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# The Electronic Communications Code - FAQs

Please note that the guidance set out in this document is provided for information only and does not constitute legal advice by Scottish Futures Trust or DWF to any local authority or any other person. In addition, this document is not intended to provide an exhaustive statement of the matters that will require consideration by local authorities in connection with the grant of rights to use land or buildings and/or in connection with the use of the Payment Guidance. Neither Scottish Futures Trust nor DWF takes any responsibility for any decisions made by a local authority or any other person based upon the contents of this document. A local authority should obtain its own advice in relation to any proposed transaction.

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## **1. Introduction**

- 1.1 This document has been prepared by Scottish Futures Trust in conjunction with DWF to help provide initial guidance on the Electronic Communications Code to public authorities when they are approached by mobile operators to put up a mobile mast on the public authority's site.
- 1.2 While this document addresses some "frequently asked questions" that may come up in such a situation, it is not a comprehensive statement on the legislative position. A public authority should obtain specific professional advice in relation to any proposed transaction.

## **2. About the Electronic Communications Code**

### **2.1 What is the Electronic Communications Code?**

- 2.1.1 The Electronic Communications Code<sup>1</sup>, that came into force on 28 December 2017, provides authorised mobile telecoms operators with statutory rights to get access to, construct and maintain mobile equipment on both public and private land.

### **2.2 What was the aim of the Code?**

- 2.2.1 The previous legislation was widely acknowledged to be outdated and unsuitable for the digital age, having been implemented to regulate landline telephone provision before even the first commercial internet domain name had been registered.
- 2.2.2 With the 2017 version of the Code, the UK Government's intention was to put in place a modern regulation which fully supported the quicker roll out and maintenance of high-quality digital infrastructure (such as mobile phone masts, exchanges and cabinets), and promote investment in new communication networks. By introducing a regime for access to land and valuation for communications infrastructure like what applies for electricity and water infrastructure, it would make it more commercially viable for operators to extend the mobile network.
- 2.2.3 The Code has radically changed the extent of the landlord's control of the site, rental payment methodology, and how you terminate both the lease and the rights associated with the Code. As a result, the dynamics of standard landlord/tenant negotiations have swung more towards the mobile operator tenant. While the landlord and tenant can still negotiate the terms of the lease, the starting point for negotiations are the rights contained in the Code.
- 2.2.4 Some parts of the mobile industry do not believe that the Code has gone far enough in supporting connectivity roll out and have launched the Speed Up Britain

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<sup>1</sup> set out in Schedule 3A to the Communications Act 2003



campaign<sup>2</sup> to further amend the Code and remove perceived ‘loopholes’ in the current legislation.

### 3. The Impact of the Electronic Communications Code

#### 3.1 What powers does the Code give?

3.1.1 The Code gives mobile operators<sup>3</sup> a number of ‘Code Rights’, including the right to enter the land to install, operate, maintain, repair, or alter telecoms apparatus, which is on, under or over the land.

3.1.2 Subject to very limited conditions, mobile operators will no longer have to seek site owner consent to upgrade or share their apparatus, and site owners will not be able to earn additional income from additional operators using or adding to the existing apparatus.

#### 3.2 How is rent impacted by the Code?

3.2.1 Previously, rent was agreed on the value of the site to the mobile operator. Now, like for other utilities, the Code bases the payment on the market value of the underlying land or rooftop, specifically excluding the value to the mobile operator.

3.2.2 The Code makes separate provisions for:

3.2.2.1 **Consideration** - a one-off or periodic payment representing the value of the right to use the site for the term, representing the market value of the agreement to be bound by the Code Rights; and

3.2.2.2 **Compensation** - represents loss or damage sustained (or that will be sustained) by the site owner because of the lease.

3.2.3 The amount of Consideration payable by the mobile operator must represent the market value: the amount a willing buyer would pay a willing seller for the agreement in an arms' length transaction based on a few assumptions.<sup>4</sup> One of the key assumptions is that the rights being granted do not relate to the provision or use of a communications network. This is known in the sector as a ‘no-network’ principle.

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<sup>2</sup> <https://www.speedupbritain.com/>. The UK Government also launched a consultation in January 2021 on whether further legislative changes are needed to support digital coverage and connectivity <https://www.gov.uk/government/consultations/consultation-on-changes-to-the-electronic-communications-code>

<sup>3</sup> Those persons that Ofcom have listed as a Code Operator in the register <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/policy/electronic-comm-code/register-of-persons-with-powers-under-the-electronic-communications-code>

<sup>4</sup> See para 24 of the Code.



3.2.4 The value of the site to the willing buyer will depend in every case on its characteristics and potential uses, and not simply on the number of potential bidders in the market or the existence of other potential sites.

3.2.5 Normally, the site will be a small area that holds little value to the site owner and may have few other potential uses. Based on the methodology in the Code, rents will be lower than those agreed pre-Code.

### 3.3 **Can a mobile operator automatically exercise their Code Rights over a site without the consent of the site owner?**

3.3.1 A mobile operator will normally approach the site owner in the first instance to try agree the terms. The Code should be considered the new starting point for those discussions.

3.3.2 If an agreement cannot be reached, then the mobile operator can start a statutory process to get agreement without the site owner's consent.<sup>5</sup>

### 3.4 **Can you refuse the Code Rights being exercised?**

3.4.1 A site owner could initially refuse the exercise of the Code Rights and seek to negotiate the terms of the exercise of the Code Rights, keeping in mind that the mobile operator always has the right to seek a court order in the Lands Tribunal<sup>6</sup>.

3.4.2 If the site is planned for redevelopment, there may be grounds for the site owner to vary the location of the site or even refuse the application of the Code Rights. However, a site owner cannot assert the grounds themselves and must have it verified via statutory process and ultimately the Lands Tribunal<sup>7</sup>, adding time and expense to the process.

### 3.5 **What if the site owner and the mobile operator cannot agree on the terms?**

3.5.1 If agreement is not reached, then the mobile operator does have an alternative way to get agreement - through the Lands Tribunal.

3.5.2 The mobile operator must give written notice to the site owner of the proposed terms of access. If the site owner does not agree to those terms within 28 days, the mobile operator can start the statutory process by applying to the Lands Tribunal<sup>8</sup> to get the court to give agreement and confirm the terms of the agreement

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<sup>5</sup> See para 3.5.1 of this document.

<sup>6</sup> See para 3.5.1 of this document.

<sup>7</sup> See para 21(5) of the Code. For example, in the case of *E Ltd and Hutchison 3G UK v Meyrick 1968 Combined Trust of Meyrick Estate Management* [2019] UKUT 164 (LC), the Upper Tribunal in England found that the landowner had failed to prove necessary intention to redevelop in order to refuse the application for Code Rights under para 21(5) of the Code.

<sup>8</sup> under Part 4 of the Code.



based on the Code. Further detail on this process is outside the scope of these FAQs.

- 3.5.3 A site owner should carefully consider whether it has good and valid reasons to object to an application from a mobile operator. A statutory process could result in them incurring significant costs in defending any formal action and which may not be fully recoverable by the public authority even if it is ultimately successful<sup>9</sup>.

### 3.6 **How can Code Rights be terminated?**

- 3.6.1 Code Rights continue even after the lease ends, whether at the end of its term or due to the site owner exercising any early right of termination.
- 3.6.2 A statutory process must be followed to terminate both the lease and the Code Rights. This process is complicated and commentary on it is outside the scope of these FAQs. However, it is worth noting that the process involves lengthy prior notice periods (a minimum of 18 months) and there are several conditions to be met to justify the termination.

### 3.7 **Can the public authority "contract-out" of the operation of the Code?**

- 3.7.1 No. The operation of the Code is mandatory. All negotiations are subject to the compliance with the Code.

## 4. **Other Considerations and Further Reading**

- 4.1 It is important that the public authority understands its potential responsibilities, obligations and risks as a site owner under the Code and ensures that its overall strategy for facilitating digital connectivity is aligned with its legal duties under the Code.
- 4.2 In addition, it is advisable for a public authority to ensure that it is well-prepared to handle requests from mobile operators for access to its sites in accordance with the relevant timescales and requirements set out in the Code. The introduction of the Code has already given rise to a marked increase in the number of applications being made by mobile operators to public and private sector site owners, and an increased willingness on the part of mobile operators to escalate any refusals of access to the relevant tribunals.
- 4.3 A public authority that fails to deal appropriately with the review, management, and negotiation of requests for access under the Code may increase the risk that the matter is escalated to the Lands Tribunal, which could have cost and/or reputational risks for

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<sup>9</sup> In the recent decision of the English Upper Tribunal in *Cornerstone Infrastructure Limited v Central Saint Giles Partner Ltd and another*, a housing association and the freeholder of the relevant land were awarded £5,000 of costs where they successfully resisted the mobile operator's application under the Code, even though the costs they incurred in defending the application were more than £100,000,



the public authority. It may also increase the risk of the public authority being obliged to grant access on terms that are unfavourable to the public authority.

- 4.4 Public Authorities can take steps to help better manage mobile operators:
  - 4.4.1 Have efficient processes in place to review and handle requests from mobile operators for access to its sites.
  - 4.4.2 Develop/adopt Code compliant lease templates and pricing strategies that will reduce the length of negotiations, like those developed by Infralink<sup>10</sup>.
  - 4.4.3 Identify whether existing leases and agreements are subject to the Code or previous legislation and think about how those agreements can be dealt with before they expire.
  - 4.4.4 Consider developing a strategy/policies for the location of electronic communications apparatus on its sites (e.g. to minimise impacts for the public authority and mobile operators), which could help mobile operators understand the specific concerns of the public authority during negotiations.
  - 4.4.5 Identify sites that are subject to development or potential future development on an ongoing basis so that this can be factored into (and support) any negotiations/objections to applications by a mobile operator.
- 4.5 The regulatory authority, Ofcom, has produced guidance on how to manage negotiations, the operation of the lease and at its termination all in line with the Code.<sup>11</sup>

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<sup>10</sup> <http://infralink.scottishfuturetrust.org.uk/>

<sup>11</sup> [https://www.ofcom.org.uk/\\_data/sites/pdf\\_file/0025/108790/ECC-Code-of-Practice.pdf](https://www.ofcom.org.uk/_data/sites/pdf_file/0025/108790/ECC-Code-of-Practice.pdf)