APWireless – submission to the Commons Bill Committee of the Product Security and Telecommunications Infrastructure Bill

APW is a subsidiary of Radius Global Infrastructure, a multinational infrastructure company that owns telecoms infrastructure sites in 19 countries. APW is one of the UK's leading providers of sites and infrastructure that support the UK's mobile networks, having invested over £120 million in approximately 1,500 sites since we started operating over ten years ago.

APW is an important enabler of digital infrastructure rollout, upgrading and operation, getting everyone across the UK the connectivity they need. A separate Radius Global Infrastructure subsidiary – Radius BTS Limited – has been granted Code powers by Ofcom.

We firmly support the government's ambitious goal to achieve nationwide rollout of next-generation digital infrastructure networks. Securing reliable access to high-speed internet is essential to the UK's productivity growth and to boosting regional economic development.

1. APW is concerned that the government's proposed changes to the Electronic Communications Code, due to be given effect by the Product Security and Telecommunications Infrastructure (PSTI) Bill, will not address the causes of ongoing disruption in the land market for telecoms infrastructure. Instead, they will exacerbate the situation by increasing tensions between site providers and operators.

2. Reforms to the Code made in 2017 were intended to deliver faster, more collaborative rental agreements for the property. These were expected to assist with the rollout of 5G, in turn delivering world-beating connectivity across the UK. Instead, the number of property negotiation impasses between property owners and mobile network operators and infrastructure providers referred to tribunals has sharply increased.

3. Based on figures provided by operators, the number of expired agreements today is three times what it was when the Code was enacted. The government was made aware of this expected impact before it enacted its 2017 reforms; a report commissioned by DCMS in 2013 modelled the impact of lower prices on delays to rollout.[1] This is a direct result of network operators' application of the code to seek severe rent reductions which can be above 90%, far in excess of the forecast of up to 40% set out in the government's 2016 Economic Impact assessment.

4. This all but eliminates any incentive for site owners to engage in consensual negotiations with network operators. Furthermore, it has had the unintended consequence of incentivising site owners to give serious consideration to redeveloping their property for an alternative use. Operators have seen an increase in the number of notices to quit being served by site providers since the Code came into force.

5. We support the government's objective of speeding up the 5G rollout. However, instead of boosting the rollout, the current approach risks the opposite by accentuating extreme market dysfunction, increasing the threat and actual pursuit of tribunal litigation without any evidence

[1] Nordicity: Modelling the Economic Impacts of Alternative Wayleave Regimes, October 2013

that rent savings are invested in networks. Indeed, evidence shows that rent savings simply increase profits.

6. The government recognises that its reforms have not had their intended effect. However, the proposed reforms in the PSTI demonstrate it is not intending to address the fundamental issues that are slowing progress toward our shared goal of greater connectivity. The draft legislation will only lead to continued animosity in this dysfunctional market.

7. APW operates in 19 countries across the globe. None of these countries has adopted a UK model of determining the rental value of mast sites, and many have higher average rents than in the UK. Despite this, many of these countries have more developed 5G rollouts, proving that the amount of rent paid and negotiations with property owners is not a limiting factor in digital connectivity. This point was also underlined by an independent report from the Centre for Economics and Business Research (CEBR), which showed that rents paid to site providers before the 2017 reforms were sustainable.[2] There is a risk that the Code remains an entirely avoidable barrier to the UK's 5G rollout and subsequent economic performance.

8. This submission sets out APW's perspective on the impact of specific aspects of the legislation, and the implications for the land market for mobile telecoms infrastructure and the UK's wider connectivity ambitions. We have three key areas of concern that we believe the Committee should probe:

    a) **The extension of the "no scheme" valuation framework will impact rent values on many new sites;**
    b) **The technical drafting of the legislation could inadvertently lead to a range of unintended consequences; and**
    c) **The legislation entrenches a lack of appropriate protections for site providers.**

9. In addition, we are very concerned that the government's policy decision is not based on a review of evidence that considers the overall objectives of the 2017 reforms against the outcomes experienced in the market.

Issue 1: The addition of new valuation clauses into the Landlord and Tenant Act 1954 and the Business Tenancies Order 1996 will undermine prior agreements and drive down rent values across a large number of sites, reinforcing the disruption in the market [Clauses 61, 62]

10. The new "no scheme" valuation framework introduced into the Code in 2017 prevents site providers from receiving a market price for their land. This has significantly reduced the rents paid by operators to site providers – reductions that go far beyond the government's forecasts. The government made clear in its original consultation that it would not be considering the impact of the changes to the statutory valuation framework, even though prior independent analysis (including the Law Commission's original 2013 recommendations for changes to the Code[3]) advised that adopting "no scheme" valuation would lead to disfunction in the market.

11. The government's position was repeated in the response to its consultation, which stated: "*the government does not intend to revisit the statutory valuation framework. This issue was therefore not within the scope of the consultation*."

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[2] CEBR – Sustainability of pre-2017 telecoms land rents, September 2021
[3] The Electronic Communications Code: A Summary. Law Commission, Feb 2013

12. However, the draft legislation does revisit the statutory valuation framework contained in the original Code by extending the reach of the no scheme valuation. It inserts new valuation clauses (identical to those in the Code) into two separate pieces of legislation: the Landlord and Tenant Act 1954 and the Business Tenancies Order 1996.

13. The original statutory framework of the Code intended that the existing valuation methods in those pieces of legislation should be maintained. This change will have significant valuation implications for a large number of telecoms sites whose leases are currently governed by those Acts, potentially leading to a substantial increase in the overall reduction in rents received by site providers. This fact is acknowledged in the Memorandum for the Joint Committee on Human Rights[4] related to the Bill, which notes that if these changes were to reach statute, "*there was a probability that the amount of rent on renewal [of affected sites] would be lower*". Unlike the Landlord and Tenant Act 1954, it is not possible to contract out of the Business Tenancies Order 1996, meaning these latest changes will have a disproportionate impact on Northern Irish site providers.

14. The change to the interim rent valuation provisions is also concerning, particularly given that rent reductions are often around 85% - 90%. By linking interim rent to the no scheme valuation there is a risk that the no scheme valuation will be applied retrospectively. This would mean that site providers must pay substantial sums of back rent to operators, particularly in cases where interim orders are made on renewals under the Landlord and Tenant Act 1954 or Business Tenancies Order 1996, because the commencement of the interim rent is likely to be backdated to the expiry of the original notice, which may be years before the application itself.

15. This undermining of prior agreements and the transitional provisions introduced in the 2017 reforms will increase site providers' distrust in the market and discourage them from bringing forward land consensually, creating further disruption for the government's connectivity objectives.

16. The Landlord and Tenant Act 1954 has been a pillar of property law over the last half century, providing security and certainty of rights to both landlords and tenants across a plethora of business purposes. This change, and the perceived undermining of the Landlord and Tenant Act regime, could have implications that reach far beyond the telecoms sector.

17. We disagreed with the government's original intent not to revisit valuation in its proposed reforms. We firmly believe that a fair valuation system, such as that recommended by the Law Commission in 2013, would help to address the underlying causes of the dislocation in the market while still tackling a minority of alleged excessive rents. Public interest is best served by a market that works effectively, where site owners and operators are incentivised to participate in consensual negotiations. The Committee should carefully consider the impact of extending "no scheme" valuation as the legislation currently intends to do.

Issue 2: The technical drafting of the legislation may inadvertently create unintended consequences that could inhibit a return to a functioning market

18. The draft legislation creates a range of potential consequences that do not align with the government's stated position in its consultation response. These could create negative outcomes that hinder the government's connectivity ambitions.

[4] PSTI Bill: memorandum for the Joint Committee on Human Rights. Nov 2021

19. **Most notably, changes to the definition of "occupier" will have considerably broader impacts on the exercise of Code rights by operators than has been envisaged by government [Clause 57]**.

20. The government has been clear that changes to the definition are intended only to address the "*specific, narrow circumstances*" where an operator is occupying land, but their Code agreement with the site provider expired prior to the introduction of the Code, something which many operators were prepared to allow to happen, gambling on the Code giving them more beneficial terms. The intention of this ostensibly technical change is to allow an operator that is already in place, but needs additional permissions, to be able to secure these changes from the underlying site provider.

21. However, legal analysis shows that the impact is not limited to these specific circumstances, and instead the proposed changes would apply to all interactions between an operator and a site provider. The practical impact of this is substantial and is likely to:

    a) allow operators to modify or cancel agreements mid-term, including those entered into prior to the original changes in 2017, in order to gain additional rights or better commercial terms;

    b) allow operators, in conjunction with other changes in the legislation, to request additional sharing rights during a lease without paying compensation to site providers; and

    c) allow operators to choose between different methods of renewal or modification (or even make simultaneous applications to court using different provisions).

22. This goes beyond '*specific, narrow circumstances*'. APW also notes that the government's consultation response stated explicitly that agreements could not be changed by court order during the course of the contract: "*we do not have sufficient evidence to support making reforms which would allow the courts to modify an ongoing Code agreement*" (*see paragraph 3.71*).[5]

23. We have urged the government to review the impact of the draft definition of 'occupier' and make appropriate clarifications in line with the publicly stated policy intent. We believe the Committee should amend the Bill to deliver the government's policy intent but without the wider consequences that would arise from the proposed definition amendment. The easiest way to resolve this would be to create a more surgical definition of 'occupier' that sits separately to the broader definition that runs through the Bill and only deals with the specific circumstances intended in the consultation response.

24. It is vital that the legislation addresses this issue. Uncertainty over the definition of 'occupier' in the existing Code has recently been heard by the Supreme Court. It is clear therefore that it is a significant issue that will have far reaching implications, and careful consideration must be made of the proposed definition change. We firmly believe the PSTI should clarify the government's proposed approach once and for all.

25. **We are also concerned that the new procedures permitting interim arrangements for renewal negotiations will disincentivise operators from reaching consensual negotiations, when instead they will be able to rely on court-imposed settlements indefinitely [Clause 67].**

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[5] Access to land: consultation on changes to the Electronic Communications Code - government response. November 2021

26. These changes, that will allow operators to seek modified terms on an interim basis, are intended to add "*fairness*" to the renewals process, particularly in cases where both sides cannot reach agreement and before a court has been able to reach a decision on the case.

27. In practice this means that, for the first time during renewal negotiations, the legislation will give operators the ability to obtain rent based on a Code valuation prior to a final court decision. This change is likely to lead to a substantial number of claims by operators as a matter of course, regardless of the state of negotiations in individual cases. The inclusion of such a provision is contrary to the underlying aim of incentivising consensual agreements (and also cuts against the intention of the original Code, which only allowed applications for an interim rent where the new rate of consideration was higher). If an operator is able to fast track a no scheme reduction, then there is little incentive to reach a consensual deal, which is typically at a higher level, to avoid the delay in getting to the no scheme level through the courts.

28. Once operators have achieved a rent reduction imposed by an interim order, there is very little incentive for them to continue with negotiations, instead of accepting the new court-decided rate as the de facto rent. A fairer way of dealing with this would be to allow operators to have interim rights to upgrade or share, but without dealing with the financial terms – this would benefit the public and improve connectivity, rather than an operator's bottom line.

29. We believe the Committee should explore the risk that this change will lead to a reduction in consensual negotiations. We are concerned that this measure will discourage potential site providers from entering the market.

Issue 3: This legislation will reduce the protections site providers receive, further eroding property rights for limited policy benefit. Reforms to encourage good operator behaviour will help deliver the government's connectivity objectives

30. In drafting its legislation, the government has rightly acknowledged that behaviour by operators often falls short of expectations. In some areas, the legislation will provide some improvements in the protections site providers receive in the face of aggressive and uncooperative behaviour.

31. However, the reality facing site providers is that the market dynamic is tilted heavily in favour of operators. This legislation will not address this imbalance. The changes that the government intends to benefit site providers will have limited practical impact, not least given they lack statutory force. By contrast, the legislation makes considerably more substantive statutory changes in operators' favour in other areas, most notably on upgrading and sharing rights, and on the process for renewal of expired agreements, effectively removing transitional measures originally implemented to phase in the new provisions.

32. We believe the Committee should consider amending the draft legislation to provide better protections for site providers, introducing some element of counterbalance and in turn improving the functioning of the market.

33. This could include enforcing **mandatory use of Alternative Dispute Resolution (ADR) schemes [Clause 68].** The government's consultation response rightly acknowledged that the increased use of ADR could provide significant benefits in terms of more consensual and collaborative resolutions to disagreements. Properly enforced, it would reduce the operators' reliance on litigation through the courts and encourage better behaviour by both parties. It would also bring some potential balance to mitigating cost exposure to site providers.

34. However, the draft legislation, which imposes a duty on operators to "*consider*" the use of ADR "*if it is reasonably practicable to do so*", is not sufficient to ensure that operators are incentivised to choose ADR as a matter of course. The government's proposed incentive – that any "*unreasonable"* refusal to engage in ADR could be taken into account by courts when allocating costs – is again likely to be easily circumvented by the operators.

35. We believe that the use of ADR should be mandatory. As the consultation response acknowledges: "*Even where parties are unable to reach an agreement via ADR, the process should assist the parties in at least narrowing down the issues between them. This in itself is useful, as it reduces the amount of resources and court time needed to determine the dispute*". Given the potential benefits for both parties, and for the wider public interest, it is difficult to see the case for this process remaining advisory.

36. Ensuring **Ofcom's Code of Practice has statutory force** would also allow for greater oversight of operator (and site provider) behaviour. The government's consultation response recognises the importance of ensuring that site providers are protected from the poor behaviour of operators. Its approach is to encourage Ofcom to **provide better guidance through its Code of Practice [Clause 69].** We do not believe these measures will do enough to encourage constructive behaviour from operators.

37. To address this, the government should revise and strengthen the Code of Practice to offer much greater clarity on what good and bad behaviours look like for both operators and site providers. The Code of Practice should include guidance on costs and on the circumstances when it might be reasonable or unreasonable for a Code Operator to make a reference to the Courts. This would help return to a functioning market, by signalling that Code Powers should not be used on a widespread basis as a daily tool for network deployment or lease renewals.

38. We firmly believe the Code of Practice should be given statutory force, with penalties for parties that break it and additional powers for Ofcom to address repeated breaches, in line with the considerably tougher regimes faced by true utility providers in sectors such as energy and water. The Code of Practice should also be used as a reference point for the courts in deciding whether or not to impose any rights and in assessing and awarding costs, with parties that have not engaged in commercial and ADR processes in good faith taking the burden of court costs. This move would provide security to both parties, and reduce poor behaviours, such as unauthorised access to land by telecoms operators.

39. The legislation also imposes a statutory requirement on telecoms operators to have a complaints handling process in place. While mandating complaints handling processes is a positive step, by itself it will not create a step change in the incentives facing operators. There are no guidelines about how telecoms companies should run this service and the consequences for non-compliance are likely to be limited.

40. To address this, the legislation could provide **specific clarity on what these complaints handling processes should cover.** This could cover important issues such as ensuring compensation is paid to site providers in cases of unauthorised access or damage to property. It could also create a formal process for punishing systematic bad behaviour, such as failure to comply with building regulations.

41. While these minor amendments to the legislation would not fully assuage the concerns of site providers on the impact of this Bill, and would only impact those operators who fail to engage

fairly and in good faith, they would be welcomed as a demonstration of the government's commitment to ensuring that there is a fair balance of rights in the market.

We remain concerned over the lack of a comprehensive evidence base supporting the legislation

42. Finally, **we would like to underline our concern with the evidence base used to inform this legislation**. Ministers have made clear that no full review of the impact of the 2017 reforms has been undertaken. Despite this, the legislation makes further sweeping changes to the balance in the market, using the same potentially flawed judgements that informed the previous reforms.

43. The legislation's supporting documents, including the *De Minimis* Assessment, rely on a variety of evidence points that appear to have been supplied by operators. However, it is not clear to us that the government has considered evidence supplied by APW and other members of the site provider community, including on rent levels, or the independent reports produced by the CEBR investigating the expected impact of the government's proposals[6] and the assertion that pre 2017 rental level were unsustainable.

44. We firmly believe the government should commit to undertake a full economic review of the impact of the 2017 legislation, more comprehensively considering whether the legislation has delivered its policy intentions, as it committed that it would to Parliament at the time of the 2017 legislation. Without such a review, and using only contested evidence put forward by operators, this legislation will not address the significant disruption and lack of balance in the market. If the government is not willing to make this commitment, we believe Parliament should amend the legislation to place in statute an obligation for the government to review its impact.

[6] CEBR: Response to 2021 DCMS consultation on changes to the Electronic Communications Code. April 2021