK needs, these consensual agreements at fair rental levels have helped accelerate the Government's efforts to achieve its ambitious connectivity goals, running counter to the misconception that valuation prevents agreements from being reached.

Accelerated mobile connectivity is vital to our economic and society's future and this underpins the case for reform. Revisiting the valuation issue may be in the interest of a relatively small number of landowners, but it is not in the interests of the UK economy or constituents who want improved mobile connectivity which requires massive investment from the MNOs at a time when they are already investing heavily in new technology and the Shared Rural network (£500m being contributed by the industry and £500m by UK Gov). The benefit of Code agreements is not the rental value conferred on landowners, but the improved connectivity for the communities, which benefit from new or upgraded mobile infrastructure.

Product Security and Telecommunications Infrastructure (PSTI) Bill

We welcomed the Government's decision to consult on potential changes to the Code last year and the subsequent publication of the Product Security and Telecommunications Infrastructure (PSTI) Bill.

There is much within the Government's response to the consultation on potential Code reform and the PSTI Bill to welcome, notably:

- The introduction of interim arrangements for renewal negotiations is a positive step towards removing some of the disincentives for landowners and their agents to conclude agreements.
- We are pleased that the Government has – on the whole – recognised the contradictions that exist within the legislative framework and committed to introducing changes to the Landlord and Tenant Act 1954 and the Business Tenancies Order (Northern Ireland) 1996.
- We support the Government's plan to introduce a procedure that addresses the issue of unresponsive landowners or occupiers of land.
- We welcome Government's commitment to resolving the problems currently arising out of the definition of occupier, which has the potential to resolve two fundamental issues for operators:
 - seeking a new agreement over land that is occupied pursuant to an expired "old code" agreement; and
 - seeking additional Code rights during the term of an agreement to enable upgrades to take place.

However, there are some drafting issues in the Bill which, if not addressed, will mean the Bill will fail to remedy the deficiencies in the current legislation and, therefore, not deliver the changes which the Government has confirmed it is seeking to address as set out in its response. Unless corrected, this will continue to impact the ability of the mobile industry to roll out infrastructure at the pace required to meet the Government's connectivity targets and deliver on its ambition of world-leading mobile connectivity.

Our concerns:

- The definition of "occupier"
- Acquiring Code rights during the term of an agreement
- Expired "old code" agreements

It is essential that these outstanding concerns are addressed to ensure the Code, in practice, can match the clear and welcome policy intent set out by the Government in its response to the consultation, the Bill itself, and the associated explanatory notes. These remaining issues, and our proposed solutions, are set out in detail below.

1. The definition of "occupier"

Section 57 of the Bill proposes that the definition of "occupier" should be amended, by the insertion of paragraph 105(6A) and (6B), to expand the definition to include 'land which is exclusively occupied by an operator (or operators) **exercising code rights** in relation to the land' (emphasis added).

This proposed amendment would not resolve the problem highlighted at 3.56 of *Access to land: consultation on changes to the Electronic Communications Code – Government Response* ("the

Response”), or as set out at page 11 (particularly paragraph 55) of Speed Up Britain’s response to the consultation.

- “Code right” is a defined term within the Code. It is limited to those activities as are listed within paragraph 3 and exercised for the statutory purpose described at paragraph 4;
- The definition at paragraph 3 does not incorporate rights exercised pursuant to the “old code”;
- Code rights for the purposes of the Code are not applied retrospectively to agreements that expired prior to the commencement of the Code in December 2017;
- Judicial decisions have determined that operators in occupation of land following the expiry of an “old code” (not subsisting) agreement do not have and therefore cannot exercise code rights, and as a result
- Operators occupying land subsequent to an expired “old code” (not subsisting) agreement would not come within the definition of occupier as proposed by paragraph 105(6A). In consequence, they would remain unable to use the Code to acquire code rights or renew expired agreements, unless paragraph 105(6A) were revised.
- The use of the word ‘exclusively’ would invite debate as to whether the Operator is or is not in exclusive occupation of the land in order to fall within the exemption

We urge the Bill Committee to reconsider the wording of the proposed paragraph 105(6A), so that it is not limited only to operators that exercise code rights in relation to the land which they occupy exclusively, but also to operators that occupy the land pursuant to an “old code” agreement that expired prior to the commencement of the Code, for the statutory purpose as defined at paragraph 4.

2. Acquiring Code rights during the term of an agreement

It is critical to the rollout of 5G technologies and operators’ abilities to satisfy evolving consumer demand that operators are able to use paragraph 20 of the Code to acquire necessary additional rights over land during the term of an existing agreement. 5G rollout is likely to be impacted by in-term agreements, which often require additional rights to be secured to facilitate that rollout.

DCMS endorsed this stance in the Explanatory Notes to the proposed reforms as published on 24 November 2021, in relation to the definition of occupier within the Code:

*“This clause ... [addresses] situations where the only occupier(s) of land is or are one or more operators who have Code rights in relation to that land but need to secure new **or additional Code rights**. In these circumstances, the person who will be able to confer the Code rights sought will be, in effect, whoever would be treated as the occupier of the land were it not for the operator’s presence on it.” (at 233, emphasis added)*

We understand that, by amending the definition of occupier, operators will be able to use paragraph 20 to seek an additional agreement, where necessary, to secure further rights to those already enjoyed. This poses no prejudice to site providers because:

- it does not require the modification or renegotiation of existing agreements, but rather a wholly separate additional agreement; and
- they would be entitled to an additional award of compensation and consideration for the conferral of an additional agreement.

We are however concerned that this function of paragraph 20 might be undermined by comments in the Government’s response to the consultation:

*“the majority did not think that operators or site providers should be able to ask a court to impose new, **additional or modified rights** or terms, including the vast majority of landowners... Having considered the responses... we do not have sufficient evidence to support making reforms which would allow the court to **modify an ongoing Code agreement**” (at 3.70-3.71 emphasis added).*

We invite the Bill Committee to make clear that paragraph 20 is still intended to provide a mechanism by which operators may seek additional Code rights by way of a supplemental agreement during the term of an existing Code agreement.

3. Expired “old code” agreements

We are concerned that, despite the proposed reforms, there would remain a discrete category of “old code” agreements for which there is no statutory renewal mechanism – implied periodic tenancies:

- implied periodic tenancies acquire Landlord and Tenant 1954 Act protection automatically upon creation, however it is not possible to renew them using s. 26 of that Act; and
- as those agreements enjoy security of tenure under the 1954 Act, it is currently not possible to use Part 4 of the Code to renew them, either.

As a result, operators are unable to use any statutory mechanism to renew these sites and find themselves frequently in a “ransom” negotiation with site providers, otherwise denied the opportunity to acquire Code rights and unlock the associated societal benefits.

We invite the Bill Committee to review this considerable challenge, which we consider can be resolved only by amending the scope of either Part 4 of the Code or the 1954 Act, (perhaps through transitional provisions, so that one might be used to renew implied periodic tenancies that have 1954 Act security.

Speed Up Britain is committed to supporting the Government to ensure the Electronic Communications Code 2017 delivers on its purpose of enabling the faster rollout of mobile infrastructure and is keen to work with all stakeholders to address these remaining issues. If you have any questions or wish to discuss further, please contact contact@speedupbritain.com.