The Electronic Communications Code: A Consultation Paper

Response to Law Commission Consultation Paper No 205

Who we are

1. The Charities' Property Association is chaired by Lord Cameron of Dillington. It represents charities that hold land to sustain their charitable purposes – which for many of them include environmental protection and conservation. Our members number almost one hundred charities with significant property portfolios, including charitable housing trusts, Oxford and Cambridge colleges, Anglican cathedrals and major public schools.

2. The Churches' Legislation Advisory Service is a registered charity (No 256303) chaired by the Bishop of Exeter, the Rt Revd Michael Langrish. It is an ecumenical body that includes all the major Christian denominations in the United Kingdom, together with many of the smaller ones and the United Synagogue. Largely though not exclusively for historical reasons, the Churches – particularly the Church of England, the Church of Ireland, the Church of Scotland, the Church in Wales and the Roman Catholic Church throughout the United Kingdom – have significant property portfolios in their own right.

3. We welcome the opportunity to respond to this consultation.

The need for a code

4. Paragraph 1.20 of the consultation document suggests that the balance between the rights and interests of operators and of landowners set out in the current Electronic Communications Code contained in Schedule 2 to the Telecommunications Act 1984 requires reappraisal.

5. Paragraphs 2.2 and 2.3 argue that reliance on the market and existing landlord and tenant legislation without further intervention is inadequate as a means of ensuring that the electronic communications infrastructure can be extended and, as the technology develops and changes, upgraded. Paragraph 2.3 argues for compulsion, "at least as a last resort", to prevent landowners either refusing to grant access "or, more likely, hold[ing] out for payment at a ransom level". Paragraph 2.3 suggests that there is at least anecdotal evidence that operators

> "… have experienced great difficulty in agreeing access or price, and have had either to abandon a preferred route or site or to agree to what they regard as an

> unrealistic payment to the landowner, because the Code does not provide either sufficiently swift compulsion or clearly defined levels of payment".

6. We do not contest either the need for a Code or the fact that a Code drafted in the early 1980s is bound to have been overtaken by the rapid progress of technological change. We are, however, concerned that any revised Code should not be weighted unduly against the interests of landowners.

7. In that connexion, we note Clause 7 of the Growth and Infrastructure Bill introduced into the House of Commons on 18 October 2012. The Explanatory Notes to the Bill explain the purpose of Clause 7 as follows:

> "Clause 7 adds the need to promote economic growth as another consideration to be taken into account in making regulations under section 109 of the Communications Act 2003, which set out the conditions and restrictions subject to which the electronic communications code (which is in Schedule 2 to the Telecommunications Act 1984) is applied to operators".

8. We note that Clause 7 about *operators* rather than *landowners*. However, we hope that the introduction of the Growth and Infrastructure Bill will not, in effect, pre-empt the outcome of the Law Commission's present consultation.

Compensation and consideration

9. Paragraph 6.35 proposes

> "… a single entitlement to compensation for loss or damage sustained by the exercise of rights conferred under the Code, including the diminution in value of the claimant's interest in the land concerned or in other land, should be available to all persons bound by the rights granted by an order conferring code rights.
>
> Do consultees agree?".

10. If, as we surmise, the result of this will be compensation *only*, then *we certainly do not agree*.

11. Paragraph 3.53(2) asks whether it could be right to compel a landowner in any circumstances where financial compensation would not be adequate; but the consultation document does not then indicate how such cases would be dealt with if the conclusion were that in some circumstances compulsion would be appropriate.

12. Charities hold their buildings and other property partly in order to conduct within them those activities for which they were established (eg the physical plant of the Oxford and Cambridge colleges or the cathedrals) and partly to generate income which will enable the charities to fulfil their charitable purposes (eg income from tenanted agricultural land).

13. In law, charity trustees are under an overriding fiduciary obligation to protect the assets of their trust and to make sure that those assets are properly applied for the objects of the

charity. Any charity trustee who did not attempt to negotiate the most advantageous terms for (eg) the installation of a telecoms mast on the charity's land would surely be failing in his or her duty.

14. In addition, much of the physical plant of some of our member charities consists of listed buildings: the Church of England alone has some 12,000. Our members are also the custodians of a considerable acreage of land that has historic landscape value in its own right. The consultation is silent on the treatment of listed buildings, scheduled ancient monuments and historic landscape owned by third party landowners. How will a compulsory right of undertakers to impose works – against the will of the owner – on land occupied by a listed structure square with listed building consent?

15. So far as the Church of England is concerned, in particular, in the absence of a faculty it is unlawful to carry out *any* works to a church except of a very minor kind – whether the building is listed or not. What will happen in the case of a conflict where the undertaker wishes to impose a particular item of equipment and the diocesan chancellor refuses a faculty for the works? An application for judicial review of the chancellor's decision?

16. We are not convinced that the proposals in the consultation document strike the proper balance between the need for a robust electronic communications infrastructure and the need to protect the historic built environment and landscape of heritage value.

17. In our view, using the approach in the Land Compensation Act 1961 will remove rights from charity trustees that sometimes enable them to generate a significant part of the trust's charitable income. If, however, the absolute rights of landowners *are* to be interfered with and if, as we assume, what the consultation document describes as the "ransom" approach is not an option, then we should prefer the market value approach to the *Bocardo* approach. We are unconvinced by the contention that there is a lack of comparators – or, at any rate, by the apparent assumption that this will remain the case in the future. Our expectation would be that in a growing and fast-changing market the number of comparators would grow fairly quickly.

18. One of the underlying issues in the consultation is the fear that landowners will use their position as monopoly sellers extortionately. We have seen a draft of the submission on behalf of Guy's & St Thomas' Charity which suggests that, in reality, landowners are not in a position to abuse monopoly power because land-holdings are only very rarely sufficiently large and monolithic to give an individual landowner a monopoly position. The contention of Guy's & St Thomas' Charity is that there is likely to be a neighbouring landowner who will be willing to accommodate a telecoms mast for the income-stream that the rent would provide.

19. There will certainly be cases in which a particular landowner will be in a monopoly position: but that must be an extremely rare occurrence and we can see no good reason for predicating changes to the Communications Code on the premise that landowners are monopoly sellers as a matter of routine.

20. We see considerable force in the argument of the Country Land and Business Association (at paragraph 6.58) that consideration should be substantial because Code Operators are commercial entities who run their business to generate profits for their shareholders, usually without being obliged to provide a universal service.

21. As consumers of such services ourselves, we can also understand the counter-argument that providing electronic communications services to individuals, businesses and society as a whole is a public benefit. On balance, however, we would argue for the solution that generates the maximum financial benefit for our members' charitable trusts. If, as we contend, the landowner is only very rarely a monopoly seller, in almost all circumstances the landowner is only ever going to be able to secure the return which the market will bear. On that basis, the market should, by and large, be left to work on its own, which will mean the landowner will be able to secure a reasonable commercial return.

Conclusion

22. We fully understand that importance of the need to improving communications networks – not least because of their positive economic and social impact in rural areas. However, the duty of the trustees of our member charities is to apply their charitable assets for the benefit of their beneficiaries: no more, no less. Any wider considerations of social or economic benefit to the public at large are ultimately a matter for the Government.

23. The number of operators and the number of installations has increased considerably since the Electronic Communications Code was enacted in 1984 and is likely to continue to increase. We feel that any amendments to the Code that interfere with or override the rights of landowners to manage their land or to influence decisions that affect it should be made only after the most careful consideration.

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27 October 2012

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LAW COMMISSION
CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

RESPONSE FORM

This optional response form is provided for consultees' convenience in responding to our Consultation Paper on the Electronic Communications Code.

You can view or download the Consultation Paper free of charge on our website at:

www.lawcom.gov.uk (see A-Z of projects > Electronic Communications Code)

The response form includes the text of the consultation questions in the Consultation Paper (numbered in accordance with Part 10 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

The reference which follows each question identifies the Part of the Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

As noted at paragraph 1.34 of the Consultation Paper, it would be helpful if consultees would comment on the likely costs and benefits of any changes provisionally proposed when responding. The Department for Culture, Media and Sport may contact consultees at a later date for further information.

We invite responses from 28 June to 28 October 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or

by post to: James Linney, Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ

Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information 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 Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

Your details

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Are you responding on behalf of a firm, association or other organisation? **If so, please give its name (and address, if not the same as above):**
Arqiva
If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:
.
As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: GENERAL

10.3 We provisionally propose that code rights should include rights for Code Operators: (1) to execute any works on land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus; (2) to keep electronic communications apparatus installed on, under or over that land; and (3) to enter land to inspect any apparatus. Do consultees agree? Consultation Paper, Part 3, paragraph 3.16.
Yes – but we consider the rights should be extended as explained under 10.4 below.

10.4 Do consultees consider that code rights should be extended to include further rights, or that the scope of code rights should be reduced? Consultation Paper, Part 3, paragraph 3.17.
We have specific experience of issues associated with the extent of rights bestowed under the current code and the definition of electronic communications apparatus, which we deal with under 10.7. The issues with the rights as currently construed is that they can be interpreted as confining the operator to accessing land to either execute specific works, or to inspect apparatus. For examples: The wording at (1) does not arguably include the “addition, improvement, removal or replacement” of electronic communications apparatus. The wording in (3) does not include the simple right of access to a site across third party land The wording in (1) and (2) confine the right to where apparatus is installed etc. Access is sometimes required for facilitating maintenance and/or for health and safety reasons. For example, when working at height a drop zone has to be fenced off to allow for the possibility of something being dropped. This is half the height of the mast or 50 metres, whichever less. In many cases this extends to land in third party ownership and in the main, it is possible to do this by agreement. We frequently have issues with neighbouring landowners who deliberately prevent us carrying out planned maintenance or health and safety inspections. The same landowners often offer to sell us this land or grant us a temporary right at a ransom price. We have therefore considered acquiring the land under the Code, but have been advised by our lawyers that this is not possible. Our lawyers have however, also advised that it is possible under the more recent provisions set out under paragraph 3 of Schedule 4 of the Communications Act 2003. As the wording under these provisions reflects better the reasonable requirements of operators and is not so limiting, we believe the Code should be revised based upon them. We suggest some further changes are necessary under 10.5 and suggest some revised wording that would

take account of the above concerns in our answer to that question.

Additionally, the Code Powers should be extended to provide rights in an emergency. Electronic communications are an essential requirement of modern life and the need to maintain services in an emergency already has statutory recognition. For example, Class A A. (b) of Part 24 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995 allows the installation of moveable apparatus for a period of 6 months in the event of an emergency.

Arqiva has had specific experience of major catastrophic events – a fire which destroyed a 150 metre high radio broadcast mast at Peterborough and a fire at the Oxford Main Station Mast, also about 150 metres high, during the Digital Switchover works. In both cases agreements had to be rapidly reached with adjoining landowners to allow emergency masts to be erected and for access. This has led to a review of our contingency planning, but in both these cases we were lucky to be able to agree terms on a reasonable basis with the landowner. However, we consider emergency rights to access and use land are required to:

- Allow for the fact that even with thorough contingency planning, it is not possible to cover all eventualities or scenarios, especially with very large masts.
- Avoid a situation where a landowner in a unique position could try and ransom an operator.
- Allow access to be gained where the landowner is not readily identifiable or contactable.

Such rights should be temporary in nature and extend no longer than required for providing temporary replacement coverage and subsequent decommissioning (which in the case of a large temporary broadcast structure could be several months and weather dependent).

An extended code should make provision for retrospective compensation after access has been gained, with provision for the parties to reach agreement first or failing that on some form of mediation process, such as an appointment of an arbitrator by the President of the Royal Institution of Chartered Surveyors.

10.5 We provisionally propose that code rights should be technology neutral.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.18.

Yes – before the Communications Act 2003 came onto the statute books, the predecessor companies to Arqiva highlighted the anomaly that unlike the telecommunications operators such as the mobile network operators, the broadcast networks did not benefit from Code Powers. We pointed out that in a converging market this was anti-competitive and the validity of those arguments is not only stronger, but point to the need for further amendments to the Code.

The use of Code Powers is currently linked to an operator's network. This reflects the way in which the first generation mobile licensees, now O2 and Vodafone, were only allowed to develop the network infrastructure and had to wholesale access to third party providers who supplied the public.

The second generation licences changed that with the new incumbents, now T- Mobile and Orange being licensed to establish new networks, with services they could retail direct to the public. O2 and Vodafone were granted this second right later and no distinction was made with the third generation services, the new operator, now "3", being given right of access to the O2 network for a limited period to help place them on a competitive level.

The mobile operators have now begun consolidating their networks, looking to compete on retail price and the range and bundling of services offered to the public. Individual networks are no longer necessary to drive competition in the market and indeed the costs of network deployment

are such that it is a major deterrent to new service providers, especially with existing mature and competing networks.

There has therefore been a blurring of the way networks are deployed, operated, shared and maintained, with many sites now being owned and managed by wireless infrastructure companies, who are effectively neutral hosts providing a range of infrastructure and operational management services to operators. This has also led to a blurring between the relationships held with the landowner, with often no direct link with third party sharers who may be code operators.

Thus the underlying assumption in the Code that a single operator may need to use code powers in relation to a network site against a single landlord is therefore no longer valid.

An unfortunate consequence of this evolution is uncertainty about the scope of code powers in given situations. To illustrate this, we have had direct experience of sites coming under risk where we own the infrastructure, but have no operational network apparatus. In these cases, we are left in the unsatisfactory position of having to rely upon the use of code powers by a third party, who may be unwilling, because of the liability for compensation. There are also uncertainties as to whether in such circumstances the code powers might protect a site in its entirety or be limited to the apparatus belonging to an individual operator. For example, with a 25 metre high mast supporting a range of sharers, which might include the RNLI, the local ambulance service and the AA, but only one code operator at 15 metres, the Court could conclude that any paragraph 21 notice could only protect the mast up to 15 metres in height and not cover any radio equipment installed on the mast belonging to the RNLI etc.

In summary we consider the scope of code powers should be amended to end this unsatisfactory situation, i.e.:

- To better reflect that the rights may be necessary to use to improve or maintain a site and not just its initial deployment
- To be technology neutral
- To be network neutral
- To be better aligned with the provisions in the Communications Act 2003
- Overall to provide greater clarity on the extent of the rights

To achieve these aims, we recommend code rights be amended so that Code operators can attain rights over land, when it is required:

(1) for, or in connection with, the establishment or running of the operator's network or that of another code operators network, or a public service network ; or
(2) for continued access, the laying of cables or ducting, or the installation and maintenance of overhead lines, or other reasons for, or in connection with the running of the operator's network; or
(3) as to which it can reasonably be foreseen that it will be so required.

Public service network could then be defined to include non-code operators, such as Central or local Government agencies, emergency services, breakdown services and public utilities.

10.6	Do consultees consider that code rights should generate obligations upon Code Operators and, if so, what? Consultation Paper, Part 3, paragraph 3.19.

In return for exercising code rights it is reasonable to impose similar obligations upon Code Operators to those found in standard telecoms Leases. For example our standard lease obliges us to keep the equipment and demise in good repair and return the demise to its original state once we have vacated.

10.7	We ask consultees to tell us their views on the definition of electronic communications apparatus in paragraph 1(1) of the Code. Should it be amended, and if so should further equipment, or classes of equipment, be included within it? Consultation Paper, Part 3, paragraph 3.27.

We do have specific experience or knowledge of issues associated with the definition, in part, because the definition is or was referred to within the permitted development rights granted to Code Operators under the respective General Permitted Development Orders in the UK. See for example the definitions expressed in Part 24 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995 – Development by Telecommunications Code Systems Operators (Wales). To illustrate this we attach a copy of a Secretary of State's decision dated 8 August 1995 in relation to an enforcement appeal that was handled by our Saleem Shamash.

The specific problems that we have experienced and which are partly encapsulated in the attached case, have tended to fall within three areas, i.e.:

- In spite of the phrase "in connection with" disputes still arise over whether the definition extends to ancillary apparatus or structures, such as rooftop safety fencing
- Likewise, disputes have still arisen over whether shrouding or screening designed to lessen visual impact fall within the definition
- Some seek to introduce a test of necessity, which does not exist – so for example, a dish may be argued to be unnecessary, because a fixed link could be installed instead

We believe these issues would be overcome by introducing wording in the first part so that it reads "…which is designed or adapted for the reasonable use in connection with the running of an electronic communications system, and…." and by extending the examples to include:

(c) any ancillary apparatus or structures; and

(d) any apparatus designed or adapted to shield or disguise the installation or its site

10.8 We ask consultees to tell us their views about who should be bound by code rights created by agreement, and to tell us their experience of the practical impact of the current position under the Code. Consultation Paper, Part 3, paragraph 3.40.
We consider that the current priority provisions should be retained because they are important to enable Code Operators to deliver their services to their customers and prevents the interruption of critical services to occupiers.

10.9 We ask consultees for their views on the appropriate test for dispensing with the need for a landowner's or occupier's agreement to the grant of code rights. In particular, consultees are asked to tell us: (1) Where the landowner can be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code, should it be possible for the tribunal to make the order sought without also weighing the public benefit of the order against the prejudice to the landowner? (2) Should it be possible to dispense with the landowner's agreement in any circumstances where he or she cannot be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code? (3) How should a revised code express the weighing of prejudice to the landowner against benefit to the public? Does the Access Principle require amendment and, if so, how? Consultation Paper, Part 3, paragraph 3.53.
We respond in corresponding fashion: (1) The system must be fair and equitable in its operation and so we consider it should be necessary to for the tribunal to have to weigh the public interest against the prejudice. (2) With the change proposed to the compensation arrangements, which we support, we consider this to be highly unlikely and therefore a hypothetical question. (3) The Access principle needs updating for the reasons identified in Paragraph 3.52 of the Consultation Paper and to reflect the further reasoning and changes we suggest under 10.5.

10.10	We ask consultees to tell us if there is a need for a revised code to provide that where an occupier agrees in writing for access to his or her land to be interfered with or obstructed, that permission should bind others with an interest in that land. Consultation Paper, Part 3, paragraph 3.59.
We agree there is a need to bind others with an interest in that land for the same reasons as mentioned at 10.8.	

10.11	We ask consultees to tell us their views about the use of the right for a Code Operator to install lines at a height of three metres or more above land without separate authorisation, and of any problems that this has caused. Consultation Paper, Part 3, paragraph 3.67.
We believe the provisions set out under paragraphs 10, 17 and 18 of the Code relate to the power to install overhead lines. We note from Paragraph 3.65 of your Consultation Paper that the Law Commission is also under this impression. To that extent, we have no observations as the systems operated by Arqiva are either wireless or entail the use of underground cables. However, there are problems associated with the wording of Paragraph 18, as it can and has been interpreted to include any apparatus installed 3 metres above ground level. This would include therefore any radio mast or tower and any apparatus installed on that mast above 3 metres, i.e. everything. In our experience there does not seem to be any consensus amongst the main operators as to whether Paragraph 18 must be complied with. Most, including Arqiva take the view that these provisions are not relevant to radio masts or towers and so in general notices are not affixed. The main exception to this is Airwave and we attach a copy of the judgment of John Edward Hensher v Airwave MM O2 Limited, dated 24 August 2004. You will see that this related to the installation of a mast, as opposed to overhead lines and that the Defence admitted that Paragraph 18 applied. It does concern us that others may interpret the provisions of Paragraph 17 and 18 as binding upon what in essence are our daily activities and indeed the activities of all the main operators, especially as explained further in 10.13 they constitute an unnecessary duplication of existing controls. The provisions therefore need clarification to comply would be a major and unnecessary administrative burden and we need to have lifted the possibility of being accused of committing an offence.	

10.12	Consultees are asked to tell us their views about the right to object to overhead apparatus. Consultation Paper, Part 3, paragraph 3.68.
See our response to 10.11	

10.13 Consultees are asked to give us their views about the obligation to affix notices on overhead apparatus, including whether failure to do so should remain a criminal offence.

Consultation Paper, Part 3, paragraph 3.69.

See our response to 10.11.

If the Law Commission concludes that the obligation is binding on mast and tower operations and should remain so then we do not consider that failure to do so should remain a criminal offence.

Any radio mast or tower and the apparatus installed upon it will generally fall within the definition of operational development. This therefore triggers the requirement for a planning permission, either upon application to the local planning authority or as may be granted by a General Development Order. This process allows local consultation and/or compliance with conditions and limitations, which mean that all masts must at least fall under the prior approval procedures which provide control over detailed siting and appearance. It is difficult to understand what additional purpose a Paragraph 18 notice has or how the rights of any third party could really be prejudiced by a failure to affix a notice. In these circumstances, failure should not be a criminal offence.

This position contrasts with that which relates to the installation of telegraph poles and lines. Telegraph poles do not fall within the definition of radio masts or towers and so in England and Wales can be installed up to a height of 15 metres without generally falling under any local planning authority control and with it the obligation to consult and the power to refuse. In these circumstances there is some logic to the requirement to affix notices, although it does seem draconian that the mere failure to comply is an offence.

10.14 Do consultees consider that the current right for Code Operators to require trees to be lopped, by giving notice to the occupier of land, should be extended:

(1) to vegetation generally;

(2) to trees or vegetation wherever that interference takes place; and/or

(3) to cases where the interference is with a wireless signal rather than with tangible apparatus?

Consultation Paper, Part 3, paragraph 3.74.

Yes, to all three scenarios. We have recent experience of requiring trees to be lopped on neighbouring land. Fortunately the landowner co-operated, but if he had not, we would have been powerless under the Code as the trees were not overhanging a street.

However, the rights should be further extended to allow for lopping or clearance of vegetation if is has the potential to cause interference with a wireless signal or apparatus, so that preventative action could be taken. For example, it would be preferable to have the power to lop fast growing conifers on neighbouring land before they grew to a problematical height and before any disruption to service.

10.15 We ask consultees:

(1) whether Code Operators should benefit from an ancillary right to upgrade their apparatus; and

(2) whether any additional payment should be made by a Code Operator when it upgrades its apparatus.

Consultation Paper, Part 3, paragraph 3.78.

As we have said previously Arqiva is both a landlord and a tenant so we see this issue from both sides. As a landlord we are one of a number of infrastructure companies whose businesses are based on granting contractual rights to Code Operators to install network equipment. The core business model of such companies is that contractual revenues are typically linked to the level and type of equipment installed as well as the wider rights granted and so a proposal to grant ancillary rights to upgrade without a charge will cut across this and so damage such businesses. This is also a practical issue when upgrades take place in that it may be necessary to upgrade or strengthen the infrastructure as a result and the costs of these enhancements will have to be recovered from the relevant Code Operators.

As a tenant we, of course, recognise the desire to upgrade equipment for the reasons identified at paragraph 3.76 of the Consultation Paper. However, as explained in 10.5 and in our covering letter, the relationship and contract with the landlord is usually with the first operator, or now often a wireless infrastructure company. The lease may contain restrictions on upgrading equipment, usually to trigger an additional rental payment and the agreement with the first operator or radio site management company may also make provision for payments, linked not so much to the right to use or occupy land, but for additional services and management fees. It would therefore be wrong for any revised code to allow either of these governing contracts to be circumvented without payments being made in line with those contracts.

Therefore, we would not support Code Operators having a general right to upgrade which might be open to abuse and used to override all other agreements entered into willingly by a Code Operator or a predecessor company. Where such rights have been determined by the agreements freely entered into between the parties this should not be overridden by the code.

We therefore advocate a tiered approach to reflect different scenarios, with payments only made as explained further at 10.44.

Such an approach would have the benefit of reflecting current practice and striking a fair balance between the Code Operators, the landowners and wireless infrastructure companies (that might be the first operator holding onto a lease).

Furthermore as a company we pride ourselves on having robust health and safety policies and procedures. We consider these rigorous standards to be crucial to the safety of our employees, contractors, customers and surrounding occupiers. Therefore any rights to upgrade, add to or share equipment should not override individual company health and safety policies or statutory obligations.

10.16 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from sharing their apparatus causes difficulties in practice;

(2) whether Code Operators should benefit from a general right to share their apparatus with another (so that a contractual term restricting that right would be void); and/or

(3) whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it shares its apparatus.

Consultation Paper, Part 3, paragraph 3.83.

Our response to this question is similar to that at 10.15. As we said previously, the basis of an infrastructure sharing businesses is to grant network equipment rights that are personal to a specific Code Operator entity and any rights to share, or not, are discussed as part of the contract negotiations. We understand the desire to share equipment. However such a right should not be available to use to circumvent the personal contractual rights held by Code Operators (whether with the Landowner, infrastructure provider and/or a third party) or avoid any additional payment flowing from any governing contract/s. Whilst we acknowledge the need for infrastructure or sites providers to work with the Code Operator community to reduce property or network costs, commercial contracts and any restrictions on equipment sharing, should not be overridden by statute. We would not therefore support Code Operators having a general right to share which overrides all other agreements.

For the same reasons as outlined at 10.15, where there is no contract in place or the contract has expired we would suggest the same tiered approach is adopted.

Again, such an approach would have the benefit of reflecting current practice and striking a fair balance between the Code Operators, the landowners and radio site management companies (that might be the first operator holding onto a lease).
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10.17 We ask consultees to what extent section 134 of the Communications Act 2003 is useful in enabling apparatus to be shared, and whether further provision would be appropriate.

Consultation Paper, Part 3, paragraph 3.88.

We have never relied upon this section and as far as we are aware it has not been used against us. We would therefore consider its scope is limited and further provision as detailed at para 10.16 is now appropriate.

10.18 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from assigning the benefit of agreements that confer code rights causes difficulties in practice;

(2) whether Code Operators should benefit from a general right to assign code rights to other Code Operators (so that a contractual term restricting that right would be void); and

(3) if so, whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it assigns the benefit of any agreement.

Consultation Paper, Part 3, paragraph 3.92.

Our experience suggests that the relevant land agreements or contracts adequately deal with this and an overriding right to assign should not be included within a revised Code.

10.19 We ask consultees to tell us if they consider that any further ancillary rights should be available under a revised code.

Consultation Paper, Part 3, paragraph 3.94.

None in addition to the ones we raise in our responses to other questions.

10.20 We ask consultees to tell us if they are aware of difficulties experienced in accessing electronic communications because of the inability to get access to a third party's land, whether by the occupiers of multi-dwelling units or others.

Consultation Paper, Part 3, paragraph 3.100.

We have experienced situations where we have been unable to gain access or held to ransom to gain access over third party land.

An example is a rural site (where we own a freehold site but the access way is owned (although this has yet to be proved) by a third party. The third party is holding us to ransom for an extortionate fee because he claims that our right of access is limited to broadcast use only but we also want to use the access way for other telecoms operators' usage. We believe our right extends to telecoms but it would assist us if there was a general right under the code to gain access over third party land in return for the landowner receiving a reasonable payment.

10.21 Do consultees see a need for a revised code to enable landowners and occupiers to compel Code Operators to use their powers to gain code rights against third parties? Consultation Paper, Part 3, paragraph 3.1.01.
No – and please see also our response to 10.22.

10.22 Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used? Consultation Paper, Part 3, paragraph 3.102.
We are not aware that this power has ever been used. We consider that the right to use Code Powers should be at the discretion of the Code Operator and not the behest of a potential subscriber for economic and network management reasons. Apart from anything else, there is no obligation on the subscriber to subscribe and remain as a subscriber in the event that Code Powers are used and a third party or parties paid compensation.

10.23 We ask consultees: (1) to what extent unlawful interference with electronic communications apparatus or a Code Operator's rights in respect of the same causes problems for Code Operators and/or their customers; (2) to what extent any problem identified in answer to (1) above is caused by a Code Operator having to enforce its rights through the courts or the nature of the remedy that the courts can award; and (3) whether any further provision (whether criminal or otherwise) is required to enable a Code Operator to enforce its rights. Consultation Paper, Part 3, paragraph 3.106.
We believe that criminal sanction is a step too far but we would support a provision either affording operators extra protection (by imposing financial penalties) and/or a fast track solution. The current enforcement methods are too slow and our customers (such as the emergency services) need reassurance that we will be able to deal with unlawful interference swiftly.

10.24 We ask consultees whether landowners or occupiers need any additional provision to enable them to enforce obligations owed to them by a Code Operator. Consultation Paper, Part 3, paragraph 3.107.
In return for exercising code rights it is reasonable to impose similar obligations upon Code Operators to those found in standard telecoms Leases.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: SPECIAL CONTEXTS

10.25 We provisionally propose that the right in paragraph 9 of the Code to conduct street works should be incorporated into a revised code, subject to the limitations in the existing provision. Do consultees agree? Consultation Paper, Part 4, paragraph 4.11.
Yes – these rights have been used quite extensively and will continue to be so. We are not aware of any particular problem with the current provisions.

10.26 We ask consultees to let us know their experiences in relation to the current regime for tidal waters and lands held by Crown interests. Consultation Paper, Part 4, paragraph 4.20.
No experience or comment

10.27 We seek consultees' views on the following questions. (1) Should there be a special regime for tidal waters and lands or should tidal waters and lands be subject to the General Regime? (2) If there is to be a special regime for tidal waters and lands, what rights and protections should it provide, and why? (3) Should tidal waters and lands held by Crown interests be treated differently from other tidal waters and lands? Consultation Paper, Part 4, paragraph 4.21.
No experience or comment.

10.28 We ask consultees:

(1) Is it necessary to have a special regime for linear obstacles or would the General Regime suffice?

(2) To what extent is the linear obstacle regime currently used?

(3) Should the carrying out of works not in accordance with the linear obstacle regime continue to be a criminal offence, or should it alternatively be subject to a civil sanction?

(4) Are the rights that can be acquired under the linear obstacle regime sufficient (in particular, is limiting the crossing of the linear obstacle with a line and ancillary apparatus appropriate)?

(5) Should the linear obstacle regime grant any additional rights or impose any other obligations (excluding financial obligations)?

Consultation Paper, Part 4, paragraph 4.30.

No experience or comment

10.29 We provisionally propose that a revised code should prevent the doing of anything inside a "relevant conduit" as defined in section 98(6) of the Telecommunications Act 1984 without the agreement of the authority with control of it.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.34.

Yes

10.30 We provisionally propose that the substance of paragraph 23 of the Code governing undertakers' works should be replicated in a revised code.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.40.

Yes

10.31 We provisionally propose that a revised code should include no new special regimes beyond those set out in the existing Code. Do consultees agree? Consultation Paper, Part 4, paragraph 4.43	
No comment	

ALTERATIONS AND SECURITY

10.32 We provisionally propose that a revised code should contain a procedure for those with an interest in land or adjacent land to require the alteration of apparatus, including its removal, on terms that balance the interests of Code Operators and landowners and do not put the Code Operators' networks at risk. Do consultees agree? Consultation Paper, Part 5, paragraph 5.11.
We agree that a procedure similar to Paragraph 20 should be retained.

10.33 Consultees are asked to tell us their views about the alteration regime in paragraph 20 of the Code; does it strike the right balance between landowners and Code Operators? Consultation Paper, Part 5, paragraph 5.12.
We consider that it does strike a fair balance by enabling alteration or removal but also protecting the operator's network and financial concerns. However we believe the notice provisions need clarifying which we will consider in more depth at para 10.55. As far as we are aware Arqiva has never relied upon paragraph 20 because of the uncertainty concerning financial awards under the code.

10.34 We provisionally propose that it should not be possible for Code Operators and landowners to contract out of the alterations regime in a revised code. Do consultees agree? Consultation Paper, Part 5, paragraph 5.13.
Yes

10.35 We seek consultees' views on the provisions in paragraph 14 of the Code relating to the alteration of a linear obstacle. Do consultees take the view that they strike an appropriate balance between the interests involved, and should they be modified in a revised code? Consultation Paper, Part 5, paragraph 5.18.	
No observations	

10.36 We provisionally propose that a revised code should restrict the rights of landowners to remove apparatus installed by Code Operators. Do consultees agree? Consultation Paper, Part 5, paragraph 5.47.	
We agree that the continuity provision at para 21 should be retained. Many of our agreements do not attract security of tenure under other statutes and therefore it is important that this right be retained for continuity of service to our customers.	

10.37 We provisionally propose that a revised code should not restrict the rights of planning authorities to enforce the removal of electronic communications apparatus that has been installed unlawfully. Do consultees agree? Consultation Paper, Part 5, paragraph 5.48.	
Yes – otherwise the Code would enable operators to circumvent the planning system. Arqiva regards it as important that the planning system and the associated checks and balances should retain credibility and public confidence.	

10.38 We ask consultees to tell us their views about the procedure for enforcing removal. Should the onus remain on landowners to take proceedings? If so, what steps, if any, should be taken to make the procedure more efficient?

Consultation Paper, Part 5, paragraph 5.49.

We appreciate that the current position that the landowner can only serve a notice once the lease, licence or other arrangement has come to an end cannot be retained. Also the fact that the Landowner has to apply for a double order - one to enforce removal and one for removing it in default seems illogical.

We suggest that the Landowner should still be responsible for serving the initial notice but we also suggest a standardised notice process has to be incorporated within a new/revised Code. All notices whether served by Landowners or Code Operators should be standardised. At the moment only the Counter-Notices are standardised and in our experience it can be difficult to tell what amounts to a code notice. Also the notices should be served on any party with an interest or in occupation/sharing/using the land. This information could be ascertained in a similar way to section 40 of the Landlord and Tenant Act 1954.

The current 28 day time limit is not long enough especially if the Code operator was minded to vacate the site. In our experience the average time to move a site is two years.

10.39 We ask consultees to tell us whether any further financial, or other, provisions are necessary in connection with periods between the expiry of code rights and the removal of apparatus.

Consultation Paper, Part 5, paragraph 5.50.

Our view is that landowners/licensors would be reluctant to accept payment for this interim period because of the potential risk of waiving the breach. However once the operators has removed the apparatus the landowner/ licensors should be able to claim payment equal to the letting value of the property under the code for this intervening period.

10.40 We provisionally propose that Code Operators should be free to agree that the security provisions of a revised code will not apply to an agreement, either absolutely or on the basis that there will be no security if the land is required for development.

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.51.

We do not agree. In our experience if there is an option for the Landowner to exclude security of tenure rights then they will insist upon it. Also with the suggestion that the security of tenure rights under the Landlord and Tenant Act 1954 will also be excluded then Operators will be left with no security of tenure at the end of the contractual period.

This is unacceptable given that our customer contracts extend beyond the term of our land agreements. Our customer contracts often extend beyond the term of our land agreements either because a new customer has come onto a site after the initial acquisition or because we have acquired a new customer portfolio as the result of a corporate merger or acquisition.

10.41	Do consultees agree that the provisions of a revised code relating to the landowner's right to require alteration of apparatus, and relating to the security of the apparatus, should apply to all equipment installed by a Code Operator, even if it was installed before the Code Operator had the benefit of a revised code? Consultation Paper, Part 5, paragraph 5.56.
Yes we agree with this principle.	

FINANCIAL AWARDS UNDER THE CODE

In responding to these questions, please note the definitions of "compensation" and "consideration" adopted at paragraph 6.5 and following of the Consultation Paper.

10.42 We provisionally propose that a single entitlement to compensation for loss or damage sustained by the exercise of rights conferred under the Code, including the diminution in value of the claimant's interest in the land concerned or in other land, should be available to all persons bound by the rights granted by an order conferring code rights. Do consultees agree? Consultation Paper, Part 6, paragraph 6.35.
Yes – this would simplify the current regime.

10.43 We ask consultees whether that right to compensation should be extended to those who are not bound by code rights when they are created but will be subsequently unable to remove electronic communications apparatus from their land. Consultation Paper, Part 6, paragraph 6.36.
This seems equitable and Arqiva believes that it is important for all relevant parties to be treated fairly under the Code.

10.44 We provisionally propose that consideration for rights conferred under a revised code be assessed on the basis of their market value between a willing seller and a willing buyer, assessed using the second rule contained in section 5 of the Land Compensation Act 1961; without regard to their special value to the grantee or to any other Code Operator. Do consultees agree? We would be grateful for consultees' views on the practicability of this approach, and on its practical and economic impact. Consultation Paper, Part 6, paragraph 6.73.
Yes – this is an established and well understood basis. If adopted, it would make the code consistent with general compulsory purchase valuation principles, with the practical benefit that it would be easier for all parties to understand and indeed reach agreement upon. This is also appropriate because the powers of compulsory purchase and the valuation principles have been devised on the basis that public projects that rely upon the use of compulsory acquisition should not pay an unduly high burden, otherwise projects in the public interest could be rendered uneconomic. As recognised in your consultation paper 2.2 onwards the same factors apply to electronic communications networks and we point out that under Section 107 (4) (a), the first criteria considered by Ofcom in determining applications for Code Powers is the public benefit of the system.

The basis is also a fair basis and maintains an incentive for otherwise reluctant or opportunistic landowners to reach agreement at market value without pushing an operator to use code powers.

However, it concern us that a simplified and more accessible code could be abused by operators seeking to circumvent or subvert commercial agreements willingly entered into. Also and as already mentioned at 10.15 we think there should be a distinction between a willing landowner who has agreed to grant rights to a telecoms operator on bare undeveloped land and wireless infrastructure companies which acquire and invest in developing and maintaining the site, so providing additional services beyond the scope of a commercial landlord. Likewise, there is a distinction between a willing landlord in principle, seeking to agree best commercial terms and one who wishes to ransom an operator.

The financial provisions should therefore be tiered to allow for these different scenarios, to require:

- Payment of any sums under any connected existing contract or land agreement entered into by the operator or an associated or linked company, e.g. a network consolidation company would be equally bound by a contract entered into by a parent company. Where a relevant contract exists that should not be overridden by any of the following procedured
- Where there is no overriding contract and where services are offered beyond the scope of a commercial landlord of undeveloped land then the parties must be permitted to negotiate the terms of that commercial sharing arrangement independent of any Code regime.
- Where a willing landlord exists, but no contract exists and none can be negotiated, payment of any sum reached by an arbitrator appointed by the President of the Royal Institution of Chartered Surveyors
- Where no such agreement exists and where the landowner is unwilling to be subject to a third party settlement, then compensation provisions should come into play.

For the avoidance of doubt the Law Commission should confirm that the matters considered in this section only refer to land and specifically exclude infrastructure and any other tenants' fixtures and fittings.

10.45 Consultees are also invited to express their views on alternative approaches; in particular, the possibility of a statutory uplift on compensation (with a minimum payment figure in situations where no compensation would be payable).

Consultation Paper, Part 6, paragraph 6.74.

Profit share or ransom would be wholly inappropriate for the economic reasons given in 10.44. Code powers are required to help operators avoid being held to ransom, so that valuation basis would render them pointless and mean that in every case the landowner would hold out for unrealistically high figures. To adopt this basis would effectively stifle future network development against the wider public interest.

Market value would not be appropriate. As indicated in 10.44, the prospect of gaining less through code powers is an incentive for landowners to reach agreement. It is also one reason why historically the mere threat of code powers has usually brought parties together so obviating the need to seek confirmation from the court.

10.46	We provisionally propose that there should be no distinction in the basis of consideration when apparatus is sited across a linear obstacle. Do consultees agree? Consultation Paper, Part 6, paragraph 6.78.
No observations	

10.47	We provisionally propose that, where an order is made requiring alteration of a Code Operator's apparatus, the appropriate body should be entitled to consider whether any portion of the payment originally made to the person seeking the alteration in relation to the original installation of that apparatus should be repaid. Do consultees agree? Consultation Paper, Part 6, paragraph 6.83.
Yes.	

TOWARDS A BETTER PROCEDURE

10.48 We provisionally propose that a revised code should no longer specify the county court as the forum for most disputes. Do consultees agree? Consultation Paper, Part 7, paragraph 7.26.
Yes we agree

10.49 We ask for consultees' views on the suitability of the following as forums for dispute resolution under a revised code: (1) the Lands Chamber of the Upper Tribunal (with power to transfer appropriate cases to the Property Chamber of the First-tier Tribunal or vice versa); (2) a procedure similar to that contained in section 10 of the Party Wall etc Act 1996; and (3) any other form of adjudication. Consultation Paper, Part 7, paragraph 7.27.
We would support the Upper Tribunal as the forum for dispute resolution.

10.50 We provisionally propose that it should be possible for code rights to be conferred at an early stage in proceedings pending the resolution of disputes over payment. Do consultees agree? Consultation Paper, Part 7, paragraph 7.31.
We agree that code rights should be conferred pending resolution of a dispute over financial terms.

10.51 We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay. Consultation Paper, Part 7, paragraph 7.32.
As already mentioned at para 10.38 we would suggest that **all** notices are standardised and served upon any party with an interest or in occupation/sharing/using the land.

10.52 We seek consultees' views as to how costs should be dealt with in cases under a revised code, and in particular their views on the following options: (1) that as a general rule costs should be paid by the Code Operator, unless the landowner's conduct has unnecessarily increased the costs incurred; or (2) that costs should be paid by the losing party. Consultation Paper, Part 7, paragraph 7.37
We believe that the award of costs should be left to the discretion of the court.

10.53 We also ask consultees whether different rules for costs are needed depending upon the type of dispute. Consultation Paper, Part 7, paragraph 7.38.
We believe that the award of costs should be left to the discretion of the court, but suggest that the provisions of Section 52 of the Telecommunications Act are replicated in the revised Code.

10.54 We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service. Do consultees agree? Consultation Paper, Part 7, paragraph 7.52.	
We agree entirely with this and we again stress the need for all (including landowner) notices to be in a prescribed form and served upon any party with an interest or in occupation/sharing/using the land.	

10.55 Do consultees consider that the forms of notices available to Code Operators could be improved? If so, how? Consultation Paper, Part 7, paragraph 7.53.	
We again stress the need for all (including landowner) notices to be in a prescribed form and served upon any party with an interest or in occupation/sharing/using the land.	

10.56 Do consultees consider that more information is needed for landowners? If so, what is required and how should it be provided? Consultation Paper, Part 7, paragraph 7.54.	
No comment.	

10.57	We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms. Consultation Paper, Part 7, paragraph 7.60.
We would welcome a standardised form of agreement however in practice it will be difficult to draft a “one size fits all” agreement. If a standardized agreement was adopted it would be preferable to have the ability to amend the terms with the agreement of both parties.	

INTERACTION WITH OTHER REGIMES

10.58 We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease. Do consultees agree? Consultation Paper, Part 8, paragraph 8.22.	
No, we strongly disagree to the exclusion of Part 2 of the Landlord and Tenant Act 1954. This is because the 1954 Act is a well-used, understood and accepted procedure for renewal that has been developed over the years through common law. Replacing it with an untested piece of legislation would not be in the public interest and could prove highly problematical, placing landlords at a particular disadvantage through their greater unfamiliarity with the Code. However if the Law Commission are minded to propose that security under this statute is excluded we recommend that Part 2 of the Landlord and Tenant Act 1954 only be excluded from Leases where operators enjoy the benefit of code protection and where other rights under paragraph 21 have not been excluded. Otherwise Code Operators could find that they have no security rights at the end of their contractual period.	

10.59 We provisionally propose that where an agreement conferring a right on a Code Operator also creates an interest in land of a type that is ordinarily registrable under the land registration legislation, the interest created by the agreement should be registrable in accordance with the provisions of the land registration legislation, but that a revised code should make it clear that its provisions as to who is bound by the interest prevail over those of the land registration legislation. Do consultees agree? Consultation Paper, Part 8, paragraph 8.33.	
We agree.	

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

10.60 We ask consultees to tell us:

(1) whether they are aware of circumstances where the funds set aside under regulation 16 have been called upon;

(2) what impact regulation 16 has on Code Operators and on Ofcom;

(3) if a regime is required to cover potential liabilities arising from a Code Operator's street works; and

(4) if the answer to (3) is yes, what form should it take?

Consultation Paper, Part 9, paragraph 9.14.

We are not aware of any circumstances under which the funds that we have set aside under regulation 16 have been called upon.

10.61 We ask consultees for their views on the Electronic Communications Code (Conditions and Restrictions) Regulations 2003. Is any amendment required?

Consultation Paper, Part 9, paragraph 9.39.

Yes. Regulations 5, 6, 7 and 8 should be removed as unnecessary duplications of the planning system. These regulations reiterate conditions that were set out in the licences granted under Section 7 of the Telecommunications Act 1984 and require notifications to be given to local planning authorities in certain circumstances. The privatisation of telecommunications then introduced was matched by permitted development rights introduced in 1985. At that time, the town planning system was UK wide and the rights then introduced allowed amongst other things the installation of masts up to a height of 15 metres, without any form of detailed control on siting and appearance. The licence conditions therefore provided a check in the case of inappropriate installations – although as far as we are aware have never been exercised.

Since that time, permitted development rights have been scaled back to different degrees across the four UK regions, but even in England and Wales, where they are widest, the more significant ground based and rooftop based installations fall under the prior approval system. The determination than carried out by the local planning authority should therefore take into account matters such as the setting of any nearby listed building.

These regulations therefore now offend the usual principle of non-duplication of controls and in so doing impose an unnecessary administrative burden. The fact that no local planning authority has ever responded to the many thousand notifications we have made over the years is clear evidence that these regulations are no longer required.

LAW COMMISSION
CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

RESPONSE FORM

This optional response form is provided for consultees' convenience in responding to our Consultation Paper on the Electronic Communications Code.

You can view or download the Consultation Paper free of charge on our website at:

www.lawcom.gov.uk (see A-Z of projects > Electronic Communications Code)

The response form includes the text of the consultation questions in the Consultation Paper (numbered in accordance with Part 10 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

The reference which follows each question identifies the Part of the Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

As noted at paragraph 1.34 of the Consultation Paper, it would be helpful if consultees would comment on the likely costs and benefits of any changes provisionally proposed when responding. The Department for Culture, Media and Sport may contact consultees at a later date for further information.

We invite responses from 28 June to 28 October 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or

by post to: James Linney, Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ

Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information 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 Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

Your details

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Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):
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If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:
As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: GENERAL

10.3 We provisionally propose that code rights should include rights for Code Operators:

(1) to execute any works on land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus;

(2) to keep electronic communications apparatus installed on, under or over that land; and

(3) to enter land to inspect any apparatus.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.16.

Agreed, but the requirement for the agreement of the occupier to be obtained in writing is key and should be retained. See our response at paragraph 10.36 below with regards the importance of a written agreement.

10.4 Do consultees consider that code rights should be extended to include further rights, or that the scope of code rights should be reduced?

Consultation Paper, Part 3, paragraph 3.17.

Our view is that Code rights should not be extended to include either:

(1) adding apparatus – this is a valuable right for which landowners should be able to negotiate additional consideration. This should be considered distinct and separate from upgrades to existing equipment. Clarification as to the difference between additions and upgrades is required. See our response to paragraph 10.15 below.

(2) sharing – see our response to paragraph 10.16 below.

(3) Rights to enter land to access apparatus cannot be dealt with by way of an unrestricted right contained in the Code. Many wireless cell sites are located on land owned by statutory undertakers such as Water Utilities. They are obliged by their own governing statutes to restrict access to their land for security reasons. If unrestricted access right are imposed under the Code, these companies are likely to withdraw their land from this sector, which will lead to a hindrance to the provision of communication services. The same applies for rooftop sites located on buildings occupied by sensitive occupiers – e.g governmental organisations or financial institutions. The most appropriate place to deal with access rights is the written agreement made between the landowner and Operator. Each party has an opportunity to set out the exact access procedure. The Agreement is also the proper starting point to resolve any difficulties arising from obtaining access.

10.5 We provisionally propose that code rights should be technology neutral. Do consultees agree? Consultation Paper, Part 3, paragraph 3.18.
(1) The principle that no technology should be discriminated against is a good objective but unworkable for all elements of the Code. Whilst some elements of the Code can be applicable to all technologies, for other elements of the Code, the technologies and the particular issues they face are too different and must be treated separately. Specifically, the wireless sector (relating to mobile phone operators) is significantly different to the wireline sector (cable/fibre optic operators).

10.6 Do consultees consider that code rights should generate obligations upon Code Operators and, if so, what? Consultation Paper, Part 3, paragraph 3.19.
Yes (1) obligation to remove apparatus and make good damage caused to land at end of term (although allow parties to contract out of this obligation to reflect site specific circumstances). (2) obligation to take formal steps to seek to renew expiring written agreements to avoid delay at expiry as operators often have no incentive to re-negotiate and put a fresh agreement in place as they are code protected and this can leave landowners in a state of limbo (3) obligation to insure (to be no less than £5 million) for personal injury and death or damage to property caused directly or indirectly to an individual or third parties' property (4) obligation to continue to comply with all the terms of an existing agreement which has expired (where operator has remained on site) including obligation to pay previous annual fee until such time as a new agreement in writing is concluded or apparatus is removed (effectively "holding over provisions" equivalent to Landlord and Tenant Act 1954). This last proposal would encourage operators to commence renewal negotiations earlier and ensure that landowners are properly compensated during the period whilst the operator remains on site under the Code and no negotiations are commenced by the operator. Many landowners are perfectly happy to allow an operator to renew but are concerned as no legally binding contract agreement exists after expiry of an agreement.

10.7 We ask consultees to tell us their views on the definition of electronic communications apparatus in paragraph 1(1) of the Code. Should it be amended, and if so should further equipment, or classes of equipment, be included within it? Consultation Paper, Part 3, paragraph 3.27.
(1) We broadly agree with your view as set out in paragraph 3.24. That said, we would suggest that it would be helpful to expressly include "towers and masts" within paragraph (d) to the definition of "electronic communication apparatus" for the sake of clarity. (2) Rights relating to electricity supply cables and access tracks should be dealt with expressly in the written Agreement. If these items were protected by the Code there may be a tendency on the Operators to not define them properly, leading to mis-communication and problems in the future.

10.8 We ask consultees to tell us their views about who should be bound by code rights created by agreement, and to tell us their experience of the practical impact of the current position under the Code. Consultation Paper, Part 3, paragraph 3.40.
(1) As a general comment, Operators often present tenants with "Agreements" or "Wayleaves" which do not mention the Code or its effect and those occupiers may enter into them not knowing that the Operator will obtain rights to remain once the "Agreement" has come to an end. This will have adverse effects on owners of reversionary interests in land. The ability to "contract out" of the Code regime may mitigate this to a certain extent (dependent on an occupier understanding the impact of the Code and the ability to contract out). A much more effective solution to this issue would be to oblige Operators to inform occupiers of the existence of the Code and its impact. We appreciate this is the reversal of the LTA 1954 where a notice has to be served by the landowner on the incoming tenant warning of contracting out of the rights but the LTA 1954 is designed to protect unadvised tenants. In the telecoms sector, the Operators (in this scenario the tenants) are very well advised and it is the landowners that can be unrepresented or poorly advised. In our practice, we have had to deal with many landowners who have telecoms equipment on their land and who are angry once they understand the impact on the Code. They comment that the Operators (through their agents) did not bring the Code to their attention or misted them about its impact. This extends to farmers but also major corporate estate management teams – who express dismay to hear that signing a two page "early access agreement" with a one month fixed occupational period is enough to grant Operators the right to occupy protected by the Code. (2) we also consider that Operators with no written agreement with an occupier have no rights under the Code, nor should "abandoned" equipment pursuant to paragraph 22 of the Code – see our response to paragraph 10.36 below.

10.9 We ask consultees for their views on the appropriate test for dispensing with the need for a landowner's or occupier's agreement to the grant of code rights. In particular, consultees are asked to tell us:

(1) Where the landowner can be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code, should it be possible for the tribunal to make the order sought without also weighing the public benefit of the order against the prejudice to the landowner?

(2) Should it be possible to dispense with the landowner's agreement in any circumstances where he or she cannot be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code?

(3) How should a revised code express the weighing of prejudice to the landowner against benefit to the public? Does the Access Principle require amendment and, if so, how?

Consultation Paper, Part 3, paragraph 3.53.

(1) No. This would effectively entitle any Operator to pick and choose entirely at its own discretion where it wants sites. It would hold to ransom any landowner that does not have immediate development plans or other clear evidenced reasons for not wanting an Operator on its land. A landowner should as a general principle be entitled to do as it wishes with its own land.
(2) No. A landowner has legal estate in land and is entitled to enjoy the benefit of its own asset or to adequate compensation if such rights are to be fettered. If it is not possible to adequately compensate then no order should be made. It is likely that such a scenario would be extremely rare in practice but that does not mean to say that the possibility would not arise and the fact that it is unlikely should not be a reason to include it in the Code in the first place.
(3) Yes – the current Access Principle is very hard to explain to clients. It needs simplifying. It also needs clarification as there is a big difference between denying a person access to "an" (single) network where there are plenty of other networks available already to the public and denying access to "the only" available network or service in an area which would otherwise be available to the public if the rights were granted.

The Code was drafted in the context of getting at least one mobile telephone network rolled out and available to the vast majority of the public so that if in one geographical area there was no coverage because there were no freely available mast sites, an operator could exercise its paragraph 5 powers to acquire rights over land to enable its service/network to cover that geographical area and the general public in that area would then benefit from the site. In this instance it is easy to see how the principle that the public benefit would outweigh private prejudice.

However the reality now is that most members of the public in most areas have a choice of networks and that preventing one operator from using one site or mast, whilst affecting one potential area of coverage would not in actual fact prevent the general public from having access to at least one or more other networks. In such circumstances it is difficult to see how the refusal of the court to grant paragraph 5 rights in such an instance could be said to be denying access to "a" network or service as others would remain available.

Where there is effective wireless coverage of an area by an existing Operator, a new Operator should not be able to compulsorily obtain a right over land. It should be left to landowners to negotiate with Operators in a free market. The roll out of wireless cell sites in the UK has been very effective and it is widely acknowledged that the UK has the most comprehensive level of wireless infrastructure in Europe. A free market has not affected wireless infrastructure.

We understand that the fibre/cable network is less developed, but the same principles apply – once an area has access to one fibre/cable network, other networks should not be able to compulsorily acquire separate rights over landowners. We submit that competition and quality of service issues relating to Operators should be dealt with directly with them and not resolved to the detriment of landowners.

As a final comment, the wording of the Access Principle is therefore unclear even in considering what is potentially being denied let alone what then is reasonable or unreasonable in that context.

10.10 We ask consultees to tell us if there is a need for a revised code to provide that where an occupier agrees in writing for access to his or her land to be interfered with or obstructed, that permission should bind others with an interest in that land.

Consultation Paper, Part 3, paragraph 3.59.

No.
The occupier needs to take responsibility to understand its ability to grant rights over the access route over neighbouring land, and the Operator should carry out title investigation to confirm them. If the occupier has only an easement over the access route, some easements will allow the occupier to share that right with others, whilst some will not. However, the occupier needs to be made aware of the impact of granting those rights to an Operator – may be by way of a "warning notice" as suggested in paragraph 10.8 above. Operators currently are very coy about the powers they have and do not voluntarily explain them to landowners so it is unlikely that a landowner seeking to get a neighbour's agreement for access will properly explain the Code to the neighbour. If the neighbour then agrees to allow such access, then it should not bind others who have an interest in the neighbour's land and only be valid for so long as the neighbour has the immediate interest in land.

10.11 We ask consultees to tell us their views about the use of the right for a Code Operator to install lines at a height of three metres or more above land without separate authorisation, and of any problems that this has caused.

Consultation Paper, Part 3, paragraph 3.67.

We have no direct experience of dealing with this but we would suggest that the right should be amended in line with underground cables, so that permission is obtained before erection. With the disappearance of telephone wires from the majority of our streets, Operators should not be able to erect new overhead cabling without permission. It should be controlled as a blight to the land as our townscapes have changed since the 1980's.

10.12 Consultees are asked to tell us their views about the right to object to overhead apparatus.

Consultation Paper, Part 3, paragraph 3.68.

See above comment.

10.13 Consultees are asked to give us their views about the obligation to affix notices on overhead apparatus, including whether failure to do so should remain a criminal offence. Consultation Paper, Part 3, paragraph 3.69.
No comment.

10.14 Do consultees consider that the current right for Code Operators to require trees to be lopped, by giving notice to the occupier of land, should be extended: (1) to vegetation generally; (2) to trees or vegetation wherever that interference takes place; and/or (3) to cases where the interference is with a wireless signal rather than with tangible apparatus? Consultation Paper, Part 3, paragraph 3.74.
(1) Yes. We can see the sense in that – bushes, weeds etc are not trees. (2) And (3) this would be a far reaching right that interferes with the right for landowners to enjoy their property. Such issues should be resolved through agreement, and not enjoyed as of right.

10.15 We ask consultees: (1) whether Code Operators should benefit from an ancillary right to upgrade their apparatus; and (2) whether any additional payment should be made by a Code Operator when it upgrades its apparatus. Consultation Paper, Part 3, paragraph 3.78.
The major infrastructure provider landowners such as WIG, Shere and Arqiva do not prevent upgrades or charge additional payments for upgrades. They do however specify the number of certain types of apparatus and also maximum size. The underlying principle is that Operators should pay for the rights they enjoy. Note that sometimes when Operators talk about “upgrades” they mean changing the type of technology altogether. An upgrade in this context should be clearly limited to modernising an existing piece of equipment – not swapping one Operator’s piece of equipment for a completely different piece of equipment or indeed another Operator’s piece of equipment because they want to surreptitiously share apparatus. This is not an “upgrading issue”. It is a “sharing issue”. Alterations and additions (additional dishes, equipment racks, equipment cabins etc) are different to upgrades of existing apparatus and should be treated differently. If the Code did grant an ancillary right to upgrade apparatus, then the definition of “upgrade” would have to be clearly defined to be limited as described above. This may be quite difficult to achieve and therefore more desirable to simply not cover it in the Code and allow the terms of the written agreements to prevail.

10.16 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from sharing their apparatus causes difficulties in practice;

(2) whether Code Operators should benefit from a general right to share their apparatus with another (so that a contractual term restricting that right would be void); and/or

(3) whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it shares its apparatus.

Consultation Paper, Part 3, paragraph 3.83.

(1)We have seen no evidence that the ability to control sharing has caused difficulties to do so in practice. We reiterate the point made in response to paragraph 10.9, point 3 above that the roll out of wireless cell sites in the UK has been very effective and it is widely acknowledged that the UK has the most comprehensive level of wireless infrastructure in Europe.

In our combined 20 years of experience in this sector, we are unaware of any examples of landowners wishing to prevent sharing for the sake of it or in return for a ransom payment. Landowners are very willing to facilitate sharing provided that the terms of existing written agreements are honoured and, where appropriate, increases in rent are paid in accordance with settled market comparables. The requirement to comply with freely negotiated agreements should not be classed as a "difficulty" experienced by Operators to share apparatus. We are aware that companies such as WIG, Shere and Arqiva that specialise in the provision of site infrastructure to wireless operators (and therefore assist in the provision of wireless services to the UK in a very real and measurable way) have concluded multi site agreements with H3G and Everything Everywhere Limited to allow sharing. They did not discourage sharing, but positively encouraged it to support their income streams. There is no evidence of a wireless cell site deployment issue, so there is no need to legislate on the issue.

(2) and (3) There should not be a general right to share apparatus and there should be the ability to require additional payment when sharing occurs. Companies such as WIG, Shere and Arqiva invest capital to provide site infrastructure which assists in the provision of a wireless system within the UK. Their ability to obtain a return on their investment depends on their ability to control access to their infrastructure by Operators in return for additional consideration. If the ability to obtain that consideration was adversely affected, it would have a significantly detrimental effect on the number of sites being made available for wireless Operators and therefore adversely prejudice the Government's aim to improve broadband connectivity.

There is also a separate issue relating to the right to share apparatus installed on land with no additional payment made to the landowner. WIG, Shere and Arqiva each own towers themselves upon which Operators erect apparatus. Under the existing Code, those towers are classed as apparatus and, due to their degree of annexation (simply being bolted to the ground) they arguably would not form part of the land. Indeed, the multi million pound joint venture company currently being set up between Telefonica and Vodafone (called Cornerstone Technology Infrastructure Limited) is proceeding on the basis that just the towers alone are apparatus protected by the Code, and do not form part of the land. We are informed by that company that they have been granted a licence by OFCOM which grants their towers protection under the Code. To be clear, that company will not own the transmitting apparatus itself – that will be retained by Vodafone and Telefonica. Using the same model, there is no reason why WIG, Shere and Arqiva could not do the same. They could obtain Code protection for their own network of towers and as they would not form part of the land, the Operators would not obtain a right under

the Code to erect their transmitting apparatus on tower apparatus owned by those companies.

Unfortunately, a redundant water tower owned by a water company solely used for the erection of telecoms apparatus or indeed a rooftop of a building could not obtain the benefit of the same "lacuna" (in part due to the definition of "structure" in paragraph 1 (1) of the Code). We suggest it would be unfair and capricious to create a situation where these two types of structures are treated differently.

A further issue is that the current intention of the Code is that payment is made by each Operator that has rights over land, to reflect the fact that the landowner has occupiers over its land with rights adverse to the landowner. There is no reason to change this position – each Operator that obtains rights over the land should pay the landowner for those rights. Having two Operators on the land is more detrimental than having one Operator (etc etc) and payment should be made to reflect this.

Finally, we disagree with the assertion made by Operators that if an Operator pays an amount for a lease then it should then pay no more for additional sharers. The position is that if any occupier in any Real Estate sector wants an unfettered ability to share then that Agreement will command a premium (and vice versa so a fettered ability will attract a discount). RICS accredited rent review surveyors work on this basis (both within the telecoms sector and outside). For example occupiers that run serviced office business from office buildings which allow multiple occupiers to use the space have to pay a rent higher than an occupier that can only use the space itself.

10.17 We ask consultees to what extent section 134 of the Communications Act 2003 is useful in enabling apparatus to be shared, and whether further provision would be appropriate.

Consultation Paper, Part 3, paragraph 3.88.

Operators do not refer to this provision when requesting a right to share, so we have no practical experience of when it would be applicable. However, for the reasons set out in para 10.16 above, any statutory changes to sharing rights would have an adverse effect on the supply of wireless sites to the Operators.

10.18 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from assigning the benefit of agreements that confer code rights causes difficulties in practice;

(2) whether Code Operators should benefit from a general right to assign code rights to other Code Operators (so that a contractual term restricting that right would be void); and

(3) if so, whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it assigns the benefit of any agreement.

Consultation Paper, Part 3, paragraph 3.92.

(1) We re-iterate the comments made at paragraph 10.16 (point 1) above. We have no experience of restrictions on assignments causing difficulties to the roll out of an Operator's network. We also re-iterate the point that being obliged to comply with freely negotiated contracts cannot surely be classed as a "difficulty".

(2) There needs to be restrictions on assignment. Why should one code operator be automatically entitled to assign an agreement to another? If a landowner freely enters into an agreement with one legal entity it should be entitled to the same freedom to say yes or no to that agreement passing to another legal entity (subject to Paragraph 5 applying). What if one code operator has good covenant strength and can comply with payment, insurance and, very important at the end of the agreement, reinstatement obligations and a proposed assignee does not? If uncontrolled assignments were allowed, then all an Operator would have to do to avoid any reinstatement liability at the end of an Agreement would be to assign that Agreement immediately prior to its end to a worthless shell company safe in the knowledge that there could be no claim against the Operator. If automatic assignment is allowed then automatic guarantor provisions similar to AGAs under the Landlord and Tenant (Covenants) Act 1995 should apply binding the assignor in the event of breach by the assignee.

In addition often applications to assign are made from operator A to assign to operator A and operator B jointly [redacted] No restriction on assignment would mean that more than one Operator each with its own code powers could be foisted upon a landowner on a site where previously there was only one code operator. This is "sharing" and we re-iterate the comments made at paragraph 10.16 (point 2) above.

(3) There should be no automatic right to assign but if there were to be, then yes, the operator should be made liable to pay (a) the land owner's reasonable legal costs for processing that assignment and (b) if assignment is to more than one operator as joint tenants then an additional fee should be payable.

10.19 We ask consultees to tell us if they consider that any further ancillary rights should be available under a revised code.

Consultation Paper, Part 3, paragraph 3.94.

We re-iterate the points made in previous paragraphs regarding suggested additional ancillary rights.

10.20 We ask consultees to tell us if they are aware of difficulties experienced in accessing electronic communications because of the inability to get access to a third party's land, whether by the occupiers of multi-dwelling units or others. Consultation Paper, Part 3, paragraph 3.100.
We come across this regularly when representing owners or occupiers of multi let commercial buildings or estates (industrial parks, office buildings, shopping centres). Owners are generally prepared to allow cable operators to install their apparatus within the common parts of their buildings - fundamentally because it makes their buildings or estates more desirable to potential tenants and in the current economic climate, owners are making significant efforts to make their buildings as attractive as possible. In recent months, we have seen a significant increase in instructions from building owners wishing to contract with operators for the installation of wi-fi services for the benefit of their tenants. Owners do however have a problem with cable operators – namely the fact that their cables will be protected by the Code. Owners are very nervous about agreeing to anything that may adversely affect their ability to carry out works to their buildings or estates and they worry that Code protected cables could cause problems in the future. In order to protect themselves, Owners take time to take professional advice, and the cost of that advice is generally passed on to the cable operators. If parties were able to contract out of the protection of the Code, we suggest that this reluctance to allow access to cable operators would generally disappear. Cable operators would be able to install their equipment quicker and cheaper. We submit that cable operators are misunderstanding the issue here – they think that the Code is a way to resolve this problem, but in our view the existence of the rights under the Code is the problem. Additional protections under the Code could simply make the matter worse. We submit that it would be better to be able to contract out of the Code and then let market forces dictate that all multi – tenanted buildings have cable connectivity.

10.21 Do consultees see a need for a revised code to enable landowners and occupiers to compel Code Operators to use their powers to gain code rights against third parties? Consultation Paper, Part 3, paragraph 3.101.
No. We have never come across this in practice.

10.22 Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used? Consultation Paper, Part 3, paragraph 3.102.
No.

10.23 We ask consultees: (1) to what extent unlawful interference with electronic communications apparatus or a Code Operator's rights in respect of the same causes problems for Code Operators and/or their customers; (2) to what extent any problem identified in answer to (1) above is caused by a Code Operator having to enforce its rights through the courts or the nature of the remedy that the courts can award; and (3) whether any further provision (whether criminal or otherwise) is required to enable a Code Operator to enforce its rights. Consultation Paper, Part 3, paragraph 3.106.
We often act for landowners who want to restrict the Operator's access to sites or disconnect power to equipment. They do this due to frustration in dealing with the Operators - in particular the Operator's lack of interest and seemingly institutional arrogance in dealing with repair issues, unauthorised equipment and renewing expired agreements. Access problems are therefore borne out of a breakdown in the relationship between the parties, rather than malicious action. Furthermore, we have acted for a city council which as part of its redevelopment of a city centre inadvertently via its contractors cut through cabling laid outside and adjacent to a tower block due to the fact that (1) the cabling was only a few inches beneath the surface and (2) there were no detailed plans available from the operator recording the exact location of the cables on the ground and no means of visually identifying the location. In addition, the Code applies to equipment placed within or under residential properties. Again it would be inappropriate to make interference with such equipment a criminal offence as any home owner, family member or even pet could inadvertently interfere with apparatus without any malicious intent. As such, criminal or other sanctions would be wholly inappropriate. The Operator should simply rely on its rights contained in the written Agreement.

10.24	We ask consultees whether landowners or occupiers need any additional provision to enable them to enforce obligations owed to them by a Code Operator. Consultation Paper, Part 3, paragraph 3.107.

We have to deal with the widespread issue of Operators refusing to enter into renewal agreements whilst retaining their equipment in situ and claiming Code protection. The Operators behaviour amounts to an abuse of the existing Code. Whilst the proposal to remove protection under the LTA 1954 will help - in that landowners will be more willing to accept rental payments in the knowledge that protected business tenancies will not arise, landowners still require certainty of income streams so should be able to require Operators within a certain time frame to enter into renewal Agreements for fixed terms or to vacate land.

It is not a fair approach to allow an Operator to simply occupy until the Operator itself decides whether to stay or go. Particularly as if the landowner accepts any rent or payment during this period it creates some form of binding tenancy/implied agreement such that many landowners refrain from accepting further payments to avoid this issue and then suffer from an operator on its land with no certainty as to when or if it will renew and no compensation payment in the interim.

All other sectors of land occupation proceed on this basis. A sensible solution would be to provide for a court or tribunal led resolution mechanism for straight renewals similar to that which is already in place for LTA 1954 protected business tenancies. Such that if the operator wants to renew it must take positive steps within a set time frame or by a set deadline if notice has been served on it by a proactive landowner (equivalent to service of a s.25 notice by a landlord on a tenant which then requires the tenant if it wants to stay to issue court proceedings by a specified deadline in the landlord's notice or otherwise lose its right to remain on the site).

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: SPECIAL CONTEXTS

10.25	We provisionally propose that the right in paragraph 9 of the Code to conduct street works should be incorporated into a revised code, subject to the limitations in the existing provision. Do consultees agree? Consultation Paper, Part 4, paragraph 4.11.

Yes, we see no reason for street works to be treated entirely separately.

10.26 We ask consultees to let us know their experiences in relation to the current regime for tidal waters and lands held by Crown interests. Consultation Paper, Part 4, paragraph 4.20.
None.

10.27 We seek consultees' views on the following questions. (1) Should there be a special regime for tidal waters and lands or should tidal waters and lands be subject to the General Regime? (2) If there is to be a special regime for tidal waters and lands, what rights and protections should it provide, and why? (3) Should tidal waters and lands held by Crown interests be treated differently from other tidal waters and lands? Consultation Paper, Part 4, paragraph 4.21.
No comment.

10.28 We ask consultees:

(1) Is it necessary to have a special regime for linear obstacles or would the General Regime suffice?

(2) To what extent is the linear obstacle regime currently used?

(3) Should the carrying out of works not in accordance with the linear obstacle regime continue to be a criminal offence, or should it alternatively be subject to a civil sanction?

(4) Are the rights that can be acquired under the linear obstacle regime sufficient (in particular, is limiting the crossing of the linear obstacle with a line and ancillary apparatus appropriate)?

(5) Should the linear obstacle regime grant any additional rights or impose any other obligations (excluding financial obligations)?

Consultation Paper, Part 4, paragraph 4.30.

No comment.

10.29 We provisionally propose that a revised code should prevent the doing of anything inside a "relevant conduit" as defined in section 98(6) of the Telecommunications Act 1984 without the agreement of the authority with control of it.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.34.

Yes, it makes sense to retain this.

10.30 We provisionally propose that the substance of paragraph 23 of the Code governing undertakers' works should be replicated in a revised code.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.40.

No comment.

10.31 We provisionally propose that a revised code should include no new special regimes beyond those set out in the existing Code. Do consultees agree? Consultation Paper, Part 4, paragraph 4.43
Yes, agreed.

ALTERATIONS AND SECURITY

10.32 We provisionally propose that a revised code should contain a procedure for those with an interest in land or adjacent land to require the alteration of apparatus, including its removal, on terms that balance the interests of Code Operators and landowners and do not put the Code Operators' networks at risk. Do consultees agree? Consultation Paper, Part 5, paragraph 5.11.
Agreed. We come across this with regards repairs to rooftops requiring lift and shift of cabling or equipment cabins or moving a tower or street furniture from one location to a nearby location on the landowner's site.

10.33 Consultees are asked to tell us their views about the alteration regime in paragraph 20 of the Code; does it strike the right balance between landowners and Code Operators? Consultation Paper, Part 5, paragraph 5.12.
No as a code operator can almost always prove that any requirement even to lift and shift apparatus will "substantially interfere" with its network service as aside from minor relocation of cabling any other action, including lift and shift will usually require a service to be shut down/suspended albeit temporary. Perhaps the test should be changed from "not substantially interfere" to "not substantially interfere otherwise than temporarily"? Landowners do not have access to the technical information which wireless Operators have regarding their national coverage and service provision and cannot very easily, if at all, dispute evidence put before the court in this regard. To force a landowner to issue a court application as soon as an Operator serves a counter notice (which they invariable do upon receipt of any Paragraph 20 notice) places an unfair and immediate litigation cost burden on the landowner. We consider that when serving a Paragraph 20 notice a landowner should have to provide some detail as to the extent of the alteration that is required and that similarly either upon service of a counter notice or within a relatively short time frame thereafter the Operator should at the very least be obliged to serve details of why it considers the proposed alteration will substantially interfere with its network provision so that the landowner can consider the evidence at little additional cost before being forced to issue court proceedings and incurring immediate litigation cost as a result.

10.34 We provisionally propose that it should not be possible for Code Operators and landowners to contract out of the alterations regime in a revised code. Do consultees agree? Consultation Paper, Part 5, paragraph 5.13.
We agree that the alterations regime in the Code should remain as a minimum requirement – a large percentage of landowners obtain no or ineffective professional advice on these Agreements and our experience is that the Operators will take full advantage of this fact for their own benefit. In addition, where a landowner has had code rights foisted upon it following a successful Paragraph 5 application, that landowner should have the legal ability in theory to require later removal or alteration or lift and shift of that apparatus even during the term of an existing code agreement if it needs to require the apparatus to be altered to enable its own redevelopment plans to proceed. The revised Code needs to make it absolutely clear that such provisions override any existing written agreement or court awarded agreement which is in place so that if a landowner seeks to operates its rights under Paragraph 20, that the code operator cannot argue that such exercise is in breach of the contractual obligations of the landowner under the written or court awarded agreement (for example derogation from grant/breach of covenant for quiet enjoyment giving rise to injunctive relief or damages claims). However, the parties should be able to agree to additional alteration provisions should the site specific circumstances require it. For example, additional alterations provisions are often inserted in agreements dealing with rooftop occupations to reflect the fact roofs may need repairing. The parties should be able to agree to “lift and shift” apparatus in advance without the landowner requiring to obtain a court order should the Operator change its mind relating to a previously agreed contractual provision.

10.35 We seek consultees’ views on the provisions in paragraph 14 of the Code relating to the alteration of a linear obstacle. Do consultees take the view that they strike an appropriate balance between the interests involved, and should they be modified in a revised code? Consultation Paper, Part 5, paragraph 5.18.
We do not consider the provisions of paragraph 14 should be retained.

10.36 We provisionally propose that a revised code should restrict the rights of landowners to remove apparatus installed by Code Operators. Do consultees agree? Consultation Paper, Part 5, paragraph 5.47.
Yes, subject to the ability to contract out, as discussed in para 10.40 below. However, we disagree with your summary at paragraph 5.26 as to whose rights should be restricted. (1) If apparatus has been abandoned within the meaning of para 22 of the Code, we do not think the landowner is, or indeed should be, required to obtain a court order to remove the apparatus. The existing para 22 states that the Operator "is not entitled to keep that apparatus so installed" if the apparatus is not being used and there is no reasonable likelihood of it been used. If it is not entitled to keep that apparatus installed, the Operator should not benefit from the protection of para 21. If an Operator wants to retain its equipment then it should be satisfying a different test – that there is a reasonable likelihood that the apparatus will be used in the future. We come across this issue in the context of cable within multi-tenanted buildings or estates. If the landowner has removed all tenants to enable it to re-develop the site, any Operator's apparatus will no longer be in use, and depending on the extent of the re-development, there may be no likelihood that it will be used in the existing positions in the future. As such the landowner should not be obliged to go through the para 21 procedure. (2) A landowner on whose land apparatus has been installed by mistake surely cannot have to deal with Code protected apparatus for two reasons. Firstly as a matter of legal interpretation of para 2 of the Code. Para 2 clearly states that "the agreement in writing of the occupier….shall be required for conferring on the operator a right….to keep ….apparatus". If the landowner has not agreed in writing, then the apparatus will not be protected by the Code or any of its provisions. We have dealt with this situation in practice and when it was established that there was no agreement in writing, the Operator agreed to remove its equipment with 28 days (being a timescale agreed mutually between the parties). The Operator did not rely on para 21 of the Code. Secondly, as a matter of public policy, trespassing Operators should not get Code protection. Otherwise what is the point of their right under para 5 ? The Code surely cannot allow Operators the ability to "install today, negotiate tomorrow". The Operators certainly do not conduct themselves in this manner now – otherwise they would not be so particular about insisting that landowners sign "early access agreements". All Operators have to do to avoid the issue of mistaken landowner identity is to carry out proper due diligence on who owns the land. The risk of a mistake should be borne by the Operator and not an innocent landowner.

10.37 We provisionally propose that a revised code should not restrict the rights of planning authorities to enforce the removal of electronic communications apparatus that has been installed unlawfully. Do consultees agree? Consultation Paper, Part 5, paragraph 5.48.
Agreed. This should be no different to where apparatus has been erected on land without written consent of the occupier – the Operator has to take responsibility to confirm the identity of the occupier and also complying with planning regulations.

10.38 We ask consultees to tell us their views about the procedure for enforcing removal. Should the onus remain on landowners to take proceedings? If so, what steps, if any, should be taken to make the procedure more efficient? Consultation Paper, Part 5, paragraph 5.49.
No. Landowners often have limited financial means whereas the operators are usually of significant financial strength and so it would be fairer for the operator to have to instigate proceedings. Operators are often very dilatory in taking steps to make it clear whether they want to stay and if so on what terms and a change of onus requiring the operator to assert if it wants to stay would encourage negotiations to be commenced earlier and for operators to be more proactive creating less uncertainty for landowners and a shorter average time frame for concluding negotiations. The onus should be on a code operator to issue protective proceedings if it wants to remain on site after expiry of a certain notice period following service of a notice upon it from the landowner asking it to leave or renew on fresh terms (similar to issue of protective lease renewal proceedings by a business tenant following service of a s.25 notice). A 6 to 12 month notice period, with notice being able to be served by the landowner any time commencing no earlier than 6 months before the end of the current agreement or any time thereafter would provide ample time for a code operator to react and consider its position on that site, even if that operator has 1000's of sites across the country. If no notice was served by the landowner, then the default position would be that the operator is entitled to remain on the site on the same terms as the expired agreement (equivalent to holding over under the LTA 1954) and paying the same level of rent without any new agreement in writing being required. This would protect both the operator and the landowner. In addition, if the code operator wanted to instigate a renewal it could have the ability to serve a similar notice with similar time frames on the landowner proposing terms for renewal. If the landowner did not respond within a certain time frame (say 3 months) agreeing those proposals then the code operator could have the right to then issue its claim. However any delay/failure of a landowner to respond should not entitle a code operator to renew automatically on the terms it had proposed.

10.39 We ask consultees to tell us whether any further financial, or other, provisions are necessary in connection with periods between the expiry of code rights and the removal of apparatus.

Consultation Paper, Part 5, paragraph 5.50.

In our experience, Operators have paid rent for these period. Either without argument or after the occupier has threatened recovery under principles of common law damages for use and occupation of the site (mesne rents) where a landowner does not want to agree that any implied tenancy has been created post expiry of the written code agreement.

It would however be very sensible to incorporate within the Code a clear and express obligation upon code operators to continue to pay the previous existing level of fee (pro rata on a daily basis) until either removal of apparatus (or written release from the landowner from this obligation). This would encourage operators to enter into early dialogue with a landowner when an agreement was approaching expiry and an operator was not intending to renew. Furthermore it would protect and compensate a landowner where an agreement has expired and the operator is slow in removing and making good the site – compensating the landowner for its inability to freely use the site immediately after expiry.

10.40 We provisionally propose that Code Operators should be free to agree that the security provisions of a revised code will not apply to an agreement, either absolutely or on the basis that there will be no security if the land is required for development.

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.51.

We agree, the parties should be allowed to contract out for whatever the reason and not just limit it to a "re-development" ground. In addition, certain apparatus are of a low value and are easy to relocate so there is no real need for protection (e.g microcells and picocells). Having security provisions actually limits the amount of sites available as generally landowners are very wary of agreeing to have apparatus on their site due to automatic code protection.

In our experience, not all landowners will insist on contracting out. In order to generate income, companies such as WIG, Shere and Arqiva provide access to infrastructure for the benefit of Operators. They want Operators to remain on site and are therefore unlikely to insist on Agreements being contracted out.

10.41 Do consultees agree that the provisions of a revised code relating to the landowner's right to require alteration of apparatus, and relating to the security of the apparatus, should apply to all equipment installed by a Code Operator, even if it was installed before the Code Operator had the benefit of a revised code?

Consultation Paper, Part 5, paragraph 5.56.

We agree that for existing agreements, the Code should continue to be retrospective. However, for future agreements under a revised Code, if the Operator did not have benefit of the Code when it entered into the agreement, then the Code should not have retrospective effect.

We do not agree that the alternative is "perverse" as you set out in paragraph 5.54. If the Operator has no paragraph 21 protection under the Code then they can still apply for a new agreement under paragraph 5. But they would have to take steps to do so – they cannot simply sit back and do nothing whilst relying on paragraph 21.

We also think that this "retrospectivity" will not work with your contracting out proposals. At the commencement of an Agreement with an occupier with no Code protection, it should not be

necessary to contract out the Agreement from the Code "just in case" they later obtain protection. We can foresee the situation where landlords will be advised to require an agreement to be contracted out of the Code if a tenant wishes to install telephone lines or a television satellite dish. If there is a contracting out procedure, solicitors will not want to take the risk of not advising their landlord's clients to use it "just in case".

It also adds to complexity with regards the right to payments under the Code. This issue would not arise if "retrospectivity" was removed. In such circumstances payments could then be dealt with when an application was made by the operator to remain on site under paragraph 5.

FINANCIAL AWARDS UNDER THE CODE

In responding to these questions, please note the definitions of "compensation" and "consideration" adopted at paragraph 6.5 and following of the Consultation Paper.

10.42 We provisionally propose that a single entitlement to compensation for loss or damage sustained by the exercise of rights conferred under the Code, including the diminution in value of the claimant's interest in the land concerned or in other land, should be available to all persons bound by the rights granted by an order conferring code rights. Do consultees agree? Consultation Paper, Part 6, paragraph 6.35.
Yes, the current Code has at least 3 different tests for compensation contained in various different paragraphs of the Code some of which are linked and some of which are not. 4(4) deals with compensation equal to the value of a depreciation in a person's interest in land as a result of Paragraph 21 applying when that person was not originally bound by the code rights when granted but is subject and bound by Paragraph 21 at the end of the agreement and by virtue of paragraph 4(8) section 5 Land Compensation Act 1961 rules are brought into play. 5(4) deals with the Court awarding terms which ensure the "least possible loss and damage" where rights are exercised and is linked to 7(1) which deals with payment of consideration which is "fair and reasonable" [7(1)(a)] and being "adequately compensated.. for any loss or damage sustained" [7(1)(b)] where the right is exercised against the person with the relevant interest in land where the rights are to be exercised. 7(2) deals with the Court awarding compensation to a neighbouring landowner and requires "prejudicial effect" to be taken into account Consistency is key and in our view there should be one clear stand alone set of compensation provisions in one place in the Code which cover all potential persons who could be bound or affected by the Code

10.43 We ask consultees whether that right to compensation should be extended to those who are not bound by code rights when they are created but will be subsequently unable to remove electronic communications apparatus from their land. Consultation Paper, Part 6, paragraph 6.36.
Yes. The way the Code deals with the various superior and inferior leasehold and freehold interests at paragraph 2 is very confusing and complex in its wording and this needs amending in any event. It is simply misleading for statements to be made that superior interests are not "bound" at the point that an inferior interest holder in land (or occupier) enters into a code agreement as effectively as soon as that agreement is in place the superior leaseholder or freeholder can only force the removal of the operator after expiry of the agreement (because otherwise the code operator has the right to be there) and only then if it can satisfy the test at Paragraph 21 which in most cases is impossible. This is clearly stated by paragraphs 4(2) and 4(3). These provisions should sit with paragraph 2. In short, any persons with any superior interest in the land will be affected by the code agreement coming into being and should have the right to be compensated. Depreciation of the current land value may not be sufficient compensation. For example how does this work in a scenario where a freeholder who has medium term development plans for a site, contracts to sell to a developer with hope value on a specified date and who, having granted a sub tenancy upon determination of that sub tenancy discovers that the sub tenant, in breach of its tenancy entered into a code

agreement with an operator such that the freeholder cannot then complete its contract to sell to the developer as planned as it does not have vacant possession. The depreciation of the land value will not necessarily be sufficient compensation.

10.44 We provisionally propose that consideration for rights conferred under a revised code be assessed on the basis of their market value between a willing seller and a willing buyer, assessed using the second rule contained in section 5 of the Land Compensation Act 1961; without regard to their special value to the grantee or to any other Code Operator.

Do consultees agree? We would be grateful for consultees' views on the practicability of this approach, and on its practical and economic impact.

Consultation Paper, Part 6, paragraph 6.73.

No we strongly disagree to this proposal as it assumes a "no scheme world" and disregards all telecoms networks and the reality of the telecoms market and open market telecoms comparables which have been built up over the past 25 plus years.

Such a proposal would devalue all existing telecoms sites and be severely prejudicial to landowners as the open market non telecom market for renting a small area of land or rooftop would be nominal. For example a corner of a field would be based on agricultural acreage values alone. A small piece of yard rented by a business adjacent to a motorway would have de minimis value. A 4 x 4 metre area on a roof top would have little or no value to the non telecoms market.

We disagree that there is a lack of market evidence for rents payable in the wireless cell site market. There are a number of specialist property agencies that operate only in this sector who have developed a highly sophisticated knowledge of the market and the rents payable. Not only do they advise occupiers on rents payable when entering into new agreements, but also act as specialist arbitrators in rent review disputes, and provide expert advice on rental levels when disputes reach court.

We reiterate the points made at para 10.16 above in relation to the strength of the UK wireless infrastructure network and the part that the existing consideration valuation basis has played in creating that network. Companies such as WIG, Shere and Arqiva are in effect a vehicle by which capital funds are invested into the sector – they invest money in creating the network themselves and then provide sites available to be used by all Operators. The existing valuation basis supports those vehicles and their models should be recognised and supported as an essential part of the creation of a strong network. They should not be removed from the sector.

Any change to the existing valuation basis would also impact on individual site owners – both greenfield and rooftop space providers. If landowners received no or little income then there would be no reason for them to provide sites and the Operators would then have to go to the time and expense of acquiring sites through the para 5 process. By changing the basis of consideration to be an amount equivalent to compulsory purchase values, it is highly likely that all future sites would have be to acquired via the compulsory purchase process. This would have the exact opposite effect to the Government's aims.

Where there has been a slow down in the investment in new site infrastructure, this is due to the consolidation under way within the Operators themselves and not due to the level of market rents.

The existing effective market for valuing consideration payable upon wireless cell sites should not be dismantled and replaced with a system which we assume you have suggested to resolve difficulties within the cable/fibre optic sector.

10.45 Consultees are also invited to express their views on alternative approaches; in particular, the possibility of a statutory uplift on compensation (with a minimum payment figure in situations where no compensation would be payable). Consultation Paper, Part 6, paragraph 6.74.
We are not valuation experts so are reluctant to give detailed comments on this save to say that the market for wireless cell sites operates well on the current basis but that a different valuation approach may well be required for the laying of continuous lines of cabling underground.

10.46 We provisionally propose that there should be no distinction in the basis of consideration when apparatus is sited across a linear obstacle. Do consultees agree? Consultation Paper, Part 6, paragraph 6.78.
We agree that the current Code seems to create an arbitrary distinction.

10.47 We provisionally propose that, where an order is made requiring alteration of a Code Operator's apparatus, the appropriate body should be entitled to consider whether any portion of the payment originally made to the person seeking the alteration in relation to the original installation of that apparatus should be repaid. Do consultees agree? Consultation Paper, Part 6, paragraph 6.83.
Agreed, provided that the amount paid back is a fair and proper proportion taking into the account the specific circumstances for the case and not just a simple pro-rated amount.

TOWARDS A BETTER PROCEDURE

10.48 We provisionally propose that a revised code should no longer specify the county court as the forum for most disputes.

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.26.

We tentatively agree with the proposal that the county court should not be the forum for any disputes under the revised Code. We feel that there are a significant number of county court judges who are unfamiliar with both the Code and the valuation issues that arise.

10.49 We ask for consultees' views on the suitability of the following as forums for dispute resolution under a revised code:

(1) the Lands Chamber of the Upper Tribunal (with power to transfer appropriate cases to the Property Chamber of the First-tier Tribunal or vice versa);

(2) a procedure similar to that contained in section 10 of the Party Wall etc Act 1996; and

(3) any other form of adjudication.

Consultation Paper, Part 7, paragraph 7.27.

We are of the view that the Lands Chamber of the Upper Tribunal would be a suitable forum for dispute resolution under a revised code if the Lands Chamber is granted sufficient additional resources to deal with disputes in a timely fashion and the Code makes it clear that issues of law, fact and valuation can be determined by the High Court Judges who sit in the Lands Chamber.

If issues of law (such as the correct interpretation of the provisions of the Code itself) are not clearly put within the jurisdiction of the Lands Chamber to be determined, then as an alternative we would propose that the Technology and Construction Division of the High Court should be the appropriate forum for such issues.

We would however be strongly opposed to the Central London County Court (which often deals with technology and construction matters) from being an appropriate forum as in our experience this Court has no capacity to deal with these additional disputes and the administration of this particular Court is haphazard at best.

However we have concerns about cases under the revised code being dealt with by a newly formed and inexperienced First-tier Tribunal. It is vital that an experienced and specialist body make the decisions. Having a more junior and less experienced tribunal deal with such disputes would be undesirable in all but the most straightforward of cases which turn on valuation only where all other terms are agreed or settled and the landowner has no objection in principle to the code operator remaining or coming on to its site.

If it should be decided that a two-tier system is used then all applications should be routed through the Land Chamber for a decision on allocation to ensure that only those cases that do not raise any complex issues and are thought to be of a low financial value or which are pure valuation issues only are referred to the Property Chamber.

In any event, the Lands Chamber should deal with the majority of cases to begin with, as the early decisions will form important precedents that will be invaluable to those seeking to resolve matters through negotiation. Any trickle down to the Property Chamber should be a gradual process so that it can build experience and ensure it has the benefit of a substantial body of decisions made by the Lands Chamber.

If the only dispute is over the amount payable for rights (where all such rights have been agreed or determined already) then we would not object to a procedure similar to that contained in Section 10 of the Party Wall etc Act 1996 (with a right of appeal to the Lands Chamber) being used to resolve matters. We stress that we do not support a Party Wall type dispute procedure for dealing with any decisions relating to the conferral of code rights or applications for removal or alteration under the current Paragraphs 20 and 21.

If all the terms have been agreed through negotiation or mediation, apart from those relating to payment, then the parties should be encouraged to settle the matter by expert determination before having recourse to the Lands Chamber. As stated above we cannot see any objection to a procedure similar to that under the Party Wall etc Act being used in these circumstances.

10.50 We provisionally propose that it should be possible for code rights to be conferred at an early stage in proceedings pending the resolution of disputes over payment.

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.31.

We agree with the proposal that it should be possible for code rights to be conferred pending the resolution of disputes over payment. Clearly this would only be appropriate where all of the other terms of occupation are agreed or are ordered by the Lands Chamber.

However, Code operators must still be encouraged to try to negotiate with landowners and explore ADR prior to the issue of any proceedings.

10.51 We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay.

Consultation Paper, Part 7, paragraph 7.32.

This goes back to having a clear framework and timing for service of notices by the landowner and code operator in the run up to or after expiry of an existing agreement to ensure that steps have to be taken by both parties to encourage negotiation and narrowing of issues in dispute.

There should be costs sanctions for a failure to follow the steps set out in the Code unless time extensions have been agreed between all the parties.

The need for a statutory deadline by which a code operator must instigate court/tribunal proceedings to assert a right to remain on a site after expiry of an agreement is the only practical way in which operators can be made to engage fully with landowners.

Dependent on which future forum for disputes is decided upon, split trials/hearings/tribunals dealing with in isolation

(a) the right to remain/remove;
(b) the extent of the rights to be conferred/renewed; and
(c) the level of consideration/compensation payable

should be available to the parties and encouraged.

10.52 We seek consultees' views as to how costs should be dealt with in cases under a revised code, and in particular their views on the following options:

(1) that as a general rule costs should be paid by the Code Operator, unless the landowner's conduct has unnecessarily increased the costs incurred; or

(2) that costs should be paid by the losing party.

Consultation Paper, Part 7, paragraph 7.37

We are of the view that costs should not be payable by the Code Operator as a general rule. It is our view that the body responsible for settling the dispute should have the same discretion with regard to costs as is granted to the courts in general civil claims under the Civil Procedure Rules.

The discretion under the CPR enables the court to make orders as to costs that take into account all the factors and surrounding circumstances to reach a fair conclusion. The discretion would enable split costs orders to be made where a party wins on some points but not on others, to sanction a party for any unreasonable behaviour and to limit any costs orders if costs are disproportionate to the dispute.

10.53 We also ask consultees whether different rules for costs are needed depending upon the type of dispute.

Consultation Paper, Part 7, paragraph 7.38.

It may be fair that the code operators should pay the costs when it comes to disputes under paragraph 5 of the Code as they are seeking to impose terms on an unwilling landowner.

In addition, where notice is given by an adjoining owner under paragraph 20 to a code operator where the adjoining owner has no contractual relationship with the code operator, then in such circumstances perhaps the code operator should pay.

However, if the landowner or adjoining owner should cause costs to increase as a result of unreasonable behaviour then the decision making forum should be granted the discretion to order something different with regard to costs. Therefore, the assumption that the code operator will pay the costs in such cases should only be a starting point and discretion should be exercisable where appropriate.

10.54 We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service. Do consultees agree? Consultation Paper, Part 7, paragraph 7.52.
Yes definitely. Prescribed forms for notices and counter notices would assist both legal advisers and litigants in person to ensure that all relevant information is included and received and remove or limit arguments regarding the validity or otherwise of a notice. The rules for service in the Code at present appear to be limited to service on a code operator addressed to its company secretary. As a matter of practice we always serve at the registered office address but clear rules as to service would be welcomed. It is suggested that adopting s.196 of the Law of Property Act would be sensible as there is a clear body of case law in existence already and the provisions are well understood by legal advisors.

10.55 Do consultees consider that the forms of notices available to Code Operators could be improved? If so, how? Consultation Paper, Part 7, paragraph 7.53.
No comment.

10.56 Do consultees consider that more information is needed for landowners? If so, what is required and how should it be provided? Consultation Paper, Part 7, paragraph 7.54.
Warning notices on code notices served by operators on landowners highlighting the deadlines for responses is necessary.

10.57 We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms. Consultation Paper, Part 7, paragraph 7.60.
It is a sensible proposal, but one which we suspect the Operators would resist. They benefit from the imbalance of power between themselves and individual site owners and they are unlikely to want to give that up. We have negotiated and put in place precedent agreements between landowners with large portfolios of sites and all of the main wireless Operators. However, without exception those Operators are at pains to point out that those agreed terms cannot be relied on when we represent individual site owners. They will only agree standard terms where the balance of negotiating power is broadly equal.

INTERACTION WITH OTHER REGIMES

10.58 We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease. Do consultees agree? Consultation Paper, Part 8, paragraph 8.22.
Yes. Strongly agree provided "lease" includes/means "tenancy". This would be a simple amendment to make to the 1954 Act where types of excluded tenancies are listed. There is much need to take the agreements covered by the Code outside of the ambit of the 1954 Act as at present the two statutory regimes do not work together at all particularly in relation to the ability of a landowner to terminate by s.25 notice a 1954 Act tenancy and oppose renewal on s.30(1) ground f (demolition/redevelopment) or ground g (own occupation) where it cannot prove that immediately after expiry of the agreement/notice period it will be able to redevelop/occupy due to the code protection afforded to the code operator which continues.

10.59 We provisionally propose that where an agreement conferring a right on a Code Operator also creates an interest in land of a type that is ordinarily registrable under the land registration legislation, the interest created by the agreement should be registrable in accordance with the provisions of the land registration legislation, but that a revised code should make it clear that its provisions as to who is bound by the interest prevail over those of the land registration legislation. Do consultees agree? Consultation Paper, Part 8, paragraph 8.33.
Yes.

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

10.60 We ask consultees to tell us: (1) whether they are aware of circumstances where the funds set aside under regulation 16 have been called upon; (2) what impact regulation 16 has on Code Operators and on Ofcom; (3) if a regime is required to cover potential liabilities arising from a Code Operator's street works; and (4) if the answer to (3) is yes, what form should it take? Consultation Paper, Part 9, paragraph 9.14.
No, we have never experienced this.

10.61 We ask consultees for their views on the Electronic Communications Code (Conditions and Restrictions) Regulations 2003. Is any amendment required? Consultation Paper, Part 9, paragraph 9.39.
No comment.

Tom Bodley-Scott

From: Charles Ponsonby [redacted]
Sent: 28 October 2012 09:27
To: Tom Bodley-Scott
Subject: Response to Law Commission Consultation Paper No. 205

[redacted] granted 15 year leases to [redacted] for rural mobile telephone masts. I currently receive rents of [redacted]

In the last year or two, I have been advised on telecoms matters by Tom Bodley Scott of Batcheller Monkhouse, who has submitted a painstakingly detailed response to you. Mr Bodley Scott has always struck me as knowledgeable, sensible and fair (this is far from true of all the "professionals" I encountered in a 35 year career in the City of London). From the outset, as a landlord I have been easy to deal with and open to reasonable proposals.

By way of contrast, one of my tenants, and its agents, have consistently exhibited arrogance, bullying and a certain economy with the truth, not least in pleas of poverty and attempts to dazzle with science. I was told by Mr Bodley Scott some months ago that my unpleasant experience with this tenant was widely shared by other telecoms landlords.

The leases I entered into reflected the tenants' greatly superior bargaining power and I am surprised that serious consideration is being given to making the landlords' position even worse, especially during the short currency typical of such leases. I am also amazed that a significant extension of the compulsory purchase principle is being contemplated. It is not as if we are in the 19th and early 20th centuries and compulsory purchase was necessary for railways to be built or telephony to be established. Further, in numerous respects mobile telephone installations cannot be equated with telegraph posts.

May I suggest that any tendency to characterise landlords as Luddites obstructing operators dedicated to technological progress for the benefit of all (rather than the maximisation of their own, already massive, profits and values) be resisted?

I have read Mr Bodley Scott's submission (other than the technical bits) and commend it to you.

Sir Charles Ponsonby, Bt, MA (Oxon), FCA

LAW COMMISSION
CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

RESPONSE FORM

This optional response form is provided for consultees' convenience in responding to our Consultation Paper on the Electronic Communications Code.

You can view or download the Consultation Paper free of charge on our website at:

www.lawcom.gov.uk (see A-Z of projects > Electronic Communications Code)

The response form includes the text of the consultation questions in the Consultation Paper (numbered in accordance with Part 10 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

The reference which follows each question identifies the Part of the Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

As noted at paragraph 1.34 of the Consultation Paper, it would be helpful if consultees would comment on the likely costs and benefits of any changes provisionally proposed when responding. The Department for Culture, Media and Sport may contact consultees at a later date for further information.

We invite responses from 28 June to 28 October 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or

by post to: James Linney, Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ

Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information 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 Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

Your details

Name:
Alicia Foo and Nicholas Vuckovic
Email address:
[redacted]
Postal address:
Pinsent Masons LLP, 3 Colmore Circus, Birmingham. B4 6BH
Telephone number:
[redacted]
Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):
We are responding in our personal capacities though we are both practising solicitors at Pinsent Masons LLP.
If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:
As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: GENERAL

10.3 We provisionally propose that code rights should include rights for Code Operators:

(1) to execute any works on land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus;

(2) to keep electronic communications apparatus installed on, under or over that land; and

(3) to enter land to inspect any apparatus.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.16.

- We would remove the words "*the installation, maintenance, adjustment, repair or alteration*" as in our experience this gives rise to sterile arguments about the definition of each of these and whether the planned works fall within them e.g. the status of replacement / upgrading is unclear on the current drafting. If works are to be executed to electronic communication apparatus they should be automatically permitted provided that the detail relating to the works is openly set out, and is transparent to the landowner for a transparent price.
- We would add/extend the words "in", "under or over" (land) to "on" all 3 points above as appropriate.
- The definition of "land" should be extended broadly to include "adjoining land" so that if there are any works that involve an "angle" or suspension over / use of the airspace of adjoining land or go beyond the parameters / boundaries of the "land" in question, then such works are not restricted because "land" excludes such works. We have come across situations where whilst we can carry out works on the operator's own land, the operator is held to ransom because the adjoining land is owned by others who are determined to prevent legitimate and necessary works. Whilst the Access to Neighbouring Land Act 1992 may assist, this is long-winded and tortuous. The Code does not really provide for this "extra" access and should be a complete solution for operators seeking to access their apparatus.

10.4 Do consultees consider that code rights should be extended to include further rights, or that the scope of code rights should be reduced?

Consultation Paper, Part 3, paragraph 3.17.

Yes. It should be extended to include and carry with it "access rights". At present, the rights expressed above do not address how an operator potentially **accesses** the land to execute / keep / enter land to carry out works to the apparatus. Potentially, one might say it is implicit that to exercise any of the above rights this carries with it a need to access the land. However, from experience, an implied right does not work and this is a lacuna in the Code which must be addressed especially in circumstances where the access route is owned separately from the "land" in question. This then gives each of the separate landowners of the access and the land ransom positions.

10.5	We provisionally propose that code rights should be technology neutral. Do consultees agree? Consultation Paper, Part 3, paragraph 3.18.
Yes. This must be the case in order to future-proof the Code.	

10.6	Do consultees consider that code rights should generate obligations upon Code Operators and, if so, what? Consultation Paper, Part 3, paragraph 3.19.

Yes

As a minimum, obligations should be the usual:

1. Carry out any works with all reasonable care and skill;
2. Compliance with all statutory obligations whether health and safety, planning etc;
3. Compliance with Ofcom or other statutory body requirements;
4. Indemnity for contractors/sub-contractors works; and
5. Have adequate insurance in place.

Insofar as any of these overlap or are already referred to in the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 then these should be referred to as shorthand.

But there should also be obligations to:

1. Consult with and notify landowners, save in an emergency, with a package of method statements / indemnity / insurance etc. (the sort of package of information which the Access to Neighbouring Land Act 1992 requires); and
2. Make good the impact of their works.

10.7	We ask consultees to tell us their views on the definition of electronic communications apparatus in paragraph 1(1) of the Code. Should it be amended, and if so should further equipment, or classes of equipment, be included within it? Consultation Paper, Part 3, paragraph 3.27.
No we consider the definition to be broad enough in our experience.	

10.8 We ask consultees to tell us their views about who should be bound by code rights created by agreement, and to tell us their experience of the practical impact of the current position under the Code. Consultation Paper, Part 3, paragraph 3.40.
Paragraph 2 is just incomprehensibly drafted and is a terrible mish-mash of compromise by Parliament. See Alicia Foo's views in her Blundell Lecture "Property Problems under the Electronic Communications Code"  at paragraph 5.2.5. If the Code is to work properly, then all parties whether up or down the chain of superior or inferior interests should be bound but subject to the following safeguards: a) ensure that the principles of not unreasonably withholding consent enshrined in section 134 of the Communications Act 2003 apply across the board (i.e. not just in a building) so that consent is not unreasonably withheld whether or not in a landlord and tenant situation and that the only grounds for refusing are if another system / apparatus is installed / about to be installed at the same cost; b) there is a clear record of what equipment has been installed (there is a duty on the operator to update with sanctions) to avoid the proliferation of equipment; meet the landlords' concerns about "control" and superior interests can see at a glance just what has been installed; and c) if these guidelines / safeguards are not met a sanction could be for there to be an opportunity for the operator's conduct to be referred to Ofcom.

10.9 We ask consultees for their views on the appropriate test for dispensing with the need for a landowner's or occupier's agreement to the grant of code rights. In particular, consultees are asked to tell us: (1) Where the landowner can be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code, should it be possible for the tribunal to make the order sought without also weighing the public benefit of the order against the prejudice to the landowner? (2) Should it be possible to dispense with the landowner's agreement in any circumstances where he or she cannot be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code? (3) How should a revised code express the weighing of prejudice to the landowner against benefit to the public? Does the Access Principle require amendment and, if so, how? Consultation Paper, Part 3, paragraph 3.53.
The necessary and expedient test in other "utility" statues has much to commend it for the simplicity of the test.    As stated in Alicia Foo's Estates Gazette article on the Code published 13 August 2012 "*The access principle is outdated. Devised 30 years ago to encourage competition / rollout of networks where hitherto there had been only one operator (BT), now the question is not "has there been a denial of access to networks or services?" as a range of networks and services are largely available save for certain (largely rural) parts of the UK. Any new test should balance*

public / private interests. Landowners' interests shouldn't be overridden simply because they can be financially compensated. A revised test should clarify which factors can be considered and these should be placed under one section drawing from case law guidance or from the Electronic Communications Code (Conditions and Restrictions) Regulations 2003.

Should there, however, be two tests depending on the circumstances? In an urban / suburban context, if a landowner refuses for whatever reason but there are alternative technology solutions and all things being equal, a grant of rights should not prevail. In a rural /other context where the cost is prohibitive or economically unviable (the recent broadband contract rolled out by the government, which attracted only two bidders since these were said to be put off by the cost of remote areas, is a case in point) the balance swings to rights granted.

The question is not so much has there been a denial of access to networks or services, but rather at what cost and speed? A new test specifying minimum levels of speed and size of data should be considered."

10.10 We ask consultees to tell us if there is a need for a revised code to provide that where an occupier agrees in writing for access to his or her land to be interfered with or obstructed, that permission should bind others with an interest in that land.

Consultation Paper, Part 3, paragraph 3.59.

Yes, see our answer to 10.8.

10.11 We ask consultees to tell us their views about the use of the right for a Code Operator to install lines at a height of three metres or more above land without separate authorisation, and of any problems that this has caused.

Consultation Paper, Part 3, paragraph 3.67.

We have not encountered this in practice.

10.12 Consultees are asked to tell us their views about the right to object to overhead apparatus. Consultation Paper, Part 3, paragraph 3.68.
We have not encountered this in practice.

10.13 Consultees are asked to give us their views about the obligation to affix notices on overhead apparatus, including whether failure to do so should remain a criminal offence. Consultation Paper, Part 3, paragraph 3.69.
We have not encountered this in practice, though why it should be a criminal offence escapes us.

10.14 Do consultees consider that the current right for Code Operators to require trees to be lopped, by giving notice to the occupier of land, should be extended: (1) to vegetation generally; (2) to trees or vegetation wherever that interference takes place; and/or (3) to cases where the interference is with a wireless signal rather than with tangible apparatus? Consultation Paper, Part 3, paragraph 3.74.
See Alicia Foo's views in her Blundell Lecture "Property Problems under the Electronic Communications Code" property problems under the electronic c at paragraph 6.6.1(a)(iv) The right to tree lop's limitation to just applying to **streets** should be removed. If the intention is to prevent interference to signals arising out of electronic communications, then this right to tree lop should be extended to 1 and 2 above with appropriate safeguards along the lines set out in paragraph 19 save that provision should be made for emergencies, overriding the deadline of 28 days and counter-notice procedure.

10.15 We ask consultees:

(1) whether Code Operators should benefit from an ancillary right to upgrade their apparatus; and

(2) whether any additional payment should be made by a Code Operator when it upgrades its apparatus.

Consultation Paper, Part 3, paragraph 3.78.

(1) Yes, but what definition do you have in mind for "upgrade"? This needs careful addressing otherwise we fall into the same sterile disputes over what amounts to be an upgrade (see our comments at 10.3).

Furthermore, operators should have the right (especially with technology moving so quickly) to change / switch apparatus and not necessarily to demonstrate that this constitutes an "upgrade".

(2) It will depend upon what that upgrade is. If the parties agreed a one-off payment at the outset then so be it. However, if another payment mechanism e.g. fixed sum per "upgrade" or review was put in place, freedom to contract should be permitted subject to the restriction that landowners should not be able to demand ransom sums for each and every change / switch / upgrade, together with an automatic referral to dispute resolution in the event of no agreement being reached within 28 days or earlier in the case of an emergency.

10.16 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from sharing their apparatus causes difficulties in practice;

(2) whether Code Operators should benefit from a general right to share their apparatus with another (so that a contractual term restricting that right would be void); and/or

(3) whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it shares its apparatus.

Consultation Paper, Part 3, paragraph 3.83.

(1) Yes this ability causes delays whilst consents are sought and gives landowners leverage to seek ransom sums for swift sharing rights. Sharing means less proliferation of equipment and makes operators more competitive and nimble which surely must be of benefit to all.

(2) Yes subject to safeguards on transparency so the landowner understands what is being shared.

(3) No, subject to our comments above in the scenario where sharing necessitates additional / an upgrade to apparatus. Where this is not required, no additional burden is placed upon a landowner as a result of sharing, and so there can be no justification for landowners demanding an additional payment.

10.17 We ask consultees to what extent section 134 of the Communications Act 2003 is useful in enabling apparatus to be shared, and whether further provision would be appropriate.

Consultation Paper, Part 3, paragraph 3.88.

We have very rarely seen this used in practice and believe that it is hardly ever called upon as most landowners see the benefits of having a "wired up" building. As a statutory provision it is worth retaining as a tool to be used with difficult landowners who stand in the way of technological developments.

10.18 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from assigning the benefit of agreements that confer code rights causes difficulties in practice;

(2) whether Code Operators should benefit from a general right to assign code rights to other Code Operators (so that a contractual term restricting that right would be void); and

(3) if so, whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it assigns the benefit of any agreement.

Consultation Paper, Part 3, paragraph 3.92.

A landowner wants to have control, know who it is dealing with and whether there is sufficient covenant status affecting its investment. Permitting operators to assign the benefit of Code powers without landlord's consent is unfair; normal landlord and tenant rules (assuming the agreement is a lease) should apply e.g. the implication of duties under section 19(2) of the Landlord and Tenant Act 1927 for landlords not to unreasonably withhold consent and to give consent subject to reasonable conditions and within a reasonable time under the Landlord and Tenant Act 1988 should be sufficient to protect the tenant. It is unreasonable to require the tenant to pay consideration on an assignment and the same should apply here.

10.19 We ask consultees to tell us if they consider that any further ancillary rights should be available under a revised code.

Consultation Paper, Part 3, paragraph 3.94.

10.20 We ask consultees to tell us if they are aware of difficulties experienced in accessing electronic communications because of the inability to get access to a third party's land, whether by the occupiers of multi-dwelling units or others. Consultation Paper, Part 3, paragraph 3.100.

10.21 Do consultees see a need for a revised code to enable landowners and occupiers to compel Code Operators to use their powers to gain code rights against third parties? Consultation Paper, Part 3, paragraph 3.101.
No.

10.22 Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used? Consultation Paper, Part 3, paragraph 3.102.
No.

10.23 We ask consultees:

(1) to what extent unlawful interference with electronic communications apparatus or a Code Operator's rights in respect of the same causes problems for Code Operators and/or their customers;

(2) to what extent any problem identified in answer to (1) above is caused by a Code Operator having to enforce its rights through the courts or the nature of the remedy that the courts can award; and

(3) whether any further provision (whether criminal or otherwise) is required to enable a Code Operator to enforce its rights.

Consultation Paper, Part 3, paragraph 3.106.

10.24 We ask consultees whether landowners or occupiers need any additional provision to enable them to enforce obligations owed to them by a Code Operator.

Consultation Paper, Part 3, paragraph 3.107.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: SPECIAL CONTEXTS

10.25 We provisionally propose that the right in paragraph 9 of the Code to conduct street works should be incorporated into a revised code, subject to the limitations in the existing provision.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.11.

Generally, the differences within the special regimes and between the special regimes and general regime is hard to understand. Any revised code should seek to standardise where possible the differences and make it similar to that under the general regime. See Alicia Foo's views in her Blundell Lecture "Property Problems under the Electronic Communications Code".

property problems under the electronic c

10.26 We ask consultees to let us know their experiences in relation to the current regime for tidal waters and lands held by Crown interests.

Consultation Paper, Part 4, paragraph 4.20.

10.27 We seek consultees' views on the following questions.

(1) Should there be a special regime for tidal waters and lands or should tidal waters and lands be subject to the General Regime?

(2) If there is to be a special regime for tidal waters and lands, what rights and protections should it provide, and why?

(3) Should tidal waters and lands held by Crown interests be treated differently from other tidal waters and lands?

Consultation Paper, Part 4, paragraph 4.21.

There seems little justification for "special" treatment being given to the Crown and this should be removed.

10.28 We ask consultees:

(1) Is it necessary to have a special regime for linear obstacles or would the General Regime suffice?

(2) To what extent is the linear obstacle regime currently used?

(3) Should the carrying out of works not in accordance with the linear obstacle regime continue to be a criminal offence,or should it alternatively be subject to a civil sanction?

(4) Are the rights that can be acquired under the linear obstacle regime sufficient (in particular, is limiting the crossing of the linear obstacle with a line and ancillary apparatus appropriate)?

(5) Should the linear obstacle regime grant any additional rights or impose any other obligations (excluding financial obligations)?

Consultation Paper, Part 4, paragraph 4.30.

We have no strong views, save for that it seems odd to differentiate between the crossing of a linear obstacle and the installation of apparatus alongside it.

10.29 We provisionally propose that a revised code should prevent the doing of anything inside a "relevant conduit" as defined in section 98(6) of the Telecommunications Act 1984 without the agreement of the authority with control of it.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.34.

10.30 We provisionally propose that the substance of paragraph 23 of the Code governing undertakers' works should be replicated in a revised code.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.40.

Yes subject to ironing out inconsistencies on notice periods, compensation etc.

10.31 We provisionally propose that a revised code should include no new special regimes beyond those set out in the existing Code. Do consultees agree? Consultation Paper, Part 4, paragraph 4.43

ALTERATIONS AND SECURITY

10.32 We provisionally propose that a revised code should contain a procedure for those with an interest in land or adjacent land to require the alteration of apparatus, including its removal, on terms that balance the interests of Code Operators and landowners and do not put the Code Operators' networks at risk. Do consultees agree? Consultation Paper, Part 5, paragraph 5.11.
Yes in principle.    EG - Ringing the changes.pdf Specifically: see Alicia Foo's Estates Gazette article on the Code published 13 August 2012 where she comments: *"The current procedures for / entitlement to relocating apparatus by reason of redevelopment (paragraph 20) and permanent removal (paragraph 21) are complex and inconsistent. Coupled with the additional complications on timings and procedures under the 1954 Act if the agreements are business tenancies, these do not "mesh" at all, making it difficult for landowners to know where they stand when seeking to redevelop their properties or remove the apparatus. A limited form of contracting out of the code is permitted under paragraph 20 but not under paragraph 21. Further, currently there is little incentive for the operators to take active steps once their position is protected by serving a counter-notice to a landowner's notice for relocation / removal.* *The Law Commission has concluded that there is to be no contracting out under paragraph 20, but that the parties should be free to contract out of paragraph 21.* *But Freedom of contract is to be encouraged and the distinction drawn between the two paragraphs 20 and 21 is unclear. Why not follow the position under the Landlord and Tenant 1954 Act where the parties are free to contract in or out and in so doing, taking the consequences? If the recommendation that the additional layer of protection the 1954 Act provides is removed, this leaves code operators vulnerable so they should elect for code protection. There should, however,* ***be true*** *contracting out, i.e. no getting code rights through the back door under paragraph 5. There should be an obligation on code operators to pro-actively take steps once served with a landowner's notice."*

10.33 Consultees are asked to tell us their views about the alteration regime in paragraph 20 of the Code; does it strike the right balance between landowners and Code Operators? Consultation Paper, Part 5, paragraph 5.12.
No. It is skewed in favour of the operator with the requirement that the operator's network should not be substantially interfered with and with little caselaw and guidance on how it operates, there is uncertainty on how a court would view the tests in paragraph 20. Such a test is, like the Access Principle, in our view outdated - it was created at a time to give the operators needed security for their networks. That is not the case now with mature networks in place, save for the last rural third of the country. If there is to be a new test then this should be clearly set out and by reference to the new Access Principle. Further there are inconsistencies throughout which Alicia Foo identifies in paragraph 6.7 in her Blundell Lecture "Property Problems under the Electronic Communications Code"  property problems under the electronic c which need ironing out. In particular, as raised in the Blundell lecture, the ability it seems for the operator to be removed under paragraph 20 should not be circumvented by the operator seeking to get an order ("a

second bite at the cherry") by making an application for rights under paragraph 5 (see paragraph 20(5).

Furthermore, the operation of paragraph 20(8) does provide a considerable financial disincentive to landowners to compensate for "any expenses" incurred by the operator. As the Blundell lecture (see paragraph 6.7(x)) shows this cost of relocation can be high and there seems to be no means of challenging this given the phrase "any expenses". In principle, it is accepted there should be a financial payment to deter landowners form recklessly putting the operator through the expense of relocation (as some landowners have been wont to do in our experience) but it should have a cap or limit or for the court to have some financial oversight and control to avoid operators trying it on.

There is an obvious solution – many practitioners are familiar with the redevelopment ground of opposition to a business lease renewal based on ground (f) of section 30(1) of the Landlord and Tenant Act 1954. Why not utilise the test for redevelopment there? There is a strong and well established body of case law relating to s30(1)(f). This could be with the added gloss of a further test or hurdle of no substantial interference with operator's networks.

Although we will be arguing (in later sections) for the 1954 Act **not** to apply to operators as they should not benefit from double protection or at least if the Law Commission is minded to permit this, nevertheless there could be a consistency in approach, the tests and possibly the basis of compensation with the 1954 Act. However, in the case of the latter 1x or 2x the rateable value is too low as financial compensation for redevelopment.

10.34 We provisionally propose that it should not be possible for Code Operators and landowners to contract out of the alterations regime in a revised code.

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.13.

No. Freedom of contract should prevail – we agree with what you say in paragraph 5.43.

10.35 We seek consultees' views on the provisions in paragraph 14 of the Code relating to the alteration of a linear obstacle. Do consultees take the view that they strike an appropriate balance between the interests involved, and should they be modified in a revised code?

Consultation Paper, Part 5, paragraph 5.18.

This should be made consistent with the general regime (in whatever form).

10.36 We provisionally propose that a revised code should restrict the rights of landowners to remove apparatus installed by Code Operators. Do consultees agree? Consultation Paper, Part 5, paragraph 5.47.	
See above – yes, but a balance needs to be struck.	

10.37 We provisionally propose that a revised code should not restrict the rights of planning authorities to enforce the removal of electronic communications apparatus that has been installed unlawfully. Do consultees agree? Consultation Paper, Part 5, paragraph 5.48.	
Yes.	

10.38 We ask consultees to tell us their views about the procedure for enforcing removal. Should the onus remain on landowners to take proceedings? If so, what steps, if any, should be taken to make the procedure more efficient? Consultation Paper, Part 5, paragraph 5.49.	
There is currently a practice by the operators under paragraph 21 that once they have served their counter-notice and say they are "taking steps" to sit back and do nothing or very little unless pressed and pushed at the expense of the landowner. On the basis that they have been served with a notice to remove their apparatus, they should take "active" steps or face real financial sanctions otherwise there is very little incentive for the operators to do anything substantive. If they wish to have Code protection then they must comply with the responsibilities that go with it.	

10.39 We ask consultees to tell us whether any further financial, or other, provisions are necessary in connection with periods between the expiry of code rights and the removal of apparatus. Consultation Paper, Part 5, paragraph 5.50.
Operators should expect to continue to pay during any period in which they continue to occupy a landlord's property prior to removing their apparatus. See also our comments at 10.38.

10.40 We provisionally propose that Code Operators should be free to agree that the security provisions of a revised code will not apply to an agreement, either absolutely or on the basis that there will be no security if the land is required for development. Do consultees agree? Consultation Paper, Part 5, paragraph 5.51.
Yes. See our comments at 10.33 and 10.34.

10.41 Do consultees agree that the provisions of a revised code relating to the landowner's right to require alteration of apparatus, and relating to the security of the apparatus, should apply to all equipment installed by a Code Operator, even if it was installed before the Code Operator had the benefit of a revised code? Consultation Paper, Part 5, paragraph 5.56.
Yes, otherwise you have inconsistency in that landowners may be able to require the removal of some equipment but not others.

FINANCIAL AWARDS UNDER THE CODE

In responding to these questions, please note the definitions of "compensation" and "consideration" adopted at paragraph 6.5 and following of the Consultation Paper.

10.42 We provisionally propose that a single entitlement to compensation for loss or damage sustained by the exercise of rights conferred under the Code, including the diminution in value of the claimant's interest in the land concerned or in other land, should be available to all persons bound by the rights granted by an order conferring code rights. Do consultees agree? Consultation Paper, Part 6, paragraph 6.35.

10.43 We ask consultees whether that right to compensation should be extended to those who are not bound by code rights when they are created but will be subsequently unable to remove electronic communications apparatus from their land. Consultation Paper, Part 6, paragraph 6.36.

10.44 We provisionally propose that consideration for rights conferred under a revised code be assessed on the basis of their market value between a willing seller and a willing buyer, assessed using the second rule contained in section 5 of the Land Compensation Act 1961; without regard to their special value to the grantee or to any other Code Operator. Do consultees agree? We would be grateful for consultees' views on the practicability of this approach, and on its practical and economic impact. Consultation Paper, Part 6, paragraph 6.73.
Yes. See Alicia Foo's views in her Blundell Lecture "Property Problems under the Electronic Communications Code" property problems under the electronic c at paragraph 7.10ff and in the joint article in the Estates Gazette "*The Future is Bright*, *EG*, 24 September, 2011" with Nicholas Taggart, Barrister of Landmark Chambers. More recently see Alicia Foo's Estates Gazette article on the Code EG - Ringing the changes.pdf published 13 August 2012 where she says "*Anything that makes the entitlement to*

compensation and consideration simpler and clearer is welcome. Unsurprisingly, the ransom / market value approaches are rightly (at least for ransom value) rejected as inappropriate, counter-productive and contrary to the public interest. Such approaches are a disincentive to operators who may have been considering delivering services to the parts of the UK that are not already economically viable. The preferred approach of adopting compulsory purchase valuation principles is encouraging given the strong support shown for this at the stakeholder meeting held by the Law Commission in March 2012.

It is a tried and tested approach, avoids "unduly onerous" payments and meets the public interest argument. However, has the Law Commission (having in mind the policy of widening access to technology) gone too far in favour of the public interest? The preferred approaches will yield low levels of landowner payment under a revised code and will be opposed. The operators are companies run for profit and, as such, should pay the market price. On balance, where the majority of the network is already in place, to incentivise operators to go the last third or upgrade their equipment, they cannot be put off by high access prices.

What about a two-tier approach? Where there are existing networks, market value principles should apply but for that "last third" of the country without access or with limited access to electronic communications, market value utilising compulsory purchase principles should apply. That may do the most justice and strike the fairest balance between the parties' competing interests and meet the public's demand for better electronic communications throughout the UK."

10.45 Consultees are also invited to express their views on alternative approaches; in particular, the possibility of a statutory uplift on compensation (with a minimum payment figure in situations where no compensation would be payable).

Consultation Paper, Part 6, paragraph 6.74.

See above.

10.46 We provisionally propose that there should be no distinction in the basis of consideration when apparatus is sited across a linear obstacle.

Do consultees agree?

Consultation Paper, Part 6, paragraph 6.78.

We agree.

10.47 We provisionally propose that, where an order is made requiring alteration of a Code Operator's apparatus, the appropriate body should be entitled to consider whether any portion of the payment originally made to the person seeking the alteration in relation to the original installation of that apparatus should be repaid. Do consultees agree? Consultation Paper, Part 6, paragraph 6.83.
Yes.

TOWARDS A BETTER PROCEDURE

10.48 We provisionally propose that a revised code should no longer specify the county court as the forum for most disputes.

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.26.

Yes but this needs to be replaced with a legal forum where there are specialists who understand the Code (as revised) and valuation. At the Charles Russell consultation run in conjunction with the Law Commission in early October, there was talk of having split forums, one for valuation (akin to the PACT procedure for business lease renewals or the Party Wall Act mechanism) and one for "legal" disputes. We consider this would be counter-productive to have the "forums" divorced from each other. There should be a specialist "valuation" pool within whichever forum is chosen but just one forum, with the necessary resources to handle matters swiftly and effectively.

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As said in Alicia Foo's Estates Gazette article on the Code published 13 August 2012 "*This split of rights makes little sense. Typically, disputing parties become entrenched in polarised positions and a "court / tribunal" is the proper forum to resolve issues on valuation addressed by a court-appointed or parties'-appointed joint valuer."*

10.49 We ask for consultees' views on the suitability of the following as forums for dispute resolution under a revised code:

(1) the Lands Chamber of the Upper Tribunal (with power to transfer appropriate cases to the Property Chamber of the First-tier Tribunal or vice versa);

(2) a procedure similar to that contained in section 10 of the Party Wall etc Act 1996; and

(3) any other form of adjudication.

Consultation Paper, Part 7, paragraph 7.27.

10.50 We provisionally propose that it should be possible for code rights to be conferred at an early stage in proceedings pending the resolution of disputes over payment. Do consultees agree? Consultation Paper, Part 7, paragraph 7.31.
Absolutely, where it can be established that payment is the sole issue standing in the way of installation, otherwise technological advances are held up due to ransom positions being taken by landowners and Alicia Foo says as much in her Blundell Lecture paragraph 8.1.6(a).

10.51 We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay. Consultation Paper, Part 7, paragraph 7.32.
We would suggest:- • Consistency in deadlines/timings across the board whether special or general regimes; • Financial sanctions; and • Potentially even the threat of loss of Code protection.

10.52 We seek consultees' views as to how costs should be dealt with in cases under a revised code, and in particular their views on the following options: (1) that as a general rule costs should be paid by the Code Operator, unless the landowner's conduct has unnecessarily increased the costs incurred; or (2) that costs should be paid by the losing party. Consultation Paper, Part 7, paragraph 7.37
There should be a general discretion as is currently the case under the CPR to have split costs orders as very rarely are either party without blame in delaying tactics and unreasonable behaviour resulting in increased costs. There should be financial sanctions should parties not treat each other courteously and without regard to notice periods, consultation requirements etc which should be built into the revised Code. This balanced approach puts the onus on both parties to act sensibly rather than creating an adversarial approach which has too often been the case hitherto.

10.53 We also ask consultees whether different rules for costs are needed depending upon the type of dispute. Consultation Paper, Part 7, paragraph 7.38.
No but as part of the overall disincentive to rack up costs and encourage settlement perhaps there should be a sliding scale of costs awarded and required to be paid (so the costs reality is real and present rather than left to the end) the longer the dispute carries on.

10.54 We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service. Do consultees agree? Consultation Paper, Part 7, paragraph 7.52.
Yes. Alicia Foo addresses this in her Blundell Lecture, highlighting the inconsistencies on timings and if and when notices / counter-notices need to be served. Why should there be a difference between the special and general regimes?

10.55 Do consultees consider that the forms of notices available to Code Operators could be improved? If so, how? Consultation Paper, Part 7, paragraph 7.53.
There are prescribed forms for paragraph 5 notices and prescribed wording for the explanatory notes and for counter-notices but curiously no such provision for notices served under paragraph 20 or 21 leading to confusion over whether any letter suggesting termination merits a counter-notice. Often counter-notices are served out of an abundance of caution but the revised Code could be clearer across all notices to be served rather than just limited to paragraph 5 in: a) what notices should say; and b) the prescribed information to be contained in such notices.

10.56 Do consultees consider that more information is needed for landowners? If so, what is required and how should it be provided? Consultation Paper, Part 7, paragraph 7.54.
Yes - prescribed information with a warning (as with the explanatory notes annexed to a paragraph 5 notice).

10.57 We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms. Consultation Paper, Part 7, paragraph 7.60.
Yes, and Alicia Foo says as much in her Blundell Lecture paragraph 8.1.6(a).

INTERACTION WITH OTHER REGIMES

10.58 We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease. Do consultees agree? Consultation Paper, Part 8, paragraph 8.22.
There should be no double protection for operators – much has already been written by Wayne Clark and Oliver Radley-Gardner both of Falcon Chambers about how the 2 systems are wholly inconsistent with each other and we share their views.    EG - Ringing the changes.pdf As said in Alicia Foo's Estates Gazette article on the Code published 13 August 2012: *"This (removal of 1954 Act protection) will be music to landowners' and practitioners' ears as they have puzzled and despaired over how to make both regimes dovetail and avoids the multiplicity of notices being served under both regimes each without prejudice to each other!"*

10.59 We provisionally propose that where an agreement conferring a right on a Code Operator also creates an interest in land of a type that is ordinarily registrable under the land registration legislation, the interest created by the agreement should be registrable in accordance with the provisions of the land registration legislation, but that a revised code should make it clear that its provisions as to who is bound by the interest prevail over those of the land registration legislation. Do consultees agree? Consultation Paper, Part 8, paragraph 8.33.
We cannot see why land registration rules do **not** apply if the interest in question is a property interest to which the land registration legislation applies (but see below for our thoughts on whether realistically a code right is, in fact, a property right). If we are to assume there **is** a property right that requires registration to say as paragraph 2(7) suggests, it need not be, this does not make sense. As said in Alicia Foo's Estates Gazette article on the Code    EG - Ringing the changes.pdf published 13 August 2012: *"This is unsatisfactory. There should be a public record at the Land Registry if registrable or under the code so that there is clarity on which interests bind the land. Given the Law Commission's own stated policy of wanting the register to be a complete and accurate record of relevant title information, why not insist on these rights being registered? Alternatively, in the absence of this, a separate record of code rights easily ascertainable should be required"* We would point out though that you do not refer to or make mention of the interaction with Schedule 4 of the Communications Act 2003. This provides the following rights for network operators: (a) the right to enter land to inspect it to see if it suitable for the operator's network (paragraph 6); and (b) the right to compulsorily acquire land where authorised by the Secretary of State (presumably of the Department of Culture, Media, and Sport) and Ofcom where it can be shown that the land

is for or in connection with the establishment or running of the operator's network or where it can be reasonably foreseen that it will be so required (paragraph 3).

Enquiries of Ofcom and DCMS would suggest no authorisation has been sought from Ofcom or from DCMS to such a right.

This seems a curious oversight on the part of the Law Commission given the clear overlapping provisions of Schedule 4 of the Communications Act 2003 with paragraphs 2 and 5 of the Code. The difference is that the 2003 Act provides for the operator to acquire an **actual property interest** as opposed to the paragraphs 2 and 5 rights / court ordered rights. This is suggestive that perhaps a Code right is or was intended to be no more than a contractual wayleave and this may explain the operation of paragraph 2(7). The practice has been, however, for most operators to duck the question and enter into leases. If, however, the Law Commission recommendation that the 1954 Act protection is removed, many more operators may start considering the operation of Schedule 4 compulsory purchase rights instead of Code rights. This overlap does need addressing though. It is instructive to note that following the Schedule 4 compulsory purchase route would lead to a "consideration" payable to landowners akin to the Law Commission's recommended route of how landowners get paid. Could this be taken as Parliament's anticipatory endorsement of the Law Commission recommendations?

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

10.60 We ask consultees to tell us:

(1) whether they are aware of circumstances where the funds set aside under regulation 16 have been called upon;

(2) what impact regulation 16 has on Code Operators and on Ofcom;

(3) if a regime is required to cover potential liabilities arising from a Code Operator's street works; and

(4) if the answer to (3) is yes, what form should it take?

Consultation Paper, Part 9, paragraph 9.14.

10.61 We ask consultees for their views on the Electronic Communications Code (Conditions and Restrictions) Regulations 2003. Is any amendment required?

Consultation Paper, Part 9, paragraph 9.39.

These, on the face of it, provide little known but sensible guidance and clarification. However, these "flesh on the bones" regulations should be updated and consolidated into the revised Code to be read in conjunction with the Code. These could perhaps operate somewhat like the practice directions to the Civil Procedure Rules?

Batcheller Monkhouse

27 October 2012
Our Ref.: T001-15/TBS

Telecommunication Sites
Estate Agency
Estate Management
Rural Business Advice
Planning
Valuations
Lettings

[redacted]

James Linney
Law Commission
Steel House
11 Tothill Street
London. SW1H 9LJ

Dear Mr Linney,

LAW COMMISSION CONSULTATION PAPER NO 205
ELECTRONIC COMMUNICATIONS CODE
RESPONSE from Batcheller Monkhouse

I attach my firm's response to the above, together with an annexe of accompanying papers.

The Law Commission should surely identify the statutory rights which the operators need to ensure the public policy objectives secured by the Code are met. Beyond that, it should be a matter for freedom of contract.

The review should help fix only those bits of the Code that are broken.

We look forward to reading your report and/ or being invited to comment or explain any point we have made further.

Yours sincerely

T M Bodley Scott MRICS FAAV

Enc Response
Annexe to Response

Batcheller Monkhouse

LAW COMMISSION
CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

RESPONSE FORM

This optional response form is provided for consultees' convenience in responding to our Consultation Paper on the Electronic Communications Code.

You can view or download the Consultation Paper free of charge on our website at:

www.lawcom.gov.uk (see A-Z of projects > Electronic Communications Code)

The response form includes the text of the consultation questions in the Consultation Paper (numbered in accordance with Part 10 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

The reference which follows each question identifies the Part of the Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

As noted at paragraph 1.34 of the Consultation Paper, it would be helpful if consultees would comment on the likely costs and benefits of any changes provisionally proposed when responding. The Department for Culture, Media and Sport may contact consultees at a later date for further information.

We invite responses from 28 June to 28 October 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or

by post to: James Linney, Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ

Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information 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 Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

Your details

Name:
Tom Bodley Scott MRICS FAAV
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Batcheller Monkhouse No 1 London Road, Tunbridge Wells, Kent, TN1 1DH
Telephone number:
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Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):
We are responding on behalf of a firm and the following 63No Clients:

BM File No.	LLAddName
T001	Burnt House Farm
T001	Eastridge Estate
T001	Herriard Estates
T001	Hill Farm Estates Ltd
T001	Howarden Estate
T001	Palmers Farm
T001	Sale & Partners
T001	Yattendon Estate
T004	Burnett Business Park Ltd
T025	Derbyshire Dales DC
T028	Messrs R & P Waters
T033	C Brant Esq
T039	C Pitcher Esq
T043	Highfield Park Trust
T048	Fitzwilliam (Wentworth) Estates
T058	R Mortimer-Lee Esq
T059	S Newell Esq
T064	C Lamplugh Esq
T088	The Trustees for Methodist Church Purposes
T094	W Champion Esq
T113	Pippingford Estate Co
T115	The Trustees of Sir A Elton (dec'd)
T120	H Stroude Esq
T133	Shiftall Ltd
T137	HH Holman Properties Ltd

T139	R Thornhill Esq
T149	Mr & Mrs D Cooper
T152	Broadland Properties Ltd
T170	Lawnstill Ltd
T172	D Lowhar Esq
T193	N Kingsley-Smith SIPP
T196	Clinton Devon Estates
T205	The Moorings Management Ltd
T213	Corby Borough Council
T214	M Wallace Esq
T220	The Chamberlayne Estates
T221	Adames (Flansham) Ltd
T225	Mr & Mrs F Hodge
T242	The Mountcurzon Group
T245	The Linen Chest
T246	Chambers Farming Group Ltd
T248	Mr & Mrs A Ellis
T249	Brighton & Hove City Council
T250	St. Margaret's Court (Rottingdean) Ltd
T257	Abacona Investments Ltd
T259	Gawthorpe Estates Ltd
T267	Fosse Way Court Management Ltd
T268	Bridlington Cash & Carry Ltd
T269	Offer Group Ltd
T276	Sir Charles Ponsonby Bt
T279	Yeovil District Hospital NHS Foundation Trust
T280	NG Sperry Marine BV
T284	Kalmax Ltd
T289	E Young Esq
T292	Dr & Mrs B Dumughn
T294	Mr & Mrs A Clarke
T296	W & P Jolly
T300	Mr J and Mrs J Rudkin
T302	Mrs E Atkins
T310	J G Shelton & Co Ltd
T318	Jonathan Boucher Esq
T323	Wotton Estate
T325	S Bosley Esq

Letters of endorsement to this response are attached in the Annexe. Some of the letters make particular observations and these have been forwarded to you already as a separate response. They are also attached to this response.

Batcheller Monkhouse is a private partnership, regulated by the RICS, specialising in Telecommunications, property management, planning, development and estate agency.

Batcheller Monkhouse's Telecom Department is responsible for advising property owners on all aspects relating to their Telecom installations across the whole of the UK. Batcheller Monkhouse

does not act for the Code Operators.

The Firm has acted, and does act, for over 300 separate Site Providers with around 1,300 different telecom installations between them. Most of these installations are for above ground telecom apparatus (i.e. not Cable)

The Firm has two principal partners, Tom Bodley Scott MRICS and Leo Hickish FRICS, each with over 20 years' experience in telecoms, acting solely for property owners. The firm also employs two other full time staff in their telecom department. The firm is one of the largest of its kind in the UK.

Tom Bodley Scott is the Partner in charge of the Telecom Department based in Batcheller Monkhouse's Tunbridge Wells office. Tom is the editor of the firm's regular Newsletter and has also been involved in the preparation of professional papers and briefings on issues relating to the industry. Tom has also spoken at various seminars, including those run by the RICS and the Henry Stewart Conference Studies, CLT Conferences and the Institutional Landowners Group of the Country Land & Business Association on landlord and tenant issues and valuation principles relating to the telecoms industry.

Batcheller Monkhouse have compiled and manage a database covering over 10,000 separate Telecom transactions providing some helpful evidence to which we will refer in this response.

We are happy for this evidence to be made available for scrutiny on a confidential basis.

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:

We are happy for the information to be openly available.

As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: GENERAL

10.3 We provisionally propose that code rights should include rights for Code Operators:

(1) to execute any works on land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus;

(2) to keep electronic communications apparatus installed on, under or over that land; and

(3) to enter land to inspect any apparatus.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.16.

We agree that these activities (together with "operation") should potentially be subject to the Code so that when the Code is invoked by a Code Operator they become Code rights.

However, Code protection should only be available in respect of apparatus that is the apparatus of the specific Code Operator seeking to rely on the rights given by the Code. This is to ensure that the Site Provider, as owner of the land, and Code Operator, as owner of the specific apparatus, knows and are bound by their respective rights and obligations under an agreement.

We Recommend:

1. That (1) above is amended to read "to execute any works on land for or in connection with the installation, maintenance, ***operation***, adjustment, repair or alteration of ***the Code Operator's*** electronic communications apparatus;"

10.4 Do consultees consider that code rights should be extended to include further rights, or that the scope of code rights should be reduced?

Consultation Paper, Part 3, paragraph 3.17.

We believe that the code rights are appropriate in extent.

However, if the rights are extended (or clarified) so that, say, services to the apparatus are also covered by the Code, the ownership of those services needs to be considered as well. This is dealt with in our recommended alteration set out in Paragraph 10.3 above.

10.5 We provisionally propose that code rights should be technology neutral.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.18.

We agree that this is a good proposal in respect of ensuring that one technology is not given any undue advantage over another. However, the difficulty arises in the manner in which they are installed on over or under land.

The method of recording the rights and liabilities of Code Operators installing differing apparatus on, over or under land has evolved in different ways to become the "Market norm" from:

- A lease for a defined area with exclusive possession (such as green field masts) to
- An easement or wayleave (such as for a cable).

Different rights and obligations exist for the various arrangements and different markets have evolved.

Leases are basically commercial arrangements with a well understood market to assess rental value and well understood lease terms.

Easements and wayleaves, which are common in agreements with utility companies with

compulsory purchase powers, often use standard agreements with standard rates of Consideration/ Price recommended by such organisations as the NFU and CLA.

In either case the Consideration/ Price appears to reflect the nature of the right taken.

The issue of Consideration/ Price and Compensation is covered later in our response.

10.6 Do consultees consider that code rights should generate obligations upon Code Operators and, if so, what?

Consultation Paper, Part 3, paragraph 3.19.

Firstly:
Many leases have obligations on Code Operators not to cause a nuisance and on Site Providers to give peaceful and quiet occupation. However, most agreements with Code Operators have no general obligation on how each party should behave.

In practice, we have found that some agents acting for Code Operators are frustrated by the time Site Providers might take to, say, grant consent for an equipment upgrade. Likewise, we increasingly find that Code Operators, once they have secured occupation of a site, fail to act in a "tenant like manner" or "diligently" (for example in a lease renewal during a rising market).

Given the statutory protection of the Code, perhaps it is now right that an obligation to act diligently should be generated on both parties to liaise and negotiate a settlement.

Secondly:
In Paragraph 3.15 of the Consultation Paper it is suggested that the grant of a right to install a mast does not oblige the Code Operator to insure against any damage to the land arising from the presence of the mast. From most of the agreements that we have read there are provisions in the lease that oblige the Code Operator to insure and /or indemnify the owner against damage sustained.

Although there are also often provisions to make good the site if/ when the Code Operator vacates, there is seldom agreement by the Code Operator to insure or provide a bond for such works, should for instance the Code Operator go bankrupt. Although the occurrence of Code Operators going bankrupt is thankfully small, we are aware that in the case of Dolphin (who then became Inquam) that they abandoned equipment on site when they went bankrupt. This left an inherent cost to the Site Provider to remove equipment (including masts) from a variety of locations, at some cost (The reinstatement of a site that had housed a 15m mast would be about £15,000).

Thirdly:
We have heard many Code Operators claim (incorrectly) that trying to establish market evidence is difficult. If this is so and in an attempt to create greater transparency for the market place as a whole, it is hard to understand why Code Operators:

1. Routinely have confidentiality agreements incorporated into leases (we have analysed 297 agreements with Orange, who are the one Code Operator who have such a clause in their standard agreements, and of those which we were able to read in full 108 (36%) have confidentiality clauses) and
2. When they lodge leases with the Land Registry, routinely apply to have key provisions (including rent paid) blanked out/ made confidential. We attach in the Annexe in the section dealing with Response 10.59 evidence of this practice where the financial information "has not been stated" by the Land Registry. We acted for the Site Provider and know for certain that there is no confidentiality clause in the lease.

We Recommend that:

1. There is an obligation in any new Code on both parties to act diligently and in a timely

manner.
2. There is an obligation in any new Code on the Code Operator to insure or take out a bond to cover the cost of reinstatement, should the Code Operator go bankrupt (as is seen in Wind Farm agreements)
3. Confidentiality clauses should either be banned or only available to either Site Provider or Code Operator in exceptional circumstances.
4. Leases lodged with the Land Registry should be complete unless exceptional circumstances dictate that all or part of the lease should remain confidential.

10.7 We ask consultees to tell us their views on the definition of electronic communications apparatus in Paragraph 1(1) of the Code. Should it be amended, and if so should further equipment, or classes of equipment, be included within it?

Consultation Paper, Part 3, paragraph 3.27.

The definition of apparatus ought to be general because it is difficult to anticipate how technological development will alter the telecommunications apparatus needed for a network.

It might be appropriate to extend the definition of electronic communications apparatus to include the Code Operators own services to its electronic communications apparatus such as power cables.

We refer to the relevance of the ownership of electronic communications apparatus in Paragraphs 10.3 and 10.4 above.

We mention this because electronic communication apparatus could belong to a non Code Operator (such as a mast, belonging to a Police authority, to which the Code Operator has attached its apparatus). In such circumstances where a non Code Operator owns apparatus, it should be appropriate that the Site Provider is able to adjust, repair, alter or (conceivably) move its apparatus as it chooses.

A parallel can be seen in the water industry where the water pipe on side of the meter belongs to a statutory undertaker and the water pipe on the other belongs to the house holder. The Code Operator should not be able to frustrate the plans of the non Code Operator to do these things to its own “electronic communications apparatus” (ie support structure). An appropriate proviso can be built to ensure that the Code Operator’s reasonable operation of that part of its network from the site is maintained.

Likewise, the electricity to a site may, for instance, be provided either by the Regional Electricity Company, the Site Provider (a “Landlord’s Supply”) or the Code Operator (via a generator).

The rights vary depending upon who owns the services. Regional electricity companies are statutory undertakers and they have their own legislation to protect their equipment. Services provided by Code Operators should, in our opinion, be covered by the new Code and any services provided by the Site Provider should not be Code protected but instead be at the control of the Site Provider and covered by any contractual arrangement that the Site Provider might enter into directly with the Code Operator.

From a practical point of view a Site Provider can find it very difficult to obtain information on which item of electronic communication apparatus installed on site might belong to which Licenced Operator.

In instances where a Site Provider has let space on a roof to more than one Code Operator, it can be very difficult to establish not only which Code Operator is occupying the site but also which particular item of electronic communication apparatus belongs to which Code Operator. This problem will become more widespread if more sites become shared.

We Recommend that:

1. The definition of electronic communications apparatus should be extended to include service cables owned by that particular Code Operator.
2. There ought to be the ability for Site Providers to get Code Operators to provide certain information on:
    a. what electronic communications apparatus they, and/ or their Sharers, own and have installed on the site and
    b. which other Code Operators are sharing the site or sharing use of the principal Code Operator's equipment. That information should include:
        i. The name of the sharer
        ii. A schedule of the sharer's equipment on site
        iii. The location of the sharer's equipment on site and
        iv. Certain other details concerning the arrangements between the sharer and the Code Operator including the date the sharer went on site, and the terms of that sharing arrangement, including the amount of Consideration/ Price paid.

10.8 We ask consultees to tell us their views about who should be bound by code rights created by agreement, and to tell us their experience of the practical impact of the current position under the Code.

Consultation Paper, Part 3, paragraph 3.40.

We have inspected 89 transactions involving telecommunication installations on property that has its freehold owned by a third party who might not be party to the agreement with the licensed Code Operator.

Most of these transactions involve freeholders who are local authorities (in the case of business parks etc) or traditional rural estate owners (such as is seen where the Forestry Commission might have been granted a 999 year lease over a wood), or historic urban estates (such as Grosvenor in London).

On only a very small proportion of these transactions has a dispute arisen between the Site Provider and their freeholder. However, We do accept that there may be other instances where this is more widespread.

To avoid disputes, the Code should bind the specific parties to the agreement: The Code Operator and the Site Provider, with an interest in the land, who is capable of granting the agreement.

That person, with the interest in the land capable of granting the agreement, may not be the occupier and should not be a licencee. They should have a long term interest in the land.

We Recommend that:

1. The agreement has to be with the person who is actually capable of granting the interest required (the "Site Provider").
2. No one who cannot grant the right should be party to an imposed agreement for that right.
3. Code Operators should be required to undertake the same research into title & interests as those purchasing property have to.
4. Site Providers should give full details of those with interests in the land.

10.9 We ask consultees for their views on the appropriate test for dispensing with the need for a landowner's or occupier's agreement to the grant of code rights. In particular, consultees are asked to tell us:

(1) Where the landowner can be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code, should it be possible for the tribunal to make the order sought without also weighing the public benefit of the order against the prejudice to the landowner?

(2) Should it be possible to dispense with the landowner's agreement in any circumstances where he or she cannot be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code?

(3) How should a revised code express the weighing of prejudice to the landowner against benefit to the public? Does the Access Principle require amendment and, if so, how?

Consultation Paper, Part 3, paragraph 3.53.

The existing Code has not to our knowledge had to deal with this test.

The test to assess whether or not to impose Code rights on a Site Providers property should be the first stage of the question. The second should be the assessment of compensation, if it is decided that it is right for Code rights to be imposed.

Should code rights be imposed?
If the Code Operator wishes to install electronic communications apparatus on property against the wishes of a Site Provider (which could, I imagine, also include some of the public), it seems logical that there should be a demonstrable and significantly greater benefit to the public in those rights being granted. If this cannot be shown, it must be reasonable for access to be denied.

As such, there must be occasions when the concerns of one faction (the Site Provider) [with or without some anxious public] are capable of outweighing the benefit to the [rest of the] public.

Compensation
If the benefit to the Public does outweigh the rights of the Site Provider, there ought to be the second aspect of the test which is to assess the loss to the Site Provider so as to put the Site Provider in no worse a financial position than it was in before the imposition of the Code Rights.

The Site Provider should also be able to charge the Code Operator a Consideration/ Price for the right to be there (see later comments), as is currently the case.

We Recommend that:

1. The test to assess whether or not to impose code rights on a Site Providers property should be drafted so that:
    a. It is the public's access to electronic communications that matters, not the interests of any specific Code Operators.
    b. It is based on wide criteria such as the improvement in choice and quality, so that the Court can make a judgement based on these criteria.
    c. The Site Providers case is heard
    d. The burden of proof rests with the Code Operator as it has access to the evidence needed to demonstrate any improvement.
2. If the benefit to the Public does outweigh the rights of the Site Provider and an order is made to install the apparatus, the order should specify:
    a. The Compensation and Consideration payable to the Site Provider (as at present) and, where appropriate
    b. The accommodation works to be undertaken.
3. Any opinion of that part of the public who "are on the side of the Site Provider" should also

be taken into consideration as they may also conceivably suffer some loss.

10.10 We ask consultees to tell us if there is a need for a revised code to provide that where an occupier agrees in writing for access to his or her land to be interfered with or obstructed, that permission should bind others with an interest in that land.

Consultation Paper, Part 3, paragraph 3.59.

The consent of an occupier should not bind anyone with a greater interest in the land than that occupier.

In practice, prior to telecom apparatus being installed on property, the site acquisitions surveyor acting for the Code Operator will agree separate access rights and/or rights to lay cables etc over third parties' land. Only once that has been agreed the main lease between the Code Operator and Site Provider can be completed.

We proposed in Paragraph 10.8 above that the above procedure is formalised so that prior to installing any apparatus on the Site Provider's property, the consent (where needed) of any other party with an interest in the land should also be secured. If this is adopted there should be few if any disputes.

10.11 We ask consultees to tell us their views about the use of the right for a Code Operator to install lines at a height of three metres or more above land without separate authorisation, and of any problems that this has caused.

Consultation Paper, Part 3, paragraph 3.67.

We have not come across this problem in practice except when an extra fibre (for telecommunication purposes) is installed on pylon sites (used for the supply of power).

Normally owners will grant a right to an electricity company to install power cables across its property and restrict that right to power cables only. If the electricity company then wants to run a cable comprising telecommunication apparatus it is usual for the Code Operator to negotiate a variation to the existing agreement to allow the telecom apparatus to be installed.

We Recommend that:

1. Separate authorisation should be obtained for the right to install telecommunication apparatus on power lines where that right is not available under the electricity wayleave or easement. Each party should be free to negotiate freely commercial terms for such a right.
2. The 3m height should be raised to 5m to cater for larger machinery that might be passing underneath.

10.12 Consultees are asked to tell us their views about the right to object to overhead apparatus.

Consultation Paper, Part 3, paragraph 3.68.

We believe that overhead apparatus will affect visual and other amenities enjoyed by the Site Provider and as such it should be correct that the Site Provider should be able to object to such apparatus.

10.13 Consultees are asked to give us their views about the obligation to affix notices on overhead apparatus, including whether failure to do so should remain a criminal offence.

Consultation Paper, Part 3, paragraph 3.69.

In our experience there is a degree of uncertainty over the interpretation of what overhead apparatus is, because we have come across a number of instances where Notices have been fixed on rooftop installations when perhaps this might not have been the intention under the Code.

We can see the advantages of labelling overhead apparatus so that the public can identify publicly the Code Operator's interest and notify them in an emergency.

We are unclear as to what advantages there are in making the failure to affix notices a criminal offence.

10.14 Do consultees consider that the current right for Code Operators to require trees to be lopped, by giving notice to the occupier of land, should be extended:

(1) to vegetation generally;

(2) to trees or vegetation wherever that interference takes place; and/or

(3) to cases where the interference is with a wireless signal rather than with tangible apparatus?

Consultation Paper, Part 3, paragraph 3.74.

In our experience most agreements have rights granted to Code Operators that enable them to trim or lop trees. We see no reason why this should not be extended to include vegetation generally. Code Operators, when they install telecommunication apparatus on a Site Provider's property, will survey the site and if the site is to be erected in, say, a wood they will ensure that the height of a mast is sufficient to avoid interference from the trees. If Code Operators were to be granted the right to cut back or lop trees, there ought to be an obligation on the Code Operator to undertake their initial survey with due diligence, so as to avoid the scenario that a Code Operator installs a mast that is too short and subsequently applies to the Site Provider to lop a large number of trees in the area, which would not have been necessary if the Code Operator had installed a mast at the correct height in the first instance.

We Recommend that:

1. In cases where the obstruction is on the land owned by the party to the agreement, the Code Operator should be granted the right to cut back vegetation as a result of the growth of that vegetation, with the Site Provider's consent such consent not to be unreasonably withheld.
2. In cases where the obstruction is remote from the Site Provider, the matter should be dealt with like a new agreement where the Code Operator endeavours to reach agreement with the owner of the obstruction (including any payment for Compensation & Consideration) with recourse to the Courts if the access test needs to be judged.
3. The Code Operator has to illustrate that there is no other reasonable means of avoiding the obstruction.
4. The Site Provider is compensated for its loss.
5. The Code Operator is required to ensure that the work is carried out by an appropriate person (such as a tree surgeon) and at an appropriate time of year.

10.15 We ask consultees:

(1) whether Code Operators should benefit from an ancillary right to upgrade their apparatus; and

(2) whether any additional payment should be made by a Code Operator when it upgrades its apparatus.

Consultation Paper, Part 3, paragraph 3.78.

We have analysed 4,533 transactions with provisions for upgrades set out. This has been summarised in the Annexe.

Preamble

The practice of restricting upgrades is widespread (60% of all agreements) and has arisen for a number of reasons including where Site Providers:

1. [of a green field site] might worry about the height or the aesthetic look of a mast.
2. [of a roof top site] are concerned about the impact an installation might have on the loading on the roof or future works to the roof such as re-roofing works or the ability to install air conditioning units.
3. [might own the mast itself, such as a Police Authority] and are concerned to control the number or height of the antennae on the mast to prevent the mast becoming overloaded and having to be replaced or strengthened.

What currently happens

Code Operators have accepted restrictions and when reaching agreement on the terms for a new agreement often ensure that they have sufficient rights to enable them to install what they want and a bit more (for future upgrades).

The agreement both parties enter into records the rights and sets the rent. In general, the greater the restriction on apparatus, the lower the rent.

Should a Code Operator wish to install some equipment over and above that permitted by their agreement, either of the following might happen:

1. Each party refers to the agreement. Some agreements set out a procedure to follow when a Code Operator wants to upgrade their equipment. The agreement might also include a schedule of prices (often referred to as a "Rate Card") for each element of additional apparatus deployed. An example of this is set out in the Annexe or
2. The Parties negotiate a variation to the agreement. In the vast majority of cases terms for a Variation to the restricted agreement are agreed amicably and in good time.

   In those few cases where Site Providers demand too high an increase in rent or be too slow in granting consent, it is extremely rare for the matter to be referred to some dispute resolution service, perhaps because no such forum is currently available or if it were, it is considered too cumbersome for what might be a relatively minor or low value matter. Instead, the Code Operator either manages without the upgrade, or finds another way of carrying out the upgrade, which is permitted by the agreement, or "black balls" the Site Provider by seeking to vacate the site at the earliest opportunity and engage with a more lenient Site Provider.

Summary

1. Most agreements specify restricted equipment rights and provide that certain alterations or upgrades cannot take place without certain procedures taking place, further rent being paid, or terms having to be negotiated.
2. Lower rents are agreed for sites with small amounts of apparatus.
3. The Market for assessing the additional rent to be paid for an Upgrade is established and available within the industry.
4. Site Providers may require restricted agreements for valid reasons, such as to protect their property

5. The arrangement of settling disputes should be improved as a means of reducing any aspect of ransom.

We Recommend that:

1. Parties to an agreement should continue to be free to negotiate terms relating to the extent of equipment and the right to alter and upgrade that equipment.
2. On those agreements where the Code Operators are restricted, they should not benefit from an ancillary right to upgrade their apparatus. The terms of the agreement should stand.
3. The Code Operator and Site Provider should be free to agree what commercial arrangements they choose for a variation to an existing agreement in including Consideration.
4. Any payment under 3 above is based on market evidence and if not agreed is referred to an appropriate Dispute Resolution Service with the facility to quickly and efficiently deal with the dispute.

10.16 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from sharing their apparatus causes difficulties in practice;

(2) whether Code Operators should benefit from a general right to share their apparatus with another (so that a contractual term restricting that right would be void); and/or

(3) whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it shares its apparatus.

Consultation Paper, Part 3, paragraph 3.83.

We have analysed 3,066 transactions with provisions for site sharing set out. This has been summarised in the Annexe.

Preamble

Evidence suggests that most agreements cover the issue of the sharing of the occupation of the site and/ or the use of a Code Operator's apparatus ("Site Sharing").

A relatively small proportion (14%) ban site sharing and at least about one half of agreements have some form of arrangement for the payment to the Site Provider of an additional sum, over and above a "base rent", should the site and/ or apparatus be shared ("Pay Away").

Pay Aways to Site Providers became more common as a result of Site Providers reacting to the advent of new operators in the market and the Government wishing to control the proliferation of masts by encouraging the sharing of sites. Site Providers sought Pay Aways in new agreements as a means of securing an additional Consideration to reflect the fact that their tenant (as Host) gets a financial advantage by charging its Sharer an annual fee.

Site Providers were also faced with additional visits to the site across their property; and the very presence of an additional licensed Code Operator on their property had repercussions under the Code when it came to seeking the alteration or removal of apparatus.

What currently happens

The amount a Sharer may pay the Host to Site Share has in the past been based on the amount of equipment the Sharer installs on the Host's apparatus (such as the mast).

The amount of Pay Away is usually based on a % (typically 25-50%) of the Site Share fee.

However, more recently and in particular with the advent of Radio Access Network sharing ("RAN sharing") the Pay Away set out in an agreement is based either on a % of the rent the Host pays the Site Provider (per additional sharer); or on a fixed sum (per additional sharer).

Code Operators are seeking to change the arrangements over site share payments so that they can avoid having to make them in future.

For instance, some Code Operators as Hosts:

1. Are choosing not to charge their joint venture partners a Site Share fee (meaning that the Site Provider receives a Pay Away of £0 (i.e. 25-50% of £0) or
2. Avoid the site sharing provisions of their agreements by either using the assignment provisions to assign the lease to themselves and another operator so as to become a joint tenant or assigning the lease to a "group company" which might include two or more licenced Code Operators (see more detailed response in Paragraph 10.18 below).

In those circumstances where a Code Operator as Host wishes to allow another Code Operator to share the Site but is banned from doing so, the agreement is varied by negotiation.

In most cases terms for a Variation to the restricted agreement are agreed amicably and in good time. In those cases where the Site Provider is demanding too high a Pay Away or the Site Provider does not want a further Code Operator (with or without any additional equipment) onto the site because it may, for instance, frustrate the Site Providers plans to redevelop the site the site share does not take place.

Summary

1. A small proportion of agreements (14%) ban site sharing, the remainder of agreements allow site sharing either conditionally or unconditionally.
2. Where needed, the Market for assessing the additional Pay Away to be paid for a Site Share is established and available within the industry.
3. Site Providers seek Pay Aways because a site is worth more, where its tenant sub lets space to other operators, than a similar site where no such sharing is taking place

We Recommend that:

1. Parties to an agreement should continue to be free to negotiate terms relating to the arrangements over site sharing and encorporate them into a binding agreementthat is not trumped by the Code.
2. Code Operators should not benefit from a general right to share their apparatus with another (so that a contractual term restricting that right would be void)
3. On those agreements where the Code Operators are banned from site sharing, both Site Provider and Code Operator should be entitled to agree terms between them (including payment of a Consideration, if any) for a novation to an existing agreement to reflect the added value, if any, of the site to the Code Operator.
4. Any payment under 3 above is based on market evidence and if not agreed is referred to an appropriate Dispute Resolution Service.

10.17 We ask consultees to what extent section 134 of the Communications Act 2003 is useful in enabling apparatus to be shared, and whether further provision would be appropriate.

Consultation Paper, Part 3, paragraph 3.88.

We are not aware of any party applying the provisions of s134 of the Communications Act 2003. As such we conclude that it is not useful.

However, because if it should apply, s134 turns an absolute prohibition on sharing into one that requires the Site Provider's consent, such consent not to be unreasonably withheld, we believe it goes against the general principal that parties to an agreement should be free to negotiate terms relating to the sharing of the occupation of the site and/ or the use of a Code Operator's apparatus.

We Recommend that:

1. Parties to an agreement should continue to be free to negotiate terms relating to the sharing of the occupation of the site and/ or the use of a Code Operator's apparatus.

10.18 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from assigning the benefit of agreements that confer code rights causes difficulties in practice;

(2) whether Code Operators should benefit from a general right to assign code rights to other Code Operators (so that a contractual term restricting that right would be void); and

(3) if so, whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it assigns the benefit of any agreement.

Consultation Paper, Part 3, paragraph 3.92.

We have analysed 1,902 transactions with provisions for assignment set out. This has been summarised in the Annexe.

Preamble

Evidence suggests that most agreements (98%) cover the issue of the assignment of agreements. Most agreements currently have some form of restriction on assignment (such as only allowing assignment to a Group Company), but only a relatively small proportion (5%) ban assignment.

Arrangements over the assignment of agreements are common in all commercial leases in order to maintain covenant strength.

Since the beginning of 2009 the assignment provisions in leases have come under closer scrutiny as Code Operators seek to find ways to allow a joint venture partner of theirs onto a site without any payment that might become due under the site sharing provisions of their lease. Code Operators do this by assigning their leases not to one Company (as one might expect under a merger) but to itself and another Company. For example, T-Mobile (now Everything Everywhere) and Hutchison 3G sought to share their portfolio of sites with each other. Rather than rely on the site sharing provisions of the agreements to do this they decided to seek to assign each of their leases into the joint names of themselves and the other. On completion of the assignment each lease then had T-Mobile (now Everything Everywhere) and Hutchison 3G as joint tenants.

More recently other Code Operators[1] are seeking to alter the definition of "Group or Associated Companies" in leases away from the usual definition under s42 Landlord & Tenant Act 1954 to "*a company in which [the tenant Code Operator] has a 15% or more shareholding*". The tenant Code Operator can then set up a company with one or more other licensed Code Operators[2] (who are not necessarily genuine Group Companies, under previously accepted definitions) in which it retains a 15% or more shareholding and then assigns its lease to that company, thus enabling one or more other Code Operators to operate from the site, when previously they might not be able to.

It is clear that these ways of sharing portfolios of sites with each other is being pursued because it costs the respective companies much less. As can be seen from the tables in the Annexe, nearly three times as many agreements ban site sharing compared to those agreements that ban assignment (14% and 5% respectively). In addition, in those leases that we have analysed 36% of the site sharing clauses provide for no payment compared to nearly 100% of the assignment clauses which provide for no payment to be made to the Site Provider.

[1] Such as Vodafone

[2] As is the case with Telefonica and Vodafone setting up the company Cornerstone Telecommunications Infrastructure Ltd (Company No 08087551)

What currently happens
In those [few] circumstances where a Code Operator wishes to assign its lease but is banned from doing so, the agreement might need to be varied by negotiation.

In most cases terms for a Variation to the restricted agreement are agreed amicably and in good time. We are aware of no cases where the Code Operators feel that they are being held to ransom.

Summary

1. A small proportion of agreements ban assignment (5%), the remainder of agreements allow assignment either conditionally or unconditionally.
2. Some Code Operators are seeking to use the assignment provisions of the agreements, in ways that were originally not envisaged, as a means of becoming joint tenants on a site or to avoid future Pay Aways to Site Providers
3. Where needed, the Market for assessing the additional payments (usually a one off Premium) to allow Assignment is established and available within the industry.
4. Site Providers seek payments because a site which is occupied by two Code Operators is worth more than a similar site occupied by just one and a Site Provider is at a greater disadvantage with two rather than one Code Operator operating from the site.

We Recommend that:

1. Parties to an agreement should continue to be free to negotiate terms relating to the arrangements over assignment. The Code should not over ride that agreement.
2. Code Operators should not benefit from a general right to assign code rights to other Code Operators.
3. On those agreements where the Code Operators are banned from assigning both Site Provider and Code Operator should be entitled to agree terms between them (including payment of a Consideration, if any) for a novation to an existing agreement to reflect the added value, if any, of the site to the Code Operator.
4. Any payment under 3 above is based on market evidence and if not agreed is referred to an appropriate Dispute Resolution Service.

10.19 We ask consultees to tell us if they consider that any further ancillary rights should be available under a revised code.

Consultation Paper, Part 3, paragraph 3.94.

The Code should not cover any further ancillary rights

10.20 We ask consultees to tell us if they are aware of difficulties experienced in accessing electronic communications because of the inability to get access to a third party's land, whether by the occupiers of multi-dwelling units or others.

Consultation Paper, Part 3, paragraph 3.100.

We have never come across this as being a problem. It is normal for the property, should it be sold away, to reserve appropriate rights for services which would normally include telecom apparatus.

10.21 Do consultees see a need for a revised code to enable landowners and occupiers to compel Code Operators to use their powers to gain code rights against third parties?

Consultation Paper, Part 3, paragraph 3.101.

We do not see such a need.

10.22 Are consultees aware of circumstances where the power to do so, currently in Paragraph 8 of the Code, has been used? Consultation Paper, Part 3, paragraph 3.102.
No, We are not aware of such a power being used.

10.23 We ask consultees: (1) to what extent unlawful interference with electronic communications apparatus or a Code Operator's rights in respect of the same causes problems for Code Operators and/or their customers; (2) to what extent any problem identified in answer to (1) above is caused by a Code Operator having to enforce its rights through the courts or the nature of the remedy that the courts can award; and (3) whether any further provision (whether criminal or otherwise) is required to enable a Code Operator to enforce its rights. Consultation Paper, Part 3, paragraph 3.106.
It is suggested that Code Operators need to enforce their rights and existing methods of protecting those rights are too slow and that in some circumstances it is appropriate for a Site Provider to be committing a criminal offence for, say, denying access. In our experience, we come across circumstances whereby an agreement comes to an end and despite best efforts from the Site Provider, the terms for a new agreement cannot be agreed. In order to protect the Site Provider's interests, Paragraph 21 Notices might be served on the Code Operator and/ or no rent demanded. In many, perhaps most, cases we have found that Code Operators are happy not to negotiate, knowing that it is an expensive and time consuming procedure for the Site Provider to pursue the matter through the courts in order to reach agreement for the Code Operator's continued occupation. Therefore, in these instances we find that a Code Operator continues to operate from the site without being charged a rent and without any inclination to agree appropriate market terms for their continued occupation. Some Site Providers may resort, out of frustration, to deny Code Operators access (for example) to the site in the hope that they will be encouraged to negotiate terms for their continued occupation. It is not appropriate for the Site Provider to be deemed to be committing a criminal offence. Many agreements granted by Site Providers to Code Operators do permit 24 hour access to the site. There may be circumstances when it is appropriate for the Site Provider to effectively breach such a right such as for Health & Safety or security reasons. This can apply when building works are being carried out on a rooftop installation or if the Code Operator has not provided appropriate risk assessments or security clearance (such as at Water Authority or MOD sites). In these circumstances it would be inappropriate for the Site Provider to be committing a criminal offence. We would envisage that the circumstances when unlawful interference with electronic communications apparatus occurs would fall away if the procedure for renewing agreements and handling disputes were to be streamlined (see later response). **We Recommend that:** 1. Procedures are improved to encourage both sides to negotiate.

10.24 We ask consultees whether landowners or occupiers need any additional provision to enable them to enforce obligations owed to them by a Code Operator. Consultation Paper, Part 3, paragraph 3.107.
As indicated in our response to 10.23 above, the occasions when a Code Operator is forced to take legal action to enforce their rights under the agreement and the Code should be reduced. We have many cases (as a firm we are handling about 200 negotiations at any one time) where the Code Operators are both unresponsive and dilatory in pursuing any necessary negotiations to a conclusion after they have installed their apparatus. They have what they need and are reluctant to engage in negotiations, especially if they might involve an increase in rent. Negotiations for Lease renewals seem the worst. Code Operators serve their counter-notices but then take no action to agree terms to remain on site until driven to the steps of the Court. This is a costly and unnecessary process for the average Site Provider, a fact the average Code Operator knows and dare we say it, exploits. Even when trying to agree an inflationary rent review (using a simple mathematical formula), we often have to send "Calderbank" letters to Code Operators to encourage them to return the signed rent memoranda. The symbiotic relationship Site Providers and Code Operators had only a few years ago, when the activity in site acquisition was higher, is now at risk. Site Providers are concerned about the tactics deployed by the large commercial companies with statutory privileges and do not like them riding rough shod over the interests of the Site Providers with whom they have a legal relationship. As mentioned earlier, timeliness is required and procedures are needed for getting things done. There should be consequences for not getting things done. This can fairly be applied to Site Providers and Code Operators alike. This backed up with an effective and appropriate dispute resolution mechanism will encourage better behaviour. We believe that there is a role for Ofcom to take into consideration the interests of Site Providers and Code Operators and to enforce the obligations owed to Site Providers by Code Operators. **We Recommend that**: 1. Consideration be given to encourage timeliness in getting Site Providers and Code Operators to agree terms 2. There should be consequences for not getting things done in time. 3. If possible, Ofcom should have a closer role in the monitoring of Code Powers so that they have a closer understanding of when such powers are exercised.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: SPECIAL CONTEXTS

10.25 We provisionally propose that the right in Paragraph 9 of the Code to conduct street works should be incorporated into a revised code, subject to the limitations in the existing provision.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.11.

No comment as this is an area of work we do not come across

10.26 We ask consultees to let us know their experiences in relation to the current regime for tidal waters and lands held by Crown interests.

Consultation Paper, Part 4, paragraph 4.20.

No comment as this is an area of work we do not come across

10.27 We seek consultees' views on the following questions.

(1) Should there be a special regime for tidal waters and lands or should tidal waters and lands be subject to the General Regime?

(2) If there is to be a special regime for tidal waters and lands, what rights and protections should it provide, and why?

(3) Should tidal waters and lands held by Crown interests be treated differently from other tidal waters and lands?

Consultation Paper, Part 4, paragraph 4.21.

No comment as this is an area of work we do not come across

10.28 We ask consultees:

(1) Is it necessary to have a special regime for linear obstacles or would the General Regime suffice?

(2) To what extent is the linear obstacle regime currently used?

(3) Should the carrying out of works not in accordance with the linear obstacle regime continue to be a criminal offence,or should it alternatively be subject to a civil sanction?

(4) Are the rights that can be acquired under the linear obstacle regime sufficient (in particular, is limiting the crossing of the linear obstacle with a line and ancillary apparatus appropriate)?

(5) Should the linear obstacle regime grant any additional rights or impose any other obligations (excluding financial obligations)?

Consultation Paper, Part 4, paragraph 4.30.

No comment as this is an area of work we do not come across

10.29	We provisionally propose that a revised code should prevent the doing of anything inside a "relevant conduit" as defined in section 98(6) of the Telecommunications Act 1984 without the agreement of the authority with control of it. Do consultees agree? Consultation Paper, Part 4, paragraph 4.34.
No comment as this is an area of work we do not come across	

10.30	We provisionally propose that the substance of paragraph 23 of the Code governing undertakers' works should be replicated in a revised code. Do consultees agree? Consultation Paper, Part 4, paragraph 4.40.
No comment as this is an area of work we do not come across	

10.31	We provisionally propose that a revised code should include no new special regimes beyond those set out in the existing Code. Do consultees agree? Consultation Paper, Part 4, paragraph 4.43
The fewer the regimes the better.	

ALTERATIONS AND SECURITY

10.32 We provisionally propose that a revised code should contain a procedure for those with an interest in land or adjacent land to require the alteration of apparatus, including its removal, on terms that balance the interests of Code Operators and landowners and do not put the Code Operators' networks at risk. Do consultees agree? Consultation Paper, Part 5, paragraph 5.11.
We agree provided that the correct balancing of interests is made even if, after that balancing, part of the Code Operators' network is put at risk. We consider this matter in our response in Paragraph 10.33 below.

10.33 Consultees are asked to tell us their views about the alteration regime in paragraph 20 of the Code; does it strike the right balance between landowners and Code Operators? Consultation Paper, Part 5, paragraph 5.12.

We also take the regime in Paragraph 20 of the Code to mean that it can be exercised by a Site Provider during the currency of a lease, where that Site Provider would otherwise have no right to require alteration.
 	
In practice, we have found that a number of Site Providers who granted leases when sites were originally acquired failed to fully consider the implications of the Code and granted agreements to the Code Operator with no right to require alteration (including removal) in favour of the Site Provider.
 	
This has meant that if the Site Provider wants to remove the apparatus to redevelop a field for residential development or relocate the apparatus to renew asphalt on a roof, may have had either to rely on Paragraph 20 of the Code or to wait until they are in a position to require the Code Operator to leave (such as at the end of the lease) at which point they might be able to proceed down the Paragraph 21 route.
 	
Due to the potential liability for a Site Provider to incur the cost of the Code Operator's move under Paragraph 20, Site Providers tend to avoid this route wherever possible.
 	
In those instances where we have advised Site Providers to follow the Paragraph 20 regime we have found that it can be cumbersome.
 	
To illustrate this, we set out the following scenario:
• The Site Provider serves a Paragraph 20 Notice and receives a Counter Notice
• Surveyors are instructed to act for each side to reach a negotiated settlement
• Heads of Terms are agreed:
  ○ to deal with matters such as the timing of the alteration (typically the removal or the re-siting) of the apparatus
  ○ to set out the costs that each party (typically just the Site Provider) has to incur.
• Solicitors are often then instructed to document the agreed Heads of Terms. Reaching this point may be sufficient for many Site Providers. However, with the statutory protection afforded by the Code, Code Operators could argue that they are not bound by that agreement and as such can refuse to move their Apparatus.
• Faced with the risk of a Code Operator remaining on site, Site Providers solicitors then have to go through the expense of commencing proceedings against the Code Operator with a view to securing a Court Consent Order binding the Code Operator into the agreed Heads of Terms.
• The Code Operator then moves its equipment and the Site Provider proceeds with its plans.

In practice we have found that this regime has a number of problems. These might include one or more of the following:

1. The above routine is very cumbersome (and costly) when it comes to the Site Provider wanting to carry out routine matters of repair to their property (such as resurfacing the roof)
2. For Paragraph 20 to apply the alteration has to be shown to be "necessary" not just "desirable".
3. The burden is on the Site Provider to show that the alteration "will not substantially interfere with any service which is or is likely to be provided using the operator's network". This is an onerous obligation for the Site Provider in that it is often difficult to get commercially sensitive information from the Code Operators to assess interference and/ or it can only be assessed by specialist radio network planners.
4. Site Providers, being faced with requests from the Code Operator to contribute towards their expenses, may face unpredictable, large or merely unreasonable demands.
5. Even though Heads of Terms for an agreement can be reached over the alteration to the Apparatus, it does not make sense that the parties then have to go down the route (and cost) of issuing proceedings to get the agreement sanctioned by the Court (thus becoming binding)
6. This is compounded by the problems of interpreting the interaction of Paragraph 20 "notwithstanding the terms of any agreement binding that person [the Site Provider]" and Paragraph 27 which says the Code is "without prejudice to any rights or liabilities arising under any agreement to which the operator is a party".

In contrast to Paragraph 21, the Code also appears to have no provisions which preclude landlords contracting out of Paragraph 20 in their lease to Code Operators.

Nowadays the implications of the Code are more widely understood and so Site Providers, who are considering granting leases to Code Operators over property that they might wish to redevelop in the future, either avoid granting any agreement at all (the most common recommended course of action) or grant an agreement with appropriately worded redevelopment breaks in favour of the Site Provider (thus enabling the Paragraph 21 route to be followed).

We Recommend that:

1. Separate regimes are developed for:
    a. the alteration of apparatus (an improved Paragraph 20 regime)
    b. the removal of apparatus (an improved Paragraph 21 regime)
2. Parties to an agreement should be free to negotiate terms relating to the alteration of apparatus which would be binding on both parties without the need for a Court Order. As such, there ought to be the ability to contract out of the security of tenure provisions of the Code.
3. The Site Provider should have to show that the alteration is "desirable" rather than "necessary".
4. There should be procedures to follow and timescales to apply to encourage timeliness in getting Site Providers and Code Operators to agree terms. Balancing the interests (the Site Provider wanting to repair a leaky roof –v- the Code Operator preferring its network remaining untouched) dictates that these would be reasonable provisions to seek.
5. The Code Operator, rather than the Site Provider, should have to show that the alteration will substantially interfere with any service which is or is likely to be provided using its network if it is to succeed in turning down a Paragraph 20 application.
6. Code Operator should be under a duty to disclose what expenses they will incur if asked to move their apparatus under Paragraph 20.
7. Where agreement cannot be reached, the Court should have discretion as to where the costs of alteration should lie.

10.34 We provisionally propose that it should not be possible for Code Operators and landowners to contract out of the alterations regime in a revised code. Do consultees agree? Consultation Paper, Part 5, paragraph 5.13.
For the reasons set out in our response to Paragraph 10.33 above we propose that it should be possible for Code Operators and Site Providers to reach agreement between them that will bind both parties and as such both parties should be able to contract out of the alterations regime in a revised code.

10.35 We seek consultees' views on the provisions in Paragraph 14 of the Code relating to the alteration of a linear obstacle. Do consultees take the view that they strike an appropriate balance between the interests involved, and should they be modified in a revised code? Consultation Paper, Part 5, paragraph 5.18.
No comment as this is an area of work we do not come across

10.36 We provisionally propose that a revised code should restrict the rights of landowners to remove apparatus installed by Code Operators. Do consultees agree? Consultation Paper, Part 5, paragraph 5.47.
We agree that in order to protect a Code Operator's network, Site Providers should be restricted in their ability to remove apparatus from their property to certain specific circumstances and after any adopted procedures have (or have not) been taken.

10.37 We provisionally propose that a revised code should not restrict the rights of planning authorities to enforce the removal of electronic communications apparatus that has been installed unlawfully. Do consultees agree? Consultation Paper, Part 5, paragraph 5.48.
We understand why local authorities may wish to enforce the removal of electronic communications apparatus that has been installed unlawfully because they are effectively powerless to do so now. Code Operators do have certain emergency powers under planning legislation and because they have that advantage we believe, where Code Operators still find themselves in breach of planning legislation and have been given a reasonable time to remedy the breach, the local authorities should be given the right to enforce the removal of electronic communications apparatus.

10.38 We ask consultees to tell us their views about the procedure for enforcing removal. Should the onus remain on landowners to take proceedings? If so, what steps, if any, should be taken to make the procedure more efficient?

Consultation Paper, Part 5, paragraph 5.49.

We come across many instances when Site Providers rely on Paragraph 21 of the Code to either:

1. seek removal of a Code Operator's equipment or
2. get the Code Operator to instigate procedures that will enable an application to be made to the Court to settle terms for the Code Operator to remain on the Site Providers' property should agreement (for say a lease renewal) not be reached.

In those instances where we have advised Site Providers to follow the Paragraph 21 regime have found that it can be unnecessarily cumbersome and costly.

To illustrate this, we set out the following [typical and actual] scenario:

- The Site Provider serves a Paragraph 21 Notice and receives a Counter Notice from the Code Operator usually stating not only that the Site Provider is not entitled to require the removal of the apparatus but also undertaking to take steps, at some future and unknown date, to secure a right to remain on site.
- Surveyors are instructed to act for each side to reach a negotiated settlement
- Heads of Terms are agreed:
    - to deal with matters such as the timing of the removal of the apparatus to facilitate a development.
    - to set out the costs that each party (typically just the Code Operator) has to incur.
- Solicitors are often then instructed to document the agreed Heads of Terms. Reaching this point may be sufficient for some Site Providers. However, with the statutory protection afforded by the Code, Code Operators could argue that they are not bound by that agreement and as such they can refuse to remove their Apparatus.
- Faced with the risk of a Code Operator remaining on site, Site Providers' solicitors then have to go through the expense of commencing proceedings against the Code Operator with a view to securing a Court Consent Order binding the Code Operator into the agreed Heads of Terms.
- The Code Operator then removes its equipment and the Site Provider proceeds with its plans.

In cases of Paragraph 21 proceedings involving a site's redevelopment, the driver on the Code Operator to negotiate and/ or remove its apparatus is the threat that if the matter ever went to Court (which none have, to our knowledge) it will either:

1. Be asked to remove its apparatus by the Court, because the public already have access to a telecommunication network, presumably provided by another Code Operator not affected by the redevelopment of the site or
2. The Court will allow the Code Operator to remain on site but require that it pays the Site Provider Compensation (for the loss of development value – potentially a large sum) and Consideration (i.e. the price or rent based on comparable market transactions).

In practice, we have found that this regime has a number of problems. These include one or more of the following:

1. Site Providers have no certainty that they can recover possession of their land on a particular date even if they were to enter into a written agreement requiring possession. They only get this certainty once a Court Order has been granted. Therefore, knowledgeable Site Providers are reluctant to deal with Code Operators because of these security provisions. Having the ability to contract out of the security of tenure provisions of the Code would give that degree of certainty to each party.

   In our opinion many more urban sites would then be made available to Code Operators to install their equipment. Both parties would then be able to plan ahead: the Site Provider

for development or re-use of the land, and the Code Operator for re-siting the equipment.

2. Even though Heads of Terms or an agreement can be reached over the removal of the Apparatus, it does not make sense that the parties then have to go down the route (and cost) of issuing proceedings in order to get the agreement sanctioned by the Court (thus becoming binding on both parties). This would be over come if the Code can be excluded from agreements.
3. Once a Code Operator has served a counter-notice and indicated that it will set out the steps it intends to take to secure a right against the person seeking the removal, there is no requirement for the Code Operator to actually do anything. The onus is on the person who served the notice to seek to enforce it by arguing that the Code Operator "is not intending to take those steps or is being unreasonably dilatory in doing so".

   As a Code Operator can continue to operate lawfully from the site there is little incentive for them to act diligently. The Site Provider can only progress matters by commencing proceedings, an option really on open to Site Providers on a redevelopment scheme (where the stakes are higher, rather than say during the negotiations for a lease renewal outside the provisions of the LTA 1954. The court can enforce the order if the Code Operator is found to be "unreasonably dilatory" in taking steps to secure the right to keep the apparatus on site.

   In practice, we have found that it can take many months or even years to progress negotiations for a lease renewal outside the provisions of the LTA 1954.
4. No guidance on a 'reasonable time' or what constitutes "being unreasonably dilatory" is given.
5. There is no clear mechanism for the agreement of Compensation and Consideration following a Code Operator serving a counter notice, particularly if it does nothing and then removes its apparatus before the court can enforce terms. Throughout this period the Site Provider is suffering a loss and the Code Operator is earning income from the site.
6. There is a lack of clarity over when a person is entitled to require the removal of apparatus especially given the security of tenure provisions of Part 2 of the Landlord and Tenant Act 1954. This is considered further later in this response.

We Recommend that:

1. Separate regimes are developed for:
   a. the alteration of apparatus (an improved Paragraph 20 regime)
   b. the removal of apparatus (an improved Paragraph 21 regime)
2. Parties to an agreement should be free to negotiate terms relating to the removal of apparatus which would be binding on both parties without the need for a Court Order. As such, there ought to be the ability to contract out of the security of tenure provisions of the Code
3. There should be procedures to follow and timescales to apply to encourage timeliness in getting Site Providers and Code Operators to agree terms and remove the apparatus. Balancing the interests (the Site Provider wanting to plan the redevelopment of a site –v- the Code Operator preferring its network remaining untouched) dictates that these would be reasonable provisions to seek.
4. The onus within the Code should be reversed so that Code Operators have to take positive steps to secure their position and to act within agreed time frames.
5. The Code Operators' liability to pay Compensation and Consideration should arise during the period after the serving of a Paragraph 21 Counter Notice and the earlier of the date the Code Operator vacates the site and the date a new written agreement is in place.
6. The relationship of the Code with the Landlord and Tenant Act 1954 should be reviewed in the context of when a Site Provider is entitled to serve a Paragraph 21 Notice.

10.39 We ask consultees to tell us whether any further financial, or other, provisions are necessary in connection with periods between the expiry of code rights and the removal of apparatus. Consultation Paper, Part 5, paragraph 5.50.
The protection Paragraph 21 affords to the Code Operator is wide ranging and when it is agreed between Site Provider and Code Operator that the Code Operator should vacate a site, and they do not, conflict arises. As such, we consider that the Site Provider should be entitled to charge a penalty to provide the appropriate incentive for the Code Operator to vacate the site when they have agreed to; or, to take steps to reach agreement if not.

10.40 We provisionally propose that Code Operators should be free to agree that the security provisions of a revised code will not apply to an agreement, either absolutely or on the basis that there will be no security if the land is required for development. Do consultees agree? Consultation Paper, Part 5, paragraph 5.51.
For the reasons set out in our response to Paragraph 10.38 above, we propose that it should be possible for Code Operators and Site Providers to reach agreement between themselves that will bind both parties. As such, each party should be free to agree that the security provisions of a revised code will not apply to an agreement.

10.41 Do consultees agree that the provisions of a revised code relating to the landowner's right to require alteration of apparatus, and relating to the security of the apparatus, should apply to all equipment installed by a Code Operator, even if it was installed before the Code Operator had the benefit of a revised code? Consultation Paper, Part 5, paragraph 5.56.
Any revised provisions for alteration or removal should apply to all agreements under the Code whether made before or after the new Code is applied. Apparatus should not be protected by the Code until the owner of that Apparatus becomes a Code Operator.

FINANCIAL AWARDS UNDER THE CODE

In responding to these questions, please note the definitions of "compensation" and "consideration" adopted at Paragraph 6.5 and following of the Consultation Paper.

10.42 We provisionally propose that a single entitlement to compensation for loss or damage sustained by the exercise of rights conferred under the Code, including the diminution in value of the claimant's interest in the land concerned or in other land, should be available to all persons bound by the rights granted by an order conferring code rights.

Do consultees agree?

Consultation Paper, Part 6, paragraph 6.35.

We assume that the reference here is to Compensation, being designed to reimburse the Site Provider for its loss, and not Consideration, being designed as a price the Code Operator has to pay the Site Provider to use its property.

Consideration is considered in Paragraphs 10.44 and 10.45 below.

We understand the wish to have a single entitlement for compensation but there can be several potential claimants with varying heads of claim (possibly unforeseen) which may arise in relation to the installation of the apparatus. Accordingly it seems inappropriate to preclude later potentially justifiable claimants or claims.

10.43 We ask consultees whether that right to compensation should be extended to those who are not bound by code rights when they are created but will be subsequently unable to remove electronic communications apparatus from their land.

Consultation Paper, Part 6, paragraph 6.36.

We cannot foresee a situation where someone not bound by Code rights would need to claim compensation.

However if the lopping of remote trees is such a situation, there ought to be a provision whereby the person who suffers a loss, arising from the exercise of such rights, should be entitled to claim compensation.

10.44 We provisionally propose that consideration for rights conferred under a revised code be assessed on the basis of their market value between a willing seller and a willing buyer, assessed using the second rule contained in section 5 of the Land Compensation Act 1961; without regard to their special value to the grantee or to any other Code Operator.

Do consultees agree? We would be grateful for consultees' views on the practicability of this approach, and on its practical and economic impact.

Consultation Paper, Part 6, paragraph 6.73.

Currently a market exists that enables Code Operators and Site Providers to agree a Consideration (i.e. a "Price") for the right for the Code Operator to place electronic communication apparatus on the Site Providers property.

Compensation, on the other hand, arises much less often but when it does, it usually applies in the following circumstances:

1. When telecom apparatus is being installed and unforeseen damage to the Site Providers property occurs. Such as:
    a. Crop damage arising from the Code Operator trampling crops to gain access to build a site in a field
    b. Roof damage arising from the Code Operator piercing a roof membrane when building a roof top site

2. When a lease for a telecom installation is brought to an end (as a result of a "Landlord's Break" or because the term has expired) and the circumstances at the site have changed since the lease was originally granted. Such as:
    a. The Site Provider has now been granted planning permission, or has a settled intention, to redevelop the site and the site is now much more valuable to the Site Provider as a site for redevelopment than as a site to accommodate telecom apparatus.
3. Theoretically, Compensation could also arise in circumstances when a new agreement is imposed by the Court in favour of a Code Operator. However, such matters rarely, if ever, reach the Court. In practice, the Code Operator presumably reads the situation after a period of futile dialogue with the Site Provider and decides to seek to secure the rights it needs with another Site Provider, who would not be seeking compensation for loss and would willingly grant an agreement for Consideration alone.

In the case of the first circumstance outlined above, the Code Operator would agree to either remedy the damage or, if that is not possible, make a payment for compensation.

In the case of the second circumstance, the Code Operator generally accepts the Site Provider's position (usually following the commencement of Paragraph 21 proceedings) and decides to vacate the site to enable the redevelopment to take place and to avoid the cost of paying what could be a high level of compensation.

The third circumstance has not to our knowledge happened.

In this response we propose that the current regime for Compensation should remain unchanged.

Consideration

Consideration is almost always paid in the form of rent. Rarely is Compensation and Consideration both paid, but for reasons set out earlier in this response the ability for Site Providers to charge both should remain.

Consideration has been based on market evidence from comparable transactions. As such, commencement rents have been based on Market Value. This has worked well for the last 25 years and we are surprised that there is any suggestion that it should be changed.

During the life on a telecom agreement, nearly all agreements have a provision enabling the rent to be reviewed at regular intervals (typically 3 or 5 yearly).

We have analysed our database and found that 4,230 out of 7,997 agreements (i.e. 53%) have provisions to review the rent to market value. The remainder are usually based on a mathematical formula. This is illustrated in the following table, which lists all the methods of review we have come across:

Method of Rent Review	
Not based on Market Value	**Based on Market Value**
Construction Costs	Alternate RPI/MV
Fixed @ 20%/RPI	Discretionary
Fixed @ 3%/RPI	Landlord's absolute discretion
Fixed @ 3.5%/RPI	MV
Fixed @ 4%/RPI	MV (can rentalise mast)
Fixed @ 5%	MV (time of essence)
Fixed @ 5%pa/RPI	MV (up or down)
Fixed @ 50%/RPI	MV/Rate Card
Fixed @ 6%	MV/RPI

Fixed @ 7%	MV/RPI (can rentalise mast)
Fixed @ 7.5%	MV/RPI (time of essence)
Fixed @ 7.5%/RPI	MV/RPI/£750pa
Fixed at £	MV/RPI/3%
Other	MV/RPI/Upwards
Rate Card	MV/RPI/Upwards (can rentalise mast)
RPI	MV/Upwards
RPI (time of essence)	MV/Upwards (can rentalise mast)
RPI plus 3%/Upwards	
RPI/Construction Index	
RPI/Construction Index/Upwards	
RPI/Scale Charge	
RPI/Upwards	
Scale Charge	
Total: 3,767 (47%)	**Total: 4,230 (53%)**

Outside rent reviews, the rent may also be reviewed during the term as a result of some renegotiation.

In most agreements Code Operators have agreed to be restricted in their ability to carry out certain things such as increase its equipment rights, site share or assign its lease. Some Site Providers demise only a small area to the Code Operator. In all of these cases the initial rents agreed between both parties usually reflect the restrictive nature of the agreement and have lower rents.

If the parties to such an agreement want to alter the agreement (to enable the Code Operator to do something they cannot) the transactions that have taken place in the market over the last 25 years can and do provide the necessary evidence to assess what, if any, variation to the rent should apply.

For instance if the Code Operator wishes to increase its demise, add an additional cabin or install say 6No antennae rather than the 3No antennae that may be permitted by its agreement, market evidence will exist and be available.

By way of an illustration, we attach in the Annexe a random selection of the many examples of evidence available for upgrades alone.

Valuers, acting for both Site Provider and Code Operator, do have access to and share the raft of evidence available that might be needed to conclude negotiations for a new agreement or a novation to an existing agreement.

The evidence that we have collected can and is gathered by all valuers who practice in this field.

Valuers would also have evidence for the rents or Considerations paid for other situations such as:

- A right of access across a third party's property to a telecom installation
- The right to allow an agreement to be assigned
- An extension to a lease term or the alteration to either parties break clause provisions
- The extension to a demise
- Various beneficial or onerous site share provisions
- The changes in the height of a mast or the addition of an extra mast
- The rental values of equipped and unequipped Green Field and Roof Top sites
- The rental value of particular items of equipment added to a third Party structure (i.e. Rate

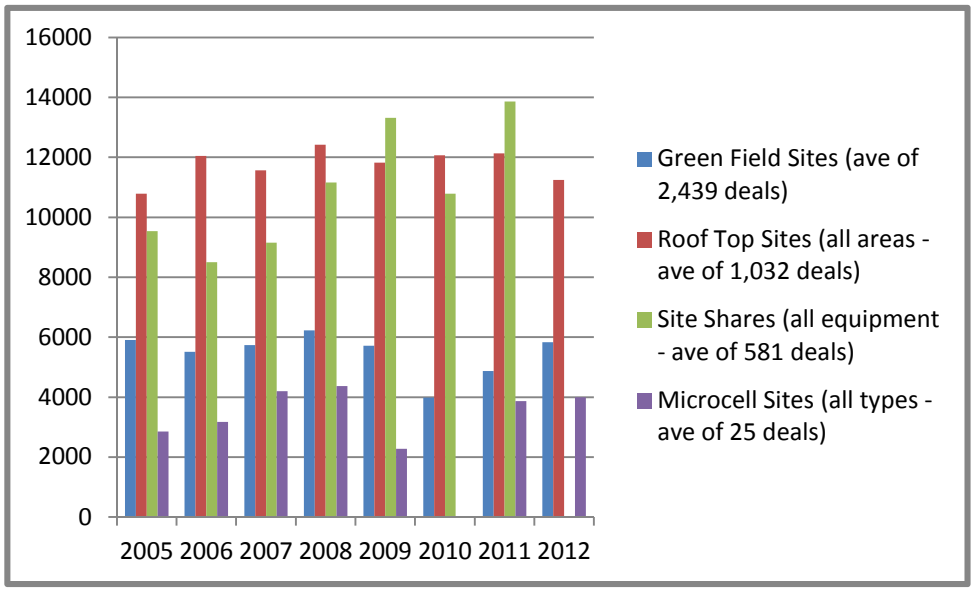
Card evidence – an extract of which is attached in the Annexe).

We set out the above because there is some suggestion that market evidence is lacking or not available and that might be a good reason to alter the valuation method. The reality is that there is plenty of evidence and this has been established over a long period of time (in the context of telecoms).

We have been responsible for collecting and analysing data on rents for telecom sites for many years. This is then published by us and made available to whoever might need to see it.

In light of the need to prepare this response we have updated the analysis of our database. We analysed all of the transactions we have either dealt with ourselves or been informed about (by both Site Providers and Code Operators) for the period since 1 January 2005.

The full table is attached in the Annexe. The following graph illustrates the results from over 4,000 deals and shows the rents paid for the four main categories of site (for the mobile phone industry).



This perhaps represents just under 10% of the whole market (assuming that there are 52,000 telecom installations in the UK). However, we do believe that it is representative of the whole market as it has not been filtered in any way and is based on all the information we have been provided by both the Code Operator and the Site Provider.

Market Value (no scheme world)

The suggestion put forward by the Law Commission is to exclude the value to the Code Operator and to any other Code Operator by treating the national electronic communications network as "the scheme" to be disregarded. In other words the suitability of the site for any communications regulated by the Code is to be excluded.

This suggestion is a very great departure for the current regime of Market Value. Requiring the special assumption that the proposal for the apparatus itself is to be disregarded makes the willing seller into a forced seller, so moving away from the core concept of market value.

The proposal seems to suggest that the main concern expressed by the Code Operators is the issue of ransom.

As agents for Site Providers we would agree that any element of ransom should be ignored.

However, we consider that ransom is already ignored not only in practice, but also in the definition of Market Value.

The issue of ransom should not be dealt with by changing the current method of valuation but by changing the dispute resolution procedure so that disputes are settled quickly and efficiently thus discouraging either party to hold the other to ransom.

Summary so far
In short, we believe that the introduction of a completely different method of valuation is not necessary because the Market Value approach is established and already caters for the exclusion of Ransom.

Ransom is paid if the person who pays it has no quick and effective means of disputing its payment. This would be resolved if the dispute resolution provisions were improved and made more easily accessible.

Market evidence is available to all who seek it out and for almost any situation that could arise during negotiations over a Consideration under a telecom lease. New situations will arise (as they have done in the past) and the deals struck for those situations will create market evidence which can be used when those situations reoccur in the future.

There should be the generally adopted principle that transactions should not be bound by confidentiality agreements and that any lease registered by the Land Registry or put on the Local Land Charges Register should not be edited.

Current evidence will then become even more widespread and this, when handled professionally, will ensure deals are done quickly (preferably by negotiation or failing that by referral to the appropriate dispute resolution service).

Other impacts/ practical issues
The Law Commission invites views on the practicability of the proposal to move away from Market Value approach to a Market Value in a "no scheme world" approach and on its practical and economic impact.

We set out a few observations as follows:

1. **The effect on mast rents.**

If the proposed change in valuation to a "no-scheme world" were to be adopted we would estimate that the rents would fall as is illustrated in the following examples:

a. Rural Green Field Site with a demise of 100m2 with stock farming as an existing use. Assume existing use value (£50 per acre). Rental Value under a "no-scheme" world would drop to £1.27 per annum, calculated as follows: (£50 per acre = £127 per hectare; 100m2 = 0.01 hectares. Therefore £127 x 0.01 = £1.27 per 100m2). **Current Market Value about £4,000 per annum. Proposed Market Value in a "no-scheme world": say £5 per annum.**

b. London Green Field Site with a demise of 50m2 with open yard storage as an existing use. Assume existing use value (£3 per sq ft). Rental Value under a "no-scheme" world would drop to £1,500 per annum, calculated as follows: (£3 per sq ft = £32 per m2. Therefore £32 x 50 = £1,600 per 50m2). **Current Market Value about £6,000 per annum. Proposed Market Value in a "no-scheme world": say £1,600 per annum.**

c. Provincial Roof Top Site currently forming part of a Church. Assume no [monetary] existing use value. Rental Value under a "no-scheme" world would drop to £Nil per annum. **Current Market Value about £9,000 per annum. Proposed Market**

Value in a "no-scheme world": say £Nil per annum. This nil value could also equally apply to a central London Roof Top Site where the **Current Market Value would be about £20,000 per annum.**

The above illustrates the position with radio mast installations. It would be hard to establish whether there is any Rental Value under a "no-scheme" world for a wayleave for a cable

Fixing a rent becomes a hypothetical exercise, technically difficult for both parties. The outcome will in almost all cases be a low Consideration or Price. At that point the installation would be purely an imposition on the Site Provider, which Site Providers will resist at all stages in the proposal.

2. The effect on Cable rents

As a firm we handle far fewer transactions involving cables.

However we are aware that the market is far more secretive as many agreements are subject to confidentiality clauses. Such clauses only hide the existence of the market and it would surely be in the public interest that the Code should prohibit confidentiality clauses.

We are aware that when [redacted] began the development of a network of fibre optic cables using existing electricity pylons, the NFU and CLA agreed standard rates with [redacted] However, these rates were turned down in the market place, as landowners would not accept them, resulting in landowners' agents negotiating market rates with [redacted] s agents to reach agreement.

These rates were not related to any earning capacity of the cables, but a mutual recognition of what was felt to be sensible between the parties. Therefore the market helped to arrive at an outcome acceptable to the Code Operator and Site Provider alike and displaced rates that were not mutually accepted.

3. The effect on Site Providers

Changing the basis of valuation away from Market Value would be seen by Site Providers as a disadvantage and the start of a process that would de-stabilise existing agreements as the Code Operator seek to exercise a break and renew their agreements under a new cheaper regime as quickly as possible.

The Site Provider would seek to resist any change as vigorously as possible faced with the drastic reduction of the rental income stream they had been enjoying.

If a prospect of succeeding in litigation could be established, Site Providers would be prepared to invest in professional fees to resist the Code Operators pressing for change (for example by resisting any grounds by the Code Operator to break the lease).

With the prospect of renewing under lesser terms the following comments made to us by a client reading a draft of this response, seem to be typical ... "*We have two masts and we would not renew a lease on lesser terms, we would rather have our view back!*"

The proposed change will lead previously willing Site Providers to view communications apparatus, especially masts, no longer as a benefit but as a burden and so resist their installation.

Either way, the move away from a Market Rent to no scheme world will reduce the number of willing Site Providers, prolong the delays in rolling out new sites and increase the costs by encouraging disputes.

There are some 52,000 telecommunications installations. 10% could be Streetwork Solutions where no rent is paid, leaving say 46,000 with rents paid.

An average rent could be calculated using the 2011 evidence from our Database as follows:

- Roof Top rents representing 1,032/ 4077ths of all masts @ £12,133 = £3,071
- Green Field rents representing 2,439/ 4077ths of all masts @ £4,867 = £2,911
- Microcell rents representing 25/ 4077ths of all masts @ £3,869 = £24
- Site Share rents representing 581/ 4077ths of all masts @ £13,859 = £1,975

This would arrive at an average overall rent for "a typical mobile phone installation" of £7,981 (£3,071 + £2,911 + £24 + £1,975), say £8,000 per annum.

That gives a rental income to landowners (and a cost to Code Operators) in the broad region of say £350M (£8,000 x 46,000 (and rounded down).

This income will be spread across the whole of the UK.

Although there are a few large Companies who happen to have a large number of installations on their property[3], the vast majority of Site Providers (as is seen in the wide cross section of Site Providers we act for) are Site Providers with one or only a few masts on their property. Many are in rural or deprived locations.

The income lost by many of these Site Providers (some of which supports Sports Clubs, Pension Plans and small charities such as churches) will have a dramatic and adverse impact. In other cases, the current income represents a major source of discretionary spending which would be lost to the local economy.

The list of clients who have written in to us in support of this response illustrates the various types of Site Provider who are concerned by the thought of any change.

4. The effect on Code Operators

Code Operators will need to find additional resource to handle any increased litigation arising from the change in valuation method. With so many leases in place, and potentially falling in as a result of their wish to take advantage of a new valuation regime, the resource needed will have to be very significant.

Disputes reaching the Courts involving compulsory purchase far outstrips those involving the Code[4].

The Code Operators already struggle to resource the handling of negotiations arising within existing agreements.

The cost saving to the Code Operator will be significant (say £350M) and we can only speculate whether the full benefit of that saving will be ploughed back into the development of a better UK wireless network and that any benefit arising outstrips the benefit of rent receipts to the Site Providers.

5. The effect on investors

The reduction in payments will also affect those who have entered the telecom investment market or who wish to release capital by selling telecom sites or the income rights to them.

We have acted for two Police Authorities[5] and many farmers who have managed to release capital by selling their telecom sites to specialist investors. A farmer who gets an income from a

[3] United Utilities Facilities and Property Services (F&PS) declared they in 2004 when proposing to sell the income rights to a portfolio of telecoms lettings comprising 250 tenancy agreements on 114 sites that the current gross rent roll of the Portfolio was approximately £1.5 million.

[4] Perhaps only two cases have dealt with consideration: London and India Docks Investments v Mercury (LIDI) and Cabletel v Brookwood Cemetery.

mast of £5,000pa can expect to raise £50,000 on a sale.

We have been following this market over the last decade and have annexed our analysis to this response.

By effectively striking out rental values this market will be closed.

6. Observations on Europe

Under the European Union's State Aid rules we understand that transactions are expected to be at market value if they are to withstand challenge as a distortion of competition. This seems inconsistent with the proposal to have a "no scheme world".

7. Observations on Government

Rents from telecom sites are on the whole paid to Site Providers as private owners and small businesses. That income will be subject to personal taxation. Only larger businesses tend to be incorporated and so many payments will be subject to tax at Income Tax rates of 40%. Other Site Providers will be paying Corporation Tax.

The moving away from Market rents will dramatically reduce Tax receipts from this sector of let property. Presumably part of the saving arising from lower rents will result in greater profits for the Code Operators and a larger amount of Corporation Tax that they might pay. However, this may not be by that much given that many Code Operators are large companies that often pay relatively little in Corporation Tax[6] with dividends being paid to an international base of shareholders.

Telecom Installations are also liable for Non-Domestic Rates where the assessment is based on the rental value. Based on information taken from the VOA website:

- a typical Green Field mast might each contribute £2,750 per annum in Non-Domestic Rates and
- a typical provincial Roof Top site might each contribute £4,250 per annum in Non-Domestic Rates and
- a typical London Roof Top site might each contribute £10,000 per annum in Non-Domestic Rates.

This across some 52,000 sites masts will make a considerable contribution to the UK economy.

8. Observations on Market Value

Market value is an unconstrained agreement, neutral between the parties. It is the expectation as to what willing parties in a competitive framework would agree.

The formal definition of Market Value[7] (with the parallel Market Rental Value applying it to rental value) is:

"*The estimated amount for which the asset should exchange on the valuation date between a willing buyer and a willing seller in an arm's-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion.*"

Market value does not require any further assumptions beyond those in its definition.

Market value is not seen as entitling the landlord to a share of the tenant's turnover or profit.

[5] [redacted]

[6] See Reuter's article http://uk.reuters.com/article/2012/06/26/uk-vodafone-tax-idUKBRE85P0GO20120626 "The world's largest mobile phone company, Vodafone Group, has shaved 1 billion pounds, and possibly more, off the taxes its UK operating unit might have paid in the past decade, thanks to accounting factors not seen at other European units".

[7] European Valuation Standards 2012, EVS 1

Market value is simply where the aspirations of hypothetical willing parties to a transaction coincide. The commerciality of the Code Operator's need and other market settlements will frame its approach. Equally, the landlord's approach will bear his economics and other market settlements in mind.

9. Observations on Fair Value

Fair Value considers the value in the circumstances between the parties and could be considered as an alternative to Market Value.

The formal definition of Fair Value[8] is:
"*The price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between willing market participants possessing full knowledge of all the relevant facts, making their decision in accordance with their respective objectives.*"

The European Valuation Standards 2012 opens its commentary on Fair Value by saying: "*Fair Value may generally be used as a basis of valuation for real estate as between specific participants in an actual or potential transaction, rather than assuming the wider marketplace of possible bidders.*"

With its less demanding assumptions, one advantage of Fair Value in this context is its greater ease of application to markets in which there is limited information. Market Value presumes a level of information which is not always available.

We have maintained that with the large number of transactions having taken place over the last 25 years and with the prospect of greater transparency the correct level of information already exists to assess Market Value and accordingly it does not seem appropriate to alter the valuation method to Fair Value.

We recommend that:

1. Market Value should be retained, with its exclusion of special ransom value already incorporated, for the above reasons including:
    a. It is consistent with the fundamental point that Code rights over private land are obtained by agreement or, if necessary, a deemed agreement imposed on fair and reasonable terms.
    b. Abandoning both agreement and the associated Market Value approach would overturn a system of valuation that has worked well for the last 25 years
    c. Under an alternative arrangement with a lower Consideration/ Price/ Rent, new conflict would arise leading to delay in Code Operator network expansion and higher transaction costs.
    d. a change will lead Code Operators to consider the wholesale renegotiation of existing agreements, in order to take advantage of lower/ no rents, and an associated increase in litigation, cost and delay.
2. The application of market value should be encouraged, especially for cables, by restricting the practice of using confidentiality clauses. Greater disclosure of information would aid transparency.
3. Consideration be given to the undermining of the concept of ransom by reducing the time taken to conclude deals and settle valuation disputes. Any accusation of ransom arising out of the level Consideration sought is conveniently already dealt with within the definition of Market Value.

[8] European Valuation Standards 2012, EVS 2

10.45 Consultees are also invited to express their views on alternative approaches; in particular, the possibility of a statutory uplift on compensation (with a minimum payment figure in situations where no compensation would be payable). Consultation Paper, Part 6, paragraph 6.74.
As a consequence of the points we have made in Paragraph 10.44 above, we do not believe that alternative approaches would be appropriate.

10.46 We provisionally propose that there should be no distinction in the basis of consideration when apparatus is sited across a linear obstacle. Do consultees agree? Consultation Paper, Part 6, paragraph 6.78.
We agree that the same basis of Consideration should be applied equally to “linear obstacles”.

10.47 We provisionally propose that, where an order is made requiring alteration of a Code Operator’s apparatus, the appropriate body should be entitled to consider whether any portion of the payment originally made to the person seeking the alteration in relation to the original installation of that apparatus should be repaid. Do consultees agree? Consultation Paper, Part 6, paragraph 6.83.
This presumably would only apply if some kind of capital payment were made at the commencement of the agreement. It might apply to say a Compensation payment awarded by the Court based on the loss the Site Provider would suffer as a result of the apparatus remaining on site for a period of time. If the Code Operator then removed its apparatus early, the payment the Court had awarded may have been lower. As such there may be an argument that part of the capital payment should be reimbursed. Capital payments (not including rent being paid say three years in advance) are in our experience very rare. The practical difficulty of reclaiming all or part of the capital sum, especially if the recipient had sold his interest in the site, would be difficult. In view of this we do not agree with your proposal to allow the Code Operator to be entitled to be repaid.

TOWARDS A BETTER PROCEDURE

10.48 We provisionally propose that a revised code should no longer specify the county court as the forum for most disputes.

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.26.

We agree with the proposal that the County Court should not be the forum for resolution of most disputes, on the basis that we agree with the Law Commission's conclusion that the County Court is ill-equipped, not least in terms of expertise, to adjudicate on the types of issues that are the subject of most disputes under the Code

10.49 We ask for consultees' views on the suitability of the following as forums for dispute resolution under a revised code:

(1) the Lands Chamber of the Upper Tribunal (with power to transfer appropriate cases to the Property Chamber of the First-tier Tribunal or vice versa);

(2) a procedure similar to that contained in section 10 of the Party Wall etc Act 1996; and

(3) any other form of adjudication.

Consultation Paper, Part 7, paragraph 7.27.

We believe that First Tier or Lands Chamber of the Upper Tribunal is the most appropriate forum for resolving disputes under a revised Code.

However, the Upper Tribunal needs to have sufficient resources to deal quickly with disputes. We also feel that alternative, cheaper and more rapid methods of resolution are considered before the matter gets to the Lands Tribunal.

We recommend:
the following process to handle disputes is set out under a revised Code:

1. A period of discussion and/or negotiation which, we believe, may resolve many cases. However, we would not advocate a compulsory period of negotiation prior to either party being able to refer matters to the Upper Tribunal.
2. If negotiation is unsuccessful, then the parties should consider mediation rather than be obliged to mediate. If the only matter in dispute is the compensation or Consideration then Arbitration or referral to an Independent Expert should be an option via the RICS (if an Arbitrator or Expert cannot be agreed upon).
3. As a last resort the matter should be referred to the Upper Tribunal.

10.50 We provisionally propose that it should be possible for code rights to be conferred at an early stage in proceedings pending the resolution of disputes over payment.

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.31.

No. In order to reduce disputes and avoid conflict the twin issues of the grant of rights and the payment for them should be dealt with together.

In our experience, the impetus for Code Operators to pursue discussions disappears once they have installed their apparatus.

10.51 We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay.

Consultation Paper, Part 7, paragraph 7.32.

The suggestions in Paragraph 10.49 should result in a significant reduction in delays from parties acting unreasonably.

10.52 We seek consultees' views as to how costs should be dealt with in cases under a revised code, and in particular their views on the following options:

(1) that as a general rule costs should be paid by the Code Operator, unless the landowner's conduct has unnecessarily increased the costs incurred; or

(2) that costs should be paid by the losing party.

Consultation Paper, Part 7, paragraph 7.37

All reasonable and proper costs incurred by the Site Provider in connection with the acquisition of rights over its property should always be met in full by the Code Operator as the acquirer imposing itself on the Site Provider.

The costs of disputes should generally follow the event to influence behaviour.

10.53 We also ask consultees whether different rules for costs are needed depending upon the type of dispute.

Consultation Paper, Part 7, paragraph 7.38.

We believe that it would be reasonable for the costs associated with a Paragraph 5 agreement to be deemed to be part of the acquisition costs and therefore being borne by the Code Operator.

Otherwise see comments in Paragraph 10.52 above.

10.54 We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service.

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.52.

We agree that a revised Code should prescribe consistent notice procedures and should clearly set out the rules for service and what is expected of each party thereafter.

10.55 Do consultees consider that the forms of notices available to Code Operators could be improved? If so, how?

Consultation Paper, Part 7, paragraph 7.53.

We believe that the current forms of notices used by Code Operators should be simplified.

The Notices should include clearer warnings to the Site Provider. The Explanatory Notes in the current notices are long winded and the information the Site Provider needs is buried within.

The creation of a suite of notices similar to those used under the Landlord & Tenant Act 1954 regime would be helpful. These contain clear prescribed warnings and make use of boxes and highlighting to separate the most important warnings to the recipient.

The Law Commission has suggested (Paragraph 7.50) that it would be inappropriate to require land owners to use a standard form of notice. We agree with this statement. This is because the Site Provider may not want to go to the initial cost of appointing solicitors to serve a prescribed

Notice when, say, a short letter requiring the removal of the Code Operator's apparatus might suffice.

10.56 Do consultees consider that more information is needed for landowners? If so, what is required and how should it be provided?

Consultation Paper, Part 7, paragraph 7.54.

Site Providers should be clearly told that the notice could have significant consequences for their property and their use of it. They should be advised to act swiftly and take such advice as they might need before responding.

10.57 We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms.

Consultation Paper, Part 7, paragraph 7.60.

We envisage that there would be a number of difficulties with the proposal for standardised forms of agreement and terms, such as:

1. The rights required by Code Operators are many and varied and can take numerous different forms. Different clauses will be required for fixed line equipment; underground or over ground equipment; picocells systems in shopping centres; point to point dish links on hill top masts etc. There will be difficulties and little to be gained from a set of standardised forms of agreement.
2. Site Providers also having different requirements. A Police Authority letting space on its mast and a Water Company letting space on a Water Tower will have different requirements to a Methodist Church or Hill Farmer letting space within its grounds.
3. The advances in technology which have emerged over the last three years, let alone what might emerge over the next 20 years, will mean that any standard documents will have to be regularly reviewed and updated.
4. Most of the current agreements are protected by the LTA 1954, and Code Operators will be seeking to renew those rights within the provisions of that Act. The protocol for dealing with agreements with Code Operators has been established without the need for standard agreements and, in our opinion, works.

INTERACTION WITH OTHER REGIMES

10.58 We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease. Do consultees agree? Consultation Paper, Part 8, paragraph 8.22.
The interaction of Code procedures with Part 2 of the 1954 Act in England and Wales do create a major practical problems when renewing Code agreements or seeking possession under Paragraph 21. Yes, we agree that Part 2 of the Landlord and Tenant Act 1954 should not apply to any agreement. It is common market practice for many telecoms leases to be excluded from the security provisions of the LTA 1954 and the Law Commissions proposal therefore reflects what is happening in practice If the security provisions of the LTA 1954 no longer applies to telecoms agreements, then agreements can revert to Licences, Wayleaves or contracted out Leases, whichever is the more appropriate for the types of installation installed by Code Operators. Provided that Market Value valuation remains on the grant of a new agreement under the Code there ought to be less conflict on those mixed use sites where part of the property could be a genuine commercial property (such as a shop) and the remainder used by a Code Operator for network purposes. This would particularly apply to a Code Operators switch centre in a business park or a Code Operator with telecom apparatus in one of its high street shops. So as to avoid a two tier market (between Code and non Code Operators) it is perhaps appropriate that the security provisions of the LTA 1954 do not apply to all telecom leases, whether they be with Code Operators or with Non Code Operators. The disadvantages of Telecom leases coming outside the security provisions of the LTA 1954 is that there are established and adopted procedures for say the renewal (and denial of the renewal) of leases. If the security provisions of the LTA 1954 is to be removed certain adopted procedures, incentives and timescales need to be reintroduced so as to avoid the current difficulties Site Providers experience when renewing a lease that has been contracted out of the LTA 1954. Here the Site provider can only attempt to get the Code Operator to the negotiating table by serving a Paragraph 21 notice. Code Operators, having served their counter notice, then often do nothing, appearing simply to rely on the possession they have. Only expensive and time consuming court action can break this log jam. Likewise the LTA 1954 is established (with the benefit of case law) in the context of denying lease renewals under various grounds such as for redevelopment. It would seem appropriate that those arrangements should apply to the renewal or otherwise of Code leases.

10.59 We provisionally propose that where an agreement conferring a right on a Code Operator also creates an interest in land of a type that is ordinarily registrable under the land registration legislation, the interest created by the agreement should be registrable in accordance with the provisions of the land registration legislation, but that a revised code should make it clear that its provisions as to who is bound by the interest prevail over those of the land registration legislation. Do consultees agree? Consultation Paper, Part 8, paragraph 8.33.
We support the proposal that the rights are registered so that the existence of agreements is then evident to all interested in the property. A Code right that should in future be registered is not registered, should only bind the party to the agreement and not anyone else. It is the Code Operator's obligation to register leases and failure to do that should carry a sanction. The alternative is that registration will be overlooked. We would suggest that even short leases are registered because it is envisaged that agreements will have a high degree of security and are likely to continue for many years beyond the initial term. At the very least, it might be good practice to encourage its entry on the relevant local land charges register especially if the land has an unregistered title. We have raised our concern in Paragraph 10.44 above that currently Code Operators routinely apply to have parts of their registered agreements blanked out even if there is no confidentiality clause contained within the agreement. To check that this is a widespread practice we checked several leases (with no confidentiality clauses contained within). In the Annexe to this response we have shown an extract of the Land Registry website indicating that no financial information on a telecommunication site is available. In the quest for greater transparency this habit ought to be stopped.

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

10.60 We ask consultees to tell us: (1) whether they are aware of circumstances where the funds set aside under regulation 16 have been called upon; (2) what impact regulation 16 has on Code Operators and on Ofcom; (3) if a regime is required to cover potential liabilities arising from a Code Operator's street works; and (4) if the answer to (3) is yes, what form should it take? Consultation Paper, Part 9, paragraph 9.14.
Although there are reinstatement provisions within most leases we are not aware of any provision for Code Operators to hold reinstatement bonds. Such bonds do exist in wind farm agreements. Our response in Paragraph 10.6 above makes an example of a Bankrupt Code Operator abandoning equipment on site, leaving the Site Provider with a potentially expensive clear up operation. The general principal should be that a defaulting Code Operator does not leave a landowner with an expensive liability. This can be compounded if the apparatus attracts Business Rates up until it is actually removed. Code Operators should be required to demonstrate that sufficient funds are available and ring-fenced to ensure that the cost of decommissioning and removing the apparatus can be met.

10.61 We ask consultees for their views on the Electronic Communications Code (Conditions and Restrictions) Regulations 2003. Is any amendment required? Consultation Paper, Part 9, paragraph 9.39.
No Comment

Batcheller Monkhouse

LAW COMMISSION
CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

RESPONSE FORM

ANNEXE

to Response by Batcheller Monkhouse

Letters of Endorsement from Batcheller Monkhouse Clients

BM File No.	LLAddName
T001	Burnt House Farm
T001	Eastridge Estate
T001	Herriard Estates
T001	Hill Farm Estates Ltd
T001	Howarden Estate
T001	Palmers Farm
T001	Sale & Partners
T001	Yattendon Estate
T004	Burnett Business Park Ltd
T025	Derbyshire Dales DC
T028	Messrs R & P Waters
T033	C Brant Esq
T039	C Pitcher Esq
T043	Highfield Park Trust
T048	Fitzwilliam (Wentworth) Estates
T058	R Mortimer-Lee Esq
T059	S Newell Esq
T064	C Lamplugh Esq
T088	The Trustees for Methodist Church Purposes
T094	W Champion Esq
T113	Pippingford Estate Co
T115	The Trustees of Sir A Elton (dec'd)
T120	H Stroude Esq
T133	Shiftall Ltd
T137	HH Holman Properties Ltd
T139	R Thornhill Esq
T149	Mr & Mrs D Cooper
T152	Broadland Properties Ltd
T170	Lawnstill Ltd
T172	D Lowhar Esq
T193	N Kingsley-Smith SIPP
T196	Clinton Devon Estates
T205	The Moorings Management Ltd
T213	Corby Borough Council
T214	M Wallace Esq
T220	The Chamberlayne Estates
T221	Adames (Flansham) Ltd
T225	Mr & Mrs F Hodge
T242	The Mountcurzon Group
T245	The Linen Chest
T246	Chambers Farming Group Ltd
T248	Mr & Mrs A Ellis

T249	Brighton & Hove City Council
T250	St. Margaret's Court (Rottingdean) Ltd
T257	Abacona Investments Ltd
T259	Gawthorpe Estates Ltd
T267	Fosse Way Court Management Ltd
T268	Bridlington Cash & Carry Ltd
T269	Offer Group Ltd
T276	Sir Charles Ponsonby Bt
T279	Yeovil District Hospital NHS Foundation Trust
T280	NG Sperry Marine BV
T284	Kalmax Ltd
T289	E Young Esq
T292	Dr & Mrs B Dumughn
T294	Mr & Mrs A Clarke
T296	W & P Jolly
T300	Mr J and Mrs J Rudkin
T302	Mrs E Atkins
T310	J G Shelton & Co Ltd
T318	Jonathan Boucher Esq
T323	Wotton Estate
T325	S Bosley Esq

1001

MORRIS CONTRACT SERVICES

[redacted]

26.10.12

To
J. Linney Esq
Law Commision
Steel House
11 Tothill Street
London
SW1H 9LI

Response to Law Commission Consultation Paper No205 on the electronic communications code.

I, Scott Dudley Morris, hereby endorse the enclosed responses to the above consultation paper, submitted on my behalf, by Batcheller Monkhouse.

Yours Faithfully

Scott Morris

T001

EASTRIDGE ESTATE

[redacted]

EASTRIDGE ESTATE OFFICE
RAMSBURY
MARLBOROUGH
WILTSHIRE
SN8 2HJ

J Linney Esq.
Law Commission
Steel House
11 Tothill Street
London
SW1H 9LJ

26th October 2012

Dear Sir,

The Eastridge Estate – Response to Law Commission Consultation Paper No 205 on the Electronic Communications code

We hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours faithfully,

Will Russell
For and on behalf of the Eastridge Estate

100 1

J.L. & J.T.L. JERVOISE
[redacted]

ESTATE OFFICE
HERRIARD PARK
BASINGSTOKE
HAMPSHIRE RG25 2PL

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London. SW1H 9LJ

26 October 2012

Dear Sir

Response to Law Commission Consultation Paper No205 on the Electronic Communications Code

I/ We hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours faithfully

John Jervoise

John T L Jervoise
Director - Herriard Estates
[redacted]

T001

Hill Farm Estates Limited

Farmers
Agricultural Contractors
Landscaping
Land Drainage
Top Soil Suppliers

Europa Park
London Road
Grays
Essex RM20 4DB
[redacted]

GC/PDC
26th October 2012

J. Linney, Esq.
Law Commission
Steel House
11 Tothill Street
London
SW1H 9LJ

Dear Sir,

Re: Response to Law Commission Consultation Paper No. 205 on the Electronic Communications Code

We hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours faithfully
For and on behalf of Hill Farm Estates Ltd

Charles Green
Finance Director

W.E.F. Hall, B.Sc., FRICS
A.W.J. Hall, B.Eng.(Hons), M.Sc., MRICS, FAAV

1001

William Hall & Co.,

Chartered Surveyors, Land Agents, Valuers, Auctioneers and Estate Agents
THE ESTATE OFFICE, GLYNNE WAY, HAWARDEN, FLINTSHIRE CH5 3NX
[redacted]
Regulated by RICS

Our Ref: AWJH.WH&Co.GEN Your Ref:

Date: Friday, 26 October 2012

J. Linney Esq.
Law Commission
Steel House
11 Tothill Street
London
SW1H 9LJ

Dear Sir,

Re: Response to Law Commission Consultation Paper No205 on the Electronic Communications Code

We hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours faithfully,

William Hall & Co.

1001

PM & J C Rogers

Palmers Farm

Brocks Copse Road

Wootton Bridge

Ryde

Isle of Wight

PO33 4NP

[redacted]

26 Oct 2012

J Linney Esq

Law Commission

Steel House

11 Tothill Street

London, SW1H 9LJ

Dear Mr Linney

RE: Response to Law Commission Paper No 205 on the electronic Communications Code.

We endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours sincerely

Peter M Rogers & Jennifer C Rogers

1001

our ref: WMW/AMB
your ref:

sale & partners
chartered surveyors · land & estate agents · valuers

26 October 2012

J Linney Esq
Law Commissions
Steel House
11 Tothill Street
London SW1H 9LJ

Dear Sir

Response to Law Commission Consultation Paper No. 205 on the Electronic Communications Code

We act on behalf of three separate landowners who have a total of six telecommunication masts on their land. We have considered the Consultation Paper No. 205 and endorse the enclosed responses submitted by Batcheller Monkhouse.

Yours faithfully

W. M. Wood

head office: 18-20 glendale road
wooler, northumberland NE71 6DW
[redacted]
www.saleandpartners.co.uk

Partners: R.M. Landale FRICS
W.M. Wood FRICS FAAV
E.R.T. Harris MRICS
Associate: R.C. Pardoe MRICS

Regulated by RICS

also at: blagdon estate office, seaton burn, newcastle upon tyne NE13 6DE t: 01670 789621

1001

Our Ref: PJS/FMG

26th October 2012

[redacted]

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London
SW1H 9LJ

Yattendon Estates Limited
The Estate Office
Yattendon, Berkshire
RG18 0UY
[redacted]

Dear Mr Linney

Response to Law Commission Consultation Paper No. 205 on the Electronic Communications Code

I hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf by Batcheller Monkhouse.

Yours sincerely.

PJS.

P J Sedgwick MRICS
Managing Director

T004

CHURCH FARM BUSINESS PARK

The Grain Bin, Church Farm Business Park
Corston, Bath BA2 9AP

[redacted]

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London. SW1H 9LJ

22nd October 2012

Dear Mr Linney

Response to Law Commission Consultation Paper No205 on the Electronic Communications Code

I/ We hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours faithfully

David Hitchings

T025

INVESTORS IN PEOPLE

DERBYSHIRE DALES DISTRICT COUNCIL

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London
SW1H 9LJ

[redacted]

25 October 2012

Dear Sirs

RESPONSE TO LAW COMMISSION CONSULTATION PAPER NO. 205 ON THE ELECTRONIC COMMUNICATIONS CODE

I hereby endorse the enclosed responses to the above consultation paper submitted on behalf Derbyshire Dales District Council by Batcheller Monkhouse.

Yours faithfully

Mike Galsworthy BSc (Hons) MRICS CEM Dip.FM
ESTATES AND FACILITIES MANAGER

Paul Wilson MCD, Dip TP, Dip Mgmt, MRTPI
Director of Planning and Housing Services
Town Hall, MATLOCK, Derbyshire. DE4 3NN
[redacted] visit www.derbyshiredales.gov.uk

1028

RS. PW. & LG. WATERS.

[redacted]

J Linney Esq.
Law Commission,
Steel House,
11 Tothill Street,
London,
SW1H 9LJ.

22nd October 2012.

Response to Law Commission Consultation Paper No.205 on the Electronic Communications Code.

Dear Mr Linney,

We hereby endorse the enclosed responses to the above consultation paper submitted on our behalf by Batcheller Monkhouse.

Yours faithfully,

R S Waters.

T033

CHRISTOPHER POUND F.R.I.C.S.

Chartered Surveyor
Forestry Consultant & Land Agent

[redacted]

Mr. J. Linney,
Law Commission,
Steel House,
11 Tothill Street,
LONDON
SW 1H 9LJ

22nd. October 2012

Dear Sir,

Response to Law Commission Consultation Paper No. 205 on Electronic Communications Code.

I write on behalf of my client, who is the lessor of such a site, to fully endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Messrs. Batchellor Monkhouse.

Yours faithfully,

C. D. A. Pound

TC39

[redacted]

23rd October 2012

J. Linney Esq.
Law Commission
Steel House
11, Tothill Street
London SW1H 9LJ

Dear Mr. Linney

Re:- Response to Law Commission Consultation Paper No 205 on the Electronic Communications Code

Having discussed the implications of the above with a senior partner we hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf by our agents, Batcheller Monkhouse.

Yours sincerely,

Mr & Mrs C. S. Pitcher

1043

HIGHFIELD PARK TRUST

West Lodge
Hill End Lane
St Albans
Hertfordshire
AL4 0RA
[redacted]

22 October 2012

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London
SW1H 9LJ

Dear Mr Linney

Re: Response to Law Commission Consultation Paper No205 on the Electronic Communications Code

I hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours sincerely

Richard Bull

Richard Bull
Park Manager & Company Secretary
For and on behalf of Highfield Park Trust

FITZWILLIAM (WENTWORTH) ESTATES

1048

[redacted]

Agent:
A H Barber-Lomax FRICS FAAV

[redacted]

Our ref: ABL/RT/WE 11/01/01 *(please use this reference in return correspondence)*

22 October 2012

J. Linney, Esq.,
Law Commission
Steel House
11 Tothill Street
London
SW1H 9LJ

Dear Sir

Response to Law Commission Consultation Paper No. 205 on the Electronic Communications Code

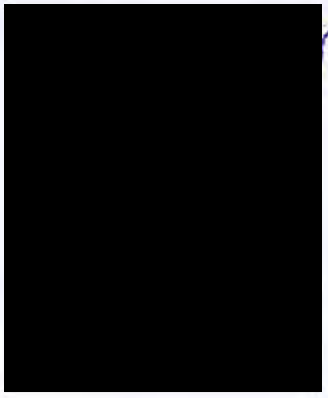
Re: Sir Philip Naylor-Leyland, Bt., Trustees of Olive, Countess Fitzwilliam's Will Trust and the Milton (Peterborough) Estates Company.

The above named client's indorse the enclosed responses to the above consultation submitted on their behalf by Batcheller Monkhouse.

Yours faithfully

Anthony Barber-Lomax FRICS FAAV
Email: agent@wentworthestate.co.uk

Encs



1058

23.10.12.

REF. Response to Law Commission Consultation Paper No 205 on the Electronic Code for Communications.

Dear Sir.

I hereby endorse the enclosed response to the above consultation Paper submitted on my behalf by Batchelor Monkhouse.

Yours faithfully

Richard Martinez Dec

D. Lindsey Esq.
Law Commission.
Steel House
11 Tothill Street
London
SW 1H 9LS.

1059

[redacted]

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London. SW1H 9LJ

24/10/12

Response to Law Commission Consultation Paper No205 on the Electronic Communications Code

Dear Sir

I hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours faithfully,

S.J.D. Newell J.P. LL.B

1064

[redacted]

26 October 2012

Recipient

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London. SW1H 9LJ

Response to Law Commission Consultation Paper No205 on the Electronic Communications Code

Dear Sir,

I hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monk house.

i) Landlords should continue to be able to control or ban the addition of equipment where there is already such a provision in the agreement.
ii) · Landlords should continue to be able to control or ban the sharing of sites where there is already such a provision in the agreement.
iii) · Landlords should be able to continue to charge for site sharing where there is already such a provision in the agreement.
iv) · Landlords should continue to be able to restrict or ban the assignment of leases where there is already such a provision in the agreement.
v) · Landlords should be able to contract out of "Code Powers" so that if the landlord has a genuine redevelopment proposal, and the operators equipment would frustrate such a scheme, the operators can be forced to move or remove their equipment within an agreed and acceptable timeframe.
vi) · The basis of valuing sites is established and should remain unchanged.
vii) · The basis of settling valuation disputes should be altered so that referral can be made to an appropriate body with the appropriate expertise (not for instance the County Court) and that that body will handle the dispute quickly and at low(er) cost.
viii) · The way in which the existing Code interacts with the Landlord & Tenant Act 1954 should be clarified so that they can work [better] together.

Yours faithfully,

Charles Lamplugh

Charles Lamplugh

1088

The **Methodist** Church
Bury St Edmunds Circuit.
Northumberland Avenue Methodist Church · Minister: Rev Rob Hufton

[redacted]

J.Linney Esq
Law Commission,
Steel House,
11 Tothill Street,
London. SW1H 9LJ.

24 October 2012.

Response to Law Commission Consultation Paper No205 on the Electronic Communication Code.

Dear Sir,

As Trustees for Methodist Church Purposes at Northumberland Avenue Methodist Church, Bury St. Edmunds and with added responsibility to The Charity Commissioners, we are happy to endorse the enclosed responses to the above consultation paper,submitted on our behalf, by Batcheller Monkhouse.

Yours faithfully,

Charles H. Simmonds

(Charles Simmonds Property Secretary & Steward.)

[redacted]

1094

[redacted]

OCTOBER 24TH 2012.

J LINNEY ESQ.
LAW COMMISSION
STEEL HOUSE
11 TOTHILL ST.
LONDON SW1H 9LJ

RESPONSE TO LAW COMMISSION CONSULTATION PAPER No 205 ON THE ELECTRONIC COMMUNICATIONS CODE.

Dear Sir,

I hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf by Bate Keller Monkhouse

Yours faithfully

R. W. Bramdion.

T113

Poppinghole Estate Company Ltd

[redacted]

23/10/12

Response to Law Commission Consultation Paper No 205 on the electronic communications code

I hereby endorse the enclosed responses to the above consultation paper submitted on our behalf by Batcheller Monkouse.

Our main concerns are that there will be a determination in favour of telecoms companies which are profit making organisations that overrules existing agreements that are legally binding. This then becomes state interference at the expense of our profit in favour of another companies profit under the pretence of public benefit.

We are entitled to determine the rents set on our land and the method upon which reviews and sub use is implemented. Any change to our rights to do so will in my opinion be a breach of the European Human Rights act with reference to the ownership and operation of land. It will also be completely at odds to a free market economy.

Our customers are entitled to go wherever else they want to and make a deal to replace their existing use of our land and we are entitled to strike the best deal we can for our land. State interference is most unwelcome and is most likely a vehicle to the benefit of telecoms companies at the expense of small business with no perceivable benefit to the general public. Where existing infrastructure is operating well and with full representation of all telecoms companies who wish to be there why on earth change things ? How on earth can the Law Commisston ensure that any savings to the telecoms companies are directly passed on to the consumer ?

Yours Sincerely

Richard Morriss

TIS

·TIM NICHOLSON·
Chartered Surveyor

The Old Vicarage
Vicarage Lane
Barrow Gurney
BRISTOL BS48 3RT
[redacted]

Tom Bodley Scott
Batcheller Monkhouse
No 1 London Road
Tunbridge Wells
Kent
TN1 1DH

22 October 2012

Dear Tom

Telecom Installations: Telecom Code Review

I am writing in my capacity as a surveyor representing a landowner client with telephone masts on his land.

This confirms my wholehearted support for your response to the above review.

Yours sincerely

T120

Tom Bodley-Scott

From: Tom Bodley-Scott
Sent: 26 October 2012 12:40
To: 'HAROLD STROUDE'
Subject: RE: Telecom Installations. Telecom Code Review URGENT

Dear Mr Stroude
Thank you for your E-Mail of endorsement

Tom Bodlet Scott
Batcheller Monkhouse

From: HAROLD STROUDE [redacted]
Sent: 23 October 2012 11:35
To: Tom Bodley-Scott
Subject: RE: Telecom Installations. Telecom Code Review URGENT

Letter for Law Commision.

Mr J Linney.
Law Commision
Steel House
11 Tothill Street
London SW1H 9LJ

Response to Law Commission Consultation Paper No: 205 on Electronic Communiction code.

Dear Mr Linney,
We hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf , by Batchellor Monkhouse.
Yours sincerely
Harold Stroude

SHIFTALL LTD.

T133

Oakwood
Lower Dunton Road
Nr. Brentwood
Essex CM13 3SP
[redacted]
www.shiftall.com

22nd October 2012

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London. **SW1H 9LJ**

Dear Sir

Re: Response to Law Commission Consultation Paper No205 on the Electronic Communications Code

We hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours faithfully

Mrs Marianne Jackson
Director

T137

Developing and investing in commercial property

H&H Holman Properties Limited

and Associated Companies

PCJH/KJB

23rd October 2012

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London
SW1H 9LJ

Dear Sirs,

Re:- Response to Law Commission Consultation Paper No205 on the Electronic Communications Code

We hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours faithfully,

Patrick C J Holme
For H & H Holman Properties Ltd

Needs to be
sent as an
attachment
to Emily

H&H Holman Properties Ltd.,
PO BOX 2901
Stafford
ST16 9FY
[redacted]

Registered Office
PO BOX 2901
Stafford
ST16 9FY
Registered Company No: 1414252 England
Directors:
Patrick CJ Holme FRICS (Chairman & Managing)
SE Holme

T139

R. G. Thornhill (Holly Farm) Ltd. 1002829

[redacted]

Directors:

R. G. THORNHILL
S. R. GRIFFEN
J. A. GRIFFEN
I. R. GRIFFEN

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London.
SW1H 9LJ

Response to Law Commission Consultation Paper No 205 on the Electronic Communications Code.

I on behalf of the directors of R G Thornhill(Holly Farm) Ltd hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours Faithfully,

Ian Griffen (Director)

[redacted]

T149

J Linney Esq
Law Commission
Steel House
11 Tothill STreet
London
SW1H 9LJ

Response to Law Commission Consultation Paper No 205 on the Electronic Communications Code

Dear Sir,

We are the landlords of [redacted] With a phone mast erected on the roof, therefore we hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours Faithfully

T152

BROADLAND PROPERTIES LIMITED

[redacted]

Our ref: JH/aa-f

25 October 2012

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London
SW1H 9LJ

Dear Sirs

Response to Law Commission Consultation Paper No 205 on the Electronic Communications Code

We hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours faithfully

James Hill

7170

Lawnstill Limited

Registered in England No. 3564423

Trafalgar House, Grenville Place, London NW7 3SA

[redacted]

DIRECTORS
M. SHAW, F.R.I.C.S.
B. WILLIAMS-JARED, F.R.I.C.S. (Secretary)

25th October 2012

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London. SW1H 9LJ

Dear Sirs,

Response to Law Commission Consultation Paper No205 on the Electronic Communications Code

We hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours faithfully,

Martin Shaw

FTR2

RAMACOMM INVESTMENTS

25th October, 2012

J Linney Esq.,
Law Commission,
Steel House,
11, Tothill Street,
London. SW1H 9LJ.

Response to Law Commission Consultation Paper No. 205 on the Electronic Communications Code.

I hereby endorse the enclosed responses to the above Consultation Paper, submitted on our behalf, by Batcheller Monkhouse.

Yours faithfully,

Reuben Malcolm

Reuben Malcolm
Ramaccom Investments

54 Evelina Road London Se15 2DY
[redacted]

T193

81 High Street
Chatham, Kent ME4 4EE
[redacted]
Web: www.kslaw.co.uk

KingsleySmith
SOLICITORS LLP

Our ref – 13/ZB/MI009.116 Your ref – Date 26 October 2012

J Linney Esq

Law Commission

Steel House

11 Tothill Street

London. SW1H 9LJ

Dear Mr Linney

Response to Law Commission Consultation Paper No205 on the Electronic Communications Code

I refer to Tom Bodley Scott's submissions on behalf of Batcheller Monkhouse of No. 1 London Road Tunbridge Wells Kent TN1 1DH that have been considered when writing this response to the consultation. I act for many site providers.

The Supreme Court's decision in Bocardo appears to have been given great weight before reaching the proposition stated at paragraph 6.7.3/4. The principle of Pointe Gourde has been taken out of context and Bocardo is not properly relevant to the consideration of code operator site valuation methodology. The Land Compensation Act 1961 is founded upon the principle that those landowners affected by new major infrastructure schemes under compulsory acquisition should be subject to the "no scheme world". The point here is a new scheme, focused upon specific freehold land that is "taken" for a specific project, not some nationwide cabal of commercial enterprises that can readily achieve its aims in the open market and have done so with remarkable speed to date at little comparative cost. The LCA ensures a new railway line cannot be ransomed, but the telecoms industry does not face any ransom, as Mr Bodley Scott's analysis proves.

It is certainly correct that where parties might disagree about more apparatus there ought to be some guidance and a code of practice, in default arbitration. The LC would be most valuable in promulgating that outcome. But there is no justification for departing from the general presumption that there is freedom to negotiate; to enable code operators to thwart legal terms reached at arms length and claim it need not pay more than a nominal sum, which it appears to be the approach. The notion that operators should be able to impose more apparatus for a peppercorn is equally flawed for the same reason. As for [illegible]

the position would be catastrophic as no potential site provider would agree anything. The obvious point is that Code powers apply to tens of thousands of masts and antenna over the country, rolled out in a matter of a few short years. To suggest that the law be changed to render existing site providers with the blight of such in perpetuity for a peppercorn would amount to a gross unfairness to those owners. There is no case to benefit already hugely rich multi billion pound corporate bodies that in any event pay quite modest sums for these sites. The raison d'etre of CPO is to facilitate major projects that are otherwise commercially unviable due to ransom, but equally there is no basis to import a compulsory purchase regime when there is no impediment to the telecom companies operations. The speed and proliferation of the existing network again speaks for itself.

The proposal to import compulsory purchase valuation methodology fails the public interest test. There is no new scheme of national importance arising here, the network is mature. It must be of significant concern that providing such power to peppercorn rent in favour of various vast conglomerates with limitless financial resources would result in exploitation of existing site providers and kill the prospect of finding willing site providers. There is no new infrastructure scheme requirement here and the proverbial horse bolted a few short years ago.

I agree with the approach suggested by Tom Bodley Scott that there are many aspects to code powers which need to be improved, and refinement and simplification is always a good starting point. However to ignore the obvious public concern expressed towards long established utility companies over charging reflects a clear British demand there be fair play. Telecom operators are commercial entities making a great deal of profit from their enterprises and naturally the government makes a killing from licences. The Human Rights Act and the current planning law framework makes perfectly clear that the balance has to be reached but the argument that code operators need the no scheme world to be applied for the public good is not made out and equipoise is absent. There is a vast patchwork quilt of telecoms apparatus networks governed by the law of supply and demand - the same must apply to site providers as to code operators. Otherwise any expansion that may be required will not occur.

The provisional proposal is therefore as misconceived as it is unnecessary. Taken to its logical conclusion it would open the floodgates to a much wider application of effective compulsory purchase acquisition for a wide number of commercial interests. As an example it may very well be considered that the public benefit from power generated by onshore wind farms. But these sites are provided by site owners for turbines that would clearly have no interest if a peppercorn was all that was payable. Millions of people would use the power generated but there is no suggestion that wind farm developers have CPO rights. The public would also regard it as inappropriate for say a German wind farm giant to be able to rent farm sites for a peppercorn, effectively compulsorily acquire land anywhere they wish for their great turbines. There are doubtless many other more examples.

The existing system and law demonstrates that there is an adequate and flexible framework that has enabled code operators to rapidly build up networks throughout the country, which never needed oppression to secure. It is clear beyond argument that there

can be no case for introducing a no scheme world to something that has flourished at great pace and works well already. I hope the Commission will see there is much to commend guidance and a code of practice, in default arbitration, but the proposal to change so dramatically what is paid by these conglomerates to site providers amounting to a peppercorn is simply as unnecessary as it is unreasonable for a nation that prides itself as a free market economy, which attracts the foreign investment in any event.

Yours sincerely

Nicholas Kingsley Smith
Kingsley Smith Solicitors LLP
For and on behalf of Kingsley Smith Solicitors LLP
[redacted]

T196

CLINTON DEVON ESTATES

Our reference: CJK/ajs/6297
Your reference:

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London
SW1H 9LJ

26 October 2012

Dear Sir/Madam

Response to Law Commission Consultation Paper No205 on the Electronic Communications Code

We hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours faithfully,

Caroline J Kissock (Mrs) MRICS FAAV
Estates Surveyor (Maternity Cover)
[redacted]

[redacted]

T205

MOORINGS FREEHOLD LTD

[redacted]

Mr Tom Bodley Scott MRICS FAAV
Batcheller Monkhouse
1 London Road
Tunbridge Wells
Kent TN1 1DH

25 October 2012

Dear Mr Bodley Scott

Response to Law Commission Consultation Paper No 205 on the Electronic Communications Code
We fully endorse the enclosed responses to the above consultation paper submitted by Batcheller Monkhouse.

Yours sincerely

Liz Moloney (Ms) Director
For the board

[redacted]

T213

The Corby Cube
Parklands Gateway, George Street,
Corby, Northamptonshire, NN17 1QG
[redacted]
Web: www.corby.gov.uk

Corby Borough Council

Head of Property
Steven Redfern FRICS

26th October 2012

Mr T Bodley Scott
Batcheller Monkhouse
1 London Road
Tunbridge Wells
Kent
TN1 1DH

Dear Tom

Re: Law Commission Consultation Paper No. 205 Electronic Communications Code

I refer to the above, and confirm on behalf of Corby Borough Council that we are in agreement with your draft response to the above which you kindly sent to us and which we have now had the opportunity to peruse. Please feel free to attach a copy of this letter to your response as our endorsement of the contents of your response.

Yours sincerely

Simon R Wright
For and on behalf of CB Property

[redacted]

CB Property
The Cube
George Street
Corby
NN17 1QB

T214

penmarlam
caravan & camping park

Bodinnick-by-Fowey
Cornwall PL23 1LZ
[redacted]

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London.
SW1H 9LJ

25th October 2012

Dear Sir,

Response to Law Commission Consultation Paper No205 on the Electronic Communications Code.

I hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours faithfully,

Marcus R Wallace.

T220

THE CHAMBERLAYNE ESTATES

ESTATE OFFICE CRANBURY PARK WINCHESTER HAMPSHIRE SO21 2HL
[redacted] [redacted]

PCP24/TJP/sgg
25th October 2012

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London. SW1H 9LJ

Dear Sir,

The Chamberlayne Estates
Response to Law Commission Consultation Paper No205 on the Electronic Communications Code

I am writing to you in my capacity as Agent for The Chamberlayne Estates and hereby endorse the enclosed responses to the above consultation paper, submitted on the Estate's behalf, by Batcheller Monkhouse.

Yours faithfully,

T J Piper BSc (Hons) MRICS
Agent for the Chamberlayne Estates

T221

Adames (Flansham) Ltd.

Chessels Farm, Chessels Farm Drive, Flansham, Bognor Regis, Sussex, PO22 8EG
[redacted]

J. Linney Esq,
Law Commission,
Steel House,
11 Tothill Street
London SW1H9LT

22nd October 2012.

Response to Law Commission paper no.205 on the electronic communication code.

Dear Mr Linney,

On behalf of this company I hereby endorse the enclosed responses to the above consultation paper , submitted on behalf of Batchellor Monkhouse

Nick Adames

Nicholas Adames

T225

[redacted]

22 October 2012

J. Linney Esq.,
The Law Commission,
Steel House,
11 Tothill St.,
London, SW1H 9LJ

Response to the Law Commission Consultation paper, No. 205 on the Electronic Communications Code

Dear Sir,

I endorse the enclosed responses to the above consultation paper, submitted on my behalf, by Batchellor, Monkhouse.

Yours faithfully,

Francis Hodge

[redacted]

T242

THE MOUNTCURZON GROUP
CURZONFIELD HOUSE
42/43 CURZON STREET
LONDON
W1J 7UE

[redacted]

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London
SW1H 9LJ

22nd October 2012

Dear Mr Linney,

Re: Response to Law Commission Consultation Paper No205 on the Electronic Communications code

I hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours faithfully

John W. Law

T245

The Linen Chest

THE HOUSE OF FINE FURNISHINGS
144A HIGH STREET, RUISLIP, MIDDLESEX HA4 8LJ
[redacted]

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London. SW1H 9LJ

22nd October 2012

Dear Mr. Linney

RE: Response to Law Commission Consultation Paper No205 on the Electronic Communications Code

I hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours sincerely

Kirit Nanalal

T246

Chambers Farming Group Ltd
Reed Hall
Reed
Royston
Hertfordshire
[redacted]

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London SW1H 9LJ

22nd October 2012

Response to Law Commission Consultation Paper No. 205 on the Electronic Communications Code

Dear Sir

I hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf by Batcheller Monkhouse.

Yours faithfully

Robert Chambers

Robert Chambers

Director

T248

AJ & HL Ellis
Preston Farm
Emington
Ivybridge
Devon PL21 9NG

24 October 2012

J Linney Esq
Law Commision
Steel House
11 Tothill Street
London SW1H 9LJ

Dear Sir,

Response to Law Commission Consultation Paper No 205 on the Electronic Communications Code

We (as owners of Arqiva Ltd Site Ref 13115) endorse the enclosed responses to the above consultation paper, submitted on our behalf by Batcheller Monkhouse.

Yours faithfully,

AJ Ellis

Brighton & Hove City Council

T249

Resources
King's House
Grand Avenue
Hove
BN3 2LS

Mr J Linney
Law Commission
Steel House
11 Tothill Street
London. SW1H 9LJ

Date: 25 October 2012
Our Ref:
Your Ref:
[redacted]

Dear Mr Linney

Response to Law Commission Consultation Paper No205 on the Electronic Communications Code

I hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours faithfully,

Jessica Hamilton

Jessica Hamilton MRICS
Acting Estates Manager
Property & Design

[redacted]

St. Margarets Court (Rottingdean) Ltd.

[redacted]

T250

Tom Bodley-Scott
Batcheller Monkhouse
No.1 London Road
Tunbridge Wells
Kent TN1 1DH

October 24th 2012

Dear Mr Bodley-Scott,

Response to Law Commission Consultation Paper No205 on the Electronic Communications Code

In support of Batcheller Monkhouse's submission to the Law Commission Consultation we should like to underline our support for them and the need for arbitrators in the conflicting interests of landowners and telecoms operators.

There is a presumption in law that people who own land and people who want to use it should be free to negotiate whatever contracts they wish, subject to the general law of the land (including the 1954 Landlord and Tenant Act). We have found that already operators are slow to implement the law as it stands.

The proposals in the consultation paper would appear to leave landlords considerably out of pocket without their having the opportunity to withdraw from dealing with the telecoms companies. This exacerbates the present situation where the telecoms companies already seem to hold all the cards. If the proposal is that they could requisition land without the need to search for alternative sites that would be cavalier. This could affect the possibility of change of use or redevelopment of land/roof space in perpetuity: unless these are deemed to be major redevelopments.

Because of these potential sweeping powers, and what we have experienced as their lack of care of other people's property, we would not advise other landlords to get involved with telecom companies. Proposals that further adversely affect the rights of landlords, and the publicity this will engender, could be counterproductive to the intention of expansion of the network as landlords would be loathe to cooperate.

Yours faithfully,

June E. Harben

June E. Harben
Company Secretary

Abacona
Investments Ltd

7257

Steps House, Glebe Rise, Austrey, North Warwickshire, CV9 3HF [redacted]

J. Linney Esq
Law Commission
Steel House
11 Tothill Street
London
SW1H 9LJ

23rd October 2012

Our ref: MBP/VP/Telecom Sites

Dear Sir

Re: Response to Law Commission Consultation Paper No 205 on the Electronic Communications Code

Abacona Investments Limited has four telecom sites all let to national operators and these are situated on two blocks of residential flats in the Birmingham area. It has always been our policy to share rents received from telecom sites with lessees of the flats and they have received substantial benefit by reduction in their service charges. It is important to lessees and this company therefore, that the present arrangements of negotiating rental with the telecom companies be maintained, that is, open market rent should apply.

There is a considerable move towards site sharing by the telecom operators, who wish to reduce their costs however this should not be a reason for overriding existing lease arrangements. Site sharing brings with it additional traffic on roofs from engineers regular visits and works of upgrade. Enhanced site sharing rental, where agreed, goes some way towards the additional and more frequent costs of roof repair. Only this week I have had to write to three telecom tenants whose contractors have caused damage to a roof. Telecom tenants require twenty-four hour access, site sharing usually means more visits by contractors, which is a nuisance to our residential lessees, especially at night.

A landlord must have control over the placing and amount of equipment on the telecom site, particularly with regard to leaving proper access for roof maintenance and existing lease provisions should apply.

Our agent, Batcheller Monkhouse, is also responding to the Consultation Paper and I hereby endorse such responses as submitted on our behalf by that firm.

Yours faithfully

M B Pennycuick

Malcolm B. Pennycuick FRICS
Managing Director

T259

GAWTHORPE ESTATES LTD.

Managing Director
A. J. Sellick M.R.A.C.

Warnford Park, Warnford
Southampton, Hampshire

[redacted]

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London
SW1H 9LJ

24th October 2012

Dear Mr Linney

Response to Law Commission Consultation Paper No.205 on the Electronic Communications Code

I hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours sincerely

Andrew Sellick
Director
Gawthorpe Estates Ltd

Enc

FOSSE WAY COURT (MANAGEMENT) LIMITED

T267

[redacted]

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London SW1H 9LJ

Ref: 45003
Date: 24th October 2012

Response to Law Consultation Paper No. 205 on the Electronic Communications Code

We hereby endorse completely the enclosed responses to the above consultation paper submitted on our behalf by Batcheller Monkhouse, particularly when taking into account the oppressive manner in which the Tenants seek to take unfair advantage of the Landlord & Tenant Act when dealing with Landlords of modest means and experience.

M H Gardiner F.C.A.
Estate Manager

T268

[redacted]

J Linney Esq
Law Commission
Steele House
11 Tothill Street
London
SW1H 9LJ

22.10.12

Dear Sirs

Response to Law Commission Consultation Paper No205 on the Electronic Communications Code

I hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours faithfully

M. Gosden

P.P. Simon Williams
Managing Director

T269

OFFER GROUP LTD

Burgoine House, 8 Lower Teddington Road, Hampton Wick
Kingston upon Thames KT1 4ER

[redacted]

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London
SW1H 9LJ

22nd October 2012

Dear Sir,

Response to Law Commission Consultation Paper No205 on the Electronic Communications Code

I/ We hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours faithfully,

Harry Offer
The Offer Group Ltd

T276

Tom Bodley-Scott

From: Charles Ponsonby [redacted]
Sent: 28 October 2012 09:27
To: Tom Bodley-Scott
Subject: Response to Law Commission Consultation Paper No. 205

[redacted] granted 15 year leases [redacted] for rural mobile telephone masts. I currently receive rents of [redacted]

In the last year or two, I have been advised on telecoms matters by Tom Bodley Scott of Batcheller Monkhouse, who has submitted a painstakingly detailed response to you. Mr Bodley Scott has always struck me as knowledgeable, sensible and fair (this is far from true of all the "professionals" I encountered in a 35 year career in the City of London). From the outset, as a landlord I have been easy to deal with and open to reasonable proposals.

By way of contrast, one of my tenants, and its agents, have consistently exhibited arrogance, bullying and a certain economy with the truth, not least in pleas of poverty and attempts to dazzle with science. I was told by Mr Bodley Scott some months ago that my unpleasant experience with this tenant was widely shared by other telecoms landlords.

The leases I entered into reflected the tenants' greatly superior bargaining power and I am surprised that serious consideration is being given to making the landlords' position even worse, especially during the short currency typical of such leases. I am also amazed that a significant extension of the compulsory purchase principle is being contemplated. It is not as if we are in the 19th and early 20th centuries and compulsory purchase was necessary for railways to be built or telephony to be established. Further, in numerous respects mobile telephone installations cannot be equated with telegraph posts.

May I suggest that any tendency to characterise landlords as Luddites obstructing operators dedicated to technological progress for the benefit of all (rather than the maximisation of their own, already massive, profits and values) be resisted?

I have read Mr Bodley Scott's submission (other than the technical bits) and commend it to you.

Sir Charles Ponsonby, Bt, MA (Oxon), FCA

T 249

Yeovil District Hospital NHS
NHS Foundation Trust

Our Ref: RS/mld/121019

Yeovil District Hospital
Higher Kingston
Yeovil
Somerset
BA21 4AT

[redacted]

19th October 2012

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London. SW1H 9LJ

Dear Sirs

Re: Response to Law Commission Consultation Paper No205 on the Electronic Communications Code

We hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours faithfully

Robert Steele
Director of Estates & Facilities
For and On behalf of Yeovil District Hospital NHS Foundation Trust

T280

Tom Bodley-Scott

From: Edward BYAM-cook [redacted]
Sent: 26 October 2012 10:57
To: Tom Bodley-Scott
Subject: Law commission review

I wish to confirm that I and my clients Northrop Grumman Sperry Marine fully support all the comments you have made in your response to the Law Commission.
As the mobile Companies are commercial Companies they must accept that all their dealings must market value based, otherwise they must accept that their customers should have their phone charges artificially capped as well!
[redacted]

Edward Byam-Cook - [redacted]

T284

KALMAX
Properties Limited

5 Richmond Place
Tunbridge Wells
Kent
TN2 5JZ
[redacted]

James Linney
Law Commission
Steel House
11 Tothill Street
London
SW1H 9LJ

26th October 2012

Dear Sir

Response to Law Commission Consultation Paper No205 on the Electronic Communications Code

I hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours faithfully

A R Rutherford
For and on behalf of Kalmax Properties Limited

T289

[redacted]

[redacted]

26/10/12

Dear Sir,

Re: [redacted]

We request Batcheller Monkhouse to fully represent our interests in all respects concerning any proposals or changes to the law that could reduce and undermine our position as landlords.
All agreements between Telecom operators and Landlords should be on a fair market basis and not have interference from a law providing one side greater powers than the other.
We request simple market forces should be allowed to prevail similar to all matters common to rentals and property.

Yours faithfully

Mr E. D. Young

T292

October 25th 2012

Dear Mr Bodley-Scott,

I am flabbergasted by the contents of your letter. The idea that any organisation can suddenly step in to interfere with agreements between two parties takes me by surprise. The "Law Commission" sounds a formidable body but how on earth does it come to play a roll in this matter? Does it also oversee domestic property letting? For that matter, why not prices at the supermarket or the pumps?

Your letter suggests financial changes amounting to something of the order of 1,000%. The rent which I receive represents an important augmentation to my NHS pension.

Yours sincerely,

Barry Dumughn

Dr Barry Dumughn

T294

A P & N E CLARKE

[redacted]

25th October 2012

J.Linney Esq.
Law Commission
Steel House
11 Tothill Street
LONDON SW1H 9LJ

Response to Law Commission Consultation Paper No. 205 on the Electronic Communications Code

Dear Sirs

We hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours faithfully

Norma E. Clarke & Andrew P. Clarke

T296

W. O. & P. O. JOLLY
FARMERS & CONTRACTORS

ROUDHAM FARM ROUDHAM NORWICH NORFOLK NR16 2RJ
[redacted]

Partners: T Jolly, E Jolly, P Jolly, Vat Registered no. 102 6241 25

22nd October, 2012

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London. SW1H 9LJ

Dear Sirs,

Response to Law Commission consultation Paper no 205 on the Electronic Communications Code

We hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours faithfully,

Ellen Jolly

Ellen Jolly
Partner

T300

[redacted]

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London. SW1H 9LJ

25th October 2012

Response to Law Commission Consultation Paper No205 on the Electronic Communications Code

Dear Sir

We hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf, by Batcheller Monkhouse.

Yours faithfully

J.K. Rudkin

J.M. Rudkin

T302

[redacted]

18 October 2012

Dear Sir or Madam,

Re: Telecom Code Review by the Law Commission

I have recently received a communication from Mr Bodley Scott of Batcheller Monkhouse regarding the Electronic Communications Code that is currently up for review.

This letter is to confirm that I am in full support of the points raised by Batcheller Monkhouse in their response to the proposed changes in legislation.

Having discussed this issue at length with Batcheller Monkhouse and reviewed the information on the Law Commission website, please take this letter as additional support of Mr Bodley Scott's response on behalf of his clients.

Yours faithfully,

Elizabeth Ann Atkins

T310

SHELTON

J. G. SHELTON & CO. LTD.
CHACE FARM
THE WARREN
ASHTEAD
SURREY KT21 2SH
[redacted]

25th October 2012
Our ref : PJS/slf
Your ref : Consult N°. 205

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London SW1H 9LI

Dear Sir

Response to Law Commission Consultation Paper No 205 on the Electronic Communications Code

We hereby endorse the enclosed responses to the above consultation paper, submitted on our behalf by Batcheller Monkhouse.

Yours faithfully

P J Shelton
for **J G Shelton & Co Ltd**

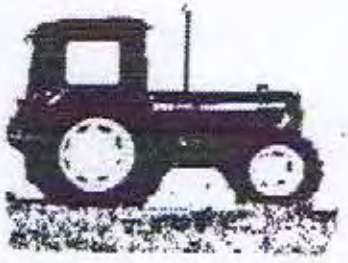
[redacted]

T318

J. F. Boucher

Farmer and Contractor

[redacted]



[redacted]

J. Linney Esq,
Law Commission,
Steel House,
11. Tothill Street
London
SW1 H9LJ

23.10.2012

Response to Law Commission Paper No 205 on the Electronic Communications Code

I hereby endorse the enclosed responses to the above consultation paper, submitted on my behalf by Batcheller Monkhouse.

Yours faithfully

J F Boucher

T323

The Estate Office
Manor Farm
Wotton
Dorking
Surrey
RH5 6QB
[redacted]

22nd October 2012

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London
SW1H 9LJ

Dear Sir

Electronics Communications Code
Response to law Commission Consultation paper No. 205

I have studied the response to be made to you on the above by Batcheller Monkhouse, who are my Managing Agents for my estates, which include telecom masts. I wish to support all the comments made in this response.

Yours faithfully

J P M H Evelyn Esq DL

T325

[redacted]

J Linney Esq
Law Commission
Steel House
11 Tothill Street
London. SW1H 9LJ

21st. October 2012.

Dear Sir,

Telecommunication Masts at Whaddon Farm, Darlingscote Road, Shipston on Stour, Warwickshire
Response to Law Commission Consultation Paper No205 on the Electronic Communications Code

I hereby endorse the enclosed responses to the above consultation paper, submitted on my behalf, by Batcheller Monkhouse.

Yours faithfully,

J.S.S. Bosley

[redacted]

Response 10.15 (Upgrades)
Part 1: Analysis of Database.

We are aware from inspecting 4,533 transactions (where the rights to upgrade equipment are known) that:

- Agreements allowing upgrades with the Site Providers consent comprise 279 (6%)
- Agreements allowing upgrades without the Site Providers consent comprise 1,539 (34%)
- Agreements allowing upgrades, as the agreement is silent, comprise 9 (0%)
- Agreements restricting upgrades comprise 2,706 (60%)

On those agreements that restrict upgrades, it is normal for a limit of equipment to be specified (equipment in this regard is usually referred to as either or all: Panel Antennae; Dish Antennae; or, Antenna Support Structures – i.e. Masts).

These restrictions range from being very restrictive (such as allowing a Code Operator to install 1No antenna on, say, a Site Provider's Mast at a particular height and orientated on a particular bearing) or being relatively open (such as allowing a Code Operator to install 10No antenna on the Code Operators mast not exceeding 20m in height) or being very open (such as allowing a Code Operator to install unlimited antenna on the Code Operator's mast not exceeding 20m in height).

Response 10.16 (Site Sharing)
We are aware from inspecting 3,066 transactions (where we have some knowledge of the site sharing provisions) that many agreements provide for the sharing of the occupation of the site and/ or the use of a Code Operator's apparatus ("Site Sharing").

We have summarised those transactions in the following table:

Site sharing provisions (if shared)	Unknown whether payments are required or not	Payment required	No payment required	Total transactions	as a %
Banned	0	0	442	442	14%
Group Companies only	0	7	289	296	10%
Restricted	255	741	35	1,031	34%
Restricted to Specific Co	18	25	13	56	2%
Reasonable Consent	91	243	78	412	13%
Silent	0	0	67	67	2%
Unrestricted	79	499	184	762	25%
total	443	1,515	1,108	3,066	
as a %	14%	49%	36%		

From this we can deduce that most agreements currently have some form of restriction on Site Sharing but only a relatively small proportion (14%) ban site sharing.

We can also deduce that at least about one half of agreements have some form of arrangement for the payment to the Site Provider of an additional sum, over and above a "base rent", should the site and/ or apparatus be shared.

The payments made to the Site Providers vary from site to site. The following table summarises the 1,515 transactions referred to above:

Site sharing provisions (if shared)	number	as a %
Fixed or variable Payaway to Site Provider (7.5-100%)	1,437	94.9%
Fixed Payaway to Site Provider (£ specified)	41	2.7%
Fixed Payaway to Site Provider (£ to be agreed)	10	0.7%
Triggers RR	3	0.2%
Higher of £ or %	24	1.6%
total	1,515	

From this we can deduce that most agreements provide that the Site Provider is entitled to a payaway based on an agreed and specified % of the fee that the sharing operator (the "Sharer") pays the host Code Operator (the "Host"). In most cases the Site Provider has no control over what fee the Sharer may pay its Host.

Response 10.18 (Assignment)
We are aware from inspecting 1,902 transactions (where we have some knowledge of the assignment provisions) that most agreements (98%) have specific provisions that deal with the assignment of agreements.

We have summarised those transactions in the following table:

Assignment provisions	Total transactions	as a %
Banned	93	5%
Group Companies only	625	33%
Restricted	253	13%
Reasonable Consent	796	42%
Silent	46	2%
Unrestricted	89	5%
total	1,902	

From this we can deduce that most agreements currently have some form of restriction on assignment, but only a relatively small proportion (5%) ban assignment.

LAW COMMISSION
CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

RESPONSE FORM

This optional response form is provided for consultees' convenience in responding to our Consultation Paper on the Electronic Communications Code.

You can view or download the Consultation Paper free of charge on our website at:

www.lawcom.gov.uk (see A-Z of projects > Electronic Communications Code)

The response form includes the text of the consultation questions in the Consultation Paper (numbered in accordance with Part 10 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

The reference which follows each question identifies the Part of the Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

As noted at paragraph 1.34 of the Consultation Paper, it would be helpful if consultees would comment on the likely costs and benefits of any changes provisionally proposed when responding. The Department for Culture, Media and Sport may contact consultees at a later date for further information.

We invite responses from 28 June to 28 October 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or

by post to: James Linney, Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ

Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information 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 Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

Your details

Name: ✂
Email address: ✂
Postal address: 10 Fleet Place, London, EC3M 7RB
Telephone number: ✂
Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):
Level 3 Communications (UK) Ltd, address as above
If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:
✂
As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

INTRODUCTION

Level 3 Communications UK Ltd („Level 3') welcomes this opportunity to comment on the Law Commission's Consultation Paper No 205. As a Communications Provider („CP') supplying services to both Enterprise customers and other Communications Providers, we rely heavily on the ability to install and maintain the infrastructure that supports our services.

As an operator, we have previously experienced significant practical difficulties in exercising our rights under the present Code and have supported calls for a revision of the current legislation. We therefore welcome the prospect that this initiative will deliver a workable solution which will strike a fair balance between the rights of private landowners and the need to enable communications providers to access that land for the purpose of building network infrastructure.

As a member of UKCTA, we have contributed to and support that organisation's submission on this matter. Should any part of this response conflict with the UKCTA response, then this individual submission should take precedence.

CONFIDENTIALITY

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GENERAL

As a general point, we fully agree that the current Code requires a fundamental overhaul in order to ensure that it is fit for future purposes. Our understanding is that the genesis of the current/1984 Code is a series of commercial agreements executed in 1933 (the "1933 Agreements") between the then six privately-owned railway companies and the Post Master General which, inter alia, provided for the Post Office to run cables both laterally and transversely on railway land and to fly wires over the property.

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✂ new network build is increasingly been driven not by speculative investment but by actual end-user demand.

✂ We therefore welcome the Commission's inclusion of the dispute resolution procedure within the scope of the consultation. In an environment where network investment is success-driven, ie that the need for investment is triggered by the securing of new end-user business, the user expectation is that service will be delivered within 30 days or at worst, within 60 days. Beyond that time, the user will frequently cancel their order and elect to find an alternative supplier who is able to meet their demand, thus tending to distort market competition. It is essential, in our view, that a means of ensuring effective dispute resolution within 4-6 weeks of the commencement of proceedings.

The context of UK regulation needs to sit comfortably within the overarching EU regime and Commission will doubtless be mindful that the UK has an obligation to: "contribute to the development of the internal market by … removing remaining obstacles to the provision of electronic communications networks, associated facilities and services .." (Art 8 Framework Directive 2002/21/EC). Likewise, we would highlight a number of relevant sections in the Authorisation Directive 2002/20/EC, including recitals 7, 26, 33 and 34 together with Articles 13 and 14.

In light of the importance to the UK economy and citizens of enabling a world-leading communications infrastructure, we see the current consultation as an opportunity for legislators to

redress the considerable differences between the statutory regimes applying to the communications industry in comparison with other utilities such as electricity, gas and water.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: GENERAL

10.3 We provisionally propose that code rights should include rights for Code Operators:

(1) to execute any works on land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus;

(2) to keep electronic communications apparatus installed on, under or over that land; and

(3) to enter land to inspect any apparatus.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.16.

We agree with the high level principle that access to land should be protected for the purpose of installing and maintaining network equipment and supporting facilities. What is important, in our view, is that as broad a definition of „apparatus' is given so as to ensure that no unforeseen restrictions are put in the way of technological progress.

10.4 Do consultees consider that code rights should be extended to include further rights, or that the scope of code rights should be reduced?

Consultation Paper, Part 3, paragraph 3.17.

We propose that, once the regime is amended following the Commission's output, CPs should be given a right to renegotiate any existing wayleave agreements that they may deem to be incompatible with the revised Code.

10.5 We provisionally propose that code rights should be technology neutral.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.18.

Yes we agree and have made points in our introductory remarks above in relation to this matter.

Additionally, we observe that network apparatus installed under one statutory regime (eg electrical wires) can be used for the purpose envisioned by another (eg communications). In order to ensure there is no distortion of competition, it follows that there is a need to ensure compatibility across all statutory schemes.

Furthermore, we are concerned that landlords are presently able to use future technological changes and upgrades by the CP to trigger increased payments. We fundamentally disagree that

such technology changes affect the cost or diminution of value incurred by the landlord and therefore suggest that there is no place for technology-specific provisions in future wayleave agreements.

10.6 Do consultees consider that code rights should generate obligations upon Code Operators and, if so, what?

Consultation Paper, Part 3, paragraph 3.19.

In our view, there is no need to introduce additional regulatory obligations and the most efficient approach would be to ensure that all relevant obligations are contained within the commercial wayleave agreements which can be enforced through whatever dispute resolution scheme is developed.

10.7 We ask consultees to tell us their views on the definition of electronic communications apparatus in paragraph 1(1) of the Code. Should it be amended, and if so should further equipment, or classes of equipment, be included within it?

Consultation Paper, Part 3, paragraph 3.27.

As we have observed above, we believe that it is important to ensure that core terms such as „apparatus' are defined as broadly as in order to avoid any unintended consequences as a result of future technological change.

10.8 We ask consultees to tell us their views about who should be bound by code rights created by agreement, and to tell us their experience of the practical impact of the current position under the Code. Consultation Paper, Part 3, paragraph 3.40.
✂ Typically, landlords will insist upon terms which grant the landowner strong rights, for instance in relation to redevelopment. While we are always conscious of landlords' commercial drivers, we nevertheless believe that if such restrictive terms are to be used contractually, then the result should be a proportionate lowering of the value of the wayleave.

10.9 We ask consultees for their views on the appropriate test for dispensing with the need for a landowner's or occupier's agreement to the grant of code rights. In particular, consultees are asked to tell us: (1) Where the landowner can be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code, should it be possible for the tribunal to make the order sought without also weighing the public benefit of the order against the prejudice to the landowner? (2) Should it be possible to dispense with the landowner's agreement in any circumstances where he or she cannot be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code? (3) How should a revised code express the weighing of prejudice to the landowner against benefit to the public? Does the Access Principle require amendment and, if so, how? Consultation Paper, Part 3, paragraph 3.53.
We argue for a scheme that is as simple in practice as possible and that a standard scale of charges would be one way in which this might be designed. Such simplicity would suggest that it would not generally be necessary for a tribunal to conduct a full cost/benefit analysis.

10.10 We ask consultees to tell us if there is a need for a revised code to provide that where an occupier agrees in writing for access to his or her land to be interfered with or obstructed, that permission should bind others with an interest in that land. Consultation Paper, Part 3, paragraph 3.59.
As a general principle, we see merit in this. One of the areas of difficulty that we have experienced is in relation to the crossing of private roads where the party for whom communications service is being supplied is not the only party with an interest in the road. In practice, it can be very difficult to obtain agreement of all interested parties, so a „one stop shop' approach would be very helpful.

10.11 We ask consultees to tell us their views about the use of the right for a Code Operator to install lines at a height of three metres or more above land without separate authorisation, and of any problems that this has caused. Consultation Paper, Part 3, paragraph 3.67.
While we have little experience of flying wires, we nevertheless believe that a height of three metres is not unreasonable in most cases. However, there may be exceptions where the use of the land genuinely requires a clearance of greater than three metres and we suggest that there should be a mechanism for landlords to argue for exceptional circumstances to prevail.

10.12 Consultees are asked to tell us their views about the right to object to overhead apparatus. Consultation Paper, Part 3, paragraph 3.68.
As above, we believe that provided the necessary safeguards are in place to prevent abuse of such a provision, and that any exceptions would be speedily agreed. ✂

10.13 Consultees are asked to give us their views about the obligation to affix notices on overhead apparatus, including whether failure to do so should remain a criminal offence.

Consultation Paper, Part 3, paragraph 3.69.

Our understanding is that the primary purpose behind making a failure to post notices a criminal offence lies in the health and safety nature of certain notices. However, we are unaware of any proceedings involving this provision and believe that the current criminal provisions should be relaxed for two reasons, firstly because properly fixed notices can be removed by third parties outwith the control of the Code Operator and secondly because health and safety practice and law has been developed significantly since the original Code text was enacted.

10.14 Do consultees consider that the current right for Code Operators to require trees to be lopped, by giving notice to the occupier of land, should be extended:

(1) to vegetation generally;

(2) to trees or vegetation wherever that interference takes place; and/or

(3) to cases where the interference is with a wireless signal rather than with tangible apparatus?

Consultation Paper, Part 3, paragraph 3.74.

We broadly agree with the maintenance of the current provisions which have proved themselves suitable in practice.

10.15 We ask consultees:

(1) whether Code Operators should benefit from an ancillary right to upgrade their apparatus; and

(2) whether any additional payment should be made by a Code Operator when it upgrades its apparatus.

Consultation Paper, Part 3, paragraph 3.78.

In line with our earlier comments, ✂ we anticipate an increasing need for network upgrades as market needs and technology develop, and that we do not believe such upgrades should trigger additional payments to the landlord.

10.16 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from sharing their apparatus causes difficulties in practice;

(2) whether Code Operators should benefit from a general right to share their apparatus with another (so that a contractual term restricting that right would be void); and/or

(3) whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it shares its apparatus.

Consultation Paper, Part 3, paragraph 3.83.

Apparatus sharing is increasingly being used to reduce installation costs and speed up the process while ensuring minimum disruption to the environment. We can see no reasonable justification for landlords to prevent or charge for such sharing.

10.17 We ask consultees to what extent section 134 of the Communications Act 2003 is useful in enabling apparatus to be shared, and whether further provision would be appropriate.

Consultation Paper, Part 3, paragraph 3.88.

While we have little practical experience of the use of s.134, we nevertheless propose that it serves a useful purpose and should be maintained.

10.18 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from assigning the benefit of agreements that confer code rights causes difficulties in practice;

(2) whether Code Operators should benefit from a general right to assign code rights to other Code Operators (so that a contractual term restricting that right would be void); and

(3) if so, whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it assigns the benefit of any agreement.

Consultation Paper, Part 3, paragraph 3.92.

A general right to assign (or novate) to affiliate companies within a corporate group would be of significant benefit to CPs as this would enable considerable simplification of legal entities and is likely also to reduce the administrative burden faced by landowners. We do not therefore believe that additional payments could reasonably be justified. The one plausible exception to these general provisions might be where one party to an agreement can reasonably raise objections on the grounds of materially increased commercial risk.

10.19 We ask consultees to tell us if they consider that any further ancillary rights should be available under a revised code. Consultation Paper, Part 3, paragraph 3.94.
We have nothing to add to our earlier commentary.

10.20 We ask consultees to tell us if they are aware of difficulties experienced in accessing electronic communications because of the inability to get access to a third party's land, whether by the occupiers of multi-dwelling units or others. Consultation Paper, Part 3, paragraph 3.100.
We are aware that such circumstances do occasionally give rise to difficulties. For example, we have previously cited the case of private roads which are owned by multiple parties and consequently in the absence of enhanced Code rights, can significantly delay access purely because of practical difficulties experienced by the Code Operator in obtaining all necessary consents..

10.21 Do consultees see a need for a revised code to enable landowners and occupiers to compel Code Operators to use their powers to gain code rights against third parties? Consultation Paper, Part 3, paragraph 3.101.
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10.22 Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used? Consultation Paper, Part 3, paragraph 3.102.
We are not aware of the use of this provision but, if such compulsory requirements were to be maintained in the new Code and particularly if their use was to be encouraged, then we would argue the respective rights and obligations of all parties be clearly expressed in the provision itself.

10.23 We ask consultees: (1) to what extent unlawful interference with electronic communications apparatus or a Code Operator's rights in respect of the same causes problems for Code Operators and/or their customers; (2) to what extent any problem identified in answer to (1) above is caused by a Code Operator having to enforce its rights through the courts or the nature of the remedy that the courts can award; and (3) whether any further provision (whether criminal or otherwise) is required to enable a Code Operator to enforce its rights. Consultation Paper, Part 3, paragraph 3.106.
One long-standing concern shared by several CPs is in relation to cable theft. In some circumstances, an intention to steal may actually result in a simple disconnection of network apparatus and once it is confirmed that fibre as opposed to copper is present in the network, the value to the thief is diminished. On occasion, this can result in action that stops short of criminal damage but nevertheless causes severe difficulties for user and CP alike. If the Commission were to introduce a new criminal provision such that merely interfering with protected network apparatus and disrupting the network's ability to provide end user service could be prosecuted then this would be a most useful deterrent.

10.24 We ask consultees whether landowners or occupiers need any additional provision to enable them to enforce obligations owed to them by a Code Operator. Consultation Paper, Part 3, paragraph 3.107.
We do not believe this would be necessary, particularly considering the protections that landowners and occupiers can enforce their contractual rights.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: SPECIAL CONTEXTS

10.25 We provisionally propose that the right in paragraph 9 of the Code to conduct street works should be incorporated into a revised code, subject to the limitations in the existing provision.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.11.

Yes we agree with the general approach proposed here. We are however mindful that CPs face significant obligations under the relevant road/street/transport legislation so would propose that such obligations should certainly not be increased and arguably simplified under the new Code.

10.26 We ask consultees to let us know their experiences in relation to the current regime for tidal waters and lands held by Crown interests.

Consultation Paper, Part 4, paragraph 4.20.

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10.27 We seek consultees' views on the following questions.

(1) Should there be a special regime for tidal waters and lands or should tidal waters and lands be subject to the General Regime?

(2) If there is to be a special regime for tidal waters and lands, what rights and protections should it provide, and why?

(3) Should tidal waters and lands held by Crown interests be treated differently from other tidal waters and lands?

Consultation Paper, Part 4, paragraph 4.21.

In our view, while there may well be a need to ensure that tidal waters are optimally used for the benefit of the UK and its citizens, we believe that appropriate legislation and regulation already exists to ensure adequate protection. We therefore believe it is possible to include tidal waters within the General regime.

We further propose that there is no reasonable justification for ✂

10.28 We ask consultees:

(1) Is it necessary to have a special regime for linear obstacles or would the General Regime suffice?

(2) To what extent is the linear obstacle regime currently used?

(3) Should the carrying out of works not in accordance with the linear obstacle regime continue to be a criminal offence, or should it alternatively be subject to a civil sanction?

(4) Are the rights that can be acquired under the linear obstacle regime sufficient (in particular, is limiting the crossing of the linear obstacle with a line and ancillary apparatus appropriate)?

(5) Should the linear obstacle regime grant any additional rights or impose any other obligations (excluding financial obligations)?

Consultation Paper, Part 4, paragraph 4.30.

We do occasionally need to make use of a linear crossing, so would propose that the new Code is drafted with this requirement in mind. Provided the General regime is worded appropriately, we believe that it may be possible to avoid special provisions, however we have no strong views as to the scheme that may be most appropriate.

We do not accept that any charge for crossing a linear obstacle can be justified, particularly in light of ✂

In relation to the carrying out of works, where the linear obstacle is a statutory undertaking, as is generally the case, then there are normally regulations or bylaws which adequately protect the landlord. Hence we do not think there are adequate reasons for introducing new criminal protection.

10.29 We provisionally propose that a revised code should prevent the doing of anything inside a "relevant conduit" as defined in section 98(6) of the Telecommunications Act 1984 without the agreement of the authority with control of it.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.34.

We agree with the proposed approach

10.30 We provisionally propose that the substance of paragraph 23 of the Code governing undertakers' works should be replicated in a revised code. Do consultees agree? Consultation Paper, Part 4, paragraph 4.40.
We have no strong views either way in relation to this point.

10.31 We provisionally propose that a revised code should include no new special regimes beyond those set out in the existing Code. Do consultees agree? Consultation Paper, Part 4, paragraph 4.43
Unless any new rationale should emerge of which we are not aware, then we agree with the proposal not to extend the special regime.

ALTERATIONS AND SECURITY

10.32 We provisionally propose that a revised code should contain a procedure for those with an interest in land or adjacent land to require the alteration of apparatus, including its removal, on terms that balance the interests of Code Operators and landowners and do not put the Code Operators' networks at risk. Do consultees agree? Consultation Paper, Part 5, paragraph 5.11.
Yes, we agree with this approach which will help to redress the balance of rights and responsibilities.

10.33 Consultees are asked to tell us their views about the alteration regime in paragraph 20 of the Code; does it strike the right balance between landowners and Code Operators? Consultation Paper, Part 5, paragraph 5.12.
We believe the current statutory alteration regime in accordance with s.20 of the present Code does strike a fair balance. The problems we have encountered in practice have essentially occurred where ✂

10.34 We provisionally propose that it should not be possible for Code Operators and landowners to contract out of the alterations regime in a revised code. Do consultees agree? Consultation Paper, Part 5, paragraph 5.13.
Unless both parties willingly wish to contract out of any statutory provision, then our concern is that one party could effectively force through an opting out. We therefore agree with the proposed approach but suggest that there should be a mechanism whereby the parties could jointly and willingly apply to an adjudicator in order to enable them to jointly agree to opt out.

10.35 We seek consultees' views on the provisions in paragraph 14 of the Code relating to the alteration of a linear obstacle. Do consultees take the view that they strike an appropriate balance between the interests involved, and should they be modified in a revised code? Consultation Paper, Part 5, paragraph 5.18.	
We have no experience in relation to such events but do generally support the proposed approach.	

10.36 We provisionally propose that a revised code should restrict the rights of landowners to remove apparatus installed by Code Operators. Do consultees agree? Consultation Paper, Part 5, paragraph 5.47.	
Yes we agree with this proposal.	

10.37 We provisionally propose that a revised code should not restrict the rights of planning authorities to enforce the removal of electronic communications apparatus that has been installed unlawfully. Do consultees agree? Consultation Paper, Part 5, paragraph 5.48.	
Yes we agree with this proposal.	

10.38 We ask consultees to tell us their views about the procedure for enforcing removal. Should the onus remain on landowners to take proceedings? If so, what steps, if any, should be taken to make the procedure more efficient? Consultation Paper, Part 5, paragraph 5.49.
In our view, it is appropriate that the landowner should be required to take proceedings or at least make a formal application in order to enforce removal. If a procedure was established via whatever body is empowered to resolve disputes, then they would be in a position to build up a good knowledge base and introduce their own streamlined procedure without the need to statutorily prescribe a process. The Commission may wish to consider whether it may be helpful to attach a relevant duty to the dispute resolution body to deliver timely decisions on removal (and other) matters.

10.39 We ask consultees to tell us whether any further financial, or other, provisions are necessary in connection with periods between the expiry of code rights and the removal of apparatus. Consultation Paper, Part 5, paragraph 5.50.
We believe this is a matter that could be dealt with satisfactorily under contract.

10.40 We provisionally propose that Code Operators should be free to agree that the security provisions of a revised code will not apply to an agreement, either absolutely or on the basis that there will be no security if the land is required for development. Do consultees agree? Consultation Paper, Part 5, paragraph 5.51.
We have some concerns with the proposed approach as our experience suggests that ✂

10.41	Do consultees agree that the provisions of a revised code relating to the landowner's right to require alteration of apparatus, and relating to the security of the apparatus, should apply to all equipment installed by a Code Operator, even if it was installed before the Code Operator had the benefit of a revised code? Consultation Paper, Part 5, paragraph 5.56.
We generally agree with the direction of the Commission's approach, but would note that the eventual outcome on this point should not be conclusively considered until after other related matters are resolved.	

FINANCIAL AWARDS UNDER THE CODE

In responding to these questions, please note the definitions of "compensation" and "consideration" adopted at paragraph 6.5 and following of the Consultation Paper.

10.42 We provisionally propose that a single entitlement to compensation for loss or damage sustained by the exercise of rights conferred under the Code, including the diminution in value of the claimant's interest in the land concerned or in other land, should be available to all persons bound by the rights granted by an order conferring code rights. Do consultees agree? Consultation Paper, Part 6, paragraph 6.35.
While we agree with the general move to simplify the compensation regime, we do feel that there will be considerable difference between one case and another. Hence, we propose that a degree of flexibility should be built into the regime.

10.43 We ask consultees whether that right to compensation should be extended to those who are not bound by code rights when they are created but will be subsequently unable to remove electronic communications apparatus from their land. Consultation Paper, Part 6, paragraph 6.36.
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10.44 We provisionally propose that consideration for rights conferred under a revised code be assessed on the basis of their market value between a willing seller and a willing buyer, assessed using the second rule contained in section 5 of the Land Compensation Act 1961; without regard to their special value to the grantee or to any other Code Operator. Do consultees agree? We would be grateful for consultees' views on the practicability of this approach, and on its practical and economic impact. Consultation Paper, Part 6, paragraph 6.73.
It is clear to us that the parties will instinctively have fundamentally different approaches to the matter of compensation. For this reason, we urge the Commission to ensure that all components of a compensation scheme are objectively justified.

10.45 Consultees are also invited to express their views on alternative approaches; in particular, the possibility of a statutory uplift on compensation (with a minimum payment figure in situations where no compensation would be payable). Consultation Paper, Part 6, paragraph 6.74.
Should the Commission consider that a statutory uplift is appropriate, then this should be factored into the initial calculations. Furthermore, although we have frequently been required to contractually accept RPI-based indexation we do not think this is the most appropriate index ✂ ✂

10.46 We provisionally propose that there should be no distinction in the basis of consideration when apparatus is sited across a linear obstacle. Do consultees agree? Consultation Paper, Part 6, paragraph 6.78.
The term „consideration' raises concerns here and we believe that it would be more appropriate to base the analysis on the question of compensation. ✂ ✂ principles should apply in relation to linear obstacles.

10.47 We provisionally propose that, where an order is made requiring alteration of a Code Operator's apparatus, the appropriate body should be entitled to consider whether any portion of the payment originally made to the person seeking the alteration in relation to the original installation of that apparatus should be repaid. Do consultees agree? Consultation Paper, Part 6, paragraph 6.83.
We agree that a partial repayment under such circumstances would seem appropriate.

TOWARDS A BETTER PROCEDURE

10.48 We provisionally propose that a revised code should no longer specify the county court as the forum for most disputes.

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.26.

We fully agree. The County Court is clearly not the ideal forum for handling the disputes arising from the Code which tend to be of a very specialist nature.

10.49 We ask for consultees' views on the suitability of the following as forums for dispute resolution under a revised code:

(1) the Lands Chamber of the Upper Tribunal (with power to transfer appropriate cases to the Property Chamber of the First-tier Tribunal or vice versa);

(2) a procedure similar to that contained in section 10 of the Party Wall etc Act 1996; and

(3) any other form of adjudication.

Consultation Paper, Part 7, paragraph 7.27.

We agree that the Lands Tribunal is better placed to deal with disputes than other forums.

10.50 We provisionally propose that it should be possible for code rights to be conferred at an early stage in proceedings pending the resolution of disputes over payment.

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.31.

Yes, we agree with this analysis.

10.51 We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay. Consultation Paper, Part 7, paragraph 7.32.
We agree that delay minimisation is a desirable and valuable requirement. We have nothing to add to our earlier comments as to how this could be achieved in practice.

10.52 We seek consultees' views as to how costs should be dealt with in cases under a revised code, and in particular their views on the following options: (1) that as a general rule costs should be paid by the Code Operator, unless the landowner's conduct has unnecessarily increased the costs incurred; or (2) that costs should be paid by the losing party. Consultation Paper, Part 7, paragraph 7.37
In our view, it would be fairer to work from a presumption that costs should be borne by the losing party in any litigation.

10.53 We also ask consultees whether different rules for costs are needed depending upon the type of dispute. Consultation Paper, Part 7, paragraph 7.38.
In our view, the nature of disputes can generally be distilled to a financial value. It appears to us that the subject of costs should be managed so as to dis-incentivise the bringing of speculative cases. We do not, however, see any viable alternative to the general principle that costs should be awarded to the successful party to a proceeding.

10.54 We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service. Do consultees agree? Consultation Paper, Part 7, paragraph 7.52.
We broadly agree with this principle however, for the reasons set out in ✂, we accept that a different approach may be necessary in relation to notices issued by landowners.

10.55 Do consultees consider that the forms of notices available to Code Operators could be improved? If so, how? Consultation Paper, Part 7, paragraph 7.53.
✂

10.56 Do consultees consider that more information is needed for landowners? If so, what is required and how should it be provided? Consultation Paper, Part 7, paragraph 7.54.
We do not believe that additional information should be required. If landowners ✂ ✂ we would expect there to be a valid rationale which would stand up to an appropriate level of scrutiny.

10.57 We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms. Consultation Paper, Part 7, paragraph 7.60.
We see no difficulty with standardised forms and indeed can see benefits in certain circumstances.

INTERACTION WITH OTHER REGIMES

10.58 We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease.

Do consultees agree?

Consultation Paper, Part 8, paragraph 8.22.

✂

10.59 We provisionally propose that where an agreement conferring a right on a Code Operator also creates an interest in land of a type that is ordinarily registrable under the land registration legislation, the interest created by the agreement should be registrable in accordance with the provisions of the land registration legislation, but that a revised code should make it clear that its provisions as to who is bound by the interest prevail over those of the land registration legislation.

Do consultees agree?

Consultation Paper, Part 8, paragraph 8.33.

While we generally agree with the principles behind the Commission's proposal, we nevertheless would urge that a thorough analysis be carried out into all permutations of types of land interest to which reference is made here in order to satisfy interested parties that no legal conflict can arise.

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

10.60 We ask consultees to tell us:

(1) whether they are aware of circumstances where the funds set aside under regulation 16 have been called upon;

(2) what impact regulation 16 has on Code Operators and on Ofcom;

(3) if a regime is required to cover potential liabilities arising from a Code Operator's street works; and

(4) if the answer to (3) is yes, what form should it take?

Consultation Paper, Part 9, paragraph 9.14.

We are not aware of such circumstances where funds have been drawn. Indeed, were such circumstances to arise, it is not clear to us how the respective interests of the rights holders can be balanced in the case of a relevant event.

In our view, this requirement, which may have been justified in the initial days of mass network investment, is no longer sensible. The reality is that this administrative burden is costly and technically difficult to service and has not delivered any tangible benefit.

10.61 We ask consultees for their views on the Electronic Communications Code (Conditions and Restrictions) Regulations 2003. Is any amendment required?

Consultation Paper, Part 9, paragraph 9.39.

We are unaware of any difficulties with the present regulations, however our view is that the situation should be reviewed in light of any changes to the Code itself that may arise from this consultation.

cell:cm
CHARTERED SURVEYORS
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12 Clarendon Place
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[redacted]
www.cellcm.co.uk

Your Ref: CP205

Our Ref: PAPM.OG.LAW COMM

28 October 2012

James Linney
The Law Commission
Steel House
11 Tothill Street
London
SW1H 9LJ

BY E-MAIL ONLY
Email: propertyandtrust@lawcommission.gsi.gov.uk

Dear Mr Linney

RE: LAW COMMISSION CONSULTATION PAPER NO 205 ELECTRONIC COMMUNICATIONS CODE

Please find attached to the email accompanying this letter, a response to the above consultation from Cell:cm Chartered Surveyors.

Cell:cm Chartered Surveyors is a niche practice specialising in telecommunications property advice. Our clients are land and property owners with mobile phone masts, radio towers, rooftop antennas and radio base stations on their land and buildings. Our wide range of clients varies from individual land or business owners with a low income mast site to multi-national real estate companies and investment funds with million pound plus rent rolls.

Without exception, our clients' properties have considerable value derived from the UK market for radio base station sites.

We have completed our response using the Law Commission's own form, downloaded from its website. Our response to many of the points is very detailed.

On their request, we have also issued responses from twelve of our clients. These have been emailed to you under separate cover. These respondents are as follows:-

- Aberdeen Asset Managers
- Bizspace Limited
- Bruntwood Limited
- Central Scotland Police Authority
- Glasgow Housing Association
- Highcross Strategic Advisors Limited
- Leeds City Council
- Leicestershire Police Authority
- Northern Trust Company Limited
- Nottinghamshire Police Authority
- UK Land Estates
- WM Housing Group

These organisations own property let to various communications operators including mobile phone network operators, broadcast organisations, wireless broadband operators, local radio stations, private network operators (such as taxi firms), community radio stations etc. Collectively, they have

just under 400 tenancies, leases or licences, with a combined annual income of approximately £3.85m.

We act for hundreds of other smaller businesses and organisations in addition to these major clients. We recently provided a valuation for inheritance tax purposes of a client's portfolio of 12 radio tower sites. This client's income amounts to £1.3m. The portfolio has a substantial capital value. That client built up its portfolio from its own personal investment in radio network infrastructure. The commercial market for radio network infrastructure is well established. We expand upon this in our response form.

The directors of Cell:cm Chartered Surveyors are Andrew Cranston BSc(Hons) MRICS ACIArb and Philip Morris MRAC MRICS ACIArb.

Andrew and Philip, have a combined total of 30 years experience providing day to day management and strategic property advice in the telecommunications sector. In various roles, they have each advised clients on both the Landlord and Tenant side of the telecoms market, giving them an unrivalled balance of experience.

With Newcastle City Council in the mid 1990's, Andrew had sole responsibility for the rapidly expanding telecoms portfolio on Council property. At around the same time, in his role with Clark Scott Harden in Cumbria, Philip advised mainly agricultural landholding clients on telecoms related matters.

The Directors met in 2000 when they both worked in Vodafone's National Estates Management Department (Philip covering London and the South East, Andrew covering the North of England, Scotland and Northern Ireland). They subsequently left Vodafone to work with different consultants to the telecoms operators (Andrew at Waldon Telecom and Philip at Mono Consultants).

In 2004, they established Cell:cm Chartered Surveyors, now one of the leading firms providing specialist advice to clients in the electronic communications sector.

Both Andrew and Philip are Arbitrators and Independent Experts on the RICS President's Panel for rent review and lease renewal disputes. They were elected onto the panel following an invitation from the President based on the Industry's recognition of their specialist electronic communications property experience and knowledge.

Philip is also the past chairman of RICS matrics, a former member of RICS Governing Council and the RICS Leadership team. He is an active member of the RICS Telecoms Forum and has spoken at a number of CPD briefings on telecommunications property issues throughout the UK. He was invited to speak at the inaugural Henry Stewart conference on Telecommunications Property in January 2006 and went on to chair it in 2007, 2008, 2010 and 2011. He has been asked to take part as a speaker and panellist for the event scheduled for 2013.

We would be grateful if you would confirm receipt of this response and those of our clients listed above. We trust you will attach considerable weight to them. Should you wish, we would be delighted to meet with you or speak to you on the telephone to elaborate on any point included within the responses.

Yours sincerely

Philip A.P. Morris MRAC MRICS ACIArb
Director, Cell:cm Chartered Surveyors
[redacted]

LAW COMMISSION
CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

RESPONSE FORM

This optional response form is provided for consultees' convenience in responding to our Consultation Paper on the Electronic Communications Code.

You can view or download the Consultation Paper free of charge on our website at:

www.lawcom.gov.uk (see A-Z of projects > Electronic Communications Code)

The response form includes the text of the consultation questions in the Consultation Paper (numbered in accordance with Part 10 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

The reference which follows each question identifies the Part of the Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

As noted at paragraph 1.34 of the Consultation Paper, it would be helpful if consultees would comment on the likely costs and benefits of any changes provisionally proposed when responding. The Department for Culture, Media and Sport may contact consultees at a later date for further information.

We invite responses from 28 June to 28 October 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or

by post to: James Linney, Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ

Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information 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 Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

Your details

Name:
Andrew Cranston BSc (Hons) MRICS ACIArb & Philip Morris MRAC MRICS ACIArb
Email address:
[redacted]
Postal address:
Cell:cm Chartered Surveyors 12 Clarendon Place Leamington Spa CV32 5QR
Telephone number:
[redacted]
Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):
Response on behalf of Cell:cm Chartered Surveyors, address as above
If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:
Parts of this submission are confidential as they refer to cases studies of actual cases. Some of these are on-going disputes and even though the parties are anonymous, the details of the case may be familiar to the parties involved. The disclosure of the details may prejudice the outcome of the cases. Where the information provided is confidential this is clearly indicated and prior to being put in the public domain we ask for these sections to be redacted.
As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: GENERAL

10.3 We provisionally propose that code rights should include rights for Code Operators:

(1) to execute any works on land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus;

(2) to keep electronic communications apparatus installed on, under or over that land; and

(3) to enter land to inspect any apparatus.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.16.

Code rights should be granted in conjunction with a legal agreement with the landowner/site provider (SP). Most agreements between Code Operators (CO's) and SP's provide for rights to upgrade, maintain, install, inspect etc. Where such rights have not been included it will be for a specific reason i.e. the CO may not need the rights at the outset or the SP may not wish to grant them as doing so may be too great an imposition on his property.

Only if the most basic rights cannot be agreed at the outset should they be imposable by CO's. There is no reason to allow CO's to obtain wider rights than are negotiated by two well advised parties in a written agreement.

10.4 Do consultees consider that code rights should be extended to include further rights, or that the scope of code rights should be reduced?

Consultation Paper, Part 3, paragraph 3.17.

The Code works because it provides a "back stop" to negotiations between SP's and CO's. As long as CO's can acquire legally and properly negotiated rights at the outset of an agreement and retain their apparatus at the end of that (subject to changes in the renewal of rights procedure commented on in 10.38) there is no need to extend the rights in the Code.

10.5 We provisionally propose that code rights should be technology neutral.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.18.

Code rights granted should not be technology neutral. There will be instances where the type of apparatus is different and the Code should deal with them in different ways. For example, a simple installation of a cable across a field is very different to a large rooftop site of microwave dishes within a wireless network. The land owner will hardly notice the cable is there, provided it is installed at the necessary depth, to a specification which is clearly set out in a written, legal agreement and the SP has the ability for it to be moved so it doesn't impact on his property ownership strategy.

On the other hand, the rooftop site will fetter the use of a building and will provide a massive commercial benefit to the Operator's network, in the same way as, say, a customer service call centre will.

These two installations need different regimes to govern their installation and on-going

operations.

At 3.29 the consultation states *"…The occupier is the one most likely to want the supply of electronic communications services, and also the most likely to be inconvenienced by the apparatus of Code Operators..."*

This extract suggests the Commission has misunderstood the relevance of the Code to wireless networks installations. Whilst the Occupier may be the beneficiary of services from a cable CO, it is often not the one most likely to want the supply of services from a wireless CO. E.g. the owner of an office building which lets its roof space to, say, Orange, may not receive any direct benefit from that network. There may be four other networks available in the area that the occupier can subscribe to. The installation will provide coverage to the Orange network for several hundred metres around a building or it may provide a location for microwave links to connect other, more distant sites in the Orange network. Either way the site is for the benefit of the CO and not the Occupier.

This is one example where wireless and cable regimes do require different types of code intervention. The Code should not be technology neutral. We also say more about this in our response to 10.8, below.

Comparing CO's Code rights with powers that other Utilities benefit from further highlight's the need for a differentiation between wireless and cable apparatus. Electricity and water suppliers benefit from compulsory purchase powers under the Electricity Act 1989 and the Water Industry Act 1991. Both of these grant rights relating to linear apparatus comprising electric lines and water pipes etc. (see paras A.14 and A18 of Appendix A to the Consultation Document). This relates easily back to communications cables but not to wireless radio base station apparatus.

The following photo shows a large rooftop wireless base station installation:-

In the Commercial market this has a rental value of over fifty thousand pounds per annum. This is

a very different type of installation to a cable run across a farmer's field.

10.6 Do consultees consider that code rights should generate obligations upon Code Operators and, if so, what?

Consultation Paper, Part 3, paragraph 3.19.

CO's should be obliged to act honestly and transparently with their SP's. CO's often contact their SP's and ask for rights to which they are not entitled, but imply are permitted under their legal agreement with the SP. For example by implying a certain equipment upgrade is permitted when the licence governing the installation (which will have been freely and openly negotiated, at considerable expense to both parties), expressly prohibits the upgrade.

Such actions place an air of distrust in the relationship between SP's and CO's and do not assist the long term sustainability or expansion of communications networks. Acting more openly and transparently would allow SP's to trust the CO's and more amicably agree apparatus upgrades, enhancements, additions etc.

10.7 We ask consultees to tell us their views on the definition of electronic communications apparatus in paragraph 1(1) of the Code. Should it be amended, and if so should further equipment, or classes of equipment, be included within it?

Consultation Paper, Part 3, paragraph 3.27.

The existing definition in Para 1(1) provides a good back stop to the roll out and retention of networks. Individual agreements will tailor the apparatus that can be installed to what is applicable at the site. CO's draft agreements to ensure their rights to power etc. are protected. Errors have been made in the past but these have been resolved between an SP and a CO with no detriment to the network.

The market learns from these errors. Subsequent legal agreements are amended and the market moves on.

Expanding the definition of electronic communications apparatus would be self- defeating as technology moves on. Making it more specific will mean apparatus which may not yet have been invented is not included in the definition.

10.8 We ask consultees to tell us their views about who should be bound by code rights created by agreement, and to tell us their experience of the practical impact of the current position under the Code.

Consultation Paper, Part 3, paragraph 3.40.

The Occupier and its inferior interests (sub-tenants, licensees etc.) should be bound by the Code.

Referring to para 3.29 (also see response to 10.5, above) if the Occupier wants a cable service, or a local boost to its wireless coverage then it is likely to amicably agree to the operator's installation, without reference to the code. If the Occupier needs the consent or approval of its superior Landlord or freeholder then it should apply for that consent under the terms of its lease. Landlord and Tenant based legislation exists to allow such consent to be granted and prevent ransom situations developing (such as s19 of the Landlord and Tenant Act 1927). If the Occupier has entered in to a defective lease which doesn't allow the connection of e-comms services then that should be a matter for the Occupier and it's superior to resolve, without the interference of the Code.

Ultimately the freeholder may benefit from having the services to its property as it may benefit future tenants. In which case it will probably agree to the connection. The Code may need to be a light touch in this instance, perhaps leaving the freeholder open to a claim from the Occupier if access to the e-comms service is denied.

The current Code is a (virtually never used) back stop in this situation. The freeholder may capitulate if its hand is forced. However, this may be at the cost of the good will between the Occupier and the freeholder, so the overall benefit may be limited, avoiding one dispute but starting another.

It is not necessary or reasonable for the Code to bind anyone other than the Occupier or its inferior interests. If a lease comes to an end and the Tenant has to deliver vacant possession the Code should not interfere with that. A relatively low value installation may cause a huge devaluation of the superior interest if VP cannot be obtained unless the freeholder goes through a convoluted and expensive court process. This may mean the Occupier Tenant faces a claim from the Superior Landlord, which may be inequitable if the Occupier is only made aware of the existence of the Code once apparatus is installed and Code Powers are in place.

In these circumstances the Code should not apply. Provided SP's are fully aware of the Code and its impact, before the outset of an agreement, it will be less problematic. CO's could be obliged to serve a "health warning" notice on the Grantor of a licence before the agreement is completed, similar to that served on a Tenant by the Landlord under the Landlord and Tenant Act 1954.

However, this is likely to interfere with the completion of many agreements if the notice is only served at the last minute. Likewise it may deter many occupiers from entering in to negotiations in the first place if it is served too early. A combination of both may be a solution. Firstly making the SP aware of the existence of the Code with the CO's first offer for an agreement (the heads of terms negotiation stage) and obliging the full health warning notice to be served before completion of an agreement. Only once the health warning has been validly served should Code Powers be created.

The health warning should contain the steps that the SP would have to take to remove the apparatus, so the SP can see what process is required at the end of his lease/licence with the CO. The removal process needs to be available whilst the lease/licence is running rather than as provided by the Code at present, when the lease has come to an end.

One way around this would be to enable the contracting out of Paragraph 21, in the same way as s24-28 of the 1954 Act. This will probably free up sites where, in the past, Owners haven't allowed e-comms apparatus because of the existence of the Code. Provided the SP can see that VP can be obtained at the end of a lease and its renewal or non-renewal is clearly dealt with by

the CO this will allow time for a new site to be acquired and it will be able to cope with the non-renewal of a lease.

In this circumstance the onus could be on the SP to serve a particular form of notice on the CO advising it that its agreement will not be renewed. Similar to a hostile s25 notice under the 1954 Act. A reasonable notice period could be between 12 and 24 months. Any CO should be able to acquire alternative sites during this time, even in the most arduous or restrictive of locations, particularly if the Code assists in the acquisition of rights.

Again this highlights differences between installations directly for the benefit of an occupier and those where it is for the wider area or wired and wireless installations. Where an installation doesn't provide a benefit directly to the SP e.g. a cable for one CO to another CO's apparatus (say a wireless base station) the terms of the second CO's licence agreement with its SP should over-ride the Code, so that SP is protected from claims from its superior interest. The Code is too remote and CO's are too disinterested to get involved in claims between SP's and their superiors. The County Court is too expensive a resolution. Making the Code more intrusive will result in more disputes and stand-off's between SP's and CO's.

[redacted]

[redacted]

Whilst the Code was always present in the background of this case, its dispute resolution procedure was not adequate. The county court would take too long and be too expensive to resolve the dispute in this case. All parties recognised this and came to an agreement to settle all matters. Had ADR been available, (in the same way as PACT is under the 1954 Act or Arbitration as provided by Para 13 of the Code), the matter could have been referred to an Arbitrator with the skill and knowledge of the e-comms wireless base station market. This is cheaper and quicker than any court process and would enable the resolution of disputes within a few months, rather than years.

The whole dispute would probably not have arisen if i) T2 had carried out proper title searches and satisfied itself that the occupier and correct grantor of the licence should have been T and not L. ii) L and T had been made aware of the existence of the Code before L completed its agreement with T2.

In the end, an amicable agreement was reached to settle the dispute by reference to market evidence and comparable transactions and without recourse to the County Court. This demonstrates the importance of the lettings market for this type of installation and scenario.

10.9 We ask consultees for their views on the appropriate test for dispensing with the need for a landowner's or occupier's agreement to the grant of code rights. In particular, consultees are asked to tell us:

(1) Where the landowner can be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code, should it be possible for the tribunal to make the order sought without also weighing the public benefit of the order against the prejudice to the landowner?

(2) Should it be possible to dispense with the landowner's agreement in any circumstances where he or she cannot be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code?

(3) How should a revised code express the weighing of prejudice to the landowner against benefit to the public? Does the Access Principle require amendment and, if so, how?

Consultation Paper, Part 3, paragraph 3.53.

Under the current code, the burden falls with the landowner to demonstrate that his detriment outweighs the public benefit. This is an extremely difficult proposition for a landowner and one which could be costly. In a situation in which a question arises about the weighing of prejudice to the landowner against benefit to the public, a reference to an independent body (such as Ofcom) should be available to make a binding decision within a set timescale and cost.

Compulsory acquisition should be an absolute last resort. The principles in R (on the application of Sainsbury's Supermarkets Ltd) V Wolverhampton City Council and another [2010] UKSC 20 should be borne in mind. That a Local Authority should not be exercising its powers of compulsory purchase in order to make a commercial profit; the dominant aim must be betterment in planning terms. To apply this same principle to Code Powers a CO (which may include a public authority) should not use compulsory acquisition simply to make its network more profitable. The dominant aim is to better society as a whole.

10.10 We ask consultees to tell us if there is a need for a revised code to provide that where an occupier agrees in writing for access to his or her land to be interfered with or obstructed, that permission should bind others with an interest in that land.

Consultation Paper, Part 3, paragraph 3.59.

Unless the Code is watered down considerably and indemnities within it made clearer, the answer should be no. The Code should only bind superiors as far the agreement allows between the Occupier and its superior interests.

To do otherwise will create a difficult situation that interferes with existing agreements. Inferior interest holders will have to renegotiate agreements with their superiors, unless the Code cuts through them, which will be impractical. Para 3.42 states the benefits to society should be balanced against the private interests of those who own and occupy the land over which rights are acquired. Where does that balance lie? Where does

A hypothetical example is where cable CO X wishes to install a cable across a car park which is rented by T from L under a lease with, say, three years left to run. T wants to install X's high speed broadband service to its adjacent office building, also leased from L. X proposes to run the cable to a cabinet just outside the lease area, which will also provide more links to serve other users (U) in the area. This cable run will be installed via a wayleave between T and X.

L has a long term plan to develop the car park and will require a cleared site to do so. It has a detailed lease with T, drafted carefully to ensure this can take place as soon as possible after T's lease ends.

If T has the right to grant wayleaves in its lease but there is no reference to the Code in that lease (which is quite likely). If the Code binds L, it will mean T can't guarantee vacant possession on expiry of its lease for the sake of a cable which it needs to enhance its business connectivity. X will therefore have to negotiate with L to allow the installation, or compulsorily acquire it. A compulsory acquisition is likely to take considerable time and cost, with no benefit to L other than having a happy Tenant, T with high speed broadband.

If the Code is binding on L, it cannot remove the cable on expiry of T's lease. It will be inequitable on L to lose its development value, which could be several hundred thousand pounds. X will not want to risk incurring responsibility for this, so the Code will be ineffective. T will not want to risk a claim from L for the same. The Code binding L will create a risk for loss of development value on X and the same claim from T. This doesn't provide the right balance just to retain cable services to a small number of users from a single cabinet in the same area.

Not binding L will allow it to remove the cable on expiry of T's lease. This may mean U has their cable service interrupted when L disconnects X's cable. X will have to plan for this eventuality in its initial installation plan and have a contingency in place to retain U's connections via another route, when T's lease expires. So long as T can provide possession in line with the terms of its agreement with L there will be no problem. X can take the time to plan an alternative route.

A health warning notice served by X on T before its wayleave completes could set out the steps T needs to take to remove the cable, with specific notice periods included – perhaps 12 months. This should be separated from any contract between X and T for cable services.

The case study in our response to 10.8 is also relevant to this. If the Code had bound T in that example, it would have been in a position where it had a civil claim against its Landlord L, but the CO, T2, would not have been a party to that claim and no incentive to deal with it. In all likelihood T2 would have sat back and done nothing to regularise the position.

[redacted]

[redacted]

10.11 We ask consultees to tell us their views about the use of the right for a Code Operator to install lines at a height of three metres or more above land without separate authorisation, and of any problems that this has caused. Consultation Paper, Part 3, paragraph 3.67.
NO COMMENT

10.12 Consultees are asked to tell us their views about the right to object to overhead apparatus. Consultation Paper, Part 3, paragraph 3.68.
NO COMMENT

10.13 Consultees are asked to give us their views about the obligation to affix notices on overhead apparatus, including whether failure to do so should remain a criminal offence.

Consultation Paper, Part 3, paragraph 3.69.

NO COMMENT

10.14 Do consultees consider that the current right for Code Operators to require trees to be lopped, by giving notice to the occupier of land, should be extended:

(1) to vegetation generally;

(2) to trees or vegetation wherever that interference takes place; and/or

(3) to cases where the interference is with a wireless signal rather than with tangible apparatus?

Consultation Paper, Part 3, paragraph 3.74.

There should be no distinction between trees and vegetation. What would be the test? When is a tree not a tree?

A question of proportionality should be applied to any cutting back. If a CO has to cut back hundreds of metres of forest to clear growth which is interfering with a run of telegraph cables it is probably impractical for the CO to increase the height of each support pole to avoid the tree lopping being required.

However, if a wireless CO has to cut back the same length of forest to allow a microwave dish link on a radio tower to maintain line of sight to another tower several miles away, is the tree lopping the best way to achieve this? Probably not. Installation of a new link or increasing the height of the existing one would be a more effective short term solution and one that enables a long term replacement link to be acquired. Such links can be acquired relatively easily and a competitive market exists for CO's to accurately predict what such a replacement would cost to deploy and retain.

An example of interference with wireless signals by trees was highlighted in a recent news story – please see the following link:- http://www.bbc.co.uk/news/uk-wales-south-east-wales-20010415

Tree growth is gradual and, from experience, interference with wireless signals gradually increases with tree growth. Good monitoring of network links should prevent this type of problem from occurring but when it does there needs simply to be a proportionate response.

As for the suggestion in 3.73 that the right should apply to building which block a wireless signal, that takes Code powers too far. Wireless networks have been established in a competitive market place. If the Code was to grant such far reaching powers to (in the main) private companies, to interfere with buildings owned and occupied by parties with whom they have no contractual relationship and may be geographically removed from the apparatus, this shifts the balance of the CO's and public's interest too far against the private property owner's interest.

10.15 We ask consultees:

(1) whether Code Operators should benefit from an ancillary right to upgrade their apparatus; and

(2) whether any additional payment should be made by a Code Operator when it upgrades its apparatus.

Consultation Paper, Part 3, paragraph 3.78.

Any code rights that are conferred by agreement on the CO must be "exercised in accordance with the terms…subject to which [they are] conferred" (The Code, para 2(5)).

The market for the negotiation of terms included in agreements between CO's and SP's has evolved over the last three decades. Both CO's and SP's seek specifications and limitations on equipment rights granted as this has a fundamental impact on the level of consideration and visual impact. For example, the main cellular network operators all maintain guidelines for use by their acquisition contractors when negotiating terms with SP's. These guidelines include differing levels of consideration for alternative configurations of apparatus. Rights included in an agreement for three antennas and a cabin on a roof top will differ in consideration terms to rights for six antennas, four dishes and a cabin. Both CO's and SP's are aware that the rights included in the freely negotiated agreement will impact on the level of consideration payable. The CO therefore seeks rights to cover its requirement and thus limits its payment liability and the SP has the comfort of knowing the limits of what will be installed on or at his property.

The agreements will also cover the ability and extent to which the CO may alter, renew, upgrade etc the apparatus. It is generally the case that a CO will have a right to undertake any such works within the parameters of its equipment rights. This right may be unfettered and available to the CO subject to the access provisions only or it may be subject to the prior consent of the SP. In the latter case, the consent of the SP must not be unreasonably withheld or delayed. If, for example, a CO has a requirement to "swap" or "upgrade" existing antennas for new antennas due to evolving technology, this right will exist without the ability for the SP to validly object or expect additional consideration. Specifications within freely negotiated agreements rarely limit a CO to the use of a specific type of technology. Such agreements may refer to "antennae", "transmission dishes" or "equipment cabinets" etc. These are generic terms within which a CO can choose to operate an antenna for GSM, UMTS or LTE technologies. The only limitations will be on the number of antennas and dishes etc. Should a CO wish to increase the number of antennas beyond its rights in an agreement, it will take more space on a roof top or increase the wind loading on a tower and will be expected by the SP to pay for such additional rights. Many agreements actually include a right to the CO to add items of apparatus beyond the rights granted for pre-agreed rates.

Where rights for any proposed upgrade do not exist within the agreement, the CO is able to apply to the SP in order to "acquire" such additional rights by negotiation for a variation to the agreement.

We do not therefore believe that CO's should benefit from a statutory right and ability to upgrade apparatus regardless of limitations embedded in agreements.

Whether additional consideration should be paid for upgrades is a question to be considered with knowledge of the extent and impact on the SP of the proposed upgrade. If six existing antennas are to be removed and replaced by six new antennas due to a technological change, no additional consideration should be paid (as the general rights remain the same and the visual impact is limited). However, if six additional antennas are to be added with no change to the existing equipment, additional consideration should apply. The market for the quantum of consideration in such situations is mature and transactional evidence is ubiquitous so agreeing or settling an appropriate rate for such upgrades is non-contentious.

10.16 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from sharing their apparatus causes difficulties in practice;

(2) whether Code Operators should benefit from a general right to share their apparatus with another (so that a contractual term restricting that right would be void); and/or

(3) whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it shares its apparatus.

Consultation Paper, Part 3, paragraph 3.83.

(1) The ability of SP's to prevent CO's from sharing their apparatus does not cause difficulties in practice. When negotiating terms for an agreement, the parties will address the ability for the CO to share (with specific named third parties, third parties in general and with group companies). The inclusion of a right to allow sharing is common and will generally impact on the level of consideration (either by an increase in the main rent or fee or by way of site share pay-away – the payment by the main CO to the SP of a fixed percentage of the fee it receives from the sharer).

Where sharing is precluded in an agreement and the CO contacts the SP to advise of a requirement for sharing from another CO, the parties are free to negotiate a settlement for a variation to the agreement to allow such sharing to proceed. This generally results in agreement of market terms based on a multitude of available comparable transactions and the CO is given a right to share. The SP will receive additional payment from the CO either by way of a fixed increase or percentage pay-away.

For example, in the last two years, Vodafone Limited and Telefonica UK Limited ("O2") have been progressing their agreement to share their combined mast sites (a project called "Cornerstone"). In numerous cases, the ability to share was embedded in the agreement so the other operators' equipment was installed and the SP may have been paid an additional annual sum based on the specifics of the agreement. In other cases, the agreement precluded the ability to share and the incumbent operator sought a right from the SP by negotiation. Due to the sheer number of cases, the market generated an "acceptable value" for such transactions at an increase for the SP equivalent to 15% of the main rent passing, payable in addition to the rent. For instance, where a passing rent was £5,000 per annum for the right for Vodafone to operate, an additional right for Vodafone to share with O2 was granted and, for the period O2 operates, Vodafone is obliged to pay the SP and additional 15% of £5,000 (£750 per annum). Vodafone and O2 have an agreement to pay each other 50% of the passing rent in such situations so the amount of "pay-away" in this scenario is 30% which aligns with the general site share market which has been established over the last three decades. Where the Cornerstone arrangement differs from the established site share market is in the agreement between Vodafone and O2 to pay one another licence fees for sharing at a prescribed rate which is substantially less than explicit in the "rate cards" they have with other CO's (and vice-versa) and between infrastructure providers such as Arqiva and the CO's. Put in other terms, the payments agreed between Vodafone and O2 are viewed by many as being at less than market value. The possibility that Vodafone and O2 may agree not to pay each other a licence fee to share has resulted in the market response to replace of the old "pay-away" regime with a site share payment based as a percentage of the passing rent.

Generally, a SP benefits from the negotiation of a sharing arrangement where such a right does not exist. The CO's also benefit as they are provided with the right to share on a freely negotiated basis. Thus, in practice, the ability for SP to prevent CO's from sharing causes no difficulties.

(2) It would be unreasonable to grant CO's a general right to share their apparatus with another (so that the contractual term restricting that right would be void). The ability for a CO to share is a valuable right. If the value derived from this right is removed due to a

statutory ability for a CO to share, this would have a clear impact on the property rights of a SP. It would contravene an established market where site sharing is encouraged by both CO's and SP's due to the benefits gained by both in progressing such arrangements.

In a roof top situation, there is finite space available and certain sections of this space may be let to various CO occupiers. Each agreement will generally preclude the ability for the CO to share. The SP may therefore benefit from several separate payments pursuant to each agreement. If a CO is provided with an unfettered ability to share, a SP's income from separate agreements may be dramatically decreased as the CO's may seek agreements with one another to share from one main base station (with a single rent).

(3) An additional payment should be made by a CO to a SP when it shares its apparatus. The current market demonstrates this to be the case (as outlined above). It would be unreasonable to expect a SP to forego this accepted principle which has been established by the open market.

10.17 We ask consultees to what extent section 134 of the Communications Act 2003 is useful in enabling apparatus to be shared, and whether further provision would be appropriate.

Consultation Paper, Part 3, paragraph 3.88.

We are not aware of this right being used by a CO. We do not believe it is useful in enabling apparatus to be shared. It could be suggested that this right may turn an absolute prohibition on sharing into a qualified prohibition (subject to consent) in respect of an electronic communications system within a building (for example, a shopping centre or airport). Again, this would directly impact on the SP's ability to grant terms on an established market basis and would have a detrimental impact on his property rights.

10.18 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from assigning the benefit of agreements that confer code rights causes difficulties in practice;

(2) whether Code Operators should benefit from a general right to assign code rights to other Code Operators (so that a contractual term restricting that right would be void); and

(3) if so, whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it assigns the benefit of any agreement.

Consultation Paper, Part 3, paragraph 3.92.

(1) The ability for SP's to prevent CO's from assigning the benefit of agreements that confer code rights does not cause difficulties in practice. The ability to assign such rights is an agreed term which carries value. A SP has a clear right to know who is operating from his property under the terms of the agreement he entered into with the CO. He may grant a Licence which is personal to the Licensee CO or he may grant a lease with a prohibition on assignment. In some cases, where assignment is allowed, a SP may find himself in a situation where he had granted code rights to a single CO but then this is assigned to another party which enables more than one CO to operate and, thus, gain code rights. This affects the SP's reversion in a manner which was not envisaged when the agreement was granted.

The CO may also enter into a joint venture with another CO under a single newly formed company in order to circumvent the market payments to share apparatus. For instance,

Vodafone and O2 are soon to announce plans for such a joint venture company under which both will be able to operate. A Vodafone agreement which prohibits sharing but allows assignment may be transferred to the new joint venture company, thus effectively enabling O2 to share without payment and in contravention of the intentions of the parties when agreeing the original terms.

When the former T-Mobile (UK) Limited and Hutchison 3G UK Limited signed an agreement in 2007 to combine their 3G access networks, they sought to assign the agreements for the installations they decided to retain into the joint names of both companies. In many cases, the agreements precluded assignment. Cell:cm Chartered Surveyors advised SP's in just under 200 separate cases where market terms were agreed between the parties and the agreements were assigned. The project was progressed without difficulty relying on normal market processes.

(2) Giving a CO a general right to assign, regardless of the terms agreed between the parties would infringe on a SP's property rights and could affect the value of his reversion. His grant of a licence personal to a CO could transform into an operation at his property by several CO's under a single agreement. The agreement between the parties should be the over-riding factor which covers the rights to assign or not. Anything else would violate an established market.

(3) If an agreement is assigned from one CO to another and is not done in order to circumvent the value in site sharing, there should be no additional payment by the CO to the SP. However, if the assignment to progressed with a view to enable sharing but avoid a the pay-away, a payment equivalent to what the sharing arrangement would generate in market terms should be made to the SP.

10.19 We ask consultees to tell us if they consider that any further ancillary rights should be available under a revised code.

Consultation Paper, Part 3, paragraph 3.94.

We do not consider that any further ancillary rights should be available under a revised code.

10.20 We ask consultees to tell us if they are aware of difficulties experienced in accessing electronic communications because of the inability to get access to a third party's land, whether by the occupiers of multi-dwelling units or others.

Consultation Paper, Part 3, paragraph 3.100.

We are not aware of any such difficulties aside from those which have been reported in the public domain. Case law exists which provides precedents to prevent restrictions occurring of the type suggested in para 3.95 of the consultation document.

In our experience most agreements relating to wireless radio base station sites relate to a certain area of land or part of a building. Provided it has been correctly drafted, the agreement will grant to the CO access to its apparatus on that land or building. Where the CO needs to access a neighbours land would normally only occur where an SP has, say, sold land immediately adjacent a cell site, which the CO as a Tenant may have a right of access over to be able to maintain its apparatus. In this case the agreement should bind the new owner to the rights of access in

accordance with the lease in place on the Vendors retained land.

CO's tend to be sophisticated organisations with considerable expertise in drafting legal agreements. The market for such agreements is nearly 30 years old and most problems of this type have been ironed out of CO's leases.

10.21 Do consultees see a need for a revised code to enable landowners and occupiers to compel Code Operators to use their powers to gain code rights against third parties?

Consultation Paper, Part 3, paragraph 3.101.

We are not aware of any situation where a subscriber has used Para 8 of the Code to compel an operator to use its code powers to acquire access to land or property for network sites or cable installations.

The cost of deploying this strategy to the CO may, as the consultation document suggests, unduly interfere with the strategic operation of that CO's network.

That this function has never been used in 28 years of network deployment suggests it is not required going forward.

10.22 Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used?

Consultation Paper, Part 3, paragraph 3.102.

We are not aware of any situation where a subscriber has used Para 8 of the Code to compel an operator to use its code powers to acquire access to land or property for network sites or cable installations.

10.23 We ask consultees:

(1) to what extent unlawful interference with electronic communications apparatus or a Code Operator's rights in respect of the same causes problems for Code Operators and/or their customers;

(2) to what extent any problem identified in answer to (1) above is caused by a Code Operator having to enforce its rights through the courts or the nature of the remedy that the courts can award; and

(3) whether any further provision (whether criminal or otherwise) is required to enable a Code Operator to enforce its rights.

Consultation Paper, Part 3, paragraph 3.106.

The Case Study in 10.8 above is relevant here. In that case, access to the CO's apparatus was denied by the Occupier. This may have affected the CO's service provision to its customers in the area. However, this was a short term measure which brought the CO to the negotiating table so that a resolution to the problem was finalised.

In our experience most occurrences of this type are necessary only because the Code has been defective in compelling the CO to deal with the Occupier.

The following case study is relevant to this response:-

[redacted]

[redacted]

There is already a criminal offence of interfering with communications apparatus. It is believed denial of access would constitute such interference. There is no need to create a further offence.

Instigating proceedings to enforce this has been threatened by CO's in the past. It is often sufficient for a CO to simply threaten an injunction for an SP to cease any interference with the apparatus and allow access once again.

Such actions are often only used by SP's where CO's obligations under a commercial agreement have been neglected and SP's pleadings to deal with them have been ignored.

10.24 We ask consultees whether landowners or occupiers need any additional provision to enable them to enforce obligations owed to them by a Code Operator.

Consultation Paper, Part 3, paragraph 3.107.

A simple notice process could suffice, which alerts a CO to the presence of its obligation, such as to pay electricity at a deemed rate or to enforce a repair covenant in a lease. In a commercial lease the Landlord will probably instigate forfeiture proceedings including serving a notice to perform the covenant and if the performance doesn't take place an application can be made to the court for the lease to be terminated. The Code is thought to cut across this and only once the lease has been terminated can Code proceedings begin to enforce the removal of apparatus.

The sums involved are often small (such as seeking a payment to replace a length of fence alongside a cell site). They do not warrant the cost of commercial lease forfeiture proceedings to be instigated. The small claims court could be one resolution for financial claims. For claims to enforce obligations the small claims court is not appropriate.

A process could be introduced which enables the SP to serve a notice on the CO to enforce the obligation or face financial penalties and costs. Such a process could be similar to that relating to relevant undertakers in Paragraph 23 of the Code.

The dispute could be referred to Arbitration as failure to comply with a notice to remedy or repair, in a similar way to the resolution of disputes under the Agricultural Holdings Acts 1976 and 1986.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: SPECIAL CONTEXTS

10.25 We provisionally propose that the right in paragraph 9 of the Code to conduct street works should be incorporated into a revised code, subject to the limitations in the existing provision. Do consultees agree? Consultation Paper, Part 4, paragraph 4.11.
NO COMMENT

10.26 We ask consultees to let us know their experiences in relation to the current regime for tidal waters and lands held by Crown interests. Consultation Paper, Part 4, paragraph 4.20.
NO COMMENT

10.27 We seek consultees' views on the following questions. (1) Should there be a special regime for tidal waters and lands or should tidal waters and lands be subject to the General Regime? (2) If there is to be a special regime for tidal waters and lands, what rights and protections should it provide, and why? (3) Should tidal waters and lands held by Crown interests be treated differently from other tidal waters and lands? Consultation Paper, Part 4, paragraph 4.21.
NO COMMENT

10.28 We ask consultees:

(1) Is it necessary to have a special regime for linear obstacles or would the General Regime suffice?

(2) To what extent is the linear obstacle regime currently used?

(3) Should the carrying out of works not in accordance with the linear obstacle regime continue to be a criminal offence, or should it alternatively be subject to a civil sanction?

(4) Are the rights that can be acquired under the linear obstacle regime sufficient (in particular, is limiting the crossing of the linear obstacle with a line and ancillary apparatus appropriate)?

(5) Should the linear obstacle regime grant any additional rights or impose any other obligations (excluding financial obligations)?

Consultation Paper, Part 4, paragraph 4.30.

NO COMMENT

10.29 We provisionally propose that a revised code should prevent the doing of anything inside a "relevant conduit" as defined in section 98(6) of the Telecommunications Act 1984 without the agreement of the authority with control of it.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.34.

We agree with this.

10.30 We provisionally propose that the substance of paragraph 23 of the Code governing undertakers' works should be replicated in a revised code.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.40.

We broadly agree with this. However, the scenario in Para 4.38 of the consultation document should be dealt with by a modification. If the relevant undertakers alteration requirements cause the CO to breach its agreement with, say, its SP or a third party such as a power provider, the relevant undertaker should be obliged to deal with the SP or third party to ensure the necessary alteration is carried out properly and legally.

10.31 We provisionally propose that a revised code should include no new special regimes beyond those set out in the existing Code. Do consultees agree? Consultation Paper, Part 4, paragraph 4.43
We broadly agree with this but emphasise, again i) the difference between linear networks and wireless networks, ii) the established commercial market for consideration payments for radio base station site leases and licences. The revised Code should not disrupt this market.

ALTERATIONS AND SECURITY

10.32 We provisionally propose that a revised code should contain a procedure for those with an interest in land or adjacent land to require the alteration of apparatus, including its removal, on terms that balance the interests of Code Operators and landowners and do not put the Code Operators' networks at risk. Do consultees agree? Consultation Paper, Part 5, paragraph 5.11.
We agree that the revised code should contain a procedure for those with an interest in land or adjacent land to require the alteration of apparatus, including its removal, on terms that balance the interests of the Code Operators and landowners and do not put the Code Operators' networks at risk.

10.33 Consultees are asked to tell us their views about the alteration regime in paragraph 20 of the Code; does it strike the right balance between landowners and Code Operators? Consultation Paper, Part 5, paragraph 5.12.
For paragraph 20 to apply, the alteration must be "necessary". This definition should be clarified, as, what one party deems necessary the other may not. This difference of opinion could lead to long and costly court proceedings. Under the current legislation it is for the SP to prove that the alteration "will not substantially interfere with any service which is or is likely to be provided using the operator's network". We believe it unlikely that the SP will be able to satisfy this requirement as it is the CO which possesses the technical knowledge about its network (including its radio propagation software etc). Where paragraph 20 is required for a SP to ensure a CO relocates apparatus (on a temporary or permanent basis) due to a need to undertake unplanned or emergency maintenance works, the SP should not be liable to pay the CO's costs. For instance, where repairs to a flat roof are required to stop water penetration, and a cabin must be moved to allow access to the roof, there should be an ability under para 20 for the CO to assist the SP with the requirement at the CO's cost. We agree that the costs of any relocation or removal under para 20 which rises from a decision of a SP to develop or substantially alter for reasons other than maintenance or repair, should continue to be met by the SP. Where para 20 results in the removal of apparatus but the contract between the parties runs for a period of years until reversion without a right for the SP to break, what happens to this contract? Has the removal of the apparatus resulted in the "surrender" of the contract? If this is the case it does not appear to be fair to the CO. Clarification should be made as to how removal under para 20 affects the agreement in place between the parties.

10.34 We provisionally propose that it should not be possible for Code Operators and landowners to contract out of the alterations regime in a revised code.

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.13.

We have put forward several scenarios elsewhere in this response which support a requirement to contract out of the Code.

The Code's very existence and the inability to contract out of Paragraph 21 means many SP's do not want to host CO's on their land and buildings. There is no doubt this has hampered the establishment of CO's networks. Ironically this is often in very high value areas and properties where the existence of such networks will be of the greatest economic benefit to society (such as shopping centres, high profile commercial buildings etc.).

10.35 We seek consultees' views on the provisions in paragraph 14 of the Code relating to the alteration of a linear obstacle. Do consultees take the view that they strike an appropriate balance between the interests involved, and should they be modified in a revised code?

Consultation Paper, Part 5, paragraph 5.18.

NO COMMENT

10.36 We provisionally propose that a revised code should restrict the rights of landowners to remove apparatus installed by Code Operators.

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.47.

Yes, but the CO should not be able to rely upon its code powers as a reason for inaction when a SP genuinely requires vacant possession, within a reasonable timescale, for a clear and settled intention. For instance, the demolition of a building with electronic communications apparatus on the roof. There are no set timescales following the service of a code powers counter-notice by a CO for the parties to reach specific milestones. Time (and costs) is expended in court proceedings following the valid service of the notices. Information is not provided by the CO about its actions to replace coverage etc, and the SP is given no definitive indication of when he can expect vacant possession.

In the revised Code the CO's should be forced to take positive steps within set timescales to establish the "public interest element" that underpins their continued use of the SP's property and to demonstrate that this out-weighs the SP's requirement for vacant possession. The CO's should cover all of the SP's reasonable professional costs incurred as a direct result of the continuation of a CO's occupation via its code powers after the expiry/termination of the agreement where there is no protection afforded by the Landlord & Tenant Act 1954.

10.37 We provisionally propose that a revised code should not restrict the rights of planning authorities to enforce the removal of electronic communications apparatus that has been installed unlawfully. Do consultees agree? Consultation Paper, Part 5, paragraph 5.48.
NO COMMENT

10.38 We ask consultees to tell us their views about the procedure for enforcing removal. Should the onus remain on landowners to take proceedings? If so, what steps, if any, should be taken to make the procedure more efficient? Consultation Paper, Part 5, paragraph 5.49.
The procedure is unsatisfactory due to the inaction and delays on the part of the CO's. The onus in taking proceedings should be reversed from SP to the CO. This should be only after a set period of time in which the parties are given to freely negotiate a mutually acceptable basis going forward. This period could be 28 days, the same time frame within which the CO's have the ability to serve their counter-notice on receipt of a para 21 notice. The parties should be given the ability to agree extensions to this timescale (if negotiations are positive) to obviate the need for proceedings to be issued, thus saving costs on both sides. The dispute resolution process should be more efficient. See our comments in 10.51. Where a legal agreement is coming to an end, the Code should be compatible with other land law and landlord and tenant law. It is not reasonable for a SP to have to deal with the termination of Landlord and Tenant Act rights, possibly through an expensive court process to terminate the lease, only to have still to deal with the Code powers. Code powers should be determinable within the time limits of the legal agreement. If there is a lease to a CO for 25 years (whether or not it is inside the 1954 Act), ending it should be the same for a CO as it would be for a commercial tenant, but for the existence of Code Powers. So a landlord L may serve a notice to quit on a CO Tenant T as the lease is coming to an end, asking for vacant possession by a certain date (normally the end date of the lease). Currently the Code only allows for this to happen once a lease has come to an end. L's NTQ may specify a removal date. T can respond with a counter notice under the Code. That counter notice should specify why T cannot comply with the request and what steps will follow for both sides e.g. L or T could apply to the court by a certain date. T should confirm by when it can comply with removal. L should confirm on what grounds removal is required. T should set out its argument for the Public Access requirement. At this point either side should be able to request arbitration or some other form of ADR is enforced, to enable a prompt resolution. Provided the Code is clarified and written to be compatible with existing laws it will work. The main reason it doesn't work now is it is incompatible with so many laws which govern the agreements under which the market has accepted apparatus is installed. This leads to confusion between the parties and as the dispute resolution forum is too slow, expensive and inappropriately qualified, disputes are allowed to run and run with no end in sight.

A case study follows:-

[redacted]

[redacted]

10.39 We ask consultees to tell us whether any further financial, or other, provisions are necessary in connection with periods between the expiry of code rights and the removal of apparatus. Consultation Paper, Part 5, paragraph 5.50.	
	Consideration should be payable to the SP by the CO for this period at the rate previously payable under the agreement unless one of the parties makes an application for an alternative level of consideration based on the prevailing market rate. This application should be similar in its mechanism to an application for interim rent under a L&T Act 1954 lease renewal.

10.40 We provisionally propose that Code Operators should be free to agree that the security provisions of a revised code will not apply to an agreement, either absolutely or on the basis that there will be no security if the land is required for development. Do consultees agree? Consultation Paper, Part 5, paragraph 5.51.	
	Yes, so long as the consideration payable by a CO to a SP is based on the open market. Consideration payable for an agreement in which the security provisions of a revised code do not apply may be less than an agreement where the CO is afforded such protection. This is similar to the way that a lease to a tenant with security of tenure under the L&T Act 1954 may be more valuable (include a higher rent) than the same lease which was contracted-out of s.24 to 28 of the L&T Act 1954. In this way, SP's that are currently reluctant to grant negotiated agreements to CO's due to the existence of para 21 rights, may be willing to re-offer properties for lease on market terms without the potential issues caused by the security provision of the code (where such rights are excluded).

10.41 Do consultees agree that the provisions of a revised code relating to the landowner's right to require alteration of apparatus, and relating to the security of the apparatus, should apply to all equipment installed by a Code Operator, even if it was installed before the Code Operator had the benefit of a revised code? Consultation Paper, Part 5, paragraph 5.56.
No. This would be a retrospective change in the law, which is unjustified and contrary to natural justice. Some SP's may be willing to enter into agreements with occupiers that do not benefit from code powers but not with CO's (regardless of the current CO rights under para 5). During the term, if the same non-code operator becomes a CO, it would be disturbing to a property owner to be informed that its occupier is now protected under the code, the very situation which the SP sought to avoid at the out-set by not granting rights to any CO. The occupier should provide vacant possession at the end of the term of the agreement, to accord with the agreement itself. Should the CO then wish to instigate its para 5 rights to re-enter the property, it is within its rights to do so but the SP should not suffer as a result of a retrospective change.

FINANCIAL AWARDS UNDER THE CODE

In responding to these questions, please note the definitions of "compensation" and "consideration" adopted at paragraph 6.5 and following of the Consultation Paper.

10.42 We provisionally propose that a single entitlement to compensation for loss or damage sustained by the exercise of rights conferred under the Code, including the diminution in value of the claimant's interest in the land concerned or in other land, should be available to all persons bound by the rights granted by an order conferring code rights. Do consultees agree? Consultation Paper, Part 6, paragraph 6.35.
Yes. However this should not apply to persons who create code powers by agreement, such as SP's of wireless base stations. The Code should be the method of last resort and CO's should be encouraged to agree commercial terms with SP's. Where agreement cannot be reached then market value rules should apply. Where rights are exercised under the Code on others who are bound by them but are not the main SP the compensation provisions should apply.

10.43 We ask consultees whether that right to compensation should be extended to those who are not bound by code rights when they are created but will be subsequently unable to remove electronic communications apparatus from their land. Consultation Paper, Part 6, paragraph 6.36.
Yes, with the compensation payable from the date when the code rights are conferred.

10.44 We provisionally propose that consideration for rights conferred under a revised code be assessed on the basis of their market value between a willing seller and a willing buyer, assessed using the second rule contained in section 5 of the Land Compensation Act 1961; without regard to their special value to the grantee or to any other Code Operator. Do consultees agree? We would be grateful for consultees' views on the practicability of this approach, and on its practical and economic impact. Consultation Paper, Part 6, paragraph 6.73.
We do not agree and we wish to express serious concerns about this provisional proposal and the reasons for its inclusion in the Consultation Paper. **Should consideration be payable at all?** The Paper confirms that many of the stakeholders who have discussed this with the Law Commission believe that consideration should be payable. Significant is the confirmation that many of the CO's have no objection to the payment of consideration. It is clear then that consideration should be payable. The question for discussion is how this consideration is to be set or valued. From paragraph 6.11 there is an explanation of what constitutes "consideration". Consideration is

a price. It leaves the recipient better off than he or she was beforehand. Three different levels of consideration are set out in more detail.

Ransom or Profit Share
The explanation given in the Paper is familiar to valuers. However, it may be useful to provide some practical examples of how the market has historically dealt with possible ransom positions in the electronic communications sector. In certain parts of the United Kingdom, single persons or organisations control large land holdings. Where a CO requires network coverage within these areas, agreement must currently be reached with the single landowner (there may be no other options for agreements on alternative land). [redacted]. Whilst the SP in these cases has the option of "naming his price" which, if not accepted, would result in no electronic communications coverage to the areas concerned, transactions have been freely negotiated with just a small premium in consideration above market value compared to "non-ransom" situations. The evidence suggests that this premium is between 15% - 20% above market value. This is not a huge increase and is more equitable and economical than referring the cases to dispute resolution.

Market Value
The Paper includes a familiar overview of for this level of consideration. In paragraph 6.17, it is stated,

"Crucial, therefore, to the ability of a valuer to determine market value is the availability of "comparables"; that is, information about similar deals." We expand upon this point later.

Market Value on Compulsory Purchase Principles
This is assessed based on the value of the land to the owner at the time of acquisition, rather than the value to the potential buyer. This is what is known as the *Pointe Gourde* principal, derived from the relevant case and assumes a "no scheme world".

The Code states that the payment of consideration is to be assessed as a figure that "would have been fair and reasonable if the agreement had been given willingly." The leading case of *Mercury Communications Ltd v London and India Dock Investments Ltd* decided that "fair and reasonable" consideration should include an element of price. HHJ Hague QC was of the view that what is "fair and reasonable" consideration is best determined by looking at comparable transactions, bearing in mind the bargaining strengths of both parties and the importance and value of the proposed right to the grantee. The best comparables in *Mercury* were deals made between the same parties. HHJ Hague QC outlined that,

"…in my view the market result is the obvious starting point; and in most cases it will come to the same thing as what is "fair and reasonable"… But there may be circumstances, of which the absence of any real market may be one, in which a judge could properly conclude that what the evidence may point to as being the likely market result is not a result which is "fair and reasonable".

As outlined in 6.49, The Law Commission appears to have been told that at present it is almost impossible for an operator or a landowner to come to a view on what a court may decide constitutes fair and reasonable consideration. It is likely that this view comes from the CO's. It is further stated that the CO's have concerns about the levels of consideration. The Law Commission notes that, in the telecommunications industry it can be extremely difficult for operators to obtain a sufficient range of appropriate comparables to assess the true going rate.

For nearly 30 years, the level of consideration has been freely agreed between SP's and CO's thus establishing clear market value based on transactional evidence for differing property types, apparatus requirements and locations. The Law Commission appears to have dismissed this "Market Value" basis for consideration as "not workable" going forward. The reasons for doing so

are as follows:

A. The lack of comparables

This is simply not the case. We are unclear as to why the Law Commission makes this suggestion when there is an abundance of good comparable evidence available in the telecoms sector. The catalyst in reaching expedient and mutually acceptable agreements between SP's and CO's is the open availability of such comparable transactional evidence on both sides. There are few property sectors, especially in recent years, where good comparable evidence is as freely available as in the electronic communications market.

In rent review and lease renewal negotiations, both SP's and CO's refer to comparable evidence in order to support their views of market value. Comparables are so widespread that the parties to negotiations spend a great deal of time deciding which are the best transactions upon which to rely and discounting others from a substantial list. We have been involved in rent review disputes where the Arbitrator, the Independent Expert or one of the Expert Witnesses has requested the imposition of a limit to the number of comparable transactions to be led by the parties. Acting recently as an Independent Expert I was asked by the operator's representative to direct that each party should submit a maximum of 10 comparables. This request was made to mitigate costs as there were so many comparable available to the parties. In a rent review Arbitration case in which one of the Directors of Cell:cm published his Award in April 2012, the parties collectively referenced over 100 separate comparables. The main skill of the Arbitrator in such situations is to decide which comparables carry more evidential weight than others. There is certainly no lack of comparable evidence.

This is not surprising given that there are reported to be up to 70,000 base station site agreements in the UK. The vast majority of these are formalised via documentary agreement between the willing SP and the willing CO. Since the change in the lease registration legislation in 2002, many are held at the Lands Registry. Numerous reviews, renewals, variations and new lettings are consistently agreed and documented and become available to those in the telecoms sector as comparable evidence. Cell:cm Chartered Surveyors maintains a database of thousands of such transactions. Many other surveying companies in the sector hold similar schedules, both on the SP's and CO's sides of the market. The CO's each operate their networks via in excess of 10,000 base stations. They possess evidence from all such transactions. The surveyors representing the CO's in market value negotiations refer to evidence from the databases maintained by the operators. It is common for the CO's to be able to refer to far more transactional evidence than the SP's simply because of their access to such a large number of comparables. When required, the CO's assist each other with the provision of specific evidence so that transactions from a range of occupiers can be referenced. In the same way, those representing the SP's will seek evidence from other SP's and those representing other SP's as is standard practice in most property sectors.

In *Mercury*, HHJ Hague QC referred to the existence of some circumstances where there may be limitations with the fair and reasonable process to demonstrate market value by evidence. He outlined that one such situation could be "the absence of any real market". Some specialist property sectors do suffer from an absence of good evidence due to the lack of transactions. The large retail shed sector is a good example. [redacted] Transactions are comparatively few in any specific region, which tests valuers' ability to rely on clear evidence to establish and agree market value. This problem most definitely does not exist in the telecoms sector, where radio base station lettings are concerned. The main issue in this sector is the need to refine the sheer number of comparables so that the main focus is on those that are the most relevant and carry most weight.

When explaining the mechanism of "market value" as a level of consideration, the Law

Commission highlights the importance of the availability of comparables; that is, information about similar deals. The word actually used in gauging this importance is "crucial". Given the thousands, or perhaps tens of thousands of items of comparable evidence in the electronic communications sector, and noting that such comparables are "crucial" to the valuer's ability to determine market value, we believe that such a basis for consideration which has worked well for nearly 30 years, should be allowed to continue without intervention.

B. The inability for SP's and CO's to agree

A suggestion is made in the Consultation Paper that the parties in the electronic communications sector have difficulty in reaching agreement with one another (because of a lack of clear definition of consideration in the code and due to the lack of comparable evidence). Again, this is incorrect. It is estimated that up to 70,000 electronic communication installations are currently operational in the UK. The majority of these were established as a result of market negotiations between SP's and the occupiers. Given the open availability of comparable evidence, a willingness on both sides to agree mutually acceptable terms and a requirement for the CO's to "roll-out" near ubiquitous networks within short time frames, these transactions were expediently concluded with both sides content with the results.

If SP's and CO's have difficulty in reaching agreement would the UK have such strong telecoms coverage from tens of thousands of installations where CO's rights under para 5 have very rarely been relied upon? The fact is that the CO's have preferred to enter into freely negotiated settlements with willing SP's, resulting in an amicable arrangement, without contention and crucially, without delays.

C. It results in an artificially high price being paid by the CO's

Those working in the electronic communications sector will be familiar with the recent activities of the main network operators in attempting to re-set the "market" levels of consideration by making veiled threats to SP's that the future income from an installation may be at risk if the SP does not reduce the rent and accept other amendments to the agreement.

Only the CO's could have informed the Law Commission that consideration set by "market value" results in artificially high prices being paid. We therefore suggest that this is just another attempt by the CO's to artificially reduce their financial liabilities which have been set by the open market process.

We agree with the Country Land and Business Association's (CLA) views that the CO's are commercial entities who run their businesses on a competitive basis to generate profits for their shareholders. The CLA outline that most CO's are not obliged to provide a universal service, thus differentiating them from the traditional utilities. It would therefore be appropriate to leave the assessment of consideration entirely to the market so that it would amount to whatever CO's would be willing to pay for their rights to install apparatus. Public benefit is demonstrably improved via this method as national networks have been swiftly established via free agreement between CO's and SP's with "market value" transactions at their foundation.

Rents and licence fees currently paid by the main network operators amount to between just 2 – 5% of their total costs. Further, a radio base station installation can generate substantial calls and data revenue for the CO occupier. From periods when we were employed by one of the main network operators, we are aware that many urban roof top installations will routinely generate hundreds of thousands of pounds per annum for the relevant CO. In numerous cases, such revenues are in excess of one million pounds per annum. For a Central London roof top installation, the rent may be £20,000 per annum

and the revenue £1m per annum. It is therefore difficult to understand why the CO's regard rents as being "artificially high" when they represent just tiny fractions of both their total costs and the revenues they generate.

In summary, we believe it premature, counterfactual and erroneous for the Law Commission to discount "market value" as being "not-workable". The opposite applies. It works extremely well. This is mainly due to the open and free availability in the electronic communications sector of good comparable evidence and the proven ability for CO's and SP's to reach swift and amicable agreements in the open market.

The Law Commission appears to support a move to consideration based on market value assessed using compulsory purchase principles. The consultation states, "We take the view that assessing consideration on the basis of the market value of the right, but discounting the value of the right to the CO and the scheme underlying the transaction, strikes the right balance between giving a price to the landowner, but not setting that price at a level which is unduly onerous for CO's". To be disregarded is the value to any CO by treating the national electronic communications network as "the scheme". Comparables are then required to set market value in this "no-scheme world". In the rural community, where land within a farmer's holding may be worth £5,000 per acre, a letting to a CO of 50 sqm within which to construct a mast would, in a no-scheme world, generate less than £100 per annum for the SP. The current rents payable to such SP's, set by free market negotiations are between £4,000 - £6,000 per annum.

How would one assess value under compulsory purchase principles for an area of a flat roof top or for apparatus located on the external elevations of an industrial chimney? Many thousands of electronic communications installations are currently deployed under negotiated agreements in such situations. In a no-scheme world, what is the value of 12 square metres of space on an otherwise un-used roof top which is there to simply seal a building so that it is wind and water-tight? We know of no appropriate comparables which would be useful in assisting with a valuation. Such valuation would perhaps be nil or negligible. Remember, in urban roof-top situations, the CO's generate many hundred's of thousands of pounds in calls and data revenue from small interests.

Thousands of SP's generate many millions of pounds in additional revenue from their property holdings via lettings to CO's and other users of electronic communications apparatus. This encourages SP's to enter into agreements with CO's, despite concerns about how code powers could hamper future development etc. A SP is willing to enter into a transaction with a CO where there is a balance between the potential detriment to the property and the income generated in rent/licence fees. Transactions would not be welcomed by SP's based under a "no-scheme world" valuation. We believe that approach, if adopted, would do more harm than good to the electronic communications sector as it would result in the immediate emergence of many thousands of disgruntled SP's. Many of these SP's are major property holding organisations in both the private and public sector. Some of them are clients of Cell:cm Chartered Surveyors and have written to the Law Commission to express their concerns.

Remembering that the installation rents currently paid by the main network operators amount to between 2% - 5% of their total costs, that the rents are often a similar small percentage of the revenues generated by the CO's and that both parties are currently content to enter into freely negotiated settlements, there does not appear to be any requirement to enforce changes to the way in which consideration is currently established.

We have established that consideration by market value should continue. The Law Commission points towards difficulties in the parties' interpretation of how this is to be assessed under the Code. Currently, consideration is to be assessed as a figure that "would have been fair and reasonable if the agreement had been given willingly". Whilst we believe this to be adequate, should further clarity be required, perhaps the Law Commission should consider the use of a wider definition similar to that included in Section 34 of The Landlord & Tenant Act 1954 where, for statutory lease renewals,

"The rent payable under a tenancy granted by order of the court under this Part of this Act shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court to be that at which, having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing lessor, there being disregarded—

(a)any effect on rent of the fact that the tenant has or his predecessors in title have been in occupation of the holding,

(b)any goodwill attached to the holding by reason of the carrying on thereat of the business of the tenant (whether by him or by a predecessor of his in that business),

(c)any effect on rent of any improvement carried out by the tenant or a predecessor in title of his otherwise than in pursuance of an obligation to his immediate landlord,

(d)in the case of a holding comprising licensed premises, any addition to its value attributable to the licence, if it appears to the court that having regard to the terms of the current tenancy and any other relevant circumstances the benefit of the licence belongs to the tenant."

The UK is not alone in having such a market. In the USA there are several major companies which invest in mast site and tower leasing. In Europe the same applies. CO's agree commercial terms for mast site locations. Also the Law Commission should note that in comparison, rent levels per site in the UK are lower than those in the USA and mainland Europe. The UK is already a relatively cheap place for CO's to do business.

To conclude, it is clear

- that both parties believe consideration should be payable; and
- that the current market value basis for consideration functions well due to the availability of comparable evidence and the ability for the SP's and CO's to expediently agree mutually acceptable terms for freely negotiated agreements; and
- that there would be great difficulties in establishing value in many electronic communications situations in a "no-scheme" world.

For the reasons set out within this section, we are most concerned about the implications of the Law Commission's proposals to change the current basis for consideration. It is our view that to do so would constitute an assault on an established and perfectly functioning market. We therefore respectfully request that the Commission carefully re-consider its proposed revisions in connection with the basis for consideration.

10.45 Consultees are also invited to express their views on alternative approaches; in particular, the possibility of a statutory uplift on compensation (with a minimum payment figure in situations where no compensation would be payable).

Consultation Paper, Part 6, paragraph 6.74.

We believe it unnecessary to alter a functioning approach. The only suggestion would be to clarify the current Code definition of market value ("fair and reasonable" etc) to something more akin to that found in Section 34 of The Landlord & Tenant Act 1954.

10.46 We provisionally propose that there should be no distinction in the basis of consideration when apparatus is sited across a linear obstacle. Do consultees agree? Consultation Paper, Part 6, paragraph 6.78.
We agree that there should be no distinction in the basis of consideration when apparatus is sited across a linear obstacle.

10.47 We provisionally propose that, where an order is made requiring alteration of a Code Operator's apparatus, the appropriate body should be entitled to consider whether any portion of the payment originally made to the person seeking the alteration in relation to the original installation of that apparatus should be repaid. Do consultees agree? Consultation Paper, Part 6, paragraph 6.83.
We believe that this proposal is fair and reasonable, especially in the circumstances set out in 6.81 and 6.82.

TOWARDS A BETTER PROCEDURE

10.48 We provisionally propose that a revised code should no longer specify the county court as the forum for most disputes. Do consultees agree? Consultation Paper, Part 7, paragraph 7.26.
Provided there are clear structures to the process, the County Court may have a place in resolving disputes. Please see our response to 10.49 below for more detail on this.

10.49 We ask for consultees' views on the suitability of the following as forums for dispute resolution under a revised code: (1) the Lands Chamber of the Upper Tribunal (with power to transfer appropriate cases to the Property Chamber of the First-tier Tribunal or vice versa); (2) a procedure similar to that contained in section 10 of the Party Wall etc Act 1996; and (3) any other form of adjudication. Consultation Paper, Part 7, paragraph 7.27.
In many cases Code disputes relate to valuation issues. There will be other issues as well though. One example is the Case Study in the response to 10.23 above. In this scenario the matter related to fair and reasonable, market justified terms for a new lease. With commercial leases the County Court is the forum for disputes under the 1954 Act, with an option for the Parties to refer the resolution of lease terms by reference to the Professional Arbitration on Court Terms (PACT). The Lands Tribunal has been suggested as a possible alternative to the County Court, however, such tribunals are generally only skilled in valuation. The panel members may not have dealt with e-comms apparatus or e-comms property at all. In such cases the tribunal will not be able to offer any greater expertise than a County Court judge. Referring other Code disputes to a suitably experienced Arbitrator will enable matters to be resolved in one forum. The Code already allows for Arbitration to resolve disputes in relation to linear obstacles. Arbitration is an internationally recognised method of resolving disputes. The Arbitration Act 1996 allows for disputes to be settled promptly, fairly and without undue expense. The six month timetable in Para 7.4 of the consultation document is only likely to be met by reference to Arbitration. The Technology Court has also been suggested as an alternative forum. However that is likely to be as, if not more, expensive than the County Court. It is not likely to be any quicker either. The Party Wall Act 1996 s10 process is similar to that in PACT but relates to awards being made by nominated surveyors. The Arbitration Act 1996 is already familiar to many legal and property professionals and has established procedures for dealing with costs, rules of evidence, grounds for appeal etc. By providing an agreed "seat" for the Arbitration also enables it to be conducted in accordance with the laws of different countries. So it could be as easily used in England,

Scotland, Northern Ireland or Wales.

A simple process for referring disputes to Arbitration can be set out in the Code. Arbitrators could be appointed by reference to the RICS or a separate panel. The RICS already has a recognised panel of Arbitrators that can be called upon with skill sets appropriate to the dispute at hand.

10.50 We provisionally propose that it should be possible for code rights to be conferred at an early stage in proceedings pending the resolution of disputes over payment.

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.31.

The Code currently confers Code Powers on a CO once it has the Occupiers agreement in writing. In many cases this is provided by an early access agreement which comprises the basic terms to be put in to a formal lease. This can result in access for a CO being obtained in a matter of days after approaching a SP.

CO's need planning permission for their installations in many cases and they usually apply for that once terms have been agreed in principle with an SP.

Conferring code powers in this way does work. Other than the provision of a health warning notice there is little more that needs to be done to change this part of the code.

Conferring Code Powers whilst there is a dispute in process will not speed up access to land. If a SP is not supportive of a cell site installation it will make the site acquisition process incredibly slow. Access for site surveys could be denied. Legal intervention could be required at every step. What currently takes just a few weeks or months, could end up taking years.

It sounds like a nice idea and may work for the installation of pipes or cables across farm land. However, in relation to the installation of new sites on urban buildings and land, it will massively slow down the process.

10.51 We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay.

Consultation Paper, Part 7, paragraph 7.32.

The best way to minimise delay is to keep the Code as a light touch regime. Only in the most extreme cases should there be powers to compel a potential SP to come to the table.

In many cases the Code works simply because it is there in the background. Its main weakness is it doesn't work in relation to disputes because its forum is too expensive and slow in relation to the value of the dispute.

To speed up access to land the current paragraph 5 system could be modified to refer the matter to Arbitration or dispute resolution once a series of steps has been taken by the CO. The current regime is nebulous once a para 5 notice has been threatened or served. Set out steps for a SP to respond to the para 5 notice within a certain time, say two months. The para 5 notice could contain the CO's terms, including an undertaking to pay the SP's costs. If one or other step isn't taken then the matter can be referred to dispute resolution.

10.52 We seek consultees' views as to how costs should be dealt with in cases under a revised code, and in particular their views on the following options:

(1) that as a general rule costs should be paid by the Code Operator, unless the landowner's conduct has unnecessarily increased the costs incurred; or

(2) that costs should be paid by the losing party.

Consultation Paper, Part 7, paragraph 7.37

Because of the complexity of Code issues SP's often incur costs which are out of proportion to the value of the matter at hand. CO's leases are not drafted to benefit the SP and need specialist professional advice to ensure they don't prejudice the SP's interests.

E.g. in the case of a new lease of a cell site on a rooftop of a Central London office building the rent may be £20,000 per annum. The SP's professional costs in negotiating terms, managing the survey and design process (which is often very high risk), drafting the lease and all other associated matters can amount to several thousand pounds. This may be more than the cost of a commercial lease of an office below the cell site where the rent is ten times that of the cell site.

However, the market has developed to accept this. Contributions to SP's costs are paid by CO's.

Where a case under the Code is referred to dispute resolution it is likely that costs should follow the event. However, this may lead to injustices against SP's or potential SP's who cannot afford legal representation.

Only if the SP has been unreasonable in its behaviour should it have to pay costs in a case which has been forced on it by compulsory acquisition. For example if he has appointed QC's to argue frivolous motions or unreasonably delayed arbitration proceedings.

10.53 We also ask consultees whether different rules for costs are needed depending upon the type of dispute.

Consultation Paper, Part 7, paragraph 7.38.

CO's should be obliged to pay the SP's reasonable (and abortive) costs in new site negotiations. This should reflect the complexity of the case rather than its value. E.g. the heads of terms for a cell site lease may extend to 40 or more different items. This may be for a rent of a few thousand pounds a year.

Often potential SP's incur abortive costs from negotiating terms and dealing with the site survey and design process, only to find the operator walks away from a site or seeks to change terms long after they are agreed.

One example of this follows:

[redacted]

[redacted]

10.54 We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service. Do consultees agree? Consultation Paper, Part 7, paragraph 7.52.	
We agree with this proposal.	

10.55 Do consultees consider that the forms of notices available to Code Operators could be improved? If so, how? Consultation Paper, Part 7, paragraph 7.53.
CO's notices are long and rambling and differently worded by each CO. The notice essentially needs to say why the CO is serving the notice and what steps it will take to follow up the notice and enforce the regime. A prescribed form of notice would be useful, in the same way as the notices in the 1954 Act follow a prescribed form. This would set consistency across the industry and the market and make it easier for SP's to understand what is being served on them and why.

10.56 Do consultees consider that more information is needed for landowners? If so, what is required and how should it be provided? Consultation Paper, Part 7, paragraph 7.54.
The notice should say who has served it and on who else's behalf. For example is the head tenant CO (say Arqiva) serving the notice on behalf of any sharers on a site e.g. Orange, O2, Virgin Media. CO's need to work together in these situations. If not all CO's on a site are party to the notice it should end the code powers of the ones who aren't named. The following information should be included:- The reason for the service; The legislation it is served under; The timescales for following up the notice by each side; What will be the next step to be taken by the CO; When that next step will be; The contact at each CO named in the notice or that a single contact will deal with the SP's response;

10.57 We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms. Consultation Paper, Part 7, paragraph 7.60.
We agree that mandatory agreements could not deal satisfactorily with every situation that arises in practice (due to differences in technologies, SP requirements, CO requirements, physical characteristics etc). The main network operators all have their own standard terms and many multi-site SP's also have their own forms of agreement. The two differ markedly. There are always differences between what one SP or CO is willing to accept compared to another. However, we also agree that it may be useful for a revised code to include a voluntary form with some "standard" terms, or a selection of "standard" terms from which to choose to cover the main aspect of an agreement. The Lease Code 2007 (www.leasingcommercialpremises.co.uk) may be a useful indicator of such a voluntary basis. This is the latest version of the Code of Practice for Commercial Leases in England and Wales which was first published in 1995 and re-issued in 2002.

INTERACTION WITH OTHER REGIMES

10.58 We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease.

Do consultees agree?

Consultation Paper, Part 8, paragraph 8.22.

We have personal knowledge of the issues caused by the lack of compatibility between the Code and Part 2 of The Landlord and Tenant Act 1954 where vacant possession is required by a SP at the end of a tenancy. In cases where the lease is "contracted-out", the process is more straightforward. We therefore agree that in such situations where a CO has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the '54 Act should not apply to the lease.

Our concerns about a standardised "contracting-out" of the '54 Act provisions come not in cases where removal is required (where the loss of '54 Act protection will avoid the current difficulties) but in those cases where a protected tenancy ends and another is both offered by the landlord and required by the tenant. In such situations, one of the parties issues the notice/request (under either s.25 or s.26). In the case of the Landlord's s.25 Notice, this is non-hostile and includes proposed terms for a renewal. The parties then seek agreement of terms to be crystallised into a new lease which will commence after the date of expiry of the notice. If agreement of terms is not reached prior to the expiry of the notice, either party may make an application to the court for a new tenancy and the statutory process is progressed through the directions of the court.

In general commercial property, where a lease is contracted-out (where s.24 – 28 of the '54 Act do not apply) the landlord is entitled to possession on expiry of the agreement. Due to the existence of the Code in the electronic communications sector, where a property is leased to a CO, the SP's cannot obtain vacant possession following the expiry of a contracted-out tenancy. Even where the SP is entirely content for the CO to continue in occupation under a new tenancy on updated "market" terms, it may be the case that the CO procrastinates in the agreement of such terms and continues to operate from the property, with the protection of its code rights. If the lease was not contracted-out, the SP would have been able to commence the statutory process through the courts to ensure that a new lease is agreed (or determined by the court or via the PACT process) within a finite period. Whilst we are aware that the '54 Act was not established to "protect" the interests of landlords, where a renewal is offered by a landlord, at least it gives surety in the process. A CO, in a contracted-out situation, can remain on site under its code powers and the SP has no tested, workable and cost effective means to expedite the process.

It is therefore clear that a revised code, where it is intended that the security provisions of the '54 Act will not apply, must contain provisions to deny the CO the current ability to procrastinate and benefit from inertia in a "renewal" situation at expiry of the term.

10.59 We provisionally propose that where an agreement conferring a right on a Code Operator also creates an interest in land of a type that is ordinarily registrable under the land registration legislation, the interest created by the agreement should be registrable in accordance with the provisions of the land registration legislation, but that a revised code should make it clear that its provisions as to who is bound by the interest prevail over those of the land registration legislation.

Do consultees agree?

Consultation Paper, Part 8, paragraph 8.33.

We agree with this proposal so long as this does not interfere with the market place. We can see some difficulties with early access agreements, which currently confer code powers but are not registered. Only once the lease proper is complete is it registered.

This principle should continue.

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

10.60 We ask consultees to tell us: (1) whether they are aware of circumstances where the funds set aside under regulation 16 have been called upon; (2) what impact regulation 16 has on Code Operators and on Ofcom; (3) if a regime is required to cover potential liabilities arising from a Code Operator's street works; and (4) if the answer to (3) is yes, what form should it take? Consultation Paper, Part 9, paragraph 9.14.
1) We are not aware of any circumstances where funds have been set aside or called upon. 2) No comment. 3) The obligation should be on CO's to provide funds available to the local authority to cover the cost of maintaining or removing the streetworks apparatus if the CO abandons it or goes out of business. 4) A bond payable to the Local Authority to be ring fenced and called upon if the CO cannot meet its basic obligations.

10.61 We ask consultees for their views on the Electronic Communications Code (Conditions and Restrictions) Regulations 2003. Is any amendment required? Consultation Paper, Part 9, paragraph 9.39.
The only amendment we would suggest is to regulation 8(2) and oblige the CO to show the design of the proposed installation if practicable, as well as the location where it is proposed.

THE BERKELEY GROUP PLC

SUBMISSION TO THE LAW COMMISSION

TELECOMMUNICATIONS CODE

A. Introduction

1. This submission has been made by and on behalf of The Berkeley Group plc ("Berkeley"). Berkeley is a leading mixed use regeneration developer operating in London and the South East of England. Berkeley is delivering much needed housing, both private and affordable, together with employment generating commercial space in its schemes.

2. Residential developers assess the price they will pay for land on a residual land basis. This means that they take the value of the finished development and deduct from that the costs of obtaining planning consent (including s106 and community infrastructure costs), the site specific costs, the construction costs and the sales and marketing costs. They then deduct the profit margin they are aiming to achieve and what is left is the price they can afford to pay for the land. It is clear that the cost of clearing any Telecommunications Code encumbrance will feed into this model and reduce the land value.

3. If the development land value is less than or only marginally more than the current use value, the landowner is unlikely to wish to become involved in the delays inherent in removing Code protected equipment and/or paying compensation.

4.1.1 The process of bringing any site to the point that construction can start is expensive and time consuming so any further delay or the risk of delay will have a knock-on affect on the delivery of housing and, in some circumstances, can make a scheme unviable.
4.1.2 Certainty of timing in bringing a scheme to the market is a key feature for any developer given the cyclical nature of property markets.
4.1.3 Certainty of timing for planning applications is also important. A planning consent only has a short life and falls away if not implemented. New applications for planning consent come with the inherent risk that the presumptions made about costs at the time the first consent was obtained are no longer valid. For example, the requirement for the percentage of affordable housing on a site may have increased between planning applications or new planning obligations may

have been introduced such as Community Infrastructure Levy which impact on the viability of the scheme as originally assessed.
4.2 The Telecommunications Code's processes and uncertainties around recovering possession from operators and the compensation payable make many sites that would otherwise be ideal for development unattractive to developers.
4.3 In recent years Berkeley has become increasingly concerned at the risk posed to development by telecommunications installations because Code powers, which originally were used very little by the operators, are now invoked more or less as a matter of course. This means that vacant possession, essential to any development, cannot necessarily be assumed, whatever the terms of any operator lease or license may say.
4.4 Given that vacant possession of a telecoms site cannot be guaranteed until the operator has actually vacated, developers who are aware of Code powers are loathe to acquire sites with telecoms installations in situ. The risk is too great, and until vacant possession has been obtained, it is impossible to plan the development or organise finance and contractors. This effectively means that what could be a major development is jeopardised. The potential risk that the landlord or the developer may have to pay the operator's relocation costs together with the legal costs and the possibility that a court order for repossession may not even be granted blights development sites used by telecoms operators.

5.1 Berkeley is aware of the lobbying carried out by the telecommunications industry to be treated in the same way as other statutory utilities and is concerned that an unintended consequence of granting such powers will be a reduction in housing numbers. The existing powers are already reducing the sites that can viably be developed. Greater powers will only worsen the position.

5.2 There are a number of practical reasons why the telecommunications industry should not be treated in the same manner as the other statutory utilities.

6. Berkeley fully appreciates that criticism unaccompanied by alternatives is unhelpful. Accordingly, it has taken the liberty of making suggestions of how the problems it encounters with the telecommunication industry can be resolved. It is hoped that these suggestions will be considered by both the Law Commission and the telecommunications industry in the constructive spirit intended.

7. In this note Berkeley has included three illustrative examples from its own experiences. Berkeley does not wish these sites to be identified as sites it has an interest in and the place names have been omitted as two of these conflicts are commercially sensitive and not yet resolved. However, Berkeley is willing to make documentation available to the Law Commission for inspection (but not retention) if the Law Commission deems this necessary or helpful.

8. The lettering and numbering used in this note corresponds to that referred to in the accompanying pro-forma response.

B. Concerns

9. Landowners are often unaware of the extent to which they are encumbering their land when they sign up to telecoms agreements. When Berkeley brings these matters to the attention of the landowner it is clear that:
9.1 The telecoms operators did not advise them of the Code powers and the impact that may have on their ability to sell the land, in particular, if it has development potential;
9.2 It is not made clear to landowners prior to execution of the telecoms agreements which aspects of the equipment are Code protected so the landowner does not negotiate the location of equipment and its service routes from a position of understanding;
9.3 Standard form agreements are often presented to landowners who are encouraged to sign them without first taking legal advice;
9.4. Landowners often believe that because they have excluded protection under the Landlord and Tenant Act 1954 from their leases with telecom operators that they have the same automatic right to repossession against the telecom operator at the end of the lease term as they would against another lessee who is not Code protected. Similarly, where they have not excluded the renewal provisions of the Landlord and Tenant Act 1954, they erroneously believe that they enjoy the same entitlements to recover possession as under any other commercial lease, including that on the grounds of redevelopment. This is not the case with Code protected operators;
9.5 Operators' standard form agreements often include equipment sharing rights at little or no extra consideration paid to the landowner and without any explanation of the impact this may have on the landowner's ability to recover possession against the operators or the compensation payable. Sharing rights also substantially increase the risk that a court will not be able to make an order for repossession of the land because of the overriding principle that no person should be deprived of the right to access the mobile phone network. Consolidation in the telecoms industry will exacerbate this problem.

10. The owner of a superior land interest can be bound by an agreement entered into by a tenant without consent or even knowledge of the agreement. This means that where a tenant grants rights to an operator to install equipment but fails to obtain the consent of the landlord, the landlord will nonetheless be bound to the extent that even if the tenant's lease is forfeited or expires, whilst the landlord will be able to remove the tenant, it will not be able to require the operator to give vacant possession; court proceedings (with no guarantee of success) will be required.

11.1 Court proceedings for recovery of possession by landowners are expensive and with no guarantee of success;

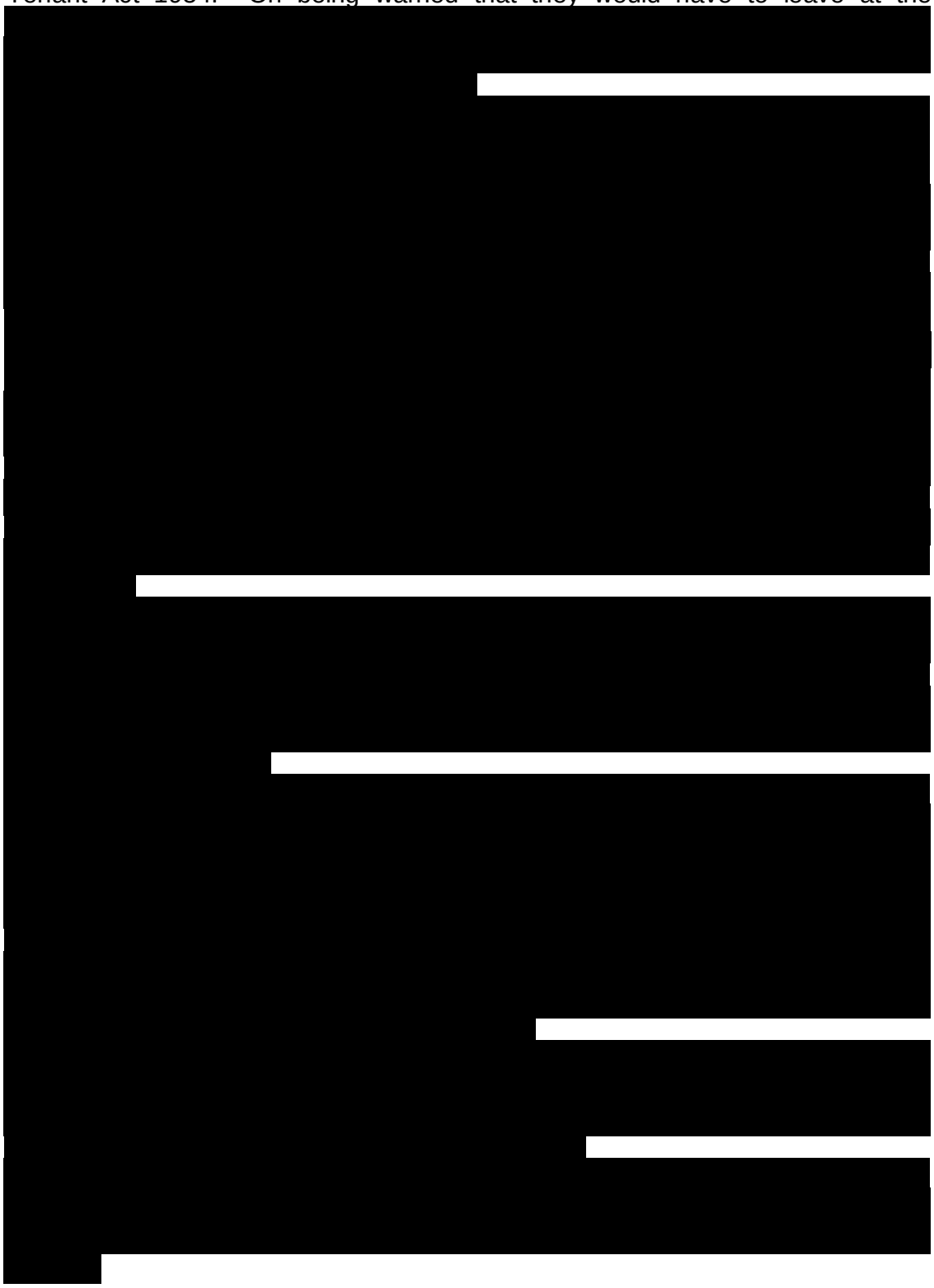
11.2 The Code provisions around compensation payable to or by the operators are complex and not clear;
11.3 It is very difficult for landowners to challenge operators' evidence on the need for the equipment or the cost of moving it. Operators now use this to their advantage by being reluctant to engage in negotiations or providing supporting information as to which parts of their equipment are protected and which not. This is often information that it is simply impossible for a landowner to obtain elsewhere. When challenged, an operator will often claim that all the equipment is protected, even if this is not the case;
11.4 Operators who are aware of the development timetable often use Code powers deliberately to exacerbate this situation to force the landlord to pay significant sums of money in exchange for early cooperation or to pay the operator's costs of relocation so they move on time or offer alternative sites at extremely preferential rates or significant rent-free periods.

12. The telecommunication operators are seeking parity of treatment with the suppliers of other utilities. However, there are substantial differences in the way the telecommunications industry deals with land issues:
12.1 There are clear protocols in place for dealing with other utilities eg lift and shift protocols and build over agreements. The costs of relocating the equipment of other utility providers are readily ascertained and can be factored into negotiations with landowners at an early stage;
12.2 Utility providers have an established history of working responsively with landowners to find solutions. This is not the experience of working with telecoms operators who are often non-communicative. (Berkeley accepts that it is not always as easy for telecoms operators to relocate equipment as it is for the other utility providers.)

C. Case Studies

[redacted]

Tenant Act 1954. On being warned that they would have to leave at the



D Parity with other Statutory Undertakers

16. The telecoms industry is seeking to be treated in the same way as the other utility companies. However, there are major differences between them:
16.1 The processes and procedures for moving other utilities are clear and the costs ascertainable;
16.2 Other utility providers have shown themselves willing to allow their apparatus to be moved at the developer's expense and to its time frame.

17. For other providers of utilities, there is a financial benefit to a new development being connected into their systems as it brings them new customers. This is not the case for telecommunication operators as their networks are required for the benefit of the public at large, many of whom are transient and not permanently located in the same area as the equipment.

18. The relocation of telecoms equipment is not a simple matter of digging a fresh trench in a slightly different place, as is usually the case for other utilities. Suitable locations or buildings may have to be identified and secured. Relocation for telecoms operators may be an inconvenience for them with little benefit.

19. In the main, telecoms equipment is much more expensive to move and takes longer because of the need to find a suitable location.

E. Berkeley Proposals

Proposal 1 Restricted Security of Tenure

20.1 The provisions for termination of the lease governing an electronic communications installation should be aligned with those of the Landlord and Tenant Act 1954 which is clearly drafted and has operated successfully for nearly 60 years with very little amendment.

20.2 Under the 1954 Act, a landlord has the right to exclude a tenant's statutory security of tenure subject to paying compensation (unless the right to compensation is negated in the lease). If the 1954 Act is not excluded, there is a statutory right to resist the granting of a lease to enable redevelopment of the property.
20.3 Berkeley recognises that there are practical constraints on the operators of obtaining alternative sites and recognises also that relocation can take longer than the 6 -12 month notice period in the 1954 Act. This can be addressed by inserting longer notice periods for telecommunications equipment. This could perhaps be an 18-24 months notice period.
20.4 If a statutory exemption to a telecoms operator's right to a new lease is to be offered where the lease has not been contracted out of the legislation, then the tenant should be served with, say, two years' express notice that any application for a new lease will be contested on redevelopment grounds.
20.5 Where there is a sharing arrangement in place, notice served on the lead operator should be deemed to be effective service on all sharers.

Proposal 2 (in the event legislation in the form suggested in 20.1 is not passed):

21.1 All agreements offered by telecoms operators to landowners should carry a "health warning" clearly setting out that Code protected equipment is to be installed on/under/over the land and that this equipment will enjoy protected status. Code power operators should provide prospective landlords with clear information about the implications of Code powers and their likely effect, in a format approved in advance by OFCOM. Where such information is not provided, and where the landlord does not clearly state that he understands the implications of entering into the agreement with the electronic communications operator, then that operator should not be able to exercise Code powers.
21.2 The consent of the owners of all land interests should be obtained before any telecoms agreement is entered into, including that of superior landlords, lessees and mortgagees. Failure to obtain such consent should make the operator's interests unenforceable against those whose consent has not been secured.
21.3 Where sharing is proposed, a full explanation of the consequences of sharing on the ability of the landowner to obtain vacant possession and on compensation payments should be clearly set out. Failure to comply should prevent the sharing operators from enjoying Code protection.

Proposal 3 Registration at the Land Registry

22. Any agreement that enables Code protected equipment to be installed on land or buildings should be registered at the Land Registry against all affected titles. Such registration should also make clear whether sharing rights are granted in the documentation. Failure to register should make the agreement unenforceable.

Proposal 4 Code protection not to be retrospective

23. Code protection should not be extended retrospectively. If the definition of Code protected equipment changes during the life of an agreement, the parties to the agreement should be governed by the status of the equipment at the time the agreement is made.

Wendy Pritchard
Group Solicitor

The Berkeley Group plc

27 October 2012

LAW COMMISSION
CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

RESPONSE FORM

This optional response form is provided for consultees' convenience in responding to our Consultation Paper on the Electronic Communications Code.

You can view or download the Consultation Paper free of charge on our website at:

www.lawcom.gov.uk (see A-Z of projects > Electronic Communications Code)

The response form includes the text of the consultation questions in the Consultation Paper (numbered in accordance with Part 10 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

The reference which follows each question identifies the Part of the Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

As noted at paragraph 1.34 of the Consultation Paper, it would be helpful if consultees would comment on the likely costs and benefits of any changes provisionally proposed when responding. The Department for Culture, Media and Sport may contact consultees at a later date for further information.

We invite responses from 28 June to 28 October 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or

by post to: James Linney, Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ

Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information 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 Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

Your details

Name:
Wendy Pritchard
Email address:
[redacted]
Postal address:
Berkeley House 19 Portsmouth Road Cobham Surrey KT11 1JG
Telephone number:
[redacted]
Are you responding on behalf of a firm, association or other organisation? **If so, please give its name (and address, if not the same as above):**
The Berkeley Group plc
If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:
Two of the three case studies provided are commercially sensitive and not yet resolved. Disclosure of our thinking as to how matters may be resolved could adversely impact on our negotiating strategy. See para 7 of the accompanying note.
As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: GENERAL

10.3 We provisionally propose that code rights should include rights for Code Operators:

(1) to execute any works on land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus;

(2) to keep electronic communications apparatus installed on, under or over that land; and

(3) to enter land to inspect any apparatus.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.16.

Yes to the extent that such rights have been negotiated with the landowners.

10.4 Do consultees consider that code rights should be extended to include further rights, or that the scope of code rights should be reduced?

Consultation Paper, Part 3, paragraph 3.17.

The scope of Code rights should be only as negotiated with landowners.

10.5 We provisionally propose that code rights should be technology neutral.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.18.

Not agreed. See para 23 of the accompanying note.

10.6	Do consultees consider that code rights should generate obligations upon Code Operators and, if so, what? Consultation Paper, Part 3, paragraph 3.19.
	Yes. In short, duties of honest disclosure and transparency. See paras 9, 10, 11.3, 11.4, 13, 14, 15, 21 and 22 of the accompanying note.

10.7	We ask consultees to tell us their views on the definition of electronic communications apparatus in paragraph 1(1) of the Code. Should it be amended, and if so should further equipment, or classes of equipment, be included within it? Consultation Paper, Part 3, paragraph 3.27.
	No observation save that agreements between landowners and operators should be governed by the definition in force at the date of the agreement. See para 23 of the accompanying note.

10.8	We ask consultees to tell us their views about who should be bound by code rights created by agreement, and to tell us their experience of the practical impact of the current position under the Code. Consultation Paper, Part 3, paragraph 3.40.
	As to who should be bound by Code rights - See para 21.2 of the accompanying note. As to experiences - See paras 13 - 15 of the accompanying note.

10.9 We ask consultees for their views on the appropriate test for dispensing with the need for a landowner's or occupier's agreement to the grant of code rights. In particular, consultees are asked to tell us:

(1) Where the landowner can be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code, should it be possible for the tribunal to make the order sought without also weighing the public benefit of the order against the prejudice to the landowner?

(2) Should it be possible to dispense with the landowner's agreement in any circumstances where he or she cannot be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code?

(3) How should a revised code express the weighing of prejudice to the landowner against benefit to the public? Does the Access Principle require amendment and, if so, how?

Consultation Paper, Part 3, paragraph 3.53.

No rights should be acquired other than by negotiation with landowners (regardless of the compensation rights of those owners) unless the legislation protects the rights of landowners to lift and shift equipment at their own expense (save where the equipment has to be moved to enable a landowner to carry out repairs and maintenance where the cost should be borne by the Code Operator);

If land subsequently has a development value were it not for the existence of the protected equipment, the landowner should be entitled to call for the removal of that equipment subject to paying compensation as a term of its removal. In this respect the method of calculating compensation should be simplified so there is certainty – this may mean that it is by way of a formula rather than by actual cost. Compare with the calculation for assessing compensation under the Landlord and Tenant Act 1954.

10.10 We ask consultees to tell us if there is a need for a revised code to provide that where an occupier agrees in writing for access to his or her land to be interfered with or obstructed, that permission should bind others with an interest in that land.

Consultation Paper, Part 3, paragraph 3.59.

See para 21.2 of the accompanying note.

10.11 We ask consultees to tell us their views about the use of the right for a Code Operator to install lines at a height of three metres or more above land without separate authorisation, and of any problems that this has caused. Consultation Paper, Part 3, paragraph 3.67.
Three metres is very low and will sterilise a number of other land uses that could be carried on contemporaneously with the telecoms use.

10.12 Consultees are asked to tell us their views about the right to object to overhead apparatus. Consultation Paper, Part 3, paragraph 3.68.
All land rights should be negotiated with the landowner.

10.13 Consultees are asked to give us their views about the obligation to affix notices on overhead apparatus, including whether failure to do so should remain a criminal offence. Consultation Paper, Part 3, paragraph 3.69.
No observation

10.14 Do consultees consider that the current right for Code Operators to require trees to be lopped, by giving notice to the occupier of land, should be extended:

(1) to vegetation generally;

(2) to trees or vegetation wherever that interference takes place; and/or

(3) to cases where the interference is with a wireless signal rather than with tangible apparatus?

Consultation Paper, Part 3, paragraph 3.74.

No observation

10.15 We ask consultees:

(1) whether Code Operators should benefit from an ancillary right to upgrade their apparatus; and

(2) whether any additional payment should be made by a Code Operator when it upgrades its apparatus.

Consultation Paper, Part 3, paragraph 3.78.

See para 21.2 of the accompanying note. Upgrades should only be allowed with the express consent of all affected landowners if they further restrict the landowners' use and enjoyment of their land.

10.16 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from sharing their apparatus causes difficulties in practice;

(2) whether Code Operators should benefit from a general right to share their apparatus with another (so that a contractual term restricting that right would be void); and/or

(3) whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it shares its apparatus.

Consultation Paper, Part 3, paragraph 3.83.

(1) No observation

(2) See paras 20.5, 21.3 and 22 of the accompanying note

(3) If the burden on the land is increased or could be, the payment should reflect this

10.17 We ask consultees to what extent section 134 of the Communications Act 2003 is useful in enabling apparatus to be shared, and whether further provision would be appropriate.

Consultation Paper, Part 3, paragraph 3.88.

No observation

10.18 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from assigning the benefit of agreements that confer code rights causes difficulties in practice;

(2) whether Code Operators should benefit from a general right to assign code rights to other Code Operators (so that a contractual term restricting that right would be void); and

(3) if so, whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it assigns the benefit of any agreement.

Consultation Paper, Part 3, paragraph 3.92.

A landowner should always assess the financial covenant strength of any party with whom it enters into any type of land agreement. A Code Operator's absolute right to assign could leave the landowner without an effective remedy in the event of default by a Code Operator. This is an unreasonable risk to impose on the landowner. Additional payment would not ameliorate this risk.

10.19 We ask consultees to tell us if they consider that any further ancillary rights should be available under a revised code.

Consultation Paper, Part 3, paragraph 3.94.

The Code already has an adverse impact on bringing land forward for development. Extension of ancillary rights will only exacerbate this. See accompanying note.

10.20 We ask consultees to tell us if they are aware of difficulties experienced in accessing electronic communications because of the inability to get access to a third party's land, whether by the occupiers of multi-dwelling units or others. Consultation Paper, Part 3, paragraph 3.100.	
No observation	

10.21 Do consultees see a need for a revised code to enable landowners and occupiers to compel Code Operators to use their powers to gain code rights against third parties? Consultation Paper, Part 3, paragraph 3.101.	
No	

10.22 Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used? Consultation Paper, Part 3, paragraph 3.102.	
No	

10.23 We ask consultees:

(1) to what extent unlawful interference with electronic communications apparatus or a Code Operator's rights in respect of the same causes problems for Code Operators and/or their customers;

(2) to what extent any problem identified in answer to (1) above is caused by a Code Operator having to enforce its rights through the courts or the nature of the remedy that the courts can award; and

(3) whether any further provision (whether criminal or otherwise) is required to enable a Code Operator to enforce its rights.

Consultation Paper, Part 3, paragraph 3.106.

(1) and (2) No observation

(3) Code operators already enjoy extensive rights. It would not be in the interests of landowners to extend them further. See accompanying note.

10.24 We ask consultees whether landowners or occupiers need any additional provision to enable them to enforce obligations owed to them by a Code Operator.

Consultation Paper, Part 3, paragraph 3.107.

Landowners need provisions that give them an adequate remedy against Code Operators, in particular as regards recovery of their land and transparency in Code Operators' dealings with landowners. See paras 20 - 23 of the accompanying note.

Where a Code Operator has not been open about the extent of the Code powers in dealings with landowners, that Code operator should lose its rights to enforce Code powers against the landowner. In such circumstances, a landowner should have an absolute right to require removal of Code protected equipment from his land.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: SPECIAL CONTEXTS

10.25 We provisionally propose that the right in paragraph 9 of the Code to conduct street works should be incorporated into a revised code, subject to the limitations in the existing provision. Do consultees agree? Consultation Paper, Part 4, paragraph 4.11.
No observation

10.26 We ask consultees to let us know their experiences in relation to the current regime for tidal waters and lands held by Crown interests. Consultation Paper, Part 4, paragraph 4.20.
No observation

10.27 We seek consultees' views on the following questions. (1) Should there be a special regime for tidal waters and lands or should tidal waters and lands be subject to the General Regime? (2) If there is to be a special regime for tidal waters and lands, what rights and protections should it provide, and why? (3) Should tidal waters and lands held by Crown interests be treated differently from other tidal waters and lands? Consultation Paper, Part 4, paragraph 4.21.
No observation

10.28 We ask consultees:

(1) Is it necessary to have a special regime for linear obstacles or would the General Regime suffice?

(2) To what extent is the linear obstacle regime currently used?

(3) Should the carrying out of works not in accordance with the linear obstacle regime continue to be a criminal offence, or should it alternatively be subject to a civil sanction?

(4) Are the rights that can be acquired under the linear obstacle regime sufficient (in particular, is limiting the crossing of the linear obstacle with a line and ancillary apparatus appropriate)?

(5) Should the linear obstacle regime grant any additional rights or impose any other obligations (excluding financial obligations)?

Consultation Paper, Part 4, paragraph 4.30.

No observation

10.29 We provisionally propose that a revised code should prevent the doing of anything inside a "relevant conduit" as defined in section 98(6) of the Telecommunications Act 1984 without the agreement of the authority with control of it.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.34.

No observation

10.30 We provisionally propose that the substance of paragraph 23 of the Code governing undertakers' works should be replicated in a revised code.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.40.

No observation

10.31 We provisionally propose that a revised code should include no new special regimes beyond those set out in the existing Code. Do consultees agree? Consultation Paper, Part 4, paragraph 4.43
No observation

ALTERATIONS AND SECURITY

10.32 We provisionally propose that a revised code should contain a procedure for those with an interest in land or adjacent land to require the alteration of apparatus, including its removal, on terms that balance the interests of Code Operators and landowners and do not put the Code Operators' networks at risk. Do consultees agree? Consultation Paper, Part 5, paragraph 5.11.
Agreed. See accompanying note. A simple and clear process is essential. However, where a Code Operator has not been open and honest with the landowner about the extent of Code powers, the landowner should have the right to require the removal or alteration of apparatus as of right.

10.33 Consultees are asked to tell us their views about the alteration regime in paragraph 20 of the Code; does it strike the right balance between landowners and Code Operators? Consultation Paper, Part 5, paragraph 5.12.
The Code is unfair to landowners as it enables Code Operators to delay for financial gain. See para 13 of the accompanying note.

10.34 We provisionally propose that it should not be possible for Code Operators and landowners to contract out of the alterations regime in a revised code. Do consultees agree? Consultation Paper, Part 5, paragraph 5.13.
The key to this matter lies in the openness and honesty of Code Operators in their dealings with landowners. A duty of openness must be imposed on Code Operators. In addition, the alterations regime must be made more clear and easier to operate than at present if there is to be no ability to contract out.

10.35 We seek consultees' views on the provisions in paragraph 14 of the Code relating to the alteration of a linear obstacle. Do consultees take the view that they strike an appropriate balance between the interests involved, and should they be modified in a revised code? Consultation Paper, Part 5, paragraph 5.18.
No observation

10.36 We provisionally propose that a revised code should restrict the rights of landowners to remove apparatus installed by Code Operators. Do consultees agree? Consultation Paper, Part 5, paragraph 5.47.
The key to this matter lies in the openness and honesty of Code Operators in their dealings with landowners. A duty of openness must be imposed on Code Operators if restrictions are to be imposed on landowners. Also, the impact that giving greater rights to Code Operators may have on land coming forward for development needs to be weighed carefully. A world with telecoms equipment and no homes would not be welcome! See accompanying note.

10.37 We provisionally propose that a revised code should not restrict the rights of planning authorities to enforce the removal of electronic communications apparatus that has been installed unlawfully. Do consultees agree? Consultation Paper, Part 5, paragraph 5.48.
Agreed. Planning authorities are used to having to deal with unlawful land use and have the relevant skills and expertise for this role.

10.38 We ask consultees to tell us their views about the procedure for enforcing removal. Should the onus remain on landowners to take proceedings? If so, what steps, if any, should be taken to make the procedure more efficient? Consultation Paper, Part 5, paragraph 5.49.
See paras 16 and 20 on the accompanying note.

10.39 We ask consultees to tell us whether any further financial, or other, provisions are necessary in connection with periods between the expiry of code rights and the removal of apparatus. Consultation Paper, Part 5, paragraph 5.50.
See accompanying note.

10.40 We provisionally propose that Code Operators should be free to agree that the security provisions of a revised code will not apply to an agreement, either absolutely or on the basis that there will be no security if the land is required for development. Do consultees agree? Consultation Paper, Part 5, paragraph 5.51.
Agreed. See para 20 of the accompanying note.

10.41 Do consultees agree that the provisions of a revised code relating to the landowner's right to require alteration of apparatus, and relating to the security of the apparatus, should apply to all equipment installed by a Code Operator, even if it was installed before the Code Operator had the benefit of a revised code? Consultation Paper, Part 5, paragraph 5.56.	
No. See para 23 of the accompanying note.	

FINANCIAL AWARDS UNDER THE CODE

In responding to these questions, please note the definitions of "compensation" and "consideration" adopted at paragraph 6.5 and following of the Consultation Paper.

10.42 We provisionally propose that a single entitlement to compensation for loss or damage sustained by the exercise of rights conferred under the Code, including the diminution in value of the claimant's interest in the land concerned or in other land, should be available to all persons bound by the rights granted by an order conferring code rights. Do consultees agree? Consultation Paper, Part 6, paragraph 6.35.
Agreed.

10.43 We ask consultees whether that right to compensation should be extended to those who are not bound by code rights when they are created but will be subsequently unable to remove electronic communications apparatus from their land. Consultation Paper, Part 6, paragraph 6.36.
Rights to compensation should apply to all affected landowners. See para 21.2 of the accompanying note.

10.44 We provisionally propose that consideration for rights conferred under a revised code be assessed on the basis of their market value between a willing seller and a willing buyer, assessed using the second rule contained in section 5 of the Land Compensation Act 1961; without regard to their special value to the grantee or to any other Code Operator. Do consultees agree? We would be grateful for consultees' views on the practicability of this approach, and on its practical and economic impact. Consultation Paper, Part 6, paragraph 6.73.
This is too simplistic where land is being brought forward for a planning use that enhances its value. Examples are where considerable funds are being expended to promote a green field site for inclusion in a new planning strategy or a planning application is submitted or being worked up for redevelopment of a site. The value would have to reflect the possible development value otherwise the persons making the planning application and landowner would be considerably out of pocket.

10.45 Consultees are also invited to express their views on alternative approaches; in particular, the possibility of a statutory uplift on compensation (with a minimum payment figure in situations where no compensation would be payable). Consultation Paper, Part 6, paragraph 6.74.
See previous response. Any compensation system needs to recognise that land values are a function of the potential land uses. As the calls on land increase, it would be unconscionable to pay landowners small sums that cannot be reconsidered if the land is in the process of being identified for another use or subject to work leading to redevelopment.

10.46 We provisionally propose that there should be no distinction in the basis of consideration when apparatus is sited across a linear obstacle. Do consultees agree? Consultation Paper, Part 6, paragraph 6.78.
No observation

10.47 We provisionally propose that, where an order is made requiring alteration of a Code Operator's apparatus, the appropriate body should be entitled to consider whether any portion of the payment originally made to the person seeking the alteration in relation to the original installation of that apparatus should be repaid. Do consultees agree? Consultation Paper, Part 6, paragraph 6.83.
Whilst seemingly fair as a principle, many land owners may simply spend the monies initially paid and be unable to make a repayment. This proposal is perhaps quite difficult to enforce.

TOWARDS A BETTER PROCEDURE

10.48 We provisionally propose that a revised code should no longer specify the county court as the forum for most disputes.

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.26.

The issues that have to be debated are complex and County Courts are not the best forum for such technical debates.

10.49 We ask for consultees' views on the suitability of the following as forums for dispute resolution under a revised code:

(1) the Lands Chamber of the Upper Tribunal (with power to transfer appropriate cases to the Property Chamber of the First-tier Tribunal or vice versa);

(2) a procedure similar to that contained in section 10 of the Party Wall etc Act 1996; and

(3) any other form of adjudication.

Consultation Paper, Part 7, paragraph 7.27.

The second alternative will be the quickest and probably the cheapest provided that the Code Operators are compelled to cooperate.

10.50 We provisionally propose that it should be possible for code rights to be conferred at an early stage in proceedings pending the resolution of disputes over payment.

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.31.

No. There would be no incentive on Code Operators to finalise payment if they had already secured the rights they require. Code Operators are already poor at engaging with landowners.

10.51 We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay. Consultation Paper, Part 7, paragraph 7.32.
No observation

10.52 We seek consultees' views as to how costs should be dealt with in cases under a revised code, and in particular their views on the following options: (1) that as a general rule costs should be paid by the Code Operator, unless the landowner's conduct has unnecessarily increased the costs incurred; or (2) that costs should be paid by the losing party. Consultation Paper, Part 7, paragraph 7.37
(1) Agreed (2) Not agreed

10.53 We also ask consultees whether different rules for costs are needed depending upon the type of dispute. Consultation Paper, Part 7, paragraph 7.38.
No further observation

10.54 We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service. Do consultees agree? Consultation Paper, Part 7, paragraph 7.52.	
Agreed. See paras 20 – 22 of accompanying note.	

10.55 Do consultees consider that the forms of notices available to Code Operators could be improved? If so, how? Consultation Paper, Part 7, paragraph 7.53.	
See paras 20 – 22 of accompanying note.	

10.56 Do consultees consider that more information is needed for landowners? If so, what is required and how should it be provided? Consultation Paper, Part 7, paragraph 7.54.	
See paras 9, 10, 11.2, 11.3 and 13 – 22 of accompanying note.	

10.57 We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms. Consultation Paper, Part 7, paragraph 7.60.
See paras 9.3, 9.5 and 20 – 22 of accompanying note.

INTERACTION WITH OTHER REGIMES

10.58 We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease. Do consultees agree? Consultation Paper, Part 8, paragraph 8.22.	
No. See paras 9.4, 13, 14.1 and 20 of accompanying note.	

10.59 We provisionally propose that where an agreement conferring a right on a Code Operator also creates an interest in land of a type that is ordinarily registrable under the land registration legislation, the interest created by the agreement should be registrable in accordance with the provisions of the land registration legislation, but that a revised code should make it clear that its provisions as to who is bound by the interest prevail over those of the land registration legislation. Do consultees agree? Consultation Paper, Part 8, paragraph 8.33.	
No. See para 22 of accompanying note.	

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

10.60 We ask consultees to tell us: (1) whether they are aware of circumstances where the funds set aside under regulation 16 have been called upon; (2) what impact regulation 16 has on Code Operators and on Ofcom; (3) if a regime is required to cover potential liabilities arising from a Code Operator's street works; and (4) if the answer to (3) is yes, what form should it take? Consultation Paper, Part 9, paragraph 9.14.
No observation

10.61 We ask consultees for their views on the Electronic Communications Code (Conditions and Restrictions) Regulations 2003. Is any amendment required? Consultation Paper, Part 9, paragraph 9.39.
No observation save as applicable in the accompanying note.

Consultation response 115 of 130

Linney, James

From: Sandra Rankine [redacted]
Sent: 28 October 2012 19:47
To: LAWCOM Property and Trust
Cc: [redacted]
Subject: FW: Reponse to Law Commission Consultation on The Electronic Communications Code
Follow Up Flag: Follow up
Flag Status: Orange

rls law
property specialists

Dear Sirs

[redacted]

[redacted] I am an experienced non-contentious lawyer. I am not a specialist telecommunications lawyer but I have come across these agreements reasonably regularly so these views are those of a non-contentious real estate lawyer dealing mainly for landowners (though I have recently done some work for an operator). I don't work on the contentious side so there are quite a few questions where I just don't have experience and can't add any value.

[redacted]

[redacted]

I may say not all the documents I read are as well written, well thought out and easy to respond to as this one! Clearly an enormous work has been put into its production.

Clause 3.16

Agree that these are the appropriate rights. They should be more simply and clearly stated in the revised code.

Clause 3.17

The scope of rights does not need to be extended or reduced.

Clause 3.18

Agree for the reasons you have stated.

Clause 3.19

There should be an obligation when corresponding with landowners to provide information in a clear way and advise of the importance of taking legal advice at the cost of the Code Operator.

Clause 3.27

The status of equipment which is installed through existing conduits eg under sharing arrangements between operators should be clarified. We agree that including specific further items may be limiting but the clause you suggest ie ancillary equipment or works that are necessary for the proper use of the apparatus would be useful (although this would need to be balanced against the fact that there would be considerable scope for debate.

Clause 3.40

I can't remember seeing any leases which address the issue specifically ie contain a prohibition or restriction relating to an electronic telecommunications matter.

This means that an advisor to an occupier has to interpret clauses which are not really designed to cover the matter. It would be best if precedent leases did cover it but that is beyond the scope of the consultation and does not help with existing leases. Consideration should be given to expanding the application of clause 134 (2) so that any prohibition on creating third party rights shall be converted into a fully qualified consent in relation to the installation of telecommunications equipment unless the landlord specifically addresses the issue.

My experience acting for operators and landowners is that the most difficult and time consuming part of advising is trying to establish the consent position on the holders of superior interests. I am dual qualified to practise in Scotland as well as England and Wales and the issue is the same and just as difficult.

Clause 3.53

(1) No.
(2) Yes but compensation provisions would require to be flexible and set with realistic caps.
(3) Current basic principle seems fine but as mentioned in the consultation document it may be that reference should be not simply to an electronic communications network but to the level of service then available to the majority of persons using the network.

Clause 3.59

No experience.

Clause 3.67

No experience.

Clause 3.68

No experience but as a general principle the availability of the right to object should be made clear.

Clause 3.69

No experience but criminal sanction is a good one in these kind of circumstances. Such potential liability helps stop operators taking a commercial view.

Clause 3.74

(1) No
(2) No
(3) Yes

Clause 3.78

(1) Yes
(2) Yes

Clause 3.83

Consultation response 115 of 130

(1) No experience
(2) Yes unless there is a genuine commercial reason why not appropriate
(3) Yes

Clause 3.92

(1) No experience.
(2) Yes unless there is a genuine commercial reason why not appropriate
(3) No

Clause 3.94

No suggestions.

Clause 3.100

No experience.

Clause 3.101

No.

Clause 3.102

No experience.

Clause 3.106

(1) No experience.
(2) No experience.
(3) Can see issue but it is a wider issue ie how long it takes to get a case into court and although troublesome this issue does not merit different treatment.

Clause 3.107

No.

Clause 4.11

Yes.

Clause 4.20

No experience

Clause 4.21
(1) No
(2) See above
(3) No

Clause 4.30

(1) Yes
(2) No experience
(3) Yes
(4) No experience
(5) No experience

Clause 4.34

Yes.

Clause 4.40

Consultation response 115 of 130

Yes

Clause 4.43

Yes.

Clause 5.11

Agree

Clause 5.12

Fair

Clause 5.13

Agree

Clause 5.18

Yes strike appropriate balance.

Clause 5.47

Agreee

5.48

Agree

Clause 5.49

No experience

Clause 5.50

No view

Clause 5.51

Agree

Clause 5.56

Agree

Clause 6.35

Agree

Clause 6.36

Difficult question – if they buy and do proper due diligence then this should strictly have been factored into price.

Clause 6.73

Agree

Clause 6.73

Statutory uplift too arbitrary.

Clause 6.78

Consultation response 115 of 130

Agree

Clause 6.83

Agree

Clause 7.26

Agree

Clause 7.27

(1) Agree
(2) No view
(3) No view

Clause 7.31

Agree

Clause 7.32

No view

Clause 7.37

(1)

Clause 7.38

No view.

Clause 7.52

Agree

Clause 7.53

No view.

Clause 7.54

No experience.

Clause 7.60

Agree strongly. The agreements come before many solicitors without specific experience which causes risk to clients and delay to transactions. If there was a standard agreement it would be easy to see how it had been altered and that would be extremely helpful.

Clause 8.22

Agree.

Clause 8.33

Agree

Clause 9.14

No view

Clause 9.39

Consultation response 115 of 130

No view.

Sandra Rankine
Partner
[redacted]

rls law, 19a Floral Street, Covent Garden, London, WC2E 9DS
[redacted]

LAW COMMISSION
CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

RESPONSE FORM

This optional response form is provided for consultees' convenience in responding to our Consultation Paper on the Electronic Communications Code.

You can view or download the Consultation Paper free of charge on our website at:

www.lawcom.gov.uk (see A-Z of projects > Electronic Communications Code)

The response form includes the text of the consultation questions in the Consultation Paper (numbered in accordance with Part 10 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

The reference which follows each question identifies the Part of the Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

As noted at paragraph 1.34 of the Consultation Paper, it would be helpful if consultees would comment on the likely costs and benefits of any changes provisionally proposed when responding. The Department for Culture, Media and Sport may contact consultees at a later date for further information.

We invite responses from 28 June to 28 October 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or

by post to: James Linney, Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ

Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information 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 Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

Your details

Name:
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Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):
Responding on behalf of Arc Partners (UK) Limited. Address and phone number as above.
If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:
N/A
As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: GENERAL

10.3 We provisionally propose that code rights should include rights for Code Operators:

(1) to execute any works on land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus;

(2) to keep electronic communications apparatus installed on, under or over that land; and

(3) to enter land to inspect any apparatus.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.16.

Agreed

10.4 Do consultees consider that code rights should be extended to include further rights, or that the scope of code rights should be reduced?

Consultation Paper, Part 3, paragraph 3.17.

The rights [to execute works, keep equipment on land and enter the land to inspect] should be subject to the same caveats that one would expect to find in a commercial lease (obligations specified in 10.6).

10.5 We provisionally propose that code rights should be technology neutral.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.18.

Agreed.

10.6	Do consultees consider that code rights should generate obligations upon Code Operators and, if so, what?
	Consultation Paper, Part 3, paragraph 3.19.

The Code rights should be balanced by obligations. The following would all form part of a typical commercial lease, and as such, are things that Operators typically agree to do.

Obligations:

- Causing as little inconvenience to the Landowner as possible [during installation]
- Completing the installation in a good and workmanlike manner
- Making good any damage to the reasonable satisfaction of the Landowner
- Maintaining insurance against public and other third party liability
- Fully and effectually indemnifying the Landowner against any proceedings that may be brought against him (in his capacity of the Landowner) in respect of the exercise of the Code rights
- Keeping the Equipment in a good and safe state of repair and condition
- Giving 24 hours notice to entering the land (save for an emergency)

10.7	We ask consultees to tell us their views on the definition of electronic communications apparatus in paragraph 1(1) of the Code. Should it be amended, and if so should further equipment, or classes of equipment, be included within it?
	Consultation Paper, Part 3, paragraph 3.27.

It is agreed that the definition should remain general, and be defined by purpose rather than described specifically, to allow for technology developments, without the need of regularly updating the definition.

Ancillary equipment, eg electricity supply cables, should be included within the definition as they are a necessary requirement for the Apparatus to function as required.

10.8	We ask consultees to tell us their views about who should be bound by code rights created by agreement, and to tell us their experience of the practical impact of the current position under the Code.
	Consultation Paper, Part 3, paragraph 3.40.

We believe that tenants should not be able to make agreements with Operators, with Landlords subsequently being bound by the Code. Aside from it seeming unfair to bind a Landlord to Code rights when they have not agreed to an installation, and probably do not even know of the installation. Practically, it complicates matters unnecessarily – in our experience, it has meant that leases (for the telecoms apparatus) have been created using false information (that the tenant had sufficient title) and it creates disputes as to whom the telecoms rent should be paid – the Landlord or Tenant.

To allow a tenant to make an agreement with an Operator seems wholly unnecessary and against common law principles. It should be the Landlord (or the courts) who are in a position to grant consent, not a tenant, who would likely only consider short term personal gain and may not be aware of all the pertinent information (eg the building might be scheduled to be redevelopment rendering it unsuitable for telecoms occupation).

Whilst the situation of a tenant granting consent against the Landlord's wishes or without their knowledge is not something we find to be commonplace, it is something that we do come across (approximately 5 situations in the last 10 years). However, we make a point of generally refusing

to act for Landlords/tenants where consent has been granted by the tenant, such are the complexities and disputes that ensue.

10.9 We ask consultees for their views on the appropriate test for dispensing with the need for a landowner's or occupier's agreement to the grant of code rights. In particular, consultees are asked to tell us:

(1) Where the landowner can be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code, should it be possible for the tribunal to make the order sought without also weighing the public benefit of the order against the prejudice to the landowner?

(2) Should it be possible to dispense with the landowner's agreement in any circumstances where he or she cannot be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code?

(3) How should a revised code express the weighing of prejudice to the landowner against benefit to the public? Does the Access Principle require amendment and, if so, how?

Consultation Paper, Part 3, paragraph 3.53.

The Assess Principle seems heavily weighted against the Landowner – consent can be granted under the Principle, provided that the prejudice is capable of adequately being financially compensated. The Operator would have approached the Landowner offering financial recompense (in the form of a commercial agreement) far before it sought to utilise the Assess Principle, and if the Assess Principle is being utilised, then that means that the Landowner has previously refused money for the Operator installing on the land. So, it seems unfair for a court to make an order as long as the Landowner receives some money, when there is little/no public benefit, and the Landowner is clearly not motivated or satisfied with financial recompense.

Equally, there is a situation whereby consent could be granted and the Landowner isn't compensated, which seems wholly unfair. It is their land, it is clearly something they don't want to happen, and they don't even receive compensation – there is absolutely no balance for the private interest in this situation.

The development of new technologies is clearly something that benefits the public, and not something we would wish to be fettered, but it does invite the question of where the line should be drawn. Utilities like electricity and gas are absolutely necessary for the general standard or living, and while mobile phones are probably now included in that, something like 4G would not be seen as a necessity (at present). It would therefore seem unfair that the test for electricity wayleaves is strict (it is 'necessary or expedient' to install…) whereas consent can be granted to an operator purely if the Landowner can be compensated.

It would seem far fairer, given the change in circumstances (established 2G and 3G networks), that a stricter test is applied, such as the test for consent in respect of electricity wayleaves.

10.10 We ask consultees to tell us if there is a need for a revised code to provide that where an occupier agrees in writing for access to his or her land to be interfered with or obstructed, that permission should bind others with an interest in that land. Consultation Paper, Part 3, paragraph 3.59.
It would create a 'messy' situation if access was agreed, but not all those with an interest in the land were bound to it. As in 10.8, we believe that it should be the Landowner who makes any such agreement and not an occupier, and the Landowner would then be in a position to 'enforce' compliance of any occupiers etc with the agreement, however, if an occupier were able to grant consent, a Landowner may not even know about it.

10.11 We ask consultees to tell us their views about the use of the right for a Code Operator to install lines at a height of three metres or more above land without separate authorisation, and of any problems that this has caused. Consultation Paper, Part 3, paragraph 3.67.
It would seem a more balanced approach that the Operator should have to seek consent from the Landowner, and if consent was denied, the court would have the power to grant consent, having consideration for the benefit to the Operator/public and the Landowner's objections.

10.12 Consultees are asked to tell us their views about the right to object to overhead apparatus. Consultation Paper, Part 3, paragraph 3.68.
As above, it would seem fairer to have to seek consent from the Landowner/court. However, if it remains that Operators may install overhead lines without seeking consent, it should also remain that the Landowner has the mechanism to object and be compensated and potentially have an order made for alteration.

10.13 Consultees are asked to give us their views about the obligation to affix notices on overhead apparatus, including whether failure to do so should remain a criminal offence. Consultation Paper, Part 3, paragraph 3.69.
Due to the safety implications (of potentially not knowing who equipment belonged to in an emergency situation), and that it is not at great cost or effort to affix a sign, it seems reasonable to make it a criminal offence to ensure compliance.

10.14 Do consultees consider that the current right for Code Operators to require trees to be lopped, by giving notice to the occupier of land, should be extended:

(1) to vegetation generally;

(2) to trees or vegetation wherever that interference takes place; and/or

(3) to cases where the interference is with a wireless signal rather than with tangible apparatus?

Consultation Paper, Part 3, paragraph 3.74.

It would seem unfair that an occupier could be ordered to lop trees (even protected or in a conversation area) and the onus being on them to object via a notice to the court, and not be compensated for lopping their trees (which can be a costly thing to do).

However, it may be imperative to the Operator to cure the interference, so whilst it would be agreed the right could be extended as per (1), (2) and (3), in balance, it would seem fairer to put the onus on the Operator to need to refer the matter to court if the occupier objects and ensure there is provision for, as a minimum, the occupier recovering the cost of having the trees lopped.

10.15 We ask consultees:

(1) whether Code Operators should benefit from an ancillary right to upgrade their apparatus; and

(2) whether any additional payment should be made by a Code Operator when it upgrades its apparatus.

Consultation Paper, Part 3, paragraph 3.78.

Operators should not have an ancillary right to upgrade their apparatus where the apparatus would be materially different to the apparatus installed originally. A deed of variation (or similar) should be a requirement in the case of any upgrade, alteration or addition where the apparatus is materially different, or increased, as these should not be things that are an automatic right in a commercial agreement, and it should be between Landowner and Operator to negotiate the payment for the variation, as would be standard in a commercial setting.

10.16 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from sharing their apparatus causes difficulties in practice;

(2) whether Code Operators should benefit from a general right to share their apparatus with another (so that a contractual term restricting that right would be void); and/or

(3) whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it shares its apparatus.

Consultation Paper, Part 3, paragraph 3.83.

We do not believe the Revised Code should confer a general right to share, thus rendering the lease term void. Operators sharing sites is far more in their own financial interests than in the public interest in respect of the level of service provided or progression of the network. As such, the operators should not have the right to save themselves money at the expense of the landowner, with whom they willingly entered into a commercial agreement (ie a landowner should be entitled to refuse site sharing if it is prohibited in the lease, and the landowner should be entitled to receive monetary compensation where the lease allows for site sharing).

If operators were to be given an automatic right to share sites under the Revised Code, not only

would landowners be deprived of potential additional rental income, they would have far more onerous (and costly) processes if the 'sharers' were to exercise their Code Powers to remain on the site – so a landowner may have to serve multiple notices under para 20/21 and suffer the additional costs in respect of such (Telecommunications Act 1984, sch 2, para 21(11)), which is very much skewed towards prejudicing the landowner (while only really seeking to benefit the operator's financial interests).

S 40 of the Landlord and Tenant Act 1954 requires a tenant to provide information about subtenants and other occupiers, however, there is no equivalent provision in the Code, consequently, if site sharing took place and the operators were not transparent about who was on site, who particular apparatus belonged to etc, a landowner might be forced to apply to court to seek a *Norwich Pharmacal* order requiring disclosure of information relating to potential parties to litigation. While there is an obligation to affix notices to overhead apparatus, giving the name and address of the operator to whom it belongs, there can still be situations where the site is shared (or assigned) and it is not clear who all the apparatus on site belongs to. For example, a notice would only be required on a mast if the person erecting it was to use it for the purposes of its own network, and it may be impossible to identify the owner of apparatus within an equipment cabin – as there is no requirement to affix notices to apparatus inside a cabin, and often a landowner will not even have access to the cabin.

It is, therefore, concluded that the issue of sharing should remain vested in the lease.

10.17 We ask consultees to what extent section 134 of the Communications Act 2003 is useful in enabling apparatus to be shared, and whether further provision would be appropriate.

Consultation Paper, Part 3, paragraph 3.88.

We believe the provision to be useful, the requirement for Landlord consent necessary, but further provision unnecessary.

10.18 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from assigning the benefit of agreements that confer code rights causes difficulties in practice;

(2) whether Code Operators should benefit from a general right to assign code rights to other Code Operators (so that a contractual term restricting that right would be void); and

(3) if so, whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it assigns the benefit of any agreement.

Consultation Paper, Part 3, paragraph 3.92.

Whilst operators can transfer ownership of physical apparatus, they cannot necessarily transfer Code rights (and as such there could conceivably be a situation whereby the landowner could request the removal of the apparatus that was transferred to another operator). We are asked, practically, whether this ability to prevent operators assigning causes difficulties. In our experience, it does not. We have found that it would be very rare for an agreement between landowner and operator, not to address the issue of alienation. If operators were afforded a general right to assign (rendering any contractual terms void), it may lead to a situation whereby it was unclear who's equipment was on the land and who was responsible for the payment of rent, who to contact in an emergency etc. If operators were afforded such a general right it would be imperative that conditions were attached to protect the landowner, eg the assignee enters into a deed with the landowner. However, as alienation is routinely included in leases between landowners and operators, it would seem unnecessary to have any special assignment provisions under the Code

10.19 We ask consultees to tell us if they consider that any further ancillary rights should be available under a revised code.

Consultation Paper, Part 3, paragraph 3.94.

No

10.20 We ask consultees to tell us if they are aware of difficulties experienced in accessing electronic communications because of the inability to get access to a third party's land, whether by the occupiers of multi-dwelling units or others.

Consultation Paper, Part 3, paragraph 3.100.

Not aware of any such situations.

10.21 Do consultees see a need for a revised code to enable landowners and occupiers to compel Code Operators to use their powers to gain code rights against third parties? Consultation Paper, Part 3, paragraph 3.101.
It seems unnecessary, given that the power has not been utilised before.

10.22 Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used? Consultation Paper, Part 3, paragraph 3.102.
No.

10.23 We ask consultees: (1) to what extent unlawful interference with electronic communications apparatus or a Code Operator's rights in respect of the same causes problems for Code Operators and/or their customers; (2) to what extent any problem identified in answer to (1) above is caused by a Code Operator having to enforce its rights through the courts or the nature of the remedy that the courts can award; and (3) whether any further provision (whether criminal or otherwise) is required to enable a Code Operator to enforce its rights. Consultation Paper, Part 3, paragraph 3.106.
N/A

10.24 We ask consultees whether landowners or occupiers need any additional provision to enable them to enforce obligations owed to them by a Code Operator. Consultation Paper, Part 3, paragraph 3.107.
Yes, the current methods are too slow and in some cases inadequate.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: SPECIAL CONTEXTS

10.25 We provisionally propose that the right in paragraph 9 of the Code to conduct street works should be incorporated into a revised code, subject to the limitations in the existing provision. Do consultees agree? Consultation Paper, Part 4, paragraph 4.11.
Yes

10.26 We ask consultees to let us know their experiences in relation to the current regime for tidal waters and lands held by Crown interests. Consultation Paper, Part 4, paragraph 4.20.
No issues

10.27 We seek consultees' views on the following questions. (1) Should there be a special regime for tidal waters and lands or should tidal waters and lands be subject to the General Regime? (2) If there is to be a special regime for tidal waters and lands, what rights and protections should it provide, and why? (3) Should tidal waters and lands held by Crown interests be treated differently from other tidal waters and lands? Consultation Paper, Part 4, paragraph 4.21.
(1) General Regime (2) N/a (3) No

10.28 We ask consultees:

(1) Is it necessary to have a special regime for linear obstacles or would the General Regime suffice?

(2) To what extent is the linear obstacle regime currently used?

(3) Should the carrying out of works not in accordance with the linear obstacle regime continue to be a criminal offence,or should it alternatively be subject to a civil sanction?

(4) Are the rights that can be acquired under the linear obstacle regime sufficient (in particular, is limiting the crossing of the linear obstacle with a line and ancillary apparatus appropriate)?

(5) Should the linear obstacle regime grant any additional rights or impose any other obligations (excluding financial obligations)?

Consultation Paper, Part 4, paragraph 4.30.

(1) No
(2) No direct experience of it being used
(3) No (subject to civil sanction)
(4) Yes
(5) No

10.29 We provisionally propose that a revised code should prevent the doing of anything inside a “relevant conduit” as defined in section 98(6) of the Telecommunications Act 1984 without the agreement of the authority with control of it.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.34.

Yes

10.30 We provisionally propose that the substance of paragraph 23 of the Code governing undertakers’ works should be replicated in a revised code.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.40.

Yes

10.31	We provisionally propose that a revised code should include no new special regimes beyond those set out in the existing Code. Do consultees agree? Consultation Paper, Part 4, paragraph 4.43
Yes	

ALTERATIONS AND SECURITY

10.32 We provisionally propose that a revised code should contain a procedure for those with an interest in land or adjacent land to require the alteration of apparatus, including its removal, on terms that balance the interests of Code Operators and landowners and do not put the Code Operators' networks at risk. Do consultees agree? Consultation Paper, Part 5, paragraph 5.11.
Yes

10.33 Consultees are asked to tell us their views about the alteration regime in paragraph 20 of the Code; does it strike the right balance between landowners and Code Operators? Consultation Paper, Part 5, paragraph 5.12.
The justification of this Code power is to protect public access to electronic communications networks and services. However, it is now difficult, if not impossible to argue that loss of a particular site will produce a gap in coverage, even when that particular site is subject to a network sharing agreement. It is, therefore, difficult to justify the operator's powers over landowners in this respect. Further objections to this power can be raised in respect of how and why it is actually used by operators. Often a counter notice will be served as a deterrent, to either make the landowner drop his demands, as they will wish to avoid referring the matter to court , or to 'buy time' for negotiation. The Code provides that a court can order the removal of apparatus after a counter notice (in the instance the counter notice has been served on the basis the operator specifies steps they proposes to take to secure a right against the person whom served the notice) where the operator is not intending to take steps to secure the rights, or is being unreasonably dilatory. Prima facie, this serves to prevent the operators serving counter notices merely as a delaying tactic or to give them a stronger position in negotiations. However, in practice, it does not achieve this - landowners would wish to avoid lengthy and expensive court actions, and even if they were to pursue an action, it would be difficult to prove that the operators had no intention of securing the rights, or that they are being unreasonably dilatory. In addition, there is no time frame or limit specified for the resolution of a counter notice, which does not serve to encourage landowners to pursue an action in respect of a counter notice. The fact that the landowner has to refer to matter to county court upon being served a counter notice complicates matters further. It is widely accepted this is an inappropriate forum as it is ill-equipped to deal with valuation issues. It is suggested that jurisdiction is transferred to (or is concurrent with) the Lands Tribunal. It would seem unfair that the onus is on the landowner to pursue an action to enforce the removal of apparatus when a lease has expired. As both parties would have agreed to a particular period of occupation, it would be more appropriate for the party who is, in effect, not honouring the agreement by wishing to stay in occupation for longer than was originally agreed, to take positive steps to enforce their Code powers to remain in occupation, rather than the onus being on the party who wishes to honour the terms of the original agreement. Para 21 operates regardless of any contrary agreement, and as such, even if the provisions for

security of tenure under the Landlord and Tenant Act 1954 have been explicitly excluded form a lease, the Code powers remain. Many leases contain an exclusion from s 24 – 28 Landlord and Tenant Act 1954 – this could be interpreted as the operators no longer having a genuine need for a protected tenancy as they are willing to make this exclusion, but more likely is that they are happy to exclude it, knowing that their Code powers will 'trump' any exclusion of s 24 – 28. This is not altogether satisfactory, as it renders the process of excluding those provisions seemingly pointless.

The best suggestion, therefore, seems that there should be the ability to exclude para 21 of the Code in the same way that s 24 – 28 of the Landlord and Tenant Act 1954 can be excluded, ie with the agreement of both parties, who are represented by experts. An alternative would be to restrict the nature of para 21, for example, it can only be utilised if the landowner requires vacant possession for the purposes of redevelopment, or to include a clause in the lease whereby the landowner was fully indemnified against losses (including losses arising from the inability to redevelop) that arise as a result of continued occupation. However, neither of these alternatives would be as effective as the ability to exclude para 21. Landowners do have redress to require vacant possession in the event of redevelopment under para 20, and having to fully indemnify the landowner for such circumstances could result in a far greater cost to the operator, than the costs associated with simply vacating the site. As such, the ability to exclude para 21, rather than attaching conditions or restrictions to it, seems the simplest way forward.

10.34 We provisionally propose that it should not be possible for Code Operators and landowners to contract out of the alterations regime in a revised code.

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.13.

No – it is our view it should be possible to contract out, as above.

10.35 We seek consultees' views on the provisions in paragraph 14 of the Code relating to the alteration of a linear obstacle. Do consultees take the view that they strike an appropriate balance between the interests involved, and should they be modified in a revised code?

Consultation Paper, Part 5, paragraph 5.18.

Agreed there is an appropriate balance.

10.36 We provisionally propose that a revised code should restrict the rights of landowners to remove apparatus installed by Code Operators. Do consultees agree? Consultation Paper, Part 5, paragraph 5.47.
There should be some level of restriction/conditions so that a landowner could not remove apparatus if for example there was going to be a lease renewal. But the current protection is far too extensive, and as disruption to service is not an issue in the same way it was when the code was drafted, it seems unfair and unbalanced that Operators have this level of protection.

10.37 We provisionally propose that a revised code should not restrict the rights of planning authorities to enforce the removal of electronic communications apparatus that has been installed unlawfully. Do consultees agree? Consultation Paper, Part 5, paragraph 5.48.
Agreed.

10.38 We ask consultees to tell us their views about the procedure for enforcing removal. Should the onus remain on landowners to take proceedings? If so, what steps, if any, should be taken to make the procedure more efficient? Consultation Paper, Part 5, paragraph 5.49.
The current process is unsatisfactory, lengthy and costly. If a contracted out (s.24 – 28 Landlord and Tenant Act 1954) lease has expired or otherwise been determined, the onus should not be on the Landowner to require removal, the onus should be on the Operator to utilise their power to stay on the land under paragraph 21. The Landowner will have taken reasonable steps to ensure vacant possession when a lease ends – 'yield up' clauses etc, so it should be for the Operator to take steps to enforce para 21 if that is what they wish to do.

10.39 We ask consultees to tell us whether any further financial, or other, provisions are necessary in connection with periods between the expiry of code rights and the removal of apparatus. Consultation Paper, Part 5, paragraph 5.50.
Provision for the Landowner to be paid at the prevailing rate for the whole time the land was occupied by the equipment should be included as well as compensation for losses which arise as a result of continued occupation (eg inability to redevelop)

10.40 We provisionally propose that Code Operators should be free to agree that the security provisions of a revised code will not apply to an agreement, either absolutely or on the basis that there will be no security if the land is required for development. Do consultees agree? Consultation Paper, Part 5, paragraph 5.51.
Yes. We believe that there should be the option to opt out absolutely and an option that security provisions won't apply if the land is required for redevelopment. We believe this is extremely important – Landowners know how difficult, lengthy and costly it can be to get apparatus removed from their land, and, quite simply, it is putting them off entering into agreements with Operators in the first place. If a redevelopment worth millions of pounds could be held up indefinitely by the presence of the apparatus on their land, they are not going to be inclined to accept an annual rent of £10,000 or so, knowing that it could cost them far, far more than they will ever receive. Landowners are becoming more and more reluctant to enter into agreements, which is to the benefit of no one. If a Landowner had the knowledge that if they required vacant possession, they could obtain it, the would be more likely to do a deal with an Operator in the first place.

10.41 Do consultees agree that the provisions of a revised code relating to the landowner's right to require alteration of apparatus, and relating to the security of the apparatus, should apply to all equipment installed by a Code Operator, even if it was installed before the Code Operator had the benefit of a revised code? Consultation Paper, Part 5, paragraph 5.56.
Yes, particularly for the sake of clarity. It is not uncommon for a landowner with several installations not to know when particular equipment was installed, or even what operator they belong to, especially if the land has had numerous owners.

FINANCIAL AWARDS UNDER THE CODE

In responding to these questions, please note the definitions of "compensation" and "consideration" adopted at paragraph 6.5 and following of the Consultation Paper.

10.42 We provisionally propose that a single entitlement to compensation for loss or damage sustained by the exercise of rights conferred under the Code, including the diminution in value of the claimant's interest in the land concerned or in other land, should be available to all persons bound by the rights granted by an order conferring code rights. Do consultees agree? Consultation Paper, Part 6, paragraph 6.35.
Yes

10.43 We ask consultees whether that right to compensation should be extended to those who are not bound by code rights when they are created but will be subsequently unable to remove electronic communications apparatus from their land. Consultation Paper, Part 6, paragraph 6.36.
Yes, they are effectively suffering the same inability to remove apparatus as they would if bound by the Code and as such should have the same rights to compensation.

10.44 We provisionally propose that consideration for rights conferred under a revised code be assessed on the basis of their market value between a willing seller and a willing buyer, assessed using the second rule contained in section 5 of the Land Compensation Act 1961; without regard to their special value to the grantee or to any other Code Operator. Do consultees agree? We would be grateful for consultees' views on the practicability of this approach, and on its practical and economic impact. Consultation Paper, Part 6, paragraph 6.73.
We would disagree that the proposed market value on compulsory purchase principles is the most appropriate measure. The 'Pointe Gourde' principle operates fairly in the event of a compulsory purchase, with each side benefiting from the principle. The landowner who is compelled to sell receives the open market value of the land, with no regard to how the value of the land will diminish once the scheme commences. The purchaser has the benefit of not being held to ransom because that particular land is of particular value to them, they simply pay what the land is worth having no regard to the scheme. However, when we apply the Point Gourde principle to landowners and operators, it seems that it only has a tangible benefit for the operators. While telecoms installations may diminish the value of the land in respect of residential sites, they are unlikely to do so in commercial sites, and if anything, would be likely to increase the value of a commercial site, so in many cases, the landowner would be unlikely to suffer a

decrease in the value of his land by virtue of the installation. In those cases, what benefits the landowner by applying the Point Gourde principle? If there is no diminishment in value to consider, then 'disregarding' it is entirely neutral – in effect nothing is being disregarded. The benefit for the operator is always that no regard will be had to the value of the land to them, personally. It would, therefore, seem unfair to use a measure which is always to the benefit of the operator, and mostly does not benefit the landowner. A measure of 'market value' would be much fairer as its principles do not favour either party; it is simply the value of the land.

10.45 Consultees are also invited to express their views on alternative approaches; in particular, the possibility of a statutory uplift on compensation (with a minimum payment figure in situations where no compensation would be payable).

Consultation Paper, Part 6, paragraph 6.74.

Market Value, as above.

10.46 We provisionally propose that there should be no distinction in the basis of consideration when apparatus is sited across a linear obstacle.

Do consultees agree?

Consultation Paper, Part 6, paragraph 6.78.

Yes.

10.47 We provisionally propose that, where an order is made requiring alteration of a Code Operator's apparatus, the appropriate body should be entitled to consider whether any portion of the payment originally made to the person seeking the alteration in relation to the original installation of that apparatus should be repaid.

Do consultees agree?

Consultation Paper, Part 6, paragraph 6.83.

Yes.

TOWARDS A BETTER PROCEDURE

10.48 We provisionally propose that a revised code should no longer specify the county court as the forum for most disputes. Do consultees agree? Consultation Paper, Part 7, paragraph 7.26.
Yes, the Lands Tribunal is a far more appropriate forum.

10.49 We ask for consultees' views on the suitability of the following as forums for dispute resolution under a revised code: (1) the Lands Chamber of the Upper Tribunal (with power to transfer appropriate cases to the Property Chamber of the First-tier Tribunal or vice versa); (2) a procedure similar to that contained in section 10 of the Party Wall etc Act 1996; and (3) any other form of adjudication. Consultation Paper, Part 7, paragraph 7.27.
We believe that arbitration (in accordance with the Arbitration Act 1996) should be available as dispute resolution, particularly over rent review disputes or disputes over the terms of a renewal. And that the Lands Tribunal should be the primary forum beyond that.

10.50 We provisionally propose that it should be possible for code rights to be conferred at an early stage in proceedings pending the resolution of disputes over payment. Do consultees agree? Consultation Paper, Part 7, paragraph 7.31.
Yes

10.51 We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay. Consultation Paper, Part 7, paragraph 7.32.
Ofcom should be proactive in policing the Code – there have been instances where Landowners have been told that their disputes are private, when the disputes have been over the Code, which should be within the remit of Ofcom.

10.52 We seek consultees' views as to how costs should be dealt with in cases under a revised code, and in particular their views on the following options: (1) that as a general rule costs should be paid by the Code Operator, unless the landowner's conduct has unnecessarily increased the costs incurred; or (2) that costs should be paid by the losing party. Consultation Paper, Part 7, paragraph 7.37
We believe (1) is more appropriate as, it is in keeping with the Land Chamber's general rule.

10.53 We also ask consultees whether different rules for costs are needed depending upon the type of dispute. Consultation Paper, Part 7, paragraph 7.38.
No

10.54	We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service. Do consultees agree? Consultation Paper, Part 7, paragraph 7.52.
Yes	

10.55	Do consultees consider that the forms of notices available to Code Operators could be improved? If so, how? Consultation Paper, Part 7, paragraph 7.53.
A Counter Notice in respect of para 21 is often merely served as a delaying tactic, which should clearly not be permitted.	

10.56	Do consultees consider that more information is needed for landowners? If so, what is required and how should it be provided? Consultation Paper, Part 7, paragraph 7.54.

10.57 We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms. Consultation Paper, Part 7, paragraph 7.60.
A standardisation of terms would offer much need clarity to the Code.

INTERACTION WITH OTHER REGIMES

10.58	We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease. Do consultees agree? Consultation Paper, Part 8, paragraph 8.22.
Yes	

10.59	We provisionally propose that where an agreement conferring a right on a Code Operator also creates an interest in land of a type that is ordinarily registrable under the land registration legislation, the interest created by the agreement should be registrable in accordance with the provisions of the land registration legislation, but that a revised code should make it clear that its provisions as to who is bound by the interest prevail over those of the land registration legislation. Do consultees agree? Consultation Paper, Part 8, paragraph 8.33.
Yes	

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

10.60 We ask consultees to tell us: (1) whether they are aware of circumstances where the funds set aside under regulation 16 have been called upon; (2) what impact regulation 16 has on Code Operators and on Ofcom; (3) if a regime is required to cover potential liabilities arising from a Code Operator's street works; and (4) if the answer to (3) is yes, what form should it take? Consultation Paper, Part 9, paragraph 9.14.
No direct experience of Regulation 16

10.61 We ask consultees for their views on the Electronic Communications Code (Conditions and Restrictions) Regulations 2003. Is any amendment required? Consultation Paper, Part 9, paragraph 9.39.
No

Consultation response 117 of 130

Linney, James

From:	R FOXWELL [redacted]
Sent:	28 October 2012 21:49
To:	LAWCOM Property and Trust
Subject:	Response to Law Commission Consultation Paper No205 on the Electronic Communications Code
Follow Up Flag:	Follow up
Flag Status:	Orange

As a landlord of four telecommunication sites I wish to raise the following points regarding the consultation.

-Landlords should continue to be able to control or ban the addition of equipment where there is already such provision.
-Landlords should continue to be able to control or ban the sharing of sites where there is already such provision in the agreement.
-Landlords should be able to continue to charge for site sharing where there us already such provision in the agreement.
-Landlords should be able to continue to restrict or ban the assignment of leases where there is already such a provision in the agreement.
-Landlords should be able to contract out of "Code Powers" so that if the landlord has a genuine redevelopment proposal, and the operators equipment would frustrate such a scheme, the operators can be forced to move or remove their equipment within an agreed and acceptable timeframe.
-The basis on valuing sites is established and should remain unchanged.
-The basis of settling valuation disputes should be altered so that referral can be made to an appropriate body with the appropriate expertise (not for instance the County Court) and that the body will handle the dispute quickly and at low(er) cost.
-The way in which the existing Code interacts with the Landlord & Tenant act 1954 should be clarified so tat they can work (better) together.

My Agent, Tom Bodley-Scott of Batcheller Monkhouse, has raised said points.
I am concerned as a landlord that the implications of the legislation could be far reaching and, if adopted, have a significant impact on rents. For instance:

- Site share payments may be stopped and
-the method of calculation rents (currently based on market value) could be changed to compulsory purchase principals with a "no scheme worls".

By the way of illustration, this would mean that rural green field site rent would be as low as say £50pa and a roof top rent about £500pa.

This could entail no network nationwide. I fully support my agent mentioned prior.

I look forward to your response,
Roger Foxwell

Please reply to: Geoff Whittaker
[redacted]

Sunday 28th October 2012

James Linney,
Law Commission,
Steel House,
11 Tothill Street,
London,
SW1H 9LJ.

By email only: propertyandtrust@lawcommission.gsi.gov.uk

Dear Sirs,

Electronic Communications Code consultation –
comments of Agricultural Law Association

ALA is the country's largest inter-professional organisation focused on rural business with more than 1,000 members – lawyers, surveyors, accountants, farm business consultants and other professional advisers – across the UK. We are affiliated to the European Council for Rural Law which is composed of similar national associations in other Member States and elsewhere in Europe. For more information see www.ala.org.uk

ALA is an apolitical association and our comments, therefore, concentrate on practical issues arising out of the proposals and questions raised in the consultation.

This response has been compiled by an ALA Working Group consisting of the following:

Michael Holland – Surveyor, King West, Stamford
Jonathan Thompson – Solicitor, Mills & Reeve, Norwich

We do not have contributions on all questions asked, but comment as follows in relation to the several Parts of the consultation, with responses to specific questions appropriately numbered:

Part 1 – Introduction

We welcome the Commission's review of the Electronic Communications Code. As the paper rightly points out, the Code is "...confusing and unduly complicated". Its ancestry deriving from so many diverse sources leads to difficulty of understanding and therefore of application. Starting again from scratch is undoubtedly the most useful approach.

Part 2 – Legal and Policy Context

We agree that a Code is necessary for precisely the reasons set out in the paper. However, we believe it should not be available to either the landowner or the operator as a stick with which to beat the other. Rather, it should be left to the parties to negotiate positively to reach a mutually agreeable conclusion, with the role of the Code being that of a safety net where this becomes impossible.

If it is accepted on policy grounds that there is a public interest in wide-scale provision of mobile communications – matter on which ALA retains an impartial position – it is important to ensure a balance between that public interest and that of the landowner and his property rights. We do not argue with the Commission's commentary on the Human Rights aspects of the Code's *existence (paras. 2.6 et seq.), but satisfaction of that question must depend on the precise provisions which it covers.*

Public interest is not a black-and-white question. Undoubtedly, services which enhance the performance of the emergency services, for example, would be in the public interest. So, arguably, would services rendering business more efficient. Whether the same could be said of facilitation of mere social conversation is another question, and whether the Code should attempt to differentiate between them is a matter for its devisors to determine.

Where does the public interest rank alongside the rights of citizens to use land to provide an income? In terms of rural land use, it might be said in the extreme case to be a balance between the provision of communications and the provision of food. Whilst most sites involve small areas with comparatively little impact on agricultural use, there are examples where blocks of land have been effectively sterilised by electronic communications equipment, for example the laying of a cable through a block of Grade 1 arable land. That would give rise to greater Human Rights concerns and the Code should be phrased so as to take that into account.

Parts 3 & 4 – Rights and Obligations of Code Operators

The Code's *current application, with the modifications made in 2003, dates from a time when privatisation of telecommunications was a novelty. The industry and the technology it implements have developed beyond the thinking of that day and the new Code should attempt to future-proof its application so far as possible in light of that experience.*

In response to the Commission's specific questions under this head:

3.16 – Yes, subject to our comments under Part 6 below.

3.17 – No: the present rights are wide enough.

3.18 – We agree.

3.19 – The comments of our members show that the balance of Code rights presently sits in favour of operators and against landowners. Recent renewals of 10-year leases entered into between 2000 and 2003 indicate that attitudes of operators have become increasingly dictatorial in reliance on the strength of those rights.

Whatever the 'public interest' intent of the Code, the primary responsibility of the operators is to their shareholders, not to the landowners in particular or the public in general. Policy-makers will of course have their own view, but we doubt whether those who drafted the present Code could have intended to support the use of Code rights for commercial gain in preference to service provision. The present redrafting of the Code should not permit that situation to continue.

3.27 – No, for reasons stated above. If the basic definition of 'electronic communications equipment' is sufficiently flexible to permit foreseeable new technology to be encompassed without being uncertain in its application, further specification becomes redundant.

3.40 – All parties with an interest in the land affected should be required to consent and the duty should be on the operator to seek out, identify and obtain consent from such persons, or to satisfy the court or other decision-making forum that consent might be dispensed with. It is unconscionable that a freeholder should be bound by an act of his tenant or licensee in breach of the terms between them.

3.53 – We refer you to our comments above regarding 'public interest' and the relative merits of communications such as Airwave (Government command and control, emergency services) masts and the need to support mere social intercourse.

We suggest that the appropriate test for dispensing with the need for a landowner's consent is whether:

(a) the need for communications equipment is crucial for the interests of national security or emergency or other public services; or

(b) without the equipment, a business would not have access to the most commercially expedient communications systems; or

(c) without the equipment, an individual would not have access to any communications systems.

If any one of those tests is met, the consent of the landowner might be dispensed with, subject to an appropriate court or similar order and to the payment of appropriate compensation to the landowner (see below).

3.59 – We can see that this is expedient as a form of overreaching of, for example, easements or other rights the landowner may have granted.

3.69 – In rural areas, such warning signs and notices are crucial.

3.78/3.83 – The ability for operators to be able to share sites has clear commercial benefits. Where the parties are unable to agree, the operator should be obliged to provide annual information on site-sharing arrangements. Compensation should be payable to a landowner on the same basis as with initial installation to ensure a balance of interest.

3.88 – Where an agreement freely made contains provisions of this nature, those provisions should not be overridden in the manner provided for by s.134 or

equivalent measures without proper justification. Whether such interference is politically justified will depend on the weight given to the 'public interest' considerations discussed above.

3.92 – As noted, agreements made between two consenting parties should not be interfered with without proper justification. Whether such interference is politically justified will depend on the weight given to the 'public interest' considerations discussed above.

3.106/3.107 – In keeping with our general view, the Code should seek to provide a safety net for parties who are unable to agree. Where one party has a grievance against another, that grievance should be addressed by appropriate dispute resolution mechanisms. We suggest it would be appropriate that such matters routinely be dealt with by the same tribunal as other matters arising under the Code.

Part 5 – Alterations and security

The right to move or remove apparatus in given circumstances should remain. The circumstances of its application will depend upon the 'public interest' considerations discussed above.

The use of a landowner's land, particularly in a rural context, can and does change and the need to rotate land use as a matter of general practice and not merely as an element of improvement of land should be borne in mind in setting out those circumstances.

Specifically on the Commission's questions:

5.11 – Yes, for reasons given above.

5.12 – The balance between the large scale commercial interests of the operator, whose equipment it is, and the smaller landowner, often an independent business or private citizen, is often uneven. Especially in cases where food production land is concerned, it would we consider be in keeping with broader considerations of public interest to require the cost of removal to be met by the operator.

5.13 – We disagree. Where the parties are in agreement as to a method, they should be allowed to pursue it, and the Code should come into play only if they are unable to agree.

5.47 – No, for reasons given above, especially where food production land is concerned.

5.49 – We consider the forum for dispute resolution and enforcement under Part 7 below.

5.51 – In keeping with our general position, we agree that parties should be able to contract out of the Code provisions on such terms as they may agree.

Part 6 – Financial

We are of the view that the consideration for the installation or, as the case may be, sharing of equipment should, insofar as it is not agreed between the parties, be a 'fair value'.

The meaning of that expression is stated by the International Valuation Standards Council as "The estimated price for the transfer of an asset or liability between identified *knowledgeable and willing parties that reflects the respective* interests of those parties".

Alternatively, the European Group of Valuers' Associations (TEGoVA) defines it largely to the same effect as "The price that would be received to sell an asset or paid to transfer *a liability in an orderly transaction between willing market participants possessing full knowledge of all the relevant facts, making their decision in accordance with their* respective objectives".

This has been the basis of dealings since well before the current Code for the installation of equivalent equipment. We consider that these bases reflect more realistically than any element either of ransom or compulsory purchase valuation the environment in which electronic communications equipment is dealt with in practice.

Compensation on this basis ought to be available to anyone affected by the installation, operation and maintenance of any electronic communications equipment, in the interests of balance and of the Human Rights principles noted at the beginning of the consultation paper.

Part 7 – Procedure

It is essentially in our view that any procedure with regard to application of rights or resolution of disputes should be straightforward and as quick and cost-effective as possible.

We agree with the proposition to revise the present arrangements and of the various options given consider that the mechanism of appointment of (suitably qualified and experienced) surveyors outlined in paras.7.23-7.25, similar to that applicable under the Party Wall etc Act 1996, would be most suitable.

As regards costs, and in the absence of unreasonable behaviour, we agree with the proposal in para.7.37.

Part 8 – Interaction with other regimes

In respect of the two questions in Part 8 we respond as follows:

8.22 – We agree. The coexistence of the Code provisions with those in Landlord and Tenant Act 1954, Pt.II achieve no benefit and cause considerable problems, as noted in the paper.

However, in the same way that a tenant is warned about contracting out of the 1954 Act, we consider that a notice should be served warning a landowner of what is about to bind him.

8.33 – We do not agree. The point of registration is to centralise the recording of rights and interests relating to land. If this is to be effective there should be no exceptions. The owner of any other commercial interest is bound by this aspect of the law and we see no reason why the same should not apply to electronic communications operators.

Leases for less than seven years and rights granted in agreements other than leases should be noted on the superior title; leases for longer than seven years will, of course, require registration in their own right.

If thought appropriate, a new form might be created for the registration of notice of such a right – a Notice of Electronic Communication Equipment – otherwise the existing Forms AN1 or UN1 would suffice.

Where the superior title is unregistered, the Land Charges Registry would be used. Rights should not be a Disclosable Overriding Interest.

_____

We shall be pleased to assist the Law Commission further in this exercise in any way possible. In particular we would welcome the opportunity to contribute to any relevant stakeholder group(s).

Yours faithfully,

G.D. Whittaker
Consultant & Adviser

MLM Cartwright solicitors

Mr James Linney
Law Commission
Steel House
11 Tothill Street
London
SW1H 9LJ

[redacted]

Your ref:

Our ref: DRK.

Date: 28th October 2012

Dear Sirs

Please find attached our views on the Law Commission's Consultation Paper No.205. Having acted on behalf of Operators and landowners we have dealt with and continue to deal with a high level of transactions relating to Electronic Communications. What is extraordinary is that given the number of transactions with which we have dealt, there are very few occasions upon which the Code has ever reared its head. The Code has mostly been experienced when Code Notices have been served or received under Paragraphs 20 and 21.

Our view is that a revised Code needs to be a backstop to enable Operators to roll out and manage their networks where all reasonable measures have failed. What it should not be used as is a means of enabling operators to achieve other commercial objectives (such as cost saving to the detriment of landowners and their property rights) through its use. Equally it is unfair on Operators where unreasonable actions by landowners can hold them to ransom, for instance where penalty rents are requested or other uncommercial terms are imposed. It is in these circumstances that a Code should be usable.

It should also be noted that whilst being an Operator is a commercial business, so too is being a landlord of the Operators, and the investment which is made by such landlords should also be acknowledged and respected when considering the revised wording of a new Code.

The current regime seems to work quite well, so a clearer easier to use and understand Code would be welcomed, but not one which invites unfairness to landowners or Operators or indeed which invites litigation, wasted costs and delay.

Yours sincerely

DAVID KING
PARTNER

Pendragon House, Fitzalan Court, Newport Road, Cardiff CF24 0BA
[redacted] Web: www.mlmcartwright.com

10.3	Are the proposed rights proposed exhaustive? The wording needs to be more precise since as proposed there is ambiguity and a lack of clarity.
10.4	The extent of current rights is adequate. The exercise of those rights is not caveated by the need to obtain planning permission.
10.5	Yes.
10.6	Yes, in circumstances where there is already a tenancy agreement/licence/lease in place then the Operator should abide by the terms of the same. Where there is no such documentation then the Code should impose some standard commercial tenancy terms.
10.7	The current definition is adequate.
10.8	Code rights should bind any occupiers of the land and any other persons who have a legal interest in the land. The Operators should be bound to make reasonable enquiries to ascertain whom is entitled to a legal interest in the land (for instance undertaking an index map search) and attending on site to ascertain who is in occupation. Anyone else who is not discoverable by these means should be bound. This may appear unfair on landowners who hold unregistered title interests but the Code is meant to be for the greater good of the public.
10.9	Our view is that there should only be extreme circumstances in which landowner's or occupier's consent should be dispensed with. Where there has been unreasonable delay or the landowner/occupier is attempting to obtain an unreasonable amount of compensation or is trying to impose other unreasonable conditions. In our experience this happens rarely but often enough to cause problems for the Operators. It often occurs where the Operator needs a quick decision for instance when a high profile sporting event is shortly to be held and access to the apparatus is required. There needs to be a mechanism for a speedy resolution of such issues for the benefit of all parties involved.
10.9 (1)	If the level of compensation is adequate then this is acceptable.
10.9 (2)	If the level of compensation is inadequate then this is not acceptable.
10.9 (3)	If there is a genuine public need for a particular site to be used then this must outweigh the landowner's rights, however what is a genuine need?, most masts can be resited to an alternative location, there will of necessity need to be a revised radio coverage plan as a result.
10.10	Not automatically (see comments at 10.8 above).
10.11	No comment other than the current rights should not be enlarged.
10.13	Some form of notice is required to identify the owner/Operator but a civil remedy/penalty would suffice.
10.14 (1)	Yes.
10.14 (2)	Yes.
10.14 (3)	Only if the trees are located within the same land ownership as the tangible apparatus.
10.15 (1)	Only if the Landlord/occupier is being unreasonable (see reply to 10.9) otherwise the Operator should seek to agree commercial terms for upgrading. The Code needs

	to be in place to assist Operators but not to replace normal commercial negotiations between willing parties.
10.15 (2)	It depends on the type and purpose of upgrade. For instance if the purpose of the upgrade is purely for commercial reasons (such as facilitating consolidation where there is a current tenancy agreement in place which prohibits consolidation) then a payment should be made.
10.16 (1)	Operators do sometimes face difficulties. Most Operators take a mature approach to sharing, advising the landowner when this is being done. The Code should include a requirement for Operators to advise landowners when they are sharing and with whom and what the financial arrangements/payments are. The lack of clarity /communication between the Operators and the landowners with regard to sharing can cause landowners to attempt to prevent access which is in itself unacceptable.
10.16 (2)	No. The current regime seems to work well.
10.16 (3)	Yes. Such payment to be a market rate
10.17	The current wording of Section 134 is difficult to interpret. If it is intended that this section is meant to permit the sharing of fibre or other cabling within a building so that multiple suppliers can provide services to multiple users, then provision needs to be made to the effect that if a supplier is no longer providing services to a customer within a building then that supplier no longer benefits from Code Rights within that building.
10.18 (1)	Most assignments have occurred without too much difficulty, either within rights contained in the tenancy/lease agreement or by separate negotiation. It can be argued that a Code power allowing assignment if the landlord/owner is acting unreasonably should be created but its use would only be in extreme circumstances (including where a landlord cannot be identified).
10.18 (2)	No, the other Code Operator, benefitting from Code rights should simply seek to enforce its own Code rights.
10.18 (3)	Not necessarily, if it is simply a case that one Operator is being replaced by another Operator then no payment need be made. Ordinarily a landlord acting reasonably will permit this subject to negotiating terms in the normal way. If a landlord acts unreasonably and will not permit such an assignment then the Code should provide for this.
10.19	A right for the landlord/owner to remove redundant apparatus after it has served notice on the Code Operator, and to recharge its costs to the Operator of so doing.
10.20	Yes, this can sometimes arise where for instance the consent of a mortgagee is required or other interested party. Sometimes the costs of obtaining the relevant consents and licences means it is uneconomic for an Operator to install a service. A balance needs to be struck between the landowner's rights, and the needs of the customer.
10.21	Yes
10.22	No but this may be because awareness of these provisions may be low.
10.23 (1)	Interference does occur, either as a result of criminal damage or as a result of unhappy landlords.
10.23 (3)	Interference needs to be a criminal offence carrying the threat of imprisonment or a large fine or both.

10.24	Yes, provisions should be included, akin to those which would be available to a Landlord under a lease when enforcing tenant covenants.
10.25	Yes.
10.32	Yes.
10.33	The problem with the regime is that there is little transparency in how the Operators calculate what the costs of removal are which the Landlord may be required to pay. A mechanism needs to be provided by which the costs can be assessed as being reasonable, otherwise Landlords will be reticent to use these powers.
10.34	If the Code is fairly worded then it should not be possible to exclude the Code. An express statement within the Code needs to state that any provision excluding it shall be void, however it should be possible for a Landlord to claim damages/compensation if the Code is used to its detriment.
10.36	Yes.
10.37	Yes.
10.38	The current procedure for removal is cumbersome. Operators do tend to shy away from using their rights and usually try and negotiate a withdrawal from the site where an application has been made. It would be useful if any new Code caveated the use of such powers such that either party has to act reasonably, so that for instance if a building is being redeveloped then the Operator does not refuse to vacate or hold out for an unreasonable financial concession. Similarly landlord's must not use these provisions to ransom a site and obtain an unreasonable or unfair financial concession either.
10.39	If an Operator remains on site after it has lost Code Powers Landlords can rely on the general law to recover mesne rents. A landlord should be entitled to remove the redundant equipment itself (see comments to 10.19).
10.40	Yes, however what does development mean, and what if planning permission is not required to undertake that development? There should be some form of compensation payable by a landlord if they fail to undertake the proposed development within the timescales they set as this will prevent the abuse of such rights.
10.41	As the Code is so unclear, retrospective effect will be welcomed provided that no prejudice is caused to any parties affected.
10.42	It has always been the case that where an agreement has been made at arm's length between an Operator and a landlord that an annual rental has been paid. On occasions a 'rolled up' rental equivalent to a certain number of years' rental has been paid, but we have never come across a case of a single 'one off' payment being made. It would depend on the basis of how the compensation payment is calculated as to whether it would be fair to a landowner and indeed whether it would be fair to an Operator. As for it being a once and for all payment, we would suggest that if a payment is made it would be in respect of a fixed term of say 10 years, and the landowner would then be able to apply for further compensation after that period or the Operator and landowner would be at liberty to agree separate terms for a new tenancy/lease after that period.
10.43	It is only fair that persons bound by Code rights should be entitled to apply for compensation. If the circumstances envisaged are for instance in relation to the sale of land then ordinarily the existence of such rights is taken into account on that sale in any event. It would not be fair that an Operator would have to pay twice for the

	rights being obtained and if there is a 10 year term as we have suggested in 10.42 then the new owner can either apply for further compensation after that 10 year period, or can do a deal with the Operator to grant a lease/tenancy.
10.44	The problem with this approach is that the Open Market Value of most telecoms sites will be considerably less if their special use as a telecoms site is not taken into account. We would therefore suggest that their special use as a telecoms site should be taken into account. This is not to say that unreasonable levels of compensation should be paid. It is only in relatively few cases where a landlord holds out for an unreasonably high rental and it would be in those circumstances that these provisions should help the Operator. We would hope that most sites would still be acquired at arm's length.
10.45	As stated previously our view is that the statutory compensation route is not the preferred route at all and if our suggested approach taken to valuation in 10.44 is used then there will be no need for an uplift.
10.47	This depends on how much compensation has been paid previously, and how long after the date of payment the alteration is requested.
10.50	If a landlord is acting unreasonably then this would seem fair, however if an Operator has been acting unreasonably then this would not be fair.
10.52 (1)	This would be unfair on the Operator in most circumstances save where for instance a landlord needs a roof top installation moving temporarily for roof repairs. In those occasions the Operator ought to be paying the costs.
10.52 (2)	This does seem fairest, save in cases which may be unfair (and the losing party would have to justify this is the case).
10.54	Yes.
10.55	Yes. The current notices are difficult for an untrained person to complete correctly, they need to be made simpler to use. It should also be stated that an error on a notice can be rectified without invalidating the notice.
10.57	Standard statutory terms should be included for cases where an agreement needs to be imposed on a landowner. These should not however be used as a replacement for agreements made at arm's length between a willing landowner and Operator.
10.58	Yes, unless the parties agree otherwise.
10.59	Yes.

Avondale House
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28 October 2012

[redacted]

James Linney
Law Commission
Steel House
11 Tothill Street
London SW1H 9LJ

Dear Mr Linney

Please find enclosed comments on behalf of Wireless Infrastructure Group (WIG) in relation to the Law Commission consultation paper on The Electronic Communications Code (the Code). Our detailed response to the questions set by the Law Commission will be forwarded separately in due course.

Introduction

WIG is a leading provider of shared communications infrastructure to the UK wireless sector. WIG invests in and manages communication towers together with complex rights from water utilities and other large landholders to enable fast and efficient deployment of wireless networks. WIG's infrastructure is open and shareable and has on average 3.3 separate network customers at each location – far higher than industry average. WIG invests capital in wireless infrastructure, ensures deployment can be executed far quicker than may otherwise be the case, manages the multi-user issues, and charges a market rate for access to our infrastructure and services.

WIG has operated in the wholesale access infrastructure market for 15 years and is the second largest independent owner and manager of communication towers in the UK. WIG also operates a business stream in the wireless real estate market (i.e. land itself) that provides access to land for operators to develop infrastructure. WIG therefore participates in the sector as infrastructure provider, landlord and tenant. WIG is not currently a Code Operator although our infrastructure forms part of electronic communications networks and the company is in the process of becoming a Code Operator.

WIG has elected not to quote any specific details of its contractual terms or examples in order to maintain confidentiality with its customers.

Communications as a utility

WIG agrees that a home broadband and mobile connection form part of modern day utility. The context in which these services are delivered does however differ from other utilities. Water, electricity and gas transmission assets represent monopoly infrastructure with returns on capital invested in that infrastructure subject to a regulated framework. Universal service obligations apply so that each premises has access to a supply of that utility (i.e. 'First Service') and any plans to build new power lines or create reservoirs etc are subject to proper consideration and review.

Wireless networks are different in a number of ways: returns on investment in them are not fully regulated; there are no universal service obligations; there are multiple methods of delivery; and most importantly multiple options exist beyond First Service in most populated areas. If wider regulation is planned and more extensive powers are granted to Code Operators in the interests of public benefit, should the infrastructure that gets deployed have access to it regulated in line with other utilities? Should this public benefit be locked into more universal obligations? Should a wider and more comprehensive exercise, to ensure an equitable basis of establishing regulated asset values for a range of infrastructure and wireless real estate, be conducted? If full utility status is to be afforded to communications then changes to the Code can, in WIG's view, only be considered as part of a much broader package of review covering the entire regulatory framework.

WIG does not consider that wider regulation of the wireless sector would produce better invested networks. Within the UK wireless sector there is a significant proliferation of over 50,000 cell sites which WIG believes matches and in many cases exceed per capita and per km2 deployments of other developed telecom markets.

Targeted legislation

WIG would suggest that any new legislation is targeted at fixing a specific problem. Namely ensuring that a workable process exists where First Service is being prevented by a land owner denying access altogether or seeking ransom over their land. Where a court grants access against land-owners' wishes there should be a public benefit to justify this action and in such cases where a market exists the pricing and terms applicable to this market should be set by the court.

WIG operates in the wireless sector and has focussed the comments above on wireless. WIG does believe that there are some important differences between wireless and wireline/fibre deployments that should be considered when measuring the public benefit in each case:

- the physical deployment for wireless is more intrusive;
- wireless is more likely to require exclusive demise when compared to an underground cable;
- wireless operators may run several competing deployment options at a time (given the inherent nature of the technology a number of site options can deliver signal to an area) lowering the risk of ransom situations compared to fibre;
- wireless equipment needs to be accessed more frequently and the lease terms typically requested have short breaks (often after year 5); and
- a more active market arguably exists for wireless real estate (see below).

WIG notes the Law Commission comments around Technology Neutral however the First Service test is more likely to apply to fibre deployments (particularly if a USO is applied to operators) and given the fundamentally different conditions set out above there is in WIG's view likely to be the need for different measures for wireless vs. wireline in much the same way that specific measures are unique to transport policy for air when compared to rail.

Wireless real estate market

The wireless real estate market is well established in the UK and in this regard the UK is identical to other developed wireless markets. WIG has been involved in reviewing a number of markets including Germany, USA, Netherlands, France, Spain, Italy and Ireland all of which operate on a similar basis for the provision of sites for wireless network equipment. Pricing for wireless real estate in the UK market is in line with most other markets and contains no material differences than would be found in other classes of real estate. Recent research conducted by Savills for example indicated agricultural land in the UK was 50% more expensive than in Germany (where WIG believes land for cell sites is marginally cheaper due to significant deployment on government land) and more than twice as expensive as in the US (where land for cell sites is actually significantly more expensive than in the UK). By way of further example, WIG owns towers in Ireland and the average price of land under these towers is higher than for WIG's UK portfolio.

A common feature is the buying power exerted by the wireless operators – in the UK we have the equivalent of Sainsbury's and Tesco acting as one buyer and all the other supermarkets acting as another. One recent feature in the wireless real estate market is operators seeking to base contract reviews on market value rather than a fixed/objective mechanism - clear evidence of the existence of a market that is favourable to operators.

WIG can appreciate that when a Code Operator is asked if it would like to pay less for its sites and reset certain contractual terms the answer is likely to be yes. WIG also rents land under a large number of its communication towers and would like to lower this cost to increase profit however there is no rationale for breaking contracts that were entered into willingly or interfering in a well established market. If policy makers have a concern that the UK is out of step with other developed communication markets, then a review to evidence this should be conducted. This review should also consider whether safeguards over application of buying power are needed over the mobile network operators in the UK given the duopoly that now exists at network level.

WIG believes the UK wireless real estate market is already highly competitive and involves significant tension and inconsistencies like any other functioning real estate market. It has served to create widely deployed networks and can continue to support this in the vast majority of cases. Any material changes to this will likely freeze progress rather than deliver it as major real estate owners resist changes and withdraw from the market.

Tower companies/ market for provision for site access to wireless operators

It is important that any changes to the Code recognise the complex business models that are in operation across the sector.

WIG classes itself as a tower company and operates a co-location communications infrastructure business model that is commonplace in the communications industry both in the UK and in every other developed market of note. Other co-location business models in the sector include data centres, fibre, satellite, and arguably mobile networks themselves. In each case investment is made in infrastructure and rights with a view to adding customers over time to generate a return on that

investment. Co-location businesses may operate networks direct to the consumer or (like WIG) adopt a wholesale access infrastructure model providing service instead to carriers/ other network operators.

The disaggregation of communication networks is a growing feature of the market with any given network relying on a mixture of self-supply and outsourced network components (e.g. a mobile operator may have its own base station and antenna sharing a third party's communication tower, using a third party transmission link back to its own core network). In order to raise capital/ provide funds for capex investment, the sale of communication towers have recently been conducted by telecom companies such as KPN, Deutsche Telecom and Telefonica amongst others and WIG believes that further disagreggation of networks is likely. This trend builds on the sale of towers in many other markets around the world to independent tower companies, a number of which are identified in the Appendix.

Independent tower companies in other markets provide access to sites including towers, rooftops and land for wireless networks in an identical manner to Arqiva, WIG and Shere in the UK. Within the UK there is an active and competitive tower and rooftop market with the mobile network operators themselves retaining a large stock of towers. The Office of Fair Trading's (OFT) clearance note (published 11 October 2012) in relation to the anticipated towerco joint venture between Vodafone Limited and Telefonica UK Limited clearly highlights this fact. The OFT estimated that the joint venture towerco when combined would control a share of supply of 25-35% of UK sites and no competition concerns were identified.

The competitiveness of the market is reflected in price for access to UK towers and rooftops when considered in an international context. For example, WIG estimates that average pricing in the UK with one of its larger customer is lower than in other key markets:

Comparable tower and rooftop annual charge for customer A

Market	***Index***
WIG UK average annual charge for customer A - common specification	100
Estimated Netherlands charge for same	138
Estimated German charge for same	142
Estimated US charge for same	148

In common with other wireless markets and elsewhere in the communications sector terms and conditions of access to UK tower infrastructure (including upgrade rights and term) have a direct bearing on price. Allowing operators to upgrade, alter or add equipment when contracts require this to be subject to agreement and potentially additional charging is neither practical nor appropriate. Many forms of communication infrastructure are used by multiple parties and the interaction between users must be controlled. Adding equipment or capability results in capacity being taken up (such as an additional dish on a tower or rooftop, an additional rack in a data centre, or an upgrade to allocate more strands of fibre). This goes to the heart of the commercial model. Allowing operators to share when they have entered contracts to state otherwise goes to the same point - commercialising access to the infrastructure by multiple parties is fundamental to initial investment. This does not mean sharing is prevented and WIG has demonstrated its full support for sharing initiatives.

Infrastructure and Land

Like many other many other communication assets, WIG's infrastructure is proximate to land. WIG's communication towers are moveable but do rest on land, BT's fibre runs through and over land, data centres and satellite earth stations clearly attach to land. Given WIG's wholesale access business model is geared entirely towards maximising use of its infrastructure, we do not consider that access to any of our portfolio is covered by or intended to be covered by provisions of the Code (save insofar as they are protected by it as they are Apparatus forming part of Communications Networks).

As part of this review process should Code Powers be extended or altered (or the combined effects of the changes serve to achieve this) to produce any risk that these assets be captured by an obligation to charge based on a regulated mechanism then a much wider review of regulation of communication infrastructure assets should be performed including the basis of access to mobile and fibre networks themselves.

Observing existing contractual positions

The consultation paper poses a number of questions in relation to terms and conditions for altering, upgrading, adding to or sharing by code operators.

In addition to the comments above in relation to wholesale access infrastructure being clearly excluded from the Code, WIG does not believe any additional protections are needed in relation to land itself save for exceptional cases.

Through the course of establishing a wireless real estate market, practices have evolved in relation to pricing and terms. For example ground which is used for a small tower with only limited equipment can be obtained more cheaply than land used for a larger tower. Rights to share are almost always anticipated in ground leases and landowners accepted usage risk in relation to these agreements – rather than charge a rental for unrestricted use of the site, mobile operators often preferred to pay a lower rental and agree to increase this rental if they added more equipment or shared the site with other parties.

Any arguments that land agreements serve to limit sharing is simply not credible in the vast majority of instances. WIG for example has invested in its infrastructure and business processes to maximise the sharing opportunity on its assets with a very high sharing rate as a consequence – WIG secures land in the same market as the mobile operators themselves.

WIG appreciates that the operators may like to move away from some of the contractual terms but this should only be possible by agreement. Only in situations where there is a public benefit established by court should contractual terms be capable of being overridden and in such cases additional consideration should be payable in line with market.

Other comments

One of the main concerns with deployment is the existence of the Code itself. Many real estate owners that WIG is aware of would be far more willing to agree to deployments if the risks of Code Powers over-riding the contract were not in place. This is typically for fear of a cell site deployment potentially risking a multi-million pound sale or development down the line, or an office requiring new HVAC systems which would involve recovering roof-space. If the tenure opt-out provisions were in place, real estate owners could agree directly with network operators what period they would provide as a minimum guarantee and to agree to compensate the operator if they do not fulfil

this obligation. In practice this gives the operator clarity over occupation and means the real estate owner can consider its plans and ability to provide access over a finite period.

WIG's experience of working within the Code is limited to discussions around renewal. WIG wants every customer to remain on its infrastructure but requires them to execute appropriate contractual terms in the same way that network operators require their customers to do so. Typically we receive a Code Power notice despite WIG having no intention to remove the operator and yet no efforts are made to execute a renewed agreement.

Scope of consultation

One of WIG's main observations is that the early phase of the consultation process has largely been based around the network operators. The suppliers of the real estate are widespread and not in our view appropriately represented in the process meaning there are issues that are unlikely to have surfaced in the consultation. For example, the UK water and power utilities are major suppliers of real estate into the communication sector and have not as far as WIG is aware been included in the process. It could be relevant for example to extend the special terms around access to conduits to all active infrastructure such as pylons, water towers, reservoir compounds, sub stations etc. to ensure that as with conduits, access should be solely by agreement to avoid conflict with host infrastructure.

Summary

Overriding property or contract rights should remain a genuine last resort and be demonstrably in the public interest in each and every case. WIG believes that appropriately targeted legislation could help secure faster deployment when there is a First Service delivery being obstructed by a land owner denying access under any circumstances or seeking ransom and where the alternative solutions have been appropriately considered. In WIG's view this is more likely in a scenario involving fibre deployment and changes to the Code should focus on this objective and on providing a better process for such instances.

There is a well established market in land for communications with sufficient tension between buyer and seller (in particular for wireless real estate). The market in the UK operates no differently from other EU member states and is in line with dynamic wireless markets such as the USA. In cases where access has been granted by court consideration should be based on market value where a market exists.

WIG would welcome the opportunity to engage further with the Law Commission and policy makers on this process.

Scott Coates
CEO
Wireless Infrastructure Group

Appendix

Independent tower companies

Name	*Site Numbers*	*Markets*
American Tower	c.50,000 (26,000 in US)	United States, India, Mexico, Brazil, Chile, Colombia, Peru, South Africa, Ghana, Uganda
SBA Communications	c.13,000	United States , Canada, Costa Rica, El Salvador, Guatemala, Nicaragua and Panama
Crown Castle International	c.23,500 (22,000 in US)	United States and Australia
TDF	c.10,300	France, Germany, Poland, Hungary, Spain
Indus Towers	c.109,000	India
Protelindo	c.7,100	Indonesia
Helios Towers	c.3500	Ghana, Tanzania, Congo, Nigeria
Bharti-Infratel	c.33,000	India

Electronic Communications Code Review –

Submission by:

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Introduction

It is quite apparent that the Commission has consulted widely in preparing the consultation paper. The list of consultees refers to many of the industry stakeholders and perhaps inevitably is very much weighted towards representation of those who might be expected to rely upon the provisions of the code in furtherance of their commercial interests. A review of this area of law should be balanced and consider the interests of all stakeholders and specifically those individual landowners whose property rights are potentially restricted or interfered with for the purposes of the greater good of providing access to telecommunications services for subscribers.

In days gone by it may have been appropriate for a nationalised provider of telecommunications services to have the ability to fly lines across a landowners property, for example, for the purposes of providing a telephone service to an outlying property or even a village etc. The modern world of telecommunications is quite different though with a significant number of private companies engaged in the business. The effect of the code as it currently operates is to give those private companies powers which are tantamount to compulsory purchase powers which they can deploy in support of their business activities. In short they have the power to use land against the will of the owner so as to advance their own profit making activities. Very often these landowners are private individuals or sometimes small business owners who do not have the resources to challenge the mobile network operators in issues relating to valuation of mast sites, renewal of agreements or circumstances. In practical terms the current regime can result in situations whereby a landowner who has made a site available to an operator for, say ten years at a rent of £5,000, who then requires the equipment removed at the end of the lease can be faced with litigation at a cost in excess of all the income they have earned from the site throughout the whole of the lease term. In short from a financial perspective they would have been better served have never entered into the agreement in the first place.

The overall tone of the paper would seem to suggest that in fact code rights and powers need to be reviewed for the benefit of the code operators. It fails to take account of the interests of the thousands of individual site providers who have no unified representation. Whilst it is acknowledged that some landowners organisations have taken part in the consultation process the reality is that most of the site providers my firm represent are individuals who have let out small pieces of real estate or provided the facility for the installation of electronic communications equipment on their premises – and many of whom

then come to bitterly regret having done so when they come into conflict with the network operators who appear prepared to ride roughshod over their property rights.

To this end there should be a fundamentally different regime in relation to mobile telephone masts and similar equipment which relies on the ability of network operators and site providers to negotiate freely in the open market.

Background

Shulmans solicitors are based in Leeds but have a specialist telecommunications practice advising clients throughout the whole of England and Wales. We act solely for landowners who make their land available to network operators ["site providers"] and do not act for any network operators. A number of our solicitors specialising in telecommunications work have previously acted for network operators when working at other firms and therefore we have a broad view of the business and the legal framework in which it operates. We have a good understanding of the current operation of the code and its deployment by the network operators to further their commercial objectives.

Our work focuses primarily on issues relating to mobile telephony and we are currently involved in litigation with all the major mobile operators on behalf of a wide range of clients. Examples of the types of dispute we are involved in are as follows:

a) Seeking to remove code operators from development sites in order to facilitate demolition / redevelopment of the sites.

b) Situations where one network operator has taken an agreement at a defined rent and then seeks to assign the agreement into the joint names of more than one operator so as to enable all to benefit from the agreement without the landowner receiving any further income.

c) Network operators seeking to terminate agreements and deprive site providers of future income by asserting that the sites are no longer of beneficial use to the network operator and are therefore capable of being terminated. In some cases site providers have been offered terms to surrender agreements which would have the consequence that they would suffer substantial loss of future income from the network operator had they not taken specialist professional advice. Unfortunately not all site providers do with some just relying upon representations made by the network operators.

d) Renewal proceedings under the Landlord and tenant Act 1954.

e) Disputes about unlawful use of sites by other network operators / site sharing.

f) Disputes as to the ability of network operators to introduce additional equipment to sites and upgrading of sites.

g) Situations whereby site providers believed they had granted permission for one operator, Orange Personal Communications Service Limited, to occupy a site but when they seek to remove the operator they find that they receive a code counter notice from an operator they have never permitted to enter upon their property – usually T Mobile (of course now renamed Everything Everywhere Limited).

The reality of the situation is that the network operators already have a raft of powers available to them which in real and practical terms means that they are able to dictate terms to site providers who simply do not have the resources to fund challenges to the network operators or risk the cost consequences of challenging them on issues such as, for example, attempts to drive down rents on lease renewals under the provisions of the Landlord and Tenant Act 1954. Lease renewals under the Landlord and Tenant Act 1954 are of course court proceedings undertaken in accordance with the provisions of the Civil Procedure Rules the overriding objective of which is to deal with cases justly by, amongst other things, ensuring that parties are on an equal footing. This is rarely achieved in lease renewals between site providers and network operators. For example the open market rent to be determined by the court will often be done so based upon evidence of comparable sites. Of course the network operators have access to a very broad range of comparable sites and can, therefore, cherry pick that evidence they rely upon before the court. The site provider whose primary business may be, for example, the owner of a boatyard does not have access to any comparables. They are therefore forced to retain the services of an expert, for example a surveyor, to advise them on these issues incurring additional expense very early in the renewal process.

Of course in situations such as this the network operators could be ordered by the court to provide comprehensive disclosure of comparable mast sites or indeed might offer such disclosure. The reality is that they do not but rather they resist orders for disclosure on occasions committing substantial resources in fighting orders for disclosure of comparables other than those they choose to disclose. I have seen situations whereby network operators have taken appeals against orders for disclosure with the consequence that the site provider seeking nothing more than to achieve a fair rent on renewal is faced with potentially catastrophic risk of costs in fighting appeals with the consequence that in many cases they are simply unable to stand up to such tactics by the network operators. If anything, therefore, the powers of network operators need to be tempered rather than strengthened. Because of the nature of the work we undertake for site providers at Shulmans I do not propose responding to all the questions posed by the commission but rather I will restrict my observations to those most pertinent to the issues we have to address on a day to day basis in acting for site providers who may in reality not be represented in any other forum before the commission.

Responses

We provisionally propose that code rights should include rights for Code Operators:

(1) to execute any works on land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus;

(2) to keep electronic communications apparatus installed on, under or over that land; and

(3) to enter land to inspect any apparatus.

Do consultees agree?

No. Any other business which has to acquire rights over property for the purpose of its business has to negotiate the terms for use of that property in a free, open market negotiation with the landowner. The development of the telecommunications (mast) market throughout the 1990s and more recently shows clearly that network operators are quite capable of negotiating commercial terms that are acceptable to both site providers and

network operators in relation to many thousands of masts. Commercially negotiated agreements are quite capable of being drafted to address all the points set out (1) to (3) above and the network operators can negotiate precisely what rights they require and this can be reflected in the price. Statute should not be deployed to fill in gaps in their requirements where they have failed to negotiate all the rights they require. I have never come across a situation whereby a network operator has sought to deploy code powers to acquire rights for a mast but rather they simply use the existing code powers to strengthen their negotiating position on renewals or situations where the removal of the apparatus is required by the site owner. There is such a proliferation of networks and masts sites now that no particular mast is so critical to the network as to be required to facilitate access to a communication service for subscribers. There are many willing site providers with many available sites and the negotiation of occupation rights (and what should be paid for those rights) by private sector companies can, and indeed should, be left to the free market process. As part of that process though the code should be amended to require network operators to disclose not only rental payment data for all their sites but they should also disclose site traffic and revenue data on a mast by mast basis so as to ensure that this information is available to all parties involved in any negotiations in relation to mast sites.

[paragraph 3.16]

10.4 Do consultees consider that code rights should be extended to include further rights, or that the scope of code rights should be reduced?

The current rights should be reduced. They are not required to facilitate the provision of mobile telephony and data networks but in practical terms are used to oppress individual site providers in relation to renewal of agreements and attempts to remove code operators. In the field of mobile telephone masts I know of no situation whereby the operators have relied on code powers to actually acquire a site but rather the code powers are used on renewals where the operator is not satisfied with the commercial terms offered by the site provider. Similarly I know of no situation whereby the network operators have actually used code powers to remain on site where a site provider wished to recover possession but they regulalrly use the code for the purpose of delaying the recovery of the site by the site provider sometimes putting substantial redevelopment projects in jeapordy with the consequence that we have to advise clients considering redevelopment of sites with masts on the begin the process of removing the network operators several years before vacant possession is required. We also have to recommend to clients that they set substantial budgets for the legal costs involved in the process of securing removal of network operators who are relying on code powers – notwithstanding the fact that they had freely entered into contractual arrangements committing them to vacating a site at the end of the term of a lease. There is already a substantial imbalance in the negotiating positions of the network operators and individual site providers and the code actually serves to exacerbate this differential.

[paragraph 3.17]

10.5 We provisionally propose that code rights should be technology neutral.
Do consultees agree?

[paragraph 3.18]

10.6 Do consultees consider that code rights should generate obligations upon Code Operators and, if so, what?

The obvious answer to this is to suggest that
Code rights should generate obligations in relation to reinstatement of the site when the operator ultimately vacates but in practical terms it is difficult to envisage such a situation. Once code rights are deployed to occupy a site then the reality is that the site provider has very little recourse against the Code Operator.

[paragraph 3.19]

10.7 We ask consultees to tell us their views on the definition of electronic communications apparatus in paragraph 1(1) of the Code. Should it be amended, and if so should further equipment, or classes of equipment, be included within it?

From my perspective this is not particularly an issue. Anything that a network operator puts on a site is fairly considered as relevant equipment. I cannot envisage an argument with say O2 or Vodafone that something they wished to place on site was not electronic communications apparatus.

[paragraph 3.27]

10.8 We ask consultees to tell us their views about who should be bound by code rights created by agreement, and to tell us their experience of the practical impact of the current position under the Code.

There is a fundamental difference of position between where there is a need to, for example, run a high capacity fibre line across a piece of land and where a mobile phone network operator seeks to deploy code powers in response to a renewal of an existing agreement. This is a major flaw in the operation of the code as the former requires the right to utilise land to provide a service that is of high importance to business and individuals which in practical terms will have little impact on the land once installed but will serve possibly thousands of subscribers and even be an important piece of nation telecommunications infrastructure. Code rights should be available for this type of requirement. The latter is just the utilisation of statutory powers by private sector companies to avoid the operation of a free market in relation to renewal terms for mast agreements.

My experience of the practical impact of the current position under the court is that it us used to defeat the ultimate ability of site providers to say to network operators that they do not find their renewal terms sufficiently attractive to warrant renewing and therefore they should vacate. In short the Code prevents site providers from negotiating on equal terms with network operators.

[paragraph 3.40]

10.9 We ask consultees for their views on the appropriate test for dispensing with the need for a landowner's or occupier's agreement to the grant of code rights. In particular, consultees are asked to tell us:

(1) Where the landowner can be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code, should it be possible for the tribunal to make the order sought without also weighing the public benefit of the order against the prejudice to the landowner?

Public benefit should not be part of the equation which should only focus on the detriment to the landowner and what would have to be paid for the rights in the open market. Private landowners should not have the obligation (either legal or moral) to make their land available for the greater public good. This is particularly so in relation to individual mobile phone mast sites where the network operators in competing with each other should go into the free market to acquire the rights and sites they need to operate their networks. Where there is a need though for compulsory acquisition of sites for major infrastructure works and so forth then the public benefit should only be considered in relation to the value of the rights to the operator and this does not need to be specifically addressed as this will inevitably be reflected in any open market valuation. This may of course include a ransom element but a site provider with a particularly valuable piece of real estate should not be penalized because of this.

(2) Should it be possible to dispense with the landowner's agreement in any circumstances where he or she cannot be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code?

No

(3) How should a revised code express the weighing of prejudice to the landowner against benefit to the public? Does the Access Principle require amendment and, if so, how?

There needs to be differentiation between the types of equipment. Major infrastructure should be wholly different from individual mast sites etc. Because of the proliferation of networks and mast sites then the prejudice to the landowner of the application of code rights in relation to any particular mast site is potentially great whereas the loss of the site (and the inevitable acquisition of an alternative) is unlikely to be even noticed by the public. It is only of any real inconvenience to the network operator who have the cost of decommissioning the site and securing an alternative. It should be remembered that network operators do not use the code to acquire mobile phone mast sites but merely to retain them when faced with the expense and inconvenience of either a site provider who wished to recover possession of their land or one who has a different view on open market rent for the site.

[paragraph 3.53]

10.10 We ask consultees to tell us if there is a need for a revised code to provide that where an occupier agrees in writing for access to his or her land to be interfered with or obstructed, that permission should bind others with an interest in that land.

The consent of all those having any interest in the land should be required. This is a relatively simple principle and would be reflective of the situation with authoruized subletiing under leasehold interests where the requirement for consent by the holders of superior interests is imposed.

[paragraph 3.59]

10.11 We ask consultees to tell us their views about the use of the right for a Code Operator to install lines at a height of three metres or more above land without separate authorisation, and of any problems that this has caused.

[paragraph 3.67]
10.12 Consultees are asked to tell us their views about the right to object to overhead apparatus.

No comment

[paragraph 3.68]

10.13 Consultees are asked to give us their views about the obligation to affix notices on overhead apparatus, including whether failure to do so should remain a criminal offence.

No comment

[paragraph 3.69]

10.14 Do consultees consider that the current right for Code Operators to require trees to be lopped, by giving notice to the occupier of land, should be extended:
(1) to vegetation generally;
(2) to trees or vegetation wherever that interference takes place; and/or
(3) to cases where the interference is with a wireless signal rather than with tangible apparatus?

The right should not be extended to wireless signals. One might envisage a situation whereby a Code Operator wished to run a communication link where trees many miles from the transmitter would interfere with the signal. A landowner could then be faced with the totally unexpected prospect of the requirement for lopping. What would they do in those circumstances? Just accept the position and acquiesce or find themselves having to spend significant sums on consultants to establish whether there was a genuine need for lopping. What if, for example, the service could easily be provided by an alternative means but a significantly greater cost to the operator?

[paragraph 3.74]

10.15 We ask consultees:
(1) whether Code Operators should benefit from an ancillary right to upgrade their apparatus; and
(2) whether any additional payment should be made by a Code Operator when it upgrades its apparatus.

Where the right to occupation is granted pursuant to the code then it should be for specific and limited purposes. If the network operators then decide that in fact they want additional or different rights then they should apply for such rights and pay accordingly.

[paragraph 3.78]

10.16 We ask consultees
:
(1) whether the ability of landowners and occupiers to prevent Code Operators from sharing their apparatus causes difficulties in practice;

It does not.

(2) whether Code Operators should benefit from a general right to share their apparatus with another (so that a contractual term restricting that right would be void); and/or

They should not. This is a quantum leap from providing a mechanism that enables a Code Operator to secure rights over land so as to operate their business. This effectively gives them carte blanche to then grant further rights over the third parties land to other Code Operators without any input from the legal owner of the land. Throughout the process of reviewing the provisions of the Code it must be remembered that what is being considered is the granting of rights over land against the wishes of the owner of that land. It is accepted that in certain (limited) circumstances there may be a need for this for the overall benefit of society as a whole. That is a relatively uncontroversial proposition accepted in many parts of our law – but subject to control so as to balance the interests of the landowner against the need for the rights. This proposal takes away any element of control and grants to private sector companies the ability to effectively grant rights at their will to other private sector companies without any regard to the wishes or interests of the landowner.

(3) whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it shares its apparatus.

Yes otherwise the shareholders of the Code Operator are benefitting from use of the land without having to pay the landowner for the privilege of using it for their business.

[paragraph 3.83]

10.17 We ask consultees to what extent section 134 of the Communications Act 2003 is useful in enabling apparatus to be shared, and whether further provision would be appropriate.

[paragraph 3.88]

10.18 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from assigning the benefit of agreements that confer code rights causes difficulties in practice;

It does not and the status quo should remain.

(2) whether Code Operators should benefit from a general right to assign code rights to other Code Operators (so that a contractual term restricting that right would be void); and

They should not

(3) if so, whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it assigns the benefit of any agreement.

If they were able to do so then there should be payment for the benefit of the ability to assign in the first place and secondly there should be a payment based on any consideration paid for the actual assignment.

[paragraph 3.92]

10.19 We ask consultees to tell us if they consider that any further ancillary rights should be available under a revised code.

No – the code represents powerful rights of compulsory acquisition placed not in the hands of public bodies but rather with private companies. The rights should be restricted particularly with regard to mobile telephony infrastructure.

[paragraph 3.94]

10.20 We ask consultees to tell us if they are aware of difficulties experienced in accessing electronic communications because of the inability to get access to a third party's land, whether by the occupiers of multi-dwelling units or others.

None whatsoever.

[paragraph 3.100]

10.21 Do consultees see a need for a revised code to enable landowners and occupiers to compel Code Operators to use their powers to gain code rights against third parties?

No.

[paragraph 3.101]

10.22 Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used?

No

[paragraph 3.102]

10.23 We ask consultees:

(1) to what extent unlawful interference with electronic communications apparatus or a Code Operator's rights in respect of the same causes problems for Code Operators and/or their customers;

None that I am aware of.

(2) to what extent any problem identified in answer to (1) above is caused by a Code Operator having to enforce its rights through the courts or the nature of the remedy that the courts can award; and

None

(3) whether any further provision (whether criminal or otherwise) is required to enable a Code Operator to enforce its rights.

No.

[paragraph 3.106]

10.24 We ask consultees whether landowners or occupiers need any additional provision to enable them to enforce obligations owed to them by a Code Operator

No.

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[paragraph 3.107]

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: SPECIAL CONTEXTS

10.25 We provisionally propose that the right in paragraph 9 of the Code to conduct street works should be incorporated into a revised code, subject to the limitations in the existing provision.
Do consultees agree?

The right to undertake street works granted to private sector companies should be subject to obligations in all circumstances to pay for the privilege.

[paragraph 4.11]

10.26 We ask consultees to let us know their experiences in relation to the current regime for tidal waters and lands held by Crown interests.

None

[paragraph 4.20]

10.27 We seek consultees' views on the following questions.
(1) Should there be a special regime for tidal waters and lands or should tidal waters and lands be subject to the General Regime?

(2) If there is to be a special regime for tidal waters and lands, what rights and protections should it provide, and why?

(3) Should tidal waters and lands held by Crown interests be treated differently from other tidal waters and lands?

[paragraph 4.21]

10.28 We ask consultees:
(1) Is it necessary to have a special regime for linear obstacles or would the General Regime suffice?

(2) To what extent is the linear obstacle regime currently used?

(3) Should the carrying out of works not in accordance with the linear obstacle regime continue to be a criminal offence,or should it alternatively be subject to a civil sanction?

(4) Are the rights that can be acquired under the linear obstacle regime sufficient (in particular, is limiting the crossing of the linear obstacle with a

line and ancillary apparatus appropriate)?

(5) Should the linear obstacle regime grant any additional rights or impose any other obligations (excluding financial obligations)?

[paragraph 4.30]

10.29 We provisionally propose that a revised code should prevent the doing of anything inside a “relevant conduit” as defined in section 98(6) of the Telecommunications Act 1984 without the agreement of the authority with control of it.
Do consultees agree?

[paragraph 4.34]

10.30 We provisionally propose that the substance of paragraph 23 of the Code governing undertakers’ works should be replicated in a revised code.
Do consultees agree?

[paragraph 4.40]

10.31 We provisionally propose that a revised code should include no new special regimes beyond those set out in the existing Code.
Do consultees agree?

Yes

[paragraph 4.43]

ALTERATIONS AND SECURITY
10.32 We provisionally propose that a revised code should contain a procedure for those with an interest in land or adjacent land to require the alteration of apparatus, including its removal, on terms that balance the interests of Code Operators and landowners and do not put the Code Operators’ networks at risk.
Do consultees agree?

Where rights are granted pursuant to the code then is the landowner subsequently seeks to alter or remove the apparatus then there should be a procedure to facilitate this applying the same test as for the acquisition of the rights in the first instance. Where rights are subject to a contract freely entered into between the landowner and the Code Operator then the contractual obligations should have primacy over anything else.

[paragraph 5.11]

10.33 Consultees are asked to tell us their views about the alteration regime in paragraph 20 of the Code; does it strike the right balance between landowners and Code Operators?

[paragraph 5.12]

10.34 We provisionally propose that it should not be possible for Code Operators and landowners to contract out of the alterations regime in a revised code.
Do consultees agree?

[paragraph 5.13]

10.35 We seek consultees' views on the provisions in paragraph 14 of the Code relating to the alteration of a linear obstacle. Do consultees take the view that they strike an appropriate balance between the interests involved, and should they be modified in a revised code?

[paragraph 5.18]

10.36 We provisionally propose that a revised code should restrict the rights of landowners to remove apparatus installed by Code Operators.
Do consultees agree?

No

[paragraph 5.47]

10.37 We provisionally propose that a revised code should not restrict the rights of planning authorities to enforce the removal of electronic communications apparatus that has been installed unlawfully.
Do consultees agree?

Yes

[paragraph 5.48]

10.38 We ask consultees to tell us their views about the procedure for enforcing removal. Should the onus remain on landowners to take proceedings? If so, what steps, if any, should be taken to make the procedure more efficient?
A summary procedure in the county court should suffice. The establishment of a specialist court with jurisdiction in telecoms matters would be sensible – for example all telecoms matters could be assigned to the Technology and Construction Court.

[paragraph 5.49]

10.39 We ask consultees to tell us whether any further financial, or other, provisions are necessary in connection with periods between the expiry of code rights and the removal of apparatus.

[paragraph 5.50]

10.40 We provisionally propose that Code Operators should be free to agree that the security provisions of a revised code will not apply to an agreement, either absolutely or on the basis that there will be no security if the land is required for development.
Do consultees agree?

Yes – this is a very positive suggestion. Refusal by a Code Operator to agree to such terms should be a relevant factor for specific consideration in any determination of rights under the Code subsequently.

[paragraph 5.51]

10.41 Do consultees agree that the provisions of a revised code relating to the landowner's right to require alteration of apparatus, and relating to the security of

the apparatus, should apply to all equipment installed by a Code Operator, even if it was installed before the Code Operator had the benefit of a revised code?

Yes

[paragraph 5.56]

FINANCIAL AWARDS UNDER THE CODE

10.42 We provisionally propose that a single entitlement to compensation for loss or damage sustained by the exercise of rights conferred under the Code, including the diminution in value of the claimant's interest in the land concerned or in other land, should be available to all persons bound by the rights granted by an order conferring code rights.
Do consultees agree?

No – it should be remembered that the Code regime takes from landowners that which they legitimately own and have the right to enjoy. If they are to have their property appropriated by use of statutory provisions legislated for the benefit of private sector companies who will profit from the exercise of those powers then the payment for exercise for those powers should be the greater of the loss or damage sustained or a defined proportion of the profit / benefit gained by the company in the exercise of those rights.

[paragraph 6.35]

10.43 We ask consultees whether that right to compensation should be extended to those who are not bound by code rights when they are created but will be subsequently unable to remove electronic communications apparatus from their land.

Yes

[paragraph 6.36]

10.44 We provisionally propose that consideration for rights conferred under a revised code be assessed on the basis of their market value between a willing seller and a willing buyer, assessed using the second rule contained in section 5 of the Land Compensation Act 1961; without regard to their special value to the grantee or to any other Code Operator.

Do consultees agree? We would be grateful for consultees' views on the practicability of this approach, and on its practical and economic impact.#

No – there is a fundamental difference between, for example, acquiring land for the building of public infrastructure works – a road, Olympic Park etc and the acquisition of land by private sector companies who require it to improve their overall business and profitability.

[paragraph 6.73]

10.45 Consultees are also invited to express their views on alternative approaches; in

particular, the possibility of a statutory uplift on compensation (with a minimum payment figure in situations where no compensation would be payable).

The approach needs to have regard to the benefit to the specific operator in question and to make sure that much of the benefit is passed to the landowner who is having their property appropriated.

[paragraph 6.74]

10.46 We provisionally propose that there should be no distinction in the basis of consideration when apparatus is sited across a linear obstacle.
Do consultees agree?

Yes

[paragraph 6.78]

10.47 We provisionally propose that, where an order is made requiring alteration of a Code Operator's apparatus, the appropriate body should be entitled to consider whether any portion of the payment originally made to the person seeking the alteration in relation to the original installation of that apparatus should be repaid.
Do consultees agree?

No.

[paragraph 6.83]

TOWARDS A BETTER PROCEDURE
10.48 We provisionally propose that a revised code should no longer specify the county court as the forum for most disputes.
Do consultees agree?

It can still specify the county court but it should be one with Technology and Construction Jurisdiction. In the same way that there is a Patents Court then a County Court (not the Central London County Court) should be designated as a Telecommunications Court with judges trained and specialist in this field of law. The Technology and Construction Court should retain jurisdiction over more complex matters with liaison between the TCC judges involved in telecommunications cases and the judges in the county court.

[paragraph 7.26]

10.49 We ask for consultees' views on the suitability of the following as forums for dispute resolution under a revised code:

(1) the Lands Chamber of the Upper Tribunal (with power to transfer appropriate cases to the Property Chamber of the First-tier Tribunal or vice versa);

No – this is a specialist area which is more suited to the jurisdiction of the courts and specialist Technology and Construction Court Judges,

(2) a procedure similar to that contained in section 10 of the Party Wall etc Act 1996; and

No – there is no quality control over the appointment of the “third surveyor”

(3) any other form of adjudication.

No – this is specialist law which should be adjudicated upon by specialist judges.

[paragraph 7.27]

10.50 We provisionally propose that it should be possible for code rights to be conferred at an early stage in proceedings pending the resolution of disputes over payment. Do consultees agree?

No – unless there is a provision that the landowner is automatically entitles to all their costs of the proceedings from the point at which the rights have been granted because once the required rights have been secured then the Code Operator will have no interest in seeing the proceedings progress further.

[paragraph 7.31]

10.51 We would be grateful for consultees’ views on other potential procedural mechanisms for minimising delay.

The question above seems to work on the presumption that delay works against the operator. Again there is a need to differentiate the operation of the code in relation to phone mast sites and other apparatus as the Code Operators do not use the code to acquire rights to establish mast sites rather they use them to remain on established sites – where there position is already protected and therefore any delay in determining the final rights / cost works in their favour and to the detriment of the site provider who is forced to pursue expensive litigation to close the issues off.

[paragraph 7.32]

10.52 We seek consultees’ views as to how costs should be dealt with in cases under a revised code, and in particular their views on the following options:

(1) that as a general rule costs should be paid by the Code Operator, unless the landowner’s conduct has unnecessarily increased the costs incurred;

This is an entirely sensible proposition and in fact is the one proposal that is likely to resolve many of the issues that cause delay and conflict in relation to phone mast issues under the code. As mentioned above the imbalance in the position of network operators and the many thousands of individual site providers is a serious concern and the ability to spend site providers into submission is a tactic deployed by the network operators. This provision would be a major factor towards levelling the playing field which is one of the specific requirements set out in the Civil Procedure Rules for achieving the overriding objective of dealing with cases justly. Specific regard should be had to rule 1 of the Civil Procedure Rules when considering this proposal. This simple suggestion would solve many of the problems associated with telecommunication mast disputes.

Or

(2) that costs should be paid by the losing party.

This is unjust within the context of telecommunications disputes because of the imbalance in the position of the parties so far as resourcing litigation is concerned (in most cases)

[paragraph 7.37]

10.53 We also ask consultees whether different rules for costs are needed depending upon the type of dispute.

No – Code operators should acquire the rights they need to run their businesses by negotiation in the open market. Where they cannot do so and are therefore forced to impose their will by seeking to rely on the provisions of the code so as to acquire rights against the will of landowners should pay the land owners costs of diaputes whatever the outcome.

[paragraph 7.38]

10.54 We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service.

Do consultees agree?

Ideally but this is not an issue in practice.

[paragraph 7.52]
10.55 Do consultees consider that the forms of notices available to Code Operators could be improved? If so, how?

They could require code operators to set out a defined timetable by which they will take action to secure the rights they require and in default they should be precluded from relying on the code further.

[paragraph 7.53]

10.56 Do consultees consider that more information is needed for landowners? If so, what is required and how should it be provided?

[paragraph 7.54]

10.57 We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms.

[paragraph 7.60]

INTERACTION WITH OTHER REGIMES
10.58 We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act

1954 shall not apply to the lease.
Do consultees agree?

In relation to mobile phone mast sites – No. The code is superfluous for these sites and the negotiation and renewal of such agreements should be left to the free market. The Code should not apply and the regime under the Landlord and Tenant Act 1954 should be relied upon. This would enable network operators to acquire sites with security of tenure and if they chose to take a site without security of tenure then they should do so knowing they would be expected to vacate if they do not agree a renewal.

[paragraph 8.22]

10.59 We provisionally propose that where an agreement conferring a right on a Code Operator also creates an interest in land of a type that is ordinarily registrable under the land registration legislation, the interest created by the agreement should be registrable in accordance with the provisions of the land registration legislation, but that a revised code should make it clear that its provisions as to who is bound by the interest prevail over those of the land registration legislation.
Do consultees agree?

Yes

[paragraph 8.33]

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003
10.60 We ask consultees to tell us:
(1) whether they are aware of circumstances where the funds set aside under regulation 16 have been called upon;
(2) what impact regulation 16 has on Code Operators and on Ofcom;
(3) if a regime is required to cover potential liabilities arising from a Code Operator's street works; and
(4) if the answer to (3) is yes, what form should it take?

[paragraph 9.14]

10.61 We ask consultees for their views on the Electronic Communications Code (Conditions and Restrictions) Regulations 2003. Is any amendment required?
[paragraph 9.39]

LAW COMMISSION
CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

RESPONSE FORM

This optional response form is provided for consultees' convenience in responding to our Consultation Paper on the Electronic Communications Code.

You can view or download the Consultation Paper free of charge on our website at:

www.lawcom.gov.uk (see A-Z of projects > Electronic Communications Code)

The response form includes the text of the consultation questions in the Consultation Paper (numbered in accordance with Part 10 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

The reference which follows each question identifies the Part of the Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

As noted at paragraph 1.34 of the Consultation Paper, it would be helpful if consultees would comment on the likely costs and benefits of any changes provisionally proposed when responding. The Department for Culture, Media and Sport may contact consultees at a later date for further information.

We invite responses from 28 June to 28 October 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or

by post to: James Linney, Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ

Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information 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 Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

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As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: GENERAL

10.3 We provisionally propose that code rights should include rights for Code Operators:

(1) to execute any works on land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus;

(2) to keep electronic communications apparatus installed on, under or over that land; and

(3) to enter land to inspect any apparatus.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.16.

10.4 Do consultees consider that code rights should be extended to include further rights, or that the scope of code rights should be reduced?

Consultation Paper, Part 3, paragraph 3.17.

10.5 We provisionally propose that code rights should be technology neutral.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.18.

10.6	Do consultees consider that code rights should generate obligations upon Code Operators and, if so, what? Consultation Paper, Part 3, paragraph 3.19.

10.7	We ask consultees to tell us their views on the definition of electronic communications apparatus in paragraph 1(1) of the Code. Should it be amended, and if so should further equipment, or classes of equipment, be included within it? Consultation Paper, Part 3, paragraph 3.27.

10.8	We ask consultees to tell us their views about who should be bound by code rights created by agreement, and to tell us their experience of the practical impact of the current position under the Code. Consultation Paper, Part 3, paragraph 3.40.
There should be provision to prevent the possibility that a land owner may allow a Code Operator on to the property without signing a formal lease e.g. by way of early access where the land owner has not been made aware of such actions creating code rights and subsequently being bound by those rights.	

10.9 We ask consultees for their views on the appropriate test for dispensing with the need for a landowner's or occupier's agreement to the grant of code rights. In particular, consultees are asked to tell us:

(1) Where the landowner can be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code, should it be possible for the tribunal to make the order sought without also weighing the public benefit of the order against the prejudice to the landowner?

(2) Should it be possible to dispense with the landowner's agreement in any circumstances where he or she cannot be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code?

(3) How should a revised code express the weighing of prejudice to the landowner against benefit to the public? Does the Access Principle require amendment and, if so, how?

Consultation Paper, Part 3, paragraph 3.53.

10.10 We ask consultees to tell us if there is a need for a revised code to provide that where an occupier agrees in writing for access to his or her land to be interfered with or obstructed, that permission should bind others with an interest in that land.

Consultation Paper, Part 3, paragraph 3.59.

10.11 We ask consultees to tell us their views about the use of the right for a Code Operator to install lines at a height of three metres or more above land without separate authorisation, and of any problems that this has caused.

Consultation Paper, Part 3, paragraph 3.67.

10.12 Consultees are asked to tell us their views about the right to object to overhead apparatus. Consultation Paper, Part 3, paragraph 3.68.

10.13 Consultees are asked to give us their views about the obligation to affix notices on overhead apparatus, including whether failure to do so should remain a criminal offence. Consultation Paper, Part 3, paragraph 3.69.

10.14 Do consultees consider that the current right for Code Operators to require trees to be lopped, by giving notice to the occupier of land, should be extended: (1) to vegetation generally; (2) to trees or vegetation wherever that interference takes place; and/or (3) to cases where the interference is with a wireless signal rather than with tangible apparatus? Consultation Paper, Part 3, paragraph 3.74.

10.15 We ask consultees:

(1) whether Code Operators should benefit from an ancillary right to upgrade their apparatus; and

(2) whether any additional payment should be made by a Code Operator when it upgrades its apparatus.

Consultation Paper, Part 3, paragraph 3.78.

(1) No
(2) Yes

10.16 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from sharing their apparatus causes difficulties in practice;

(2) whether Code Operators should benefit from a general right to share their apparatus with another (so that a contractual term restricting that right would be void); and/or

(3) whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it shares its apparatus.

Consultation Paper, Part 3, paragraph 3.83.

(1) It may cause an extended negotiation process, but my clients consider it correct that such provisions should be documented.
(2) No.
(3) Yes.

10.17 We ask consultees to what extent section 134 of the Communications Act 2003 is useful in enabling apparatus to be shared, and whether further provision would be appropriate.

Consultation Paper, Part 3, paragraph 3.88.

10.18 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from assigning the benefit of agreements that confer code rights causes difficulties in practice;

(2) whether Code Operators should benefit from a general right to assign code rights to other Code Operators (so that a contractual term restricting that right would be void); and

(3) if so, whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it assigns the benefit of any agreement.

Consultation Paper, Part 3, paragraph 3.92.

10.19 We ask consultees to tell us if they consider that any further ancillary rights should be available under a revised code.

Consultation Paper, Part 3, paragraph 3.94.

10.20 We ask consultees to tell us if they are aware of difficulties experienced in accessing electronic communications because of the inability to get access to a third party's land, whether by the occupiers of multi-dwelling units or others.

Consultation Paper, Part 3, paragraph 3.100.

10.21 Do consultees see a need for a revised code to enable landowners and occupiers to compel Code Operators to use their powers to gain code rights against third parties? Consultation Paper, Part 3, paragraph 3.101.

10.22 Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used? Consultation Paper, Part 3, paragraph 3.102.

10.23 We ask consultees: (1) to what extent unlawful interference with electronic communications apparatus or a Code Operator's rights in respect of the same causes problems for Code Operators and/or their customers; (2) to what extent any problem identified in answer to (1) above is caused by a Code Operator having to enforce its rights through the courts or the nature of the remedy that the courts can award; and (3) whether any further provision (whether criminal or otherwise) is required to enable a Code Operator to enforce its rights. Consultation Paper, Part 3, paragraph 3.106.

10.24	We ask consultees whether landowners or occupiers need any additional provision to enable them to enforce obligations owed to them by a Code Operator. Consultation Paper, Part 3, paragraph 3.107.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: SPECIAL CONTEXTS

10.25 We provisionally propose that the right in paragraph 9 of the Code to conduct street works should be incorporated into a revised code, subject to the limitations in the existing provision.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.11.

10.26 We ask consultees to let us know their experiences in relation to the current regime for tidal waters and lands held by Crown interests.

Consultation Paper, Part 4, paragraph 4.20.

10.27 We seek consultees' views on the following questions.

(1) Should there be a special regime for tidal waters and lands or should tidal waters and lands be subject to the General Regime?

(2) If there is to be a special regime for tidal waters and lands, what rights and protections should it provide, and why?

(3) Should tidal waters and lands held by Crown interests be treated differently from other tidal waters and lands?

Consultation Paper, Part 4, paragraph 4.21.

10.28 We ask consultees:

(1) Is it necessary to have a special regime for linear obstacles or would the General Regime suffice?

(2) To what extent is the linear obstacle regime currently used?

(3) Should the carrying out of works not in accordance with the linear obstacle regime continue to be a criminal offence,or should it alternatively be subject to a civil sanction?

(4) Are the rights that can be acquired under the linear obstacle regime sufficient (in particular, is limiting the crossing of the linear obstacle with a line and ancillary apparatus appropriate)?

(5) Should the linear obstacle regime grant any additional rights or impose any other obligations (excluding financial obligations)?

Consultation Paper, Part 4, paragraph 4.30.

10.29 We provisionally propose that a revised code should prevent the doing of anything inside a “relevant conduit” as defined in section 98(6) of the Telecommunications Act 1984 without the agreement of the authority with control of it.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.34.

10.30 We provisionally propose that the substance of paragraph 23 of the Code governing undertakers’ works should be replicated in a revised code.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.40.

10.31 We provisionally propose that a revised code should include no new special regimes beyond those set out in the existing Code. Do consultees agree? Consultation Paper, Part 4, paragraph 4.43

ALTERATIONS AND SECURITY

10.32 We provisionally propose that a revised code should contain a procedure for those with an interest in land or adjacent land to require the alteration of apparatus, including its removal, on terms that balance the interests of Code Operators and landowners and do not put the Code Operators' networks at risk. Do consultees agree? Consultation Paper, Part 5, paragraph 5.11.	

10.33 Consultees are asked to tell us their views about the alteration regime in paragraph 20 of the Code; does it strike the right balance between landowners and Code Operators? Consultation Paper, Part 5, paragraph 5.12.	

10.34 We provisionally propose that it should not be possible for Code Operators and landowners to contract out of the alterations regime in a revised code. Do consultees agree? Consultation Paper, Part 5, paragraph 5.13.	

10.35	We seek consultees' views on the provisions in paragraph 14 of the Code relating to the alteration of a linear obstacle. Do consultees take the view that they strike an appropriate balance between the interests involved, and should they be modified in a revised code? Consultation Paper, Part 5, paragraph 5.18.

10.36	We provisionally propose that a revised code should restrict the rights of landowners to remove apparatus installed by Code Operators. Do consultees agree? Consultation Paper, Part 5, paragraph 5.47.

10.37	We provisionally propose that a revised code should not restrict the rights of planning authorities to enforce the removal of electronic communications apparatus that has been installed unlawfully. Do consultees agree? Consultation Paper, Part 5, paragraph 5.48.

10.38 We ask consultees to tell us their views about the procedure for enforcing removal. Should the onus remain on landowners to take proceedings? If so, what steps, if any, should be taken to make the procedure more efficient? Consultation Paper, Part 5, paragraph 5.49.

10.39 We ask consultees to tell us whether any further financial, or other, provisions are necessary in connection with periods between the expiry of code rights and the removal of apparatus. Consultation Paper, Part 5, paragraph 5.50.

10.40 We provisionally propose that Code Operators should be free to agree that the security provisions of a revised code will not apply to an agreement, either absolutely or on the basis that there will be no security if the land is required for development. Do consultees agree? Consultation Paper, Part 5, paragraph 5.51.

10.41	Do consultees agree that the provisions of a revised code relating to the landowner's right to require alteration of apparatus, and relating to the security of the apparatus, should apply to all equipment installed by a Code Operator, even if it was installed before the Code Operator had the benefit of a revised code? Consultation Paper, Part 5, paragraph 5.56.

FINANCIAL AWARDS UNDER THE CODE

In responding to these questions, please note the definitions of "compensation" and "consideration" adopted at paragraph 6.5 and following of the Consultation Paper.

10.42 We provisionally propose that a single entitlement to compensation for loss or damage sustained by the exercise of rights conferred under the Code, including the diminution in value of the claimant's interest in the land concerned or in other land, should be available to all persons bound by the rights granted by an order conferring code rights. Do consultees agree? Consultation Paper, Part 6, paragraph 6.35.

10.43 We ask consultees whether that right to compensation should be extended to those who are not bound by code rights when they are created but will be subsequently unable to remove electronic communications apparatus from their land. Consultation Paper, Part 6, paragraph 6.36.

10.44 We provisionally propose that consideration for rights conferred under a revised code be assessed on the basis of their market value between a willing seller and a willing buyer, assessed using the second rule contained in section 5 of the Land Compensation Act 1961; without regard to their special value to the grantee or to any other Code Operator. Do consultees agree? We would be grateful for consultees' views on the practicability of this approach, and on its practical and economic impact. Consultation Paper, Part 6, paragraph 6.73.
No – I agree with the position of the Country Land and Business Association as set out at clause 6.58 of the Consultation Paper No 205. The provision of this proposal I consider should act in tandem with the Code acting as a "safety net" rather than the starting position which appears to be the position as envisaged by the Consultation Paper of the points set out at here (10.44). In the case of the electricity industry it is not the starting point to seek a "statutory easement" but a possible necessity noting the utility function of the Distribution Network Operators.

10.45 Consultees are also invited to express their views on alternative approaches; in particular, the possibility of a statutory uplift on compensation (with a minimum payment figure in situations where no compensation would be payable). Consultation Paper, Part 6, paragraph 6.74.
With regard to the use of 'market value' notwithstanding other concerns that have been raised it may be seen that where there is no ‘real market’ or the proposed valuation has odd characteristics ‘Fair Value’ may be a better measure in those circumstances. It is considered that this form of valuation can better reflect individual circumstances, with definitions already available in International Valuation Standards and RICS Red Book.

10.46 We provisionally propose that there should be no distinction in the basis of consideration when apparatus is sited across a linear obstacle. Do consultees agree? Consultation Paper, Part 6, paragraph 6.78.

10.47 We provisionally propose that, where an order is made requiring alteration of a Code Operator’s apparatus, the appropriate body should be entitled to consider whether any portion of the payment originally made to the person seeking the alteration in relation to the original installation of that apparatus should be repaid. Do consultees agree? Consultation Paper, Part 6, paragraph 6.83.

TOWARDS A BETTER PROCEDURE

10.48	We provisionally propose that a revised code should no longer specify the county court as the forum for most disputes. Do consultees agree? Consultation Paper, Part 7, paragraph 7.26.

10.49	We ask for consultees' views on the suitability of the following as forums for dispute resolution under a revised code: (1) the Lands Chamber of the Upper Tribunal (with power to transfer appropriate cases to the Property Chamber of the First-tier Tribunal or vice versa); (2) a procedure similar to that contained in section 10 of the Party Wall etc Act 1996; and (3) any other form of adjudication. Consultation Paper, Part 7, paragraph 7.27.

10.50	We provisionally propose that it should be possible for code rights to be conferred at an early stage in proceedings pending the resolution of disputes over payment. Do consultees agree? Consultation Paper, Part 7, paragraph 7.31.

10.51 We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay. Consultation Paper, Part 7, paragraph 7.32.

10.52 We seek consultees' views as to how costs should be dealt with in cases under a revised code, and in particular their views on the following options: (1) that as a general rule costs should be paid by the Code Operator, unless the landowner's conduct has unnecessarily increased the costs incurred; or (2) that costs should be paid by the losing party. Consultation Paper, Part 7, paragraph 7.37

10.53 We also ask consultees whether different rules for costs are needed depending upon the type of dispute. Consultation Paper, Part 7, paragraph 7.38.

10.54 We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service. Do consultees agree? Consultation Paper, Part 7, paragraph 7.52.

10.55 Do consultees consider that the forms of notices available to Code Operators could be improved? If so, how? Consultation Paper, Part 7, paragraph 7.53.

10.56 Do consultees consider that more information is needed for landowners? If so, what is required and how should it be provided? Consultation Paper, Part 7, paragraph 7.54.

10.57	We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms. Consultation Paper, Part 7, paragraph 7.60.

INTERACTION WITH OTHER REGIMES

10.58 We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease. Do consultees agree? Consultation Paper, Part 8, paragraph 8.22.	

10.59 We provisionally propose that where an agreement conferring a right on a Code Operator also creates an interest in land of a type that is ordinarily registrable under the land registration legislation, the interest created by the agreement should be registrable in accordance with the provisions of the land registration legislation, but that a revised code should make it clear that its provisions as to who is bound by the interest prevail over those of the land registration legislation. Do consultees agree? Consultation Paper, Part 8, paragraph 8.33.	

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

10.60 We ask consultees to tell us: (1) whether they are aware of circumstances where the funds set aside under regulation 16 have been called upon; (2) what impact regulation 16 has on Code Operators and on Ofcom; (3) if a regime is required to cover potential liabilities arising from a Code Operator's street works; and (4) if the answer to (3) is yes, what form should it take? Consultation Paper, Part 9, paragraph 9.14.

10.61 We ask consultees for their views on the Electronic Communications Code (Conditions and Restrictions) Regulations 2003. Is any amendment required? Consultation Paper, Part 9, paragraph 9.39.

THINKING OUTSIDE THE 'PHONE BOX?

- or -

Some radical solutions to current legal problems under the Code

NICHOLAS TAGGART

Landmark CHAMBERS

1 Introduction - My Life as a Crossed Line:

1.1 Some say:[1]

> ... it must rank as one of the least coherent and thought-through pieces of legislation on the statute book.

and some say:[2]

> ... it is unfortunate that what is literally a matter of household and daily import should be phrased in the way that it is, which is very difficult indeed - even for a lawyer and certainly for a non-lawyer to understand.

All know, is we call it "the Code".[3]

1.2 I am a barrister. And if that was not bad enough, I act regularly in disputes arising by reason of the Telecommunications Act 1984, Schedule 2, as amended by the Communications Act 2003- commonly referred to as "The Code". And it gets worse: I act about as much for Operators as I do for landowners. Everybody in the room will have a reason to hate me.

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1 *Bridgewater Canal Company Ltd. v. Geo Networks Ltd.* [2010] 1 WLR 2576, [7], *per* Lewison J.

2 *Finsbury Business Centre Ltd. v. Mercury Communications Ltd.* (Lands Tribunal Ref. 99/1993) *per* HH Judge Marder QC, sitting as President of the Lands Tribunal.

3 If we are going to be formal about this, the Code is to be found in the Telecommunications Act 1984, Schedule 2, as amended by the Communications Act 2003. But, as Lewison J pointed out in *Geo Networks*, "Even its name is open to doubt. Although section 106 of the 2003 Act says that the code set out in Schedule 2 to the 1984 Act is referred to as 'the electronic communications code' in 'this Chapter', the amendments made by the 2003 Act did not include changing the title to Schedule 2, so that in Schedule 2 itself it is still called 'The Telecommunications Code'."

1.3 One of the good things about being something of a Code litigator is that no-body knows what the wretched Code actually means anyway. The drafting is terrible, there is no case-law worth 'phoning home about and everybody is terrified of going to Court over it. Owners all think that Code litigation is hugely expensive and are absolutely terrified that they might lose.[4] Operators all think that Code litigation is hugely expensive and are absolutely terrified that they might win....

1.4 This is both liberating and frustrating. It is liberating, because the lack of clear drafting makes interpreting the Code not just a challenge, but a real opportunity for creative thinking. There are not many statutes that you can play "what if..." with for so many hours and get so many equally implausible interpretations. *Game On!* But, because of the lack of willingness in the market to test ideas out that, of course, have to be caveated with words like, "no-one has ever argued this before, but...", these arguments never get tested. *Game Over!*

1.5 As we all know, the days of the Code are numbered, and you do not need to ring a "118" number to know that. In December 2010, a Report was produced entitled, "Britain's Superfast Broadband Future".[5] It was signed by the Secretary of State for Culture, Media, Sport and the Olympics and the Minister for Culture, Communications and The Creative Industries. Even I could not make this up.

1.6 The Report was intended to promote a key promise made by the Coalition Government, namely that the UK should have the best superfast broadband network in the European

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[4] I appreciate that persons burdened with Code rights are owners or occupiers, and the Byzantine mess that is Paragraph 2 of the Code primarily deals with Occupiers. I am going to use "Owners" as a shorthand for both landowners and occupiers of all sorts, as opposed to "Operators", meaning persons who have been designated as providers an electronic communications network by OFCOM or by the Secretary of State, under Communications Act 2003, section 106.

[5] http://www.culture.gov.uk/images/publications/10-1320-britains-superfast-broadband-future.pdf.

Union by 2015.[6] Apparently, "Local participation in deciding what is the most useful and appropriate communications solution for your own community is one of the themes of this strategy. We want to do more than bridge the digital divide – we want communities to have the tools to participate fully in the Big Society".[7]

1.7 The central premise of the Report is that "Private sector investment *[need to be]* freed from unnecessary barriers". I think they might mean the Code:

> 5.13 The Court process is time-consuming, with cases currently taking anything up to and beyond 2 years to decide; although it is anticipated that implementation of Article 11 of the Framework Directive will shorten this. Following implementation of the Directive, a decision on rights of way will be made within 6 months. Code operators agree that remuneration for access to land should be given, and that is right, but there are some inconsistencies in the Code, which refers to both "compensation" and "consideration", and agreeing appropriate compensation is often difficult as a result, with compensation packages varying wildly.
>
> 5.14 These factors create uncertainty for investment decisions. Government will therefore revisit some of these issues, as part of an overall review of the Communications Act during the lifetime of this Parliament.
>
> 5.15 We will consider whether it is appropriate to separate the grant of rights of way from the compensation element, which would at least allow companies to deploy networks more quickly. We will also be reviewing whether it is still appropriate that the County Court award compensation, or whether another body may be more suitable.

1.8 As we all know, the Government 'phoned a friend and the buck stopped got passed to the Law Commission. The plan is to then produce a recommendation Report (a "White Paper") in spring 2013.[8] This will give the Government an opportunity to bring forward a draft bill before the end of this Parliament in 2015. Assuming it lasts that long.

1.9 So, in what might be the last months of the Code, I thought it would be good to record some of the legal arguments I have heard some people say about the Code.

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6 There must be some room for debate as to whether the French and the Germans will be all that's left of the EU by 2015, but that's for another day...

7 Anybody know where the sick-bag is? This and the following quote just come from the Foreword.

8 http://lawcommission.justice.gov.uk/areas/electronic-communications-code.htm.

Professor Cooke has made it clear that the Law Commission is intending to scrap the existing text of the Code, and start with a blank sheet of paper, which has got to be the right answer given what a mutt the Code is, that is as well. I must stress that these are just arguments I have heard some people say. Some of these arguments I might even have heard myself say and some of them I might have heard others say. Some say these arguments are right; some say these arguments are wrong. What I might say probably depends whose side I am on this week.

2 The True Nature of a "Right" Under the Code:

2.1 Some say the nature of the right conferred under the Code is unclear. Some say it is a proprietary right, like a tenancy and some say it is nothing more than a statutory right to be on another person's land. Some say this is a fundamental problem which has bedevilled most people's understanding of the Code.

2.2 Let us just lay some conceptual foundations for a moment. If the proprietary right route is taken, then the most obvious right being conferred on an Operator is a tenancy;[9] if the Code confers a statutory right, then it is going to create a wayleave.

2.3 The leading modern statement of what distinguishes a tenancy from any other right to be in occupation of land is to be found in the speech of Lord Templeman in *Street v. Mountford*:[10]

> There can be no tenancy unless the occupier enjoys exclusive possession; but an occupier who enjoys exclusive possession is not necessarily a tenant. He may be owner in fee simple, a trespasser, a mortgagee in possession, an object of charity or a service occupier. To constitute a tenancy **the occupier must be granted exclusive possession for a fixed or periodic term certain in consideration of a premium or periodical payments.** The

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9 There is some support for the proposition that the right is in the nature of an easement, following *Re Salvin's Indenture* [1938] 2 All ER 498 (Farwell J), who said that the entire infrastructure of a water company could in some circumstances be analysed as a network of easements, but this analysis only works for cable Operators, not mast Operators.

10 [1985] 1 AC 800, 818 (HL).

> grant may be express, or may be inferred where the owner accepts weekly or other periodical payments from the occupier.

The words in bold are the key words of the test. Whilst everybody says this is the leading modern statement of the law, even though some say it is obviously wrong, on at least two counts. For our purposes, they matter a little, so:

2.3.1 first, Lord Templeman's use of the word "possession" obscures as much as it illuminated, because the term "possession" carries with it the concept of legal ownership and control.[11] Read literally, his test amounts to "if you are a tenant, then you are a tenant". Splendid. What he really meant was "exclusive physical or factual occupation or control".[12]

2.3.2 Secondly, the payment of a monetary rent or premium is not necessary either. As long as the occupier is giving, or has given, something of even notional benefit to the landowner, there can be a tenancy.[13]

2.4 By contrast, a wayleave is a non-possessory right to be on someone else's land. The holder of a wayleave has no right of ownership over the land surrounding his cable, or supporting his mast: all he has is the bare right to be there and such additional rights as are necessary for the purpose of carrying out his statutory functions.

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11 *JA Pye (Oxford) Ltd. v. Graham* [2003] 1 AC 419 (HL) at [38]-[40], *per* Lord Browne-Wilkinson and [68]-[70] *per* Lord Hope. See also *Akici v. LR Butlin Ltd.* [2006] 1 WLR 201 at [31]-[36] *per* Neuberger LJ (CA).

12 *JA Pye (Oxford)* at [61], *per* Lord Browne-Wilkinson and [71]-[72] *per* Lord Hope and [75]-[76] *per* Lord Hutton.

13 Law of Property Act 1925, section 205(1)(xxvii); *Ashburn Anstalt v. Arnold* [1989] Ch 1 at 9-10 *per* Fox LJ,), overruled on another point in *Prudential Assurance Co.Ltd. v. London Residuary Body* [1992] 2 AC 386 (HL). Rent can include providing a service: for example, the rent in *Montagu v. Browning* [1954] 1 WLR 1039 (CA) comprised an obligation to clean a synagogue.

Describing a wayleave right to lay and maintain a public sewer, Lord Russell CJ said in *Bradford v. The Mayor of Eastbourne* :[14]

> It has been clearly held that the vesting is not a giving of the property in the sewer and in the soil surrounding it to the local authority, but giving such ownership and such rights only as are necessary for the purpose of carrying out the duties of a local authority with regard to the subject-matter of its duties

That judgment gives us a good working definition of what a wayleave, which needs just a little updating to reflect changes to some general statutory requirements.[15] The legal nature of a wayleave is as follows:

2.4.1 It is a right for a statutory undertaker to enter onto land belonging to another person for the purposes of laying, operating and maintaining apparatus associated with the undertaking.

2.4.2 It also encompasses the right to retain and use the apparatus thus installed for the purposes of the statutory undertaking, without that apparatus constituting a trespass or a nuisance to the landowner.

2.4.3 It confers no right of ownership or proprietorship in the land over which it has been granted and therefore it is not a legal or equitable interest in the land. It is not a lease or an easement. It confers no right to exclusive possession of the land it burdens, although it imposes obligations on the Owner not to interfere with it, whatever space it occupies.

2.4.4 It does not oblige the Owner to take any positive steps to facilitate the Operator's occupation, but only a negative obligation not to interfere with

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14 [1896] 2 QB, 205, 211 (QBDC).

15 For another collection of the principles see *per* Morton LJ in *Newcastle-under-Lyme Corporation v. Wolstanton Ltd.*[1947] Ch 427, 457 (CA), in relation to a gas pipe, laid under the Gas Works Clauses Act 1847, section 6.

occupation. Critically, that means that an Owner with, say, a mast on the roof of a building cannot lawfully demolish the building, but he has no obligation to maintain the building so it does not fall down.[16] A farmer with a mast in his field may not padlock the gates and refuse the Operator access, but he has no obligation to maintain the track to the field or, for that matter, the drainage to stop that corner of his field that has the mast.

2.4.5 Subject to those limitations, it has otherwise all the characteristics of a freehold interest in the exact land subject to the wayleave, save that it is determined automatically if the statutory undertaker ceases to require the apparatus for its statutory purposes.[17] I wonder how that works for a cable Operator installing or maintaining cables as "dark fibre" for future capacity, or a mobile Operator keeping on a site as a back-up, but not actually using it? Or a mobile Operator who acquired the initial rights from the Owner, but the site is now used entirely by *other* Operators?[18]

2.4.6 Because they are not interests in land, true wayleaves are not registerable under the Land Registration Act 2002. The extent to which successors in title are bound is controlled by whichever Act which supports their creation. In the case of electronic communications apparatus, that is the Code.

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16 This is why the mining company had no duty to provide support for a gas main laid in its land in *Newcastle-under-Lyme Corporation v. Wolstanton Ltd.* [1947] Ch 427 (CA).

17 Obviously, the Code has other termination rights. I am setting out the common elements of a wayleave.

18 Check out paragraph 1 of the Code: to use the Code, an Operator must be discharging the "statutory purposes", which are the provision of "***the*** Operator's network", not ***another*** Operator's network, even if that other Operator is paying for the privilege of using a site. See also an exception for surplus kit expressly made in Paragraph 21(11).

2.5 Legally, the difference between the two is a bit like the difference between a person who is the residential tenant of a self-contained flat and a lodger. This difference was explained by Lord Templeman in *Street v. Mountford* as being:[19]

> ... whether the occupier has or has not a stake in the room or only permission for himself personally to occupy...

2.6 By now, you are saying to yourselves "why does any of this matter?" Some say it matters quite a lot when one is trying to work out the terms on which the Operator comes onto land, or stays on land, pursuant to the Code. If the tenancy analogy is right, then the sorts of rights and liabilities that any landlord and any tenant might agree to put into a lease are the subject of a negotiation under the Code. This is because a tenant has "a stake in the land", which is rightly capable of being made subject to, and have the benefit of other substantial rights and liabilities.

2.6.1 This might be of particular importance to an Operator, who may want certain rights of access to his equipment to be within his control, and so will want formal easements and rights to secure certain areas of land against all comers, including the owner. The essence of a wayleave is that it is non-possessory, and confers only the minimum rights necessary to discharge the statutory function. A secure compound might be a bit difficult to justify, if all that the Code confers is a non-possessory right to be there.

2.6.2 It might also be of particular importance to an Owner, who may want to impose certain controls over the Operator's rights to share occupation of a site with another Operator, at least without paying an increased sum for the privilege. If a Code right is a non-possessory right to occupy land for discharge of a statutory function, it is difficult to see how an Owner can seek to control the number of Operators sharing a common site.

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[19] At page 825.

2.6.3 It might matter to both Owners and Operators when it comes to moving from a situation where a consensual arrangement has come to an end, and an Operator is still in occupation. Imagine the right voluntarily conferred on the Operator was a contractual licence, or a lease excluded from the Landlord and Tenant Act 1954.

2.6.3.1 Some say that there are lawyers advising Operators and Owners out there who proceed on the basis that the Code creates a parallel situation to a 1954 Act lease renewal. They apply the terms of the exiting arrangement on the basis that the Code requires them to do so, subject to changes in term, rent and such changes to the other covenants as are reasonable.[20] If the Code is actually only mandating a non-possessory wayleave, subject to the minimum rights and liabilities necessary to facilitate the statutory function, this "same again" approach is fundamentally flawed, even if it is commercially convenient.

2.6.3.2 Some say there are lawyers advising Operators and Owners out there who proceed on the opposite basis, namely that once a consensual agreement comes to an end, a Code Operator can simply remain relying on what is, in effect, "a status of Irremovability",[21] which allows them to exercise any power conferred on them by the Code, but without having to pay

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20 In other words, the famous *O'May* principle under the Landlord and Tenant Act 1954, section 35: *O'May v. City of London Real Property Co.Ltd.* [1983] 2 AC 726 (HL).

21 A "status of irremovability is what a residential tenant under the Rent Acts enjoys: see: *Jessamine Investment Co. v. Schwartz* [1978] QB 264, 272 *per* Sir John Pennycuick (CA).

anything or do anything, because the statutory wayleave created by the Code simply drops into place. [22]

2.6.3.3 Some say these two hypotheses are mutually incompatible.

2.7 Just pausing there, some say that the Code is, or should be, technology neutral, so that the same rights and liabilities should attach to mobile Operators' masts as they do to cable Operators fibre-optics. It might be said that the example I have just given illustrates that it ain't necessarily so. An Owner might have good estate management reasons to control the numbers of Operators seeking access to a mast on his land, particularly if it is an urban, rooftop site. That might be said to be a justification for wanting payment to reflect the number of Operators using the site. But who says they really care how many underground fibres in a cable are lit by whom, unless it is to extract some readies?

2.8 Be that as it may, what is a right under the Code: wayleave or tenancy? Some say it is a tenancy, because the Paragraph 2 proceeds on the assumption that the Operator starts by way of negotiating "a right" and the Code imposes no limit on the nature of the right that the Operators can request. If the Operator chooses to ask for a "right which takes the legal form of a tenancy", then Paragraph 2(1) allows him to have one, because such a right falls within the definition. Paragraph 2(1) provides that:

> The agreement in writing of the occupier for the time being of any land shall be required for *conferring on the operator a right for the statutory purposes*—
>
> (a) to execute any works on that land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus; or
> (b) to keep electronic communications apparatus installed on, under or over that land; or

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[22] There is a degree of support for this hypothesis in the linear obstacles regime: see *The Bridgewater Canal Co.Ltd. v. Geo Networks Ltd.* [2011] 1 WLR 1487 (CA).

> (c) to enter that land to inspect any apparatus kept installed (whether on, under or over that land or elsewhere) for the purposes of the operator's network.

My emphasis. The words I have italicised certainly could have that wide a meaning, because there is nothing by way of limitation. Therefore, the nature of a right under the Code is anything the Operator wants to ask for. If that is right, some say it follows logically that, when the Operator asks for the consent of the Owner to be dispensed with, the Operator is, in effect, asking for the grant of a lease or an easement or any other right, because there is no limit in Paragraph 2. This is because the power of the Court in Paragraph 5 is to grant any interest that could fall within Paragraph 2:

> (1) Where the operator requires any person to agree for the purposes of paragraph 2 or 3 above that a**ny right should be conferred on the operator,** or that any right should bind that person or any interest in land, the operator may give a notice to that person of **the right and of the agreement that he requires**.
>
> (2) Where the period of 28 days beginning with the giving of a notice under sub-paragraph (1) above has expired without the giving of the required agreement, **the operator may apply to the court for an order conferring the proposed right**, or providing for it to bind any person or any interest in land, and (in either case) **dispensing with the need for the agreement of the person to whom the notice was given**.

My emphasis. The logical end-stop of this is that the Operator can ask for the acquisition of the freehold under this power. Why not? If there are no limitations on what the right to be conferred is, why not the right to own land outright?

2.9 Some say there is actually a limitation, and that a careful look at the Code tells you that the proper analysis is wayleave, not proprietary right. This argument lacks the simplicity of the alternative argument, which is a bit "why not?", and this is why the contrary argument has to prove "here's why not"? Here's why not.

2.10 The first point made in support of the "wayleave only" argument is that Operators now do have access to "true" powers of compulsory purchase, which entitle them to

compulsorily acquire estates in land. This is in the Communications Act 2003, section 118 and Schedule 4, which provides that, where an Operator requires, or reasonably foresees that it will require, land or rights over land for or in connection with the establishment or running of its network, the Secretary of State and OFCOM may authorise the Operator to acquire land compulsorily. The important provision is Schedule 4, paragraph 3:

> (1) Subject to sub-paragraph (2), the Secretary of State may authorise a code operator to purchase compulsorily any land in England and Wales which is required by the operator—
>
> (a) for, or in connection with, the establishment or running of the operator's network; or
> (b) as to which it can reasonably be foreseen that it will be so required.
>
> (2) No order is to be made authorising a compulsory purchase under this paragraph by a code operator except with OFCOM's consent.
>
> (3) This power to purchase land compulsorily includes power to acquire an easement or other right over land by the creation of a new right.
>
> (4) The Acquisition of Land Act 1981 is to apply to any compulsory purchase under this paragraph as if the code operator were a local authority within the meaning of that Act. ...

2.11 Some say that this power has never been used, and if you ring up OFCOM and ask them if an Operator has ever even applied to use it, they say no. Be that as it may, existence of a power granted, in the 2003 Act, which enables Operators to acquire estates and interests in land compulsorily, such interests to include easements, but only with the express sanction of the Secretary of State and OFCOM is, some say, a pretty strong indicator that the draftsman of the 2003 Act thought that the Code did *not* already give Operators a power to acquire interests any other way. If that hypothesis is right, then logically the only thing that an Operator can be acquiring forcibly under Paragraph 5 is a wayleave.

2.12 Some say that there is a further clue in Paragraph 2(7), which expressly exempts any interest granted to an Operator under Paragraph 2 - and, by necessary implication, under Paragraph 5 - from the requirements of the Land Registration Act 2002 and the Land Charges Act 1972:

> It is hereby declared that a right falling within sub-paragraph (1) above is not subject to the provisions of any enactment requiring the registration of interests in, charges on or other obligations affecting land.

Now, some say, if the Code can be used to create leases or easements or any other possessory property right, what is the logical basis for excluding it from land registration? Of course, if all it creates is an non-possessory wayleave this makes more sense. Land Registration registers interests and estates in land, not statutory rights over it which confer no property rights. Some also say that Paragraph 5(4) is a tell-tale, too, because it contrasts an Operator's rights with the Owner's "interest in the land":

> An order under this paragraph made in respect of *a proposed right* may, in conferring that right or providing for it to bind any person or **any interest in land** and in dispensing with the need for any person's agreement, direct that *the right* shall have effect with such modification...

2.13 Lastly, there is the case law, such as it is.

2.13.1 In *Mercury Communications Ltd. v. London and Indian Dock Investments Ltd.*, the parties had agreed a "deed of grant ... for a term ending in the year 2009", but there is nothing in the Report of the case which actually confirms what the right was.[23] The use of the word "term" suggests a lease, but that may be just the word was used to denote that the agreement was for a limited duration.

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[23] (1993) 69 P&CR 135 (Mayor's and City County Court).

2.13.2 You have to get all the way to the last substantive paragraph of *Cabletel Surrey & Hampshire Ltd. v. Brookwood Cemetery Ltd.*, to discover that the agreement being valued was a wayleave, to be paid for on a once-and-for-all basis, but it is not clear whether the Court of Appeal was ruling out a lease or an annual wayleave agreement, or simply agreeing with the trial Judge that, on the evidence before him, a one-off payment for a permanent wayleave was appropriate.[24]

2.13.3 Hearing the first appeal in *Bridgewater Canal Company Ltd. v. Geo Networks Ltd.* Lewison J was so busy having a pop at the drafting of the Code, that he did not himself say what he thought the nature of the right the Arbitrator was valuing was.[25] It is, however, implicit in his judgment that he thought it was a bare statutory right, in the nature of a wayleave, and permanent in its effect:

> [49] This conclusion feeds into the interpretation of paragraph 13(2)(e)(ii). This paragraph is concerned with "consideration" (ie price). Since loss and damage to the undertaker has been dealt with in paragraph 13(2)(e)(i), the natural reading of paragraph 13(2)(e)(ii) is that it is dealing with something else. What is that something else, if not the value to the operator of acquiring the right? If, as I think, part of the notion of carrying out works is the permanent (or indefinite) consequence of carrying them out, then it seems to me that paragraph 13(2)(e)(ii) envisages that the consideration will take into account the fact that the right to carry out the work will carry with it the right to retain on or under the land whatever apparatus has been installed as a result of those works....

2.13.4 The Court of Appeal came to the opposite conclusion on what "compensation" meant, but apparently on the same basis as to what the right being valued was, a non-possessory wayleave:[26]

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24 [2002] EWCA Civ 720 at [44] *per* Mance LJ, Aldous and Longmore LJJ agreeing.

25 [2010] 1 WLR 2576 (Lewison J).

26 [2011] 1 WLR 1487 (CA) *per* Sir Andrew Morritt C, Leveson and Patten LJJ agreeing.

> [29] Given these features I do not approach the question, as Counsel for BCC was inclined to do, on the basis that the Code should be interpreted so as not to burden a person's property without some compensatory payment. ... It is clear from the opening words of paragraph 12(1) that sub-paragraphs (a) and (b) are included for implementing the grant of the right to install and keep the apparatus crossing the railway not for conferring it. ... Given the structure of paragraphs 12(1) and 13(2)(e) I see no reason to interpolate into the words "the right to carry out the works" in paragraph 13(2)(e) the additional words "and to keep the same".

2.14 So, the really interesting question is this: given significant legal and practical distinctions between what either party can negotiate for under a lease and what a statutory undertaker exercising a bare right to a wayleave can ask for, what are the terms that the Court can impose if an Operator actually exercises a power under Paragraph 5:

> (4) An order under this paragraph made in respect of a proposed right may, in conferring that right or providing for it to bind any person or any interest in land and in dispensing with the need for any person's agreement, direct that *the right shall have effect with such modifications, be exercisable on such terms and be subject to such conditions as may be specified in the order*.
>
> (5) The terms and conditions specified by virtue of sub-paragraph (4) above in an order under this Paragraph, *shall include such terms and conditions as appear to the court appropriate for ensuring that the least possible loss and damage is caused by the exercise of the right in respect of which the order is made to persons who occupy, own interests in or are from time to time on the land* in question.

My emphasis. Some say it is a shame that there is no reported decision by an Court on this point. Some say that might be just as well.

3 Is the 1954 Act Really a Problem?

3.1 I want to move onto another topic, which may or may not be a very different one. Some say it is axiomatic that there is a terrible and insoluble problem caused by the interaction between the Code and the Landlord and Tenant Act 1954, which means that Code Operators are just like cockroaches: once you've got an infestation, nothing

short of global thermonuclear warfare will get rid of them. Some say it ain't necessarily so.

The Orthodox View:

3.2 The orthodox view -what most people say- is this. No matter on what terms any agreement with an Operator is made,[27] and no matter who may claim *not* to be bound by an Operator's rights under Paragraph 2, once an Operator is there he has security of tenure until a Court orders him to leave. This, it is said, is buried in Paragraph 21(9):

> Any electronic communications apparatus kept installed on, under or over any land shall (***except for the purposes of this paragraph*** and without prejudice to paragraphs 6(3) and 7(3) above) be deemed, as against any person who was at any time entitled to require the removal of the apparatus, ***but by virtue of this paragraph not entitled to enforce its removal***, to have been lawfully so kept at that time.

My emphasis: it is by reason of those words that Paragraph 21(9) renders all occupation for Code purposes lawful, until an Order is made under Paragraph 21(6) or any of the other grounds on which an Order can be made.[28]

3.3 This cross-checks with Paragraph 27(2), which prevents the parties to an agreement from contracting out of the operation of Paragraph 21 of the Code. Paragraph 27(2) looks like this:

> The provisions of this code, except paragraphs 8(5) and 21 and sub-paragraph (1) above, shall be without prejudice to any rights or liabilities arising under any agreement to which the operator is a party.

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27 There is one recherché exception, to which I shall return.

28 Or any of the other grounds on which the Court could order removal, such as Paragraph 20, where the landlord requires the apparatus to be removed to facilitate demolition. The right in Paragraph 21(9) to lawfully retain the apparatus *in situ* is applied to those other removal provisions by Paragraph 21(12).

Some say that this inability to require an Operator to go out of possession consensually gives Operators a fantastic benefit, because they have no liability for damages for trespass or breach of the implied covenant to yield up at the end of a lease.[29] Not only does this follow from the apparatus being deemed to be lawfully on the Property, but Paragraph 27(3) expressly confirms the position:

> Except as provided under the preceding provisions of this code, the operator shall not be liable to compensate any person for, or be subject to any other liability in respect of, any loss or damage caused by the lawful exercise of any right conferred by or in accordance with this code.

On the orthodox analysis, therefore, when an agreement expires, the Operator has no obligation to continue paying any "rent" or licence fee, unless he actually is subject to an Order under Paragraph 5: Paragraphs 4(4) and 7(3) expressly provide that, where an Operator goes all the way and exercises his Paragraph 5 powers, he has to pay for his occupation between the end of any consensual agreement and the making of an Order under Paragraph 5. Some say he can leave anytime before the Order is made and pay diddley-squat.

3.4 In fact, some say the logical consequence of reading the Code this way is this: if an Operator simply marches onto your land and installs some electronic communications apparatus without so much as a "here's a cheque for a ridiculously small sum", the Owner cannot get the Operator off the land because of Paragraph 21(9) and cannot get any damages from the Operator because of Paragraph 27(3) - even though the Operator is a trespasser. It might be a brave Operator who tried it, but...

3.5 Even in a lesser case, some say this is a bit of an unfair situation, especially where an Owner can only rely on the "standard" method of removal, in Paragraph 21 of the Code. It is expressed as a bar on Owners asserting a right to possession against an

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[29] For implied covenants to yield up, see *Henderson v. Squire* (1869) LR 4 QB 170 at 172; *Harding v. Crethorn* (1793) 1 Esp 56. Every lease has one, unless it is expressly implicitly excluded.

Operator. Unfortunately, one has to go through quite a lot of Paragraph 21 to see how it works.

3.5.1 Paragraph 21(1) provides that no person entitled to require the removal of electronic communications apparatus is entitled to enforce the removal of that apparatus other than by the procedure set out in Paragraph 21, or one of the other Paragraphs later referred to.

3.5.2 By Sub-Paragraph (2), if the landowner requires the removal of any such apparatus, he must give a notice to the Operator, requiring its removal of the apparatus.

3.5.3 Where a person gives a notice under sub-Paragraph (2) above and the Operator does not give that person a counter-notice within the period of 28 days, that person shall be entitled to enforce the removal of the apparatus.

3.5.4 If the Operator gives a counter-notice, it must either:

3.5.4.1 state that the person giving the Notice is not entitled to require the removal of the apparatus; and/or

3.5.4.2 specify the steps which the Operator proposes to take for the purpose of securing a right as against that person to keep the apparatus on the land.

3.5.5 Then comes the all-important Paragraph 21(6). Where a counter-notice is given under by the Operator, the occupier may only enforce the removal of the apparatus in pursuance of an order of the court; and, where the counter-notice specifies steps which the operator is proposing to take to secure a right to keep

the apparatus on the land, the court shall not make such an order unless it is satisfied:

3.5.5.1 that the Operator is not intending to take those steps or is being unreasonably dilatory in the taking of those steps; or

3.5.5.2 that the taking of those steps has not secured, or will not secure, for the Operator as against that person any right to keep the apparatus installed on, under or over the land or, as the case may be, to re-install it if it is removed.

In light of the orthodox interpretation of Paragraph 5, the Operator can almost always secure the necessary rights.

3.6 This orthodox view of the power of Paragraph 5, arises because the Court does not have much discretion. Paragraph 5(3) is highly prescriptive, because it *requires* the Court to grant the Operator whatever rights it has requested, provided that:

3.6.1 any prejudice to the landowner or occupier caused by the making of the Order is capable of being compensated by money (and what, you may ask, is not capable of being compensated in money); and that

3.6.2 any such prejudice is outweighed by the benefit accruing from the order, having regard to, "the principle that no person should unreasonably be denied access to an electronic communications network".[30]

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[30] Paragraph 5(3): "The court shall make an order under this paragraph if, but only if, it is satisfied that any prejudice caused by the order- (a) is capable of being adequately compensated for by money; or (b) is outweighed by the benefit accruing from the order to the persons whose access to an electronic communications network or to electronic communications services will be secured by the order".

Some say that, in light of Sir Andrew Morritt C's decision in *Geo*, describing "the principle that no person should unreasonably be denied access to an electronic communications network" as the "overriding principle" of the Code, it is very difficult so see how an Operator's claim under Paragraph 5 can ever be defeated in law. The context of that comment about "overriding principle" is this:

> [25] ... The Code was originally enacted as part of the privatisation of British Telecommunications and consequential expansion of the telecommunications market. It was substantially amended by the Communications Act 2003 which was enacted for the like purpose but in the light of all the technological developments in the intervening period. Thus the overriding principle proclaimed in paragraphs 5(4), 13(5) and elsewhere is that "no person should unreasonably be denied access to an electronics communications network or to electronic communications services".

In other words, some say this means the Code should always be interpreted pro-Operator and contra-Owner.

3.7 Even if that goes to far, as some say it does, in practical terms, an Operator who invokes Paragraph 5 is extremely unlikely to lose a Paragraph 20 Claim, unless it either fails to serve a counter-notice and/or is "unreasonably dilatory" in taking such steps as it has said it will take. No-one knows what "unreasonably dilatory" is, because there has never been a case. But it is probably the Owner's best hope, because the right to remove an Operator under Paragraph 20 is otherwise about as much use as a candy-floss hacksaw.

3.8 There is worse to come. The orthodox view is that, if an Operator also has security of tenure under the Landlord and Tenant Act 1954, the Code kills any claim under "Ground (f)" which the Owner might use to get the Operator off his land. As we all

know, the Landlord and Tenant Act 1954, section 30(1)(f), requires the landlord to prove that:[31]

> that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding ...

3.9 We also all know that the Act gives an expanded meaning to the word "intends", because of *Cunliffe v. Goodman*:[32]

> An "intention" to my mind connotes a state of affairs which the party "intending" -I will call him X- does more than merely contemplate; it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. ...
>
> Not merely is the "intention" unsatisfied if the person professing it has too many hurdles to overcome, or too little control of events; it is equally inappropriate if at the material date that person is in effect not deciding to proceed but feeling his way and reserving his decision until he shall be in possession of financial data sufficient to enable him to determine whether the payment will be commercially worthwhile.
>
> In the case of neither scheme did *[the landlord]* form a settled intention to proceed. Neither project moved out of the zone of contemplation -out of the sphere of the tentative, the provisional and the exploratory- into the valley of decision.

The test of intention, therefore, breaks down into two parts:

3.9.1 does the landlord subjectively have the stated "intention" (meaning "desire"); and

3.9.2 does the landlord objectively have the practical means to actually implement that desire?

3.10 It is that latter limb of intention that causes the problem. To prove that he has an intention, the landlord has to show that he can practically implement his scheme. The relevant date for proving that intention is upon "the termination of the current tenancy".

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31 The problem I am about to demonstrate also kills any Owner's claim for own-occupation under Ground (g): I will not go through the reasoning, because it is essentially the same.

32 *Cunliffe v. Goodman* [1950] 2 KB 237 (CA). The case was actually concerned with the Landlord and Tenant Act 1927, but was approved as appropriate for section 30(1)(f) in *Betty's Cafés Ltd. v. Phillips Furnishing Stores Ltd.* [1959] AC 20 (HL), *per* Viscount Dilhorne.

By reason of section 64 of the Act, this date is three months and 21 days after the judgment in any trial of the landlord's grounds of opposition.[33] If the relevant intention cannot be shown, but the Court is satisfied that the landlord will have the necessary intention within twelve months of the date named in the section 25 Notice, the Court may so declare and the tenant can apply for the tenancy to end on that date, rather than in accordance with section 64 of the 1954 Act.[34]

3.11 Thus, if an Operator can show that, on the balance of probabilities, he still has Code rights which will be in place at that stage, he can defeat the landlord's case. Paragraph 21(1) of the Code again:

> Where any person *is for the time being entitled to require the removal of any of the operator's electronic communications apparatus from any land* (whether under any enactment or because that apparatus is kept on, under or over that land otherwise than in pursuance of a right binding that person or for any other reason) that person shall not be entitled to enforce the removal of the apparatus except, subject to sub-paragraph (12) below, in accordance with the following provisions of this paragraph.

My italics. Sub-Paragraph (12) contains some saving provisions, which are not relevant here.

3.12 Accordingly, the landlord is not entitled to rely on Paragraph 21 on this hypothesis, because he is not "entitled to require the removal of any of the operator's electronic communications apparatus" until the Operator's tenancy is disposed of under the 1954 Act. Indeed, he cannot even give a notice under Paragraph 21(2) until he is so entitled.

3.13 But, the landlord cannot show that entitlement unless he has disposed of the tenancy under the 1954 Act. That he cannot do, unless he can prove that the Code will not prevent him from redeveloping the premises, "on the termination of the current

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33 *Dutch Oven Ltd. v. Egham Estate & Investment Co.Ltd.* [1968] 1 WLR 1483; *Somerfield Stores Ltd v. Spring (Sutton Coldfield) Ltd. (in administration) (Nº.2)* [2010] EWHC 2084 (Ch); [2010] 3 EGLR 37 (HH Judge Purle QC, sitting as a High Court judge).

34 Section 31(2).

tenancy". Accordingly, he cannot terminate the rights under the Code because of the continuation of the tenancy under the Act, and he cannot terminate the tenancy under the Act, because he cannot even begin the process to terminate the rights under the Code. It is a near-perfect "Catch-22".[35]

3.14 Some say that, even on the orthodox view, the story does not end there. The "lift-and-shift" provision in Paragraph 20 can rescue the beleaguered landowner. To explain how Paragraph 20 works, one needs to start with Sub-Paragraph (1):

> Where any electronic communications apparatus is kept installed on, under or over any land for the purposes of the operator's network, any person with an interest in that land or adjacent land may (notwithstanding the terms of any agreement binding that person) by notice given to the operator require the alteration of the apparatus on the ground that the alteration is necessary to enable that person to carry out a proposed improvement of the land in which he has an interest.

One of the many surprising things in the Code is the width of the definition of "alteration", in Paragraph 1(2):

> In this code, references to the alteration of any apparatus include references to the moving, **removal** or replacement of the apparatus.

My emphasis. A little less surprising is the definition of "improvement", in Paragraph 20(9):

> In sub-paragraph (1) above "improvement" includes development and change of use.

Thus, under Paragraph 20, an occupier can serve a notice requiring an Operator to remove its apparatus, provided that it can show its removal is, "necessary to enable *[the landowner]* to carry out a proposed *[development]* of *[the property]*".

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35 *Per* Heller, J.

3.15 Note also that Paragraph 20 is predicated upon there being a "proposed development".[36] So far as I am aware, there is no authority on how advanced the "proposals" need to be. There is, therefore, no guidance as to how far the landowner needs to have proceeded with its plans. It may be that evidence that the local planning authority would be minded to grant permission might also suffice.[37]

3.16 Some say that this tactic also only works where the Owner who serves the Paragraph 20 notice has at least a desire to undertake works of "improvement" and some ability to implement that plan, but for the Code. Some say the argument would go this way: the Paragraph 20 notice is not a break-right as such, but is conditional upon an "alteration *[being]* necessary to enable *[the landowner]* to carry out a **proposed** improvement of the land": the bold emphasis is mine. If the landowner has no such proposals, then the notice he serves may not be "genuine": in the general common law, some notices which are served to facilitate an intention or proposals are invalid and of no effect, if the server did not genuinely and actually have the relevant intention or proposals.[38]

3.17 Sub-Paragraphs 20(2)-(3) contain a notice and counter-notice provision, broadly similar to that in Paragraph 21.[39] If the Operator serves a counter-notice, it does not have to do anything to comply with the notice, unless the Court make an Order compelling it to do so. However, the terms of the Court's jurisdiction here are a little more pro-Owner here. Under Paragraph 20(5), the Court will make an Order in the Owner's favour if:

3.17.1 the alteration is necessary for the carrying out of the improvement; and

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36 In fact, so far as I know, there is no authority at all on Paragraphs 20 and 21 of the Code.

37 By an analogy with the comparable cases on "intention" under the 1954 Act: *Westminster City Council v. British Waterways Board* [1985] AC 676 (HL) and *Coppen (Trustees of the Thames Ditton Lawn Tennis Club) v. Bruce-Smith* (1998) 77 P&CR 239 (CA).

38 For a case where a notice served without a genuine intention to give effect to it rendered it ineffective as a notice, see *Earl of Stradbroke v. Mitchell* [1989] 2 EGLR 5 (Aldous J).

39 One notable difference is that the Operator who fails to counter-notice then has a statutory duty to remove himself, as opposed to the landowner having to seek an order for his removal.

3.17.2 the alteration will not substantially interfere with any service which is, or is likely to be, provided by the Operator's network; **and**

3.17.3 either:

3.17.3.1 the Operator already has all the rights he needs to make the alteration, or

3.17.3.2 the Operator could obtain them on an application made to the court under Paragraph 5 and that an application under Paragraph 5 would be likely to succeed.

3.18 That last provision looks more harmless than it is: if the Operator serves a counter-notice, he can certainly then use Paragraph 5 in an attempt to then compulsorily acquire all the rights he would need to stay on the land. So, if an Operator can make out a case under Paragraph 5, he can defeat the Paragraph 20 notice. He will, of course have to pay the landowner compensation for the loss of the development value of the Property, which can be a very serious commercial disincentive. But the apparatus stays on site.

The First Unorthodox View, or The Petite Heresy:

3.19 There are two arguments which some say solve the problem with getting rid of Operators and make it easy-peasy. The less obviously courageous approach is to push the boundaries of the extent to which it is possible to contract out of the Code. If it can be done, some say the problem can be headed off with some cautious and preventative drafting. Here is how it might be made to work.

3.20 Paragraph 27(2) states that the parties have complete autonomy to contract out of the Code, with the critical exception of Paragraph 21. For convenience, here is Paragraph 27(2) again:

> The provisions of this Code, except paragraphs 8(5) and 21 and sub-paragraph (1) above, shall be without prejudice to any rights or liabilities arising under any agreement to which the operator is a party.

In the General Regime, Paragraph 21 is the only relevant way an Operator can be made to remove its apparatus from land, apart from Paragraph 20. However, to demonstrate a right to possession under Paragraph 20, the landowner has to prove that it has a relevant intention *and* defeat any defence the Operator might run in reliance on Paragraph 20(5), as set out above. Hardly a practical contracting out mechanism?

3.21 But wait: Paragraph 20 has hidden depths. Let us look more carefully at the Operator's response to the service of a Paragraph 20 Notice, as mandated by Paragraph 20(2):

> Where a notice is given under sub-paragraph (1) above by any person to the operator, the operator **shall comply with it unless he gives a counter-notice under this sub-paragraph** within the period of 28 days beginning with the giving of the notice.

My emphasis. So, as the Code permits the "contracting out" of Paragraph 20, some say that the Operator and the Owner can agree that, if the Operator is served with a notice under Paragraph 20(1), it will not serve a counter-notice under Paragraph 20(2), and therefore lose its rights under the Code.

3.22 The theory then goes that the Owner no longer has to rely on the Code as such to obtain possession. The words emphasised amount to the imposition of a statutory duty on the Operator to vacate, which can be enforced by an injunction to restrain an ongoing breach of statutory duty by the Operator. The Operator's immunity from a damages claim also disappears, because he is no longer exercising his Code rights. Paragraph 27(3) again:

> Except as provided under the preceding provisions of this code, the operator shall not be liable to compensate any person for, or be subject to any other liability in respect of, any loss or damage **caused by the lawful exercise of any right conferred by or in accordance with this Code.**

Some say “neat”!

The Second Unorthodox View, or The Grande Heresy:

3.23 Some say there is a significantly more profound, and simple, solution to the problems caused by the interaction between the Code and the 1954 Act: there is no problem, because there is no interaction. People who say this start from the proposition that the Code is a code, and as such is self-contained. An Operator is either exercising its Code powers, or it is not.

3.24 On this hypothesis, Paragraph 2 is a statement of the essential DNA of the Code. The only rights which are conferred on an Operator under Paragraph 2 are (go on, you want to see it again):

> .... *a right for the statutory purposes—*
>
> (a) to execute any works on that land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus; or
> (b) to keep electronic communications apparatus installed on, under or over that land; or
> (c) to enter that land to inspect any apparatus kept installed (whether on, under or over that land or elsewhere) for the purposes of the operator’s network.

If one buys into the hypothesis that this creates on proprietary interest, but only gives the Operator a non-possessory right, then an Operator in occupation of land under a tenancy or even a contractual licence not expressed to be made as a wayleave under the Code is simply not exercising a Code power. The restrictions on obtaining possession in Paragraphs 20 and 21 do not apply to an Operator who is in occupation other than pursuant to a an agreement made under Paragraph 2 or imposed under Paragraph 5.

3.25 This hypothesis neatly fits together with the Landlord and Tenant Act 1954, which only applies to tenancies and where there is occupation for business purposes: see section 23:

> **Tenancies to which Part II applies**
>
> (1) Subject to the provisions of this Act, this Part of this Act applies to *any tenancy* where *the property comprised in the tenancy* is or includes premises which are *occupied by the tenant and are so occupied* for the purposes of a business carried on by him or for those and other purposes. ...
>
> (3) In the following provisions of this Part of this Act the expression "the holding", *in relation to a tenancy* to which this Part of this Act applies, *means the property comprised in the tenancy, there being excluded any part thereof which is occupied neither by the tenant nor by a person employed by the tenant and so employed for the purposes of a business* by reason of which the tenancy is one to which this Part of this Act applies.

The italics are mine: note the focus in this section on "tenancy" and "occupied". A statutory wayleave is not a "tenancy", for the reasons I have already discussed, so if the only true right governed by the Code is a wayleave, then there is no overlap between the two statutory regimes.

3.26 Moreover, for the 1954 Act, "occupation" connotes some degree of physical occupation and exercising of a degree of control. This is well explained in *Hancock & Willis (a firm) v. GMS Syndicate Ltd.*, where Eveleigh LJ said:[40]

> The phrase "occupied for the purposes of a business carried on by him" ... import, in my judgment, an element of control and user and they involve the notion of physical occupation. That does not mean physical occupation every minute of the day, provided the right to occupy continues. But it is necessary for the judge trying the case to assess the whole situation where the element of control and use may exist in variable degrees. At the end of the day it is a question of fact for the tribunal to decide, treating the words as ordinary words in the way in which I have referred to them.

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40 [1983] 1 EGLR 70, 73 (CA).

This is why even a proper tenancy of a non-possessory right, such as a mere easement cannot be renewed under the 1954 Act.[41]

3.27 Just as an aside, some say that the Code is technology-neutral, and perhaps it is. Might be difficult to say, however, that the Landlord and Tenant Act 1954 is: how *does* a cable Operator "occupy" a bundle of fibres, precisely? Some say we have to resort to the scientific theory that light is both a wave and a particle, so the Operator can possess the light in the fibres.[42] Some say that mast Operators actually have their own problems, though: if there are different Operators all with their own locked equipment cabinets at a single site, which one of them is in occupation for lease renewal purposes?

3.28 Moving back to the idea that Code = Wayleave and nothing else, some say there are certain problems with this hypothesis, because the Code applies on its face to tenancies, as one can see from Paragraph 21(1):

> Where any person is for the time being entitled to require the removal of any of the operator's electronic communications apparatus from any land (*whether under any enactment or because that apparatus is kept on, under or over that land otherwise than in pursuance of a right binding that person or for any other reason*) that person shall not be entitled to enforce the removal of the apparatus except, subject to sub-paragraph (12) below, in accordance with the following provisions of this paragraph.

My emphasis: "otherwise than in pursuance of a right" might be said to show that Paragraph 21 is clearly binding on those Owners with a Code Operator on their land, "Otherwise than in pursuance of a right binding" on them. If "right" means "right under the Code", then that shows Paragraph 21 applies to situations other than occupation pursuant to Code rights. Does that not torpedo the "mutual exclusivity argument"?

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41 *Land Reclamation Co.Ltd. v. Basildon District Council* [1979] 1 WLR 767 (CA).

42 http://en.wikipedia.org/wiki/Wave%E2%80%93particle_duality accessed 29.x.12.

3.29 Some say not, because Paragraph 21 is not a provision restricting Owners in their ability to remove Operators from their land. Quite the opposite, as the same italics show. Paragraph 21 is properly understood as an additional power, which allows an Owner to remove or relocate an Operator notwithstanding the existence of any agreement binding on the Operator. It is actually a statuary right of removal for the benefit of Owners against the interests of Operators. The same point can be made in respect of Paragraph 20.

3.30 Some say that this analysis still does not properly explain away the width with which Paragraphs 20 and 21 have been drafted. Some say the right answer lies by asking pondering these points:

3.30.1 If one applies the hypothesis that a right under the Code is only a wayleave, and that because the Code is a self-contained statutory mechanism, one avoids the Code and the 1954 Act forming a mutually destructive vicious circle. Is it right to ascribe to the draftsman of the Code, no matter how big a wally you assume him to be, an intention to create a Code which forms a viscous circle with the 1954 Act? Or do you ascribe to him the view that the two are mutually exclusive, because the Code is only for non-possessory wayleaves and the 1954 Act is only for possessory tenancies?

3.30.2 If you say that the Code only applies to agreements for wayleaves, granted consensually or by operation of Paragraph 5, it becomes un-necessary to say that Paragraph 21 protects the occupation of an Operator who is, and has always been, a trespasser. Some say, no matter how big a wally you assume the draftsman of the Code to be, he is unlikely to have intended a literal reading of Paragraph 21 to protect a trespasser.

3.30.3 If you say that the Code only applies to agreements for wayleaves, granted consensually or by operation of Paragraph 5, it becomes unnecessary to read the immunity from suit conferred by Paragraph 27(3) is being astonishingly wide. It protects only Operators exercising rights conferred under Paragraph 2 or 5, because the Code catches no other proprietary rights.

3.31 Some say that there are limits to how stupid a Court is prepared to assume the Parliamentary draftsman is, despite all of the evidence to the contrary. Some say otherwise.

4 Redial - Circularity and Code Rights:

4.1 Here is a short but deeply amusing argument. It is funny, no matter whether it is right or wrong. Most Operators serve a Paragraph 21(3) counter-notice to anything which could be a demand for the removal of apparatus, and even things which could not be.[43] This enthusiasm might be because the consequences of not giving a counter-notice is that statutory duty to get off the land. Here it is again, for old time's sake:

> Where a notice is given under sub-paragraph (1) above by any person to the operator, the operator shall comply with it unless he gives a counter-notice under this sub-paragraph within the period of 28 days beginning with the giving of the notice.

4.2 Can an Operator who has accidentally failed to give a Paragraph 21(3) counter-notice calmly respond to an injunction to enforce the statutory duty to go with a Paragraph 5 notice, to re-acquire all the rights it has just lost by failing to counter-notice? For that matter, if a Court makes an Order under paragraph 21(6) permitting an Owner to remove the Operator, can an Operator simply make a fresh application under Paragraph 5.

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[43] The in-house legal team at one Operator even sent my fees clerk a counter-notice in response to an invoice for my advice on whether an Owner was entitled to give a Paragraph 21(2) notice. Fact.

4.3 Some say that there is nothing expressly stated on the face of the Code which prevents this from happening, so "why not?"

4.4 Some say that, although it is true that there is nothing expressed on the face of the Code which prevents an Operator from re-dialling Paragraph 5 every time his rights are ended by some other route, say by reason of having been unreasonably dilatory in asserting his rights for Paragraph 21(6) purposes, Parliament cannot have intended Paragraph 21(2) *et al* to have no real content. Some say that permitting the Operator to put itself into as good a position by not serving a counter-notice as it would have been in by serving one is so obviously bonkers, the Code has to be construed as containing a limitation on just serving a stream of Paragraph 5 Notices.

5 Retention of Title - Whose Line is it Anyway?

5.1 Some say the most obviously bonkers bit of the Code is Paragraph 27(4):

> The ownership of any property shall not be affected by the fact that it is installed on or under, or affixed to, any land by any person in exercise of a right conferred by or in accordance with this code.

George Orwell would have been proud of this as an example of "doublethink", because it simultaneously means two conflicting things.[44]

5.2 Before we look at how that happens, let us spend a moment on what the problem is. It is a general rule of law is that whenever a chattel is sufficiently "annexed" to the

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44 "The power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them... To tell deliberate lies while genuinely believing in them, to forget any fact that has become inconvenient, and then, when it becomes necessary again, to draw it back from oblivion for just as long as it is needed, to deny the existence of objective reality and all the while to take account of the reality which one denies – all this is indispensably necessary. Even in using the word doublethink it is necessary to exercise doublethink. For by using the word one admits that one is tampering with reality; by a fresh act of doublethink one erases this knowledge; and so on indefinitely, with the lie always one leap ahead of the truth." George Orwell, *1984*, chapter 3.

land, it becomes part of the land. This is a very, very old rule of law, but one which so forms the foundations of the law of property that it can get forgotten.[45] Moreover, the parties to a lease or a sale agreement *cannot* contract out of this rule.

5.3 In *Melluish (Inspector of Taxes) v. B.M.I. (Nº. 3) Ltd.*, in order for the defendant finance house to avoid some serious tax, the things it was leasing to various local authorities had to be personal property, or chattels, not real property such as buildings.[46] The lease between the finance house and the local authority said, in terms, that the items leased were chattels which remained BMI's personal property, notwithstanding that it might have become affixed to any land or building. As these items of "personal property" included Burnley municipal crematorium, it might not be that surprising that the tax man did not accept the argument.

5.4 Neither did the House of Lords. Lord Browne-Wilkinson said that the terms expressly agreed between the parties to a contract could not affect the determination of the question whether, in law, the chattel has become a fixture and, as such, *belonged to the owner* of the land to which it was affixed. That was a question of law *impossible* to contract out of. The most the parties could agree was that the person who owned the chattel before it became affixed, and so became part of the land, could be given contractual rights to sever that object from the land. Once severed, it would return to being a chattel in law. Once the object was severed from the land, legal title thereto could be returned, by the contract, to the original owner. Lord Browne-Wilkinson said As Lord Browne-Wilkinson said:[47]

> The terms expressly or implicitly agreed between the fixer of the chattel and the owner of the land cannot affect the determination of the question whether, in law, the chattel has become a fixture and therefore in law belongs to the owner of the soil ... The terms of such

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45 A rule of law so venerable, it is still expressed in Latin: *quicquid plantatur solo, solo cedit*. Freely translatable as "nail it down; give it away".

46 [1996] AC 454 (HL).

47 Page 473.

> agreement will regulate the contractual rights to sever the chattel from the land as between the parties to that contract and, where an equitable right is conferred by the contract, as against certain third parties. But such agreement cannot prevent the chattel, once fixed, becoming in law part of the land and as such owned by the owner of the land so long as it remains fixed.

5.5 Of course, Parliament is sovereign, so if it wanted to disapply this rule of law from electronic communications apparatus under the Code, it plainly could do so. If Parliament wishes to bog-up some drafting, it can plainly do so.

5.6 Some say that, as the the basic rule of law is that the rights of ownership of items annexed to the soil inevitably passes from the chattel owner to the soil owner, Paragraph 27(4) is confirming that rule, precisely because "the ownership of any property shall not be affected by that fact that it is ... affixed to any land ... in exercise of a right conferred by ... this Code". If the Code makes no difference to rights of ownership, then ownership of an annexed chattel must pass to the Owner, subject to any contractual right to remove it the Operator has negotiated for, either before or after annexing the kit.

5.7 Some say that such an interpretation is obviously mad, and Paragraph 27(4) is abrogating the usual rule. When Paragraph 27(4) states that "the ownership of any property shall not be affected by that fact that it is ... affixed to any land ... in exercise of a right conferred by ... this Code", it means that the present ownership of a chattel is not affected by subsequent annexation. The kit is the Operator's no matter how annexed it is.

5.8 Some say that the Code is technology neutral. Some say that Mast Operators might not mind if the right answer to this exercise in doublethink is that they can abandon redundant masts on the basis that the mast now belongs to the Owner by reason of

annexation.[48] Some say that Cable Operators who have not negotiated leases might be surprised to realise that the consequence of not having leases is that they have irretrievably lost ownership of their apparatus, even if it is irremovable by the Owner whilst being used. Some say "doubleplusungood"?

6 On the Wrong Tariff? - Compensation and Compensation:

6.1 The last of my Code Conundrums is the timeless and ineffable mystery of what Paragraph 7(1) means, when it provides for two distinct payments: a payment of "fair and reasonable" "consideration" for the grant of the rights conferred, and "adequate compensation" for "any loss and damage sustained":

> (a) such terms with respect to the payment of **consideration** in respect of the giving of the agreement, or the exercise of the rights to which the order relates, as it appears to the court **would have been fair and reasonable if the agreement had been given willingly and subject to the other provisions of the order**; and
>
> (b) such terms as appear to the court appropriate for ensuring that that person and persons from time to time bound by virtue of paragraph 2(4) above by the rights to which the order relates are **adequately compensated (whether by the payment of such consideration or otherwise) for any loss or damage sustained by them** in consequence of the exercise of those rights.

My emphasis.

6.2 Some say that those are obviously distinct, in that "compensation" is a payment for disruption or damage to the occupier's premises, whereas "consideration" is a payment for the grant of the right, over and above paying for any losses flowing from

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[48] Paragraph 22 would not prevent this argument, because it says an Operator may not keep redundant apparatus on an Owner's land. It says nothing about whether the apparatus an Operator has no use for remains his. Paragraph 22 says: "Without prejudice to the preceding provisions of this code, where the operator has a right conferred by or in accordance with this code for the statutory purposes to keep electronic communications apparatus installed on, under or over any land, he is not entitled to keep that apparatus so installed if, at a time when the apparatus is not, or is no longer, used for the purposes of the operator's network, there is no reasonable likelihood that it will be so used."

it. Some say that, but the Court of Appeal have managed to come to different conclusions, at least in another, if related, context.

6.3 The Electricity Act 1989, Schedule 4, paragraph 7 provides that landowners should receive compensation "in respect of the grant" for the imposition of electricity wayleaves. The Court of Appeal held in *Welford v. EDF Energy Networks (LPN) plc* that "compensation" includes an element of price, upholding an award by the Lands Tribunal of £2,360.00, "in respect of the value of the wayleave".[49]

6.4 In the special regimes case of *Geo Networks*, the Court of Appeal held that the payment of consideration and compensation for crossing a canal included something for the grant of the right to initially install the apparatus, but nothing for the rights to retain it once the electronic communications apparatus, once it was installed: a construction Lewison J had rejected as a statutory "buy one get one free".[50] In other words, the reference to "consideration" had no real content.

6.5 In the context of the general regime, there has only been one considered judgment on the subject of what "compensation" means under the Code: the decision of HH Judge Hague QC, in *Mercury Communications Ltd. v. London and Indian Dock Investments Ltd*.[51] Some say that this decision has been approved by the Court of Appeal in *Cabletel Surrey & Hampshire Ltd. v. Brookwood Cemetery Ltd.*, but that is not really the case, for the reason Mance LJ gave:[52]

> [6] So far as concerns the interpretation of these paragraphs [5 and 7] , both parties were content before the judge (and before us) to adopt as correct the statements of principle in a judgment of His Honour Judge Hague QC in *Mercury Communications Ltd. v. London and Indian Dock Investments Ltd.* We have not therefore heard argument on any

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49 [2007] 2 P & CR 15 (CA).

50 Lewison J at [2010] 1 WLR 2576, [39]; Court of Appeal at [2011] 1 WLR 1487, [25]-[30]. Lewison J was overrules, proving the old saying, "He who laughs last, BOGOFs longest".

51 (1993) 69 P&CR 135 (Mayor's and City County Court).

52 [2002] EWCA Civ 720.

> point which might or might be thought to arise as to the proper approach, and we are not in the circumstances to be taken as expressing any concluded view on any such point. However, we can, we think, highlight certain aspects which emerge from the judgment in *Mercury*, since they are, as we say, common ground before us.

Some say that is Judge-speak for "the case is obviously wrong to us, if not to Counsel appearing before us, so we'll leave it alone".

6.6 In *Mercury Communications*, Mercury argued that Paragraph 7 had to be interpreted in accordance with compulsory purchase principles, so that (put crudely) the value **to Mercury** of laying its cables under LIDI's land would be disregarded. Mercury relied on *BP Petroleum Developments Ltd. v. Ryder*, a case under the Mines (Working Facilities and Support) Act 1966, which was said by Mercury to be analogous to the Code.[53]

6.7 HH Judge Hague QC refused to do follow the *BP Petroleum Developments* case, stating that it was "quite untenable" to apply compulsory purchase principles to the Code and that "the Code must be applied without regard to compulsory purchase principles".[54] He decided that the Code created its own valuation mechanism, which required him to decide what was "fair and reasonable" consideration:

6.7.1 which excludes any element of profit share or ransom, but

6.7.2 going beyond a figure which simply reflects the diminution in value of the occupier's interest in the land.

6.8 The Judge went on to decide that such consideration was best determined by looking at comparable transactions, bearing in mind the bargaining strengths of both parties and the importance and value of the proposed right to the grantee. That of course

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53 [1987] 2 EGLR 233 (Peter Gibson J).

54 Page 156. The following passage attempts to summarise pages 161-164 and 168-169.

requires the use of comparables; the best comparables available in *Mercury* were deals made between the same parties, but the Judge then took the view that what was required was not simply market value, because "fair and reasonable consideration" meant something more than a determination of the market value of the rights. Determining a "market value" would involve an "objective assessment of a factual matter", but "fair and reasonable consideration" required "an element of subjective judicial opinion", depending on a Judge's own perception of what was fair and reasonable:[55]

> It is in my judgment clear that what I have to determine is not the same as what the result in the market would have if the grant had been given willingly. That is, however, far from saying that the market result is irrelevant or can afford no guidance. Indeed, in my view the market result is the obvious starting point; and in most cases it will come to the same thing as what is "fair and reasonable" … But there may be circumstances, of which the absence of any real market may be one, in which a judge could properly conclude that what the evidence may point to as being the likely market result is not a result which is "fair and reasonable"

Some say this is *"How to Make A Badly Drafted Statute Worse, Volume 1, Chapter 1"...*

6.9 Now, in so holding, Judge Hague decided that the so-called *Pointe Gourde* principle had no application to the Code.[56] This matters. In a sentence, *Pointe Gourde* principle is this: the calculation of compensation for the compulsory purchase of land must exclude any increase in value of the land acquired attributable solely to the scheme of development giving rise to the compulsory acquisition.[57] In other words, the land acquired is valued by reference to its value to the owner, in a world where there

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55 At 144-5.

56 Named after *Pointe Gourde Quarrying and Transport Co.Ltd. v. Sub-Intendent of Crown Lands* [1947] AC 565, 572 *per* Lord MacDermott (PC);.

57 *Pointe Gourde* at page 572 *per* Lord MacDermott. See also *Transport for London v. Spirerose Ltd.* [2009] UKHL 44; [2009] 1 WLR 1797, [88] *per* Lord Collins.

is no scheme for compulsory acquisition, and not by reference to the value to the person exercising compulsory acquisition powers.[58]

6.10 This disregard of the effect of the scheme does not require the valuer to value *only* the present use of the land being acquired. He must also take into account also any other more beneficial purpose to which it could be put in the foreseeable future, unless that future value is wholly the consequence of the very scheme which is otherwise to be disregarded. The valuer may, therefore, take the view that the land acquired had an inherent value as a ransom strip, but irrespective of the existence of the scheme for which it was being appropriated. However, in the vast majority of cases, *Pointe Gourde* destroys any form or ransom value or profit-share based valuation.

6.11 HH Judge Hague had rejected any reliance on the *Star Ryder* case on the wording of the Petroleum (Production) Act 1934. That statute has subsequently been considered by the Supreme Court, and in a way which makes the decision in *Mercury* very difficult to sustain. This is the case of *Bocardo SA v. Star Energy UK Onshore Ltd*.[59] The 1934 Act nationalised all underground reserves of oil and petroleum, and created a system of licencing companies to extract petrol. Star had such a licence, but failed to use its compulsory acquisition powers when extracting oil and natural gas from a naturally occurring reserve in, of all places, Oxted, Surrey: it simply drilled its pipe in at an angle from its land, some distance away, and slurped the oil out from under.

6.12 For our purposes, all we need to do is note that the operative words of the 1934 Act are the same as those in Paragraphs 5 and 7 of the Code, and note that the majority of the Court interpreted them as importing standard compulsory purchase principles,

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58 In *Stebbing v. Metropolitan Board of Works* (1870) LR 6 QB 37, 42, cited by Lord Collins in *Spirerose*, Cockburn CJ said that the landowner should be compensated to the extent of his loss, "tested by what was the value of the thing to him, not by what will be its value to the persons acquiring it".

59 [2010] UKSC 35; [2011] 1 AC 380 (SC).

including the *Pointe Gourde* principle. Only one Justice, Lord Clarke, directly commented on the decision of Judge Hague in *Mercury*, but he was one of the two dissenters on this issue.[60] Giving the leading judgment for the majority Lord Brown was unimpressed with the logic used in *Mercury*, even though he did not refer to the case directly. Lord Brown thought that the use of particular words was not necessary to invoke the general principles of how to compensate for a compulsory purchase.[61]

6.13 On the contrary, provisions in *any* statute which facilitate the compulsory purchase of land should be analysed by reference to the policy underlying such statutes, because, quoting from Lord Nicholls in *Waters*, he said, "Parliament cannot have intended that the acquiring authority should pay as compensation a larger amount than the owner could reasonably have obtained for his land in the absence of *[that]* power".[62] Lord Brown continued:

> [74] This issue cannot be resolved by reference simply to the language of section 8(2): what is fair and reasonable compensation as between a willing grantor and a willing grantee must inevitably depend upon whether the willing grantee is or is not entitled in the notional negotiation between the parties to exploit the position he would be in but for the grant of compulsory purchase powers to deny the licence-holder access to the petroleum he is statutorily empowered to win. It depends, in short, upon whether the court construing section 8(2) should approach it with the same general attitude and expectation as ordinarily it brings to the construction of statutory provisions dealing with compensation for compulsory land acquisition. If so, the *Pointe Gourde* principle applies: the landowner's compensation should not be assessed at more than he could reasonably have attained for the grant of the ancillary right had the licence-holder not enjoyed a statutory power to acquire it compulsorily for a particular purpose...

This is not the right talk to go into microscopic detail, so please take it from me that all of the arguments which were put to, and accepted by, HH Judge Hague in *Mercury Communications* were also run before the Supreme Court and rejected by a 3/2

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60 Lord Hope DPSC also dissented on this issue, on a similar basis to Lord Clarke, but without reference to *Mercury Communications*.

61 Lord Collins agreed at [101].

62 Paragraph [18] of Lord Nicholls' speech in *Waters v. Welsh Development Agency*.

majority. It follows that the correctness of *Mercury Communications* is now definitely up for grabs...

6.14 In short, some say total confusion now reigns.

7 Conclusion - Keep Calm and ...:

7.1 Some say that, if there have been no cases, there are no answers and the whole Code might be wholly re-written in the next couple of years anyway, is there any reason why you should continue listening to me? And, of course, Frankie says "relax". I say it must be time for me to hang up...[63]

N. TAGGART
29th October 2012

Landmark CHAMBERS

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63 Some of those who have said things to me, or who have told me interesting things that other people say, and to whom I am grateful include: all the in-house Code Operator lawyers I have acted for, who I know to prefer anonymity; [redacted] These good people should all be absolved from any blame for any of this, as all this mischief is of my own making.

LAW COMMISSION
CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

RESPONSE FORM

This optional response form is provided for consultees' convenience in responding to our Consultation Paper on the Electronic Communications Code.

You can view or download the Consultation Paper free of charge on our website at:

www.lawcom.gov.uk (see A-Z of projects > Electronic Communications Code)

The response form includes the text of the consultation questions in the Consultation Paper (numbered in accordance with Part 10 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

The reference which follows each question identifies the Part of the Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

As noted at paragraph 1.34 of the Consultation Paper, it would be helpful if consultees would comment on the likely costs and benefits of any changes provisionally proposed when responding. The Department for Culture, Media and Sport may contact consultees at a later date for further information.

We invite responses from 28 June to 28 October 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or

by post to: James Linney, Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ

Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information 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 Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

Your details

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99b Kiln Ride Finchampstead Wokingham RG40 3PD
Telephone number:
[redacted]
Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):
Hibernia Atlantic
If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:
As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: GENERAL

10.3 We provisionally propose that code rights should include rights for Code Operators:

(1) to execute any works on land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus;

(2) to keep electronic communications apparatus installed on, under or over that land; and

(3) to enter land to inspect any apparatus.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.16.

10.4 Do consultees consider that code rights should be extended to include further rights, or that the scope of code rights should be reduced?

Consultation Paper, Part 3, paragraph 3.17.

10.5 We provisionally propose that code rights should be technology neutral.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.18.

10.6	Do consultees consider that code rights should generate obligations upon Code Operators and, if so, what? Consultation Paper, Part 3, paragraph 3.19.

10.7	We ask consultees to tell us their views on the definition of electronic communications apparatus in paragraph 1(1) of the Code. Should it be amended, and if so should further equipment, or classes of equipment, be included within it? Consultation Paper, Part 3, paragraph 3.27.

10.8	We ask consultees to tell us their views about who should be bound by code rights created by agreement, and to tell us their experience of the practical impact of the current position under the Code. Consultation Paper, Part 3, paragraph 3.40.

10.9 We ask consultees for their views on the appropriate test for dispensing with the need for a landowner's or occupier's agreement to the grant of code rights. In particular, consultees are asked to tell us:

(1) Where the landowner can be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code, should it be possible for the tribunal to make the order sought without also weighing the public benefit of the order against the prejudice to the landowner?

(2) Should it be possible to dispense with the landowner's agreement in any circumstances where he or she cannot be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code?

(3) How should a revised code express the weighing of prejudice to the landowner against benefit to the public? Does the Access Principle require amendment and, if so, how?

Consultation Paper, Part 3, paragraph 3.53.

10.10 We ask consultees to tell us if there is a need for a revised code to provide that where an occupier agrees in writing for access to his or her land to be interfered with or obstructed, that permission should bind others with an interest in that land.

Consultation Paper, Part 3, paragraph 3.59.

10.11 We ask consultees to tell us their views about the use of the right for a Code Operator to install lines at a height of three metres or more above land without separate authorisation, and of any problems that this has caused.

Consultation Paper, Part 3, paragraph 3.67.

10.12 Consultees are asked to tell us their views about the right to object to overhead apparatus. Consultation Paper, Part 3, paragraph 3.68.

10.13 Consultees are asked to give us their views about the obligation to affix notices on overhead apparatus, including whether failure to do so should remain a criminal offence. Consultation Paper, Part 3, paragraph 3.69.

10.14 Do consultees consider that the current right for Code Operators to require trees to be lopped, by giving notice to the occupier of land, should be extended: (1) to vegetation generally; (2) to trees or vegetation wherever that interference takes place; and/or (3) to cases where the interference is with a wireless signal rather than with tangible apparatus? Consultation Paper, Part 3, paragraph 3.74.

10.15 We ask consultees:

(1) whether Code Operators should benefit from an ancillary right to upgrade their apparatus; and

(2) whether any additional payment should be made by a Code Operator when it upgrades its apparatus.

Consultation Paper, Part 3, paragraph 3.78.

10.16 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from sharing their apparatus causes difficulties in practice;

(2) whether Code Operators should benefit from a general right to share their apparatus with another (so that a contractual term restricting that right would be void); and/or

(3) whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it shares its apparatus.

Consultation Paper, Part 3, paragraph 3.83.

10.17 We ask consultees to what extent section 134 of the Communications Act 2003 is useful in enabling apparatus to be shared, and whether further provision would be appropriate.

Consultation Paper, Part 3, paragraph 3.88.

10.18 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from assigning the benefit of agreements that confer code rights causes difficulties in practice;

(2) whether Code Operators should benefit from a general right to assign code rights to other Code Operators (so that a contractual term restricting that right would be void); and

(3) if so, whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it assigns the benefit of any agreement.

Consultation Paper, Part 3, paragraph 3.92.

10.19 We ask consultees to tell us if they consider that any further ancillary rights should be available under a revised code.

Consultation Paper, Part 3, paragraph 3.94.

10.20 We ask consultees to tell us if they are aware of difficulties experienced in accessing electronic communications because of the inability to get access to a third party's land, whether by the occupiers of multi-dwelling units or others.

Consultation Paper, Part 3, paragraph 3.100.

10.21 Do consultees see a need for a revised code to enable landowners and occupiers to compel Code Operators to use their powers to gain code rights against third parties? Consultation Paper, Part 3, paragraph 3.101.

10.22 Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used? Consultation Paper, Part 3, paragraph 3.102.

10.23 We ask consultees: (1) to what extent unlawful interference with electronic communications apparatus or a Code Operator's rights in respect of the same causes problems for Code Operators and/or their customers; (2) to what extent any problem identified in answer to (1) above is caused by a Code Operator having to enforce its rights through the courts or the nature of the remedy that the courts can award; and (3) whether any further provision (whether criminal or otherwise) is required to enable a Code Operator to enforce its rights. Consultation Paper, Part 3, paragraph 3.106.

10.24	We ask consultees whether landowners or occupiers need any additional provision to enable them to enforce obligations owed to them by a Code Operator. Consultation Paper, Part 3, paragraph 3.107.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: SPECIAL CONTEXTS

10.25 We provisionally propose that the right in paragraph 9 of the Code to conduct street works should be incorporated into a revised code, subject to the limitations in the existing provision.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.11.

10.26 We ask consultees to let us know their experiences in relation to the current regime for tidal waters and lands held by Crown interests.

Consultation Paper, Part 4, paragraph 4.20.

[redacted]

As identified in paragraph 4.17 of the Consultation Paper, it is not immediately apparent to Hibernia why Crown tidal waters and lands should benefit from the Code exemption when other tidal waters and lands and foreshore (whether or not in Crown ownership) do not. [redacted] Hibernia, and potentially other Code Operators, face real material commercial issues where the Crown withholds agreement or imposes terms which are commercially unviable for any operator.

10.27 We seek consultees' views on the following questions.

(1) Should there be a special regime for tidal waters and lands or should tidal waters and lands be subject to the General Regime?

(2) If there is to be a special regime for tidal waters and lands, what rights and protections should it provide, and why?

(3) Should tidal waters and lands held by Crown interests be treated differently from other tidal waters and lands?

Consultation Paper, Part 4, paragraph 4.21.

(1) Hibernia are of the view that there does not need to be a special regime as the provisions of the General Regime (including provisions for payment under a revised code and method of valuation) will provide the adequate balancing exercise between the benefit accruing from granting a right and the prejudice caused by the order. This is particularly so as the Code must be read in light of the statutory protection governing coastal waters set out in the Marine and Coastal Access Act 2009.
(2) As mentioned above Hibernia do not believe this is appropriate.
(3) As you will see from the response to paragraph 10.26, Hibernia can see no justification for differentiating the ownerships in tidal waters and lands. The current Crown exemption should be removed.

10.28 We ask consultees:

(1) Is it necessary to have a special regime for linear obstacles or would the General Regime suffice?

(2) To what extent is the linear obstacle regime currently used?

(3) Should the carrying out of works not in accordance with the linear obstacle regime continue to be a criminal offence,or should it alternatively be subject to a civil sanction?

(4) Are the rights that can be acquired under the linear obstacle regime sufficient (in particular, is limiting the crossing of the linear obstacle with a line and ancillary apparatus appropriate)?

(5) Should the linear obstacle regime grant any additional rights or impose any other obligations (excluding financial obligations)?

Consultation Paper, Part 4, paragraph 4.30.

10.29 We provisionally propose that a revised code should prevent the doing of anything inside a "relevant conduit" as defined in section 98(6) of the Telecommunications Act 1984 without the agreement of the authority with control of it. Do consultees agree? Consultation Paper, Part 4, paragraph 4.34.

10.30 We provisionally propose that the substance of paragraph 23 of the Code governing undertakers' works should be replicated in a revised code. Do consultees agree? Consultation Paper, Part 4, paragraph 4.40.

10.31 We provisionally propose that a revised code should include no new special regimes beyond those set out in the existing Code. Do consultees agree? Consultation Paper, Part 4, paragraph 4.43

ALTERATIONS AND SECURITY

10.32 We provisionally propose that a revised code should contain a procedure for those with an interest in land or adjacent land to require the alteration of apparatus, including its removal, on terms that balance the interests of Code Operators and landowners and do not put the Code Operators' networks at risk. Do consultees agree? Consultation Paper, Part 5, paragraph 5.11.	

10.33 Consultees are asked to tell us their views about the alteration regime in paragraph 20 of the Code; does it strike the right balance between landowners and Code Operators? Consultation Paper, Part 5, paragraph 5.12.	

10.34 We provisionally propose that it should not be possible for Code Operators and landowners to contract out of the alterations regime in a revised code. Do consultees agree? Consultation Paper, Part 5, paragraph 5.13.	

10.35	We seek consultees' views on the provisions in paragraph 14 of the Code relating to the alteration of a linear obstacle. Do consultees take the view that they strike an appropriate balance between the interests involved, and should they be modified in a revised code? Consultation Paper, Part 5, paragraph 5.18.

10.36	We provisionally propose that a revised code should restrict the rights of landowners to remove apparatus installed by Code Operators. Do consultees agree? Consultation Paper, Part 5, paragraph 5.47.

10.37	We provisionally propose that a revised code should not restrict the rights of planning authorities to enforce the removal of electronic communications apparatus that has been installed unlawfully. Do consultees agree? Consultation Paper, Part 5, paragraph 5.48.

10.38 We ask consultees to tell us their views about the procedure for enforcing removal. Should the onus remain on landowners to take proceedings? If so, what steps, if any, should be taken to make the procedure more efficient? Consultation Paper, Part 5, paragraph 5.49.

10.39 We ask consultees to tell us whether any further financial, or other, provisions are necessary in connection with periods between the expiry of code rights and the removal of apparatus. Consultation Paper, Part 5, paragraph 5.50.

10.40 We provisionally propose that Code Operators should be free to agree that the security provisions of a revised code will not apply to an agreement, either absolutely or on the basis that there will be no security if the land is required for development. Do consultees agree? Consultation Paper, Part 5, paragraph 5.51.

10.41	Do consultees agree that the provisions of a revised code relating to the landowner's right to require alteration of apparatus, and relating to the security of the apparatus, should apply to all equipment installed by a Code Operator, even if it was installed before the Code Operator had the benefit of a revised code? Consultation Paper, Part 5, paragraph 5.56.

FINANCIAL AWARDS UNDER THE CODE

In responding to these questions, please note the definitions of "compensation" and "consideration" adopted at paragraph 6.5 and following of the Consultation Paper.

10.42 We provisionally propose that a single entitlement to compensation for loss or damage sustained by the exercise of rights conferred under the Code, including the diminution in value of the claimant's interest in the land concerned or in other land, should be available to all persons bound by the rights granted by an order conferring code rights. Do consultees agree? Consultation Paper, Part 6, paragraph 6.35.

10.43 We ask consultees whether that right to compensation should be extended to those who are not bound by code rights when they are created but will be subsequently unable to remove electronic communications apparatus from their land. Consultation Paper, Part 6, paragraph 6.36.

10.44 We provisionally propose that consideration for rights conferred under a revised code be assessed on the basis of their market value between a willing seller and a willing buyer, assessed using the second rule contained in section 5 of the Land Compensation Act 1961; without regard to their special value to the grantee or to any other Code Operator. Do consultees agree? We would be grateful for consultees' views on the practicability of this approach, and on its practical and economic impact. Consultation Paper, Part 6, paragraph 6.73.

10.45 Consultees are also invited to express their views on alternative approaches; in particular, the possibility of a statutory uplift on compensation (with a minimum payment figure in situations where no compensation would be payable). Consultation Paper, Part 6, paragraph 6.74.	

10.46 We provisionally propose that there should be no distinction in the basis of consideration when apparatus is sited across a linear obstacle. Do consultees agree? Consultation Paper, Part 6, paragraph 6.78.	

10.47 We provisionally propose that, where an order is made requiring alteration of a Code Operator's apparatus, the appropriate body should be entitled to consider whether any portion of the payment originally made to the person seeking the alteration in relation to the original installation of that apparatus should be repaid. Do consultees agree? Consultation Paper, Part 6, paragraph 6.83.	

TOWARDS A BETTER PROCEDURE

10.48 We provisionally propose that a revised code should no longer specify the county court as the forum for most disputes.

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.26.

10.49 We ask for consultees' views on the suitability of the following as forums for dispute resolution under a revised code:

(1) the Lands Chamber of the Upper Tribunal (with power to transfer appropriate cases to the Property Chamber of the First-tier Tribunal or vice versa);

(2) a procedure similar to that contained in section 10 of the Party Wall etc Act 1996; and

(3) any other form of adjudication.

Consultation Paper, Part 7, paragraph 7.27.

10.50 We provisionally propose that it should be possible for code rights to be conferred at an early stage in proceedings pending the resolution of disputes over payment.

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.31.

10.51 We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay. Consultation Paper, Part 7, paragraph 7.32.

10.52 We seek consultees' views as to how costs should be dealt with in cases under a revised code, and in particular their views on the following options: (1) that as a general rule costs should be paid by the Code Operator, unless the landowner's conduct has unnecessarily increased the costs incurred; or (2) that costs should be paid by the losing party. Consultation Paper, Part 7, paragraph 7.37

10.53 We also ask consultees whether different rules for costs are needed depending upon the type of dispute. Consultation Paper, Part 7, paragraph 7.38.

10.54 We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service. Do consultees agree? Consultation Paper, Part 7, paragraph 7.52.

10.55 Do consultees consider that the forms of notices available to Code Operators could be improved? If so, how? Consultation Paper, Part 7, paragraph 7.53.

10.56 Do consultees consider that more information is needed for landowners? If so, what is required and how should it be provided? Consultation Paper, Part 7, paragraph 7.54.

10.57	We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms. Consultation Paper, Part 7, paragraph 7.60.

INTERACTION WITH OTHER REGIMES

10.58	We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease. Do consultees agree? Consultation Paper, Part 8, paragraph 8.22.

10.59	We provisionally propose that where an agreement conferring a right on a Code Operator also creates an interest in land of a type that is ordinarily registrable under the land registration legislation, the interest created by the agreement should be registrable in accordance with the provisions of the land registration legislation, but that a revised code should make it clear that its provisions as to who is bound by the interest prevail over those of the land registration legislation. Do consultees agree? Consultation Paper, Part 8, paragraph 8.33.

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

10.60 We ask consultees to tell us: (1) whether they are aware of circumstances where the funds set aside under regulation 16 have been called upon; (2) what impact regulation 16 has on Code Operators and on Ofcom; (3) if a regime is required to cover potential liabilities arising from a Code Operator's street works; and (4) if the answer to (3) is yes, what form should it take? Consultation Paper, Part 9, paragraph 9.14.

10.61 We ask consultees for their views on the Electronic Communications Code (Conditions and Restrictions) Regulations 2003. Is any amendment required? Consultation Paper, Part 9, paragraph 9.39.

LAW COMMISSION
CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

RESPONSE FORM

This optional response form is provided for consultees' convenience in responding to our Consultation Paper on the Electronic Communications Code.

You can view or download the Consultation Paper free of charge on our website at:

www.lawcom.gov.uk (see A-Z of projects > Electronic Communications Code)

The response form includes the text of the consultation questions in the Consultation Paper (numbered in accordance with Part 10 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

The reference which follows each question identifies the Part of the Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

As noted at paragraph 1.34 of the Consultation Paper, it would be helpful if consultees would comment on the likely costs and benefits of any changes provisionally proposed when responding. The Department for Culture, Media and Sport may contact consultees at a later date for further information.

We invite responses from 28 June to 28 October 2012.

Please send your completed form:

By email to: propertyandtrust@lawcommission.gsi.gov.uk or

By post to: James Linney, Law Commission
Steel House, and 11 Tothill Street, London SW1H 9LJ

Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information 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 Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

Your details

Name:
Mrs Fiona Beale
Email address:
[redacted]
Postal address:
[redacted]
Telephone number:
Are you responding on behalf of a firm, association or other organisation? **If so, please give its name (and address, if not the same as above):**
If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:
As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: GENERAL

10.3 We provisionally propose that code rights should include rights for Code Operators:

(1) to execute any works on land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus;

(2) to keep electronic communications apparatus installed on, under or over that land; and

(3) To enter land to inspect any apparatus.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.16.

Yes

10.4 Do consultees consider that code rights should be extended to include further rights, or that the scope of code rights should be reduced?

Consultation Paper, Part 3, paragraph 3.17.

Code rights should not be extended.

10.5 We provisionally propose that code rights should be technology neutral.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.18.

This seems reasonable in principle although the Code applies to very different types of agreements – eg BT cables on one extreme where there is no exclusive occupation to leases of radio masts etc where the Landlord & Tenant Act 1952 also impinges.

10.6	Do consultees consider that code rights should generate obligations upon Code Operators and, if so, what? Consultation Paper, Part 3, paragraph 3.19.

We were totally unaware of the impact of the Code on property rights until we had to deal with a situation [redacted].

We were totally unaware of this agreement until the surrender of the tenancy nor of the impact of the Code [redacted].

There should be an obligation on operators to deal with the landowner and to provide all affected parties with a comprehensive guide to the impact of the Code PRIOR to entering into any binding agreement.

10.7	We ask consultees to tell us their views on the definition of electronic communications apparatus in paragraph 1(1) of the Code. Should it be amended, and if so should further equipment, or classes of equipment, be included within it? Consultation Paper, Part 3, paragraph 3.27.

The definition should remain in general terms. We accept that technology is continually evolving, and equipment should not, therefore, be too precisely defined.

10.8	We ask consultees to tell us their views about who should be bound by code rights created by agreement, and to tell us their experience of the practical impact of the current position under the Code. Consultation Paper, Part 3, paragraph 3.40.

We do not believe that a landowner (freeholder) should be bound by code rights negotiated by parties with lesser interests in the land, and certainly not beyond the term of their tenure. Negotiations should be with the party with the strongest interest in the land.

We have been put to considerable expense [redacted] *in that we have now a claim against the outgoing tenant, had to renegotiate terms with the ingoing tenant to reflect the presence of the equipment* [redacted]

10.9 We ask consultees for their views on the appropriate test for dispensing with the need for a landowner's or occupier's agreement to the grant of code rights. In particular, consultees are asked to tell us:

(1) Where the landowner can be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code, should it be possible for the tribunal to make the order sought without also weighing the public benefit of the order against the prejudice to the landowner?

(2) Should it be possible to dispense with the landowner's agreement in any circumstances where he or she cannot be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code?

(3) How should a revised code express the weighing of prejudice to the landowner against benefit to the public? Does the Access Principle require amendment and, if so, how?

Consultation Paper, Part 3, paragraph 3.53.

(1) The landowner should be fairly and adequately remunerated for the granting of code rights, and the public benefit of the scheme should be assessed before compulsory rights are granted.
(2) No.
(3) *Public benefit should be assessed to be very significant before code rights are granted. The onus should be on the operator to establish that these terms are met.*

10.10 We ask consultees to tell us if there is a need for a revised code to provide that where an occupier agrees in writing for access to his or her land to be interfered with or obstructed, that permission should bind others with an interest in that land.

Consultation Paper, Part 3, paragraph 3.59.

We do not believe that terms agreed with an occupier should be binding (or exercisable) on those with a greater interest.

It would have been perfectly possible [redacted] *to agree terms with ourselves. Where they choose not to do so the Code should not be exercisable against the landowner.*

10.11 We ask consultees to tell us their views about the use of the right for a Code Operator to install lines at a height of three metres or more above land without separate authorisation, and of any problems that this has caused.

Consultation Paper, Part 3, paragraph 3.67.

Although this does not directly affect us we note that 3m is likely to interfere with normal agricultural activities given the increased size of modern farm machinery

10.12 Consultees are asked to tell us their views about the right to object to overhead apparatus. Consultation Paper, Part 3, paragraph 3.68.
It seems reasonable that there should be a right to object to overhead apparatus, if the landowner believes that his land will be injuriously affected by the presence of that apparatus, or that his agricultural operations will be restricted.

10.13 Consultees are asked to give us their views about the obligation to affix notices on overhead apparatus, including whether failure to do so should remain a criminal offence. Consultation Paper, Part 3, paragraph 3.69.
This obligation should remain in place.

10.14 Do consultees consider that the current right for Code Operators to require trees to be lopped, by giving notice to the occupier of land, should be extended: (1) to vegetation generally; (2) to trees or vegetation wherever that interference takes place; and/or (3) to cases where the interference is with a wireless signal rather than with tangible apparatus? Consultation Paper, Part 3, paragraph 3.74.
These rights should not be extended. Code operators should only be able to go on to private land to carry out work to trees or vegetation having first served notice on the landowner. *Although this does not directly affect us as landowners we are concerned that work to vegetation other than trees – such as hedges – could interfere with a landowner's/occupier's claims for Single Farm Payment, may affect cross-compliance, and reduce his eligibility for various environmental scheme payments.*

10.15 We ask consultees:

(1) whether Code Operators should benefit from an ancillary right to upgrade their apparatus; and

(2) whether any additional payment should be made by a Code Operator when it upgrades its apparatus.

Consultation Paper, Part 3, paragraph 3.78.

(1) No.
(2) *Yes.*

10.16 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from sharing their apparatus causes difficulties in practice;

(2) whether Code Operators should benefit from a general right to share their apparatus with another (so that a contractual term restricting that right would be void); and/or

(3) whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it shares its apparatus.

Consultation Paper, Part 3, paragraph 3.83.

(1) We do not believe that difficulties are being caused, in practice.
(2) No.
(3) Yes, a figure should be separately negotiated by the Code Operator and landowner. This is especially appropriate where it is proposed that different kinds of equipment will share infrastructure as is the case with the joint ventures now being entered into between operators. [redacted] are demanding the right to share [redacted] assign their licence [redacted] even although the current Code would not permit this. This is proving a sticking point in concluding a new agreement.

10.17 We ask consultees to what extent section 134 of the Communications Act 2003 is useful in enabling apparatus to be shared, and whether further provision would be appropriate.

Consultation Paper, Part 3, paragraph 3.88.

The Code should relate to a single operator and not permit operators to gain valuable consideration / save costs by using it to obtain rights for multiple operators.

10.18 We ask consultees:

(1) whether the ability of landowners and occupiers to prevent Code Operators from assigning the benefit of agreements that confer code rights causes difficulties in practice;

(2) whether Code Operators should benefit from a general right to assign code rights to other Code Operators (so that a contractual term restricting that right would be void); and

(3) if so, whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it assigns the benefit of any agreement.

Consultation Paper, Part 3, paragraph 3.92.

(1) No, we do not believe that difficulties are caused by this.
(2) No – these are commercial arrangements, and commercial leases customarily require the consent of the lessor to an assignment by the lessee to another party.
(3) *Not necessarily, but any costs incurred by the landowner/occupier in checking or completing the documents should be met by the Code Operator.*

10.19 We ask consultees to tell us if they consider that any further ancillary rights should be available under a revised code.

Consultation Paper, Part 3, paragraph 3.94.

No – we consider that existing rights are sufficient.

10.20 We ask consultees to tell us if they are aware of difficulties experienced in accessing electronic communications because of the inability to get access to a third party's land, whether by the occupiers of multi-dwelling units or others.

Consultation Paper, Part 3, paragraph 3.100.

We are not aware of such a problem.

10.21	Do consultees see a need for a revised code to enable landowners and occupiers to compel Code Operators to use their powers to gain code rights against third parties? Consultation Paper, Part 3, paragraph 3.101.
No.	

10.22	Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used? Consultation Paper, Part 3, paragraph 3.102.
No.	

10.23	We ask consultees: (1) to what extent unlawful interference with electronic communications apparatus or a Code Operator's rights in respect of the same causes problems for Code Operators and/or their customers; (2) to what extent any problem identified in answer to (1) above is caused by a Code Operator having to enforce its rights through the courts or the nature of the remedy that the courts can award; and (3) whether any further provision (whether criminal or otherwise) is required to enable a Code Operator to enforce its rights. Consultation Paper, Part 3, paragraph 3.106.
(1) We have seen no evidence to suggest that this is a significant problem, restricting the provision of a good service. *(2) This does not appear to significantly affect the service provided.* (3) *No, not without substantial evidence to support such a change. We believe that existing legislation provides sufficient redress.*	

10.24 We ask consultees whether landowners or occupiers need any additional provision to enable them to enforce obligations owed to them by a Code Operator. Consultation Paper, Part 3, paragraph 3.107.
Our experience is it is the operator who fails to progress matters! Code Operators appear to sit back and do nothing, relying on their statutory powers. Letters remain unanswered and operators ignore landowners' agents and refuse to engage in meaningful negotiations. *We, as the landowner, are faced with significant legal costs which are unlikely to be recovered from the other side unless the matter progresses to trial. Our only recourse seems to be to threaten to raise an action for vodafone's removal on the grounds of being unreasonably dilatory.* *We believe that the Code should include provision for a financial penalty, based on a daily rate and charged to the Code Operator, where the Operator has failed to conclude a lease renewal by timeously. This would encourage Code Operators to start negotiations for a lease renewal well in advance of the expiry date of the existing lease, which clearly is not happening at present.* *There should also be the ability for the landowner to apply to the Court for the determination of terms given that the operator can seem to be able to procrastinate indefinitely.*

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: SPECIAL CONTEXTS

10.25 We provisionally propose that the right in paragraph 9 of the Code to conduct street works should be incorporated into a revised code, subject to the limitations in the existing provision. Do consultees agree? Consultation Paper, Part 4, paragraph 4.11.
N/A

10.26 We ask consultees to let us know their experiences in relation to the current regime for tidal waters and lands held by Crown interests. Consultation Paper, Part 4, paragraph 4.20.
N/A

10.27 We seek consultees' views on the following questions. (1) Should there be a special regime for tidal waters and lands or should tidal waters and lands be subject to the General Regime? (2) If there is to be a special regime for tidal waters and lands, what rights and protections should it provide, and why? (3) Should tidal waters and lands held by Crown interests be treated differently from other tidal waters and lands? Consultation Paper, Part 4, paragraph 4.21.
N/A

10.28 We ask consultees:

(1) Is it necessary to have a special regime for linear obstacles or would the General Regime suffice?

(2) To what extent is the linear obstacle regime currently used?

(3) Should the carrying out of works not in accordance with the linear obstacle regime continue to be a criminal offence,or should it alternatively be subject to a civil sanction?

(4) Are the rights that can be acquired under the linear obstacle regime sufficient (in particular, is limiting the crossing of the linear obstacle with a line and ancillary apparatus appropriate)?

(5) Should the linear obstacle regime grant any additional rights or impose any other obligations (excluding financial obligations)?

Consultation Paper, Part 4, paragraph 4.30.

N/A

10.29 We provisionally propose that a revised code should prevent the doing of anything inside a “relevant conduit” as defined in section 98(6) of the Telecommunications Act 1984 without the agreement of the authority with control of it.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.34.

N/A

10.30 We provisionally propose that the substance of paragraph 23 of the Code governing undertakers’ works should be replicated in a revised code.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.40.

N/A

10.31 We provisionally propose that a revised code should include no new special regimes beyond those set out in the existing Code. Do consultees agree? Consultation Paper, Part 4, paragraph 4.43
We see no reason for the number of special regimes currently in place under the Code.

ALTERATIONS AND SECURITY

10.32 We provisionally propose that a revised code should contain a procedure for those with an interest in land or adjacent land to require the alteration of apparatus, including its removal, on terms that balance the interests of Code Operators and landowners and do not put the Code Operators' networks at risk. Do consultees agree? Consultation Paper, Part 5, paragraph 5.11.
That right would seem to be available under the Code and see no reason for a special regime

10.33 Consultees are asked to tell us their views about the alteration regime in paragraph 20 of the Code; does it strike the right balance between landowners and Code Operators? Consultation Paper, Part 5, paragraph 5.12.
Yes, we consider that the current Code does in that an operator is able to apply for the rights under Paragraph 5.

10.34 We provisionally propose that it should not be possible for Code Operators and landowners to contract out of the alterations regime in a revised code. Do consultees agree? Consultation Paper, Part 5, paragraph 5.13.
We have concerns here in that we would wish to impose a lift and shift provision to enable us to move Vodafone's equipment to maintain our property etc. This proposal would impact on our ability to do so and would therefore seem to infringe our property rights.

10.35	We seek consultees' views on the provisions in paragraph 14 of the Code relating to the alteration of a linear obstacle. Do consultees take the view that they strike an appropriate balance between the interests involved, and should they be modified in a revised code? Consultation Paper, Part 5, paragraph 5.18.
N/A	

10.36	We provisionally propose that a revised code should restrict the rights of landowners to remove apparatus installed by Code Operators. Do consultees agree? Consultation Paper, Part 5, paragraph 5.47.
No, we do not agree. *There should be an opportunity for landowners to remove apparatus, under certain circumstances, for freedom of contract.* *It is unreasonable for an operator to have such security of tenure and create such mischief to the management of property in respect of a microcell serving such a small part of the population. The current powers of an operator need rebalancing.*	

10.37	We provisionally propose that a revised code should not restrict the rights of planning authorities to enforce the removal of electronic communications apparatus that has been installed unlawfully. Do consultees agree? Consultation Paper, Part 5, paragraph 5.48.
It seems absurd that an operator even in breach of his licence, contract or planning law can have the protection of the Code.	

10.38 We ask consultees to tell us their views about the procedure for enforcing removal. Should the onus remain on landowners to take proceedings? If so, what steps, if any, should be taken to make the procedure more efficient?

Consultation Paper, Part 5, paragraph 5.49.

The burden should be placed on Code Operators to justify the retention of the apparatus on the land affected and establish the public need. Without this, there is little incentive for the Code Operators to do anything. Landowners/occupiers should be enabled to remove the apparatus, after serving notice, if it is not removed by the Code operator within a set period, or if negotiations are not concluded within a reasonable period (say 28 days from the service of any Counter Notice).

10.39 We ask consultees to tell us whether any further financial, or other, provisions are necessary in connection with periods between the expiry of code rights and the removal of apparatus.

Consultation Paper, Part 5, paragraph 5.50.

If apparatus remains on site after the expiry of code rights, the landowner/occupier should be able either remove it, or obtain exemplary damages based on the benefit to the operator (the call income generated).

10.40 We provisionally propose that Code Operators should be free to agree that the security provisions of a revised code will not apply to an agreement, either absolutely or on the basis that there will be no security if the land is required for development.

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.51.

Yes, freedom of contract should apply.

10.41	Do consultees agree that the provisions of a revised code relating to the landowner's right to require alteration of apparatus, and relating to the security of the apparatus, should apply to all equipment installed by a Code Operator, even if it was installed before the Code Operator had the benefit of a revised code? Consultation Paper, Part 5, paragraph 5.56.
Yes – if the apparatus was not installed under the provisions of the Code, then there should be no retrospective application of code powers.	

FINANCIAL AWARDS UNDER THE CODE

In responding to these questions, please note the definitions of "compensation" and "consideration" adopted at paragraph 6.5 and following of the Consultation Paper.

10.42 We provisionally propose that a single entitlement to compensation for loss or damage sustained by the exercise of rights conferred under the Code, including the diminution in value of the claimant's interest in the land concerned or in other land, should be available to all persons bound by the rights granted by an order conferring code rights. Do consultees agree? Consultation Paper, Part 6, paragraph 6.35.
No, we do not agree with this proposal. 1. *It is unreasonable for a one off payment in respect of an ongoing relationship* 2. *The basis should be open market value*

10.43 We ask consultees whether that right to compensation should be extended to those who are not bound by code rights when they are created but will be subsequently unable to remove electronic communications apparatus from their land. Consultation Paper, Part 6, paragraph 6.36.
Yes – it is only fair that compensation should be payable if a landowner cannot remove apparatus which was installed under Code powers by agreement with a third party, such as a tenant or other party with lesser powers.

10.44 We provisionally propose that consideration for rights conferred under a revised code be assessed on the basis of their market value between a willing seller and a willing buyer, assessed using the second rule contained in section 5 of the Land Compensation Act 1961; without regard to their special value to the grantee or to any other Code Operator. Do consultees agree? We would be grateful for consultees' views on the practicability of this approach, and on its practical and economic impact. Consultation Paper, Part 6, paragraph 6.73.
We strongly object to this proposal which will have a huge impact on an established market. *The market value of the rights sought* [redacted] *. Compensation on the basis suggested would be a fraction of this.* [redacted] *We would vehemently oppose any attempt* [redacted] *to seek rights on such a basis on any property owned by us given the impact of the rights. We suspect that we would not be alone in this.*

10.45 Consultees are also invited to express their views on alternative approaches; in particular, the possibility of a statutory uplift on compensation (with a minimum payment figure in situations where no compensation would be payable). Consultation Paper, Part 6, paragraph 6.74.
We feel that there the basis should be open market value – ie the status quo.

10.46 We provisionally propose that there should be no distinction in the basis of consideration when apparatus is sited across a linear obstacle. Do consultees agree? Consultation Paper, Part 6, paragraph 6.78.
N/A (albeit we fail to see the reasons for the various different regimes).

10.47 We provisionally propose that, where an order is made requiring alteration of a Code Operator's apparatus, the appropriate body should be entitled to consider whether any portion of the payment originally made to the person seeking the alteration in relation to the original installation of that apparatus should be repaid. Do consultees agree? Consultation Paper, Part 6, paragraph 6.83.
If there is to be any alteration in this respect it is only equitable that any increase in value should also be reflected

TOWARDS A BETTER PROCEDURE

10.48 We provisionally propose that a revised code should no longer specify the county court as the forum for most disputes.

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.26.

Yes. The County Court lacks the necessary expertise and specialised knowledge.

10.49 We ask for consultees' views on the suitability of the following as forums for dispute resolution under a revised code:

(1) the Lands Chamber of the Upper Tribunal (with power to transfer appropriate cases to the Property Chamber of the First-tier Tribunal or vice versa);

(2) a procedure similar to that contained in section 10 of the Party Wall etc Act 1996; and

(3) any other form of adjudication.

Consultation Paper, Part 7, paragraph 7.27.

We agree that the Lands Tribunal would be the most effective forum

Generally, disputes under the terms of an agreement (such as rent reviews) could be dealt with under arbitration. There must also be an appeals system, as currently in place.

10.50 We provisionally propose that it should be possible for code rights to be conferred at an early stage in proceedings pending the resolution of disputes over payment.

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.31.

No: once Code Operators are in possession of land, difficulties can be encountered in getting them to conclude negotiations as we ourselves are finding.

10.51 We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay. Consultation Paper, Part 7, paragraph 7.32.
See 10.38 above. This would prevent operators spinning matters out indefinatly.

10.52 We seek consultees' views as to how costs should be dealt with in cases under a revised code, and in particular their views on the following options: (1) that as a general rule costs should be paid by the Code Operator, unless the landowner's conduct has unnecessarily increased the costs incurred; or (2) That costs should be paid by the losing party. Consultation Paper, Part 7, paragraph 7.37
Essentially, we believe that the present procedures should be left unaltered.

10.53 We also ask consultees whether different rules for costs are needed depending upon the type of dispute. Consultation Paper, Part 7, paragraph 7.38.

10.54 We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service. Do consultees agree? Consultation Paper, Part 7, paragraph 7.52.
This, on the face of it, seems a sensible idea, and notice procedures and rules for service could be set out in an information pack (see 10.56 below), with topics clearly grouped under headings. This would help to avoid extra and unnecessary costs.

10.55 Do consultees consider that the forms of notices available to Code Operators could be improved? If so, how? Consultation Paper, Part 7, paragraph 7.53.

10.56 Do consultees consider that more information is needed for landowners? If so, what is required and how should it be provided? Consultation Paper, Part 7, paragraph 7.54.
Yes, we do believe that more – and better – information should be made available to landowners, from the onset so as they are fully aware of the ramifications of the Code. There should be an information pack provided by operators, in a format approved by Ofcom, to all affected parties prior to any agreement becoming binding. This should be written in plain English, so that the procedures, potential impact etc can be easily understood. *This should be a prerequisite for the operator invoking the Code.*

10.57 We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms. Consultation Paper, Part 7, paragraph 7.60.
Again, we can see merit in this, if it would simplify and reduce the cost of the process.

INTERACTION WITH OTHER REGIMES

10.58	We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease. Do consultees agree? Consultation Paper, Part 8, paragraph 8.22.
We would agree that it seems sensible for the Code to be the sole operative mechanism.	

10.59	We provisionally propose that where an agreement conferring a right on a Code Operator also creates an interest in land of a type that is ordinarily registrable under the land registration legislation, the interest created by the agreement should be registrable in accordance with the provisions of the land registration legislation, but that a revised code should make it clear that its provisions as to who is bound by the interest prevail over those of the land registration legislation. Do consultees agree? Consultation Paper, Part 8, paragraph 8.33.
Land registration would have ensured that we as landowner, the party most affected, would have been aware of the agreement [redacted] *but that would not necessarily addressed the main issue which is that the impact of that agreement on our property interest*	

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

10.60 We ask consultees to tell us: (1) whether they are aware of circumstances where the funds set aside under regulation 16 have been called upon; (2) what impact regulation 16 has on Code Operators and on Ofcom; (3) if a regime is required to cover potential liabilities arising from a Code Operator's street works; and (4) If the answer to (3) is yes, what form should it take? Consultation Paper, Part 9, paragraph 9.14.
No comment.

10.61 We ask consultees for their views on the Electronic Communications Code (Conditions and Restrictions) Regulations 2003. Is any amendment required? Consultation Paper, Part 9, paragraph 9.39.
No comment.

ELLANDI

James Linney
Law Commission
Steel House
11 Tothill Street
London
SW1H 9LJ

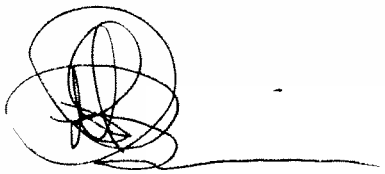
26th October 2012

Dear Sir,

Re: Law Commission Consultation Paper No.205 – Electronic Communications Code

I hereby endorse the enclosed response to the above mentioned paper, submitted on our behalf by TPCL.

Yours Faithfully,



Mark Robinson
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John G. Woolman

[redacted]

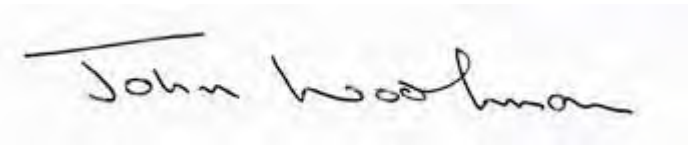
J Linney Esq
Law Commission
Steel House
11 Tothill Street
London. SW1H 9LJ

Dear Sir

Response to Law Commission Consultation Paper No. 205 on the Electronic Communications Code

I have read the response to the consultation paper submitted by Tom Bodley Scott of Batcheller Monkhouse. I thought it was well set out and listed clearly the problems that could be caused to a landlord. I think the suggested improvements were sensible and would improve the code for both sides.

Yours faithfully



J G Woolman

Landowners Working for the Countryside

Consultation Response

Consultation Title:	**The Electronic Communications Code**
Date:	**28 October 2012**
To:	**propertyandtrust@lawcommission.gsi.gov.uk**
From:	**Scottish Land & Estates**
Telephone:	[redacted]
E Mail:	[redacted]

Scottish Land & Estates is a member organisation that uniquely represents the interests of both land managers and land-based businesses in rural Scotland. Scottish Land & Estates has over 2,500 members with interests in a great variety of land uses and will be directly affected by the proposed changes to the Electronic Communications Code. Therefore we welcome the opportunity to respond to this consultation.

The Rights and Obligation of Code Operators: General

10.3 We provisionally propose that code rights should include rights for Code Operators:

(1) to execute any works on land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus;
(2) to keep electronic communications apparatus installed on, under or over that land; and
(3) to enter land to inspect any apparatus.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.16.

Scottish Land & Estates agrees with the proposal outlined above provided that reasonable notice is given ahead of Code Operators taking access, and that adequate compensation is paid to the landowner/ occupier for damage caused as a result of works.

10.4 Do consultees consider that code rights should be extended to include further rights, or that the scope of code rights should be reduced?

Consultation Paper, Part 3, paragraph 3.17.

Scottish Land & Estates believes that that code rights should not be extended.

10.5 We provisionally propose that code rights should be technology neutral.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.18.

Scottish Land & Estates is broadly supportive of the above proposal however it is important to note that different and new technologies may have significant impacts on land and it should be open to landowners and Code Operators to negotiate terms.

Consultation Response

Landowners Working for the Countryside

10.6	Do consultees consider that code rights should generate obligations upon Code Operators and, if so, what? Consultation Paper, Part 3, paragraph 3.19.
Scottish Land & Estates believes that code rights should generate obligations upon Code Operators. For example, the Code Operators should be required to enter in to negotiations with landowners/ occupiers and seek to install apparatus in locations which cause minimum disruption. The Operator should also be obliged to remove the apparatus and equipment at the end of the term of the wayleave, deed of servitude or lease.	

10.7	We ask consultees to tell us their views on the definition of electronic communications apparatus in paragraph 1(1) of the Code. Should it be amended, and if so should further equipment, or classes of equipment, be included within it? Consultation Paper, Part 3, paragraph 3.27.
Scottish Land & Estates believes the definition should not be amended to include further equipment or classes of equipment, but continue in general terms to account for further anticipated changes in technology.	

10.8	We ask consultees to tell us their views about who should be bound by code rights created by agreement, and to tell us their experience of the practical impact of the current position under the Code. Consultation Paper, Part 3, paragraph 3.40.
Scottish Land & Estates would welcome specific provisions which apply to Scotland only. As the Code is applicable to both England and Scotland, the use of English lease terminology is not helpful.	

10.9	We ask consultees for their views on the appropriate test for dispensing with the need for a landowner's or occupier's agreement to the grant of code rights. In particular, consultees are asked to tell us: (1) Where the landowner can be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code, should it be possible for the tribunal to make the order sought without also weighing the public benefit of the order against the prejudice to the landowner? (2) Should it be possible to dispense with the landowner's agreement in any circumstances where he or she cannot be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code? (3) How should a revised code express the weighing of prejudice to the landowner against benefit to the public? Does the Access Principle require amendment and, if so, how? Consultation Paper, Part 3, paragraph 3.53.
(1) Scottish Land & Estates believes that it should not be possible for code rights to be imposed on landowners without also weighing the public benefit of the proposal against the prejudice to the landowner. (2) No. (3) We believe that the Access Principle requires clarity and that a suitable test needs to be developed.	

Landowners Working for the Countryside

Consultation Response

10.10	We ask consultees to tell us if there is a need for a revised code to provide that where an occupier agrees in writing for access to his or her land to be interfered with or obstructed, that permission should bind others with an interest in that land. Consultation Paper, Part 3, paragraph 3.59.
Scottish Land & Estates believes that those with the greatest interest in land (i.e. the landowner) should not be bound by rights negotiated by the occupier of that land.	

10.11	We ask consultees to tell us their views about the use of the right for a Code Operator to install lines at a height of three metres or more above land without separate authorisation, and of any problems that this has caused. Consultation Paper, Part 3, paragraph 3.67.
Compensation should continue to be paid if the land over which the lines pass can be shown to be injuriously affected, as set out in paragraph 16 of the Code. Cables as low as three metres above the land are likely to interfere with agricultural operations, and Code Operators should be required to liaise with landowners to check whether this will be the case. If necessary, they should be required to raise the cables or bury them.	

10.12	Consultees are asked to tell us their views about the right to object to overhead apparatus. Consultation Paper, Part 3, paragraph 3.68.
Scottish Land & Estates believes there should be a right to object to overhead apparatus, if the landowner believes that his land will be injuriously affected by the presence of that apparatus, or that operations such as agriculture or forestry will be restricted.	

10.13	Consultees are asked to give us their views about the obligation to affix notices on overhead apparatus, including whether failure to do so should remain a criminal offence. Consultation Paper, Part 3, paragraph 3.69.
Scottish Land & Estates is unable to comment.	

10.14	Do consultees consider that the current right for Code Operators to require trees to be lopped, by giving notice to the occupier of land, should be extended: (1) to vegetation generally; (2) to trees or vegetation wherever that interference takes place; and/or (3) to cases where the interference is with a wireless signal rather than with tangible apparatus? Consultation Paper, Part 3, paragraph 3.74.
Scottish Land & Estates believes that these rights should not be extended. Code Operators should only be able to go on to private land to carry out work to trees or vegetation having provided reasonable notice to the landowner. There is also concern that work to vegetation other than trees (e.g. hedges) could interfere with a landowner's/ occupier's claims for Single Farm Payment, may affect cross-compliance, and reduce eligibility for support through environmental scheme such as the Scotland Rural Development Programme.	

Landowners Working for the Countryside

Consultation Response

10.15 We ask consultees: (1) whether Code Operators should benefit from an ancillary right to upgrade their apparatus; and (2) whether any additional payment should be made by a Code Operator when it upgrades its apparatus. Consultation Paper, Part 3, paragraph 3.78.	
	(1) Operators should benefit from an ancillary right to upgrade their apparatus subject to written consent from the landowner and provided that the upgrade does not result in an increased burden on the landowner. (2) Yes.

10.16 We ask consultees: (1) whether the ability of landowners and occupiers to prevent Code Operators from sharing their apparatus causes difficulties in practice; (2) whether Code Operators should benefit from a general right to share their apparatus with another (so that a contractual term restricting that right would be void); and/or (3) whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it shares its apparatus. Consultation Paper, Part 3, paragraph 3.83.	
	Scottish Land & Estates is broadly supportive of operators sharing apparatus. However we are aware that there is lack of consistency with regard to the extent to which Code Operators advise landowners of site sharing or allowing shared use of cables and we feel that that Code Operators should be required to inform landowners/ occupiers of site sharing and compensate accordingly.

10.17 We ask consultees to what extent section 134 of the Communications Act 2003 is useful in enabling apparatus to be shared, and whether further provision would be appropriate. Consultation Paper, Part 3, paragraph 3.88.	
	Scottish Land & Estates is unable to comment.

10.18 We ask consultees: (1) whether the ability of landowners and occupiers to prevent Code Operators from assigning the benefit of agreements that confer code rights causes difficulties in practice; (2) whether Code Operators should benefit from a general right to assign code rights to other Code Operators (so that a contractual term restricting that right would be void); and (3) if so, whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it assigns the benefit of any agreement. Consultation Paper, Part 3, paragraph 3.92.	
	(1) Scottish Land & Estates does not believe that this causes difficulty for Code Operators. (2) No, we feel that landowners should be entitled to restrict assignation.

10.19 We ask consultees to tell us if they consider that any further ancillary rights should be available under a revised code. Consultation Paper, Part 3, paragraph 3.94.	
	Scottish Land & Estates does not consider that any further ancillary rights should be available under a revised code.

Landowners Working for the Countryside

Consultation Response

10.20	We ask consultees to tell us if they are aware of difficulties experienced in accessing electronic communications because of the inability to get access to a third party's land, whether by the occupiers of multi-dwelling units or others. Consultation Paper, Part 3, paragraph 3.100.
Scottish Land & Estates is unable to comment.	

10.21	Do consultees see a need for a revised code to enable landowners and occupiers to compel Code Operators to use their powers to gain code rights against third parties? Consultation Paper, Part 3, paragraph 3.101.
Scottish Land & Estates is unable to comment.	

10.22	Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used? Consultation Paper, Part 3, paragraph 3.102.
Scottish Land & Estates is unable to comment.	

10.23	We ask consultees: (1) to what extent unlawful interference with electronic communications apparatus or a Code Operator's rights in respect of the same causes problems for Code Operators and/or their customers; (2) to what extent any problem identified in answer to (1) above is caused by a Code Operator having to enforce its rights through the courts or the nature of the remedy that the courts can award; and (3) whether any further provision (whether criminal or otherwise) is required to enable a Code Operator to enforce its rights. Consultation Paper, Part 3, paragraph 3.106.
Scottish Land & Estates is unable to comment.	

10.24	We ask consultees whether landowners or occupiers need any additional provision to enable them to enforce obligations owed to them by a Code Operator. Consultation Paper, Part 3, paragraph 3.107.
Scottish Land & Estates would support the need for an additional provision to enable landowners/ occupiers to enforce operators' obligations, and the provisions which already exist should be reviewed to make them more fit for purpose. We would support the view that there needs to be a financial penalty on the operator if certain time limits are not met, in order to provide an incentive for operators to negotiate with landowners promptly. This could be, for example, be based on a daily charge until complete.	

Landowners Working for the Countryside

Consultation Response

The Rights and Obligation of Code Operators: Special Contexts

Scottish Land & Estates is unable to comment on this section.

Consultation Response

Landowners Working for the Countryside

Alterations and Security

10.32	We provisionally propose that a revised code should contain a procedure for those with an interest in land or adjacent land to require the alteration of apparatus, including its removal, on terms that balance the interests of Code Operators and landowners and do not put the Code Operators' networks at risk. Do consultees agree? Consultation Paper, Part 5, paragraph 5.11.
Scottish Land & Estates agrees with the above proposal.	

10.33	Consultees are asked to tell us their views about the alteration regime in paragraph 20 of the Code; does it strike the right balance between landowners and Code Operators? Consultation Paper, Part 5, paragraph 5.12.
Scottish Land & Estates believes that the alternation regime is unfair on landowners and that a more balanced procedure is required.	

10.34	We provisionally propose that it should not be possible for Code Operators and landowners to contract out of the alterations regime in a revised code. Do consultees agree? Consultation Paper, Part 5, paragraph 5.13.
Scottish Land & Estates agrees with the above proposal.	

10.35	We seek consultees' views on the provisions in paragraph 14 of the Code relating to the alteration of a linear obstacle. Do consultees take the view that they strike an appropriate balance between the interests involved, and should they be modified in a revised code? Consultation Paper, Part 5, paragraph 5.18.
Scottish Land & Estates is supportive of the view that the Code should strike a balance between the rights and obligations of the Code Operator and the disruption to the landowner's/ occupier's use of the land. The Code should require that compensation be paid to the landowner/ occupier when the balance cannot be adequately achieved.	

10.36	We provisionally propose that a revised code should restrict the rights of landowners to remove apparatus installed by Code Operators. Do consultees agree? Consultation Paper, Part 5, paragraph 5.47.
Scottish Land & Estates does not agree with the above proposal and believes that it is essential that there is a balance between the interests of both the Code Operator and the landowner. Once agreements have ended, it should be possible for landowners to request that Code Operators remove their apparatus within a reasonable period of time.	

Landowners Working for the Countryside

Consultation Response

10.37	We provisionally propose that a revised code should not restrict the rights of planning authorities to enforce the removal of electronic communications apparatus that has been installed unlawfully. Do consultees agree? Consultation Paper, Part 5, paragraph 5.48.
Scottish Land & Estates agrees with the proposal outlined above.	

10.38	We ask consultees to tell us their views about the procedure for enforcing removal. Should the onus remain on landowners to take proceedings? If so, what steps, if any, should be taken to make the procedure more efficient? Consultation Paper, Part 5, paragraph 5.49.
We believe that it should be up to the Code Operator to justify the need to keep apparatus on the land affected. Without this, there is little incentive for the Code operator to do anything. The revised Code should include a clear procedure for removal including time limits for responses, actions and should consider a less expensive procedure in order to resolve disputes.	

10.39	We ask consultees to tell us whether any further financial, or other, provisions are necessary in connection with periods between the expiry of code rights and the removal of apparatus. Consultation Paper, Part 5, paragraph 5.50.
Scottish Land & Estates believes that compensation should be paid to the landowner/ occupier between the expiry of code rights and the removal of the apparatus. This would also provide an incentive for Operators to remove their equipment promptly once their rights have expired, which would not exist if Code Operators could leave apparatus without making payment.	

10.40	We provisionally propose that Code Operators should be free to agree that the security provisions of a revised code will not apply to an agreement, either absolutely or on the basis that there will be no security if the land is required for development. Do consultees agree? Consultation Paper, Part 5, paragraph 5.51.
Scottish Land & Estates agrees with the proposal outlined above.	

10.41	Do consultees agree that the provisions of a revised code relating to the landowner's right to require alteration of apparatus, and relating to the security of the apparatus, should apply to all equipment installed by a Code Operator, even if it was installed before the Code Operator had the benefit of a revised code? Consultation Paper, Part 5, paragraph 5.56.
Scottish Land & Estates agrees with the proposal outlined above.	

Consultation Response

Landowners Working for the Countryside

Financial Awards Under the Code

10.42	We provisionally propose that a single entitlement to compensation for loss or damage sustained by the exercise of rights conferred under the Code, including the diminution in value of the claimant's interest in the land concerned or in other land, should be available to all persons bound by the rights granted by an order conferring code rights. Do consultees agree? Consultation Paper, Part 6, paragraph 6.35.
Scottish Land & Estates does not agree with the proposal outlined above.	

10.43	We ask consultees whether that right to compensation should be extended to those who are not bound by code rights when they are created but will be subsequently unable to remove electronic communications apparatus from their land. Consultation Paper, Part 6, paragraph 6.36.
Scottish Land & Estates believes that the right to compensation should be extended.	

10.44	We provisionally propose that consideration for rights conferred under a revised code be assessed on the basis of their market value between a willing seller and a willing buyer, assessed using the second rule contained in section 5 of the Land Compensation Act 1961; without regard to their special value to the grantee or to any other Code Operator. Do consultees agree? We would be grateful for consultees' views on the practicability of this approach, and on its practical and economic impact. Consultation Paper, Part 6, paragraph 6.73.
Scottish Land & Estates does not agree with the proposal outlined above.	

10.45	Consultees are also invited to express their views on alternative approaches; in particular, the possibility of a statutory uplift on compensation (with a minimum payment figure in situations where no compensation would be payable). Consultation Paper, Part 6, paragraph 6.74.
Scottish Land & Estates is unable to comment.	

10.46	We provisionally propose that there should be no distinction in the basis of consideration when apparatus is sited across a linear obstacle. Do consultees agree? Consultation Paper, Part 6, paragraph 6.78.
Scottish Land & Estates agrees with the above proposal and believes there should be no distinction in the basis of consideration when apparatus is sited across a linear obstacle.	

10.47	We provisionally propose that, where an order is made requiring alteration of a Code Operator's apparatus, the appropriate body should be entitled to consider whether any portion of the payment originally made to the person seeking the alteration in relation to the original installation of that apparatus should be repaid. Do consultees agree? Consultation Paper, Part 6, paragraph 6.83.
Scottish Land & Estates agrees that where an order is made requiring alteration of a Code Operator's apparatus, the appropriate body should be entitled to consider whether any portion of the	

payment originally made to the person seeking the alteration in relation to the original installation of that apparatus should be repaid.

Consultation Response

Landowners Working for the Countryside

Towards a Better Procedure

10.48 We provisionally propose that a revised code should no longer specify the county court as the forum for most disputes. Do consultees agree? Consultation Paper, Part 7, paragraph 7.26.	
	The County Court is not the forum for dispute resolution in Scotland - it is the Sheriff Court. Scottish Land & Estates believes that the Code should no longer specify the Sheriff Court as the forum for most disputes. As previously stated there is a need for a more accessible dispute resolution forum.

10.49 We ask for consultees' views on the suitability of the following as forums for dispute resolution under a revised code: (1) the Lands Chamber of the Upper Tribunal (with power to transfer appropriate cases to the Property Chamber of the First-tier Tribunal or vice versa); (2) a procedure similar to that contained in section 10 of the Party Wall etc Act 1996; and (3) any other form of adjudication. Consultation Paper, Part 7, paragraph 7.27.	
	Scottish Land & Estates is unable to comment.

10.50 We provisionally propose that it should be possible for code rights to be conferred at an early stage in proceedings pending the resolution of disputes over payment. Do consultees agree? Consultation Paper, Part 7, paragraph 7.31.	
	Scottish Land & Estates believes that there should be an opportunity for an advance payment to be made however this must be balanced against the possibility that acceptance of such a payment may bind a landowner to terms which are not acceptable. Once the equipment is installed, the Operator has the benefit of the code and therefore the landowner is left without an appropriate forum for dispute resolution and/or removal of the equipment.

10.51 We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay. Consultation Paper, Part 7, paragraph 7.32.	
	Scottish Land & Estates suggests that it should be possible for interest or penalty charges to be paid if negotiations are not concluded within an agreed timescale.

10.52 We seek consultees' views as to how costs should be dealt with in cases under a revised code, and in particular their views on the following options: (1) that as a general rule costs should be paid by the Code Operator, unless the landowner's conduct has unnecessarily increased the costs incurred; or (2) that costs should be paid by the losing party. Consultation Paper, Part 7, paragraph 7.37	
	Scottish Land & Estates believes that costs should be paid by the Code Operator, unless the landowner's conduct has unnecessarily increased the costs incurred.

Landowners Working for the Countryside

Consultation Response

10.53	We also ask consultees whether different rules for costs are needed depending upon the type of dispute. Consultation Paper, Part 7, paragraph 7.38.
Scottish Land & Estates agrees that different rules for costs are required depending upon the type of dispute.	

10.54	We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service. Do consultees agree? Consultation Paper, Part 7, paragraph 7.52.
Scottish Land & Estates agrees with the proposal outlined above.	

10.55	Do consultees consider that the forms of notices available to Code Operators could be improved? If so, how? C onsultation Paper, Part 7, paragraph 7.53.
Scottish Land & Estates believes that all forms should be simple, easily understood and written in plain English.	

10.56	Do consultees consider that more information is needed for landowners? If so, what is required and how should it be provided? Consultation Paper, Part 7, paragraph 7.54.
Scottish Land & Estates believes that clearer information should be made available to landowners.	

10.57	We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms. Consultation Paper, Part 7, paragraph 7.60.
Scottish Land & Estates believes there is support for standardised forms of agreement and terms. However, the standardised agreements would need to be in a format which balances the interests of both parties whilst maintaining the opportunity to freely contract to those terms which they find acceptable which may be difficult to achieve.	

Landowners Working for the Countryside

Consultation Response

Interaction with other regimes

10.58	We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease. Do consultees agree? Consultation Paper, Part 8, paragraph 8.22.
Scottish Land & Estates is unable to comment.	

10.59	We provisionally propose that where an agreement conferring a right on a Code Operator also creates an interest in land of a type that is ordinarily registrable under the land registration legislation, the interest created by the agreement should be registrable in accordance with the provisions of the land registration legislation, but that a revised code should make it clear that its provisions as to who is bound by the interest prevail over those of the land registration legislation. Do consultees agree? Consultation Paper, Part 8, paragraph 8.33.
Scottish Land & Estates agrees with the proposal outlined above.	

Scottish Land&Estates
Landowners Working for the Countryside

Consultation Response

The Electronic Communications Code (Conditions and Restrictions) Regulation 2003

Scottish Land & Estates is unable to comment on this section.

SHEPHERD+ WEDDERBURN

Response to Law Commission Consultation Paper Number 205 (The Electronic Communications Code – A Consultation Paper)

We have sought to keep our comments as brief and as relevant as possible given the timing of this response. We have a few comments on the general application of the Code but a lot of what we may have included in our response has already been fully covered off in the Mobile Operators Association Response that was submitted to the Law Commission in England and therefore all that remains for us to do is to flag up any additional comments that we have or any Scottish specific points that we thought worth mentioning. On the whole, however, we would highlight that from our experience in the sector we strongly agree with the proposals within the Mobile Operators Association Response.

Having acted for Code Operators since rollout of networks in the 1990s we thoroughly agree that the Code is confusing and unduly complicated. There are too many overlapping provisions and conflicting procedures and despite the length of time that we have been acting for Code Operators in a period of extensive roll out, we have had no involvement in any case that has reached the Scottish courts under Paragraph 5 of the Code. As noted in the Consultation Paper, Code Operators in general have indicated that they are unlikely to rely on the Code as currently drafted (at least in terms of asking a court to impose terms under Paragraph 5).

We have made comments against some specific paragraph numbers in the Consultation Paper. Where we have not raised any specific comments then we have nothing further to add to or emphasise from the Mobile Operators Association Response.

Paragraph	Sub-paragraph	Comments
3.17		Given the rights that Code Operators require in order to ensure continuity of service and coverage, these should in our opinion be reflected in further Code Rights, including the right to actually operate the apparatus and to upgrade, refresh, renew and enhance the apparatus. We also suggest that the Code be amended to ensure that Code Operators are entitled to access sites following the expiry date of any site agreement (subject to paying appropriate compensation for any damage caused or detriment suffered). We are aware of instances where site providers have refused to grant access for urgent necessary maintenance following expiry as a means of leveraging renewal negotiations. Currently the process for acquiring and/or enforcing access rights under the Code in such situations is cumbersome and uncertain and the inability to access sites could materially impact network coverage and service for customers.
3.18		We agree that Code Rights should be technology and frequency neutral. Such restrictions will inhibit the roll out of new technology and allow a landowner or occupier to demand a ransom for any such changes to equipment. We have seen this evidenced in negotiations we have been involved in on Scottish sites. Something that we have been considering, which applies to this and other sections of the Consultation, is the fact that even where a Code Operator has apparatus installed in terms of what amounts to

a lease, the landowner or occupier often attempts to restrict how the apparatus is used. The issue of a landowner or occupier having the ability to restrict what the Code Operator can do with its apparatus should really be justified on the basis that the change will take up additional space and there would seem to be no further justification for preventing alterations to the apparatus itself (whether hardware, software or physical changes e.g. the installation of a dish). The apparatus is essentially a tenants' fixture and any restriction on what the Code Operator can do to the apparatus is therefore a restriction on what they can do to their own property, notwithstanding the fact that any alterations may not affect the occupier's property. The mast, once installed, and the equipment that is fixed to the mast are regarded as tenant improvements or fixtures and should be treated accordingly. However, the market practice that has grown in terms of telecommunications leases is that there is fairly heavy regulation on what can be done to the tenant's fixtures, which would inhibit new technology rollout.

Of course, there will be an assumption even if nothing is expressed in the lease, that the Code Operator will make good any damage to the landowner or occupier's land on vacating. Any alterations by way of changes to the apparatus on the mast, however, would not cause any such damage.

3.53 The Access Principle requires updating in the context of new technology and the demand for high speed, high quality, robust and reliable communications networks and services. As highlighted in the Mobile Operators Association's Response simple access to such services is not sufficient in today's society and any decisions in relation to a Paragraph 5 application should have regard to those considerations.

3.59 We consider that it is important for any agreement in writing for access to land (as opposed to the main site itself) should bind others with an interest in that land. Otherwise, the Code Operator may be able to secure rights to the site itself but not the access to that site and end up with a virtually landlocked site. The same issues for maintaining network coverage and being able to upgrade apparatus to accommodate new technology will apply here in our opinion as there would be an inability to actually access the site to make such changes and/or to repair service affecting faults. The priority provisions should equally apply here.

3.78 (1) We believe that Code Operators should indeed benefit from an ancillary right to upgrade their apparatus. It is a very important right particularly with advances in technology which cannot be foreseen at the point of entering into any agreement (or having a court decide the terms of occupation in terms of Paragraph 5). We often come across landowners or occupiers refusing access, except at a ransom price, for Code Operators to upgrade their equipment when in fact the proposed upgrade has no detrimental effect on the landowner or occupier (in terms of taking up additional space). Such a right would allow faster rollout of new technology and increase the capacities of the existing apparatus and allow, for example, 4G services to be rolled out more quickly on a wider scale without delays or reaching stalemate with some landowners or occupiers.

(2) We do not believe that any additional payment should be made by a

Code Operator when they upgrade apparatus as there is no detrimental impact on the landowner or occupier and the circumstances simply tend to be used as a ransom situation.

3.83 (1) We have been involved in a number of negotiation situations where the ability of landowners and occupiers to prevent Code Operators from sharing their apparatus has caused difficulty. The issue of sharing is often the one that the landowners and occupiers are most alive to and many use it as an opportunity to demand extra payments in the event of sharing being proposed often as a result of arbitrary restrictions mentioned in the agreement itself. This often leads to protracted negotiations, potential ransom payments and ultimately the potential abandonment of negotiations if demands of the landowners and occupiers are too high. This will mean, of course, that the Code Operators end up not being able to keep up with the government policies and targets.

(2) Given the issues at (1) we do believe that Code Operators should benefit from a right to share their apparatus with another, overriding any contractual terms. This is particularly the case as new technology may well mean less additional equipment is involved in sharing. It would allow additional Code Operators to share at lower costs and therefore offer services at lower cost to customers.

(3) We do not consider that additional payment should be made by a Code Operator in such circumstances as that will work against government policies and targets. Only in the case of such changes reducing the value of the land should a payment be made.

3.92 (1) We have seen, in acting for Code Operators, the ability of landowners and occupiers to prevent assignation of agreements causing significant difficulties in practice. This is particularly the case in the context of network consolidation. The Code Operators have such large networks to manage that if a decision is made to improve services, increase coverage and upgrade technology it is very difficult to implement if rights to assign are required to progress the decision but assignation is prohibited at a site specific level. The Code Operators are then forced to enter into a ransom situation which can result in stalemate/no progress when the end result is something that is really in the public interest.

(2) The issue in Scotland is of course that where alienation is covered off in the lease there is no implied obligation on the landlord to be reasonable in consenting to an assignation as there is under the Landlord and Tenant Acts, and therefore in the absence of express wording requiring the landlord to act reasonably, even where the assignation is a reasonable request and there is no detriment to the landowner or occupier, and indeed their proposed tenant's covenant may be improved, the landowner or occupier can simply refuse leaving the Code Operator with a ransom situation.

We appreciate that landowners or occupiers may be nervous of allowing an assignation to just anyone, but we suggest there could be a degree of protection put in place, for example a requirement that the assignee of sufficient financial standing.

(3) We do not consider that the ability to assign should be subject to compensation as there will be no loss as a consequence of assignation.

3.106	(2)	We do consider that the fact that the Code Operator would need to follow a court process for something that a relatively quick response is required for is not a helpful. As highlighted in the Mobile Operator Association Response, the coverage, networks and services available to customers can be disrupted/unavailable as a result and, in Scotland, the most obvious remedy would be to obtain an interdict/interim order from the court to stop any such interference. However, we are aware of at least one example where the terms of an interim order, because of its very specific terms in prohibiting a certain action being taken which was preventing access/interfering with the site, was gotten round and the Code Operator had to keep going back to court to obtain different interim orders to stop the interference/blocking of access.
	(3)	In light of the points at (2) above we agree with the Mobile Operator's Association's Response that criminalising unlawful interference with apparatus is recommended. Not only is the service of the network potentially affected but also such interference is dangerous and a quick response would be very useful.
5.11		We do not consider that Paragraph 20 should allow removal of apparatus. Removal is sufficiently dealt with under Paragraph 21 in cases where the landowner or occupier is entitled to remove the apparatus. The landowner or occupier has granted a lease or licence of a certain term to the Code Operator, which the Code Operator will have relied on to plan and maintain its coverage throughout that time. Paragraph 21 (as revised) should have sufficiently clear procedures to go through when at a break option or expiry of the lease. Any proposed development can then be used at that stage to seek to remove the apparatus (under a revised Paragraph 21 which contains sufficient protections for Code Operators in terms of notice periods and evidence that the proposed development will progress) but until then the ability should only be to alter the apparatus. In our opinion there is, if anything, not enough protection in Paragraph 20 for the Code Operators as things stand – the precise location of a site is very important to the network coverage and a substitute may not be adequate.
5.47		We also agree that the rights of landowners to remove apparatus installed by Code Operators should be restricted to for example redevelopment of the land. Given there is no protection from the Landlord and Tenant Acts in Scotland, when a lease comes to its expiry and a valid notice to terminate has been served by the landlord, it will of course simply end. The Code is the only protection for Scottish sites and given the importance of maintaining (and the pressures of improving) network coverage, any additional protection that can be offered in Scotland is highly recommended.
5.49		We agree that the onus should remain on landowners to raise proceedings as this accords with what is required under leases in any event i.e. if the landowner would need to serve a notice to terminate if it wanted the lease to end.
5.51		We strongly disagree that there should be any ability to contract out

of the security provisions. We also feel that the approach taken by landowner's solicitors would be to require a Code Operator to contract out every time a lease was proposed, and any benefit of a revised Code would then be lost. It would just produce another negotiation hurdle and delays to rollout and upgrading of technology and we believe that if procedures under the Code are made clearer this should be sufficient so that all parties know where they stand.

6.35 We agree this should be a single entitlement to compensation that applies throughout and our opinion is this approach is extremely sensible. The current provisions are too uncertain and complex and it is not clear what financial award would be given under the Code in advance. It does discourage its use by Code Operators. We also believe that the diminution in value approach is very sensible.

6.73 We agree with the proposals on market value on compulsory purchase principles being the way forward for valuing a grant of rights under a revised Code. Given the importance of the mobile world in today's society then it makes sense to treat the electronic communications networks in the same way as other more "traditional" utilities. Landowners may well argue that there would be an economic impact here but that is probably more on the basis of artificially high rents having been paid on certain sites as a result of there being no alternatives in the area, and a lack of appetite to use the complex provisions of Paragraph 5.

The equivalent legislation in Scotland is the Land Compensation (Scotland) Act 1963 but the relevant provisions as regards the diminution in value principle are the same and we agree that the application of these rules here makes sense.

6.8.3 We agree that it makes sense to be able to revisit an award of compensation if the Code Operator is subsequently required by an order to alter the apparatus under Paragraph 20.

7.26 We agree from the perspective of Scots law that given that this is a fairly undeveloped area of law the Sheriff Court is not well equipped to deal with any such disputes and this forum should be changed.

7.27 We agree that from a Scottish perspective, the Lands Tribunal of Scotland is the most appropriate body to deal with the disputes which may be referred under the Code. We would comment that there may be a need to adapt or create some special additional rules to ensure that the procedure is dealt with expeditiously.

In terms of the Party Wall etc Act 1996, this of course does not apply in Scotland but we question whether or not there is a need in Scotland to have any other form of dispute resolution given that the Lands Tribunal of Scotland should be able to cope from a capacity perspective with the number of disputes that may arise under a revised Code, and our thoughts are that it would make sense to direct all disputes towards the same body if possible.

There would be an ability in the Lands Tribunal process to remit an aspect of dispute to a "man of skill" if required (for example on compensation issues) which may save some time for the Lands Tribunal, whilst still having the dispute directed to that one body in

the first instance. The Lands Tribunal could assist in that process or sist the Lands Tribunal action while the dispute is referred to third party and the Lands Tribunal could simply implement the decision.

7.3.2 We believe that subject to putting in place any special additional rules the Lands Tribunal should be able to cope with any such dispute resolution cases and it means that everything then is directed towards the same body which is simpler. Our concern is that, if an arbitrator or expert is consulted first (particularly if that is mandatory) but that decision is not final and binding, then the parties may ultimately end up at the Lands Tribunal in any event and have lost time.

In terms of fast track procedures, we agree it would be sensible to try to introduce procedures to allow proceedings to reach a full hearing within a limited period of time to avoid there being excessive amounts of time spent waiting for a conclusion on a dispute. This would obviously have to be considered against the background of the Scottish Courts as well but the principle appears to be sensible.

7.5.3 We agree that there should be clarity on what information to include in notices but that there should not be a specific format prescribed so as to avoid arguments from recipients of such notices that the notice is invalid on an irrelevant pure technicality.

7.5.4 Our opinion is that landowners and occupiers receive sufficient information with the current form of notices and counter-notices.

7.60 There are fairly standardised terms as things stand and market practices have grown up and Code Operator styles have developed to be fairly similar to each other. A number of landowner's solicitors are also used to the Code Operators' style agreements having dealt with them previously. Even if there was a move towards having some standard clauses we do not believe there would be a need for full standard agreements to be produced particularly if the standard styles would not be mandatory (and we do not suggest styles should be mandatory). We would expect Code Operators to continue to use their standard styles as the main concerns of landowners will already have been covered off by those in any event.

8.33 Different considerations apply in Scotland as only leases of over 20 years need to be registered and telecommunications leases are unlikely to be for over 20 years. There is therefore already a significant "non-public" element to the telecommunications leases etc in Scotland. A site visit would of course identify the majority of the infrastructure that may be installed.

We agree that the Land Registration provisions must apply but that Code rights must prevail as regards who is bound.

Shepherd and Wedderburn LLP

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